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International Law, Human Rights, and LatCrit Theory

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FOREWORD

INTERNATIONAL LAW, HUMAN RIGHTS, AND LATCRIT THEORY

ELIZABETH M. IGLESIAS *

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I. INTRODUCTION

The last two years have witnessed the birth of the LatCrit movement in and through the work of an increasingly expanding

* Professor of Law, University of Miami. Thanks to Dean Samuel Thompson for his unwavering support of these efforts, the editors of the *University of Miami Inter-American Law Review*, Professor Berta Hernández-Truyol and special thanks to my friend and colleague, Professor Francisco Valdes.

group of legal scholars.¹ These scholars, who come from different Latina/o, Asian, and black communities, have been drawn together by a shared commitment to reinvigorate the antisubordination agenda of Critical Race theory, or RaceCrit, revive its ethical aspirations, and expand its substantive scope by introducing new themes, perspectives, and methodologies. Their efforts have produced a series of conferences focused on exploring how Critical Race theory might be expanded beyond the limitations of the black/white paradigm to incorporate a richer, more contextualized analysis of the cultural, political, and economic dimensions of white supremacy, particularly as it impacts Latinas/os in their individual and collective struggles for self-understanding and social justice. Equally important, these conferences reflect a commitment to ensuring that LatCrit theory is developed in a manner which produces a form of scholarship relevant to the legal struggles of other subordinated communities, whose particular histories of oppression and resistance have also been neglected in and through the black/white paradigm.

This Foreword introduces the proceedings of the third such gathering, which was organized in the form of a one day Colloquium entitled International Law, Human Rights, and LatCrit theory.² The proceedings can be read both as an effort to continue the conversations already underway and as a unique and significant scholarly event. Connecting this effort to articulate a LatCrit perspective on international law and human rights to past and future efforts in other substantive areas of law reveals the rapidly

1. For a chronicle of the movement see Francisco Valdes, *Latina/o Ethnicities, Critical Race Theory, and Post-Identity Politics in Postmodern Legal Culture: From Practices to Possibilities*, 9 LA RAZA L.J. 1 (1996) [hereinafter, Valdes, *Latina/o Ethnicities*] (chronicling presentations made at first colloquium sponsored by the Law Professors Section of the Hispanic National Bar Association in conjunction with the 1995 annual meeting of the HNBA in Puerto Rico); Francisco Valdes, *Poised at the Cusp: LatCrit Theory, Latina/o Pan-Ethnicity and Latina/o Self-Empowerment*, 2 HARV. LATINO L. REV. (forthcoming 1997) (providing a historical account of LatCrit theory's origination).

2. The Colloquium was organized in conjunction with the Law Professors Section of the Hispanic National Bar Association (HNBA) and cosponsored by the University of Miami School of Law and the *Inter-American Law Review* and presented in Miami during October of 1996. It was preceded by the first gathering of the HNBA Law Professors Section (cosponsored by the University of Puerto Rico and the University of Miami) in Puerto Rico during the Fall of 1995 and LatCrit I (cosponsored by CalWestern and the University of Miami School of Law) in La Jolla during the Spring of 1996. It is currently scheduled to be followed by LatCrit II (sponsored by St. Mary's School of Law) in San Antonio during the Spring of 1997, and LatCrit III (sponsored by the University of Miami School of Law) during the Spring of 1998.

expanding scope of the collective dialogue that is, in essence, the heart of the LatCrit movement. LatCrit discourse continues to grow, in part, because the practice of diversity and inclusion has enabled each successive conference to explore new points of departure, thus, building on the conceptual formulations, thematic priorities, and political concerns of earlier conferences.

Reading and publishing LatCrit conference proceedings as part of an evolving conversation serves important practical objectives as well. Professor Francisco Valdes argues persuasively that these publications transform critical legal scholarship into a practice of political activism. The publications expand the depth, breadth, and quantity of legal scholarship devoted to issues relevant to Latina/o communities—a compelling imperative given the current lack of such scholarship. Equally important, Valdes emphasizes the community building effected through publication.³ Publishing these proceedings strengthens our intellectual community by transforming the production of legal scholarship from an experience of intellectual isolation into a practice of collective engagement and empowerment.

The proceedings of this Colloquium also have value in themselves and apart from the substantial contribution they will make to the development of LatCrit legal theory. The Colloquium represents the first self-conscious collective effort to explore some of the major issues in international law and international human rights from a critical race perspective and to articulate the significance of these issues to the antisubordination agenda that currently links the LatCrit movement to its RaceCrit precursors. This makes the Colloquium a significant scholarly event for two distinct, but interrelated reasons.

First, the effort to link the resolution of current international legal controversies to the domestic struggle against subordination calls upon the RaceCrit and LatCrit movements, both jointly and severally, to develop a broader scope for a more inclusive vision of the antisubordination agenda. The idea that international law and processes are relevant—let alone fundamental to the antisubordination agenda of Critical Race theory—is hardly ubiquitous in the

3. Valdes, *Latina/o Ethnicities*, *supra* note 1, at 11-12 (noting that the publication of LatCrit conference proceedings serves “to build relationships among and between Latina/o legal scholars and journals; [and] in this way ... foster the work and success of both.”).

scholarship. Indeed, a number of the conference participants have noted the extent to which the antisubordination struggles of various social movements in the United States have been impoverished by their relative isolation from and ignorance of the ongoing struggles for human rights and self-determination of peoples of color throughout the world.

This isolation may be due, in part, to a failure of vision that reflects inherited patterns of collective action and identity politics. From this perspective, both the RaceCrit and LatCrit movements face a common set of questions about the positions we will take, not only in relation to each other, but also towards the far larger group of humanity that does not share the privileges of our First World citizenship. These are the peoples of color, whose claims of right and struggles for justice will become increasingly compelling, both domestically and internationally, as the processes of globalization continue to unfold. Making the international move in our scholarship confronts us with the question whether our particular experiences of oppression will inspire us to imagine a broader more inclusive community, based on our common humanity and in solidarity with each other and the struggles and suffering of our Third World "others," or whether these experiences of oppression will become the media through which we stake our claim in the privileges of our First World citizenship.

Focusing on the relationship between international and domestic relations of subordination will also further constructive engagement between the RaceCrit and LatCrit movements by suggesting new points of intersection for imagining community and building solidarity. Many of the problems we share, as racially subordinated peoples, are a function of the impoverishment and subordination of our nations of origin through the processes of colonialism and imperial capitalism. Of course, there are differences in these histories, differences, for example, in the terms and timing of colonial penetration, political independence, and outmigration. Understanding the way these historical differences reach into the present and are manifested in the institutional structures and discourses of international law will enable us to combat more effectively, the processes through which these differences are used strategically to divide us politically.

From another perspective, making the international move reveals new sites of contestation in the legal struggle against subordination. This is because the fragmentation of the various lib-

eration movements in the United States and their isolation from similar movements throughout the world is not exclusively attributable to a failure of inclusionary vision. The ability to forge a common political agenda and organize collective action across the divisions of class, race, gender, and national boundaries requires more than vision and will. It requires resources, but more importantly, it presupposes the existence of social spaces and institutional arrangements that can operate effectively as forums for the development and expression of collective political identities. While the practice of international advocacy may promote some of the cross-national solidarities needed to broaden and deepen our antisubordination struggles, the ultimate effectiveness of this strategy is limited by the fragmentation of international and domestic legal regimes.⁴

International and domestic legal regimes are fragmented at multiple points, for example, by denial of the indivisibility and interdependence of the human rights enumerated in the Universal Declaration of Human Rights (Universal Declaration), by the separation of international and domestic rights regimes effected through state refusals to incorporate international human rights into their internal domestic laws and to accept accountability for their violations of international law in international forums, and

4. The political fragmentation of the civil rights and labor movements in the United States provides a good example of the way the fragmentation of legal fields can obstruct the development of cross-national solidarity. See Elizabeth M. Iglesias, *Structures of Subordination: Women of Color at the Intersection of Title VII and the NLRA*, 28 HARV. C.R.-C.L. L. REV. 395, 497-502 (1993). Both movements have been severely weakened by their failure to develop a cooperative political agenda. This failure is, in part, attributable to the race-based essentialism of civil rights leaders and the class-based essentialism of the labor movement, in other words, to their exclusionary visions of community. However, the failure to develop effective intermovement alliances is also attributable to structural constraints established and enforced through the interpretative fragmentation of Title VII and the NLRA. The fragmentation of national labor policy across these two statutory regimes (and the subordination of Title VII's antidiscrimination mandate to the imperatives of an antidemocratic industrial relations policy) has suppressed the development of institutional arrangements that might have fostered the evolution of intermovement alliances and the consolidation of new collective political identities that could help us supersede the race and class essentialism that has undermined these movements.

