As a child, I learned in school about the Alamo and of the courageous men who fought to their death against the overwhelming forces of the Mexican Army. My classmates and I were told that their defeat became a rallying cry for Texans who sought independence from Mexican rule. The Texans were likened to the founding fathers of our nation who sought independence from British rule. I wanted to learn more, so I went to my small town's public library and found in the children's section a biography of Davey Crockett, one of the brave fighters who fell at the Alamo. It was with excitement that I read about the men in the Alamo. I read about how they responded to the news of the huge army of General Santa Anna, how they drew a line in the sand so that those who would stay and fight were to cross over it and those who didn't could leave before the enemy army came. I remember the story of one man who was sick or injured in a stretcher who asked to be carried over the line to join the men who were going to stay and fight. When the battle ensued, the men in the Alamo fought bravely but were overcome not by the Mexican army's superior tactics or martial skills but by their sheer numbers. Davey Crockett, after running out of bullets, fought Mexican soldiers with his bare hands until he too was killed. This is how I was taught as a child to remember the Alamo.

As an adult, I read Rodolfo Acuna's Occupied America: A History of Chicanos, which tells a very different story about the battle at the Alamo. In this account, "from all reliable sources, it is doubtful whether Travis ever drew a line in the sand." And Davey Crockett didn't fight to his death. He was among those who were surrendered and was later executed. Although Texans did struggle to liberate themselves from Mexican rule, their goals were not as noble as the professed aspirations of the founding fathers of the United States. One of the driving impulses of the elite leading the Texas independence movement was the desire to maintain the institution of slavery, which was abolished by Mexico in 1829.

There is the childhood memory of what was taught in school alongside the history contained in works such as Acuna's. They represent very different versions, and visions, of what this country's history is, and consequently, what this country is today. In the same way that an individual is constituted by her or his memory, a nation is constituted by its official history. Perhaps this helps to explain what Stephen Gottlieb has observed, that history as taught in secondary schools is bent or distorted in order to foster feelings of patriotism. I wonder if the same can be said of law schools, whether a similar charge can be brought based on the way race is taught or not taught in U.S. law schools. The way race is taught or not taught may reflect positive curricular choices that serve consciously or unconsciously to foster a colorblind ideology. The standard constitutional narrative is one that mourns the sins of the founding fathers with regard to the stain that slavery left upon our Constitution but that celebrates the
eventual, inevitable march toward progress as we leave our racial and racist past behind. Students are left with a historical predicate where the chief lesson is that the nation's constitutional mistake came from its formal use of race. This historical predicate doesn't sit well when these same students, later our judges and political leaders, are asked to take heed of the factual predicate that would justify state-sponsored race-conscious remedial measures. [FN7] The way race is taught or not taught in law schools is reflective of the historical and factual predicates we want our students to have.

The two articles in this cluster might be understood as laying the groundwork for this charge. Francisco Valdes, in Barely at the Margins, begins his article by stating that "[f]inding 'Latinas/os' in the law school curriculum at the dawn of the new millennium is no easy task." [FN8] Valdes reports the results of two nationwide surveys of U.S. law schools to determine the presence/absence of courses devoted primarily to the study of Latinas/os and the law along with courses that include coverage of Latinas/os in related race-themed courses and related "mainstream" doctrinal courses. He found that only 7 schools offered courses specifically devoted to "Latinas/os and the Law" [FN9] and that most of these courses were not offered every year. [FN10] With regard to related courses, Valdes provides a summary analysis of three kinds of related courses: "Critical Race Theory" courses; "Race, Racism and Race Relations" courses, and "mainstream" doctrinal courses. [FN11] In these courses, he finds that the race-themed courses devote on average 10-15% of course time to Latina/o issues. [FN12] Surprisingly, the "mainstream" doctrinal courses that cover Latinas/os reported that they devote on average 20% of course time to Latina/o issues. [FN13] Valdes then extrapolates from reported average enrollments and scheduling cycles for the course to conclude that "nationwide, less than 5% of all law students in the 1999-2000 and 2000-01 academic years would have been enrolled in one of these [primary or related] courses." [FN14] Stated differently, fewer than "5 in 100 law students received any formal education on race, ethnicity or Latinas/os and the law *115 during the past two academic years." [FN15] Valdes notes that this is probably an overstatement because it does not factor in the possibility that a student might enroll in more than one of these courses, if offered at their school, so that the true figure is probably less than he reports. [FN16] What this means is that students at most institutions have little opportunity to engage in the formal study of race and the law. Students have even less opportunity to engage in the formal study of Latinas/os and the law.

Most, if not all, of the courses on critical race theory are taught by faculty-of-color. [FN17] Most of the primary courses on Latinas/os and the law are taught by Latinas/os. [FN18] If more related and primary courses are going to be offered by schools, then it seems that schools must hire faculty-of-color who have research and teaching interests in the area of critical race theory and on Latinas/os and the law. Valdes notes that many of these courses came to be taught because of the specific interest of a faculty member sometimes combined with student efforts to establish these courses. [FN19] While he lauds these successes, Valdes wonder[s] whether any progress in the formal law curriculum would be evident but for the presence of minority faculty and interested students--and whether such courses can be sustained in spite of the onset of backlash and retrenchment via the "culture wars" that already have decimated diversity and begun to resegregate some prominent law schools around the country. [FN20]

The Valdes study provides a much-needed snapshot of legal education that can "raise awareness of the gaps and needs in . . . [the areas of race and ethnicity in] the contemporary law school curriculum." [FN21] It also provides wonderful resources in terms of the syllabi bank and contact information of those teaching courses on Latinas/os and related race courses and "mainstream" doctrinal courses. The question, though, is how law school administrators, law school faculty, and law students will respond to Valdes's threshold observation that "the 'primary' courses *116 on 'Latinas/os and the
law,’ as well as the ‘related’ courses on critical race theory, are taught exclusively (or virtually so) by faculty of color who have taken on the task of introducing and incorporating those courses into their institution’s formal curriculum.” [FN22]

Law schools have a choice with regard to what courses they offer. Sometimes, though, this choice is not exercised in a conscious way. The Valdes study allows this choice to be made in a knowing, culpable manner. If, after the Valdes study is published and its results disseminated, law schools still choose not to broaden or integrate their curricular offerings (or to hire faculty interested in integrating the curriculum), then the choice is reflective of a conscious prioritizing within a framework of limited resources. Choosing not to broaden the curriculum (or to hire interested faculty) reflects a decision that the study of the legal treatment of race and ethnicity is not sufficiently important to warrant the allocation of the school's limited resources. The choices a school makes in this regard is an indicia of a school's commitment to diversity and integration.

The insight confirmed by the Valdes study, that minority faculty tend to be the ones most interested in teaching primary race-themed courses, is something that law students at some schools have already observed. [FN23] John Hayakawa Török's symposium contribution tells the story of students at Columbia Law School and their struggle to promote faculty diversity and to establish in the curriculum a course on Asian American Jurisprudence (AAJ). [FN24] Török presents the Columbia experience as a blueprint for those at institutions that do not have Latina/o law professors or Latina/o curricular offerings. [FN25] The strength and weakness of the article as a blueprint for others is its particularity.

The detail that Török provides of the participants and their roles and the issues and disputes that arose can prove to be very helpful for those engaging in or already engaged in similar struggles at other institutions. Török very carefully sets forth the objectives:

1. to argue for faculty and curricular diversification;
2. to demonstrate that there was (a) demand for [and] (b) intellectual validity to [an] Asian Americans and the Law curriculum;
3. to allow participants to teach and learn as Asian Americans; and
4. to produce Asian American legal scholarship.

These provide a wonderful starting point for student activists. Török also describes how the readings were chosen and the coalition work that took place to get faculty sponsors for the initial student-run course and the work with students at other schools.

Török, as a graduate law student pursuing a J.S.D. at Columbia, was able to play an active role for several years. One problem with this first-person participant ethnography serving as a blueprint is that at most law schools there will not be someone such as him to provide continuity and institutional memory over a several year period. Law students typically are at an institution for three years. This is not to take anything away from the achievements of the students at Columbia Law School, but only to note that students at other schools face the challenge of maintaining student interest as student participants graduate and that efforts must be made to preserve and transmit the institutional history in such a way that it survives the graduation of those student participants.

As Török notes, though, the efforts at Columbia have only partially succeeded. The course has been offered the last several years, including a greater commitment on the part of the school in the last five years when it has hired adjuncts to teach the course,
often flying them in to teach the course. [FN26] It has yet to hire an Asian American on a full-time basis to teach the course. Thus, their efforts toward faculty diversification have yet to bear fruit.

The fact that faculty and students must struggle to achieve faculty and curricular diversification raises the important question of what is at stake in this struggle. At the core is a struggle over this nation's history. If the history of legal discrimination and legal neglect of persons and communities of color along with the resultant sedimentation of racial inequality are of consequence today, then there wouldn't be a question of curricular diversification: the curriculum would already be diversified and integrated in such a way that attention to race would exist across the entire curriculum rather than in the few segregated "safe zones" of race-themed courses that exist in some institution. [FN27] The fact that this is not the case indicates that this history is not of consequence. It is a history that we are supposed to forget. It is part of the colorblind fantasy, which tells us that in order to get along, we must forget the past and ignore current-day reality. But without a critical history, [FN28] we are left with the story of the Alamo that I learned as a child. That is a story I would rather forget.

But maybe forgetting is not quite the right solution. What we need is broad-based remembering. We need to remember the standard narrative about the Alamo and how that narrative has been deployed to foster nativist racism directed against persons of Mexican ancestry. We need to remember the revised account presented by Rodolfo Acuna as a partial antidote to the standard narrative. This remembering, if it is to be effective, must not be limited to segregated safe zones. It must take place across the curriculum and become part of the official history of this nation. Perhaps, then, we as a nation will believe that the necessary factual predicate exists that would justify race-conscious remedial measures. Perhaps, then, we would move a step or two closer to realizing the dream of Brown. [FN29]

Professor Francisco Valdes and John Hayakawa Török in this symposium document some of the challenges that exist along with recommendations to help achieve this broad-based remembering. The Alamo isn't something that can or should be forgotten. The struggle, though, is how we will be allowed to remember it.

Footnotes:


[FN2]. Id. at 11.

[FN3]. Id. at 7-8.

[FN4]. See Marita Sturken, Tangled Memories: The Vietnam War, the AIDS Epidemic, and the Politics of Remembering 1 (1997) ("memory provides the very core of identity").

[FN5]. Cf. at 259 ("Discourses of memory and forgetting are both essential to the
construction of national meaning.


[FN9]. Id. at 133, n.53.

[FN10]. Id. at 134.

[FN11]. Id. at 131-41.

[FN12]. Id. at 135.

[FN13]. Id. at 136 (Valdes notes that this figure might be viewed with some skepticism).

[FN14]. Id. at 137.

[FN15]. Id.

[FN16]. Id. at 137, n.78. I can attest to this phenomenon because I have had students take all three of my race-related courses and know of other students in my classes who have taken race-related courses taught by my colleagues.

[FN17]. Id. at 138. Valdes does not comment about the racial makeup of the faculty teaching related race, racism and race relations courses. I imagine that this is because these courses are more numerous and he doesn't know offhand all the faculty who teach the courses, but I would guess that the majority are faculty-of-color. I will not venture a guess on the racial makeup of those teaching related "mainstream" doctrinal courses that include some coverage of Latinas/os.

[FN18]. Id.

[FN19]. Id. at 138, n.85 (discussing how these courses become introduced along with one anecdotal account). I came to be the one non-Latina/o to teach a primary course on Latinas/os and the law because some students from La Raza, who knew that I taught a course on Asian Americans and the Law and who knew that I was active in the LatCrit movement, asked me to teach the course and simultaneously approached the administration with a list of currently enrolled students interested in taking such a course. I agreed to teach the course on a temporary basis because of the student interest, to get the course established in our curriculum, and with the hope that we might eventually hire a Latina/o whose research and teaching interests were in this area. I get the sense that some students would prefer to have a Latina/o teaching the course. Apparently, at a La Raza meeting last year, a student asked why the course couldn't be taught by Latina/o. While I am sympathetic to this sentiment, at present, none of the Latinas/os on our faculty want to teach the course and we have yet to hire a Latina/o with research and teaching interests in this area.

[FN20]. Id. at 139.

[FN21]. Id. at 155.
[FN22]. Id. at 141. Part III. Observations and Recommendations.


[FN25]. Id. at 307-08.

[FN26]. Keith Aoki taught one year; Neil Gotanda taught the course the last three years; Frank Wu is teaching the course this year. Aoki commuted from Boston; Gotanda at least one of the years commuted from Los Angeles; Wu is commuting from Ann Arbor, Michigan.

[FN27]. Valdes notes that these "safe zones" may exist "within institutional context that otherwise may lend little more than neglectful tolerance" to faculty and students of color. Valdes, supra note 8, at 138.

[FN28]. Robert Gordon discusses the notion of a critical history as:
... any approach to the past that produces disturbances in the field--that inverts or scrambles familiar narratives of stasis, recovery, or progress; anything that advances rival perspectives ... for surveying developments; or that posits alternative trajectories that might have produced a very different present--in short any approach that unsettles the familiar strategies that we use to tame the past in order to normalize the present. Robert W. Gordon, Foreword: The Arrival of Critical Historicism, 49 Stan. L. Rev. 1023, 1024 (1997).

Finding "Latinas/os" [FN1] in the law school curriculum at the dawn of the new millennium is no easy task, as illustrated by the two nationwide surveys of *120 accredited law schools in the United States that comprise this project. [FN2] The near absence of Latinas/os in the curriculum, moreover, parallels the circumstances from which LatCrit theory emerged seven years ago. [FN3] LatCrit theory responds to the *121 invisibility of Latinas/os in North American law and society despite our longstanding presence within the lands now known as the United States--a presence that, in some instances, predates the establishment of the country. [FN4] In many ways, *122 these surveys and their findings reflect LatCrit's ambitions, the reasons behind its origins, and the challenges that we and allied scholars and activists have faced and continue to face. [FN5]

The absence of Latinas/os in the law school curriculum is made increasingly notable--and untenable--by structural shifts in North American society. These shifts include demographic trends that position Latinas/os as the largest "minority" ethnic and racial group in the United States, as well as by concomitant economic figures that make Latinas/os an increasingly lucrative market for capitalist attention and activity. [FN6] As Latinas/os become more salient in social and economic terms over the next several decades, our continued invisibility in discursive and curricular terms grows increasingly anomalous and insupportable, coming under heightening pressure.
For the moment, however, this survey and its findings confirm that the historic exclusion or marginalization of Latinas/os in the legal culture and larger society of the United States continues to define the status quo in the formal curriculum of the "typical" law school in this country. At the same time, and as with the larger frames of law and society, the mixed results reported in this survey portray the initial stirrings of Latinas/os' formal inclusion in legal education within the United States. As outlined below, Latinas/os are to be found, but barely and only at the margins, of law school curriculum--a marginalization that includes, unfortunately, those portions of legal education that loosely may be described as race and ethnic legal studies. [FN7]

Reflecting LatCrit theory's multiple purposes or functions, [FN8] this project endeavors to encourage the incipient process, glimpsed in the combined findings presented below, of the meaningful inclusion of new courses on, or somehow directly relevant to, Latinas/os qua Latinas/os in the "typical" law school curriculum of the United States. In some key ways, this project is an effort to practice and perform LatCrit theory--to apply theorizing to the curriculum, and to employ the *123 insights of theory to guide LatCritical promotion of curricular and institutional reform. This project aims to help improve the quality of legal education in the United States regarding "Latinas/os" specifically, and race and ethnicity more generally, in ways that are congruent with LatCrit commitments to antiessentialism, multidimensionality, and antisubordination in theory and praxis. [FN9]

The surveys' findings are presented in three parts below, followed by an Appendix of tables and related documents. Part I of this article outlines the origins, history and methodology of this project. This opening is intended to provide a general understanding of the background of the project, as well as how and why it unfolded as it did. Part II summarizes the basic documentary results and findings of the two nationwide surveys comprising this study. This part is intended to provide a basic overview or sketch of the raw data. Part III concludes with some brief observations, and forward-looking thoughts and recommendations which, drawn from the data and anecdotal faculty accounts, further the basic objectives of curricular inclusion and improving educational quality. [FN10] This final part also includes the Syllabi Table, which describes the Syllabi Bank of 40-some course *124 syllabi submitted by individual faculty as part of this project. [FN11] The Appendix to the article then presents the five tables of results, which break down and present the combined raw data gathered via this project in their entirety, along with the questionnaires employed to conduct the two surveys. While the findings ultimately speak for themselves, [FN12] hopefully the information and brief discussion presented below will contribute to LatCrit theory's continuing efforts to promote principles and practices in furtherance of social justice and through formal legal education. [FN13]

I. Background and Methodology

The origins of this project can be traced back to students questioning the structure and limits of their formal legal education--an education that oftentimes excises Latinas/os' existence and experiences from casebooks and classrooms, thereby precluding formal consideration and discussion of how such a sociolegal record might or should substantially affect law- and policymaking today. [FN14] These queries, arising in law schools from coast to coast in the context of various presentations, conferences, or similar events devoted to critical legal theory or outsider jurisprudence, challenge the quality of legal education in substantive terms. [FN15] LatCrit theorists are thus called upon to take up the students' challenge and specifically question the continuing invisibility of Latinas/os in the law school curriculum as an integral component of our commitment to antisubordination praxis in law and society.
Latinas/os' historic invisibility certainly is no accident; this history instead is explained by intentional motives of exclusion based on nativistic racism. Thus, one way to explain today's legacy of invisibility is the persistence of institutionalized habits of thinking and doing in the legal academy that automatically replicate historic skews; intentional invisibility yesterday breeds institutionalized invisibility today. The habits of the present--and their consequences--reflect and reinforce the past, in social as well as institutional terms. Nonetheless, this history does not provide a complete account of the status quo; while this broad historical account provides a general context for the status quo in legal education, it does not and cannot provide a comprehensive sense of the state of the legal curriculum vis-à-vis Latina/o communities and their particular sociolegal concerns, interests, or needs. This history may explain (at least in part) why Latinas/os have been absent from legal education, and contextualizes why we remain so, but it does not measure to what extent that invisibility continues today. It may help to explain "why" but not much else.

It thus became apparent that a more systematic effort to produce a "snapshot" of the state of legal education on this question would be beneficial, if not necessary. Such an effort could provide a measure of Latinas/os' (non)inclusion in the contemporary law school curriculum and create a baseline for subsequent remedial efforts that may seem advisable in light of the findings. A nationwide law school study could also help to contextualize the anecdotal accounts and queries drawn from student questions, helping all interested parties to better understand both the national and local situation. Indeed, such a study--for all its inevitable limitations--could serve as a tool for many positive purposes.

With this in mind, in fall 1999 I began to conceptualize and design this project as an effort to ascertain the place and prospects of "Latinas/os" in the contemporary law school curriculum. In spring 2000, we mailed questionnaires to the Dean of every member law school of the American Association of Law Schools (AALS). Reflecting the project's origins, the questionnaire form, included in the Appendix to this article, focused on courses that might be described as "primarily" devoted to "Latinas/os and the Law" as a category of study. In the parlance of this project, this type of Latina/o-focused course became known as a "primary" course, while other courses with some coverage of Latinas/os became "related" courses, as described in more detail below.

A few weeks later, a duplicate of that questionnaire was sent to all non-responding schools asking, again, for the requested information. After that follow-up mailing, we followed up again via fax. Finally, a few weeks later, we contacted by telephone every school that still had not responded to obtain the requested information. The aim was to ensure as complete a compilation of curricular information as possible under the circumstances of this informal study.

This initial documentation process included a request that each school identify the faculty member(s), whether full-time or otherwise, teaching the reported courses. This request allowed a follow-up with each identified faculty member to confirm the course information reported by the institution, and to obtain further information regarding the nature, content, and design of these courses. Through these direct faculty follow-ups we also elicited anecdotal accounts of classroom experiences to supplement the data gathered via the questionnaires. These follow-up efforts therefore served both to verify the statistical data as well as to amplify it.

Moreover, through these follow-up efforts we also were able to assemble a Syllabi Bank, discussed in more detail below. This Syllabi Bank forms the main source of pedagogical information presented in this article to identify general approaches to, and
The materials used in the teaching of the reported courses in American law schools today. [FN24] Ideally, the Syllabi Table presented in Part III of this article will help nurture the development of similar courses by helping both new and experienced teachers to consider various approaches, materials, and organizational structures for use in these types of courses. [FN25]

In reviewing the findings of that initial data-gathering process, one particular detail quickly came to the fore: many schools responded "No" to the question about primary courses on "Latinas/os and the Law," but then remarked that their curriculum contained "related" courses on topics like "race" or "race relations" or "racism." In addition, but perhaps less surprising, was a similar type of response, in which schools said "No" to the question on primary courses, but then referred to more "mainstream" doctrinal courses, such as "immigration" or "civil rights" and the like, as providing some measure of Latina/o-focused coverage. These uncertain or *128 ambivalent responses, while reporting the absence of a primary course on Latinas/os and the Law, indicated some formal curricular coverage of Latina/o communities and their sociolegal circumstances in law courses devoted principally to race/ethnicity studies or in "mainstream" courses that are oftentimes (deemed) especially germane to Latina/o populations in the United States. These responses, and in particular those regarding the race/ethnicity courses, raised or renewed questions and issues that have been threshold matters in the inception and cultivation of LatCrit theory.

From the beginning of LatCrit theorizing in the mid-1990s, LatCrit scholars have, of course, interrogated "race" and "ethnicity" as social and legal constructs, thus engaging and continuing lines of critical inquiry developed in outsider jurisprudence a decade earlier. [FN26] LatCrit theorists, however, also have focused on questions relating to these two constructs that became threshold considerations for the formation of LatCrit theory as a distinct genre of critical legal theory. From the beginning of the LatCrit enterprise, LatCrit theorists have investigated the relationship of "race" and "ethnicity" to each other, as well as their interaction in the formation of populations within the borders of the United States (and beyond) that might be racially/ethnically described as "Latina/o." [FN27] This investigation surfaced as a threshold consideration in the formation and articulation of LatCrit theory precisely because the formation of "Latina/o" identities in the United States has remained--until now--a marginal area of legal studies, whether critical or conventional in nature.

In those early LatCritical exchanges, varied views were aired and discussed before a consensus emerged. [FN28] That consensus reflected a realization, adduced via the exchanges, that "race" and "ethnicity" were and are central to the construction of Latina/o lives and histories. Both were and are used to construct "Latina/o" identities in law and society, and consequently, both require(d) LatCritical *129 interrogation. Those early exchanges thus produced a collective realization that the separation of "race" and "ethnicity" in law and legal theory remained a blurry and unstable distinction that LatCrit theorists must--and did--reject in order to craft a socially relevant analysis of the Latina/o condition under the Anglocentric rule of the United States. [FN29] Since then, both race and ethnicity have remained central lenses of LatCritical inquiry. [FN30]

However, it appeared from the uncertainty conveyed in the ambivalent responses mentioned above that this consensus has yet to penetrate the formal curriculum. As a whole, they seem to indicate that "Latinas/os" receive only superficial or selective study in "related" law school courses--including those devoted explicitly to "race" or race relations--even though LatCrit theorists conclusively have shown the "salience" of race to the formation of Latina/o communities. [FN31] The responses described above therefore prompted a second round of fact-finding. To conduct this second round, we developed a second questionnaire--also included in the Appendix to this article--that
requested both more expansive and specific information on "related" courses of various types, and also on the level or extent of coverage within them focused on Latinas/os qua Latinas/os. [FN32]

In the 2000-2001 academic year, we undertook a data-gathering process similar to the initial one described above. But in this second fact-finding round, we also sought to identify all law school courses devoted to "race" or "ethnicity" and, for each such course, to ascertain whether, and if so to what extent, they included coverage that might be described as focused on Latina/o populations or the issues (deemed) most germane to Latinas/os. In this second round, therefore, the project's *130 purview expanded. We set out not only to take a snapshot of the curriculum on "Latinas/os" but also a snapshot of the curriculum on "race" and "ethnicity" more generally. Through this second round, we also were able to update the information gathered the prior year in all respects, and thus to present the "combined findings" for 1999-2000 and for 2000-2001, as summarized below and detailed in the five tables of the Appendix.

In this way, and over this time, the project took on its three main purposes, which are both interrelated and mutually-reinforcing. The first remains the original motivation: taking a snapshot of the study of Latinas/os qua Latinas/os in the formal law school curriculum. The second purpose is to produce a snapshot of the formal curriculum on race and ethnicity in "related" courses focused on these two constructs and their operation in law and society. The third purpose is to generate a better sense of the relationship between "Latinas/os" and "race" or "ethnicity" in the formal curriculum as reflected in the design, materials, and pedagogy of these courses--and in light of the early LatCrit exchanges and resulting consensus on this particular point. [FN33] In pursuing these three purposes, the combined findings presented here ideally will help to connect curricular analysis and reform to LatCrit discourse on the substance of these threshold questions, as well as on the perennial issues they continue to raise both in and outside of the classroom relating to legal education and social justice. [FN34]

Once the data from the two rounds of fact-finding were combined, the results became the basis of a presentation at the Seventh Annual LatCrit Conference (LatCrit VII) in Oregon during May 2002. At that presentation a group of about thirty scholars, students, and activists discussed the findings and their implications, as well as possible follow-up actions. After that discussion, we sent e-mail queries to all conference participants requesting confirmation or correction of the findings pertaining to their respective schools or courses, as well as soliciting supplemental or anecdotal information. [FN35] Finally, to conclude the fact-finding process, we sent targeted e-mails and visited school websites to finalize--as much as possible under the circumstances--the remaining specific gaps in the combined findings. [FN36]

Hopefully, the combined findings of the two surveys reported below will lend themselves to manifold reformatory uses by persons interested in curricular development on race, ethnicity, and LatCrit theory or, more broadly, outsider jurisprudence. As mentioned above, the identification of courses and faculty on the subjects of race, ethnicity, and Latinas/os can provide a basis for the formation of new networks to exchange information about course design and pedagogy, which, in turn, can aid the improvement of formal legal education on these topics. Similarly, the documentation of the mixed results reported below ideally will help to raise awareness--both within the academy and beyond it--of curricular needs and gaps. *131 This heightened awareness may yield needed reforms to ameliorate the histories and legacies of invisibility that still shroud Latinas/os and other marginalized groups in formal legal education. The snapshot provided by the combined findings also can help establish a baseline from which to measure progress--or its lack--in coming years, as we revisit this issue periodically. Finally, but most proximately, the combined findings can enable immediate follow-up
actions in programmatic terms through various professional organizations or venues, including, but not limited to, annual LatCrit conferences and other similar events. [FN37]

In sum, the combined data are proffered here to all interested parties as building blocks toward the advancement of legal education on race and ethnicity generally, and especially on Latinas/os qua Latinas/os, at the turn of a millennium predicted to witness the emergence of this group as the nation's most numerous "minority" population. [FN38]

II. Summary of Combined Findings--2000 and 2001

As mentioned at the outset, the combined findings and results on "primary" and "related" courses gathered via the two data-finding phases of this project present a mixed picture both on race and ethnicity as well as on Latinas/os. A total of 164 schools responded to the first and/or second rounds of data-gathering described above [FN39] and, of these, 136 schools reported offering either or both types of courses. [FN40] Yet, 26 schools reported "none" to all categories of courses, [FN41] while another 21 schools either declined to participate [FN42] or neglected to respond to the repeated requests for information during the two-year fact-finding process. [FN43] Thus, almost all *132 of the AALS member law schools in the country--136 of 164--report offering some formal opportunity for the study of "race" and/or "ethnicity" and/or "Latinas/os" to their students. [FN44]

These 136 schools reported a total of 337 courses of either or both types. [FN45] Of these 337 courses, 20 are devoted "primarily" to Latinas/os and the Law, [FN46] while the others are deemed "related" to Latinas/os qua Latinas/os in one way or another--either in the form of "critical race theory" and other "race/racism/race relations" courses or in the form of more "mainstream" courses on topics like immigration and civil rights. [FN47] The project therefore identifies three types of "related" courses that reported providing some coverage of Latinas/os and the Law: (1) those that focus specifically on critical race theory, (2) those that focus more broadly on race, racism or race/ethnicity relations, and (3) those that focus on "mainstream" categories of legal doctrine oftentimes deemed especially germane to Latinas/os. The first of these "related" categories--"critical race theory" courses--distinguishes explicitly "critical" courses from the remainder. [FN48]

Of the 317 total "related" courses, 20 were on "critical race theory" [FN49] while another 113 were on "race/racism/race relations and the law." [FN50] The bulk of the remainder--182 courses--represent the more "mainstream" courses on general doctrinal topics deemed especially "related" to Latina/o communities. [FN51] In addition, of the 337 total courses identified in this project, 12 are clinical courses--one of these is in the "primary" category and the other eleven in "related" categories. [FN52] Thus, Latinas/os indeed may be found in several portions or pockets of the contemporary law school curriculum, including a handful of courses devoted specifically to this branch of legal studies. As discussed below, however, these findings provide a mixed picture that counsels against complacency.

*133 A. Primary Courses: "Latinas/os and the Law" Courses

The study found 20 schools offering 20 primary courses, of which 7 were devoted specifically to "Latinas/os and the Law" [FN53] while another 10 were devoted to courses on topics like "Comparative Law" that are focused on Latin American legal systems. [FN54] In addition, 2 more of these primary courses are devoted to "Legal Spanish" [FN55] while another is a clinical course--apparently, the only law school clinical course or program in the nation devoted entirely to Latina/o-identified issues or clients. [FN56] Eight of these 20 primary courses are taught "every year" while another
twelve are offered "every other year" or less. Most of the primary courses are taught by full-time faculty, and just over half of them--11--are offered for three academic credits. These courses attract enrollments that range from 7 to 20 students, although enrollment figures tend to cluster mostly in the low-to-mid teens. [FN57]

Perhaps unsurprisingly, the seven schools that offer the seven "Latinas/os and the Law" courses are in California and other Latina/o-intensive locales: 4--over half of the 7--are in California and the rest are in New Jersey and Illinois schools. [FN58] Apparently, some (if not all) of these seven primary courses are offered only--or chiefly--because individual faculty are interested in or committed to providing legal education to their local students on this topic, and because they decided to fill a curricular void in their respective institutions. [FN59] As a whole, then, very few law students have access to the "primary" courses and, of those, most are geographically concentrated in one state and a couple of other regions. Yet, the full-time status of the faculty teaching these courses at the identified schools suggests that these *134 offerings are likely to remain in the curriculum--at least for as long as these teachers are willing and able to carry these courses as part of their recurrent teaching loads. [FN60]

Interestingly, 4 of the 7 courses on Latinas/os and the Law--again, over half--were reported as a "new course" introduced to the curriculum in the year 2000. [FN61] From one perspective, then, these primary courses have more than doubled in the past couple of years. From this comparative perspective, the curricular trends are congruent with the larger demographic and economic trends in the United States, as noted earlier. [FN62] Three of these four courses, however, are scheduled to be offered "every other year"--and the scheduling cycle for the fourth new course on Latinas/os and the Law was reported as uncertain. [FN63]

In absolute terms, the bottom line is quite clear: most law students in the United States never will receive the opportunity to enroll in any "primary" course--whether devoted specifically to "Latinas/os and the Law" or focused on "Comparative Law" with an inter-American orientation--during the regular course of their formal legal education. Students in California and other Latina/o-intensive locales may fare a bit better, but even then they will have limited opportunities to enroll during their three years in law school: more than half of all primary courses--12 of the 20--are offered only every other year or less. [FN64]

This paucity of primary course offerings--of formal opportunities in legal education to engage in focused studies of Latina/o populations--without question projects into the present the historic invisibility of Latinas/os in legal culture and discourse. The combined results on "primary" courses therefore call for continued LatCritical scrutiny to encourage and track the evolution of the curricular trends toward fragile inclusion suggested by these findings, while at the same time confirming the need to expand and accelerate these belated trends to better match the larger social or demographic developments that they seem to effectively reflect. It is this beckoning that formulates LatCrit's principal challenge in curricular reform.

*135 B. Related Courses: "Critical Race Theory" Courses

In addition to the combined findings on the "primary" courses summarized above, 20 schools reported offering 20 "related" seminars or courses titled "Critical Race Theory" to enrollments ranging from 9 to 40 students, and 12 of these--over half--are offered every year. [FN65] Nearly all of these related courses also are taught by full-time faculty, usually for three credits or more. And about a third of these explicitly critical courses--7--reported providing some level of specific coverage devoted to Latina/o-associated issues or topics, ranging from "2 of 14 sessions" and "one eighth" of the course to
"40%" of the course. [FN66] On average, however, the related courses on "Critical Race Theory" that reported a level of specific coverage devoted to Latinas/os indicate that students in those courses should expect about 10-15% of the class to be devoted to Latinas/os. [FN67] In the final analysis, then, the combined findings seem to corroborate the indications on "race" and "Latinas/os" that were projected in the uncertain responses that triggered the project's second round of fact-finding: "race" critical courses provide some but limited coverage devoted "primarily" to Latinas/os and the law. [FN68]

C. Related Courses: "Race, Racism and Race Relations" Courses

Additionally, 85 law schools reported offering another 113 law courses on "Race, Racism and/or Race Relations." [FN69] These additional "related" courses typically are taught every year by full-time faculty to student enrollments of 3 to 80, usually for two to four academic credits. Of these 113 courses, about a quarter--27--specified the level of coverage devoted specifically to Latinas/os, and these levels ranged from several courses reporting "one week" to one course that reported "50%" of the course devoted to Latinas/os and the law. [FN70] On average, however, these additional "related" courses on race and the law reported devoting between 1 and 3 weeks of the semester, or again about 10-15% of the course, to the focused study of legal issues deemed especially germane to Latina/o communities or persons. [FN71] Thus, as with the critical race seminars or courses, these other race-related courses offer some, but limited, coverage of Latinas/os qua Latinas/os that *136 seem, again, to comport with the ambivalent responses of the project's initial data-gathering process. [FN72]

D. Related Courses: "Mainstream" Doctrinal Courses

Finally, 83 schools reported offering another 188 "related" law courses that are not generally focused on critical race theory or other race/ethnicity-related topics. [FN73] These other "related" courses typically train attention on "mainstream" areas or categories of legal doctrine and study, such as equal protection, international human rights, employment discrimination, immigration and naturalization law, civil rights, poverty law, criminal justice, and the like, all of which seem to be generally associated in the United States with Latina/o populations. These "related" mainstream courses are taught by a combination of full-time and non-full-time faculty to enrollments ranging from 3 to 90 students, usually for two to four credits, and typically on a yearly basis.

Of these 188 related "mainstream" courses, 91--about half--provided additional information on their levels of specific coverage focused on Latina/o issues. These levels ranged from several reports of "one class" to one report of "50%" of the class. [FN74] On average, however, the levels of specific coverage on Latina/o-associated issues reported for these related mainstream courses tend to be about 20% of the course, [FN75] thus indicating (perhaps in a counterintuitive way that may warrant some skepticism) that these courses tend to offer slightly more coverage of Latinas/os than those devoted to critical race theory or to race, racism and race/ethnicity relations.

E. Summary Assessment: "Primary" and "Related" Courses

While these figures indicate that most law schools provide one or more formal opportunities for the study of these socially and legally relevant topics when broadly framed to include "mainstream" courses, they also reflect that most schools still fail to provide their students with any opportunity to engage in the formal study of legal issues focused on "race" or "ethnicity" and/or "Latinas/os" in the context of a law school course. These numbers thereby show significant but qualified inclusion in absolute terms. Though this bottom line applies especially to the handful of "primary" courses on
“Latinas/os and the Law” that reach only a severely limited number of students, it also applies to all of the "related" courses—whether those focused on the study of "race" or those of a more general or "mainstream" nature—that allocate a relatively meager 10-20% of total course time to this topic.

Structurally, these combined findings depict a basic—and familiar—two-track development of formal legal studies on Latinas/os specifically, and on race and *137 ethnicity more generally. The first "track" consists of "specialty" courses that are focused on "Latinas/os" or on "race/racism/race relations," while the second track consists of "mainstream" doctrinal courses devoted to more generalized topics like immigration, human rights, employment law, or civil rights. Enrollment figures for the Latina/o and race courses tend to concentrate in the 10 to 25 range, while the mainstream courses for the most part tend to be larger. Numerically, however, both "tracks" tend to reach relatively few American law students in any given year: for instance, in the two academic years spanning this project--1999-2000 and 2000-2001--law students in J.D. programs nationwide numbered 125,184 and 125,173, respectively. [FN76] Based on the findings reported here, about 5875 to 6506 students enrolled in all of the primary and related courses identified in this study during those two years. [FN77] Thus, using a rounded-off total of 125,000 J.D. students nationwide, less than 5% percent of all law students in the 1999-2000 and 2000-01 academic years would have been enrolled in one of these courses. [FN78] Based on the combined findings reported by schools and faculty, less than 5 in 100 law students received any formal education on race, ethnicity, or Latinas/os and the Law during the past two academic years.

These student and enrollment figures of course raise numerous questions ripe for follow-up investigation: for example, why such low enrollments, why such limited coverage of Latinas/os in race courses, why so few courses on Latinas/os and the Law? On the whole and at best, these figures, in tandem with the overall combined results for all courses, thereby provide grounds for some cautious optimism: the mixed findings of this project depict a definite yet limited availability, accessibility, and delivery of formal educational opportunity regarding these topics during the process of a contemporary legal education in the United States. These results, in other words, depict a definite but limited penetration of the curriculum and consciousness of the contemporary American law school on these issues or topics.

These results also show a mixed, and perhaps not too surprising, geographic distribution for the current course offerings. By and large, as noted above, the combined findings of this project indicate that progress on "primary" courses devoted to Latinas/os and the Law, such as it is, is concentrated mostly in one state on the nation's West Coast. [FN79] Thus, the progress being made is not being made across the board, nor consistently throughout the country. These results show pockets, rather than blankets, of progress. On a systemic level, these results again depict a definite but limited penetration of formal legal education and discourse.

Perhaps the brightest spot in these results is that most of these courses are taught by full-time faculty, a detail that can correlate to the long-term sustainability and availability of these kinds of courses as part of the formal law school curriculum. These particular findings are significant because they suggest that these courses are being embraced by the category of faculty members with the most power and influence in American legal education-- those either with tenure, or those on the *138 track toward it. However, 6 of the 7 primary courses on "Latinas/os and the Law" are taught by Latinas/os, [FN80] and 1 by an Asian American who "could be Latino." [FN81] Similarly, it appears that all, or virtually all, of the twenty critical race theory courses identified in this study are taught by faculty-of-color, mostly Black or African American. [FN82] For reasons that follow-up research should probe, it appears that no white faculty regularly
teach either in the primary courses or in the "critical" courses on race. [FN83] Thus, the existence of these courses in the formal law school curriculum seems rooted more in the incremental diversification of the legal professorate during the past twenty years than in the embrace of race/ethnicity studies by the still-predominantly white legal academy of the United States. [FN84]

While reflecting some progress toward formal inclusion in the curriculum, these findings consequently do not reflect a general climate of increased acceptance for the study of these issues in legal academia generally. Nor do these combined findings necessarily reflect a climate of increased institutional acceptance for the students, faculty, and staff that embody these issues, and that in recent decades have begun to populate the corridors or classrooms of American law schools. Rather, these findings indicate that entrepreneurial faculty of color and interested students in today's law schools have teamed up to carve out a relatively "safe zone" for these courses, and for the formal study of these issues, within institutional contexts that otherwise may lend little more than neglectful tolerance to their initiatives and activities. [FN85]

These combined findings, in other words, capture in concrete terms the difference that diversity can make. [FN86] These findings demonstrate the existence of courses that are available today chiefly, it seems, because faculty-of-color have elected to develop, introduce, and teach them. These findings consequently indicate *139 tangible, though not necessarily institutional or attitudinal, progress regarding awareness of, and concern for, the presence and treatment of racial/ethnic minorities or interests in today's law schools. Yet these mixed findings make one wonder whether any progress in the formal law curriculum would be evident but for the presence of minority faculty and interested students--and whether such courses can be sustained in spite of the onset of backlash and retrenchment via the "culture wars" that already have decimated diversity and begun to resegregate some prominent law schools around the country. [FN87]

This brief summary of highlights indicates how the findings regarding the numbers and types of "primary" and "related" courses being offered as of 2000-01 at specific schools present some cause for cautious optimism, and much need for determined perseverance. This summary indicates limited yet actual progress in comparative terms but continued marginality and vulnerability in absolute terms. This summary, and the snapshots that the reported information provides of legal education at the turn of the millennium, counsel LatCritical praxis on curricular reform to preserve and expand the tentative gains of recent years.

To help sort through these mixed findings and results, and thus to help orient the future direction of curricular reform efforts in this area, the following data are broken down into five sets of findings in the Summary Table of Combined Findings that begins on the next page. The summary categories presented below, in order of presentation are: Schools, Courses, Scheduling, Credit, Enrollment, and Faculty, respectively. This summary table, then, is supplemented with the set of five tables presented in the Appendix to this article, which together break down the combined data according to the type of course--whether "primary" or "related"--for each school. [FN88] The summary table included here provides a quick statistical overview to accompany this sketch of the combined findings, while the five tables in the Appendix provide the data in their entirety as reported by schools and faculty. [FN89]

*140 Summary Table of Combined Findings--2000 and 2001

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*141 III. Observations and Recommendations
The mixed results reported in the summary discussion and table above, and amplified in the tables presented below in the Appendix, make for some forward-looking, if general, observations regarding both the current situation of and near-term prospects for legal education on Latinas/os specifically, and on race/ethnicity generally. [FN90] Perhaps the most striking aspect of the status quo depicted by the findings of this project is the crucial importance of individual law teachers and scholars who are filling the voids of knowledge created by the silence and ignorance that shrouds, today as it has over the ages, the subject of Latinas/os, race, and ethnicity in American law, life, and society. [FN91] As noted above, the "primary" courses of "Latinas/os and the Law," as well as the "related" courses on critical race theory, are taught exclusively (or virtually so) by faculty of color who have taken on the task of introducing and incorporating those courses into their institution's formal curriculum. [FN92] This threshold observation in turn underscores the importance of faculty diversity in both demographic and intellectual terms to ensure the expansion and sustainability of these recent curricular reforms.

Recognition of these threshold observations should motivate proactive action to ensure the sustainability and continuation of these developments, especially in light of the culture wars that have instigated sociolegal backlash and begun to resegregate legal education in racial and ethnic terms. [FN93] These threshold observations, in other words, counsel LatCritical theorizing and activism around *142 curricular reform in this area in order to resist the likely effects on the curriculum as a function of the larger retrenchment triggered by cultural warfare. [FN94] These efforts must continue to focus on faculty and student diversity; as suggested by the combined findings reported here, this diversity--both among faculty and students--provides the important institutional critical mass toward curricular reform.

In addition, and more specifically, LatCritical curricular praxis must aim to foster a multidimensional pedagogy that reflects the advances of outsider jurisprudence and LatCrit theory in recent years. [FN95] LatCritical curricular praxis must promote the study of Latinas/os in relationship to race and ethnicity within intergroup frameworks that include international and comparative perspectives as well as interdisciplinary materials and analyses, and these frameworks additionally must help to center intragroup diversities that affect law and policy. [FN96] LatCritical praxis must embrace the study both of specific group histories and how they fit into larger patterns of subordination based on colonialism, identity politics, systems of supremacy, capitalism, and, most recently, corporate globalization. [FN97] These intergroup frameworks and cross-disciplinary approaches must be designed to help cultivate intra- and intergroup reconciliation and critical coalitions devoted to antisubordination legal reform and social transformation. [FN98] In sum, LatCritical *143 curricular praxis requires LatCrit theorists to apply and "perform" the theory in formal curricular contexts. [FN99]

To be most effective, this LatCritical praxis must be cognizant of, and engage, the various categories of curricular coverage documented by this project: first, the "primary" courses and, second, the several types of "related" courses. [FN100] In each of these course categories, a foundational task is helping to ensure the ongoing incorporation of the burgeoning legal literature on Latinas/os and on race/ethnicity into formal course materials. [FN101] Within this effort, however, LatCritical praxis must pay particular attention to the expansion of course materials specifically for "primary" courses. This question arises from the observation that, to date, no standard text is readily available for courses that might be described as focused on "Latinas/os and the Law."

At the moment, the three most likely sources of standardized text materials in either the "primary" or the "related" race courses, as indicated by the Syllabi Bank created as part of this project, are: Race and Races (Juan Perea, Richard Delgado, Angela Harris, and Stephanie Wildman eds., 2000); A Reader on Race, Civil Rights and American Law
(Timothy Davis, Kevin Johnson, and George Martinez eds. 2001); and The Latino/a Condition (Richard Delgado and Jean Stefancic eds. 1998). Each of these books is excellent; as illustrated by the Syllabi Bank, these new or recent sources of course materials are being put to good use. [FN102] Each of these books in its own way is responsive to pressing curricular needs noted and documented in this study.

Sometimes, as the Syllabi Bank illustrates, faculty elect to use them (and other sources) in synergistic combinations. And because the editors of these books consciously elected to collect social and historical materials, these books do more than teach students about "law" in traditional, case-bound studies; they help faculty teach these courses in innovative ways. The books (and similar materials) have helped to facilitate the cross-disciplinary, trans-doctrinal nature of today's primary courses, as well as many of the related courses on critical race theory or on race, racism and race relations.

Conversely, none of these fine books is particularly focused on "Latinas/os" and "law" as a unit of formal legal study in the United States. [FN103] This observation is not in the nature of a critique, for each fulfills a particular kind of important need; the trio of books introduced over the past several years, and presently being used in many of the reported courses, clearly have gone a long way toward alleviating the sore lack of standardized materials that previously existed. Their collective creativity has enabled innovative, cross-disciplinary pedagogy, but it also has raised a key question: whether a casebook focused on "Latinas/os and the Law" is a needed resource to build on their strengths while enlarging the universe of options and approaches available to teachers and students. [FN104]

Of course, LatCritical discussion of this question must include some consideration of the current state of Latina/o legal studies--both the relative scarcity of courses focused on "Latinas/os and the Law" as well as the limited coverage of Latinas/os reported in the various categories of "related" courses. From a substantive LatCritical perspective, additional materials that focus on Latinas/os and law obviously would be a welcome addition to the available tools in contemporary legal education. The mixed findings reported here, though, also can be interpreted to raise "doubts" over the existence of a "market" for additional materials, especially materials "narrowly" focused on Latinas/os and law. These mixed findings therefore might impose external "market" limitations on reformatory possibilities that we might pursue and implement. Thus, collective and deliberate discussion about both substance and strategy is a necessary next step--a step toward considering whether the development of additional materials is not only substantively warranted but also practicable, and if so, how. Without question, the three most-frequently used books, as a set, provide the best available materials today. Nonetheless, our collective challenge is to consider whether we now need to--and can--fuse their strengths into a casebook tailored to law school courses focused on Latinas/os qua Latinas/os.

In this and other ways, this project underscores the need for increased opportunities to exchange ideas and suggestions between faculty already teaching in this area as well as others who may be interested in doing so. To begin with, LatCritical praxis must attend promptly to potential programmatic efforts that enable interested parties to discuss questions such as the one posed above about the need for a casebook--and that spotlight the need for curricular reforms toward the greater inclusion of Latinas/os in formal legal education. Whether in LatCrit conferences or other outsider venues--or whether in more "mainstream" venues--LatCrit theorists must spearhead the effort to form panel discussions, roundtable presentations, and similar events that enable current teachers to develop their thoughts and practices, and that also help raise the level of scholarly and institutional awareness on this issue and its importance in light of recent and ongoing demographic trends. [FN105]
One model to consider as we contemplate LatCritical discussion of reformatory possibilities is the "Critical Race Studies Concentration" ("CRSC") *145 developed in recent years at the UCLA School of Law by faculty of color interested in expanding curricular opportunities to their students relating to race and the law. This model--to date unique in legal education--combines both "primary" courses and a variety of "related" courses, including "mainstream" courses, to organize a broad yet focused study of race, racism and race relations in the United States. This unique curricular innovation should serve as a key point of reference--or even may serve as a concrete point of departure--for a LatCritical conversation on curricular reform.

The CRSC covers five broad areas of study--history, theory, comparative subordination, doctrine, and practice--and was put together by seven tenured law faculty at UCLA who already were engaged in areas of "teaching and writing [that] probe the links between racial inequality, racial classification, and the American legal system." [FN106] They devised this curriculum because the "deep interconnection between race and law, and particularly the ways in which race and law are mutually constitutive, is an extraordinary intellectual challenge with substantial practical implications . . . [i]n an increasingly racially diverse nation." [FN107] This program now is available to second-and-third year UCLA law students, and is especially aimed toward students "who seek advanced study and/or practice in race and the law, critical race theory, civil rights, public policy and other legal practice areas that are likely to involve working with racial minority clients and communities or working to combat racial inequality." [FN108] The CRSC is designed to "offer an advanced curriculum that will foster students' systematic and more rigorous study in this area of growing interest to scholars, lawyers, and the general public." [FN109]

The CRSC curriculum is organized in four parts: two "core" courses, two "comparative subordination" courses, two "applied" courses, and a "substantial" writing requirement. Students first must complete two core requirements: the law school's courses on Civil Rights and Critical Race Theory. Next, students must take two elective courses in comparative subordination, selecting at least one course from the following list: Asian American Jurisprudence, Federal Indian Law, Latinos/as and the Law, or Comparative Racialization & the American Legal System. The second of the courses necessary to satisfy the "comparative subordination" component of the CRSC may be selected from another list, which includes: Women & the Law, Disability Law, Sexual Orientation & the Law, and the Law, American Legal History, and Law & Terrorism. CRSC students next must take two "Applied Courses"--one each from two different lists of elective courses corresponding to "doctrine" [FN110] and to "practice." [FN111] Finally, students must complete a "substantial writing" requirement, either working independently with a CRSC faculty member or through an approved *146 seminar. [FN112] In addition to this program of formal study, students are invited to attend or help to organize extra-curricular activities related to race and the law, including on-campus events and editorial work on UCLA law journals devoted to race or ethnicity and the law.

The specific courses offered as part of the CRSC curriculum necessarily vary from year to year, along with faculty schedules and other institutional considerations. However, the substantive core and specific focus of the CRSC, as well as its basic curricular purpose and schema, are clear: students are offered the formal opportunity to study race and law in a focused, structured curriculum that is integrated into the three-year cycles of legal education. And successful completion of the CRSC is similarly recognized in, and integrated into, the formalities of graduation: upon completion of these four requirements with a B- grade average or better, graduating students will receive a special notation on their UCLA law school diplomas. [FN113]
The impetus for the CRSC reflects the kinds of student concerns about "traditional" curricular gaps that prompted this very study: an opportunity for formal legal study of long-neglected areas that is "systematic and more rigorous" than the idiosyncratic efforts of individual faculty, which is the most that students across the country can expect from their institutions today. Moreover, the CRSC's curricular design reflects this study's basic findings: the CRSC curriculum blends courses that, in the parlance of this study, would be designated "primary" courses together with all three kinds of "related" courses on (1) "critical race theory" and (2) "race, racism and race relations" and (3) mainstream doctrinal courses on civil rights, immigration, and the like. In so doing, the CRSC underscores a crucial lesson for similar reformatory efforts: curricular reform must address and engage both "mainstream" as well as "boutique" courses. While the former, with their broad parameters of study, are insufficiently focused to provide in-depth education, they are necessary to establishing a substantive understanding of doctrinal links and policy frameworks that affect race and ethnicity as legal or social concepts. At the same time, the latter--precisely because they are tightly focused on the subject--provide the otherwise missing opportunity for deep study and focused reflection that complements the doctrinal and other elements of a formal legal education in the United States today. As the CRSC illustrates, the two types of courses are necessary as mutually complementary, and mutually reinforcing, aspects of a formal legal education devoted to race and ethnicity.

The CRSC curriculum begins with two "core" requirements. The first of these is a broad (but apparently not necessarily critical) introduction to "civil rights" law, while the second core requirement is completion of a focused (and apparently necessarily critical) introduction to "critical race theory." Afterward, the CRSC curricular structure directs students toward comparative studies in subordination, and the range of courses available to satisfy this two-course requirement makes it clear that students are expected to study "race" (or "ethnicity") in relationship to other identity markers, and in the context of cross-group formation and inter-group relations. [FN114] Next, CRSC students are directed to enroll in two "applied" courses that are designed as opportunities to "practice" the knowledge earned through the core and comparative courses, thus providing a praxis-oriented component to the CRSC curriculum. Finally, the writing requirement ensures that students will help to produce knowledge that may be disseminated to others in the form of written work products. In these interrelated ways, students learn not only to reject essentialized notions of race (or other axes of identity) but also to study race (and other axes of identity) in comparative, cross-group frameworks designed to counter subordination in, among, or between "different" categories of social or legal identity. [FN115] In these ways, the CRSC is completely congruent with LatCrit theory and its longstanding commitments to antiessentialism, multidimensionality, and antisubordination in and through legal education, discourse, and praxis.

The origins and operations of the UCLA CRSC also illustrate another point reflected in this study's findings: curricular reform oftentimes depends on the proactive interventions of interested faculty (and students). As is the case with so many of the courses at other law schools reported in the five tables of the Appendix to this article, the CRSC curriculum at UCLA springs from the efforts of individual faculty members who, in this instance, also were able to act collectively to secure formal institutional reform of the curriculum. Indeed, the program literature makes plain that the CRSC "builds" on the pre-existing resources represented by the group of individual faculty members who make the CRSC possible. [FN116] Thus, the CRSC underscores the importance not only of faculty (and student) diversity in legal education, but also of creating a "critical mass" of interested faculty so that similar "programs" of formal study may become institutionally viable.
Finally, the CRSC curriculum touches on, but leaves open, a substantive issue over stance and method that runs through the findings of this project as well: whether the study of race and ethnicity is necessarily a "critical" enterprise given the histories and legacies that are the subject of such studies. In theory, of course, the answer would appear to be "no" but in practice, the question that arises is: how does one design a serious program to study race, ethnicity, and the law in the United States today without effectively adopting a "critical" perspective toward the histories and legacies that constitute the object of such study? Neither the CRSC curriculum nor the findings of this study provide an answer, but both certainly point to this question as an important part of future conversations. [FN117] The table immediately following shows the organization of this innovative curricular program.

*148 UCLA "Critical Race Studies Concentration" Courses--2001
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As the CRSC makes plain, curricular reform is possible. Moreover, curricular reforms can emanate from faculty directly--though they must work collectively to secure institutional acceptance. But curricular reform in turn depends on the pre-existence of faculty and students interested in such reforms--and able to craft and sustain them personally. As with the project's other findings, the CRSC confirms the substantive potential and impact of diversification in legal education. Perhaps most importantly, however, the CRSC teaches that formal curricular reforms indeed can be designed to be congruent with LatCrit insistence on antiessentialism, multidimensionality, and antisubordination in scholarship and praxis. [FN118]

The CRSC thus helps to set the stage for collective consideration of the findings reported here, and the questions they raise. These findings and questions, of *149 course, additionally should take into account the information reported by faculty at other schools, who as individuals are helping to provide curricular opportunities relating to race and ethnicity in legal education to students who otherwise would have less or none. The information provided by individual faculty members around the country both confirms and amplifies the observations drawn from the CRSC, and vice versa. These faculty members, and in particular those who submitted anecdotal information or course syllabi, represent a source of experience and perspective that, like the CRSC, should inform LatCritical discussion of curricular reforms.

To help contextualize this discussion, the Syllabi Tables presented immediately below list the various faculty members teaching in relevant areas who submitted their course syllabi for inclusion in the Syllabi Bank as a means of encouraging interested faculty to share information and ideas on course development and pedagogy. As with the tables of the Appendix that follows this article, these Syllabi Tables break down the various courses according to their categories: first the "primary" courses and then the three types of "related" courses--critical race theory courses, race/racism and race relations courses, and mainstream courses. While it is impracticable to reproduce here the hard-copy syllabi collected via this project for the creation of a Syllabi Bank, these Syllabi Tables enable faculty to contact each other directly to discuss areas of mutual interest based on the courses they teach or are considering teaching. [FN119]

Syllabi Table: "Primary" Courses--2000 and 2001
TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

*150 Syllabi Table: "Critical Race Theory" Courses--2000 and 2001
TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

*151 Syllabi Table: "Critical Race Theory" Courses--2000 and 2001
Conclusion

This project shows that the stirrings that produced LatCrit theory seven years ago have only recently begun to penetrate the formal curriculum. The coming years will determine whether this stirring is only a beginning--or already a plateau created by the sociolegal backlash spurred by cultural warfare. For better or worse, the coming years will see either the development and maturation, or the retrenchment and stagnation, of a discipline now in apparent infancy. Therefore, LatCrits and others interested in ensuring the former and foreclosing the latter should embark on conscious collaborations toward the ongoing development of our materials and methods relating to courses on these topics.

Fortunately, the LatCrit community--and the works we collectively have produced since 1995--already have put into place some of the necessary conditions and networks for programmatic discussion of curricular issues and reformatory initiatives. During the past seven years, LatCrit scholars have formed collaborative projects that position us to intervene collectively as well as individually to improve the state of legal education on Latinas/os, race, and ethnicity. Furthermore, during these past seven years we collectively have also produced a body of work that can help to inform the substance of such interventions. During the past seven years, we have traveled the path that brings us to today--and positions us for tomorrow.

However, to embark on a LatCritical praxis devoted to curricular reform, we must work collaboratively over a multi-year timeframe: to make a difference on this front of our social justice struggles, LatCrit theorists and activists must marshal our resources and focus our attention for the long haul. Yet, with LatCrit networks of knowledge and discourse growing, interested teachers, students, and administrators increasingly have opportunities to invigorate each other's imaginations and, over time, mutually enhance our collective success toward the meaningful inclusion of education on Latinas/os into the law school experience of more North American students.

In sum, the "snapshot" of legal education on "Latinas/os" specifically and on "race" or "ethnicity" generally that is presented in this project ideally will help raise awareness of the gaps and needs in these areas of the contemporary law school curriculum. Hopefully, this snapshot will help to motivate and orient follow-up projects and interventions to help address and remedy the curricular shortcomings documented here. Without question, the LatCrit community should help to spearhead the discussion and implementation of the curricular reforms that we collectively conclude might be warranted by the findings discussed above, and presented in full detail below in the five tables of the Appendix to this article. The invisibility of Latinas/os in the law school curriculum has persisted for far too long and the LatCrit community must ensure that Latinas/os' growing place in society is reflected with an increased visibility in legal education.

Footnotes:

[FN1]. Professor of Law and Co-director, Center for Hispanic & Caribbean Legal Studies, University of Miami. I am grateful to all the administrators and faculty who took the time
to participate in this study, and to the handful of assistants (named in note 21) who, during the past two years, have helped me to compile and assess the data gathered for this project. I am equally grateful to the members and editors of the Berkeley La Raza Law Journal, and in particular Victor Rodríguez, for lending their limited time, capable work, energetic spirit, and extraordinary talents to improve the final report presented here. In addition, I thank the participants of the LatCrit VII conference who helped me think through the various ways of interpreting and presenting the data gathered via this study. Finally, I thank Steve Bender and Keith Aoki for helping the LatCrit community produce another important conference and symposium. All errors are mine.

[FN1]. "Latinas/os" of course are a multiply diverse yet generally recognized social group. For demographic portraits of Latina/o heterogeneity, see Berta Hernandez-Truyol, Building Bridges - Latinas and Latinos at the Crossroads: Realities, Rhetoric and Replacement, 25 Colum. Hum. Rts. L. Rev. 369 (1991); Gerald P. Lopez, Learning About Latinos, 19 Chicano-Latino L. Rev. 363 (1998); Gloria Sandrino-Glasser, Lost Confundidos: De-Conflating Latinas/as' Race and Ethnicity, 19 Chicano-Latino L. Rev. 69, 75-77 (1998); see also Juan F. Perea, Los Olvidados, 70 N Y U. L. Rev. 965 (1995). Similarly, "LatCrit theory" comprises many scholars with varying views, and therefore it is somewhat misleading to speak of "LatCrit theory" in the singular. Nonetheless, the multiply 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, Latina/o Ethnicities]. Latinas/os' multiple diversities have sparked spirited discussions over the naming and labeling of the group. See, e.g., Luis Angel Toro, "A People Distinct from Others": Race and Identity in Federal Indian Law and the Hispanic Classification in OMB Directive No. 15, 26 Tex. Tech. L. Rev. 1219 (1995) (critiquing the ramifications of the current labeling system in the United States, which "lumps together all people who can connect themselves to some 'Spanish origin or culture' together as 'Hispanics'"); see also Jorge Klor de Alva, Telling Hispanics Apart: Latino Sociocultural Diversity, in The Hispanic Experience in the United States: Contemporary Issues and Perspectives 107-36 (Edna Acosta-Belen & Barbara R. Sjostrom eds., 1988) (discussing Latinas/os and the labels used in the United States to describe this multiply diverse social group); Suzanne Oboler, Ethnic Labels, Latin Lives (1995); Earl Shorris, Latinos: A Biography of the People (1992). See generally The Latino/a Condition: A Critical Reader (Richard Delgado & Jean Stephancic 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., Chicanos" and "Puerto Rican" and "Cuban." See U.S. Dep't of Commerce, Bureau of the Census, Form D-1, Question Seven (2000) (copy on file with author). See generally Alex M. Saragoza et al., 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-Hispanic-Latina/o labels into a single identity category). These discussions have included LatCritical exchanges over the relative utility of "race" and "ethnicity" in social or legal analysis of "Latina/o" communities. See infra notes 28-31 and accompanying text on these early exchanges. Thus, each time LatCrit theorists and other analysts speak of "Latinas/os," we do so and for accuracy's sake must take care to always do so, in a way that foregrounds multiple "internal" diversities, including those based on nationality, ethnicity, race, immigration background and status, class, religion, gender, sexual orientation, dis/ability, and other categories of identity and identification that have been rendered relevant to antisuordination analysis socially and/or legally. See, e.g., Alicia G. Abreu, Lessons From LatCrit: Insiders and Outsiders, All at the Same Time, 53 U. Miami L. Rev. 787 (1999) (discussing author's dual sense of "insider" and "outsider" positionality within LatCrit conferences); Elvia Arriola, Welcoming the Outsider to an Outsider Conference: Law and

[FN2]. As described below, this project unfolded in two data-gathering phases using two different questionnaires to survey law schools: first on "primary" courses devoted to "Latinas/os and the Law" and, later, on various "related" courses devoted to critical race theory, to race, racism and race relations, or to mainstream doctrinal topics generally deemed important to Latina/o and other communities of color in the United States, such as civil rights or immigration law courses. See infra notes 20-34 and accompanying text.


Information on LatCrit theory, including the full text of the inaugural LatCrit symposium based on the First Annual LatCrit Conference, can be obtained at the LatCrit website, www.latcrit.org. For other LatCrit symposia, including those based on subsequent conferences or colloquia, see Symposium, LatCrit Theory: Naming and Launching a New Discourse of Critical Legal Scholarship, 2 Harv. Latino L. Rev. 1 (1997) (LATCRIT I); Colloquium, International Law, Human Rights and LatCrit Theory, 28 U. Miami Inter-Am. L. Rev. 177 (1997) (publishing the proceedings of the first LatCrit colloquium focused on international law); Symposium, Difference, Solidarity and Law: Building Latina/o...


[FN6] These social and economic trends have been noted in LatCrit theory from the outset, and have helped to inform the emergence and evolution of LatCrit theory over the past seven years. See, e.g., Rachel Moran, Neither Black Nor White, 2 Harv. Latino L. Rev. 61, 61-65 (discussing these trends in national and regional contexts). See generally Francisco Valdes, Latina/o Ethnicities, supra note 1, at 1-11 and 24-30 (discussing the emergence of LatCrit theory from critical race theory, and the importance of these jurisprudential developments in an increasingly multicultural society).
As noted above, this study documents both "primary" courses devoted principally to "Latinas/os and the Law" as well as three types of "related" courses that also provide some coverage of this general topic, as follows: (1) courses on critical race theory; (2) courses on race, racism and race relations; and (3) courses on mainstream doctrinal categories, like civil rights and immigration, that generally are deemed important to Latina/o communities or persons. See supra note 2; see also infra notes 38-89 and accompanying text. Generally, I would include the "primary" courses, as well as the "related" courses on critical race theory and on race, racism and race relations, to constitute loosely "race and ethnic legal studies" in the context of this curricular survey because these courses are consciously framed and aimed at educating students in "race, ethnicity and the law" as a coherent and important unit of study.

In my view, LatCrit theory aims to fulfill four interrelated functions: (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. 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) [hereinafter, Under Construction].

"Essentialism" and "antiessentialism" 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, differences that can produce consequences for lawmaking and policymaking decisions. Essentialist categories oftentimes divert or inhibit attention to intragroup differences, helping to consolidate a group's agenda around the group's internal elites. See, e.g., Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 Stan. L. Rev. 581 (1990); 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). By contrast, "antiessentialist" theory seeks to reveal intragroup differences to resist relations of subordination and domination that may exist within and among the members of any particular group. Therefore, "antisubordination principles and analysis, applied in critical and self-critical ways, provide the substantive limits for and directions of antiessentialism in LatCrit theory, community, and praxis ... antiessentialism is no end unto itself; its utility is defined in relation to a contextual antisubordination purpose. In LatCrit theory, community and praxis, antisubordination ideally always contextualizes and informs antiessentialism." Thus, the former anchors the latter. Elizabeth M. Iglesias & Francisco Valdes, Expanding Directions, Exploding Parameters: Culture and Nation in LatCrit Coalitional Imagination, 5 Mich J. Race & L. 787, 815-16 and 33 U. Mich. J.L. Reform 203, 231-32 (2000); see also Iglesias & Valdes, Coalitional Theory, supra note 3, at 513-21 (discussing antiessentialism and antisubordination in LatCritical analysis).


[FN10]. Faculty teaching in these areas were asked to share anecdotal accounts and observations of teaching experiences to help contextualize the raw data, and these accounts now are part of the LatCrit Curriculum Project Files.

[FN11]. The Syllabi Tables describe the syllabi contained in the Syllabi Bank, whereas the Syllabi Bank itself consists of hard copies of approximately 40 syllabi submitted by individual faculty members for various courses. The Syllabi Bank is available upon request to: latcrit@law.miami.edu. For further discussion of the Syllabi Bank, see infra note 119, accompanying text and tables.

[FN12]. This article endeavors to summarize the findings' highlights and to draw some basic observations from the raw data presented in the five tables of the Appendix, but does not attempt to interpret the data in any definitive and conclusive manner. In keeping with LatCrit norms and ideals, this act of interpretation is a collective task of the LatCrit community, which now can draw on this project as well as other sources of information to consider and devise plans of action toward curricular reforms.

[FN13]. It bears emphasis that LatCrit theory and praxis are aimed not only at law and society writ large, but also at the structures and practices of legal education, as well as our own projects and plans. See generally Iglesias & Valdes, LatCrit at V, supra note 5, at 1309-14 (focusing on LatCrit efforts to reform the norms and practices for the production of legal scholarship).

[FN14]. This phenomenon is corroborated in the anecdotal information collected via this project, which is intended to supplement, and to help contextualize, the raw statistics gathered through the curricular questionnaires. For example, one faculty member teaching a "related" course on immigration reported that "many students are hungry to talk about race ... some express relief that we are finally talking about the elephant in the room, when it gets ignored in so many other classes." See LatCrit Curriculum Project Files (copy on file with author).

[FN15]. Oftentimes, students specifically query why their legal educations are so poor in critical theory and in "outsider" studies. As a result, LatCrit theorists have begun to establish programs that can serve as "lifelines" to law students who may be isolated in their "home" institutions. For a more detailed discussion of this problem, see Francisco Valdes, Insisting on Critical Theory in Legal Education: Making Do While Making Waves, 12 La Raza L.J. 137 (2001). These LatCrit programs include the Critical Global Classroom, a study abroad summer program devoted to social justice legal studies in international and comparative frameworks undertaken in partnership with The University of Baltimore School of Law: because study abroad programs are open to students nationwide, the "CGC" will permit students from all law schools in the United States to gather in a "safe" educational environment to explore issues omitted or marginalized in their schools' formal curriculum. For more information on the "CGC" and other student-oriented LatCrit initiatives, see Iglesias & Valdes, LatCrit at V, supra note 5, at 1327-32.

[FN16]. The significance of minority presence in the legal academy, discussed in more detail infra at notes 80-87 and accompanying text, 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,
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, 9 Tex. J. Women & L. 167 (2000) (discussing how the LSAT continues to project that history into the present); see also Robert Stevens, Law School: Legal Education in America From the 1850s to the 1980s (1983) (providing a comprehensive account of the politics--including the identity politics--that dominated the institutionalization of formal legal education). See generally Nicholas Lemann, The Big Test: The Secret History of the American Meritocracy (1999) (providing a similar history focused, more generally, on the standardized tests used in various educational settings in the United States).


[FN17]. "Latinas/os" historically have been elided in the public discourses and national politics of the United States, as well as in legal analysis and theory. See generally Juan F. Perea, The Black/White Binary Paradigm of Race: The 'Normal Science' of American Racial Thought, 85 Cal. L. Rev. 1213 (1997); 10 La Raza L.J. 127 (1998). This kind of historical practice eventually becomes internalized culturally; in other words, it becomes institutionalized, as was recognized by the federal government in the decision to establish programs to end institutionalized racism through "affirmative actions" designed to disrupt the repetition of historical habits. See generally James E. Jones, Jr., The Origins of Affirmative Action, 21 U.C. Davis L. Rev. 383, 395 (1988) (explaining that "affirmative action" was directed at "patterns of past discrimination built into institutional systems so they are re-created without the necessity of malice" or actual intent). Similarly, historic patterns of Latina/o invisibility are now built into institutional systems, and may be re-created without the necessity of malice or intent.

[FN18]. Because of faculty mobility and annual changes to curricula at various schools, this project only can document the information reported by schools and faculty in response to the two questionnaires employed in this study, or that we obtained via school websites and catalogs for those schools that "neglected" or "declined" to respond to the questionnaires and our follow-up efforts. See infra notes 41-43 and accompanying text.

[FN19]. Because this study is based chiefly on the information reported by schools and faculty, the information provided (or omitted) by these sources necessarily establishes the parameters and limits of the findings presented here. It thus bears emphasis that this study is but a first step toward mapping and understanding the (non)inclusion of Latinas/os in the law school curriculum. This study therefore cannot and does not claim to provide definitive details or answers to the many issues broached here, or otherwise raised by the data. However, this study does create the most complete "picture" or snapshot of Latinas/os in the formal law curriculum that exists to date, and thus serves as a springboard to follow-up efforts. Ideally, this study will encourage LatCrit scholars and other interested parties to develop the findings and observations presented below to promote a greater inclusion than is reported here.

[FN20]. "We" refers to a small team of dedicated assistants, to which I am profoundly grateful, including: Cari Bergnes, Beatriz Garrido, Ardissie Monasterios, Jessica Serna, and Belkys Torres. The spring 2000 questionnaire is included in the Appendix to this article. The law schools to which the questionnaire was sent were taken directly from the 1999-2000 Directory of the AALS. In total, 164 AALS-member law schools were included in the study.

[FN21]. The "primary" courses were the principal focus of the study, but in the process of gathering data, three types of "related" courses became important: related courses on (1) critical race theory, (2) race, racism and race relations, and (3) mainstream doctrinal categories, like civil rights and immigration, which generally are deemed important or especially germane to Latina/o populations in the United States. See infra notes 31-32 and accompanying text.

[FN22]. The project, as noted earlier, surveyed the AALS member schools identified in the 1999-2000 AALS Directory of American Law Teachers. See supra note 20.

[FN23]. See infra note 119, and accompanying text and tables.
The Syllabi Bank consists of hard copies of approximately 40 syllabi for various courses generously contributed by individual faculty for this purpose. Ideally, the Syllabi Bank will make it easier for interested faculty to introduce and teach these courses in their respective institutions. Copies of the Syllabi Bank are available upon request to latcrit@law.miami.edu. The Syllabi Tables presented below in the text of this article lists the syllabi, courses, and faculty who helped to create this Syllabi Bank.

Interested faculty may contribute additional syllabi to the Syllabi Bank, as a way of keeping it current or expanding its coverage, by sending syllabi to the author at the Miami School of Law.


For instance, the 1995 colloquium at which the term "LatCrit" was coined, and at which the First Annual LatCrit Conference was initially conceived, was focused on the role of "Latinas/os" in critical race theory specifically. For the proceedings of that colloquium, see Colloquium, Representing Latina/o Communities: Critical Race Theory and Practice, 9 La Raza L.J. 1 (1996). A few months later, the LatCrit I program was focused on race and ethnicity in relationship to the possibility of Latina/o pan-ethnicity. For more information on the LatCrit I conference, including the full text of the symposium based on its program, visit www.latcrit.org. See also infra notes 28-31 and sources cited therein on "race" and "ethnicity" in LatCrit analysis of "Latina/o" concerns.


[FN30]. These engagements have been programmatic, and designed to advance race critical studies in LatCrit venues and ways. For a discussion of programmatic efforts, see Iglesias & Valdes, LatCrit at V, supra note 5, at 1292-98.


[FN32]. This second questionnaire requested respondents to "specify as best as possible the approximate amount of class time actually devoted to issues focused substantially on Latinas/os and the law (for instance, the number of weeks or class sessions)" devoted to that purpose. See infra Appendix. Thus, the data presented here on "levels" of coverage focused on Latinas/os in "related" courses is framed in these terms, as well as in percentages. See, e.g., infra notes 66-68, 70-72, 74-75, and accompanying text on the levels of coverage in various types of "related" courses.

[FN33]. See supra notes 28-31 and sources cited therein on race (and ethnicity) in LatCrit theory.

[FN34]. See supra notes 14-17 and 86-87 and sources cited therein on the history and state of formal legal education in the United States.

[FN35]. Anecdotal information also was included occasionally in cover notes that accompanied the responses to the questionnaires. Throughout this article, I refer to anecdotal accounts from time to time to illustrate or amplify the information and observations based on the raw data collected via the two questionnaires and related follow-up efforts.

[FN36]. This project's limitations bear reminder from time to time. In particular, this project's findings are limited chiefly by the information actually and accurately provided--or omitted or erroneously reported--in the responses to the questionnaires that comprise this study. See supra note 19. For example, schools sometimes reported information inaccurately or incompletely, or neglected or declined to report information. See infra notes 41-43.

[FN37]. See infra note 105 and accompanying text on some follow-up programmatic events already under discussion, and contemplated for the next annual LatCrit conference in May 2004.

[FN38]. See supra note 6 and sources cited therein on recent and current demographic statistics.

[FN39]. See supra notes 20-33 and accompanying text describing the project's two phases.
For the combined "overall" findings, see infra Table 5 of the Appendix.

The 26 schools reporting "none" on all courses or questions were: Arkansas-Fayetteville, Arkansas-Little Rock, Baylor, Case Western, Catholic University of America, Drake, Louisville, Loyola-Chicago, Loyola-New Orleans, Maine, Michigan, Michigan State, Mississippi College of Law, Montana, Northeastern, Notre Dame, Ohio Northern, Oklahoma, Pepperdine, Quinnipiac, South Dakota, Southern Illinois, Texas, Virginia, Wyoming, and Yale. Of these 26 schools, 4 of them apparently do have some courses relevant to this study. These schools are Arkansas, Case Western, Northeastern, and Yale. Thus, after the follow-up research, 22 of these 26 appear truly to have "none." These remaining 22 schools are: Arkansas-Fayetteville, Baylor, Catholic University of America, Drake, Louisville, Loyola-Chicago, Loyola-New Orleans, Maine, Michigan, Michigan State, Mississippi College of Law, Montana, Notre Dame, Ohio Northern, Oklahoma, Pepperdine, Quinnipiac, South Dakota, Southern Illinois, Texas, Virginia, and Wyoming. This kind of discrepancy based on (non)reported information illustrates one limitation in this study. See supra note 19.

The 6 schools declining to respond to the questionnaires were: (1) Brooklyn, where the Dean's secretary affirmatively notified us that "no one could help" with the survey after our third call; (2) Harvard, where the Dean's secretary advised us that the school would "not respond" to the survey, without providing any reason, and again on the third call; (3) Mercer, where the Dean's secretary advised us that the Dean had received the survey and "that it was at his discretion to answer"; we never received a response; (4) Toledo, where the Dean's secretary advised us that the school "did not have time" to respond to the questionnaire; (5) Wake Forest, where the Dean's secretary "explained that the Dean had received the survey several times but had chosen not to respond"; and (6) William & Mary, where "no one was able to help" provide a response after repeated calls and messages. LatCrit Curriculum Project Files (copy on file with author). Any information presented below respecting these schools therefore derives from the schools' official websites and related research.

This "neglect" was quite persistent, in light of the numerous follow-up contacts via fax and phone. The 15 schools in this category are: Arizona, Baltimore, Duquesne, Georgia State, Gonzaga, Kentucky, New Mexico, Richmond, San Francisco, Suffolk, Temple, Utah, Washburn, University of Washington, and Whittier. In each instance, we followed up on the two questionnaires numerous times and each time were asked to "call back"--but we never received either a completed form nor any other communication refusing or declining to do so. LatCrit Curriculum Project Files (copy on file with author). Any information presented below respecting these 15 schools therefore derives from the schools' official websites and related research.

This estimate is based on the number of AALS member schools in the 1999-2000 Directory. See supra note 20.

For an overview of the combined findings, see infra Part II, Summary Table of Combined Findings.

For the results on the "primary" courses, see infra Table 1 of the Appendix.

For the results on the "related" courses, see infra Tables 2-4 of the Appendix.

It bears note that legal studies devoted to "race" or "ethnicity" or even "Latinas/os" are not always "critical" in perspective or approach.

For the results on the critical race theory courses, see infra Table 2 of the
Appendix.

[FN50]. For the results on the race, racism and race relations courses, see infra Table 3 of the Appendix.

[FN51]. For the results on the mainstream "related" courses, see infra Table 4 of the Appendix.

[FN52]. The 12 clinical courses and respective schools are: Criminal Justice Clinic (Howard), Legal Aid Clinic (Idaho), East San Jose Community Law Center Clinical Service (Santa Clara), Civil Clinic (North Carolina), Indian Country Environmental Justice Clinic (Vermont), Clinic for Asylum, Refugee and Immigrant Services, Farmworker Legal Aid Clinic, Federal Tax Clinic, Civil Justice Clinic (Villanova), Civil Rights & Community Justice Clinic (Washington), Immigration Law Clinic (West Virginia), and Immigration Clinic (William Mitchell). See infra Table 5 of the Appendix. Of these, the Farmworker Legal Aid Clinic at Villanova is deemed a "primary" course because it was reported to be devoted "100%" to Latina/o clients. See infra note 56.

[FN53]. The 7 "Latinas/os and the Law" primary courses and respective schools are: Latinos/as and the Law (UC Davis), Latinos and the Law (UCLA), Latinas/os and the Law (California Western), Latinas/os and the Law (Illinois), Latinas/os and the Law (Loyola-Los Angeles), Latinos and Native Americans: LatCrit Theory (Northern Illinois), and LatCrit: Beyond the Black/White Paradigm (Seton Hall). See infra Table 1 of the Appendix.

[FN54]. The 10 "Comparative Law" primary courses and respective schools are: Comparative Law: Latin American in the U.S. (Alabama), Temas Especiales en Derecho Internacional (American), Inter-American Human Rights Law (American), Comparative Law: Latin American Law (Connecticut), Law and Politics in Latin America (Northeastern), Seminar on Constitutional Relation between the U.S. and Puerto Rico (Puerto Rico), Latin American Legal Development (Richmond), Latin American Law and Institutions (Southwestern), Latin American Business Law (Stetson), and Immigration Law: Problems in Mexican Migration To The U.S. (Wisconsin). See infra Table 1 of the Appendix. As one anecdotal account illustrates, primary courses on Latin America or on comparative law can be linked to Latina/o-focused studies: "many of the themes [in these types of courses] are relevant to the Latina/o experience in this country--questions of race, sexuality, sexual orientation are common to discussions of culture both in Latin America and Latina/o communities" in the United States. "In fact," continues one faculty respondent teaching in this area, "my aim is to analyze critically many aspects of Latino/a-ness in the hope of interrogating assumptions about both Latin American and these communities in the U.S." LatCrit Curriculum Project Files (copy on file with author).

[FN55]. The 2 "Legal Spanish" primary courses and respective schools are: Legal Spanish (Florida State) and Spanish for American Lawyers (North Carolina). See infra Table 1 of the Appendix.

[FN56]. This clinical course is the Farmworker Legal Aid Clinic (Villanova). See infra Table 1 of the Appendix. This clinic is included as a primary course because Villanova reported that: "100% of the clinic's clients are Latinas/os." LatCrit Curriculum Project Files (copy on file with author).

[FN57]. See infra Table 1 of the Appendix.

[FN58]. The schools in California are: UC Davis, UCLA, California Western, and Loyola-Los Angeles; in New Jersey, the school is Seton Hall. The two Illinois schools are Illinois and Northern Illinois. See infra Table 1 of the Appendix.
For example, the anecdotal accounts indicate that individual faculty members have taken the initiative, especially in recent years, requesting to teach these courses—sometimes in response to "student demand" or interest. These accounts include those that have produced the "new" courses on Latinas/os and the Law introduced in the past year or two. See infra note 61.

On the other hand, anecdotal information reveals that some of these courses are precarious. In one instance, the course was introduced as an "overload" course for a faculty member scheduled to go on sabbatical the following year. Similar factors bring into question the staying power of these (and other) courses identified in this project. See infra note 64 for some examples of these factors and similar variables.

The 4 "new" "Latinas/os & Law" courses are: Latinos/as and the Law (UC Davis), Latinos and the Law (UCLA), Latinas/os and the Law (California Western), and LatCrit: Beyond the Black/White Paradigm (Seton Hall). See infra Table 1 of the Appendix.

See supra note 6 and sources cited therein on Latinas/os' growing presence in the United States.

The 3 new courses scheduled to be offered "every other year" are: Latinos and the Law (UCLA), Latinas/os and the Law (California Western), and LatCrit: Beyond the Black/White Paradigm (Seton Hall). The scheduling cycle remains uncertain for Latinos/as and the Law (UC Davis). See infra Table 1 of the Appendix.

Course offerings "every other year" or less effectively mean that upper-level students eligible for enrollment in these courses will have at most one opportunity during their second or third year of law school to enroll in such a course, but the vagaries of academic and student schedules oftentimes produce conflicts that prevent students from enrolling in courses. These factors can include, in addition, faculty sabbaticals and visits to other schools, which interrupt these limited course offerings and make access to them even more elusive. Thus, the scarcity of these course offerings, coupled with the typical demands or limitations on student and faculty schedules, can inhibit access to these educational opportunities as a practical matter, and despite the formal inclusion of the course in the curriculum. See, e.g., supra note 60 and infra note 85 for some examples of these and similar exigencies.

See infra Table 2 of the Appendix.

The course reporting the highest level of coverage in this category was Critical Race Theory (North Carolina). See infra Table 2 of the Appendix. Interestingly, however, as one faculty respondent noted in an anecdotal account relating to critical race courses, sometimes Latina/o-identified topics can enliven race discussions: in that instance, "language rights was the hottest (most controversial) topic" of the semester. LatCrit Curriculum Project Files (copy on file with author).

Of necessity, this estimate is based on those courses within this category that elected to provide specific information on Latina/o-focused coverage.

See supra notes 66-67 and accompanying text on these responses; see also infra Table 2 of the Appendix.

See infra Table 3 of the Appendix.

The course reporting the highest level of coverage in this category was Race and Law (Vermont Law School). See infra Table 3 of the Appendix. The general status quo is
aptly captured in one faculty respondent's anecdotal account: "Each time I teach the [Law and Race] seminar, I lament the fact that I don't do more regarding Latinos and Latinas." LatCrit Curriculum Project Files (copy on file with author).

[FN71]. Again, this estimate of course is based on those courses within this category that provided specific information on Latina/o-focused coverage.

