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# Intersections Between LatCrit Theory and Law and Development Studies

Enrique R. Carrasco

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# OPPOSITION, JUSTICE, STRUCTURALISM, AND PARTICULARITY: INTERSECTIONS BETWEEN LATCRIT THEORY AND LAW AND DEVELOPMENT STUDIES

ENRIQUE R. CARRASCO\*

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## I. INTRODUCTION

This essay explores how emerging LatCrit theory<sup>1</sup> can inform efforts to critically assess and monitor global neoliberalism. My discussion is premised upon two persistent and striking dualities throughout the world. One relates to liberalism's promise of prosperity. Just over fifty years ago, a post-war liberal order was created to promote global prosperity. If one looks solely at the increase in world income from \$4 trillion in 1950 to over \$20 trillion in the 1990's, one would likely conclude that liberalism has performed admirably.

Yet the distribution of that income is highly skewed. Today, the richest twenty percent of the global population captures eighty-five percent of global income, while the remaining portion is shared by three-quarters of the world's population living in developing countries.<sup>2</sup> Distributive disparities within countries, especially in South Asia, Latin America, and the Caribbean, are likely to increase in the future.<sup>3</sup>

These disparities do not exist solely in developing countries, however. Distributive inequality has been steadily increasing in the United States. The gap between the very rich and all other segments of society is wider today than at any other period since World War II.<sup>4</sup> Recent data indicates that Latinas/os dispropor-

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1. LatCrit theory (signifying "Latina/o" and "critical") is an outgrowth of Critical Race Theory. The former is "more openly, directly, and unabashedly Latina/o in content and focus." Francisco Valdes, *Foreword: Latina/o Ethnicities, Critical Race Theory, and Post-Identity Politics in Postmodern Legal Culture: From Practices to Possibilities*, 9 LA RAZA L.J. 1, 11 (1996).

2. James Gustave Speth, *Foreword* to UNITED NATIONS DEVELOPMENT PROGRAMME, 1995 HUMAN DEVELOPMENT REPORT, at iii (1995)[hereinafter 1995 HUMAN DEVELOPMENT REP.]. See WORLD BANK, POVERTY REDUCTION AND THE WORLD BANK, at vii (1996)[hereinafter POVERTY REDUCTION REPORT] ("[M]ore than 1.3 billion people in the developing world still struggle to survive on less than a dollar a day, and the number continues to increase."); *id.* at 2-9 (examining worldwide trends in poverty from late 1980s to mid -1990s).

3. *Outcome of the World Summit for Social Development: Draft Declaration and Draft Programme of Action*, U.N. GAOR Preparatory Committee for the World Summit for Social Development, 2d Sess., Annex, Agenda Item 4, at 4, U.N. Doc. A/CONF. 166/PC/17 (1994).

4. Steven A. Holmes, *Income Disparity Between Poorest and Richest Rises*, N.Y. TIMES, June 20, 1996 (reporting on Census Bureau report indicating increased post-war income inequality in the United States). For recent literature relating to income distri-

tionately occupy the low end of the economic spectrum.<sup>5</sup>

Another closely related duality relates to liberalism's opportunity principle. The creators of post-war liberalism spoke eloquently of freedom of opportunity, a foundational freedom that would enable "the people of every nation ... through their industry, their inventiveness, their thrift, to raise their own standards of living and enjoy, increasingly, the fruits of material progress

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bution in the United States, see MARTIN N. BAILY ET AL., *GROWTH AND EQUITY: ECONOMIC POLICYMAKING FOR THE NEXT CENTURY* (1993) (recommending policies which will accelerate growth and narrow gap of inequality); MAURO BARAZINI, *A THEORY OF WEALTH DISTRIBUTION AND ACCUMULATION* (1991) (discussing a new model of macroeconomic theory of income distribution and wealth accumulation); BERCH BERBEROGLU, *THE LEGACY OF EMPIRE: ECONOMIC DECLINE AND CLASS POLARIZATION IN THE UNITED STATES* (1992) (analyzing recent transformation of the United States and world capitalism within the context of accumulation of capital on global scale); DENNY BRAUN, *THE RICH GET RICHER: THE RISE OF INCOME INEQUALITY IN THE UNITED STATES AND THE WORLD* (1991) (recognizing increase in inequality as a danger and discussing alternatives and strategies for change on global, national, and personal level); SHELDON DANZIGER & PETER GOTTSCHALK, *AMERICA UNEQUAL* (1995) (discussing public and private sector solutions to rising poverty rate and inequality in past two decades); SHELDON DANZIGER & PETER GOTTSCHALK, *UNEVEN TIDES: RISING INEQUALITIES IN AMERICA* (1993) (essays exploring growth in inequality in context of labor market changes and distribution of earnings, demographic changes and distribution of family income, and public policy changes and distribution of family income); HERBERT INHABER & SIDNEY CARROLL, *HOW RICH IS TOO RICH? INCOME AND WEALTH IN AMERICA* (1992) (advocating two-prong test that includes progressive tax on incomes above \$100,000 and inheritance tax system); PAUL R. KRUGMAN, *PEDDLING PROSPERITY: ECONOMIC SENSE AND NONSENSE IN THE AGE OF DIMINISHED EXPECTATIONS* (1994) (advocating that the United States should diminish problem of slow growth and poverty by less government regulation, more innovative ideas); PAUL R. KRUGMAN, *THE AGE OF DIMINISHED EXPECTATIONS: U.S. ECONOMIC POLICY IN THE 1990S* (1990) (looking at future of economic policy relating to income distribution); NANCY G. LEIGH, *STEMMING MIDDLE-CLASS DECLINE: THE CHALLENGES TO ECONOMIC DEVELOPMENT PLANNING* (1994) (analyzing widening gap in individual earnings of middle class and advocating investment in social infrastructure); NAN L. MAXWELL, *INCOME INEQUALITY IN THE UNITED STATES, 1947-1985* (1990) (analyzing income polarization and declining middle class in context of shifts in employment, population age, income-receiving unit composition, macroeconomy, and government spending); *TAX PROGRESSIVITY AND INCOME INEQUALITY* (Joel Slemrod ed., 1994) (discussing who bears burden of taxation); TIMOTHY M. SMEEDING ET AL., *POVERTY, INEQUALITY AND INCOME DISTRIBUTION IN COMPARATIVE PERSPECTIVES: THE LUXEMBOURG INCOME STUDY* (1990) (analyzing distribution and redistribution of economic well-being through cross-country comparisons); EDWARD N. WOLFF, *TOP HEAVY: A STUDY OF THE INCREASING INEQUALITY OF WEALTH IN AMERICA* (1995) (showing that wealth inequality has been increasing but proposing to ignore growing inequality and to exclude tax policy options).

5. See DANZIGER & GOTTSCHALK, *supra* note 4, at 73 (noting that Hispanics made no economic progress between 1973 and 1991); Cheryl Wetzstein, *Poverty in Young Children Up Sharply*, WASH. TIMES, Dec. 11, 1996, at A9 (explaining National Center for Children in Poverty's report indicating that Hispanics showed fastest growth in poverty rates); United States Dept. of Commerce, U.S. Census Bureau, *Income, Poverty, and Health Insurance* (Sept. 26, 1996) (noting that for first time poverty rate of Hispanics has surpassed that of blacks).

on an earth infinitely blessed with natural riches."<sup>6</sup> The U.N. Charter and other international and regional human rights instruments created thereafter have called for the elimination of the main obstacle to opportunity—discrimination.<sup>7</sup>

Little progress has been made on this front either. Relatively few people today can find meaning in the opportunity principle. Rampant economic discrimination on the basis of ethnicity, race, gender, and religion prevails in nearly every region of the world. As the World Bank has noted, "certain groups systematically do worse than others. For example, unstable employment and lower earnings are more common among the indigenous than the nonindigenous people of Guatemala, among blacks than whites in Brazil, among the members of scheduled castes and tribal groups than the upper castes in India."<sup>8</sup> More women than men are trapped in a degrading life of absolute poverty, and they are disproportionately affected by related problems: social disintegration, unemployment, environmental degradation, and war.<sup>9</sup> Once again, we need not look outside of the United States for pervasive manifestations of this duality.<sup>10</sup>

These dualities have not dissuaded many countries today from supporting an updated or "neoliberal" version of what was

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6. UNITED STATES DEPARTMENT OF STATE, 1 PROCEEDINGS AND DOCUMENTS OF THE UNITED NATIONS MONETARY AND FINANCIAL CONFERENCE 80 (1948) (remarks of Henry Morgenthau Jr., U.S. Treasury Secretary)[hereinafter PROCEEDINGS].

7. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A810 (1948); Convention on the Elimination of All Forms of Racial Discrimination, Jan. 4, 1969, 660 U.N.T.S. 195; Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 14 (1981); American Convention of Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123; American Declaration of the Rights and Duties of Man.

8. THE WORLD BANK, ADVANCING SOCIAL DEVELOPMENT 9 (1995).

9. *Report of the World Summit for Social Development*, U.N. World Summit for Social Development, Copenhagen Declaration on Social Development, U.N. Doc. A/CONF. 166/9 (1995) 16 (g). See generally HUMAN DEVELOPMENT REP., *supra* note 2.

10. See, e.g., CHRISTOPHER EDLEY, Jr., NOT ALL BLACK AND WHITE 42-52 (1996) (Special Counsel to President Clinton appointed to review affirmative action policy) (reviewing evidence of pervasive discrimination against minorities in the United States and concluding that "the pattern of racial disparities in economic and social conditions remains painfully stark."). The Texaco case is the most recent example of blatant and egregious discrimination litigation against Texaco, where plaintiffs' counsel discovered audio tapes recording racist remarks by high corporate officials. Texaco recently settled the case for \$176.1 million. Jack E. White, *Texaco's White Collar Bigots: Top Executives, Confronting A Discrimination Suit, Talk About Shredding Documents*, TIME, Nov. 18, 1996; Peter Fritsch et al., *Texaco to Pay \$176.1 Million in Bias Suit*, WALL STREET J., Nov. 18, 1996, at A3.

viewed in the 1940s as a universal principle—that an open, market-based, interdependent, international economy combined with democratic governance is the best prescription for global peace and prosperity.<sup>11</sup> Policymakers realize, however, that neoliberalism cannot flourish over the long-term in the face of massive social inequalities. Equitable “development” is, thus, as necessary today as it was after World War II. Yet “law and development” efforts have addressed this need with only moderate success.

The question is, therefore, whether LatCrit theory can help those of us dealing with law and development issues to think of ways to promote “a political, economic, ethical and spiritual vision for social development ... based on human dignity, human rights, equality, respect, peace, democracy, mutual responsibility and cooperation, and full respect for the various religious and ethical values and cultural backgrounds of people.”<sup>12</sup>

Given the incipency of the LatCrit “movement,” my response is cautiously optimistic. LatCrit theory’s emphasis on opposition, justice, structuralism, and particularity—animated in part by concepts of ethnicity<sup>13</sup>—may help scholars explore and articulate a socio-legal framework that will give rise to an enabling environment for social development,<sup>14</sup> especially in Latin America. In particular, these concepts may enable development scholars and activists to engage in a careful and nuanced criticism of neoliberalism.

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11. See WORLD BANK, 1991 WORLD DEVELOPMENT REPORT 1. Neoliberal economic policies comprise noninflationary growth, fiscal discipline, high savings and investment, trade and foreign investment liberalization, privatization, and domestic market deregulation. They have become collectively known as “the Washington consensus.” See JOHN WILLIAMSON, *THE PROGRESS OF POLICY REFORM IN LATIN AMERICA* (1990) (discussing ten areas of market-based policy reforms in debtor countries that “could arguably muster a fairly wide consensus ... in Washington”).

12. This definition of development was articulated at the 1995 World Summit for Social Development in Copenhagen, Denmark. Social development is based in part on human rights. The Copenhagen Declaration thus pledges to strive for the realization of rights set out in various international instruments and declarations, including Universal Declaration of Human Rights, the Covenant on Economic, Social and Cultural Rights, as well as the Declaration on the Right to Development. See generally *World Summit for Social Development 1: An Overview, Report of the Secretary-General*, U.N. Doc. A/CONF. 166/PC/8 (1994). Social development focuses on specific social sector issues, such as health, education, and welfare, as well as on broader concepts relating to human societies, such as equal opportunity and citizen participation. *Id.* at 3.

13. See generally *supra* note 1.

14. See Enrique R. Carrasco, *Critical Issues Facing the Bretton Woods System: Can the IMF, World Bank, and the GATT/WTO Promote an Enabling Environment for Social Development?*, 6 TRANSNAT’L L. & CONTEMP. PROBS., at i (1996).

## II. LATCRITS' TOOLS OF CRITICISM

LatCrit theory, which is emerging from Critical Race Theory,<sup>15</sup> is complex and thematically broad.<sup>16</sup> In this essay, I will address opposition, justice, structuralism, and particularity, four basic concepts of LatCrit theory that can inform our thinking about social development. As the discussion below will indicate, these concepts reflect both modern and postmodern views of law and society, to the extent that they reveal a hopeful quest for enlightenment leading eventually to liberation while at the same time rejecting modernism's epistemological foundations.<sup>17</sup>

As to opposition, LatCrit theory, like Critical Race theory, seeks to continue the "long tradition of human resistance and liberation."<sup>18</sup> History has taught Latinas/os that engaging in *la lucha* (struggle) is both honorable and inevitable. Struggling for *justicia* (justice) is almost a teleological "given" in the Latina/o community. LatCrits engaged in *la lucha por la justicia* (the fight for justice) thus seek to understand and change a U.S. socio-legal system that presents a *disabling* environment for social development of Latinas/os via new nativism and racism.<sup>19</sup> Im-

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15. See generally CRITICAL RACE THEORY: THE KEY WRITING THAT FORMED THE MOVEMENT (Kimberle Crenshaw et al. eds., 1995)[hereinafter KEY WRITING]; CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed., 1995)[hereinafter THE CUTTING EDGE].

16. See Colloquium, 9 LA RAZA L.J. 1 (1996); Colloquium, 2 HARV. LATINO L. REV. (forthcoming 1997).

17. See Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 760 (1994) (proposing "jurisprudence of reconstruction" and suggesting Race-Crits are compelled "to live in the tension between modernism and postmodernism, transforming political modernism in the process.").

18. Cornel West, *Foreword* to KEY WRITING, *supra* note 15. See EDWARD W. SAID, CULTURE AND IMPERIALISM 209-20 (1993) (discussing postcolonial resistance culture). MICHEL FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977, at 142 (1980) ("there are no relations of power without resistances").

19. See Juan F. Perea, *Los Olvidados: On the Making of Invisible People*, 70 N.Y.U. L. REV. 965 (1995) (discussing how the U.S. historical and statutory concepts reveal "white nation," causing "symbolic deportation" by making Latinas/os invisible or stigmatizing them for their "foreignness"). Latina/o scholars also note that even when structuralism is addressed, it is done so in black and white terms which still largely ignore the Latina/o population. See also Juan F. Perea, *Ethnicity and the Constitution: Beyond the Black and White Binary Constitution*, 36 WM. & MARY L. REV. 571 (1995) (noting Supreme Court and legal academia exclude many minorities from Constitutional protection by largely ignoring discrimination based on ethnic characteristics, like bilingualism); Rodolfo O. De la Garza & Louis DeSipio, *Save the Baby, Change the Bathwater, and Scrub the Tub: Latino Electoral Participation After Seventeen Years of Voting Right Act Coverage*, 71 TEX. L. REV. 1479 (1993) (explaining 1975, 1982, and 1992 registration and voting rights protection debates in Congress left out Latinas/os). See generally IAN F. HANEY

portantly, the inspiration and strength needed to wage *la lucha por la justicia* comes not from an intellectual construct, but rather from a communitarian ethic diasporically linked to Latin America.

