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Introduction: LatCritical Encounters with Culture, In North-South Frameworks

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CLUSTER I

LATCRITICAL ENCOUNTERS WITH CULTURE, IN NORTH-SOUTH FRAMEWORKS

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I. INTRODUCTION

Latina/o Critical Race Theory (LatCrit) is an academic enterprise that owes much to prior theoretical schools,[1] but it is most especially and

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1. "LatCrit theory follows and in some ways stems from the historical experience with Critical Legal Studies, Feminist Legal Theory, Critical Race Theory, Critical Race Feminism and Queer Legal Theory." Francisco Valdés, *Poised at the Cusp: LatCrit Theory, Outsider Jurisprudence and Latina/o Self-Empowerment*, 2 HARV. LATINO L. REV. 1, 4-5 (1997). I would

clearly a re/orientation of Critical Race Theory (CRT).[2] LatCrit is outsider jurisprudence,[3] often postmodern[4] in style, and mostly, though not exclusively, pursued by academics of color who seek to center the Latina/o experience[5] in the legal mainstream of the United States.[6] The principal

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add that Critical Legal Studies (CLS) was the heir to American Legal Realism and the unwitting catalyst for Critical Race Theory (CRT). *See generally* AMERICAN LEGAL REALISM (William W. Fisher, III et al. eds., 1993); MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987) (providing background of CLS); Symposium: *Critical Legal Studies: Roll Over Beethoven*, 36 STAN. L. REV. 1 (1984) (describing the movement and presenting examples of its scholarship); Cornel West, *Foreword, in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xi, xxii-xxvii (Kimberlé Crenshaw et al. eds., 1995) [hereinafter THE KEY WRITINGS] (outlining background on initial relationship and eventual split of CLS and CRT).

2. While definitions are often dangerous, if not impossible, see Francisco Valdes, *Under Construction: LatCrit Consciousness, Community, and Theory*, 85 CAL. L. REV. 1087, 1089 n.2 (1997), *reprinted in* 10 LA RAZA L.J. 1, 3 n.2 (1998) (noting that defining LatCrit is difficult), I like this one:

> Critical Race Theory is the most exciting development in contemporary legal studies. This comprehensive movement in thought and life—created primarily, though not exclusively, by progressive intellectuals of color—compels us to confront critically the most explosive issue in American civilization: the historical centrality and complicity of law in upholding white supremacy (and concomitant hierarchies of gender, class, and sexual orientation).

THE KEY WRITINGS *supra* note 1, at xi; *see also* Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741 (1994) (providing introduction to a symposium devoted entirely and specifically to CRT).

3. *See* Mari J. Matsuda, *Legal Storytelling: Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2323-24 (1989) (discussing how "outsider jurisprudence" is scholarship produced by and focused on outsider perspectives, communities, and interests, i.e., going beyond the dominant group). Other forms of outsider jurisprudence include Asian-American Legal Theory, Critical Race Feminism, Feminist Legal Theory, and Queer Legal Theory.

4. Although I find his treatment of postmodernism overly harsh, there are some helpful descriptions in David West's essay, *The Contribution of Continental Philosophy, in* A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY 39 (Robert E. Goodin & Phillip Pettit eds., 1993):

> Postmodernism proposes a last desperate leap from the fateful complex of Western history. Anti-humanism, with its critique of the subject and genealogical history, has shaken the pillars of Western political thought. Heidegger's "dismantling" of metaphysics and Derrida's deconstruction carry the corrosion of critique to the fundamental conceptual foundations of modernity.

Id. at 64. West adds later in the essay: "Postmodernists seek to disrupt all forms of discourse, and particularly forms of political discourse, which might encourage the totalitarian suppression of diversity." *Id.* at 65.

5. LatCrit has and will continue to have a fundamental intellectual link to CRT, but it represents a re/orientation of CRT 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

products of the LatCrit enterprise, both oral and written, are mostly associated with the annual LatCrit conferences.[7] This Symposium issue

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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 CRT, 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 1, at 3 n.5 (noting that the CRT workshop in 1995 had about forty participants, only two of which were Latina/o, Trina Grillo and Frank Valdés); Comments of Sumi K. Cho, Panel: *Multiplicities and Intersectionalities: Exploring LatCrit Diveristies: Essential Politics*, 2 HARV. LATINO L. REV. 433, 454 n.44 (1997) (condemning the "ritualistic 'violence' against gay and lesbian race crits in recent years at the [CRT] summer workshop"); *see also* Stephanie L. Phillips, *Mapping Intellectual/Political Foundations and Future Self Critical Directions: The Convergence of the Critical Race Theory Workshop with LatCrit Theory: A History*, 53 U. MIAMI L. REV. 1247, 1249 n.4 (1999) (conceding, as a member of the original workshop organizing committee, that, despite best of intentions, the workshop "replicat[ed] troubling hierarchies . . . in particular, the privileging of African American experience and of heterosexuality"). *See generally* Phillips, *supra* (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).

6. Francisco Valdés, one of the founders of this new movement, explains:

> LatCrit theory is 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. 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 Valdés, *Theorizing "OutCrit" Theories: Comparative Antisubordination Experience and Subordination Vision as Jurisprudential Method*, (citations omitted), *available at* http://personal.law.miami.edu/~fvaldes/latcrit/overview.html (last visited Oct. 12, 2002).

7. Naturally, this Symposium issue is the most recent installment in LatCrit scholarly discourse, Symposium, *LatCrit VI: Latinas/os and the Americas: Centering North-South Frameworks in LatCrit Theory*, 55 FLA. L. REV. 1 (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); Symposium, *LatCrit III: Comparative Latinas/os: Identity, Law and Policy in LatCrit Theory*, 53 U. MIAMI L. REV. 575 (1999); Symposium, *LatCrit II: Difference, Solidarity and Law: Building Latina/o Communities Through LatCrit Theory*, 19 CHICANO-LATINO L. REV. 1 (1998); Symposium, *LatCrit I: LatCrit Theory: Naming and Launching a New Discourse of Critical Legal Scholarship*, 2 HARV. LATINO L. REV. 1 (1997); Colloquium, *LatCrit: Representing Latina/o Communities: Critical Race Theory and Practice*, 9 LA RAZA L.J. 1 (1996); Colloquium, *International Law, Human Rights and LatCrit Theory*, 28 U. MIAMI INTER-AM. L. REV. 177 (1996); *see also* Joint Symposium, *LatCrit Theory: Latinas/os and the Law*, 85 CAL. L. REV. 1087 (1997), *reprinted in* 10 LA RAZA L.J. 1 (1998) (noting that this was a "stand-alone" symposium, not directly connected to one of the LatCrit conferences).

partly memorializes the Sixth Annual LatCrit Conference, which represented an important milestone because it reached out and empowered the voices of the Southern part of our hemisphere.[8] The essays in the cluster addressed in this Essay are the product of this cooperative process of giving voice to the native[9] scholars from the Southern Americas, while seeking to expand our voice within the North American academy.

The initial challenge in writing this cluster introduction was to articulate the thread of unity in the themes covered by the authors and the

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8. The Substantive Program Outline described it as follows:

> Saludos! This year, the LatCrit Annual Conference will take the long foreshadowed step of affirmatively and self-consciously exploring the links that bind Latina/o Communities in the United States to their homeland societies, cultures and economies and how the impact of such globalization informs an articulation of LatCrit theory and discourse. As many LatCritters have repeatedly commented, the articulation of an inclusive vision of intra-and intergroup justice has for too long been paralyzed by the conflation of citizenship and geography in popular discourse and legal theory. These links help to explain why Latinas/os in the United States constitute transnational groups and communities, typically retaining strong material connections to, and cultural identifications with, their homelands' traditions, issues, concerns, hopes and aspirations. These links, while oftentimes noted in prior LatCrit programs and texts, have yet to be explicitly thematized and explored in a programmatic way; this year, we take up this pending challenge collectively.
>
> The LatCrit VI planning committee has made an affirmative effort to structure the program to center specifically inter-American approaches to social and legal issues. Our hope is to undertake some comparative critical studies of "domestic" issues and their counterparts throughout the Americas, using one or more of the following five lenses or categories which have been employed in prior years' conference themes: (1) Latina/o pan-ethnicity and multiracialism, including intra-Latina/o issues of sameness and difference as well as non-Hispanic Latinas/os, including mestizaje, Indianess and blackness in Latina/o communities and societies; (2) identity—religion, culture, gender, sexuality and heteropatriarchy; (3) immigrations, migrations, and citizenships; (4) coalition, democracy, and community; (5) class and economic equity, including trade, labor, and environment. The basic concept is to encourage critical inquiry of these five broad areas in ways that illuminate and elucidate the North-South character of Latina/o transnationality. Underscoring the inter/national nature of LatCrit theory to date, this year's conference planners generally hope to turn the gains and insights of the past five years toward a better collective understanding of the diverse hemisphere we share: the Americas.

Sixth Annual LatCrit Conference, Substantive Program Outline, *at* http://personal.law.miami.edu/~fvaldes/latcrit/lcvidocs/lcvisubstantiveprogram.html (visited June 6, 2002) [hereinafter Substantive Program Outline].

9. "Native" is used here to refer to people who are autochthonous to the Americas, not as a reference to Native American, "Indian," or indigenous identity. *See also infra* note 58 and accompanying text.

panels in which they initially presented their ideas during the Sixth Annual LatCrit Conference. After all, they were located in different geographic and, seemingly, different intellectual sites within the conference.[10] But this cluster of essays, individually and collectively, effectively captures the overall theme of LatCrit VI: *Latinas/os and the Americas: Centering North-South Frameworks in LatCrit Theory.*[11] Specifically, every one of the essays in this section focuses on Latin American legal systems and cultures.[12] The methodology may be theoretical or practical, philosophical or sociological, legal or interdisciplinary, but all these works address the challenges posed by the legal systems and cultures that co-exist within the nations of Latin America in 21st century academic legal discourse.

This Essay will first discuss how the essays fit within or challenge the themes of the specific roundtable, plenary, or workshop in which they were presented. It will then locate the cluster within the present and the future of LatCrit Theory generally, and LatCritical praxis[13] in particular.

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10. Hugo Rojas and Mauricio García-Villegas participated in the Opening Roundtable: *Encountering Latin America: Exploring the Parameters and Encountering Latin America: Exploring the Parameters and Relevance of LatCrit Theory In and Through a Regional Rotation.* Susan Scafidi participated in Plenary Panel One: *Implications of Indigenous Activism.* Jorge Esquirol and Michael Wallace Gordon participated in the third concurrent panel, titled *TWAIL/NAIL: Latin American Legal Theory.*

11. *See* Substantive Program Outline, *supra* note 8.

12. "Culture" is used here to describe complex social constructs. The negative forms of culture include the essentialized development of dominant ones, and the imposition of negative stereotypes by the dominant culture on social outsiders. *See infra* notes 104-06 and accompanying text. The positive forms of culture include communitarian, empowering self constructs. *See infra* notes 107-09 and accompanying text.

13. "LatCritical" describes the LatCrit approach to legal theory. 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, *supra* note 1, at 53.

II. THE CONFERENCE CONTEXTS: THE ARTICULATION AND THEORETICAL PERFORMANCE OF LATCRIT

This part of the Essay will address each presentation, the specific conference context(s) in which it was delivered, and how the essays produced by the presenters develop these ideas.