[FN72]. See supra notes 70-71 and accompanying text on these responses; see also infra Table 3 of the Appendix.

[FN73]. See infra Table 4 of the Appendix.

[FN74]. The two courses reporting the same highest levels of coverage in this category are Legal Control of Discrimination (Nebraska) and Jurisprudence: Critical Lawyering (St.Mary's). See infra Table 4 of the Appendix. In their anecdotal accounts, faculty members suggested that the areas in mainstream courses most likely to elicit Latina/o-focused discussion included profiling, preemptory challenges, English-only regulations, and similar topics. LatCrit Curriculum Project File (copy on file with author).

[FN75]. As noted above, supra note 67, this estimate necessarily is based on those courses within this category that actually provided specific information on Latina/o-focused coverage. See supra notes 73-74 and accompanying text on these responses; see also infra Table 4 of the Appendix.

[FN76]. The student figures are derived from the American Bar Association's website, www.abanet.org (last visited on September 16, 2002).

[FN77]. These figures are based on the "low" and "high" enrollment figures reported by schools and faculty. See infra Table 5 of the Appendix.

[FN78]. These figures and calculations produce a generous estimate, as they include all students in courses over the two-year period spanning this project (1999-2000 and 2000-2001), and a student who enrolled in more than one course during that time additionally may "count" as more than one for these calculations.

[FN79]. See supra notes 53-64 and accompanying text on the "Latinas/os and the Law" courses.

[FN80]. This observation is based on the author's personal knowledge of the faculty in question.


[FN82]. This observation is also based on the author's personal knowledge of the faculty in question, but the assessment is complicated by some schools' reports that the faculty teaching these courses "vary" over time.

[FN83]. As noted above, these assessments are based on the author's personal knowledge of the faculty identified in the study as teaching these courses, but these assessments are complicated by reports that teaching faculty can "vary" over time for some courses. See supra note 64, 82.

[FN84]. See supra note 15-17 and sources cited therein on diversity in legal education; see also infra notes 86-87 and source cited therein on the relationship between diversity and reform in legal education. See generally www.abanet.org for more detailed statistics
on both faculty and student diversity spanning from 1963 to 2001.

[FN85]. When individual faculty members take the initiative in introducing these courses, they oftentimes do so in conjunction with student interest, see supra note 59, and also in the face of general institutional indifference. For example, one anecdotal account reports that, "Since I am the only one on my faculty willing or able to teach [a Race and Law] course, it is unlikely it will be available every year. In fact, I'm pretty sure it will not be offered next year. I am also picking up some other courses next year or the year after, which will make it even more unlikely that I can teach Race and the Law every year." LatCrit Curriculum Project Files (copy on file with author); see also supra notes 60 and 64 for other reports on the introduction of these courses. This "take it or leave it" institutional attitude reflects a general indifference to the accessibility and sustainability of these courses, which also is typified in the student queries providing the original impetus for this project. See supra notes 14-15 and accompanying text on the project’s origins.

[FN86]. See 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 32 (Francisco Valdes, Jerome McCristal Culp, Jr. & Angela P. Harris eds., 2002) (making a connection between the emergence of critical race theory in the late 1980s to the ongoing diversification of the legal professorate, and to student activism that help to prod that diversification).


[FN88]. For a more detailed description of these categories, see supra note 7.

[FN89]. The Appendix also contains the two principal questionnaire forms used in the project. See supra notes 14-15 and accompanying text describing the project's origins and history.

[FN90]. As explained earlier, the data is presented with only minimal interpretation to invite collective analysis and follow-up action. See supra note 12.

[FN91]. See supra note 16 and sources cited therein on exclusionary identity politics in
the legal professions.

[FN92]. See supra notes 80-84 and accompanying text on faculty for these two categories of courses.

[FN93]. These culture wars--and the sociolegal ambience of hostility toward race and ethnicity that they have excited--may help to explain the refusal (or "neglect") of various schools to respond to this project's questionnaires and follow-up contacts, designed simply to document the study of race and ethnicity in their respective formal curricula. See supra note 42 and 43; see also supra note 87 and sources cited therein on the culture wars and critical legal theory.

[FN94]. For example, one anecdotal account reports that students "were afraid to take [a course on Latinas/os and the Law] because of how it might affect their resumes (stigma)" while another account reported that "there have been a few students who were critical of race-talk" in a related course. The first of these examples echoes similar concerns concerning courses on sexuality or sexual orientation and the law. See generally 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'l. J. Sexual Orientation L. 149 (1995). Moreover, both of these examples illustrate the complex dynamics of "silencing" that suppress critical race and LatCritical studies in the legal academy--dynamics that are part of the culture wars. See Montoya, Bender and Roberts, respectively, supra note 16 and their articles on silence and "silencing" in contemporary legal education.

[FN95]. See supra note 9 and sources cited therein on multidimensional analysis and related topics.

[FN96]. See Iglesias & Valdes, LatCrit at V, supra note 5, at 1314-15 and 1324-27 on diversity and transnationality, respectively, in LatCrit analysis and praxis.

[FN97]. See generally supra note 4 and sources cited therein on colonialism and its legacies.

[FN98]. Coalitional discourse and praxis is central to LatCritical analysis. See, e.g., Iglesias & Valdes, Coalitional Theory, supra note 3, at 562-57 (discussing theory and solidarity in both intra- and intergroup contexts); see also Kevin R. Johnson, Some Thoughts on the Future of Latina/o Legal Scholarship, 2 Harv. Latino L. Rev. 101 (1997) (discussing the challenges facing LatCrit theory); George A. Martinez, African-Americans, Latinos and the Construction of Race: Toward an Epistemic Coalition, 19 Chicano-Latino L. Rev. 213 (1998) (urging Latinas/os, Blacks, and other groups of color to coalesce around "race" and our collective, cumulative knowledge of white supremacy); Ediberto Roman, Common Ground: Perspectives on Latina-Latino Diversities, 2 Harv. Latino L. Rev. 483, 483-84 (1997) (urging Latinas/os to focus on our similarities rather than our differences as a way of promoting intragroup justice and solidarity); Eric K. Yamamoto, Conflict and Complicity: Justice Among Communities of Color, 2 Harv. Latino L. Rev. 495 (1997) (analyzing intergroup grievances and relations among groups of color). By "critical coalitions" I mean alliances based on a thoughtful and reciprocal interest in the goal(s) or purpose(s) of the coalition. A "critical" coalition--unlike strategic forms collaboration--is the sort of collaborative project that results from a careful and caring commitment to the substantive reason(s) for it, and that produces on all sides a reformatory agenda and cooperative dynamic that reflects this mutual commitment. See Francisco Valdes, Outsider Scholars, Legal Theory and OutCrit Perspectivity: Postsubordination Vision as Jurisprudential Method, 49 DePaul L. Rev. 831, 835-38 (2000) (elaborating critical coalitions). For further discussion of this concept, see Julie A. Su & Eric K. Yamamoto, Critical Coalitions: Theory and Praxis, in Crossroads, Directions
and a New Critical Race Theory 379 (Francisco Valdes, Jerome McCristal Culp & Angela P. Harris eds., 2002).

[FN99]. And as with the theory and other forms of praxis based on the theory, LatCritical pedagogy is best aimed at combating interlocking forms of subordination, including those that are embraced in "Latina/o" cultures or contexts. One anecdotal account describes the experience with gender and sexuality/sexual orientation in a Latinas/os and the Law course that met twice per week, in which 12 of 14 students were Latinas/os and 5 were men:
I spent one week on gender/sexuality ... The gender discussion on day one was terrific--the students were engaged and talkative and drawing both on the texts and their own experiences [but] the day on sexual orientation ... was disappointing--only one man showed up and the students were not really able to engage the question of homophobia in the Latino community, which [the faculty member] had attempted to center. LatCrit Curriculum Project Files (copy on file with author).

[FN100]. For further description of these course categories, see supra note 7.

[FN101]. This task includes, in part, keeping abreast of the LatCrit symposia. See generally supra note 3 and sources cited therein.

[FN102]. As explained earlier, the Syllabi Bank consists of hard copies of syllabi submitted by individual faculty as part of this project. The Syllabi Bank therefore is available only in hard copy, and may be obtained by contacting the author at Miami.

[FN103]. The first book, for example, provides a comprehensive and richly detailed history of racial construction in inter-group settings using inter-disciplinary materials, including court opinions, but is not focused on Latina/o communities or issues. The second is a reader of secondary texts on the topics of race, civil rights and law covering, again, multiple racialized/ethnicized groups, but does not include court opinions. The third is focused specifically on Latinas/os and includes many selections that speak to legal issues, but also does not include court opinions.

[FN104]. As a practical matter, one place to begin is with the texts of the twelve LatCrit symposia that LatCrit theorists have produced during the past seven years, since the emergence of LatCrit theory in 1995. See supra note 3 and LatCrit symposia cited therein. These texts provide the basis of a reader focused specifically on the intersection of "Latinas/os and the law"--a reader that would need to be supplemented with key or relevant court opinions, and with those discussed in the readings.

[FN105]. With this kind of follow-up action in mind, the organizing committee for the next annual LatCrit conference--LatCrit VIII at Cleveland- Marshall School of Law--already has begun to plan for a program event to carry forward the possibilities of LatCritical curricular reforms. For more information on the LatCrit VIII program, please visit the LatCrit website at www.latcrit.org.

[FN106]. These faculty members are: Devon Carbado, the CRSC director, Kimberle Crenshaw, Carole Goldberg, Laura E. Gomez, Cheryl I. Harris, Jerry Kang, and Khaled Abou El Fadl. Brochure, UCLA School of Law, Critical Race Studies Concentration (copy on file with author).

[FN107]. Id.

[FN108]. Id.

[FN109]. Id.
The "doctrine" courses from which CRSC students must select one are: Federal Courts, Employment Discrimination, Race-conscious Remedies, Immigration Law, Urban Housing, Criminal Procedure, Education Law, or Election Law. Id.

The "practice" courses from which CRSC students must select one are: Community Law Practice, Public Policy Advocacy, Street Law, Law & Social Change, Law & the Poor, Quantitative Methods in the Law, or Civil Rights: Public Interests Litigation. Id.

Seminars include: Race & Gender, Race & Criminal Law, Legal Philosophy--Feminist Contributions, Selected Topics on the U.S. Civil Rights Commission, Tribal Law, and Islamic Law & Human Rights. Id.

Id.

See supra notes 109-112 and accompanying text on the "comparative subordination" courses.

One pending apparent question about congruence is the CRSC's substantive purview, which appears to be chiefly "domestic" (rather than transnational) in nature. LatCrit theorists long have embraced the notion that legal studies of race, ethnicity, and similar constructs cannot be guided by the prevailing domestic/foreign dichotomy and must, instead, be designed to dismantle such false dichotomies. See, e.g., Colloquium, International Law, Human Rights, and LatCrit Theory, 28 U. Miami Inter-Am. L. Rev. 177 (1997). For an excellent example of ongoing efforts in this area, see Tanya Kateri Hernandez, Multiracial Matrix: The Role of Race Ideology in the Enforcement of Antidiscrimination Laws, A United States-Latin American Comparison, 87 Cornell L. Rev. 1093 (2002). One obvious idea is that the CRSC curriculum could add "comparative" courses that are transnational in scope to the established program of study.

See Brochure, UCLA School of Law, Critical Race Studies Concentration (copy on file with author).

The question is raised both in this study and in the CRSC curriculum by the co-existence of "critical" and non-critical courses, a status quo that beckons queries over pedagogy, stance, and the like.

See supra note 9 and accompanying text.

As explained earlier, the hard copy Syllabi Bank may be obtained as a set upon request from the author.
History is important. You choose who you are by choosing which tradition you belong to. Aung San Suu Kyi seeks to call attention to what she sees as the best aspects of the national and cultural heritage and to identify herself with them. Such profound knowledge and such a deep sense of identity are an irresistible force in the political struggle. [FN1]

Introduction

A Columbia law student campaign for faculty diversity established a new law school seminar. As a J.S.D. student, I participated in the law faculty hiring campaign in 1996-1997 and designed the Spring 1997 "Towards Asian American Jurisprudence" ("TAAJ") class at Columbia Law School. Our efforts to diversify the Columbia Law School faculty involved an alliance between the Asian Pacific American Law Student Association (APALSA) and the South Asian Law Students Association (SALS).

Section One of this article documents part of the campaign, including the creation of the first student-organized class. [FN2] The theoretical underpinnings of "Towards Asian American Jurisprudence" included Critical Race Theory's long engagement with postmodern and poststructural critique. Understanding TAAJ as both an intellectual project and an activist campaign requires discussing both the Sumi Cho and Robert Westley critique of, and the Farber and Sherry attack on, "postmodernism" in Critical Race Theory. [FN3]

In Section Two, I discuss and critique Cho and Westley's article. This section also historicizes the TAAJ class as an organizing project by putting it into the context of prior student of color race-conscious organizing projects in higher education. My account of the Critical Race Theory Workshop (CRTW), and the evolution of LatCrit from the CRTW, connects developments in student of color movement organizational structures to similar
developments at the law professor of color level. It further contextualizes law student diversity organizing.

In Section Three, I dispute Farber and Sherry’s account of Critical Race Theory. My account of CRTW in the preceding section should make it clear that their account is a distorted one. I contend that their book, fundamentally, is a modernist attack on postmodernism. I contest their claim to represent Asian American interests because their account of Asian American success is a stereotypical one. Moreover, I show that they fail to understand the very tradition--what they call the "Enlightenment tradition"--that they claim to protect. Finally, I argue that their work is an attack on critical legal theoretical scholarship and thus functions as ideological policing.

In the concluding section, I draw out the APALSA/SALSA organizing model’s implications for Latina/o law students and LatCrit, Inc. The article as a whole is intended to highlight the importance of and to advance law student of color racial subjectivity in advocating for faculty hiring and curricular inclusion.

I. The "Towards Asian American Jurisprudence" Campaign at Columbia Law School

The "Towards Asian American Jurisprudence" class grew out of the APALSA/SALSA faculty hiring campaign. It was the first "protest class" at an American law school by Asian Pacific Americans. [FN5]

As a political activist, dissident intellectual, and a participant in LatCrit, I take an anti-essentialist, race-conscious, anti-subordination stance. [FN6] LatCrit has *273 developed the outsider perspective for a number of different reasons. [FN7] However, some other outsider/insider issues are in play here. As the author of this article and as an active participant in the campaign, I am subject and object, insider and outsider. [FN8] I take an outsider position to write as historian of the campaign, [FN9] and as an ethnographer of both the campaign and Asian American racialization. [FN10] Nonetheless, I am an Asian Pacific American law student. I participated in the student campaign. I experience Asian American racialization. Thus, I am also an insider. [FN11]

*274 Law students of color are simultaneously outsiders and privileged as insiders precisely because they are students of law. [FN12] This conflict highlights a larger issue respecting law student of color activism about jurisprudential inclusion in legal education. [FN13] While Columbia’s Asian Pacific American law students are privileged insiders in American legal education, our physical presence in the law school does not mean that we are epistemologically included. We participate in an "epistemological privilege of the oppressed." [FN14] This privilege is the basis for outsider jurisprudence. [FN15] Outsider jurisprudential position is one of the foundations for Critical Race Theory, Queer Legal Theory, and Feminist Jurisprudence. It is also a foundation for LatCrit Theory. [FN16]

Progressive and student of color activists have claimed and must continue to claim outsider perspectives in organizing drives for diverse law faculty and curricular reform. [FN17] This is needed to assure jurisprudential inclusion. We in Columbia APALSA/SALSA did so in our organizing effort through including readings in Critical Race Theory in our curriculum. Our work occurred in the context of an ongoing local diversity movement, spearheaded by a Coalition on Legal Recruiting (CoLR). [FN18]

*275 I use "we" in this article to mean Columbia Asian Pacific American and South Asian law students. I use "us" and "our" to denote this group and also to situate myself within a legal [FN19] and scholarly community. [FN20] I also sometimes use "they" to denote
groups of which I am a member. My multiple roles and the insider/outsider questions account for these shifts between the "I," "we," and "they" positions in my text.

Articulating a "we"--Asian Pacific Americans--creates a "they"--those who are not Asian Pacific Americans. [FN21] Exclusion is always an issue when groups articulate their identity. [FN22] Since Asian Pacific Americans are racially subordinated, they must understand racism to protect themselves from mistreatment and discrimination. [FN23] Members of subordinated racial groups need race-consciousness. *276 This refers not to state or federal governmental race-consciousness, as race-consciousness by government actors to remedy racial exclusion and discrimination is considered unconstitutional by five members of the Supreme Court in most cases and generally improper in liberal legalism. [FN24] The race-consciousness that we student organizers at Columbia sought to advance was of an internal nature. [FN25]

Asian Pacific Americans have been described as the "model minority." [FN26] Social scientists in the 1960s began to claim that certain Asian American groups have cultural characteristics that account for their educational achievement. Our cultural values, allegedly, predispose us to hard work and perseverance and to atypically high scores on standardized tests. [FN27] Further, some writers, ignoring the *277 scientific and cultural critiques of American testing, took the position that differences in average intelligence test results across racial groups may have had a genetic basis. This intelligence, supposedly, predicts for group success. These depictions are the norm in mass media portrayals of Asian Americans. [FN28]

Meritocratic fundamentalism--particularly the proposition that standardized test results and grade point averages truly measure merit--has been debunked by progressive legal scholars and social scientists. [FN29] The model minority myth has been debunked by progressive Asian American scholars, who show how it denies American racism and validates white supremacy. They argue that Asian Americans do not represent the Horatio Alger myth on an ethnic scale. [FN30] However, some Asian Americans accept the depiction, and thus accept its premise that other people of color should reinvent themselves to be like Asian Americans--hence the term "model minority." In addition, some claimed that race-based affirmative action policies were and are unfair to hard-working, high-scoring Asian American students, because other people with lower standardized test results were admitted to elite educational programs ahead of them. [FN31] Needless to say, these perceptions were exploited politically by the opponents of race-based affirmative action. [FN32]

When it comes to progressive social change respecting faculty hiring and jurisprudential inclusion for outsider groups in higher education, without struggle there is no progress. [FN33] Anti-racist struggle that fails to understand the intensity of *278 contemporary racial backlash politics will fail of its object. [FN34] Educating ourselves about the manipulation of our community by national forces that serve white supremacy is essential. These politics complicate any Asian American anti-subordination educational project. [FN35]

A. Organizing "Towards Asian American Jurisprudence"

The failure of critical scholars to take account of the historical and existential needs of minority peoples manifests itself in ideological paradigms and organizational practices antithetical to minority interests. [FN36]

The history of student activism at Columbia is long and storied. From anti-war protests in the 1960s to 1990s activism around faculty diversity, Columbia students have sought to change the world for the better. [FN37] 1996 was the year of California's Proposition
209, as well as the so-called Asian Campaign Finance Scandal. In Spring 1996, the Columbia campus ethnic studies movement culminated in a student hunger strike, mass protests, and building takeovers. [FN38] In this context, Asian Pacific American law women helped to organize the Spring 1996 Women of Color and the Law Conference (WoCC) at Columbia Law School.

Asian Pacific American women's leadership was crucial to both WoCC and to the APALSA/SALSA campaign. Ava Hahn, WoCC Conference co-chair, suggested starting an Asian Americans and the Law class in Spring 1996. Other APA women organizers of the conference, including Lynda Hong, played key roles in the 1996-97 academic year. [FN39] The WoCC conference energized a leadership core *279 of APA women and created the space that made "Towards Asian American Jurisprudence" possible.

APALSA had been advocating for Asian American law teacher hiring for some years. However, the previous year's activism affected students, and the drive for faculty hiring moved to the forefront. Kenji Iida and Lynda Hong, the 1996-97 APALSA co-chairs, organized a meeting on October 30, 1996, for APALSA members interested in working on increasing Asian American numbers on the law faculty and securing an Asian Americans and the Law class. [FN40] About a dozen people attended. Most of the third-year women who had organized the WoCC the previous year were there. [FN41] Other meetings followed.

Several third-year students said that they wished they could have learned about Asian Americans in a law school class. I suggested that we organize a student-directed group independent study both to address this exclusion, and as a protest on the faculty hiring issue. The idea was not accepted, first, because designing and teaching it seemed daunting, and second, because we thought students would not want to learn from other students. We also did not know whether academic credit would be available. However, when we asked directly for a class in the Spring semester, the faculty curriculum and appointments committees said no. Thus, we came to consensus that the group independent study plan would be our next option. [FN42]

Our strategy was the use of rights assertion to curricular and racial representation. [FN43] We claimed the right to make ourselves the subjects and the object of our own legal educations. We claimed the right to have more Asian American law teachers. When we approached the relevant faculty committees, they raised a quality assurance concern. Bright Columbia law students, they said, would surely settle for nothing less than excellence in their teachers. We, they said, would be unsatisfied with mediocre teachers of Asian American Jurisprudence, and they asked *280 us to wait until they could find a teacher who met Columbia's high standards. Thus, they did not share our sense of urgency about the question of our jurisprudential inclusion. Their response did nothing for our graduating third-year students. [FN44] We refused to accept this rationalization for delay and decided to organize our own class.

In "Towards Asian American Jurisprudence," we sought both: (1) to increase the number of Asian American law teachers, and (2) the inclusion of Asian American curriculum. [FN45] Our two demands were connected: someone who did not identify as Asian American would be uninterested in teaching this area or in being a resource for students. If we used only race as a marker for the kind of teacher we wanted, we faced the possibility that the administration would use race to divide our community and choose someone who fit that "requirement," yet who would not be supportive of or a mentor for Asian American law students.

We learned that the new Dean, David Leebron, [FN46] had not understood Asian American student demands regarding faculty and curricular diversity, although APALSA
had met with him the previous year on the issue. Consequently, Lynda Hong and Kenji Iida requested and secured meetings with the Dean. He empathized with APALSA's concerns. Janice Kam, an APALSA member and a past co-chair, organized delegations of primarily first-year students to meet with as many of Columbia's about sixty-six law professors as we could to talk about both faculty hiring and curricular inclusion. We also wanted to learn whether there was any faculty support for our demands.

Meeting with all the faculty members allows law students of color in local diversity campaigns to assess their faculty's attitude to the inclusion of other teachers who look like the students themselves within their ranks. Taking first-year law students to the meetings serves two purposes: early politicization and building race-consciousness. It further allows student organizers, in a quasi-empirical manner, to gather intelligence about their faculty's racial ideology. In most law schools, deans are figureheads, and real power lies with the faculty as a whole. For this reason, local student organizers must assess their faculty's racial ideology for proper strategizing.

The support of and suggestions from progressive Columbia professors was invaluable. From them, we learned of past strategies and campaigns. For example, Professor Kimberlé Crenshaw provided us with the "protest class" strategy. In a lecture to the Critical Race Theory Reading Group at Columbia, she spoke about the 1981 Alternative Course at Harvard Law School. She called it "the first institutionalized expression of Critical Race Theory." [FN47] This protest class was organized to boycott the Harvard administration's proposed substitute for Professor Derrick Bell's civil rights class after he left to become dean of the University of Oregon Law School. Bell had pioneered race-conscious legal scholarship in white legal academia. The substitute offered was a three-week mini-course on civil rights taught by Professors Jack Greenberg and Julius Chambers. Crenshaw, as a law student, organized the protest class. Harvard's Critical Legal Studies faculty sponsored it. [FN48]

After we decided to organize our class, Kenji Iida distributed an e-mail requesting suggestions about our class's substantive coverage. In their responses, APALSA members said they wanted to cover immigration exclusion, citizenship and naturalization issues, alien land laws, Japanese American internment, and the social construction of racial and other identities through legal discourse. [FN49]

The class itself was an organized protest about Asian American exclusion from law teaching and legal curriculum at Columbia Law School. As student organizer, I drew upon syllabi for courses taught by Professors Neil Gotanda, Mari Matsuda, Keith Aoki, and Jerry Kang. [FN50] I relied on a copy of Professor Brant Lee's student paper "Here All Along: A Reader for Asian American Legal History." [FN51] The student suggestions, the syllabi, and my background allowed me to complete the syllabus draft over a weekend. [FN52] It had four sections, an introduction, a section on histories, followed by one on identities, and a conclusion. [FN53] The syllabus I developed was emailed to APALSA members for comment and modified based on the comments we received.

As student organizers, Lynda and Kenji worked hard to generate interest in the group independent study among Asian Pacific American law students. When Professor Kendall Thomas, at my request, agreed to serve as the faculty sponsor, prospective class participants learned they could receive academic credit.

We began the class with sixteen participants on January 27, 1997. [FN54] About a dozen students from the law school attended throughout the semester. To enroll, students were required to meet with Professor Thomas and agree upon a paper topic. As a student organizer, I attended class, secured the participants' commitments to facilitate particular class discussions, and made the materials available.
I explained our objectives on our first day: (1) to argue for faculty and curricular diversification; (2) to demonstrate that there was (a) demand for and (b) intellectual validity to Asian Americans and the Law curriculum; (3) to allow participants to teach and learn as Asian Americans; and (4) to produce Asian American legal scholarship.

The class readings and discussion sought: (1) to ensure literacy about the law's role in our historical subordination, (2) to learn and teach about Asian American identities as women and men of diverse national origins, generations, class backgrounds, sexualities, political views, and religions, and (3) to enhance our race-consciousness.

While the student organizers agreed that racism against Asian Pacific Americans existed, not all Columbia Asian Pacific American law students shared that premise. That Asian Pacific Americans were and are racially subordinated led to our focus on building race-consciousness, both within APALSA and in our development of curriculum for our class.

Events from the late 1980s fostered race-consciousness among South Asian immigrant youth in the New York City region. I therefore sought to ensure that one of the two class organizers every year after the first year was South Asian. My prior political work, and local racial politics, informed my choice about class organizers. Within "Towards Asian American Jurisprudence," the term "Asian American" was not intended to deny the need for separate consideration of the circumstances of each ethnic/national group or regional conglomeration. Thus, South Asians require separate consideration not only from East Asians and Southeast Asians, but also in terms of ethnic/national categories (India, Pakistan, Bangladesh, Sri Lanka) and other identity categories. I feared that the law school administration would foster, or exploit, an East/South Asian split as a divide and rule tactic. By Spring 2000, Asian American Jurisprudence at Columbia was officially jointly sponsored by SALSA and APALSA.

Professor Sumi Cho, in her theory of white racial redemption, identifies the phenomena of "racial brokering" and "racial mascotting." Racial brokering is the pitting by whites of racial minorities against one another to help maintain white supremacy, while simultaneously redeeming whiteness by adopting an anti-racist posture. Adopting a racial mascot makes this posture possible. Racial mascotting is the promotion by whites of one racial minority group's perceived interests at the expense of the interests of another racial minority group. Thus, white conservatives adopt Asians as their racial mascots in their war against the policy that was designed to remedy racism: affirmative action. As a result, they present themselves as anti-racists, redeeming their whiteness even as they pursue racist policy ends. On the other hand, white liberals adopt African Americans as their racial mascots, supporting affirmative action remedies. Their whiteness is redeemed by this anti-racist stance, even though their position on Asian American admissions adversely affects another racial minority group. The net effect, in both cases, is the maintenance of white supremacy by whites at the expense of a people of color group, with their whiteness redeemed through the appearance of anti-racism that their racial mascots provide. Cho's theory illuminates the complexity of racial politics.

To address this complexity, I modeled the discussion component of "Towards Asian American Jurisprudence" upon the second-wave western feminist movement's consciousness-raising groups. These women's groups involved women talking with each other about their experiences to theorize male domination and patriarchy. They provided mutual support and built critical consciousness to both theorize and challenge male supremacy. We used this method to theorize and challenge white, male, and straight supremacy as experienced by Asian Pacific American law students.
To encourage student expression and risk-taking in the class, I opened with a poem, Marge Piercy's To Be of Use. [FN65] Class discussion began with the question, "Where are you from?" [FN66] I wrote the question, and the following words, on the blackboard before class: geography, culture, politics, [FN67] sexuality, religion, generation, and socioeconomic and educational background. I asked all class participants to answer the question in terms of the categories on the board. I started, and disclosed information about my ethnic, religious, sexuality, generation, immigration, class, and biracial [FN68] background. This introduction, which moved from me to the rest of the members of the class, ensured full class participation. [FN69] In later *285 classes we rotated the role of class facilitator. In these ways, participant expression became the classroom norm. [FN70]

One stereotype of Asian Americans is that we are not expressive. [FN71] We centered Asian American self-expression to allow us to gather information to develop a shared understanding of Asian American experiences. [FN72] This focused discussion, in a dialogue about class participants' subjective experiences, helped build race-consciousness. [FN73] Reading historical and legal materials also helped to build such consciousness. [FN74] The readings framed our inward focus to the Asian American experience. As we developed our shared understanding of experiences and history over the semester, it allowed us to begin articulating claims for justice for Asian Pacific Americans. [FN75]

*286 B. Ensuring the Future of Asian American Jurisprudence

This is at bottom a fight to gain equal access to the power of the intelligentsia to construct knowledge, social meaning, ideology, and definitions of who "we" are. [FN76]

School administrators rely on the fact that student activism does not last. Law student movements are particularly transient because law students are in law school for only three years. Law school administrators know this. Without continuous consciousness-raising in our class, we feared our campaign would not be sustainable. A class participant said that our class was like an Asian American freedom school. Although the original organizers had not used the phrase, it describes our intent accurately. Our self-education about anti-Asian racism and its intersections with other forms of subordination, along with our direct advocacy for Asian American inclusion on Columbia's faculty, made for a layered educational experience. [FN77]

Kenji, Lynda, and the class participants considered our class a law school class from day one. Formally, however, "Towards Asian American Jurisprudence," later "Asian American Jurisprudence," was directed research in the form of a group independent study under faculty supervision. The hierarchy of law school teaching, generally, values classes and teachers based on a number of different criteria, such as tenure status of the professor, numbers of students enrolled, or whether or not it is a mainstream, black-letter law class. Professor Kendall Thomas, who is tenured at Columbia, sponsored the group independent study in both 1997 and 1998. Professor Keith Aoki of the University of Oregon Law School graded the papers as an adjunct in 1999. Professor Neil Gotanda of Western State College of Law taught the 2000, 2001, and 2002 seminars as an adjunct. Professor Frank Wu of Howard University Law School taught the 2002-2003 seminar as an adjunct. [FN78] Columbia has not yet named a full-time or tenured professor to help institutionalize the class. This clearly indicates its temporary status.

At the end of the Spring 1997 semester, I asked two second-year students, Farhad Karim and Anny Huang, to organize the 1998 class. Although there was an outstanding faculty appointment offer to Professor Kenji Yoshino, we assumed, as it turned out, correctly, that we might still be in the same position the following year. Ranjana
Natarajan and Andrew Yang, who participated in the class in its second year, were asked by Karim and Huang to organize the 1999 class. Natarajan and Yang, in turn, selected Shruti Rana and Joseph Yu to organize the Spring 2000 class. Rana and Yu selected Jayesh Rathod and Jennifer Haejoo Lee to organize the 2001 class. The student organizers of the first three class years were wholly responsible for the syllabi for their years. [FN79]

**287** This organizational structure has a purpose. Student organizers have a job. First, if no teacher is hired in any given year, they are responsible for finding a faculty sponsor, and organizing and teaching the class as directed research in the form of a group independent study. This would replicate the first classes. Second, they must mobilize APALSA/SALSA students every year until the campaign’s political goals--curriculum and a permanent faculty hire to teach it--are achieved.

"Towards Asian American Jurisprudence" was my first time organizing a law curriculum. [FN80] It was also the first time for each of my successors as student organizers. For this core group, Asian American Jurisprudence combined the intensity of activism with student teaching in a way I believe was transformative. It allowed us simultaneously to develop curricular expertise and to bridge the "seemingly impossible gap between academics and activism." [FN81]

In Spring 1999 Asian American Jurisprudence was formally recognized as a law school seminar, effective the 1999-2000 academic year. [FN82] Asian American Jurisprudence was officially listed as a Columbia law school seminar for the first time in Spring 2000. [FN83] Further, in Spring 2000, New York University Law School APALSA organized a similar class. Hyeon-Ju Rho and Chan Park were the lead organizers there. [FN84] In 2002-2003, the class/seminar completed its seventh year at Columbia.

Non-Asian critical race theorists helped create Asian American Jurisprudence. At N.Y.U., the faculty sponsors included Professors Gerald Lopez, Paulette Caldwell, and Peggy Davis, and at Columbia, as noted, Professor Kendall Thomas. Without them, Asian American Jurisprudence at these two law schools would not have been possible. Given Asian American Jurisprudence’s objective to develop race-consciousness among Asian Pacific American lawyers-to-be, I am confident that former class participants will work in coalition with others for social justice. [FN85]

In the 1996-97 academic year, Lynda and Kenji’s predecessor as chair Janice Kam lead APALSA members to meet individually with Columbia Law School faculty members to ascertain if they supported Asian American law faculty hiring and Asian American curriculum. The lobbying visits continued during Bettina Yip and Maryanne Woo’s tenure as APALSA chairs in the 1997-98 academic year. In Fall 1998, under John Rhee, Joseph Yu, and Enoch Liang’s **288** leadership, members met individually with all members of the Columbia faculty appointments committee to lobby them. [FN86] In the 1999-2000 year, under Sylvaine Wong and Jennifer Lee, similar activity was planned with SALSA under Jayesh Rathod and Mehrin Masud. [FN87]

Direct advocacy by law students for curricular inclusion and faculty hires was a learning activity. It made Columbia Law School itself into an Asian Pacific American racial justice advocacy clinic and was integral to the educational project of "Towards Asian American Jurisprudence." In the organizing meetings, it was suggested that we seek institutional reform by actually asking for it. [FN88] This is the mode white liberals claim is effective and that they prefer for institutional change. White conservatives, on the other hand, believe that all is for the best in the best of all possible institutions, and thus, no change is necessary. In the Fall of 1996 the administration and faculty responded as I expected they would, by saying no to both the curriculum change or a rapid faculty hire to teach
the class for the next semester. This educated that generation of students on the limits of liberalism when it comes to racial justice at home. [FN89]

The gains achieved by the law student campaigns--adjunct professors at a couple of New York law schools [FN90]--easily could disappear. Given the student demand both for professors and for the classes to continue, law schools should hire permanent instructors for Asian Pacific American Jurisprudence. [FN91] The classes need to be institutionalized through permanent faculty hires. Many professors would have much to offer Columbia and N.Y.U. students. [FN92] Increased student activism at these schools may be needed to further these ends.

*289 The Columbia campaign also sought to promote Asian American legal curriculum and faculty hiring at law schools elsewhere. APALSA/SALSA began that work. Columbia APALSA organized a panel at the National Asian Pacific American Law Students Association ("NAPALSA") Conference in New York City in October 1998, to encourage other APALSA to create their own Asian American Jurisprudence protest classes. In Spring 1999, we shared Asian American Jurisprudence syllabi and organizing strategies at an Asian American Law and Public Policy conference in Cambridge, Massachusetts, and at the inaugural national South Asian Law Students Association Conference in Washington, D.C. Columbia APALSA and SALSA thus sought to replicate the class elsewhere. [FN93]

Our national organizing effort was intended to increase demand for Asian American faculty hiring by encouraging Asian American student activism for Asian American curriculum and faculty at their law schools. [FN94] "Asian American law professor" remains an oxymoron at too many schools with a significant percentage of Asian Pacific American students. [FN95] This should not be. [FN96] By writing my story of "Towards Asian American Jurisprudence," I hope to inspire my law student readers to change their worlds. [FN97]

In conclusion, the Columbia student campaign accomplished its goal of securing Asian American law curriculum. It further secured the hiring of a founder of Critical Race Theory, Professor Neil Gotanda, as an adjunct for three years. [FN98] It has yet to accomplish the goal of the hiring of a permanent Asian Pacific American Jurisprudence instructor. [FN99] Since 1996, there have been no Asian Pacific American tenure-track or tenured law faculty hires at Columbia Law School. [FN100] After seven years, student insurgency seems to be the logical next step. That requires building a sustainable organization beyond the Asian American Jurisprudence class itself in coalition with other law school outsider groups. [FN101]

II. Of Critical Race Theory, Scholarly Paradigms, and Movement Organizational Structures

Since we can no longer assume any historical event, no matter how recent, to be common knowledge, I must treat events dating back only a few years as if they were a thousand years old . . . the struggle of man against power is the struggle of memory against forgetting.

-- Milan Kundera [FN102]

Professors Sumi Cho and Robert Westley, in Critical Race Coalitions: Key Movements That Performed the Theory, argue that during Critical Race Theory's (CRT) first decade, there was a paradigm shift in the method of critical race theory scholarship. [FN103] They associate this shift with a generational change in the participants in Critical Race
Theory Workshops (CRTW) and with the effects of changing fashions in American intellectual life in the early 1990s on that later generation. [FN104]

Cho and Westley identify the first CRT methodological paradigm for theorizing and scholarship as synergism. Synergism involves theorizing based on personal participation in race-conscious anti-subordination social movements. [FN105] *291 They identify the second CRT methodological paradigm as sublimationism. [FN106] They assert that the first wave of CRT theorizing and scholarship by first-generation race-crits was synergistic. [FN107] In the second wave, the dominant paradigm was anti-essentialist and sublimationist. [FN108] Sublimationism, Cho and Westley claim, is best characterized by the second-generation critical race theorists' (race-crits) over-emphasis on postmodern narratives and their denigration of activism. [FN109] During Critical Race Theory's second decade, Cho and Westley urge a "practical turn" and a return to synergism in a third wave of CRT scholarship. [FN110]

While acknowledging the scholarly contribution and theoretical brilliance of the first generation of critical race theorists (race-crits), Cho and Westley argue that the national law student diversity movement of 1988-90 helped create the conditions for some of these race-crits to be hired at the prestigious schools. [FN111] Further, they demonstrate that the national rate of minority law teacher hiring increased sharply during and after the student movement. [FN112] These claims I agree with. They also state that the space created by the movement allowed second-generation race-crits to distance themselves from political struggle, impoverishing their theorizing. [FN113] On this, I disagree with them. [FN114] Nonetheless, I further agree with them that institutional histories subjugate movement histories. [FN115] Moreover, I *292 agree with them that experiential knowledge based on personal participation in social movements is a key method for developing critical theory. I diverge from them, however, when they claim that it should be the preferred method in Critical Race Theory. [FN116]

I dispute one of Cho and Westley's central claims: that there was a "postmodern turn" in Critical Race Theory in the 1990s. [FN117] The methods of critical inquiry that have come to be known under the rubric "postmodernism" began to be used in American intellectual life as early as the 1960s. Leftist legal scholars adopted the methods in the 1970s and 1980s. Scholars in the Critical Legal Studies (CLS) movement elaborated a critique of law, legal institutions, and society using these methods, among others. The antecedents of Critical Race Theory include a group of legal scholars of color, who participated in, became organized within, and then in the mid-1980s began to contest the erasure of race in CLS. The CLS "race turn" followed the CLS "feminist turn." These methods of critical inquiry were part of CRT at the moment CRT named itself and developed its first organizational structure, the Critical Race Theory Workshop (CRTW). [FN118] "Postmodernism," thus, was present at the creation. [FN119]

I categorize the anti-apartheid, diversity, and critical race theory movements as race-conscious movements. They had a common ethic of both race-consciousness and anti-subordination. Cho and Westley's experiences as student leaders in the Berkeley anti-apartheid and diversity movements, [FN120] some historical data on race-conscious organizing at Boalt and Berkeley, [FN121] and a statistical analysis of minority law faculty hiring nationally before and after 1988-90 diversity movement, [FN122] ground their critique of CRT method. Cho & Westley mention some misreadings, presumably by some second-generation race-crits, of events in recent American racial movements. [FN123] To the extent that race-crits rely upon mainstream textual sources to write accounts of social movements, it is not surprising that their accounts are flawed. Mass media is part of the apparatus of ideological control in American society. [FN124]
Cho and Westley forward synergistic theorizing. This method embraces engagement in social movements and builds theory through direct participation in political struggle. It is an "intersubjective" method because work in movements involves people talking with each other, building movement structures and organizations, analyzing situations and strategizing action together, assessing any success or failure, and then moving on to the next step. In essence, activism is conceptualized as a collective process of theorizing. [FN125] Sublimationist theorizers, Cho and Westley contend, deny the centrality of participation in political struggle to the task of building critical theory and are not personally engaged as participants in race-conscious movements. Further, they claim, sublimationists misunderstand, deny, or minimize the role that political contestation by race-conscious movements played in creating the actually existing racial order. [FN126] They associate sublimationist method with the second generation.

Cho and Westley describe and analyze organizational development and change in race-conscious organizing by students at Berkeley. This situates the synergistic theorizing they favor as founded upon and based on work in social movements. [FN127] As student activists, they developed a sophisticated awareness of, and tactics with which to address, the dynamics of white privilege and power in progressive social movements. [FN128] They acknowledge that the minority critique of Critical Legal Studies (CLS) [FN129] contributed to and supported their analysis of racial politics in the late 1980s. Examining this theoretical scholarship confirmed their understanding of racial power dynamics in progressive social movements. This understanding affected how they reorganized movement organizational structures, specifically the Boalt Coalition for a Diverse Faculty. [FN130]

The most valuable part of Cho and Westley's article, for our purposes, carefully describes organizational models and leadership issues in the race-conscious movements at Berkeley and Boalt. [FN131] The organizations can be categorized by whether they had individuals or organizations as members; whether they included only people of color (Black, Latina/o, APA, Native American), or not; and if they were not exclusively people of color, whether the organizational leadership structure *294 was designed to share power with people of color. Thus, Berkeley's 1969 Third World Strike, which established Ethnic Studies, was a people of color action. The Third World Liberation Front (TWLF), a coalition of people of color organizations, organized it. [FN132] Also at Berkeley, the United People of Color (UPC), which was active in the anti-apartheid movement, was an individual membership organization of people of color. [FN133] Boalt's United Law Students of Color (ULSC) was also an individual membership organization for people of color. [FN134] By contrast, at Berkeley, Cal-SERVE was a student organization coalition led by people of color organizations that included other outsider groups and that consistently ran winning slates for campus student government. [FN135] These organizational types are referred to as "people of color" (UPC, ULSC) and "race-plus coalition" (Cal-SERVE), respectively. The TWLF, by further contrast, was a "people of color coalition," as it had organizational membership by people of color groups. [FN136]

The organizational development from 1985 of the Boalt Coalition for a Diverse Faculty (BCDF) is particularly revealing. The BCDF was initially an individual membership organization open to all. After 1985, white domination led students of color to exit. [FN137] The United Law Students of Color (ULSC) organization, which was people of color, formed but soon disintegrated. [FN138] However, the ULSC's faculty hiring committee joined the BCDF and proposed a change to the organizational form from an individual membership organization to a race-plus coalition, and to incorporate the leadership changes necessary to reflect the organizational change. The change was voted upon and approved by the membership. The initial coalition leadership structure including representatives from the Black, Latina/o, Asian Pacific American, and Women's law student associations. Cho, Westley, and Renee Saucedo represented the Asian,
Black, and Latina/o student organizations, respectively. It was under this form of leadership that the BCDF mobilized first the Boalt student body and then the national law student diversity movement. [FN139]

Cho and Westley developed their theory of people of color leadership and its relation to white privilege and power in progressive movements in the course of their student activism. [FN140] Their choice to publish the story of their activist work, to analyze it, and to historicize it, [FN141] in a law review makes available the "subjugated knowledge" that activists depend upon for strategy and survival. This scholarly contribution will help in the future development of other race-conscious, anti-subordination movements. In this respect, their work will be used in the same way that the minority critique issue was used by our generation of activists. [FN142]

To advance knowledge about student movement organizational structures, I add the following. At Columbia in Spring 1996, the Committee on Ethnic Studies and the Core Curriculum (CESCC) organized educational activities, a series of mass meetings, dozens of protests, a hunger strike, and building takeovers. Its "core" was an exclusive, individual membership, people of color organization. In recruiting new members, the core asked for and got commitments both to secrecy and to high-risk activism. Those recruited tended to be emerging leaders of people of color organizations. Since secrecy was a key principle, the core was an underground organization. CESCC's operations, however, were open to the broader student body. The core provided leadership for the student protest movement from the underground. Although core members later expressed dissatisfaction at the outcome and frustration with the institutional reform process, their protest activity was quite effective and did result in meaningful change. [FN143] When I arrived at Columbia Law School in Fall 1996, student awareness of this recent activism was high, and the political climate was progressive and energized.

As a political activist, I have long admired Cho and Westley's commitment and the victories they won. [FN144] As a critical race theorist, I believe their critique merits serious engagement by the CRT movement. Unfortunately the movement has not had organized expression as "Critical Race Theory" since the 1997 Yale Conference. [FN145]

*296 As noted, I dispute Cho and Westley's claim that in the 1990s there was an anti-essentialist "turn" in CRT method or a "second wave" in CRT scholarship. [FN146] What follows is my version of the experience, and my interpretation of it. [FN147] The Critical Race Theory Workshop (CRTW) was invitational, limited to around thirty-five people with race-conscious scholarly projects and who were willing to give and receive critique. [FN148] There was an application process. [FN149] It was a people of color organization. [FN150] The workshop provided support for developing critical legal scholarship, and to individual progressive people of color law teachers. [FN151]

I do not draw as sharp a generational distinction as to participants in CRT as Cho and Westley do. There was at least one first-generation participant who I believe showed up to every workshop from 1989 to 1997. [FN152] Many other first-generation participants came when they could. [FN153] What most characterized the workshops was the willingness of participants to learn from and teach each other, and their deep engagement in working collectively during the workshop to support *297 each others' scholarship and to theorize the world in order to change it. It was small enough that people could get to know each other. The intensity and duration of the workshops built trust among workshop participants. [FN154] The workshop always seemed friendly to a range of theoretical and scholarly approaches, with the idea that theory and scholarship served anti-subordination struggles at many sites. Part of that struggle was and is faculty hires and retention. The engagement with postmodernism itself was a skeptical, if continuous, one. [FN155] Whatever was useful would be used. Race was a focus, but
not the only one. There was no prescription how participants were to use what they learned, whether in their scholarship, teaching, or in activism. I used what I learned principally in race-conscious activism in the "community," and as a law student activist as this article documents.

The Critical Race Theory Workshop also has an organizational legacy. Many workshop participants helped build the ongoing network of people of color legal scholarship conferences. These are annual people of color events at sites around the country. Perhaps most significant, later entrants to CRTW spearheaded the creation of the LatCrit Theory organization and movement. These are not minor contributions--building POC organization and a new legal intellectual movement.

LatCrit as an organization built upon the foundation of the Critical Race Theory Workshop. By contrast to the CRTW, the LatCrit Theory Conference is an open conference. However, it apparently is structured to ensure that leadership comes from people of color. It thus has the race-plus coalition structure that Cho and Westley describe. It is therefore an available site for the synergistic theorizing method that Cho and Westley propose should occur. The organizational development of the workshop into the conference appears to parallel the earlier organizational development of Berkeley's and Boalt's student organizations from people of color organizations into race-plus coalitions. The stories of the development from the workshop to the conference, as far as I know, have not yet been told.

However, in neither the CRTW nor the LatCrit Conference was there a formal alliance of people of color groups in coalition. Rather, they were and are membership organizations of progressive people of color. However, LatCrit apparently has opened up membership and participation to all interested persons. LatCrit, it seems, emphasizes "collective political agency, synergistic theorizing, and intersubjective methodology." It has become an annually created "political and counter-epistemic space" that "links theory with the lived experience of the subordinated and political resistance." Its theorizing is often "rooted in the history of community-based anti-subordination struggles."

The LatCrit organizing project is worth supporting and fighting for. It is a race-conscious, leftist legal intellectual movement. Its openness is a boon because, at minimum, it allows for larger numbers and for building alliances across difference. However, the fact that LatCrit is an open conference also presents dangers. Like other progressive movements before it, it may be subjected to attacks, to infiltration, and to subversion. There is a long history of American political repression, and a significant relationship between the academy and the national security state. LatCrit is further imperiled by a potential decline in the future numbers of Latina/o law professors should the Supreme Court decide that affirmative action in higher education is improper. That is, unless all people of good will find ways to ensure Latinas/os access to educational opportunities.

Finally, Cho and Westley suggest that a practical turn in third-wave critical race theory emphasize "continuous diversity mobilizing through shared power and strategies for developing race-plus coalitions." This, they hope, will reclaim the moral high ground for identity-based political organizing. In their article, however, they also discuss the effect of the right's highly effective intervention, the discourse of political correctness, that became prevalent from October 1990. I submit that diversity movements never lost the moral high ground. They were and are merely temporarily incapacitated by a hostile discursive re-framing constantly propounded by the right. As participants in CRT, a legal intellectual movement that is an heir to Critical Legal Studies, we ought to appreciate the irony that the right used a method that might be called "trashing."
I support Professor Chang's and Ms. Fuller's call for a discussion. However, I do not think it should take the form of a debate on the place of anti-essentialism or any postmodern "turn" in CRT. Rather, it should be a discussion of the relationship of personal participation in race-conscious political struggle to theorizing, and what the critical race theory movement's position is on that relationship, if any. Moreover, because I fear we face the loss of Justice Powell's diversity rationale for affirmative action in higher education from his plurality opinion in the Bakke case, I suggest a further discussion. Perhaps, we might examine whether personal commitments to non-violent direct action are appropriate. By its nature, this should be an internal discussion, not a public debate. The site for this might be a LatCrit conference.

The national law student diversity movement reached its peak in 1988-90. These were years of political contestation around the world. Myanmar and China's militaries put down pro-democracy movements in 1988 and 1989 in their respective countries. In Czechoslovakia, East Germany, Poland, and Hungary, pro-democracy movements secured the end of longstanding one-party rule in 1989. The Berlin Wall fell, and dissident Vaclav Havel was elected President of Czechoslovakia in 1989 because of mass popular pro-democracy protest by citizens. In South Africa, negotiations opened in 1989 led to the release of Nelson Mandela after twenty-seven years of imprisonment in 1990. I see the American diversity movement of these years as our pro-democracy movement. The backlash discourse of political correctness suggests that the movement threatened American elites.

In the 1980s, the critique of racial power and order in legal academia was raised both by race-crits in published scholarship and also sharply by student activists in the pro-democracy movement. The critique remains powerful. The movements and the scholarship were synergistic and arose fairly simultaneously. Race-crits as law teachers continue to teach and learn about racial order and power in critical race theory and other classes. Critical Race Theory has been institutionalized in some places. Thus, racial critiques of and in legal academia--as well as of the broader society--continue.

I further submit that the movement for diversity in higher education is a continuation of the civil rights movement. The diversity movement's goal is integration--a goal that no one would dispute was a focus of the civil rights movement. Massive resistance, in a sense, has not ended. Its terrain merely shifted in the 1990s to the realm of mass media and public culture. Under these circumstances, the CRTW's engagement with postmodernism, poststructuralism, and so forth was consistent with its core mission: applying the tools of critical theory to the task of dismantling racial hierarchies in the United States. Developing strategy in political work, and theory in scholarship, requires access to all the available tools. Multicultural democracy is a demand for both integration and shared power.

I brought what I had learned both in the critical race theory movement and as a community and student activist to the Columbia APALSA/SALSA campaign. This included a theory of racial power and order in American legal education. However, the Columbia law students were already conscious and had set the goals of curricular change and faculty hiring before I arrived. The key political problem that emerged was ensuring a strong alliance between the South Asian and Asian Pacific American law students groups to support the campaign demands. The Columbia Law School racial order--the presence of a South Asian woman on the faculty--meant that the law school administration could easily create a schism between the South Asian and Asian
Pacific American groups and thereby derail the student campaign. [FN188] This did not happen, probably because we secured our SALSA/APALSA organizational coalition.

The APALSA/SALSA campaign was based on a racial critique of Columbia Law School on Asian American curriculum and faculty hiring. It thus represents a continuation, and a further development, of the racial critique of legal academia strand of critical race theory. [FN189] "Towards Asian American Jurisprudence" *302 as an organizing project also may provide an organizing model for law student activists in other law school outsider groups in law schools who seek jurisprudential inclusion. [FN190]

In sum, I agree with Cho and Westley that experiential knowledge based on personal participation in race-conscious anti-subordination movements is a proper method for developing Critical Race Theory, and thus, by extension, LatCrit Theory. I disagree with them that it should be the preferred method. [FN191] However, before I discuss the use of this method by Latina/o student activists, I must address some potential critics.

III. A Note on Critics: Of Farber and Sherry

Daniel Farber and Suzanna Sherry's Beyond All Reason: The Radical Assault on Truth in American Law is a curious polemic. [FN192] Farber and Sherry are sharply critical of "social constructionism" because it can be used to undermine certain fundamental concepts like "truth" and "objectivity." They claim that some critical race and feminist theorists use "social constructionism" to create a mode of legal thought that Farber and Sherry denominate "radical multiculturalism." [FN193] They contend that "radical multiculturalist" legal thought is a dangerous ideology. [FN194] They attack three aspects of this legal thought: (1) the critique of merit; [FN195] (2) legal storytelling; [FN196] and (3) a self-referential, closed discourse among radical multiculturalists that they say distorts intellectual and public discourse on race and *303 equality. [FN197] They seek to eradicate of this mode of legal thought, while denying any desire to preclude the continued participation in legal academia of the legal scholars whose work they attack. [FN198]

The authors are white liberal constitutional law professors who see themselves as "advocates of equality." [FN199] They argue that the critique of merit is racist and anti-Semitic. [FN200] They argue that "radical multiculturalist" legal thought has anti-Semitic and racist implications. [FN201] They strongly oppose "social constructionist" critiques of "truth," "objective merit," "reason," "objective truth," and "the rule of law." [FN202] They suggest critiques of "Reason" and the "Enlightenment" tradition are anti-Semitic in effect and they position themselves as "defenders" of the tradition and "our Enlightenment heritage." [FN203]

Farber and Sherry deploy an image of Asian American success to argue that the critique of merit is racist as well as being anti-Semitic. [FN204] They use Asian Americans as their racial mascots [FN205] to support their claim about anti-Semitism in American legal education. [FN206] However, their account of Asian Americans is a flattened, stereotypical one. [FN207] They state that contemporary anti-Semitism manifests itself as rejection of Jewish success. [FN208] Asian Pacific Americans, however, are not well represented on the faculties of the elite university law schools. Thus, their Asian-Jewish analogy breaks down--there is no Asian American success to reject in the relevant context. Farber and Sherry thus are not advancing Asian Pacific American interests by using an Asian American stereotype to bolster their claim about the anti-Semitism in legal education that they perceive.

Farber and Sherry disclaim philosophical sophistication and clearly disdain continental philosophy. [FN209] They use reason and the Enlightenment as buzzwords. *304 Their
manner of seeking to put certain critiques and methods out of bounds, by labeling them racist and anti-Semitic, promotes the eclipse of reason rather than reason. [FN210] To the extent they are attacking postmodernism through the avatar of "radical multiculturalism," [FN211] they have constructed a careful legal brief against part of a European and American intellectual tradition that they do not understand to defend another part of the intellectual tradition that they claim. [FN212]

Farber and Sherry are fearful of Derridean deconstruction. [FN213] The scope of their attack is broader, however, and encompasses the use of continental theory by people of color. [FN214] Their agenda is to police the use of critical theory and postmodern/poststructural methods by feminist, queer, and people of color legal theorists who are, like them, advocates of equality. [FN215] However, critical theory, postmodernism, and poststructuralism have become commonplace in U.S. university intellectual life in the last thirty years. [FN216] The universities are still standing. Institutional practices on hiring and promotion, and expectations about scholarly productivity, have been little affected by these critiques. I suspect the effects of these critiques on law schools, their employment practices, and on most legal knowledge production are and will be similar to what happened in the universities. [FN217] Thus, I submit that Farber and Sherry's fear of outsider legal scholars using the tools drawn from continental theory is significantly overdrawn.

**305** Nineteenth-century German idealist philosophers questioned reason and viewed the social world as a human construction. Franz Boas, who moved from Germany to the United States and founded the discipline of cultural anthropology, was deeply influenced by their thought. [FN218] Boas, having accepted the social construction thesis, liberalized American anthropology. He spearheaded the revolt against the scientific racism and challenged its premises using a method he promoted and developed--the careful study of different human societies through ethnography. [FN219]

Critical theorists highlighted the "dark side" of the Enlightenment after World War Two. Max Horkheimer and Theodor Adorno, two prominent members of the exiled Frankfurt School, sharply critiqued the Enlightenment and reason. They were interested, as German outsider intellectuals, in the relation of anti-Semitism to philosophy, knowledge production, and politics in the Enlightenment tradition. [FN220] The corollary to Farber and Sherry's claim that a so-called radical multiculturalist critique of the Enlightenment is anti-Semitic may be that Adorno and Horkheimer's critique is also anti-Semitic.

A race-conscious, anti-subordination stance and knowledge of Atlantic World history and political economy should lead one to skepticism of the Enlightenment, and its intellectual products. There were exclusions--categories of people seen as less than human--who were made the object of racial "knowledge," but who were otherwise ignored in constructing the conversation that is "us." The philosophical developments that have been reified into the Enlightenment occurred concurrently with: the expansion of European colonial empires in Africa, Asia, and the Americas; the rise and development of the transatlantic slave trade and the system of racial slavery; the expropriation of indigenous lands and the extermination of indigenous peoples; and the development of scientific racism and other knowledge to provide ideological justification for the relations of domination and subordination that these projects all encompassed. These developments were related to the change over time from agrarian to mercantile to industrial capitalism. [FN221]

**306** The "truth" produced by a rational, scientific method, based on source material drawn from the imperial periphery by knowledge producers at the imperial core, is subject to critique. [FN222] Similarly, the knowledge produced by white knowledge producers about racial others in the lands now called the United States is subject to
critique. The question of objectivity in scholarship is, as already noted, a complex one. This knowledge and truth was and is intertwined with law, since the business of law includes the maintenance of social order, including racial, imperial and other hierarchies. Thus the law's racial knowledges can and should be studied. There is nothing anti-Semitic about this intellectual inquiry, even if it renders the European Enlightenment suspect. "Towards Asian American Jurisprudence" proposed a legal intellectual inquiry that centered the examination of race, racism and American law and culture from an Asian Pacific American standpoint.

*307* Farber and Sherry seek to delegitimize the use of critical theory and postmodern/poststructural methods in legal scholarship. Their attack focuses on critical race theory, critical feminist theory, and critical queer legal theory. It inherently questions the place of critical scholarship, and thus of critical scholars of color, critical feminist and queer scholars, as well as the students in these categories, in legal intellectual life. They deny any intent to limit the presence of, or the opportunities to participate in debate by, the left in legal academia. However, their work functions as ideological policing and to further marginalize critical scholars and their scholarship.

Conclusion

The Columbia APALSA/SALSA campaign's student protest class argued that there should be more Asian American professors at Columbia Law School, and that there should be a permanent place for Asian American Jurisprudence in the curriculum. I hope that our class will become a model for agitating for needed change by other outsider groups in law schools.

Our Columbia experience also shows that liberal institutional reform strategies are useful, but limited. First, asking for what we wanted got us nowhere. Nonetheless, we did achieve a curricular reform by means of the protest class. There has been no permanent faculty hire, however. Clearly, the protest class as an institutional reform strategy for permanent faculty hiring has been unsuccessful. The logical conclusion, based on our experience, is that the most effective means to improve racial representation on the permanent faculty is disruptive student protest. This is a radical institutional reform strategy.

*308* Latina/o law students have been active in diversity movements. Professor Michael Olivas, at considerable professional cost to himself, is well known for the "dirty dozen" list, designed to shame law schools into hiring Latina/o law professors. Nonetheless, more student activism using both liberal and radical institutional reform strategies should make a difference.

The first question is whether Latinas/os and the Law curriculum is a political priority. Today, racial backlash politics is eviscerating affirmative action in higher education, decimating Latina/o educational access at all levels, thereby reducing the pool of prospective law students and law teachers. Under these circumstances, is Latina/o jurisprudential inclusion a sound objective? I assume for the purposes of the following discussion that it is.

The second question is whether teaching Latina/o legal histories and identities is within LatCrit's non-profit organizational mission. The third is about mapping and involves three interrelated questions: which American law schools are the Latina/o law students in? And, how many Latinas/os and the Law classes are there, and where are they taught? Do the classes and the students overlap? If a national organizing project is adjudged appropriate, I suggest the following.
LatCrit, Inc. and Latina/o law students should determine whether the APALSA/SALSA organizing model makes sense. If so, it may serve as a blueprint for an organizing strategy. Next, LatCrit should develop a Latinas/os and the Law syllabus bank that Latina/o student organizers can access easily. [FN241] Further, LatCrit should identify teachers at law schools that have Latina/o student populations who would be willing to sponsor protest classes. This list should be available to all *309 LatCrit participants likely to be contacted by student organizers. Finally, Latina/o students should be encouraged to organize classes through national Latina/o law student organizations. [FN242]

Our Columbia experience indicates as follows. Organized student demand using this model will likely secure curriculum. Students will learn and teach each other about Latina/o histories and identities. Presenting their administrations with racial justice claims about Latina/o faculty hiring will itself be an education. The students will learn the limits of their law schools' rhetoric of inclusion. They will enter the profession with a better understanding of both the necessity for and the complexity of making racial justice claims. This will benefit American society as well as Latina/o communities. It will also perhaps turn more new Latina/o lawyers toward social justice and community service. [FN243]

If the objective is Latina/o faculty hires, however, the Columbia experience suggests that student insurgency--sit-ins, demonstrations, and the like--will be required. [FN244]

O, let America be America again –
The land that never has been yet –
And yet must be –
The land where every man is free. [FN245]

It is forty years since the 1963 March on Washington. [FN246] We have not yet reached the Promised Land. Some claim to believe that American society has achieved non-racist individualism, and that remedies for institutional and structural racism are now not needed. [FN247] All fair-minded Americans know that this is simply *310 wrong. [FN248]

The need to diversify the legal profession is not just a vague liberal ideal: it is an essential component of the administration of justice. The legal profession must not be the preserve of only one segment of our society. Instead, we must confront the reality that if we are to remain a government under law in a multicultural society, the concept of justice must be one that is shared by all our citizens.

-- Dean Herma Hill Kay, May 18, 1995. [FN249]

Footnotes:


[FN2]. Hyeseung Lynda Hong and Kenji Iida were co-chairs of the Columbia APALSA when we organized "Towards Asian American Jurisprudence." They were the leaders in
our common enterprise. I dedicate this article to Lynda Hong’s memory. Her former boyfriend, Edmund Ko, was convicted of murder for her March 1998 killing. See Ex-Boyfriend is Convicted of Murdering Columbia Student, N.Y. Times, July 28, 2000, at B3. In their eulogies at Lynda's memorial, Dean David Leebron and Kenji Iida both highlighted her passionate advocacy in the faculty hiring campaign. With this article I memorialize a small, but important, part of her life. Columbia Law School and the Hong family have established a Hyeseung Lynda Hong Memorial Scholarship, "which will provide funds for a student, preferably a woman of Asian descent, who possesses intellectual vigor and a genuine love for the law." The Asian American Jurisprudence seminar is Lynda Hong’s other legacy to Columbia Law School. Colum. L. School Rep. 41 (Autumn 1998). See APALSA’s Kenji Iida Commemorates Lynda Hong's Legacy, Colum. U. L. School News 3 (Apr. 1998).


[FN4]. In 1997, APALSA and SALSA came together around this issue, beginning with the co-sponsorship of three public lectures by Professors Sumi Cho and Keith Aoki, by Professors Maivân Clech Lâm and Dinesh Khosla, and by Yuri Kochiyama. From 1998, one of the two student class organizers was always South Asian. By the Spring of 2000, the AAJ class itself was officially co-sponsored with SALSA.


[FN8]. Insider/outsider and subject/object questions in relation to knowledge production are historically complex. See Henry Yu, Thinking Orientals: Migration, Contact and Exoticism in Modern America 125-48 (2001) (discussing outsiders (sociologists, anthropologists) investigating insiders (racial minorities, natives) using participant observation to write reports and ethnographies and produce knowledge). Historians

[FN9]. Here, the campaign is the object of study. Movement history is an established genre. Cho & Westley, supra note 3, at 1380-1401. See also Vincent Harding, Hope and History: Why we Must Share the Story of the Movement (1990); Ranajit Guha, Elementary Aspects of the Peasant Insurgency in Colonial India (1983).

[FN10]. Here, the campaign and APA racialization are the objects of study. Margaret H.R. Chon, On the

all the historian may hope to do is to record a passing point of view as honestly and thoughtfully as he knows how: not to ... cut a slice out of the pie of Truth, but to suggest plausible interpretations to his time and indicate to others who come later how his own age mirrored itself in its past.
See supra Novick, at 598.


[FN13]. "Post-modern nationalism calls for multicultural movements in legal studies to reclaim their cultural heritage and experiences as different racial groups including African Americans, Asians, Latinas/os Native Americans, and other minorities." Gary Minda, Postmodern Legal Movements: Law and Jurisprudence at Century's end 182 (1995); Gary Peller, Notes Toward a Postmodern Nationalism 1992 U. Ill. L. Rev. 1095.


[FN17]. Cho & Westley, supra note 3, at 1394-95.

[FN18]. This alliance of outsider groups--including OutLaws, Law Women, BLSA, LALSA, NALSA, SALSA and APALSA--was active for several years and may be still. The history of this movement remains to be written.

[FN19]. I am member of the National Asian Pacific American Bar Association ("NAPABA") and an awardee of a 1998 NAPABA Law Foundation Presidential Scholarship. NAPABA, formed in 1988, includes forty-five local Asian Pacific American ("APA") bar associations, and represents over 40,000 APA attorneys, law professors, judges, and other legal professionals. NAPABA promotes the interests of APA attorneys and the APA community on a nationwide level, and the exchange of information among its members and the broader legal community. NAPABA seeks to promote diversity in the legal profession and access to the legal system for all. See National Asian Pacific American Bar Association homepage, at http://www.napaba.org (last visited Nov. 18, 2002).

[FN20]. The annual Conferences of Asian Pacific American Law Faculty and the bi-annual Asian Pacific American Legal Scholarship Workshops are the organized expressions of this scholarly community. See www.law.pitt.edu/news/capalf.html (last visited Oct. 19, 2002).

[FN21]. Related to this, for any readers who might be threatened by the Asian American assertion of race-consciousness, I note that a lack of a positive white identity and racism are correlated. Whites who lack a positive white identity often feel threatened by the assertion or presence of racial consciousness by or in racial minority groups. Janet E. Helms, Toward a Model of White Identity Development, in Black and White Racial Identity: Identity: Theory, Research and Practice 49, 50 (Janet E. Helms ed., 1990).

[FN22]. Articulating an identity involves claiming or forming a category. Identities are more made than found. The "multiple categories through which we understand ourselves are sometimes implicated in complex ways with formation of categories through which others are constituted." Peter Kwan, Jeffrey Dahmer and the Cosynthesis of Categories, 48 Hastings L.J. 1257, 1280 (1997). Thus, Orientalism offered a series of absolute differences according to which the Oriental could be understood as the negative of the European. [T]he Orient was created as the apparent exterior of the West ... what is outside is paradoxically what makes the West what it is, the excluded yet
The production of Orientalist knowledge promotes racist discourse about Asian Americans. See Chomsky, The Responsibility of Intellectuals, in Mandarins, supra note 11, at 323-66 (critiquing, inter alia, anti-Asian racist attitudes and policy by U.S. government and its apologists on/in U.S. Asia policy); Yu, supra note 8, at 125-33, 140-48, 159-60, 166-67 (discussing Chinese American and Japanese American Chicago-trained sociologists, whose white mentors constructed, and then trained them to study, a sociological "Oriental Problem"). Is there an Oriental problem in American law? If so, how was it made, and who made it? What is its scope, its structure? What is its function? See Edward W. Said, Orientalism (1978); see also Lowe, Immigration, Citizenship, Racialization: Asian American Critique, in Immigrant, supra note 8, at 1-36, 101-02 ("Orientalism was deployed to justify the use of brutal military force in the colonization of the Philippines; the war against Japan, culminating in the nuclear bombing of Hiroshima and Nagasaki; the war and partition in Korea, and the war in Vietnam. Orientalism also bears a crucial relationship to the history of Asian immigration, exclusion, and naturalization.").


[FN25]. There is "a positive ... and liberating role for race consciousness, as a source of community, culture and solidarity to build upon rather than transcend," internal to the racial minority community in question. Peller, supra note 24, at 761; Jayne Chong-Soo Lee, Navigating the Topology of Race, 46 Stan. L. Rev. 747, 772 (1994) (reviewing Kwame Anthony Appiah, In My Father's House: Africa in the Philosophy of Culture (1992)) ("[S]ome communities of color have successfully reappropriated the categorizations [of race] and united around them. They have redeployed "race" as an affirmative category around which people have organized to assert the power of their group and its identity."); see also T. Alexander Aleinikoff, A Case for Race Consciousness, 91 Colum. L. Rev. 1060 (1991).

This conclusion was drawn from research conducted on Japanese and Chinese American populations, to the exclusion of other East, South East, or South Asian populations. Keith Osajima, Asian Americans as the Model Minority: An Analysis of the Popular Press Image in the 1960s and the 1980s, in Reflections on Shattered Windows: Promises and Prospects for Asian American Studies 165, 166 (Gary Y. Okhiro et al. eds., 1988); William Peterson, Success Story, Japanese American Style, N.Y. Times Magazine, Jan. 9, 1966; Success of One Minority in the U.S., U.S. News & World Rep., Dec. 26, 1966; Andrea Guerrero, Silence at Boalt Hall: The Dismantling of Affirmative Action 23 (2002). The corollary to the idea that a superior culture promotes educational achievement is that there is also deficient culture. Cultural deficiency theories are the basis for the "blaming the victim" discourse. The relation of culturalist explanations for group success or failure to racism is thus clear. The culturalist explanation for Asian American success reinscribes racial hierarchy, and should be rejected. We must understand the liberal institutional structures (academic disciplines) that produce racial knowledges about us. This knowledge is used to create both governmental and popular racist discourse. See supra notes 8, 11, 22 (discussing sociology, anthropology, and Asian Studies); see also Elazar Barkan, The Retreat of Scientific Racism: Changing Concepts of Race in Britain and the United States Between the World Wars 67, 76-95 (1992) (discussing Columbia's Franz Boas and his students' influence on American anthropology); Novick, supra note 11, at 143-45, 284-85, 548-55 (discussing intellectual and political currents in American anthropology); John W. Dower, War Without Mercy: Race and Power in the Pacific War 118-36, 140-46, 336-40, nn.1-20 (1986) (discussing culture and personality school, the wartime Japanese national character study, and its effects). Boasian cultural anthropology, however, deserves credit for discrediting scientific racism. Thomas F. Gossett, Race: The History of an Idea in America 416 (1963).


Justice, supra note 24, at 17-19; Natsu Tailor Saito, Model Minority, Yellow Peril: Function of 'Foreigness' in the Construction of Asian Pacific American Legal Identity, 4 Asian L.J. 71 (1997). It is a short step from "how smart they are" and "how hard they work" to "they are unfair competition"--from the model minority to the yellow peril.

Justice, supra note 24, at 23-24; White, supra note 29, at 421 ("Affirmative action is typically attacked as a preference for less qualified minority students."); Dana Y.


[FN33]. Professor Derrick Bell was an inspiration for Critical Race Theory. He has attributed his 1969 hiring to the Harvard Law School to student and outside demands and protests. In 1990, he went on a protest leave from teaching to support student demands for the hiring of one woman of color. He said, "I cannot continue to urge students to take risks for what they believe if I do not practice my own precepts." In 1992, he was fired. When, in 1998, Professor Lani Guinier was appointed, Bell noted "it is the Harvard Law School students who deserve credit for this appointment, and they can now celebrate this positive step." Fox Butterfield, Harvard Law Professor Quits Until Black Woman is Named, N.Y. Times, Apr. 24, 1990, at A1; Fox Butterfield, Old Rights Campaigner Leads Harvard Battle, N.Y. Times, May 21, 1990, at A18; Harvard Law Notifies Bell of Dismissal for Absence, N.Y. Times, July 1, 1992, at A19; Laura Kalman, Indicting the Elite, N.Y. Times, § 7, at 15 (book review); Derrick Bell, At Last, Harvard Sees the Light, N.Y. Times, Jan. 29, 1998, at A23. For background on racial exclusion in legal academia, see Critical Race Theory: The Cutting Edge, supra note 6, at 389-473.

[FN34]. An analogous point can be made about the hiring and curricular inclusion of women and sexual minorities in higher education, and the subsequent gender and sexual backlash politics. See infra notes 164, 177, 183 (discussing political correctness backlash discourse.)

[FN35]. What follows is my interpretation of recent events in American politics that affected Asian Americans. The racial scapegoating of Asian American democratic donors successfully deflected attention from the real scandal, which is the power of money in American politics, and is one instance of Asian American powerlessness in national politics. Wang, supra note 23. A second is the racially selective investigative targeting and later prosecution of Asian American nuclear scientist Wen Ho Lee. Lee & Zia, supra note 23. The former was a republican initiative, the latter democratic. A third example of powerlessness is the explicit legislative denial of a remedy to Asian American and Native Alaskan plaintiffs (who brought the case) that was granted to all others, when Congress acted to overturn the Supreme Court's decision in Ward's Cove Packing Co. v. Atonio, 490 U.S. 642 (1989). Justice, supra note 24, at 40-41, n.124.

[FN36]. Jose A. Bracamonte, Foreword: Minority Critiques of the Critical Legal Studies Movement, 22 Harv. C.R.-C.L. L. Rev. 297, 298 (1987). This comment is directed to the administrators in the liberal institutions which people of color law students study.


[FN39]. Iida, supra note 5. Columbia's Women of Color started organizing for the
conference in 1991. It is no surprise to me that it took so long to get off the ground. "Not being from Mars, I expect to find our legal institutions in sync with our political and economic institutions ...." Philip E. Areeda, The Socratic Method, 109 Harv. L. Rev. 911, 914 (1996). Heterosexual white male supremacy continues to be normative at elite law schools, as in most American political and economic institutions. On an earlier WoCC conference, see Angela Y. Davis, Women of Color at the Center: Selections from the Third National Conference on Women of Color and the Law, 43 Stan. L. Rev. 1175 (1991).

[FN40]. Email from Kenji Iida to Columbia Law School APALSA, Oct. 28, 1996 (on file with author).

[FN41]. They included Ava Hahn, WoCC conference co-chair; Janice Kam, former APALSA co-chair; Rita Hao, former Columbia Law Women President; and Lynda Hong, who was active in her first year in the Women of Color Coalition.

[FN42]. SALSA and APALSA members were invited to participate in the protest class. Once the class was officially recognized as a seminar by the law school, it was open to all students.


[FN44]. Cf. Critical Race Theory: The Key Writings that Formed the Movement, supra note 6, at xx-xxi ("The liberal white administration responded to student protests ... by asserting that there were no qualified black scholars who merited Harvard's interest. Harvard's response was structured within two points around liberal race discourse which Critical Race Theory would ultimately contest. First, they asked why the students wouldn't prefer an excellent white professor over a mediocre black one--that is, at a conceptual level, they posited the particular liberal epistemology that associated colorblindness with merit. Second, the Harvard administration, skeptical about the pedagogical value of a course devoted to racial topics, asserted that no special course was needed when "those issues" were already covered in classes devoted to constitutional law and employment discrimination thus, to our minds, failing to comprehend the significance of Bell's projects."). Note the similarity of two elite white liberal law school administration responses, fifteen years apart, one respecting African American, and one respecting Asian American jurisprudential inclusion and faculty hiring.


Critical Race Theory: The Key Writings that Formed the Movement, supra note 6, at xxi. Professor Crenshaw gave the lecture on September 11, 1996.

The course reading was Bell's Race, Racism and American Law treatise. Mari Matsuda, as a graduate law student, participated. The guest speakers included Professors Charles Lawrence, Linda Greene, Neil Gotanda, and Richard Delgado. Critical Race Theory: The Key Writings that Formed the Movement, supra note 6, at xx-xxi.

See Iida, supra note 5 (summarizing the email correspondence).

I am grateful for the support, encouragement, and information from the Asian American law professor list, <ylopearl>. I also had the materials for an Asian Americans and the Law class taught at Cornell Law School by Rockwell Chin, formerly of the New York City Commission on Human Rights.

He submitted the reader in 1990 to Professor Derrick Bell in the Civil Rights at the Crossroads class, and I received a copy from Bell in late 1992. Bell taught the class while seeking the appointment of a woman of color to the Harvard Law School faculty. See Laura Kalman, Indicting the Elite, N.Y. Times, Oct. 2, 1994, § 7, at 15, 16 (reviewing Derrick Bell, Confronting Authority: Reflections of An Ardent Protestor (1994)).

My background in Asian American Studies, race and the law, and critical race theory was extensive because of coursework in college and law school, a research fellowship, and my participation in the Critical Race Theory Workshops (CRTW) in the 1990s.


All 1997 class participants were co-founders of Asian American Jurisprudence at Columbia. Those present on the first day were: Geoff Mukae, Janice Kam, Kenji Iida, David Takeuchi, Beesham Seecharan, Farhad Karim, Ava Hahn, Rita Hao, Lily Lu, Hubie Yang, Donna Lee, and Judy Wong from the law school. In addition, Holly Manansala and Penny Bunyaviroch, who were involved in the Ethnic Studies protests at Columbia, were there. Nguyen Quan, an anthropology graduate student and Vietnamese court interpreter, and Andy Hsiao, a Village Voice senior editor who was at Columbia while on a Revson Fellowship, were also there. The participants who facilitated class were Lily Lu, Randy Kim, Janice Kam, Hubie Yang, Judy Wong, Beesham Seecharan, Farhad Karim, Anny Huang, Geoff Mukae, Kenji Iida, David Takeuchi, Donna Lee, Lynda Hong, and Rita Hao. My class phone list shows a total of twenty participants.

As already noted, some Asian Americans internalize model minority discourse and use it as a self-description. In part, this is because it makes them feel better in the face of cognitive dissonance created by racialized mistreatment. It is also in part because the discourse serves a dominant narrative that all Americans wish were, and some claim to believe is, true, that we in America already live in a non-racist society.

Lynda and Kenji’s APALSA leadership roles reflected this orientation. I started working on Asian American race-consciousness in college. See The Quarry: An Anthology of Writings by Students of Asian Origin and Descent 1 (Sabrina Susan Gee, JoLani Hironaka, Gillian Khoo, Kaweah Lemesheswsky, Lia Price & John Torok eds., 1987) (“We have the potential to be organized and unified by more than externally applied pressures
and stereotypes. We Japanese, Chinese, Korean, Filipino, Vietnamese and Asian Indian
people, further defined by class, generation, gender, and sexual orientation, are the
foundation of a rich community, a wealth of soul searching, a contentious dialogue, a
political presence, an evolving sensibility that is not mainstream American, not hodge-
podge Asian, but something uniquely Asian American.”). In 1988, I helped organize a
NAPALSA conference held at Fordham Law School. See Conference: Asian Awakening:
Representation and Consciousness (Oct. 28-30, 1988) (conference poster on file with
author).

[FN57]. In 1988-89, I volunteered with Indian Youth Against Racism ("IYAR," later "YAR"
for Youth Against Racism) as its only active non-South Asian member. IYAR formed to
fight racist violence by a white supremacist gang called the "dot-busters" against Indian
migrants to New Jersey. I joined IYAR partly because I knew about nineteenth-century
anti-Chinese violence from a college Asian American history class. The anti-South Asian
violence in 1988-89 reminded me of the late-nineteenth-century anti-Chinese violence,
and required an immediate response through community organizing and public education.
IYAR was committed to those strategies, and open to my participation. See generally
Deborah N. Misir, The Murder of Navroze Mody: Race, Violence, and the Search for Order,

[FN58]. For example, states, regions, social class, gender, languages, sexualities, color
hierarchy, and religions. This illustrates the complexity available within the race-based
identity categories that we assert strategically in diversity campaigns. See generally Chris
K. Iijima, The Era of We-Construction: Reclaiming the Politics of Asian Pacific American

[FN59]. In 1999, Columbia class facilitator Shruti Rana was a panelist on South Asian
legal identities at the first Asian Pacific American Legal Scholarship Workshop. One could
read this alternatively as a call for a new movement in critical legal theory--Desi
Jurisprudence. See ABCD (Laxmi Pictures, 1999) (New York Asian American International
Film Festival Screening, Summer 2000) (ABCD is an abbreviation for American Born
Confused Desi). See Prashad, supra note 23; A Part, Yet Apart: South Asians in Asian
America (Lavina Dhingra Shankar & Rajini Srikanth eds., 1998); Satyagraha in America:
The Political Culture of South Asian Americans 25:3 Amerasia J. (1999-2000) (Special
Issue). South Asian students were active in the Boalt Hall diversity movements.

[FN60]. There have been persistent questions about ceiling quotas against Asians in
admissions to higher education. The neoconservative rearticulation of this was to focus
on affirmative action as the problem. However, the anti-Asian ceiling quotas appear to
have been designed to protect whites against "competitive" Asian candidates. Guerrero,
supra note 27, at 36-42; Justice, supra note 24, at 23-24; Grace Tsuang, Assuring Equal
Access of Asian Americans to Highly Selective Universities, 98 Yale L.J. 659 (1989);
Takagi, supra note 31. White liberals, it appears, were responsible for the anti-Asian
celing quotas. They manipulated the definition of merit intending adverse effects on
Asian admissions. Such "negative action" against Asians is illegal. Justice, supra note 24,
at 24. From a race-conscious Asian-American standpoint, white liberals played a pivotal
and damaging role in the manipulation of admissions standards to exclude members of a
racialized minority group.

[FN61]. Sumi K. Cho, Redeeming Whiteness in the Shadow of Internment: Earl Warren,
Brown, and a Theory of Racial Redemption, 40 B.C. L. Rev. 73, 168- 70 (1998); Justice, s
upra note 24, at 26.

(introducing Symposium: Difference, Solidarity and Law: Building Latina/o Communities Through LatCrit Theory, LatCrit II); Katharine T. Bartlett, Feminist Legal Methods, 103 Harv. L. Rev. 829, 863-64 (1990) ("Consciousness-raising is an interactive and collaborative process of articulating one's experiences and making meaning of them with others who also articulate their experiences. Consciousness-raising is a method of trial and error. When revealing an experience to others, a participant in consciousness-raising does not know whether others will recognize it. The process values risk-taking and vulnerability over caution and detachment. Honesty is valued above consistency, teamwork over self-sufficiency, and personal narrative over abstract analysis. The goal is individual and collective empowerment, not personal attack or conquest."); but see Edwards, supra note 15, 393-400 (dismissing feminist jurisprudence).


[FN64]. For critiques of essentialism in feminist theory, see Maivân Clech Lâm, Feeling Foreign in Feminism, 19 Signs: Journal of Women in Culture and Society 865 (1994); Chon, supra note 10, at 16; Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 Stan. L. Rev. 581 (1990).

[FN65]. Elizabeth Davis of the CUNY Law School Alumni Association told me that Marge Piercy's To Be of Use was a favorite poem of our Dean, the late Haywood Burns. Marge Piercy, The Art of Blessing the Day 73-74 (1999). I used this excerpt in the class: I want to be with people who submerge in the task, Who go into the fields to harvest and work in a row and pass the bags along, Who stand in line and haul in their places, Who are not parlor generals and field deserters but move in a common rhythm when the food must come in or the fire be put out. The work of the world is common as mud. Botched, it smears the hand, crumbles to dust. But the thing worth doing well done has a shape that satisfies, clean and evident. Greek amphoras for wine or oil, Hopi vases that held corn, are put in museums but you know they were made to be used. The pitcher cries for water to carry and a person for work that is real.

[FN66]. Persons of Asian heritage in the United States are often asked this question. Underlying the question there is often, but not always, a racialized presumption of foreignness. Often, implicit in that presumption is a further question: "When are you going back?" Making the question into a class problem allowed us to start discussing our racialization.

[FN67]. Almost everyone in the group characterized themselves as leftist or liberal--perhaps because it was a self-selected group.