LatCrit theory's structural critique of U.S. society and its preference for particularity or perspectivism over universalism can also be useful for social development. Structuralist criticism of law and society was first formulated by legal realists and subsequently refined by Critical Race Theorists. Derrick Bell, for example, has used structural theory to show how civil rights reform has been tied to the long-term interests of whites.<sup>20</sup> Similarly, Kendall Thomas has explored questions of race, power, and culture in the context of popular constitutional historiography ("popular memory") in order "to challenge the conceptual order or hierarchy that subtends the exclusion of the common run of human beings and their concerns from the historical study of constitutional law."<sup>21</sup>

Structural analysis is also evident in Ian Haney López's examination of the social construction of the white race<sup>22</sup> and Juan Perea's exploration of how hierarchy and whiteness adversely affect the Latina/o population in the United States.<sup>23</sup> This type of scholarship has been characterized as "structural determinism" because it focuses "on ways in which the entire structure of legal thought ... influences its content, always tending toward maintaining the status quo."<sup>24</sup>

LatCrits seek to enrich structural critiques with scholarship emphasizing particularity, through the use of storytelling techniques to examine embedded racism, power, and ideology.<sup>25</sup> Particularity is the deconstructive companion of structuralism inasmuch as "[s]tories, parables, chronicles, and narratives are powerful means for destroying mindset—the bundle of presuppositions, received wisdoms, and shared understandings against

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LOPEZ, WHITE BY LAW (1996) (examining the "structuring and content of Whiteness as a legal and social idea").

20. Derrick A. Bell Jr., *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

21. Kendall Thomas, *Rouge et Noir Reread: A Popular Constitutional History of the Angelo Herndon Case*, 65 S. CAL. L. REV. 2599 (1992).

22. See LÓPEZ, *supra* note 19.

23. See generally *supra* note 19.

24. THE CUTTING EDGE, *supra* note 15, at 205.

25. See generally Symposium, *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989).

a background of which legal and political discourse takes place."<sup>26</sup> Well-known illustrations of this technique in the Lat-Crit context include Richard Delgado's *The Rodrigo Chronicles*, in which his alter ego, Rodrigo, explores racism in the United States,<sup>27</sup> Margaret Montoya's piece on Latina stories and legal discourse,<sup>28</sup> Michael Oliva's article weaving his grandfather's stories into a commentary on immigration law,<sup>29</sup> and Leslie Espinoza's reflections on how her background affects her work in legal academia.<sup>30</sup>

Taken together, opposition, justice, structuralism, and particularity appear to be useful analytical tools for scholars addressing what amounts to social development in the United States. Nevertheless, those of us who have been working in the international law and development field may view the tools with a bit of weary skepticism. For we are well aware that opposition, justice, structuralism, and particularity have also been important elements in our field. Unfortunately, as described below, they have not been very effective in the international context.

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26. Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989).

27. RICHARD DELGADO, *THE RODRIGO CHRONICLES* (1995). Rodrigo was born in the United States of an African-American father and Italian mother. In the first chronicle, Delgado's fictional professor tries to describe Rodrigo: "His tightly curled hair and olive complexion suggested that he might be African-American. But he could also be Latino, perhaps Mexican, Puerto Rican, or any one of the many Central American nationalities ... ." *Id.* at 1. For another example of using narrative to address racism in the United States, see DERRICK BELL, *AND WE ARE NOT SAVED* (1987).

28. Margaret E. Montoya, *Mascaras, Trenzas, y Greñas: Un/masking the Self While Un/braiding Latina Stories and Legal Discourse*, 15 CHICANO-LATINO L. REV. 1 (1994).

29. Michael A. Olivas, *The Chronicles, My Grandfather's Stories, and Immigration Law: The Slave Traders Chronicle as Racial History*, 34 ST. LOUIS U. L.J. 425 (1990).

30. See Leslie G. Espinoza, *Masks and Other Disguises: Exposing Legal Academia*, in THE CUTTING EDGE, *supra* note 15, at 451; see also Enrique R. Carrasco, *Collective Recognition as a Communitarian Device: Or, Of Course We Want to be Role Models!*, 9 LA RAZA L.J. 81 (1996) (exploring the meaning of the role model in Latino culture by using a *cuento*—a type of narrative found in Latino culture); Ian F. Haney, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 10 (1994) (telling of the author's Irish and Latino background, and how he and his brother looks similar, but identify differently with their Latino heritage and social constructs).

### III. OPPOSITION, JUSTICE, STRUCTURALISM AND PARTICULARITY IN THE INTERNATIONAL CONTEXT

The "story" of social development in the international context commonly begins with post-war liberalism. After World War II, the Allied Powers believed that an international economy was the best prescription for global prosperity, which, in turn, would help maintain international peace.<sup>31</sup> Development issues that demanded contextual analysis, such as structural impediments facing developing countries, were marginalized as a result of the discourse of universal liberalism.<sup>32</sup> After decolonization, frustrated developing countries claimed the prevailing global order perpetuated economic inequality among nations.<sup>33</sup> However, as the examples below illustrate, efforts to promote progressive change were based on incomplete or otherwise flawed notions of opposition, justice, structural critique, and particularity. Hence, these analytical tools failed to make any significant changes in the global order.

#### A. *The New International Economic Order*

Conceived as a broad critique of post-war liberalism, the New International Economic Order (NIEO) was perceived as

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31. PROCEEDINGS, *supra* note 6, at viii (1948) (stating "[t]he proposal for ... the Fund ... was based on the premise that international financial cooperation and the establishment of conditions conducive to international trade are imperative to the economic welfare of the peoples of the world and to world peace ... . Proposals for the establishment of the Bank were based on the premise that postwar reconstruction and development would aid political stability and foster peace among all nations.").

32. See HAROLD JAMES, INTERNATIONAL MONETARY COOPERATION SINCE BRETTON WOODS 120 (1996); Richard N. Gardner, *Establishing a Vision for Promoting Development*, in FIFTY YEARS AFTER BRETTON WOODS: THE FUTURE OF THE IMF AND THE WORLD BANK 63, 65 (James M. Boughton & K. Sarwar Lateef eds., 1995) ("There was simply no conception of the vast needs of the developing countries and of the role of the Bank should play in meeting them."); Victor L. Urquidi, *Reconstruction vs. Development: The IMF and the World Bank*, in THE BRETTON WOODS-GATT SYSTEM: RETROSPECT AND PROSPECT AFTER FIFTY YEARS 47-48 (Orin Kirshner ed., 1996) (noting that White and Keynes "did not seem to have a clear idea of the unusually quite different structural problems of the less developed countries").