A. *The Opening Roundtable*

Hugo Rojas and Mauricio García-Villegas participated in our opening roundtable discussion: *Encountering Latin America: Exploring the Parameters and Relevance of LatCrit Theory In and Through a Regional Rotation.*[14]

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14. This was described in the Substantive Program Outline as follows:

> The focus of this opening discussion marks a new trajectory for the LatCrit practice of rotating centers, by challenging inherited categories that would otherwise map the world's regions in racial terms. In this inherited framework, the world is divided into racialized regions: Latin America is Hispanic, Africa is Black, Europe and North America are White, and Asia is (no surprise) Asian. By centering Latin America in LatCrit theory, this kick-off discussion seeks to challenge these essentialist constructions. Latin America, like the United States, and indeed, all regions of the world, is multiethnic, multilingual, multicultural, and multiracial. It is inhabited by individuals and groups marked by differences of gender, class, national origin, sexual orientation, and religion, as well as by the historical articulations of white supremacy, colonialism, and the expansion of international capitalist processes and social formations.
>
> Against this background, the opening plenary explores how focusing LatCrit antiessentialist, antisubordination perspectives on the particularities of Latin American realities might inspire new theoretical insights and enable new coalitional possibilities among subordinated groups, both within Latin America and across other regions. How, for example, do questions of group identity and the role of law in the production of inter-group justice map across the realities of ongoing civil war, politicized military institutions, dictatorial cultural traditions, an interconnected church and state, resurgent indigenous nations, imported jurisprudence and civil law systems? How are these realities reflected in the structure and substance of Latin American legal institutions and norms and, with what implications for the process of social transformation? Put differently, what does LatCrit theory have to offer Latin American legal scholars and social activists, and conversely what do they offer LatCrit theory?
>
> This opening plenary seeks to engage these important questions by convoking a diverse group of legal scholars, educators, and social scientists from Colombia, Cuba, Mexico and the United States to share their critical perspectives on the realities confronting Latin America and their relevance to Latinas/os and other outsider groups within the United States.

Substantive Program Outline, *supra* note 8.

Mauricio García-Villegas, a Colombian-born and trained academic, engages LatCrit in a critique of what he describes as the Legal Consciousness Studies Movement,[15] a subset of Law and Society.[16] Professor García-Villegas uses a linguistic style and structure that to the United States observer might appear to be related to university disciplines other than law. However, his writing must be contextualized in the Colombian system of legal education, which is more analogous to our undergraduate system of college education in methodology, if not necessarily in content. Moreover, Colombia, like most Civil Law systems, approaches legal education as a more interdisciplinary endeavor than the traditional United States law school curriculum.[17]

Professor García-Villegas aims high, and thus purposely chooses language that might be inaccessible in any other context. Reaching the proper balance between the critical exploration of language and its *abuse*—its use in hurtful and negative ways—is often a challenge, and critical race scholars have often been accused of language abuse.[18] While the attacks on CRT all too often are essentialist[19] attempts to silence

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15. He explains that

> [s]tudies of legal consciousness bring together, with variants, essential parts of both the "Law and Society" and the critical traditions. From Law & Society they have taken the idea that empirical research is essential to make sense of the way that law functions in the society. From the critical tradition they have adopted the aspiration that sociolegal studies should serve not only to describe how law operates in society but also and above all to contribute to the transformation of society and the defense of the excluded.

Mauricio García-Villegas, *Symbolic Power Without Symbolic Violence?*, 55 FLA. L. REV. 157 (2003).

16. The "Law and Society Association, founded in 1964, is a group of scholars from many fields and countries, interested in the place of law in social, political, economic and cultural life." The Law and Society home page, *at* http://www.lawandsociety.org (last visited Oct. 12, 2002). For a critical analysis of the Law and Society Movement, see Trubek, *infra* note 82.

17. *See generally* Richard J. Wilson, *The New Legal Education in North and South America*, 25 STAN. J. INT'L LAW 375 (1989) (containing a dated but still largely accurate description of legal education in South American countries, including Colombia); THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA AND EAST ASIA 841-91 (John Henry Merryman et al. eds., 1994) (providing a brief introduction to legal education in the civil law world generally) [hereinafter CIVIL LAW TRADITION].

18. *Compare* Dennis W. Arrow, *Pomobabble: Postmodern Newspeak and Constitutional "Meaning" for the Uninitiated*, 96 MICH. L. REV. 461 (1997), *with* Ronald J. Krotoszynski, Jr., *Legal Scholarship at the Crossroads: On Farce, Tragedy, and Redemption*, 77 TEX. L. REV. 321 (1998).

19. "Essentialism adopts the view that all members of a group are alike and share a common 'essence.'" Cho, *supra* note 5, at 433 n.1. As it is used herein:

> The concept of essentialism suggests that there is one legitimate, genuine

different voices,[20] the intentional misuse of language simply for the sake of showing off or of being exclusionary can be hegemonic[21] and, more simply, ineffective.[22] But, in the LatCrit context, deconstructionist postmodern analysis, such as that undertaken by García-Villegas, clearly demands a careful approach to language which allows scholars properly to explore the hidden complexities of its subjects.[23] The LatCrit use of

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> universal voice that speaks for all members of a group, thus assuming a monolithic experience for all within the particular group—be it women, blacks, latinas/os, Asians, etc. Feminists of color have been at the forefront of rejecting essentialist approaches because they effect erasures of the multidimensional nature of identities and also collapse multiple differences into a singular homogenized experience.

Berta Esperanza Hernández-Truyol, *Constructing LatCrit Theory: Diversity, Commonality, and Identity: LatIndia II—Latinas/os, Natives, And Mestizajes—A LatCrit Navigation of Nuevos Mundos, Nuevas Fronteras and Nuevas Teorías*, 33 U.C. DAVIS L. REV. 851, 862 n.26 (2000) (citations omitted); *see also* FEMINIST LEGAL THEORY: FOUNDATIONS 335 (D. Kelly Weisberg ed., 1993) (discussing gender essentialism); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 588 (1990) (discussing gender and racial essentialism).

20. *See* Pedro A. Malavet, *Performing LatCrit: Literature and the Arts as Antisubordination Praxis: LatCrit Theory and Cultural Production: The Confessions of an Accidental Crit*, 33 U.C. DAVIS L. REV. 1293, 1297-1306 (2000) (discussing the debate over the use of narrative in legal scholarship).

21. For example, abuse of language can be nothing more than a self-indulgent attempt to develop a secret speech that sets your little clique apart, both in private and in public. In her critique of the excesses of literary criticism, Barbara Christian explains the real dangers of such language abuse:

> For I feel that the new emphasis on literary critical theory is as hegemonic as the world which it attacks. I see the language it creates as one which mystifies rather than clarifies our condition, making it possible for a few people who know that particular language to control the critical scene—that language surfaced, interestingly enough, just when the literature of peoples of color, of black women, of Latin Americans, of Africans began to move to "the center."

Barbara Christian, *The Race for the Theory, in* MAKING FACE, MAKING SOUL: HACIENDO CARAS: CREATIVE AND CRITICAL PERSPECTIVES BY FEMINISTS OF COLOR 335, 338 (Gloria Anzaldúa ed., 1990).

22. Here I refer to the forced use of overly complicated language simply for the sake of making an exaggerated pseudo-intellectual display, rather than to write effective scholarship. Barbara Christian again articulates the problem well: "And as a student of literature, I am appalled by the sheer ugliness of the language, its lack of clarity, its unnecessarily complicated sentence constructions, its lack of pleasurableness, its alienating quality. It is the kind of writing for which composition teachers would give a freshman a resounding F." *Id.* at 339.

23. For example, LatCrit scholarship challenges the traditional civil rights discourse in law by thoroughly exploring the weaknesses of the Black/White binary paradigm of race. *See* Ian F. Haney López, *Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 85 CAL. L. REV. 1143 (1997), *reprinted in* 10 LA RAZA L.J. 57 (1998); Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CAL. L. REV. 1213

language in legal scholarship is thus exciting, intellectually stimulating, and effective.[24]

García-Villegas acknowledges that his work is abstract to a level that his "critique is not suitable to all authors interested in legal consciousness."[25] However, in typical LatCrit form, García-Villegas introduces a provocative theoretical paradigm that will enrich LatCrit Theory. Using the language of postmodernism, Professor García-Villigas explains how the Legal Consciousness Movement fails to adequately account for the effects of structural power hegemonies within a particular legal culture, thus undermining its practical effectiveness as a viable theoretical school. Legal Consciousness Theory might be described as Legal Realism from a different frame of reference: that of the client or party, rather than that of the judge or attorney. The "client," moreover, is usually a marginalized person, an "other."[26]

(1997), *reprinted in* 10 LA RAZA L.J. 127 (1998) [hereinafter Perea, *The Black/White Binary Paradigm of Race*]; Juan F. Perea, *Ethnicity and the Constitution: Beyond the Black and White Binary Constitution*, 36 WM. & MARY L. REV. 571 (1995). This 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*, 9 LA RAZA L.J. 1 (1996); *see also* Robert S. Chang, *The Nativist's Dream of Return*, 9 LA RAZA L.J. 55 (1996) (stating that Asian-Americans do not fit within the "comfortable binary" of the Black/White paradigm of race); Rachel F. Moran, *Neither Black Nor White*, 2 HARV. LATINO L. REV. 61 (1997) (finding that Latinas/os are not adequately represented in American civil rights debate because they do not fit within the paradigm); Neil Gotanda, *"Other Non-Whites" in American Legal History: A Review of Justice at War*, 85 COLUM. L. REV. 1186, 1188 (1985) (book review) (explaining that "foreignness" and the construction/imposition thereof establishes many U.S. citizens, especially Asian-Americans and Latinas/os, as a permanent underclass); Deborah Ramirez, *Forging A Latino Identity*, 9 LA RAZA L.J. 61, 63 (1996) (explaining a personal experience that required her to challenge the paradigm in order to properly assist a local Latina/o community); 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' challenges to the Black/White binary).

24. Of course, a demanding use of language is essential to critical scholarship. More generally, mastering language is an essential skill for a lawyer or academic, and challenging the language skills of any audience can have strong pedagogical effects. But teachers and scholars should be offended by the notion that simple language is a sign of simple-mindedness. For example, popular cultural narratives may sometimes be spoken in plain and simple language and are still perfectly able to transmit complex ideas that constitute antisubordination praxis. (I do not mean to imply that popular culture is always "plain and simple" in language. In fact, popular culture is incredibly complex and textured. However, *on occasion*, the popular artist uses plain and simple language to make very complex messages accessible to everyone in their community.) Additionally, the capacity to present complex concepts in language that make them accessible to students and to persons outside our field takes a great deal of talent. Moreover, making our work accessible to uninitiated audiences is part of our educational mission and is essential to LatCrit praxis.

25. García-Villegas, *supra* note 15, at 159.

26. In general, as used herein, "other" and being "othered" mean to be socially constructed

García-Villegas provides an important warning about shifting the focus of law too much towards the micro-level, and about the methodology of symbolism. He explains that "the absence of a macrosociological lens lessens the capacity to 'see' and analyze genuinely efficacious emancipatory options for the excluded."[27] This, García-Villegas explains, is the result of practical contradictions created by attempts within the Legal Consciousness Movement to maintain theoretical coherence in its use of the symbolic. This "exigency of theoretical coherence,"[28] prevents the Legal Consciousness theorists from leading us into effective legal reform. The solution, García-Villegas suggests, is to develop a proper balance between the "micro/macro terrain" presented by any complex functioning society and nation. The symbolic theoretical vision of any critical theory that aspires to effective praxis must also be able to produce "a theory of the symbolic strategy as a political instrument, whether it be of domination or of social emancipation."[29] García-Villegas' work fits within previous comparative legal discourse about the differences between hortatory (exhortative) and prescriptive (compulsory or coercive) legal systems.[30] Additionally, Critical Race theorists long ago identified the tension, and sometimes the disjunction, between theory and praxis.[31]

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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 572, 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.

Id. (*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 111 and accompanying text.

27. García-Villegas, *supra* note 15, at 187.

28. *Id.* at 188-89.

29. *Id.* at 189.

30. *See, e.g.*, MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 5-8 (1987) (indicating that classical Greek vision in which "the aim of law is to lead the citizens toward virtue, to make them noble and wise," comparing it to the U.S. and England where laws take the forms of "prescriptions" intended to rule actual conduct rather than to persuade and educate subjects into compliance therewith).

