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The Role of Transnational Identity and Migration

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LATCRIT THEORY AND INTERNATIONAL CIVIL AND POLITICAL RIGHTS: THE ROLE OF TRANSNATIONAL IDENTITY AND MIGRATION

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I. INTRODUCTION

My comments will focus on LatCrit theoretical perspectives on identity as they relate to debates about the declining role of state sovereignty in international law and the role of international advocacy strategies in promoting international civil and political rights in the United States.[1] I have chosen the idea of transnational identity—an idea that may be common to many Latinos/as—to address these two issues.

As Rina Benmajor noted in *Crossing Borders: The Politics of Multiple Identity*:

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1. We have been asked to address three main issues in our talks about international civil and political rights: 1) LatCrit theoretical perspectives on identity as these relate to traditional themes and concerns; 2) whether LatCrit theory offers new perspectives on recent trends toward regional economic cooperation, such as NAFTA, and the impact of these regimes on Latinos/as; and 3) whether LatCrit theory has anything to offer to key international law debates such as the role of sovereignty in international law, the appropriate scope of state intervention in civil society, and the status of international human rights in regional integration agreements.

> The child of the Americas is forged not only from the history of conquest but from global migration, thus incorporating the experience of being Puerto Rican or Latin in the United States, of "third world" in the "first." From this vantage point, the strategy for collective empowerment implies a recognition of transnational cultural citizenship rooted in but moving beyond strictly national terms of identity.[2]

A transnational identity is typically evidenced by recent immigrants who maintain close ties with their home country, including frequent travel, visits by friends and family members from the home country, and other ties. I use the term transnational identity in a broader sense, which includes those members of the Latino/a community who maintain physical or less tangible ties to their ancestral home countries which may or may not include frequent travel to that country. For many Latinos/as, there may be a sense of possessing a home country other than the United States, regardless of the actual ties to that home country, which may provide for a world view that is less tied to parochial U.S. interests. For example, Caribbean immigrants are noted for possessing a transnational dual identity because of frequent travels to and from their ancestral home countries. It has been asserted that there must be a recognition of this transnational identity and, thus, some form of transnational multiculturalism that operates within the borders of the United States and across permeable borders.[3]

It is this transnational identity, which many Latinos/as and other "immigrant" or "migrant" groups may possess, that could aid in the development of a more inclusive view of pluralism.[4] Professor Mari Matsuda refers to the notion of radical pluralism as a constitutional entitlement in the United States.[5] Radical

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2. Rina Benmajor, *Crossing Borders: The Politics of Multiple Identity*, 2 CENTRO DE ESTUDIOS, PUERTORRIQUENOS BULL. 72, 74 (1988).

3. *See* Constance R. Sutton, *Transnational Identities and Cultures: Caribbean Immigrants to the United States*, *in* IMMIGRATION AND ETHNICITY: AMERICAN SOCIETY—"MELTING POT" OR "SALAD BOWL"? (Michael D'Innocenzo & Josef P. Sirefman eds., 1992).

4. This transnational identity is shared with others who possess roots in the Western Hemisphere, such as persons with links to the non-Spanish-speaking Caribbean. *Id.* It has also been asserted that this transnational, postcolonial identity is shared by Asian/Pacific Islanders as well. *See* Neil Gotanda, *Chen the Chosen: Reflections on "Unloving,"* (pending publication) (manuscript at 13, on file with author).

5. Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1401 (1991).

pluralism finds an entitlement to cultural diversity that is mandated by the U.S. Constitution and principles of democracy. This entitlement would include self-determination in making and promoting one's culture and sharing it with other politically equal cultures.[6] Professor Matsuda asserts a need for radical pluralism in the context of accent discrimination where there would be a right to "keep" one's accent even if it is changeable with the result that no citizen would be required to alter a core part of their identity in order to participate in society.[7]

The U.S. constitutional basis for radical pluralism could be supported by what has been termed the international right to personal self-determination. This international right to personal self-determination allows for individual choice regarding loyalty to country, ethnic or racial groups, or any other common bond. The existence of this right to personal self-determination is evidenced by the growing international practice recognizing dual nationality. The deterioration of the nation-myth that defines the United States as a tribal community with a shared white, Christian, and Western European heritage is further accelerated by increased economic and trade integration and transnational migration.[8]

II. TRANSNATIONAL IDENTITY AND INTERNATIONAL ADVOCACY STRATEGIES

What is the potential role of individuals with a transnational identity in the development of international advocacy strategies? It is the establishment of working relationships with international civil rights groups. The Latino/a connection to Latin America, however temporal it may be, may be critical to forming a more integrated advocacy approach to advancing an

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6. *Id.* at 1401 (citing Kenneth L. Karst, *Paths to Belonging, the Constitution and Cultural Identity*, 64 N.C. L. REV. 303 (1985-86); Frank Michelman, *Saving Old Glory: On Constitutional Iconography*, 42 STAN. L. REV. 1337 (1990); Robert Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CALIF. L. REV. 297 (1988); Gerald Torres, *Local Knowledge, Local Color: Critical Legal Studies and The Law of Race Relations*, 25 SAN DIEGO L. REV. 1043 (1988)).