33. Robert S. Jordan, *Why A NIEO? The View from the Third World*, in THE EMERGING INTERNATIONAL ECONOMIC ORDER 59, 63 (Harold K. Jacobsen & Dusan Sidjanski eds., 1982).

radically oppositional. In the name of global justice, developing countries called for negotiations with industrialized countries to modify the philosophical, juridical, and institutional structures comprising post-war liberalism.<sup>34</sup> The broad agenda for structural change included issues ranging from official development assistance from the North, to international trade and finance, to health, education, and welfare.<sup>35</sup>

The NIEO's oppositional vision was not all that radical, however. The strategy was premised on a fundamental construct of liberalism—the nation state.<sup>36</sup> Because the NIEO's goal was to give true meaning to the principle of sovereign equality among states, particularly with respect to economic matters,<sup>37</sup> developing countries avoided discussion of *justicia* within their own borders. They argued that domestic inequalities could not be remedied without first transforming relations among nations.<sup>38</sup> They also claimed that the principle of sovereign equality among states gave developing countries the right to shield their domestic policies from international scrutiny.<sup>39</sup>

The NIEO agenda was hopelessly contradictory because it insisted upon radical and contextual change within liberalism's moderate, state-centered, and universal framework. Not surprisingly, much debate addressed the legal significance of the NIEO. While supporters asserted that the NIEO reflected customary international law,<sup>40</sup> critics argued that the non-binding United Nations resolutions were merely moral or political state-

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34. See TYRONE FERGUSON, *THE THIRD WORLD AND DECISION MAKING IN THE INTERNATIONAL MONETARY FUND* 7-46 (1988).

35. See generally ERVIN LASZLO ET AL., *THE OBJECTIVES OF THE NEW INTERNATIONAL ECONOMIC ORDER* (1978).

36. See *Charter of Economic Rights and Duties of States*, U.N.G.A. Res. 3281 (XXIX), 29 GAOR Supp. (No. 31) chap. II, art. 7, U.N. Doc. A/9631 (Dec. 12, 1974) ("Every state has the primary responsibility to promote economic, social and cultural development of its people.").

37. Jordan, *supra* note 33, at 70-72.

38. LASZLO, *supra* note 35, at xxii.

39. See *id.* at 239-40 (recording India's position that national governments have sovereign right to determine development needs).

40. See Edwards A. Laing, *International Economic Law and Public Order in the Age of Equality*, in 12 *LAW AND POLICY IN INTERNATIONAL BUSINESS* 727 (1980); Inamul Haq, *From Charity to Obligation: A Third World Perspective on Concessional Resource Transfers*, 14 *TEX. INT'L L.J.* 389 (1979) (arguing that new equitable principles of international law support NIEO's call for transfer of wealth from rich to poor countries). See generally MOHAMMED BEDJAOUI, *TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER* 123-262 (1979).

ments, at best constituting "soft law."<sup>41</sup> Deep divisions between the North and South continue to this day over much of the NIEO's substance.<sup>42</sup>

### B. *Import Substitution*

Import substitution was another strategy developing countries adopted (particularly in Latin America) to challenge post-war liberalism. In the 1950s and 1960s, development economists articulated a structural and particularized critique of the international economy, grounding their theory on a bias in the global trading system against developing countries which export primary commodities.<sup>43</sup> Import-substitution policies encompassed high tariffs and nontariff barriers that protected infant industries, laws that controlled foreign investment, and favorable financing that subsidized state-guided investments.<sup>44</sup>

Despite considerable efforts, the import-substitution model of development yielded mixed results in terms of economic growth in Latin America.<sup>45</sup> More importantly, the model provided little *justicia*. Supporters of import substitution assumed the welfare state would distribute the fruits of growth on an equitable basis. Yet populists redistributive policies only widened the gap between the rich and the poor.<sup>46</sup>

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41. See *Texaco Overseas Petroleum Company v. Libyan Arab Republic*, 17 I.L.M. 1, 27-31 (Int'l Arb. Trib. 1978) (holding the expropriation provisions in the Charter of Economic Rights and Duties of States was "a political rather than ... a legal declaration"); Stephen Zamora, *Is There Customary International Economic Law?*, 32 GERMAN Y.B. INT'L L. 1, 15-18 (summarizing criticisms).

42. FERGUSON, *supra* note 34, at 41.

43. See Celso Furtado, *Capital Formation and Economic Development*, 4 INTERNATIONAL ECONOMIC PAPERS (1954), reprinted in THE ECONOMICS OF UNDERDEVELOPMENT (A.N. Agarwala & S.P. Singh eds., 1958); W. Arthur Lewis, *Economic Development with Unlimited Supplies of Labor*, 155 THE MANCHESTER SCHOOL 22 (May 1954), reprinted in ECONOMICS OF DEVELOPMENT 109 (Malcom Gillis et al. eds., 1992); GUNNAR MYRDAL, AN INTERNATIONAL ECONOMY (1956); Raúl Prebisch, *The Economic Development of Latin America and Its Principal Problems*, 7 ECON. BULL. LATIN AM. 1 (1962); Hans W. Singer, *The Distribution of Gains Between Investing and Borrowing Countries*, 40 AM. ECON. 473 (1950).

44. Enrique R. Carrasco, *Law, Hierarchy, and Vulnerable Groups in Latin America: Towards a Communal Model of Development in a Neoliberal World*, 30 STAN. J. INT'L L. 221, 230-35 (1994).

45. See Enrique R. Carrasco & M. Ayhan Kose, *Income Distribution and the Bretton Woods Institutions: Promoting an Enabling Environment for Social Development*, 6 TRANSNAT'L L. & CONTEMP. PROBS. 1, 14-15 (1996).

46. ROBERT R. KAUFMAN, THE POLITICS OF DEBT IN ARGENTINA, BRAZIL, AND

### C. *The Rise and Fall of Oppositional Voices*

The increasing gap between the rich and the poor in developing countries undermined development models emphasizing capital accumulation and import substitution.<sup>47</sup> This gave rise to radical critiques of global liberalism that caused as much controversy as LatCrit/Critical Race Theory's current critique of domestic liberalism. In the late 1960s, for instance, neo-Marxists argued that "peripheral" (developing) countries were stuck in a state of underdevelopment and unequal exchange with the "center" (advanced capitalist countries). A socialist revolution was needed to capture the economic surplus for development.<sup>48</sup>

These critiques, though provocative, were ineffectual. Other voices in development claimed that neo-Marxist solutions, such as autarky, were unrealistic.<sup>49</sup> Much of neo-Marxist theory proved to be incomplete or empirically incorrect.<sup>50</sup> Moreover, the theory itself was too grand and fatally formalistic.<sup>51</sup>

Co-optation also stifled oppositional voice in international development. For example, the preoccupation in the 1970s with

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MEXICO 62 (1988) (noting that import substitution in Mexico "provided extensive protection and subsidies for favored industrial and agro-commercial elites"); *id.* at 11 (noting that import substitution in Brazil benefited "military elites, coffee exporters, industrialists, and rural bosses"); *id.* at 71 (noting the Mexican working class maintained its share of expanding economy, whereas, in Brazil increases in income were limited to the top ten percent); *id.* at 92 (noting that Mexican "[i]mport-substituting firms ... were the most important group opposing trade liberalization"); Enrique R. Carrasco, *Chile, Its Foreign Commercial Bank Creditors, and Its Vulnerable Groups: An Assessment of the Cooperative Case-by-Case Approach to the Debt Crisis*, 24 LAW & POL'Y INT'L BUS. 273, 294-95 (1993) (noting that Chile's rich and relatively wealthy middle class benefited from import substitution); Alejandro Foxley, *Stabilization Policies and Their Effects on Employment and Income Distribution: A Latin American Perspective*, in ECONOMIC STABILIZATION IN DEVELOPING COUNTRIES 191, 195-96 (William R. Cline & Sidney Weintraub eds., 1981) ("After a short initial success in redistributing income toward wage earners and in moderating the rate of inflation, the imbalances generated by the [populist] policy result in accelerating inflation and a regression in the initial distributive gains.").

47. DIANA HUNT, *ECONOMIC THEORIES OF DEVELOPMENT: AN ANALYSIS OF COMPETING PARADIGMS* 64 (1989).

48. *Id.* at 64-67, 163-95.