[FN69]. "[O]ne cannot talk about race in America without addressing the personal experience, feelings and values of class participants." Charles R. Lawrence, III, The Word and the River: Pedagogy as Scholarship as Struggle 65 S. Cal. L. Rev. 2231, 2241 (1992); Minda, supra note 13, at 185 ("Race is multivocal and must be understood within the intersections of power relations of a multicultural and racially diverse society.").

[FN70]. In his remarks as we went around the circle on the first day, Professor Kendall

[FN71]. Asian American Columbia law students examined why Asian Americans did not speak in law school classes. See Iida, supra note 5. See also Pat K. Chew, Asian Americans: The "Reticent" Minority And Their Paradoxes, 36 Wm. & Mary L. Rev. 42 (1994) (discussing the influence of the researcher's race on clinical research study results on Asian American non-assertiveness); Gary Y. Okihiro, Margins and Mainstreams: Asians in American History and Culture 143 (1994) (describing popular culture figure Charlie Chan as "gain[ing] membership within the American community, despite racism, through quiet, faithful servitude.").

[FN72]. Thus, we problematized the very category that we asserted--Asian American--on the first day of our self-education project in the "Towards Asian American Jurisprudence" class. A poststructuralist critique of the racial category framed our deconstruction of ourselves to ourselves. Adopting a racial category as an identity is a choice we make, a strategic essentialism, when we engage in a modernist project like fighting for racial inclusion. See Angela Harris, Foreword: The Jurisprudence of Reconstruction, 82 Cal. L. Rev. 741, 772, 775, 784 (1994).

[FN73]. Throughout the class, students exposed racializing and orientalizing discourses about Asian Americans, Asia, and Asians to the class's collective scrutiny.


[FN75]. Cf. Richard Delgado, The Inward Turn in Outsider Jurisprudence, 34 Wm. & Mary L. Rev. 741 (1993). The dialogue's effects included the development of a stronger leadership core for APALSA and increased Asian American law student activism. Iida, supra note 5. "It is not a sign of pathology within the community to have people who are different say they are different. It is a sign of cosmopolitan, postmodern nationalism." Alex M. Johnson, Jr., The New Voice of Color, 100 Yale L.J. 2007, 2055 (1991).


[FN77]. I use "self" here in a collective sense: We Asian Pacific American law students educated ourselves as a group.

[FN78]. Professor Aoki was visiting at Boston College School of Law. Professor Gotanda was visiting at St. John's University Law School in Queens, New York, for the first two years, and then in California his third year. Professor Wu was visiting at Michigan. We are grateful to these professors for commuting to and participating in the class.

[FN80]. Donna Lee said one day in class that she would have taken it for reasons of racial solidarity alone. This statement of support illustrated how both the process of creating the class and the class itself built community.

[FN81]. Marisa Arrona, Alegría De La Cruz, César del Peral, From Michigan to Cincinnati: Our Fate is in Their Hands, 13 Berkeley La Raza L.J. 103, 107 (2002); cf. Duncan Kennedy, Legal Education as Training for Hierarchy, in The Politics of Law: A Progressive Critique 38 (David Kairys ed., rev. ed. 1992). I sincerely hope that the other student organizers, leaders, and teachers will write and publish their own stories about the classes and campaigns at various schools. Iida's, supra note 5, is the first published account about Columbia.


[FN86]. John Rhee, Faculty Recruiting, 1:2 APALSA QUARTERLY UPDATE, at 1, 4, available on Columbia APALSA webpage, supra note 53.

[FN87]. These leaders and the class organizers mentioned earlier deserve recognition. Their intellect and dedication ensured the survival of Asian American Jurisprudence.

[FN88]. As already noted, talking to the faculty also allowed student organizers to assess the "temperature" of the faculty around issues of race. In 1999, the Columbia law faculty had sixty-five (65) male, and sixteen (16) female members, for a total of eighty-one (81) professors. Thirteen (13) of these were emeritus professors, all white men. There were eight (8) people of color professors: three Black women, three Black men, one South Asian woman, and one Latino. In this calculation, I included various professor ranks and categories, but excluded visiting and adjunct professors and lecturers. Columbia Law School Faculty Directory, 1999-2000 1-70 (1999). One of the Black women and the Latino were hired after 1996.

[FN89]. See Iida, supra note 5; "Struggle is a form of education." Melvin Chapman, Address at Miller Junior High School, Detroit, Michigan, (1961) in My Soul Looks Back, 'Less I Forget': A Collection of Quotations By People Of Color 388 (Dorothy Winbush Riley ed., 1991). As a student organizer--or perhaps a "clinical legal educator"--I too learned from this process.

[FN90]. Professor Gabriel J. Chin of the University of Cincinnati School of Law visited to teach the N.Y.U. class in 2001. There has apparently been no subsequent adjunct hire at

Each year that the Columbia student leaders lobbied the administration on faculty hiring, the administrators asked them for lists of Asian American law professors. Every year, APALSA/SALSA compiled lists and gave them to the administration. This pattern suggests that students adopting a liberal institutional reform approach is ineffective as a means to secure racial representation on the faculty. The Association of American Law Schools publishes a Directory of Law Teachers annually, available at http://www.acls.org/aalaws.htm (last visited Nov. 18, 2002). Professor Frank Wu of the Howard University Law School maintains a list of Asian Americans in law teaching. Iida, supra note 5.

"Synergism refers generally to an interaction of agents and conditions that produce a combined effect that is greater than the sum of the individual effects." Cho & Westley, supra note 3, at 1405. Both at and beyond Columbia, the APALSA/SALSA campaign appears to have produced such a combined effect. This remains to be documented.

Professor Yen's finding that Asian Pacific Americans were not affirmative action targets in law faculty hiring spurred us to have an activist response. See Yen, supra note 91.

I am not making an argument here for racial proportional representation or parity. Law school faculties should, however, be able to do better than zero (or one) APA law teachers given the APA student numbers.

Asian American law faculty hiring should not, however, be limited only to those schools with substantial Asian American law student populations. The argument is merely that those schools serve their Asian American law students poorly if they do not provide them Asian American-identified law teachers. Further, Asian American professors experience barriers once they are hired. While the following data do not come from law schools they are suggestive. National EEOC data show that Asian American faculty have one of the lowest tenure rates of all minority groups--41% versus an overall tenure rate of 52%. Yvonne M. Lau, Asian Americans on College Campuses: Profiles and Trends, in Ill. Advisory Cmm. to the U.S. Comm'n on Civil Rights, Civil Rights Issues Facing Asian Americans in the United States 143 (may 1995).

Writing thus rejects the objectivist-empiricist critiques of what may be called the postmodern turn in American historiography. See generally Novick, supra note 11, at 415-629. Simply put, one critique states that hortatory history is not history. However, since American historiography long excluded the history of Asian migrants, and to a large extent still excludes it, to this Asian American writer, telling this story seems worthwhile. Novick raises questions about subordinated groups writing their own histories. Novick, Every Group Its Own Historian, supra note 11, at 469-521.

Writings that Formed the Movement, supra note 6, at xxvii.

[FN99]. I do not know whether our class prompted Asian American legal scholarly publication, another of our goals. I note here that at least two 1997 class participants did publish: Stephen Fan, Note, Immigration Law and the Promise of Critical Race Theory: Opening the Academy to the Voices of Aliens and Immigrants, 97 Colum. L. Rev. 1202 (1997) (Fan was an occasional unregistered class participant); Donna R. Lee, Mail Fantasy: Global Sexual Exploitation in the Mail-Order Bride Industry and Proposed Legal Solutions, 5 Asian L.J. 139 (1998). Further, Farhad Karim, a 1997 class participant and 1998 class co-organizer, was editor in chief of the Columbia Human Rights Law Review.

[FN100]. See Letter, John Hayakawa Török to Professor Jack Greenberg, March 9, 2001; Jack Greenberg to John Hayakawa Török, March 29, 2001 (discussing the appointment of Bill Lann Lee to Columbia Law School academic faculty) (on file with author). Professor Amy Chua visited in Fall 1999. Colum. L. School Observer, Sept. 1999, at 2. Were we naive to hope that one change we sought--Asian Pacific American permanent law faculty hires--could be achieved by means short of insurrection?

[FN101]. See Cho & Westley, supra note 3, at 1388-90, 1394, 1396, 1405, 1425 (describing Coalition for a Diverse Faculty and discussing coalitional organizing using "race-plus" structure).


[FN103]. Cho & Westley, supra note 3, at 1377. Some questions arose for me. Can individuals, organizations, coalitions, or movements perform theory? How exactly does one assess when a theory is being performed? What is a theoretical performance? What criteria are used to evaluate the performance? Is performance intersubjective? Does the performer modify the performance in light of changed conditions? Of audience reaction? Does the performer even seek to change conditions? Or is the performance an aesthetic experience? Social movements are about changing the social order. If a movement performs a theory, does it change either the theory or the movement? And does a movement's theoretical performance change the world? And can a movement's performance be aesthetic? See generally Robert S. Chang & Natasha Fuller, Performing LatCrit, 33 U.C. DAVIS L. REV. 1277 (2000).

[FN104]. Cho & Westley, supra note 3, at 1414, 1421-23. Chang, Cho, Westley, and I are CRT contemporaries. The Cho/Westley critique is a critique of our generation. Id. at 1421. Although, as discussed later, I dispute the theoretical weight that Cho and Westley give to a CRT generational divide, I do not dispute the claim that there were generations as such. Further, I am not sure that there are "tensions" between generations to be reconciled. Id.

[FN105]. Cho & Westley, supra note 3, at 1409, 1410-13; see also Matsuda et al, supra note 76, at 10-11 ("Central to the methodology of critical race theory and liberationist pedagogy is an ongoing engagement in political practice.").

[FN106]. Cho & Westley, supra note 3, at 1413-16.

[FN107]. Id. at 1411, 1421.

[FN108]. Id. at 1413-14, 1416-19, 1421, 1423. Cho & Westley's critique is another iteration, perhaps, of a continuing praxis/theory debate among academic leftists, particularly after the New Left. See Paul Buhle, Marxism in the USA 221-57, 264-70


[FN110]. Cho & Westley, supra note 3 . at 1409, 1426.

[FN111]. Id. at 1403-04. I suspect none of the first-generation race-crits would dispute this claim. Accord, id. at 1423, n 94. Not all the first-generation race-crits teach at the highly prestigious schools.

[FN112]. Id. at 1399-1403.

[FN113]. Id. at 1410, 1411, 1412-13, 1419, 1420, 1423, 1425-26. Sublimationism is stated as the negative of the method that Cho and Westley, rather than as a well-developed position or program on race-conscious legal intellectual work.

[FN114]. It is my impression that many CRTW participants are locally active in community or public interest organizations as board members, volunteers, contributors. These include those that Cho and Westley may think of as part of the dominant culture of anti-essentialism. Cho & Westley, supra note 3, at 1413-14. I suspect, further, that most if not all CRTW participants accept the vocation and practice of "liberationist teaching. Matsuda et al, supra note 76, at 2. Cho and Westley propose that the intersubjective methodology for CRT in its "third wave [be] one that seeks to provide a research and theory arm to contest and open up structures of power for communities in struggle." Cho & Westley, supra note 3, at 1426. A formalized research/theory arm for CRT would require substantially more resources than were required for the organizing of the workshops themselves. Access to financial resources for that purpose was already always a struggle, I understand.

[FN115]. Cho & Westley, supra note 3, at 1407, 1409. CRT, however, has not entirely sublimated its movement origins. See Critical Race Theory: The Key Writings that Formed the Movement, supra note 6, at xiii, xxi-xxii; Matsuda et al., supra note 76, at 3, 7. Cho and Westley acknowledge this. Cho & Westley, supra note 3, at 1379. The liberal institutional story is that change occurs through reasoned dialogue, when the subordinated make better arguments; or when the subordinated through hard work come to merit inclusion. As a race-conscious activist, like Cho and Westley, I do not find this story credible. Id. at 1380.

[FN116]. CRT is necessarily collaborative, requiring information and insights gleaned from movements in order to formulate discursive strategies that must ultimately be tested in the context of actual struggle. The intersubjective nature of the CRT project reveals its political-theoretical essence. The moment that critical race theorizing loses its grounding in the political and the communal is the moment it ceases to be an antisubordinationist project. Id. at 1410. Race-conscious anti-subordination legal scholarship, as such, is
antisubordinationist, given the dominant liberal paradigm of neutral, objective scholarly production. Further, I can imagine historical method, for example, contributing to CRT, as it did to CLS. Novick, supra note 11, at 557.

[FN117]. Chang & Fuller, supra note 103, at 1291; Cho & Westley, supra note 3, at 1413-14.

[FN118]. Critical Race Theory: The Key Writings that Formed the Movement, supra note 6, at xvi-xix, xxii-xxvii; Harris, supra note 72, at 745-50; Minda, supra note 13, at 2-5, 106-27, 167-85; Novick, supra note 11, at 523-24, 540-70.

[FN119]. In the founding workshop, the thirty-five participating law scholars "responded to a call to synthesize a theory, that "while grounded in critical theory, was responsive to the realities of racial politics in America." Critical Race Theory: The Key Writings that Formed the Movement, supra note 6, at xxvii; see also Matsuda et al., supra note 76, at 5.

[FN120]. Cho & Westley, supra note 3, at 1384-87, 1392-97.

[FN121]. Id. at 1381-97.

[FN122]. Id. at 1399-1403.

[FN123]. Id. at 1415-16, 1418, 1419-20.

[FN124]. Id. at 1424; see, e.g., Stephen Carter, Foreword, in Lani Guinier, The Tyranny of the Majority: Fundamental Fairness in American Democracy vii-xiii (1994) (discussing "quota queen" media discourse). See generally Noam Chomsky, Necessary Illusions: Thought Control in Democratic Societies (1989); Edward S. Herman, Manufacturing Consent: The Political Economy of Mass Media (1988); Michael Parenti, Inventing Reality: the Politics of Mass media (1986). Cho and Westley's call for CRT participants to engage more in "intersubjective method" to ensure a more accurate portrayal of social movements may be reduced to either of two injunctions: "be an activist!" or "talk with the activists!"

[FN125]. Cf. Matsuda et al., supra note 76, at 3 ("Critical race theory is grounded in the particulars of social reality that is defined by our experiences and the collective historical experience of our communities of origin. Critical race theorists embrace subjectivity of perspective and are avowedly political. Our work is pragmatic and utopian, as we seek to respond to the immediate needs of the subordinated and oppressed even as we imagine a different world and offer different values. It is work that involves both action and reflection. It is informed by active struggle and in turn informs that struggle.").

[FN126]. See Cho & Westley, supra note 3, at 1416-17.

[FN127]. Id. at 1409.

[FN128]. Id. at 1386-87, 1394.


[FN130]. Id. at 1394-95. See infra notes 137-139 and accompanying text.

[FN131]. My "subject position" of activist influences this evaluation. Cf. Chang & Fuller,
supra note 103, at 1289, n.61 (acknowledging their faith in antiessentialist theory).


[FN133]. Id. at 1385.

[FN134]. Id. at 1392.

[FN135]. Id. at 1385.

[FN136]. Id. at 1383.

[FN137]. Id. at 1394.

[FN138]. Id. at 1392.

[FN139]. Id. at 1392-96.

[FN140]. Id. at 1385-87, 1404-05. It is this understanding of white power that grounds Cho's critique of the white left's attack on identity politics. Sumi Cho, Essential Politics, 2 Harv. Latino L. Rev. 433, 446-53 (1997).

[FN141]. It is worth distinguishing between the intellectual operations of historicizing, and doing history, and making history. Historicizing is putting an event or a phenomenon in historical context. Doing history requires having the courage of one's conventions, or a provisional belief, that the method that History Departments are organized to teach has some validity. Finally, activists, by making change, make history. Gandhi, Mandela, and Castro started as a student activists and lawyers. See generally Mohandas K. Gandhi, Autobiography: The Story of My Experiments with Truth (1983); Nelson Mandela, No Easy Walk to Freedom (1965); Fidel Castro, My Early Years (1998), Peter G. Bourne, Fidel: A Biography of Fidel Castro (1986).

[FN142]. Regarding my claim to be in the same activist generation as Cho and Westley, I offer this narrative: "The Story of a Confused Diversity Sit-In." There was a BCDF solidarity sit-in in the CUNY Law School Dean's office on April 6, 1989. At CUNY, students were aware of, but not engaged by, the Boalt Coalition for a Diverse Faculty's (BCDF) national day of protest on April 6, 1989. We had such a diverse faculty that hiring was not an issue in the same way for us. When I graduated I realized almost half of my teachers were black men, and the other almost half were white women. I had one Latina and one Latino professor, Professors Celina Romany and Luis DeGraffe. I had four white male and two women of color professors (including Professor Romany). However, in 1989 at CUNY we knew about the national day of action. My housemate Alejandro Beltran said we had to do something, and walked down the hallway to organize a sit-in. In about two minutes, we had maybe seven of us, Black, Latina/o, APA, women, and men. We proceeded to Dean Haywood Burns's office. He was a well-known human rights lawyer and the first African American dean of a law school in New York state. We knocked and announced the sit-in. He let us in. He invited us to sit with him in a circle on sofas and chairs in his office. He offered us coffee, etc., which we declined. I was nervous. On the wall behind his desk he had artwork, portraits of Chaney, Schwerner, and Goodman. I was nervous. We had barely formulated any demands while walking to his office, but people came up with various concerns and expressed them. He listened attentively, made a few comments, told us to put our concerns in writing so he could address them. He thanked us. Then we all shook hands and the sit-in ended. Fifteen minutes maximum. We never wrote up anything. In hindsight, I am amused and a little bemused by this protest, although I am glad to have taken part in a solidarity action with the Boalt students. In Spring 1990, Dean Haywood Burns, as former president of the National Lawyers Guild,
sponsored a national law student organizing conference for diversity activism that was held at CUNY. See Conference: "Unequal Treatment Under the Law": Racism, Sexism, Classism and Homophobia in U.S. Law Schools: A National Law Student Conference for Students, Activists, Faculty and Lawyers (Feb. 16-18, 1990) (conference materials on file with author).


[FN144]. Cho's work and reputation preceded her.

[FN145]. Phillips, supra note 6, at 1248.

[FN146]. Cho & Westley, supra note 3, at 1426. They claim an anti-essentialist turn and suggest a practical turn. An assessment about any "turning" should be made by: reading all the scholarship published by all the participants over the nine years of CRTW; doing oral history interviews based on this reading, having read the relevant workshop plenary materials available to each individual interview subject; and reading each workshop's organizing ephemera from the organizers. I see more continuity than change in CRT. My description in this article, of course, is subject to the same critique as mine of Cho and Westley, as not adequately grounded in the published scholarship or in knowledge of the political work of CRTW participants.

[FN147]. Cf. Phillips, supra note 6, at 1248. (This is "my version of part of the history, as well as my interpretation of it ... [It is] my version of the evolution of the politics of the Workshop, [and not] nebulous pronouncements on the nebulous Critical Race Theory.") The 1989 CRTW was the moment when the Critical Race Theory Movement announced its existence to itself and perhaps to the world. Phillips, id. at 1248; Cho & Westley, supra note 3, at 1378 n.2. The unnamed movement was critiqued as it was developing CRTW, its first formal organizational structure. See Critical Race Theory: The Key Writings that Formed the Movement, supra note 6, at xxvi; Minda, supra note 13, at 175-77. The critique may have played a role in a decision to make the group invitational. A number of founding participants have written accounts of Critical Race Theory's origins and each historicizes those origins slightly differently. Along with Cho and Westley's account, this points to a need for a political and intellectual history of the Critical Race Theory Workshop. See generally Martin Jay, The Dialectical Imagination: A History of the Frankfurt School and the Institute of Social Research, 1923-1950 (rev. ed. 1996); Laura Kalman, Legal Realism at Yale, 1927-1960 (1986); Minda, supra note 13. Cho and Westley organized the most recent, Summer 1997 workshop. Professors Angela Harris and Harlon Dalton organized the Yale Critical Race Theory Conference in Fall 1997. Phillips, supra note 6, at 1248 n.2. Many CRTW participants were involved in the start-up of LatCrit Theory and a number of us, including the author, first attended at the 1998 LatCrit III conference. Id. at 1248.

[FN148]. I am a CRT insider, see supra note 104, writing an account of the workshops. Thus, my earlier discussion of subjectivity, objectivity, history, and ethnography applies here. See supra notes 8-11. The inquiries, "when and where did the critical race theory movement begin," and if it has ended, "where did it end," are historical ones.

[FN149]. Phillips, supra note 6, at 1249. When I entered, I was also asked by Professor Lisa Ikemoto to contribute to a plenary to help move CRTW beyond the white over black paradigm of race. See, id. at 1253.

[FN150]. The workshop's organizational form and recruitment techniques were similar to those of the later organized Columbia CESCC. I experienced CRTW as a spiritual space, in
Anthony Cook’s sense. Harris, supra note 72, at 782-83 (quoting Anthony Cook).

[FN151]. Most, but not all, participants were law teachers. Many, but not all, had deep prior engagement in social movements.

[FN152]. Cho and Westley call on first-generation race-crits to interact more with the second generation. Cho & Westley, supra note 3, at 1424. There are specific, political reasons, according to Phillips, for example for Crenshaw’s non-attendance after the first workshops. Phillips, supra note 6, at 1250 n.8.

[FN153]. The authors do acknowledge the presence of these first-generation race-crits. Cho & Westley, supra note 3, at 1424.

[FN154]. Because different people of color groups experience racialization differently, we learned from each other in the workshop about racial hierarchies. This happened both through the presentation and critique of scholarly work, and through conversations between individuals and in groups. Once one had attended, the option to return was always available. At the end of each workshop, volunteers were sought to organize the next one. It was an annually created, to use Cho and Westley's language, counter-epistemic space that used intersubjective methodology. Collective political engagement was generally limited to the work of the workshop itself and the organizing of the workshop the following year. However, people supported each other's anti-subordination political work as well as their theorizing. But see Arriola, supra note 62 (discussing Society of American Law Teachers' San Francisco protest march against California’s resegregation of public higher education).

[FN155]. This was because of a fear that what Cho and Westley call anti-essentialism unmodified, Cho & Westley, supra note 3, at 1416-17, might adversely affect race-conscious organizing, legal practice, or scholarship. The project was critical legal inquiry. The avoidance of political quietism, id. at 1418, through a sort of "modified" anti-essentialism was a premise. As it uses "postmodern" methods of critical inquiry to expose "racism within seemingly neutral concepts and institutions, however, CRT has not abandoned the fundamental political goal of civil rights scholarship: the liberation of people of color from racial subordination." Race-crits critique "from a perspective that places racial oppression at the center of analysis and privileges the racial subject." Harris, supra note 72, at 750.

[FN156]. On gender, see Phillips, supra note 6, at 1250 n.7. Phillips documents the long internal struggle over whether opposition to heterosexism and homophobia should be among the workshop's principles of unity. Id. at 1250-51, 1253. This was agreed upon. She notes the move beyond the white over black paradigm with the 1993 workshop. Id. at 1252-53. She further notes that the last workshop centered Native American or indigenist perspectives, and the centering of this discourse at the subsequent Yale conference. Id. at 1253-54.

[FN157]. Like CRT before it in CLS, Latina/o legal scholars participated in, became organized within, and in the mid-1990s began to contest the erasure of Latina/os in the CRT movement. See supra text accompanying note 118.

[FN158]. I have not been very active in LatCrit and have not read the entire corpus of literature. I am grateful to LatCrit, Inc., and Professors Valdes, Iglesias, and Kwan, for invitations to participate and conference subsidies in 1998 and 2002.

[FN159]. Cho & Westley, supra note 3, at 1427. LatCrit's collective political agency appears to be limited to building the LatCrit community of scholars and supporting and publishing LatCrit Theory, and thus is quite similar to CRT.
[FN160]. Cho & Westley, supra note 3, at 1426. This, conceivably, would make LatCrit third-wave CRT in Cho and Westley's scheme.

[FN161]. This is a free country. However, the state apparatus, through its police and intelligence agencies, has a tradition of policing the intellectual life and dissent of citizens and residents. In the twentieth century this included surveillance; blacklisting; and covert operations including disinformation and paramilitary components, within the United States. See Schrecker, No Ivory Tower, supra note 16; Frank J. Donner, The Age Of Surveillance: The Aims and Methods of America's Political Intelligence System (1981); Richard Gid Powers, Secrecy and Power: The Life of J. Edgar Hoover (1987); David J. Garrow, The FBI and Martin Luther King, Jr.: From "Solo" to Memphis (1981); Kenneth O'Reilly, The FBI's Secret File on Black America, 1960-1972 (1989); Diamond, supra note 102; Rebecca Lowen, Creating the Cold War University: The Transformation of Stanford (1997); Angus MacKenzie, Secrets: The CIA's War at Home (1997); Ward Churchill & Jim Vander Wall. The FBI's Secret Wars Against the Black Panther Party and the American Indian Movement (1988); It Did Happen Here: Recollections of Political Repression in America (Bud Schultz & Ruth Schultz eds., 1989).

Those who have it in their power to transact the business of the state in secret, have the state in their power. They lie in their ambuscade constantly striking against the citizens ... It is the old story of those who seek after absolute rule ... Under the larva of the patriot the oppressor is concealed.

Baruch Spinoza, Tractatus Politicus, in Diamond, supra note 102, at 348 (citation omitted).


[FN163]. Cho & Westley, supra note 3, at 1426. "Towards Asian American Jurisprudence" as an organizing project was designed produce continuous diversity mobilizing, but not within a race-plus coalition. Rather, it was a coalition between SALSA and APALSA. Like LatCrit, it was based on what Cho and Westley call "conscientious essentialism," id. at 1420, or what Peller in earlier work called "postmodern nationalism." Peller, supra note 13.

[FN164]. Cho & Westley, supra note 3, at 1396-97, 1412, 1414.

[FN165]. Phillips, supra note 6, at 1252; Critical Race Theory: The Key Writings that Formed the Movement, supra note 6, at xxii-xxvii; Critical Race Theory: The Cutting Edge, supra note 6, at xiv.

[FN166]. See Minda, supra note 13, at 111 (discussing trashing and 'trashing' of CLS through 'legal nihilism' discourse). Of course, to call these right-wing attacks trashing may dignify them overmuch. CLS trashing encompassed deconstruction and ideological criticism. Novick, supra note 11, at 557.


Activist intellectuals know that "successful multiracial coalitions and movements that respond to daunting forces of oppression are as fragile and fleeting as they are deeply satisfying." Cho & Westley, supra note 3, at 1417. See also Chomsky, On Resistance, in Mandarins, supra note 11, at 367-85 (discussing non-violent direct action for an intelligentsia audience).

Is the LatCrit conference a safe space for an internal movement discussion? For the basis of my fear, see supra note 161.

In this paragraph I "historicize" the movement. See supra note 141.

Aung San Suu Kyi, Letters From Burma 123-34, 147-58, 167-69, 179-81 (1997) (discussing the mass democracy movement suppressed with brutal military and police force); see also Aung San Suu Kyi, The Voice of Hope (1997); David Reynolds, One World Divisible 579-83 (2000) (discussing largest mass democracy movement in Chinese history suppressed first by military then by ideological discursive reframing; "Tiananmen" becomes synonymous with brutal government suppression).


Reynolds, supra note 173, at 558-59; Gilbert, supra note 174, at 697-98. Hungary also saw a former dissident be elected president. Id.


See Cho & Westley, supra note 3, at 1451. "They are profoundly critical of any effort to change the composition of the academic community or the content of intellectual discourse by giving attention to the race or gender of the potential participants." Matsuda, et al., supra note 76, at 14.


Thus, I accept Cho and Westley's claim that the theory and the movement were synergistic. See Cho & Westley, supra note 3, at 1377-78.
The civil rights movement was a pro-democracy movement. It sought equal citizenship for people of color in areas as central to the definition of a democracy as the right to vote. See Bell, supra note 168, at 176-203; David J. Garrow, Bearing The Cross: Martin Luther King Jr. And The Southern Christian Leadership Conference 161-63, 168, 189, 197, 216 (1986); see also Guinier, supra note 124, at 43-48 (discussing broader social democracy aspirations of civil rights movement).

But see "Racial integration [is] a great myth, which the ideologues of the system and the liberal establishment expound, but which they cannot deliver in reality." Harold Cruse, quoted in Manning Marable, Race, Reform And Rebellion: The Second Reconstruction In Black America 40 (1991). Cruse, who briefly joined the Communist Party after World War Two, is among the Black intellectual precursors to CRT because he adopted the position that "the fundamental conflicts within American society were not rooted in class but in ethnic conflicts." Id. at 254-55. Phillips notes that most of the organizers of the first two critical race theory workshops--including herself, Kim Crenshaw, Neil Gotanda, Mari Matsuda, and Richard Delgado--were leftists. These organizers adhered to a stance against all forms of oppression. Phillips, supra note 6, at 1248-49.

1990s political correctness discourse in public culture is an example of this. As for legal educational institutions: some white professors (not at Columbia or CUNY, I hasten to add) used the phrases "politically correct" or "political correctness" in my presence. I did my work for those professors under a rebuttable presumption that I was operating in a racially hostile environment.

Phillips, supra note 6, at 1248. Media and cultural critique would seem to be particularly salient.


Critical Race Theory: The Key Writings that Formed the Movement, supra note 6, at xx-xxii, xxix; Minda, supra note 13, at 179-81; Critical Race Theory: The Cutting Edge, supra note 6, at 389-473. Analogous theories concerning the gender and sexuality and class power and order are also relevant.

I have not had a conversation with Professor Subha Narasimhan. I thus have no information on her position on law faculty hires or on Asian American Jurisprudence as an intellectual project. The organizers never received any indication that she had done anything to harm the student campaign. Our fear was not so much about her possible position, but rather that her presence on the faculty might be used by her faculty colleagues to deligitimize our student campaign.

Lee, supra note 25, at 757-58, 779 (postmodern race-consciousness recognizes the need to analyze particular local racial orders and power configurations closely); Minda, supra note 13, at 184 ("Critical race scholars have reconceptualized race in a postmodern way, recognizing the importance of the racial context of a multicultural society in which group existence is partial, unstable, and in flux.").

Chang and Fuller state that Cho and Westley understand anti-essentialist theory "to be antithetical to effective political organizing." Chang & Fuller, supra note 103, at 1292. As this article indicates, anti-essentialism and organizing are, for me, consistent.

Perhaps it is symptomatic of CRT's maturation that we are having a Methodenstreit. Or perhaps not.

Farber & Sherry, supra note 3. I note my bias here. I am a former employee of Professor Derrick Bell. Derrick Bell, supra note 168, at xxix; Derrick Bell, Faces at the Bottom of the Well: The Permanence of Racism xiii (1992). I am a former colleague of Professor Richard Delgado. He was affiliated with the Center for the Study of Ethnicity and Race in America at the University of Colorado at Boulder when I was a Rockefeller Humanities Fellow at the Center in 1992-93. Farber and Sherry use the legal thought of both Bell and Delgado to construct their concept of "radical multiculturalism." Farber and Sherry claim that part of Bell's legal thought is anti-Semitic. Farber & Sherry, supra note 3, at 4, 25-26, 44, 58-59, 166 n.10. I have one observation. The FBI used the allegation of Black anti-Semitism to discredit Black radicals in the 1960s as part of their broader effort to subvert and destroy the movement. O'Reilly, supra note 161, at 315-20; see also Ward Churchill, "To Disrupt, Discredit and Destroy": The FBI's Secret War Against the Black Panther Party, in Liberation, Imagination, and the Black Panther Party: A New Look at the Panthers and Their Legacy 78-117 (Kathleen Cleaver & George Katsiaficas eds., 2001) (discussing police extra-judicial killings of Black Panther Party members). Farber and Sherry's choice of argument resonates with this history. Farber and Sherry further state that "radical multiculturalists" sometimes have a "paranoid mode of thought." Farber & Sherry, supra note 3, at 12, 133-37. There is a difference between paranoia and historical consciousness.

"This motley group is united primarily by their rejection of the aspiration to universalism and objectivity that is the fruit of the European Enlightenment." Radical multiculturalism "includes a broad-based attack on the Enlightenment foundations of democracy." Farber & Sherry, supra note 3, at 5. Farber and Sherry invent a "battle between radical multiculturalism and the Enlightenment tradition." Id. at 141.

Farber and Sherry focus on the legal thought of Derrick Bell, Richard Delgado, Patricia Williams, and to a lesser extent on Jerome Culp, Alex Johnson, and Mari Matsuda to construct their account of a "radical multiculturalist" strand of CRT. Although these are prominent critical race theorists, they are not the whole movement. Farber and Sherry's argument is useful, however, to the project of discrediting the CRT movement as a whole. Opponents will take their depiction of part to represent the whole. Moreover, Farber and Sherry claim that theirs is a representation of more than a part, that it fairly describes the dominant ideology within CRT. Id. at 13, 49, 118-37.

This might be called their "reverse imperial scholar" thesis. Cf. Delgado, supra note 178.
ideology of radical multiculturalism, which has a fatally flawed conception of equality because of its racist and anti-Semitic implications).

[FN202] Id. at 6, 12, 36-37, 72, 96-98.

[FN203] Id. at 36, 48, 69-70. "Objectivity, reason, and universalism are, of course, the crown jewels of our Enlightenment heritage." Id. at 28. "Attacks on the Enlightenment, and on the norms and techniques of objective science, have long been associated with anti-Semitism and other prejudices." Id. at 70.

[FN204] Id. at 9-10, 56-58, 59-61.

[FN205] See supra text accompanying notes 60-61.

[FN206] Farber & Sherry, supra note 3, at 52-71.

[FN207] See supra text accompanying notes 26-32 (discussing model minority construct and stereotype); supra notes 35, 60 (discussing APA powerlessness in national politics and issue of ceiling quotas on APA admissions in higher education). See also Amado Cabezas, Larry H. Shinagawa & Gary Kawaguchi, Income Differentials Between Asian Americans and White Americans in California, 1980, in Income and Status Differences Between White and Minority Americans: A Persistent Inequality 181 (Sucheng Chan ed., 1990) (critiquing Asian American success discourse and finding that APAs are not economically successful).


[FN209] Farber & Sherry, supra note 3, at 7, 15, 22-24, 124, 140. Continental philosophy is one of the intellectual resources that critical race theorists draw upon. Many of us also draw upon the philosophical and theoretical work of intellectuals, legal and other, from Latin America, Asia, and Africa, and in indigenist movements, particularly those who participated in the decolonization movements. The use of these latter sources by race-crits seems to have wholly escaped Farber and Sherry's notice. Cf. Dower, supra note 27, at 178-80 (briefly comparing American and Japanese racisms, and noting the failure of western scholars to engage non-western knowledge).

[FN210] Farber and Sherry retell the story of a labor camp commandant's summary execution of Diana Reiter, an architectural engineer, in order to terrorize the other camp inmates into submitting to the regime of forced labor. They state: "In hell, it seems, all reality is socially constructed, and merit does not exist." Farber & Sherry, supra note 3, at 71. Farber and Sherry celebrate reason and are critical of rhetoric. Id. at 31, 113. This is a rhetorical use of a holocaust story to silence "social constructionists."

[FN211] Jerry Kang, Cyber-race, 113 Harv. L. Rev. 1130, 1133-35 (2000). Unlike Kang, who chose the avatar that was then attacked, Farber and Sherry invented their avatar of "radical multiculturalism" in order to attack postmodernism.

[FN212] Farber & Sherry, supra note 3, at 49 (discussing reason and the Enlightenment).

[FN213] Id. at 14-15, 64, 137. Deconstruction is one of the methods of critical inquiry included in American legal intellectual appropriations of continental philosophy. Analytical philosophy, sometimes known as "good English philosophy" in contrast to (continental) "bad French philosophy," is the dominant school in American higher education.

[FN214] See, e.g., id. at 22, 24, 98, 106 (Michel Foucault). Farber and Sherry really
mention only continental theorists Foucault and Jacques Derrida among the continental theorists that critical race theorists draw upon. They miss the philosophical sophistication that critical race theorists have brought to their work.

[FN215]. Their account of "social constructionism" is a flattened and deeply impoverished description of critical theory, to say nothing of continental philosophy. This is my interpretation. To this CRT insider, their "roadmap," id. at 49, as it relates to CRT is too distorted to be useful.


[FN217]. As for the effects on legislation, judicial decisionmaking, and the like, they are likely to be limited, and not only because of the relative powerlessness of people of color. Critical theory is not known for its effectiveness in the public policy realm. To the extent it emphasizes negation, it does not seek to influence that realm.


[FN219]. Gossett, supra note 28, at 416. See supra note 27 (discussing Boasian anthropology). The social construction thesis made possible the suspension of judgment about the morality of different practices in different human societies. It allowed the anthropologist to view his or her own judgments as culture-bound. It thus made possible cultural relativism, which is fundamental to ethnographic method.

[FN220]. See Theodor Adorno & Max Horkheimer, Dialektik Der Aufklarung (1947) ("Dialectic of the Enlightenment"); Max Horkheimer, The Eclipse of Reason (1947); Theodor Adorno, Minima Moralia: Reflexionen Auf Dem Beschadigten Leben (1951) ("Mimima Moralia: Reflections on a Wounded Life"). This work is discussed in Jay, supra note 147, at 232-33, 253-80. See also id. at 260 (distinguishing between subjective and objective reason).


[FN222]. See supra notes 10, 22, 27 (discussing anthropology and sociology); Tensions Of Empire: Colonial Cultures In A Bourgeois World (Frederick Cooper & Ann Laura Stoler eds., 1997); Cultures Of United States Imperialism (Amy Kaplan & Donald E. Pease eds., 1993); Said, supra note 22; Edward W. Said, Culture and Imperialism (1993); Selected
Subaltern Studies (Ranajit Guha & Gayatri Spivak eds., 1989); Tayyab Mahmud, Colonialism and Modern Conceptions of Race: A Preliminary Inquiry, 53 U. Miami L. Rev. 1219 (1999). The not so implicit ideology, which was racial, in these structures of knowledge production was that "enlightened" Europeans know, and all the "dark" others are known. On the relation, in the Vietnam war era, of American liberal knowledge production to Asia and Asians, see supra notes 11, 22. Radical critics were policed. In 1967, the Committee of Concerned Asian Scholars (CCAS) formed to critique mainstream scholarly production that supported American war policy. They began publishing the Bulletin of Concerned Asian Scholars. The CCAS face political repression, including a false murder accusation against a member, and a false allegation that they planned to bomb book stalls at the 1970 Association of Asian Studies conference. Encyclopedia Of The American Left 73, 130-31 (Mari Jo Buhle, Paul Buhle & Dan Georgakas eds., 1998).

[FN223]. Robert A. Williams, Jr., The American Indian In Western Legal Thought: The Discourses Of Conquest (1990); Gossett, supra note 221; Stanton, supra note 221; Gould, supra note 28; YU, supra note 8. See generally David Theo Goldberg, Anatomy Of Racism (1990); David Theo Goldberg, Racist Culture: Philosophy And Politics Of Meaning (1993).

[FN224]. Relating to law, legality, and empire: is race relevant to the following stories? It is a reasonable inference, based on the available evidence, that President Dwight D. Eisenhower ordered the death of the Congo's Patrice Lumumba in 1960. President Richard Nixon, and Secretary of State Henry Kissinger, may have ordered the death of General René Schneider in 1970 to destabilize Chile. They sought to facilitate General Augusto Pinochet's coup against democratically elected President Salvador Allende. John Ranelagh, The Agency: The Rise And Decline Of The CIA 336-41, 514-19 (1986). Five hundred and four (504) primarily women, children, and elderly men were killed in the 1968 "My Lai" massacre by American soldiers in Vietnam. See generally Seymour M. Hersh, Cover-Up: The Army's Secret Investigation of the Massacre at My Lai (1972). Should these historical events have any bearing on "our" understanding of the rule of law? Were categories of people somehow excluded in these instances? If so, what remedy? Is this a project that liberals who celebrate the rule of law in the United States engage with? Or have they forgotten? See Kundera, supra note 102 ("The struggle of man against power is the struggle of memory against forgetting."). See also Libération, Imagination, and the Black Panther Party, supra note 192 (discussing extra-judicial killings of Black Panthers in the United States). These stories are useful for raising questions about the nature and function of law in American liberal democracy.


[FN226]. An Orientalism critique of the Enlightenment might suggest that the Enlightenment's excluded others--Africans, Latina/os, Asians, indigenous peoples generally--were constitutive of the Enlightenment's power and identity. See supra note 22 (discussing Orientalism).

[FN227]. But see supra note 72 (discussing deconstructing Asian American category). My postmodern premises, combined with my work, in organizing "Towards Asian American Jurisprudence" and in writing this article to advance racial subjectivity, might provide a partial response to the question whether it is wise politics for advocates of equality to engage in what Farber and Sherry might call a "radical multiculturalist" project. Farber & Sherry, supra note 3, at 50.

[FN228]. Their attack recapitulates the earlier attack on the postmodernism in CLS using the discourse of legal nihilism. However, Farber and Sherry also fear the positive program
of some CRT participants. They criticize the effort by Matsuda, Lawrence, Crenshaw, and Delgado to protect students of color from race- and gender-based hostile environments on white university campuses. The Matsuda group developed this new First Amendment jurisprudence based on, and because of, the experiences of discrimination that students of color were reporting to them. Farber and Sherry engage the arguments in a highly decontextualized manner. Farber & Sherry, id. at 11, 42-46, 123; Matsuda, et al., supra note 76. This implies a catch-22 situation for critical legal theorists: if you take the position that critique is all there is, you are a legal nihilist; if you develop a positive program that includes jurisprudential innovation, you are destroying the Enlightenment tradition.

[FN229]. While critical of "deconstruction," Farber and Sherry support the "reconstructive" scholarship of "Lani Guinier and Gerald Torres in critical race theory, Margaret Radin and Martha Minow in feminist legal theory, Dan Ortiz and Janet Halley in gaylegal studies, and Robert Gordon and Morton Horwitz in CLS among "many others." Id. at 141. "The choice between modernism and postmodernism is an impossible one. The task is to live in the tension itself: to continually rebuild modernism in light of postmodernist critique. This is the task of what Mari Matsuda calls a jurisprudence of reconstruction." Harris, supra note 72, at 744.

[FN230]. Farber & Sherry, supra note 3, at 13-14.

[FN231]. See generally Kennedy, supra note 29, at 717-21 (political and cultural case for large-scale affirmative action).

[FN232]. Cho & Westley, supra note 3, at 1400-01, 1404 (charts and text on effect of 1989 national diversity protest movement's national effect on minority faculty hiring) ("As critical race scholars, we should be wary of histories of our inclusion that perpetuate the myth of institutional openness to racial justice.").

[FN233]. I draw a sharper distinction here between the protest class as a liberal strategy, and, let us say, a sit-in as a radical strategy for the purpose of argument than is perhaps completely called for. The protest class itself may be viewed as radical by many.

[FN234]. See Guerrero, supra note 27, at 52-53, 75-79, 82-83, 86-88, 121-24, 128-32, 139-46, 149-50; see also Marisa Arrona, Alegría De La Cruz, César del Peral, supra note 81.


[FN236]. For an article discussing this question, see Francisco Valdes, Barely at the Margins: Race and Ethnicity in Legal Education--A Curricular Study With LatCritical Commentary, 13 Berkeley La Raza L.J. 119.

[FN237]. See Mendez & Martinez, supra note 162, at 75-85 (on Latina/o law teacher and law student numbers and educational access issues relevant to reaching population parity in legal education).

[FN238]. Outsider jurisprudence is in part about understanding what is happening, why what is happening is happening, how best to fight it, and the relation of all this to law, from the outsider group's standpoint. It is useful to do this politico-legal intellectual work in student-organized law school classes. Outsider group law students can, and should, make themselves the subjects and the object of their own legal educations.
I am no market fundamentalist. However, in 1996 I did quick market research on the potential demand for Asian Pacific American Jurisprudence. I assumed that Asian Pacific Americans would be the principal consumers. Based on 1994 data, Asian Pacific Islanders (APIs) represented about 5.8 percent of all law students (6987 out of 119,864). Harvard, Yale, Columbia, N.Y.U., and Chicago had 171 (10.4%), 66 (10.3%), 127 (12.1%), 123 (9.5%), and 46 (8.5%) API students respectively in 1994. Law School Admissions Council, Official Guide To U.S. Law Schools 22-29 (1996) ("Official Guide"). The 1995 J.D. enrollment in A.B.A.-approved schools was 129,318, of which 7719, or 6%, were APIs. Conversation with Richard White, Association of American Law Schools Statistician, Nov. 13, 1996, drawing on data in American Bar Association Section On Legal Education And Admission To The Bar, A Review Of Legal Education In The United States (Fall 1995). These data also were used to support a National Asian Pacific American Bar Association resolution at the November 1996 national convention favoring affirmative action hiring of Asian Pacific American law teachers. I thank Linda SooHoo of Skadden Arps, then of NAPABA's national board, for taking the matter up.

This is the market research component of the organizing project.

As noted earlier, Columbia APALSA/SALSA did this by posting syllabi on the web. LatCrit, Inc. might consider putting curricular material on line in downloadable form.

I am thinking here about English-language law schools within the lands now called the United States. "Towards Asian American Jurisprudence" was conceptualized within that frame. Expanding the frame, one can imagine a transnational Latina/o Jurisprudence project in Spanish-language law schools throughout the Americas. Student insurgency by students in parts of Latin America (as in parts of Asia and Africa), however, can present higher risks to their lives, liberty, and bodies than the risks faced by students in the United States. What would, for example, a LatCrit educational project in and on Colombia look like?

By contrast, Asian Americans are less likely than whites and other people of color to work in public interest law. Why Most APA Lawyers Go Corporate, Asian Week, Apr. 22, 1999, at 18. I believe ignorance of our history makes public interest law and public service seem unnecessary to many of us. See generally Rockwell Chin, Long Struggle For Justice: Asian Pacific Americans Have Played A Key Role in This Country's Civil Rights Struggles: Their Fight is Not Yet Over, 85 Am. Bar Ass'n J. 66 (Nov. 1999); Laura Kingsley Hong, Advocacy For Justice, 85 Am. Bar Ass'n J. 72 (Nov. 1999). I am happy that several Columbia class participants are serving Asian Pacific American and other communities around the country through organizing and as public interest lawyers.

See generally Cho & Westley, supra note 3.

Langston Hughes, Let America Be America Again, quoted in Harding, supra note 9, at 181 (Harding asks whether, had Hughes written later, he might not have used the word "man," id. at 182).

Martin Luther King, Jr., I Have A Dream viii (1993).

See Center for Individual Rights, available at http://www.cir-usa.org (last visited Oct. 31, 2002). I fear for my country if this group succeeds in its agenda. See generally James Baldwin, The Fire Next Time (1963); Martin Luther King, Jr. Where Do We Go From Here: Chaos Or Community (1967); see also Lawrence, supra note 31, at 955 ("So long as [liberal] university faculties remain indifferent to the continuing legacy of their own past discriminatory practices or the ways in which current admissions policies unjustifiably reinforce contemporary racial discrimination, they need not face up
to their own active participation in the maintenance of racial and class privilege.
Matsuda Et Al., supra note 76, at 14 ("The struggle against institutional, structural, and culturally ingrained unconscious racism and the movement toward a fully multicultural, postcolonial university is central to the work of the liberationist teacher.").


[FN249]. Guerrero, supra note 27, at 80.
Latinos/as are no longer bunched into the land geography that was Mexico prior to the Treaty of Guadalupe Hidalgo. Rather, Latinos/as now are dispersed throughout the United States. This creates new research issues and leadership challenges. These shifts reconfigure familiar racial/ethnic conflicts and concepts. On the other hand, there are new opportunities for positive intervention that might yield new norms of co-existence. -- Sylvia R. Lazos [FN1]

The ceding of the Philippines by Spain to the U.S.; the U.S.'s so called Benevolent Assimilation project, its "civilizing mission," and its ongoing political and military pressures; the brutal Japanese occupation during World War II; and IMF/World Bank-led policies all shape the relationship between the Philippines and particular nations such as the U.S. and the channels available for migration. Filipina migrants travel to places where flows and pathways already exist as well as locations inserted into the network of global labor by new occurrences, as in the case of Middle Eastern oil boom. -- Donna Maeda [FN2]

The Oxford Dictionary and Thesaurus defines osmosis both as "any process by which something is acquired by absorption," and as a biological cellular function by which solvents are absorbed through semipermeable partitions. [FN3] The two articles by Professor Sylvia Lazos and Donna Maeda, which both deal with the causes and effects of labor migration, though on different levels and involving different populations, challenge traditional notions of the physical and metaphysical borders between nation-states. While traditional notions of the border and state sovereignty paint a picture of rigidity depicting nation-states as well-defined and knowable, feeding conceptions of harsh doctrines of immigration and insularity, Lazos and Maeda show that the path of migration caused by capitalist structures subservient to international trade make national borders seem more like semipermeable partitions that allow absorption of labor to fuel the powerhouses of the nation-state cell but entirely without any structures, supports, or even sentiments for the needs and well-being of those who are absorbed. These articles help us to think about human rights *312 and labor justice devoid of the artificiality of the border as a legal construction. Professor Lazos's careful attention to the causes and effects of Mexican labor migration into the midwestern United States and Donna Maeda's persuasive analysis of the causes and effects of legal interpretation on global migration, particularly Filipina migration, allow us to think on a number of different levels about what our responses to capitalist-created human rights injustices should be--a key question in RaceCrit and LatCrit inquiry.

In "Latina/o-ization" of the Midwest: Cambio de Colores, Professor Sylvia Lazos takes a
close look at the increasing migration and presence of Latinas/os in the Midwest, particularly Kansas, Nebraska, Iowa, and Missouri, where the Latina/o population has more than doubled since the last census in 1990. This Latina/o hypergrowth is characterized interestingly by a notable trend toward migration to rural areas. What explains this particular pattern of migration? According to Professor Lazos, and perhaps not surprisingly, it is the development and growth of giant farming enterprises on the plains, the agromaquilas. The agromaquilas are "multinational corporate oligopolies, which aggressively aim to keep costs low and corporate profits high." Primarily meatpacking and poultry processing enterprises, the agromaquilas center their operations in the rural Midwest, and Latina/o ingress charts a path to them. The agromaquilas are labor intensive. The meatpacking slaughterhouses employ 200 to 500 workers a day and slaughter 4000 to 5000 cattle a day. Jobs are low-paying and, accordingly, labor conditions are harsh. According to Professor Lazos, agromaquilas are proactive with respect to their migrant workforce--the firms both advertise and provide transportation from the border of the United States and Mexico. As jobs and conditions at the border have become lower-paying and harsher based on NAFTA effects, Mexican labor in particular has moved inland, to the rural Midwest.

Professor Lazos sets out the characteristics of this Latina/o workforce. Most come from Mexico, have a limited educational background, have a high need to learn English, are young families (and therefore tend to have very low income), are racially "other," drawing from indigenous and mestizo roots, and, finally, are, in substantial numbers, undocumented. Although there are scattered groups, particularly religious ones, that have arisen to help Latinas/os with a variety of issues, Lazos documents the tension created in many rural communities as a result of the differences between the backgrounds of longtime residents and Latina/o newcomers. In particular, discrimination in employment and social discrimination are substantial barriers to immigrant well-being. Professor Lazos notes the racialization dynamic that plays a substantial part in how local communities react to the influx of Latina/o migrant workers. Importantly, Professor Lazos shows how communities that embrace a multicultural ethic are more likely to have an overall positive transition process. Professor Lazos details the causes and effects of Latina/o hypergrowth on the "boomtowns" created by the agromaquilas. Lazos explores the extraordinary difficulties encountered by Latinas/os in the boomtown context. She notes difficulties created by social class gaps, anti-foreigner (racialized) sentiment, 9/11, and language issues. Lazos documents the increase in hate crimes against Latinas/os in the Midwest, noting the increasing presence of white supremacist groups and the KKK.

Finally, Professor Lazos sets out barriers that present substantial hurdles to immigrant success in the Midwest. Lazos details the problems created by language barriers in education and in law enforcement. She emphasizes issues related to transportation for low-wage Latina/o immigrants, particularly noting the effects of racial profiling and 9/11 hysteria in both closing access to driver's licenses and increasing enforcement of immigration restrictions through state law enforcement mechanisms. The effect, as Lazos points out, is an increasing immigrant vulnerability to scams and extortion. Professor Lazos concludes with an exhortation for groups like LatCrit to increase alliances aimed at decreasing subordination and increasing racial justice. As an example, Lazos describes the March 2002 conference sponsored by the University of Missouri on Cambio de Colores in Missouri: A Call to Action!, in which a variety of groups converged to discuss the Latina/o influx into rural Missouri. [FN4]

After Professor Lazos's regionalized focus on specific causes and effects of Latina/o migration from Mexico to the Midwest, Donna Maeda attempts to detail causes and effects of Filipina migration in the more global context. Maeda's focus is more on the migratory consequences of hegemonic global legal hierarchies, particularly those imposed by United Nations-influenced international legal regimes, which give lip service to human rights but which actually function to enable international trade. Maeda's detailing of the
effects of international economic regimes on Filipina migrants is purposely anti-essentialist as she takes care to ensure that the singular and actualized voices of Filipina migrants are not somehow silenced or reduced in her articulation of their story. In other words, she is careful not to attempt to speak for them. Agencies of Filipina Migrants in Globalized Economies: Transforming International Human Rights Legal Discourse is about the promise and potential of Filipina migrant agencies for creating and sustaining a counter-discourse in international law that de-essentializes and gives voice to Filipina migrants. The article begins with Robert Cover's insight about interpretation being itself a violent act when the interpreter's claims have the effect of dismissing or legally destroying the realities of other persons. Maeda then explains how the United Nations-influenced international law regime has, through discursive interpretation, done actual (material and physical) violence to migrants, including Filipinas, whose lives do not fit into generalized categories suitable for the attention of institutional and State-based international law and human rights approaches. Maeda's goal is to examine the United Nations' approach to migrant human rights within the framework of globalization, the violence done by this approach, and the potential existing in transnational Filipina rights organizations for the articulation and expression of the multiple forms of subordination that shape the lives of migrant workers who must leave their home countries to work in order to support their families.

Maeda begins by focusing on the current United Nations-influenced international law human rights regime. Citing to Henkin, Maeda attempts to show that philosophical and ideological bases for the current regime come from western enlightenment and its political project. She then proceeds to show the influence by examining how United Nations documents on human rights still reflect these underlying ideologies. Maeda analyzes a report on trade and globalization by Hoe Lim, a report on gender and globalization by Fantu Cheru, and a preliminary report on globalization by the U.N. Secretary General. Maeda effectively shows how the "conservative" Lim and the "liberal" Cheru, while outlining distinct positions, nevertheless both operate within the same political binary of free trade versus protectionist state intervention, a binary that is tied narrowly to notions of the State. *314 Maeda shows how the economic-oriented free trade/protectionist paradigm always relegates human rights concerns to subsidiary status. She then explains how the United Nations diligently mediates the free trade/protectionist debate while only mentioning human rights concerns in passing. An analysis of the Secretary General's report reveals a preference for social ordering required by an overall economic paradigm influenced by liberal notions of property and wealth, devoid of any real feeling for human rights. United Nations mechanisms such as the GATT, WTO, IMF, and the World Bank show the economic emphasis. While human rights are often mentioned, these rights are articulated in terms of the State, not individuals, and are clearly tolerated only within a certain economic context.

Maeda next examines the human rights of migrants. Citing extensively to two papers from the U.N. Economic and Social Council's Commission on Human Rights' Working Group of Intergovernmental Experts on the Human Rights of Migrants, Maeda emphasizes key findings about the heightened vulnerability of labor migrants to the harms of housing and job discrimination, workplace violence (including sexual violence), exploitation, trafficking, and hate crimes. Maeda points to the Working Group's recommendation that legislation is necessary on issues regarding migrant access to public services, family reunification, acquisition of nationality and freedom of association. The Working Group urges, finally, more realistic assessments of labor market needs in globalization, particularly noting that decreasing migrant vulnerability will lead to an increase in hiring costs followed by a decrease in demand for migrant labor and a discouragement of migration. Maeda aptly points out, however, that one of the substantial reasons for migration is the deplorable working and living conditions of home countries. Her point is that even if demand for migrant labor were to decrease, migration would still occur.
According to Maeda, today's migrants do not move because of free choice; they are really more like asylum-seekers.

The central contribution of Maeda's article is her discussion of Filipina migration in the global economy, and particularly her focus on Filipina articulation of their human rights and circumstances through Filipina migrant organizations over the Internet. Maeda begins this section of the article by providing an overview of Filipinas as contract workers overseas, detailing the types of jobs they do, their destination countries, and the deplorable conditions they face in the Philippines. Maeda notes the "colonial" relationship between the Philippines and more developed countries, emphasizing the economic reasons that exist to maintain the pathways that encourage migration by Filipinas into devalued jobs, an international division of reproductive labor. Into this context, Maeda inserts a discussion of Filipina migrant organizations and the ways in which they give voice to their members in "creative, multilayered, hypertextual formats." The first of these, The Mission for Filipino Migrant Workers (HK) Society's website, "Migrants.Net," [FN5] is a substantial online resource linking human rights injustices perpetuated by the Philippine government and the ongoing impact of colonialism on the Philippines. The next of these, Gabriela, is a "multi-chapter, transnational Filipina organization." The website "serves as one of [the organization's] tools for connecting various chapters around the world," providing issue analysis, press releases, and other information about the organization's activities. [FN6] Maeda discusses what can be found at these websites and *315 discusses their potential for challenging the dominant, colonialist international law paradigm.

Maeda concludes her article by asking for an expansion of the international human rights framework to include multiple discourses and contexts in order to avoid the violence of interpretation and to reveal injustices against migrants around the world. Citing to an abundance of scholarship by Berta Hernandez-Truyol, Sharon Rush, Penelope Andrews, Celina Romany, and Sherene Razack that calls for new voices to reveal the limits of liberal legalism and "open up truth claims," Maeda avoids making any essentialist claims regarding migration in order to be careful about, as Razack states, not repeating an imperial "civilizing" move. After discussing postcolonial theory and the hazards and ubiquity of colonialist thinking, Maeda cautions against articulating migrant concerns and voices through colonialist regimes or paradigms. According to Maeda, the key here is to give Filipina migrants a voice to challenge the master narratives of liberal structures by occupying hybridic space, a space where stories can be told and disseminated but that avoids the grasp of the power of imperialism and Empire. If this can happen, Maeda emphasizes, then the focus of the discourse appropriately will be on the conditions that place Filipina migrants in the position of hybrid, postcolonial Other.

The Lazos and Maeda articles allow us to think both locally and globally about the causes and especially the effects of labor migration across international borders. Both articles reveal the semipermeable nature of borders, which exist solidly or malleably as dictated by internal nation-state economic realities. Exposing the contingent nature of borders, which are subservient entirely to global economic policy, is an important part of LatCrit scholarship. However, the articles also possess solutional elements that have potential for transforming status quo discourse, thus embracing the programmatic side of the LatCrit movement. Lazos's call for intergroup alliances to help bring about change, and, in particular, her introduction and description of the Midwestern Cambio de Colores conferences represent a beginning step in trying to address issues involved in migratory influx away from the United States border with Mexico and into the Midwest. Likewise, Maeda's description of the work of Filipina migrant agencies' use of websites and the Internet to give visibility to Filipina migrant voices represents a magnification of those efforts that carries with it the potential of "opening up truth claims," and eventually changing, in some way at least, the largely imperialist/colonialist discourse on human rights. Osmotic absorption of labor by semipermeable nation-states will continue to pose
challenges to basic human rights. Critical scholarship must continue to make this process visible and to seek transformation of it.

Footnotes:

[FNd1]. Associate Professor, University of Denver College of Law.


[FN4]. Reports and findings are detailed at the conference website, http://www.decolores.missouri.edu.


We are called the living heroes or the new heroes. Yet why are we called 'heroes' when we are slaves in other countries[?] . . . Yes, we earn a little bit more yet the pain of our bodies, minds and most of all feelings are equal to none . . . When can you finally provide us with a peaceful and simple life? [FN1]

We dream of a society where families are not torn apart by the need to survive. We dream of, and will actively work for, a homeland where all can live decently and with dignity. [FN2]
ways that the formation of legal rules and principles participates in the social organization of violence. [FN4]

This Essay will examine the organization and distribution of violence in international human rights law's approach to migration and globalization. I will consider how connections between discursive violence and material and physical violence are manifest in the lives of those who do not fit into the legally proscribed categories constructed by United Nations-based approaches to human rights. The United Nations provides important fora for addressing human rights on an international level. However, the elision of "western" with "universal" in its approach and its failure to confront neo-colonialism and ongoing effects of colonial relations serve to circumscribe the realm of human rights and to limit the usefulness of human rights legal discourse for the lives and needs of disempowered, dispossessed and subordinated people around the globe.

Current contexts of globalization raise significant issues and problems for this human rights regime. Global capitalism and "free trade" require international political and legal systems that enable their flow across national borders. Multinational corporations both challenge States' sovereignty and rely on their maintenance of order. Such corporations are not legally controlled by any one State and yet they rely on an international legal regime that facilitates their transactions. How are human rights to be framed in the complex new order? Postcolonial contexts challenge foundational concepts of what is "human" while structural approaches to rights push for goals defined by that which is enforceable. What does this mean for lives contained by these limits?

The "freeing" of trade and capital to cross national borders has resulted in massive dislocations of persons, creating large numbers of migrants who leave their home countries in search of work. Migration flows are shaped by the creation of employment zones that require large numbers of laborers in production and service sectors. This paper will examine the developing United Nations system's approach to migrants' human rights within the globalized economy. Patterns of migration indicate new massive movements and dislocations that result from globalization while current international legal regimes continue to struggle for the ratification of a Covenant protecting migrants' rights in a framework based on old State-based models of rights. Transnational migrants in globalization thus mark containments of competing economic, political, social, and legal orders.

In contrast to United Nations-based frameworks, voices "from the ground up" articulate different notions of human rights. Rather than looking from a *319 structural enforcement approach developed from a western European Enlightenment history of rights that provided "freedom" and dignity in contrast to old orders of authoritarianism, grassroots human rights movements express needs and attempt to counter harms as they are experienced. Grassroots transnational human rights movements show how lives are shaped by multiple systems and structures of power in contexts of globalization. This paper will examine how transnational Filipina human rights organizations express multiple forms of subordination that shape lives of workers who must leave their home countries to work in other nations in order to support their families. While U.N.-based human rights focus on migrants' lack of protection from physical and sexual violence and their vulnerability to discrimination, Filipina organizations point to ongoing effects of colonization that shape the conditions that necessitate migration to other nations for employment. They also surface relationships between subordination at home and abroad, racializations of workers in receiving states and complex economic, political, and "cultural" relations shaped by ongoing effects of colonialism.

Part I of this Essay will look at the relationship between ideology, practice, and discourse in the international human rights regime of the U.N. It will examine connections between
philosophical foundations in western Enlightenment thought and the framing of those particular rights that are to be protected within that system. This Part will conclude with a section focusing on the U.N.'s approach to the human rights of migrants.

Part II will turn to human rights articulations that come from Filipina migrant workers' lives. This Part will focus on conditions of the Philippines in global economic and political contexts and patterns of migration linked to those conditions. I will look at ways that Filipina migrant organizations link migration, militarization and the objectification of women in sex and service industries to neo-colonialist relations in new global economies.

Part III of the Essay will turn to an analysis of competing discourses of human rights. This Part will consider critiques of human rights legal discourse by those who attempt to challenge and change it from within. Other critics consider the ongoing effects of colonialist relations not only in structures and practices but also in the constitution of the Subject at the heart of rights. This Part of the Essay will examine problematics of inclusion and voice in these analyses of human rights.

Finally, using poststructuralist theories of subjectivity and postcolonial theories of agency, Part IV will consider transformations of human rights discourse by agencies in human rights, not as liberal, intentional subjects but rather as those who open up ruptures that interrupt hegemonic regimes of Truth.

*I. International Human Rights in a Legal Regime: The United Nations Framework [FN5]*

A. Philosophical/Ideological Justifications for International Human Rights

Louis Henkin, a leading international human rights philosopher, provides an entry into understanding the grounding of "human rights" in western Enlightenment thought. Henkin posits contradictory claims that human rights are universal because they are grounded in what human beings are and that they are the product of a certain western politico-philosophical history. In his 1978 work, The Rights of Man Today, Henkin tells a standard historical story of liberal rights from U.S., English and French philosophies: these have developed into a system of constitutionalism and positive law that balances individual rights with claims to welfare understood as claims against society. [FN6] However, in later works, [FN7] Henkin writes that the concept of human rights is universal, not tied to a particular history: human rights are individual rights that provide moral claims against society. The individual provides the foundation for systems and institutions that uphold rights through the notions of contract and consent.

In the 1990 The Age of Rights, Henkin no longer acknowledges that human rights may not simply come out of universal understandings of what it means to be "human." He writes, "International expressions of rights themselves claim no philosophical foundations, nor do they reflect any clear philosophical assumptions; they articulate no particular moral principles or any single, comprehensive theory of the relation of the individual to society . . ." [FN8] He thus minimizes the importance of the political and ideological contestations that have shaped current understandings as well as institutions, structures and systems of human rights. This framework for human rights is clearly modeled on the western Enlightenment subject and its political project. Henkin elides "universal" with "western," not only in tracing the history of an idea, but also by ignoring the politics of the institutions that support the concept of human rights.

While Henkin is only one philosopher of international human rights, his work illustrates the basic terms of the framework by which the concept is explicated. Others who provide justifications for certain understandings of the idea of "human" rights may disagree
about emphases (for example, in the balance between individuals and groups, liberty and welfare, etc.). [FN9] However, the framework used by *321 Henkin is shared in the discourse that shapes institutions, structures, and systems of international human rights.

B. Discourse Analysis of Human Rights Documents: Framing the Issues

Analyses of United Nations documents show how human rights issues are framed within the international legal regime. These framings link the ideologies of rights with practices that set up certain relationships between individuals, States, and rights. U.N. documents on globalization and migration—a not yet well-developed area of human rights law—show how the U.N. is currently investigating concerns and attempting to analyze new conditions shaped by globalization. How issues are framed, along with the requirements for practice and the ideological framework of rights, set the terms for working toward migrants' rights in ways that do not necessarily match with their lived experiences.

The United Nations' approach to globalization and human rights currently attempts to reconcile goals and standards of international human rights law with those of international trade agreements. The Secretary General's 2000 preliminary report entitled "Globalization and its Impact on the Full Enjoyment of All Human Rights" [FN10] notes common goals between the World Trade Organization and human rights law. An analysis of themes in a report on trade and globalization submitted by Hoe Lim, a report on gender and globalization by Fantu Cheru and the Secretary General's preliminary report on globalization provides insight into the way that the U.N. attempts to reconcile perspectives from international free trade with perspectives that prioritize human rights. While the Secretary General's analysis does not specifically cite to these two particular reports, it clearly attempts to balance the free trade viewpoint with human rights.

In a working paper entitled "Trade and Human Rights: What's at Issue?" [FN11] submitted to the Committee on Economic, Social and Cultural Rights in Spring 2001, Hoe Lim comments on common goals expressed in the United Nations Charter; the Preamble to the Universal Declaration of Human Rights; the CCPR; the International Covenant on Economic, Social, and Cultural Rights (CESCR); and GATT/WTO agreements (especially WTO Articles XX and XXI). Both the human rights documents and international trade agreements seek to establish higher standards of living worldwide. The agreements also seek to increase stability between nations, which Lim suggests "arguably" promotes equity between nations. [FN12] The agreements also promote standards of non-discrimination and economic human rights and coincide with the right to work and the right to favorable living standards.

Yet Lim also notes potential tensions between the trade and human rights agreements. Although the GATT/WTO agreements are concerned with compliance by States, they attempt to balance compulsion with flexibility by focusing on incentives to comply with international agreements in order to foster free trade across national borders. Lim writes that the free trade approach is "neutral"; the agreements do not restrict states from implementing other obligations, including *322 human rights obligations. [FN13] For Lim, human rights embody values that may be in competition with other values. The free trade agreements do not "take sides" between competing values, but instead allow States to make choices in their own domestic political realms. Lim does suggest that economic liberties, freedom of individual choice and the protection of property, each crucial to free trade, are "necessary complement [s]" to human rights freedoms. [FN14] In other words, if human rights are conceived in particular ways, they may go hand-in-hand with free trade.
Importantly, Lim points out that human rights agreements attend to relationships between individuals and States while trade agreements are negotiated contracts between States that set the rules for international trade. Lim does not acknowledge that in the international human rights legal regime, States also determine the standards and terms of Covenants (with non-governmental organizations playing a role in the political end of the regime), thus limiting the input that persons (such as laborers) have in the free trade agreements.

Lim clearly imports a law and economics approach into the analysis of international trade and human rights. For Lim, the international economics/legal regime leaves room for, or even coincides with, human rights. However, human rights are not a goal or standard for an economic approach to the organization of international relations. Expanding markets and increasing economic wealth globally will lead to greater well-being in terms of higher standards of living around the world. Yet Lim prioritizes freedom itself in the global marketplace over any particular non-economic outcomes. Lim assumes that a non-interventionist model which allows markets to run most freely will lead to greater economic freedom for all. Lim separates politics-- as a form of intervention--from an international legal order that allows the market to run freely. Politics are for domestic issues; States may "intervene" on the domestic level as long as they do not infringe on obligations undertaken by free trade agreements. For Lim, the international level of trade ought to run on free choices for wealth maximization; the role of governments is to step away from economic regulation--just as U.S. domestic law and economics advocates promote a separation of values and politics from economic choice.

In contrast, Fantu Cheru's report, entitled "Gender Equality and Globalization: Understanding Complex Dimensions of Opportunity and Challenge," raises concerns about growing inequalities under the globalized free trade world order. He criticizes "trickle-down" arguments that claim economic growth on the global level raises the standard of living for all. According to Cheru, the economic benefits of free trade have not improved conditions for all. Rather, globalized free trade has raised major problems and difficulties, particularly for women. Cheru points to the following problems under globalization: the feminization of labor activity and the lowering of labor standards; the "informalization" of homework; the intensification of poverty; the rise of migration and trafficking; the rise in transnational crime networks; the growth of nationalistic political violence; and increasing environmental insecurity.

Cheru points to the diminution of State power as one reason for human rights problems in certain areas. For example, while globalization creates a large degree of homogeneity among cultures and limits State action as national borders become more permeable for capital, nationalist groups reassert their identities into the void. This problem is exacerbated by the increasingly free flow of arms across borders. However, Cheru also recognizes that States do exert power through policies and programs they create in the context of globalization. Cheru notes that while globalization has limited the ability of States to control the economic outcomes of global markets, they remain central to economic planning. Further, States remain beholden to their human rights obligations as they make policy choices. Cheru argues for increasing democratization as he calls on States to create positive conditions for human rights to thrive. He explicitly criticizes placing human rights on a level secondary to market "needs." Instead, Cheru argues that States must prioritize human rights and build policies that enable the fulfillment of those rights.

Cheru clearly does not share Lim's presumptions about the outcomes of free trade, namely that globalized free markets will lead to higher standards of living and more freedom for all. Instead, States must continue to play a role by shaping their policies
giving priority to the well-being of humans. Cheru argues against leaving such well-being to the uncontrolled outcome of the free trade system, whose players focus on economic freedom and see regulation as unnecessary and unwelcome intervention into free action.

The documents by Lim and Cheru mirror the "liberal" versus "conservative" split in U.S. law. One side protests against "interference," not just by States but also by international organizations. International trade organizations operate to maintain the freedom of trade, not to shape its outcomes. Economic freedom is promoted as separate from politics or law except to the extent that these protect freedom from intervention. From this perspective, freedom will increase general well-being. On the other hand, those primarily concerned with human rights believe that State and international systems must provide governance over trade in order to adequately manage economic outcomes for the well-being of all persons.

The United Nations attempts to mediate this supposed binary opposition between free trade and rights-based, interventionist perspectives in its approach to globalization. Although the Lim and Cheru documents are reports to the United Nations, not formal positions within it, (and, as mentioned above, the Secretary General's preliminary report on globalization does not specifically rely on either report), the document for the General Assembly clearly attempts to balance these competing perspectives as binary opposites that need to be reconciled.

In "Globalization and its Impact," the Secretary General focuses on the need for more research to assess the impact of globalization on development and on human rights. The report evokes the basic framework set forth in the Universal Declaration of Human Rights: "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized." [FN26] The report explicitly mentions the two sets of objectives represented by international human rights law and international rules under GATT, the WTO, the International Monetary Fund and the World Bank, stating,

While the norms and standards of international human rights law stress participation, non-discrimination, empowerment and accountability, the global economy stresses economic objectives of free trade, growth, employment and sustainable development. The challenge facing the international community is to ensure that these two sets of objectives can be brought together to meet the commitment to a social and international order conducive to the enjoyment of all human rights. [FN27]

As it turns specifically to the question of human rights, the report focuses on issues of discrimination, particularly against women; the relegation of large numbers of women into low-wage work, especially in the informal sector; the rise of conflict with the provision of "tools" by international arms transfers; the dumping of environmental waste near low-income or minority groups; and the rise of the crime of trafficking in "drugs, diamonds, even human beings." [FN28] The report also notes the impact that the growth of transnational corporations may have on the protection of workers' rights and the continuing problem of poverty. According to the report,

[This] preliminary overview of globalization identifies evidence to suggest that while globalization provides potential for the promotion and protection of human rights through economic growth, increased wealth, greater interconnection between peoples and cultures and new opportunities for development, its benefits are not being enjoyed evenly at the current stage. Indeed, many people are still living in poverty. [FN29]
Still, the report cites World Bank figures that "the number of people living on less than $1 a day has been relatively stable in the past decade, in spite of an increase in the world's population." [FN30] The report "balances" this statistic with statements that "poverty alleviation is uneven," that certain regions (such as Europe and Central Asia) have seen increases in poverty, and that huge numbers of people have inadequate access to food, water and basic health services. [FN31]

In the end, the report repeats the invocation of the need for a social and international order that can support the realization of human rights as universal, shared values. This can be achieved by "constant monitoring of the social impacts of economic policies, the reduction of negative impacts of international financial turbulence on social and economic development, the strengthening of the capacities of developing countries . . . and the integration of social as well as economic aspects in the design of structural adjustment and reform programs." [FN32]

The report neither confronts basic questions about a presumed "trickle down" of wealth nor addresses any approach to understanding the role of States in *325 mediating the relationship between the economic and social realms. It also fails to address how "shared values" might resolve the gap between the free trade and human rights approaches. Although the preliminary report is not intended to suggest solutions to the problem of human rights in conditions of globalization, the Secretary General's report does not begin to acknowledge the contradictions between the human rights "values" and late capitalism's turn to globalism because of its need for ever-expanding markets and cheap labor, including pools of un- and under-employed workers that help to keep labor costs low. Although the report attempts to find a balance between global free trade and human rights, that very "balance" presumes the necessity of a global free trade system within which human rights must fit. In other words, that system already places human rights in a secondary position. The free trade system needs as much freedom from intervention as possible. It is limited by what is needed to protect human rights. Human rights are the balance; free trade makes up the basis for the system and the violations that are identified. People are to be protected from human rights violations within the system; victims may attempt to make claims for identifiable harms within that system. This "balance" resembles the U.S.'s legal liberalism in its "balance" of freedom and welfare rights. The ordering of each system relies on liberal presumptions, not simply the priority of individual choice but more significantly the protection of property and the economic realm.

Although human rights violations can be handled under international covenants, they are difficult because of limitations in the recognition of claims within the system. Because existing covenants do not adequately address human rights concerns in the context of globalization, many harms are rendered invisible within the system that attempts to balance free trade and human rights. Particular concerns exist in the realm of economic, social, and cultural rights. These are so-called "second generation" rights because they are already considered to be less enforceable than "first generation" civil and political rights such as the right to non-discrimination. In a legalized international order in which even claims about civil and political rights that focus on protections ("negative" rights) are difficult, claims to more proactive or "positive" rights are even more problematic. While the problem of enforcement is one significant issue, the power to define what human rights are and what claims can be made lies not in those whose lives are most negatively affected by globalization but in a system that attempts to fit those voiceless claimants' harms into the free-trade based system. The limitations on kinds of harms and resulting human rights claims that can be identified as legitimate are even more evident in the examination of the problem of migration in globalization.

C. Human Rights of Migrants in a Globalized Order
Currently the primary concern regarding the human rights of migrants in the U.N. legal regime is their vulnerability as newcomers or outsiders in receiving countries. Migrants are vulnerable to any number of harms, including discrimination in job markets and housing; violence in workplaces, including physical and sexual violence perpetrated against domestic workers; exploitation due to lack of knowledge about their rights; trafficking; and hate crimes. In a pair of working papers, the Working Group of Intergovernmental Experts on the Human Rights of Migrants (under the Economic and Social Council's Commission on Human Rights), headed by Special Rapporteur Jorge Bustamante, focuses on this concept of vulnerability. In its 1998 Report, the Working Group defines vulnerability as "a condition of a lack of empowerment" which results from their being ascribed with certain characteristics. In a subsequent Report, the Working Group notes that outsider migrants are vulnerable because of scapegoating, slave-like working conditions in low-paying service industries, and their weakness in their ability to organize. The Working Group first affirms the ability of sovereign States to make determinations about who crosses their borders and under what conditions they may do so. Yet once migrants have entered, States are obligated to observe their human rights. The Working Group urges legislative mechanisms to provide access to all public services that address their vital needs, as well as family reunification, acquisition of nationality, and freedom of association in order to overcome vulnerability. In addition, the Working Group seeks punishment for illegal traffickers and those who subject migrants to slave-like conditions at work. It also urges more "realistic" assessments of labor market needs in globalization. This last item follows from the Working Group's Report from the previous year that asserted that if the vulnerability of migrants is reduced, the costs of hiring them will rise so that demand for migrant labor will decrease. That Report suggested that such a decrease in demand would discourage migration.

While this Working Group identifies important harms suffered by migrants, its identification of human rights issues under conditions of globalization is limited. The Working Group neglects to consider reasons why people are pushed out of their home countries in the first place or how globalization creates conditions that make survival at home difficult or impossible. Even if States improve conditions in receiving countries to reduce migrants' vulnerability to discrimination, violence, and exploitation, thus raising employment costs, if globalized free trade creates unlivable conditions in underdeveloped countries, a lessened demand for migrant labor will not stop people from crossing national borders to search for work.

In addition, the focus on vulnerability centers on "migrant" as a kind of status category for human rights analysis. Rather than addressing conditions that disable people from living well as human beings and focusing on changing those conditions, this human rights model places migrants into a status category with particular identifiable harms. While it is important that those harms be addressed, the treatment of migrants as a status renders invisible the conditions that create their vulnerability in the first place. Dynamics of labeling and stereotyping contribute to migrants' vulnerability, but this approach addresses only the after-effects of the material conditions that create migrants in globalization. Migrants' lives require attention not only to their treatment but also to the existence of an economic system that forces mass movements of people.

This problem is apparent in the Special Rapporteur on the Human Rights of Migrants' first Report to the Commission on Human Rights that focuses on the definition of "migrants" in contemporary contexts. Gabriela Rodríguez Pizarro, the Special Rapporteur, notes that current migrants differ from those recognized by international law in the past, who, for the most part, moved largely out of free choice. Current migrants also might not fit the established category of "migrant workers" who are already identified in international legal regimes. Today's migrants are in some ways similar to asylum-seekers in that they face conditions of forced
Yet these economic migrants are not asylum-seekers; their human rights concerns are not fully addressed by any already-existing category. [FN44]

Noting the similarities between current migrants and refugees, this Report recognizes several reasons for migration, including poverty, civil conflicts, and persecution in home countries. The Report notes a serious gap in human rights jurisprudence in this area: the system of protection for rights of refugees prioritizes violations of civil and political rights over economic, social and cultural rights. [FN45] The anti-discrimination sections of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC) do not deal directly with the rights of migrants who reside outside the border of the countries in which they hold citizenship. [FN46] Since current migration is so often caused by economic factors, the refugee model fails as a means of addressing human rights of migrants. Like the Working Group of Intergovernmental Experts on the Human Rights of Migrants, the Special Rapporteur focuses on discrimination, violence, abuse, trafficking and intolerance. The Report recommends further research, data collection, increased dialogue, monitoring multinational trade agreements, pushing for the ratification of the International Convention of the Rights of All Migrant Workers and Members of Their Families, working with the Commission on Crime Prevention and Criminal Justice, strengthening advisory services and training in international human rights instruments, cooperating to develop better migration policies, and documenting cases of mass migrations caused by discrimination and racial and ethnic conflicts. [FN47] As in the case of the Report of the Working Group of Intergovernmental Experts, this Report does not address the causes of massive migration. This first Report of the Special Rapporteur on the Human Rights of Migrants never uses the term "globalization," nor does it explicitly address how new regimes of international trade shape the economic conditions of migrants. There is no attention to global economic restructuring, the growth of transnational corporations and capitalist free trade structures, or to how these shape conditions that make people leave their home countries. This document focuses mainly on protecting people from individualized harms as migrants rather than the problems of migration that affect possibilities for full human rights.

*328 D. Conclusions

While the United Nations' system of international human rights provides important fora for addressing protections of rights across national borders, the regime is currently shaped by historically and culturally specific presumptions about what is most fundamental about human beings, what ought to be protected in human lives, and how those protections ought to be enforced. These presumptions limit the system's current ability to address and even conceive of the human rights of migrants in globalized economic orders. The next Part of this Essay turns more specifically to conditions that shape the lives of transnational Filipina migrant laborers.

II. Globalization, Labor and Gender: Filipina Migrants in the Global Economy

A. Filipina Migrant Laborers in Globalized Markets

The lives of Filipina migrants illustrate the limitations of the United Nations' current international human rights system for understanding and addressing "rights" that are needed in contexts of globalization. As this section will show, the location of the Philippines in the global economy, its histories of multiple colonizations, and policies formulated by its government all contribute to dehumanizing conditions of migrant Filipinas' lives. A U.N. system of human rights that recognizes only claims of individuals against a State and that seeks only to protect individuals from harms to which migrants are particularly vulnerable reproduces certain relationships between nations, corporate
interests, and "workers" while assuming the legitimacy of certain descriptions of the rights and needs of migrants.

In the mid-1990s, the Philippine government estimated that more than 4% of the nation's population worked as contract workers overseas. [FN48] According to the Philippines' Department of Labor and Employment, in 2000, there were 978,000 registered Overseas Filipino Workers (OFWs). Of these, 527,000 were male and 451,000 were female. [FN49] These numbers do not include unregistered or "illegal" OFWs, who are required to register with the Philippine Overseas Employment Administration (POEA). In 2000, 308,000 of the 451,000 female OFWs were employed as service workers; 283,000 of these were as " Helpers and Related Housekeeping Service Workers." The next largest category of employment for female OFWs was 74,000 "Professional, Technical and Related Workers." [FN50] In the first quarter of 1999, the countries of destination with the largest numbers of OFWs were Saudi Arabia (41,564), Hong Kong (27,154), and Taiwan (17,075). Other nations with large numbers of OFWs were Japan, the United Arab Emirates, Italy, *329 Singapore, Brunei, Kuwait, Oman, Bahrain, Libya, Malaysia, and Qatar. [FN51] Large numbers of female OFWs in Japan and the Middle East are employed in sex and "entertainment" industries. [FN52] Large mail order bride industries in the United States, Germany, Finland, and Norway are sometimes also included in OFW numbers collected by non-governmental organizations. [FN53]

Overseas Filipino Workers send a large amount of money back to the Philippines as remittances. In 1994, $4.87 billion U.S. was sent back to the Philippines in official remittances. [FN54] Estimates that include non-official remittances range from $6-10 billion U.S. annually; these remittances provide the largest source of foreign exchange in the country. [FN55]

These large numbers of overseas Filipina/o workers must be placed into the context of global economic restructuring. In Servants of Globalization: Women, Migration and Domestic Work, Rhacel Salazar Parreñas cites as reasons for large numbers of migrants not only poor economic conditions and high rates of under- and unemployment in the Philippines but also high demand for low-wage service workers in "developed" nations. [FN56] As a "developing" nation in the globalized economy, the Philippines' export-based national economy includes laborers as exports. [FN57] "Developed" nations with a significant workforce in high-income jobs of finance capitalism require large numbers of low-wage workers to provide a service class. [FN58]

Parreñas notes that relationships between developed and developing nations recall histories of colonial ties. Migrants do not randomly choose nations; historical relations between nations, as well as relative costs of migrating and expected wages in receiving nations shape these choices. [FN59] Global capitalism as a world-system structures unequal relations between nations that seek low-wage workers and those that export them. These relations mirror old colonial relations because of the reproduction and continuation of structural inequalities between "developed" and "underdeveloped" nations: developed nations continue to benefit from resources of underdeveloped nations. Migrating labor from underdeveloped to developed nations *330 is part of the circulation of resources and a global division of labor in the global capitalist order. [FN60]

After its colonization of the Philippines in 1898, the United States employed an educational and political system to train Filipinos to be proper and disciplined subjects. [FN61] As Enrique de la Cruz writes,

If one were to examine the most obvious areas where one might expect to find the remnants of America's empire, the Philippine economy, its political institutions, its
educational system, and its immigrant communities here in the U.S., one finds not just the remnants but the enduring legacies of empire.