7. Matsuda, *supra* note 5, at 1400.

8. Kevin R. Johnson, *Free Trade and Closed Borders: NAFTA and Mexican Immigration to the United* States, 27 U.C. DAVIS L. REV. 937 (1994). This migration and increased economic integration occurs in the Western Hemisphere despite the active attempts of the United States to avoid labor and other forms of human migration from the South.

international civil rights and political rights agenda in the United States and in the Western Hemisphere in general. If we accept the notion that the struggle to secure fundamental civil rights is essentially a domestic struggle, but that international law and relations can have an impact in the local struggle, then this should propel us to form alliances with international advocacy groups.[9]

There is a significant history of appealing to international civil rights norms as a means of prompting the advancement of civil rights in the United States. Civil rights groups in the United States were among the first in the world to petition the United Nations for relief from abusive conduct by a member state.[10] In 1947, the National Association for the Advancement of Colored People filed a petition before the United Nations denouncing race discrimination in the United States; this led to international approbation and ultimately aided in the civil rights revolution in this country.[11] The international exposure of the civil rights hypocrisy that existed in the United States, after this country had successfully fought genocide in Europe, influenced both foreign policy and domestic civil rights.[12]

Latinos/as can lead an international advocacy effort that links struggles in the United States with those of other oppressed groups in the Western Hemisphere and worldwide. Since the 1950s, U.S. civil rights groups have lacked a working relationship with international civil rights groups. These relationships are important as vehicles to expand the understanding of the application of international law within states.[13]

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9. Dorothy Q. Thomas, *Advancing Rights Protection in the United States: An Internationalized Advocacy Strategy*, 9 HARV. HUM. RTS. J. 15 (1996). Thomas notes that local rights activists worldwide have recognized that most serious domestic rights problems have an international dimension and that domestic groups in a growing number of countries have successfully drawn upon international human rights law and have used global pressure and scrutiny to challenge and ameliorate adverse domestic conditions. *Id.* at 17.

10. *Id.*

11. *Id.* In addition, the Civil Rights Congress filed a second petition in 1951, charging the United States with genocide under the 1948 Convention on the Prevention and Punishment of Crimes of Genocide; however, neither petition resulted in formal denunciation of or charges against the United States.

12. *See* Mary Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988); Thomas, *supra* note 9, at 18.

13. Thomas, *supra* note 9, at 18. The National Association for the Advancement of Colored People Legal Defense Fund and the American Civil Liberties Union have only recently begun to actively work with international organizations. Thomas explains the

U.S.-based civil rights groups have not maintained ties to international groups until recently.[14] For example, in 1993, Human Rights Watch and the American Civil Liberties Union (ACLU) released a joint report that documented the United States failure to comply with the International Covenant on Civil and Political Rights.[15] This joint effort yielded concrete results. The publication of the joint Human Rights Watch-ACLU report led the United Nations Human Rights Committee to question the United States about sex and race discrimination and about the treatment of juvenile and other offenders.[16]

Integrated relationships between U.S. civil rights groups and international groups may be critical because of the effective limits on the application of international law in the United States.[17] Active Senate obstruction of the application of international law in the United States through the use of treaty reservation authority,[18] as well as the Supreme Court's willingness to jettison international law principles, especially international human rights obligations in pursuit of asserted U.S. government interests, have rendered legal strategies relatively ineffective.[19]

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lack of connection to the obstruction by the Supreme Court and Congress, in particular, to the application of international law in the United States. *Id.* at 20.

14. *Id.* at 19.

15. HUMAN RIGHTS WATCH & AMERICAN CIVIL LIBERTIES UNION, HUMAN RIGHTS VIOLATIONS IN THE UNITED STATES: A REPORT ON U.S. COMPLIANCE WITH THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (1993). *See also* Thomas, *supra* note 9 (reporting other joint efforts including joint hearings in October 1994 held by the Geneva-based World Council of Churches and the New York-based National Council of Churches around the United States on U.S. compliance with the Convention on the Elimination of Racial Discrimination).

16. *See also* Thomas, *supra* note 9, at 19.

17. Gordon A. Christenson, *Problems of Proving International Human Rights Law in U.S. Courts: Customary International Human Rights Law in Domestic Court Decisions*, 25 GA. J. INT'L & COMP. L. 225 (1995-96).