31. *See* Harris, *supra* note 2, at 751 (noting that there is a tension between the deconstructionist theoretical bent of CRT that attacks entrenched power hegemonies, and the design of an affirmative program of racial "emancipation" which she labels "reconstruction"); Harlon L. Dalton, *The Clouded Prism*, 22 HARV. C.R.-C.L. L. REV. 435, 436-37 (1987) (discussing the split between CLS practitioners and theorists); Robert L. Hayman, Jr., *The Color of Tradition: Critical Race Theory and Postmodern Constitutional Traditionalism*, 30 HARV. C.R.-C.L. L. REV. 57, 69-70 (1995) (arguing postmodern theory cannot produce a reform project); Patricia J. Williams,

Accordingly, LatCrit Theory has always tried to ensure that its theoretical work is capable of contributing to praxis.[32] Therefore, García-Villegas' work fits within the LatCrit enterprise, which seeks to empower the marginalized through effective praxis, while maintaining a coherent theoretical paradigm.

Hugo Rojas challenges the traditional construct of Chilean society as representing a single mixed race and a homogeneous national culture.[33] LatCrit has studied a similar racialized demand for assimilation into a normative,[34] homogeneous White culture in the United States.[35] LatCrit

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Alchemical Notes: Reconstructing Ideals From Deconstructed Rights, 22 HARV. C.R.-C.L. L. REV. 401, 404-06 (1987) (noting CLS' rejection of rights makes reform difficult).

32. As discussed above, praxis is one of the essential guideposts of LatCrit Theory. *See* Valdés, *supra* note 1 and accompanying text; *see also* Adrien Katherine Wing, *Critical Race Feminism and International Human Rights*, 28 U. MIAMI INTER-AM. L. REV. 337, 341 (1996) ("[W]hile [Critical Race Feminism] is concerned with theoretical frameworks, it is very much centered on praxis and attempts to identify ways to empower women through law and other disciplines.").

33. Hugo Rojas, *Stop Cultural Exclusions (in Chile)!: Reflections on the Principle of Multiculturalism*, 55 FLA. L. REV. 121 (2003).

34. Normative means the dominant societal paradigm, that is, what is considered "normal" in a given sociological context. *See* Berta Esperanza Hernández-Truyol, *Borders (En)gendered: Normativities, Latinas and a LatCrit Paradigm*, 72 N.Y.U. L. REV. 882, 891 (1997) (noting that "knowledge is socially constructed," therefore, the "normative paradigm's dominance" defines "normal").

35. In the United States there is a legal and social mythology of *two* racial groups, Blacks and Whites, which LatCrit has labeled the "Black/White binary paradigm of race." *See supra* note 23. Within the binary, Whiteness, and the privilege associated with it, implies full assimilation into the U.S. body politic, and Blackness implies exclusion from the normative society. Moran, *supra* note 23, at 69 (arguing "Latinos receive the message that they are supposed to adapt to American life as earlier generations of White ethnic immigrants did, [or] instead they will remain an isolated and unassimilable population like Blacks"). In addition to fighting against the White supremacist nature of the paradigm, LatCrit scholarship has studied and debated why Latinas/os are denied full citizenship, despite our legal classification as White. *See, e.g.*, Ian F. Haney Lopez, *supra* note 23 (examining U.S. legal and social racial categorizing, concluding that Latinas/os are legally classified as White, but socially racialized as "other"); Ian F. Haney Lopez, *Retaining Race: LatCrit Theory and Mexican American Identity in* Hernandez v. Texas, 2 HARV. LATINO L. REV. 279 (1997) [hereinafter Lopez, *Retaining Race*] (responding to Professor Perea, arguing that Latinas/os are denied full citizenship despite legal Whiteness because they are socially constructed as belonging to an inferior non-White race); George A. Martinez, *The Legal Construction of Race: Mexican-Americans and Whiteness*, 2 HARV. LATINO L. REV. 321, 326-29 (1997) (noting that U.S. courts recognized Mexicans as White for purposes of the naturalization laws—which only allowed Whites to become U.S. citizens; census also classified Mexican Americans as White); Juan Perea, *Five Axioms in Search of Equality*, 2 HARV. LATINO L. REV. 231 (1997) (arguing that Latinas/os are excluded from full citizenship because of "ethnicity") [hereinafter Perea, *Five Axioms*]; Perea, *The Black/White Binary Paradigm of Race*, *supra* note 23 (arguing that Latinas/os are "racialized," leading to our marginalization). *See also* Kevin R. Johnson, *"Melting Pot" or "Ring of Fire"?: Assimilation and the Mexican-American Experience*, 85 CAL. L. REV. 1259 (1997), *reprinted in* 10 LA RAZA L.J. 173 (1998) (positing that the U.S. myth of assimilation acts as a "ring of fire" that

seeks to empower the "other" within all societies and challenges the notions of an assimilationist culture that imposes a homogenized normativity. Rojas does just that in the very specific Chilean context by explaining the need for multicultural citizenship generally. But he is specially concerned with the marginalization of indigenous peoples within Chilean culture, and the accompanying deprivation of political rights under the Chilean Constitution.[36] Rojas once again brings into LatCrit focus the distinction between imposed racialized[37] constructs of cultural citizenship[38] and legal/political citizenship.[39]

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must burn away "non-U.S." cultural identity, and resistance thereto makes Latinas/os unassimilable); Rachael E. Moran, *What If Latinos Really Mattered in the Public Policy Debate?*, 85 CAL. L. REV. 1315, 1344 (1997), *reprinted in* 10 LA RAZA L.J. 229 (1998) ("Latinos are forcing America to revisit conventional wisdom about immigration and civil rights by reconsidering popular assumptions about citizenship and identity as well as processes of assimilation and pluralism.").

36. In the United States, critical theorists, including LatCritters, have written about the need for a multicultural, constitutional definition of citizenship. *See, e.g.*, Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1401-03 (1991) (taking the position that "radical pluralism," entitlement to cultural independence, is constitutionally justified, and perhaps even required by the U.S. Constitution); Enid Trucios-Haynes, *The Role of Transnational Identity and Migration*, 28 U. MIAMI INTER-AM. L. REV. 293 (1996) (arguing that "transnational identity" leads to "transnational multiculturalism" within the U.S. borderlands, which deserves legal recognition and protection). *See also* Kenneth L. Karst, *Citizenship, Race and Marginality*, 30 WM. & MARY L. REV. 1 (1988); Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303 (1986); Gerald Torres, *Local Knowledge, Local Color: Critical Legal Studies and the Law of Race Relations*, 25 SAN DIEGO L. REV. 1043 (1988).

37. LatCrit scholarship has noted that the social and legal construction of Latinas/os in the United States is fundamentally a racialized process. For example, Ian F. Haney Lopez 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.

López, *Retaining Race*, *supra* note 35, at 283 (footnotes omitted).

38. 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: A DOCUMENTARY HISTORY 1087, 1096 (Hyung-Chan Kim ed., 1992).

Rojas identifies independence, secession, and regional autonomy, while remaining within a single federal government, as alternatives to empower indigenous peoples.[40] These are certainly sensible choices when a

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> [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.
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> . . . [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.

Id.; see also Juan Perea, *Los Olvidados: On the Making of Invisible People*, 70 N.Y.U. L. REV. 965, 966 (stating "Latino invisibility" is 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.*, 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"); Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 350-73 (1992) (analyzing "official English" legal proposals);.

39. The distinction and disjunction between cultural and political citizenship has been a strong theme in CRT generally and LatCrit Theory in particular. *See, e.g.*, 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) (detailing how Mexican-Americans in the Southwest had their land taken away in spite of their legal citizenship—and their property rights); Pedro A. Malavet, *Puerto Rico: Cultural Nation, American Colony*, 6 MICH. J. RACE & L. 1 (2000) (describing Puerto Ricans as 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); Robert Westley, *Many Billions Gone: Is it Time to Reconsider the Case for Black Reparations?*, 40 B.C. L. REV. 429 (1998) (advocating reparations to bring African-Americans to full political citizenship in the U.S.); Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. REV. 477 (1998) (containing a critical review of reparations for the internment of U.S. citizens of Japanese descent during the Second World War).

> 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.

Kevin R. Johnson, *The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 268 (1996). *See generally* Symposium, *Citizenship and its Discontents: Centering the Immigrant in the Inter/National Imagination*, 76 OR. L. REV. 207 (1997); Ibrahim J. Gassama et al., *Foreword*, 76 OR. L. REV. 207, 209 (1997) ("The papers in this Symposium investigate the aporectic relations among the nation-state, liberal understandings of citizenship, and problematic constructions of race and ethnicity as they are applied to immigrants.").

40. Every one of these alternatives falls under the rubric of autonomous regimes under

combination of an identifiable indigenous group and a definable territory can be found.[41] However, it is not a general solution to the problems of a multicultural modern state in which co-existence within the same territory is a practical necessity. Such a factual situation requires a different theoretical paradigm.[42]

Rojas' deployment of the work of Will Kymlicka must be viewed with some care. Kymlicka is a staunch defender of liberalism, and in fact favors the "toleration" model of the liberal state as a solution to the challenges of multiculturalism.[43] This is a result of Kymlicka's stance as a modern

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International Law. *See generally* Natsu Taylor Saito, *Considering "Third Generation" International Human Rights Law in the United States*, 28 U. MIAMI INTER-AM. L. REV. 387 (1996) (arguing that international human rights, such as the right to self-determination, can help to inform LatCrit Theory and to implement its praxis).

41. "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Annex Supp. No. 16, at 52, U.N. Doc. A/6316 art. 1 § 1 (1966) (entered into force Mar. 23, 1976); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 art. 1 § 1 (1966) (entered into force Jan. 3, 1976).

42. Adeno Addis explains:

> As a general response to diversity in political units, however, separation seems as impractical as it is dangerous. It is impractical partly because not all groups that believe themselves to be marginalized and excluded from the social and political life of the polity *live in a defined territorial unit.* In such circumstances, secession will not be a viable answer to the problem of exclusion and discrimination. Indeed, the notion of separation under these conditions is likely to lead to a process of ethnic cleansing. It is also true that not all groups that have grievances against a dominant majority want to secede, even if that were practically possible. They simply wish to participate equally and fully in the life of the political community.

Adeno Addis, *On Human Diversity and the Limits of Toleration, in* ETHNICITY AND GROUP RIGHTS 112, 113 (Will Kymlicka & Ian Shapiro eds.,1997) (emphasis added) (footnote omitted) [hereinafter ETHNICITY].

43. 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. *See* WILL KYMLICKA, LIBERALISM, COMMUNITY, AND CULTURE (1989). "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." *Id.* 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

liberal.[44] However, it is important to emphasize that liberalism is not an inherently progressive political theory,[45] it requires a multicultural lens to produce a form of citizenship that truly empowers cultural minorities.[46]

Rojas then properly uses the work of Jürguen Habermas, providing a coherent political theory that applies to resolve the problems of minority groups within the multicultural state.[47] 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 constitutional patriotism, individuals are free to develop their own personal or group culture[48] as long as they share legal/political citizenship and a common

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> 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.

Id.

44. In his works, Kymlicka maps himself as a modern liberal scholar, *a la* Ronald Dworkin. KYMLICKA, *supra* note 43, at 10 ("[H]op[ing] to show how my Kymlicka's arguments are related to the political morality of modern liberals from J.S. Mill through to Rawls and Dworkin"). *See also* RONALD DWORKIN, LAWS EMPIRE (1989); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1986).

45. "[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 & Philip Pettit eds., 1993).

46. *See generally* Malavet, *supra* note 39, 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).

47. *See* Jürgen Habermas, *Citizenship and National Identity: Some Reflections on the Future of Europe, in* THEORIZING CITIZENSHIP 255 (Ronald Beiner ed., 1995).

> 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, *supra*nationally shared political culture . . . . Particularist anchoring of *this sort* would in no way impair the universalist meaning of popular sovereignty and human rights.

Id. at 264 (emphasis added).