. . . [T]he Philippine economy continues to be dominated by American-based multinational corporations. Politically, it was the United States who shaped an emerging Filipino economic upper class . . . into a political oligarchy that has since dominated Philippine politics. [FN62]

The "ceding" of the Philippines by Spain to the U.S.; the U.S.'s so-called Benevolent Assimilation project, its "civilizing mission," and its ongoing hegemonic political and military pressures; the brutal Japanese occupation during World War II; and IMF/World Bank-led policies all shape the relationships between the Philippines and particular nations such as the U.S. and the available channels of migration. [FN63] Filipina migrants travel to places where flows and pathways already exist as well as locations inserted into the network of global labor by new occurrences, as in the case of the Middle Eastern oil boom.

The global division of labor exists in sectors other than service. Factories run by transnational corporations seek low-wage workers not only in developing nations in Asia and Latin America but also developed nations such as the U.S.; low wages in developing nations serve to keep wages low in developed nations. Migrants in both developed and developing nations [FN64] serve as a global low-wage class. Even as certain industries rely on female labor in this low-wage class (as in the maquiladora zone in Mexico), wages are further depressed by the growing informal labor sector in which women do piecework at home.

Saskia Sassen analyzes the gendered nature of this division of labor in the global economy. As men have emigrated to find work, women have developed skills and have themselves become targets of labor recruiters seeking low-wage workers. [FN65] In the maquiladoras, signs on factories often advertise that they specifically seek young women for hire. In the domestic work sector, the growing need for service workers has created a large demand for female workers. Sassen *331 argues that immigrant women provide an important labor supply in this sector because as household labor becomes part of the labor market, it is devalued. Devalued forms of work are feminized as wages are kept low. [FN66] Migrant women fill the need for large numbers of workers in this sector.

Parreñas applies Sassen's notion of the gendered global division of labor to the migration of Filipinas to developed nations by pointing out the international division of reproductive labor. Drawing from Evelyn Nakano Glenn's analysis of the racial division of reproductive labor in the U.S., Parreñas notes that immigrant women slip into the domestic labor roles filled by women of color as white women seek to escape such labor. [FN67] Filipina migration to places like the U.S. and Italy indicate the complex dynamics of gender role negotiations between developed and developing nations in the globalized context. While Parreñas' analysis of the insertion of migrant Filipinas into the "woman of color domestic" role does not account for their high numbers in such work in the Middle East, [FN68] the gendered dimensions of household work still operate there.

B. Filipina Migrant Laborers and the Human Rights Regime

The above section clearly indicates that conditions of Filipina migrants' lives raise more than issues of vulnerability. Certain concerns of Filipina migrants are indeed capturable within existing international human rights discourse; some people work with migrant Filipinas within this framework. For example, Grace Chang points to the mobilization of migrant Filipina workers to expose abuses, fight for the protection of their rights, gain
legal advocacy for claims, lobby for legislative changes, and obtain legal counseling on labor and immigration rights. [FN69] Chang also notes the difficulties in developing strategies to confront more complex issues such as fighting for a ban on recruitment for overseas workers because effectiveness here might force workers into an even more dangerous "illegal" status. [FN70] Other strategies for aiding migrants include working for the ratification of the Convention for the Protection of All Migrant Workers and Members of Their Families, literacy and life skills classes, and other forms of practical support. [FN71]

Dan Gatmaytan, a human rights legal scholar, looks to the Philippine constitution and statutes as well as international agreements for ways of addressing violations of migrant Filipinas' human rights. According to the Philippine Constitution, the state shall "protect working women by providing safe and healthful working conditions, taking into account their maternal functions, and such facilities and opportunities that will enhance their welfare and enable them to realize their full potential in the service of the nation." [FN72] Protections of migrants are included in labor codes and in administrative agencies such as the Philippines Overseas Employment Agency. However, Gatmaytan notes that issues of migrants' vulnerability are not fully addressed because of the lack of enforcement of their rights. [FN73] For example, domestic and international laws, policies, and codes have not solved the problem of violence against Filipina migrant domestic workers. [FN74] Gatmaytan argues that the Philippine government must improve local economies, provide more protection for overseas workers, and create employment opportunities domestically. [FN75] Gatmaytan then acknowledges that these recommendations, while desirable, are insufficient and that Filipina migrants' "degraded status" will only change with the transformation of capitalist structures. [FN76] As an international human rights legal scholar, Gatmaytan is caught between pointing out the deep problems for overseas Filipina workers and attempting to address those concerns within the limiting discourse of human rights legal protections for migrants.

The next section turns to transnational Filipina migrants' organizations' articulations that connect grassroots, everyday experiences to analyses of globalization and multilayered strategies for creating change.

C. Speaking Out of Experience: Transnational Filipina Migrants' Articulations of Their Rights

This section examines the ways in which transnational Filipina organizations connect issues of human rights across legal, political, economic, historical, geographic, and communicative boundaries. Rather than speaking from within any particular regime under which truth claims can be heard, these organizations present voices of migrant Filipinas in a variety of forms. Several non-governmental organizations working with migrants use the World Wide Web as a forum to present issues, provide analyses, and give voice to their members in creative, multilayered, hypertextual formats. Organizations' web pages serve as centers for disseminating information and for organizing members and potential members across national borders. They also provide analyses and perspectives that challenge dominant discourses.

1. Mission for Filipino Migrant Workers (HK) Society

The Mission for Filipino Migrant Workers (HK) Society's Migrants.Net: Online Resources for Migrant Workers [FN77] provides much information and significant analyses about the links between human rights problems created by the Philippine government, the poor economic situation of the nation in the global order, and ongoing effects of
colonialist histories. Its online publication, Migrant’s Focus Magazine, provides a history of the Philippine government's role in shaping an economy based on the export of laborers. [FN78] During the 1970s, the Philippine government under Ferdinand Marcos saw the potential for bringing in large amounts of money by sending Filipina/os to the Middle East during the early years of the oil boom when that region needed large numbers of workers. Marcos systematized and institutionalized labor export by creating the Philippine Overseas Employment Agency (POEA), which recruits, registers, and collects the many mandatory fees from overseas workers. Although the Labor Export Program was intended to be a short-term measure to help the Philippines' economy, it has become a firmly entrenched part of the national economy. Indeed, President Corazon Aquino called overseas workers the "new economic heroes" of the nation.

Migrant’s Focus Magazine also provides much information about the forced remittance program, the many mandatory fees required of overseas workers, and the lack of funding for services for migrant laborers. As the Magazine points out, the total of overseas remittances is second only to earnings by crude oil trading for the nation. In addition to requiring overseas workers to remit a large proportion of their earnings through formal bank channels, the Overseas Workers Welfare Administration (OWWA) collects numerous mandatory fees from both workers registering to work abroad and those who are already working in other countries. While portions of these fees are ostensibly earmarked for services for the workers themselves, only 11% of the OWWA’s budget goes to such services.

Migrants.Net points not only to the government's exploitative behavior, but also to environmental conditions and land-use issues that affect Filipina/os' survival options. Philippine land is largely exhausted; farmers have either lost their land or become laborers for wealthy landowners who use the land for cash crops. Much land has also been lost to golf courses intended to bring in tourists. Those who formerly lived by farming have been displaced from the land. Migrants.Net links these issues to the government’s destruction of minority populations and its counterinsurgency policies that attack those who seek to change the structures of dominance and to reclaim land for farmers. The website also points to the role that foreign superpowers play in "plundering" the economy.

By linking a critique of Philippine government policies to environmental and land-use issues and to issues of foreign dominance as these shape the conditions in which Filipino/a workers must migrate in order to find work, even as it works to serve migrant laborers, Migrants.Net refuses a model of analysis that looks only to vulnerability and the harms of discrimination and individualized experiences of violence.

2. Gabriela

Gabriela is a multi-chapter, transnational Filipina organization. Its websites serve as tools for connecting chapters around the world, provide the organization's analyses of issues, present Gabriela's press releases, and give information about the organization's activities. [FN79] Gabriela seeks to "forge women's unity within and among classes and constituencies to wage a struggle for the liberation of women and the rest of the Filipino people." The organization strives for this liberationist goal by seeking an end to foreign intervention in the Philippines, especially that of the U.S.; pushing for a government that provides support systems for women; supporting the struggle for self-determination of cultural communities; fighting to end militarization; advocating for reform of the legal and judicial systems; pushing for land reform; supporting liberationist education; working for a socio-cultural context that does not demean women; building a self-reliant economy that is geared toward domestic consumption and that supports women's
equality; and forging solidarity with women's groups around the world to fight sexism, imperialism and militarism. [FN80]

Gabriela's website includes creative links that forward these goals and principles. For example, there is an extended series of links about the organization's "Passion Show," which includes images of members modeling clothing as political statements. The Passion Show includes such gear as "[a] wedding gown of rags and chains . . . [to symbolize] the plight of mail-order brides." [FN81] The website links the Passion Show to information about the effects of militarization on women, including the growth of the exploitative sex trade. It also links these pages to statements against the Visiting Forces Agreement which extends U.S. military presence in the nation. Each of these pages is also linked to information about one of Gabriela's main projects, the Purple Rose Campaign, which seeks to inform people and to gather support for women who have been trafficked. The website also includes stories of individual people whose lives have been shaped by these issues. Finally, the website contains links to other organizations that add to their analysis.

For example, Gabriela links to Bayan, the New Patriotic Alliance. Bayan's website lists guiding principles, including statements that: 1) True national sovereignty lies in asserting our nation's independence from imperialist domination . . ., 2) The power of the people rests on building their organized strength, founded on the basic alliance of workers and peasants . . ., 3) A self-reliant and progressive economy rests on ending imperialist exploitation and breaking its feudal land base . . ., 6) The right to self-determination is the core of the indigenous and Moro peoples' struggles . . ., 7) The emancipation of women requires the dismantling of a semi-feudal and semi-colonial system made worse by patriarchy . . ., and 8) The building of a strong anti-imperialist front strengthens solidarity with the oppressed peoples of the world. [FN82]

As in Migrants.Net, Gabriela's website connects complaints about the government to analyses of issues that stem from globalization, militarization, and imperialism. Clearly this organization's transnational, feminist perspective moves beyond an identification of vulnerabilities to being treated "differently" or "unfairly" in a globalized economy. Fulfillment of human rights for such organizations as the Mission for Filipino Migrant Workers (HK) Society, Gabriela and Bayan require attention to complex, multiple dynamics that stem from histories of colonialism rather than to moving individuals into a liberalized system of rights against discrimination.

III. Empire or Imperialism? Overlapping Regimes in Postcolonial Time-Space

As organizations such as the Mission for Filipino Migrant Workers (HK) Society and Gabriela make clear, "human rights" do not reside solely within the international legal framework developed under the United Nations. The idea of human rights is powerful for those attempting to assert claims to change conditions in their lives and to work for justice on a global level. In addition, critical human rights workers are able to use U.N. fora to organize and transform approaches to human rights. Multiple discourses or regimes of human rights co-exist, compete, coincide, and overlap. Acknowledgment of these multiple discourses in contexts of globalization moves from simply adding formerly excluded voices to a more critically transformative approach to severe power differentials in postcolonial, post-liberal contexts.

A. International Human Rights Scholarship: Expanding the Framework

Several international human rights legal scholars are attempting to address limitations in current discourse by pointing to exclusions of particular voices as well as uneven relationships between nations caused by histories of colonization. Scholars such as Berta
Esperanza Hernandez-Truyol, Sharon Elizabeth Rush, Penelope Andrews, and Celina Romany draw from the critique of liberal legalism and its exclusions as they suggest new possibilities for transforming international human rights. These authors' works suggest that an expansion of voices and perspectives in international discourse may open up possibilities for new orders of rights.

By pointing out historical exclusions created by legal frameworks, Hernandez-Truyol, Rush, and Romany insert perspectives shaped by experiences of subordination with hopes of transforming human rights discourse. In "Culture, Nationhood, and the Human Rights Ideal," Hernandez-Truyol and Rush examine critical voices that "deconstruct the legal master narrative." [FN83] They point to specific limitations in international conventions and urge an inclusion of harms based on intersectionalities of race, sex, ethnicity, class, religion, language, and sexuality. [FN84] Similarly, Celina Romany points to the reproduction of liberalism's public/private split in international law's approach to violence against women. [FN85] Women's experiences of violence indicate the existence of forms of power that connect the two realms. Penelope Andrews points to the lack of cultural fit between legal structures and Aboriginal women's needs in Australia as well as difficulties created by formal procedures and evidentiary requirements for making claims. [FN86] For these scholars, bringing forward critical perspectives of persons who have been marginalized provides the opportunity to open up and to change the limitations in human rights law. Hernandez-Truyol and Rush point out that intersectional experiences emphasize the indivisibility and interconnectedness of rights in ways that will lead to more complex treatments of various levels of difference. [FN87]

*336* New international human rights scholarship also points to connections between exclusions in current regimes and multiple histories of colonization. For Hernandez-Truyol and Rush, colonization histories inform the hegemonic western and northern biases in international norms [FN88] as well as differences in which nations are allowed sovereignty. [FN89] Hernandez-Truyol points out that the division between "first-generation" civil and political rights and "second generation" economic, social and cultural rights reflects the priority of historical "bourgeois" European revolutions that conceived of rights as primarily negative protections against state authority. She notes that the normativity of such perspectives on the priority of rights ignores the non-universality of the "white, Anglo, western, European, Judeo-Christian, educated, propertied, heterosexual, able-bodied male" whose life provided the model for these rights. [FN90] Andrews discusses Aboriginal women's subordinated status in the context of multiple struggles for land rights, cultural rights, and rights to self-determination within a group's continued status of dependency. Andrews specifically links violence against Aboriginal women to the ongoing violence of colonization. [FN91]

Each of these new works in international human rights calls for new voices and perspectives that will open up the limits of liberal legalism in international human rights. As Sherene Razack notes, new stories open up truth claims that resist imperial moves. Razack attends to how we tell stories or how we narrativize issues as well as the importance of the interpretive structures through which we hear and understand other perspectives. [FN92] Yet Razack also pushes the critiques of the international human rights legal scholars. Speaking and telling do not themselves change power relations and structures. While crucial, adding formerly excluded perspectives, even ones that challenge the limitations of the foundational notions underlying legal systems of rights, does not guarantee a transformation of relationships of dominance and subordination. Razack notes the difficulties that result when power looks at "others" of its system. Importantly, Razack notes this dynamic even within well-intentioned human rights work. She writes, "[I]n seeing ourselves as good human rights activists engaged in crucial issues of social justice, we can sometimes repeat an imperializing move, and in so doing, fail to see how we oppress others." [FN93] Razack recognizes the power of the
gaze, in which subjects within structures of power determine and define the rights and needs of "others" of that system by perceiving those "others" from within the subject's own lens. While Hernandez-Truyol, Rush, Romany and Andrews most likely would not disagree with Razack on this point, their claims about adding perspectives shaped by intersectionality, multiple forms of subordination, and relationships of colonization do not address the problem of how those voices can transform the subject/other dynamics of power.

*337 B. Human Rights and Postcolonial Theory: Constitutions of Subjects and Their Others

As noted above, [FN94] relations between nations continue to be shaped by histories of colonization. The ongoing effects of colonial relations exist not only in political and economic structures and institutions, but also in constitutions of Subjects and Others. Under colonialism, Subjects who conceived themselves as carrying forth grand projects of law, order and civilization constituted their Others. The colonized were not only constituted as Other through political and economic projects but also through representations of their cultural and religious "difference." As Edward Said points out, representations of the "East" as inherently and essentially different from the "West" served the colonialist project. [FN95] The East, because of its mysterious, exotic, disordered, and pre-civilized ways, was ripe for colonization by the orderly, structured, civilized West. As Leila Ahmed adds, this dynamic is built not only on the regulations of nations but also of gendered relationships in both colonized and colonizing locations. [FN96] Looking at the Other operates not only in binary fashion (colonizer nation/colonized nation; men/women) but in complex interactions of discursive productions within and across political, legal, economic, and cultural forms. Productive power circulates in discourse [FN97] and shapes these interweaving forms beyond the control of rational, planning Subjects; power is at work in the constitution of the Subjects and Others themselves. Individuals in the position of Subject cannot determine or control discourse or the constitution of their own subjectivity, even as they may wish to resist enforced relations. Neither can individuals in the position of Other escape the production of their own subjectivity under conditions of subjugation, even as they also resist enforced relations. [FN98]

The complexity of the relationships of power in the constitution of Subjects and Others points out a problem in attempting to add excluded voices. Colonial histories and the historically constructed Subject/Other relations continue to shape who can "speak" in appropriate languages of power and truth. Others to the Subject must learn to speak the language of the Subject in order to be heard. In the international human rights context, Others to the history that has developed the legal regime insert themselves into a Subject's position by learning to articulate themselves, their needs, and the harms they experience in the language of systems of power. However, when the transnational migrant Filipina Other attempts to insert herself into the position of Subject by claiming rights, her experiences are not translatable within the structures of power of the legal regime. In order for her claims to be heard and addressed, the Other must become what she is not, namely someone whose voice, experience, needs, and claims can be articulated through an established regime of truth and power. Can an Other, constituted as Other by the productive power of discourse, be what has been constituted by the production of her *338 Otherness? As Trinh Minh-ha points out, the binary relationship between Subject and Other does not mark an essential difference between the two. Conceiving of the split as so essential ignores the constructedness of each in relation to the other within particular systems of epistemological power. Those constituted as Other cannot simply bridge the divide by speaking back to those in the position of Subject who see the Other through this constituted relationship. Others are not essentially other but must negotiate the divide of their produced otherness. [FN99]
Historically constituted Others must be inserted into the time-space of the "post" of postcoloniality. [FN100] A global order that understands nations to be "developed" or "developing" is built on the historicization of nations on whose histories concepts of "pre-modern," "modern," and "post-modern" have been built. Although lines between nations that have been colonizers and colonized may be clear, what exists in the "post" of the postcolonial continues to be shaped by the powers of the nations who have been modern and colonialist. [FN101] Even as persons from the formerly colonized (underdeveloped, not yet modern) nations are invited to participate in the global order and to progress in their development, they must attempt to speak as Subjects even though their actual subject positions are incommensurable with that subjecthood.

In a much lauded as well as lambasted article, Gayatri Spivak poses the question, "Can the Subaltern Speak?" [FN102] For Spivak, the subaltern is she who cannot be conceived within any regime of knowledge. She is displaced from all regimes of knowledge by which what is spoken can count as truth. She writes that women in decolonized spaces are gendered subalterns; they are doubly displaced. [FN103] Since gendered subalterns are not simply marginalized or excluded, but also displaced from the position of Subjects of history or knowledge, their speaking cannot simply be included or added to current regimes of truth. Gendered subalterns cannot be conceived within power/knowledge networks that reproduce otherness by expecting sameness in subjects and a "fit" between that subjectivity and truth. [FN104]

In a global capitalist system that requires expendable (potential) laborers for continued growth and functioning, not everyone can be "included." If the international human rights regime works to sustain that order and to subsume and define human rights within that framework, not all voices can be heard--not simply because they are not included but because their claims of truth about the "rights" their lives require are incommensurable with the regime of truth in which they attempt to "speak." If their human rights claims must fit into categories and procedures established to protect systems that contribute to the production of their otherness, women in (not yet) decolonized space cannot make their claims.

*339 As the international human rights regime privileges civil and political rights over economic, social and cultural rights because they are more enforceable, the distance between the articulations of gendered subalterns and claimable human rights becomes clear. Gendered subalterns live in the realm of impossibility created by the regime's connection to global economic structures that foster freedom of capital and then seek to "protect" vulnerable people from discrimination and individualized violences. Lives of gendered subalterns indicate the violence of the context as well as epistemic violences in the underside of structures and ideologies in postcolonial, not-yet-decolonized spaces. Discourses of human rights that lament current impossibilities and exclusions while reproducing the structure of those impossibilities participate in what Spivak calls the "logic of postponement." [FN105] Although calls are made for greater inclusion, the grand narratives of inclusive human rights rely on endless postponement to reconcile the realities of the regime with its purported rightness. This raises additional questions about the relationship between the international human rights system and new forms of colonial relations.

C. Empire or Imperialism?

In their recently published Empire, Michael Hardt and Antonio Negri analyze the juridical order of the United Nations as an embodiment of a new form of Empire that is more appropriately understood to be global than international. [FN106] This most recent form of Empire seeks not to rule by overt power but by the integration of the political, cultural, and ontological through the creation of norms and legal structures. [FN107]
Hardt and Negri point to the desire for order as a means to gain peace. The value of peace provides an integrating force that leads to the establishment of a juridical order that has the police power to regulate, control and maintain order. Since Empire consolidates these interests across national borders, this power is supra-national; its values are represented as beyond history and space. Empire's order appears to be "permanent, eternal and necessary."

According to Hardt and Negri's narration of a global Empire that escapes the control of any particular nation, the desire for peace does not simply rely on consent to coercive power or an expansion of constitutionalism, although Empire encompasses both of these. The newness of the global juridical order lies instead in the global integration of value with structure in ways that escape the order of power of any particular nation or set of competing nations. Empire is not simply an expansion of nation-based imperialism. It rather escapes those origins to create something newly global.

Although global order challenges state sovereignty and national boundaries, it is not clear that it escapes national ties entirely. Even as global order challenges nations, its power remains tied to some nations more than others. The historical roots of Empire in Europe and its expansion through the U.S. still have effects in the global order. Although even the U.S. cannot completely control the global order, it is able to exert not just coercive police or military power, but also considerable ideological power in the shaping of norms.

In a sense, the current expansion of order on a globalized level marks a period of competition between Empire and imperialism. Certain nations still hold forms of imperial power by which they can exert their will. The U.S. in particular still holds power to shape the juridical order in its actions in the United Nations, in its (threatened) use of military power, and in its exportation of cultural forms across the globe. Yet even the U.S. cannot control the power that extends from its centers. Norms created from U.S. pressures and influences are shifted and turned back on the U.S. itself; its cultural forms are appropriated and re-formed in multiple local contexts. Globalized markets facilitate these shifts in power, order and expression.

A significant problem in this competition between Empire and imperialism lies in the position of those who are subject to the reach of power of both yet not integrated into the structures for directing or benefiting from either. Gendered subalterns, transnational migrant Filipina laborers and multiple others lie both within and beyond the reach of Empire and imperialism. They cannot grasp the power of either for intentional use and yet their distance from the centers of each also provide for some possibilities of shifting the terms of power. Productive power requires repressive power because something always escapes both. What possibilities lie in the "something else" that escapes the overarching power of competing regimes of Empire and imperialism?

IV. Conclusion: Resistances of Post-Liberal Subjects and Transformations of the Human Rights Legal Regime

Postcolonial theorists do not simply critique marginalization, othering, logics of postponement and processes that render some "outside" regimes of knowledge, truth and power. They also offer alternative ways to reconceptualize agency in order to resist confinement and appropriation by liberalism in postcolonial contexts. In a globalized world, we must, in Spivak's terms, inhabit inescapable structures of violence and devise strategic negotiations with those structures with persistently critical practice. Those who are incommensurable with the logic of regimes of power must figure out how to negotiate the structures, not from equal negotiating positions but in the sense of finding one's way in order to survive. Furthermore, those whose lives are inserted into
social/legal texts but who cannot be the expected subjects indicate ruptures in their legitimizing narratives of the global order. Strategic negotiations with structures of power not only physical violence but also the violence of the word of law with its definitional and constructive powers, as conceptualized by Robert Cover. For example, migrants in a globalized world of capital show not only the global legal order's repressive power but also its productive power--the power to produce a legal order that cannot conceive or address the lives most harmed by the order. When migrants speak back, they do not simply add excluded voices but indicate the escape of that which cannot be captured by the legitimizing narratives of the order.

For Spivak, the multiple layerings of incommensurability of the Other constantly bring each term of order to crisis. [FN114] As lives of migrant Filipina laborers are fit into narratives of "woman," their domestic laboring challenges that story. As their lives are fit into narratives of "labor," their location in gendered coloniality indicate the invisibility of these positions within labor movements. As their lives are fit into narratives of "migrants," as pointed out above, [FN115] their location in informal sectors as gendered workers disrupt old understandings of migrant workers. The distance of the lives of transnational Filipina migrants from each master narrative indicates not only marginality but the possibility of bringing each to crisis [FN116] and "turn[ing] conditions of impossibility into possibility." [FN117] As the migrant laborers organize and develop strategies to negotiate the multiple structures of physical, ideological, legal, and epistemic violences, their lives move from marginality to bringing legitimating narratives to crisis to transforming structures of violence. These transformations do not simply come out of notions of strategy, agency, and actions that derive from liberal forms of subjectivity. The strategic negotiations that deal with multiple erasures, violences, and productive forms of power require something beyond coherent, intentional action based on empiricist understandings of cause and effect. Postcolonial migrant Filipinas thus insert agency that also escapes master narratives of liberal structures. These forms of agency and persistently critical practice need not be understood as alternatives to liberal plans of action based on intentionality, rationality, and the power of the coherent subject. Rather, postcolonial subjectivities stretch and extend notions of acting that can lead to transformation through the negotiations of multiple, complex layerings of power. Multiply positioned subjects are not simply intersectional; intersectionality implies a coherence that the gendered subaltern cannot inhabit. The agency of multiply-positioned subjects under globalization also enriches the interpretation of strategic essentialism: the point is not to rest on an essentialism, even though one must in order to act. [FN118] Instead, the focus turns to the persistently critical practice that does not revere the coherence of the moment but rather the persistence of the critique.

This concept of the agency of transnational migrant Filipina laborers as disruptive of multiple legitimizing narratives of power can be supplemented by Homi Bhabha's notions of doubling, ambivalence and hybridity. Not quite, not yet de-colonized subjects are inserted into explanatory, discursive, political, and economic narratives yet remain incommensurable to each. Required to be Subjects to be acknowledged, but neither allowed to fully assume that position nor capable of doing so because of the incommensurability of the constitution of the Subject/Other positions, the not quite, not yet de-colonized subject is a double: "neither the One nor the Other but something else besides, in-between." [FN119] This hybrid position caught between the colonial expectation for sameness and its required difference marks the ambivalence of colonial discourse. In decolonizing space, formerly subjected Others assume the mantle of Subject but mark the hybridity between the positions. For Bhabha, hybridity marks alterity - the "something else, besides" that challenges the binary split between colonizer and colonized. New subjects in formerly colonized locations cannot simply take up a pre-colonial, non-colonized subjecthood. Nor can agents of the formerly colonizer nations take on a non-colonizer agency. Rather than locating this dynamic simply on subjects or agents, Bhabha's hybridity indicates movements and transformations from the
"something else." The hybrid double is not all that is transformed by colonization or de-colonization. Rather, any pre-given understandings of "what is" are shifted: how can we conceive of knowledge and truth from the "something else"? Attention to these dynamics between constitutions of subjects and hybrid agencies denote the power that shapes expected or assumed stabilities. What are hybrid subjects "supposed" to be?

For transnational migrant Filipina laborers, this question of hybrid agency shifts us from this question of what "they must be" and "how they must speak," into an interrogation of the conditions that place them in the position of the hybrid, postcolonial Other. As migrant Filipinas' lives indicate, it is the multiple forms of power that sustain global stability and order in ways that mark their positions as Other to global political, economic, and legal regimes and their possibilities. Recognizing these multiple dynamics of productive power calls for multiple, strategic maneuvers from those "something else, besides" positions. Transnational, coalitional organizations like Gabriela that critique and illuminate multiple sites of power call for expansions of critical strategic practice that negotiate multiple structures of violence across borders, not only as liberal subjects but as agents of something else, besides.

Footnotes:

[FNd1]. J.D. expected, May 2003, University of California, Berkeley, School of Law (Boalt Hall); Ph.D., University of Southern California; B.A., St. Olaf College. I would like to thank Rosie Baldonado and Ken Nakasu Davison for their inspiring work; the editors at Berkeley La Raza Law Journal; Professor Angela Harris and her students in "Wealth and Class Relations" seminar; and Quyen Ta, Jee Park, Daniela Yanai, Kevin Bundy, Serena Lin, Mary Beth Kaufman, Laura Quilter, Hillary Ronen, Yunie Hong, and Catha Worthman for all of their support for this project.


[FN4]. Id. at 1628.

[FN5]. This section is not intended to provide a detailed analysis of the United Nations-based system of international human rights. Here I give an overview of some basic issues in the ideological relation between "western" and "universal" conceptions of human rights.


[FN8]. The Age of Rights, supra note 7, at 6.


[FN11]. U.N. Doc. E/C.12/2001/WP.2, 10 April 2001. Lim is an external relations officer of the World Trade Organization. However, the report represents his views only, not that of the WTO.

[FN12]. Id.

[FN13]. Id.

[FN14]. Id.

[FN15]. Id.

[FN16]. See id.

[FN17]. See id.


[FN19]. Id. at 2.

[FN20]. Id. at 2-4.

[FN21]. Id. at 5.

[FN22]. Id. at 4.

[FN23]. Id. at 5.

[FN24]. Id. at 6.

[FN25]. Id.


[FN27]. Id. at 3.

[FN28]. Id. at 8.

[FN29]. Id. at 9.

[FN30]. Id.

[FN31]. Id.

[FN32]. Id. at 10.


[FN34]. Id. at I(C).
This of course ignores historical examples of economic migrations before "globalization," including much of the migration between the U.S. and Mexico over the past century.

Migrant workers move for specific remunerated activities.

In order to be granted asylum, a person must qualify as a refugee by showing a "well-founded fear of persecution" on account of race, religion, nationality, membership in a particular social group, or political opinion. Economic factors are notably missing from this list of qualifications. See "Definition of a Refugee from the Immigration and Nationality Act," Immigration and Naturalization Service, available at http://www.ins.usdoj.gov/graphics/howdoi/refugee.htm.

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Text 49 (1996). Rosie Baldonado points out how migration in the mail order bride industry contributes to the commodification of Filipinas and extends social scripts of hypersexuality and dehumanization. Transmitting Images: The Exoticization and Commodification of Filipinas (unpublished manuscript, on file with author).


[FN57]. Id. at 11.


[FN59]. Servants of Globalization, supra note 1, at 2, 40.

[FN60]. Id. at 25.


[FN63]. See generally E. San Juan, Jr., One Hundred Years of Producing and Reproducing the "Filipino," 24 Amerasia Journal 1 (1998).

[FN64]. People displaced by extremely poor economic conditions migrate to factory zones in developing nations that may be relatively more well-off.

[FN65]. Globalization and its Discontents, supra note 58, at 112.

[FN66]. Id., at 87, 90, 129.

[FN67]. Id., at 61-62.

[FN68]. Parreñas does not attempt to account for the high numbers of Filipinas in domestic work in all receiving nations. Her work focuses on Filipina migrants to the U.S. and Italy.

[FN69]. The Global Trade, supra note 48, at 145.

[FN70]. Id. at 148.


[FN72]. Death and the Maid, supra note 54, at 249.

[FN73]. Id. at 253.
[FN74] Id.

[FN75] Id. at 261.

[FN76] Id.


[FN84] Id. at 833.


[FN91] Violence Against Aboriginal Women in Australia, supra note 86, at 926.


[FN93] Id., at 18.

[FN94] See supra Part II(A).


See, e.g., Albert Memmi, The Colonizer and The Colonized (1967); Frantz Fanon, Black Skins, White Masks (1986).


See Homi Bhabha, The Location of Culture 142 (1994).

Antony Anghie argues that the very concept of state sovereignty that informs modern understandings of the nation continues to be embedded in colonialist projects begun during the nineteenth century. See Antony Anghie, Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law, 40 Harv. Int'l L.J. 1 (1999) [hereinafter Finding the Peripheries].


Patricia Williams argues a similar point in her analysis of the silence of Tawana Brawley as a young, Black female in Mirrors and Windows, in The Alchemy of Race and Rights 166 (1994).


Id. at 9-10.

Id. at 15-17.

Id. at 11.

Aiwha Ong offers an interesting point about resistances by Asian nations that challenge both Hardt and Negri's notion of Empire and imperialism tied to "western" nations. Ong argues that Asian nations have incorporated the governmentality of liberalism but not its valorization of individual autonomy. The capitalist economic order of some Asian nations rely on cultural forms of discipline through governmentality rather than the regulation of individuals through a liberal legal regime based on the idea of consent. Ong argues that this has allowed Asian countries, including China, to "say no" to the social/legal regime of the west even while joining in the capitalist global economy.


[FN113]. See The Post-Colonial Critic, supra note 105, at 138-151.


[FN115]. See supra, Section I(D).

[FN116]. See Who Claims Alterity?, supra note 103, at 280.

[FN117]. See In Other Worlds, supra note 114, at 201.

[FN118]. See The Post-Colonial Critic, supra note 105, at 53.

[FN119]. The Location of Culture, supra note 100, at 219.
The 2000 census confirmed what many already knew—the traditional image of what it means to be a heartland state is changing. The new Census shows that the fastest growing racial and ethnic group in the Midwest are Latinas/os. [FN1] Kansas’s Latina/o population doubled from 93,670 in 1990 to 188,252 in 2000 (100%); Nebraska’s Latina/o population grew from 36,969 to 94,425 (155%); Iowa’s population increased from 32,647 to 82,473 (152%); and Missouri’s Latinas/os doubled from 61,702 in 1990 to 118,592 in 2000 (92%). [FN2] The Midwest joins a group of agricultural states, North and South Carolina (393%), Arkansas (337%), and Tennessee (278%), experiencing Latina/o explosive growth. [FN3] These states have far outstripped the national growth rate of 58%. [FN4]

As compared to African Americans and Asian Americans, Latinas/os in these agricultural areas are more widely dispersed. [FN5] Since post Reconstruction, *344 African American settlement has been primarily urban. By contrast, new Latina/o settlement in the Midwest is both urban and rural. [FN6]

The prototypical Midwestern farm town—almost all white, English-speaking, of European heritage, and mostly middle class—is becoming diverse culturally, racially, and class-wise. Virtually overnight, small rural towns gained a significant Latina/o presence. Garden City, Kansas, is 25 percent Latina/o; [FN7] Noel, Missouri, is 40 percent Latina/o; [FN8] and Clark City, Arkansas, is 30 percent Latina/o. Postville, Iowa, had a 50 percent increase in its Latina/o population since 1990. [FN9] Colfax and Dixon counties in Nebraska had an 831.8% and 1119.6% growth, respectively, leading the nation in the greatest percentage growth of Latinas/os in a county. [FN10] According to Dr. Refugio Rochín’s 1995 study, at least three million Latinas/os had settled in rural America. [FN11] As compared to urban Latinas/os, rural settlers are more likely to live in poverty (34% versus 25%), be first-generation immigrants (40% versus 13%), and
have difficulty with English (90% versus 65%). [FN12] The characteristics Rochín first analyzed with 1990 Census data are now more prevalent, as captured in 2000 Census data and various surveys taken from 1993 to 2001 in Missouri, [FN13] Nebraska, [FN14] Iowa, [FN15] and Kansas. [FN16]

"Latina/o-ization" of rural America is a distinct phenomenon in the regions where agriculture is a key industry, the Midwest, California, [FN17] and the Southeast. [FN18] The influx of Latinas/os is felt immediately and visibly. There is no possibility of Latinas/os remaining "olvidados," or unseen, as Juan Perea once claimed. [FN19] Spaces in rural America are small and contained, neighbors know one another. These are communities where newcomers are immediately noticed and scrutinized. The sense of who is a newcomer spans generations, not years; counties, not countries. [FN20] On the other hand, these are communities where norms of community and neighborliness could help ease transitions, and where positive community leadership is easier to exercise by a handful of well-motivated individuals.

In this article, I focus on this important development in Latina/o experience in the United States. Latinas/os are now the majority minority group in the United States. [FN21] Increasingly, Latinas/os are rural dwellers, living in areas without a historical Latina/o presence. Latinas/os are no longer concentrated into the land geography that was Mexico prior to the Treaty of Guadalupe Hidalgo. Rather, the most recent wave of Latina/o immigration has dispersed settlement throughout the United States. Part I discusses these changes in Midwest rural communities, and describes this new pattern of Latina/o immigration to the United States. Part II then focuses on the cultural, socio-economic, and racial tensions that Midwest rural communities are experiencing. Immigration shifts reconfigure familiar racial/ethnic geography, create new conflicts, and call for new concepts. On the other hand, these changes create opportunities for positive interventions that might yield new norms of co-existence. Part III describes the key legal issues for Latinas/os who have settled in the rural Midwest. Post 9/11, Latina/o "foreignness" has made what should be routine, for example obtaining a driver's license, a source of tension between immigrant communities and local law enforcement. Finally, Part IV describes how the organization of the University of Missouri's Cambio de Colores conference, based on the LatCrit conferencing model, has created a venue for communities of learning and activism in the Midwest.

I. Changes in the Midwest: From Farm Towns to Agromaquila Centers

A. New Settlement Patterns Due to Agromaquila Decentralization

Settlement patterns of Latinas/os are changing. Previously Latina/o immigrants entered through the gateway states of California, Texas, New York, and Florida and went no further. The new national pattern is that Latinas/os are more dispersed throughout the United States. [FN22] Latina/o immigrants move through these gateway states and settle elsewhere. In the Midwest, areas where Latinas/os have already settled are being augmented by new flows of first-generation Latina/o immigrants. For example, Kansas City, which is home to the largest Latina/o population in the Midwest, doubled the number of Latinas/os, which placed it eleventh overall among urban centers experiencing the greatest Latina/o urban growth. [FN23]

Latina/o growth in rural areas is not so much an issue of numbers, but of proportional impact. In Missouri, the counties recording the most growth in Latina/o population are all rural. [FN24] For example, Sullivan County-- with a total population of approximately 7000--now has over 600 Latina/o residents, whereas in 1990 it had recorded only 23. [FN25] Most other counties in Missouri with populations of around 7000 had barely 50 Latina/o residents in 1990. [FN26] McDonald County, which abuts Arkansas' poultry
region, with over 2000 Latina/o residents, had only 121 in 1990. [FN27] Nebraska has had a similar experience. [FN28] Dawson County, Nebraska, once experiencing net out migration, had an increase of 5000 residents from 1990 to 2000, for an 838% growth of Latinos. [FN29] Garden City, Kansas, has tripled in size in the last three decades, and now has high concentrations of Latinas/os, Vietnamese, and Laotians. [FN30] Midtown, Iowa, which had been declining in the 1980s, surged in growth during the 1990s and recorded increases in Latina/o residents, from a handful to close to 200. [FN31]

This hyper growth is not haphazard. Latinas/os are being drawn by jobs from meatpacking and food processing industries—siempre hay trabajo (there is always work). [FN32] As Tables 2 and 3 show, in Missouri and Nebraska, the rural counties experiencing Latina/o hyper growth are also those experiencing a transformation in agricultural production methods from small, family-owned producers to large-volume, high-profit, low-cost, labor-intensive production, which Professor Guadalupe Luna and others have described as U.S. "agromaquilas." [FN33] The *347 growth of Garden City, Kansas, as well, is due to the location of two beef plants that slaughter up to 4000 head of cattle a day. [FN34] Similarly, Midtown's growth can be explained by the siting of a meat processing center. [FN35] Agromaquilas are multinational corporate oligopolies, which aggressively aim to keep costs low and corporate profits high. Meatpacking agromaquilas are made up of four major processing giants, Tyson Foods (which recently merged with Iowa Beef Processing (IBP)), Cargill, Con-Agra, and Smithfield; [FN36] the top three control 70 percent of cattle slaughter in the United States. [FN37] In the 1990s, the meat processing industry consolidated to realize greater economies of scale, and began to decentralize in order to be closer to production points. [FN38] The major meat processing areas are now located in rural Iowa, Nebraska, Kansas, Colorado, Texas, Arkansas, North Carolina, and Missouri. [FN39] Plants in what had been major meat processing centers, Kansas City, Sioux City, and Des Moines, closed down. [FN40] New agromaquilas opened in rural America, often with the support of local tax abatements and subsidies. [FN41]

Some commentators view agromaquilas' rural relocation as an attempt to contain unions. Since the major labor strife in the early 1960s and 1980s, the meatpacking and poultry industries restructured with non-unionized labor. [FN42] New giant slaughterhouses employ from 200 to 500 workers over two or three shifts and typically slaughter 4000 to 5000 cattle a day. [FN43] A major cost of food processing is labor. [FN44] The industry has been unable to mechanize the cutting up of carcasses, *348 which still requires human hands and human eyes. [FN45] Workers' wages average between $7 and $8.50 per hour, sometimes less. [FN46] Yet, job conditions have not improved markedly since the 1940s and 1950s, [FN47] when American workers in Minnesota, Nebraska, and Iowa staged strikes for better working conditions and better pay. [FN48] Working conditions remain harsh. [FN49] Workers stand for the entire length of their shift, lining up on fast-moving conveyor belts cutting carcasses with very sharp instruments in cold, wet environments. [FN50] A slip or a mistake means an injury. According to the Department of Labor, meat and poultry processing plants are the most hazardous workplaces in the United States. These conditions are physically taxing, and the work-line conditions can dehumanize. [FN51]

The large pools of low-cost labor required by agromaquilas are being filled by mobile immigrants seeking work. Regression analysis shows that nationally, immigrants are supplying labor where there has been a shift to high-profit labor-intensive agriculture. [FN52] Labor economists have coined the concept of demand-pull immigration to describe the movement of new populations pulled by industry that acts as a magnet. [FN53] Immigrant communities through word of mouth communicate *349 that there is plentiful work in these areas. [FN54] Multiple family members work at these plants, often more than one shift. With turnover averaging 100 percent and more in these plants, thousands of workers come and go each year. [FN55] Because the local surplus
labor supply cannot fill the demand, pulling migrants to agromaquila centers is an ongoing process. Missouri has documented reports of meat and poultry processing companies actively recruiting Latina/o workers near the Mexican border. Jerry Edwards, state director of Missouri’s Title 1-C program, which receives some of the annual $30 million federal grant for migrant education, states that "Missouri plants are advertising all the way down to Mexico and South Texas." [FN56] Premium Standard Farms in Milan provides transportation from the border to recruited workers and a moving allowance of $250. [FN57] Nancy Naples found in her case study of a meatpacking plant in Midtown, Iowa, that workers were recruited by newspaper advertisements posted in Laredo, Texas. [FN58]

The recent case of U.S. v. Tyson, [FN59] the largest poultry processor in the Midwest, challenges the legality of these recruiting practices under immigration laws which proscribe employers from knowingly hiring undocumented workers. The lawsuit avers Tyson knowingly engaged in a widespread practice of recruiting undocumented workers from as far as the Texas border with Mexico. [FN60] So far only one lower-level official has been convicted. [FN61] Whether this is a far-reaching practice or the malfeasance of isolated individuals remains to be determined. Industry officials have steadily maintained they do not engage in illegal hiring practices. [FN62]

Nevertheless, the combination of very low wages, high turnover, and employer recruitment practices at the border has changed the demographic composition of the food processing work force. Because U.S. a gromaquila centers have proliferated and penetrated into the rural heartland, there has been a boom in low-wage jobs being filled by immigrants, mostly Latinas/os because of proximity to the U.S. border, but also Asian Americans. Gouveia and Stull’s study reports that in meat processing plants in Nebraska, the workforce has become upwards of 60% Latina/o. [FN63] Annual incomes range from $15,000 to $25,000, [FN64] depending on hours worked and plant layoffs. For families from rural Latin America, where subsistence living has been made even harsher by NAFTA, these wages provide an accessible alternative to a better life. However, particularly as families are getting established, they are living at the edge of poverty; some struggle just to put food on the table. [FN65] In Missouri and Iowa’s agromaquila counties there has been a precipitous increase in the number of children living close to or below the poverty line. [FN66] Agencies providing last-resort help, like food banks, shelters, and public health clinics, report they are stretched thin as they attempt to provide needed services to new immigrants. [FN67]

The demand-pull fueled by the food processing agromaquillas has multiplier effects. The active recruitment of immigrant workers must be ongoing. Because the food processing industry experiences such high turnover rates, they quickly exhaust the local labor pool. In these plants, jobs are always waiting to be filled. Once established in these small rural towns, these workers seek upward mobility, and soon try to move on to better jobs, working in small plants, construction, or service. [FN68] Latinas/os recruited at the border may initially come to a rural location where a meatpacking plant is located, but within a year or two, they will try to find jobs in other locations. In Missouri the movement has been from rural agromaquila centers to small cities under 100,000, where there is employment in small factories, service, and construction. [FN69] Other small cities in the Midwest have seen increases in Latinas/os because of this ripple effect. Lincoln, Nebraska; Indianapolis, Indiana; Iowa City, Iowa have all seen jumps in the Latina/o population. South of the border, Latina/o immigrants continue to be attracted by the mythology of a better life in "El Norte." [FN70]

This ongoing cycle means that the Heartland’s experience in the last decade with geometric expansion of the Latina/o population will continue. Latina/o population may double yet again during the next decade. Some Latina/o immigrants are transitory, but
the core group decides to stay. They have found in Midwest rural and small towns affordability, plentiful jobs, and peaceful neighborhoods. These are economic and social assets that are not necessarily available in their countries of origin and are increasingly scarcer in gateway states, like Texas and California. The majority of the new arrivals are filling the lower echelon jobs that Midwest food production industries require to continue functioning. The longer Latinas/os stay, the more likely that they are to work their way up. Their dream is, after all, the American Dream.

B. Demographic Profile

Let us now consider what can be said about the characteristics of this Latina/o group. Latinas/os are not homogeneous; however, characteristics shared by the majority can provide a general profile. [FN71]

Most come from Mexico, many from rural, agricultural areas, and possess limited education and English skills. Because their children do not necessarily speak English, local school districts are overwhelmed with the rapid growth, particularly in the elementary school population of Limited English Proficient children. The need for learning English is therefore very high among both adults and children. Adults recognize English skills are necessary for them to make a better life and are anxious to learn English.

Latin/o families are also young, have young children, and earn low incomes. A long-term concern is to help families and their children make their way to greater economic sufficiency.

Significant proportions self-identify as "other" racially, perhaps because the rural Midwest is drawing from indigenous and mestizo populations in Mexico and elsewhere in Latin America who do not consider themselves white. Finally, a significant percentage of this population is undocumented. It is difficult to arrive at numbers but the food processing industry employs large numbers of undocumented workers. According to data from an INS "raid" in a Nebraska EXCEL plant, as many as 17 percent of the plant's workers were undocumented. [FN72] A recent INS check of all of Kansas City's McDonald's restaurants uncovered inconsistencies in over 40 percent of the workforce's work papers. [FN73]

These very public INS activities have a double edge. On the one hand, it is undeniable that in these raids the INS captures some workers who are undocumented. This seems inevitable given employers' recruitment practices at the border and past the border, which is currently being challenged in court. [FN74] As well, INS "raids" can serve to confirm white residents' fears that Latinas/os are largely foreign and constitute a dangerous presence in a post 9/11 environment. [FN75] The tension created by the INS's very public enforcement actions can serve as a form of ongoing oppression. Naples found that INS "raids" in Midtown, Iowa, generated a sense of anxiety among Latina/o residents, regardless of whether they were citizens, noncitizens with proper papers, or undocumented workers. [FN76] Legal residents were being detained, driven far away, left without proper clothing or pocket money, and released without transportation back home.

II. Latina/o Newcomers: Discrimination or Integration?

Will Latinas/os in the Midwest be able to achieve the American Dream? Will Midwestern communities be able to incorporate Latinas/os who are fueling food production industries? These questions are important to the LatCrit enterprise, as the global becomes the local in the Midwest. The United States calls itself a nation of immigrants, but when cultural and racial newcomers come to largely white-settled areas there has been a history of conflict.
The Midwest, in particular, has been settled by European immigrants who formed new farm communities. In Nebraska, Iowa, and Missouri, enclaves of German American communities survived the hostility of World War I [FN78] and remained bicultural, German-speaking, and practicing religious and cultural practices from the old country, including agricultural rites of spring and fall reflecting versions of what these immigrants did in their nations of origin. [FN79] This immigrant regional history co-exists with a memory of Jim Crow legal regimes toward Mexicans and Mexican Americans. In Kansas City, Missouri, and Topeka, Kansas, Latinas/os were segregated from whites in public schools. [FN80]

Are Latinas/os being fully and positively incorporated into local communities? The answer is that community relations are an ongoing struggle in the rural Midwest, as they are elsewhere in the United States. On the one hand, there are positive forces for incorporating Latina/o communities in the same fashion rural German Americans were able to acculturate and integrate into local farm communities. Individual communities in Kansas, Missouri, Iowa, and Nebraska have worked hard to provide for the needs of newcomers. [FN81] In Missouri, in each hyper growth rural county a community group has sprouted up in response to the perceived needs of immigrants. Such religious or community-based nonprofit organizations are usually the brainchild of a handful of local neighbors or church groups who are drawn because of the needs they witness. Religious leadership has been significant. [FN82] In Kansas and Missouri, religious organizations organized a summit of community workers. In Nebraska, grassroots civil rights lawyers working with academics have drawn attention to the issue of immigrants in meatpacking plants. [FN83] Iowa adopted an official strategic plan that would have had the state be designated as an “immigration enterprise zone.” The plan would have allowed immigrants to relocate in greater numbers and more rapidly, [FN84] and would have exempted Iowa from application of certain provisions of federal immigration laws.

Nonetheless, signs of conflict exist and persist. Latinas/os are reporting that they are experiencing discrimination. In two Missouri surveys, half of the respondents reported they had encountered discrimination. [FN85] In southwest Missouri, adults ranked discrimination second to language barriers among the significant hurdles that they face in bettering their families. [FN86] Youths were more likely than adults to report experiencing discrimination and see discrimination as a major barrier to their becoming successful in their communities. [FN87] This finding foreshadows future tension, since youth who perceive rejection are less likely to identify with the majority culture and opt instead for separatist forms of self-identification. [FN88]

The Missouri survey data depict a wide range of reported experiences. By far the most readily identifiable source of discrimination was work. [FN89] On-the-job treatment may be viewed as a source of discrimination because of the practices in meat and poultry processing plants. A New York Times report describes tasks being doled out by race and ethnicity, with Latinas/os doing the dirtiest and lowest-paid jobs (for example, cutting), African Americans holding dirty jobs at a slightly higher pay (such as killing), and whites doing the higher-skilled and best-paid jobs (like repairing machines or packing). [FN90] Research by Griffith, Gouveia, and Stull also reports that employers often give immigrants the toughest shifts and start them at the bottom of the pay ladder. [FN91] These practices underscore that Latina/o newcomers begin their lives in Midwestern agromaquila communities at a large socio-economic deficit. They come in as low-paid workers filling the least desirable jobs; they struggle economically because of their low pay; and their jobs subject them both to physical hardship and conditions that assault their human dignity. The difficulty of Latina/o meatpacking immigrants can best be summed up by the statement oft repeated that Latina/o immigrants are taking the jobs that Americans find undesirable.
There is an argument to be made that the most significant factor dividing immigrant Latinos/as and established white residents is the economic distance created by Latinos/as' low wages and difficult jobs, rather than race or culture. In a study of three meatpacking communities in Nebraska, researchers found that Latina/o immigrants and long-term white residents had a great deal in common. Each group saw the same positives in their communities (a quiet life) and the same challenges (for example, child education and adolescent drug use). The most salient explanation for feelings of alienation and lack of well-being appeared to be the economic situation of Latina/o families. The researchers conclude that alliances and bridge-building may be possible if diverse groups can become conscious of their commonalities.

While it is true that economic status and income earning potential is a key divider between white established residents and immigrant newcomers, there are also racial dynamics at play. These are no different in the Midwest than in other communities. Many of the markers of racial construction that Latinas/os experience elsewhere--caste-like treatment based on phenomology, anti-foreign sentiments, struggles over language, and outright discrimination because of suspected illegal status--are also at play in rural Midwest communities. In the Missouri survey, besides work, Latinas/os cited as sources of discrimination "because I am Mexican, they don't like my race" (around one-quarter); encounters in restaurants, stores, and in procuring housing or medical services (around one-third); and because the Latina/o respondent did not speak English (less than 10 percent). Nancy Naples concludes that the general perception of "illegal" status, the construction of Latinos/as as potential criminal wrongdoers, and hostility to Latina/o cultural practices, such as speaking Spanish, will "prevent their full acceptance by their European American neighbors." This view echoes the racial determinism strain of Critical Race Theory and LatCrit.

Racialization also can be conceptualized as an ongoing dynamic local process that can be influenced by local interventions. Different local histories, economic conditions, local racial attitudes, and community leadership can affect how Latina/o immigrants are received in small local communities and whether they remain isolated and not integrated into social and economic local institutions. Under this view, local context is significant in how successfully new immigrants are able to incorporate themselves into local communities. Alejandro Portes and Ruben Rumbaut ask an important question: What makes the process of integration occur more quickly and smoothly in some communities as opposed to others? Their concept of "context of reception" emphasizes that legal structures can make it easier for immigrant newcomers to integrate successfully into existing communities. Governmental laws and policies can promote positive long-term incorporation. Lourdes Gouveia and Michael Broadway add that local social and cultural factors can ease transition of immigrant newcomers.

Theoretically, communities more open to new ideas and "multiculturalism" will be more successful at integrating new immigrants who are racially and culturally distinctive. The culture of certain communities may be more open to new racial immigrants and unfamiliar cultural practices. There is some indication that this may be at play in the Midwest by comparing distinctive communities. In Columbia, Missouri, home to the flagship campus of the University of Missouri, "multiculturalism" is a goal of local government, put in practice by local volunteers who convene "speaker's circles" around race relations. The chief of police espouses "zero tolerance" toward racial profiling. Local law enforcement does not detain immigrants who use false identification; instead, they confiscate it and let the immigrant go. (The justification is that the Kansas City INS office has repeatedly expressed no interest in routine immigration violations, preferring to concentrate on criminals and terrorists.) In this community, Latinas/os should be in a better position to integrate into the community. One datum that might indicate that this is the case is that Latinas/os in Columbia report lower levels of discrimination, around
30%, [FN104] compared to 40% and 66% in rural towns with agromaquila centers. [FN105]

Communities that have a strong historical memory of racial conflict, on the other hand, should experience more difficulty in integrating Latina/o immigrants. Southern Missouri has been home to white supremacist, white militia groups and Christian Identity groups. [FN106] The Christian Identity movement [FN107] and the Skinheads [FN108] have a strong presence in Southern Missouri. The handful of pastors *357* within the Christian Identity movement who have national prominence are all located in the Ozarks region of Missouri. [FN109] The Hammerskin Nation prints its newsletter from Springfield, Missouri, and held a concert in April 2001 attended by thousands of youth. [FN110] Reflecting that this may be a social context that is not receptive of immigrants of color, Southern Missouri is where Latinas/os are having the most problems with law enforcement and driver's license bureau officials, [FN111] and more frequently are experiencing hate crimes.

Hate crime statistics maintained by the Department of Justice indicate that among Kansas, Iowa, Missouri, and Nebraska, Missouri has the largest total number of reported hate crime offenses against Latinas/os, [FN112] even though Missouri has the smallest number of Latina/o residents. In the southwest corner of Missouri, in Purdy, a church catering to a Latina/o congregation was attacked three times in 2000 and 2001. The most recent incident, on June 8, 2001, involved a church window being shot out. [FN113] On July 16, 2001, four Latina/o families in Noel, Missouri, also located in southwest Missouri, awoke to find their cars vandalized and "KKK" signs on their lawn with ethnic slurs and death threats written on them. [FN114]

Acculturation, integration, and incorporation are never simple, smooth processes. The entry of large numbers of Latinas/os into communities that have long been predominantly (if not totally) white, middle class, ethnically European makes Latinas/os' phenomology, language, [FN115] religion, [FN116] cultural practices, [FN117] and ideology immediately relevant, and a potential source of interethnic and racial conflict. [FN118] For these reasons, unease has been triggered by large Latina/o immigration. Gouiveia's study of integration of Latinas/os in Nebraska captures anxiety and tension. [FN119] The mood captured by Missouri's Legislative Joint Immigration Committee hearings during 1999 and 2000 was one of apprehension and general unfamiliarity. [FN120]

Race, language, and cultural conflicts are playing out in Midwest communities in a variety of ways. First, as mentioned, Latinas/os start their lives in Midwest rural communities from a social deficit position. Portes and Rumbaut *358* emphasize that the key determinant of successful integration is how much social distance must be traveled between the immigrant and the host community. [FN121] Lack of knowledge of English, low levels of educational attainment, a subsistence income, and class differences are key barriers to successful acculturation and economic integration.

Second, cultural practices can be a flashpoint for conflict. Latinas/os in rural areas have a great need for "affordable" housing, yet low stocks often means that Latinas/os are living in shantytowns, substandard rentals, and mobile home communities at the edge of town. [FN122] High rents, relative to wages earned, means many crowd into available housing. On hot evenings, as is customary in Latin America, Latinas/os may congregate socially outdoors, play music, and interact. [FN123] These are cultural practices that do not necessarily fit well in farm communities, where families are accustomed to retiring to the privacy of home life in the evenings. This is an example of conflict where there might be a mix of cultural distinction, socio-economic distance, and racial stereotyping. From the perspective of some whites, this Latina/o cultural social practice may symbolize that
Latinas/os do not want fit in, are inferior to ____ (fill in the blank as to speaker's own racial or ethnic group), are bringing down the neighborhood, being "un-neighborly," "low class," etc.

Third, anti-foreigner sentiment continues to be a strong racial marker applied to Latinas/os. Unwelcoming remarks, like "Go Back to Mexico" and "Why can't you speak English?", which were captured in the Missouri surveys, emphasize the perceived foreignness of Latinas/os. [FN124] LatCrit has described that racialization of Latinas/os as well as Asian Americans falls along the lines of fencing them out of the construct of being American. Residents from white European immigrant stock distinguish themselves as "real Americans" (meaning that Americans are those of white European heritage), while Mexicans and Mexican Americans are foreign. Nancy Naples's study of rural Iowa provides a description of this process by a Texan Mexican American respondent:

A lot of the Americans think that because we're brown everybody comes from Mexico and it's not like that you know . . . because you can be Mexican, Hispanic, and you come from Texas, . . . Chicago. . . . You can be born and raised in California . . . . They think . . . "they're from Mexico. They're all foreigners." [FN125]

Further emphasizing the so-called "foreignness" of Latinas/os are language issues. In rural areas a large proportion--up to 70 percent in southwest Missouri [FN126]--of new immigrants report difficulty with English. Most white Americans view speaking English as an essential attribute of what it means to belong within the polity of the United States. Continued use of Spanish is, for some, a conspicuous indicator of a failure to assimilate and be faithful to the American ideal. [FN127] This is a conflict of symbology and ideology, what does America stand for, and whether those who do not abandon their own home culture and hold on to a distinct non-European, non-white cultural identity are "real" Americans. [FN128] Community responses to the author's comment in a Nebraska newspaper that "the influx of Latinas/os into the Midwest was a positive influence that would benefit the entire community" reflect this mix of cultural hostility and symbolic conflict:

RESPONDENT #1: I have been looking for a job here for about a month now. . . . Both jobs require applicants to be bilingual. . . . I'm not racist. I work at a job now where we have a large Hispanic clientele and I've never had problems communicating with them. They usually bring a child or other adult along with them to interpret. I'm upset because I thought I lived in America where the national language was English. Why then am I being discriminated against in my own country???? . . .

I have compassion, but what about us? Now the desirable jobs are being taken away from those of us that are Americans. Is that fair? RESPONSIVE 2: While I agree that these folks are not going to speak English immediately, I think we make it too easy for them not to learn English and otherwise assimilate at all. If my grandparents could have been taught in the public schools in their native tongue of German, they would never have learned English. Nor would my parents, and I would now be speaking German as well. . . . If they do not learn English in America they have virtually no chance to succeed. They will always live in a sub-culture which will always border poverty. That sub-culture will be a perpetual problem for the rest of society, i.e. higher crime rate, higher cost to educate, etc. etc. This problem, fortunately, is usually cured in one generation. At least it always has been in the past. But we must pressure incoming people to learn English and otherwise assimilate . . . what we need is One America, One Culture, One Language. [FN129]

In sum, Midwest communities are struggling to come to terms with the cambio de colores (change of colors). In small communities Latinas/os are highly visible. Tensions
cannot be disguised for long. Midwest communities have found it difficult to cope with the costs, both economic and social, that agromaquila development has shifted to local communities. Long-time residents have seen their towns change very quickly. Disappointment surfaces when the promises of economic benefits fall short of what was initially promised. The costs and consequences of rapid immigration have put pressure on affordable housing, social services, and local school districts, and have vexed local law enforcement officers unable to speak Spanish.

However, in small communities local leaders and residents do not have the luxury, as they do in urban centers, of ignoring racial tensions. Incidents occur, by accident or otherwise, that disturb the semblance of racial and social equity, and good neighborliness. These incidents can rouse leadership out of (white middle-class) complacency and cause communities to take notice of the changes occurring around them and become proactive to ensure that these changes are positive. Hence, these incidents create opportunities for positive impacts. For example, in California, Missouri, the catalyst for community soul-searching occurred when a fire in a rundown apartment building killed five Latina girls, ages 9 months to 11 years, and their 35-year-old father. Accusations surfaced that the family trying to fight the fire was unable to get neighbors to help. Some reported that what happened reflected more on the family's isolation than on the neighborliness of the community. [FN130] After the fire there was greater support for "multicultural activities." Reverend Francis Gilgannon maintained that "there was some fear [of Latinas/os] at the beginning, . . . since then the fear has dissipated because nothing happened . . . . People see them as good workers and caring people, with great concern for their families." [FN131] These comments point to an area of common ground. Host communities can find areas of mutual appreciation, as in a shared work ethic, "family values," and love for rural life. [FN132] Local "multicultural" groups, community centers, and even city hall can be important venues where communities can engage in communicative as well as critical dialogue.

III. What Are Key Legal Issues for Latinas/os in the Midwest?

The discussion in Part II underscores that Latinas/os in the Midwest are confronted with a set of challenges that have some commonality with national concerns, but are also unique to the Midwest. For Latinas/os in the Midwest the key legal issues are (A) language, (B) access to driver's licenses, and (C) local enforcement of immigration laws.

A. Language

In the rural Midwest, surveys report that as many as three-quarters of Latinas/os have trouble with English. [FN133] Therefore, language issues are survival issues. Non-English-speaking immigrants must co-exist in rural areas where for the most part Latina/o immigrant communities are not yet large or self-sufficient enough to make English dispensable. English is necessary in basic transactions, buying food and clothes, obtaining help from local government offices, enrolling kids in school, going to the doctor, and communicating with supervisors at work.

The Limited English Proficiency (LEP) regulations [FN134] issued in June 2002 could greatly help non-English speakers who live in rural communities. Under the regulation, recipients of federal financial assistance must provide meaningful access to their services to LEP persons. [FN135] What services must be provided is the result of a four factor assessment, which includes the number of such persons to be serviced, the frequency with which they come into contact with the program, the importance of the program, and the resources available. [FN136]
In hyper growth counties, Latinas/os represent a significant presence. Up to now, few translation services have been routinely available in areas having great day-to-day impact, like health services and law enforcement. However, since the final regulations have only been recently issued, there is an ongoing process of making determinations as to what translation services localities must provide. In the many rural areas where there has been no accommodation to LEP persons, this focus on legal requirements will be helpful in improving the situation of non-English-speaking immigrant Latinas/os.

In law enforcement, language issues are more complex. Data suggest language may be playing a role in searches and arrests of Latinas/os. Data from Missouri show racial profiling of Latinas/os occurs most frequently in rural counties where there has been Latina/o hyper growth, and that Latinas/os are being searched and subsequently arrested at up to eight times the rate for white drivers. [FN137] In some rural counties one in two stops are resulting in searches. [FN138] In these cases, limited English proficiency may mean an inability to understand fully what rights the driver has when the officer interrogates the driver at the stop. Constitutional rights protect all persons against unreasonable stops by law enforcement and may only be waived knowingly and intelligently. [FN139] When a police officer is questioning a non-English-speaking driver there may be no communication. What the officer takes to be consent may not be consent but a non-response. [FN140]

Language also plays a role in private settings. Non-English-speaking customers can enter into contracts not being fully informed of their obligations. [FN141] The issue of requiring translation into Spanish of major purchase contracts is only beginning to make its appearance on the consumer protection legislative agenda. Meanwhile, Spanish-speaking Latinas/os are prey to unscrupulous vendors and lenders. [FN142]

To protect the rights of Latinas/os in these contexts, public education needs to inform Latina/o immigrants of their rights in Spanish. For example, this author has developed a "know your rights" pamphlet for distribution to Spanish-speaking Latinas/os in Missouri. [FN143] However, there is a need for more law reform, and support for dissemination and education.

B. Driving in Rural America

Driving in rural America is a necessity. In most agromaquila centers there is no public transportation and where there is, those who work late shifts may find themselves cut off from service. In rural areas, Latinas/os are involved in traffic violations in greater proportions than their representation in the local population. [FN144] The most frequent violation is driving without a license. [FN145]

Welfare reform in the early 1990s resulted in states requiring social security numbers as a primary document to obtain a driver's license as a way to trace spouses who did not pay child support. [FN146] However, by requiring submission of social security numbers, certain noncitizens who have proper visas as well as undocumented aliens cannot qualify for driver's licenses. [FN147]

National Latina/o advocate and immigration groups have been lobbying in state legislatures for more accessibility. [FN148] In addition to the obvious inconvenience of not having ready access to transportation, other hardships are caused by lack of driver's licenses. Driving repeatedly without a license can escalate to a felony offense. Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, conviction for a felony is cause for deportation. This leads to hardship, as families can be broken apart. Prior to 9/11, Nancy Naples's research describes how driver's bureau officials in Iowa
were closely scrutinizing, and sometimes withholding, U.S. citizenship identification submitted by Latinas/os from Texas:

Anna Ortega . . . who is a bilingual United States citizen, was initially successful in her fight to protect other Mexican Americans from discrimination by DMV officials. . . . [The DMV] tried to take away the U.S. citizenship cards from the Tejanos. I had to bring the judge over and complain. I had to call immigration. I even had to call the mayor of Laredo, Texas to tell him what was going on here--that they were picking up our birth certificates saying that they were fake and that we were illegal aliens. [FN149] A recent report from southern Missouri mirrors this complaint. [FN150] These incidents point to local arbitrary and discriminatory practices based on stereotyping of Latinas/os as foreigners, a practice that only can be expected to increase post 9/11.

Barriers to driver's licenses, both legal and as part of erroneous administrative practices, is a source of tension between law enforcement and the Latina/o community. Racial profiling statistics in Missouri show racial profiling of Latinas/os is high in rural counties. [FN151] The data are not conclusive as to whether transit officers are racially profiling. Law enforcement indicates that there may be valid reasons for Latinas/os being stopped more frequently. Latinas/os reportedly are more frequently breaking driving laws than other racial or ethnic groups. The sources of these violations are driving without a license and lack of education regarding driving laws. [FN152] This points to a "Catch as Catch Can" situation. Latinas/os drive without a license because there are legal and administrative barriers to obtaining them. Because they are not going through the licensing process, they also lack education as to driving laws. Because of these conditions it appears that more Latinos/as are likely to violate traffic laws, which in turn may encourage local law enforcement to profile Latinos/as.

The legislative battle for reform will be difficult in the post 9/11 environment, where states are unsure as to what are their homeland security *364 responsibilities, [FN153] but are anxious to legislate in a way that appears to combat the "war on terrorism." As reported by the National Center for Immigration Studies, 38 states in 2002 considered driver's license reform, most pushing for more restrictive requirements. [FN154] Valid concerns regarding homeland security will counter reform efforts to grant driver's licenses to undocumented aliens. It is reported that all but one of the Al-Qaeda terrorists who commandeered planes on September 11 held driver's licenses. [FN155] On the other hand, some Midwestern legislators want to require visa expiration dates to be printed on state licenses as a tool that law enforcement allegedly can use to combat terrorism and allow better watchfulness of the "foreigners" in our midst. [FN156] Latina/o groups oppose these measures as they encourage thinking along the lines of foreigners (bad terrorists) versus U.S. citizens (good persons). This kind of line-drawing has too often resulted in Latinas/os being lumped with the (bad) foreigners.

A compromise position might be to impose stricter proof of identity requirements for obtaining driver's licenses. This would allow U.S. citizen Latinas/os as well as settled undocumented workers to be able to have access to driver's licenses. In the 2003 legislative cycle, Latina/o groups will have to monitor this issue.

C. Local Law Enforcement of Immigration Laws

In June 2002, the Department of Justice requested local law enforcement to cooperate with the federal government in patrolling noncitizens who have overstayed their visas. Attorney General John Ashcroft proposed that states participate voluntarily in the course of "encounters" by checking the National Crime Information Center (with photographs, fingerprints, and other information) system that post 9/11 maintains a list of persons who violate INS Entry-Exit Registration rules. [FN157] Ashcroft views this cooperation as
part of a "narrow anti-terrorism mission." [FN158] Thus far, only North Carolina and the Las Vegas Police Department have stated their intent to enforce immigration laws actively. [FN159]

Enforcement of federal immigration laws by local law enforcement in the past has resulted in greater police intervention in Latina/o communities and serial violations of Latinas/os' civil rights. The kind of stereotyping most likely to be applied to Latinas/os, as reported in Part II, is easily triggered in these contexts. Sheriff Ralph Lopez of San Antonio puts the issue in this way: "What are we saying? 'Hey you've got an accent. Let me see your passport.' It damn near leads us to racial profiling." [FN160] In 1997 local authorities in Chandler, Arizona, conducted a series of roundups to help Border Patrol agents find violators of federal immigration laws. Local residents, many of whom were U.S. citizens, including a local elected official, complained they appeared to have been racially profiled. Complaints led to an investigation by the Arizona Attorney General that concluded police stopped Latinas/os without probable cause, bullied women and children suspected of being undocumented, and made late-night entries into suspects' homes. [FN161] These practices could be repeated with even more frequency in a post 9/11 environment. In rural immigrant communities without ready access to civil rights groups or attorneys, the potential for civil rights abuses looms as an even greater threat. This area demands close attention at the state level.

IV. De Colores Conferences as LatCrit Praxis

A central tenet of LatCrit is that critical scholars act to improve the status of Latinas/os and groups subordinated because of gender, sexual orientation, race, ethnicity, and class status. LatCrit sees the formation of alliances as an important avenue to pursuing racial justice. In the area of rural Latina/o immigration, LatCrit scholars can work with academics in universities concerned with rural and agricultural issues.

In March 13-15, 2002, the University of Missouri sponsored Cambio de Colores (Change of colors) in Missouri: A Call to Action!, a conference focusing on the influx of Latinas/os in rural Missouri. [FN162] The University of Missouri financially supported this effort, as it saw the goals of the conference as fitting within the overall mission of a land grant state University. From the perspective of the University of Missouri Outreach and Extension arm, this was a signature event in that the conference assembled academics who presented their recent research on rural issues in Missouri, presented community best practices, introduced Latina/o cultural experiences in rural America, and trained University extension personnel. Findings have been reported in a monograph [FN163] and posted on a public website. [FN164]

This conference followed the LatCrit conference model. The planning took more than one year and involved more than 40 persons, including Outreach and Extension faculty, community workers, government officials, and social service workers. The planning process was a means to form new networks for social action. This community of learning continues to operate on a variety of civil rights, health, *366 and social issues. The conference was well received, with 250 attendees, and generated enthusiasm for creating new coalitions and learning communities interested in rural and racial justice.

Borrowing from LatCrit conference practice, from the beginning the Cambio de Colores conference was planned as an annual event that would rotate sites within the state. The project was perceived as a statewide effort, allowing for greater ownership by participants. In 2002 the conference focused on mostly rural issues since the site was Columbia, Missouri. In 2003, the conference shifts to Kansas City to focus on urban issues.
The Cambio de Colores conference experience could be duplicated in other Latina/o hyper growth states where there is a land grant university tradition focusing on agricultural and rural areas, such as Tennessee, North Carolina, Georgia, Nebraska, Kansas, Colorado, Arkansas, and Iowa. This type of LatCrit praxis provides a space for new alliances, and provides opportunities for activism to be spawned in state communities where it is needed the most. It is hard work, but highly recommended. It is also needed in this new era when Latina/o immigration is no longer confined to the Treaty of Guadalupe states. It is an educative tool that can help academics, social workers, and community groups start coming to grips with the new reality, that Latinas/os are increasingly making their homes in predominantly white, rural areas. In these places new networks have to be built, and this form of LatCrit praxis is one way to address the gap.

Table 1: Midwest Latina/o Growth

Table 2: Missouri Rural Latina/o Hyper Growth Counties, Ranked by Percentage Growth of Latina/o Population and Major Agromaquila Employers, 1990-2000

Table 3: Growth and Percentage Change for Total Population and Latina/o Population for Selected Nebraska Counties, 1990 and 2000

Footnotes:

[FNd1] © Sylvia R. Lazos Vargas 2002. Associate Professor of Law, Missouri-Columbia School of Law; Professor of Law, University of Las Vegas-Nevada, Boyd School of Law. J.D., University of Michigan. I wish to acknowledge the financial assistance of Missouri-Columbia School of Law, which helped to make this work possible. I also wish to thank Guadalupe Luna, Kevin Johnson, Domingo Castilla-Martinez, Corinne Valdivia, and Judith Davenport for helpful comments and their support.

[FN1] See infra Table 1.


[FN4] The number of Latinas/os per the 2000 Census is 35.3 million, or 13 percent of the total population of 281.4 million people. The number of African Americans is 34.7 million. Among African Americans are 710,353 people who self-identify as being of Latina/o ethnic origin. U.S. Census Bureau, Census 2000 Brief: Overview of Race and Hispanic Origin, Table 1, T.3 & 10 (March 2001), available at http://www.census.gov/prod/2001pubs/c2kbr01-1.pdf [hereinafter Census Hispanic Overview].

[FN5] Id.

Garden City is the largest community in western Kansas and larger than Dodge City. Garden City is 31% minority (25% Latinas/os). Lourdes Gouveia & Donald D. Stull, Dances with Cows: Beefpacking's Impact on Garden City, Kansas, and Lexington, Nebraska, in Any Way You Cut It: Meat Processing and Small-Town America (Donald D. Stull et al. eds., 1995).

The percentage of Latinas/os in some Missouri towns is as follows: Sedalia 5.6%, Milan 21.9%, California 7.6%, Southwest City 37.3%, and Noel 36.5%. OSEDA Hispanic Population, supra note 2.


Rochín, supra note 6, at 6.

Id. at 7-8.

Dept. of Rural Sociology, Social Sciences Unit, University of Missouri-Columbia, A Study of Minorities in Selected Non-Metropolitan Communities in Missouri (1999-2002); Jim Wirth, The Story of the Hispanic/Latino Experience in Southwest Missouri: Surveys of Latino Adults, Latino Youth, and Non-Hispanic Service Providers/Community Residents (University of Missouri Outreach & Extension) (2001-02) (on file with author) [hereinafter Southwest Survey].


Mark A. Grey, Meatpacking and the Migration of Refugee and Immigrant Labor to Storm Lake, Iowa, Department of Sociology, Anthropology, and Criminology, University of Northern Iowa (July 1996) (unpublished manuscript).

Gouveia & Stull, Dancing with Cows, supra note 7.

Rochín, supra note 6, at 8.


positive public identity and legitimacy).

[FN20] Nancy Naples, Contested Needs: Shifting the Standpoint on Rural Economic Development, 3 Feminist Econ. 63, 83 (1997) (reporting the perspectives of newcomers and the difficulty of fitting in for those whose viewpoints fail to conform to the majority's. A white woman with progressive political analysis of newcomers considered herself a "newcomer" because she came from outside of the Iowa rural community. Another woman born in a nearby town reported feeling like an outsider, and inferior because she "grew up on a farm.... I was a country bumpkin. It was difficult ... because here ... all these kids ... knew one another....").


[FN23] Id.

[FN24] See infra Table 2.

[FN25] Id.

[FN26] For example, in Atchison County total population 6430, Latina/o population 43; Reynolds County total population 6689, Latina/o population 55; Shelby County total population 6799, Latina/o population 43; Gentry County total population 6861, Latina/o population 44; Clark County total population 7416, Latina/o population 52. See OSEDA Hispanic Population, supra note 2.


[FN28] See infra Table 3.


[FN34] Gouveia & Stull, supra note 7, at 89; Benson, supra note 31.
[FN35]. Naples, supra note 32.

[FN36]. The top five meatpacking companies by 2001 revenue were ConAgra ($20 billion in sales), IBP ($17 billion), Cargill ($10 billion), Tyson ($7.1 billion), and Smithfield ($5.1 billion). Tyson Foods has since acquired IBP, making Tyson the largest food company in the world. Reap 2001 Report on the Meatpacking Industry (2001), available at www.reapinc.org.


[FN38]. James M. MacDonald et al., Consolidation in U.S. Meatpacking, U.S.D.A. Ag. Econ. Rep. (No. 785) 37-39 (1999). These authors view consolidation and decentralization as a response to the very intense competition in this industry.


[FN40]. Michael J. Broadway et al., What Happens When the Meat Packers Come to Town?, 24 Small Town, Jan.-Feb. 1994, at 24.

[FN41]. Gouveia & Stull, supra note 15; Mark A. Grey, Pork, Poultry, and Newcomers in Storm Lake, Iowa, in Any Way You Cut It, supra note 7. Mark Grey reports that in Storm Lake, Iowa's decision to site an IBP plant various spurious assumptions were made, for example, how many jobs would be brought (only one-fourth what was estimated to begin with), what the economic contributions of the workforce might be (failed to calculate how lowly paid the workers would be).

[FN42]. Unionizing the Jungles Labor and Community in the Twentieth-Century Meatpacking Industry (Shelton Stromquist & Marvin Bergman eds., 1997) (discussing how, in the late 1970s, the meatpacking industry was centered in northern cities like Chicago and Omaha, where union wages hovered at $18 an hour); Eric Schlosser, The Chain Never Stops, Mother Jones, July/Aug. 2001 ("This trend began with Iowa Beef Packers (IBP) moving their packing plants to the Midwest in the late 60's, far away from union strongholds, and instead recruiting immigrant workers from Mexico."). See also MacDonald et al., supra note 39, at 38 (noting the labor strife may have been a product of price competition, not necessarily antagonism toward labor unions).


[FN45]. Id. "Further automation ... depends on 'developing economical and reliable cutting machinery capable of adapting to the physical differences in animal carcasses'" (quoting Technology and Labor In Four Industries, BLS Bulletin 2104 (Bureau of Labor Statistics, 1982)).

[FN46]. See MacDonald et al., supra note 39, at 15-16 (reporting that hourly wages at poultry processing at around $7.50 per hour and meat processing plants range at about $8.50 per hour in 1992); Grimsley, infra note 50 ("Immigrants are routinely paid $6 an
hour to work in poor conditions and an extremely dangerous environment."); Schlosser, supra note 43 ("Today meatpacking is one of the nation's lowest-paid industrial jobs, with one of the highest turnover rates."); Gouveia and Stull report that wages in Lexington, Nebraska, hover at $7.15 an hour, and in Garden City at about $6.60. See Gouveia & Stull, supra note 7, at 90; Gouveia & Stull, supra note 15.


[FN48] The authors of an economic study suggest that labor conditions have actually worsened as a result of economies of scale and consolidation. See MacDonald et al., supra note 39, at 37-38. But see Iowa Beef Packers Statement on the 60 Minutes story (March 9, 1997), available at http://www.ibpinc.com/ibpnews/IBPNews.asp?date=3/10/1997&id=53&Display=Post: IBP provides a safe work environment and competitive wages for its workers. We use whatever resources are available to us--including the most advanced technology, job training programs, language classes and monetary assistance-- to make the work, and sometimes the transition to a new lifestyle or community, safer and easier.


[FN53] Researchers contend U.S. capital, specifically U.S. employers, is the big magnet for both legal and illegal immigration from Mexico and Central America. U.S. wages, which even at minimum wage can be six to ten times higher than prevailing wages in Mexico and most of Central America, "pull" immigrant labor to the United States. Even the relatively well-educated will seek out harsh jobs in hopes of attaining lifelong dreams of middle-class comfort. See Wayne Cornelius & Philip Martin, The Uncertain Connection: Free Trade & Mexico-U.S. Migration: Free Trade & Mexico-U.S. Migration (1993); Alejandro Portes & Ruben B. Rumbaut, Immigrant America: A Portrait 17-20 (1990); Marcus Stern, Jobs Magnet, San Diego Union Trib. Nov. 2, 1997.

[FN54] Griffith, supra note 33, at 141; see also Naples, supra note 32 (discussing word of mouth recruitment).

[FN55] See also Broadway, supra note 41, at 25; Gouveia & Stull, supra note 15 (examining their case study of IBP plant in Lexington, Nebraska, researchers found turnover of 12% per month and in Excel's Dodge City, Kansas, plant turnover averaged 30% per month).

[FN57]. Interviews with PDF personnel in Milan, Missouri.

[FN58]. See Naples, supra note 32, at 7. She reports on the following interview:
I decided to come here with my daughter, my son and my husband because this job
announcement was in the newspaper. It came in the newspaper in Laredo, Texas and it
had a little sign saying "Southwestern town in Iowa now hiring full-time employees for
[food processing] company" and it had the toll-fee number to call. So we called. Got
hired. We did the fax machine applications. They told us "Come on down. You have a
job." So we came.
See also Grey, supra note 16, at 4 (reporting that in his study of Mexican immigration to
Storm Lake Iowa, all 70 individuals surveyed had been recruited by a Texas-based
recruiter. Men from Chihuahua were approached by the recruiter about jobs in Storm
Lake, Iowa).

[FN59]. Indictment available at http://
www.tned.uscourts.gov/cases/401cr061/tyson.PDF.

[FN60]. The indictment alleges that six Tyson managers participated in the scheme to
smuggle 2000 undocumented workers into the United States, and that the smugglers
were paid between $100 and $200 a worker with Tyson corporate checks. See also David
Barboza, U.S. Accuses Meat Processor of Recruiting Illegal Workers, N.Y. Times, Dec. 20,
2001; Christopher Leonard, Hooked on Tyson, Colum. Daily Trib., Oct. 31, 1999, at 1D,
4D.

[FN61]. A lower-level employee has been convicted of being the smuggling leader. See
Kevin Sack, Immigrant Lived American Dream by Trafficking Illegals into U.S., N.Y.
Times, Jan. 27, 2002.

[FN62]. Tyson said it "has a long history of partnering" with the INS "to ensure corporate
compliance with immigration laws." Tyson Execs Charged with Smuggling Illegal Aliens,
newsmax.com/archives/articles/2001/12/19/154608.shtml.

[FN63]. Gouveia & Stull, supra note 15.