49. *Id.* at 189.

50. *Id.* at 67, 217-19, 220-21. Bill Warren, an "Orthodox Marxist" critiquing neo-Marxist theory, noted "empirical observations suggest that the prospects for successful capitalist economic development of a significant number of major underdeveloped countries are quite good; that substantial progress in capitalist industrialization has already been achieved ... that the imperialist countries' policies and their overall impact on the Third World actually favor its industrialization ... ." *Id.* at 190.

51. *Id.* at 189.

inequitable development led some economists to reject the notion that growth in per capita income alone could be used to measure development.<sup>52</sup> Taking advantage of the emerging view that growth need not necessarily be sacrificed for equity, the World Bank soon declared there could be redistribution with growth.<sup>53</sup> The Bank's approach, however, avoided radical redistributive policies, advocating instead a moderate, incremental strategy of redirecting investment to raise the productivity and incomes of the absolute poor.<sup>54</sup> The World Bank took a similar approach to the controversial "basic human needs" approach to development<sup>55</sup> and avoided radical redistributive policies of that model by focusing on cost-effective, targeted expenditures on the poor.<sup>56</sup>

The clearest indication of the broadening crisis in the development field came from the "law and development" movement. During the Cold War, funding from the U.S. government, private foundations such as the Ford and Rockefeller Foundations, and international organizations enabled scholars to write about and advise on non-communist strategies to modernize "Third World" nations through legal reform.<sup>57</sup> Inspired by the work of Max Weber,<sup>58</sup> scholars believed that an autonomous, consciously designed, and universal legal system could help replicate the development path of Western industrialized societies.<sup>59</sup>

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52. See Dudley Seers, *What Are We Trying to Measure?*, in MEASURING DEVELOPMENT 21 (Nancy Baster ed., 1972).

53. HOLLIS B. CHENERY ET AL., REDISTRIBUTION WITH GROWTH (1974).

54. *Id.* at 47-49.

55. See Carrasco & Kose, *supra* note 45, at 21 & nn.116-17 (noting *inter alia* that basic needs stressed autonomous development through considerable investment in human capital and access to employment).

56. HUNT, *supra* note 47, at 270-71. See Margaret E. Grosh, Social Spending In Latin America: The Story of the 1980s (World Bank Discussion Papers No. 106, 1990).

57. David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WISC. L. REV. 1062; David F. Greenberg, *Law and Development in Light of Dependency Theory*, in LAW AND DEVELOPMENT (Anthony Carty ed. 1992). See also John H. Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, 25 AM. J. COMP. L. 457 (1977); Elliot M. Burg, *Law and Development: A Review of the Literature & A Critique of the "Scholars in Self-Estrangement,"* 25 AM. J. COMP. L. 492 (1977); Robert B. Seidman, *Law and Development: A General Model*, 6 LAW & SOC'Y 311 (1972).

58. See MAX WEBER, *ECONOMY AND SOCIETY* 641, 900 (Geunther Roth & Claus Wittich eds., 1978) (addressing the sociology of law).

59. See David M. Trubek, *Toward a Social Theory of Law: An Essay of the Study of Law and Development*, 82 YALE L.J. 1 (1972).

By the early 1970s, scholars began to doubt the utility of the "liberal legalist model."<sup>60</sup> In a soul-searching article titled *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, David Trubek and Marc Galanter despairingly observed:

Law and development studies are in crisis because some scholars have come seriously to doubt the liberal legalist assumptions that "legal development" can be equated with exporting United States institutions or that any improvement of legal institutions in the Third World will be potent and good. They have come to see that legal change may have little or no effect on social economic conditions in Third World societies and, conversely, that many legal "reforms" can deepen inequality, curb participation, restrict individual freedom, and hamper efforts to increase material well-being.<sup>61</sup>

Having identified disadvantages associated with "pragmatic problem solving" and "positivistic pure science" approaches to law-and-development studies, the authors advanced an "eclectic critique" that "transforms the central assumptions underlying the law and development enterprise into critical standards."<sup>62</sup> The call for critical analysis by these and other authors<sup>63</sup> failed to ameliorate the crisis. The law and development "movement" subsequently subsided.<sup>64</sup>

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60. See Trubek & Galanter, *supra* note 57; Merryman, *supra* note 57. See generally JAMES GARDNER, *LEGAL IMPERIALISM* (1980).

61. See Trubek & Galanter, *supra* note, 57 at 1080.

62. *Id.* See David M. Trubek, *Unequal Protection: Thoughts on Legal Services, Social Welfare, and Income Distribution in Latin America*, 13 TEXAS INT'L L.J. 243 (1978); David M. Trubek & John P. Esser, "Critical Empiricism" in *American Legal Studies: Paradox, Program, or Pandora's Box?*, in CRITICAL LEGAL THOUGHT: AN AMERICAN-GERMAN DEBATE 105 (Christian Joerges & David M. Trubek eds., 1989) (addressing "critical empiricism" in law and society movement).

63. See GARDNER, *supra* note 60; Merryman, *supra* note 57; Abelardo Lopez Valdez, *Developing the Role of Law in Social Change: Past Endeavors and Future Opportunities in Latin America and the Caribbean*, 7 LAW. AM. 1 (1975); Abelardo Lopez Valdez, *Law and Socio-Economic Change in Latin America and the Caribbean*, 10 J. INT'L L. & ECON. 553 (1975).

64. Merryman, *supra* note 57, at 481 ("The mainstream law and development movement, dominated by the American legal style, was bound to fail and has failed."). See also David M. Trubek, *Back to the Future: The Short, Happy Life of the Law and Society Movement*, 18 FLA. ST. U. L. REV. 1 (1990) (describing 25-year evolution of "law and society" movement, which began in mid-1960s, and critically assessing related "law and development" movement).

#### IV. POTENTIAL INTERSECTIONS BETWEEN LATCRIT THEORY AND LAW AND DEVELOPMENT

The story I have recounted does not bode well for the creation of an enabling environment for social development. Those who work in the law and development field are likely to conclude that the tools of opposition, justice, structuralism, and particularity are worn and of little utility today.

The apparent triumph of neoliberalism in the face of glaring dualities in the global order breeds cynicism about the future of social justice. Along with the disintegration of the Soviet Union and the socialist bloc in Eastern Europe,<sup>65</sup> the debt crisis of the 1980s has led policymakers in developing and transitioning countries to abandon import substituting and statist approaches to development in favor of economic law and policy based on an open, privatized, market-based economy. Although the former policies failed to empower vulnerable groups, there is no guarantee that neoliberal policies alone will effectively address these groups either.<sup>66</sup>

Is there no hope, then, for a progressive approach to law and development? I believe there is, provided we reconstitute opposition, justice, structuralism, and particularity by examining potential intersections between LatCrit theory and concepts relating to law and development.<sup>67</sup> This process may help us find new ways of looking at the process of development, especially in Latin America. It may also reveal "domestic" aspects of Lat-Crit/Critical Race Theory that can be strengthened.

##### A. *Opposition and Justice*

As to intersections relating to opposition and justice, we should consider the following proposition: A critical approach to development based on LatCrit theory should avoid waging a frontal assault on global neoliberalism in the name of *la lucha*

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65. See generally Symposium, *Economic, Legal and Political Dilemmas of Privatization in Russia*, 5 TRANSNAT'L L. & CONTEMP. PROBS. 1 (1995).

66. See Carrasco & Kose, *supra* note 45, at 28-34 (discussing mixed impact of stabilization and adjustment programs on income distribution in developing countries).

67. See Trubek, *supra* note 64, at 41-55 (describing post-modern emerging "countervision" based in part on Critical Race Theory, that rejects ideas prevailing in earlier stages of law and society movement).