48. "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 109 and accompanying text.

political culture.[49] Rojas will surely apply this type of scholarship in further development of his own work.

Accordingly, Rojas will benefit from the sophisticated critiques of liberalism and exposition of postmodern alternatives thereto that are common in LatCrit scholarship.[50] Conversely, LatCrit will benefit from his development of these theoretical foundations, and from his discussion of the specific context of Chilean society, a matter that he begins in his essay, and which we can only hope he continues to develop within the LatCrit enterprise.

Both García-Villegas and Rojas engaged the conference in precisely the type of discussion that the opening roundtable, the overall conference, and LatCrit jurisprudence intended to foster. They both "centered" their nations to our South (Colombia and Chile respectively) in LatCrit discourse. Moreover, both García-Villegas and Rojas challenged theoretical and social constructs of Latin American nations and their citizens as constituting a single, mixed, Latina/o "race."

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/os are not a race; rather, we are a cultural/ethnic group encompassing persons of many different races. To put it more simply, phenotypically or anthropologically, some Latinas/os are White, Black, Indigenous, Asian, Arab, something else, or of mixed heritage. On the other hand, many Latinas/os embrace the concept of a "*sociedad o raza india, española y africana*" (an Indian, Spanish, and African society or

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49. *See* Habermas, *supra* note 47.

> [E]xamples of multicultural societies like . . . the United States demonstrate that a political culture in the seedbed of which constitutional principles are rooted by no means has to be based on all citizens sharing the same language or the same ethnic and cultural origins. Rather, the political culture must serve as the common denominator for a constitutional patriotism which simultaneously sharpens an awareness of the multiplicity and integrity of the different forms of life which coexist in a multicultural society.

Id. at 264.

50. *See generally* Jean Stefancic, *Latino and Latina Critical Theory: An Annotated Bibliography*, 85 CAL. L. REV. 1509 (1997), *reprinted in* 10 LA RAZA L. J. 423 (1998) (critiquing liberalism is one of the basic themes of LatCrit Theory). *See, e.g.*, Enrique R. Carrasco, *Intersections Between LatCrit Theory and Law and Development Studies*, 28 U. MIAMI INTER-AM. L. REV. 313 (1996) (critiquing neo-liberal development theory); Berta Esperanza Hernández-Truyol & Sharon Elizabeth Rush, *Foreword: Culture, Nationhood, and the Human Rights Ideal*, 33 U. MICH. J. L. REFORM 233, 246-51 (2000) (critiquing liberalism using international legal principles); Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 85 CAL. L. REV. 1449 (1997), *reprinted in* 10 LA RAZA L. J. 363 (1998) (using critical theory to deconstruct the liberal myth of an incompatible merit/bias binary).

race).[51] But, of course, these shifting constructions of *Latinidad* (Latina/o-ness) only help to reinforce the LatCrit tenet that race is a social construct,[52] and as such varies according to lens.[53] The racialization of Latinas/os as a single-non-White race produces our marginalization within the United States borderlands. However, in the nations of Latin America the "single-mixed-race" construct enforces White Supremacy by denying the existence of socially constructed racial differences and enforced racial privilege(s). As Hugo Rojas points out, this reduces racial minorities, such as indigenous peoples, to invisibility, and thus leaves them powerless within the legal/political system. García-Villegas underscores the concept that critical theorists can only empower the diverse members of their societies by focusing both on the individual and on his/her legal/political/social location within the nation as a whole.

These two essays balance each other quite well. García-Villegas wants to empower the marginalized "other," but warns that this can best be accomplished within the national social and legal structure. Rojas begins to explore how liberalism, with a multicultural sensitivity, might provide true constitutional citizenship for Chilean indigenous peoples. Both authors fully capture the anti-essentialist nature of LatCrit Theory. In particular, García-Villegas focuses "LatCrit antiessentialist, antisubordination perspectives on the particularities of Latin American realities [that] might inspire new theoretical insights and enable new coalitional possibilities among subordinated groups, both within Latin America and across other regions."[54] This is precisely what the panel was intended to bring to the forefront of our conference. Rojas, likewise

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51. This is a common image in Latin-American popular culture. *See, e.g.*, LA SONORA PONCEÑA, DESCENDENCIA, 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."* (emphasis added). 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.").

52. "Race is social, in the sense that the groups commonly recognized as racially distinct have their genesis in cultural practices of differentiation rather than in genetics, which plays no role in racial fabrication other than contributing the morphological differences onto which the myths of racial identity are inscribed." Lopez, *Retaining Race, supra* note 35, at 281; *see also* L. LUCA CAVALLI-SFORZA ET AL., THE HISTORY AND GEOGRAPHY OF HUMAN GENES (1994) (discussing the lack of biological basis for racial categories); MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1980S (1986); Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994).

53. *See* Berta Esperanza Hernández-Truyol, *Indivisible Identities: Culture Clashes, Confused Constructs and Reality Checks*, 2 HARV. LATINO L. REV. 199, 207 (1997) (suggesting imposed social constructs are dynamic and tend to change based on the racialized, gendered frame of reference of the actor).

54. *See* Substantive Program Outline, *supra* note 8.

working within the context of the panel, challenges the single-race construct of Latin America, to remind us all of the strong but marginalized indigenous element in the Americas.

B. *Plenary Panel I: Implications of Indigenous Activism*

Susan Scafidi, who participated in Plenary Panel One:[55] *Implications of Indigenous Activism*,[56] argues that the legal construction of indigenous

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55. Generally, the plenaries were intended to:

> [R]eflect a delicate balance between the need to revisit issues of fundamental and continuing importance to our multiply diverse communities and the need to chart new directions, center particular struggles and integrate new issues and perspectives into evolving LatCrit social justice agendas. Both are crucially important in deepening the theoretical insights and expanding the solidaristic commitments already achieved through the collective discourse and community-building efforts of prior LatCrit conferences.

Id.

56. The plenary was described in the Substantive Program Outline as follows:

> In our theorizing about identity, U.S. Latinos/as have focused on naming and analyzing the superordinant practices of White culture and examining relations among ourselves . . . as well as our relations to and with other subordinated groups within the U.S. . . . As LatCrits, we are just now exploring the political and economic benefits of a pan-ethnic Latina/o identity while learning of the complex experiences that both connect and divide the different populations that fit within the Latina/o umbrella.
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> The rest of the continent is witnessing seismic changes in the struggles associated with ethnic identities. . . . At least eight Latin American nations—Bolivia, Colombia, Ecuador, Guatemala, Mexico, Nicaragua, Peru, and Paraguay—now recognize the ethnic pluralism of their societies by including specific constitutional provisions granting varying degrees of autonomy to the indigenous groups within the national borders . . . .
>
> This identity, asserted by indigenous peoples, is as distinct from the mestizo/a majority as it is from the criollo/a minority (i.e., the White European elites) . . . .
>
> What does this hemispheric dialogue and struggle mean for U.S. Latinas/os? How is the Latina/o struggle for voice, vote, and power in the U.S. understood south of our borders? What does this struggle mean for LatCrit theory and practices? What can we learn when such concepts as mestizaje and hybridity are challenged and then revived by Latin American theorists . . . ? Latin American theorists, . . . are drawing on concepts such as performativity, mimicry, and national myths to deepen the understanding of the construction of national identities in Latin America. LatCrit theory can be strengthened and broadened by exploring its links to this new theorizing about the identities that define the various groups in Latinas'/os' countries of origin and that also define ethnicity as a concept and by extension give the "Lat" in LatCrit more specific meanings.

Id.

peoples in the former Spanish Americas, mostly influenced by Juan de Solórzano Pereira,[57] is flawed because the European-Spanish legal culture in which the original rules developed was markedly different from the colonial Spanish-Indigenous culture imposed in the Americas. Moreover, the difference between the more "homogeneous" Spanish culture in the Iberian peninsula and the more racially and culturally diverse Spanish-Indigenous culture(s) in the Americas, is one of the reasons for the continued subordination of the Latin-American indigenous peoples. Scafidi correctly diagnoses the result: the legal construction of "indians"[58] in the Americas that was imposed by the Spanish *conquistadores* (conquerors) was flawed and has left the indigenous peoples as a permanent underclass in the new nations of the Americas. Scafidi argues that the subordination of the indigenous peoples is the product of a failure to adapt Spanish laws, which were developed in the context of a relatively homogeneous Spain in the 17th century, to the more complex social realities of the Americas. Scafidi's analysis suggests that the development of the *Leyes de las Indias* (the Laws of the Indies, the Spanish Americas) was a legal blunder—a failed comparative experiment—rather than an affirmative attempt legally to control the indigenous peoples.

However, rather than failing properly to analogize, perhaps Solórzano achieved exactly what he set out to do: to justify, through law, the colonial occupation of the Americas and the subordination of the indigenous peoples to the Spanish colonizers. The indigenous peoples are still subordinated because one mostly White, Spanish-speaking, Christian postcolonial dominant group has replaced a White, Spanish-speaking, Christian colonial dominant group. Now, like then, the "White" (male) elite also benefits from continuing the subordination of the indigenous peoples. Therefore, the reason for the continued subordination of the indigenous peoples is not some fundamental failure of analogy or comparative methodology to bridge the cultural gap between Spanish and colonial cultures.[59] The real problem is that Spanish *Leyes de las Indias*

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57. Susan Scafidi, *Old Law in the New World: Solórzano and the Analogical Construction of Legal Identity*, 55 FLA. L. REV. 191 (2003) (indicating that her "essay examines the efforts of seventeenth-century Spanish jurist Juan de Solórzano Pereira to clarify Native American legal identity within the Spanish social order through the use of legal analogy").

58. Both generally and in law, Spanish *conquistadores* referred to the new colonies of the Americas as the "*Indias*" (Indies) and to the indigenous inhabitants thereof as *Indios* (Indians). *See* IV DICCIONARIO ENCICLOPÉDICO DE DERECHO USUAL 389 (1998) (explaining that use of Indias was due to Columbus' error in mistaking the islands of the Caribbean and the Eastern coast of the Americas with the Eastern coast of the Indian subcontinent); *see also id.* at 392 (noting that "Indio" refers to indigenous peoples of what the Spanish called the Indies).

59. Most comparativists accept the necessity of "bridging the cultural gap" when doing any transnational work. *See, e.g.*, Roger J. Goebel, *Professional Qualification and Educational Requirements for Law Practice in a Foreign Country: Bridging the Cultural Gap*, 63 TUL. L. REV.

intentionally replicate the essentialized normativities of *13th century*[60] Spanish society: *moros* (Moors, Muslims), Jews, and *cristianos* (Christians).[61] By focusing on the 17th century Spanish society in which Solórzano performed his duties, Scafidi perhaps misses the real analogy intended by Solórzano, between 13th century *moros* (Muslims) and Jews in Spain on the one hand, and 17th century *indias/os* in the Americas, on the other. Re/viewed in this manner, the *conquistadores* merely duplicated the social hierarchies they had at "home" in Spain in their newly

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443, 444-54, 508 (1989). Accordingly, the "cultural, social, political and economic systems" in which the law must be applied are essential when instructing a client on the "relevant considerations" of international legal transactions. *Id.* This matter is discussed further below in Part III, *infra* notes 99-102 and accompanying text.

60. The 13th century might make a better historical frame of reference because this is the period during which the *Partidas*, the most important "national" code in Spain and its colonies, were produced, starting in 1265. It is also important to note that this is a period of the *Reconquista*, the process through which the Catholic kingdoms defeated and expelled Muslims and Jews from the Iberian Peninsula. II DICCIONARIO DE LA LENGUA ESPAÑOLA 1743 (2001) (defining "Reconquista," in upper case, as generally referring to "the recovery of the Spanish territory invaded by the Muslims . . . the culmination of which was the taking of Granada in 1492" (author's translation)).