[FN64]. Id. Broadway, supra note 41, at 25. According to a mid-Missouri survey, most
Latina/o immigrants earned below $8 per hour. In Jefferson City the median wage was
$6.50 per hour, California $7.90, Sedalia $8.00, and Marshall $10.50. Mid-Missouri
Survey, supra note 14. In the survey of southwest Missouri, half of respondents reported
annual household income between $10,000 and $24,999, and 19% earned less than
$10,000. Southwest Survey, supra note 14, at 7.

[FN65]. Gouveia and Stull report hardship is particularly pronounced among Latinas/os,
who come from agricultural regions in Mexico and do not have the cash necessary to ease
initial transition. Gouveia & Stull, Dances with Cows, supra note 7, at 101. See also Steve
Jeanetta, Missouri Communities Responding to Change (February 2002). available at
www.decolores.missouri.edu (reporting same in Missouri).

[FN66]. Gouveia & Stull, supra note 15. According to Census data, in McDonald and
Dunklin between 25 and 43 percent of all children live below the poverty line; in Barry,
between 20 and 25 percent; and in Newton, Lawrence, Pettis, Saline, and Sullivan,
between 15 and 20 percent. Office of Soc. and Econ. Data Analysis, An Update on
Missouri's Children and Families, available at
http://www.osedamissouri.edu/presentations/.
[FN67]. See Jeanetta, supra note 67. In the Missouri Southwest survey respondents who were asked what were their most pressing human needs, one-fifth responded food; over one-third responded clothing and shoes; one-quarter responded heat, electricity, and plumbing. Southwest Survey, supra note 14, at 8.


[FN69]. See Sylvia R. Lazos Vargas, Cambio de Colores (CHANGE OF COLORS): Legal and Policy Challenges as Latinas/os Make Their Homes in Missouri, University of Missouri Outreach and Extension (forthcoming 2003).

[FN70]. El Norte is a movie directed and written by Jorge Nava that vividly depicts the mythology that for the poor Latin American, many indigenous, migration to the North will result in middle-class status, abundance, and a happy family life. El Norte (Anna Thomas 1983) (motion picture). The reality, unfortunately, is that many immigrants endure untold hardship and suffering, loss of human dignity in this migration North, and then when they arrive they are sentenced to mind-numbing work, like the manual labor of a meat processing plant. See Valerie M. Mendoza, They Came to Kansas: Searching for a Better Life, 25 Kan. Q. 97-106 (1994).

[FN71]. I am drawing this profile from my monograph on this subject, Cambio de Colores (CHANGE OF COLORS), supra note 71; Grey, supra note 16 (describing characteristics of Latina/o immigrants to Storm Lake, Iowa); Carranza & Gouveia, supra note 15 (describing characteristics of Latina/o immigrants to Nebraska); Gouveia & Stull, Dancing with Cows, supra note 7 (reporting on experiences in Garden City, Kansas).

[FN72]. In May and June of 1999, the INS mounted an enforcement operation in the Vanguard meat processing plant in Nebraska; 4500, or 17 percent, of the 26,000 employees had suspect documentation. Most workers quit on the spot; only 23 were arrested. See Philip A. Martin, Farm Labor in California: Then and Now, CCIS Working Paper No. 37 (Center for Comparative Immigration Studies April 2001), available at http://www.ccis-ucsd.org/PUBLICATIONS/wrkg37.PDF.


[FN74]. See supra notes 61-64 and accompanying text.

[FN75]. Grey, supra note 16, at 5 (noting that INS raid in Storm Lake, Iowa's IBP plant in which 64 workers were found to undocumented "seemed to validate residents' concerns about illegal immigration.").

[FN76]. See Naples, supra note 32, at 8. She reports the following: Sanchez and other Mexican and Mexican American residents in Midtown witnessed the deportation of many co-workers when the INS "raided" the town in the spring of 1992. INS officials waited in the parking lot outside the plant and picked up Mexican and Mexican American residents walking along the streets and playing in the school yard. Landers, a life long resident of the area, believed that a local white resident who resented the Mexicans and Mexican Americans contacted the INS. The tension created by this and other "raids" in Midtown generated a sense of anxiety among everyone including those with United States citizenship and legal working papers. Since legal residents had also been picked up in the raids and driven to Omaha before they were released without
transportation home, their fears were well-founded. According to an official working at INS's regional office in Omaha, Nebraska, they received an anonymous tip.


[FN82]. This was one of the key findings of the Missouri legislative committee that during 1999 to 2000 took testimony over the impacts of Latina/o immigration in Missouri. Jt. Comm. Rep. Immigration, supra note 83.


[FN85]. In southwest Missouri 52% of adults responded that they had experienced discrimination. Southwest Survey, supra note 14, at 18 (item 3a). In the Midwest survey, 129 of 270, or 48%, responded that they had encountered discrimination. Mid Missouri Survey, supra note 14. On this item, the Midwest survey data is outweighed by the responses in Sedalia, where 66% responded affirmatively to the discrimination question. Sedalia had the largest sample size in the survey. (Sedalia n=125; California n=31; Jefferson City n=45; Marshall n=55; Columbia n=14).

[FN86]. Adults ranked discrimination (13%)--in numbers statically equal to jobs (14%) and legal documentation (15%)--second to language barriers (35%) as one of the greatest hurdles that they face. Southwest Survey, supra note 14, at 1.

[FN87]. In southwest Missouri 62% of youths responded they had experienced discrimination. Southwest Survey, supra note 14, at 37 (item 4). They ranked discrimination (19%) second to language barriers (36%) as the greatest issues they face, supra note 14, at 1.

See Mid Missouri Survey, supra note 14; Lazos, supra note 71.

According to New York Times reporter Charlie LeDuff:
The first thing you learn in the hog plant is the value of a sharp knife. The second thing you learn is that you don't want to work with a knife. Finally you learn that not everyone has to work with a knife. Whites, blacks, American Indians and Mexicans, they all have their separate stations. The few whites on the payroll tend to be mechanics or supervisors. As for the Indians, a handful are supervisors; others tend to get clean menial jobs like warehouse work. With few exceptions, that leaves the blacks and Mexicans with the dirty jobs at the factory, one of the only places within a 50-mile radius in this muddy corner of North Carolina where a person might make more than $8 an hour.
See LeDuff, supra note 50; see also Griffith, supra note 33 (noting job segregation based on tenure at the plant).

Gouviea & Stull, Dances with Cows, supra note 7, at 90, 101; Griffith, supra note 33, at 146.


Davenport & Dannerbeck, supra note 94.

In Sedalia, 21% and California, 27%, Jefferson City 33%, cited this source of discrimination. See Mid Missouri Survey, supra note 14. See Lazos, supra note 71.

In Sedalia, 16%, in California, 36%, and Jefferson City (33%) cited these as sources of discrimination. See Mid Missouri Survey, supra note 14; Lazos, supra note 7. In southwest Missouri 47% responded that they had experienced discrimination in these locations. Southwest Survey, supra note 14, at 18.

In Sedalia, 8% and in California, 9% cited this as a source of discrimination. See Mid Missouri Survey, supra note 14; Lazos, supra note 71.


See Derrick Bell, And We Are Not Saved: The Elusive Quest For Racial Justice (1989); Derrick Bell, Faces at the Bottom of the Well 3 (1992) [hereinafter Faces].


Portes & Rumbaut, Legacies, supra note 102, at 313.

Gouviea & Stull, supra note 7, at 101.

Michael Broadway, Planning for change in small towns or trying to avoid the slaughterhouse blues, 16 J. Rural St. 37-46 (2000); Broadway, supra note 41.


[FN105]. Id. These rates correspond to Sedalia, Missouri and Marshall, Missouri.

[FN106]. Michael Foster, A Profile in Hate: A Review of the Activities of Hate Groups Targeting Missouri's Latino Population (2002) (on file with the author). These groups have varying ideologies, but at the core is their belief that whites are inherently superior to persons of color. Some of these groups are small and mainly active through their web pages. White supremacist groups with a presence in Missouri include Imperial Klans of America--Annapolis; World Church of the Creator--Clarkton; League of the South--Columbia; Faith Baptist Church and Ministry--Houston; Council of Conservative Citizens--Iron County; National Organization for European American Rights--Kansas City; Knights of the White Kamelia--Leslie; Imperial Klans of America--Mapaville; American Knights of the Ku Klux Klan--Nixa; Women for Aryan Unity--O'Fallon; New Order Knights of the Ku Klux Klan--Overland; Church of Israel--Schell City; Hammerskin Nation--Springfield; Council of Conservative Citizens--St. Louis; National Organization for European American Rights--St. Louis. This list was compiled through web research and by consulting with the Missouri State Highway Patrol, Hate Crimes Unit. Missouri is one of only a handful of states that has a specific unit dedicated solely to hate crimes. It was created in the mid-1980s in response to an increase in activity of the Christian Identity and Common Law Court movements in the southern portion of the state.

[FN107]. Id. The Christian Identity movement, formerly known as Anglo-Israelism, is composed of groups that believe Anglo-Saxons are the direct descendants of the twelve tribes of Israel and that only the white race are God's people.

[FN108]. The Confederate Hammerskins from Missouri are located in Springfield. The Hammerskin Nation prides itself on its exclusivity and commitment to hatred. According to David Lane, a convicted Neo-Nazi terrorist, the organization is "only here to secure the existence of our people and a future for White children." Center For New Community Background Brief, Violent Neo-Nazi Group Plans April 21 White Power Music Concert in Springfield, Missouri, at http://webmail.mizzou.edu/exchange/Attac...B3ED6BBBD51B4E30000E867D06E-CNCBackr.htm.

[FN109]. Foster, supra note 109.

[FN110]. See supra note 111.

[FN111]. See Lazos Vargas, supra note 71.


[FN115]. See Mid Missouri Survey, supra note 14; Southwest Survey, supra note 14. Close to 80% of Latinas/os in Missouri report language as being their number one barrier.
In the Missouri Southwest Survey, service providers perceived language barriers (39%) and cultural adjustment (12%) as being the greatest issues facing Latinas/os in Southwest Missouri. See Mid Missouri Survey, supra note 14; Southwest Survey, supra note 14.

[FN116]. About 80 percent in the mid Missouri and 62 percent in the Southwest survey report being Catholic. Southwest Survey, supra note 14, at 1; Mid Missouri Survey, supra note 14.

[FN117]. Latinas/os celebrate religious traditions, such as el Día de los Muertos (Day of the Dead) and the celebration of the Virgen de Guadalupe (Patroness of Mexico) in local community events. Jeanetta, supra note 67.


[FN121]. Portes & Rumbaut, Immigrant America, supra note 55.

[FN122]. See Broadway, supra note 41, at 25; Nancy Naples, A Feminist Revisiting of the Insider/Outsider Debate: The Outsider Phenomenon in Rural Iowa, 19 Qual. Soc. 83, 95 (1996); Lazos Vargas, supra note 71 (reporting on affordable housing shortages in Missouri).

[FN123]. See, e.g., Ron Graber, From Ameca to America: Learning the Language--After Moving from Mexico to California to Carthage, Topete learns English Language, Carthage Press (Aug. 15, 2002) (reporting on a Mexican immigrant commenting on different cultural practices such as socializing outside in the evenings); Murray Bishoff, Immigrant Concerns Aired To Blunt: Congressman Assemblies Area Hispanic Leaders As Focus Group, Monett Times, June 20, 2001 (reporting on Latina/o neighbors self-consciously commenting on cultural social practices, "we are loud, in a lot of ways ... we like to celebrate").

[FN124]. Anne Dannerbeck, field notes (California, Missouri) (on file with author).

[FN125]. Naples, supra note 125, at 96.

[FN126]. See Lazos Vargas, supra note 71.

[FN127]. See Lazos Vargas, supra note 121.


[FN130]. What role did language and cultural barriers play in this tragedy? It is not clear. In an interview, a neighbor said "the bad part of it is, because of the language barrier, and the cultural barrier, they didn't feel they could come over to call for help from my house." See Scott Charton, Small Town Reeling from Fire Fatalities, Colum. Daily Trib.,
Sept 18, 2000, at 1.


[FN133]. See Southwest Survey, supra note 14, at 1; Mid Missouri Survey, supra note 14.


[FN135]. Department of Justice regulations require all recipients of federal financial assistance from DOJ to provide meaningful access to LEP persons. The Department of Justice's role under Executive Order 13,166 is to provide LEP guidance to other federal agencies, which in turn will issue directives to states and contractors who receive federal monies from them. See Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 C.F.R. 41455 (June 18, 2002) (final).

[FN136]. According to the Department of Justice regulations: Recipients are required to take reasonable steps to ensure meaningful access to their programs and activities by LEP persons. While designed to be a flexible and fact-dependent standard, the starting point is an individualized assessment that balances the following four factors: (1) the number or proportion of LEP persons eligible to be served or likely to be encountered by the program or grantee; (2) the frequency with which LEP individuals come in contact with the program; (3) the nature and importance of the program, activity, or service provided by the program to people's lives; and (4) the resources available to the grantee/recipient and costs. As indicated above, the intent of this guidance is to find a balance that ensures meaningful access by LEP persons to critical services while not imposing undue burdens on small business, or small nonprofits. 67 C.F.R. 41461.


[FN138]. 2001 Racial Profiling Report, supra note 140. The Perry County and Saline County Sheriffs departments report such high incidences. See Lazos Vargas, supra note 140, at Table 6.


[FN140]. Suppose a police officer stops and questions a non-English-speaking Latina/o driver. The officer asks if he can search the car. The driver understands nothing and just looks back with a blank stare. The police officer proceeds to search. Was there consent for a search in this case? If these are the facts, then this is a nonconsent that does not rise to the level of a knowing waiver. On the meaning of cultural silences, see Maria L. Ontiveros, Adoptive Admissions and the Meaning of Silence: Continuing the Inquiry into Evidence Law and Issues of Race, Class, Gender, and Ethnicity, 28 Sw. U. L. Rev. 337
(1999).


[FN142]. One of the reported complaints from a client who defaulted on her mortgage and lost her deposit was that her mortgage payment was greater than her total monthly income. The broker had falsified financial information, as he had for others. The client, who did not speak English, complained "we didn't understand a thing." The accused broker did not speak Spanish. See Christian Murray & Carrie Mason-Draffen, Preying on Immigrants' Dreams: Realtor Accused in Housing Scam, Newsday, Aug. 16, 2002, at A 08, available at http://www.Newsday.com.


[FN144]. 2001 Racial Profiling Report, supra note 140. See also Gouveia & Stull, Dances with Cows, supra note 7, at 96.

[FN145]. See Lazos Vargas, supra note 140.

[FN146]. See Michele L. Waslin, National Council of La Raza, Safe Roads, Safe Communities: Immigrants and State Driver's License Requirements, NCLR Issue Brief No. 6 (May 2002).

[FN147]. Id.

[FN148]. National Council of La Raza and the National Center for Immigration Studies have been leading a loose coalition of state community workers.


[FN150]. Personal correspondence to Sylvia R. Lazos from Jorge Arturo Salazar, Sept. 10, 2002 (reporting Neosho, Missouri DMV officials confiscated his birth certificate from Texas because it looked "suspicious").

[FN151]. 2001 Racial Profiling Report, supra note 140; Gouveia & Stull, Dances With Cows, supra note 7, at 96.


ad stating "terrorists are here" and used the word "foreigners" to describe the special driver's license).

[FN157]. John Ashcroft, Prepared Remarks on the National Security Entry-Exit Registration System, June 6, 2002. I discuss this issue at greater length in Missouri, the "War on Terrorism" and Immigrants, supra note 137.

[FN158]. Ashcroft, Remarks, supra note 162.

[FN159]. Cheryl Thomson, Florida Has Also Taken Steps, Wash. Post, Apr. 4, 2002.


[FN161]. Office of the Attorney General Grant Woods, Civil Rights Division: Survey of the Chandler Police Department - INS/Border Patrol Joint Operation, 1997, at 33. The Chandler survey concluded that local police involvement in immigration enforcement can present a conflict to the purpose and intent of neighborhood and community policing.... It is this mutual trust and respect that will in turn enhance the ability of local police to obtain from willing citizens the information and support necessary to carry out their mission to protect and serve. This joint operation ... greatly harmed the trust relationship between the Chandler Police and many of the City's residents. Id., at 33-34.


[FN163]. See Lazos Vargas, supra note 71.

Introduction

The Seventh Annual Latina and Latino Critical Race Theory ("LatCrit") Conference held in May 2002 at the University of Oregon, not unlike other efforts in the movement, addressed a panoply of challenging, provocative, and controversial issues. Perhaps one the most intellectually interesting and yet troubling panels addressed reparations for the inhabitants of United States' colonial territories. Specifically, the panel was titled "Reparations, Redress, and Remedies: Undoing the Legacy of Colonialism and Imperialism." Members of the academy as well as a representative of Puerto Rico's Independence Party participated in a lively discussion and debate. Although the articles resulting from this panel touch upon Puerto Rico's colonial dilemma, not all addressed the issue of reparations. It is the topic of reparations that is the focus of this cluster introduction.

The topic of reparations provokes strong feelings because, among other reasons, it is a request of the dominant culture to atone for past wrongs, primarily through monetary relief. [FN1] For many, the response to any request for reparations, but particularly for a request from the inhabitants of Puerto Rico, [FN2] would be: "Why reparations?" Not unlike reparations claims for Native Hawaiians, opponents to a Puerto Rican reparations effort would probably deem the reparations claims unavailing because the opponents simply would fail to perceive that any legal wrong has occurred. [FN3] This cluster introduction will address this question of "why reparations." Before addressing the nascent Puerto Rican reparations debate, a brief description of LatCrit theory is in order.

LatCrit theory is an academic undertaking led by legal scholars, primarily those of color, aimed at transforming or at least challenging the practice of producing legal scholarship within the North American legal academy. [FN4] LatCrit is, thus, a movement within the academy that is committed to both the internal transformation of the academy itself as a site for the production of knowledge, discourse, and standards, as well as to the external transformation of social and economic hierarchies and status through the law. [FN5] Though this effort involves both oral presentations and written works, the central product of the undertaking is the diverse and provocative articles stemming from the annual LatCrit conferences. [FN6] Speaking in part on the subject of how LatCrit derived from Critical Race Theory, one of the founders of the movement described LatCrit as

an infant discourse that responds primarily to the long historical presence and general sociolegal invisibility of Latinas/os in the lands now known as the United
States. . . . like other geneses of critical legal scholarship, LatCrit literature tends to reflect the conditions of its production as well as the conditioning of its early and vocal adherents. [FN7]

LatCrit is, thus, an experiment of outsider scholarship which seeks to unmask the methods by which Western economic, political, and legal institutions have victimized, subordinated, marginalized, and silenced Latinas and Latinos and other outsider groups. [FN8]

As mentioned above, this introductory essay is part of the LatCrit effort and attempts to situate as well as critique works touching upon the topic of reparations or other redress for colonized people. After a brief discussion of the basic problems of any reparations effort, this essay will examine the articles stemming from the panel. This will be followed by a proposal to change the trajectory of the Puerto Rican reparations debate from one couched in monetary redress to one seeking restoration or repair of that country's status to one that is consistent with autonomy. As the title of the panel suggests, the topic of reparations is both provocative to progressive scholars and controversial to traditional theorists. Reparations are generally viewed as a form of financial and structural remedy for past institutional and systematic discrimination. [FN9] They are seen to include compensation from governmental authorities such as "return of sovereignty or political authority, group entitlements, and money or property transfers, or some combination of these, due to the wrong-doing of the grantor." [FN10] The form reparations will take and which governmental sector will pay for the monetary relief, state or federal authorities, depends on among other things, the particular demands of victimized group, the nature of the wrong committed, the temporal proximity of the wrong, and the extent of political influence of the victims.

I. Reparations

The topic of reparations likely provokes debate from vastly different political perspectives. One basic tension presented by any reparations debate that explores claims from a new victims group, stems from the fact that in recent legal parlance the term "reparations" has become almost synonymous with the struggle of African Americans to obtain payment of damages from the United States and individual state governments that perpetrated the immoral crimes of slavery. [FN11] This fact may result in a host of problems for any new victims group, not the least of which is a perception of changing the focus on claims by African Americans to the other victims group. In the words of Professor Robert Wesley, an expert on African-American reparations, there is the danger of replicating the "everyone's being harmed hierarchy of oppression." [FN12]

Although not all of the articles stemming from the panel sought to address the reparations issue, some instead focusing just on Puerto Rico's colonial problem, at least one of the works in this cluster seeks to expand the reparations discourse to include the plight and efforts of Puerto Rican victims of United States imperialism. [FN13] The engagement, while provocative, particularly when one considers the stagnation in the efforts to change the colonial states of the United States' island dependencies, such as Puerto Rico, is also potentially harmful to other reparations efforts, and may even result in a backlash against the more generalized effort to expose the wrong of Puerto Rico's colonial status. In particular, a reparations movement for groups such as the people of Puerto Rico runs the risk of being perceived as deprioritizing other claims, such as those of the African Americans. Professor Eric Yamamoto worried aloud about this when he noted "[r]eparations for one group may stretch the resources or political capital of the giver, precluding immediate reparations (or enough reparations) for others." [FN14]
While at the same time a reparations debate may be perceived as a "race to the bottom" in a destructive search for "comparative victimhood," [FN15] for traditionalists, the thought of reparations for any group, including African Americans, strikes them as not only unworkable but also unmerited. [FN16] This negative reaction is likely stronger for a claim by the people of Puerto Rico. The Puerto *372 Rican reparations problem can be situated within a paradigm of the problems associated with all reparations efforts. [FN17] Professor Yamamoto described three dangers or problems associated with reparations movements: (1) the problem of a legal strategy based on a group harm used in an individual rights domestic legal paradigm; (2) the psychological dilemma of further victimization of those seeking redress; and (3) the self-interest based ideology of reparations. [FN18] The danger associated with "framing" a legal strategy consists of traditional substantive and procedural legal hurdles such as standing, statute of limitations, causation, and indeterminacy of damages, [FN19] each of which may defeat a reparations claim in court. The psychological "dilemma of reparations" suggests that proponents may suffer from a backlash from the dominant culture. The very effort may perpetuate existing stereotypes of the victims, and create competitive tensions from other victim groups seeking similar redress. The ideology of reparations suggests that such a remedy will only occur when it will actually or appear to further the larger dominant culture's interests. [FN20] This essay will track Professor Yamamoto's framework in the context of a Puerto Rican reparations effort.

The dangers of efforts to gain reparations raised by Professor Yamamoto are formidable and may even be insurmountable for monetary claims in favor of the residents of Puerto Rico. Indeed, as far as Puerto Rico is concerned, as other works have illustrated, [FN21] it is likely that a person in the United States would not even know of Puerto Rico's anomalous subordinate legal status, let alone envision some colonial harm suffered at the hands of the United States. [FN22] This problem, arguably within the psychological dilemma of reparations, with perhaps limited exceptions, appears too daunting to lead to monetary compensation for the people of Puerto Rico. The dominant culture simply does not see a wrong, let alone being willing to *373 award reparations. It is, however, this very lack of recognition of Puerto Rico's colonial plight that may be the very reason to consider using a reparations effort or debate to promote what Yamamoto calls the use of reparations movements as "cultural performances" to heighten awareness of the problem irrespective of the outcome of the claims for monetary relief. After an examination of the articles in this cluster, this essay will explain further why, perhaps, a Puerto Rican reparations effort should be re-conceptualized as a coalescing political effort to raise awareness and promote political coalition building based on colonial commonalities. [FN23]

II. The Plenary on Reparations

Despite the plenary's fairly specific topic of reparations or other redress in the colonial context, the works in this cluster, though all touching upon Puerto Rico, vary greatly in emphasis. The three works in this cluster consist of: (1) Manuel Rodríguez Orellana's "Vieques: The Past, Present, and Future of the Puerto Rico-U.S. Colonial Relationship"; [FN24] (2) Charles R. Venator Santiago's "The Uses and Abuses of the Notion of Legal Transculturalization: The Puerto Rican Example"; [FN25] and (3) Pedro Malavet's "Reparations Theory and Postcolonial Puerto Rico: Some Preliminary Thoughts." [FN26] While Rodríguez Orellana's and Venator Santiago's pieces are interesting and informative works addressing Puerto Rico's colonial status, the thrust of this critique will be on Malavet's work as it focuses on the topic of the panel-- reparations or other redress to colonialism.

In his article on legal transculturalization, Venator Santiago engages in a critique of four Puerto Rican scholars who have addressed the concept of transculturalization as applied to
Puerto Rico's legal structure. [FN27] Venator Santiago explains that legal transculturation can be understood "as a process of developing a hybrid or mixed national legal system composed from the legal traditions already present in 'the contact zone' that would become the new nation." [FN28] Venator Santiago argues that such a notion can be used to explain as well as understand Puerto Rico's multiple legal traditions. [FN29] This article examines leading Puerto Rican legal commentators describing Puerto Rico's hybrid legal system, which combines a common law and civil legal system. [FN30] Venator Santiago examines the works of Carmelo Delgado Cintrón, José Trías Monge, Liana Fiol Matta, and Rubén Nazario Velasco and how they used transculturation to describe the historical development of *374 different aspects of the Puerto Rican legal system after the United States' occupation. [FN31]

Venator Santiago argues that much of the literature on Puerto Rico's legal system uses a misguided understanding of the notion of transculturation. [FN32] His thesis is that these four Puerto Rican legal commentators have failed to recognize that the notion of transculturation is ultimately premised on the organic process of constructing a national identity, yet Puerto Rico's legal tradition is contingent on the territory's subordinate legal and political status. Therefore, according to Venator Santiago, the use of the notion of transculturation without accounting for the absence of an "independent" nation-building project abuses the notion of transculturation. [FN33]

In the context of addressing transculturation, Venator Santiago's work underscores Puerto Rico's colonial status by pointing out that Puerto Rico's hybrid legal system exists as a result of its anomalous subordinate colonial predicament. Indeed, Puerto Rico's hybrid mix of civil and common law is a byproduct of United States expansion. It was the early-twentieth-century U.S.-sponsored movement of "Americanization" that was a cultural transformation effort which included, among other things, changing Puerto Rico's legal system. [FN34] Venator Santiago's work addressed this significant but narrow topic associated with colonialism rather than the title of the panel which addresses reparations or other colonial redress. In light of this fact, Venator Santiago's work also could be highlighted in a more traditional historical or comparative analysis of Puerto Rico's legal structure.

Rodríguez Orellana's article, though again not addressing reparations, does directly examine Puerto Rico's colonial subjugation. This piece focuses on the wrongs committed by the United States government against the people and environment of one of the islands that is part of Puerto Rico—the island of Vieques. [FN35] This work is useful as a precursor for the reparations discussion because it assists in understanding why and how the people of Puerto Rico have been wronged. This is an illuminating work that explores a tragedy that is essentially unexamined on mainland political, academic, or popular circles. This work, in vivid detail, answers an insulting, yet challenging, question posed to Rodríguez Orellana at the airport in San Juan, Puerto Rico, after attending a recent people of color legal conference. [FN36] A colleague of color, after discussing a panel on colonialism, asked aloud "in light of all of the problems in the world, why should we care about Puerto Rico's problem?" Rodríguez Orellana persuasively explains why people should care.

Rodríguez Orellana begins his work by compassionately noting that the story of the United States' subordination of Puerto Rico "is a story that has not been sufficiently told in the United States, and needs to be repeated as often as necessary—in legal publications, professional forums, and classrooms—to enlist the support of American intellectuals." [FN37] This article explains why the United States was so interested in Puerto Rico—because of its strategic location and the United States' long-term geopolitical interests. [FN38]
Control of Puerto Rico was basic to the extension of U.S. influence over Latin America in general and the Caribbean in particular. The invasion and acquisition of Puerto Rico, which guarded the eastern approaches of the Caribbean Sea, was inextricably tied to the decision to build a canal connecting the Atlantic and Pacific oceans. [FN39]

With respect to the length the United States would go to protect its interests, Rodríguez Orellana discussed a recently declassified 1945 U.S. War Department memorandum opposing any new status for Puerto Rico. [FN40] In the memorandum, the War Department purportedly insisted on privileges for U.S. Armed Forces in perpetuity over all public utilities, as well as all air, water, and land transportation facilities. [FN41] Rodríguez Orellana also exposes the extent to which the U.S. government went to further its interests, including keeping dossiers on persons "suspected" of subversion by virtue of their association with independence or decolonization activities. [FN42] Although Rodríguez Orellana notes that these efforts are well documented and continue today, [FN43] the article fails to enlighten the reader with those specific well-documented examples which would make his argument considerably more persuasive to those unaware of these events. Nevertheless, Rodríguez Orellana documents other troubling activities by U.S. authorities including the Federal Bureau of Investigation's admissions of "monitoring, intervention, infiltration, and persecution of persons, such as Nationalist Party leader Pedro Albizu Campos, student organizations such as the Federation of University students, and legitimate political parties--such as the Puerto Rican Independence (PIP) and Socialist parties (PSP)." [FN44]

In addition to exposing the above wrongful acts conducted by the U.S. government, the thrust of the article addresses the violations against the people and environment of Vieques. The article documents the U.S. Navy's occupation of over two-thirds of Vieques for military maneuvers and installations. These military activities consisted of bombings and other war activities resulting in contaminating Vieques' environment with dangerous levels of depleted uranium, napalm, heavy metals, toxic substances, and carcinogens. [FN45] These consequences in turn are believed to have caused or at least contributed to disproportionately high cancer rates for the people of Vieques. [FN46] Although Rodríguez Orellana's article does not address reparations, it does address other appropriate remedies for the wrongs committed against Puerto Rico and its people--self-determination through independence. Perhaps more importantly, this article engages the reader in a fashion that other writers, including this author, have struggled with overcoming. In essence, this article highlights why the colonization of Puerto Rico is a wrong that has included environmental travesties, liberty deprivations, and other violations of basic principle of human rights, including self-determination, as well as a rudimentary perversion of democracy and free-will.

The last article in this cluster is Professor Pedro Malavet's "Reparations Theory and Postcolonial Puerto Rico" piece. [FN47] This is a challenging work in part because it is the first known to this author that advances a reparations remedy for the residents of Puerto Rico. Borrowing from the critiques concerning the lack of democracy in the structure and actions of the European Union, [FN48] Malavet argues that Puerto Rico's lack of political participation and power within the United States federal government results in a "democratic deficit" for the inhabitants of Puerto Rico. [FN49] As addressed in other works, [FN50] this subordination results in a legally constructed status that is second-class. [FN51] The solution for this subjugated status is to develop what Malavet terms a "postcolonial political organization for the island." [FN52] According to Malavet, there are three legitimate postcolonial alternatives for a postcolonial organization: (1) independence, (2) non-assimilationist statehood, and (3) a constitutional bilateral form of free association. [FN53]
Two of Malavet's three so-called postcolonial alternatives are controversial and subject to challenge. As previous works have observed, [FN54] for well over fifty years supporters of Puerto Rico's commonwealth status have repeatedly argued that the 1953 creation of the commonwealth created a bilateral form of free association. [FN55] For instance, in 1953 Muñoz Marín, the first Puerto Rican-born governor of Puerto Rico and often considered the "father" of the Commonwealth, argued that the law creating the Commonwealth transformed the relationship between the Puerto Rican people and Congress to one which could not be altered without the consent of each of the contracting parties. [FN56] Similarly, a 1997 U.S. House of Representatives report described the pro-Commonwealth position on a Commonwealth definition as predicated upon a "longstanding" belief that "Puerto Rico's status had been converted in 1952 into a permanent form of associated autonomous statehood." [FN57] Yet despite these claims, as Rodríguez Orellana's article illustrates, Puerto Rico is far from able to dictate its future. Other examples of Puerto Rico's subordinate status are raised by Malavet's article when it recognizes the political disenfranchisement of the people of Puerto Rico. [FN58]

It is because of the ease in which notions of a constitutional bilateral compact have been bantered about to describe an idealistic vision of Puerto Rico's current status, despite the realities of U.S. colonialism, that serious questions exist *377 concerning the propriety of using an option that is so easily manipulated and maintains the vestiges of colonialism. [FN59] In fact, Malavet acknowledges this shortcoming of the label "freely associated" state. [FN60] The postcolonial alternative of a non-assimilationist statehood is also problematic. It may easily and persuasively be argued that statehood is merely the culmination of the colonial endeavor. This option also has pragmatic concerns. In a post-September 11, 2001, world of heightened fear of the foreigner, it is extremely unlikely that the United States would accept Puerto Rico as a state anytime in the near future. The shortcomings of the visions of a bilateral free association and a non-assimilationist statehood options are likely the reasons for Malavet's advocacy of independence as the preferred postcolonial alternative. [FN61]

Despite these noteworthy but minor questions concerning postcolonial alternatives, Malavet's focus is on the more controversial question of reparations. Although this writer, with some pause, ultimately disagrees with a generalized reparations effort seeking monetary relief for people of Puerto Rico, Professor Malavet should be applauded for his courage, his intellectually challenging argument, and perhaps his foresight in setting forth this colonial problem in this fashion.

Though his framework envisions a broader vision of "restoration," [FN62] including the psychological cure of reparations, [FN63] if in fact Malavet was primarily seeking monetary relief or return of lands for the people of Puerto Rico, the likelihood of this effort resulting in such a remedy would be probably remote. More importantly, such an effort runs the risk of resulting in ridicule, scorn, and downright contempt by both the dominant culture and other potential victims groups. The largest hurdle to overcome is likely to result from the failure of the dominant culture to even recognize a colonial problem associated with Puerto Rico. Mainland U.S. citizens simply do not think of Puerto Rico as other than as a potential vacation location. If pressed, Puerto Rico is more likely to be perceived as a foreign land, and unlikely to be viewed as a colony of the United States. [FN64] For instance, as Rodríguez Orellana noted, [FN65] when President George W. Bush on June 14, 2001, announced that the United States would discontinue military exercises in Vieques in May 2003, which ultimately was rejected by Congress, [FN66] he described the people of Puerto Rico not as U.S. citizens but as "our friends and neighbors and they don't want us there." [FN67] Interestingly, the president of the United States, when addressing a problem faced by millions of U.S. citizens residing in Puerto Rico, did not refer to them as "our own people," or as what they
actually are--U.S. citizens--but as "our \textit{friends and neighbors}."ootnote{68} Other notable examples include Congressman Jose Serrano's recollections:

What we have is a situation where I find on so many occasions that half, if not more, members of Congress have no understanding whatsoever of the relationship . . . asking me on my next trip to Puerto Rico to bring them back coins for their collections, stamps for their collection . . . [A]t my father's funeral . . . someone said to me, why is the American flag on your father's casket. I said, he wanted it that way, he served in the Army . . . [the questioner responded with] I had no idea the Puerto Rican Army used the American Flag. \footnote{69}

Congressman Serrano's point highlights a basic ignorance concerning Puerto Rico's relationship with the United States; as a U.S. territory, Puerto Rico uses U.S. postage and currency and its people have a long history of serving proudly in the U.S. military. \footnote{70} Congressman Luis Gutierrez, who is also of Puerto Rican ancestry, has his own similar story. After attending a Puerto Rican Affirmation Day Tribute for the over 3000 Puerto Rican servicemen killed or wounded in the Korean war, the congressman was refused entry into the U.S. Capitol and was accused of presenting false congressional credentials. The capitol security officer told the congressman that he and his people should go back to the country they came from. \footnote{71}

As the Chicago Tribune poignantly observed, "for Puerto Ricans, it is a peculiar part of the American experience to be treated as a foreigner in your own land. To be told with scorn to go back to your own country, when you're already there." \footnote{72} Although these accounts are far from a scientific survey, they are vivid and almost unbelievable examples of the failure to see the people of Puerto Rico as anything but foreigners. \footnote{73} Accordingly, it is also likely that most Americans are utterly unaware of any colonial problem.

For the more enlightened, there is a distorted recognition of some unique relationship between Puerto Rico and the United States, with Puerto Rico receiving billions in U.S. governmental aid and its inhabitants paying no income taxes. \footnote{74} \textit{Malavet} acknowledges the concern when he notes "the traditional narrative about Puerto Rico in the United States posits that the Puerto Rican isleñas/os 'have the best of both worlds' because 'they' do not pay federal taxes and nonetheless get federal benefits." \footnote{75} Although the reality is that the people of Puerto Rico do not pay income tax, \footnote{76} they do pay federal taxes, including user fees such as Social Security taxes. In addition, the local taxes they pay are "higher than in most states, including both federal and local contributions," and the lack of comparable benefits if Puerto Rico were a state more than makes up for the so-called benefits of its unique status. \footnote{77} This distorted perception of the people of Puerto Rico as privileged participants in the U.S. scheme of governance may result in anger at the thought or talk of reparations. This "dilemma of reparations," as Yamamoto described, \footnote{78} may be too difficult to overcome.

In addition, there may be concerns from other victims groups. As mentioned earlier, reparations is now closely associated with African-American efforts. \footnote{79} The wrongs against this group dating back to slavery and the Jim Crow era are without question. Although Malavet specifically states that he is not intending "to develop a 'comparative victimology' that is intended to divide marginalized groups," \footnote{80} there is nonetheless a danger that by increasing the number of groups seeking monetary relief there will be a corresponding weakening of other claims given the government's limited resources. \footnote{81} As Vincene Verdum, an African-American scholar, in his sobering confession noted, the source of my ambivalent reaction to [the apology to Japanese Americans] was at first difficult to identify. After some introspection, I guiltily discovered that my
sentiments were related to a very dark, brooding feeling that I had fought long and hard to conquer--inferiority. A feeling that took first root in the soil of "why them and not me." [FN82]

In addition to the dilemma of reparations with respect to Puerto Rico, there is the problem of framing a legal claim that will be recognized by U.S. courts. The thrust of this concern is that reparations efforts seek redress for group rights in the United States' judicial system which has an individual rights legal paradigm. Not unlike international law human rights claims, such as requests for self-determination, reparations seek large-scale redress for generalized wrongs to a group of victims. With certain isolated notable exceptions in the case of reparations, [FN83] the U.S. legal *380 system, which is premised upon individual rights, has not been very responsive to these efforts. [FN84] This problem was recognized by one scholar who noted that by casting reparations as a "claim for compensation based on slavery," such claims must establish "that all African Americans were injured by slavery and that all white Americans caused the injury or benefited from the spoils of slave labor." [FN85] Professor Westley acknowledged the constraints of such an effort and concluded that the use of political efforts through legislation and not the courts are the best avenue to address group claims, such as reparations. [FN86] Westley's proposal, with a recognition of certain pragmatic limits of the political process for outsiders, carries considerable force and will be addressed further in the proposed solution of this essay.

Within the U.S. judicial framework, substantive and procedural legal bars such as statutes of limitations, lack of proof of causation, lack of proof concerning individual perpetrators, lack of traceable wronged individuals, and indeterminacy of damages [FN87] have led certain writers such as Boris Bittker to abandon claims based on historical wrongs such as slavery and propose claims based on present-day societal discrimination. [FN88]

In the case of Puerto Rico, the above bars carry significant weight. For the people of Puerto Rico, in a court-based reparations effort, they would have to establish that they were individually the wronged; that the wrong occurred recently; that there is an identifiable wrongdoer; that the wrong was caused by the wrongdoer; and that the damages are certain and foreseeable. Here again there is the added problem of the dilemma of reparations with respect to identifying a wrong. Unlike slavery, Jim Crow laws, or even the overthrow of the Hawaiian Republic, a Puerto Rican effort first must situate the discussion in such a way for U.S. mainland citizens to recognize a problem with the United States' involvement with Puerto Rico. The efforts of advocates and political leaders such as Rodríguez Orellana, Malavet, and Rubén Berrios Martínez have begun that process. [FN89] Unfortunately, aside from within Puerto Rico and by a small number of progressive legal scholars within the United States, [FN90] this effort on the mainland has only just begun.

In the case of Puerto Rico, there are nonetheless certain focused claims that could be cognizable within the U.S. judicial framework. For instance, the case of the inhabitants of Vieques may very well provide for such a claim. These claims, however, likely would not be constitutionally based. The reason for this is that the United States Supreme Court, at the turn of the last century, in a series of decisions known as the "Insular Cases," seriously limited the constitutional rights of the residents of Puerto Rico and other U.S. island dependencies. [FN91] In these cases, the *381 Supreme Court developed the "Territorial Incorporation Doctrine," [FN92] whereby only fundamental constitutional rights are applied to protect the residents of the unincorporated territories such as an island dependency like Puerto Rico. [FN93] Relying on the territorial incorporation doctrine, [FN94] the United States Supreme Court has held that the disparate treatment of the residents of Puerto Rico is constitutional as long as there is a
rational basis for the discrimination. [FN95] As a result of these decisions, it appears that, unlike Japanese-American claims based upon their World War II internment, [FN96] the people of Puerto Rico likely will not be successful with constitutional claims based on doctrines such as the Equal Protection Clause. For instance, in Harris v. Rosario [FN97] and Califano v. Torres, [FN98] the Supreme Court upheld the U.S. government's unequal treatment for the residents of Puerto Rico for Supplemental Security Income and Aid to Families with Dependent Children benefits because there was some rational basis for the disparate treatment. [FN99] In the case of Vieques, the U.S. military likely will argue, as they have done before, that Vieques is the only or ideal location for the armed forces to engage in air, land, and sea maneuvers. A U.S. court reviewing such a constitutionally based reparations claim may very well conclude that there was a rational basis for the government's actions and uphold the military's actions.

The constitutional impediment to Vieques claims does not, however, preclude other federal or territorial law claims based on environmental protection, civil rights, or other human rights. The environmental and health problems, if provable in court, associated with the U.S. military operations on Vieques are the type of recent, traceable, and finite claims that may prove to be successful. The Vieques claims would be analogous to Japanese-American internment claims. As Yamamoto explained, "Japanese Americans succeeded on their reparations claims not because they transcended the individual rights paradigm, but because they were able to fit their claims tightly within it." [FN100] The federal or territorial law Vieques claims likely would be comparable to the Japanese-American claims in that (1) they would challenge specific governmental orders and ensuing military orders; (2) the challenge would be based on existing environmental or civil rights-based legal norms (in the case of Japanese Americans it was based on constitutional claims); (3) both legislatures and courts could identify violations of those legal norms; (4) the claimants are easily identifiable as they reside on Vieques; (5) the government actors would be identifiable (U.S. military and executive officials); (6) these governmental actions directly led to the wrongs for which relief is sought (they issued orders prompting the military action); and (7) damages would be manageable given the fairly small number of Vieques inhabitants. A claim for redress for the victims of the wrongs done to Vieques also would resemble claims brought by the victims of the Rosewood Massacre. [FN101] For the survivors of these narrowly tailored legal claims, which contained a causal nexus between identifiable victims and wrongdoers, and finite damages, the state of Florida in 1995 paid survivors and descendants from $375 to $150,000 each. [FN102]

In addition to claims by the residents of Vieques, as Rodríguez Orellana's article illustrates, the U.S. government engaged in legally questionable surveillance and privacy invasions against independence leaders in Puerto Rico. [FN103] These individuals may also have narrowly tailored legal claims. In fact, in Noriega-Rodríguez v. Hernandez-Colon, [FN104] the Puerto Rico Supreme Court held that the government practice of surveillance and opening files solely based on individuals' political views was unconstitutional. [FN105] Although subject to U.S. court challenge, the Noriega-Rodríguez decision and ones like it could be the basis for monetary or other relief. Yet another group of victims with potentially viable claims are the assimilation targets of the United States' "Americanization Movement." Shortly after granting the people of Puerto Rico with a form of U.S. citizenship, from 1900 to 1940 the U.S. government promoted efforts in the territory to change the culture of the Puerto Rican people, including changing their language to English. [FN106] Puerto Rico's legal system also was restructured to imitate the U.S. common law system in order purportedly to protect U.S.-based investments in the territory. [FN107] For these individuals, however, it may be more difficult to obtain judicial relief because they were not easily identifiable and their damages are more indeterminate than the Vieques or government espionage claims.

The third reparations problem for a generalized Puerto Rican reparations movement is
the self-interest-based ideology of reparations. This problem, following Derrick Bell's interest convergence theory, [FN108] arises because the dominant culture likely will not give away its wealth or apologize in the absence of some gain for the dominant culture. In the case of Puerto Rico it is not likely that the U.S. government will turn over large sums to victims the United States does not recognize as being wronged, particularly when the United States believes it has nothing to gain for its part.

In conclusion, a generalized Puerto Rican reparations effort for monetary relief, with limited exception for narrowly based claims for recent wrongs against identifiable groups, likely will not prevail. The legal hurdles, the psychological dilemma of reparations, and the failure of the dominant culture to find any self-inter*383*est in reparation for the residents of Puerto Rico lead to obstacles too difficult to overcome.

III. A Proposal

If a Puerto Rican reparations effort seeks, instead of monetary relief, other gains, particularly increased visibility of the problem, then a reparations effort may be effective. Such a reconceptualization from traditional reparations efforts may have a transformative effect of changing or at least challenging the mainland perspective of Puerto Rico's colonial dilemma. Such a focus could transform a Puerto Rican reparations effort to an effort toward "cultural performances" providing outsiders, such as the people of Puerto Rico, with an institutional public forum. As Westley suggests, even if these efforts are unsuccessful, they should be undertaken because of the "intellectual benefit of promoting dialogue." [FN109] These performances should not be limited to the judicial arena; they should involve and perhaps focus on other formal arenas such as local, state, and federal legislatures. Scholars, educators, and activists should engage in these performances in their writings, presentations, classrooms, and popular cultural avenues such as "op-eds" and other related media works. Although the Malavet article seems to advocate a vision of reparations that will result in the reallocation of public resources creating economic benefits to the people of Puerto Rico, [FN110] he also cautions that reparations should not be viewed as compensation, but as repair or restoration of broken relationships. [FN111] It is this aspect of Malavet's thesis that this essay will advocate to reconceptualize reparations as relief that does not necessarily focus on monetary relief, at least at this stage of the debate. In large part, because the pragmatic and psychological hurdles for a Puerto Rican effort are so difficult to overcome, requests for Puerto Rican reparations should--at least in this early stage of the debate--be couched in a focus on exposure of the wrongs associated with Puerto Rico's colonial dilemma; this in turn should be followed with increased efforts to seek acknowledgements of the wrong, and ultimately an apology for the wrongs against the Puerto Rican people. Although even this cautionary approach likely will be received by substantial opposition or disregard by the dominant culture, the effort should be undertaken in a continuing effort to support human rights and racial justice for the people of Puerto Rico. [FN112]

While most reparations efforts are couched in strategies geared toward seeking judicial relief, as mentioned above, judicial relief should not be the sole or even primary focus toward seeking reparations. Indeed, Professor Westley accurately exposed the shortcomings of reparations efforts focusing on judicial remedies. [FN113] He notes that the judiciary has become increasing hostile toward efforts at redressing racial discrimination such as affirmative action. [FN114] In light of this trend and the shortcomings of judicial reparations of standing, deference, timing, and res judicata, Westley advocates the use of legislatures to seek redress. [FN115] This avenue is a potentially more effective route for Puerto Rican redress efforts.
Much like Westley’s suggestion that legislative efforts seeking redress could look to the legislatures of former slave states, Puerto Rican efforts could focus on local and state arenas that may be initially more receptive. This in turn could build momentum and force further debate. For instance, a Puerto Rican redress effort could start in the Puerto Rican legislature, whereby that body could acknowledge the wrongs against the people of Vieques and other specific wrongs. The legislature could formally request an apology from Congress and the President of the United States. Though politically aggressive and far from a likely successful route, such efforts could begin legitimate dialogue. These legislative efforts could also be attempted in jurisdictions with significant Puerto Rican populations, such as New York City and Chicago, Illinois. The efforts may be grass-roots engagements where political influence is more concentrated. In a post-September 11 period of renewed nationalism and generalized fear of foreigners, even this more political route is one of questionable results. This effort should, notwithstanding the abovementioned problems, be undertaken because it may ultimately lead to debate, an apology, and in an ideal setting, that this author likely would not live long enough to see, a structural status change for Puerto Rico.

A transformative reparations effort, in addition, should not limit itself to isolated claims for redress. Reparations efforts should promote collaborative undertakings and be used for political coalition-building. As critical race and LatCrit theory have illustrated, the victimization of individuals in this country is not limited to one or a few groups. A reparations effort should use the commonalities of wrongs to coalesce and form formidable political efforts. Even the U.S. colonial problem is not isolated to Puerto Rico. As addressed in recent works, the people of Guam, the U.S. Virgin Islands, American Samoa, Micronesia, the Northern Mariana Islands, the Marshall Islands, Palau all have been victims or willing accomplices of U.S. colonialism. These and other stories must be told in conjunction with each other and efforts for change or redress should at least consider the benefits of collaborating undertakings. As one critical theorist informed this author when he entered the academy, identity is often ultimately the decisive factor in empathy and coalition efforts. In other words, if groups have commonalities, these stories should be told together in order to promote understanding and encourage coordinated action. Professor Natsu Saito, in her impressive article "Asserting Plenary Power over the 'Other'," engages in this needed comparative study at U.S. victimization of groups such as indigenous people, colonized people, and immigrants under the auspices of Congress' plenary power over foreign affairs. These intellectual endeavors should be continued on academic as well as political arenas. Again, exploring "common ground" of harmed groups has the potential of leading those groups to promote dialogue and change.

In addition to the domestic arena, as Professors Yamamoto, Westley, and Saito have recognized, international law, despite its shortcomings with respect to its enforceability, should be used to put political pressure on the United States to remedy past wrongs and engage in a broader debate. International human rights are a forceful political tool that may cause domestic legal change. In other words, international law could be used to pressure the United States to follow the rest of the world. For instance, the Universal Declaration of Human Rights contains broad mandates protecting groups from repression that could be a basis for reparations claims. Arenas such as the International Court of Justice may be one such avenue.

Other countries have used reparations to remedy wrongs. For instance, Canada recently apologized to and promised reparations to Canada's indigenous people for theft of the land and destruction of their culture. Britain has offered reparations to New Zealand’s Maori for Britain’s race wars against that group. France recognized its complicity in the deportation of 76,000 Jews to Nazi death camps. The Catholic
Church apologized for its assimilationist policy in Australia that contributed to the attempted destruction of the Aborigines spirit and culture. [FN139] Again, even if these efforts in the international arena fail to provide redress, they too may serve reparations' goals of recasting domestic civil rights claims as global international human rights claims. [FN140]

**386** Conclusion

These are some preliminary observations on a reparations debate concerning claims by colonized people, though the views expressed here are still evolving and may indeed change. Nevertheless, the panel on reparations at the LatCrit conference and, in particular, Professor Malavet's article on the subject are likely to provide continuing interesting dialogue.

It is this author's ultimate view that a reparations effort for the people of Puerto Rico should be limited to narrowly tailored federal and local territorial law based claims for identifiable victims, recently wronged by U.S. officials. Claims by the residents of Vieques, targets of unlawful governmental surveillance, and perhaps, but unlikely, the victims of Americanization efforts may be successful. Nonetheless, the reparations movement as a whole should be reconceptualized to focus on legislative and political efforts to promote dialogue and redress. This political approach should focus not only on local and state authorities, but should be geared at promoting knowledge of and support for other similarly-situated victims groups. Finally, international law norms, principles, and legal institutions should be used to attempt to achieve change or at least promote a global human rights debate.

Footnotes:

[FNd1]. Professor of Law, Florida International University, College of Law; J.D., University of Wisconsin. This essay is dedicated in loving memory to Ms. Carmen Hernandez. I would like to thank the organizers of the Seventh Annual LatCrit Conference, especially Professor Steven Bender, for allowing me to participate in the written symposium by submitting the essay.


[FN2]. Puerto Rico is a group of islands in the Caribbean. Though the main island is called Puerto Rico, the territory includes the islands of Vieques, Culebra, Mona, and Monito.

[FN3]. Id.


[FN5]. Id.

[FN6]. See Symposium, LatCrit VI: Latinas/os and the Americas: Centering North-South Frameworks in LatCrit Theory, 55 Fla. L. Rev. __ (forthcoming 2003); but there has been a symposium issue for each of the annual LatCrit conferences. See generally Symposium, LatCrit V: Class in LatCrit: Theory and Praxis in a World of Economic Inequality, 78 Denv. U. L. Rev. 467 (2001); Symposium, LatCrit IV: Rotating Centers, Expanding Frontiers: LatCrit Theory and Marginal Intersections, 23 U.C. Davis L. Rev. 751 (2000);


[FN10]. Id.


[FN12]. Westley, supra note 9, at 432.


[FN14]. Yamamoto, supra note 1, at 496.


[FN16]. See Westley, supra note 9, at 436.

[FN17]. Id.


[FN19]. Id. at 487-93.

[FN20]. Id. at 497.


[FN22]. See Roman, Alien-Citizen, supra note 21, at 2-5.


[FN26]. See Malavet, supra note 13.

[FN27]. Venator Santiago, supra note 25, at 441.

[FN28]. Id. at 444.

[FN29]. Id. at 442.

[FN30]. Venator Santiago, supra note 25.

[FN31]. Id. at 441.

[FN32]. Id. at 442.

[FN33]. Id. at 450.

[FN35]. Rodríguez Orellana, supra note 24.

[FN36]. It was insulting because it was contemptuous as well as ignorant; it was challenging because ignorance concerning Puerto Rico is actually understandable in light of the dearth of discussion regarding Puerto Rico's exploitation.

[FN37]. Rodríguez Orellana, supra note 24, at 426.

[FN38]. Id. at 427.

[FN39]. Id. at 427 (quoting Rubén Berrios Martínez, Puerto Rico's Decolonization, 76 For. Aff. 100, 103 (1997)).

[FN40]. Id. at 428 (citing Juan M. García Passalcqua, Mi Testimonio del ELA, El Vocero, Aug. 28, 2001).

[FN41]. Id.

[FN42]. Id. at 428.

[FN43]. Id. at 428.


[FN45]. Id. at 429-30.

[FN46]. Id.

[FN47]. Malavet, supra note 13.


[FN49]. Malavet, supra note 13, at 390.

[FN50]. See Roman, Empire, supra note 21, at 1120; Roman, Alien-Citizen, supra note 21, at 2-6; see also Malavet, Cultural Nation, supra note 21, at 76; Lazos, supra note 21.


[FN52]. Id. at 391.

[FN53]. Id.

[FN54]. Roman, Empire, supra note 21, at 1154.


[FN56]. Roman, Empire, supra note 21.

[FN58]. Malavet, supra note 13, at 400.

[FN59]. See Roman, Alien-Citizen, supra note 21, at 25.

[FN60]. See Malavet, supra note 13, at 404 n.88 (noting that such a state can truly be achieved by a U.S. constitutional amendment).

[FN61]. Malavet, supra note 13, at 391.

[FN62]. See id. at 405.

[FN63]. Id.

[FN64]. See supra footnotes 58-61 and accompanying text.

[FN65]. See Rodríguez Orellana, supra note 24, at 433; s ee also Ediberto Roman & Theron Simmons, Membership Denied: Subordination and Subjugation under United States Expansionism, 39 San Diego L. Rev. 437, 492 (2002).


[FN68]. Unfortunately, following the September 11, 2001 tragedy, Congress passed legislation prohibiting the cessation of military operations on Vieques. See National Defense Authorization Act for FY2002, See 1049(a), 107 P.L. 107, 115 stat. 1012 (Dec. 8, 2001); s ee also Rodriguez Orellana, supra note 24, at 433.


[FN70]. See Roman, Alien-Citizen, supra note 21, at 28.


[FN73]. See Neil Gotanda, Asian-American Rights and the "Miss Saigon Syndrome," in Asian Americans and the Supreme Court 1096 (Hyung-Chan Kim ed., 1992) (In "the United States, if a person is racially identified as African American or White, that person is presumed to be legally a U.S. Citizen and socially an American...these presumptions, however, are not present for Asian Americans, Latinos, Arab Americans, and other non-Black racial minorities. Rather, there is the opposite presumption that these people are foreigners; or, if they are U.S. citizens, then their racial identity includes a foreign component."); Juan Perea, Los Olvidados: On the Making of Invisible People, 70 N.Y.U. L. Rev. 965, 966 (noting that Latino invisibility caused in part by "our foreign" ethnicity).

[FN74]. See Malavet, supra note 13, at 410.

[FN75]. Id.

[FN77]. See, e.g., Malavet, supra note 13, at 411.

[FN78]. Yamamoto, supra note 1, at 493.

[FN79]. See Malavet, supra note 13, at 395-96.

[FN80]. See id. at 396.

[FN81]. See Yamamoto, supra note 1.


[FN83]. See, e.g., Yamamoto, supra note 1 (addressing Japanese American reparations granted by the U.S. Government); Caroline Aoyagi, Bittersweet Victory for Japanese Latin Americans: After 57 Years, Former Internees to Receive Apology and $5,000 Redress Payment from United States, Pac. Citizen, June 19-July 2, 1998, at 1; see also Yamamoto, supra note 1, at 483 (addressing President Clinton's apology to indigenous Hawaiians for the illegal U.S.-aided overthrow of Hawaii).

[FN84]. See Yamamoto, supra note 1, at 487.

[FN85]. See Verdum, supra note 81, at 630.

[FN86]. Westley, supra note 9.

[FN87]. See Yamamoto, supra note 1, at 507 (for a more exhaustive analysis of these legal hurdles).


[FN89]. For a discussion of some of Berríos's efforts, see Rodríguez Orellana, supra note 24, at 430-32.

[FN90]. See, e.g., Malavet, supra note 13; Roman, Empire, supra note 21, at 1119; Roman Alien-Citizen, supra note 21, at 1; Rivera Ramos, supra note 21, at 222; Vargas, supra note 21 (forthcoming).

[FN92]. See Downes, 182 U.S. at 289 (White, J., concurring); Balzac, 258 U.S. at 312-13.

[FN93]. Downes, 182 U.S. at 282.

[FN94]. For a further examination of the Insular Cases, see Monge, supra note 4 (arguing the Court erred by not following the elder Justice Harlan's lead); Neuman, supra note 47, at 979 (1991) ("No persuasive normative basis for the Insular Cases has been put forward."); Ramos, supra note 21 (arguing that the Insular Cases demonstrate ideological and racial bias); Roman, Alien-Citizen, supra note 21, at 23 (doctrine of incorporation is "morally illegitimate constitutional principle").


[FN96]. Yamamoto, supra note 1.

[FN97]. Harris, 446 U.S. at 651.

[FN98]. Torres, 435 U.S. at 4-5.

[FN99]. See Harris, 446 U.S. at 651-52; Torres, 435 U.S. at 4-5.

[FN100]. Yamamoto, supra note 1, at 490.


[FN102]. See Yamamoto, supra note 1, at 480 n.11.

[FN103]. Rodríguez Orellana, supra note 24, at 428.


[FN105]. Id.


[FN109]. Westley, supra note 9.

[FN110]. See Malavet, supra note 13, at 405.

[FN111]. Id.

[FN113]. Westley, supra note 9.

[FN114]. Id.

[FN115]. Id.


[FN117]. Roman & Simmons, Membership Denied, supra note 64, at 437.

[FN118]. Id. at 493.

[FN119]. Id. at 495.

[FN120]. Id. at 497.

[FN121]. Id.

[FN122]. Id. at 508.

[FN123]. Id. at 508.

[FN124]. Id. at 514.


[FN126]. Much thanks to Prof. Elizabeth Iglesias for these conversations.


[FN128]. Id.


[FN130]. Yamamoto, supra note 1, at 508.

[FN131]. Westley, supra note 9.

[FN132]. Saito, supra note 124, at 467.

[FN133]. See generally Yamamoto, supra note 1.

[FN134]. Progressive theorists have long advocated the importance of International Law. See, e.g., Natsu Taylor Saito, Beyond Civil Rights: Considering "Third Generation"

[FN136]. See Yamamoto, supra note 1, at 487.

[FN137]. Id.

[FN138]. Id.

[FN139]. Id.

[FN140]. Yamamoto, supra note 1, at 510.
Introduction: Why Are You Here?

"Home," for me, is Ponce, on the island of Puerto Rico, a United States colony since 1898. No matter how far away from it I may go, my personal, professional, and emotional travels always lead me back to Ponce. Yet, I have made the ironic choice not to live in my country while it suffers from colonial status. I shun the concept of a United States citizenship that is legally second-class and a Puerto Rican citizenship that lacks its own passport. Therefore, I live in the "states" where I can better seek the benefits of my statutory United States citizenship. But due in part to that statutory citizenship and the prevalent white racism in the United States, I am "othered" and thereby rendered socially second-class here.

Unsympathetic and unapologetic imperialists might ask: "If the United States is a racist imperialist nation, why, then, are you here?" Generally speaking, an appropriate answer to the colonialist is: "Because you were there." And, in the case of Puerto Rico it is more accurate to state: "Because you are there." I have chosen exile partly because the estadounidenses (people of the United States) are in Puerto Rico, and their presence deprives the Puerto Ricans of independent legal citizenship and nationhood. Nevertheless, exile and my position as a member of the legal academy in the Estados Unidos de Norteamérica (United States of North America) offer me a unique opportunity to critique the legal and social constructs of Puerto Rican citizenship in the United States.

The United States has continuously used Puerto Rico for various military and private economic purposes during the more than one hundred years of its second colonization. Nevertheless, in spite of United States citizenship, and because of our social
construction as a single non-white race, [FN16] all Puerto Ricans (on the island *390 or in the United States "proper") are considered too inassimilable [FN17] to become fully "American." [FN18] Moreover, the Puerto Ricans in Puerto Rico, in spite of their United States citizenship, are deprived of full participation in the U.S. political process. The island Puerto Ricans lack a congressional delegation and are not allowed to vote in presidential elections. [FN19] This lack of political participation and power within the federal government--which I label a "democratic deficit"--leaves the residents of the island relegated to a political and economic underclass within the United States.

This article primarily focuses on the plight of the Puerto Ricans on the island because, in addition to their flawed social construction by the United States and lack of national political power, they are also legally constructed as second-class citizens. In defining the legal rights of Puerto Ricans, the U.S. Supreme Court has held that territorial citizens are entitled to fewer constitutional protections than U.S. citizens residing in any of the fifty states. [FN20] The racist and essentialist [FN21] social construction of the Puerto Ricans as inassimilable, the denial of legal rights by the *391 courts, along with the democratic deficit which deprives those Puerto Ricans presently living on the island of participation in national elections, constitute the obstacles to full participation within United States society or to the establishment of their own independent sovereignty.

This long history of marginalization has produced and continues to produce serious harms. The best solution is the development of a postcolonial political organization for the island. This article uses reparations theory to inform a transition to a postcolonial Puerto Rico.

There are three very different legitimate postcolonial alternatives for a relationship between Puerto Rico and the United States: (1) independence, (2) non-assimilationist statehood, and (3) a constitutional bilateral form of free association. [FN22] I choose to focus on all three decolonization alternatives rather than my own personal choice, independence. I do so because there is broad agreement among Puerto Ricans regarding the current status of Puerto Rico as colonial. [FN23] Yet the choice of a specific postcolonial solution from among the three listed above is a deeply divisive issue among Puerto Ricans. [FN24] I have accordingly chosen to study postcolonial organizations that fit within the three general postcolonial status alternatives advocated by political parties in Puerto Rico.

The economic implications of all three status alternatives involve expenditures by the colonial power, the United States, to compensate the colonized people, the Puerto Ricans. These payments are essential both for the construction of local political power for Puerto Ricans, and to create a viable Puerto Rican economy that supports real equal opportunity for puertorriqueñas y puertorriqueño s, thus repairing the legacy of political, economic, and psychological colonization by the United States. These legal changes and payments can be characterized as reparations, as defined in contemporary critical jurisprudence. [FN25]

I was very happy to be invited to develop and present some preliminary thoughts about reparations scholarship as it relates to Puerto Ricans in the "Reparations Panel" at LatCrit VII. [FN26] This article memorializes my panel *392 presentation and develops some further thoughts on the subject, based on the discussion and research that followed the conference.

Part II of this article will explain how reparations discourse generally seeks to negate the effects of racism and essentialized racial construction by the normative (dominant) United States society. [FN27] The section engages the tensions between LatCrit and certain mostly African-American Critical Race Theory (CRT) scholars that led to the
creation of LatCrit and shaped it as an aggressively coalitional, welcoming form of outsider jurisprudence [FN28] in the critical tradition. [FN29] It will also discuss the purpose, importance, and qualifying factors of "centering" the Puerto Rican condition in reparations discourse. [FN30]

Part III of this article applies LatCrit theory [FN31] to construct the meaning and implications of reparations within recent Critical Race Theory [FN32] and more broadly in outsider jurisprudence. The article then uses the sophisticated analysis developed by the existing reparations scholarship, viewed through a LatCrit lens, to construct an initial inquiry into how reparations might inform the implementation of a postcolonial status that empowers the people of Puerto Rico. Part III concludes by explaining that the arguments developed in this article are expressly for the benefit of the Puerto Ricans presently living in Puerto Rico. For they are legally and socially marginalized to a higher extent than any other U.S. citizen, and even more than persons of Puerto Rican descent who reside in the "United States proper."

Finally, Part IV of this article, occasionally using the problems generated by the U.S. Navy's bombing of the Puerto Rican island of Vieques, applies LatCrit theory, informed by reparations scholarship, to begin developing a proper understanding of the Puerto Rico situation as it is relevant to the acquisition of independent legal and economic sovereignty, or national power within the United States, by the Puerto Ricans. [FN33]

I. Rotating Centers in the Reparations Discourse: The Sensitive Matter of Race

The normative culture in the United States socially constructs many different non-white races who are supposedly "naturally" inferior relative to whites. [FN34] In this context, the Puerto Ricans are just one of many groups who are the objects of racialization, [FN35] as are Latinas/os in general. [FN36]

Initially, one might argue that the construct of Latina/o as a racial category encompassing people of white, indigenous, and African heritage misses the point that Latinas and Latinos are not a race, but rather a cultural/ethnic group encompassing persons of many different races. [FN37] To put it more simply, phenotypically or anthropologically, some Latinas/os are white, black, indigenous, Asian, Arab, or of mixed heritage. On the other hand, many Latinas/os embrace the concept of a "sociedad o raza indígena, española y africana" (an Indian, Spanish, and African society or race). [FN38] But, of course, these shifting constructions of Latinidad (Latina/o-ness) only help to reinforce the LatCrit tenet that race is a social construct, [FN39] and as such varies according to who and how it is being defined. [FN40] Nevertheless, the racialization of Latinas/os as a single non-white race was constructed to justify and reinforce our marginalization within the United States.

It is important to note that the social construction of a Latina/o "race" is ultimately not primarily based on or motivated by ethnicity [FN41] and xenophobia, but rather by race and racism. This is not to suggest that ethnicity [FN42] and "foreignness" [FN43] are not a part of this construct, but rather to emphasize the phenomenon of the social construction of race(s). Latinas/os are racialized as a mixed, non-white race which, as in the case of African-Americans, results in our social marginalization. [FN44]

Developing consciousness about being the common victims of United States racism [FN45] has often produced more conflict than common ground internally among Latinas/os [FN46] and, as this section engages, between Latinas/os and other racialized groups, especially African-Americans. [FN47] Because reparations discourse has recently been strongly deployed by African-American scholars, the expansion of the
discourse to cover other racialized non-white groups must be undertaken with sensitivity to the claims articulated by other groups.

Accordingly, the Reparations Panel was described in the Substantive Program Outline for LatCrit VII as follows:

The term "reparations" has recently become synonymous with the struggle of African-Americans to obtain the payment of damages from governments that perpetrated the immoral crimes of slavery, especially from the government of the United States. While this panel will address this issue, it also seeks to expand the discourse to include the plight and efforts of all the victims of United States imperialism. . . . [T]he "Reparations Panel" will center a variety of progressive social movements within an expanded definition of reparations and within LatCrit theory and praxis. [FN48]

Like fellow LatCrit scholar Robert Westley--an expert on reparations for African-Americans [FN49]--I deploy a comparative study of reparations to set a moral, and sometimes legal, precedent for other claims of reparations. This is not intended to develop a "comparative victimology" which divides marginalized groups. [FN50] The movement in favor of the decolonization of Puerto Rico is simply one of many "progressive social movements" that seeks to undue the legacy of U.S. imperialism. However, looking at the problem of the Puerto Ricans in no way diminishes the claims to reparations articulated by other groups, [FN51] most especially those made by African-Americans. [FN52]

However, claiming the center in this charged discussion, [FN53] even if only temporarily, requires LatCritical sensibilities, particularly because defining *397 Blackness within LatCrit has occupied a great deal of our scholarly time. [FN54] After all, LatCrit was born, in part, out of a sense of exclusion(s) from the Critical Race Theory Workshop (the annual meeting of RaceCrits), which was at the time dominated by African-American scholars. [FN55] Additionally, the development of the Black/White Binary Paradigm of race critique by LatCrit scholars [FN56] was met with substantial discomfort, [FN57] and even some outright hostility, [FN58] among our African-*398 American fellow travelers. [FN59] Nevertheless, because of LatCrit's aggressive and often sensitive search for intersectionalities, and after strong debate, we have largely managed to reach common ground that allows us to rotate centers to focus on particular groups, without marginalizing other fellow outsiders. [FN60]

LatCrit is self-consciously coalitional (intersectional) and anti-essentialist. But LatCrit scholarship and its other interventions are also mature and sophisticated enough to manage to rotate centers, or, in the words of Athena Mutua, to "shift bottoms" to focus on different marginalized groups, [FN61] while avoiding essentialism. [FN62] The most important part of this process is to acknowledge diversity, and to avoid the dangerous homogenization of entire groups as well as the pitfalls of comparative victimology. [FN63]

*399 In this LatCrit coalitional spirit, the remainder of this article reviews existing reparations scholarship to inform a LatCrit solution to the lack of sovereignty and the general racialized marginalization of Puerto Ricans that has been imposed by U.S. imperialism, without prejudice to, and in the hope of affirmatively assisting any other legitimate claims therefor. [FN64]

II. Reparations Theory Through a LatCrit Lens

A. The Legislation-Litigation Paradox for Reparations
Reparations generally, and postcolonial reparations in particular as defined herein, will necessarily involve a legislative allocation of public resources. Additionally, reparations theory has gained momentum in recent years in large measure because of frustration with judicial decisions regarding racial discrimination and the affirmative action remedy. [FN65] But, as this section explains, judicial action might paradoxically be the only effective catalyst for postcolonial reparations in the Puerto Rico context.

The new reparations theory is mostly based on a pessimistic--albeit largely accurate--view of the willingness and ability of U.S. courts to fashion appropriate *400 remedies for enduring institutionalized racism. [FN66] People of color are seeing the legal requirements of civil rights protections, as defined and enforced by the courts, being continually eroded in this period of conservative backlash. [FN67] Accordingly, reparations theory seeks to advance, mostly through the legislative process which is not tightly bound by the requirements imposed on judicial remedies, and is therefore given greater leeway in action. [FN68]

Legislative reparations theory implies that the victims seeking compensation through reparations have the capacity to influence the political branches of government and that those institutions have the will to act on their behalf. [FN69] Colonial reparations are the responsibility of the federal government. Therefore, the pertinent branches of government are the elected legislators and the executive officials of the U.S. government. "Political" is used here rather narrowly to refer to the overtly political elections process of the members of the United States Congress, president, and vice president. In contrast, since federal judges are appointed, I do not include the judiciary among the "political" branches of government.

Voting for or against political candidates and lobbying elected officials can potentially produce positive results. But, unfortunately, these political venues and methods are largely closed to or ineffective for Puerto Ricans. History shows that the U.S. executive and legislative branches have consistently perpetrated the social and legal constructs of Puerto Rican subordination, with the courts giving them the power and discretion to do so. [FN70] More importantly, despite their U.S. citizenship, Puerto Ricans do not have a congressional delegation, just one non-voting representative in the U.S. Congress, [FN71] and are not allowed to vote in presidential elections. [FN72] This "democratic deficit" [FN73] in the U.S.-Puerto Rico relationship makes *401 any appeal to the political branches of government unlikely to succeed. [FN74] Therefore, a "political" solution to U.S. colonialism that involves either legislators or executive officials may not be possible in the context of the U.S.-Puerto Rico relationship without judicial intervention, at least as a catalyst.

In order to maintain its imperial authority, [FN75] the United States often purports that its territories possess the level of sovereignty that they desire. [FN76] Accordingly, the United States as colonial power shifts to the colonized people--the Puerto Ricans--all the legal and political burdens implicated in ending the colonial occupation. Corresponding legal burdens are imposed by judicial opinions that give the U.S. Congress almost unfettered authority to legislate in Puerto Rico, while discriminating against its citizens. This creates a presumption of legality for any status imposed by the United States on its territory (under U.S. law).

Political burdens imposed by the democratic deficit deprive Puerto Ricans of meaningful participation in the national political process. Puerto Ricans must bear the burden of pleading for a postcolonial status, the burden of production of arguments in favor of it, and the burden of proving that they are entitled to any remedy at all both in the courts and in the political arenas. The United States thus completely avoids the responsibility of justifying the imposition of continued colonialist occupation as legal or moral.
Because the political branches of the U.S. government insist upon the requirement that Puerto Ricans end their own colonial imprisonment, I remain convinced that--in the absence of an armed struggle [*FN77*]--only judicial action will in fact force the political branches of the United States government to act to decolonize Puerto Rico. [*FN78*] Skepticism about this theory is natural. Frankly, the courts have so far not been helpful to Puerto Ricans in their search for sovereignty or equal rights under U.S. law. [*FN79*] In fact, some might argue that the courts are as political as any other branch of the U.S. government. But, because of the democratic deficit of the U.S.-Puerto Rico relationship which deprives the Puerto Ricans of direct participation in national legislative and presidential elections, the judiciary is the only branch of government where the Puerto Ricans might stand a small chance of obtaining a federal declaration that continued territorial status violates the U.S. Constitution.

The constitutional basis for the U.S. power over its territories, including Puerto Rico, is the "Territorial Clause" of the Constitution, which reads as follows:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any claims of the United States, or of any particular state. [*FN80*]

In the Insular Cases, resolved at the beginning of the twentieth century by the U.S. Supreme Court, the clause was interpreted to give to the federal government almost unfettered authority over the territories and territorial residents. [*FN81*]

My basic argument is simple: It is unconstitutional for the United States to remain a colonial power--a holder of territorial possessions under the U.S. Constitution--for a period of over one hundred years. In other words, there is a time limitation on the unfettered authority of the U.S. government pursuant to the territorial clause. [*FN82*] Even conceding that the government of the United States has the power to acquire new lands by conquest, [*FN83*] the purpose of such land acquisition under the constitution must be to determine that territory's suitability for incorporation into the union, and "when the unfitness of particular territory for incorporation is demonstrated the occupation [must] terminate." [*FN84*] While the presumption of incorporation into the union, i.e., statehood, articulated in the Northwest Ordinance of 1787 [*FN85*] may no longer be in effect, [*FN86*] the requirement that territorial status be transitional should be.

Cuba and the Philippines are examples of territories occupied by the United States that eventually became independent. [*FN87*] Accordingly, there is precedent for territories becoming either states of the union or independent republics following the transitional territorial status. I argue that these precedents establish: (1) that statehood or independence are constitutional post-territorial status alternatives, and (2) that territorial status must be transitional and therefore temporary. Congress has the responsibility to make a determination about incorporating a territory into the union as a state or giving it sovereignty as an independent state (or a truly bilateral *404 free associated state). [*FN88*] Accordingly, because of Congress's failure to change Puerto Rico's colonial (territorial) status after a more than reasonable 100-year period following the occupation of the island and the first Insular Cases, it is now up to the U.S. courts to order the federal government to construct a non-territorial, constitutional status for the people of Puerto Rico.

Nevertheless, the actual implementation of a postcolonial future for mi isla (my island) will require legislative and executive actions that will be informed by the current scholarship regarding the problems of reparations. Reparations scholarship may assist in
designing a transition to sovereignty and empowerment for Puerto Ricans that gives them true political citizenship while allowing them to maintain a separate and distinct cultural citizenship. [FN89]

B. Constructing a LatCritical Meaning for Reparations

Reparations, as that term is used here, are a general remedy implemented through a judicial or legislative allocation of public resources (general tax and other government revenues) to create programs that will allow a previously marginalized group to acquire full economic, political, and social citizenship within the national polity, by repairing the harm(s) caused by the normative (dominant) legal/political culture. [FN90]

"The basis of the claim for reparations is not need, but entitlement. Need is not irrelevant, but it is by no means central to the claim. Reparations as a norm seek to redress government-sanctioned persecution and oppression of a group." [FN91] In the case of Puerto Ricans, the colonization of the island, and the legal definition of Puerto Rican citizenship as second-class, [FN92] mark the most obvious elements of oppression. The social construction of the Puerto Ricans [FN93] as being inassimilable because they belong to a single, inferior, non-white race is both the basis for identifying the victimized group, and the harm caused to them by the United States.

It also is important to understand "reparations not as compensation, but as 'repair'--the restoration of broken relationships through justice." [FN94] Reparations allow marginalized groups to "position themselves as creditors seeking payment of an overdue debt, rather than as racial supplicants seeking an undeserved preference," thus countering the reactionary deconstruction of affirmative action through the myth of meritocracy. [FN95] Accordingly, modern reparations theory seeks to empower outsider groups to coalesce as communities affirming real equality around development of a legal norm in the United States that mandates reparations to groups victimized by racism that is not group specific. Such a norm would apply to any group that could show the requisite degree of harm from racism, linked to an international standard of human rights, plus a reliable estimate of damages. [FN96]

Depending on the nature of the damages, reparations are not necessarily strictly monetary, as discussed below, [FN97] but they necessarily involve an allocation of governmental resources in one way or another. [FN98] As Westley indicates, reparations have to be a general remedy, paid by the government, as the principal perpetrator, using general taxpayer revenues, as spent by the legislature. In the case of Puerto Rico this may perhaps require a court order. To the extent that this entails monetary reparations, they should not take the form of individual payments, since that would be inconsistent with the group-vindication that is the basis of the claim. [FN99] Nevertheless, intra-group class differences must necessarily come into play when designing any economic remedy to resolve the problems of the marginalized. [FN90] Accordingly reparations should focus on "the poorest among us [who] should be compensated first and through meaningful (not symbolic) monetary transfers." [FN100]

C. Re/Creating Citizenship for Oppressed Groups Through Reparations

In framing its objectives and beneficiaries, reparations theory is conscious of the difference between legal and political citizenship, on the one hand, and cultural and social citizenship on the other. [FN101] By focusing on marginalized groups, reparations theory continues the group-centered communitarian [FN102] challenge to the traditional individual-focus of liberalism seen in the citizenship debates. [FN103]
In the citizenship debates, defenders of liberalism [FN104] favor the "toleration" model of the liberal state as a solution to the challenges of multiculturalism--diverse cultural identities and citizenships--within the modern state. [FN105] But communitarians *407 counter by saying that since liberalism is not an inherently progressive political theory, [FN106] it requires a multicultural, critical lens to produce a form of citizenship that truly empowers cultural outsiders. [FN107] For example, Jürgen Habermas provides a coherent political theory that attempts to resolve the problems of outsider groups within the multicultural state. [FN108] Habermas argues that it is possible to respect multiculturalism in a modern democratic society. Individual and group cultural differences can exist, and the state can thrive, if the citizens exercise what he calls "constitutional patriotism," under which individuals are free to develop their own personal or group culture [FN109] as long as they share legal/political citizenship and a common political culture. [FN110]

In the context of Puerto Rico, and in most colonial situations, the concept of cultural nationhood or citizenship can be used to differentiate the colonized peoples from their colonial oppressors; [FN111] it can additionally be used as a source of empowerment, consciousness, and pride. [FN112] But, cultural exploration might also *408 produce legitimate concerns over the dangers of nationalism [FN113] and cultural imperialism. [FN114] Accordingly, LatCrit theory must illuminate the proper balance between identifying cultural faultlines that require reform, and the imposition of cultural imperialism that seeks a homogenized normativity that only perpetuates the hegemony of the colonial power. This leads to a crucial question in the reparations debate: "Whether reparations are regressive in the sense that they entrench biological fictions of race." [FN115]

Westley cites Justice Bradley to illustrate the often unarticulated view of white Americans regarding African-Americans:

> When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected. [FN116]

Paradoxically, eschewing its hetero-patriarchal components, this statement of the legal meaning of citizenship represents, in some ways, what Puerto Ricans aspire to, given that their citizenship is legally constructed as inferior to that of any citizen of the United States who does not reside in the territory of Puerto Rico. [FN117] Here, Westley is discussing the search for real citizenship for African-Americans within the United States. In so doing, he constructs a response to Justice Bradley that one can apply to the Puerto Rican's search for equal citizenship:

*409 As Justice Harlan expressed then in dissent, and we today may acknowledge, "[i]t is scarcely just to say that the colored race has been the special favorite of the laws[;]" and less than twenty years out from slavery, in event, did not mark the point in Black progress at which equality with whites no longer should have been a national concern. The maintenance of a system in which "any class of human beings" is kept "in practical subjection to another class, with power in the latter to dole out to the former just such privileges as they may choose to grant[,] marks Justice Bradley's statements as not only unreasonable, but also unjust. It is no less unreasonable and unjust today." [FN118]
Critical Race and LatCrit theorists have recognized that group or identity rights are often opposed by traditional liberals and modern reactionaries. [FN119] In the case of the Puerto Ricans, they are treated as a group for the purpose of constitutional deprivation of constitutional rights guaranteed to every U.S. citizen who resides in the "United States proper," [FN120] but not for purposes of an equal allocation of the public resources spent on "regular" U.S. citizens. [FN121]

As a result of the ongoing colonial experience, there are at least two substantial Puerto Rican communities [FN122] that interact with and are distinguished from estadounidenses (people of the United States): [FN123] Puerto Ricans in Puerto Rico, and Puerto Ricans in the "United States proper." In Puerto Rico, the terms that are used *410 to distinguish the three groups of American citizens described above are gringa/o (used to refer to a non-Latina/o citizen of the United States), [FN124] niuyorican (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 isleña/o (used to refer to Puerto Ricans born on and presently living on the island). [FN125]

The group entitled to reparations in the U.S.-Puerto Rico postcolonial implementation should include all island-born Puerto Ricans who live on the island, the isleñas/os, as they constitute an identifiable cultural nation with a definable territory that is entitled to sovereignty. I am willing to allow mainland-born Puerto Ricans to migrate to Puerto Rico to become citizens, with probably a one-year residency requirement. Additionally, island-born Puerto Ricans who had left would likewise be allowed to return, if they so chose. I would also consider naturalization for any other U.S. citizen, native or naturalized, and for foreign citizens living in Puerto Rico. [FN126] But, absent a return to the island, I have purposely chosen to exclude those of us who reside in the "United States proper" because that migration from la isla to the "states" results in more legal and political rights, at least in theory, [FN127] than those enjoyed by the Puerto Ricans on the island. In any case, despite the realities of marginalization in the U.S. mainland, the truth is that the Puerto Ricans in Puerto Rico represent the "poorest among us" and are thus the group most entitled to reparations. [FN128] Moreover, their relationship to the land is legally determinative, since the sovereignty and political empowerment remedies advocated here apply to the territory of Puerto Rico.

III. Reparations, and the Politics of Colonial Citizenship

The traditional narrative about Puerto Rico in the United States posits that the Puerto Rican isleñas/os "have the best of both worlds" because "they" do not pay federal taxes and nonetheless get federal benefits. [FN129] But this narrative is initially misleading and ultimately completely false.