This is all to say that the fragmentation of legal fields (like the fragmentation of domestic and international law) is an interpretative strategy that has a direct impact on the kinds of alliances and collective action we are likely to imagine or able to pursue because it has a constitutive impact on the institutional arrangements we inhabit. The fragmentation of legal fields is, however, a strategy that operates at a jurisprudential level, thus making critical legal theory a crucial element in any struggle for social change. For a further discussion of these issues, see generally *id.*

by the separation of "private" and "public" international law. In the United States, this jurisprudential fragmentation has made international human rights and the human rights movement almost completely irrelevant to the legal struggle for domestic social justice precisely because these rights have been denied recognition as a legitimate basis for making claims within or against the United States. Promoting cross-national solidarities is, consequently, a socio-political struggle that will require LatCrits to develop the analytical resources necessary to evaluate the consequences of different ways of integrating international and domestic legal regimes and to intervene effectively in the legal struggles that the pursuit of jurisprudential integration will increasingly generate. Indeed, a number of the presentations make significant contributions to this theoretical project, thus suggesting a second major contribution of this Colloquium.

Just as engagement with international law promises to expand the way LatCrits/RaceCrits formulate and pursue our anti-subordination agenda in theory and practice, these Colloquium proceedings also show how the application of LatCrit/RaceCrit methodologies, perspectives, and themes can expand international human rights legal discourse. The various presentations illustrate the extent to which critical methodologies like story-telling, the mapping of legal terms, and the incorporation of political economy and postmodern conceptualizations of identity can alter the terms of debate on key concepts and issues in international and human rights law.

Concepts like national sovereignty, refugee and alien, sustainable development, free trade, and regional integration take on new dimensions when approached through a LatCrit perspective. By bringing the perspective and methodologies of Critical Race theory to bear on the analysis of international law, processes, relations, and institutions, LatCrit theory has created a conceptual space for exploring how the formulation and resolution of key debates in international law reproduce the conditions of subordination of peoples of color, both domestically and internationally. In short, by making the international move, these proceedings open the door to the formulation of new critical perspectives and sites of contestation in the struggle for social transformation through law.

The rest of this Foreword tracks the structure of the Colloquium in the Miami proceedings. Professor Celina Romany's keynote address,⁵ laying out in broad strokes the theoretical and political possibilities for LatCrit scholarship in the field of international human rights, was followed by three panel presentations. The panels were organized thematically around the so-called "three generations" of international human rights.⁶ All the panel participants were asked to address their remarks to one or more of the following three questions:

(1) Does a LatCrit theoretical perspective on identity politics, the multiplicity and intersectionality of Latina/o identities and cultural values, as well as the convergences and divergences in our histories and discourses of assimilation, independence, and revolution offer new perspectives on the traditional themes and concerns that have organized the legal and political struggle to promote the recognition and enforcement of human rights, broadly conceived?

(2) Does LatCrit theory offer new perspectives on the recent trend toward regional economic integration in agreements such as NAFTA, and the likely impact of these developments on the human rights of Latinas/os within the United States, at the borders, and within the Latin American states considering regional integration?

(3) Does LatCrit theory have anything to say about key debates over (a) the status of national sovereignty in international law, (b) the proper scope and limits of state intervention in civil

5. Celina Romany, *Claiming a Global Identity: Latino/a Critical Scholarship and International Human Rights*, 28 U. MIAMI INTER-AM. L. REV. 215 (1996-97).

6. The "three generations" terminology reflects an effort to distinguish and categorize the thirty human rights principles listed in the Universal Declaration of Human Rights. See generally THOMAS G. WEISS ET AL., *THE UNITED NATIONS AND CHANGING WORLD POLITICS* 115-18 (1994). In this terminology, civil and political rights (for example, the freedom of speech, association, and religion) are referred to as "first generation rights" because these were the only rights included in the national constitutions of the industrial states. They are called *negative rights* because they aim to protect individual freedom by limiting state power. "Second generation rights" refer to socio-economic rights (for example, the rights to food and shelter). These rights are associated with the rise of the welfare state. They are called *positive rights* because they aim to promote freedom by imposing upon the state the obligation to ensure a minimum standard of living, commensurate with the state's level of development. "Third generation rights" refer to the rights to peace, development, and a healthy environment. These rights are called *solidarity rights* because they "pertain to collections of persons rather than to individuals." *Id.* at 116.

society, for example, police interventions to enforce immigration restrictions or promote drug enforcement operations, particularly in minority communities, at the borders or within the territorial jurisdiction of Latin American states or both, and (c) the status of international human rights in regional integration agreements?

In presenting an introductory overview of the participants' rich, varied, and compelling interventions, Part I focuses on the presentations of panel one, which addresses the ways in which LatCrit theory can further the theoretical and practical work of promoting respect for first generation civil and political rights. Part II examines panel two, which addresses second generation economic, social, and cultural human rights, and Part III focuses on the third panel analysis of third generations solidarity rights. Read cumulatively, these presentations illustrate both the contributions a richer understanding of key debates in international law can make to our struggles against subordination, as well as the contributions LatCrit theoretical perspectives can make to the development of international law.

II. IMAGINED COMMUNITIES AND TRANSNATIONAL IDENTITIES: LATCRIT PERSPECTIVES ON FIRST GENERATION CIVIL AND POLITICAL HUMAN RIGHTS

The presentations of the first panel develop a critical analysis of the role international civil and political rights discourse and practices can play in promoting and invigorating the antisubordination struggles of the LatCrit movement in the United States. Using different methodologies and points of departure, each presentation offers insightful variations on some common themes. In each presentation, U.S. domestic laws, policies, and judicially articulated legal doctrines are measured against the requirements of international law. Each presentation questions, in one way or another, the legitimacy of these policies and doctrines, focusing particularly on the way they impact the enjoyment of internationally recognized civil and political human rights.

Professor Hernández-Truyol's intervention provides an excellent point of departure.⁷ In introducing panel one, Hernández-

7. Berta Esperanza Hernández-Truyol, *International Law, Human Rights, and LatCrit Theory: Civil and Political Rights—An Introduction*, 28 U. MIAMI INTER-AM. L. REV. 223 (1996-97).

Truyol provides an overview of the evolution and development of international human rights law. This history reveals that human rights law, in general, and civil and political rights, in particular, are artifacts of a long and continuing struggle to articulate normative frameworks and develop enforcement mechanisms that might be effectively invoked to restrict the manner and conditions under which states exercise coercive power against individuals within their jurisdiction. Early formulations grounded individual rights against the state in religious and metaphysical conceptions of a transcendent moral order or natural law. Since World War II, these rights have been asserted by reference to the positive laws of the world community, grounded for example, in the provisions of the United Nations Charter, the Universal Declaration, the International Covenants, and a proliferation of international human rights instruments articulating the rights of the world's most vulnerable groups.

In recounting this history, Hernández-Truyol makes numerous important observations. Although the Universal Declaration includes both economic and social, as well as civil and political rights, the legal framework for the enforcement of human rights law was subsequently divided into two regimes—one focused on civil and political rights, the second on economic, social, and cultural rights, each embodied in a different Covenant establishing different institutional arrangements and enforcement procedures. By reminding us that this fragmentation was a product of differences in the ideological commitments and priorities of developed and developing countries, Hernández-Truyol strikes two important themes. The first theme focuses on the way the inequality of states in the international political economy constrains the articulation and enforcement of human rights law, a theme developed more fully in subsequent interventions. The second theme, while related, goes directly to the heart of the antistatist project of the LatCrit movement (as a project in legal theory and scholarship), that is, the effort to articulate a vision of human identity that offers the most inclusive normative reference point for the enforcement of international human rights.

Hernández-Truyol argues that “a human rights construct makes sense only with a holistic reading of rights that truly allows the enjoyment of the aspirational dignity that attaches to our

status as human."⁸ Accordingly, she attacks the fragmentation of human rights law into separate regimes. While the United States recognizes only civil and political rights and continues to deny economic and social rights any legal status, Hernández-Truyol argues that this separation is morally and conceptually incoherent. From the perspective of individual persons, these rights are clearly interdependent and interrelated. Civil and political rights mean very little without the enjoyment of economic, social, and cultural rights, particularly given the differences that class and culture can otherwise make in our access to the state and to the resources necessary for effective political mobilization. Indeed, this observation has not escaped the world community, as evidenced by the Third World sponsored General Assembly Resolution 32/130 of 1977, as well as in the numerous other human rights instruments Professor Hernández-Truyol discusses.⁹

By sourcing the foundation of human rights in the individual's status as an individual and in the dignity and justice owed to individuals because of our status as human beings, Professor Hernández-Truyol deploys a formulation and stakes a position that transcends, as contingencies, the differences of race, class, gender, and citizenship. Her formulation invokes our common humanity as the fundamental normative reference point for the conceptualization and enforcement of international human rights. Making this move, she provides a normative basis for combating the very real violence that is perpetrated by domestic legal regimes organized around contingent constructs like citizenship. In short, Hernández-Truyol offers LatCrits an invitation to move even further beyond the black/white paradigm of early Critical Race theory and embrace the objective of achieving a global moral order that treats all human beings as equal.