61. The *Código de las Siete Partidas* has been described as "a work generally known as a medieval legal treatise and called 'the first extensive compilation of western secular law since Justinian.'" MARILYN STONE, MARRIAGE AND FRIENDSHIP IN MEDIEVAL SPAIN 1 (1990) (*citing* Charles Sumner Lobingier, *Introduction, in* ALFONSO EL SABIO, LAS SIETE PARTIDAS vi (Samuel Parsons Scott trans., 1931)). They were drafted under the patronage and probably the supervision of King Alfonso X, El Sabio, of Spain during the thirteenth century. *Id.* at 1-22. Some experts believe that the Partidas did not become effective law until the 1348 *Ordenamiento de Alcalá*, see, e.g., RENÉ DAVID & JOHN E. C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW 57 (3d ed. 1985), but others hold that they "were being used extensively as a book of reference by royal judges before 1348." STONE, *supra* at 10 (*citing* EVELYN S. PROCTER, ALFONSO X OF CASTILLE, PATRON OF LITERATURE AND LEARNING 51 (Reprint 1980)).

> Francisco Martínez Marina, author of a prominent essay about the history of Spanish legislation, claimed that the large number of *Partida* manuscripts with marginal notes in existence during the eras of Alfonso X, Sancho IV, Fernando IV and Alfonso XI suggests that the provisions of the *Siete Partidas* were discussed in universities and debated by lawyers and judges prior to 1348.

Id. (*citing* Francisco Martínez Marina, *Ensayo histórico-crítico sobre la legislación y principales cuerpos legales de los reinos de Leon y Castilla especialmente sobre el código de las Siete Partidas de don Alfonso el Sabio, in* OBRAS ESCOGIDAS DE DON FRANCISCO MARTÍNEZ MARINA 194 (1966)). There is strong historical evidence that the Spanish nobility objected to the *Partidas* because they appeared to limit the nobility's power and importance, both during the reign of Alfonso X, and that of Alfonso XI two generations later. *Id.* at 17. The noblemen appeared to regard some of the objectionable rules as the product of non-Spanish thinking imported from the Paris and Bologna schools. *Id.* This may account for the debate regarding their effective date.

conquered territories, it is just that the haves are essentially the same, and the have-nots are of slightly different shades and religions.

Nevertheless, regardless of the historical and social frame of reference, Scafidi engages us in an important discussion about the legal construction of the indigenous peoples of the Americas that was imposed by the Spanish *conquistadores*.[62] The "noble savages" Columbus encountered in the Caribbean have collectively become known as the Taino people.[63] The "cannibals" that Columbus warned of were the island Caribs, who posed the most consistent indigenous military challenge to Spanish control of the Caribbean.[64] To these, of course, one must add the large indigenous cultures of the continental Americas who were conquered by the Spanish because, unlike the Taino and Caribs, these cultures were not totally exterminated during the process of conquest. They are thus the principle objects of the laws that Scafidi studies.

She deftly points out how the Spanish political culture used juridical concepts that had a long history within the Christian Spanish legal order and, by analogy, developed a system to apply to the newly conquered indigenous peoples of the Americas.[65] This system is based on the natural inferiority of the colonized indigenous peoples relative to the White Spanish *conquistadores*. However, it also reflects a paternalistic charity towards these wretched wards[66] that is comparable to the medieval Catholic Canon Law and its *ratione personarum* jurisdiction over "wretched persons" and its "protection" of Jews.[67] The seemingly

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62. Scafidi, *supra* note 57.

63. *Id.* at 198.

64. "Columbus encountered Tainos throughout most of the West Indies. . . . A second peripheral group, the Island-Caribs, lived on the islands from Guadeloupe southward, separating the Tainos from South America." IRVING ROUSE, THE TAINOS: RISE & DECLINE OF THE PEOPLE WHO GREETED COLUMBUS 5 (1992). The Caribs and the Spanish fought a type of "guerrilla" war during the early 16th Century, with many raids on Puerto Rican soil, and military response from the Spanish. FEDERICO RIBES TOVAR, A CHRONOLOGICAL HISTORY OF PUERTO RICO 30-99 (1973). By the end of the century, the Caribs were no longer raiding. *Id.* The Taino on the other hand, were enslaved in the *encomiendas*, and by the 18th century, were almost completely gone. *See infra* note 68.

65. Scafidi, *supra* note 57, at 198.

66. *Id.*

67. In Catholic Canon Law, the church law and ecclesiastical court jurisdiction was divided into

> jurisdiction over certain kinds of persons (*ratione personarum*, "by reason of persons") and jurisdiction over certain types of conduct or relationships (*ratione materiae*, "by reason of subject matter"). The church claimed "personal jurisdiction" over: (1) clergy and members of their households; (2) students; (3) crusaders; (4) *personae miserabiles* ("wretched persons"), including poor people, widows, and orphans; (5) Jews, in cases against Christians; and (6) travelers, including merchants and sailors, when necessary for their peace and safety.

"charitable" language of the laws masked a horrible reality.[68] Like all social and legal constructs that are based on the alleged "natural" superiority of one group over another, the Spanish colonial model has left the *personas nativas/os americanas/os* (persons native to the Americas) as a permanent underclass within the new nations of this hemisphere.

Scafidi indicates that Critical Legal theorists attack analogical approaches to law[69] because they are "incapable of yielding just results in a heterogeneous society."[70] She focuses on the legal construction of

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Harold J. Berman, *Law and Revolution: The Reformation of the Western Legal Tradition*, *in* CIVIL LAW TRADITION, *supra* note 17, at 298.

68. For example, the *encomienda* (to entrust) system was supposedly a benign process of putting the indigenous persons of Puerto Rico to work and to educate them into Christianity. In reality, it was brutal slavery. On December 20, 1503, Queen Isabella of Spain issued a Royal order instructing the Governor of Puerto Rico to "*compel* and *force* the said Indians to associate with the Christians of the island and to work on their buildings, and to gather and mine the gold and other metals, and to till the fields and produce food for the Christian inhabitants and dwellers of the said island." THE PUERTO RICANS: A DOCUMENTARY HISTORY 18-19 (Kal Wagenheim & Olga Jiménez de Wagenheim eds., 1994). The edict itself identified the problem that it was trying to resolve as follows: "We are informed that because of the excessive liberty enjoyed by said Indians they avoid contact . . . with the Spaniards to such an extent that they will not even work for wages, but wander about idle, and cannot be had by the Christians to convert to the Holy Catholic Faith . . . ." *Id.* While the Tainos were ostensibly considered "free" men under the edict, the reality was that they were enslaved. *Id.* at 19-22. By the 18th Century most of the Tainos native to Puerto Rico were almost completely gone. PEDRO MALAVET-VEGA, HISTORIA DE LA CANCIÓN POPULAR EN PUERTO RICO (1493-1898), at 96 (1992) (noting that in 1509, 60,000 Tainos were given into the *encomiendas*; only 14,636 were left by 1515; 1,537 were left by 1530; by 1778, only 2,302 Tainos were counted as living mostly in the central mountains of Puerto Rico).

69. For example, Trina Grillo and Stephanie Wildman have described "the dangers inherent in . . . analogizing sex discrimination to race discrimination." *See, e.g.*, Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or Other-isms)*, *in* CRITICAL RACE THEORY: THE CUTTING EDGE 566 (Richard Delgado ed., 1995). Grillo and Wildman explain that

> comparing sexism to racism perpetuates patterns of racial domination by marginalizing and obscuring the different roles that race plays in the lives of people of color and of whites. The comparison minimizes the impact of racism, rendering it an insignificant phenomenon—one of a laundry list of-isms or oppressions that society must suffer.

Id.

70. Scafidi, *supra* note 57, at 202. This claim raises complex questions. As Grillo and Wildman explain:

> Given the problems that analogies create and perpetuate, should we ever use them? Analogies can be helpful. They are part of legal discourse, as well as common conversation. Consciousness raising may be the beginning of knowledge. Starting with ourselves is important, and analogies may enable us to understand

subordination for the indigenous peoples of the Americas.[71] Scafidi's project fits within the LatCrit enterprise and its goal of helping to empower the marginalized. Like Scafidi, LatCrit seeks to identify the continuing subordination of entire groups and classes in any country, but most especially in the real or imagined Latina/o "homelands"[72] at the start

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> the oppression of another in a way we could not without making the comparison. Instead of drawing false inferences of similarities from analogies, it is important for whites to talk about white supremacy, rather than leaving all the work for people of color. Questions remain regarding whether analogies to race can be used, particularly in legal argument, without reinforcing racism/white supremacy. There are no simple answers to this thorny problem. We will have to continue to struggle with it, and accept that our progress will be slow and tentative.

Grillo & Wildman, *supra* note 69, at 570.

71. As discussed above, Scafidi argues that 17th century Spanish society was relatively heterogeneous and that it was therefore an error to apply the laws of that heterogeneous society to the multicultural Americas. Nevertheless, while the Spanish society of the 17th century was indeed socially constructed as heterogeneous, after a long process of *Reconquista* and internal persecution, the laws that Scafidi critiques had their origin in the diverse Iberian peninsula of the 13th century. Therefore, I believe that she has chosen an example that does *not* support the claim that analogy cannot produce adequate or progressive results in a heterogeneous society. Rather, Spanish colonial laws are an example of the *replication* of privilege to marginalize the "other," with essentially the same privileged group (White, Christians), and a different "other" (indigenous peoples). *See* Berta Esperanza Hernández-Truyol, *The Latindia and Mestizajes: Of Cultures, Conquests, and LatCritical Feminism*, 3 J. GENDER RACE & JUST. 63, 77 (1999).

> [In] New Spain (Mexico) where the Spanish were a white minority, Spanish attitudes toward the Native population paralleled the Spanish xenophobic expulsion of Jews and Arabs from Spain . . . .
>
> [T]he Spaniards in Mexico (as well as in other places) established a complex system of racial categorization that included the prohibition of public office holders from having a "taint" of Indian, Arabic, or Jewish blood.

Id. (footnotes omitted).

72. The term "homeland" is loaded with positive and essentialized meanings, depending on lens. *Compare* Pedro A. Malavet, *The Accidental Crit II: Culture and the Looking Glass of Exile*, 78 DENV.U. L. REV. 753, 763 (2002) ("For me, 'home' is Ponce, Puerto Rico. No matter how far away from it I may go, my personal, professional and emotional travels always lead me back to Ponce."); *with* Perea, *Five Axioms*, *supra* note 35, at 240 ("'National origin's' focus on ancestral lands and traits outside the United States facilitates the attribution of foreignness to Latinos/as, our 'symbolic deportation' from within these borders. Thus we are removed from our full and constitutive role in a plenary conception of American identity."). Robert Chang explains that Latinas/os and Asian-Americans share the imposition of the essentialized normativities of nativists who construct their fellow U.S. citizens of color as foreign. Chang, *supra* note 23, at 58. The nativists then dream of the "return" of the "foreign" "other" to the imaginary homeland imposed by the nativist, or at least that the "foreigner" never will realize full citizenship within the U.S. "Where are you from," is quickly, albeit often impliedly, followed by "When are you going back?" *Id.* (citation omitted). For discussion of cultural nationhood, see also *infra* notes 110-11 and accompanying text.

of the 21st century. LatCrit thus seeks to understand how subordination, such as that described by Scafidi, is accomplished, because that is a necessary prerequisite for its antiessentialist mission. LatCrit Theory will benefit from proper historical analysis of the legal construction of identity perpetrated by the Spanish colonizers on the nations of Latin America because such constructs have enduring influence on the identity of Latinas/os even here in the United States.[73] Moreover, because the process of legal/social construction of subordination discussed by Scafidi is similar to the social construction of race in the United States,[74] this work also offers us yet another perspective on how to tear down existing power hegemonies that will be relevant to LatCrit praxis within the United States borderlands.

C. *The TWAIL/NAIL Concurrent Panel*

Jorge Esquirol and Michael Wallace Gordon participated in the third concurrent panel, titled TWAIL/NAIL:[75] Latin American Legal Theory.[76]

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73. For example, colonial racial hierarchies often become part of Latina/o identity and constitute internalized oppression(s). *See infra* note 106 and accompanying text.