*411 On Sunday, September 13, 1999, the New York Times ran an article reporting on the release of Puerto Rican political prisoners that reflected the "best of both worlds" attitude. 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. [FN130]

Initially, the statement, as drafted, is factually incorrect. Puerto Ricans do not pay federal income taxes, but they have to pay Social Security and FICA taxes on income earned in Puerto Rico. [FN131] Additionally, "[t]he local personal income tax in Puerto Rico is higher than in most states, including both federal and local contributions." [FN132] Finally, the narrative about taxation is quite misleading because, given the level of poverty in Puerto Rico, few of the island residents would be required to pay any
federal income tax at all and it would certainly not be a substantial source of income for the federal treasury. [FN133]

More importantly, the narrative is crafted to create a false impression that all Puerto Ricans live 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." In fact, the U.S. citizens residing in Puerto Rico receive federal benefits at a rate lower than citizens residing in the continental United States and bear a disproportionately high level of local taxation. [FN134]

Moreover, I believe that in both private economic gain and the use of Puerto Rican land for military and other federally defined public purposes, [FN135] the island has produced substantial profit and economic service to the United States *412 during the more than 100 years of occupation. [FN136] For example, nine out of ten pharmaceuticals consumed in the United States are produced in Puerto Rico, by a U.S.-controlled $27-billion industry. [FN137] In addition, the United States has substantial military bases in Puerto Rico, including its largest naval base and only remaining combined arms live-fire training site--Vieques island. [FN138] The government apparently wishes to continue to use them. [FN139]

Economic reparations would be designed to undo the damages caused by this colonial exploitation. But reparations are not simply economic, they can also be political and psychological. Puerto Rico is entitled to a construction of its sovereignty and the reconstruction of the citizenship of Puerto Ricans through constitutional legal reform. It is also entitled to a repair of the reputational damage done by the essentialized social construction of Puerto Ricans by the United States, and the emotional damage caused by the imperialist occupation of the island.

Accordingly, the types of reparations that would be relevant in the Puerto Rico-U.S. colonial context are, at least: (1) the construction of sovereignty; (2) the return of property and monetary compensation for the occupation; (3) information disclosure; and (4) apology. Each category will be briefly discussed below.

A. Citizenship Reparations: The Construction of Puerto Rican Sovereignty

Generally speaking, the politics of legal citizenship and status for Puerto Ricans can be divided into three categories, identified with the political parties on the island: (1) pro-statehood; (2) pro-commonwealth; and (3) pro-independence. [FN140] Those who favor statehood want Puerto Rico to become a state of the union, thereby giving its citizens full, permanent United States citizenship. [FN141] Those who favor the *413 current commonwealth likewise favor permanent United States legal citizenship, but under the free associated state/commonwealth relationship. [FN142] Finally, the pro-independence movement favors an end to U.S. citizenship and the creation of legal Puerto Rican citizenship that is recognized under international law. [FN143] Any of these categories requires basic institutional reform and has the potential to produce a legitimate postcolonial Puerto Rico. [FN144]

Eric Yamamoto provides an important warning about reparations and institutional reform:

[R]eparations by government or groups should be aimed at a restructuring of the institutions and relationships that gave rise to the underlying justice grievance. Otherwise, as a philosophical and practical matter, reparations cannot be
effective in addressing root problems of misuse of power, particularly in the
maintenance of oppressive systemic structures, or integrated symbolically into a
group's (or government's) moral foundation for responding to intergroup conflicts
or for urging others to restructure oppressive relationships. This means that
monetary reparations are important, but not simply as individual compensation.
Money is important to facilitate the process of personal and community "repair". . . . [FN145]

Community repair for Puerto Ricans on the island means the construction of real political
power for themselves and their territory. I have argued in other works that Puerto
Ricans must be able to develop "shared identities" [FN146] within their own *414
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. [FN147] To construct Puerto Ricans as cultural
"citizens of the world," [FN148] or even of the United States, would constitute an
imposed homogeneity. This argument implies that Puerto Rican nationalism may be
deployed as a positive force, [FN149] as long as it is limited by a pluralistic
communitarian consciousness. [FN150] In this context, Puerto Ricans should be able to
choose to be Puerto Rican patriots. [FN151] Or, more generally, they should be able to
choose a national affiliation to the Independent Republic of Puerto Rico, to the Free
Associated State of Puerto Rico, or to the U.S. State of Puerto Rico.

The keys to a future postcolonial legal relationship between Puerto Rico and the United
States are the preservation of Puerto Rican cultural identity on the one hand, [FN152]
and the grant of full political power to the Puerto Ricans on the other. Cultural
preservation implies resistance to assimilation into an essentialized, normative U.S.
culture. Political power implies that Puerto Ricans will have direct participation in the
political processes of the relevant sovereign authority that *415 controls Puerto Rico.

Under independence, that simply means a democratic Republic of Puerto Rico with
universal suffrage. Under statehood it means the same level of participation given to any
U.S. citizen living in a state: the power to elect a congressional delegation and to
participate in presidential elections. Under commonwealth, the matter is not entirely
clear, but I argue that it requires a type of sovereignty shared through free association
that is equally binding on the United States and on Puerto Rico; in my view, this can
only be accomplished through an amendment to the U.S. Constitution. [FN153] But the
path to true empowerment for the Puerto Ricans must also include economic and land
reform, as discussed in the next section.

B. Land and Monetary Reparations

History reveals that one of the estadounidenses' interests in their defeat of the Spanish
in the Spanish-American War was to acquire Puerto Rico's soil. [FN154] When President
McKinley instructed the U.S. delegation that negotiated the Treaty of Paris, the only full
territorial cession that the president ordered them to demand from the Spanish was that
of the islands of Puerto Rico. [FN155] Since 1898, the United States has continuously
used the island as a military outpost, [FN156] and appears *416 especially interested in
continuing to do so now for military training and as a strategically crucial base of
operations. [FN157]

Pentagon officials call the Puerto Rican island of Vieques the "only place its Atlantic fleet
can hold simultaneous land, air and sea exercises using live fire." [FN158] The United
States has 12,375 miles of coastline. [FN159] When President Clinton declared that
United States coastlines had to be protected in 2000, [FN160] he apparently did not
include all 311 [FN161] miles of coastline in Puerto Rico. [FN162] More importantly,
while Vieques is not geographically irreplaceable, it is most certainly politically irreplaceable. [FN163]

Notwithstanding the increased dependence on Puerto Rican soil for military bases and training, the United States has a long history of disregard for the health [FN164] and dignity of the Puerto Rican people. [FN165] Since the outset of United States colonization, it was evident that the United States' interest in conquering land [FN166] did not extend to accepting the colonized people as equals. The Treaty of Paris, through which Spain ceded Puerto Rico to the United States, unlike the Treaty of Guadalupe *417 Hidalgo, which ceded conquered Mexican territory, did not guarantee U.S. citizenship for the inhabitants of Puerto Rico. [FN167]

Reparations will have to include the return of the military lands to Puerto Ricans, as well as their environmental cleanup. [FN168] Moreover, the Puerto Rican economy will have to be made to work for Puerto Ricans, not just for U.S. taxpayers and investors. Currently, Puerto Ricans on the island have a mean per capita income of less than one-third of the national U.S. average. [FN169] Additionally, they have received only a fraction of the federal benefits to which any other U.S. citizens are entitled. [FN170] Reparations theory can well inform a resolution to these land and economic problems.

C. Psychological Reparations: The Cure of Information

Perhaps the biggest harm perpetrated by the United States against the people of Puerto Rico can be labeled "the crisis of self-confidence." This form of internalized oppression [FN171] that afflicts the people of Puerto Rico leads them to *418 conclude that they are incapable of self-government. Under this tragic construct, Puerto Ricans believe that they lack the economic power to succeed as an independent nation--that they lack the intellectual and moral capacity for government. [FN172] At the same time, Puerto Rico's cultural assertiveness was seen by the United States as political resistance that had to be stopped. In the process, independence was constructed as an unacceptable alternative to the United States, and a disaster for Puerto Ricans. [FN173] This resulted in a campaign of cultural [FN174] and political repression. [FN175]

The dominant narrative, as reinforced 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" [FN176]--too unassimilable--to be incorporated into the United States. [FN177] More recently, Puerto Ricans have been portrayed as "unpatriotic" and "ungrateful" in the public discourses over the release of Puerto Rican political prisoners, [FN178] and over the protests of the Navy's use of Vieques. [FN179] In addition to legally constructing Puerto Ricans as second-class citizens, the United States reinforces this devaluation of Puerto Rican dignity by using stereotyping narratives about Puerto Rican difference and "otherness" through a campaign of political repression.

From the Ponce Massacre in 1937, [FN180] where 17 civilians were killed by police while participating in a nationalist rally, to the murders of Santiago Mari-Pesquera, son of independence leader Juan Mari-Bras, [FN181] and two pro-independence *419 activists by police on the Cerro Maravilla [FN182] (and their official cover-up), [FN183] there has been a history of political violence directed at pro-independence forces in Puerto Rico. [FN184] The violence, the application of the Little Smith Act, [FN185] and the "subversive files" are the best examples of generalized anti-independence repression.

Persons were deemed to be "subversivos" (subversives) simply because they favored the independence of Puerto Rico. Accordingly, the term subversivo--in its correct meaning identifying legitimate political activists illegally targeted by government
misconduct—was thrust into the legal consciousness of all Puerto Ricans by the Puerto Rican Supreme Court decision in Noriega-Rodriguez v. Hernandez-Colón. [FN186] In that case, the Court held that the practice of opening police files to investigate persons solely on the basis of their political views and legal activities was unconstitutional. The Court ordered that the existing files be turned over to those persons on whom the files were kept. [FN187]

*420 The Puerto Rican Supreme Court's approach differed substantially from that of the U.S. Supreme Court, which did not find anything wrong with this kind of governmental political "data gathering." [FN188] Accordingly, U.S. intelligence agencies, some of which were not chartered for domestic investigations, were heavily involved in Puerto Rico. [FN189] The FBI, for example, dedicated most of its agents in Puerto Rico not to investigating bank robberies and other crimes, but to follow independentistas (independence supporters), and to attempt to sabotage the movement. [FN190]

Economic reparations are part of the solution to the crisis of self-confidence generated by the U.S. representation of the Puerto Ricans [FN191] and the acts of political repression briefly described above. But perhaps even more important than money is a full disclosure by the government of the United States of the benefits that it has derived from the century-old U.S.-Puerto Rico relationship, both in the private and public economies. This is essential in undoing the myth of Puerto Rico as a dependent U.S. welfare-state that only drains the U.S. economy.

Moreover, full disclosure of the political repression the United States has perpetrated and encouraged is also required, with specific mention of the anti--independence violence and police-state tactics that target any political dissent that the United States chooses to label as "anti-American." The distinction between public enemy and political opponent is especially important in the post-September 11 United States. Once a full disclosure is made, the Puerto Ricans can be in a position to evaluate the adequateness of any other type of reparations, including apology. [FN192]

Conclusion

Puerto Rico's colonial relationship to the United States has lasted from the days of President William McKinley at the dawn of the twentieth century, to the post 9-11 days of the twenty-first-century administration of President George W. Bush. I find it utterly astonishing that this one-hundred-year-old colonial captivity endures. To the extent that the United States holds absolute legal/political power over the island and the people of Puerto Rico, the only explanation is that the colonialists are still invested in their colony; and post 9-11 conditions make them only more aggressive and intransigent in the exercise of that colonial power.

In contrast, the second century of the United States colony in Puerto Rico had started on a few hopeful notes. The year 2000, for me, was marked by the "Latin Music Craze," in which Latina/o artists (many of them Puerto Ricans), became the darlings of MTV and of U.S. mass media. [FN193] More importantly, during 2001, prior to the tragedies of September 11, the Puerto Ricans progressed from singing and dancing to exercising their legitimate right to political activism, in the collective U.S. mind. The protests over the use of Vieques as a training site for the U.S. Navy became the most common public image of the Puerto Ricans in U.S. mass media. This was a terrific example of using a new public visibility and consciousness to subvert existing power hegemonies.

But, unfortunately, the Vieques protests by the Puerto Ricans soon proved the limitations of having to work within a normative culture in which there are the legal and cultural" others". As long as it remained entertaining, in a manner that estadounidenses found
alluring, Puerto Rican visibility was acceptable. But as soon as the message became political, the backlash was quick to follow. Now, the finest moment in Puerto Rican patriotism [FN194] during the U.S. colony is being presented *422 through the lens of U.S. politicians who feel free to misrepresent the status of the Puerto Ricans for their own political needs. [FN195]

Before September 11, 2001, I had allowed myself to become cautiously optimistic about the end of Puerto Rico's colonial status. After all, the interests appeared to be converging and U.S. uses of Puerto Rico seemed to be waning. [FN196] The army had announced the transfer of important military operations away from Puerto Rico, [FN197] and President George W. Bush had stated that he intended to close the Vieques training center in early 2003. [FN198]

But, thereafter, the Congress passed legislation prohibiting the closing of the training range, [FN199] and the Secretary of Defense has indicated that they intend to stay. [FN200] The public/military use of Puerto Rico will continue [FN201] and the private economic benefits derived by U.S. companies through their Puerto Rico operations still exist. Therefore, Puerto Rico continues to represent a net private profit and an essential site for public affairs for the U.S. imperialists. Puerto Rican independence is thus not acceptable to the United States. Moreover, the democratic deficit in the *423 U.S.-Puerto Rico relationship leaves the Puerto Ricans politically powerless to protect their own interests. Despite U.S. citizenship and federal control of their island, Puerto Ricans are a racialized "other" unacceptable for full citizenship rights in the United States.

This sad state of affairs makes it even more important to develop coherent legal theories that might help to empower the marginalized, colonized Puerto Ricans. Reparations theory, as a guide for implementing a court-ordered decolonization of the island, may be one of the most powerful tools in the execution of LatCrit praxis [FN202] to end the occupation of mi Isla del Encanto, my Enchanted Isle of Puerto Rico.

Footnotes:

[FN1]. Puerto Rico is a group of islands. It is comprised of 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 [48 USCS § 731 et seq.] 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."). Unless otherwise expressly indicated, references to the isla or island should be read as synonymous with all the Puerto Rican islands.

[FN2]. Puerto Rico is ceded to the United States by article II of the "Treaty of Peace Between the United States of America and the Kingdom of Spain," which ended the Spanish-American War. See 1 P.R. Laws Ann. 16 (1999); see also Race and Races: Cases and Resources for a Diverse America 327 (Juan Perea et al. eds., 2000) [hereinafter "Race and Races" ], citing 11 Treaties and Other International Agreements of the United States of America 1776-1949, at 615-19 (Charles I. Bevans ed., 1974). The editors of the Puerto Rico collection changed the references to "Porto Rico" included in the original
[FN3]. I was in Ponce when I wrote the initial drafts of this article.


[FN5]. "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 a peoples that are distinguishable from the inhabitants of the colony. See generally Malavet, *Cultural Nation, supra note 4.

[FN6]. See *Balzac v. People of 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." *Balzac, 258 U.S. at 311.* But as long as they remain on the island, they cannot fully enjoy the rights of United States citizenship. See also Guadalupe T. Luna, On the Complexities of Race: The Treaty of Guadalupe Hidalgo and Dred Scott v. Sandford, 53 U. Miami L. Rev. 691 (1999) (Dred Scott is arguably the first of the "Insular Cases" in that it creates the Imperial United States, with its inherent constructs of citizens and non-citizens within U.S. territorial control; Balzac then creates the categories of citizenship, based on larger or lesser entitlements to the enjoyment of constitutional rights.); Adrienne D. Davis, Identity Notes Part II: Redeeming the Body Politic, 2 Harv. Latino L. Rev. 267, 272-73 (1997) (detailing how Blacks were confined to second-class citizenship by U.S. Supreme Court opinions and "totalitarian violence").

[FN7]. Puerto Rican citizenship is not internationally recognized. Therefore Puerto Ricans, as U.S. citizens, travel abroad with United States passports. However, in an interesting, but sui generis case, the Puerto Rico Supreme Court held that Puerto Rican citizenship existed independently from United States citizenship, because of certain provisions of Puerto Rico law. Ramírez de Ferrer v. Mari-Bras, 144 P.R. Dec. 141, 97 JTS 128 (1997). The opinion was issued on November 18, 1997, according to the published text. *Id. at 141.* However, the day before the opinion was issued, Puerto Rico law was amended to require both United States citizenship and Puerto Rico residency in order to be a citizen of the island. *1 P.R. Laws Ann. § 7* (as amended by sec. 1 of Law No. 132 of November 17, 1997); see also Pedro Malavet-Vega, Introducción al Constitucionalismo Americano 179 n.485 and accompanying text (1998) (unpublished manuscript, on file with author) (the footnote discusses the controversy that arose as a result of the rather curious timing of the amendment to the statute).

on all "citizens of Porto Rico [sic]"). The Jones Act adopted the definition of Puerto Rican citizenship included in the Foraker Act. See Foraker Act § 7, ch. 191, 31 Stat. 77, 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 on or before the eleventh day of April, nineteen hundred.").

[FN9]. See generally Joe R. Feagin & Hernán Vera, White Racism ix (1995) ("In the United States white racism is a centuries-old system intentionally designed to exclude Americans of color from full participation in the economy, polity and society.").

[FN10]. In general, as used herein, "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.") citing Erving Goffman, Stigma: Notes on the Management of Spoiled Identity (1963). However, I will also use the term "Other" as a relative term. See infra note 112 and accompanying text.


[FN12]. The ongoing colonial relationship between Puerto Rico and the United States is discussed further below. See infra Parts IIIA and IIIB; see also Malavet, Cultural Nation, supra note 4 (a detailed analysis of the U.S.-Puerto Rico relationship).

[FN13]. I use the term "exile" advisedly. It is a political statement designed to underscore the colonial reality of the U.S.-Puerto Rico relationship and that will hopefully help to subvert it. It reflects the legal reality of the peoples of Puerto Rico who are deprived of sovereignty. See generally Malavet, Cultural Nation, supra note 4. It also refers to the cultural/social construction of foreignness for the Puerto Ricans in the United States, which I discuss further below. See infra note 176 and accompanying text; see also Pedro A. Malavet, The Accidental Crit II: Culture and Looking Glass of Exile, 78 Denv. U. L. Rev. 753 (2001) [hereinafter "Malavet, Accidental Crit II"] (describing the real and U.S.-manufactured social constructs of the Puerto Ricans).

[FN14]. See generally Malavet, Accidental Crit II, supra note 13, at 758-63. While there is substantial scholarship in Puerto Rico regarding status issues and the social construction of Puerto Ricans by the United States, there is remarkably little of it in English-language legal scholarship. What little scholarship exists is listed here. See, e.g., Efrén Rivera-Ramos, The Legal Construction of Identity: The Judicial and Social Legacy of American Colonialism in Puerto Rico (2001); Ediberto Román, The Alien-Citizen Paradox and Other Consequences of U.S.

[FN15]. This is discussed in Part IIIB. The Spanish colony was the first colony and the U.S. colony is Puerto Rico's second colonial period or second colony. See generally Malavet, Cultural Nation, supra note 4, at 12-45 (a history of the first colony, the Spanish colony, and a description of the historical antecedents and legal consequences of the second colony).

[FN16]. This is discussed in Part IIC.


[FN18]. See also the discussion of Balzac supra note 6 (the U.S. Supreme Court distinguishes between Puerto Rican U.S. citizens and "Americans"). Except on this one occasion, in this article, I will generally refer to the United States of America as such or as "United States" or simply "U.S." and to its citizens as United States/U.S. citizens or estadounidenses, thus purposefully avoiding the imperialistic appropriation of the terms "America" and "American" to describe only one nation and its citizens. Berta Esperanza Hernández-Truyol explains the irony of using the term "American" to refer only to citizens of the United States of America:
I use the designation United States for the United States of America. Many, if not most or all of the other authors use the terms United States 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, because I find it ironic that in a book on imperialism the imperialistic practice of denominating the United States 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). Berta Esperanza Hernández-Truyol, Introduction, in Moral Imperialism: A Critical Anthology 15 n.5 (Berta Esperanza Hernández-Truyol ed., 2002).

[FN19]. This is discussed in Part IIA infra.

[FN20]. See supra note 6; see also the discussion in Part IIA.

[FN21]. "Essentialist" means motivated by essentialism. "Essentialism adopts the view that all members of a group are alike and share a common 'essence.'" Sumi K. Cho, Essential Politics, 2 Harv. Latino L. Rev. 433 n.1 and accompanying text (1997) [hereinafter "Cho, Essential Politics" ] As it is used herein: 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, instead, collapse multiple differences into a singular homogenized experience.


**[FN22]** I have identified and discussed why these are the only legitimate alternatives in a previous article. See Malavet, Cultural Nation, supra note 4, at 96-102. I am currently working on a book that will develop a model for the future, postcolonial legal relationship between Puerto Rico and the United States in much greater detail. Pedro A. Malavet, *Puerto Rico: Cultural Nation, American Colony (forthcoming NYU Press 2004).* The basic remedial premises of the book are discussed infra notes 80-84 and accompanying text.

**[FN23]** See, e.g., Trías-Monge, Oldest Colony, supra note 14, at 195-96 (an architect of the Commonwealth concludes that "statehood, independence, or enhanced Commonwealth each have the potential of" completing the "exasperating [ly] slow ... process of decolonizing Puerto Rico"); see also the publications cited supra note 14.


**[FN27]** "Normative" means the dominant societal paradigm, i.e., what is considered "normal" in a given sociological context. See Berta Esperanza Hernández-Truyol, *Borders...
"knowledge is socially constructed," therefore, the "normative paradigm's dominance" defines "normal").


[FN30]. "The 'center' idea encompasses struggles about which issue, group and idea should be the focus of attention in a given space, research project, conference, etc." Athena D. Mutua, Shifting Bottoms and Rotating Centers: Reflections on LatCrit III and the Black/White Paradigm, 53 Miami L. Rev. 1177 n.1 (1999), citing Trina Grillo & Stephanie M. Wildman, Obscuring the Importance of Race: The Implications of Making Comparisons Between Racism and Sexism (and Other-Isms), 1991 Duke L.J. 397, 402 (1991) (Mutua explains that these authors describe "the process whereby whites, in workshops designed to discuss racial issues, re-center the discussion around themselves and issues of primary concern to them, in this context, sexism.").

[FN31]. Francisco Valdés, one of the founders of this movement, explains: LatCrit theory is [a] discourse that responds primarily to the long historical presence and general sociological invisibility of Latinas/os in the lands now known as the United States. As with other traditionally subordinated communities within this country, the combination of longstanding occupancy and persistent marginality fueled an increasing sense of frustration among contemporary Latina/o legal scholars, some of whom already identified with Critical Race Theory (CRT) and participated in its gatherings. Like other genres of critical legal scholarship, LatCrit literature tends to reflect the conditions of its production as well as the conditioning of its early and vocal adherents. Francisco Valdes, Theorizing "OutCrit" Theories: Comparative Antisubordination Experience and Subordination Vision as Jurisprudential Method, in Critical Race Theory: Histories, Crossroads, Directions (forthcoming Yale University Press) (citations omitted), available at http://personal.law.miami.edu/~fvaldes/latcrit/overview.html (last visited June 6, 2002).

[FN32]. While definitions are often dangerous, if not impossible--see Francisco Valdés,
Critical Race Theory is the most exciting development in contemporary legal studies. This comprehensive movement in thought and life—created primarily, though not exclusively, by progressive intellectuals of color—compels us to confront critically the most explosive issue in American civilization: the historical centrality and complicity of law in upholding white supremacy (and concomitant hierarchies of gender, class, and sexual orientation).

West, Foreword, supra note 29, at xi. See also Angela P. Harris, Foreword: The Jurisprudence of Reconstruction, 82 Cal. L. Rev. 741 (1994) [hereinafter "Harris, Reconstruction"] (introduction to symposium devoted entirely and specifically to Critical Race Theory).

[FN33]. This is necessarily an initial inquiry because I am still in the process of researching my book, and am therefore not yet in a position to suggest (all) final conclusions illuminated by my investigation. Nevertheless, the conference, my preparation therefor, and the work on this essay have helped me to focus on the important issues in the postcolonial Puerto Rico paradigm.

[FN34]. See, e.g., Tomás Almaguer, Racial Fault Lines: The Historical Origins of White Supremacy in California (1995) (a detailed analysis of racial construction of multiple ethnic groups—including Mexicans, Asians, and Blacks—as subordinate to whites in California); see also Feagin & Vera, White Racism, supra note 9.

[FN35]. Michael Omi and Howard Winant use the term "racialization to specify the extension of racial meaning to a previously racially unclassified relationship, social practice or group." These authors emphasize that "racialization is an ideological process, an historically specific one." Michael Omi & Howard Winant, Racial Formation in the United States: From the 1960s to the 1980s, 61-62 (1987).

[FN36]. Puerto Ricans were racialized as non-white by the United States starting early in the second colony. For example, during the congressional debate on the 1917 Organic Act for Puerto Rico, United States Representative Joseph Cannon stated that "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 percent 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 2, at 346. See also infra note 165 and accompanying text.

[FN37]. See, e.g., Gloria Sandrino-Glasser, Los Confundidos: De-Conflating Latinos/as' Race and Ethnicity, 19 Chicano-Latino L. Rev. 69 (1998) (arguing that "national origin" understanding of anti-latina/o discrimination is superior to one based on "race"); see also Juan Perea, Five Axioms in Search of Equality, 2 Harv. Latino L. Rev. 231 (1997) (arguing that "ethnicity" is a superior concept to "national origin" and "race" in understanding discrimination against Latinas/os in the United States).

[FN38]. This is a common image in Latin American popular culture. 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."

[FN39]. "Race is social, in the sense that the groups commonly recognized as racially

[FN40]. See Berta Esperanza Hernández-Truyol, Indivisible Identities: Culture Clashes, Confused Constructs and Reality Checks, 2 Harv. Latino L. Rev. 199, 207 (1997) (imposed social constructs are dynamic and tend to change based on the racialized, gendered frame of reference of the actor).

[FN41]. Ethnicity includes "common geographic origin; migratory status; race; language or dialect; religious faith or faiths; ties that transcend kinship, neighborhood and community boundaries; an external perception of distinctiveness." Harvard Encyclopedia of American Ethnic Groups vi (Stephen Thernstrom ed., 1980).

[FN42]. LatCrit scholarship has noted how the social and legal construction of Latinas/os in the United States is fundamentally a racialized process. For example, Ian F. Haney-López explains that while race and ethnicity are not essentially different; on the contrary ... race and ethnicity are largely the same. [But they] should not be conflated because these two forms of identity have been deployed in fundamentally different ways. The attribution of a distinct ethnic identity has often served to indicate cultural distance from Anglo-Saxon norms. Left unstated but implicit, however, is a claim of transcendental, biological similarity: ethnics and Anglo-Saxons are both White. The attribution of a distinct racial identity, on the other hand, has served to indicate distance not only from Anglo-Saxon norms, but also from Whiteness. Racial minorities are thus twice removed from normalcy, across a gap that is not only cultural, but supposedly innate.


[FN43]. LatCrit scholars have paid special attention to the social construction of "foreignness," with its inherent denial of "citizenship," that is often imposed on Latinas/os and other groups--such as Asian-Americans--in the United States, despite our legal citizenship. See Neil Gotanda, Asian-American Rights and the "Miss Saigon Syndrome," in Asian-Americans and the Supreme Court 1096 (Hyung-Chan Kim ed., 1992) (In "the United States, if a person is racially identified as African-American or white, that person is presumed to be legally a U.S. citizen and socially an American.... [But] these presumptions are not present for Asian-Americans, Latinos, Arab-Americans, and other non-Black racial minorities. Rather, there is the opposite presumption that these people are foreigners; or, if they are U.S. citizens, then their racial identity includes a foreign component."); Juan Perea, Los Olvidados: On the Making of Invisible People, 70 N.Y.U. L. Rev. 965, 966 ("Latino invisibility" defined as "relative lack of positive public identity and legitimacy" caused by our "foreign" ethnicity). Language has also been an important theme in LatCrit scholarship. See, e.g., Juan F. Perea, Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English, 77 Minn. L. Rev. 269 (1992) (analyzing "official English" legal proposals); Steven W. Bender, Direct Democracy and Distrust: The Relationship Between Language Law Rhetoric and the Language Vigilantism Experience, 2 Harv. Latino L. Rev. 145, 146 (1997) (discussing "Language Vigilantism," how "individuals speaking a language other than English [mostly Latinas/os] have increasingly come under attack [from normative Anglos] in their schools, their workplaces, and even in their homes and places of leisure").
[FN44]. See generally Ian F. Haney-López, Race and Erasure: The Salience of Race to LatCrit Theory, 85 Cal. L. Rev. 1143 (1997), 10 La Raza L.J. 57 (1998) (concluding, after extensive review, that Latinas/os are racialized by the normative U.S. society and failing to treat this as racial construction and racism will only result in an enforced erasure of Latina/o issues from public discourse and in permanent marginalization of our group).

[FN45]. This article uses the phrase "United States racism" rather than "racism in the United States," and "white racism" instead of "racism," to emphasize that white racism is an institutional, constitutive element of the dominant white Anglo culture in the United States. Additionally, one can be a victim of "United States racism."

[FN46]. See, e.g., Ediberto Román, Common Ground: Perspectives on Latino/Latina Diversity, 2 Harv. Latino L. Rev. 483, 484 (1997) ("I am concerned over the amount of time and energy we spend on our differences [as Cubans, Puerto Ricans, whites, blacks, men, women, heterosexuals, homosexuals, Catholics, agnostics] as compared to the time and energy we spend acknowledging common ground.").

[FN47]. See the discussion infra notes 54-60 and accompanying text.

[FN48]. Substantive Program Outline, supra note 11.


[FN50]. Comparative victimology can be defined as "the attempt to situate a given group ... at the top of an imagined hierarchy of oppression." Westley, Many Billions Gone, supra note 49, at 457 n.111.

[FN51]. For example, in the Luxembourg Agreements Germany agreed to make reparations to Jewish victims of the Holocaust, by making payments to Israel and to individual survivors of the Nazi death camps. Westley, Many Billions Gone, supra note 49, at 453-58 (discussing Wiedergutmachung agreements). Recently, the heirs of the victims and some survivors have pursued claims against Swiss banks that illegally kept the deposits of victims. Westley, Many Billions Gone, supra note 49, at 433 n.16 and accompanying text. Japanese-Americans who were the victims of U.S. government-ordered internment during World War II received an apology and money from the government of the United States. See generally Eric Yamamoto, Racial Reparations: Japanese-American Redress and African-American Claims, 40 B.C. L. Rev. 487, 19 B.C. Third World L.J. 487 (1998) [hereinafter "Yamamoto, Racial Reparations"].

[FN52]. In footnote 10 of his influential reparations article, Westley cites many works favoring reparations for African-Americans. See Westley, Many Billions Gone, supra note 49, at 432 n.10. Westley notes, however, that Derrick Bell has "cautionary views on the struggle for Black reparations" in several works, which he cites. Id. But Westley explains that "[i]t is in part the lack of political enthusiasm for a critical engagement of Black reparations since this initial effort that motivates [his reparations] article." Id.

[FN53]. As the Substantive Program indicated: "Re/Defining the Reparations Discourse. By looking at reparations through a LatCritical lens, we seek to "center" Latinas/os qua Latinas/os in legal discourse, but to do so in a way that recognizes and accounts for the many axes of difference that help to define Latina/o heterogeneity, both domestically and internationally." Substantive Program Outline, supra note 11. See also supra note 30 (defining "to center").

[FN54]. See, e.g., Elizabeth M. Iglesias, Identity, Democracy, Communicative Power,
LatCrit has and will continue to have a fundamental intellectual link to CRT, but it represents a re/orientation of Critical Race Theory to “center” outsider groups other than African-Americans. The realization of the need for a separate space for this change in focus was not an easy process. While I am not suggesting that there is a monolithic CRT experience, or that the CRT workshop (the annual meeting of race crits) either represented the entire field of Critical Race Theory, or that it lacked the capacity to grow, the dynamics of the workshop unfortunately appear to have generated a sense of exclusion(s). See Valdés, Poised at the Cusp, supra note 29, at 3 n.5 ("CRT workshop in 1995 had about forty participants, only two of which were Latina/o, Trina Grillo and [Frank Valdés]"); Cho, Essential Politics, supra note 21, at 449 (condemning the "ritualistic ‘violence’ against gay and lesbian race crits in recent years at the [CRT] summer workshop"); see also Phillips, Convergence, supra note 54, at 1249 n.4 (1999) (member of the original workshop organizing committee concedes that despite best of intentions workshop "repli[cat]ed troubling hierarchies ... in particular, the privileging of African-American experience and of heterosexuality"). For a brief history of the CRT workshop, see generally Phillips, Convergence, supra note 54 (describing history of the CRT workshop, explaining its "invitation only” policy, and suggesting that the workshop and LatCrit Conference had similar memberships and intellectual goals, and that they could and should be coordinated). For a more complete overview of the CRT-LatCrit relationship, with the benefit of the maturity of LatCrit, see Valdés, OutCrit Theories, supra note 28.

This LatCrit challenge to the binary can be traced back to the very first LatCrit colloquium in Puerto Rico. See generally Colloquium, Representing Latina/o Communities: Critical Race Theory and Practice, 8 La Raza L.J. 1 (1996); see also Francisco Valdés, Latina/o Ethnicities, Critical Race Theory and Post-Identity Politics in Postmodern Legal Culture from Practices to Possibilities, 9 La Raza L.J. 1, 20-24 (1996) (discussing various authors’ challenge to the black/white binary); Robert S. Chang, The Nativist's Dream of Return, 10 La Raza L.J. 571 (1995) (Asian-Americans do not fit within the "comfortable binary" of the Black/White paradigm of race); Deborah Ramirez, Foregoing a Latino Identity, 9 La Raza L.J. 61, 63 (1996) (explaining a personal experience that required her to challenge the paradigm in order properly to assist a local Latina/o community).
56] obscures the key insight of the Black/White paradigm: its relationship to power.""); Devon W. Carbado, Introduction: The Ties That Bind, 19 Chicano-Latino L. Rev. 283, 288 (1998) ("I am sympathetic to the concerns that inform the Black/White paradigm critique.... That said, I have not always been pleased with the way in which the Black/White paradigm critique is framed."); Leslie Espinoza & Angela Harris, Embracing the Tar-Baby: LatCrit Theory and the Sticky Mess of Race, 85 Cal. L. Rev. 1585, 1597 (1997), 10 La Raza L.J. 499, 510 (1998) [hereinafter "Espinoza & Harris, Embracing the Tar-Baby" ] (Angela Harris discusses "Black Exceptionalism," which she defines as: "The Claim ... that African-Americans play a unique and central role in American social, political, cultural, and economic life, and have done so since the nation's founding. From this perspective, the 'black-white paradigm' that Perea condemns is no accident or mistake; rather it reflects an important truth.")

[FN58]. For example, Anthony Paul Farley has written a strong critique of the Black/White paradigm theory:
There is no such thing [as the 'black/white paradigm']--except as a tool of the master. The phrase has, unfortunately, become a truism in LatCrit Theory. Rhetorical choices have political effects and the political effects of the phrase "black-white paradigm" are reactionary. First, it serves white power to allow them to divert their eyes and attention away from the people they hate the most to the other Others whom they hate less. It is akin to saying "We talk too much about your former slaves, Boss." Second, the phrase "black-white paradigm" is itself the kind of conflationary move that LatCrit Theory condemns.

[FN59]. However, it is important to note, as the citations in the footnotes in this Part disclose, that these strong scholarly debates have taken place in the context of the LatCrit conferences, and have been amply developed in the articles published in its symposia. See also note 63 infra.

[FN60]. See Espinoza & Harris, Embracing the Tar-Baby, supra note 57 (a joint article about the often difficult process of reaching common ground among marginalized groups); see also Elizabeth M. Iglesias & Francisco Valdés, Afterword: Religion, Gender, Sexuality, Race and Class in Coalitional Theory: A Critical and Self-Critical Analysis of LatCrit Social Agendas, 19 Chicano-Latino L. Rev. 503 (1998) [hereinafter "Iglesias & Valdés, Coalitional Theory" ] (exploring how LatCrit can remain a self-conscious and self-critical coalitional enterprise, capable of handling "eruptions" [strong differences of opinion, such as that over gender at LatCrit I and that over religion and sexual orientation at LatCrit II], to continue to move forward to develop both a sense of scholarly community [in friendship and solidarity] while maintaining high standards of progressive critical legal scholarship). See also Kevin R. Johnson, Celebrating LatCrit Theory: What Do We Do When the Music Stops?, 33 U.C. Davis L. Rev. 753, 778-79 (2000) (LatCrit must be capable of engaging in criticism that is constructive and even respectful of the views of others; providing specific example).

[FN61]. See Mutua, Shifting Bottoms, supra note 54. This technique of "looking to the bottom" can produce important insights by "examining carefully and critically the sources, workings and effects of power by focusing on the sectors of society where power is wielded with most license and impunity. This technique of 'looking to the bottom' to inform antisubordination theory makes sense because 'the bottom' is where subordination is most harshly inflicted and most acutely felt." Iglesias & Valdés, Coalitional Theory, supra note 60, at 516, citing Matsuda, Looking to the Bottom, supra note 25.

[FN62]. As Dorothy Roberts explains in her LatCrit III Symposium article: "Writing about
Black people is not essentialist in and of itself. It only becomes essentialist when the experiences discussed are taken to portray a uniform Black experience or a universal experience that applies to every other group. Roberts, Black Crit Theory, supra note 54, at 857. And she further explains that “the problem of essentialism [in Feminist legal theory] did not derive from studying the lives of particular women; it derived from claiming that the lives of a particular groups of women represented all women.” Id. at 856-57.

[FN63]. Iglesias and Valdés explain that LatCrit must avoid "racing to the bottom" in a counterproductive search for "comparative victimhood." LatCrit must work "despite and beyond the complex intersections of privilege and subordination that may otherwise tear it asunder along the multiple fissures that too often are produced by conclusory, abstract and uncritical assertions of comparative victimhood--whether real or apparent." Iglesias & Valdes, Coalitional Theory, supra note 60, at 516 (footnote omitted). See also Valdés, OutCrit Theories, supra note 28, at 1316-21 (warning against different forms of "regressive" nationalism(s) that would impose essentialized normativities within our communities; solution is the aggressive, self-conscious discipline--and accompanying tensions--of diversity); Mutua, Shifting Bottoms, supra note 54, at 1177-78 n.2 (explaining that focusing on "the people at the bottom" is not a surrender to victimization, but rather a celebration of survival. "At the same time, I do not think of survival or victimhood as all that binds, or should bind, these various groups. I believe these groups have similarities that transcend oppression.")); Westley, Many Billions Gone, supra note 49, at 457 (warning against comparative victimology).

[FN64]. While colonized peoples will have many intersectionalities, this article does not claim that the Puerto Ricans represent a universal colonial paradigm. After all, many other diverse groups suffer from colonialism. See, e.g., George E. Bisharat, Land, Law, and Legitimacy in Israel and the Occupied Territories, 43 Am. U. L. Rev. 467 (1994). Furthermore, LatCrit Theory has identified colonialism as a diverse and complex global challenge. See, e.g., Ediberto Román, A Race Approach to International Law (RAIL): Is There a Need for Yet Another Critique of International Law?, 33 U.C. Davis L. Rev. 1519 (2000) (advocating a race-based approach is needed in International Law to repair the legacy of racist colonization and conquest); Tayyab Mahmud, Race, Reason, and Representation, 33 U.C. Davis L. Rev. 1581 (2000) (colonialism is one of the subordinating hallmarks of Western liberalism); Sylvia R. Lazos Vargas, Globalization or Global Subordination?: How LatCrit Links the Local to Global and the Global to the Local, 33 U.C. Davis L. Rev. 1429 (2000) (analytical overview of LatCrit's global and inter/national engagements).

[FN65]. Robert Westley explains that his exploration of reparations is partly motivated by recent setbacks against affirmative action: Affirmative action for Black Americans as a form of remediation for perpetuation of past injustice is almost dead. Due to a string of Supreme Court decisions beginning with Bakke and leading up to Adarand, the future possibility of using affirmative action to redress the perpetuation of past wrongs against Blacks is now in serious doubt. Whereas some believe that the arguments supporting affirmative action as a remedy or even a tool of social policy are still sound, affirmative action programs continue to encounter strong political headwinds and judicial disapprobation. See Westley, Many Billions Gone, supra note 49, at 429-30 (footnotes omitted).

[FN66]. In favoring a legislative approach, Westley points out that "historically it has been legislatures, not courts, that have in fact initiated the most comprehensive remedies to racial subordination, Brown v. Board of Education and its progeny notwithstanding." Westley, Many Billions Gone, supra note 49, at 436.

[FN67]. See Westley, Many Billions Gone, supra note 49, at 435-36 ("No matter how
unjustly, [in this "period of backlash"] affirmative action has been pigeonholed in popular consciousness as an 'undeserved racial preference.'


[FN68]. Westley explains: "Importantly, however, a tight fit with the individual rights paradigm may be considered a legal prerequisite to success only in the context of judicially imposed redress. A tight fit is not a moral prerequisite, nor is it a legal barrier to legislative redress. It is noteworthy that even Japanese-American claims were denied by courts and ultimately awarded by Congress." Westley, Many Billions Gone, supra note 49, at 452.

[FN69]. This if "success" is defined to mean the actual award of reparations. But Professor Westley notes that: "Reparations are worth fighting for even if such a campaign is unlikely to be successful, due to the intellectual benefit of racial dialogue." Westley, Many Billions Gone, supra note 49, at 436.

[FN70]. See generally Malavet, Cultural Nation, supra note 4. See also citations supra note 14.

[FN71]. 48 USC § 891 (1994) (allowing a "Resident Commissioner" to represent Puerto Rico in the United States Congress). The Resident Commissioner's "[r]ole in Congress is determined by the House rules under which he may be a member of only three House committees and may introduce bills and speak on the House floor. He may not vote ...." Arnold H. Leibowitz, Defining Status: A Comprehensive Analysis of United States Territorial Possessions 224 (1989).

[FN72]. See De La Rosa v. United States, 842 F.Supp. 607, 609 (D.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"), aff'd, 32 F.3d 8 (1st Cir. 1994). See also Igartúa de la Rosa v. United States, 229 F.3d 80 (1st Cir. 2000), rev'g 107 F.Supp.2d 140, 141, 148 (D.P.R. 2000) (U.S. District Judge Jaime Pieras, Jr., wrote: "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." Accordingly, in denying the government's Motion to Dismiss, the court ruled that U.S. citizens residing in Puerto Rico, either by birth or by relocation from the U.S. mainland, have a constitutional right to vote in presidential elections.).

[FN73]. See Malavet, Cultural Nation, supra note 4, nn.174-77 and accompanying text.

[FN74]. This conclusion is based on three factors: (1) the Puerto Ricans are not the constituents of any of these elected voting legislators; (2) the Puerto Ricans are not an economically powerful group; and (3) history has shown that the Puerto Ricans have an extremely small influence in the U.S. Congress.

[FN75]. "The United States [is] ... the largest overseas territorial power in the world. [It] now governs five areas (Puerto Rico, [the] Virgin Islands, Guam, the Northern Marianas, and American Samoa) with over four million people and has special responsibilities for three additional areas (Federated States of Micronesia, the Marshall Islands and Palau)." Leibowitz, Defining Status, supra note 71, at 3.

[FN76]. For example, on March 20, 1953, the United States Ambassador to the United Nations, Henry Cabot Lodge, Jr., wrote to the U.N. Secretary General that Puerto Rico's
new form of government (the current status) was consistent with self-determination and thus not subject to the reporting requirements of Article 73 of the U.N. Charter. See Memorandum by the Government of the United States of America Concerning the Cessation of Transmission of Information under Article 73(e) of the Charter with Regard to the Commonwealth of Puerto Rico, March 23, 1953, Dep't St. Bull., at 584-85 [hereinafter "Puerto Rico Memorandum"] ; see also Antonio Fernós Isern, Estado Libre Asociado de Puerto Rico: Antecedentes, Creación y Desarrollo Hasta la Epoca Presente 213 (1988). The memorandum sent to the U.N. in support of the Ambassador's statements described the process as follows: "At the request of the people of Puerto Rico and with the approval of the Government of the United States, Puerto Rico has voluntarily entered into the relationship with the United States that it has chosen to describe as a 'commonwealth' relationship." The letter from Mr. Ambassador Lodge and the memorandum were jointly assigned Number A/AC-35/L. 121 by the U.N. See United Nations Resolutions: Series I: Resolutions Adopted by the General Assembly Vol. IV, 1952-53, at 198 n.7 (Dusan J. Djonovich ed., 1973). In the memorandum, the United States Delegation quotes from the Resolutions of the Puerto Rico Constitutional Convention, indicating that it "expresses the views of the people of Puerto Rico as to the status they have now achieved." Puerto Rico Memorandum at 587.

[FN77]. I would not favor an armed struggle for independence.

[FN78]. See generally Malavet, Cultural Nation, supra note 4, at 28 n.17 and accompanying text, nn.174-77 and accompanying text, and 103-06.

[FN79]. See Malavet, Cultural Nation, supra note 4, at 32-41 (explaining how the current legal regime, as interpreted by the U.S. Supreme Court, deprives the Puerto Rican U.S. citizens of equal rights under the U.S. Constitution, and allocates to the federal government almost total authority to legislate in matters applicable to the island).

[FN80]. U.S. Const. art. IV, § 3, cl. 2.

[FN81]. The "Insular Cases" largely defined the legal rights of Puerto Ricans. Some scholars would limit the label "Insular Cases" to include only nine cases resolved by the U.S. Supreme Court during its 1901 term. Applying specifically to Puerto Rico, see Downes v. Bidwell, 182 U.S. 244, 287 (1901) ("We are therefore of the opinion that the island of Porto Rico [sic] is a territory appurtenant and belonging to the United States, but not part of the United States within the revenue clauses of the constitution."); Armstrong v. United States, 182 U.S. 243, 244 (1901) (duties imposed after signing of Treaty of Paris not properly executed); Dooley v. United States, 182 U.S. 222, 235 (1901) (after the Treaty of Paris Puerto Rico was no longer subject to U.S. tariffs); DeLima v. Bidwell, 182 U.S. 1 (1901) (Puerto Rico is not a foreign country under U.S. tariff laws); Balzac v. People of Puerto Rico, 258 U.S. 298 (1922), appears to be the last case that could fall in this category. For a general discussion of this debate, see Efrén Rivera Ramos, The Legal Construction of American Colonialism: The Insular Cases (1901-1922), 65 Rev. Jur. U.P.R. 225 (1996).

[FN82]. This argument had been articulated prior to the resolution of the Insular Cases. See, e.g., Constitutional Aspects of Annexation, 12 Harv. L. Rev. 291, 292 (1898) ("[A]ccording to the spirit of the Constitution, the subjection of annexed territory to exclusive federal control is an abnormal and temporary stage necessarily preceding the normal and permanent condition of statehood.").

[FN83]. See Johnson v. M'Intosh, 21 U.S. 543, 8 Wheat. 543 (1822) (Supreme Court
ruled that the "right of discovery" and the "right of conquest" gave Europeans legal title over the American Continents). See also infra notes 166-167.

[FN84]. Downes, 182 U.S. at 343-44 (White, J. concurring). The context of Justice White’s statement is illuminating:

[T]he presumption necessarily must be that [the Congress], which within its lawful sphere is but the expression of the political conscience of the people of the United States, will be faithful to its duty under the Constitution, and, therefore, when the unfitness of particular territory for incorporation is demonstrated the occupation will terminate. I cannot conceive how it can be held that pledges made to an alien people can be treated as more sacred than is that great pledge given by every member of every department of the government of the United States to support and defend the Constitution. Downes, 182 U.S. at 343-44 (emphasis added).

[FN85]. "The Northwest Ordinance [of 1787] not only set forth the pattern of territorial development which exists even today but also stated the underlying principle of territorial evolution in U.S. law and tradition: that the goal of all territorial acquisition eventually was to be Statehood." Arnold H. Leibowitz, Defining Status: A Comprehensive Analysis of United States Territorial Relations 6 (1989).

[FN86]. The shameful opinion by Chief Justice Taney in Scott v. Sanford included some important anti-colonial language favoring the presumption of statehood for acquired territories. See Scott v. Sanford, 60 U.S. 393 (19 How.) 393, 446-47 (1857) ("[N]o power is given [to the Federal Government by the U.S. Constitution] to acquire Territory to be held and governed permanently in that character.... [Territory] is acquired to become a State, and not to be held as a colony and governed by Congress with absolute authority."). However, much of this language was rejected as dicta by the majority in the first Insular Cases, at least to the extent that Scott could be read to limit the power of Congress to pass legislation to govern the territories while they remain as such. See, e.g., Downes, 182 U.S. at 250 ("[A]s we observed in De Lima v. Bidwell, the power to establish territorial governments has been too long exercised by Congress and acquiesced in by this court to be deemed an unsettled question. Indeed, in the Dred Scott case it was admitted to be the inevitable consequence of the right to acquire territory.").

[FN87]. Spain renounced any claim over Cuba in the Treaty of Paris. Treaty of Paris, art. I ("Spain relinquishes all claims of sovereignty over and title to Cuba."). Cuba was officially turned over to the United States in January of 1899. Carlos Márquez Sterling & Manuel Márquez Sterling, Historia de la Isla de Cuba 160 (1975). Cuba became an independent republic with a constitution that was promulgated in 1901 and its first elected president took office in 1902. However, the United States imposed the so-called Platt Amendment on June 21, 1901. This U.S. law gave the United States the right to intervene in Cuba at its discretion. The law was finally abrogated by a treaty between the two nations in 1934. The Philippines were ceded to the United States by Spain through the Treaty of Paris. Treaty of Paris, art. III ("Spain cedes to the United States the archipelago known as the Philippine Islands"). The archipelago became independent in 1946.

[FN88]. A bilateral free associated state is one whose legal regime is equally binding on both related states (in this case the United States and Puerto Rico). The current legal regime for Puerto Rico is called Free Associated State in Spanish, but it is not bilateral because it is subject to unilateral legislative action by the United States. See Malavet, Cultural Nation, supra note 4, at 32-45. I have argued that, on the basis of U.S. domestic law, the only way to accomplish bilateral free association that is mutually binding on the United States and on the so-called free associated state, and thus a legitimate postcolonial status, is an amendment to the Constitution of the United States. See

[FN89]. See supra note 4. The protection of cultural citizenship within a single multicultural polity is discussed in Part IIC infra, after first defining the meaning of reparations in Part II B.

[FN90]. Although the reference here is to the dominant one, the term "culture" is generally used herein in a broader sense: [C]ulture 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. Carla Freccero, Popular Culture: An Introduction 13 (1999).

[FN91]. Westley, Many Billions Gone, supra note 49, at 473.

[FN92]. See supra note 6 and accompanying text.

[FN93]. On the social construction of the Puerto Ricans by the United States, see generally Malavet, Cultural Nation, supra note 4, at 41-45; Malavet, Accidental Crit II, supra note 13.


[FN95]. Westley, Many Billions Gone, supra note 49, at 436.

[FN96]. Westley, Many Billions Gone, supra note 49, at 436. Yamamoto explains further that the "repair paradigm of reparations" focuses on (1) historical wrongs committed by one group, (2) which harmed, and continue to harm, both the material living conditions and psychological outlook of another group, (3) which, in turn, has damaged present-day relations between the groups, and (4) which ultimately has damaged the larger community, resulting in divisiveness, distrust, social disease--a breach in the polity. Within this framework, reparations by the polity and for the polity are justified on moral and political grounds--healing social wounds by bringing back into the community those wrongly excluded. Yamamoto, Racial Reparations, supra note 51, at 524.

[FN97]. See infra Part IIB.

[FN98]. For example, the grant of sovereignty is a political/legal act which, in and of itself, does not involve direct expenditures. See infra Part IIIA. The provision of full disclosure regarding acts of political repression also might not in and of itself involve money. See infra Part IIIA. But the fact of the matter is that almost any governmental
action, with the possible exception of an apology, will likely require some reallocation of resources and produce at least some opportunity cost, if not direct expenditure.

[FN99]. I very much agree with Bob Westley when he opposes individual payments. Westley, Many Billions Gone, supra note 49, at 468. My project is about putting the Puerto Ricans in a position to earn money by controlling their own sovereignty and economy, not about feeding them for day or two.


[FN101]. The distinction and disjunction between cultural and political citizenship has been a strong theme in critical theory generally and LatCrit theory in particular. See, e.g., Malavet, Cultural Nation, supra note 4 (describing how the Puerto Ricans are an identifiable culture that lacks a legal citizenship, and how they are deprived of real political power because of their legally second-class U.S. citizenship); Westley, Many Billions Gone, supra note 49 (advocating reparations to bring African-Americans to full political citizenship in the United States); Yamamoto, Racial Reparations, supra note 51 (a critical review of reparations for the internment of U.S. citizens of Japanese descent during World War II); Guadalupe T. Luna, Chicana/Chicano Land Tenure in the Agrarian Domain: On the Edge of a "Naked Knife," 4 Mich. J. Race & L. 39 (1998) [hereinafter "Luna, Naked Knife"] (detailing how Mexican-Americans in the Southwest had their land taken away in spite of their legal citizenship--and their property rights); Kevin R. Johnson, The Social and Legal Construction of Nonpersons, 28 U. Miami Inter-Am. L. Rev. 263, 268 (1997) ("The alien represents a body of rules passed by Congress and reinforced by popular culture. It is society, often through the law, which defines who is an alien, an institutionalized "other," and who is not. It is society through Congress and the courts that determines which rights to afford aliens."). See generally Symposium: Citizenship and its Discontents: Centering the Immigrant in the Inter/National Imagination, 76 Or. L. Rev. 207-774 (1997); Ibrahim J. Gassama et al., Foreword, 76 Or. L. Rev. 207, 209 (1997) ("The papers in this Symposium investigate the aporetic relations among the nation-state, liberal understandings of citizenship, and problematic constructions of race and ethnicity as they are applied to immigrants.").

[FN102]. 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 36, 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.

[FN103]. "The theme of citizenship and the kinds of questions raised herewith have reemerged into the center of public debate in the past few years (together with the concept of civil society) as the focus of policies and studies regarding a number of major contemporary purposes...." Gershon Shafir, Introduction: The Evolving Tradition of Citizenship, in The Citizenship Debates: A Reader 1 (Gershon Shafir ed., 1998). "[The] essays [included in the reader] are a fitting summary of the debates in which the character of our future society is contested." Id. at 27. The book includes a discussion of the "Liberal Position," followed by critiques thereof labeled as: "Communitarian," "Social Democratic," "Nationalist," "Immigrant and Multiculturalist," and "Feminist." Id. at v-vi.

[FN104]. For example, in his works, Will Kymlicka self-maps as a modern liberal scholar, a la Ronald Dworkin. Kymlicka, Liberalism, Community and Culture 10 (1991) ("modern liberals from J.S. Mill through to Rawls and Dworkin"). See also Ronald Dworkin, Laws
Empire (1997); Ronald Dworkin, Taking Rights Seriously (1999).

[FN105]. Kymlicka presents important objections to the multicultural/communitarian critiques of liberal theory that challenge the critics to prove the shortcomings of liberalism or to admit that they are using liberal theory to construct a new paradigm for a more complicated world. Kymlicka for example would argue that recognition of community and culture is a process of the evolution of liberalism, rather than a competing paradigm that requires the rejection of liberalism. "Considering the nature and value of cultural membership not only takes us down into the deepest reaches of a liberal theory of the self, but also outward to some of the most pressing questions of justice and injustice in the modern world." Kymlicka, Liberalism, Community and Culture, supra note 104, at 258. See also Michael Walzer, On Toleration 111-12 (1997) ("The centrifugal forces of culture and selfhood will correct one another only if the correction is planned.... [T]he political creed that defends the framework, supports the necessary forms of state action, and so sustains the modern regimes of toleration--is social democracy. If multiculturalism today brings more trouble than hope, it does so in part because of the weakness of social democracy (in this country, left liberalism). But that is another, longer story.").

[FN106]. "[Liberalism] is not always a progressive doctrine, for many classical liberals are skeptical about the average human being's ability to make useful advances in morality and culture, for instance." Alan Ryan, Liberalism, in A Companion to Contemporary Political Philosophy 293 (Robert E. Goodin & Phillip Pettit eds., 1993).

[FN107]. See generally Malavet, Cultural Nation, supra note 4, at 75-96 (describing the failure of liberal citizenship as a model that truly empowers minorities within the multicultural state, and articulating a reformed liberalism with a multicultural sensibility).

[FN108]. See Jürgen Habermas, Citizenship and National Identity, in Theorizing Citizenship 264 (Ronald Beiner ed., 1995) [hereinafter "Theorizing Citizenship"] ("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 no way impair the universalist meaning of popular sovereignty and human rights.").

[FN109]. "Culture" as used by Habermas does not mean the stereotypes that are often used by the normative society to discriminate against certain groups discussed above. Rather, Habermas refers to positive cultural self-constructs. See infra note 110 and accompanying text.


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. 1d.

[FN111]. See, e.g., Malavet, Cultural Nation, supra note 4 (explaining that the Puerto Ricans are culturally distinct from the normative U.S. society).

[FN112]. 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 and 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.").

[FN113]. 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."

[FN114]. Freccero explains:
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 ....
[C]ultural 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 90, at 68 (citations omitted).

[FN115]. Westley, Many Billions Gone, supra note 49, at 437.

[FN116]. Westley, Many Billions Gone, supra note 49, at 475, citing Civil Rights Cases,

[FN117]. This is just one of the many paradoxes of the Territorial Clause and of the
alien/citizen paradox of the Puerto Ricans. The U.S Congress, pursuant to the Territorial
Clause, see supra note 80, has authority legally to define the privileges and legal rights of
the Puerto Ricans, unfettered by traditional constitutional constraints that apply to any
other U.S. citizens. It is a system of state-defined subordination, that has been given
seemingly oxymoronic constitutional status. (The brilliant term "alien/citizen paradox"
was coined by Ediberto Román. See Román, Alien/Citizen Paradox, supra note 14).

[FN118]. Westley, Many Billions Gone, supra note 49, at 475-76, citing Civil Rights

[FN119]. Yamamoto, for example, explains how traditionalists resist reparations claims
arguing for strict requirements of individual liability and individual entitlement.
Yamamoto, Racial Reparations, supra note 51, at 489.

[FN120]. See supra note 6. Robert Westley notes that "[t]he irony posed by the very
question of Black national group status is that in ordinary social and political discourse,
Blacks are treated as a group for every purpose other than rights-recognition." Westley,
Many Billions Gone, supra note 49, at 469.

[FN121]. See Malavet, Cultural Nation, supra note 4, at 37-40. This part of the article
discusses two Supreme Court cases that allowed the U.S. Congress to discriminate
against Puerto Ricans on the island by allocating to them dramatically lower levels of
federal funding, or no funding at all; the cases are Harris v. Santiago-Rosario, 446 U.S.
Even the reporting of the cases reflects cultural imperialism. As the case itself indicates,
the name of the plaintiff in the Califano case was César Gautier-Torres. In Puerto Rico we
commonly use both our parents' last names, with the paternal last name first. Most
estadounidenses choose to take the paternal last name as a middle name and thus
incorrectly identify the case and the person. The name of the plaintiff in the Harris case
was Awilda Santiago-Rosario; once again, the last names are incorrectly used in the reporter. Just a few pages before the Harris case in the same reporter, you can find the case officially identified as Gomez v. Toledo, 446 U.S. 635 (1980) (about qualified immunity for local officials). The names of the litigants in that case were Carlos Rivera-Gómez and the former Puerto Rico Chief of Police, Astol Calero-Toledo.


[FN123]. 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.

[FN124]. See Malavet, Accidental Crit II, supra note 13, at 767-71 (explaining how gringo is a descriptive term, as properly defined in Spanish dictionaries, not an epithet, as it is often characterized in English dictionaries).

[FN125]. See id.

[FN126]. I would require at least five years of legal residence after any change in status to become a resident of the island.

[FN127]. On the negative social construction of Puerto Ricans, and accompanying deprivation of rights, in the "U.S. proper," see supra note 93 and accompanying text. In that regard, the Puerto Rican colonial experience has many parallels to that of Chicanas/os. One prominent example is land dispossession. Guadalupe Luna has studied the Chicana/o experience and summarized it as follows:
Neither sovereignty nor property rights could forestall American geopolitical expansion in the first half of the nineteenth century. [T]he study of Mexican land dispossession suggests both the need to expand the traditional approach to teaching property law as well as the importance of deploying the Treaty of Guadalupe Hidalgo and international law in the struggle for racial equity.
Luna, Naked Knife, supra note 101.

[FN128]. See supra note 100 and accompanying text.

[FN129]. I have often been exposed to this narrative in my city of residence, Gainesville, Florida. Colleagues at the law school, law professors nonetheless, have made statements to this effect. More recently, when I pointed out to my hairdresser that I was Puerto Rican and that I favored independence, she inquired almost like a mantra, "But don't you have the best of both worlds?", and articulated the incorrect view of Puerto Rico's economic relationship to the United States. I wonder how such apparent misspending of taxpayers' money might be justified by their congressional delegations if it was in fact true.


[FN131]. See 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, 176-77 nn.68-69 and accompanying text (1998) ("The people of Puerto Rico also pay other federal taxes and user fees such as Social Security, unemployment and Medicare taxes, and customs duties. According to Barcelo [the Resident Commissioner], the U.S. Treasury collected $2.5 billion from the island in 1993.").

[FN132]. Id.

[FN133]. See Francisco L. Rivera-Batiz & Carlos E. Santiago, Island Paradox: Puerto Rico in the 1990s 65, Table 4.2 and accompanying text (1996) (mean per capita household income in 1989 was $4,099 in Puerto Rico, and the U.S. average was $14,052). And Puerto Ricans living in the largest metropolitan areas in the United States earn only between 35% and 79.5% of the mean household income for that particular area. Id. at 135-39, Table 7.7 and accompanying text.

[FN134]. See supra note 121.

[FN135]. For example, a recent book that details the negotiations between the United States and Puerto Rican governments regarding military training on the islands of Vieques and Culebra includes extensive lists of land owned by the U.S. military that was valued in millions of dollars in 1961. Evelyn Vélez Rodríguez, Proyecto V-C, Negociaciones Secretas Entre Luis Muñoz Marín y la Marina: Plan Drácula 151-58 (2002). The book explains that local officials code-named their negotiations with the U.S. military the "Dracula Plan," after the literary vampire, because of the military's demand that all corpses be removed from the cemeteries on the islands of Vieques and Culebra if they were transferred to the U.S. Id. at 15-16 n.1.

[FN136]. I hope to develop this theme in my upcoming book. See supra note 22. But let me point out that I find it absurd that the United States would continue to maintain Puerto Rico as a territory if it were a substantial net drain on the treasury. It seems inconceivable that U.S. legislators and executive officials would engage in this 100-year history without having a substantial federal purpose (or purposes) that produced net benefits for their constituents.


[FN138]. See infra note 156 and accompanying text.

[FN139]. See infra notes 199, 200, and 201 and accompanying text. Lt. General William P. Tangney, USA, Deputy Commander In Chief, United States Special Operations Command (SOCOM), recently described the value of the training site, in response to congressional inquiries about its possible closure. He stated that "with the non-availability of Vieques, which, of course, was a combined live fire range which is traditionally used by the carrier battle groups and the fleet as part of their work-ups, I am not aware of any facilities on the East Coast where you could do comprehensive, live fire that involved all of the formations in a joint task force. You can do that to a certain extent at Camp LeJeune, North Carolina. You can do a little bit at Fort Bragg, North Carolina. But you really don't have the full access and terrain to pull it all together with the airspace to make it happen." FDCH Political Transcripts, May 16, 2002, Thursday, Transcript of House Government Committee Hearing.

[FN140]. On the Puerto Rico political parties and elections, see generally Bayrón-Toro, Elecciones y Partidos Políticos de Puerto Rico, supra note 24 (providing information about the parties and their basic platforms, as well as election results in Puerto Rico from 1809 until 1988). On the Independence Party position in particular, see Manuel Rodríguez-Orellana, Vieques: The Past, Present, and Future of the U.S.-Puerto Rico Colonial
Efrén Rivera-Ramos discusses some of the debate about Puerto Rican statutory citizenship. The Congressional Research Service, for example, has argued that because Puerto Rican citizenship is statutory, it is therefore not covered by the first sentence of the Fourteenth Amendment. Accordingly, it is subject to Congressional change. Rivera-Ramos, The Legal Construction, supra note 14, at 177-81.

There is some internal diversity among commonwealth supporters about exactly what the commonwealth is or ought to be. Compare Antonio Fernós-Isern, Filosofía y Doctrina del Estadolibrismo Puertorriqueño (1996) (a collection of essays written between 1946 and 1973 explaining and defending the current commonwealth status, by one of its principal architects) with Trías-Monge, Oldest Colony, supra note 14, at 195-96 (an architect of the commonwealth refers to "enhanced commonwealth" as postcolonial alternative).

See generally Malavet, Cultural Nation, supra note 4, at 98-102.

See id., at 75-106 (setting forth requirements for legitimate postcolonial alternatives).

Yamamoto, Racial Reparations, supra note 51, at 518.

Adeno 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 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 "[T]he 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 112, at 127 (footnotes omitted) (the notion of shared identity is not a final state of harmony, as communitarians would claim).

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. Martha C. Nussbaum, Patriotism and Cosmopolitanism, in For Love of Country: Debating the Limits of Patriotism, Martha C. Nussbaum with Respondents 7 (Joshua Cohen ed., 1996) [hereinafter "For Love of Country"].
[FN149]. 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. Michael Walzer, The Civil Society Argument, in Theorizing Citizenship, supra note 108, at 166.

[FN150]. In other words, nationalism does not have to be inherently fascist. See discussion supra note 113.

[FN151]. Problematizing "patriotism" is one of the basic issues in the citizenship debates. For example, Martha Nussbaum notes that: [Richard] Rorty urges Americans, especially the American left, not to disdain patriotism as a value, and indeed to give central importance to "the emotion 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 148, at 4.

[FN152]. This is what I label as the "non-assimilationist" alternatives. Malavet, Cultural Nation, supra note 4, at 99-102.

[FN153]. As I explain in the Cultural Nation article, the legal requirements for independence and statehood are relatively well known, but the legal requirements for a truly free associated state are more complex. In my view, FAS status can only be accomplished through a U.S. constitutional amendment. See Malavet, Cultural Nation, supra note 4, at 96-98, 99-102.

[FN154]. This was true from the very conception of the Second Colony, as exemplified by the following correspondence: Assistant Secretary of the Navy Theodore Roosevelt, in a personal letter to Senator Henry Cabot Lodge, wrote: "... do not make peace until we get Porto Rico [sic]." Lodge replied: "Porto Rico [sic] is not forgotten and we mean to have it. Unless I am utterly ... mistaken, the administration is now fully committed to the large policy that we both desire." The Puerto Ricans: A Documentary History 89 (Kal Wagenheim & Olga Jiménez de Wagenheim eds., 1994) (emphasis added).

[FN155]. Instructions of the President to the United States Peace Commissioners, September 16, 1898, in Papers Related to the Treaty with Spain [submitted to the U.S. Senate when seeking its advice and consent] 3, at 4 (1901). These papers were initially secret, but on February 5, 1901, the Senate lifted the "injunction of secrecy" and ordered the publication of three thousand volumes. Id. at 1. I state "full" cession because the United States did demand the cession of individual islands in the Ladrones and Philippine archipelagos. Id. at 4, 7 (Guam in the Ladrones, and Luzón in the Philippines).
For example, Roosevelt Roads officially includes the Vieques training area and has three bays that can accommodate the Navy's largest capital ships, nuclear aircraft carriers. The base covers 37,000 acres on the main island of Puerto Rico and 22,000 acres in Vieques. It has 100 miles of roads and is occupied by 6000 people, including 2575 Active Military Personnel. It has 200,000 military visitors a year, and receives 45,000 flights, 1200 ships and 5400 small vessels a year. It houses a communications complex with five underground levels. The base serves as a staging area for operations in Guantánamo and the Panama Canal. It coordinates operations in South American coasts. It hosts joint exercises with NATO and with the air and naval forces of Central and Latin America. M. Meyin And J. Rodriguez, El Aparato Militar Norteamericano En Puerto Rico 38-41 (1982).

Other U.S. bases in Puerto Rico include Ft. Buchanan; Sabana Seca (Sabana Seca Communications Center, intelligence and espionage); Camp Tortuguero (training center); Salinas Training Area (training center mainly used by the National Guard). The National Guard, however, uses additional bases throughout the island; bases are located in Bayamón, Puerto Nuevo, San Juan, Isla Verde, Punta Salinas (Toa Baja), Aguadilla, Yauco, Ponce, Salinas, and Caguas. Id. Active-duty U.S. personnel in Puerto Rico total 3699 (1985 figures). Robert E. Harkavy, Bases Abroad: The Global Foreign Presence 124 (1989). The Aguada Navy Communications base provides a long-range transmitter to communicate with submerged submarines. Id. at 162. Aguada, Isabella, and Sabana Seca also provide for communications with surface combatants. Id. at 163. Puerto Rican bases also provide tracking and telemetry data for missiles tested from Cape Canaveral. Id. at 263. The Point Boringuen station helps to monitor solar emissions and their effect on military communications. Id. at 244.

In 1982 the U.S. Department of State put it clearly: "[The Caribbean area's] shipping lanes are vital to U.S. defense and prosperity." One-half of U.S. trade, two-thirds of imported oil, and many strategic minerals pass through the Panama Canal or the Gulf of Mexico. James N. Cortada & James W. Cortada, U.S. Foreign Policy in the Caribbean, Cuba, and Central America 1 (1985). See also supra note 139 (the more recent statement by a U.S. general).


Section 2(c) of the Executive Order specifically includes Puerto Rico among the areas in which "natural and cultural resources within the marine environment" are to be protected. Id. sec. 1.

See, e.g., The Pentagon and Vieques, The Washington 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."); Senator Warner's statement should be compared to that of Lt. General Tangney, quoted supra in note 139, where the general indicates that training on Vieques is much more intense than that taking place at any other training site. Putting the two statements together, we can understand that there are geographic locations in
the United States where such training might take place, but the political viability of it is open to question. As I personally observed, congressmen in Florida and Texas publicly requested that the Navy move their training from Vieques to their districts, only to be very quickly and publicly rebuked by their own constituents and local political leaders.

[FN164]. The government has sponsored numerous studies to investigate the use of contraception medication and sterilization of indigent persons. Federico Ribes Tovar, The Puerto Rican Woman 202-03 (1972).

[FN165]. 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 they did not "know anything more comic and irritating than Puerto Rico." Morales Carrión, supra note 14, at 212. 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. See also Truman Clark, Puerto Rico and the United States 1917-1933, 152-53 (1975) (detailing disturbing and offensive letter written by now-famous late cancer researcher Dr. Cornelius Rhoads regarding the Puerto Ricans).

[FN166]. As to the right of conquest, see generally Johnson v. M'Intosh, 21 U.S. 543, 8 Wheat. 543 (1822).

[FN167]. Treaty of Paris, art. IX. See generally Malavet, Cultural Nation, supra note 4, at 24-25 (studying art. IX of the Treaty of Paris), and 79-83 (comparing art. IX of the Treaty of Paris to art. IX of the Treaty of Guadalupe Hidalgo). This is not to say that they were not interested at all in the people. The United States wanted consumers, not citizens. See Román, Empire Forgotten, supra note 14. This situation is somewhat analogous to the treatment of the Native Americans and other peoples whose lands were conquered by the United States. In Johnson v. M'Intosh, the Supreme Court explained 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 589. 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. Id. at 589-90.


[FN169]. See supra note 133 and accompanying text.
[FN170]. See supra note 121.

[FN171]. 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 Espín 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.... Oliva W. Espín, Women Crossing Boundaries: A Psychology of Immigration and Transformation of Sexuality 8 (1999).

[FN172]. See supra note 165 and accompanying text.

[FN173]. Morales Carrión describes how the Roosevelt Administration approved the filing of "a bill to offer Puerto Rico its independence in a referendum," but not as an initiative of the administration. Morales Carrión, supra note 14, at 235. The expectation among United States officials was that the dire economic situation prevailing on the island would scare Puerto Ricans away from Independence. This was accompanied by the trial and conviction of Nationalist Party leader Pedro Albizu Campos, in a second trial, with a carefully chosen jury. To the surprise of the American officials, even pro-statehood leaders said that they would vote for independence even if that meant starvation. Id. at 235-36.

[FN174]. See Malavet, Cultural Nation, supra note 4, at 67-71 (discussing the failure of the "Americanization" process of educating Puerto Ricans in English about "American" institutions and alleged "way of life").

[FN175]. See Malavet, Cultural Nation, supra note 4, at 71-74 (discussing the anti-Independence repression).

[FN176]. See supra note 43 and accompanying text.

[FN177]. Hence, Puerto Rico remains an organized but unincorporated territory of the United States. Malavet, Cultural Nation, supra note 4.

[FN178]. See supra notes 130-134 and accompanying text.

[FN179]. See, e.g., Statement by Senator Warner, supra note 163.

[FN180]. On Palm Sunday, March 31, 1937, the pro-independence Puerto Rico Nationalist Party marched through the streets of Ponce. The mayor had initially granted a permit for the march, but had tried to rescind it at the last minute after Governor Blanton "Winship ordered the chief of police, Colonel Orbeta, to tell the mayor" to do so. After a shot of "undetermined origin," the police fired into the crowd. Nineteen were killed, including two policemen. "A later inquiry by the American Civil Liberties Union concluded that there had been a 'gross violation of civil rights and incredible police brutality.'" Morales Carrión, at 238. My grandmother, Otilia Vega Ruiz, then pregnant, was shopping in downtown Ponce on that date. She had to run for her life. Luckily for me, she survived, since the child of this pregnancy was my father.
Santiago Mari-Pesquera was the young son of Puerto Rico Socialist Party leader Juan Mari-Bras. He was murdered by a person who is known to have been a paid FBI informant. When Don Juan went to collect his subversive carpeta, several boxes worth, he found that all the documents accumulated during the period of his son's murder had been removed, apparently by the FBI. The murder is mentioned in passim in El Asesinato Político en Puerto Rico ii (Yvonne Acosta Lespier ed., 1998). Mari-Bras was the plaintiff who renounced his U.S. citizenship and claimed Puerto Rican citizenship in the case described in note 7 supra.

On July 25, 1978, at the Cerro Maravilla, Carlos Soto Arriví and Rubén Dario Rosado were murdered by the Puerto Rico Police, reportedly while FBI agents waited some distance away. (In hearings before the Puerto Rico Senate, witnesses testified that FBI agents were in the vicinity of the Cerro Maravilla on the date of the murders.) A few minutes after the ill-fated independentistas were taken by the police, a reportedly elated Governor Carlos Romero Barceló announced during a Commonwealth Day celebration that a "terrorist attack" on the Cerro Maravilla had been beaten back by police. Manuel Suarez, Requiem on Cerro Maravilla: The Police Murders in Puerto Rico and the U.S. Government Coverup 74 (1987).

The administration of Nobel-Laureate James P. Carter, former President of the United States, who is now known as a champion of civil and human rights, is alleged to have participated in the cover-up, in exchange for primary votes. The basic allegation is that Carter, then embroiled in a tight contest for the Democratic presidential nomination with Edward Kennedy, wanted Puerto Rico's 41 Democratic convention delegates. "In December 1979, it is known, Romero [Carlos Romero Barceló, then governor of Puerto Rico] met with then President Jimmy Carter and Attorney General Benjamin Civiletti. Shortly thereafter, Romero, who had previously backed Republicans, endorsed Carter in his primary election race against Sen. Edward Kennedy." Diana Maychick, On Film: Film as Expose, The Record, May 6, 1990, at E1 (reviewing the movie "A Show of Force"). See also Anne Nelson, Murder Under Two Flags: The U.S., Puerto Rico, and the Cerro Maravilla Cover Up (1986). Mr. Carter received the votes of 21 of the 41 delegates during the March 1980 primary. See generally Suarez, Requiem on Cerro Maravilla, supra note 182, at 127-53.

To be fair, nationalists did engage in violence of their own, particularly the 1950 nationalist revolt in Puerto Rico. On "March 1, 1954: Four Puerto Rican nationalists fire 30 shots from the U.S. House visitors' gallery, wounding five congressmen. Nov. 1, 1950: Two Puerto Ricans, Griselio Torresola and Oscar Collazo, attempt to assassinate President Harry S. Truman at Blair House in Washington. Torresola is killed and his partner and three police officers are wounded." Blast Rips World Trade Center in N.Y.: 5 Dead, Hundreds Hurt, L.A. Times, Feb. 27, 1993, at A1 (includes a timeline of attacks tied to Puerto Rican nationalists). Nevertheless, for anyone keeping score, the record of violence and persecution clearly puts independence supporters as the victims of United States imperialism. See generally El Asesinato Político en Puerto Rico (Yvonne Acosta Lespier ed., 1998).

Law 53 of June 10, 1948, was known in Puerto Rico as La Ley de La Mordaza. See People v. Burgos, 75 DPR 535 (1953) (the Ley de La Mordaza was constitutional under both the Puerto Rico and United States Constitutions and it had not been preempted by the Smith Act.) On the Smith Act, see Pennsylvania v. Nelson, 350 U.S. 497 (1956). (Federal Smith Act, 18 USC § 2385 [1999], imposing criminal liability on anyone who "advocates, abets, advises, or teaches ... overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof" preempts state laws.).

The court appointed a special master to take control of the files and instructed him to turn them over to their objects. *122 P.R. Dec. 650 (1988)*. See also *Noriega-Rodriguez v. Hernandez-Colón, 130 P.R. Dec. 919, 92 JTS 85 (1992)* (the files could not be edited to remove the names of undercover agents or other informants before being turned over). Puerto Rico Governor Pedro Rossello issued an executive order authorizing the payment of a small damage award to persons whose files exceeded 30 pages. I have had the opportunity to examine several carpetas. My father's was file number 31336; it had 60 pages. (Carpeta No. 31336, copy on file with the author). My godfather's carpeta consists of 543 pages. (Carpeta No. 9296, copy on file with the author). My friend Mario Edmundo Vélez's was No. 24844 (247 pages, copy on file with the author).

See *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; 92 S. Ct. 2318; 33 L. Ed. 2d 154 (1972)* (existence of "data gathering system" in which the Pentagon created files on persons it deemed dangerous--mostly anti-Vietnam War protesters--did not unduly chill the files' objects First Amendment rights). McCarthyism a la Puerto Rico, however, was a search for independentistas.

One clear example is the FBI's COINTELPRO operation. In addition, documentary evidence indicates that the United States Secret Service, the Department of State, the Central Intelligence Agency (which is not chartered for "domestic" espionage), the Office of Naval Intelligence, and the ACSI have likewise engaged in covert domestic espionage activities. See Carmen Gautier Mayoral & Teresa Blanco Stahl, COINTELPRO en Puerto Rico: Documentos Secretos del FBI (1960-1971), in Las Carpetas: Persecución Política y Derechos Civiles en Puerto Rico 255-97 (Ramón Bosque Pérez & José Javier Colón Morera eds., 1997).

See, e.g., Suárez, at 348-50. Suárez details operations around the 1968 elections in Puerto Rico, for example. He indicates that FBI agents spent a great deal of their time keeping tabs on the Pro-independence movement. They even faked political messages, attributed to different segments of the movement, in order to cause discord. One example was the attempt to argue that Juan Mari Bras, a socialist party leader, was having an affair with the wife of an independence leader. Id. The history of intelligence-gathering on Puerto Rico's dissenters is long. During the First World War, the War Department created the Military Intelligence Division (MID). MID was divided into two divisions: The first, called the "Positive Branch, ... collected information on military, political, economic, and social condition; and [the second] the Negative Branch, which investigated and suppressed sabotage and espionage." In Puerto Rico, MID shifted its focus from alien enemies to political dissenters and the "intelligence officer for the district simply took over the insular police force of eight hundred men." Joan M. Jenses, Army Surveillance in America, 1775-1980, 172 (1991).

Keith Aoki describes this type of symbolic (semiotic) RE-presentation as "a series of acts involving[] re-creation, interpretation and meaning-making". Keith Aoki, (Re)Presenting Representation, 2 Harv. Latino L. Rev. 247, 261 (1997). While in this case it is being used against the Puerto Ricans, Aoki argues that political semiotic Representation can be used to subvert existing power hegemonies. Id. at 262 n.34 and accompanying text (while political Representation, like artistic representation, can have both mimetic and semiotic aspects to it, Aoki argues that a progressive, postmodern LatCrit scholar should favor Symbolic, semiotic Political RE/presentation as a way of challenging the status quo, entrenched power normativities.).

I am personally not very interested in an apology, just in the undoing of the effects of imperialism. Nevertheless, apology can be an important type of reparation.
See, e.g., Yamamoto, Racial Reparations, supra note 51, at 518 n.173 and accompanying text (a recipient of reparations to Japanese-Americans noting the importance of symbolic payment and government apology).


[FN194]. The debate over the use of Vieques is about citizenship and patriotism, but not in the manner in which it is constructed by the normative powers within the United States. Rather, Puerto Rican patriots who believe in their own nation are protecting their right to control their own land. Additionally, the many Puerto Ricans who believe in a permanent relationship with the United States, who embrace their U.S. citizenship and who also oppose the bombing, are being American patriots as well. They are challenging "bombing without representation" and demanding that their rights as U.S. citizens and as human beings be respected by the colonizer. In fact, they are demanding that the United States live up to the rhetoric of democracy in its treatment of its own citizens.


[FN196]. I was therefore looking forward to the application of Derrick Bell's interest-convergence thesis: "Bell's thesis suggests that dominant groups only recognize 'rights' of minorities when the recognition of those rights benefits the dominant group's larger interests. That is, a government will rarely simply do the right thing; rather, it is likely to confer reparations only at a time and in a manner that furthers the interest of those in political power." Yamamoto, Racial Reparations, supra note 51, at 497.

[FN197]. See, e.g., José A. Delgado, Vieques No Tuvo Nada Que Ver [Vieques Had Nothing to Do with It], El Nuevo Día, Sept. 29, 2002, (copy on file with author) (reporting that the move of Southern Army Command from Puerto Rico to Texas, announced some months ago, will be completed by July of 2003).

[FN198]. See Ivan Roman and Tamara Lytle, Lawmakers Kill Vieques Deal: The Pentagon, Not Islanders, Won the Right to Decide if the Navy Stops Target Practice, Orlando Sentinel, Dec. 13, 2001, at A10 (reporting that President Bush had committed to leaving the island by May of 2003, thus complying with deals reached by the Clinton Administration with the Pro-statehood governor of Puerto Rico, Pedro Rossello; but Congress passed legislation forbidding the Navy from leaving until "an adequate replacement" for the training site could be found). See also Esther Schrader & Paul Richter, Political Pressure Helped Vieques Avert Cross Hairs, L.A. Times, June 15, 2001, at A1.

[FN199]. See National Defense Authorization Act for FY2002, Sec. 1049(a), 107 P.L. 107; 115 Stat. 1012 (Dec. 28 2001) ("The Secretary of the Navy may close the Vieques Naval Training Range on the island of Vieques, Puerto Rico, and discontinue training at that range only if the Secretary certifies to the President and Congress that both of the following conditions are satisfied: (1) One or more alternative training facilities exist ... [and] (2) The alternative facility or facilities are available and fully capable of supporting such Navy and Marine Corps training immediately upon cessation of training on Vieques.").

[FN200]. During a news briefing on September 16, 2002, Defense Secretary Donald Rumsfeld stated, in partial answer to a question, that: "Vieques is an important location for us, and we intend to continue to operate on a basis that's consistent with our
obligations, and we hope others will continue to cooperate in a manner that's consistent with their obligations." Available at http://www.defenselink.mil/news/Sep2002/t09162002_t0916sd.html (last visited October 1, 2002; copy on file with author). But see infra note 201.

[FN201]. This would be true even if the Vieques training center is closed. However, the most recent developments reported in Puerto Rico have reiterated that the president wishes to close the training center. Following the disclosure that the military had conducted chemical training on Vieques, published reports in Puerto Rico stated that the U.S. military would leave the Vieques training center in May of 2003. See Matthew Hay Brown, Navy to Leave Vieques, Calderón Says, Orlando Sentinel, Oct. 19, 2002, at A23; La Marina confirma el anuncio hecho por Calderón, El Nuevo Día, Oct. 19, 2002 (reporting that a White House spokesperson had confirmed that the Navy would close the training area as announced by Puerto Rico governor Sila Maria Calderón) (copy of the story as published in the newspaper's website on file with author); see also Nancy San Martin, Chemical Testing a Smoking Gun for Vieques Protests, Miami Herald, Oct. 18, 2002, Domestic News. Given that this supposed closure has been heard of before, I will take the attitude of "Santo Tomás" (St. Thomas): I will believe it when I see it.

