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# Out Of The Shadow: Marking Intersections In And Between Asian Pacific American Critical Legal Scholarship And Latina/o Critical Legal Theory

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# OUT OF THE SHADOW: MARKING INTERSECTIONS IN AND BETWEEN ASIAN PACIFIC AMERICAN CRITICAL LEGAL SCHOLARSHIP AND LATINA/O CRITICAL LEGAL THEORY

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## INTRODUCTION

Before Professor Sumi Cho asked me to comment on the two excellent articles that now constitute the major points of reference for my own contribution to this Symposium,<sup>1</sup> *Korematsu* was just another of the many cases I had often encountered as blurbs or in the string cites of some judicial opinion or law review text.<sup>2</sup> It was, for me, one of those cases *you know you ought to know*, but just never quite find or take the time to do so. Sure, I thought it might be interesting to explore the perverse implications of the fact that *Korematsu* is among a handful of cases that might arguably confirm the Supreme Court's more recent, and otherwise incredible, insistence that strict scrutiny is *not* "fatal-in-fact" to any and all race-based affirmative action plans.<sup>3</sup> But it was not until I read the articles by Professors Natsu Saito and Gil Gott that I began to realize the full significance of *Korematsu* and its

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\* Professor of Law and Co-Director, Center for Hispanic and Caribbean Legal Studies, University of Miami School of Law. This essay is based on comments I made at the Fifth Annual Conference of Asian Pacific American Law Faculty, Boston College Law School, October 1-3, 1998. Special thanks to Sumi Cho for inviting me to participate in this wonderful conference.

<sup>1</sup> See Gil Gott, *A Tale of New Precedents: Japanese-American Internment As Foreign Affairs Law*, in this issue, at 179 [hereinafter Gott, *A Tale of New Precedents*]; Natsu Taylor Saito, *Justice Held Hostage: U.S. Disregard for International Law in the World War II Internment of Japanese Peruvians—A Case Study*, in this issue, at 275 [hereinafter Saito, *Justice Held Hostage*].

<sup>2</sup> See *Korematsu v. United States*, 323 U.S. 214 (1944) (establishing strict scrutiny standard for review of racial classifications and upholding race-based internment of Japanese Americans under that standard).

<sup>3</sup> Compare *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237, 275 (1995) (Ginsburg, J., dissenting) ("A *Korematsu*-type classification . . . will never again survive scrutiny. . . . [H]owever, the lead opinion has dispelled the notion that 'strict scrutiny' is 'fatal in fact.'") with Reggie Oh & Frank Wu, *The Evolution of Race in the Law: The Supreme Court Moves from Approving Internment of Japanese Americans to Disapproving Affirmative Action for African Americans*, 1 MICH. J. RACE & L. 165 (1996) (expressing doubt that strict scrutiny will prevent a *Korematsu* redux, even as authors persuasively challenge idea that any meaningful affirmative action can survive "strict scrutiny" given Court's manner of interpretation).

progeny to many of the issues with which I am concerned: issues such as the failure of domestic and international law to provide a viable framework for deterring human rights violations both within and beyond the United States; the fact that Latin American development is still trapped and truncated by a history of violence and repression itself organized around, and legitimated by, a totalitarian rhetoric of national security in which any progressive initiative or viable social movement constitutes a threat of "subversion;"<sup>4</sup> and the impunity with which the U.S. government converted most of Central America and the Caribbean into its own private theater of "low-intensity conflict" and, along the way, suppressed domestic dissidents who fought to oppose these injustices.<sup>5</sup>

The articles by Professors Saito and Gott offer a whole new perspective on the significance of *Korematsu* and its progeny and, in doing so, have not only expanded my understanding of the wartime internments, but have also helped me clarify some fundamental points of commonality between emerging Asian Pacific American Critical Legal Scholarship ("APACrit")<sup>6</sup> and Latina/o Critical Legal Theory ("Lat-Crit").<sup>7</sup> Accordingly, my objectives in this essay are first, to map out

<sup>4</sup> See MARGUERITE GUZMAN BOUVARD, *REVOLUTIONIZING MOTHERHOOD: THE MOTHERS OF THE PLAZA DE MAYO* (1994) (torture and disappearances were not perpetrated against persons, but rather against "subversives;" subversives were not just political opponents, but sub-human allies of the anti-christ); ALAIN ROUQUIÉ, *THE MILITARY AND THE STATE IN LATIN AMERICA* (Paul E. Sigmund trans., Univ. of Cal. Press 1987) (Just War rhetoric organized around account of nature of communism as anti-christ, anti-liberty).

<sup>5</sup> See, e.g., Elizabeth M. Iglesias & Francisco Valdes, *Afterword: Religion, Gender, Sexuality, Race and Class in Coalitional Theory: A Critical and Self-Critical Analysis of LatCrit Social Justice Agendas*, 19 CHICANO-LATINO L. REV. 503, 539 (1998) (discussing persecution of Sanctuary Movement under Reagan Administration).

<sup>6</sup> This scholarship is impressive on numerous levels: quantity, quality and diversity of perspectives. See, e.g., Keith Aoki, *Colloquy: The Scholarship of Reconstruction and the Politics of Backlash*, 81 IOWA L. REV. 1467 (1996) (introducing colloquy); Symposium: *Citizenship and its Discontents: Centering the Immigrant in the Inter/National Imagination (Part I)*, 76 OR. L. REV. 207 (1997); Symposium: *Citizenship and its Discontents: Centering the Immigrant in the Inter/National Imagination (Part II)*, 76 OR. L. REV. 457 (1997).

<sup>7</sup> LatCrit scholarship has virtually exploded in the last three years. See, e.g., Symposium, *Difference, Solidarity and Law: Building Latina/o Communities Through LatCrit Theory*, 19 CHICANO-LATINO L. REV. 1 (1998) [hereinafter Symposium, *Difference, Solidarity and Law*]; Symposium, *International Law, Human Rights and LatCrit Theory*, 28 U. MIAMI INTER-AM. L. REV. 1 (1997); Symposium, *LatCrit III*, 53 U. MIAMI L. REV., 4 TEX. HISPANIC L.J. (forthcoming 1999); Symposium, *LatCrit, Latinas/os and the Law*, 85 CAL. L. REV. 1087 (1997), 10 LA RAZA L.J. 1 (1998); Symposium, *LatCrit Theory: Naming and Launching a New Discourse of Critical Legal Scholarship*, 2 HARV. LATINO L. REV. 1 (1997) [hereinafter Symposium, *LatCrit Theory*]; Francisco Valdes, *Latina/o Ethnicities, Critical Race Theory and Post-Identity Politics in Postmodern Legal Culture: From Practices to Possibilities*, 9 LA RAZA L.J. 1 (1996). This work includes contributions by numerous APACrit scholars. For a particularly insightful overview of the purposes and commitments of the LatCrit movement, Francisco Valdes, *Under Construction: LatCrit Consciousness, Community and Theory*, 85 CAL. L. REV. 1087, 1093-96 (1997), 10 LA RAZA L.J. 1, 7-10 (1998).

some of these commonalities, focusing on three themes in particular;<sup>8</sup> second, to reflect on the contributions APACrit/LatCrit cross-fertilizations can make toward the articulation of a broader and more inclusive framework for the production of outsider scholarship and coalitional politics; and finally, to illustrate the value of this cross-fertilization by focusing specifically on the way Professors Saito's and Gott's work on the World War II ("WWII") internments of Japanese Americans and Latin Americans has enriched my own theoretical perspectives in the field of international criminal law.

#### I. ARTICULATING APACRIT AND LATCRIT COMMONALITIES: THREE THEMES BEYOND THE BLACK/WHITE PARADIGM

Initially, let me emphasize that the articulation and clarification of Asian/Latina/o commonalities is a timely and pressing intellectual political project for at least three reasons. First, this project will help ground our respective anti-subordination struggles *in and upon*, rather than *against*, the pursuit of inter-group justice and solidarity.<sup>9</sup> While political identity and group alignments are neither naturally nor biologically determined, perceived commonalities and differences are, nevertheless, fundamental building blocks of solidarity and conflict or competition. By discovering and highlighting our commonalities, we generate discourses that can promote solidarity, reduce conflict and channel our energies toward common objectives.<sup>10</sup>

Second, discovered commonalities can shed new light on structures and processes of domination, whose logic, histories and modes of operation might otherwise remain invisible. While some have coded the WWII internments as an unfortunate anomaly attributable to wartime hysteria and, therefore, unlikely to be repeated, recognizing the linkage between these events and other instances where the U.S. legal system fails to protect against grievous rights violations reveals that this

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<sup>8</sup> These three themes focus on the centrality of (1) international law and relations, (2) national security ideology and (3) political economy in the articulation of an anti-essentialist, anti-subordination critical legal intervention in and between LatCrit and APACrit and beyond the Black/White paradigm, as discussed more fully *infra* Part II.