18. Reservations to treaties may exempt the United States from the obligations of specific treaty provisions, stipulate that treaty obligations will not abrogate domestic law, and stipulate that the treaty is non-self-executing and, therefore, requires implementing legislation before treaty obligations become enforceable in domestic courts. For example, ratification of the Convention on the Elimination of Racial Discrimination was conditioned on the statement that the United States need not alter its domestic laws in any way to conform to the treaty, known as the Helms Proviso. *See also* Thomas, *supra* note 9, at 20 n.23.

19. *See, e.g.*, Stanford v. Kentucky, 492 U.S. 361 (1989) (refusing to apply international law limitations on the use of the death penalty for minors under the age of 18); United States v. Alvarez-Machain, 504 U.S. 655 (1992) (finding that the U.S. government abduction of a Mexican national in Mexico did not violate the terms of the U.S.-Mexico extradition treaty because the treaty did not prohibit abduction). The resistance to the

A regional community of advocacy groups has begun to form in the Caribbean to deal with transborder women's issues. For example, Women and Development United, founded in Barbados in 1978, and the Caribbean Association for Feminist Research and Action, founded in the mid-1980s, have promoted research and action on women's issues throughout the entire Caribbean region. Moreover, these organizations have promoted contact among different local and national groups within the Caribbean and have helped establish a more regional view of women's issues.[20] This growing regionalism in the Caribbean is viewed as a challenge to the traditional role of state actors and as an opportunity to transcend the historical fragmentation that characterizes the Caribbean Basin.[21]

III. TRANSNATIONAL IDENTITY AND STATE SOVEREIGNTY

The traditional view of sovereignty is premised on the inviolability of a state's borders and is recognized as one of the few pre-emptory norms in international law. One challenge to the static notion of sovereignty offers the perspective that state sovereignty is not an intrinsic value or autonomous principle in international law, but rather is tied to human rights and respect for individual autonomy.[22] Others have criticized the concept of state sovereignty as enhancing the integrity of nations, which are lacking in human rights standards.[23] Sovereignty is also de-

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incorporation of human rights law into U.S. law has been attributed to several factors including: 1) a fear of diluting the Bill of Rights protections which may be more expansive than some human rights protections; 2) the fear of creating an affirmative duty on the part of the state to ensure social equality rather than a duty not to deprive an individual of their rights; 3) the fear of U.S. officials being held accountable in foreign countries for actions against minorities if an affirmative duty exists; and 4) the fear of too many cases clogging the U.S. judicial system with foreign plaintiffs suing their home country governments and United States citizens suing U.S. officials. Christenson, *supra* note 17.

20. Andres Serbin, *Transnational Relations and Regionalism in the Caribbean*, 533 ANNALS AM. ACAD. POL. & SOC. SCI. 139, 147 (1994).

21. *Id.* at 150.

22. Fernando R. Tesón, *International Abductions, Low-Intensity Conflicts and State Sovereignty: A Moral Inquiry*, 31 COLUM. J. TRANSNAT'L L. 551, 553 (1994) (criticizing the traditional positivist proposition as extreme and resting on antiquated and rigid notions of sovereignty); Karen Knop, *Re/Statements: Feminism and State Sovereignty in International Law*, 3 TRANSNAT'L & CONTEMP. PROBS. 293, 298 (1993) (pointing out that there is a particular focus on the respect for political rights that are central to notions of classical liberal democracy).

23. Jason Mark Anderman, *Swimming the New Stream: The Disjunctions Between and Within Popular and Academic International Law*, 6 DUKE J. COMP. & INT'L L. 293

scribed as a barrier to international governance, the growth of international law, and the realization of human values.[24]

Louis Henkin points out that international human rights over the past fifty years have had a significant impact on the deconstruction of state sovereignty as a preeminent principle in the international system.[25] He asserts that the international system, although a system of independent states, has moved beyond state values to human values and towards a commitment to human welfare, that human rights law has penetrated the state entity and addresses the condition of human rights within every state, that human rights law consists of important norms to which some states have not consented, that the international system has developed institutions for enforcing human rights law against "sovereign" states and on occasion has encouraged states to "intervene" in other states to support human rights, and that international law has importantly influenced and been influenced by national constitutions and constitutional systems.[26]

The corresponding principle of nonintervention tied to state sovereignty has also been criticized as leaving women vulnerable to discrimination and abuse.[27] The nonintervention principle, which has been the cornerstone of the Organization of American States, is considered weakened by the Organization of American States 1991 adoption of the Santiago Commitment to Democracy and the Renewal of the International System. This commitment requires consultation by Ministers of Foreign Affairs of the American Republics when a military coup takes place or when the democratic stability of a country is threatened in some way.[28]

The principle of nonintervention and state sovereignty may be weakened by the increased prominence of nongovernmental organizations in the world's international policymaking institu-

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(1996). Anderman suggests that the news media, as a force that shapes ideas and ideology in the United States, should be studied to fully understand international law. In addition, Anderman points out the disjunction between respect for sovereignty and adherence to minimal human rights standards. *Id.* at 294.