[FN202]. Francisco Valdés 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. Valdés, Poised at the Cusp, supra note 29, at 1.
I wish to thank you for the honor of accepting my designation to participate on behalf of the President of the Puerto Rican Independence Party (PIP) and Honorary President of the Socialist International, Rubén Berrios Martínez, as keynote speaker, here in Portland, Oregon, at the Seventh Annual LatCrit Conference on Coalitional Theory and Praxis: Social Justice Movements and LatCrit Community.

Professor Berrios could not be here today because of his obligations with the Socialist International, the worldwide association of social-democratic parties that have seen their democratic traditions and progressive values recently threatened throughout the European Union by the extreme right. [FN1] He has asked me to extend his best wishes for a successful conference and to congratulate you for the courage you have shown in choosing to address, through this invitation, the blatant abuse of a people still subject to colonial rule. Puerto Rico's struggle against U.S. colonialism continues to this day, and the struggle for peace in Vieques, an island-municipality of Puerto Rico under the U.S. Navy's direct control for the past 60 years, is a metaphor for our people's quest for decolonization and democracy.

I make no pretenses of impartiality—an elusive and humanly meaningless concept where normative issues are involved. Therefore, I will share with you my side of the story as part of the moral obligation that, as jurists, I believe we must share. I hold these views, not just as a law teacher who has explored the hidden meaning behind the constitutional and statutory rhetoric used to attempt to disguise my country's unnatural subordination to the United States, but also as a participant in the story. It is about an ongoing struggle that needs to be told now, even though my telling it here, today, involves the possibility that by the time of publication, the story may need to be updated. By then, important developments may—or may not—already have taken place. For instance, a White House Task Force may have initiated its work regarding the U.S. government's views on realistic status choices. [FN2] Or the governor of Puerto Rico may have initiated a meaningful dialogue with representatives of all political status options, to convene a special election for a People's Assembly on Status. [FN3] Or the U.S. Navy could announce (finally!) its intention to transfer its military maneuvers from Vieques to other sites. As Puerto Rican political analyst and former National Security Advisor Juan M. Garcia Passalacqua has observed, "With the Navy out, national affirmation has a future." [FN4]

Regardless of how events unfold, it is a story that has not been told sufficiently in the United States and needs to be repeated as often as necessary—in legal publications,
professional forums, and classrooms--to enlist the support of American intellectuals. [FN5]

I.

The domination of human beings, on behalf of the interests or the agenda of others more powerful, raises moral questions such as those settled in the United States with the abolition of slavery, or in South Africa with the termination of apartheid. In international legal terms: "The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation." [FN6]

*427 In 1868, when Puerto Rico was a colony of Spain and international law doctrine on decolonization had not yet caught up with morality, an uprising took place in the town of Lares. The insurrection demanded economic and political freedom and brought about the proclamation of a short-lived republic, a milestone in the history of Puerto Rico. The Lares uprising, together with the Yara uprising in Cuba that same year, forced the metropolitan power to reexamine its relationship with its Caribbean colonies. In Puerto Rico, this reevaluation led to the abolition of slavery in 1873 and to greater concessions regarding foreign trade and local autonomy. Lares thus marked the beginning of the struggle of the Puerto Rican people against foreign subjugation, domination, and exploitation. Most importantly, it was a clear expression of the awareness that, after nearly 400 years since the Spanish Conquest, Puerto Ricans had evolved into a different nationality: a Spanish-speaking, but Latin American and Caribbean, Puerto Rico.

The United States war of 1898 with Spain drastically altered the course of history before Puerto Rico could reach its natural destiny as a sovereign nation of the Western Hemisphere. The purpose of the U.S. invasion and acquisition of Puerto Rico at the time was, as professor Berrios has written, strategic and military:

[C]ontrol of Puerto Rico was basic to the extension of U.S. influence over Latin America in general and the Caribbean in particular. The invasion and acquisition of Puerto Rico, which guarded the eastern approaches of the Caribbean Sea, was inextricably tied to the decision to build a canal connecting the Atlantic and Pacific Oceans. [FN7]

The objectives may have varied since then, but the strategic and military purpose of retaining Puerto Rico as an overseas possession subject to the Territory Clause of the U.S. Constitution remains. [FN8]

Despite the wave of decolonization that characterized the period immediately following World War II, [FN9] congressional legislation regarding Puerto Rico--a half century after the invasion--did not alter Puerto Rico's political and economic subordination to the United States. The congressional report on the bill that was subsequently enacted into federal law, which established the so-called commonwealth, illustrates this point. It stated, in relevant part, that:

The bill under consideration would not change Puerto Rico's fundamental political, social and economic relationship to the United States . . . [and the] sections of the [previously existing] organic act which [would be repealed] are the provisions of the act concerned primarily with the organization of the local executive, *428 legislative, and judicial branches of the government of Puerto Rico and other matters of purely local concern. [FN10]
The commonwealth arrangement implemented by federal legislation in 1952 was consistent with a 1945 memorandum of the U.S. War Department that became public in 2001. The memorandum exposes the War Department's opposition to any new status arrangement that provided for Puerto Rico's sovereignty. Moreover, the War Department insisted on exclusive privileges for U.S. Armed Forces in perpetuity, in an unrestricted, preferential manner over all public utilities, as well as all air, water, and land transportation facilities. It further insisted that a federal court continue to exist to protect American military installations and personnel. [FN11]

The international configuration of forces that dominated the world stage in the years following World War II continued to make Puerto Rico's struggle for decolonization extremely difficult. The government's practice of keeping dossiers on persons "suspected" of subversion by virtue of their political association with pro-independence and decolonization activities is now well documented. Political persecution and employment discrimination of pro-independence advocates was the established practice well into the 1980s. It was exposed and denounced by the PIP in 1986. [FN12] After extensive litigation, the practice was officially proscribed, but unofficial political discrimination continues as a fact of life. [FN13] Furthermore, the federal government was an active and dominant participant in political persecution against Puerto Rico's real "freedom fighters" throughout the twentieth century.

U.S. hegemony during the Cold War ensured that no major embarrassment to the leader of one of the two major camps would take place. Consequently, the United States could get away with its colonial possessions, particularly at meetings of the United Nations. [FN14] Surely colonialism, legally proscribed by international law since 1960, was wrong. However, in the case of Puerto Rico, strategic security in the context of the Cold War provided a convenient rationalization for the leader of the "free world" to forgive itself of its colonial "indiscretions" and to assertively persuade world opinion to look the other way. This was particularly so if the colonial subjects were "well-fed," and human rights abuses were handled swiftly and *429 forcefully by local authorities posturing as contented colonials and U.S. authorities posturing as benevolent masters. [FN15] The apologists of the commonwealth often attempt to disguise its subordinate nature with a euphemistic description: "the maximum of autonomy compatible with the federal system."

In 2000, the involvement of federal agencies interfering directly, or indirectly through local government authorities, with persons, groups, or organizations that favored Puerto Rico's sovereignty and decolonization became the subject of an investigation by the Senate of Puerto Rico's Committee on Government and Federal Affairs. A resolution submitted by the PIP initiated the investigation. [FN16] In the course of the investigation, and with the valuable assistance of Congressman José E. Serrano (D-N.Y.), the F.B.I. admitted to these practices and began to make available to the Senate Committee more than one million declassified pages of federal dossiers, dating as far back as the 1930s. The documents analyzed by the Committee evidenced federal monitoring, intervention, infiltration, and persecution of persons, such as Nationalist Party leader Pedro Albizu Campos, and student organizations such as the Federation of University Students (FUPI). Legitimate political parties also were targeted, including the PIP and Socialist Parties (PSP). The FBI, the Secretary of the Interior, the Army, the Air Force, and the Navy, acting in conjunction with Puerto Rican authorities, most notably the governor and the police, carried out these interference endeavors. [FN17] The committee reports concluded that federal involvement with Puerto Rican authorities in the persecution of those advocating Puerto Rico's decolonization de facto criminalized constitutionally protected speech and political activity, thereby impeding the free exercise of Puerto Rico's legal right to self-determination. [FN18]
II.

By the end of the first century of U.S. colonial rule over Puerto Rico, in harmony with the design of the War Department's memorandum of 1945, [FN19] the U.S. Navy occupied and used over two-thirds of Vieques for military maneuvers and installations. The economic, sociological, and environmental harm perpetrated upon Vieques and its inhabitants during that period is now a matter of common knowledge in Puerto Rico, and extensively documented in the June 1999 consensus report of a commission of representatives of Puerto Rico's political parties, civic, labor, and religious organizations appointed by the governor. [FN20] Since then, until late in the year 2000, when the Puerto Rico Senate approved the above-mentioned committee report, things were coming to a head.

In May 1999, Rubén Berriós staged a peaceful protest of the Navy's lethal indiscretion by taking over the target range in Vieques. He lived there, in a tent, without electricity or running water, until May 2000, when he and hundreds of other Puerto Rican professional, civic, labor, and religious leaders were forcibly removed by federal military and police authorities. He penetrated the restricted areas a second time and, consequently, faced federal prosecution. However, in reluctant recognition of the moral strength of his non-violent leadership and his international stature as Honorary President of the Socialist International in an election year when he became a candidate for governor, the U.S. District Court in Puerto Rico ordered a nominal sentence. [FN21] Once the elections were over, however, the U.S. District Court in Puerto Rico put aside any pretenses of magnanimity toward Berriós and sentenced him to four months in federal prison after another incursion into restricted Navy lands the following year.

By the summer of the year 2000, Berriós and thousands of Puerto Ricans from all parties, ideologies, and creeds served as human shields, stopping combat practice on Vieques for more than a year. This forced suppression of amphibious landings, air-to-ground, and ship-to-shore military maneuvers in Vieques made the contention that Vieques's occupation was indispensable to U.S. national security sound hollow. The PIP's civil disobedience camp was continuously inhabited by Berriós despite two tropical hurricanes and a painful bout with diverticulitis. Berriós occupied the target range for 361 days, during which all military activity in Vieques came to a complete halt. The resumption of the Vieques maneuvers in August 2000 was perceived as nothing but a blatant ostentation of the arrogance of power.

In addition to these disingenuous claims, the Navy also contended that it was protecting the environment and public health. Nevertheless, in the course of the year in which civil disobedience camps reclaimed Vieques, dangerous levels of depleted uranium, napalm, heavy metals, toxic substances, and carcinogens were found in the devastated landscape. These substances filter into the food chain and cause irreparable harm to delicate ecological balances. [FN22] Furthermore, a disproportionately high cancer rate has continued to claim new victims in Vieques. [FN23]

Throughout 2000, Puerto Rico's three political parties, [FN24] civic and labor organizations, and religious leaders of all denominations massively demonstrated against the Navy's practices in Vieques and denounced them as immoral.

As Latin American analyst and reporter for Univisión Jorge Ramos Avalo wrote:

Vieques had effectively awakened the puertorriqueñidad [Puerto Rican identity] in millions and created a clear consciousness of the fact that the interests of Puerto Ricans were different from those of North Americans. In other words, Vieques had fractured the notion held by statehooders [federated statehood advocates]
that Puerto Ricans and North Americans could be part of the same people . . .
Puerto Rico had begun to think of itself without the United States. [FN25]

At the end of the twentieth century, Vieques became, like Lares in the late nineteenth century, another historical marker. Puerto Rico had retained and strengthened its sense of distinct identity as a Spanish-speaking nation of the Caribbean, [FN26] and peaceful civil disobedience had become our moral weapon against the Navy's abuses in Vieques. The necessity for the immediate and permanent cessation of all military activity and for the devolution of lands held by the Navy in Vieques even became public policy of the government of Puerto Rico. [FN27] This idea was correctly understood internationally as symbolizing the Puerto Rican people's cause for self-determination. [FN28]

Puerto Rico's struggle for decolonization, and the United States' human rights abuses and the ecological abomination of the island, quickly reached the desk of the American president. In a letter to President Clinton, hand-delivered through a mutual friend, Berrios wrote from the Navy's firing range in Vieques:

Here, next to the idyllic beach from where I write to you, lies a lunar wasteland of unexploded ordnance and depleted uranium-tipped radioactive shells littered about in dead wetlands and lagoons, scorched earth, and devastated marine turtle nests. . . .

Vieques presents you with a choice. To disregard the will of the Puerto Rican people, expressed beyond political, religious, or ideological differences, would set back the clock of democracy in the U.S., compounding colonialism with an overt act of tyranny. To comply with the will of the Puerto Rican people, however, will make the spiritual prison walls of colonial impotence in Puerto Rico begin to crumble. [FN29]

In the two years following Berrios's July 1999 letter, Vieques's plights and Puerto Rico's colonial status caught the attention of the president of the United States and the American public in a very peculiar way. In the letter's margin, Clinton jotted in his handwriting, "This is wrong." [FN30] Approximately a year later, Berrios and Puerto Rico's two other gubernatorial candidates, who had separately visited Berrios's Vieques camp in solidarity with Puerto Rico's demand for an end to the Navy's practices, were invited to the White House to meet with the president of the United States and his advisors. [FN31]

Yet, several weeks after this meeting, it remained unclear whether or not Clinton was willing to bring military activities to an immediate halt. He set up a muddled legislative scheme suggesting a referendum in Vieques, [FN32] which did not provide for what official public policy and the people of Puerto Rico wanted: the immediate and permanent cessation of all military activity on the island-municipality, the return of occupied lands to Puerto Rico, and the cleanup and rehabilitation of Vieques's ecologically distressed environment. At best, it would have provided for the president of the United States to conduct a referendum, to be held at the Navy's convenience, on the termination of live-fire training, or its continuation after May 1, 2003. Additionally, no provision was made for the immediate cessation of all military activity, the devolution of lands to the people of Puerto Rico, or to clean up the environment.

On status, the Clinton administration set up an erstwhile task force, presumably now under the aegis of the Bush administration, to clarify status options for Puerto Rico from the U.S. perspective. [FN33] But aside from appointing the new administration's members, the task force has remained like an empty kettle on a cold stove.

III.
The unnatural results of the 2000 election in the United States froze developments on Vieques in the peculiar position the Clinton administration had left them. On June 14, 2001, President Bush announced during a press conference in Sweden that the United States would discontinue military exercises in Vieques in May 2003. "My attitude is that the Navy ought to find somewhere else to conduct its exercises, for a lot of reasons . . . One, there’s been some harm done to people in the past. Secondly, these [Puerto Ricans] are our friends and neighbors and they don’t want us there." [FN34] However, the Bush administration simultaneously supported new legislation [FN35] that repealed the Clinton referendum provisions regarding the continuation of military training on the island of Vieques. Evidently, a referendum that would have allowed a "local community" under the U.S. flag to decide on any aspect of U.S. military presence was a potentially dangerous precedent from the perspective of the U.S. Navy, regardless of the outcome. [FN36] Through the last months of Clinton's presidency and the first few months of the Bush administration, Vieques also caught the imagination of American public-opinion makers. After Berrios penetrated restricted Navy land in Vieques a third time, the Navy successfully sought a harsh four-month prison sentence for Berrios's misdemeanor. [FN37] Yet, mounting acts of civil disobedience by Puerto Rican political leaders of all political parties and ideologies ensued. Additionally, prominent American figures, such as Congressman Luis V. Gutiérrez (D-Ill.), New York labor leader Dennis Rivera, Hollywood actor Edward James Olmos, the Reverend Al Sharpton, Jacqueline Jackson, the wife of Reverend Jesse Jackson, and environmentalist Robert F. Kennedy, Jr., all served disproportionate sentences for the petty offense of trespassing on federally restricted land in Vieques. [FN38] Since Lares in 1868, only Vieques has managed to bring Puerto Rico's morally untenable status as a colony to the attention of the metropolitan power and society. The events of September 11, however, shifted public attention away from Vieques, on both the mainland and the island.

IV.

The 2000 election also brought to power a new administration in Puerto Rico. During the gubernatorial campaign, candidate Sila Calderón embraced the two main issues that Rubén Berrios placed on the public agenda: Vieques and Puerto Rico's political status.

Berrios's courageous stance of civil disobedience against the U.S. Navy, both in the island-municipality of Culebra in 1971 and subsequently in Vieques, caused him to become the personification of the Puerto Rican struggle against the Navy's abuses. He campaigned vigorously for the immediate cessation of all military activity in Vieques and he proposed a People's Constituent Assembly on Status with proportional representation for all options. The Constituent Assembly would attempt to agree, by majority if not by consensus, on a demand for a final status solution to which the U.S. government would have to respond. [FN39] Candidate Calderón, an avowed faithful of Puerto Rico's 1952 commonwealth as the final status solution, nevertheless raised great expectations by pledging that, if elected, she would end the bombing in Vieques in two months. Also, Calderón characterized Berrios's idea of a People's Constituent Assembly on Status as an "excellent idea." She further promised to appoint a broadly representative commission to discuss status. As a result of an extremely well-financed effort in the last two weeks of the gubernatorial campaign, her newly adopted rhetoric as a "born again nationalist" and her promises to quickly solve the Vieques problem were effective in activating the "third party syndrome" and reversing the support that had been shifting in the direction of Berrios's candidacy. [FN40]

As governor, however, she soon realized that the struggle for Vieques would take her on
a collision course with the status quo. Instead of confronting the U.S. government with
the democratic will of Puerto Ricans, she remained silent for several months on both
Vieques and Puerto Rico's status. Despite a landslide victory in a municipal referendum
overwhelmingly supporting permanent and immediate cessation of all military activity,
Calderón failed to represent the will of her constituents. [FN41]

However, as the bungling and half-hearted efforts of the new administration increasingly
brought governor Calderón's credibility into question, she obtained *435 much-needed
cover from the rubble of the Twin Towers. Calderón used the events of September 11 to
distract from her administration's half-hearted efforts.

The argument that September 11 had "changed everything" thereafter became a litany to
justify inaction. Although she criticized and opposed Clinton's plan for Vieques, she
suddenly embraced his 2003 target date for the cessation of military activity, hortatively
articulated by George W. Bush in Sweden. [FN42] She remained silent on the return of
lands confiscated by the Navy to the people of Puerto Rico, and she backtracked on
cleaning up the environment. In fact, the commonwealth's Secretary of Justice and the
Resident Commissioner in Washington announced negotiations with the Navy at the
National Oceanic and Atmospheric Administration (NOAA) in Silver Spring, Maryland, on
"mitigation" of future environmental damages in Vieques--the very environmental
damages she had sworn to end. [FN43]

On status, the governor continued to pay lip service to her promise to appoint a
consensus commission to "improve" the commonwealth; though how that will interact
with legislative plans, evolving at the time of this writing, for a People's Assembly on
Status--and with the Presidential Task Force, [FN44] if it is ever activated--remains to be
seen. Her government still promotes the idea of Puerto Rico's capacity for foreign
relations and the possibility to decide on the applicability of federal laws in a
commonwealth under the sovereignty of the United States. [FN45] Reports from
Washington, however, do not support this contention.

When asked about the commonwealth arrangement's possible participation in
international organizations with foreign relations capacity, a presidential spokesperson at
the White House was reported as saying that, "as an integral part of the United States,
Puerto Rico is well represented by the [U.S.] Department of State." [FN46] On the power
to veto the applicability of federal laws in Puerto Rico, she further stated that, "[a]ll
federal laws apply to Puerto Rico, with the exception of those determined by the U.S."  
[FN47]

Typically, those acting out of dependence know they owe something in return, even if
they find the idea revolting. [FN48] However, the uncertainty of what the Puerto Rican
government is bargaining for is worrisome, when negotiations with the Navy appear to
take future maneuvers for granted, and Washington policy toward the commonwealth
arrangement remains unchanged.

The statehood party, for its part, has been in total disarray after an unexpected electoral
defeat. It has been grasping for an opportunity that would cast the leadership in an
endearing, mellow mood before U.S. authorities. The relationship between provider and
dependent is "the domain of reciprocal mistrust." [FN49] George W. Bush illustrated this
principle when he stated that Puerto Ricans are not explicitly Americans, but, really,
"friends and neighbors" who did not *436 want "them," the real Americans, in Vieques.
[FN50] This statement made statehood leaders wary that the president of the United
States might have come to realize that Puerto Ricans were, after all, not really
Americans, but a distinct people. With renewed fervor to convince their providers of their
faithful devotion to statehood, the cause that slipped ever farther away from their reach,
many of its leaders adopted the revolting idea that the U.S. Navy should continue
bombing Vieques, presumably to convince Americans that Puerto Ricans were even more American.

On status, the statehood party appears to subscribe in practice to the idea of letting sleeping dogs lie. While its leaders denounce colonialism and pay lip service to the idea of integration of a distinct cultural entity to the body politic of the United States, they have announced in advance their refusal to participate in a People's Status Assembly or in any dialogue on status. Their hope is pegged, not on any sense of real patriotism toward the United States, but on the growing dependence on federal transfers as a one-way ticket to statehood.

Puerto Rico's two major parties' unholy alliance resulting in favor of colonial stagnation has encouraged the Navy and its judicial sentinels to new heights of insolence. As if confident of a European-like wave of extreme right-wing protection, the U.S. Navy has continued to boldly announce its plans for future maneuvers. In addition, true to the role that the 1945 War Department memorandum had envisioned for unrestricted military prerogatives over public utilities, [FN51] a federal court of appeals confirmed the Puerto Rico-based U.S. District Court's decision that the U.S. Navy could continue to take and use, for free, as much water as its imperial heart desired for its naval station, from a river that supplies drinking water to Puerto Rican communities on the eastern part of the island. [FN52]

Too recently, in keeping with the Navy's history of insolence in Vieques, Puerto Rico witnessed an incident reminiscent of a war movie of the 1940s and 1950s. During the military maneuvers of April 2002, a group of sex-crazed Marines charged with security at the Navy's Camp García installations played the role of occupying forces overrunning an enemy town--this time, Puerto Rico's capital. [FN53] The group's commanding officer, Rear Admiral Kevin Green, provided official transportation from the U.S. naval base at Roosevelt Roads in eastern Puerto Rico to a brothel in Old San Juan. There, they got into a brawl and "bouncers" expelled the rowdy Marines. The fight continued outside the establishment between the Marines and the bar's security personnel and local residents who assisted them. Reportedly, the Marines--ten of whom suffered nasty cuts and bruises--finally proceeded to curse, urinate, and vomit in front of television crews and cameras in the street. [FN54] The true sentiment of U.S. military authorities toward Puerto Ricans' demand for respect and dignity could not be clearer.

Still, the quest for peace in Vieques commands the support of the vast majority of Puerto Ricans and of those who, like PIP members and others, continue to engage in a civilized and peaceful struggle to unmask the abuse of U.S. authorities that continue to imprison decent men and women--already over 2000--for a petty offense. Recently, a contingent of PIP women, led by the party's young vice president, attorney María de Lourdes Santiago, spent the entire month of April serving a thirty-day sentence for trespassing on Camp García during the Navy's military maneuvers in Vieques that month. [FN55]

As has been since the 1898 invasion, however, the United States continues to be "interested in the cage, not the birds." [FN56]

V.

The federal prison in Puerto Rico, the Metropolitan Detention Center, resembles modern-day Puerto Rico. As in most modern residential areas in Puerto Rico, there is armed security around the clock. The inmates are well fed and enjoy freedom like the commonwealth's "maximum autonomy compatible with the federal system." Only the bars in the colonial prison of Puerto Rico's commonwealth arrangement are less evident.
The struggle for Puerto Rico's sovereignty and decolonization is the struggle to break out of the historical detention center of U.S. colonial rule.

Nevertheless, the day is near when the U.S. Navy will have to permanently cease its military maneuvers in Vieques. As a recent editorial in the American newspaper in Puerto Rico has finally recognized:

Reports out of the Pentagon indicate the Center for Naval Analysis is moving steadily toward identifying alternatives to replace Vieques as the principal site for Navy maneuvers in the Atlantic area.

Increasing attention is focusing on installations at Eglin Air Force Base and Pinecastle in the Florida panhandle for air-to-land bombing exercises and on a combination of East Coast bases in North Carolina for ship-to-shore gunnery and amphibious landing practice.

President Bush has said he wants the Navy to aim for May 1, 2003 as the date for leaving Vieques, and Navy Secretary Gordon England has seconded the motion. The way the Pentagon is talking and the Center for Naval Analysis is moving suggests they are trying to meet that deadline. [FN57]

Thus, civil disobedience in the quest for peace has demonstrated two important truths about Vieques. First, while it is convenient for the United States to conduct its military exercises there--to the detriment of its Puerto Rican inhabitants--the island-municipality is not indispensable for the defense of the United States. The second important truth about Vieques is that the progress made in the struggle would not have been possible without the determination of the Puerto Rican people to demand and protect their rights, and without the widespread support enjoyed by those who have been willing to submit to the consequences of violating unjust laws.

As professor Berrios has written, "In 1898, the Navy was the moving force behind the invasion of Puerto Rico and has, since then, remained the most resolute supporter and proponent of our colonial status. In order to break with powerlessness, we Puerto Ricans must prevail in Vieques." [FN58]

The last bomb dropped on Vieques will signify an enormous achievement in Puerto Rico's struggle to break its colonial sense of powerlessness. But a triumph in Vieques is only one more step--like Lares in the nineteenth century--toward resolving Puerto Rico's colonial status. The PIP is continuing its grassroots campaign throughout the island to gather and strengthen support for a People's Assembly on Status. It envisions the Presidential Task Force on Puerto Rico's Status--if the U.S. government finally takes action--as the proper interlocutor in Washington for the work of a status assembly.

The growing strength of Puerto Rico's national identity and the federal unitary constitutional system of the United States make Puerto Rico's integration as a state a practical impossibility, if a Caribbean Quebec or Northern Island are to be averted. Furthermore, those who clamor for the protection of threatened species must minimally agree to the moral imperative to protect the diversity of peoples on this planet, including Puerto Rico's distinct identity. The protection of the Puerto Rican nationality, constructed by the toil of 500 years of human history, is undoubtedly worthy of such human respect and protection. And since the anachronistic commonwealth arrangement is the problem, it cannot be the solution. Accordingly, Puerto Rico's sovereignty is not a matter of "if," but of "when."
Professor Berrios has pointed out, however, that there are sectors in the government of the United States for whom the outmoded "possession" of the territory at the entrance of the maritime routes into the Caribbean remains critical. These factions would bide their time until a new generation of politicians sympathetic to their imperial cause comes to power. [FN59] These reactionary foci would "mothball" Vieques under the Scarlet O'Hara philosophy that tomorrow is another day. The propensity to dominate people, against their wishes and best interests, for the sake of those U.S. sectors' own interests raises the moral issues that I wanted to share with you.

We in Puerto Rico will continue to keep the pressure for the demilitarization of Vieques and the decolonization of Puerto Rico, until we prevail. *439* We are willing to face the consequences of our actions, as we have demonstrated, through every peaceful means available--from reasoned academic discourse, through the political process, to civil disobedience. Law teachers and jurists like you can no longer shun the moral obligation to educate Americans about Puerto Rico's unnatural condition under U.S. rule. Latinas/os and all Americans of good will--undoubtedly the vast majority--must be willing to learn and help others learn the moral imperative of our struggle.

That is why I am here today. If you support us in this cause, the triumph of the human spirit that Puerto Rico's liberation represents will also be your own.

Footnotes:

[FN1]. This is the full text of the keynote address at the LatCrit Conference VII in Portland, Oregon, May 3, 2002.

[FNdd1]. Secretary for North American Relations and former Senator for the Puerto Rican Independence Party; former Professor of Law, Northeastern University School of Law and Inter-American University School of Law; LL.M., Harvard Law School.; J.D., Boston College Law School; M.A., Brown University; A.B., The Johns Hopkins University.

[FN2]. "The White House believes that 'Puerto Rico should be allowed to choose its own destiny and to reach a permanent status. The task force will be looking into that issue' of whether commonwealth is considered a permanent status ...." Robert Friedman, PDP Holds on to Hope for Enhancing Rights Within Commonwealth, The San Juan Star, May 13, 2002, at 4-6.

[FN3]. "Commonwealth forces insist the most important first step is for all factions on the island to reach what some say is unreachable--consensus on the 'mechanism' or 'process'
on how status should be approached." Id.


[FN11]. Juan M. García Passalacqua, Mi testimonio del secreto del ELA, El Vocero, Aug. 28, 2001, at 37, summarizes and quotes the essential aspects from the text of this memorandum. The memorandum (photocopy available in the author's files) was contemporaneously reproduced on the internet at www.destape.org, but is no longer posted. The U.S. Navy never denied the memorandum's authenticity.


[FN13]. The alleged instances are too numerous to relate. Oftentimes cases go unreported because victims of political discrimination, particularly in the independence
movement, prefer not to turn it into a public issue that will make it more difficult for them to find employment elsewhere. From experience, I know this is not purely theoretical. When I returned to Puerto Rico on leave from my teaching job at Northeastern University School of Law and became actively involved in pro-independence politics in 1989, my wife, a former Assistant Attorney General in Massachusetts who was hired on the strength of her academic and professional qualifications, was told that she no longer enjoyed the trust of her superiors as in-house counsel for the Puerto Rican government television and radio station, WIPR. The CEO angrily and unabashedly told her that he had found out only a couple of days earlier that she was married to the Puerto Rican Independence Party's Electoral Commissioner. Thereafter, she was relegated to a desk job without legal tasks, until she subsequently secured employment elsewhere.


[FN18]. Id.

[FN19]. Supra note 11.

[FN20]. Comisión especial de Vieques, Informe al Gobernador de Puerto Rico (1999). This commission was convened after a Puerto Rican civilian worker was killed, and four others seriously wounded, by an off-target 500-pound. bomb dropped from a military plane on Vieques's main observation post in April 1999.

[FN21]. It should be noted that the U.S. District Court in Puerto Rico has not felt compelled to rationality or consistency in sentencing other participants in civil disobedience in Vieques. During the ensuing months of July to September of 2000, more than 130 Puerto Rican Independence Party members were prosecuted and imprisoned for terms varying from one week to two months, without trial, for trespass--a misdemeanor classified as a petty offense under federal law. 18 U.S.C. § 1382. Among them were the PIP's principal leaders, including its vice president and national candidate for the Senate, Fernando Martín, and other legislative and local candidates, such as the candidates for mayor of Puerto Rico's major metropolitan areas--San Juan, Mayagüez, Ponce, Bayamón, Carolina, and Caguas. In August 2000, this writer, then a senator and candidate for Puerto Rico's Resident Commissioner post in Washington (the only federal elective position in Puerto Rico), was imprisoned without a trial for six weeks in the federal
Metropolitan Detention Center in Puerto Rico, and then sentenced to "time served."

[FN22]. The tests were conducted by experts led by Puerto Rican Independence Party environmentalist Jorge Fernández-Porto, using the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) guidelines for control protocols and quality guarantees for the collection, transportation, and analysis of soil, air, and water samples, specifically Region II CERCLA Quality Assurance Manual, and compared with the federal Environmental Protection Agency's security guidelines. The findings submitted by the PIP were incorporated into the report of the 1999 multi-sector commission on Vieques appointed by Puerto Rico's governor. See supra note 20.

[FN23]. Coincidentally, a few days after his forced removal from the target area, Berrios successfully underwent surgery for a cancer condition developed during the year that he inhabited this contaminated zone.

[FN24]. Under Puerto Rico's Electoral Law, the three principal political parties are the Popular Democratic Party (pro-commonwealth), the New Progressive Party (pro-statehood), and the Puerto Rican Independence Party.


[FN26]. See Rubén Berríos Martínez, Un conflicto de nacionalidades, in Nacionalidad y Plebiscito 113-31 (1991). Any visitor may perceive this sociological reality without great effort, even among the majority that still do not favor Puerto Rico's independence. See Nancy Morris, Puerto Rico: Culture, Politics and Identity (1995) and Nacionalidad y ciudadanía: Lealtades divididas, regarding a recent poll that shows that only 20% of Puerto Ricans in 2002 consider the United States their nation, as compared with 60% who believe Puerto Rico is their nation. Although a substantial majority still believes U.S. citizenship--the only citizenship available to Puerto Ricans who live in Puerto Rico--is important, even this number has decreased from 75% in 1996 to 63% in 2002. Moreover, less than one-half of Puerto Ricans, 47%, preferred U.S. citizenship in May 2002, as compared to 51% who preferred an arrangement in which Puerto Rican citizenship would be recognized, either alone or in dual citizenship. El Nuevo Día, May 2, 2002, at 4-5. See also Juan M. García Passalacqua, New Events, supra note 4; Pedro A. Malavet, Puerto Rico: Cultural Nation, supra note 5.


[FN35]. P.L. 107-107, Sec. 1049.

[FN36]. "I do worry about the effect of being forced to leave Vieques, not only on our domestic training ranges but on international access." Gen. James Jones, commandant of the Marine Corps, Marine Commandant Speaks on Vieques, AP, Aug. 24, 2001.

[FN37]. See Rubén Berrios Martinez, Puerto Rico se arrodilla solamente ante Dios, El Nuevo Día, May 17, 2001; see also Bar Association President Criticizes Threat of Sanctions Against Lawyer, San Juan Star, May 29, 2001 (regarding a widely publicized criminal contempt complaint allegedly filed against this writer, who appeared as Berrios's counsel of record, by the federal magistrate that condemned Berrios. The purported nature of the criminal contempt was to state for the record that the sentences handed down by the court constituted "political judgments." No official notification was served and no further action has been taken since that blatant attempt to intimidate other members of the Puerto Rico federal bar).


[FN39]. Various methods to solve the status question had been attempted by Puerto Ricans since the inception of the commonwealth arrangement in 1952, notwithstanding the impediments to self-determination that the U.S. government placed along the way (see supra notes 11-14 and accompanying text). In addition to local referenda in 1993 and in 1998, which proved inconclusive, attempts in 1989-1991 and in 1996-1998 to negotiate with the U.S. Congress for legislation that would commit the United States to respond to a federally sponsored referendum failed due, as most observers agree, to the inclusion of the statehood option. See Rubén Berrios Martínez, Nacionalidad y Plebiscito, supra note 26, at 43-94. See also Manuel Rodríguez Orellana, Legal and Historical Aspects of the Puerto Rican Independence Movement in the Twentieth Century, 60 Rev. Jur. U.P.R. 567 (1991); Human Rights Talk, supra note 6.

[FN40]. In electoral theory, the third-party syndrome leads voters in a system that does not provide for proportional representation to shift support, from a preferred or protest third-party candidate, to another candidate perceived as more nearly capable of defeating the incumbent.


[FN42]. Statement by George W. Bush on Vieques, June 14, 2001, in Sweden; see supra note 34.


[FN44]. Supra note 33.

[FN46]. Lina M.F. Younes, En Casa Blanca: Puertas cerradas a desarrollo ELA, El Vocero, May 6, 2002, at 3; Robert Friedman, PDP Holds on to Hope, supra note 2.

[FN47]. Lina Younes, supra note 46; Robert Friedman, PDP Holds on to Hope, supra note 2.


[FN49]. Id. at 68.

[FN50]. Statement by George W. Bush on Vieques in Sweden, supra note 34.

[FN51]. See supra note 11.

[FN52]. United States v. Commonwealth of Puerto Rico, 287 F.3d 212 (1st Cir. 2002). See also Court Rules Navy Has 'Sovereign' Right to Take Water from River to Naval Station, The San Juan Star, Apr. 26, 2002, at 8.


[FN56]. This was the phrase used in the 1930s by Nationalist Pedro Albizu Campos, founder of Puerto Rico's modern independence movement. See Rubén Berríos Martínez, Puerto Rico's Decolonization, supra note 7, at 104. Interestingly, a nonscientific web survey conducted by a prominent pro-statehood family-owned newspaper revealed that more respondents would choose to name a new public events arena in San Juan after Albizu Campos, over the 1930s pro-statehood leader José Celso Barbosa, or the 1952 commonwealth founder Luis Muñoz Marín. El Nuevo Día, May 13, 2002, at 3.


Fernando Ortiz first coined the term transculturation during the 1940s as a substitute for the then prevailing concept of acculturation. According to Ortiz, this neologism provided a more accurate depiction of the process of national formation. To be sure, he argued that the word transculturation expressed the highly varied phenomena that have come about in Cuba as a result of the extremely complex transmutations of culture that have taken place here, and without a knowledge of which it is impossible to understand the evolution of the Cuban folk, either in the economic or in the institutional, legal, ethical, religious, artistic, linguistic, psychological, sexual, or other aspects of life.

It followed that the notion of transculturation was more flexible than the concept of acculturation, and more able to accommodate the nuances, ambiguities, and fluidity of national formation processes while acknowledging the multiple contributions of its members. In Mary Louise Pratt's terms the nation of Cuba became a "contact zone" where multiple traditions clashed and mutually constituted one another. These interactions in turn resulted in the creation of a new national culture that drew on multiple cultural traditions. Ortiz' notion of transculturation, however, was premised on a conception of the nation that resulted from an internal process of national formation. Moreover this notion of transculturation did not account for the continuous influence of external interventions such as United States imperialism.

Puerto Rican legal scholars such as Carmelo Delgado Cintrón, José Trías Monge, Liana Fiol Matta, and Rubén Nazario Velasco have used the notion of transculturation to describe the historical development of different aspects of the Puerto Rican legal system since 1898 when the United States (U.S.) formally occupied the island. They have generally used this term to analyze the socio-legal relationship between Anglo-American common law institutions and the Spanish civil law tradition in Puerto Rico. More specifically, Puerto Rican legal scholars have sought to describe the formation of a Puerto Rican legal system that draws from both traditions. Ironically, all of these scholars have not only used an incorrect translation of the term transculturation, but have also used this neologism in an incorrect context.

This paper will attempt to clarify the meaning of the notion of transculturation and assess the implications of its use for the understanding of the Puerto Rican legal system. I am especially interested in identifying the theoretical implications of the use of this term to describe the case of Puerto Rico understood as a "contact zone" for multiple legal traditions. The paper begins with a brief discussion of the notions of
transculturation and acculturation. This section is intended to situate these concepts within some of the current debates in the area of comparative law. The second part of this paper will focus on a brief discussion of the arguments of the latter four legal scholars. I will argue that while their reflections on the relationship between multiple legal traditions and the formation of a Puerto Rican legal culture and system provide us with important insights, their arguments can also be misleading.

I. From Acculturation to Transculturation

In the introduction to Cuban Counterpoint, Bronislaw Malinowski argued that the concept of acculturation contained a number of undesirable etymological implications, and was itself an ethnocentric word with negative moral implications. [FN8] Malinowski noted that acculturation was generally used to describe the experience of an immigrant in a foreign Western country, as well as those of subordinated populations conquered by the Western culture. He wrote:

The immigrant has to acculturate himself; so do the natives, pagan or heathen, barbarian or savage, who enjoy the benefits of being under the sway of our great Western culture. The "uncultured" is to receive the benefits of "our culture"; it is he who must change and become converted into "one of us." . . . It requires no effort to understand that by the use of the term acculturation we implicitly introduce a series of moral, normative, and evaluative concepts which radically vitiate the real understanding of the phenomenon. [FN9]

The exceptionalism of this concept was premised on the superiority of the Western culture over all other "less civilized cultures." Of course it is not clear whether individual immigrants could resist this process, or to what extent the Western culture was imposed and forced upon the "native." More importantly, his argument obscured the violence of acculturation. In other words, Malinowski's argument treated acculturation as a non-violent process while simultaneously ignoring the institutional policies and practices of Western imperialism. This is especially important given that Malinowski blurred the distinctions between the acculturation of an immigrant and the acculturation of a conquered "native," as well as a nation.

Legal acculturation can be understood as a process of transformation whereby a nation that utilizes a non-Western legal system adopts a more civilized Western legal system. In the context of Puerto Rico, this meant that the Spanish civil law institutions would ultimately be transformed by the influence of the ostensibly superior and more civilized Anglo-American common law institutions. This acculturation could further be understood on two levels, namely at a structural level and on a social dimension. From a structural perspective, a local legal system could be transformed by simply replacing the civil law institutions with others governed by a common law tradition. In other words, the civil code could be replaced by a judge-centered system that was premised on stare decisis. Precedents or case law could take primacy as a source of law over statutory interpretation. At a social level, this could mean that the legal actors would have to adopt the dominant method of legal interpretation. It could also mean that legal actors would have to learn new strategies for adjudication.

Contemporary comparative legal scholars generally use the concepts of constitutional borrowing [FN10] and legal transplantation [FN11] to describe the ways in which legal actors of one nation can borrow and/or adopt foreign laws. In the case of constitutional or general legal borrowing, a judge or a legal actor can borrow rationales, some principles, an interpretation, or simply an argument to solve a legal question. This can happen when a particular national legal system is silent on a matter of law, or simply when a judge wants to justify a legal position or interpretation that is more consistent
with his personal or political ideology. Transplantation occurs when a national legislature chooses to adopt a wholesale foreign legal system, say for example a penal code, to replace or substitute its existing codes. Depending on the impact of these new laws, it is possible to argue that legal actors and society in general will experience a process of legal acculturation to the foreign law to the extent that the foreign legal system exerts a hegemonic force over the existing national legal system. In some ways it is possible to argue that the efforts by the U.S. to democratize countries by forcing them to adopt a bill of rights or a legal system modeled after its constitution can be understood as a form of legal acculturation. In other words, it is possible to argue that in order to participate in the global economy some nations are forced to adopt Western legal systems, making legal transplantation a necessary evil. Legal transplantation has in fact been a characteristic of national formation.

As I noted before, Ortiz proposed the notion of transculturation to replace the concept of acculturation, which he defined as a concept "used to describe the process of transition from one culture to another, and its manifold repercussions." [FN12] Ortiz, however, was describing the internal formation of a national culture composed of multiple existing traditions and cultures clashing with one another. This is especially important because transculturation sought to describe an organic process that gave birth to a new national culture. Transculturation was a "reproductive process" that gave birth to an "offspring" culture that had "something of both parents" but was always "different from each of them." [FN13] Thus, this neologism not only explained the "problem of disadjustment and readjustment, of deculturation and acculturation," but also the new culture resulting from the mutually constitutive relationship between its component cultures. In the case of Cuba, these included the contributions of slaves and other black Cubans, "Jews, French, Anglo-Saxons, Chinese, and peoples of the four quarters of the globe." [FN14] Yet, it is not clear whether this culture would continue to change when it came into contact with new immigrants and their cultures. Nor is it clear that this process accounted for the distinct social, economic and political hierarchies present among these "micro" cultures.

It follows that legal transculturation can be understood as a process of developing a hybrid or mixed national legal system composed of the legal traditions already present in the contact zone that would become the new nation. Presumably, when legal actors would be forming a new national legal system, they would draw from the existing legal traditions and cultures and create a new legal system that had something of its "parents," but was also distinct from its progenitors. More importantly the process of legal transculturation presupposes the new national legal culture would acculturate all foreign legal cultures. In other words, to the extent that a foreign legal culture becomes a part of the new national legal system, it ceases to be foreign and strange and becomes a part of the organic whole. Unlike the process of transplantation, which presumably retains the foreign elements of an external legal culture, the process of transculturation creates a new legal system that naturalizes its foreign components.

II. Legal Transculturation in Puerto Rico

As noted above, Puerto Rican legal commentators have incorrectly used the notion of transculturation to describe the island's legal system in light of its relationship with the U.S. More specifically, this neologism has been used to explain the ways in which the Puerto Rican legal system has been formed out of the interactions between a "native" or local Spanish civil law tradition and a "foreign" or external common law culture. In a sense, the Puerto Rican legal system can be understood as a "contact zone" where these two legal cultures have historically clashed. These clashes, in turn, have generated a new legal culture that draws from both the civil and common law traditions. Moreover, while the Puerto Rican legal system has been constituted by these two traditions of
Romano-Germanic heritage, it can also be described as an amalgamation or fusion of traditions. This fusion is an example of transculturation.

The literature on legal transculturation in Puerto Rico has been informed by two interpretive approaches. The traditional approach, as articulated by Delgado Cintrón and Trias Monge, has focused on procedural issues in the local courts. In particular, these legal commentators have addressed questions concerning the use of the common law method in local courts that should otherwise be governed by civil law procedures. Their work has generally centered on the ways in which legal actors have used case law to interpret the civil code. In contrast, legal scholars like Fiol Matta and Nazario Velasco have used a post-structural method and a post-colonial approach, respectively, to understand the question of transculturation from a socio-legal vantage point. They have placed more emphasis on the relationship between society and the legal actor as a way to understand the relationship between the common and civil law traditions in the Puerto Rican legal culture. Notwithstanding their interesting and important scholarship, this literature has relied on an incorrect translation and use of the notion of transculturation. This conceptual confusion can be traced to their reliance on the work of German de Granda, a Colombian moralist and critic of linguistic imperialism in Puerto Rico. [FN15]

De Granda published his mistranslation of the notion of transculturation in 1972 in a book titled Transculturación e Interferencia Linguística en el Puerto Rico Contemporaneo. [FN16] To be sure, de Granda used Malinowski's work on acculturation to define the notion of transculturation. He neglected to cite the work of Ortiz, which was written in Spanish and sought to address the conceptual limits of Malinowski's method. Ironically, de Granda's project sought to clarify the imperialist role and interference of the English language over the Spanish vernacular in Puerto Rico. According to de Granda, the English language threatened the Puerto Rican national identity and in particular the Spanish heritage by infusing its vocabulary into the Spanish language spoken on the island. Presumably, this process of transculturation, or rather acculturation, would slowly result in the "blending in" of the Puerto Rican who would eventually be assimilated into the "American way of life." [FN17] Accordingly, the reliance on English words to describe the Puerto Rican reality would eventually result in the penetration, and eventual substitution, of Anglo-American values, morals, and cultural traditions over the Puerto Rican culture.

De Granda's argument suggests that legal "transculturation" in Puerto Rico can be understood as a process of institutional imperialism whereby the U.S. government sought to replace the island's national legal system, namely the Spanish civil law institutions, with common law institutions. It follows that this form of cultural imperialism manifested itself in institutional policies, procedures and practices as well as in the socio-legal culture. Thus, at a structural level, legal actors would rely on the stare decisis to interpret the civil code, as opposed to other methods of interpretation. At a cultural level, legal actors would adopt strategies of litigation that were more typical of the common law tradition. Of course, this argument is ultimately premised on the idea that the Puerto Rican legal system was a national, autonomous, and sovereign system. The reality, however, was much more complicated. The Puerto Rican legal system was a colonial legal system that was ultimately subordinate to the Spanish legal empire. The case of Puerto Rico is interesting because there is a structural and cultural shift from one empire to another. In other words the legal system operating in Puerto Rico prior to the U.S. occupation was also a colonial legal system and not a national legal system. Notwithstanding this conceptual problem the literature on legal transculturation in Puerto Rico raises some interesting questions about the relationship between multiple legal traditions in a geopolitical contact zone, which are discussed below.
In the introduction to his book Derecho y Colonialismo, Delgado Cintrón uses the term transculturation to describe U.S. imperialism and its cultural interference in Puerto Rican legal institutions. Transculturation, he suggests, is a "sociological phenomena where one culture displaces or substitutes another. [FN18] This argument is further premised on two ideological conceptions of the Puerto Rican legal system. According to Delgado Cintrón, Puerto Rico is a Latin American nation that was civilized by Spain and therefore adopted European civil law institutions, culture, and language. [FN19] He further suggests that the Spanish "mother land" (Madre patria) had created the Puerto Rican nation. His second contention is that the United States, as an imperial power, has been colonizing the island and threatens to replace the island's culture with an alien language and culture. It follows that Puerto Rico has been surviving in a state of siege, and its national culture has been threatened by the Anglo-American culture.

For Delgado Cintrón legal transculturation is a negative process of colonialism. This is important because Delgado Cintrón's argument not only depicts U.S. common law as a "foreign," "alien" and threatening force, but it also obscures the more egalitarian aspects of this legal tradition and its more progressive influences in the Puerto Rican legal system. For example, the Spanish civil law tradition in Puerto Rico was silent on the matter of racism and racial discrimination. In contrast, the U.S. common law tradition provided for a conception of civil rights that addressed questions of racial discrimination in Puerto Rico. This is not to say that the legal actors addressed questions of discrimination in effective ways in Puerto Rico. My point, however, is to suggest that Delgado Cintrón's wholesale dismissal of the common law tradition on account of its relationship to U.S. imperialism does not recognize the progressive possibilities of the U.S. common law tradition, and by extension of legal transculturation in general. Moreover, this argument suggests a sort of glorification of the Spanish legal tradition and the lack of a critical perspective on this imperialist legal tradition.

Delgado Cintrón's argument is more consistent with Malinowski's conception of acculturation to the extent that his argument is premised on the notion that the occupying Anglo-American empire has attempted to assimilate and absorb the existing legal institution in the island by transplanting U.S. common law institutions. To this extent, legal transplantation and acculturation can be understood as external forms of imperialism that can be used to colonize and subordinate Puerto Rico. Whereas transculturation presupposes a more egalitarian and mutually constitutive relationship between competing legal cultures and traditions, Delgado Cintrón's argument suggests that the relationship between common and civil law legal traditions can only be understood as hierarchical and unequal. This argument further obscures the political aspects of this relationship and the relative autonomy of legal actors in the Puerto Rican legal system. To be sure, some Puerto Rican judges, as well as attorneys, have purposely used the common law tradition to formulate their political and ideological opinions and arguments. The common law tradition has provided Puerto Rican legal actors with an additional source of law that has been useful in situations where the civil law tradition has been silent or simply not as amenable to manipulation. This is one of the problems inherent in understanding legal transculturation on procedural or structural terms only.

Trías Monge has written one of the most comprehensive and interesting texts on the historical relationship between the common and civil traditions in the Puerto Rican legal system. Among other things, his book focuses on the ideological arguments and strategies used by judges in Puerto Rico since the U.S. occupation. Monge suggests that this relationship can be understood within the context of the adoption of four juridical fantasies of legal interpretation. He uses the notion of transculturation to describe these fantasies, and to further highlight the clashes between the U.S. common law and the Spanish civil law traditions. Trías Monge discusses these fantasies through a historical critique of the Puerto Rican Supreme Court's jurisprudence. Unlike Delgado Cintrón,
Trías Monge envisions a Puerto Rican legal system that can draw from both legal traditions in an appropriate and wise manner. The problem with Trías Monge's use of the term transculturation is that he is also clear that the Puerto Rican legal system need not be part of an independent national formation project. He is advocating for a mixed legal system that can exist in an autonomous condition within an ambiguous political relationship between the mainland and the island.

Trías Monge's genealogy begins with a discussion of "fantasy of a superior law," which can be located during the initial periods of the conquest of Puerto Rico by the U.S. military. This fantasy was informed by a "Manifest Destiny" ideology that characterized the Anglo-American common law tradition as the most civilized and advanced legal tradition available for the governance of a territory. It followed that the Anglo-American common law tradition provided superior resources for the resolution of disputes and the pursuit of justice. In some ways, this argument suggests that the Anglo-Saxon culture imbued the common law tradition with superior qualities to those of the "less civilized" Spanish civil law tradition. Under the tenets of this argument, the Spanish civil law would be summarily displaced in favor of U.S. common law. It is further presumed that the common law tradition would have an acculturating effect over the local judges, and other local legal actors, who would eventually adopt this transplanted legal culture.

Trías Monge further contends that the "fantasy of a universal law" was initially adopted in cases or instances where the civil law was silent on a particular issue. Under the tenets of this juridical fantasy, legal questions could be answered by common law jurisprudence. It is interesting to note that of all the legal fantasies, this one leaves the most room for the judge to infuse his personal ideology in a particular case. To be sure, the silence of law provides judges with a special opportunity to issue an opinion that reflects their own ideological beliefs while suggesting that these are rooted in common law. What is interesting about this legal fantasy, however, is that there is a presumed effort to address a question in a civil law forum. Of course, it must be noted that the judge's resort to the common law is ultimately meant to replace the civil law and not to complement it. This fantasy can also be understood as an effort to transplant Anglo-American legal principles into civil law tribunals.

Trías Monge argues that the clearest and most successful example of legal transculturation can be understood in terms of the "fantasy of legal identities." This fantasy is premised on the construction of two separate legal identities that are contingent on distinct jurisdictional forums. Thus, the federal courts, which generally handle public law issues, are governed by common law, while the local tribunals, which generally handle civil and criminal disputes, are governed by the civil code. However, as Trías Monge cleverly documents, judges in the local tribunals have often resorted to the common law tradition when the civil code has been silent on a particular matter of law, or in some cases when judges seek to justify a particular ideological stance on a matter of law. In some instances, local judges have also used common law jurisprudence to reinforce a civil law principle, and to simply assert a particular political interpretation. Yet, it must be noted that this fantasy is in fact premised on the procedural recognition of two separate legal traditions. This is important because any resulting hybridization of law can be attributed to the actions of the presiding judge, and not to the conceptualization of law in itself.

Perhaps the closest example of legal transculturation in Puerto Rico can be discerned from Trias Monge's discussion of the "fantasy of the wise mixture or blending of law." Accordingly, the court of last instance has the power to compare both legal traditions and assess which doctrines could best be used to solve a legal dispute. It follows that the court could solve a dispute by drawing from both legal traditions. This would result in a new jurisprudence that is informed by multiple traditions of law in a complimentary
fashion. Thus, Puerto Rican law could be understood as a "new" and distinct law that is informed by common and civil law traditions. This method of interpretation would enable judges to not only address questions of justice in innovative manners, but also to create a jurisprudence that is informed by the "best of both worlds." What Trías Monge does not expound upon, however, is the fact that this new law would only be applicable to Puerto Rico and only as long as it did not contradict federal constitutional jurisprudence. In some ways, this argument is reminiscent of a "state's rights" ideology to the extent that it seeks to treat Puerto Rican law as an autonomous legal culture that has a legitimate place within the federal system, while simultaneously dispelling the perception that the Puerto Rican legal system is merely colonial in character. More importantly, this fantasy would enable Puerto Rican legal actors to validate a legal culture that draws from multiple and "equally" valid legal cultures. It should also be noted that under the tenets of Trías Monge's argument, the judge would have a legitimate commitment to the pursuit of justice. To be sure, the judge would be willing to suspend his political and ideological beliefs in the interest of justice and the Puerto Rican legal system in general.

Fiol Matta's discussion of legal transculturation is rooted in an empirical study of the methods and paradigms employed by local jurists, law professors and law students to analyze Puerto Rican jurisprudence between 1987 and 1991. [FN20] She analyzed over 700 legal texts comprising Puerto Rican Supreme Court opinions, legal briefs, and articles produced by law students, in order to discern the discursive method employed to represent the Puerto Rican law. It is important to note that Fiol Matta relied on a post-structural method informed by the work of Michel Foucault to reflect on the discursive strategies used by the legal actors in question to make sense of the law. Yet, while Fiol Matta's research employs a more innovative approach to the study of the relationship between the common and civil law traditions, her notion of transculturation is informed by the previously discussed work of Trías Monge. [FN21]

According to Fiol Matta, there are some clear distinctions between these two legal traditions despite their shared Roman Law heritage. For example, whereas legal actors resort to case law and legal precedent to interpret and predict the outcome of cases in the common law tradition, legal actors in the civil law tradition place more emphasis on the analysis of legal scholars and commentators. Notwithstanding these differences, Fiol Matta found that legal actors in Puerto Rico have a tendency to rely on case law and prior precedents to formulate legal strategies in civil law courts. To be sure, she suggests that Puerto Rican legal actors employ discursive methods and interpretations that are typical of a common law culture as a guide when preparing documents and legal strategies in civil law forums. Fiol Matta's argument states that transculturation explains the practice of using a common law paradigm and discourse to interpret the civil law in the Puerto Rican courts and the legal academy. Transculturation explains the discursive strategies adopted by legal actors to make sense of the Puerto Rican jurisprudence. Thus, by adopting common law discourses, Puerto Rican jurists and other legal actors reproduce U.S. ideologies in the island. More importantly the notion of transculturation can clarify some of the ways in which power is negotiated and reproduced in the island's legal system by clarifying which discursive strategies become hegemonic in the island's legal culture.

Fiol Matta's argument is important because it suggests that transculturation can be understood as part of a legal strategy to win cases. Presumably the jurist and legal actor will choose to adopt common law strategies and methods to make sense of the civil law jurisprudence without having to be acculturated to the common law tradition. Of course while there is a certain degree of choice we must also recognize that the Puerto Rican legal system operates within a U.S. legal system that is ultimately governed by a common law culture. It would be interesting, however, to explore whether jurists and other legal actors choose to adopt common law strategies in countries that are governed by a civil law tradition and culture. In any event, Fiol Matta's argument suggests that
the Puerto Rican legal system can be understood as a hybrid system informed by multiple legal discourses. More importantly, the common law culture permeates civil law spaces through the discursive strategies employed by legal actors who are seeking to win cases. This argument suggests that these legal traditions are merely discourses that are ultimately subject to the legal actor's ideology and pursuit of power.

Nazario Velasco’s approach seeks to offer a post-colonial interpretation of the effects of the legal strategies employed by legal actors in Puerto Rico during the immediate aftermath of the War of 1898 and the early stages of the U.S. colonization projects. Unlike the procedural analysis of Delgado Cintrón and Trías Monge, Nazario Velasco’s argument shifts the focus to the mutually constitutive relationship between law and society in the Puerto Rican court system during the immediate aftermath of the war, and on the efforts to “Americanize” the island’s local courts. His project documents and interprets the strategies used by Puerto Rican attorneys to succeed in a local court system that was being transformed by U.S. imperialism. He demonstrates how local attorneys both subverted the court’s ideological shift and simultaneously participated in their Americanization. To be sure, Puerto Rican attorneys trained in the civil law tradition often reproduced U.S. imperialism by employing methods of legal interpretation that were inimical to the common law tradition while seeking to further their own professional agendas.

Ironically Nazario Velasco adopts De Granda’s definition of transculturation to describe the latter relationships. This is especially intriguing given Nazario Velasco’s concern with a more innovative and creative understanding of the relationship between law and society as well as his concern with post-colonial theory. In fact it should be noted that his theoretical reflections are inconsistent with De Granda’s general framework. Notwithstanding tension in Nazario Velasco’s argument, his overall project makes a number of important and refreshing contributions to the study of the relationship between two legal traditions and the Puerto Rican legal intelligentsia.

Nazario Velasco’s argument suggests that legal actors could manipulate the process of legal acculturation in the pursuit of their personal and professional agendas. In other words, legal actors were not necessarily passive recipients of U.S. imperialist ideologies, but rather they were strategic handlers of the common law culture. They possessed a degree of autonomy and agency that enabled them to pursue particular agendas amidst a re-definition of the local legal system premised on the hegemony of an Anglo-American common law culture. In addition, Nazario Velasco’s argument further emphasizes the role of translation in this process. To be sure, in order to implement U.S. laws these had to be translated from English to Spanish. The process of translating legal principles further allowed Puerto Rican legal actors to imbue the law with particular ideologies that mitigated the effect of U.S. imperialism. The translation of legal terms and categories allowed legal actors to choose terms that could be used in strategic ways. Thus, the process of translation resulted in the transformation of the common law culture and its effects on the legal profession in the island.

It follows that the transplantation of U.S. legal institutions and ideologies was contingent on their reception by Puerto Rican legal actors. In other words, this argument suggests that even unilateral efforts to acculturate the colony’s legal intelligentsia could be subverted by the recipients of these legal narratives. Despite the fact that Puerto Rican legal actors were forced to function within a foreign legal culture, they also had a certain degree of agency to resist, transform and reproduce the externally imposed legal tradition. Puerto Rican attorneys participated in the formation of a new legal culture that was informed by the common law tradition and the Spanish civil law culture in which local legal actors were trained. In sum, legal transculturation is ultimately contingent on
the interpretations of its legal actors and on their ideological agendas despite the
hegemonic power of one of its component legal traditions.

Conclusion

First, it should be evident that Puerto Rican legal commentators and scholars have
unilaterally misused and abused the notion of transculturation. Not only have they relied
on an incorrect translation of this notion, but they have also neglected to incorporate the
role of nation building. Transculturation, as coined by the Cuban intellectual Fernando
Ortiz, is ultimately premised on the organic process of constructing a national identity. In
the case of Puerto Rico, the relationship between the U.S. common law and the Spanish
civil law traditions is ultimately contingent on the island's subordinated legal and political
status. Puerto Rico, and its legal system, is ultimately subject to a legal hierarchy where
the common law tradition reigns supreme. To use the notion of transculturation to
describe historical formation of a Puerto Rican legal system, even an autonomous legal
system, in the absence of an "independent" nation-building project is to abuse the notion
of transculturation.

Despite its ideological heritage, the notion of transculturation provides interesting
capacities for the study of legal systems that are formed out of multiple *451 legal
traditions. Moreover, despite the misuse of the notion by Puerto Rican legal scholars,
their research in this arena is important because it demonstrates some of the key
tensions that arise in places governed by mixed legal systems. As this paper suggests,
legal transculturation can be understood as a political contact zone and/or a contested
terrain where legal actors engage in the strategic formation of a new legal system that is
informed by multiple legal traditions. This argument suggests that law can be understood
as a collection of competing narratives strategically deployed by legal actors in the
pursuit of their particular agendas. This argument further suggests that legal actors
ultimately invent legal traditions.

It follows that legal transculturation can further shed some light on the ways in which the
law contributes to the transformation of society by highlighting the ideological premises
of competing legal traditions. To be sure, legal traditions are often shaped by distinct
social and political ideologies. It is possible to understand how U.S. social and political
ideologies have permeated into the Puerto Rican social fabric to the extent that we can
understand the ways in which these common law ideologies have assumed a hegemonic
position within the Puerto Rican legal system. By adopting common law principles to
resolve social disputes in Puerto Rico, legal actors are participating in the re-constitution
of a new Puerto Rican socio-legal narrative. The notion of transculturation can aid us in
the understanding of how this process occurs.

Footnotes:

[FNd1]. Department of Politics, Ithaca College. I would like to thank the participants and
commentators of the works-in-progress section of the LatCrit VII symposium for their
helpful suggestions and comments. This paper is part of a larger ongoing research project
on Legal Transculturation and Nation-Building in the Americas.

[FN1]. Fernando Ortiz, Cuban Counterpoint: Tobacco and Sugar (Harriet de Onís, trans.,
1995).

[FN2]. Id. at 98.


[FN8]. Ortiz, supra note 1, at lviii.

[FN9]. Id.


[FN12]. Ortiz, supra note 1, at 98.

[FN13]. Id. at 103.

[FN14]. Id. at 102.

[FN15]. See supra note 4, at 430; supra note 5, at 3; supra note 7, at 6. Fiol Matta relies on Trías Monge's definition of the notion of legal transculturation.


[FN17]. Id. at 44.

[FN18]. Supra note 4, at introductory note.

[FN19]. Id. at 48.

[FN20]. Supra note 6, El control del texto, at 804.

[FN21]. Id.
Cambia lo superficial

también cambia lo profundo

cambia el modo de pensar

cambia todo en este mundo. [FN1]

A Modo de Introducción

Lo que el lector encontrará. En este documento intentamos retomar algunas hipótesis que han despertado especial polémica entre juristas y sociólogos: (a) el derecho es un hecho social; (b) los cambios jurídicos son cambios sociales; (c) los cambios jurídicos pueden provocar cambios sociales; y (d) los cambios sociales pueden provocar cambios jurídicos.

En la primera parte, se ofrecen algunos antecedentes para contextualizar el sentido del debate propuesto. A continuación se aclara, al menos de manera instrumental, lo que entendemos cuando usamos los términos cambio jurídico y cambio social. Tras analizar por separado los resultados de nuestras observaciones e indagaciones respecto a las cuatro hipótesis sugeridas, queda para el final una serie de comentarios y conclusiones preliminares.

A medida que se vaya avanzando en el texto se apreciará que nos hemos atrevido a intercalar algunos fenómenos sociojurídicos llamativos. Esto no es para amenizar terrenos de suyo aristosos ni para persuadir a recién iniciados en la actividad política a conectar teoría y praxis al abordar fenómenos normativos de atractivo e interesante debate como los que aquí se presentarán. Estos fenómenos *454 sirven sino para...
aprovechar la oportunidad y motivar alteraciones en la cultura jurídica popular al insinuar una mirada diferente—ojalá novedosa—la de nuestros imaginarios colectivos sobre: la legislación que se refiere al delito de aborto; la disputa entre conservadores y liberales a propósito de una eventual ley de divorcio; el impacto social que ha tenido la reforma al sistema de educación superior implementada en la década de 1980; y la (doble) contingencia e implicancias que conlleva la discusión sobre el reconocimiento de los pueblos indígenas.

Lo que el lector no encontrará. Hemos eludido aventurarnos en la fatigosa tarea de reproducir discusiones filológicas sobre citas en torno a los conceptos de sociedad y derecho. [FN2] En cambio hemos preferido asumir en calidad de supuestos tres ideas de aceptación general, evitando así tener que destinar esfuerzos innecesarios para demostrar asuntos que no atañen directamente al fondo de este documento:

1. A pesar que en los últimos dos siglos demasiados teóricos han intentado desarrollar teorías generales tanto del derecho como de la sociedad. Sin embargo, ninguna de ellas ha sido capaz de dar una respuesta satisfactoria autónoma e integralmente. Ese desafío sigue abierto a los teóricos que se atrevan a escalar senderos escabrosos. Por de pronto diremos que ni la sociedad ni el derecho son entidades estáticas; más bien, pueden ser comprendidos como sistemas complejos en evolución y reconstrucción permanentes. Provocar alteraciones en ellos no es tan fácil como se podría augurar, pues la experiencia enseña que en la mayoría de los casos no bastan intervenciones aisladas, puntuales o esporádicas.

2. Así como ciertos autores han propiciado la separación analítica entre derecho y sociedad, también es cierto que numerosos intelectuales han tratado de explicar cuáles son las relaciones entre ambos conceptos. [FN3]

3. La interrelación entre derecho y sociedad es una pregunta constante entre quienes pensamos que es imposible llegar a conocer el derecho apropiadamente sin comprender el contexto social en el que se encuentra inserto, y viceversa. [FN4] Esto supone que el centro de gravedad en el análisis no puede corresponder exclusivamente a la ciencia jurídica ni a la ciencia social. Más bien, lo que aplaudimos es la construcción de puentes y la exploración de mayores posibilidades para las indagaciones sociojurídicas.

Lo que nos gustaría poder ofrecer al lector en una próxima ocasión. Si tuviéramos el tiempo y la energía para ampliar el radio de acción de la pesquisa original, sin duda desagregaríamos otras variables, transformando la versión del estudio que se propondrá en un análisis multidimensional y multicausal. Lo mismo ocurriría si nos ocupáramos de cambios tan interesantes como lo son: el cambio tecnológico, el cambio político, el cambio económico, el cambio cultural, el cambio religioso y el cambio internacional. Por ahora nos contentamos con ensamblar dos piezas interactivas del rompecabezas y evidenciar las intensas y complejas relaciones entre cambio jurídico y cambio social.

I. Antecedentes y Contexto del Debate

Develar cuándo, cómo y por qué aparecen nuevas teorías, visiones, modelos o formas de pensar no es tarea sencilla. La insaciable curiosidad de los investigadores suele sentirse atraída por las tendencias o corrientes críticas que de vez en cuando aparecen al interior de cada una de las áreas del saber. Si las críticas están bien fundadas y las propuestas de cambio que hay de por medio son realizables y ofrecen convincentes respuestas a interrogantes no resueltas, puede que las posturas vanguardistas superen las resistencias del establishment y logren posicionar sus ideas en la respectiva
comunidad científica o artística. Piénsese en los casos de Ludwig van Beethoven, Sigmund Freud, Galileo Galilei, Martín Lutero, Karl Marx, Pablo Picasso y Leonardo da Vinci. Todos ellos comparten los rasgos de haber sido críticos y vanguardistas, visionarios y creativos. Sin duda, sus vidas y obras provocaron un punto de inflexión con fuertes repercusiones no sólo en las disciplinas que dominaban sino también en las demás.

Pues bien, el pensamiento jurídico no ha estado exento de formulaciones críticas, las que también han alterado la manera de enseñar e investigar el derecho, cuando no el comportamiento mismo de los abogados. Ejemplos de este fenómeno sobran al revisar la historia de la evolución y reformulación constante del derecho; claro, no todos han sido exitosos. Sin ir más lejos, recordemos que en América Latina, durante las décadas de 1960 y 1970, se formularon fuertes críticas a la actividad de los juristas. Los motivos del descontento tienen que ver con una serie de factores, entre los cuales cabe mencionar: (1) el trecho entre el derecho--encerrado en una torre de marfil--y la realidad social; (2) la percepción del sistema legal como un obstáculo al cambio y al desarrollo social; [FN5] (3) el énfasis en la *exégesis de las normas jurídicas y en las clases pasivas como metodologías aplicadas en las escuelas de derecho; [FN6] (4) la creciente pérdida de espacios en las grandes decisiones públicas por parte de los abogados, desplazados por otras profesiones; (5) la falta de compromiso de los juristas con las tareas de arquitectura social y de reformas estructurales-- propiciadas por el desarrollismo cepalino, la Alianza por el Progreso y/o los partidos de izquierda, en su caso --; (6) la inexplicable homogeneidad de la cultura jurídica dominante; y (7) la mala calidad de las investigaciones jurídicas y de la infraestructura requerida para investigar; entre muchas otras razones.

En Chile, siendo aún más específicos, también se hablaba en esos años de una crisis del derecho. Con tal expresión se hacía referencia al carácter anticuado que revestían las metodologías empleadas en la enseñanza y en la investigación jurídica, aunque la disconformidad se arrastraba por muchos años. [FN7] Un selecto grupo de profesores de las cinco escuelas de derecho (tradicionales) del país tomó la iniciativa de reunirse y de intentar encontrar soluciones efectivas para superar el estado de atraso en el que se encontraban el estudio y la investigación del derecho y el ejercicio mismo de la profesión. [FN8] Sin embargo, la implementación de las reformas propuestas no fue del todo comprendida ni bien recibida por los sectores más conservadores. Cuando las autoridades militares tomaron de facto el control del país el 11 de septiembre de 1973, el incipiente debate sociojurídico que se estaba articulando en las aulas y en los nuevos centros de estudio--una víctima más de los *eventos políticos--quedó postergado por varios lustros, quizás en espera de ambientes más democráticos y de nuevas fuentes de financiamiento.

Uno podría preguntarse por qué en el Chile actual son tan escasos los estudios de sociología del derecho. Habría que decir, por un lado, que los sociólogos del derecho no contaron con la tranquilidad suficiente ni con el financiamiento que requerían para haber investigado o debatido sobre los grandes temas que afectan a la sociedad chilena. Por otro, no es fácil encontrar juristas ni sociólogos que estén preparados para trabajar juntos (aunque cada vez lo hacen más seguido, en parte con ocasión de los estudios sobre políticas públicas solicitados por la administración pública). Pero lo que es más grave es que muchas escuelas de derecho son incapaces de mirar más allá del paradigma dogmático al analizar fenómenos jurídicos. [FN9]

Con ánimo de promover la sociologización del derecho chileno, esto es, que junto con el manejo de las técnicas y destrezas tradicionales de análisis jurídico--normas positivas y fallos de los tribunales--los juristas amplíen su mirada a través del aprovechamiento de teorías, consideraciones y metodologías sociológicas, nos atrevemos a presentar algunas
hipótesis de trabajo que pueden ayudarnos a recuperar el tiempo perdido. La verdad es que si buscamos aumentar los índices de cooperación entre derecho y sociología en forma científica y no retórica, debemos actuar con agilidad y dejar a un lado imágenes negativas de una u otra actividad. La globalización y la creciente complejidad de los fenómenos sociales nos llevan a pensar que los juristas no están lo suficientemente bien preparados, desde el punto de vista teórico, como para encontrar respuestas a los múltiples problemas que la sociedad chilena deberá enfrentar en los próximos años. [FN10]

A. Cambio Social

Comprender los fenómenos sociales, y con mayor razón los cambios sociales de los que hemos tenido la dicha de ser testigos (y actores), exige nuevos debates, superposiciones y reformulaciones de los marcos teóricos predominantes en la academia. Como nuestro objetivo no es pasar revista a cada una de las teorías sobre los cambios sociales, asumamos, junto a Anthony Giddens, que: "ningún planteamiento monocausal puede explicar la diversidad del desarrollo social humano, que va desde las sociedades de cazadores y recolectores hasta los complejísimos sistemas actuales, pasando por las sociedades de pastores y las civilizaciones tradicionales." [FN11]

Resulta obvio decir que el mundo en que vivimos está en permanente cambio. Si comparamos la velocidad de los cambios actuales con la de los cambios en la época de nuestros abuelos, nos resulta fácil afirmar que los cambios ya no se generan ni difunden con calma (o en cámara lenta), sino instantánea, mediática, constante, acumulativa y globalmente. [FN12] Chile no está al margen de los cambios mundiales, los que a su vez elevan las expectativas individuales. Una muestra de nuestra total inserción aparece en los dos primeros párrafos del Informe PNUD 2002:

En las últimas dos décadas los cambios han transformado la fisonomía de Chile. Las nuevas autopistas, la expansión del tráfico aéreo, las líneas de teléfono, las antenas de los televisores y celulares, los enlaces de Internet crean interconexiones entre lugares y personas que antes no se vinculaban. Chile no se parece ya a los dibujos de los libros escolares en los que aprendió a leer la mayoría de los chilenos. Como nunca los chilenos disponen de la infraestructura para sentirse cerca y unidos en un territorio que ya no es un obstáculo. Chile ha perdido el carácter insular de solo algunas décadas atrás.

Más profundos e impactantes que los cambios exteriores han sido los cambios en el interior de las personas. Como no están a la vista, cuesta reconocerlos. Y, por ende, no es fácil encontrar las palabras y ponerle nombre a las vivencias personales. Pero los cambios están ahí. Así como el paisaje, también la propia vida y las maneras de vivir juntos se transformaron, volviéndose ambivalentes y confusas. No es raro sentir desorientación y, a veces, impotencia. Ni sorprende cierta irritación en las relaciones sociales. Los chilenos viven con perplejidad este hallarse cada vez más cerca unos de otros, pero sintiéndose extraños de sí. [FN13]

Con la intención de avanzar en la comprensión de la relación entre el derecho y los cambios sociales, nos limitaremos a reproducir la definición de cambio social proporcionada por Richard Schaefer y Robert Lamm en Sociology (1983): Cambio social es una alteración significativa a lo largo del tiempo en los patrones de comportamiento y en la cultura, incluyendo las normas y los valores. [FN14]

El cambio social es una transformación de la cultura, las estructuras sociales y los comportamientos sociales a lo largo del tiempo. El cambio social es una parte constante
de la vida social, que ocurre de diferentes maneras en todas las sociedades. En algunas
ocasiones los cambios sociales son lentos (por ejemplo, la lucha por un cambio social
profundo en Sudáfrica demoró 300 años) y en otras acelerados (por ejemplo, la
revolución rusa). También debemos considerar que el impacto que producen los cambios
sociales en la vida social y en las estructuras sociales es diverso (por ejemplo, el
impacto de la popularización de la píldora anticonceptiva en la estructura poblacional).

Una visión panorámica de las fuentes o causas de los cambios sociales puede consistir
en agruparlas en: (1) causas demográficas o fluctuaciones poblacionales; (2) cambios
en el medio ambiente; [FN15] (3) alteraciones en los elementos culturales; (4)
conflictos sociales y revoluciones; (5) cambios tecnológicos; (6) reformas económicas; y
(7) cambios normativos.

Es imposible analizar el tema del cambio social sin mencionar los factores externos e
internos de resistencia al cambio. Que hayan sectores sociales dispuestos a mantener el
status quo o encaminados a restaurar las condiciones que existían con anterioridad al
cambio social suscitado, suele ocurrir. Muchas veces esos sectores pueden desviar el
curso de la corriente social. Por ejemplo, con motivo del caso Roe v. Wade, en Estados
Unidos, surgieron movimientos antiabortistas violentos que cometieron amenazas y
homicidios contra facultativos que realizaban abortos en clínicas abortivas autorizadas
para llevar a cabo tales intervenciones.

Según Máximo Pacheco, en Introducción al Derecho (1976), "el proceso de cambio social
es intencional y racional, en el sentido de que está determinado por comportamientos
humanos intencionales, producidos con el objeto de obtener resultados a través de
medios juzgados idóneos para tal efecto," [FN16] y agrega a continuación que "el
cambio social emana de la actividad consciente de las personas que emprenden la tarea
de buscar soluciones satisfactorias a sus problemas elaborando y reelaborando
proyectos, movilizando recursos, definiendo y redefiniendo objetivos y acumulando
experiencias de éxitos y fracasos." [FN17]

En síntesis, decimos que estamos frente a un cambio social cuando observamos
transformaciones: (1) en la organización y funcionamiento de la sociedad, (2) en los
patrones de pensamiento y/o conductuales de sus integrantes, (3) durante cierto
período de tiempo y espacio identificables, (4) provocadas por todo tipo de causas
capaces de lograr una reacción social (v.gr., causas sociales, militares, religiosas,
científicas, tecnológicas, ideológicas, económicas, políticas, etc.). Reiteramos, el cambio
social ocurre continuamente en toda sociedad, aunque su intensidad e impacto puede
adoptar diferentes modalidades.

El cambio social puede ser polémico o controversial, en el evento que se observen
disputas entre sus promotores y los retractores. [FN18] Aunque también puede ser el
resultado de un consenso social en el que participe la gran mayoría de la población, de
modo que el cambio fluya como algo natural, previsible, sin contrapesos. [FN19]

Según Giddens, tres son los factores claves que históricamente han provocado cambios
sociales, a los que habría de prestar mayor atención: (1) el medio físico; (2) la
organización política; y (3) los factores culturales. Sin embargo, no se puede
comprender a cabalidad la acelerada velocidad de los cambios sociales ocurridos en la
etapa del proyecto de la Modernidad sin considerar ciertas influencias económicas
(capitalismo industrial, sistemas productivos, sistema monetario, intercambio comercial
transnacional), políticas (sistemas políticos contemporáneos, estados nacionales,
guerras, movimientos políticos) y culturales (educación, medios de comunicación y
transporte, tecnología y desarrollo científico, liderazgos, movimientos sociales). [FN20]
B. Cambio Jurídico

Si uno tuviera tiempo para revisar las estadísticas sobre producción normativa en el mundo occidental, tendría que llegar a la conclusión que en la época moderna el número de normas aprobadas es muy superior a la suma de todas las épocas anteriores. A medida que avanza los siglos se aceleran los ritmos y velocidades de los cambios jurídicos. Lo anterior se puede ratificar con mayor intensidad desde el predominio y aceptación popular de ciertas ideas como: (1) el Estado de Derecho (Rule of Law), (2) el principio de separación de poderes, (3) la independencia y profesionalización de las tareas jurisdiccionales, (4) la omnipotencia del legislador y (5) la consecuente expansión del fenómeno de la codificación a los más diversos aspectos de la vida en una comunidad políticamente organizada. Así, por ejemplo, la creciente instrumentalización de las actividades parlamentarias y reglamentarias se ha traducido en un aumento constante del número de normas aprobadas entre un período legislativo (x) y otro posterior en el tiempo (y). [FN21]

El siglo XX ha estado marcado, entre otras huellas imborrables de la memoria histórica, por el fenómeno de la legalización, esto es, por la expansión del dominio de la regulación a casi todos los ámbitos de la vida social e individual. [FN22] Nos guste o nos desagrade, lo cierto es que el derecho nos acompaña desde que somos concebidos hasta que nuestros herederos se reparten los bienes materiales que hemos acumulado en vida. El sistema jurídico es cada día más denso, más dinámico, más complejo de entender y más detallista. No hay ninguna señal que nos indique que el conjunto de normas existentes vaya a disminuir o a condensarse. A lo más, podremos anticipar que continuará produciéndose una mayor estandarización u homogeneidad jurídica entre culturas antaño distantes, con motivos de la globalización jurídica. [FN23] Tampoco hay señales como para decir que el sistema jurídico dejará de controlar las relaciones sociales, el bienestar, los mercados, el consumo, el poder, o las sanciones a las conductas desviadas. Sin embargo, es posible que ciertos sectores privilegiados en el dominio y control de dicho sistema dejen de serlo en el futuro.

En países democráticos, la publicación de las reformas legales es obligatoria, ya sea cuando han sido efectuadas y aprobadas por el legislador o por una autoridad a la que éste le delega tal facultad. [FN24] Sin embargo, no podemos confundir reforma legal con cambio jurídico. Hacerlo equivaldría a dejar fuera los cambios en la cultura jurídica popular, los cambios judiciales y las variaciones en la interpretación de las normas que realizan los tribunales en casos concretos, los cambios en la aplicación de las normas por parte de los operadores jurídicos (v.gr., estándares utilizados por fiscales y defensores en el nuevo sistema procesal penal), los cambios gestados por otros productores normativos cada día más especializados, etc.

La distinción anterior nos permite distinguir entre reforma legal (especie) y cambio jurídico (género). Los cambios jurídicos son variaciones específicas al interior del subsistema jurídico. Los orígenes de esas variaciones pueden deberse a reacciones provocadas por entidades con acceso al subsistema (legisladores, abogados, jueces, juristas, notarios, operadores jurídicos en general) o sin acceso al subsistema (ONGs, medios de comunicación, políticos, policía, empresarios, religiosos u otras personas o instituciones capaces de influir en la cultura jurídica popular). Estas reacciones ocurren en un espacio y tiempo delimitados, y afectan el funcionamiento y/o la estructura del ordenamiento jurídico, tanto en la validez de una o más normas como en su eficacia. En cambio, las reformas legales (incluyendo reformas constitucionales) son los resultados normativos del ejercicio de las facultades que tienen las autoridades establecidas por el ordenamiento jurídico-político. Estas autoridades tienen facultad para modificar o derogar una o más fuentes del derecho de igual o menor jerarquía. Debe entenderse que al mencionar fuentes de derecho nos referimos a reglas sociales
obligatorias, establecidas con carácter permanente por la autoridad pública y sancionadas por la fuerza. Como sabemos, la derogación puede ser expresa o tácita, dependiendo de qué tan explícita sea la autoridad que apruebe la respectiva reforma. En cuanto a la modificación, obviamente aquí no nos interesa referirnos a sus aspectos formales (tramitación, jerarquía, etc.), sino preferimos destacar lo que acáee con el elemento material de la norma, esto es, con el contenido jurídico que viene a ser alterado.

Para que una reforma legal sea válida debe tratarse de un acto de producción normativa ejecutada por autoridades a las que otras normas del respectivo ordenamiento facultan para la ejecución de tales actos de reforma normativa. En otras palabras, cuando destacamos que una reforma legal es válida, lo que hacemos en realidad es sostener que esa reforma existe en cuanto tal, y, por ende, es obligatoria, debiendo ser acatada y aplicada por los ciudadanos y órganos jurisdiccionales encargados de hacerlas respetar. [FN25]

Lo que sigue a continuación son, en el más optimista de los casos, unas cuantas notas para insinuar o provocar un debate que sigue abierto. [FN26] Las cuatro hipótesis que se presentarán requieren mayores niveles de profundización.

II. El Derecho Es un Hecho Social

El derecho se puede y debe analizar considerando tres ángulos de acercamiento: (1) el derecho como valor, (2) el derecho como norma positiva y (3) el derecho como hecho social. [FN27] A lo largo de la historia los autores han enfatizado uno u otro aspecto, muchas veces sin percatarse de la contaminación o restricción con la que explican los fenómenos normativos, aunque la mayoría de las veces efectivamente inclinaron el peso hacia uno de los lados del triángulo jurídico.