To be sure, this formulation is not entirely unproblematic. The international legal order that LatCrits have inherited is one profoundly at odds with the centrality Hernández-Truyol would confer upon the individual. As she acknowledges, sovereign states, not individuals, still remain the primary subjects of international law. International human rights enforcement practices

8. *Id.* at 225.

9. As further evidence of interdependence, and more importantly, as evidence that this interdependence is simultaneously acknowledged even as it is strategically suppressed, Hernández-Truyol points to the coexistence of these rights in international instruments such as the Children's Convention and the Women's Convention.

are still constrained by and within institutional procedures constructed around deference to sovereignty. Moreover, achieving a normative consensus will not necessarily produce effective social change, since law still operates in and against the structures and relations of power it seeks to regulate.

More troubling however, this emphasis on the human dignity of the individual person, when deployed as a normative reference point for combating the state-centric positivism of international law, resonates, perhaps intentionally, with the language of natural rights and divinely ordained moral order.¹⁰ Can such a move withstand the modernist challenge that it represents a psychological lapse into utopian delusion, a retreat from critical engagement to a metaphysical moral order which exists only in the imaginings of a new (LatCrit) coterie of high priests and priestesses? To my mind, it can. If modernism struck a death blow to any claims of direct access to the mind of God, the crisis in modernist categories, institutions and values has opened a space for what Professor Richard Falk has called "the postmodern possibility."¹¹ This is the possibility of creating a new world order that resolves the crisis of modernism by transcending the mess it has left us. That mess is the poverty produced by market efficiency; the conflict, instability, and violence perpetuated and exacerbated for the sake of national security; the confusion disseminated through a technocratic objectivity that purports to separate the articulation of fact and value; the ecological and human disasters that mark our development; and the crisis of identity and solidarity we confront as we struggle to imagine communities that can resolve and transcend the hatreds and injustices we have inherited from the modernist categories of class, race, and nation.

In short, what Professor Hernández-Truyol's formulation offers is an enigma—a point of re-entry into a normative order we have yet to create. Rather than building this future through ex cathedra pronouncements grounded on some privileged epistemological access to divine will or natural law, her emphasis on the human dignity of the individual is a call to commit ourselves to the project of a radical and global democracy—based on a recogni-

10. "An underlying assumption of natural law is that there is a common human nature that presupposes the equality of all human beings." See Hernández-Truyol, *supra* note 7, at 228 n.21.

11. See generally RICHARD FALK, *EXPLORATIONS AT THE EDGE OF TIME: THE PROSPECTS FOR WORLD ORDER* (1992).

tion of the fundamental equality of all human beings and a faith that more inclusive participation is our only real means of access to the common good.

Professor Elvia Arriola's presentation embraces this commitment to inclusion and addresses its implications for LatCrit scholarship at multiple levels.¹² Taking, as her point of intervention, the representational politics at work in popular media accounts of INS raids, she prefaces her substantive critique with an effort to define more precisely and self-consciously the normative commitments that should inform the LatCrit movement. Arriola links the development of the LatCrit movement, not initially to the production of a body of legal scholarship, but instead to the development of a diverse and inclusive community of scholars. She discusses LatCrit conferences, not primarily as a forum for the exchange of scholarship, but as socio-political spaces in which to practice our commitments to diversity and inclusion. By doing this, she openly invites and explicitly challenges LatCrit scholars to develop an ethical community.

Arriola's focus on LatCrit community-building is a politically and poetically appropriate preface to her substantive critique of the representational practices used to legitimate the violence of INS raids. In both instances, her call is for the development of an ethical community. In both instances, the danger is that community has often been and often is an enemy of diversity and inclusion, for as Arriola's story-telling illustrates, communities are too often constituted through the delimitation of boundaries and the construction of otherness.

Taking up her own challenge, Professor Arriola illustrates how story-telling methodologies can disrupt the boundaries of exclusionary community by exposing the inhumanity (and illegality) of the practices through which these boundaries are enforced. Significantly, her story-telling calls us to focus precisely on the narrative elements suppressed in mainstream media accounts of INS raids—the physical and psychological violence visited on the detained and deported; the terror of confronting each day the risk that friends or family will be caught without papers, their papers rejected, indefinitely detained, deported without notice, in effect disappeared.

12. Elvia R. Arriola, *LatCrit Theory, International Human Rights, Popular Culture, and the Faces of Despair in INS Raids*, 28 U. MIAMI INTER-AM. L. REV. 245 (1996-97).

By emphasizing these narrative elements, Professor Arriola exposes how popular cultural representations manipulate the lines of empathy through which we imagine community. She asks whether INS immigration practices would withstand legal/political scrutiny if the judicial/popular conscience were more regularly exposed to stories of the hopes, fears, and aspirations of the individuals these practices target and terrorize. In short, by focusing on the common humanity that is denied in popular accounts of INS raids, Arriola's story-telling goes a long way toward recontextualizing U.S. immigration policy and enabling the exposure of its failure to comply with basic human rights.

Professor Kevin Johnson's intervention further develops these points in a rich, compelling, and multilayered analysis of U.S. immigration laws.¹³ In his account, immigration law appears as a field of representation populated, among other things, by teeming hoards of rapidly multiplying, fearsome, loathsome creatures called "illegal aliens." Johnson's significant contribution begins by mapping their appearances on the field of legal discourse. Through a systematic analysis of the way the term "alien" is deployed in the articulation of U.S. immigration policy, Johnson invites us to explore more critically the values and assumptions embedded in the legal construction of citizenship. Not only does Johnson reveal the significant human costs of decisions enforcing the citizen/alien dichotomy, he also exposes the dichotomy's empirical indeterminacy—who is "illegal?"¹⁴—as well as its normative bankruptcy—why should any human person ever have to suffer the label? In this way, he, like Professor Hernández-Truyol, leads us to a new threshold for imagining community—a human community beyond the nation-state.

13. Kevin R. Johnson, "Aliens" and the U.S. Immigration Laws: *The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263 (1996-97)

14. As Professor Johnson notes:

The "illegal alien" label ... suffers from inaccuracies and inadequacies at several levels. Many nuances of immigration law make it extremely difficult to distinguish between an "illegal" and a "legal" alien. For example, a person living without documents in this country for a number of years may be eligible for relief from deportation and to become a lawful permanent resident. He or she may have children who citizens, as well as a job and community ties here. It is difficult to contend that this person is an "illegal alien" indistinguishable from a person who entered without inspection yesterday.

Id. at 277.

First, Johnson shows how U.S. immigration law subordinates the individual's enjoyment of fundamental civil and political rights to the enforcement of the citizen/alien dichotomy. Only citizens have the right to vote, to participate in jury deliberations, to engage in political activities without fear of deportation, to challenge indefinite terms of detention, and to enjoy the protection of judicial review through habeas corpus. These rights are denied to "aliens," a term that legitimizes these restrictions by connoting illegality and otherness—rather than a common humanity.

Equally important, Johnson shows how the citizen/alien dichotomy contracts the parameters of community. Through this dichotomy, the political community is defined, not by reference to the human dignity of all individuals in relation to the state, but rather by citizenship. Aliens, no matter what their "real" connections to the community, remain only partial members, as marked by their more restricted rights against the state.

By reading U.S. immigration law through the normative prism of international human rights, Johnson's analysis establishes a vantage point from which we can challenge the artificiality of the imagined community underlying the citizen/alien dichotomy. Thus Johnson observes,

[t]here is no inherent requirement ...that society have a category of "aliens" at all. We could dole out political rights and obligations depending on residence in the community, which is how the public education and tax systems generally operate in the United States. Indeed, a few have advocated extending the franchise to "aliens," a common practice in a number of states and localities at the beginning of the twentieth century.¹⁵

This revealed artificiality, in turn, enables us to explore more critically the kind of community the dichotomy sustains—the why of it all. This is Professor Johnson's second major contribution. By mapping the uses (and abuses) of the term "alien," Johnson enables us to see how the citizen/alien dichotomy legitimates practices of racial exclusion and economic exploitation. Through this

15. *Id.* at 268.

dichotomy, U.S. immigration law continues to police the racial identity of the community it defines as citizens, even as it fosters, on an international level, the divide and conquer strategy that have so successfully undermined the American labor movement. The "alien" presence is tolerated in times of labor shortage, repudiated when work is scarce, super-exploited in either case through the denial of citizenship-based rights. In this way, the citizen/alien dichotomy creates a legal space in which exploitation and exclusion are legitimated.