74. *See supra* notes 37, 52 and accompanying text.

75. Elizabeth Iglesias has defined TWAIL/NAIL: "Third World Approaches to International Law" (TWAIL) and "New Approaches to International Law" (NAIL). Elizabeth Iglesias, *Out of the Shadow: Marking Intersections in and Between Asian Pacific American Critical Legal Scholarship and Latina/o Critical Legal Theory*, 40 B.C. L. REV. 349, 372 n.65 (1998).

76. The panel was described as follows:

> The other two sets of concurrent sessions this year features [sic] four concurrent panels each. Like the plenary panels, these concurrent sessions reflect the desire for continued attention to matters of recurring significance and the effort to mark new terrain for anti-subordination critique. The concurrent panels, as indicated more fully in the attached Program Schedule, address issues ranging from continuing LatCrit efforts to engage and incorporate critical perspectives on international and comparative law, to explorations of the current day consequences of Cubans' identities within and outside the patria, Puerto Rico's colonized history, and the political economies of culture, desire and latinas' bodies.
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> As in prior LatCrit conferences, both the concurrent panels and the concurrent workshops are crucial and integral events that enable conference participants to join in relatively intimate small-group settings to carry forward ideas from prior LatCrit conferences, or from conversations begun in plenary sessions during the conference, or to break new ground that may serve as points of programmatic follow-up in future LatCrit conferences. We hope you will take advantage of, and contribute to, the synergies that are so often produced by the blend of plenary and concurrent programming and so clearly evident in the Symposium proceedings that have resulted from these blends at prior LatCrit conferences.

Substantive Program Outline, *supra* note 8.

Michael Gordon focuses on the many mis/conceptions about Latin American legal culture among United States' legal practitioners and academics. He correctly attributes these false constructs both to United States legal/cultural imperialism and to a failure to apply real comparative methodology. Because he is one of the preeminent comparativists in the United States today,[77] Gordon acts as an important intellectual bridge between North and South America, especially between the United States and the nations south of the Rio Grande.

In his all too brief remarks, Professor Gordon provides a series of illustrations of the anglo-saxon, male, protestant, pro-common law American vision of a peculiarly legal form of cultural imperialism that displaced Spanish law from those parts of what are today the United States, but were Spanish prior to the Treaty of Guadalupe Hidalgo.[78] However, Gordon provides a more optimistic view of the present and hopefully the future, particularly in the area of Public International Law. He specifically cites the North American Free Trade Agreement (NAFTA)[79] as reflecting a more pluralistic vision of law and legality that

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77. *See generally* RALPH H. FOLSOM ET AL., INTERNATIONAL BUSINESS TRANSACTIONS IN A NUTSHELL (2000); RALPH H. FOLSOM ET AL., INTERNATIONAL TRADE AND INVESTMENT IN A NUTSHELL (2000); RALPH H. FOLSOM ET AL., INTERNATIONAL BUSINESS TRANSACTIONS: A PROBLEM-ORIENTED COURSEBOOK (1999); INTERNATIONAL BUSINESS TRANSACTIONS: A READER (Ralph H. Folsom ed., 1997); MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS IN A NUTSHELL (1999) [hereinafter GLENDON ET AL., NUTSHELL]; MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS: TEXT, MATERIALS AND CASES ON THE CIVIL AND COMMON LAW TRADITIONS (1994).

78. Michael Wallace Gordon, *Legal Cultures of Latin America and the United States: Conflict or Merger*, 55 FLA. L. REV. 115 (2003). As a result of the Treaty, the U.S. acquired "present-day Texas, California, Arizona, New Mexico, Nevada, and parts of Utah, Colorado and Kansas." JUAN F. PEREA ET AL., RACE AND RACES, CASES AND RESOURCES FOR A DIVERSE AMERICA 253 (2000); *see also* Treaty of Peace, Friendship, Limits, and Settlement Between the United States of America and the Mexican Republic, Treaty of Guadalupe Hidalgo, May 30, 1848, U.S.-Mex., art. IX, 9 Stat. 922, 930 [hereinafter Treaty of Guadalupe Hidalgo]. On the Treaty of Guadalupe Hidalgo, see generally THE LEGACY OF THE MEXICAN AND SPANISH-AMERICAN WARS: LEGAL, LITERARY AND HISTORICAL PERSPECTIVE (Gary D. Keller & Cordelia Candelaria eds., 2000); RICHARD GRISWOLD DEL CASTILLO, THE TREATY OF GUADALUPE HIDALGO: A LEGACY OF CONFLICT (1989); Symposium, *Understanding the Treaty of Guadalupe Hidalgo on its 150th Anniversary*, 5 SW. J.L. & TRADE AM. 1 (1998). LatCrit scholar Guadalupe T. Luna has written extensively about the Treaty of Guadalupe Hidalgo. *See, e.g.*, Guadalupe T. Luna, *Chicanas/os, "Liberty" And Roger B. Taney*, 12 U. FLA. J.L. & PUB. POL'Y 33 (2000); Guadalupe T. Luna, *"This Land Belongs To Me:" Chicanas, Land Grant Adjudication, and the Treaty of Guadalupe Hidalgo*, 3 HARV. LATINO L. REV. 115 (1999); Guadalupe T. Luna, *Beyond/Between Colors: On the Complexities of Race: The Treaty of Guadalupe Hidalgo and* Dred Scott v. Sandford, 53 U. MIAMI L. REV. 691 (1999); Guadalupe T. Luna, *En El Nombre De Dios Todo-Poderoso: The Treaty of Guadalupe Hidalgo and Narrativos Legales*, 5 SW. J. L. & TRADE AM. 45 (1998).

79. On the Treaty, see generally RALPH FOLSOM ET AL., NAFTA: A PROBLEM-ORIENTED COURSEBOOK (2000); RALPH H. FOLSOM ET AL., HANDBOOK OF NAFTA DISPUTE SETTLEMENT (1998).

better respects the different legal systems of its member states: Mexico's civil law system, Canada's partially hybrid common law/civil law tradition, and the common law rules of the United States. Specifically, he points out that the dispute-resolution provisions of the agreement adopt the substantive legal rules and standards of review of each member state.[80] The NAFTA has been the subject of LatCrit discussion, not all of it positive,[81] but it is clearly an important area for LatCrit study.

Jorge Esquirol challenges the "Law and Development" scholarly view of Latin America.[82] This law and development model has endured well past the shelf-life of that discredited movement. Professor Esquirol refers

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80. Gordon, *supra* note 78, at 118-19.

81. *See, e.g.*, José E. Álvarez, *Critical Theory and the North American Free Trade Agreement's Chapter Eleven*, 28 U. MIAMI INTER-AM. L. REV. 303, 312 (1997) ("NAFTA investment chapter [overly] reflects U.S. laws and perspectives."); Elizabeth M. Iglesias, *Human Rights in International Economic Law: Locating Latinas/os in the Linkage Debates*, 28 U. MIAMI INTER-AM. L. REV. 361, 369-71 (1996) (critiquing the "labor accord portion of the NAFTA").

82. Jorge L. Esquirol, *Continuing Fictions of Latin American Law*, 55 FLA. L. REV. 41 (2003). David Trubek has provided a thorough, critical analysis of law and development:

> The law and development movement was a sort of export branch of Imperial legal culture. In the 1960's American legal academics, encouraged by massive grants from foundations and government agencies, turned to the study of the role of law in Third World "development." . . .
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> The law and development movement took the value of modern law to be self evident. "Modern law" usually meant the codes or new statutory enactments which third world governments had imported from other, presumably more advanced, nations. Usually, these codes or statutes set forth norms that had little relation to everyday life in the countries of Africa, Asia, and Latin America. Law and development scholars assumed that adoption and implementation of these (often imported) modern laws marked development or progress. And they treated as a "problem" the fact that social relations in Third World countries did not conform to these newly enacted norms. This equation of legal standards with progress, and the definition of non-compliance as a problem, led these scholars to spend a considerable amount of time thinking about how we could develop a way to measure—and thus increase—the "penetration" of so-called modern law.
>
> Compressed in that single word are a whole set of assumptions and attitudes that have come under attack. Critics have challenged the following assumptions: that any body of law contains a single set of principles or rules whose impact can be unproblematically measured; that law emanates from some central source and then is implanted in society; that modern law (whatever that is) is normatively desirable or historically inevitable; and, finally, that the social scientific task of measuring "penetration" is a progressive task. It does not require much sophisticated feminist analysis to see how the use of the term "penetration" crystalized the hegemonizing, dominating, and patriarchal nature of imperial legal culture in the 1960's.

David M. Trubek, *Back to the Future: The Short, Happy Life of the Law and Society Movement*, 18 FLA. ST. U. L. REV. 4, 37-38 (1990) (footnotes omitted).

to developmentalism and developmentalists to describe, respectively, the Law and Development scholarship of the 1960s and 1970s, and the United States academics who produced it.[83] Comparativists in the United States, and elsewhere, have long recognized many of the shortcomings of law and development.[84] Professor Esquirol thus engages us in a well-crafted, strong discussion and critique of the legal form of cultural imperialism perpetrated by the North upon the nations of Latin America.

Esquirol argues that the developmentalist view endures in the United States' memory because it fits in with American stereotypes about "corrupt" and, more generally, inferior Latin American cultures.[85] This essentialized view in turn affects how Americans[86] interact with Latin America. Additionally, the construct is embraced by existing dominant groups in Latin America who thus protect their privilege and continue to subordinate their own people. This marginalization from outside and from within, especially in and through law, serves only to perpetuate essentialized normativities—even within a culture that to the North American eye is an "other."

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83. *See generally* Esquirol, *supra* note 82.

84. For a succinct, critical note on law and development, see CIVIL LAW TRADITION, *supra* note 17, at 36-37.

85. Elizabeth Iglesias has described this phenomenon:

> By the term development discourse, I refer to a cluster of arguments and representations that organize our understandings of the causes and cures of Latina/o economic and political subordination around accounts linking subordination to underdevelopment and underdevelopment to the persistence of social practices, relations, and expectations that are represented as elements of Latin [American] culture.

Iglesias, *supra* note 81, at 377-78.

86. 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).

A new paradigm is needed that promotes full—both legal and economic—*desarrollo* (development). This paradigm should reject the assumption of the irrelevance of the official legal system as a positive element in the daily lives of the *americanas/os* (the people of the Americas). To the contrary, the new approach should embrace the official legal system as a catalyst for change that has the capacity to empower the marginalized. Accordingly, the process of reform should not be designed to bypass the local legal system and supplant it with a supranational alternative; rather, the end-goal should be to allow formerly marginalized peoples to participate fully in the national legal system. Reform, rather than replace the national systems; advise and empower the citizens of Latin American nations; do not presume to impose and thereby control those systems and citizens.

Esquirol provides a critical defense of the legal cultures of the nations of Latin America through a well-researched and thoughtful critique of the law and development movement as well as its more contemporary cousin, modern developmentalism. He articulates that both the shortcomings of this movement and its demise are too often constructed in culturally imperialistic ways that underestimate or totally ignore the strength and nature of individual Latin American legal systems.[87] Yet, Esquirol does not ignore the negative forces and existing hegemonies within Latin American societies. Rather, he explains how these forces are an altogether ignored element that led to the failure of law and development theory and its attempted implementation as a single model for an entire continent.[88]

This provocative and powerful critique captures the theme of the conference, and engages LatCrit in developing a theoretical blueprint to empower the nations of the Americas, with a progressive approach to legal reform and to law more generally. Esquirol captures the spirit and purpose of LatCrit by reconceptualizing the law and society movement, and removing it from the previously United States-centric, paternalistic view, and placing it in the context of the diverse legal systems of the nations of Latin America. The central theme of his critique is that by accepting the "duality," the separation between the formal legal system and the so-called informal social/legal sector,[89] critical theorists are abandoning the field of

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87. The plural is especially important because it is the national, that is, local identity of law that Esquirol explains defines the individual legal systems of the Americas. Hence, he challenges the homogenized notion that "Latin America" is a single territory or a single legal system. Esquirol, *supra* note 82, at 43.