<sup>9</sup> See, e.g., Iglesias & Valdes, *supra* note 5, at 562-88; Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821 (1997); Eric K. Yamamoto, *Re-Thinking Alliances: Agency, Responsibility and Interracial Justice*, 3 ASIAN PAC. AM. L.J. 33 (1995).

<sup>10</sup> See Ediberto Román, *Common Ground: Perspectives on Latino-Latina Diversity*, 2 HARV. LATINO L. REV. 483, 483-84 (1997) (urging Latinas/os to focus on our similarities rather than our differences as a way of promoting intra-group justice and solidarity); see also George A. Martinez, *African-Americans, Latinos, and the Construction of Race: Toward an Epistemic Coalition*, 19 CHICANO-LATINO L. REV. 213 (1998) (making similar argument urging Latinas/os to seek our commonalities with African Americans).

"failure" is not so much a malfunction as a manifestation of the systemic and structural ways in which law is permeated with the racial logic of white supremacy. In seeing our commonalities, we see these structural and systemic dimensions of subordination more clearly, even as seeing the structural dimensions of oppression helps sharpen the focus of our coalitional efforts.<sup>11</sup>

Finally, a deeper understanding of our commonalities provides the needed foundation for the equally necessary task of confronting and embracing our differences. Too often, fear of difference has led to the denial of difference, and thereby, to the suppression of the kinds of solidarity that enable new possibilities of thought and action.<sup>12</sup> The ability to embrace difference is, therefore, both a fundamental objective and a necessary evolution in the further progress of coalitional theory and politics. That ability, however, depends upon some pre-established commitment to solidarity that can make the encounter with difference a meaningful vehicle for expanding our understandings of "self and/as/in the Other," rather than triggering a retreat into ourselves—a return to the familiar. Put differently, I think the articulation of commonalities is as central as respect for difference in coalescing any movement or project that would make anti-subordination the measure of its ethical and epistemological integrity—both are crucial elements in constructing dynamic and authentic community. This is because the particularities of difference help combat the essentialist

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<sup>11</sup> Professor Saito's analysis of the legal precedents invoked in upholding the indefinite detention of Haitian asylum-seekers provides an excellent example of the power and value of seeking our commonalities in the systemic and structural dimensions of law. Not only does her analysis link the Haitian detentions to the plenary power over immigration first established in the Supreme Court's Chinese Exclusion Cases, Saito, *Justice Held Hostage*, *supra* note 1, at n.256, but also, her analysis of the discursive interconnections between the opinions in *Jean v. Nelson*, 727 F.2d 957, 962 (11th Cir. 1984) (upholding detention of Haitian asylum-seeker) and *Fernandez-Roque v. Smith*, 734 F.2d 576, 582 (11th Cir. 1984) (upholding detention of Cubans) reveals the very real costs of our failures to see ourselves in each others' oppression. The indefinite detention of the Cubans is, after all, an unsurprising application of the authority affirmed in *Jean v. Nelson*.

<sup>12</sup> The suppression and/or denial of difference is a common strategy used by dominant elites to dismiss the claims of subordinated subgroups within any particular context. By contrast, the commitment to the reintegration of difference through the dynamic transformation of a particular context is a central element in the achievement of inter-group justice and coalitional solidarity. See Elizabeth M. Iglesias, *The Inter-Subjectivity of Objective Justice: A Theory and Praxis for Constructing LatCrit Coalitions*, 2 HARV. LATINO L. REV. 467, 467–68 (1997) (rejecting notion that proliferation of political identities should be suppressed for sake of "the common good"); Elizabeth M. Iglesias, *Structures of Subordination: Women of Color at the Intersection of Title VII and the NLRA. Not!*, 28 HARV. C.R.-C.L. L. REV. 395, 475–78 (1993) [hereinafter Iglesias, *Structures of Subordination*] (explaining that neither objective truth, nor objective justice can be achieved without the redistribution of effective power to and among "the Other").

assumptions that oftentimes blind us to each others' realities, even as the effort to articulate commonalities commits us to uncover the universals that *should* bind us in solidarity, despite and, indeed, *because of* our particularities.<sup>13</sup> In the case of Asian Pacific Americans and Latinas/os, it is certainly time to articulate these commonalities and see where they lead.

Interestingly enough, the recognition of our commonalities is one of the single, most effective ways of complying with Mr. Fred Korematsu's request that in remembering the past, we keep our eyes and energies fixed on the future.<sup>14</sup> At the cusp of the twenty-first century, ours is a future where the struggle for justice will increasingly be mapped around the activation and proliferation of new, plural and intersectional political identities, like the Japanese Latin Americans of whom Professor Saito writes. In this future, the struggle against subordination will also confront new problems and possibilities generated by the increasingly accelerated inter-penetration of local/global processes and the new political identities they will activate. Political alliances, normative legitimacy and emancipatory aspirations will have to be forged among (and against) the multiplicity of political perspectives and self-defined interests that will (and should) seek to influence the ways in which the reconfiguration of domestic and international legal regimes is currently imagined and/or already underway.<sup>15</sup>

In articulating points of commonality, APACrit and LatCrit scholars need also remember to invoke and advance the substantial breakthroughs already achieved as a result of our joint and several encounters with the limitations of the Black/White paradigm.<sup>16</sup> Theorizing a

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<sup>13</sup> See Iglesias & Valdes, *supra* note 5, at 557 (urging LatCrit scholars to "avoid the essentialist tendency to seek universal truths in generalities and abstractions [and instead seek] universal liberation in and through the material . . . transformation of the particular and the contingent.").

<sup>14</sup> Eric K. Yamamoto, Address at The Long Shadow of Korematsu Symposium (Oct. 3, 1998) (opening conference proceedings and recounting Mr. Korematsu's message to conference participants). I fully agree with this exhortation: to remember the past is not enough to prevent its repetition. Too often people repeat what they remember if only because it is familiar or habitual. To prevent repetition of the past, we also have to imagine the future—both as we want it to be and as it is likely to become if we do not take affirmative action to alter the present as we live it.

<sup>15</sup> See Elizabeth M. Iglesias, *Foreword: International Law, Human Rights and LatCrit Theory*, 28 U. MIAMI INTER-AM. L. REV. 177, 179 (1997) [hereinafter Iglesias, *Foreword*] (identifying legal spaces where current conflicts over jurisprudential relationship between international and domestic legal regimes will increasingly become central concerns of LatCrit Theory).

<sup>16</sup> In the Black/White paradigm, the analysis of white supremacy is truncated by a tendency to view the problem of racial subordination exclusively in terms of, or primarily as the result of, racial discrimination by whites against Blacks. See Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CAL. L. REV. 1213 (1997), 10 LA RAZA L.J. 127 (1998). Of course, resistance to the Black/White paradigm predates the emergence of both LatCrit and APACrit scholarship, most notably in the work of Critical Race Feminists. See,

broad understanding of the historical and contemporary aspects of white supremacy has been central to the work of both LatCrit and APACrit scholars.<sup>17</sup> This work has already made significant theoretical and political advances by calling attention to recurrent conflicts over immigration law and language rights and by importing these issues into the critical legal analysis of white supremacy and its articulation in legal norms, processes and institutions, both within and beyond the United States.