At the same time, Professor Johnson makes a broader and more general contribution to the development of LatCrit theory. Johnson's work urges LatCrits to focus on legal doctrine and, more particularly, on the way language is deployed in the articulation of legal doctrine. His mapping of the term "alien," provides a powerful framework for challenging U.S. immigration policies and practices, in part, because it shows us that the legality of these policies is always a predetermined conclusion as a result of the meanings embedded in the language deployed. It makes sense, in any particular instance, to deny "aliens" basic civil and political rights—not because they are "human persons," not because they are "individuals," but because they are "aliens."

For LatCrit scholars, the implications of this analysis are profound. If legal discourse is a field of representation, legal interpretation is, all the more, an instrument of power. In order to challenge the subordination reproduced through law, we need to bridge the gap between the reality represented in legal discourse and the reality it rhetorically suppresses. Professor Johnson's intervention is, thus, a call for us to develop our critical legal theories in the interdiscipline. This means finding new modes of analysis and importing them into the field of legal discourse. It is a call he answers, as much through his skillful mapping of the language used in immigration law, as through the external critique he develops using social science data on the contribution undocumented immigrants have made to the U.S. economy, a contribution otherwise invisible in the rhetoric of monumental social problems generated by teeming hordes of invading aliens.

If Professor Johnson leads us to the threshold of a newly imagined community, Professor Enid Trucios-Haynes pushes us through, for her intervention begins precisely where Johnson

stops.¹⁶ Despite his devastating critique of the way U.S. immigration law partitions community and legitimates the denial of citizenship-based rights to its partial members, Johnson ultimately accepts the citizen/alien dichotomy.¹⁷ Perhaps the consequences of rejecting this dichotomy are deemed unacceptable, perhaps the feasibility too tenuous, but in either event it is Trucios-Haynes, who leads us to imagine a postmodern possibility superseding this dichotomy by invoking images of community and identity that transcend the nation-state.

Clearly, she travels a different route. Rather than focusing on the violence effected through the exclusion of aliens, Trucios-Haynes imagines the demise of the nation-state as a fulfillment of the possibilities embedded in the growing recognition of transnational identities. These identities, reflected in the legal form of dual citizenship, are artifacts of the increasing flows of peoples across national borders. These flows subvert inherited legal categories and compel a redefinition, a new map, of the international.

Rather than bemoaning these new changes, her formulation reveals and validates the possibilities they engender. More specifically, she views the increasing displacement of individual identity from the territorial boundaries of the nation-state as an opportunity, a new socio-political space, in which to promote the development of radical and plural democracy based on the personal self-determination of individuals. From this perspective, immigration law, particularly its construction and exclusion of aliens, reads like a last ditch effort to re-impose modernist categories in a postmodern world, a violent and regressive intervention aimed at preserving "the nation-myth, that defines the United States as a tribal community with a shared white, Christian, Western European heritage" ¹⁸

Professor Trucios-Haynes encourages LatCrit scholars to embrace our transnational identities as unique and empowering positions from which to develop cross-national solidarities. Many of us speak the languages of our places of origin. We may maintain

16. Enid Trucios-Haynes, *LatCrit Theory and International Civil and Political Rights: The Role of Transnational Identity and Migration*, 28 U. MIAMI INTER-AM. L. REV. 293 (1996-97).

17. "My point in this discussion is not that all distinctions between different types of "aliens" and between "aliens" and citizens should be discarded." Johnson, *supra* note 13, at 278.

18. Trucios-Haynes, *supra* note 16, at 295.

family and community ties to and travel between these places and the homes we have made in the United States. Engagement in and with the social justice struggles in these places will make us the embodied instruments of social transformation. Crossing borders is our way of being and creates a vantage point from which to challenge more effectively and profoundly the borders we must cross.

At the same time, Professor Trucios-Haynes is not unaware of the substantial legal obstacles we confront in our efforts to promote cross-national solidarities with human rights movements in other places. If the fragmentation of political and economic human rights reflects the impoverished vision of social justice through which international capitalism maintains its dominance and claims its legitimacy, Trucios-Haynes shows us how the separation of domestic and international law enables the United States to maintain its dominance by rejecting its accountability to the international community. In both instances, the fragmentation of legal fields reproduces the relations of subordination that undermine cross-national solidarity and contracts the jurisprudential and institutional spaces that might otherwise enable international legal advocacy to generate cross-national organizing. This makes the fragmentation of legal fields an important target for LatCrit critical scholarship—precisely because of its impact on the solidarities we want to develop.

To be sure, Trucios-Haynes's formulation is not entirely unproblematic, in part, because its most visionary elements need and deserve further development by her and other LatCrit scholars. She offers the personal right to individual self-determination as the focal point for and instrument of the cross-national solidarity she wants to promote. According to her, this right permits individual choice about loyalty to country, ethnic or racial group, or any other common bond and is evidenced in the growing recognition of dual citizenship. Can this postmodern conception of individual identity withstand the challenge it will face from scholars operating through modernist categories of group identity? Can it withstand the objection that a right to individual self-determination, at least the "choose your favorite loyalty" sort, is a recipe for possessive individualism, not collective solidarity? To my mind, it can because the contradiction between individual self-determination and collective solidarity is in large part an artifact of the policies, practices, and institutional arrangements through

which modernist categories of group identity—of race and class and nationality—have been imposed upon and enforced against the human race.¹⁹ To my mind, Trucios-Haynes's postmodern possibilities are worth pursuing, but not in a world of nation-states, dual citizenship notwithstanding. Thus, the challenge she puts to LatCrit scholars is precisely the task of envisioning and producing the type of world legal order in which the contradictions between individual self-determination and collective solidarity can be superceded.

III. FREE MARKETS, WELFARE STATES AND CULTURAL GENOCIDES: LATCRIT PERSPECTIVES ON ECONOMIC, SOCIAL, AND CULTURAL HUMAN RIGHTS

The presentations of the second panel move the focus of LatCrit analysis into the field of economic, social, and cultural human rights. These second generation rights depend upon the programmatic interventions of the welfare state, a state form increasingly under attack both in the United States and in Latin America. In the United States, these attacks are waged through the discourses of deregulation and reverse-discrimination and through a racist misogyny that targets all welfare recipients, particularly poor mothers and recent immigrants, even as it denigrates Latin cultural values and familial structures.

The welfare state, in Latin America, is also under attack through the discourses of privatization, structural adjustment, the repudiation of Latin economic nationalism and dirigista policies such as import-substitution, and increasing pressures to establish legal arrangements that protect free markets and free trade. Using different methodologies and points of departure, each of the four presentations offers a different perspective on these recent developments, their impact on the economic, social, and cultural rights of racially subordinated people and the practical and legal alternatives that a LatCrit perspective might afford.

The first presentation by Professor José Alvarez provides a critical analysis of the investment rights regime established by

19. See Iglesias, *supra* note 4 (deconstructing the manipulation of the individual/collective rights dichotomy by foregrounding the way this dichotomy has suppressed the transformative agency of women of color, whose collective political identity supercedes the various group identities into which we are subsumed).

NAFTA, the North American Free Trade Agreement.²⁰ His analysis of NAFTA's Investment Chapter makes a number of important contributions to the development of LatCrit theory, in large part because it demonstrates the significance of international trade and investment agreements to our antisubordination agenda. Alvarez encourages LatCrit scholars to turn their attention to these agreements because they are directly implicated in reproducing the patterns of subordination we struggle to dismantle. At the same time, his analysis illustrates how methodologies already familiar to critical race theorists can increase our understanding of the way international investment agreements impact on Latina/o economic, social, and cultural rights.

Like other commentators, Professor Alvarez is interested in revealing the realities of enforced subordination that are suppressed by the rhetoric through which the NAFTA is represented in legal discourse. However, Alvarez exposes these realities by invoking the rights critiques of early critical legal theory. Liberal rights, particularly negative rights, like the rights to property and privacy, have been the focus of heated debate in critical legal theory, as these rights have often proven to be empty formalisms of limited use in the struggle for social justice. Invoking these insights, Alvarez demonstrates how NAFTA's investment rights regime reproduces relations of economic and political subordination. Put differently, Alvarez can pierce the rhetoric of NAFTA's Investment Chapter, in part, because he knows how to do critical rights analysis.