88. *Id.* at 80.

89. In a work referenced by Esquirol, Hernando de Soto describes "informality" as a formally illegal process "designed to achieve such essentially legal objectives as building a house, providing a service, or developing a business." HERNANDO DE SOTO, THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD 11 (June Abbott trans., 1989). The "problem" that produces the informal economy is the state, concludes de Soto: "We can say that informal activities burgeon

formal law to the traditionalist, conservative power brokers that are thought to control it. In so doing, progressives are giving up any chance of effective legality, because informality—the conduct of trade outside the official legal system—[90]will not work as a long-term, predictable legal system.[91]

Esquirol articulates a solution, a progressive form of "legal nationalism" that conceives of "formalism . . . as the autochthonous mode of legal interpretation in the region."[92] Here, Esquirol's work is reminiscent of the debate in comparative law over the effect of "certainty" as a positive legal principle in fascist Italy and Nazi Germany.[93] "Sophisticated dichotomists," according to Esquirol, breath new life into the duality's construct of a dichotomy between the formal and informal legal sectors in all the nations of Latin America by recognizing the existence of the separation without neglecting the official legal system as

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when the legal system imposes rules which exceed the socially accepted legal framework—does not honor the expectations, choices, and preferences of those whom it does not admit within its framework—and when the state does have sufficient coercive authority." *Id.* at 12. Accordingly, there is a duality, a disjunction, between the formal legal system and the informal sector.

90. Hernando de Soto further explains the activities of the informal sector as follows:

> The concept of informality used in this book is based on empirical observations of the phenomenon itself. Individuals are not informal; their actions and activities are. Nor do those who operate informally comprise a precise or static sector of society: they live within a gray area which has a long frontier with the legal world and in which individuals take refuge when the cost of obeying the law outweighs the benefit. Only rarely does informality mean breaking *all* the laws; most individuals disobey specific legal provisions . . . .

Id.

91. Esquirol presents LatCrit with a real challenge to its convictions. *See generally* Esquirol, *supra* note 82. Progressive social and cultural consciousness are positive forces, but he questions whether the theoretical paradigm makes it impossible for praxis to work. While not discounting the dangers of legal pluralism in the hands of a repressive reactionary regime, Esquirol nonetheless challenges progressives in and out of the Americas to re-engage with the official legal system and formalist legal scholarship. *Id.* at 95. While the field is an inherently dangerous one, it is also the only possible source of a long-term solution to the problems of informality in the nations of the Americas. *Id.* Accepting informality is not the solution. Rather, we progressives must bridge the gap between the formal legal system and the pluralistic legal cultures within the nation states of the Americas. *Id.* at 96-97.

92. *Id.* at 107.

93. The long-held perception is that the formal use of certainty to oppose fascism allowed Italian judges to become a force against the excesses of the Mussolini regime, whereas the abandonment of it in Germany turned the German judiciary into a willing tool of Hitler's regime. *See* CIVIL LAW TRADITION, *supra* note 17, at 998-1004 (comparing the ability and willingness of judges in Germany and Italy to resist their respective country's fascist dictatorships by using or abandoning the principle of certainty in the law).

part of any sensible solution.[94] In other words, the duality is not a necessary part of the legal cultures of Latin America, it is rather a problem that prevents everyone within those cultures from working within an effective, pluralistic formal legal system.

Esquirol thus challenges the notion that Latin American cultures are by nature lawless or chaotic. His work, and the scholarship he studies,[95] may provide us with the tools for a paradigmatic shift[96] in the discourse of Latin American legal cultures. One that must seek to bridge the gap between formal and informal rules, and create a single pluralistic legal culture within each Latin American nation.[97]

Both Gordon and Esquirol urge LatCrit to engage the cultures of the nations of Latin America from a position of knowledge. This requires real

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94. Esquirol, *supra* note 82, at 108.

95. Esquirol specifically discusses the work of Hernando de Soto, which identifies a lack of anarchy in the informal economy, that is, the informal sector is not a completely lawless sector, nor is it without rules, it is rather a marginalized group that has found it necessary to bypass the formal legal system. It is however important to note that laws, substantive legal rules, are part of both the formal and the informal legal system. *See generally* DE SOTO, *supra* note 89.

96. Philosophical paradigm shifts can be analogized to a process of religious conversion because they are fundamentally subjective processes.

> [A] scientific revolution occurs when one paradigm is replaced by another. Paradigm shifts cause scientists to view the world in new and different ways. During scientific revolutions, then, scientists experience perceptual shifts. According to Kuhn, the transition from one paradigm to another is a conversion experience that cannot be compelled by logical argument.

George A. Martínez, *Philosophical Considerations and the Use of Narrative in Law*, 30 RUTGERS L. REV. 683, 701 (1999) (footnotes omitted). Therefore, Professor Martínez concludes "[s]ince racial divisions are founded in something other than reason—i.e., deeply held prejudices and sentiments—perhaps it can only be undone by techniques, such as narrative, that do not depend on reason." *Id.* at 705 (footnotes omitted). Or are those calling for paradigm shifts simply appealing to common sense? *See* BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW COMMON SENSE: LAW, SCIENCE AND POLITICS IN THE PARADIGMATIC TRANSITION 518-19 (1995).

> My objective, therefore, was not to present the blueprint of a new order, but merely to show that the collapse of the existing order or disorder—which Fourier significantly called "subversive order"—does not entail barbarism at all. It means, rather, an opportunity to reinvent a commitment to authentic emancipation, a commitment, moreover, which, rather than being a product of enlightened vanguardist thought, unfolds as sheer common sense.

Id.

97. *See* Esquirol, *supra* note 82. While concerned about "foreign modeled realism" Esquirol acknowledges that it does provide voice to traditionally disenfranchised peoples within the formal legal system. *Id.* at 113. The dangers are that the discourse will not be tailored to the local legal culture and that the colonial crisis of self-confidence will endow foreign models with undue discretion that will create remedies not really effective within the legal systems of Latin America.

comparative study, as Gordon particularly urges, and a non-essentialist legal/political paradigm, as Esquirol writes. Gordon takes LatCrit to the trade perspective on Public International Law, which is clearly an important area for the exercise of LatCrit praxis. However, Esquirol provides an important warning with his extensive and strong critique of the law and development movement, and the enduring negative effects of its inherent construction of the legal systems of Latin American nations, as hopelessly de-linked from informal reality.[98] His strong analysis of the theoretical shortcomings of these theories will help to produce a new paradigm, informed by LatCrit Theory, that will result in praxis to empower the "informal" sector, rather than undermine the "formal" legal systems of the Americas.

III. CONTINUING LATCRITICAL ENCOUNTERS WITH CULTURE IN COMPARATIVE NORTH-SOUTH FRAMEWORKS

These new voices within LatCrit all had a common focus: Latin American cultures—more precisely the legal and social construction of cultures—and their relationship to legal theory and praxis. Because the frame of reference of some of the authors and of members of the audience cut across national borders, this is a comparative legal study of culture.

Comparative law is the study of law that is foreign to the observer; thus, it requires a particular methodological/scientific approach.[99] The distinction between comparative methodology and comparative legal science[100] will depend on the intended use of comparative study. For

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98. LatCrit has in fact studied trade issues. *See, e.g., supra* note 81. *See also* Colloquium, *International Law, Human Rights and LatCrit Theory*, 28 U. MIAMI INTER-AM. L. REV. 177 (1996) (noting that many of the articles in this colloquium focused on the intersection between human rights and trade and development).

99. Accordingly,

> Comparative Law is not a body of rules and principles. Primarily, it is a *method*, a way of looking at legal problems, legal institutions, and entire legal systems. By the use of that method it becomes possible to make observations, and to gain insights, which would be denied to one who limits his study to the law of a single country.
>
> Neither the comparative method, nor the insights gained through its use, can be said to constitute a body of binding norms, i.e. of "law" in the sense in which we speak of "the law" of Torts or "the law" of Decedents' Estates. Strictly speaking, therefore, the term Comparative Law is a misnomer. It would be more appropriate to speak of Comparison of Laws and Legal Systems . . . .

RUDOLPH B. SCHLESINGER ET AL., COMPARATIVE LAW 1 (5th ed. 1988) (footnotes omitted).

100. To the French, for example, comparative law (*droit comparé*) "is not a branch of the law, but very specifically a part of the science of law (*science du droit*)." JEAN-LUC AUBERT, INTRODUCTION AU DROIT 55 (5th ed. 1992) (author's translation); *see also* DAVID & BRIERLEY,

example, the practitioner of comparative legal science can assist persons in other fields of the law to adopt the comparative method, either to avoid the problems created by the misunderstanding of different legal cultures, or to illuminate effective courses of action that are based on a real understanding of those cultures. Comparative law is, in this context, an effective and sophisticated system of legal translation and education, because "[l]aw, taken alone and considered only in its strict theory, would give a false view of the way in which social relations, and the place therein of law, really operate."[101] A comparative legal theorist looking across national borders ought to provide a full understanding of the law and its underlying theory in their proper practical context.[102] Analogously, LatCrit is a jurisprudential school that seeks to illuminate legal praxis, and in this particular conference it focused on the cultural context of law across international boundaries.[103]

The cultures of the nations of the Americas are the products of physical and intellectual colonization,[104] which requires LatCrit to further develop

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supra note 61, at 2-3, 11-13.

101. DAVID & BRIERLEY, *supra* note 61, at 14.

102. Goebel, *supra* note 59, at 447-48. Professor Goebel notes that this is not a universally accepted tenet, *id.* at 454, but concludes, in my opinion correctly, that this is an important, even essential requirement for properly carrying out our professional duties to our clients. For a general discussion of the importance of understanding a legal system in its proper context, see generally DAVID & BRIERLEY, *supra* note 61; GLENDON ET AL., NUTSHELL, *supra* note 77; CIVIL LAW TRADITION, *supra* note 17, at 113-115; JOHN HENRY MERRYMAN & DAVID S. CLARK, COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN AMERICAN LEGAL SYSTEMS: CASES AND MATERIALS (1978); SCHLESINGER ET AL., *supra* note 99, at 1; KONRAD ZWEIGERT & HEIN KÖTZ, 1 INTRODUCTION TO COMPARATIVE LAW: THE FRAMEWORK 68 (Tony Weir trans., 2d ed., 1987).

103. LatCrit seeks to be heard by and to assist our colleagues from the South but, in seeking to hear other voices, LatCrit is also enriched by learning to look at itself from a different frame of reference. This is a process similar to a traditional comparativist turning the study of a foreign legal system into a critical look at their own rules and procedures. The comparative method will give a national scholar "a better understanding of his own law, assist in its improvement, and . . . open[] the door to working with those in other countries in establishing uniform conflict or substantive rules or at least their harmonisation." DAVID & BRIERLEY, *supra* note 61, at 11-12.

104. Homero Manzi put it as follows:

> *Nuestra pobre América, que comenzó a rezar cuando ya eran prehistoria los viejos testamentos . . . cuando la historia estaba llena de guerreros, el alma llena de místicos, el pensamiento lleno de filósofos, la belleza llena de artistas, y la ciencia llena de sabios . . . Todo lo que cruzaba el mar era mejor y, cuando no teníamos salvación, apareció lo popular para salvarnos.*

HÉCTOR GAGLIARDI, POR LAS CALLES DEL RECUERDO 5 (1970) (emphasis added). Author's translation:

> Our poor America (meaning the continents, not the one country), which started to pray when the testaments where pre-history . . . when history was full of warriors,

the paradox of the colonized: that the society that this process left behind after the end of the colonial period is both for better and for worse, the product of the mixture of people, cultures, and laws brought together by the colonization process. Accordingly, postcolonial societies often fall victim both to external cultural imperialism[105] and to internalized oppression.[106] The former colonized peoples intellectually and culturally colonize themselves and prey upon each other by adopting and perpetuating the essentialized hierarchies of the former colonial power. As a result of this process, the peoples *themselves* are the colonizers and the colonized.