*por la justicia* (fight for justice). The story recounted above suggests that a grand counter-hegemonic strategy risks the production of flawed scholarship. Moreover, policymakers would not take our work seriously were we to adopt such a strategy.<sup>68</sup> Instead, we should develop a careful, cautious, and constructively critical position supporting neoliberalism.

This proposition is not as shocking as it first seems. If we want to reconstitute opposition and justice effectively in the international sphere, strategic positioning is crucial.<sup>69</sup> In an article dealing with the plight of the nonwhite poor in the United States, Richard Delgado asks, "In a society with power divided almost equally between two political groups, one conservative, one liberal, which is the more likely source of aid for the nonwhite poor?"<sup>70</sup> After concluding that the moderate left and communarians would unlikely provide significant long-term support for the poor, Delgado concludes that "conservative principles may be a better source of succor for the poor than has hitherto been thought, perhaps even superior to that available from the left."<sup>71</sup> He reasons that conservatives are more likely to provide the poor with job training and other forms of "cultural capital" in order to strengthen the legitimacy of conservative thought emphasizing "self-reliance, the free marketplace, and as little governmental intervention as possible."<sup>72</sup> Thus the poor should seek alliance with the right, albeit with a strident or radical voice.<sup>73</sup>

A similar strategy may be useful in the international realm. Statist-oriented development policies amply demonstrate that governments have often been indifferent to the plight of the poor, many of whom are women, children, black, Indian, and members of minority ethnic groups.<sup>74</sup> When governments *have* paid at-

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68. This proposition is especially important with respect to international economic/financial policy. Policymakers in this realm are likely to be economists, many of whom presume that non-economists and their criticisms are irrelevant.

69. See SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI 229-39 (Quintin Hoare & Geoffrey Nowell Smith, eds. & trans., 1971)[hereinafter PRISON NOTEBOOKS](describing "war of positions" in which intellectuals engage in protracted political struggle).

70. Richard Delgado, *Zero-Based Racial Politics: An Evaluation of Three Best-Case Arguments on Behalf of the Nonwhite Underclass*, 78 GEO. L.J. 1929, 1931 (1990).

71. *Id.* at 1940.

72. *Id.*

73. *Id.* at 1947-48.

74. As Claude Ake has argued, the state's indifference may be the product of colonialism, at least in Africa:

tention to the poor for political reasons, the resulting populist policies have not been sustainable and have ultimately hurt the poor.<sup>75</sup>

LatCrits with an interest in development should therefore cautiously support the neoliberal policies of the International Monetary Fund (IMF) and the World Bank. This strategy is promising because unlike the situation fifty years ago, developing countries today are the major constituencies of these two multilateral institutions. Moreover, in order to respond to critics and thus bolster the legitimacy of the neoliberal development paradigm,<sup>76</sup> both the Bank and the Fund are attempting to address many of the economic, social, and cultural issues relating to today's human rights regime.

At the World Bank, for example, labor-intensive growth, investment in human capital (e.g., education and health), safety nets for the poor during market-based transitions,<sup>77</sup> and, increasingly, good governance (e.g., accountability, transparency, participation) are the primary components of development policy.<sup>78</sup> In an effort to persuade critical observers of its commitment to the "growth-with-equity" approach to development, the Bank has highlighted its increases in social spending and initiatives aimed at poverty reduction.<sup>79</sup>

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Although political independence brought some changes to the composition of the state managers, the character of the state remained much as it was in the colonial era. It continued to be totalistic in scope, constituting a statist economy. It presented itself as an apparatus of violence, had a narrow social base, and relied for compliance on coercion rather than authority ... [P]olitical independence ... was often a convenience of deradicalization by accommodation, a mere racial integration of the political elite.

CLAUDE AKE, *DEMOCRACY AND DEVELOPMENT IN AFRICA* 3-4 (1996).

75. See *supra* notes 43-46 and accompanying text (discussing impact of populist policies during import substitution period).

76. See generally *BEYOND BRETTON WOODS: ALTERNATIVE TO THE GLOBAL ORDER* (John Cavanagh et al. eds., 1994); *FIFTY YEARS IS ENOUGH: THE CASE AGAINST THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND* (Kevin Danaher & Muhammad Yunus eds., 1994); *PERPETUATING POVERTY: THE WORLD BANK, THE IMF, AND THE DEVELOPING WORLD* (Doug Badow & Ian Vásquez eds., 1994).

77. See generally *WORLD BANK, 1990 WORLD DEVELOPMENT REPORT; POVERTY REDUCTION REPORT*, *supra* note 2.

78. *THE WORLD BANK, ADVANCING SOCIAL DEVELOPMENT: A WORLD BANK CONTRIBUTION TO THE SOCIAL SUMMIT*, at ix (1995) [hereinafter *ADVANCING SOCIAL DEVELOPMENT*].

79. *POVERTY REDUCTION REPORT*, *supra* note 2, at 29. See generally *ADVANCING SOCIAL DEVELOPMENT*, *supra* note 78.

The Bank also uses conditionality to address human rights. Responding to observations that governments facing adjustment have chosen expenditure reductions that hurt the poor, the Bank has relied upon charter provisions<sup>80</sup> to "increasingly include conditionalities in its structural adjustment operations to ensure that public expenditures on the activities and subsectors that benefit the poor disproportionately such as primary education, basic health care, nutrition, and water supply and sanitation are protected, and in many cases, even increased."<sup>81</sup>

The IMF believes it promotes human rights, albeit indirectly, by insisting upon "high quality" economic growth. This approach embraces (i) macroeconomic stability, (ii) market-based trade and investment policies, (iii) good governance, and (iv) sound social policies that create social safety nets for the poor, increased employment, and cost-effective social spending.<sup>82</sup> Moreover, Fund missions now regularly discuss distributional consequences of adjustment with borrowing countries.<sup>83</sup>

All of these developments in the human rights field are welcome and necessary, but they are not sufficient for the realization of meaningful social development. LatCrit scholars along with other activists *deben luchar por la justicia* (should fight for

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80. According to the Bank's charter, one of the Bank's purposes is to assist members with "raising productivity, the standard of living and conditions of labor in their territories." Article of Agreement of the International Bank for Reconstruction and Development, opened for signature and entered into force Dec. 7, 1945, art. 1(iii), 60 Stat. 1440, T.I.A.S. No. 1502, 2 U.N.T.S. 134, as amended, 16 U.S.T. 1942, T.I.A.S. No. 5929 (Dec. 17, 1965) [hereinafter IBRD Articles]. The charter of the International Development Association (IDA) contains a similar passage. See Articles of Agreement of the International Development Association, Jan. 26, 1960, art. 1, at 2(d), 11 U.S.T. 2284, 439 U.N.T.S. 249 (entered into force Sept. 24, 1960). Also, the IDA's charter urges accelerated economic development to promote higher standards of living and economic and social progress in developing countries. *Id.* at Preamble. Ibrahim Shihata, the Bank's General Counsel, cites these provisions in support of the Bank's involvement "with equitable distribution of income in its borrowing countries as an important aspect of development." IBRAHIM F.I. SHIHATA, *THE WORLD BANK IN A CHANGING WORLD* 87 (1991).

81. POVERTY REDUCTION REPORT, *supra* note 2, at 33-34. See James H. Weaver, *What Is Structural Adjustment?*, in *STRUCTURAL ADJUSTMENT: RETROSPECT AND PROSPECT* 1, 13-14 (1995) (noting that all bank adjustment loans must include "upfront" analysis of adjustment's impact on poor and measures to address impact). The Bank also addresses the poor through "poverty-focused" adjustment operations. Incorporated into SALs, SECALs, or rehabilitation import loans (RILs), these programs help governments implement anti-poverty measures ranging from reallocation of public expenditures to gathering data on poverty and monitoring the impact of adjustment on the poor.