From this perspective, calls to center Latinas/os and/or to center "the immigrant," like earlier calls to center "women of color," reflect affirmative efforts to construct an anti-subordination theory and praxis beyond the essentialism that has thus far prioritized the racial fault-line between Black and white Americans at the expense of more expansive anti-subordination agendas and more inclusive coalitional politics. This is not to say that the call to move beyond the Black/White paradigm is a call to de-center the legal struggle against racial discrimination or to deny the particular and pervasive forms of discrimination suffered by Black Americans.<sup>18</sup> Rather, it is a call to expand the parameters of our anti-subordination agenda by highlighting the myriad ways in which white supremacy is embedded in a network of interconnected, mutually reinforced structures of privilege. LatCrit theory does this by centering Latinas/os—a move that enables (and indeed requires) an expansive reconceptualization of the anti-subordination agenda we inherited from Critical Race Theory ("CRT") precisely *because* Latina/o identity constitutes the intersection of multiple racialized iden-

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*e.g.*, CRITICAL RACE FEMINISM (Adrien K. Wing ed., New York Univ. Press 1997). In fact, my earliest encounters with the Black/White paradigm were in my efforts to articulate the implications of taking "women of color" seriously as a distinctly *interracial* political identity that minority women might embrace as a common point of reference for revealing, resisting and organizing interracial solidarity against the particular forms of oppression minority women suffer—oppressions rendered invisible in different ways by a Black/White paradigm in which "all women are white," "all Blacks are men" and "all minorities are Black." See Iglesias, *Structures of Subordination*, *supra* note 12, at 400–03, 492–97.

<sup>17</sup> See, *e.g.*, *supra* notes 6, 7.

<sup>18</sup> See Iglesias & Valdes, *supra* note 5, at 562–74 (urging LatCrit scholars to remain cognizant and vigilant lest in rejecting the Black/White paradigm, we uncritically equate Black and white positions within a paradigm that emerged from the very real and continued oppression of whites over Blacks, as well as by non-Blacks who have sought their own liberation in the delusions of a white identity); Chris K. Iijima, *The Era of We-construction: Reclaiming the Politics of Asian Pacific American Identity and Reflections on the Critique of the Black/White Paradigm*, 29 COLUM. HUM. RTS. L. REV. 47, 50 (1997) (warning that moves beyond the Black/White paradigm may be coopted by racist status quo "unless racial identity continues to be a conscious and explicit rejection of white supremacist ideology manifesting through specific political positions . . .").

tities even as Latina/o subordination clearly implicates many fault-lines other than race.<sup>19</sup>

The political implications of these multiple fault-lines for the future of anti-subordination theory are being addressed from two particularly promising directions. One approach focuses on the historical, social, political, economic and cultural relations and structures that create stratifications in and between Latina/o and Asian Pacific American communities. This approach focuses critical attention on intra-group divisions and hierarchies.<sup>20</sup> Indeed, LatCrit Theory's initial emphasis on mapping intra-Latina/o identity politics reflects a collective project to explore differences, invoke commonalities, reveal hierarchies and promote solidarities in, and across, the multiple configurations of Latina/o identity expressed in and between Puerto Rican, Cuban-American, Mexican-American, South and Central American and Indigenous communities. Rather than suppressing or ignoring these multiple intra-group differences for the sake of some false commonality, this approach seeks to identify the historical events and the institutional and social arrangements which initially produced (and currently reproduce) intra-Latina/o divisions, stratifications and antagonisms *precisely* in order to dismantle them.<sup>21</sup>

The important point is that even this anti-essentialist move would be incomplete if LatCrit scholars should fail to recognize and engage the parallel anti-subordination projects confronting APACrit legal scholars, or vice versa, if APACrits should fail to see themselves present and implicated in the LatCrit project. From this perspective, Professor Saito's decision to analyze the wartime internments through a case study of the particular experiences and legal tribulations of Japanese Peruvians is a truly remarkable, breathtaking and path-breaking intervention.<sup>22</sup> Her analysis not only highlights the compelling justice claims

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<sup>19</sup> See, e.g., Kevin R. Johnson, *Some Thoughts on the Future of Latino Legal Scholarship*, 2 HARV. LATINO L. REV. 101 (1997); see also Elizabeth M. Iglesias, *Human Rights in International Economic Law: Locating Latinas/os in the Linkage Debates*, 28 U. MIAMI INTER-AM. L. REV. 361 (1997) [hereinafter Iglesias, *International Economic Law*] (critical assessment of current debates over whether, and how, to link human rights enforcement to international economic law is exceedingly complex given that Latinas/os are divided by differing degrees of cultural assimilation, by nationalist ideologies as well as by race, class and gender hierarchies).

<sup>20</sup> See, e.g., Symposium, *Difference, Solidarity and Law*, *supra* note 7 (intra-Latina/o stratifications central theme at LatCrit II); Symposium, *LatCrit Theory*, *supra* note 7 (intra-Latina/o diversities and commonalities central theme in all five panels and at least two of three featured articles at LatCrit I).

<sup>21</sup> See, e.g., Iglesias & Valdes, *supra* note 5, at 574-83 (suggesting how anti-essentialist, anti-subordination analysis of class and economic marginalization can be articulated in LatCrit Theory through attention to the particularities of distinct Latina/o communities).

<sup>22</sup> See Saito, *Justice Held Hostage*, *supra* note 1, at 280.

of a group rendered all but invisible by the overlapping essentialism of both the Japanese American and the non-Japanese Latina/o imaginaries of identity; it also paves the way for an anti-essentialist analysis of the way these intersectional identities and, by implication, others like the Filipina/o identity, are constituted by and reflective both of the historical processes that initially produced them and of the contemporary power relations that currently marginalize them. By centering the marginalized and intersectional identities that link Latinas/os and Asian Pacific Americans, Professor Saito shows how LatCrit and APACrit legal theory can produce particularly revealing windows into the way white supremacy infiltrates the history of U.S. colonialism and the current structures of international law.<sup>23</sup>

A second approach for addressing multiple inter- and intra-group fault-lines begins by politicizing the existential contradictions Latinas/os and Asian Pacific Americans oftentimes suffer as we attempt to reposition ourselves within the various overlapping hierarchies we inhabit.<sup>24</sup> Put differently, this means politicizing the configuration of choices we simultaneously confront and create as we work to develop new strategies for escaping “the bottom” without scratching for “the top.” This attention to, and politicization of, the internal life of subordinated individuals may, in turn, promote a more profound articulation of the ethical commitments underpinning anti-subordination legal scholarship. This is because attention to the psycho-spiritual consequences of enforced subordination links the pursuit of coalitional theory and praxis directly to the human imperative of liberation *that each of us in different ways experiences* and, hence, more directly to the pursuit of a genuinely common good or objective justice, rather than the instrumental alliances and special interest politics of intra-group elites.<sup>25</sup>

The salient point is that in neither instance does a recognition of intra-group divisions or of the multiplicity of Latina/o subject posi-

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<sup>23</sup> The history and current status, for example, of the Philippines and of Filipinas/os would be a particularly interesting point of reference for exploring intersections in and between LatCrit and APACrit critical theory. The Philippines not only share substantial commonalities with Cuba and Puerto Rico as former Spanish colonies, but they also share historical interconnections as a result of U.S. colonial pretensions after the Spanish-American War. See, e.g., MICHAEL H. HUNT, *IDEOLOGY AND U.S. FOREIGN POLICY* 46–91 (1987).

<sup>24</sup> See, e.g., *infra* notes 33–36 and accompanying text (existential crises generated by transnational identities as particularly central in Latinas/os and Asian Pacific American experiences).

<sup>25</sup> See Iglesias, *Structures of Subordination*, *supra* note 12, at 492–97 (defending controversial position that respect for individual autonomy must take precedence over articulations of “the common good” by linking the existential crises imposed on women of color to the uni-linear political agendas of competing group elites).

tions, in any way, suggest that political identity is simply "a language game."<sup>26</sup> To the contrary, LatCrit Theory emphasizes the existence of multiple hierarchies within Latina/o communities in order to develop a deeper, more nuanced and contextualized understanding of the relations through which Latinas/os, and similarly situated others, are constructed to be both oppressed and oppressors. LatCrit Theory likewise acknowledges that most Latinas/os have access to any number of possible subject positions precisely because this acknowledgment foregrounds the contingent, and therefore political, nature of the identity positions actually embraced. It is precisely this multiplicity of possible positions that makes the formation of *political identity* an existential challenge in that it reflects the many different alliances around which Latinas/os might potentially choose to define our purpose, interests, values and objectives, that is, to construct our identities.<sup>27</sup>

By the same token, this multiplicity means neither that all positions are equally legitimate nor that the legitimacy of any particular subject position can never be judged. Rather, it means that Latinas/os, like Asian Pacific Americans, often confront the choice to align with the oppressors or the oppressed. Judging political positions from an anti-subordination perspective means assessing whether a particular position promotes domination of, separation from or solidarity with the oppressed, given the particular configurations of power at any given moment. It also means asking critical and *self*-critical questions about the kinds of issues and concerns LatCrit scholars tend to center in LatCrit Theory and the way the particularities of otherwise marginalized and intersectional Latina/o identities, like Asian, Black and Indigenous identities, will be thematized in LatCrit discourse.<sup>28</sup>

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<sup>26</sup> Cf. A. Sivananda, *All that melts into air is solid: the Hokum of New Times*, RACE & CLASS, Jan.-Mar. 1990 (criticizing what he calls the proliferation of positional politics).