Alvarez begins his rights analysis by noting that NAFTA is represented as a fair contract between sovereign equals, that establishes symmetrical and reciprocal rights between the state parties and their investors. NAFTA's Investment Chapter establishes a legal regime of substantive rights and remedial procedures for the benefit of "foreign investors."²¹ The rights are broad

20. José E. Alvarez, *Critical Theory and the North American Free Trade Agreement's Investment Chapter Eleven*, 28 U. MIAMI INTER-AM. L. REV. 303 (1996-97).

21. For purposes of NAFTA, Chapter Eleven, "foreign investors" are investors of one of the three state parties to the NAFTA, who invest in the territory of one of the other two state parties. Chapter Eleven governs the treatment accorded by one state party to the investors of another state party operating within its territory. Thus, American investors are "foreign investors" protected by the provisions of Chapter Eleven, vis-à-vis their investments in Canada or Mexico, but not in the United States. Similarly, Mexican investors are "foreign investors" in the United States and Canada, but not in Mexico. Investors of states that are not party to the NAFTA are not protected by Chap-

ranging and impose significant restrictions on the state's authority to regulate economic activity within its territory. Indeed, many of these rights track the human rights enumerated in the Universal Declaration. Thus, under NAFTA's Investment Chapter, foreign investors enjoy the rights to be free of discrimination "to security, to recognition as a legal person and to nationality, to freedom of movement, and to own property and not be arbitrarily deprived of it."²²

Alvarez's first move is to reveal the fundamental asymmetry of the rights established by the Investment Chapter. He does this by invoking the critical distinction between formal rights equality and equal rights enjoyment. For example, the rights to national treatment and unencumbered repatriation of profits may be equally afforded to all investors of the three contracting parties, but these rights are much more valuable to U.S. investors than to Mexican investors because U.S. companies are moving into Mexico much faster than Mexican companies are expected to move into the United States. Like other liberal rights regimes, NAFTA's formal rights equality for all foreign investors ignores the very real inequalities in levels of economic development between the state parties. These inequalities mean that U.S. companies will be the main beneficiaries of the NAFTA investment rights regime for some time to come.

This rights asymmetry is not the only thing that Professor Alvarez's rights analysis reveals. The formal rights equality of NAFTA's Investment Chapter hides the economic subordination it perpetuates. As a regime of negative rights, NAFTA investment rights operate as restrictions on the Mexican state's authority to regulate economic activity in ways that have promoted the economic development of Mexican investors, prohibiting requirements like domestic content rules, technology transfers, local sourcing, and the use of local managerial personnel. Mexican investors get formal rights equality in exchange for economic extinction, even as the Mexican economy becomes another American market and the border becomes an INS encampment and a toxic

ter Eleven's substantive rights or remedial procedures.

It should also be noted that the term "foreign investors" refers broadly to persons involved in the "establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments." Thus, it applies broadly to companies doing business in the territory of another party.

22. Alvarez, *supra* note 20, at 308 n.24 (citing Universal Declaration, Articles 2, 3, 6, 7, 8, 10, 13, 15, 17, and 27(2)).

waste dump.

Professor Alvarez's critical rights analysis takes another turn, striking a now familiar theme. Alvarez shows yet another way in which the fragmentation of legal fields undermines the struggle for human rights. While NAFTA's Investment Chapter purports to establish a self-contained regime of substantive rights and remedial procedures for foreign investors, this agreement and the economic activities and relations it protects from state regulation have a direct impact on many rights and interests not included, nor even recognized, within the rights regime the agreement establishes. The NAFTA investment rights regime only protects the human rights of the foreign investor. The rights most directly impacted and blatantly excluded are the social, economic, and cultural human rights of the most vulnerable Latinas/os, both in the United States and throughout Latin America.

Alvarez's analysis of the Investment Chapter is more than an illustration of the way critical rights analysis can be applied to international investment treaties. It also demonstrates the value (and limitations) of story-telling methodologies in the field of international economic law. The incomplete and asymmetrical rights regime established by the Investment Chapter depends on the deployment of a particular story for its legitimacy. The narrative elements of this story project the image of innocent investors as helpless victims of nationalistic expropriations by all powerful (but corrupt) states. LatCrits can and should combat the hegemonic deployment of this story in legal discourse, but not primarily through the counter-narratives of all powerful multinational corporations super-exploiting the oppressed peoples of the Third World, whose governments are too dependent on foreign capital to enforce their own social welfare laws.

Instead, what Professor Alvarez's analysis ultimately suggests is that the innocent investor story is best combated by analyzing the economic and political impact of investment treaties through the analytical frameworks of dependency theory, international political economy, and the economic sociology of immigration flows. These interdisciplinary methodologies are relatively new to critical legal theory, but they will increase the LatCrit repertoire of critical methodologies in ways that will substantially expand the scope of our antistatist agenda and enhance the depth of our analyses.

Deploying different points of departure and critical methodologies, Professor Enrique Carrasco also encourages LatCrit scholars to turn our attention to the international economic legal order and, in doing so, illustrates the rich variety of perspectives represented in the LatCrit movement.²³ By organizing his analysis around a critical historical account of development ideas and practices in Latin America, Carrasco's intervention teaches us that the legal struggle to promote economic, social, and cultural human rights must target the policies and practices of international economic institutions such as the World Bank and the International Monetary Fund. These institutions have a direct impact on the socio-economic and political environments in developing countries and must be rigorously monitored to ensure that their policies enable the enjoyment of these rights through progressive social development.

It is no accident that Professor Carrasco's analysis does not focus directly on the substantive content of the rights recognized in the International Covenant on Economic, Social and Cultural Rights, nor on the United Nations procedures and institutions established to promote them. To be sure, these rights are crucial to eliminating the conditions of economic, political, and cultural subordination. Nevertheless, the realization of these rights—either through their incorporation in domestic legal regimes or through the development of effective international enforcement mechanisms—has been captive to a profoundly ideological debate over the way the international political economy should be organized.

The history of this debate reveals a fundamental fracture between developed and developing countries or, more precisely, between defenders of free market liberalism and advocates for the interventionist welfare state. Free market liberals reject economic, social, and cultural rights as mere aspirations; treating them as enforceable rights is viewed as completely incompatible with the processes of "creative destruction" through which free market competition produces economic growth. Developing countries have, on the other hand, invoked the failure of liberal economic policies to effectuate these rights in order to challenge the assumption that unregulated private economic activity increases

23. Enrique R. Carrasco, *Opposition, Justice, Structuralism, and Particularity: Intersections Between LatCrit Theory and Law and Development Studies*, 28 U. MIAMI INTER-AM. L. REV. 313 (1996-97).

the general welfare and to defend the regulatory and programmatic interventions of the welfare state.

Carrasco organizes his critical historical analysis of this debate around four key concepts he associates with LatCrit theory: opposition, justice, structuralism, and particularity. This analysis makes him weary and wary of operating on the assumption that radical critiques will promote progressive social change. Indeed, he argues that the history of Latin American development demonstrates the futility of critical theories that assume radical oppositional stances and proceed through abstract analyses and generalized pronouncements.

While the post-World War II liberal economic order failed to fulfill its promises that open markets and an interdependent international economy would bring world peace, prosperity, and equal opportunities for all the world's peoples, liberal ideology has survived the radical critiques of Latin American development theorists. These theorists challenged the basic structures of the liberal legal order. Their theories enabled Third World states to announce the dawn of a New International Economic Order, encouraged Latin American policymakers to reject free market competition in favor of state economic regulation and applauded the nationalization of major industries, the implementation of currency controls and other import-substitution policies as well as the social programs of the welfare state. And yet, Latin America still remains a region marked by the violence and injustices of underdevelopment. Latin American policymakers have since jumped on the neoliberal band wagon, adopted the Washington Consensus, repudiated economic planning and social welfare spending and embraced the imperatives of structural adjustment. Neoliberalism is full force throughout Latin America, and the poor are getting poorer.

Carrasco is weary of this cycle and attributes it to the flawed assumptions and methodologies of both liberal economic theory and its radical development critics. None of these theories have been able to produce a legal order that secures social justice and enables economic development for the world's peoples because all are captive to a totalizing ideology that positions them on one side or another of a false dichotomy between the free market and a state-centric political economy. While each ideology offers a series of solutions to the problems created by the policies and practices prescribed by the others, all have, in different ways, enabled the

production and reproduction of vast inequalities of wealth and power, the manipulation and exacerbation of uneven development, both within and between nation states, and the marginalization of a majority of the people. Careful and critical analysis would quickly reveal this.