Resulta interesante constatar cómo positivistas y jusnaturalistas han compartido posiciones de predominio en Chile, tanto en el foro como en la academia, dejando las corrientes realistas quizás un poco más postergadas. Una rápida ojeada a las mallas curriculares de las escuelas de derecho del país, sumada a la observación empírica que se puede realizar sobre el desempeño cotidiano de los juristas, permite sostener con elevados niveles de certeza que éstos han centrado principalmente su atención en el estudio de las normas que componen el ordenamiento jurídico, ya sea identificándolas, sistematizándolas, criticándolas o interpretándolas. [FN28]

Agustín Squella tiene razón cuando advierte que los juristas dejan fuera de su mira una serie de actos que se ubican en la génesis de la norma, los valores inspiradores o ilustradores del debate durante la producción normativa, así como los hechos sociales que siguen a la norma en cuanto ésta es efectivamente obedecida por los sujetos imperados y aplicada por los tribunales de justicia. [FN29]

En ocasiones, esa falta de visión panorámica de los fenómenos jurídicos se produce por una atrofia cultural causada en la propia formación académica de los juristas. Estos están demasiado inclinados hacia la norma, ya sea por responsabilidad de las propias escuelas en las que se han (des)formado memorizando y repitiendo normas y más normas, o por la falta de interés de los propios educandos, o por la tendencia exegética de los jueces. [FN30] En otros casos la restricción es deliberada, esencialista, a ratos autoacomplaciente, y obedece a posiciones dogmático-normativistas que lo único que hacen es reprimir la tridimensionalidad de la actividad del jurista a una sola dimensión: la dogmática. Decimos, sin temor a equivocarnos, que el jurista cumple su misión sospechando del derecho y, siendo todavía más exigentes, sospechando de sí mismo. Al igual que en otras disciplinas, el jurista que se complazce con sus propias
investigaciones, incapaz de mirar otra cosa que no sea su ombligo o de expresar la misma naranja a más no poder, es un hombre muerto caminando (si se nos autoriza a utilizar el nombre de una película inspirada en hechos reales, dirigida por Tim Robbins y protagonizada por Sean Penn y Susan Sarandon, en 1995).

¿En qué sentido es el derecho un hecho social? En primer lugar, strictu sensu, consideramos al derecho como hecho social cuando investigamos la conducta de ciudadanos y tribunales de justicia en lo que concierne a la (in)eficacia de las normas vigentes. [FN31] En segundo lugar, y en sentido mucho más amplio, el derecho es un hecho social más al interior del sistema social. Por ende, el derecho exige al jurista un esfuerzo mayor al intentar comprenderlo, debiendo recurrir a técnicas y a metodologías de investigación social, esto es, tendiendo vasos comunicantes con las ciencias sociales.

Rüdiger Lautmann tiene razón cuando alega que "muchos juristas adoptan una posición escéptica frente a la sociología. Otros, en cambio, muestran una cierta debilidad por aquélla y son por ello considerados como progresistas (a pesar de que existe también una sociología conservadora)." [FN32] El autor de Bremen, pensando más bien en la realidad alemana, agrega a continuación una idea que compartimos y que pensamos puede ayudarnos a desempolvar el estado del arte en Chile:

Cuando juristas y sociólogos se juntan, reaccionan en forma ambivalente. Ambos grupos se dan cuenta que tienen mucho que decirse y que trabajar en forma conjunta en la ciencia, en la administración y en la política; pero pronto surgen nuevas desconfianzas, cada uno conserva su identidad y se alejan, así, las posibilidades de la cooperación. Los miembros de cada uno de estos grupos suelen hablar entre sí despectivamente de los miembros del otro, adiviendo que sólo entienden su propia disciplina. De esta manera, los juristas y los sociólogos prefieren mantenerse aislados también en las respectivas facultades (...). Sin embargo, estas estrategias no pueden mantenerse indefinidamente (...).

Es innegable que las normas jurídicas aprobadas y puestas en práctica tienen una dimensión social. Autores como É. Durkheim, M. Weber, T. Parsons, W. Evan, H. Bredeemeier, L. Friedman, N. Luhmann, V. Aubert y M. Rehbinder sostienen una concepción funcionalista del derecho. Según esta concepción, no basta con comprender al derecho en términos estructurales, sistémicos ni técnicos. Sostiene esta corriente que los juristas deben estar preparados para descubrir las causas y anticipar los impactos sociales de cada norma jurídica. Pensemos, a modo de ejemplo, en las normas aprobadas durante el apartheid en Sudáfrica. La comunidad internacional condenó la discriminación y segregación racial una y otra vez. Sin embargo, las personas que controlaban el poder normativo aprobaron durante décadas cuerpos completos de normas jurídicas que atentaban contra los derechos humanos de miles de personas. Claramente, las normas del apartheid han de ser evaluadas como una pieza clave para acercarse sociológicamente a los fenómenos jurídicos circunscritos al interior de un sistema social. [FN34]

Uno de los primeros autores modernos que dedicó parte de su obra para mostrar una noción social(izante) del derecho fue Émile Durkheim. Este autor definió al hecho social como todo modo de hacer, fijo o no, que puede ejercer una coerción exterior sobre el individuo, dotado de obligatoriedad general y, al mismo tiempo, con existencia propia, independiente de las manifestaciones individuales. [FN35] Los hechos sociales se caracterizan por ser modos de actuar, pensar, sentir, exteriores al individuo, dotados de un poder de coerción en virtud del cual son impuestos. Los tres elementos del hecho social son: exterioridad, coercibilidad y generalidad. [FN36] La coerción exterior sobre el individuo puede cristalizarse de diversas maneras: jurídica, religiosa, económica, moral,
de trato social, etc., aunque se le ha identificado con el ejercicio de la autoridad dotada de facultades sancionatorias. [FN37]

*466 Con motivo de las notables transformaciones sociales de su época, Durkheim sostuvo en tres de sus obras [FN38] que la integración social se lograba controlando normativamente las acciones individuales a partir de los valores y costumbres compartidos por la comunidad (encargada de controlar normativamente las acciones individuales). ¿Hasta qué punto son valiosos y siguen siendo válidos sus estudios? El tema principal sobre el que trabajó Durkheim toda su vida fue el de la solidaridad social; le interesaba comprender cómo una unidad social mantenía a sus miembros unidos en un sistema moral. Para ello se apoyó constantemente en su concepto de hecho social en la articulación de su método investigativo, declarando que el desarrollo y el uso de tal constructo constituía el núcleo del pensamiento sociológico.

Los intereses que entran en conflicto con el orden establecido deben ser considerados como actos desviados, patológicos o anóxicos. El concepto de anomia (ausencia de regulaciones sociales o carencia de normas) le permitió al autor que revisamos acercarse a las raíces de las desviaciones. Como los procesos de cambio en el mundo moderno son tan intensos y velozes, es de común ocurrencia que surjan trastornos sociales, sensaciones de falta de objetivos y de desesperación, o sea, expresiones anómicas. [FN39] Posteriormente, Robert Merton, uno de los autores que supo aprovechar los aportes de Durkheim, reformuló la idea de la anomia para referirse a las consecuencias de una relación fallida entre las metas sociales y las formas legítimas para alcanzarlas. Otro funcionalista, Talcott Parsons, por su parte, redefinió integración social como un equilibrio en movimiento (un proceso ordenado de cambio del sistema) y un equilibrio estático. [FN40] Bajo esta perspectiva, los problemas de cohesión se formulan en términos de orden y persistencia del orden; por eso los dilemas de la unión social se estudian como condición de estabilidad de los sistemas sociales.

Sostienen los funcionalistas que las normas vienen a regular las acciones en pos de asegurar la integración social, incluso por medios coactivos. [FN41] Claro, la determinación de las normas no puede ser arbitraria o inadecuada, pues en esos casos sería la fuente misma de conflictos sociales. Una sociedad donde prime la solidaridad orgánica—en sentido durkheimiano—a diferencia del caso de la solidaridad mecánica, presupone y se manifiesta a través de la cooperación que se establece entre individuos y órganos que cumplen funciones progresivamente especializadas. [FN42]

La sociedad, en apretada síntesis, se entiende esencialmente como sistema compuesto por diversos elementos e instituciones, los que se coordinan e integran entre sí con el objetivo preciso de proveer a las personas de cierto orden, equilibrio, integración, cohesión o unión social. El derecho, elemento catalizador del poder social, cumple la función de control social, de guía o dirección de los comportamientos individuales y colectivos en pos de ciertos fines fijados por las autoridades que detentan el poder de producción normativa. Corresponde al derecho sancionar jurídicamente las conductas desviadas o anóxicas (v.gr., la comisión de conductas tipificadas como delitos, el incumplimiento de los contratos celebrados, la desobediencia de los deberes públicos, etc.), hacer todo lo posible por prevenir la realización de estas conductas disfuncionales e, incluso, premiar a quienes realicen las conductas deseadas.

Estas notas son importantes para comprender el surgimiento de la sociología del derecho como disciplina encargada de explicar el influjo recíproco entre el ordenamiento jurídico y la realidad social. En palabras de Paul Trappe, dicho influjo recíproco “merece investigarse especialmente en épocas de sorprendentes cambios sociales—en épocas por tanto en las que una discrepancia entre derecho positivo y realidad social, es por lo general, razonable y se considera necesario solucionarla y explicarla.” [FN43] El derecho
no se conforma con ser hecho social, además permite hacer ingeniería social, toda vez que es utilizado como elemento estructural conducente a armonizar intereses contradictorios o conflictivos en pos de la tan anhelada integración social. [FN44] En efecto, se supone que la razón de ser del sistema jurídico consiste en mantener, estabilizar y garantizar el orden social proporcionando seguridad jurídica a la sociedad. Sin embargo, en la infatigable lucha por cumplir tal función, se puede observar que el derecho también contribuye en la generación de cambios sociales que aumenten los niveles de justicia social. [FN45]

Sumario. Es cierto que el derecho puede ser estudiado y sistematizado en forma aislada o pura. Sin embargo, la comprensión de los fenómenos jurídicos se enriquece cuando juristas, abogados y jueces participan en estudios multidisciplinarios en los que el derecho se presenta como un conjunto de normas elaboradas por las personas que pertenecen a una comunidad política, bajo el estímulo de determinadas necesidades sentidas en su vida social y con el propósito de satisfacer necesidades en su existencia colectiva de acuerdo a unos específicos valores más o menos compartidos (justicia, libertad, etc.). Como contentarse con la mera literalidad de las normas es de suyo limitante y fetichista, todo lo anterior nos entusiasma a propiciar que el estudio del derecho abarque de manera equilibrada toda su tridimensionalidad. [FN46] Tampoco podemos dejarnos seducir por los autores que sólo restringen el derecho a un componente de la estructura social. Eso sería rendirse ante las teorías que consideran a la legalidad como una suerte de pegamento mágico que logra la unión o integración (social) de partículas individuales.

III. Los Cambios Jurídicos Son Cambios Sociales

Los especialistas en sociología del derecho y teoría del derecho han tratado el tema de las interrelaciones entre los cambios jurídicos y los cambios sociales. Detrás de muchas de esas investigaciones ha estado presente la siguiente pregunta: ¿Promueve el derecho los cambios sociales, o es un estorbo? En otras palabras, ¿debe ser el derecho indiferente a los efectos sociales de sus prescripciones o debe intervenir en la organización de las condiciones sociales? O bien, otra manera de acercarse al tema es preguntarse por las repercusiones sociales de las normas jurídicas.

La verdad es que se han ofrecido numerosas respuestas doctrinales a este dilema. Las dos opciones extremas son obvias: (1) un grupo importante de autores considera que el derecho debiera ser absolutamente neutral y abstencionista (sin escrúpulos podemos incorporar en este grupo a autores tan diversos como Savigny, Stammier, Marx, Gurvitch, Ehrlich y Weber, entre otros); (2) otros autores afirman que el derecho debe ser un generador de cambios sociales o, mejor dicho, a través del derecho se pueden introducir cambios en el sistema social (v.gr., Bentham, Austin).

Por más que se quiera decir que el derecho cambia y se actualiza permanentemente, es difícil que se logre renovar a la misma velocidad en la que ocurren los cambios sociales. Razonas para esto sobran: (1) procedimientos engorrosos y excesiva burocracia durante la producción normativa y tramitación de las leyes; (2) incapacidad de los partidos políticos de lograr rápidos consensos sociales en temas en los que es factible identificar puntos sociopolíticos compartidos; (3) escasas posibilidades de participación por parte de los movimientos de base; (4) escasez de legitimidad y/o representación de las autoridades electas; etc.

Un ejemplo puede ilustrar la relevancia del tema. En todas las latitudes, querámoslo o no, se cometen abortos. Las razones para ello pueden ser muchas, v.gr., embarazos precoces, embarazos no planificados, dificultades económicas, embarazos como resultado de violación, molestias y dificultades durante el embarazo, presiones
laborales, presiones sociales, peligro para la salud o integridad de la madre, etc. La tarea compleja que le cabe al legislador/juzgador es determinar si la conducta de realizar un aborto debe o no ser sancionada. En el evento de optar por sancionarlo, corresponde determinar en qué condiciones debe ser sancionado y cuáles debieran ser los márgenes para imponer una sanción justa. Esa determinación suele ser dinámica o sujeta a revisión en el tiempo, de modo que el establecimiento de un tipo penal puede restringirse así como extenderse. [FN47]

Por cierto, una cosa es debatir la extensión/restricción del círculo que engloba a las conductas regladas, limitando o ampliando los márgenes de libertad individual de los sujetos. Otra cosa muy diferente es identificar la rigidez/flexibilidad del sistema para alterar el círculo existente. Continuando con el ejemplo, supongamos que el legislador haya optado por sancionar la comisión del delito de aborto, las dos preguntas que cabe hacerse son: (1) ¿cuáles son las causales que permiten aplicar una sanción? (extensión/restricción del círculo reglado); y (2) ¿es posible modificar tales causales? (rigidez/flexibilidad normativa).

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Según un revelador estudio de FLACSO-Chile, [FN48] un 57.6% de los encuestados estima que en Chile se debería legislar en torno al aborto, siendo la causa de riesgo de la vida de la madre la que obtiene el mayor número de opiniones favorables (65.6%). Ante la pregunta sobre casos para los cuales debería haber una ley de aborto, destaquemos las respuestas afirmativas: (1) cuando el embarazo significa perder el trabajo o los estudios, 7.1%; (2) cuando no se puedan mantener más hijos, 14.1%; (3) el aborto se debiera permitir siempre que la mujer lo solicite, 21.3%; (4) cuando el feto presente malformación severa, 56.3%; (5) cuando el embarazo es producto de una violación o incesto, 58.3%; (6) cuando está en riesgo la vida de la madre, 65.6%. Si uno revisa la historia de Chile tomando como principal variable el tratamiento que las normas jurídicas ha dado a una institución tan importante como la familia, tendrá que aceptar que la regulación no siempre ha sido pacífica o exenta de controversias. Es más, el contenido de tales normas ha sido, mayormente, fuente inagotable de debates y de posiciones encontradas. En ocasiones se han logrado consensos, tal como ocurrió con la supresión de la categoría de hijos ilegítimos. En otros casos, la discusión se ha prolongado por años. Por ejemplo, llevamos más de una década discutiendo la posibilidad y la conveniencia de aprobar una ley de divorcio (sin distinguir entre divorcio vincular y no vincular).

Los sectores más progresistas y liberales señalan que el tema de la ley de divorcio es uno dentro de numerosos temas que se deben poner ante la opinión pública. Ellos plantean que el concepto clásico o tradicional que constituye la familia (padre, madre e hijos) es demasiado restringido o insuficiente para capturar los cambios que han estado ocurriendo socialmente en la familia chilena. La diversidad de los lazos familiares la aprecian, por ejemplo, en que: (a) los hogares monoparentales son cada vez más frecuentes; (b) el número de nacimientos ha ido disminuyendo en la última década; (c) cada año menos parejas celebran el contrato de matrimonio civil; (d) los índices de cohabitación siguen aumentando; y (e) el porcentaje de mujeres que se desempeñan laboralmente fuera del hogar se ha multiplicado en las últimas décadas. Al interior de la corriente liberal aparecen también voces que argumentan sobre la conveniencia de permitir que personas del mismo género puedan contraer matrimonio, e incluso adoptar hijos.

El último Informe del PNUD (2002), destinado a explicar los cambios y desafíos de la Cultura en Chile, no descuida esta percepción de mutaciones: “La familia chilena está cambiando, tanto en la forma de organizarse como en su imagen y en las relaciones que
Se establece entre sus miembros. Las personas perciben en forma nítida este hecho y lo vinculan a la modernización del país (...); [FN49] agregando que "pese al predominio de los hogares nucleares biparentales, existe una importante diversidad de relaciones familiares que no pueden reducirse a aquella forma clásica." [FN50]

Sectores más conservadores argumentan que se debe legislar a favor del concepto clásico de familia, el cual mantiene el carácter indisoluble del vínculo conyugal. Es posible encontrar puntos de comunión sobre este tema entre líderes conservadores de la sociedad civil y las enseñanzas de la Iglesia Católica. En tal sentido, uno de los textos que nos ha llamado la atención es el Informe Sobre el Divorcio (Universidad de los Andes, 2002). Este documento pretende ilustrar sobre los efectos mensurables y cuantitativos que la introducción del divorcio vincular en la ley civil genera en la pareja involucrada, en los hijos y en la sociedad en general. Se trata de un esfuerzo por reunir, relacionar y sistematizar la información que se ha generado en aquellos países que en la década de los setenta y ochenta del siglo XX modificaron su legislación civil para dar cabida a un modelo matrimonial disoluble por divorcio fundado en la ruptura de la convivencia. [FN51]

Sin poner en duda las buenas intenciones de los autores del informe, y sin compartir algunas de las conclusiones a las que han llegado, tanto por cuestiones metodológicas como de fondo, nos parece relevante reproducir parte de las opiniones que se mencionan a propósito de las repercusiones que tendría la aprobación de una ley de divorcio en nuestra sociedad:

La legalización del divorcio no trae sólo directamente un aumento sostenido de las rupturas matrimoniales, sino que pareciera influir también, junto con otros factores sociológicos, en una nueva organización de la estructura familiar. Una de estas nuevas estructuras es la proliferación de los núcleos familiares monoparentales, básicamente compuestos por madres e hijos (...). Este aumento del hogar monoparental puede obedecer a dos factores que se observan en sociedades en las que el divorcio por voluntad unilateral o concorde se ha inculturado: por un lado, la falta de equidad en la situación de la pareja divorciada y la asunción por parte de la mujer de la tarea de la crianza y educación de los hijos, que le impide muchas veces volver a contraer una unión legal o estable; por otra parte, el embarazo adolescente de muchos hijos de divorciados y el aumento de las tasas de nacimientos extramatrimoniales llevan nuevamente a la conformación de hogares monoparentales.

Junto a los hogares monoparentales, aparecen los núcleos familiares recompuestos o reconstituidos, en los que los cónyuges divorciados integran hijos del matrimonio anterior en una nueva unión legal.

Contrariamente a lo que pudiera esperarse, el hecho de que el matrimonio tenga un fácil acceso y una fácil salida no ha incentivado a la población a recurrir con mayor frecuencia al estado marital. Se produce un fuerte descenso de la tasa de nupcialidad junto con el aumento de las tasas de divorcialidad. No resulta sorprendente, en consecuencia, que aumenten las tasas de hijos extramatrimoniales y las de hogares conformados por convivientes que no formalizan su unión ante las leyes civiles.

La legalización del divorcio no ha hecho desaparecer la familia fundada en el matrimonio estable, pero claramente ésta ha visto disminuida su presencia social y su rol como base institucional de la sociedad. [FN52] Dejando a un lado nuestras sospechas metodológicas, el principal reproche que hacemos a este estudio es no haber considerado para nada la realidad de la sociedad chilena. De los 82 documentos citados en la bibliografía, apenas 5 fueron elaborados en Chile. Por consiguiente, mal pueden pensar los autores en extrapolarse las conclusiones a las que han llegado sobre el derecho comparado al comportamiento eventual de la sociedad chilena en caso de aprobarse una
ley de divorcio. Es más, con todos los datos proporcionados, lo único que la Universidad de los Andes consigue es reiterar algo que todos sabemos y quizás compartimos: una familia sólida, estable, construida en el amor y la confianza entre y de los padres hacia y para con los hijos es un indicador importante del sentimiento de aceptación, respeto, autoestima, cariño y tranquilidad, lo cual acarrea provechosas consecuencias en el ámbito social.

 Todos llevamos en nuestra alma un sueño de felicidad. Sin embargo, la realidad es muy diferente. Quienes tienen la dicha de vivir en el seno de una familia "ideal," bienvenidos y aplaudidos sean. Quienes sufren de violencia intrafamiliar, psíquica o física; quienes se sienten poco respetados; quienes ven a sus parejas faltar a los compromisos asumidos al momento de contraer matrimonio civil; y quienes han sido abandonados, entre muchas otras causas, desean más que nada un hogar de fidelidad y esperanza, un espacio interior de amor, de confianza y de paz. [FN53]

 Por más que lo intentemos a través de las leyes, pretender obligar a las personas a permanecer unidas por el resto de sus vidas, aún contra su propia voluntad, es algo sinceramente ingenuo y socialmente aún más peligroso. 

 A propósito de la reflexión pública y el estado del debate sobre la aprobación de una ley de divorcio, debería evaluarse con mayor detención que:

1. En la actualidad se contrae apenas el 67% del número de matrimonios que se celebraban hace diez años. [FN54]  

2. El número de nulidades matrimoniales inscritas en el Registro Civil se ha mantenido constante en los últimos diez años.

3. En la actualidad se inscribe en el Registro Civil apenas el 76% del número de nacimientos que eran inscritos hace una década.

4. La gran mayoría de la población está de acuerdo con la aprobación de una ley de divorcio vincular.

 La primera afirmación es corroborada por las estadísticas del Registro Civil. En la década de 1990, el número de matrimonios inscritos ha variado de la siguiente manera: 

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Esto puede explicar en parte que haya disminuido ostensiblemente el número de nacimientos inscritos en el Registro Civil, aunque hay otras variables implicadas (v.gr., aumento en el promedio de edad de las personas que contraen matrimonio, incremento del número de parejas que conviven sin contraer matrimonio, postergando embarazos, prolongación de los años de estudio y capacitación, e inseguridad laboral y dificultades de permanecer en el mercado laboral, cada vez más flexible):

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Puede observarse, eso sí, un dato que ha permanecido inalterado: el número de nulidades matrimoniales inscritas en el Registro Civil no ha cambiado en los últimos diez años:

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Mayores antecedentes nos proporcionan los resultados de las investigaciones cuantitativas sobre la opinión de la ciudadanía respecto de la aprobación de una ley de divorcio vincular. El Informe Ethos n° 17 del Centro de Ética de la Universidad Alberto Hurtado, publicado el 29 de septiembre de 2001, ha presentado los resultados obtenidos
en la aplicación de una encuesta sobre dos temas de actualidad: (1) la píldora del día después y (2) la ley de divorcio. [FN55]

Nos limitaremos a reproducir las conclusiones más llamativas del Informe Ethos sobre la opinión de la ciudadanía respecto de la ley de divorcio:
*474• Desconocimiento del tema: el 40% de los entrevistados sostiene que no existe ninguna diferencia entre la actual separación legal y el divorcio civil, mientras que el 42% tampoco distingue entre la nulidad civil y el divorcio civil.

• Ón de la ley de divorcio: el 10% rechaza su legalización, un 25% considera que debería aprobarse en forma restrictiva (como en casos de homosexualidad y violencia intrafamiliar) y el 65% aprueba una ley de divorcio en la que sólo bastaría el acuerdo de la pareja.

• Argumentos principales de las posturas: aquellos que la rechazan argumentan que el matrimonio debe ser para toda la vida (54%); los que aprobarían un ley restrictiva sostienen que existen circunstancias especiales que la hacen necesaria (43%); y los defensores de una ley en la que bastaría el sólo acuerdo de la pareja afirman que es un asunto de cada cual decidir seguir casado o casarse de nuevo (37%), como también que lo fundamental en el matrimonio es la presencia del amor (36%).

Estos antecedentes pueden ser corroborados con el estudio de la Fundación Chile 21, Opinión Pública nº 3 "Opiniones y Percepciones Sobre el Derecho a Elegir y la Píldora del Día Después" [FN56] (publicado el mismo día que el estudio anterior).

• 80% de los entrevistados declaró estar a favor de la aprobación de una ley de divorcio, registrando un aumento significativo de 11 puntos desde la anterior fecha de medición realizada por la misma entidad (junio del 2001). [FN57]

• El 72% de los entrevistados está "muy de acuerdo" (26%) o "de acuerdo" (46%) con la siguiente afirmación: los chilenos están suficientemente maduros para tomar decisiones por sí mismos respecto del divorcio, la píldora del día después y otras materias controvertidas.

Como si estos datos no fueran convincentes, la encuesta de FLACSO-Chile, que mencionamos al referirmos a las causas de aborto de aceptación popular, concluye en materia de divorcio que un revelador 80% de los encuestados opina que en Chile se debería aprobar una ley que permita el divorcio: (1) cuando ha habido hecho que imposibilitan la vida en común, 87.1%; (2) cuando los dos integrantes de la pareja lo solicitan, 84.6%; (3) cuando ha transcurrido más de un año de la separación de hecho, 67.6%; (4) cuando uno de los cónyuges lo solicita sin importar si el otro está de acuerdo. [FN58]

*475La regulación de la familia es un buen ejemplo para mostrar que los cambios jurídicos no se pueden comprender en forma aislada, sino en estricta relación con la realidad social en la que se encuentran inmersos. Así como las estructuras de la sociedad cambian, las percepciones que tiene la población sobre ciertos temas valóricos también evolucionan. En el caso concreto analizado, las estadísticas revelan que: (1) las personas contraen menos matrimonios y más tarde que antes; (2) ha disminuido el número de hijos por pareja; y (3) hay mayores índices de ruptura matrimonial que antaño. No cabe duda que la legislación se debe adaptar cuanto antes a tales cambios. [FN59] No adaptarse implica: (1) otorgar al derecho el desagradable papel de controlar o contener como chaqueta de fuerza prioridades, fines o valores que individuos y colectivos no aprueban; (2) no asumir con seriedad que las normas que no son compartidas socialmente suelen ser ineficaces, quedan en desuso o no son respetadas,
desprestigiando al productor normativo por su falta de realismo; y (3) tener poca claridad sobre lo que corresponde al ámbito de la ética y lo que pertenece al mundo del derecho.

IV. Los Cambios Jurídicos Pueden Provocar Cambios Sociales

La historia está llena de ejemplos de legisladores que han dejado a un lado el análisis previo del impacto social que podrían haber tenido las normas aprobadas. A veces es por malicia, otras por ignorancia, cuando no por desidia. Lo cierto es que el mundo jurídico ha de reconocer la relevancia social de las normas. Por otro lado, en no pocas ocasiones las personas que detentan el poder político utilizan el derecho para generar cambios sociales. Dentro de los fines políticos que se persigan, muchas veces las intervenciones pueden tener objetivos loables como: (1) mejorar la calidad de vida de los ciudadanos; (2) crear una distribución más equitativa de los ingresos o de la propiedad; o (3) perseguir fines geopolíticos. Sin embargo, las experiencias vividas durante el siglo XX demuestran que no se puede ser ni tan generoso ni tan ingenuo como para ofrecerle a los actores jurídico-legislativos tamaña responsabilidad, máxime si los fines perseguidos pueden estar solapados o maquillados con trajes de oveja cuando, en realidad, contienen un lobo hambriento por saciar aspiraciones personales, egoístas. [FN60]

*476 En el evento que el legislador tuviese por finalidad aprobar un proyecto de ley con el objetivo de provocar un cambio social, lo menos que se podría esperar es que se conozcan (1) los distintos escenarios posibles y (2) cuál(es) de ellos producirá(n) los objetivos deseados. Un ejemplo puede verificarse lo anterior: el hecho que el gobierno militar dirigido por Pinochet decidiera reestructurar el sistema de educación superior en Chile con la dictación de una serie de Decreto con Fuerza de Ley (D.F.L.), a partir de 1980, ha tenido un impacto profundo en el número de universitarios en Chile. [FN61] En 1983 el número total de alumnos matriculados en las distintas universidades del país ascendía a 110,333 personas, y diecisiete años más tarde esa cifra aumentó a 319,089 (véase la Tabla 1 en la página XXX). Incluso el propio Ricardo Lagos, en el Mensaje Presidencial del 21 de mayo de 2002, señaló que es bueno para el país que aumente el número de universitarios, ojalá llegando a 800,000 en el bicentenario.

Nótese el aumento considerable en el número de estudiantes matriculados en la carrera de derecho: en 1983 la cifra correspondía a 3,615 alumnos; en el año 2000 alcanzó a 24,068 personas. Esta fuerte alza se explica por el incremento de escuelas de derecho en el país (y especialmente por el aumento de las vacantes). [FN62] No siendo esta la razón por la cual hemos mencionado este ejemplo, tan sólo dos comentarios: (1) es cierto que la competitividad del mercado es dura y va a seguir aumentando, asunto que no sólo preocupa a quienes gozan de cierta tranquilidad laboral antes de la década de 1990; [FN63] (2) es de esperar que la cifra sea directamente proporcional al acceso a la justicia por parte de los sectores que más sufren en Chile, no sólo en cuanto a bienes materiales, sino también en términos culturales y sociales. [FN64] Por ende, aprovechamos la ocasión para hacer un llamado a ese porcentaje de idealistas dentro de los miles de egresados de derecho de cada año a que destinen horas al servicio público, a la renovación de las metodologías de enseñanza del derecho, a cumplir funciones de vanguardia y liderazgo en los procesos de reforma que nos toca vivir (v.gr., reforma procesal penal y acuerdos económicos) y a investigar, por supuesto.

No nos distraigamos. Hemos citado el ejemplo de la reforma legislativa a la educación superior en Chile. Esa reforma fue gestada durante el gobierno de Pinochet y democratizada lo más posible durante los gobiernos de la Concertación para consignar una idea tan clara como evidente: las autoridades que tienen facultades para dictar normas generales y obligatorias pueden incidir en el comportamiento humano, sea restringiendo o aumentando sus posibilidades de acción. Si tales cambios en el accionar humano son colectivos, permanentes y socialmente aceptados, entonces, bien podemos...
llegar a pensar--prima facie--que el legislador puede ser un agente importante de cambio social.

Sin embargo, debemos movernos con cautela y no confundir el poder que tiene el legislador con las actividades intelectuales de los juristas. En la IV Jornada Chilena de Filosofía del Derecho, Hugo Tagle presentó su ponencia, Relación Entre Derecho y Cambios Culturales, para explicar por qué correspondería a los juristas y al derecho regir los cambios culturales. Nos parece que Tagle ha pecado de excesivo entusiasmo al afirmar que

[a]j jurista--que debe dictar el derecho--por ser un humanista conocedor del hombre en su integridad corpóreo-espíritual y de la sociedad, le corresponde la noble y superior tarea--posiblemente ingrata, incomprendida y que puede chocar con los propósitos de muchos--de dirigir la vida del hombre y de la sociedad, señalando lo que es bueno para él y para ella y prohibiendo lo que es malo; así, de verdad, sirve al hombre y a la sociedad. [FN65]

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*479 Es cierto que los juristas pueden cumplir una función o servicio social, pero no por ello pueden arrogarse la calidad de cerebro y motor de los cambios socioculturales al interior de un país. Más allá de las exageraciones e inexactitudes de Tagle, diremos dos cosas: por un lado, el análisis pormenorizado del origen de cualquier cambio social es un asunto mucho más complejo de lo que a primera vista se puede apreciar; por otro, resulta bastante más apropiado sostener que los operadores del sistema jurídico también pueden aprovechar sus intervenciones para ocasionar cambios sociales de mayor o menor envergadura, dependiendo de muchos otros factores asociados. [FN66] Que estos cambios sociales sean buenos o malos, justos o injustos, para la sociedad es una cuestión absolutamente diferente, más cercana a los debates éticos y especulativos que a los de la sociología del derecho.

Otro sesgo, no menor, en que incurren los juristas consiste en creer que las reformas legales per se provocan cambios sociales--como si todo cambio legal pudiera tener efectos en la percepción de la comunidad sobre un determinado evento. Esto se aprecia todavía con más nitidez en juristas conservadores y jusnaturalistas, quienes piensan que la ley cumple un rol ejemplificador. Es obvio que quienes esperan demasiado de la ley olvidan que su eficacia encuentra una importante limitación: depende del comportamiento que adopten los miembros de la sociedad.

V. Los Cambios Sociales Pueden Provocar Cambios Jurídicos

Si el automóvil no hubiera sido creado, no hay duda que hubiera sido innecesaria la discusión y aprobación de una Ley de Tránsito. Tampoco hubiéramos tenido que memorizar una serie de preguntas/respuestas para aprobar un sencillo examen ante la Dirección del Tránsito de la Municipalidad en la que residimos para contar con la tan anhelada licencia de conductor, mucho menos se habría regulado un sistema de concesión a privados para fomentar la construcción de carreteras.

Podemos apreciar otros casos semejantes cuando se aspira a regular la firma digital, la tipificación de delitos informáticos, la captura de hackers internacionales, y la protección de la intimidad del trabajador que utiliza el correo electrónico que le proporciona la empresa en la que se desempeña. [FN67] Estas circunstancias sólo tienen razón de ser regladas una vez que las computadoras e internet pasan a formar parte de nuestra cotidianeidad.
Karl Llewellyn, al mencionar en Some Realism About Realism (1931) los famosos nueve puntos de partida del Realismo Jurídico Americano, destaca una idea que cuenta con toda nuestra aprobación: la sociedad ha de ser considerada como un flujo que avanza a una velocidad más rápida que el derecho, "de manera que siempre existe la probabilidad de que cualquier porción del Derecho necesite ser reexaminada para determinar hasta qué punto se adecua a la sociedad a la que pretende servir."  [FN68]

"480 Para demostrar que los cambios sociales pueden provocar cambios en el sistema jurídico (incluyendo, según vimos, a la legislación), recurriremos a un asunto escurridizo, complejo, delicado, riesgoso, contingente y, como si fuera poco, conflictivo: la legislación indígena.

En Chile se aprobó una nueva legislación indígena en 1993. Algunos piensan que el mero hecho que se produjera una modificación legal que superara en parte nuestro atraso normativo debería aplaudirse, por muy insuficiente que sea. En estricto rigor y guardando fidelidad de los testimonios del debate pre-parlamentario (en la Comisión de Estudios de Pueblos Indígenas, CEPI) y propiamente parlamentario (período legislativo 1990-1994), para que nuestro Congreso Nacional aprobara el proyecto de ley [FN69] enviado por el Presidente Aylwin debieron confluir y entrecruzarse en los niveles argumentativos todo tipo de intereses y razones: políticas, humanitarias, internacionales, culturales, económicas, sociales y estratégico-electorales. Lo que ha de quedar con absoluta claridad es que múltiples factores llevaron a la reformulación de la legislación indígena, siendo uno de los principales el emergente movimiento indígena. No se piense que por el hecho de tratarse este ensayo sobre las relaciones entre cambio social y jurídico nos vamos a relajar al ejemplificar un tema de tamaña relevancia. Antes de comentar sobre las presiones sociales que motivaron la reforma a la legislación indígena, vale la pena retroceder un poco y tener una idea consciente de los procesos históricos globales en los que ha de circunscribe el tema indígena. Durante el largo proceso de constitución de las naciones en América (al igual que en otras latitudes), las poblaciones indígenas fueron consideradas un obstáculo para la integración y el desarrollo nacional. En no pocos países se dio rienda suelta a fenómenos como debellatio (genocidio completo, sin dejar a nadie vivo para hacer valer sus derechos) y occupatio bellica (v.gr., el proceso militar chileno mal llamado Pacificación de la Araucanía). A pesar de las políticas estatales de genocidio cultural o etniciﬁcado, las culturas de los pueblos indígenas y tribales latinoamericanos sobreviven en la marginación y permanecen en una posición de defensa de sus identidades. José Bengoa emplea la expresión emergencia indígena para explicar la aparición en los últimos años de un nuevo discurso común pan-indígena latinoamericano. Este discurso persigue reconstruir y potenciar las identidades indígenas dentro de sociedades que necesariamente han de autodeﬁnirse como multiétnicas y multiculturalas. La emergencia indígena cuestiona antiguas y sedimentadas relaciones de dominación en la sociedad (v.gr., discriminación racial, intolerancia étnica, asimilación cultural y etno/eurocentrismos) y las bases mismas del Estado republicano que se construyó durante los siglos XIX y XX sobre la artificialidad establecida en las normas jurídicas propiciadoras de "un solo pueblo, una sola nación y un solo estado." [FN70]

Cansados de ser negados como pueblos y del excluyente diseño de las estructuras políticas, los pan-indígenas latinoamericanos han adoptado posturas más rebeldes, en sentido mertoniano. Ellos también han organizado por doquier acciones y movilizaciones de base que inciden en las relaciones y conversaciones políticas entre sus pueblos y las autoridades estatales, buscando: (1) aminorar los abusos y controles de los Estados nacionales, y (2) ser reconocidos como pueblos, acreedores de una deuda histórica, y dotados de las herramientas jurídicas que les permitan decidir su propio destino.
El resultado práctico más directo de los encuentros iniciados en la década de 1980 por parte de dirigentes indígenas ha sido la reformulación y reorientación de un discurso reivindicacionista étnico. Este nuevo discurso es constitutivo de un emergente pensamiento social con nuevos presupuestos de análisis (especialmente étnico-cultural) para articular en sus núcleos la coincidencia bipolar entre teoría y praxis. Tal coincidencia no se satisface con la oferta de beneficios ni de desarrollo económico para quienes pertenecen a las comunidades indígenas, sino propone cambios generales que afectan al conjunto de la sociedad nacional y al Estado:

En Ecuador la situación explotó al comenzar la década de los ’90 con el levantamiento indígena ecuatoriano. Los videos y documentos de lo que allí ocurrió recorrieron la región. Un año antes los indígenas brasileños habían acampado en Brasilia exigiendo ser reconocidos en la Constitución y, para la Cumbre de la Tierra en Río de Janeiro, organizaron una asamblea alternativa, denominada Kareoka, de gran impacto mundial. En Colombia se llegó a un acuerdo de desmovilización del frente guerrillero Quintín Lame del grupo indígena paesé, que condujo a un acuerdo de paz favorable a los derechos indígenas. Se les reconoció en la Constitución colombiana, se ratificó el Convenio N° 169 de la OIT y se estableció una política fuerte a los "resguardos" indígenas. En Panamá se consolidaron los territorios autonómicos kunas, guambies y emberás. En el año y día en que México entraba al Tratado de Libre Comercio se produjo la insurrección chiapaneca que se constituyó en el ícono del malestar indígena del continente. Las primeras declaraciones realizadas en lengua indígena y no en castellano muestran el nivel simbólico de ruptura al que había llegado la cuestión indígena (. . .). Los acuerdos de paz en Guatemala han colocado al nivel más alto, quizá, la cuestión étnica, y han obligado al Estado de ese indígena país a reconocer una serie de derechos que hasta ese momento parecían impensables e irrecuperables.

Sería largo señalar la enorme ola de reconocimientos indígenas que hubo en América Latina en la década de los ’90. En Chile se dictó una nueva legislación en 1993 en que si bien no se reconoce en la Constitución la existencia y derechos indígenas, sí se los reconoce en una ley específica. La existencia de reconocimiento jurídico a las comunidades indígenas, la constitución de un fondo de compras de tierras, la protección a las tierras indígenas y la institución del sistema de educación bilingüe y bicultural son algunas de las conquistas logradas por los indígenas en el contexto de la transición a la democracia chilena. [FN71] *482 En la década de 1980 surgió un movimiento general de reivindicación de los pueblos indígenas. Jóvenes indígenas, conscientes de su liderazgo, condujeron a organizaciones de base inmersas en procesos de etnogénesis y comenzaron a posicionar y a divulgar la idea de ser reconocidos y aceptados como pueblos y culturas indígenas, propiciando un entendimiento basado en la transformación del Estado Nación en un Estado Multicultural. [FN72]

Los primeros logros de estas organizaciones de base (urbanas por lo general) afloraron durante la Transición Chilena a la Democracia (1990-). Entendemos que esta transición, al menos imaginariamente hablando, es una débil autocritica colectiva de los autoengaños con que nosotros mismos nos ocultamos las formas de comportamiento de un pasado doloroso y humillante, cuyo objetivo final supone ser la desmilitarización social y el cambio de una mentalidad autoritaria a una más democrática. En estos años de incertidumbres chilensis y de autoentendimiento ético-político, entre otras cosas, se han intentado normalizar las condiciones de producción y comunicación socio-culturales a través de la rehabilitación de los formatos públicos de intervención cultural que la censura del período anterior había obliterated (v.gr., prensa escrita, medios de comunicación, universidades, etc.). [FN73] Esta apertura se tradujo en un primer momento en la expresión de muchas demandas postergadas y que no viene al caso repetir. Parafraseando a Claudio di Girolamo, durante los años de la Transición se nos
recordó a diario (con más libertad y menos censura que antes) que Chile es un conjunto de muchas culturas, muchos climas, muchos géneros, muchas formas de mirar el horizonte, muchos mestizajes, y que contamos con una extraordinaria riqueza que abarca desde lo rural a lo urbano, de lo tradicional a lo posmoderno. [FN74] Con mucha razón Habermas ha afirmado que las luchas por el reconocimiento en el Estado Democrático de Derecho sólo poseen fuerza legitimatoria en la medida en que todos los grupos pueden tener acceso al espacio público político, pueden hacer oír su voz, pueden articular sus necesidades y nadie debe ser marginado o excluido. [FN75]

*483* El Parlamento de Nueva Imperial (1989) y los tres Programas de Gobierno de la Concertación de Partidos por la Democracia han obligado al oficialismo a perseguir el cumplimiento de cuatro promesas: (1) enviar al Congreso un proyecto de ley indígena; (2) enviar al Congreso un proyecto de reforma constitucional que reconozca a los pueblos indígenas de Chile; [FN76] (3) ratificar el Convenio N° 169 de la OIT; y (4) promover el desarrollo socio-cultural y económico de los pueblos indígenas, con especial énfasis en los aspectos territoriales y educacionales. Es lamentable que la actitud sesgada y monocultural de un número no menor de parlamentarios de derecha esté impidiendo el cumplimiento de los compromisos 2° y 3°, sin contribuir en nada a resolver con justicia y equidad los conflictos interétnicos de los cuales todos los chilenos hemos sido autores, cómplices, encubridores o testigos, según el caso. [FN77] Creemos que la comprensión cabal del sentimiento de postergación mapuche exige retomar los compromisos de 1989 y promover de una vez por todas un debate abierto a la opinión pública. Este debate debe cubrir las reformas legales y constitucionales que hagan real la idea de desarrollo con resguardo de la identidad propia de los pueblos indígenas, [FN78] porque la única manera de mantener un cierto grado de paz social a largo plazo partirá del respeto a las distintas culturas que conviven en el país. [FN79]

Al referirnos en otra ocasión al principio de la multiculturalidad, [FN80] mostramos que, a pesar de las últimas innovaciones legislativas y de ciertos tanteos más o menos regulares en la década de 1990, nuestra multiculturalidad persiste en un estado de indiferente mutilación. En efecto, la Ley Indígena n° 19,253 del 5 de octubre de 1993, sólo reconoció a los indígenas el derecho a agruparse en *484* comunidades territoriales o en asociaciones funcionales, el derecho a ser oídos y considerados por la administración pública sobre temas que pudieran afectarles, el derecho a tener una representación indirecta y minoritaria en la Conadi. Esta ley también trató de remediar con la creación del Fondo de Tierras y Aguas Indígenas las políticas asimilacionistas impulsadas durante el gobierno militar. Las innumerables modificaciones que el Congreso hizo al proyecto de ley originalmente enviado por el Presidente Aylwin debilitaron considerablemente las aspiraciones y el espíritu de reconocimiento de las demandas indígenas. Por ejemplo, el Congreso: (1) eliminó la expresión pueblos indígenas, (2) permitió la constitución de hasta tres comunidades indígenas locales en una comunidad territorial o cultural antigua, (3) eliminó la prohibición de trasladar a los indígenas de sus tierras, y (4) alteró la autonomía y la composición de la Conadi en desmedro del principio de la representatividad. [FN81] En suma, el Parlamento recibió la Ley Indígena favorablemente en sus aspectos desarrollistas e indigenistas, pero pésimamente en sus aspectos políticos y étnicos. De hecho, el Parlamento buscó matizar todo elemento que planteara un reconocimiento expreso de la diversidad cultural. [FN82] Por tanto, la discusión y satisfacción de los intereses de los pueblos indígenas siguen pendientes y todo parece indicar que los fenómenos sociales inmediatos van a terminar por convencer a los sectores que se oponen a los cambios legales estancados en el Congreso: "[E]l Estado y la Sociedad--afirma Bengoa--se encuentran en una encrucijada, o continuar con la política de despojo y conflicto o encaminarse por la vía del diálogo, del respeto mutuo, de la reparación del daño histórico cometido." [FN83]

Estamos convencidos que la presión indígena, sumada a la de los sectores ambientalistas, mas la opinión pública y la presión internacional, nos van a obligar como
país a tomar la opción del diálogo. Pero este diálogo tiene algunos alcances que es necesario soslayar por anticipado. Por ejemplo, el reconocimiento legal de cualquier otra expresión que no sea la de pueblos indígenas obstaculizará el diálogo, y lo mismo ocurrirá si no se satisfacen las aspiraciones de plurietnicidad y multiculturalidad planteadas por la creciente demanda indígena. Por otro lado, los actores interesados en el desarrollo económico (básicamente agrupaciones empresariales) presionarán por un resguardo del Estado de Derecho y del orden público tal que les asegure ejecutar sus proyectos de inversión sin temor a actos violentos. [FN84] El mayor desafío, entonces, va a ser encontrar una fórmula política que permita a las diferentes culturas y pueblos convivir en un mismo territorio.

Comentarios Finales
Sería presuntuoso pretender resolver un asunto tan aristoso como el que hemos apenas enunciado. Sin embargo, algunas de las conclusiones preliminares que hemos compartido en esta ocasión merecen ulteriores sospechas:

1. Hemos distinguido entre cambio jurídico (género) y reforma legal (especie) por cuanto la cultura jurídica popular chilena suele incurrir en el error de considerarlos como si fuesen sinónimos. En puridad, las reformas legales son un tipo de cambio jurídico que se caracteriza por ser el resultado normativo del ejercicio de las facultades que tienen las autoridades establecidas por el ordenamiento jurídico-político para modificar o derogar una o más fuentes del derecho de igual o menor jerarquía que la fuente primigenia. En cambio, dentro de la categoría de cambio jurídico podemos abarcar reformas de la más variada especie y que alteran el funcionamiento y/o estructura del subsistema jurídico, sea por intervención desde dentro o fuera del subsistema, en un lugar y espacio identificables. Por ejemplo, estos pueden ser, entre otros, cambios en la opinión pública o en la consciencia colectiva, cambios en la conducta de los operadores jurídicos, o cambios en los fallos judiciales. 2. Hay una intensa correlación mutua entre cambio social y cambio jurídico. Esto hace que el diálogo entre ciencia social y dogmática jurídica se efectúe basado en puntos de contacto entre la vida social y el sistema jurídico, pues los cambios que se produzcan al interior de este diálogo pueden producir variaciones en el sistema macrosocial, y viceversa. Precisemos que no todo cambio jurídico es capaz de provocar alteraciones sustanciales en el sistema social global; para que esto acontezca, la intensidad de la intervención en el subsistema jurídico debe reunir los requisitos consignados en el apartado específico de este documento.

3. La actividad del jurista no puede restringirse a lo meramente dogmático. Seguir insistiendo en la autonomía del derecho respecto a otras áreas del saber no sólo es socialmente inadecuado sino que, además, limita a los juristas a construir en forma aislada argumentos técnicos incapaces de explorar y crear nuevas alternativas que satisfagan mejor las aspiraciones de la comunidad global y local. La distancia entre abogado y jurista es inmensa. De alguna manera en este documento hemos reforzado una idea de Lawrence M. Friedman cuando señala que "el sistema jurídico es parte de la sociedad de la misma manera que los músculos y el sistema circulatorios forman parte del cuerpo; el sistema jurídico no existe ni puede existir como una entidad independiente, viable." [FN85] Otra cosa muy diferente es distinguir entre sociedad y derecho por razones analíticas, aunque no debemos olvidar que ser y deber ser se complementan y benefician recíprocamente si se reconocen el uno al otro como piezas que forman parte de un rompecabezas tan gigantesco como autopoiético.

4. Comenzamos este ensayo presentando nuestras cuatro hipótesis. Hemos observado cómo cada una de ellas ha sido en algunos casos acotada y en otros replanteada. Así, cuando sostuvimos que el derecho es un hecho social no
estábamos del todo equivocados, aunque lo que correspondía decir era que los fenómenos jurídicos debían ser apreciados en su tridimensionalidad (hecho social, norma y valor). Una lectura integral del documento corrobora que inclinar la balanza hacia alguna de las caras del triángulo puede ser muy favorable para el desarrollo aislado de una de las tres grandes ramas del derecho (sociología del derecho, filosofía del derecho y dogmática jurídica). Sin embargo, nos parece que los juristas del futuro deberían ser capaces de dominar e integrar en sus estudios interdisciplinarios y, ojalá, multiculturales, las tres dimensiones de los fenómenos jurídicos.

5. Los cambios jurídicos también deben ser comprendidos al interior del sistema social como cambios sociales. La sociedad, como sistema social o red de intercambio social, consta de acciones sociales realizadas por los integrantes en forma individual o colectiva. Los subsistemas deben ser vistos como escenarios en los que se ejecutan esas acciones. Como las acciones sociales varían, hemos de estar atentos a identificar cuáles son las variables principales que entran en relación. Una de esas variables, no queda duda, es el derecho positivo. [FN86]

6. En cuanto al origen de las normas jurídicas, el surgimiento de algunas de ellas se debe directamente a cambios en la realidad social. Ya sabemos que es posible identificar el origen de las normas y de las reformas jurídicas dentro de uno o más de los subsistemas sociales enunciados. Para demostrar esta hipótesis nos hemos apoyado en el ejemplo de las reformas que han ocurrido en América Latina, y en Chile en particular, a propósito de las presiones de los emergentes movimientos y discursos reivindicativos de los pueblos indígenas.

7. También hemos podido apreciar que ciertos cambios jurídicos se han utilizado para moldear el comportamiento humano, incluso al nivel de provocar cambios sociales. Escogimos el tema de la reforma al sistema de educación superior en Chile, planificado por los equipos técnicos de Pinochet en la década de 1980 y mantenido *487 -- con correcciones--en los tres gobiernos de la Concertación de Partidos por la Democracia. Otro muy buen ejemplo podría ocurrir en el evento de aprobarse una ley de divorcio.

8. Cambios jurídicos y cambios sociales son apenas una porción del ritmo acelerado de cambios que observamos en la época moderna, cuyo futuro es cada día más incierto. Una visión integral de los cambios normativos obliga a internarse en los otros tipos de cambios que, por ahora, hemos dejado estilando, en espera de comentarios críticos. [FN87] Por lo mismo, a un abogado/jurista experto en dogmática jurídica le costará demasiado descubrir, a través del mero razonamiento jurídico, soluciones a los problemas sociales, pero bien puede colaborar si está dispuesto a cruzar puentes que lo conecten con otras áreas del saber.

Podría ser interesante investigar cuál ha sido el comportamiento sociojurídico tanto de la Concertación como de la Alianza por Chile durante los años de la Transición a la Democracia. Si ambas colectividades dicen ser las auténticas promotoras de los cambios profundos que requiere el país, tomando en consideración la profusa documentación que existe, ¿qué rol le asignan al derecho en la obtención de tales cambios?

Por último, quisiéramos que lo sostenido sobre el aborto, el divorcio, el sistema universitario y los pueblos indígenas, temas de la máxima seriedad, haya servido para ejemplificar la dificultad de comprender cómo se relacionan derecho y sociedad, cambio jurídico y cambio social. Cada cual podrá tener su propia opinión sobre esos temas, incluso podrá cambiar de opinión cuantas veces quiera o pueda, si el resto de la sociedad se lo permite, porque...
Lo que cambió ayer
tendrá que cambiar mañana
así como cambio yo
en esta tierra lejana.
Cambia, todo cambia...

Footnote:


[FN2]. Parafraseando a Jerome Frank, en su tan citado Prefacio a la sexta reimpresión de Law and the Modern Mind (1930), la palabra derecho chorrea ambigüedad por todas partes; incluso, el hecho de sentarse a competir con otros autores por una definición apropiada es una de las actividades que más tiempo (inútil) consume.

[FN3]. Advertimos que aquí no se pretende desarrollar una teoría jurídica de salón. Por el contrario, considérese este documento como una pieza más en la crítica que se plantea a los autores que pretenden separar o purificar el estudio del derecho de las demás variables presentes en las relaciones sociales, tales como el poder, la economía, la acción social, las emociones, la tecnología, etc. Pensamos que el derecho--lata sensu--debe ser desmitificado, deconstruido y develado desde una perspectiva amplia, interdisciplinaria, integral, multidimensional, antiesencialista, antiformalista, dinámica y sistémica. En cambio, si nos complace la definición restringida de derecho positivo que se suele difundir en nuestra tradición filosófica, esto es, como un medio o instrumento de dominación racional que (supuestamente) pretende proveer a la sociedad de un cierto orden, asegurando los mayores niveles posibles de paz social.

[FN4]. Si se nos permite alterar una idea de Jacques Maritain, aceptemos que para todo estudiante/estudiante "es un requisito previo que posea una profunda filosofía del hombre, una cultura integral, una aguda apreciación de las diversas actividades del ser humano y de su comparativa importancia, una correcta escala de los valores morales, políticos, religiosos, técnicos y artísticos (...)." Jacques Maritain, Filosofía de la Historia 22 (Editorial Troquel, Buenos Aires, 2da ed. 1962) (1957).

[FN5]. Vid. Eduardo Novoa, El Derecho como Obstáculo al Cambio Social (Editorial Siglo XXI, México 1975). Conforme a la visión de Novoa, mientras la vida moderna tiene en nuestros países un curso extremadamente móvil, determinado por el progreso científico y tecnológico, por el crecimiento económico e industrial, por el influjo de nuevas concepciones sociales y políticas y por modificaciones culturales, el Derecho tiende a conservar formas que, en su mayor parte, se originan en los siglos XVIII y XIX, cuando no el Derecho de la Antigua Roma, con lo que se manifiesta enteramente incapaz de adecuarse eficientemente a las aspiraciones normativas de la sociedad actual.
Ibid. p. 13. Incluso es más,
los juristas no han reparado, en su adormecimiento, que es preciso abandonar las posiciones rígidamente jurídicas. Solamente si obtienen información apropiada sobre el acontecer social y se disponen a utilizarla, junto con sus conocimientos técnicos, en beneficio efectivo de una mejor organización social, podrán hacer del Derecho algo
actual y eficiente. 
Ibid. p. 14. Es justo decir que no todos los autores están contestes con esta crítica. Nosotros pensamos que en ocasiones el derecho puede ser visto como un obstáculo al progreso social, pero en otras hace las veces de motor del cambio social.

[FN6]. Por doquier se decía que los juristas no podían contentarse con memorizar y explicar normas jurídicas, sino que debían comprender que el derecho era una realidad viva en la sociedad, que no es autónoma en sí misma, sino que interactúa con muchas variables (religiosas, económicas, militares, políticas, sociales, culturales, internacionales, etc.).

[FN7]. A comienzos del siglo XX se intentó implementar una ambiciosa reforma en la Universidad de Chile que permitiría vincular el estudio del derecho con otras ciencias, incorporando cursos con una marcada orientación social y propiciando el método socrático de enseñanza para que los alumnos aprendieran mientras participaban durante los debates en clases (conocido en la actualidad como sistema de clase activa). Dicha modernización no logró prosperar, es más, por décadas siguió predominando la visión dogmatista, profesionalista y enciclopedista del estudio del derecho. Vid. Steven Lowenstein, Lawyers, Legal Education, and Development: An Examination of the Process of Reform in Chile (International Legal Center, Nueva York 1992); Rolando Mellafe et al., Historia de la Universidad de Chile (Ediciones de la Universidad de Chile, Santiago 1993).


[FN10]. No podemos evitar la tentación de mencionar que en el último año hemos participado en varios estudios que confirman, en la práctica, los beneficios que existen...
cuando sociología y derecho forman complicidades y se entrelazan: Análisis del Impacto de la Reforma Procesal Penal en los Procedimientos de Carabineros de Chile (Universidad Alberto Hurtado - Ministerio de Justicia 2000); Estándares Básicos de Calidad para la Prestación del Servicio de Defensa Penal Pública (Universidad Alberto Hurtado - Defensoría Penal Pública 2000); Los Derechos de las Minorías en Chile (Corporación Tiempo 2000); La Falta de Transparencia Electoral en Chile (Corporación Tiempo 2000); Análisis de la Legislación Vigente de las Organizaciones de la Sociedad Civil (Centro de Investigación y Desarrollo de la Educación - División de Organizaciones Sociales del Ministerio Secretaría General de Gobierno 2000); y Relevancia del Derecho a la Protección de la Salud en el Ámbito del Contrato de Trabajo (Centro de Estudios Jurídicos Avanzados de la Pontificia Universidad Católica de Santiago - Fundación Científica y Tecnológica de la Asociación Chilena de Seguridad 2000).


[FN15]. Tal como lo afirma Lawrence Friedman en The Horizontal Society, supra nota 12, p. 21:

Many of the changes in life are not man-made: floods, earthquakes, droughts, hurricanes, forest fires, and other natural disasters. But all these do have a human dimension: they affect some community, some country, some wedge of the economic system. And they bring about or imply a demand on government (or somebody) to do something (...).


[FN17]. Ibídem.


[FN20]. Permítesanos agregar, a modo de ejemplo, cómo algunos hechos individuales provocan reacciones sociales inesperadas por el establishment: Rosa Parks, mujer afroamericana de Montgomery (Alabama), jamás hubiera vaticinado el impacto que tendría el hecho de oponerse a ceder el asiento a un hombre blanco durante un recorrido en bus, en 1955. Su arresto desencadenó en primer lugar un boycott de 381 días en contra del transporte urbano, transformándose en la reacción en cadena hacia la
creación del Movimiento por los Derechos Civiles. Vid. Brian Lanker, I Dream a World: Portraits of Black Women Who Changed America 16 (Stewart, Tabori & Chang, Nueva York 1989). Junto a la presión social y al cambio cultural, es digno de anotar que también hubo un cambio judicial al resolver los conflictos: la Corte Suprema, desde fines de la década de 1950 y con mayor fuerza en la década siguiente, favoreció la des-segregación racial, declarando inconstitucionales todas las normas jurídicas y políticas públicas que establecieran diferencias raciales o que frenaran los incipientes procesos de integración.

[FN21]. Baste revisar los registros del Diario Oficial, fundado en 1876 por el Presidente Aníbal Pinto, para corroborar el número creciente de leyes publicadas por el Gobierno de Chile en el paso de los años. A modo de complemento de lo anterior, las sucesivas cuentas anuales de los presidentes de la Corte Suprema al iniciarse el año judicial enseñan que el número de resoluciones judiciales por año se ha incrementado en relación con las décadas pasadas.


[FN25]. En Chile, el Poder Ejecutivo es el centro más importante de producción normativa. Si en algún momento se pensó en el dogma de la omnipotencia del Parlamento como único órgano competente para realizar la producción normativa, en verdad, el gran (re)formador de las leyes es el Presidente de la República, quien colegisla durante cada período legislativo junto a ambas cámaras del Congreso Nacional. Precisemos que el período legislativo es el cuadrienio que se inicia con la instalación del Congreso el 11 de marzo siguiente a la elección de senadores y diputados, luego de la investidura de la mayoría de los miembros (Art. 5º L.O.C. n° 18.918).

[FN26]. Si algún activista se apropia de estas hipótesis, al igual que el chiste popular, tengo una noticia buena y otra mala. La mala, tal como lo ha explicado Michel Crozier, por más que pensemos que la sociedad puede cambiar gracias al éxito de una persona concreta en lograr modificar las estructuras sociales, la verdad es que raramente cambian por intervenciones individuales. La buena noticia consiste en nunca descuidar ni despreciar el rol del activista en la sociedad. Si bien los sociólogos encuentran en las fuerzas sociales las explicaciones de los cambios socioculturales, grandes individuos (por distintas rutas, motivos, medidas, para bien o para mal) han impactado y transformado procesos históricos profundos. Buenos ejemplos para comprender lo anterior han sido proporcionados por Piotr Sztompka, The Sociology of Social Change 259- 73 (Blackwell Publishers), en The Meaning of Sociology: A Reader 376-84 (Joel Charon ed., Prentice Hall, Nueva Jersey 1996) (1980). Por cierto, un libro que todo jurista-activista debe tener: Margaret Keck & Kathryn Sikkink, Activists Beyond Borders. Advocacy Networks in International Politics (Cornell Univ. Press, Nueva York 1998).

[FN27]. Se suele sostener que el primer autor que se refirió a la teoría tridimensional del derecho fue Miguel Reale, siendo reformulada por Luis Legaz y Lacamba y Luis

[FN28]. A la luz del estudio histórico de Iñigo de la Maza sobre la abogacía en Chile, la tendencia a concentrar los estudios jurídicos en los contenidos de los códigos nacionales ha sido predominante en el país, y ha sorteado con éxito las distintas insinuaciones de reforma curricular. Quizás la única gran reforma que se ha logrado hacer al sistema de enseñanza del derecho en el último tiempo ha sido, precisamente, la implementada durante la dictadura de Pinochet (a partir de la reforma legal de 1981 se abrió la posibilidad de crear universidades privadas). Vid. Iñigo de la Maza, Los Abogados en Chile: Desde el Estado al Mercado (Centro de Investigaciones Jurídicas, Universidad Diego Portales, Informe de Investigación nº 10, Santiago enero de 2002).

[FN29]. Agustín Squella, Derecho, Desobediencia y Justicia 9 (EDEVAL, Valparaíso 1977). Es lamentable que esta situación predomine en otras latitudes: La dogmática jurídica--señalan dos autores argentinos--constituye la actividad central de los juristas o doctrinarios; se trata, desde el punto de vista cuantitativo, de la producción teórica y bibliográfica más importante generada en el campo disciplinario del Derecho, excediendo notoriamente el volumen de publicaciones de otras disciplinas jurídicas como la filosofía del derecho, la sociología del derecho o la historia del derecho.

[FN30]. Los estudiantes de derecho que no hayan desarrollado en los primeros años un espíritu crítico respecto de la información que están aprendiendo suelen ser presa fácil de los profesores que introducen argumentos ideológicos en la cátedra sin la adecuada valoración del pluralismo y de la tolerancia (v.gr., en las lecturas obligatorias, en las pautas de evaluaciones, en la construcción del programa, etc.). La enseñanza del derecho es una forma directa de incidir en las políticas públicas y, por lo tanto, cualquier agenda de reformas estructurales debería referirse al tema. Por de pronto, pueden ser aplicables a nuestro país las advertencias de Duncan Kennedy: todos sabemos que hay ciertas escuelas de derecho inclinadas hacia uno u otro sector ideológico, lo cual favorece la reproducción cultural del pensamiento político inspirador de la respectiva casa de estudios; también nos damos cuenta que las facultades de derecho son espacios de debate político y de generación de ideas, algunas más influyentes que otras, pero frente ideológicos al fin y al cabo. Como no queremos entrar en polémica sobre este punto, sólo sugerimos revisar Duncan Kennedy, Legal Education as Training for Hierarchy, en The Politics of Law: A Progressive Critique 40-64 (David Kairys ed., Pantheon, Nueva York 1982), publicado en español por Desde Otra Mirada: Textos de Teoría Crítica del Derecho 183 (Christian Courtis ed., Eudeba, Buenos Aires 2001).

[...]
Sintetiza Agustín Squella en su tesis doctoral:
El elemento fáctico (...) dice relación con ciertos hechos y conductas que se vinculan con
la normatividad jurídica, hechos y conductas que es posible constatar tanto en la génesis
de la norma (fuerzas modeladoras del Derecho y acto de creación de la norma), como
en la existencia posterior de ésta (observancia o inobservancia, aplicación o no
aplicación de la norma).
En Derecho, Desobediencia y Justicia, supra nota 29, p. 428.

Rüdiger Lautmann, Sociología y Jurisprudencia 11 (Fontanamara, México 1993)
(1971).

Ibídem.

Intereses en la realidad sudafricana, ver: Desmond Mpilo Tutu, No Future
Without Forgiveness (Rider Books, Johannesburg 1999); Kenneth Broun, Black Lawyers,
White Courts: The Soul of the South African Law (Ohio Univ. Press, Athens (OH) 2000);
After the TRC: Reflections on Truth and Reconciliation in South Africa (Wilmot James &
Linda Van De Vijver eds., David Philip Publishers, Cape Town 2000); y el testimonio de
Albie Sachs, The Soft Vengeance of a Freedom Fighter (David Philip Publishers, Cape

Cf. Émile Durkheim, Las Reglas del Método Sociológico 29 (Alianza Editorial,

En cuanto al elemento de la coercibilidad, tómense los comentarios que siguen
con cautela. De alguna manera también estamos insertos en una cultura jurídica que
señala que la coercibilidad no es otra cosa que la legítima posibilidad de hacer uso de la
fuerza institucionalmente organizada. Vid. Agustín Squella, Introducción al Derecho 52
(Editorial Jurídica de Chile, Santiago 2000).

Steven Lukes asevera que a partir de 1901 el autor francés habría dejado de
insistir en el criterio de la coerción como elemento del hecho social. En caso de ser
válida esta observación, entonces cabe advertir que nos remitiremos al concepto
primigenio de Durkheim. Vid. Steven Lukes, Émile Durkheim, su Vida y su Obra (Siglo
XXI/Centro de Investigaciones Sociológicas, Madrid 1984). Además, buenas
introducciones en Eugenio Tironi, El Régimen Autoritario: Para una Sociología de
Pinochet 16 (Dolmen Ediciones, Santiago 1997); Raúl Atria, Notas Sobre la Sociología de
Durkheim (Universidad de Chile, Materiales de Apoyo Teoría Sociológica I, Santiago
1996). Parafraseando a Paul Bohanna y Marc Glazer, para Durkheim los hechos sociales
son lo que los antropólogos entienden por cultura.

Nos referimos a De la Division du Travail Social (1893), Le Suicide (1897), Le
Formes Elémentaires de la Vie Religieuse (1912).

Cf. Sociología, supra nota 11, p. 34.

Cf. Talcott Parsons, The Social System 37, n.7 (Free Press, Nueva York 1970)
(1961).

Otro concepto fundamental de Durkheim es el de conscience collective: conjunto
de creencias y de sentimientos comunes al término medio de los miembros de una
misma sociedad dada. La consciencia colectiva se caracteriza por reprimir todo acto que
la ofende a través de la vigilancia que ejerce sobre la conducta de los ciudadanos y de
las penas especiales de que dispone. La mejor aproximación al tema del orden público
se encuentra en La División del Trabajo Social, tratado a propósito de la discusión acerca
de las formas de sanción. La autoridad castiga no sólo los crímenes más graves que violentan la consciencia colectiva por la atrocidad del perjuicio causado, también las faltas menores. En otros casos la coerción es menos violenta, pero existe, por ejemplo: si no me someto a las convenciones de la sociedad, si en mi forma de vestir no tengo en cuenta en absoluto los usos aceptados en mi país y en mi clase, la risa que provoco y el alejamiento social en que se me mantiene producen los mismos resultados que un castigo propiamente dicho, aunque de forma más atenuada. En Las Reglas del Método Sociológico, supra nota 35, p. 24.

[FN42]. La solidaridad mecánica es una solidaridad por similitud. Cuando esta forma de solidaridad domina a una sociedad, los individuos difieren poco entre sí. En cambio, la solidaridad orgánica es aquella en la cual el consenso, es decir, la unidad coherente de la colectividad resulta de la diferenciación o se expresa en ella; los individuos ya no son semejantes sino diferentes. La oposición de estas dos formas de solidaridad se combina con la oposición entre las sociedades segmentarias y las sociedades en que aparece la división moderna del trabajo. En un sentido, una sociedad de solidaridad orgánica es también una sociedad segmentaria; sin embargo, la definición de estas dos ideas no es exacta. En un tránsito hacia una sociedad organiza podemos ver que hay segmentos autárquicos (grupo social de individuos integrados estrechamente) que tienen solidaridad mecánica.


[FN46]. Un buen ejemplo de lo anterior se puede apreciar en la línea de investigación que ha realizado la Corporación Tiempo 2000 a propósito de las imperfecciones del sistema electoral. Con motivo de las elecciones parlamentarias de diciembre de 2001 elaboró el informe Transparencia Electoral, para informar al electorado sobre los costos reales de las campañas y de proponer un debate público respecto de la transparencia del financiamiento electoral. En concreto, Tiempo 2000 procedió a investigar los gastos en propaganda visual que cada uno de los candidatos a diputados de la Alianza por Chile y de la Concertación de Partidos por la Democracia incurrió en cinco distritos de la Región Metropolitana. Junto con acusar la falta de control y de transparencia, publicó el documento El financiamiento de las campañas políticas en Chile: El urgente desafío de la transparencia, en Bitácora Legislativa, nº 346, marzo de 2002; y, además organizó el Seminario Internacional Análisis Crítico del Funcionamiento del Sistema Electoral en Chile, Santiago, 20 de marzo de 2002, en internet: http://www.tiempo2000.cl. Esta intervención interdisciplinaria es una adecuada expresión de cómo las ONGs intentan influir en el debate político-jurídico en el país.

[FN47]. Considerar el caso Roe v. Wade, 410 U.S. 113 (1973). La Corte Suprema de Estados Unidos señaló que el derecho de privacidad de la mujer era un derecho fundamental de acuerdo a la Enmienda 14 a la Constitución; por lo tanto, el poder legislativo estaba facultado para regular la realización de abortos y no para prohibirlos. El resultado concreto fue dejar sin validez una serie de normas del estado de Texas.

[FN48]. Nos referimos al cuestionario realizado por FLACSO-Chile a 1199 personas mayores de 18 años, entre los días 13 y 25 de octubre de 2001, residentes en más de
29 ciudades con más de 40,000 habitantes, entre la Primera y Décimoprimería región. La selección muestral (estratificada y triepática) y el trabajo de campo fue realizado por MORI-Chile, a un nivel de confianza del 95.5%. Mayores antecedentes en internet: http://www.flacso.cl.

[FN49]. Desarrollo Humano en Chile: Nosotros los Chilenos: Un Desafío Cultural, supra nota 13, p. 204.

[FN50]. Ibid. p. 205: Muchos jóvenes quieren profundizar sus relaciones de pareja sin dar lugar aún a una familia estable; mujeres embarazadas o madres solteras deben organizar, sin el padre, un núcleo familiar capaz de sustentar la vida con los hijos; muchos separados de hecho desean rehacer sus vidas con otra pareja sin poder formalizar su vínculo; otros, que han podido anular un vínculo anterior, reconstituyen familias con hijos de padres distintos.

[FN51]. Universidad de los Andes, Informe Sobre el Divorcio: La Evidencia Empírica Internacional 7 (Ediciones Universidad de los Andes, Santiago 2002).

[FN52]. Ibid. pp. 81-82. Algunos de los supuestos con los que se ha trabajado en este documento son muy discutibles, por ejemplo: una ley de divorcio desincentiva la inversión en buscar la mejor pareja; el matrimonio transitorio desincentiva la entrega al cônyuge y a los hijos (la posibilidad de divorciarse disminuye la dedicación de tiempo y esfuerzo en el matrimonio, lo que a su vez aumenta las probabilidades de un fracaso conyugal); las segundas uniones son proporcionalmente más inestables; la transmisión y reproducción intergeneracional del divorcio; el hecho de no vivir con ambos padres incide en la precocidad y frecuencia de las relaciones sexuales de los adolescentes; etc.

[FN53]. Vid. Lo que Dios ha Unido, Carta Pastoral sobre la estabilidad e indisolubilidad del matrimonio, del Cardenal Arzobispo de Santiago, Francisco Javier Errázuriz, Santiago, 22 de junio de 2002, en internet: http:// www.iglesia.cl. Señala el texto que: [s]i bien es cierto que la familia es, a mucha distancia, el bien más apreciado por nosotros los chilenos, no es menos cierta la debilidad de nuestra realidad familiar. En nuestra Patria es muy alto el porcentaje de chilenos que cuentan con un hogar en el cual sólo uno de los padres comparte la vida con sus hijos; las más de las veces, tan sólo la madre. Es muy elevado el número de hogares en los cuales hay familiares que sufren la violencia, de palabra o de hecho, que desata uno o más de sus miembros. Son muchísimas las familias que viven en casas o piezas demasiado estrechas; no pocas comparten el mismo lecho. Esto no las ayuda a construir el respeto, la intimidad y la confianza entre sus miembros. Es más, la vivienda tan reducida favorece la vida en la calle de numerosos hijos y sus perniciosas consecuencias. Nótese que el Informe de la Universidad de los Andes es una pieza fundamental en la construcción argumentativa de la Carta Pastoral, en especial en lo referente al análisis empírico de otros países que cuentan con ley de divorcio.

[FN54]. Quienes sostienen que la aprobación de una ley de divorcio disminuiría el número de matrimonios no se dan cuenta que, en Chile, la cifra ya ha ido paulatinamente disminuyendo. Las razones de esta disminución, al menos en nuestro país, son otras, pues no habiendo ley de divorcio mal podría pensarse que ésta sería la causa principal. Esto nos hace dudar de la conclusión nº 24 del Informe Sobre el Divorcio, supra nota 51, p. 101, preparado por la Universidad de los Andes: "La evidencia internacional muestra una tendencia decreciente en el número de matrimonios, explicable en parte por la existencia de una ley de divorcio."

[FN55]. Ficha técnica: la encuesta fue ejecutada por Time Research Latinoamericana en la Región Metropolitana durante el mes de agosto de 2001. En total se entrevistó a 900 personas, de todos los grupos socioeconómicos y de todas las edades (desde los 15
La muestra fue realizada en cuotas iguales, que posteriormente fueron ponderadas de acuerdo al peso de las variables (sexo, edad y grupo socioeconómico). El cuestionario, que consta de 57 preguntas semiabiertas y cerradas, fue aplicado individualmente en el hogar del entrevistado. El margen de error es de 4.3%.

[FN56]. Ficha técnica: encuesta telefónica a 600 entrevistados, residentes en diez de las principales ciudades del país. La muestra de hogares es aleatoria, seleccionando por cuotas de edad y sexo, todos mayores de 18 años. Si la muestra fuera probabilística tendría un error estimado de 3.5%, para un nivel de confianza de 95%.

[FN57]. Recordemos que en el estudio de junio de 2001, el 69% de los entrevistados declaró estar a favor de la ley de divorcio, opinión que se vio reforzada con el 83% que considera que las personas que se separan tienen el derecho a casarse nuevamente y con el 86% que está "muy de acuerdo" y "de acuerdo" con la afirmación: es preferible un buen divorcio que un mal matrimonio. El 90% opinaba en ese entonces que la discusión del proyecto de ley de divorcio se había prolongado más de lo necesario en el Congreso Nacional.

[FN58]. El tema de las causales es demasiado relevante como para ser dejado de lado. Hemos conocido estudios que indican que los sistemas non-fault divorce (teoría del divorcio remedio) son más recomendables que los sistemas fault divorce, pues éstos se concentran en la búsqueda de un culpable.

[FN59]. Para los interesados en el tema, recomendamos Merike Blofield, The Politics of Moral Sin: A Study of Abortion and Divorce in Catholic Chile Since 1990 (FLACSO-Chile 2001). Nos preocupa el tenor de las indicaciones que están haciendo los parlamentarios conservadores y, de continuar así, lo máximo alcanzable sería la aprobación de una ley de divorcio que prolongue por años los trámites a cumplir. Estamos de acuerdo con Carlos Peña cuando dice que no le corresponde a la ley conducir a los ciudadanos por un cierto ideal de buena vida, máxime cuando esos valores no son compartidos socialmente; citado por Francisco Fuentes, Chile podría aprobar uno de los sistemas de divorcio más conservadores, La Tercera, Santiago, domingo 16 de junio de 2002.


[FN62]. Este tema lo hemos abordado en la Conferencia Latinas/os and the Americas: Centering North-South Frameworks in Latina/o Critical Legal Theory, al presentar nuestra ponencia The LatCrit Theory and the Chilean Legal Culture: A Potential Encounter?, University of Florida College of Law, Gainesville (FL), 26-29 de abril de 2002. Nótese la evolución del número de estudiantes chilenos de derecho en los últimos 50 años:

<table>
<thead>
<tr>
<th>Año</th>
<th>Estudiantes</th>
</tr>
</thead>
<tbody>
<tr>
<td>1950</td>
<td>100</td>
</tr>
<tr>
<td>1960</td>
<td>300</td>
</tr>
<tr>
<td>1970</td>
<td>600</td>
</tr>
<tr>
<td>1980</td>
<td>1200</td>
</tr>
<tr>
<td>1990</td>
<td>3000</td>
</tr>
</tbody>
</table>

La tabla ha sido construida a partir de: John Merryman, David Clark & Lawrence Friedman, Law and Social Change in Mediterranean Europe and Latin America: A Handbook of Legal and Social Indicators for Comparative Study 421 (Stanford Law School, Stanford Studies in Law and Development, 1979); Iñigo de la Maza, Los abogados en Chile: Desde el Estado al Mercado 19 (Centro de Investigaciones Jurídicas, Universidad Diego Portales, Informe de Investigación n° 10, Santiago, enero de 2002); Ministerio de Educación, Estadísticas, en http://www.mineduc.cl.

[FN63]. Es muy probable que en el futuro se mantenga la siguiente tendencia: los grandes estudios de abogados van a estar más preparados para atender a las grandes corporaciones y empresas transnacionales; en cambio, los pequeños estudios jurídicos se van a tener que conformar con los clientes individuales. Mientras los primeros privilegiarán relaciones de largo plazo, los segundos tendrán que aceptar una demanda más volátil. En esta lucha por captar clientes van a pesar: los contactos sociales y políticos (los denominados "pitutos"), las redes internacionales, la especialización y los postgrados (ojalá en el extranjero), las publicaciones, el dominio de varios idiomas (siendo indispensable el inglés), el manejo computacional (al menos en la actualidad, familiaridad con el ambiente MS Windows e Internet), el acceso a bases de datos (Westlaw, Lexis/Nexis), la capacidad de trabajo en equipo, las destrezas de negociación y mediación, las acciones de interés público, la vinculación con los medios de comunicación, habilidad para desempeñarse en proyectos interdisciplinarios y, por supuesto, la universidad de origen y los conocimientos adquiridos.


[FN67]. En cuanto a este último punto, ver contrastes de opinión sobre qué y cómo...


[FN70]. Vid. José Bengoa, La Emergencia Indígena en América Latina (Fondo de Cultura Económica, Santiago 2000); además, José Bengoa, Políticas públicas y comunidades mapuches: Del indigenismo a la autogestión, Revista Perspectivas, Escuela de Ingeniería Industrial, Universidad de Chile, Vol. III, N° 2 (Santiago 2000).


[FN72]. Una nueva generación de líderes mapuches o we che está tomando el mando de un grupo importante de comunidades, y se les debe prestar mayor atención a lo que exigen. Para ilustrar el punto, repasemos lo que nos indica José Bengoa en una de sus investigaciones:

El pegun pegun o nueva voz o voz joven, se había formado a comienzos de los años ochenta en Concepción. Un grupo de muchachos mapuches trataba de continuar sus estudios en Concepción después de concluido el Liceo en Tirúa y otros liceos de la provincia de Arauco. Necesitaban donde vivir y obtuvieron el apoyo de dirigentes y algunas instituciones (...). Se organizó una residencia de estudiantes. Allí vivían, estudiaban, pero sobre todo maduraban su condición de mapuches. Poco a poco su organización se fue extendiendo (...). Muchachos y muchachas se reunían a pensar su identidad, a discutir acerca de lo que significa ser mapuche en los años finales del siglo veinte (...). Han sido jóvenes más permeables a los efectos de la modernización. En José Bengoa, Historia de un Conflicto: El Estado y los Mapuches en el Siglo XX 221 (Planeta, Santiago 1999).


[FN75]. Jürgen Habermas, Más Allá del Estado Nacional 160 (Trotta, Madrid 1997).

[FN76]. El proyecto primigenio de reforma constitucional proponía: (1) agregar como inciso final del Art. 1º de la CPR "El Estado velará por la adecuada protección jurídica y el desarrollo de los pueblos indígenas que integran la Nación chilena"; (2) agregar como inciso final al número 22 del Art. 19 de la CPR "La Ley podrá también, establecer beneficios o franquicias determinadas a favor de las comunidades indígenas"; y (3) agregar como número 7 del Art. 62 de la CPR "7. Establecer sistemas de protección jurídica y beneficios o franquicias para el desarrollo de los pueblos indígenas." Al momento de escribir estas notas, el debate seguía abierto en el Congreso, aunque los contenidos del proyecto de reconocimiento constitucional de los (pueblos) indígenas ha
variado sustancialmente.


[FN78]. El informe del PNUD 2002 señala que, en una encuesta realizada por una entidad particular en el Gran Santiago, el 73% de los santiaguinos considera que los esfuerzos de los mapuches por "reconquistar sus tierras y obtener una cierta autonomía del estado chileno es justa." Además, el 88% de la población capitalina estima que los mapuches son discriminados por los chilenos. Mayoritariamente, los santiaguinos creen que los mapuches debieran tener un grado de autonomía, dependiente del Estado, incluyendo educación, justicia y otros. Vid. Desarrollo Humano en Chile: Nosotros los Chilenos: Un Desafío Cultural, 2002, supra nota 13, pp. 122 y ss. El estudio aludido fue difundido por PubliMetro, agosto de 2001, a lo cual habría que agregar los antecedentes proporcionados en la Encuesta Nacional del PNUD 2001.

[FN79]. En enero de 2001, el Presidente Ricardo Lagos constituyó la Comisión de Verdad Histórica y Nuevo Trato para los Pueblos Indígenas con el objeto de generar las bases de un consenso social para una política de Estado y de país sobre los pueblos "originarios" de Chile. A la fecha, se sigue trabajando en el informe final de la comisión ad-hoc.


[FN81]. Considerando 39° del fallo del Tribunal Constitucional sobre el Convenio n° 169 de la Organización Internacional del Trabajo, de 4 de agosto de 2000: "A este respecto cabe recordar que en el proyecto de la actual Ley Indígena N° 19,253 se empleaba el vocablo 'pueblos indígenas.'" Sin embargo, durante el debate en el Senado y a indicación del Senador Sinclair se acordó sustituir dicho vocablo por etnias indígenas o simplemente por indígenas y en esta forma se contiene en el artículo 1° de la indicada ley que en la parte pertinente expresa:

El Estado reconoce que los indígenas en Chile son los descendientes de las agrupaciones humanas que existen en el territorio nacional desde tiempos precolombinos, que conservan manifestaciones étnicas y culturales propias siendo para ellos la tierra el fundamento principal de su existencia y cultura. (...) Al respecto el H. Senador señor Sinclair manifestó su discrepancia al uso de estos términos en el proyecto, toda vez que la totalidad de los habitantes del territorio nacional integran el pueblo chileno, que es uno y único, siendo absolutamente inadecuado, desde un punto de vista geopolítico, la aceptación, tácita, de la existencia de pueblos aborígenes o indígenas en el interior del territorio (...).


[FN83]. Historia de un Conflicto: El Estado y los Mapuches en el Siglo XX, supra nota 72, p. 13.

[FN84]. Para comprender la posición de los empresarios sugerimos visitar la página web de la Corporación de la Madera, http://www.corma.cl; Andrés Benavente & Jorge


[FN87]. En un próximo documento pretendemos concentrarnos en la relación entre cambio jurídico y cambio tecnológico. Quizás todos estemos de acuerdo al decir que en los tiempos modernos la ciencia y la tecnología han transformado radicalmente las relaciones y los procesos sociales; sin embargo, los ritmos con los que se llevan a cabo las reformas al interior del sistema de derecho positivo parecieran ser demasiado lentos y, cuando ocurren, las normas quedan rápidamente obsoletas ante nuevos adelantos tecnológicos.