<sup>27</sup> See, e.g., Iglesias, *International Economic Law*, *supra* note 19, at 377-86 (illustrating how competing representations of Latina/o subordination in the discourses of development, dependency and neo-liberalism project very different configurations of Latina/o interests, thereby politically activating different Latina/o subject positions and promoting different inter- and intra-group alliances—with profound implications for promoting the incorporation of human rights norms in international economic law).

<sup>28</sup> LatCrit Theory has worked hard to emphasize the multiplicity and intersectionality of Latina/o political identity and to explore its anti-subordination implications. LatCrit II, for example, featured a panel devoted specifically to issues central to Indigenous Latinas/os. See, e.g., Luz Guerra, *LatCrit y la Des-colonización Nuestra: Taking Colón Out*, 19 CHICANO-LATINO L. REV. 351, 351-61 (1998); Iglesias & Valdes, *supra* note 5, at 568 n.167. Similarly, LatCrit III featured a focus group session on "BlackCrit Theory." See *infra* note 64 and accompanying text (describing original purpose of BlackCrit focus group session at LatCrit III). This effort has charted an admittedly difficult, but crucial, path that will probably prove to be the most significant element

Understood from this perspective, it should be clear that the call to move beyond the Black/White paradigm is a call to expand, not to reject, the anti-racist commitments that have thus far guided Critical Race Theory. At the same time, it should also be clear that moving beyond this paradigm means much more than simply replacing Latinas/os and/or Asian Pacific Americans at the center of our critical legal theories. Rather, it means taking a stance against all forms of subordination, both *between and within* subordinated groups. The articles by Professors Saito and Gott are two brilliant illustrations of the wide range of issues an anti-essentialist approach can introduce into the critical analysis of white supremacy and of the law's role in its reproduction. Three themes in particular are central, both to the different ways in which Professors Saito and Gott respectively analyze the implications of the wartime internments and to my own understanding of the kinds of overlapping commonalities around which LatCrits and APACrits might meaningfully map out an anti-essentialist, anti-subordination project located somewhere in and between APACrit and LatCrit legal scholarship and beyond the Black/White paradigm.<sup>29</sup>

#### A. *The Centrality of the International*

The first theme is the centrality of international law and relations to the theoretical analysis and political transformations that are often implicated in dealing with the particular kinds of subordination common to many Latinas/os and Asian Pacific Americans.<sup>30</sup> This centrality is immediately apparent in the fact that Latinas/os and Asian Pacific Americans often tend to experience and express their political identities in transnational or cross-cultural terms.<sup>31</sup> When Professor Keith

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in ensuring that LatCrit Theory remains true to its original commitment to an anti-subordination, anti-essentialism, as both political objective and critical method.

<sup>29</sup> These commonalities are in addition to our already widely recognized common interests in resisting the imposition of English only and racist immigration regimes, as well as related issues like the coercive apparatus and contracted political rights structured around the citizen/alien dichotomy or, for example, the fact that Asian Pacific Americans, like many Latinas/os, get coded as aliens because of our race, ethnicity or related attributes such as accents. For a path-breaking analysis on the racialization of accents, see Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991).

<sup>30</sup> The centrality of the international to LatCrit Theory is reflected in the recent volume entitled Symposium, *International Law, Human Rights and Latcrit Theory*, 28 U. MIAMI INTER-AM. L. REV. 1 (1997).

<sup>31</sup> See Berta Esperanza Hernandez-Truyol, *Borders (En)gendered: Normativities, Latinas, and a LatCrit Paradigm*, 72 N.Y.U. L. REV. 882 (1997); Margaret E. Montoya, *Lines of Demarcation in a Town Called Frontera: A Review of John Sayles' Movie LONE STAR*, 27 N.M. L. REV. 223 (1997); Margaret E. Montoya, *Mascaras, Trenzas, Y Grenas: Un/masking the Self While Un/braiding Latina*

Aoki recounts the story of his mother telling him, as a boy, that he should not play at killing "japs" because he is himself a "jap," he illustrates one of the ways in which transnational identities can interrupt the narrative scripts that are endlessly replayed around modernist categories of race, class and nation.<sup>32</sup> Not being comfortable killing "japs" may be experienced as a natural or necessary consequence of being a "jap," or it may be that being one of the "japs" targeted for imagined destruction offers a vantage point—an avenue of insight—into how it might be wrong to play at killing *anyone*. The story illustrates how transnational identities can be the source of existential crisis—the kinds of crises that trigger particular kinds of identity questions and choices—in this case, questions that often make explicit and compelling the normative and political imperative of rejecting the nationalist's identity in favor of a more universal humanism. After all, the rigid nationalism of "my country wrong or right" can only cause pain and confusion when we see that "the Other" is *ourSelf* and, particularly if by extension, we should ever come to see that *anyOther* is *aSelf*.

Likewise, Professor Aoki's story is interesting because it attests to the fact that being a "jap" may not, in itself, be enough to activate the kinds of existential challenges that expand identity and make possible a broader understanding of "self and/as/in the Other." That challenge depends, at least for many of us, on the extent to which we either make the commitment in solidarity to remind ourselves or are reminded by others. Thus, while transnational identities are often internally experienced by, and/or externally imposed upon, Latinas/os and Asian Pacific Americans as a result of the conflation of race/ethnicity and "foreignness," the political potential embedded in these identities provides only one of the reasons for centering the international in LatCrit and APACrit legal scholarship.<sup>33</sup> Another reason has to do with

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*Stories and Legal Discourse*, 17 HARV. WOMEN'S L.J. 185 (1994); Celina Romany, *Claiming a Global Identity: Latino/a Critical Scholarship and International Human Rights*, 28 U. MIAMI INTER-AM L. REV. 215, 219 (1997); Enid Trucios-Haynes, *LatCrit Theory and International Civil and Political Rights: The Role of Transnational Identity and Migration*, 28 U. MIAMI INTER-AM. L. REV. 293, 294 (1997).

<sup>32</sup> See Keith Aoki, *Critical Legal Studies, Asian Americans in U.S. Law & Culture, Neil Gotanda, and Me*, 4 ASIAN L.J. 19, 22-3 (1997).

<sup>33</sup> Both LatCrit and APACrit scholars have done particularly valuable and insightful work deconstructing the conflation of race and "foreignness." See, e.g., Neil Gotanda, *Asian American Rights and the "Miss Saigon Syndrome,"* in ASIAN AMERICANS AND THE SUPREME COURT: A DOCUMENTARY HISTORY 1088, 1096 (Hyung-chan Kim ed., 1992); Johnson, *supra* note 19, at 117-29 (examining treatment of Latinas/os as foreigners and its implications for Latina/o anti-subordination struggles); Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of "Foreignness" in*

the way that the structure and history of international relations is implicated in the production of racial subordination both domestically and globally.

Viewed from beyond the Black/White paradigm, the internments of Japanese Americans and Latin Americans, as recounted and analyzed in different ways by Professors Gott and Saito, provide evidence that the theoretical analysis and transformation of racial subordination implicate a whole range of anti-subordination projects currently located at the intersection (or rather disjuncture) of domestic and international legal regimes. For example, Professor Saito's account of the justice denied Japanese Peruvians despite the exhaustion of domestic legal remedies raises important questions about the limitations of any anti-racist agenda that relies exclusively on domestic legal processes and institutions.<sup>34</sup> If national courts can be expected routinely to confer impunity on national elites through the interpretative manipulation of domestic laws and constitutional doctrines, then Professor Saito is surely correct to suggest that the elimination of white supremacy depends, at least in part, on securing the domestic enforcement of international human rights norms and the creation of effective international legal forums for the prosecution of human rights violations.<sup>35</sup>

While Professor Saito's analysis uses the wartime internments to center international law in the project of producing anti-racist legal theory and praxis, Professor Gott uses them to reveal how the articulation of white supremacy is linked to fundamental conceptual structures that dichotomize the domestic and international as fields of state action governed by very different norms. In this dichotomy, the domestic is constituted as a realm of government under the rule of law, while the international marks a realm of power politics in pursuit of national interests and the defense of national security.<sup>36</sup> Professor

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*the Construction of Asian American Legal Identity*, 4 *ASIAN L.J.* 71, 77-81 (1997) (exploring the "racing" of Asian Americans as foreign).