Weary and wary of radical critiques that operate through abstract theory and righteous normativity, Professor Carrasco urges LatCrit scholars to reconstitute our oppositional strategies. Focusing specifically on the development context, Carrasco warns LatCrit scholars against making frontal attacks on neoliberalism and urges us instead to develop analytical tools that will enable "radically rigorous monitoring" of the policies and practices of international economic institutions.²⁴ Professor Carrasco knows this suggestion may be heard as a call to make our scholarship more acceptable to policymakers and consequently rejected as too much a capitulation to the way things are, but his response is compelling. Carrasco wants social development and economic justice for Latinas/os. Thus, he insists that we plant ourselves in the real world and begin to develop and deploy analytical methodologies that will have some chance of changing the policies and practices of international economic institutions. For Carrasco, this means mastering economic analysis and finance theory, getting the real stories from development victims and using this knowledge to reveal the structural discrimination neoliberal policies produce. It also means working to conceptualize and advocate new institutional structures and decisionmaking procedures that will facilitate the task of monitoring these institutions and the impact of their policies on the development process.

24. This is not to say that either Professor Carrasco's historical account or the lessons he draws are entirely uncontested. While it is certainly true that Latin American welfare states have been unable to redistribute in an equitable and sustainable manner the wealth produced by import substitution policies, it does not follow that LatCrits should accept the structural adjustment policies and free trade agenda advocated by neoliberals. A very different development trajectory would begin with the reconfiguration of Fordist production relations in the import-substituting industries and a recognition that the welfare state cannot narrow the gap between rich and poor without the power to impose real redistribution on economic elites, a power few Latin American states have ever commanded. Without that power, any redistributive policies will come inevitably at the expense of macroeconomic health because they will be financed through inflationary spending rather than through real redistribution. See generally Tamara Lothian, *The Democratized Market Economy in Latin America (and elsewhere): An Exercise in Institutional Thinking Within Law and Political Economy*, 28 CORNELL INT'L L.J. 169 (1995). Nevertheless, Professor Carrasco's call for radically rigorous monitoring is hardly objectionable.

While the first two presentations focused on the way the structures of international political economy impact upon the enjoyment of economic, social, and cultural human rights, Professor Adrien Wing's intervention shows the essential role these rights can play in developing effective remedies for the various forms of spirit injury inflicted on women of color through the practices of rape, domestic violence, and other forms of sex-based oppression.²⁵ Her presentation also makes a more general contribution to the development of LatCrit theory by introducing and deploying the new perspectives and methodologies of Critical Race Feminism.

Like LatCrit theory, Critical Race Feminism challenges the black/white paradigm of Critical Race Theory. It places women of color at the center of critical analysis and focuses specifically on the intersecting impact of multiple forms of class, race, and gender subordination women of color often experience.²⁶ In this way, critical race feminism invites us to develop a collective political identity and to forge an antistubordination agenda across the divisions of race, class, and ethnicity. Like LatCrit theory, it urges us to transcend a black/white paradigm that has ignored the oppression of women of color as much as it has ignored the impact of white supremacy on nonblack minorities. At the same time, Critical Race Feminism also constitutes a direct and compelling challenge to LatCrit theory to develop in ways that are engaged with and responsive to women's claims of autonomy, dignity, and self-determination.

Professor Wing uses Critical Race Feminism to reveal important connections between the wide-spread rapes perpetrated on Bosnian women by Serbian men and the rapes of black women by

25. Adrien Katherine Wing, *Critical Race Feminism and the International Human Rights of Women in Bosnia, Palestine, and South Africa: Issues for LatCrit Theory*, 28 U. MIAMI INTER-AM. L. REV. 337 (1996-97).

26. See Iglesias, *supra* note 4, at 400 (arguing that "women of color constitute a distinct political subject and represent a meaningful perspective from which existing legal regimes may be examined and judged."). See also Elizabeth M. Iglesias, *Rape, Race and Representation: The Power of Discourse, Discourses of Power and the Reconstruction of Heterosexuality*, 49 VAND. L. REV. 869 (1996) [hereinafter Iglesias, *Rape, Race and Representation*] (analyzing the way racialized images of women's sexual desire and feminine identity, both as mothers and as sexual beings, as well as women's economic vulnerability, reproduce the logics of white supremacy and male supremacy through the processing of rape cases, the regulation of welfare eligibility, and the resolution of child custody disputes).

white men under slavery in the United States. In both instances, the rapes did more than inflict severe physical and psychological harm on individual women; these rapes imposed systemic injuries on the entire ethnic/racial group to which these women belonged. Like the untreated spirit injuries suffered by black Americans, these injuries will reach far into the future, as the children produced by these rapes grow to confront the history that marks their very existence as an instrument of racial oppression and cultural genocide. Wing also shows how her spirit injury analysis can help LatCrits more fully understand and effectively address the many injuries inflicted on Latinas/os through the practices of state terrorism, compulsory sterilization, employment discrimination, environmental racism, and defamation.

In drawing these comparisons, Professor Wing criticizes the limited remedies available for these profoundly debilitating spirit injuries. Focusing on the victims of rape, she notes that criminal prosecutions and tort claims may provide some limited remedies to some limited number of women, but they do not remedy the spirit injuries of the women or their racial/ethnic group. Long-term spirit injuries require "a combination of law and rehabilitative and preventive measures in the fields of education, counseling, employment training."²⁷ In short, like social, economic, and cultural rights, adequate remedies require fully financed programmatic interventions. The fact that these affirmative interventions are the only adequate remedies for long-term spirit injuries underscores the crucial role of economic, social, and cultural human rights in the struggle against subordination. A greater acceptance of and commitment to the realization of economic, social, and cultural rights would make Professor Wing's suggestions seem much less radical.

Professor Wing also encourages LatCrits to acknowledge and oppose the ways in which Latin cultural norms, expectations, and practices enable and enforce the continued subordination of Latinas, both in the United States and in Latin America. Using her analysis of the substantial disabilities, constraints, and second class status imposed on Palestinian and South African women by cultural norms and, in the former instance, by the precepts of Islamic religion, Wing draws important parallels to Latin culture, noting that the glorification of *machismo* and *marianismo* and the

27. Wing, *supra* note 25, at 345.

teachings of the Catholic Church enable analogous forms of discrimination against Latinas.²⁸

Professor Wing identifies numerous practical strategies LatCrits might use to combat these cultural norms and practices through international law. In making these suggestions, Wing is well aware that male elites have often resisted compliance with basic international human rights laws aimed at eliminating all forms of discrimination against women by declaring these sexist customs and traditions to be essential elements of their culture. Wing flatly rejects these claims and shows LatCrits how Critical Race Feminism provides the needed perspective from which the deployment of law against culture can be seen as part of a process of liberation. Cultural imperialism is most certainly a form of subordination LatCrits need to oppose, but the meaning and substance of a culture is neither static nor is it the exclusive jurisdiction of cultural elites. To the extent women resist the norms, practices, and expectations that oppress us, we are participants in the process through which cultures evolve and are entitled to have our claims to dignity, autonomy, and self-determination respected and enforced.

In the final panel presentation, I urged LatCrits to focus on and contribute to the evolution of various new rights regimes linking the enforcement of human rights to international economic law.²⁹ I organize this analysis around four specific linkage regimes: (1) the rights regime established by federal statutes imposing labor rights conditionality on developing countries seeking preferential access to U.S. markets; (2) the multilateral labor rights regime established by the North American Agreement on Labor Cooperation (NAALC); (3) the linkage regime established by the U.S. embargo of Cuba, read as an effort to promote the right to democratic governance, and finally (4) proposals to link the enforcement of international human rights to the decisionmaking processes of the World Bank.

These linkage regimes are all relatively recent developments and reflect a variety of possible responses to the fundamental re-

28. For an extensive analysis of the way Latin cultural norms and practices, in complicated ways, both undermine and enable the expression of female autonomy, see Iglesias, *Rape, Race and Representation*, *supra* note 26.

29. Elizabeth M. Iglesias, *Human Rights in International Economic Law: Locating Latinas/os in the Linkage Debate*, 28 U. MIAMI INTER-AM. L. REV. 361 (1996-97).

structuring both global capitalism and the inter-state system are currently undergoing. In different ways, each linkage regime challenges and transcends the fragmentation of legal fields. Some are more likely than others to enable progressive developments in the struggle against subordination. Nevertheless, in either case, the rapid transformations currently underway in the international structure of production, investment, and trade have profound implications for LatCrit struggles against subordination both in the United States and in Latin America. Consequently, legal regimes linking the enforcement of human rights to the international regulatory frameworks that govern these processes are crucial sites for LatCrit critical analysis and political intervention.