82. The Fund pursues the fourth element through its policy advice, technical assistance, and collaboration with other agencies, particularly the World Bank.

83. TONY KILLICK, *IMF PROGRAMMES IN DEVELOPING COUNTRIES* 20 (1995).

justice) by ensuring, at the very least, that multilateral and regional financial institutions actually comply with their own policy and rhetoric relating to economic, social, and cultural matters.<sup>84</sup> This does not require Delgado's stridency tactic as much as careful and precise observation and criticism—what can be called “radically rigorous monitoring.”

LatCrit/Critical Race Theory, however, provides little guidance for the development of the analytical aspects of such monitoring, at least with respect to the intersections between race/ethnicity and financial/economic matters. This is partly due to the type of scholarship produced to date, which has focused on other pressing issues and problems relating to racism and identity in a liberal order.<sup>85</sup> In addition, important pieces in Critical Race Theory reflect the view that “law and economics” analysis is conservative, formalistic, and ultimately inconsistent with Critical Race Theory.<sup>86</sup> Thus, the argument goes, economic or financial analysis cannot effectively address systemic distortions in society.<sup>87</sup>

Although the rich LatCrit and Critical Race scholarship produced thus far can be usefully applied to social development issues, increased economic globalization will compel critical scholars to abandon their defensive posture regarding economic and financial analysis. Fortunately, recent writings suggest an expansion of critical analysis into the commercial/economic realm. Steven Bender, for example, has proposed comprehensive reform

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84. See Carrasco & Kose, *supra* note 45, at 45-46 (proposing various measures to monitor programs of World Bank and IMF with respect to income distribution); Daniel D. Bradlow, *The World Bank, the IMF, and Human Rights*, 6 TRANSNAT'L L. & CONTEMP. PROBS. (proposing that IMF and World Bank articulate human rights policy that can be effectively monitored).

85. See generally KEY WRITING, *supra* note 15; THE CUTTING EDGE, *supra* note 15.

86. See Derrick Bell, *Foreword: The Final Civil Rights Act*, 79 CAL. L. REV. 597, 604-11 (1991); Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1357, 1365 n.25 (1992); Richard Delgado, *Rodrigo's Second Chronicle: The Economics and Politics of Race*, 91 MICH. L. REV. 1183, 1202 (1993) (“Relying on economic theory to solve problems of race and sex makes about as much sense as reading Gramsci for help with one's household budget.”); cf. Jerome McCristal Culp, Jr., *Posner on Duncan Kennedy and Racial Difference: White Authority in the Legal Academy*, 41 DUKE L.J. 1095, 1097 (1992) (“Judge Posner's [essay regarding affirmative action and tenure standards] manifests the arrogance and unselfcritical nature of white supremacy in the legal academy.”).

87. Cf. Jerome Culp, *Judex Economicus*, 50 LAW & CONTEMP. PROBS. 95 (1987) (criticizing microeconomically-based assumptions of Posnerian “law and economics” model of judicial decisionmaking, using Bernard Goetz's shooting of four black youths as example).

of U.S. consumer protection regulation to ensure that Latina/o consumers and other language minorities can "strike informed bargains."<sup>88</sup> Beverly Moran's and William Whitford's critical examination of the U.S. Internal Revenue Code suggests that the Code treats blacks more harshly than similarly-situated whites.<sup>89</sup> And Anthony Taibi has used Critical Race Theory to explore how economic globalization disempowers local communities.<sup>90</sup> These and other writings<sup>91</sup> may eventually lead to a corpus of literature that can be used as a springboard for radical and rigorous monitoring of economic and financial institutions in the increasingly interconnected domestic and international spheres of today's world.

### B. Structuralism and Particularity

Radically rigorous monitoring cannot occur without structural criticism.<sup>92</sup> Although the structural critique of liberalism described above has helped change the global order in favor of developing countries,<sup>93</sup> progress in this regard has been mar-

88. See Steven W. Bender, *Consumer Protection for Latinos: Overcoming Language Fraud and English-Only in the Marketplace*, 45 AM. U. L. REV. 1027 (1996).

89. Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WISC. L. REV. 751.

90. For articles by Anthony D. Taibi on this topic, see *Racial Justice in the Age of the Global Economy: Community Empowerment and Global Strategy*, 44 DUKE L.J. 928 (1995); *Banking Finance, and Community Economic Empowerment: Structural Economic Theory, Procedural Civil Rights, and Substantive Racial Justice*, 107 HARV. L. REV. 1465 (1994); *Environmental Justice, Structural Economic Theory, and Community Economic Empowerment*, 9 ST. JOHN'S J. LEGAL COMMENT 491 (1994); *Race Consciousness, Communitarianism, and Banking Regulation*, 1992 U. ILL. L. REV. 1103.

91. See Linz Audain, *Critical Cultural Law and Economics, the Culture of Deindividualization, the Paradox of Blackness*, 70 IND. L.J. 709 (1995) (outlining a framework that will incorporate culture into law and economics analysis). See also *id.* at 712 n.4 (citing articles by Cheryl Harris, Robert Cooter, and Richard McAdams as examples of Critical Cultural Law and Economics); Andre Solé, *Official English: A Socratic Dialogue/Law and Economics Analysis*, 45 FLA. L. REV. 803 (1993).

92. Emphasizing structural critique may seem contradictory in light of post-modern aspects of Critical Race Theory. See KEY WRITING, *supra* note, at 440 (describing race and postmodernism); Trubek, *supra* note 64, at 50 (noting "critical empiricism's" contradiction between appropriation of post-structuralist concepts and reliance upon structural causes and explanations). The contradiction may be more apparent than real, however. See R.B.J. Walker, *INSIDE/OUTSIDE: INTERNATIONAL RELATIONS AS POLITICAL THEORY* 3 (1993) (characterizing "rigid division between modernity and postmodernity" as misleading). In any event, an extended discussion of this issue is beyond the scope of this article.

93. Several of Lance Taylor's works address this issue. See generally *THE ROCKY ROAD TO REFORM: ADJUSTMENT, INCOME DISTRIBUTION AND GROWTH IN THE DEVELOPING WORLD* (Lance Taylor ed., 1993); *SOCIALLY RELEVANT POLICY ANALYSIS: STRUCTURALIST*

ginal. LatCrit and Critical Race Theory may be able to broaden and invigorate the critical project by ungrounding institutionalized discrimination against communities and peoples.

Reconstituting structuralism along these lines should be premised on a proposition of LatCrit/Critical Race Theory that has begun to make inroads into scholarship relating to law and development—namely, that law is a constitutive element of race, gender, culture, and ethnicity itself.<sup>94</sup> Applying this type of structural analysis to international economic law and policy<sup>95</sup> may provide very useful insights into complex problems of development.

One of the hardest problems relates to the accountability of multilateral institutions governing the international economic order—the IMF, the World Bank, and the World Trade Organization (WTO). Progressive change does not come easily to these entities. An analogy to the Critical Race Theorists' criticism of the civil rights movement is instructive. Characterizing the civil rights movement of the late Sixties and early Seventies as "tragically narrow and conservative," Critical Race Theorists have noted that the whites who perpetrated segregation retained their positions of authority during the era of integration, making reform exceedingly difficult.<sup>96</sup>

The same can be said of the transnational elite inhabiting the IMF, the Bank, and the WTO. Although decolonization forced these institutions to recognize the needs and demands of

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COMPUTABLE GENERAL EQUILIBRIUM MODELS FOR THE DEVELOPING WORLD (Lance Taylor ed., 1990); LANCE TAYLOR, *STRUCTURALIST MACROECONOMICS* (1983); *Sustainable Development: Macroeconomic, Environmental, and Political Dimensions*, in *WORLD DEVELOPMENT* 215 (Special Issue No. 24, 1996).