<sup>34</sup> See Saito, *Justice Held Hostage*, *supra* note 1, at 326-28.

<sup>35</sup> See Saito, *Justice Held Hostage*, *supra* note 1, at 326-34. Interestingly, limited confidence in the impartiality of national courts has already produced an increasing use of international dispute resolution panels with expanded subject matter jurisdiction, direct domestic effect and adjudicative finality. See G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 *DUKE L.J.* 829, 858-94 (1995) (analyzing these dispute resolution alternatives as evidence of increasing departure from "regime management model" of international relations to "efficient market model" of international trade legalism). Viewed in this light, the question is simply whether the vindication of human rights will ever be given the same priority in international law as the property and contract rights of international business interests.

<sup>36</sup> See Gott, *A Tale of New Precedents*, *supra* note 1, at 186 (discussing domestic/foreign

Gott's analysis shows how this dichotomy enables American legal and political discourse to legitimate the consolidation and deployment of imperial power by government elites without directly threatening the national myth that this is a government of the people, by the people and for the people.<sup>37</sup>

Through his analysis of the internment cases, Professor Gott shows how the domestic/international dichotomy legitimates a socio-legal reality in which subordinated groups *outside* U.S. jurisdiction confront the blatantly asserted and transparent impunity of the only remaining superpower, unprotected, and with no effective legal recourse either domestically or internationally. At the same time, subordinated groups *within* the United States remain potentially vulnerable to the impunity of the imperial at any moment national elites declare that the domestic realm has been penetrated by a "foreign" threat. The vulnerability of domestic minorities is particularly apparent given the fact that race and "foreignness," are so easily conflated in the master narratives of white supremacy, as brutally evidenced by the internment cases. Indeed, the international/domestic dichotomy has rarely prevented the domestic deployment of unconstitutional police powers, otherwise prohibited by the rule of law norms, presumably applicable in the domestic realm, in instances where elite visions of "national security" are deemed at risk of foreign aggression.<sup>38</sup> By disguising this socio-legal reality, the domestic/international dichotomy legitimates a structure of power that makes subordinated groups extremely vulnerable to the activation of white supremacist repression both at home and abroad.<sup>39</sup>

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dichotomy as construed in "realist" theories of international relations); Saito, *Justice Held Hostage*, *supra* note 1, at 340-46.

<sup>37</sup> See Gott, *A Tale of New Precedents*, *supra* note 1, at 200 (showing how domestic/international dichotomy in constitutional jurisprudence enables "liberal" legal interpretation to constitute the state as ontologically prior to the law—meaning that national elites are above "the rule of law" at least with respect to their external escapades and their suppression of internal rebellion).

<sup>38</sup> See, e.g., *infra* notes 79-86 (war on terrorism) and notes 87-90 (war on drugs); see also RODOLFO ACUÑA, *OCCUPIED AMERICA: A HISTORY OF CHICANOS* 27, 38 (3d ed. 1988) (explaining that doubts about Mexican-American loyalty to Mexico and later to Spain were used to promote border militarization and dispossession and repression of Mexican-American citizens, during and after Mexican and Spanish-American Wars); WARD CHURCHILL & JIM VANDER WALL, *AGENTS OF REPRESSION: THE FBI'S SECRET WARS AGAINST THE BLACK PANTHER PARTY AND THE AMERICAN INDIAN MOVEMENT* 272-81 (corrected 2d ed. 1990) (describing efforts to delegitimize the American Indian Movement by linking it to foreign-dominated, communist conspiracy).

<sup>39</sup> See, e.g., ACUÑA, *supra* note 38, at 40 (explaining that impunity with which infamous Texas Rangers tortured and murdered Mexican-Americans was legitimated on ground that "affairs of the border cannot be judged by standards that hold elsewhere.").

Centering the international enables Professors Gott and Saito to offer significant new insights into how the struggle against white supremacy is potentially linked to a wide range of anti-subordination projects that have targeted the structure of international relations and the inter-state system as central sites of liberation activism. This move represents a fundamental advance beyond the Black/White paradigm because Critical Race Theory, like the mainstream power centers of the American civil rights movement, has until recently conceptualized its anti-racist agenda as concerned, for the most part, with the impact of domestic law and legal process on the struggle for racial justice in this country.<sup>40</sup> Thus, the institutional structures, state practices and substantive doctrines organized by and around the *absences* of international law, not to mention the exceedingly problematic relationship between international and domestic legal regimes, have rarely been analyzed from a Critical Race perspective—apparently because most RaceCrits have assumed that such issues are largely irrelevant to the struggle for racial justice.

By contrast, the multiple *absences* of international law constitute an important point of reference in and between APACrit and LatCrit critical scholarship precisely because many Latinas/os, like many Asian Pacific Americans, often experience subordination as directly linked to the geopolitical conflicts of the inter-state system and the ideologies of racial and/or cultural superiority through which dominant states seek to legitimate their interventions, expropriations and conquests of weaker states.<sup>41</sup> The plight of Japanese Americans interned during WWII is just one example of the way inter-state conflicts have, through-

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<sup>40</sup> Some notable exceptions include Isabelle R. Gunning, *Arrogant Perception, World Traveling, and Multicultural Feminism: The Case of Female Genital Surgeries*, in CRITICAL RACE FEMINISM: A READER 352 (Adrien K. Wing ed., 1997); Hope Lewis, *Lionheart Gals Facing the Dragon: The Human Rights of Inter/national Black Women in the United States*, 76 OR. L. REV. 567 (1997); Henry J. Richardson, III, "Failed States," *Self-Determination, and Preventive Diplomacy: Colonialist Nostalgia and Democratic Expectations*, 10 TEMP. INT'L & COMP. L.J. 1 (1996). It is also significant that Martin Luther King, Jr. and Malcolm X were assassinated just as they were moving toward an internationalist and class-based concept of liberation struggle. See Natsu Taylor Saito, *Beyond Civil Rights: Considering "Third Generation" International Human Rights Law in the United States*, 28 U. MIAMI INTER-AM. L. REV. 387, 404-05 (1997) [hereinafter Saito, *Beyond Civil Rights*].

<sup>41</sup> See, e.g., HUNT, *supra* note 23, at 46-91 (recounting how Puerto Ricans, Cubans, Native Americans, African Americans and Filipinas/os have been positioned within American ideology of racial hierarchy and the way racialized representations of these various groups were used to legitimate military interventions and occupations of Cuba, Puerto Rico and the Philippines); cf. Iglesias, *International Economic Law*, *supra* note 19 (illustrating why LatCrit anti-subordination analysis must incorporate—and move beyond—any theoretical framework that reduces Latina/o subordination to function of inter-state dependency relations centered in and by dependency discourses).

out this country's history, been articulated in the configuration of domestic repression, the activation of racialized public discourses and the ebb and flow of race hate crimes.<sup>42</sup>

From the Mexican and the Spanish-American Wars, through the Cuban Revolution to the more recent inter-state conflicts over U.S. drug war policies in the hemisphere, many Latinas/os have been profoundly impacted by the consequences of inter-state conflicts and alliances. Given this history, it is no surprise that the relationship between the international and the domestic emerged as an early and central theme in LatCrit Theory.<sup>43</sup> By centering international law and relations in anti-subordination critical legal analysis, both APACrit and LatCrit Theory are poised to see more clearly the direct relationship between the lived experience of subordination and the historic and continuing failures of the international legal system to establish the rule of law, to control the expansionary and interventionist practices of superpower foreign policy and to ensure the incorporation of international human rights laws into domestic legal systems.