24. Louis Henkin, *Sibley Lecture, March 1994, Human Rights and State Sovereignty*, 25 GA. J. INT'L & COMP. L. 31 (1995-96).

25. *Id.* at 32.

26. *Id.* at 32-33.

27. Knop, *supra* note 22, at 299.

28. Claudio Grossman, *The Inter-American System: Opportunities for Women's Rights*, 44 AM. U. L. REV. 1305 (1995).

tions. Some have suggested that the increased role of nongovernmental organizations in conference planning and participation may lead to their involvement in the formulation of customary international law; this would be another affront to traditional notions of sovereignty, such as the notion that only the state can consent to be bound by custom.[29] Thus, parallel institutional structures, including international advocacy groups, might play a significant role in the constitutive process of decisionmaking.

Latino/a transnational identity may have a further impact on the declining importance of state sovereignty. Thomas Franck posits the theory that there is a new development in international law—a right to personal self-determination.[30] This right to personal self-determination explicitly acknowledges the right of the individual to possess multiple loyalties. The example he uses is the increasing recognition among states of dual nationality, which permits dual loyalties of the individual to separate states.[31]

This recognition of a possible international law right to personal self-determination, which would recognize dual or multiple nationality or at minimum multiple loyalties, is instructive for the development of a truly pluralist society in the United States. Thomas Franck has opined that the state—defined either as a tribe sharing common genealogy or culture or as a civil society based on shared civic values—has become increasingly less significant as the source of personal identity.[32] What is unique about the decline of the state as a source of personal identity for citizens is the new opportunities for individual choice of personal identity, which did not previously exist in the nation-state system where identity is traditionally prescribed according to one's country of residence, one's relationship to the monarch, the language one's family spoke at home, the education one may have received or the career one has followed; all of which were factors usually perceived in a hierarchical harmony.[33]

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29. Knop, *supra* note 22, at 308-10 (citing IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 259 (1990)).

30. Thomas M. Franck, *Clan and Superclan: Loyalty, Identity and Community in Law and Practice*, 90 AM. J. INT'L L. 359 (1996).

31. *Id.* at 378.

32. *Id.*

33. *Id.* at 377.

This increasing recognition by states of a multilayered identity, evidenced by a tolerance for an individual's layered and textured loyalty in the form of dual nationality, may be as strong an emerging trend as the ethnic conflict we see in the situations in Bosnia-Herzegovina, Sri Lanka, and Rwanda. This change in the relationship of the individual to the state, resulting from an increased recognition of dual nationality, may be a key step toward true global pluralism in which the ties that bind us are based on our own choice of a singular citizenship-based identity or a more multilayered transnational identity.[34] As a concept, this layered loyalty, or transnational identity, need not threaten the sovereignty or the structure of a society that calls itself a nation. It is in this area that LatCrit theory, with a focus on international law, could offer some solutions to what are perceived as intractable racial and ethnic group tensions in the United States.

There is also recognition among scholars of a right to democratic governance, which has been interpreted as a right to representative democracy.[35] International advocacy strategies linking a transnational identity to a right of representative democracy and participation in a radical pluralist society could offer a critical link among Latinos/as in the Western Hemisphere. In addition, the transnational movement of people, capital, and labor further affect regional economic agreements, sovereignty, and citizenship as well as human rights issues. The transnational identity of many of the objects of multilateral trade agreements such as NAFTA create greater imperative for international strategies, both political and legal.

In conclusion, LatCrit theory may offer new ways to interpret the declining importance of state sovereignty in international law. There are many factors affecting the erosion of sov-

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34. *Id.* at 383. The Foreign Minister of Bosnia, Muhamed Sacirbey, is a U.S. citizen who stated publicly that he was not renouncing his U.S. citizenship upon taking office in Bosnia. This was one of many examples of U.S. citizens who assumed prominent policy-making roles in their other countries of nationality. *Id.*

35. Knop, *supra* note 22, at 300 (citing Antonio Cassese, *The Self-Determination of Peoples, in* THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 92, 96-98, 101-102, 106 (Louis Henkin ed., 1981)); Allan Rosas, *Democracy and Human Rights, in* HUMAN RIGHTS IN A CHANGING EAST-WEST PERSPECTIVE 17, 31-33 (Allan Rosas & Jan Helgesen eds., 1990); Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992); Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L L. 539 (1992).

ereignty as the defining attribute of states. Latino/a critiques of the mono-dimensional view of citizenship, as well as international advocacy strategies which link U.S. movements with broader hemispheric concerns, should be a propelling force toward a multilayered understanding of Latino/a identity.