> the soul full of mystics, thinking was full of philosophers, beauty was full of artists, and science was full of wise men .... Everything that crossed the sea was better and, just when we were beyond salvation, the popular [culture] appeared to save us.

Id. I realize that this quote is told from an Eurocentric perspective that might be read to exclude the Native American contribution, but the Native American is a crucial element in the Latin-American popular cultures that distinguishes us from the *conquistadores peninsulares* (*peninsulares* is a reference to persons born on the Iberian Peninsula).

105. Carla Freccero explains that:

> Imperialism can [occur] on different levels and usually involves territorial annexation, economic and political annexation, juridical (legal) annexation, and ultimately ideological and cultural annexation; these latter are often referred to as cultural imperialism .... [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.

CARLA FRECCERO, POPULAR CULTURE: AN INTRODUCTION 68 (1999) (citations omitted).

106. 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).

In its Latin American variant, the best challenge to the process of self-colonization is the development of the "popular," the home-grown forms of culture in all its variations, including recognizing that the dominant popular Latin American cultures co-exist with subordinated (mostly indigenous) systems, thus re/creating patterns of colonialism. The Sixth Annual LatCrit Conference, and the essays included in this cluster, are part of the process of challenging existing power hegemonies by recognizing the real and vibrant legal cultures of the nations of Latin America, albeit from a critical perspective. Together, they adopt a philosophically communitarian,[107] cultural studies[108] view of the term "culture," meaning that

> culture is a whole way of life (ideas, attitudes, languages, practices, institutions, structures of power) and a whole range of cultural practices: artistic forms, texts, canons, architecture, mass-produced commodities, and so on. Culture means the actual grounded terrain of practices, representations, languages, and customs of any specific historical society. Culture, in other words, means not only "high culture," what we usually call art or literature, but also the everyday practices, representations, and cultural productions of people and of postindustrial societies.[109]

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107. 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.*

108. Carla Freccero explains that the

> term "cultural studies" covers a range of theoretical and political positions that use a variety of methodologies, drawing on ethnography, anthropology, sociology, literature, feminism, Marxism, history, film criticism, psychoanalysis, and semiotics. Cultural studies is anthropological, but unlike anthropology, it begins with the study of postindustrial rather than preindustrial societies. It is like humanism, but unlike traditional humanism it rejects the distinction between so-called low culture and high culture and argues that all forms of culture need to be studied in relation to a given social formation. It is thus interdisciplinary in its approaches. Cultural studies "has grown out of efforts to understand what has shaped post World War II societies and cultures: industrialization, modernization, urbanization, mass communication, commodification, imperialism, a global economy."

FRECCERO, *supra* note 105, at 14 (footnotes omitted).

109. *Id.* at 13.

LatCrit encourages the development of the concept of cultural nationhood or citizenship to differentiate the colonized peoples from their colonial oppressors[110] because it can be used as a source of empowerment, consciousness, and pride.[111] But, this cultural exploration might produce legitimate concerns over the dangers of nationalism[112] and cultural imperialism. Accordingly, LatCrit Theory illuminates 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 supremacies promoted by the colonial power.

As all the essays in this cluster indicate, the post-colonial cultures of the Americas are the result of the racial, gender, and political mix created by the colonizer.[113] The Spaniards effectively designed the blueprint for the gender, cultural, religious, ethnic, and racial mix in the Spanish Americas by conquering and destroying the indigenous peoples, raping the indigenous women,[114] bringing in settlers, allowing immigration, and importing African slaves.[115] The Spanish then used law to define and organize their practically constructed local societies.

LatCrit takes a critical look at those cultures and recognizes and celebrates their strengths. But it also criticizes their shortcomings and provides the theoretical vision to resolve them. Thus, LatCrit, as a premier

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110. *See, e.g.*, Malavet, *supra* note 39 (explaining that the Puerto Ricans are culturally distinct from the normative U.S. society).

111. Hence, "othering" can be used as a subversive force that empowers marginalized colonial peoples. *See* Addis, ETHNICITY, *supra* note 42, at 127.

112. In speaking of the dangers of nationalism, Ronald Beiner ponders "[e]ither fascism is a uniquely evil expression of an otherwise benign human need for belonging; or there is a kind of latent fascism implicit in any impulse towards group belonging." Ronald Beiner, *Introduction, in* THEORIZING CITIZENSHIP, *supra* note 47, at 19.

113. Adeno Addis, in arguing against secession, identifies the need for co-existence: "Whether the multiplicity is the 'unintended' consequence of colonialism or the organizing principle, the defining feature, of the particular nation-state, the uncontroverted fact is that most nations are indeed multiethnic and multicultural." Addis, *supra* note 111, at 113.

114. I am not entirely comfortable with the use of the term "rape" here. As Margaret Montoya explains: "Choosing the right word [to describe 'sexual relations between the Spanish conquistadores and the indigenous women of the Americas'] is difficult . . .; perhaps rape is the accurate term, but it denies agency to all the indigenous women in the past who were involved in cross-racial relations." Margaret E. Montoya, *Academic Mestizaje: Re/Producing Clinical Teaching and Re/Framing Wills As Latina Praxis*, 2 HARV. LATINO L. REV. 349, 351 n.3 (1997). The concept of "agency" implies that people can be the objects of action or its subjects, the performers of acts, i.e., the agents of action. When one is a subject, one acts as an agent for some purpose, hence, one is exercising agency. MICHAEL WALZER, ON TOLERATION xi (1997). When a person lacks the power/capacity to take action, s/he is deprived of agency.

115. For descriptions of the process of construction of the Spanish colonial cultures in the Americas, see Hernández-Truyol, *supra* note 71, at 76-79 (providing a general description with specific examples regarding Mexico and Cuba); Malavet, *supra* note 39, at 12-20, 55-74 (describing the development of Puerto Rican culture).

example of the current deconstructionist postmodern age, rejects the idea of liberal universalism as being "merely a cover for an imperialistic particularism."[116] Postmodernism also points out the theoretical shortcomings of current philosophical movements, and warns against the mistakes of extremism at any end of the philosophical spectrum.[117] This is especially true when one in engages in cultural studies, particularly legal/comparative cultural studies, such as those included in this Symposium.

LatCrit contends that the peoples of Latin America must be able to develop "shared identities"[118] within their own community as political and cultural citizens of their respective republics —or within the United States community that is most familiar to LatCritters—as political citizens of the nation who have their culture respected by the normative society. The alternative, to construct any people as cultural "citizen[s] of the world,"[119]

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116. Beiner, *supra* note 112, at 9. "Appeals to universal reason typically serve to silence, stigmatize and marginalize groups and identities that lie beyond the boundaries of a white, male, Eurocentric hegemon. Universalism is merely the cover for an imperialistic particularism." *Id.*

117. Beiner, for example, describes what he calls the "universalism/ particularism conundrum," as: "[t]o opt wholeheartedly for universalism implies deracination—rootlessness. To opt wholeheartedly for particularism implies parochialism, exclusivity, and narrow-minded closure of horizons." *Id.* at 12.

118. 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 111, at 127 (footnotes omitted).

119. MARTHA C. NUSSBAUM, FOR LOVE OF COUNTRY: DEBATING THE LIMITS OF PATRIOTISM 5 (1996). 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

would constitute an imposed homogeneity. Critical scholars should reject the notion that being Mexican, Puerto Rican, Cuban, Columbian, Chilean (or American, or Irish) first and a citizen of the World second is morally questionable or irrelevant.[120] Nationalism, or as the authors discuss, national consciousness and sensibility, may be deployed as a positive force,[121] as long as it is limited by a pluralistic communitarian consciousness.[122] In this context, the peoples of the Americas should be able to choose to be patriots of their chosen nation,[123] more generally,

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> 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.

Id. at 7.

120.

> Once someone has said, I am an Indian first, a citizen of the world second, once he or she has made that morally questionable move of self-definition by *a morally irrelevant characteristic*, then what, indeed, will stop that person from saying, as Tagore's characters so quickly learn to say, I am a Hindu first, and an Indian second, or I am an upper-caste landlord first, and a Hindu second? Only the cosmopolitan stance of the landlord Nikhil—so boringly flat in the eyes of his young wife Bimala and his passionate nationalist friend Sandip—has the promise of transcending these divisions, because only this stance asks us to give our first allegiance to what is morally good—and that which, being good, I can commend as such to all human beings.

Id. at 5 (emphasis added) (referring to THE HOME AND THE WORLD, a novel by Tagore).

121. Michael 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 47, at 153, 166.

122. In other words, nationalism does not have to be inherently fascist. *See supra* note 112.

123.

> Richard Rorty urges Americans, especially the American left, not to disdain patriotism as a value, and indeed to give central importance to "the emotions of national pride" and "a sense of shared national identity." Rorty argues that we cannot even criticize ourselves well unless we also "rejoice" in our American

peoples of the world should be able to choose a national affiliation. While nationalism cannot become dogma,[124] cultural sovereignty within a supranational political culture that empowers the marginalized[125] would allow the nations of Latin America—and the *Estados Unidos de Norteamérica* (the United States of America)—to live up to the ideal of a diverse "political culture" that exercises "constitutional patriotism."[126]

IV. CONCLUSION: BIENVENIDAS/OS, AMIGAS/OS AMERICANAS/OS

LatCrit VI, and this issue, have brought to the forefront new voices in legal scholarship. This is part of the process of resisting the suppression of scholars of color within the United States legal academy.[127] But it is more importantly about expanding the LatCritical exploration of law, theory, and praxis within a newly-enriched United States legal scholarship. The essays in this cluster are a major contribution to creating a link between the existing LatCrit emancipatory theory and praxis, and the existing and developing academic environment in North and South America.

This part of the Symposium issue presents new voices and new discourses that develop, expand, transform, and enrich LatCrit Theory. These essays collectively provide an important lens to re/view the multicultural and multiracial Latin American societies, and thus to challenge the inherited racialized constructs of the nations of the world generally, and those of Latin America in particular. The fundamental paradigmatic shift that brings all the authors together is the denial of the

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> 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 119, at 4.

124. J.G.A. Pocock uses the French Revolution as an example to describe the terrifying results of citizenship becoming dogma which justifies the destruction of your "enemies," that is, outsiders. The French revolution went from an uprising of citizens against the *ancien regime*, to the terror of citizenship being deployed to justify the destruction of the enemy. Virtue became terror. *See* J.G.A. Pocock, *The Ideal of Citizenship Since Classical Times*, *in* THEORIZING CITIZENSHIP, *supra* note 47, at 29, 50.

125. *See* Jürgen Habermas, *supra* note 47, at 264.

126. *Id.*

127. To do otherwise, of course, would again create the incongruity identified by Richard Delgado in the *Imperial Scholar* that the civil rights discourse in legal scholarship is being dominated by the normative voices of White males and, thus, is fundamentally incomplete. *See* Richard Delgado, Comment, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984).

colonial myth of a single mixed race for Latinas/os, by pointing out that those constructs in fact create internalized oppressions that deprive the same marginalized persons, especially dark-skinned African descendants and indigenous peoples, of voice within the national discourse (as emphasized particularly by the work of Hugo Rojas and Susan Scafidi). Additionally, as García-Villegas, Gordon, and Esquirol point out, serious analysis of, and engagement with, the national legal systems of the Americas is essential to the success of any movement that wishes to empower the *americanas/os*.

LatCrit theory and praxis were well served by the oral presentations made by these authors at LatCrit VI, and the growing permanent record of LatCrit scholarship, memorialized in this Symposium issue, is enriched by it. ¡*Bienvenidas/os*!