### B. *The Centrality of National Security Ideology*

In different ways, Professors Gott and Saito also center the concept of national security as a major theme in their analysis of the wartime internments of Japanese Americans and Latin Americans. Professor Gott's critical account of the way national security ideology was invoked in *Korematsu* and *Hirabayashi* launches a profound and multilayered assault on the basic assumptions and conceptual structures that organize the field of foreign affairs in U.S. constitutional law. In one dramatic move, Professor Gott extracts *Korematsu* and its progeny from their familiar location within the field of equal protection jurisprudence and reinserts them into the alien universe of Foreign Affairs and National Security Law.<sup>44</sup> Through this simple, but brilliant shift in the frame of precedential references, Professor Gott is able to deconstruct "the rigid territorial distinction between outside and inside that has

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<sup>42</sup> See, e.g., Paula C. Johnson, *The Social Construction of Identity in Criminal Cases: Cinema Verite and the Pedagogy of Vincent Chin*, 1 MICH. J. RACE & L. 347, 388 (1996) (linking race hate crime to American male working class anxiety over impact of Asian economic competition on American jobs). The INS' retaliatory detentions of Colombian citizens entering the United States during the U.S.-Colombian fallout over the drug war and discriminatory representations of Arabs as terrorists provide two additional examples.

<sup>43</sup> See Iglesias, *Foreword*, *supra* note 15.

<sup>44</sup> See Gott, *A Tale of New Precedents*, *supra* note 1, at 182 n.17 (noting that "the domestic internment of a racially defined group of citizens and residents may seem out of place in the foreign affairs context.").

lead to the treatment of [foreign affairs and national security] law as an area of analysis apart from the 'normal' rule of law." Located in this other discursive universe, the internment cases interrupt and destabilize familiar constitutional debates.<sup>45</sup> Significantly, these cases challenge the happy assumption that "the rule of law" in a constitutional democracy can withstand the consequences of a constitutional jurisprudence that condones the exercise of imperial power by restricting the legal accountability of national elites to actions in the domestic realm, while conferring impunity for otherwise unconstitutional (and indeed criminal) actions taken in the field of foreign affairs.<sup>46</sup>

If the political branches of government, whether acting unilaterally or in concert, have the authority to organize, consolidate and deploy unconstitutional powers abroad, what's to prevent them from using these powers "at home?" The answer posited by both realists and liberals is that, of course, the internal/external dichotomy secures the rule of law and the accountability of the state in domestic affairs. But this is precisely where Professor Gott's reading of the internment cases produces a profound interruption and disruption of this received unwisdom. Reading the internment cases as foreign affairs and national security law precedents highlights the ways in which national security ideology destabilizes the internal/external dichotomy, thereby rendering the domestic realm perpetually vulnerable to the internal deployment of imperial state power. This reading also raises critical questions about the role of national security ideology in the reproduction of white supremacy and, conversely, exposes the legitimating functions of white supremacy in the articulation of national security ideology. What after all is the meaning of American "national security," when its pursuit renders American nationals so profoundly insecure against the coercive actions of government elites?<sup>47</sup>

According to Professor Gott, the underlying concept of national security has escaped critical scrutiny and Jules Lobel was, therefore, right to suggest that "[r]evitalizing the liberal legal paradigm requires

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<sup>45</sup> For example, this move deconstructs the *Curtiss-Wright* versus *Youngstown* debate over the respective roles of the President and Congress in conducting foreign affairs by suggesting that this debate actually constitutes "one side of a broader dialectic" in which the real question is from where does either branch (or both together) get "the power to act imperiously" in the context of foreign affairs. See *id.* at 208.

<sup>46</sup> See *id.*; *infra* notes 83–84 and 87–88 and accompanying text. What do the Drug Enforcement Agency's abductions in Mexico have in common with the U.S. embargo of Cuba? Answer: both are illegal under international law.

<sup>47</sup> See, e.g., Laura Gatland, *U.S. Marines Launch Assault on Chicago Sewers*, CHRISTIAN SCIENCE MONITOR, May 7, 1998, at 3 (reporting that U.S. Marines have traveled to Chicago to prepare themselves for battle in an urban environment).

a substantive redefinition of United States national security that does not necessitate the present imperial responsibility which inevitably leads to continued crisis."<sup>48</sup> The pending question for LatCrit and APACrit theory is what such a *redefinition* of national security might look like. Certainly, Professor Gott's analysis reveals the negative: national security cannot be equated with the projection of state power to enforce "the national will" because the national will, if genuinely probed in any particular crisis, would quickly fragment along the fissures of race, class and other such divisions within the American society.<sup>49</sup> To say that this very threat of internal fragmentation is the reason why, in times of national crisis, the state must be granted the authority to deploy unilaterally such coercive power as necessary to ensure national security simply begs the question as to which of these fragments constitutes the national interest on behalf of which the state is empowered to act. Is "national security" most directly implicated in the project of protecting domestic order against the machinations of foreign enemies or of protecting racial minorities against race-based persecution and imprisonment? Viewed from an anti-essentialist, anti-subordination perspective, Professor Gott's deconstructive analysis poses a fundamental challenge: that is, to find a way of answering the question of what is or is not in the interests of national security without reinscribing the myth of a unitary state in which elite special interests are routinely conflated with the national interest at the expense of non-elite interests.<sup>50</sup>

Interestingly, Professor Saito's intervention suggests one meaningful way of distinguishing elite interests from the national interest and redefining the substantive meaning of national security. Her article recounts and critically assesses the implications of the U.S. government's treatment of Japanese Latin Americans during World War II and, more recently, in its efforts to settle their 1997 class action in

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<sup>48</sup> Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1426 (1989) (emphasis added).

<sup>49</sup> Inter-group divisions over the purposes and legitimacy of U.S. participation in the Mexican War, the Spanish-American War, World Wars I and II—like more recent conflicts over the nature, extent and legitimacy of asserted national security interests in Cuba, Nicaragua, El Salvador, Grenada, Vietnam, Cambodia and more recently, in the Gulf War—all raise substantial questions about what constitutes "the American national interest" once we reject the white supremacist logic that collapses the national interest into the interest of national elites and acknowledge the equal validity of minority interests in the national security calculus. For a particularly insightful and path-breaking foray into this arena of pending critical analysis, see Henry J. Richardson, III, *Gulf Crisis and African-American Interests Under International Law*, 87 AM. J. INT'L L. 42 (1993).

<sup>50</sup> To say that the national interest is that determined by political representatives is to elevate form over substance with a vengeance, particularly given the legal structure of voting rights and campaign finance.

*Mochizuki v. United States*.<sup>51</sup> During World War II, these individuals were forcibly removed from their homes, separated from their families, dispossessed of their property and deported from all parts of Latin America (primarily from Peru) to be imprisoned as hostages in U.S. internment camps and later deported to Japan against their will.

Certainly, one of Professor Saito's prime objectives is to demonstrate the centrality of international law to any future hopes of securing basic justice for these Japanese-Peruvian victims of U.S. war crimes. But her analysis does more than develop compelling arguments for the domestic application of international law and for strengthening the enforcement capacities of international tribunals. Over and again, she emphasizes the substantial costs, measured in terms of this country's loss of stature and legitimacy, its exposure to even further liability and to the retaliation of those denied a meaningful remedy. She also notes the increased insecurity that is likely to result from a generalized cynicism toward rule of law norms, even further exacerbated by the perceived impunity of this country's government and the total abdication of its courts. These costs are the foreseeable price of impunity. After all, the U.S. government committed violations of international law similar to a number of the war crimes prosecuted after World War II. Such crimes cry for redress or retaliation.

The message is as simple as it is clear: American national security depends on justice, both domestically and internationally.<sup>52</sup> The United States will never be secure in the absence of justice. The failure to do justice makes national security depend on the consolidation of imperial power just as certainly as the guilt of the victimizer converts the victim into a constant threat, whether real or imagined.<sup>53</sup> Rather than building a stable peace based on the pursuit of justice, national security doublespeak is an instrument for legitimating repression. In

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<sup>51</sup> See Saito, *Justice Held Hostage*, *supra* note 1, at 275-80.

<sup>52</sup> See, e.g., Iglesias, *Structures of Subordination*, *supra* note 12 (thematizing profound implications of common saying "No Justice, No Peace," but arguing further that commitment to justice is necessarily commitment to redistribution of institutional power on premise that if there is no peace without justice, neither is there likely to be justice without power: "No Justice, No Peace; No Power, No Justice").