At the same time, I urge LatCrits to approach this area super critically. Proposals to enforce human rights through the institutions and procedures established by international economic law can be designed to achieve many different ends. None of these ends are uncontroversial, and not all Latinas/os are similarly situated in relation to the economic arrangements, political institutions, cultural formations, and interstate structures that would be transformed by different human rights linkage regimes. For this reason, the legal debates over different human rights linkages constitute a concrete field of analysis through which we can move beyond a simple reiteration of the now familiar insights of post-modern identity politics. While we all know that Latinas/os occupy multiple identity positions at the intersection of many different social relations of privilege and subordination, we now need to better understand the political consequences of our assuming any particular subject position. My presentation demonstrates that the legal debate over human rights linkages provides a rich and fruitful field for developing that political analysis and assessing its practical implications for our struggles against subordination.

After briefly describing the four linkage regimes, I examine the difficulties involved in identifying the critical perspective from which the LatCrit movement should begin to analyze and intervene in the debates over these different linkages. To do this, I organize my analysis around three distinct but interrelated discourses. I call these the discourses of development, dependency, and neoliberalism. By focusing on the different ways these three discourses represent the problem of Latina/o subordination, I am able to show the relations of privilege and oppression that would be reinforced and the different political alliances that would be

enabled and suppressed by analyzing these linkages through the critical perspectives expressed in each of the three discourses. For example, development discourse attributes Latina/o subordination to the persistence of underdevelopment (or underachievement) and underdevelopment to our failure to assimilate Western capitalist cultural values, modes of production, and social relations. Dependency discourse, by contrast, links Latina/o subordination to the inequality of Latin American states within the interstate system, while neoliberalism links it to the restrictions imposed on free market competition through state interventions and protectionism, as well as private monopolies and discrimination in the markets. Because each discourse attributes Latina/o subordination to different causes, each prescribes different responses and encourages different forms of political alliance and confrontation.

This analysis contributes to LatCrit theory in a number of ways. First, it illustrates the ways in which postmodern understandings of political identity and the politics of discourse can help LatCrits develop more comprehensive analyses of the legal structures through which relations of subordination are both challenged and reproduced. Any of these three discourses can be deployed either in support of or in opposition to any legal regime designed to link human rights enforcement to international economic law because each discourse simultaneously privileges and politicizes a different subject position.

Development discourse privileges subject positions most assimilated to First World cultural values and politicizes the unasimilated. Thus development discourse makes it possible to organize both support for and opposition to human rights linkages around issues related to the impact of international economic activity on pre-existing social relations of production, reproduction, and exchange. Dependency discourse privileges subject positions with control over the state apparatus and politicizes those without; thus it organizes the lines of political alliance and confrontation around issues related to the impact of international scrutiny on the sovereignty of the state; support and opposition to human rights linkages is, therefore, made to turn on one's position in relation to the state. Neoliberal discourse privileges those subject positions most favorably situated to exploit the opportunities offered by unregulated markets and politicizes those victimized by unregulated market competition; thus, it organizes support and opposition to human rights linkages around issues related to the

impact of these linkages on the operation of the markets neo-liberalism seeks to free.

These understandings, in turn, enable us to engage the legal struggle against subordination with greater awareness of the political implications of the subject positions we embrace. They clue us into the different ways in which our political identities are discursively constructed and politically manipulated and enable us to see the need for an antisubordination agenda which transcends the limited perspectives of all these various identity positions. These positions are, after all, only artifacts of the historically contingent structures of a world order we intend to transform.

This analysis also makes a second contribution. It is no accident that my intervention in the legal struggle for human rights specifically targets the way these rights have (and have not) been incorporated into the substantive and procedural frameworks of international economic law. Not only does this approach reflect my considered opinion that law facilitates the reproduction of subordination most insidiously through the fragmentation of legal fields, it also reflects my perhaps more controversial belief that the nation state will (and should) become a legal anachronism—a thing of the past. While this fate will be most directly attributable to the economic and political strategies multinational corporations are deploying in their efforts to liberate international capitalism from state interventionism and regulation, the demise of the interstate system of sovereign nations is potentially a progressive development for the struggle against subordination. After all, this system has been a major factor in enabling the processes of uneven development both within and between states and, in many ways, fosters the practice of war.³⁰

The problem, of course, is that until recently the nation-state has been the only meaningful target for antisubordination movements, at least in the United States. Indeed, in this country, most advances in the struggle for racial, gender, and economic justice have been achieved through the power of the state. This is

30. See generally CHRISTOPHER CHASE-DUNN, *GLOBAL FORMATION: STRUCTURES OF THE WORLD ECONOMY*, 107-50 (1989). See also Henry J. Richardson, III, "Failed States," *Self-Determination, and Preventive Diplomacy: Colonialist Nostalgia and Democratic Expectations*, 10 *TEMP. INT'L & COMP. L.J.* 1, 75 (1996) (offering a brilliant analysis which reveals the irrationality of international legal doctrines designed to uphold the concept of sovereignty by ignoring claims of liberation movements within the nation-state until they "earn" such recognition through successful military actions—thus fostering civil war).

changing. As international legal regimes increasingly restrict and assume the regulatory power formally held by states, they are creating new sites for the struggle against subordination. Linking human rights enforcement to these regimes is a legal strategy LatCrits should pursue because it furthers our antisubordination agendas without requiring us to continue investing in a bankrupt system of nation-states.

IV. GROUP SOLIDARITY, ENVIRONMENTAL RIGHTS AND DEVELOPMENT WRONGS: LATCRIT PERSPECTIVES ON THIRD GENERATION HUMAN RIGHTS

The presentations of the third panel provide different perspectives on the way key debates surrounding the recognition of the third generation solidarity rights might be addressed through LatCrit theory and practice. Solidarity rights have been even more controversial than economic, social, and cultural human rights. Attacked as excessively general, unenforceable and likely to undermine respect for other human rights, solidarity rights have been defended, on the other hand, as derivatives of the mutual rights and obligations inherent in the interdependence that constitutes all social life and have been sourced to Article 28 of the Universal Declaration, which entitles everyone "to a social and international order in which the rights and freedoms set forth in this declaration can be fully realized."³¹ They include the right to equitable and sustainable development, the rights of self-determination movements, and the right to a healthy environment, to security, and to peace.

The three panel presentations provide very different perspectives on the way a greater familiarity with the substance, purpose and conceptual structure of these rights might inform the development of LatCrit theory and antisubordination practices. From some perspectives, these rights promise to increase the range of strategies and expand the collective solidarities through which this agenda might be more effectively realized; from other perspectives, their implications are more ambiguous. These differences reflect the different positions from which the presenters approach these issues: Professor Natsu Saito's points of reference are the legal struggles of social justice movements in the United

31. See Sánchez, *infra* note 35.

States; Professor Ileana Porras's concern tends to emphasize the development claims of Third World states in international forums constituted to establish environmental standards, while Professor Raúl Sanchez's perspective is directly informed by his experiences representing Mexican farmers devastated by development wrongs. Together their different perspectives and positions provide a rich and compelling contribution to the development of LatCrit theory and practice.

Professor Saito's presentation provides the first point of departure.³² Saito encourages LatCrits to explore the many new legal and political possibilities that would be enabled by reconceptualizing our struggles against subordination through the discourse of international human rights, generally, and group solidarity rights, in particular. She shows us these possibilities by retelling the story of the civil rights movements in the United States—re-envisioning their history as a struggle for human rights. These movements were initially movements for first generation civil and political rights, yet the struggle for social and racial justice quickly exceeded the limited parameters of civil and political rights. The struggle for economic justice—for the rights to housing, welfare, public education, and health care—that is, for second generation economic, social, and cultural human rights soon followed, costing many civil rights leaders their lives. Recognizing these various social struggles as related movements in a broader struggle for human rights is a first step toward conceptualizing new forms of solidarity that would enable racially subordinated groups to exercise effective political power across the divisions of class, ethnicity, and citizenship.

Using human rights discourse as a consciousness raising device is only one of Professor Saito's suggestions. This discourse also offers a variety of new approaches for LatCrits operating as legal advocates and theorists. The U.S. government has often asserted that the U.S. Constitution contains all the rights needed in this country and has responded to international criticism of its failure to secure second generation welfare rights by rejecting their status as human rights. But the idea that international human rights are unnecessary in the United States is simply an ex-

32. Natsu Taylor Saito, *Beyond Civil Rights: The Potential of "Third Generation" International Human Rights Law in the United States*, 28 U. MIAMI INTER-AM. L. REV. 387 (1996-97)

pression of arrogant ignorance and a refusal to see the fundamental parallels Professor Saito notes between practices such as the ethnic cleansing in Rwanda and former Yugoslavia and the impact of welfare cutbacks and ordinances aimed at homeless people.