94. See Trubek, *supra* note 64, at 41-52 (citing Critical Race Theory movement as example of "post-imperial legal culture" in law and society movement that sees "law as fragile, contradictory, fragmentary, and dispersed"); AFTER IDENTITY: A READER IN LAW AND CULTURE 187-270 (1995) (containing essays examining "the often contradictory roles that legal rules have played in the construction of 'new identities' in postcolonial culture"); MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA 490-501 (1989) (contemplating "the possibilities of re-establishing the identity of international law by re-establishing that of the international lawyer as a social agent."). For literature relating to Post-Colonial Theory's treatment of race, gender, culture, and ethnicity, see *COLONIAL DISCOURSE AND POST-COLONIAL THEORY: A READER* (Patrick Williams & Laura Chrisman eds., 1994); *CULTURAL STUDIES* (Lawrence Grossberg et al., 1992); EDWARD W. SAID, *ORIENTALISM* (1978); SAID, *supra* note 18.

95. See generally AKE, *supra* note 74; ARJUN MAKHIJANI, *FROM GLOBAL CAPITALISM TO ECONOMIC JUSTICE* (1992).

96. *Introduction to KEY WRITING*, *supra* note 15.

developing countries (e.g., the NIEO), reform has occurred slowly and in small increments. This is because policymakers in the international economic arena, whether from developed or developing countries, by and large have gone to the same schools and/or undergone similar doctrinal training. Universalism and orthodoxy pervade their thinking, which, of course, is reflected in and reinforced by institutional policy.<sup>97</sup>

Preservation of the status quo is compounded by the fact that policymakers in these institutions are not likely to view the institutions as constitutive elements of global discrimination. Rather, in their view, discrimination exists "out there somewhere," and it is up to member states to eradicate it. These problems can be attacked through radically rigorous monitoring and equally rigorous and sound research regarding structural discrimination.

Particularity, the final intersection to be addressed in this essay, can also be used to promote a critical approach to development. As noted above, both the NIEO and the import-substitution model of development as well as development "radicals" of the 1960s and 1970s relied on particularity. However, the particularity of that era frequently lacked a human face. Much of the analysis was woodenly formalistic and exceedingly grand.

Although theory and models continue to be vital to tackling problems of development, policymakers today favor a pragmatic approach. Yet the danger with pragmatism in the realm of development is that it misleadingly suggests that programs and projects are or can be divorced from the hegemonic ideology produced by international institutions such as the IMF, the World Bank, and the WTO.

The risk of false consciousness in development calls for counter-hegemonic development stories "from the bottom."<sup>98</sup>

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97. Enrique R. Carrasco, *Chile, Its Foreign Commercial Bank Creditors and Its Vulnerable Groups: An Assessment of the Cooperative Case-by-Case Approach to the Debt Crisis*, 24 L. & POL'Y INT'L BUS. 273, 265-66 (1993).

98. See Mari J. Mastuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987); Gerald P. Lopez, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO L.J. 1603, 1608 (1989) (noting that as to progressive lawyering in the United States, lawyers must "open themselves to being educated by the subordinated and their allies about the traditions and experiences of subordinated life."). For the use of narrative in international and

Such stories should be constructed from the reverberations in local communities resulting from cavalier applications of neo-liberal law and policy.<sup>99</sup> This will require analytically rich,<sup>100</sup> contextual scholarship produced in conjunction with grassroots activists, members of non-governmental organizations, and academics in Latin American and Caribbean communities.<sup>101</sup> The goal of this type of particularity should be to monitor neoliberalism critically and radically, exposing weaknesses and contradictions in the dominant story that ultimately can be exploited to ensure a more equitable development process.<sup>102</sup>

## V. CONCLUSION

This essay has provided only preliminary thoughts and ideas regarding connections between newly evolving LatCrit theory and development in the international sphere. Future research must, among other things, address various complications that may arise from a LatCrit approach to development, especially in Latin America. For example, openness and sensitivity may require LatCrits to reassess Critical Race Theory's reliance on

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comparative law, see David Kennedy, *Spring Break*, 63 TEX. L. REV. 1377 (1985); David Kennedy, *An Autumn Weekend: An Essay on Everyday Life*, in AFTER IDENTITY 1991 (Dan Danielsen & Karen Engle eds., 1995); Lama Abu-Odeh, *Crimes of Honor and the Construction of Gender in Arab Societies* (on file with the Inter-American Law Review).

99. See BRUCE RICH, MORTGAGING THE EARTH: THE WORLD BANK, ENVIRONMENTAL IMPOVERISHMENT AND THE CRISIS OF DEVELOPMENT (1994).

100. The extensive use of narrative in the development area is likely to provoke criticisms (especially from economists) that will make the critique of the "domestic" use of storytelling in Critical Race Theory look like a mild rebuke. See Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993) ("[S]torytellers need to take greater steps to ensure that their stories are accurate and typical, to articulate the legal relevance of the stories, and to include an analytic dimension in their work."); see also Randall Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989); Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO L.J. 251 (1992); Arthur D. Austin, *Storytelling Deconstructed by Double Session*, 46 U. MIAMI L. REV. 1155 (1992). For responses to the critique, see Richard Delgado, *Rodrigo's Final Chronicle: Cultural Power, the Law Reviews, and the Attack on Narrative Jurisprudence*, 68 S. CAL. REV. 545 (1995); Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665 (1993); William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607 (1994).

101. Gloria L. Sandrino, *The Nafta Investment Chapter and Foreign Direct Investment in Mexico: A Third World Perspective*, 27 VAND. J. TRANSNAT'L L. 261 (1994).

102. Antonio Gramsci described:

a process of differentiation and change in the relative weight that the elements of the old ideologies used to possess. What was previously secondary and subordinate...is now taken to be primary [and] becomes the nucleus of a new ideological and theoretical complex.

PRISON NOTEBOOKS, *supra* note 69, at 195.

"rights,"<sup>103</sup> given that the popular justice movement in the region has favored collective over "liberal/individualistic" notions of justice.<sup>104</sup> LatCrit theory's explicit reliance on ethnicity (and Critical Race Theory's reliance on U.S. concepts of race and racism) may also need readjustment to properly assess complex conceptions of race and racism in Latin America.<sup>105</sup>

Nevertheless, I am hopeful that LatCrit theory can help development scholars construct a socio-legal framework that will promote an enabling environment for social development. A re-constituted application of opposition, justice, structuralism, and particularity may help reinvigorate critical thinking regarding development and the role of law in the development process. Moreover, LatCrit theory may be especially useful vis-à-vis development in Latin America, given increasing regional integration and the cultural/linguistic connections between "Latinas/os" in the United States and "Latin Americans."

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103. See KEY WRITING, *supra* note 15, at xxiii ("Race crits realized that the very notion of a subordinate people exercising rights was an important dimension of black empowerment"); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987).

104. Fernando Rojas, *A Comparison of Change-Oriented Legal Services in Latin America with Legal Services in North America and Europe*, 16 INT'L J. SOC. L. 203, 208-09, 219, 225 (1988).

105. See TESSA CUBITT, *LATIN AMERICAN SOCIETY* 57-84 (addressing ethnicity and race relations in Latin America); Adrienne D. Davis, *Identity Notes, Part I: Playing in the Light*, 45 AM. U. L. REV. 697 (1996) (describing impact on author of Nicauragua's "complex map of racial relations and domination"); cf. Valdes, *supra* note 1, at 27 (noting possibility that LatCrit theory could be based on politicized identities based on common struggles rather than "traditional fault lines like race and identity").