<sup>53</sup> See Saito, *Justice Held Hostage*, *supra* note 1, at 315 (recounting reasoning in which acknowledged mistreatment of Japanese Americans by white Americans is used to explain why their loyalty was in question). For an exploration of the theoretical implications following from the insight that the will to dominate is both the cause and effect of profound insecurity, see Elizabeth M. Iglesias, *Rape, Race, and Representation: The Power of Discourse, Discourses of Power, and the Reconstruction of Heterosexuality*, 49 VAND. L. REV. 869, 953 (1996) (arguing that feminist theory must begin to disaggregate its problematic conflation of "power" and "dominance;" "big stick" diplomacy, like pornographic masculinity, offers only the delusion of power, since "[t]he will to dominate means a constant anxiety and insecurity over the inability to dominate.").

its totalitarian logic, national security ideology makes the rule of law routinely give way to the conjuring of enemies, while unilateral aggression becomes preemptive self-defense.<sup>54</sup> And though race is certainly a central feature of the conjured enemy, national security ideology makes an enemy of anyone who resists the dominant structure of privilege and power.<sup>55</sup> The ensuing violations of basic civil rights and otherwise fundamental legal norms are then justified through a totalitarian logic in which the struggle for social justice and political change is recoded and attributed to "subversive elements" whose subversiveness constitutes a threat so overwhelming it cannot be stopped *unless* basic rights are suspended or fundamental legal norms violated. In sum, national security ideology is hardwired for repression rather than for justice, and as such it is part of the problem, not the solution.

By centering national security ideology, LatCrit and APACrit Theory are particularly well-positioned to develop a penetrating and comprehensive understanding of the way white supremacist power is il/legally structured, both domestically and internationally. Even a cursory review of Latina/o histories would quickly reveal the centrality of national security ideology in legitimating repression throughout the Americas.<sup>56</sup> From the dirty wars in South America, to the "low intensity conflicts" waged throughout Central America on a bankroll of U.S. taxpayer dollars and illegal earnings,<sup>57</sup> to the embargo of Cuba, to the wars in Korea and Vietnam and the bombing and subsequent desertion of the Cambodian people, the subordination of Latinas/os and Asian Pacific Americans is easily mapped around the national security doublespeak of American foreign policy.

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<sup>54</sup> The U.S. defense before the International Court of Justice in the mining of Nicaraguan harbors provides a recent example of such "preemptive self-defense."

<sup>55</sup> While many of the grossest human rights violations in Latin America can be effectively addressed through the category of race—the genocide of Guatemalan Indians, for example—many others cannot. The dirty wars in Argentina, Uruguay, Chile and Brazil targeted individuals not so much because of their racial identities (*Hispanic* Latinas/os are not minorities in Latin America), but rather because of their political identities. In the genocidal logic of these regimes, race was replaced by "subversive"—a fact that makes international criminal law instruments like the Genocide Convention of limited use in combating the mass persecution and extermination of real and putative groups in Latin America. See, e.g., Beth Van Schaack, Note, *The Crime of Political Genocide: Repairing The Genocide Convention's Blind Spot*, 106 YALE L.J. 2259 (1997).

<sup>56</sup> See, e.g., THE POLITICS OF ANTIPOLITICS: THE MILITARY IN LATIN AMERICA (Brian Loveman et al. eds., 2d ed. 1989).

<sup>57</sup> See FRANK J. SMIST, JR., CONGRESS OVERSEES THE UNITED STATES INTELLIGENCE COMMUNITY 264–65 (2d ed. 1994) (reporting that "Iran-Contra investigators unearthed plans to use the profits from secret U.S. arms sales to Iran to perpetuate a self-sustaining, overseas organization that would run future covert operations . . .").

At the same time, no critical analysis of the role of national security doublespeak in the reproduction of white supremacy would be complete, if it did not track this ideology's *domestic* deployment. In the United States, the government has orchestrated campaigns of disinformation and subversion against a wide assortment of domestic political movements, from the American Indian Movement and the Black Panther Party, to its campaigns of surveillance, infiltration and persecution of the Sanctuary Movement, the Pastors for Peace and the Committee in Solidarity with the People of El Salvador ("CISPES").<sup>58</sup> In different ways, across different socio-legal contexts, national security doublespeak has been visibly present and circulating in the repression of domestic resistance movements aligned against perceived social and racial injustices and unlawful foreign policies. Tracking this ideology through its various appearances would certainly provide a valuable comparative perspective from which to reveal and assess the extent to which state criminality is implicated in the reproduction of white supremacy as well as reveal the role of national security rhetoric in legitimating these crimes and their cover-up.<sup>59</sup> Thus, by tracking the circulation of national security doublespeak in both legal and political discourse, LatCrit and APACrit would again be positioned to reveal otherwise suppressed inter-group commonalities organized around, and against, the unlawful deployment of state coercive power.

### C. *The Centrality of Political Economy*

A third theme ripe for further APACrit and LatCrit analysis is the centrality of political economy in fostering the consolidation of white supremacy.<sup>60</sup> More specifically, this is a call for sustained analysis of the

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<sup>58</sup> See, e.g., SUSAN BIBLER COUTIN, *THE CULTURE OF PROTEST: RELIGIOUS ACTIVISM AND THE U.S. SANCTUARY MOVEMENT* 131–50 (1993) (recounting federal surveillance and prosecution of Sanctuary movement); CHURCHILL & VANDER WALL, *supra* note 38, at 370–76 (recounting FBI activities against CISPES); ROSS GELBSPAN, *BREAK-INS, DEATH THREATS AND THE FBI: THE COVERT WAR AGAINST THE CENTRAL AMERICA MOVEMENT* (1991); Interreligious Foundation for Community Organization, *IFCO's Rich History* (visited Feb. 7, 1999) <<http://www.igc.org/ifco/fuhs.html>> (documenting Pastors for Peace projects and history of federal government persecution).

<sup>59</sup> See CHURCHILL & VANDER WALL, *supra* note 38, at 272–81 (efforts to delegitimize American Indian Movement by linking it to foreign-dominated, communist conspiracy).

<sup>60</sup> See, e.g., Elizabeth M. Iglesias, *Global Markets, Racial Spaces and the Role of Critical Race Theory in the Struggle for Community Control of Investments: An Institutional Class Analysis*, in *CRITICAL RACE THEORY: HISTORIES, CROSSROADS, DIRECTIONS* (Jerome McCristal Culp, Jr. et al. eds., forthcoming 1999) [hereinafter Iglesias, *Global Markets*] (illustrating centrality of political economy to production of "racial spaces" and developing "institutional class analysis of law" as framework through which to see operation of law and legal doctrine in constructing relations of power/lessness that sustain racial spaces of political economy).

way regimes of law/lessness organize the struggle for material accumulation and economic power and promote the reproduction of white supremacist class hierarchies, both domestically and transnationally. Viewed through a *materialist* critical perspective, the internment orders directed at Japanese Americans and Latin Americans are just another example of a long line of historical instances in which racial/ethnic hostility has been activated to achieve the material and economic dispossession of a successful minority for the benefit of a resentful and envious majority. Indeed, Professor Saito's recounting of the economic achievements of the Japanese Peruvians and the hostility targeted specifically at these achievements by the Hispanic majority in Peru, evokes other instances where race hate has been mobilized to legitimate the transfer of material wealth from a non-white group to a white-identified population: the Nazi extermination of the Jews was orchestrated around the massive plunder of their wealth; throughout the Americas, the plantation economy was (and in some ways still is) an economic machine fed on the exploitation of enslaved Africans for the enrichment of a white-identified transnational elite; both Native and Mexican Americans were robbed of their lands for the benefit of white settlers whose westward expansion was cast as Manifest Destiny.

It is worth noting, initially, that the narrative line linking these stories across the disjunctures of space and time, is an act in two parts: it is the story of the way the lust for economic dominance and material accumulation insinuates itself into the articulation of white supremacy, even as white supremacy takes center stage in the project of legitimating the economic dispossession and elimination of non-white peoples. The implications of this narrative linkage are far-reaching precisely because so much ink has been spilled in abstract debates about the relative priority of race and class in the subordination and/or assimilation of non-white peoples.<sup>61</sup> Viewed against the backdrop and impasses of this race/class debate, the biggest pay-off of any collective, self-conscious effort to articulate an anti-essentialist, anti-subordination agenda somewhere in and between LatCrit and APACrit Theory and beyond the Black/White paradigm would be to shatter the grip of these theoretical abstractions on the legal imagination.

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<sup>61</sup> See, e.g., THEORIES OF RACE AND ETHNIC RELATIONS (John Rex et al. eds., 1986) (collecting assortment of essays on class and race in comparative race and race relations analysis); Harold M. Baron, *Racial Domination in Advanced Capitalism: A Theory of Nationalism and Divisions in the Labor Market*, in LABOR MARKET SEGMENTATION 187-209 (Richard C. Edwards et al. eds., 1975) (arguing that racism is social formation with economic base).