The United States is bound by international law, and the increasingly narrow interpretations of constitutional rights by a reactionary and activist Supreme Court make international law an even more important resource in the struggle for social justice within the United States. Greater familiarity with international human rights will provide lawyers with a broader perspective from which to challenge the limitations of U.S. rights regimes. LatCrits can contribute by invoking these rights in domestic litigation and international forums and by integrating them into our scholarship.

The most important site Professor Saito targets for careful critical legal analysis is the task of conceptualizing ways to promote the recognition and enforcement of group rights in American jurisprudence. American rights regimes are profoundly individualistic because American lawmakers tend to approach every social problem they want to address by articulating individual rights and remedies. Professor Saito provides a number of examples of the way this individual rights approach undermines the very interests it purports to vindicate. In one particularly compelling example, she recounts the impact of U.S. policies towards Native Americans. In the 1920s, the U.S. government attempted to divide up the Indian lands it held in trust by giving the divided parcels, along with U.S. citizenship, to individual Indians. This effort to translate the group interests of Native Americans into individual rights resulted in the loss of land, resources, communities, and access to culture and history.

The lesson Professor Saito urges us to draw from this example is that many fundamental human interests, both group interests and individual interests that arise from an individual's membership in a group, cannot be effectively protected by individual rights regimes. This lesson is there to be learned in many different areas of American law. In the 1960s and 1970s, the desegregation of longshoring unions throughout the South was carried out over the strenuous opposition of black and Mexican unions and their members. Through an excessively individualistic interpretation of Title VII's antidiscrimination mandate, the union merger cases stripped minority communities of many of the advances they had been able

to achieve through the exercise of collective rights established under the National Labor Relations Act.³³ The union mergers were necessary to preserve the illusion that Title VII protects individual antidiscrimination rights, but the price of this illusion was the power of self-determination. By illustrating the importance of group rights in the struggle for human rights, Professor Saito enables and encourages us to continue challenging the conceptual limitations of U.S. rights regimes and, in doing so, helps us reconceptualize the antisubordination agenda. Freedom from discrimination is not the same as self-determination and, for precisely this reason, it is not enough.

Professor Porras's intervention takes a more skeptical stance towards human rights discourse.³⁴ Focusing specifically on efforts to address environmental problems through the framework of international human rights, Porras asks whether LatCrit theory will embrace the rights critique articulated by the early Critical Legal Studies movement. This movement, like many social movements in Latin America, rejected the formalism of liberal rights. These rights were criticized for their tendency to obstruct the development of authentic community, to ignore social interests that are untranslatable into the language of rights, and to divert social actors from pursuing more transformative political strategies in favor, for example, of legal strategies like litigation. While Professor Saito's intervention suggests a number of ways in which the CLS critique of liberal rights might be integrated into a new narrative linking the civil rights movement to the struggle for human rights more broadly conceived, early Critical Race Theorists responded by aligning the struggle against racial discrimination to an affirmation of the negative rights regimes established by first generation civil and political rights.

In effect, Professor Porras's question asks how LatCrits, particularly those proposing to address environmental issues through a human rights framework, will position themselves in this debate. She herself expresses several doubts about the usefulness of international human rights discourse in addressing environmental problems. She notes that environmental problems are intergenerational. Solving them requires us to focus on and protect the in-

33. See Iglesias, *supra* note 4.

34. Ileana M. Porras, *A LatCrit Sensibility Approaches the International: Reflections on Environmental Rights as Third Generation Solidarity Rights*, 28 U. MIAMI INTER-AM. L. REV. 413 (1996-97).

terests of future generations, but human rights law prioritizes the present needs of individuals. When environmental values conflict with the satisfaction of basic human needs, the current human rights framework makes the satisfaction of human needs the fundamental priority—an anthropocentrism Professor Porras also rejects.

After sketching out some of her more immediate reservations, Professor Porras asks whether LatCrit theory can offer any more helpful insights on the issue of international environmental rights. She asserts that it can, focusing particularly on the way LatCrit insights can help Latinas/os negotiate the different socio-cultural processes that position our interventions in the international field between two dilemmas. On the one hand, a LatCrit perspective can help Latinas/os respond more effectively to the imperatives of assimilation; it enables us to resist the pressures to construct a USLat identity by denying what she calls the *OtroLat*; and it urges us to remember the contingencies of geopolitical boundaries. After all, as Professor Porras reminds us, the only difference between us and them is our papers. On the other hand, whatever our sense of cross national solidarity, a LatCrit perspective compels us to confront and combat the invisibility of privilege—including our own. As Professor Porras reminds us, we are Americans. The *OtroLats* we encounter will view us as Americans, in large part, because whatever our intentions or inclinations, we will think and act from the positions of our First World privilege.

How should this analysis inform our approach to environmental problems? For Professor Porras, it suggests the need for a politics that values the diversity and fluidity of the present and the indeterminacy of the possible—"a politics of embrace and non-exclusiveness." This in turn translates into a critical stance towards efforts to address environmental problems through international standards or the harmonization of domestic environmental laws or both. In taking this stance, Professor Porras is not unaware that it represents a particular subject position aligned in defense of Third World sovereignty. On the contrary, she invokes her experience as a Costa Rican representative working with the G-77 developing countries during the United Nations Conference on Environment and Development. There she saw first hand how the debates over environmental protection were manipulated in order to maintain the First World's economic domination. From

this position, Porras would affirm the legitimacy of Third World claims to permanent sovereignty over resources within their jurisdiction.

At the same time, Professor Porras rejects any facile prioritization of economic development objectives or Third World sovereignty over environmental values and the human rights of people these states purport to (but may not actually) represent. In this way, her argument illustrates the strategic positioning a LatCrit perspective enables, even as it suggests the limitations of positionality. We cannot move in all directions at the same time—though we can certainly imagine doing so. Moving from theory to practice means moving from positionalities to positions, even as we use the insights of our theoretical perspectives to redesign the structure of positionalities that constrain the positions we must take.

Professor Sanchez's intervention closes the panel presentations and the Colloquium proceedings.³⁵ It is a case study of the development wrongs perpetrated in the planning, construction, and management of a large infrastructure project located near the U.S.-Mexico border. By telling the story of the El Cuchillo Project, Professor Sanchez provides us with rich and detailed insights into the environmental and socio-economic harms created by unsustainable development projects; the governmental negligence, corruption, and political expediencies that produce them; the role and responsibilities of development banks in development disasters and the violations of domestic and international law that remain irremediable for lack of effective enforcement mechanisms.

Professor Sanchez's case study of the development wrongs produced by the El Cuchillo Project provides a graphic depiction of the way socio-economic subordination becomes a seamless web of violence constituted by innumerable and interrelated social and legal problems of daunting proportions. The development victims, whose story Sanchez tells, are enmeshed in a system that criminalizes their efforts to survive the socio-economic disruptions and environmental racism that threaten both their lives and their livelihoods, even as it allows government representatives to ignore and suppress the claims of right they assert.

35. Raúl M. Sánchez, *Mexico's El Cuchillo Dam Project: A Case Study of Nonsustainable Development and Transboundary Environmental Harms*, 28 U. MIAMI INTER-AM. L. REV. 425 (1996-97).

Professor Sanchez's story of El Cuchillo also illustrates directly and concretely the pressing need for the legal recognition and enforcement of collective rights. Development projects produce collective harms and require collective remedies. At the very least, they require collective action. Nonelite individuals do not have the economic resources or the political power to intervene effectively in the political machinations through which these projects are planned, implemented, and managed. Thus they need the rights to act collectively (rights like the right to information, participation, and collective bargaining).

In addition, Professor Sanchez's description of the various groups dependent upon the water supplies affected by the project's dam—including human beings needing potable water, farmers needing water for irrigation, and local merchants living off recreational fishermen, boaters, and tourists—gives another reason to pause. Our own experience with class actions and structural injunctions in the United States should provide a concrete reminder that legal claims crafted around the assertion of individual rights do not provide an adequate framework for resolving the many competing and legitimate claims triggered by the impact of development projects. Resolving these competing interests requires the development of forums for informed negotiation and fair compromise—forums whose effective operation presupposes a balance of power among the claimants, or at the very least, a set of ground rules that prohibits the compromise of any claimants' fundamental interests. Legal scholarship aimed at articulating the procedural and institutional structures that could establish such forums at an international level is a project worthy of LatCrit attention.

V. CONCLUSION

The proceedings of this Colloquium span a broad range of substantive issues and analytical methodologies that arise from and bear upon two distinct but related projects in critical legal scholarship: the project of integrating international human rights into LatCrit struggles for social justice and the project of integrating LatCrit theoretical perspectives and our antisubordination agendas into the development of international law. The depth, breadth, and rich variety of the presentations evidence the many possibilities embedded in both projects. They are a credit to the movement and a promise of more to come.