The questions pending for LatCrit and APACrit Theory reach far beyond the parameters of the race/class debate and map the analysis of political economy around the concrete particularities and multiple dimensions of our similarities and differences. Abstract debates must give way to the search for analytical methodologies and political strategies that will enable us: (1) to understand the activation of racial difference as a strategy of dispossession across the multiple global/local configurations of economic power and structures of production and accumulation; (2) to understand, conversely, the structural dimensions and institutional frameworks of economic power/lessness as well as the extent of material dispossession and its impact across different racial and ethnic communities; (3) to resist the reproduction of class hierarchies within and between our distinct, but overlapping communities and (4) to identify new ways of deploying law and new sites for doctrinal deconstruction and reform intervention that can counter the material dispossession of non-white peoples across the globe. These objectives represent, at minimum, a call to replace abstract categories of race and class with a comparative analysis of the particularities that historically constructed, and today challenge, the distinct identity positions we have inherited and/or embrace. It is a call to assess the structures of commonality and difference that may be thereby revealed—in light of our common and self-conscious commitment to an anti-essentialist, anti-subordination imperative—and to translate these new insights into a project of coalitional activism, legal interventions and substantive reform.<sup>62</sup>

Put differently, the convergence of white supremacy and the struggle for material accumulation in the production of racial/ethnic subordination needs to be traced through the different regimes of il/legality that have come to bear on different communities in different

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<sup>62</sup> See, e.g., Iglesias & Valdes, *supra* note 5, at 574–82 (mapping historical and regional particularities reflected in diversity among Latina/o communities and linking these differences to fact that subordination and poverty within these communities are the product of very different legal events and institutional arrangements). This approach could easily be extended, for example, by a comparative analysis of the way racial ideologies and legal instruments of the Alien Land Laws were used to dispossess Asian Pacific Americans even as Mexican Americans were dispossessed of their land titles by U.S. courts in violation of international treaty commitments to Mexico and therefore in direct violation of international law. Compare Keith Aoki, *No Right to Own?: The Early Twentieth-Century "Alien Land Laws" As a Prelude to Internment*, in this issue, with Guadalupe T. Luna, "Zoo Island": LatCrit Theory, "Don Pepe" and Señora Peralta, 19 CHICANO-LATINO L. REV. 339, 344–49 (1998). This type of comparative critical and particularized analysis promises valuable insight into the different legal methodologies through which white supremacy has reproduced itself through history, thereby directly combating the tendency to frame inter-group differences among non-white communities in competitive, rather than coextensive, terms.

socio-legal contexts. Tracking the convergence of class and racial privilege across these different contexts is important because solidarity within and between non-white groups depends, at least at this stage in the ethical development of our communities, on a shared recognition of the *similarities* at the core of our *differences*. Thus, the centrality of political economy, like national security ideology and international relations, reflects a move to focus more concretely and particularly on the way white supremacy has been reproduced in different communities through various regimes of il/legality, across both historical time and international space.

To be sure, a move to center international relations, national security ideology and political economy as central themes in and between LatCrit Theory and APACrit scholarship is a move beyond the Black/White paradigm, but it is *not* a move that excludes Black subordination from the critical enterprise. Perhaps ironically, understanding the truth of this assertion requires a major and fundamental reconceptualization of "the center" of Black identity in Critical Race Theory.<sup>63</sup> Indeed, last summer at LatCrit III, I tried to make this point explicit by organizing and moderating a focus group discussion designed to analyze the particularities of Black subordination by, for example, foregrounding issues related to the transnational dimensions of Black identity within and between different Latina/o and Caribbean communities. The purpose of this focus group session was two-fold: its *performative* purpose was to center Black subordination in LatCrit discourse long enough to make it clear that the production of LatCrit theory must not only *theorize*, but must also *operationalize*, its anti-essentialist aspirations with concrete measures and, furthermore, that these measures may, from time to time, require decentering the *HispanicLat*, precisely in order to expand the *Crit*; its *substantive* purpose was to explore intra-Black commonalities and differences, both within and beyond the United States, and to examine whether and how the Black/White paradigm suppresses critical analysis of the stratifications within and between different Black communities.<sup>64</sup>

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<sup>63</sup> This is ironic because so much of the LatCrit/RaceCrit discussion has focused on decentering Black identity to make way for *non-Black* others in Critical Race Theory. See, e.g., Elvia R. Arriola, *Foreword: March!*, 19 CHICANO-LATINO L. REV. 1, 26-27 (1998); Valdes, *supra* note 7, at 5-7. By contrast, understanding my point here requires understanding how LatCrit Theory *also* constitutes a call to decenter the *estadounidense* national cultural identity in order to make room for the particularities of transnational and intersectional *Black* identities in both LatCrit Theory and CRT.

<sup>64</sup> The title of the focus group discussion was *From Critical Race Theory to LatCrit to BlackCrit? Exploring Critical Race Theory Beyond and Within the Black/White Paradigm*. See Iglesias, *Foreword*:

Viewed from this perspective, the three common themes I emphasize for LatCrit and APACrit scholarship are of central importance to many, indeed most, of the Black peoples of the world and, therefore, would correctly be at the center of a new stage in the evolution of Critical Race Theory.<sup>65</sup> This would, however, be a *new* stage for Critical Race Theory precisely because the effort to reveal and resist these processes of subordination, in and among various and varied Black communities, *moves beyond, not within*, the parameters of the Black/White paradigm. It makes this move by recognizing that the subordination of peoples of color is effectuated by multiple processes, that these processes construct relations of privilege and subordination both within and between all minority groups, *including different Black identity groups*, and that understanding and transforming these inter- and intra-minority group hierarchies requires the configuration and activation of new political alliances beyond the racial and ethnic essentialism of our inherited forms of identity politics.

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*LatCrit III*, 53 U. MIAMI L. REV., 4 TEX. HISPANIC L.J. (forthcoming 1999). The point was to explore critically the impact of the Black/White paradigm on Black people, particularly its tendency to suppress recognition of intra-Black antagonisms and interracial solidarities that might otherwise emerge around issues of gender (i.e., Critical Race Feminism), as well as around the more marginalized issues of imperialism, colonialism, national origin identities, language rights and immigration status. To my great surprise, an enormous amount of tension and confusion developed in the mistaken expectation that the purpose of this discussion was to revisit the question of Black exceptionalism or separatism. Indeed, this effort to learn about intra-Black particularities by centering and comparing the different histories, perspectives, politics and transnational identities of Black Latinas/os and Caribbeans almost entirely failed. It did, however, generate a valuable exchange on the historical interconnections and future relationships between CRT and LatCrit Theory. It also generated enough energy and interest to warrant another try at LatCrit IV, which will feature a plenary on *The Meaning and Particularities of Blackness in Latina/o Identities and LatCrit Theory*.

<sup>65</sup> See, e.g., HORACE CAMPBELL, *RASTA AND RESISTANCE: FROM MARCUS GARVEY TO WALTER RODNEY* (1987); *GLOBALIZATION AND SURVIVAL IN THE BLACK DIASPORA: THE NEW URBAN CHALLENGE* (Charles Green ed., 1997). While some of this work is already being done by a network of international law scholars, who are loosely organized around the New Approaches to International Law ("NAIL") and the Third World Approaches to International Law ("TWAIL") Conferences, and whose general project is to promote the articulation of Critical Legal Studies' ("CLS") perspectives and methodologies in the fields of international and comparative law, there has been very little cross-fertilization between NAIL/TWAIL and CRT scholars. Through their calls to center the international in Critical Race Theory, LatCrit Theory and APACrit scholarship

## II. REFLECTIONS ON METHOD: FROM CRITICAL HISTORIES TO THE DISCURSIVE AND ONTOLOGICAL DECONSTRUCTION OF WHITE SUPREMACIST REGIMES OF IL/LEGALITY

Perhaps the most interesting thing about these two articles is the way their very different methodologies converge on the same "bottom line." Professors Saito and Gott both argue that any long-term solutions to the problems reflected by the internments of Japanese Americans and Latin Americans are to be found in the further development of international law—whether through the domestic incorporation and enforcement of international norms, the development of international institutions with effective enforcement powers or through a deconstruction of the essentialist assumptions that inform the disjunctures of domestic and international regimes.<sup>66</sup> They arrive at these common conclusions, however, by deploying very different theoretical methodologies and emphasizing distinct aspects of the problems generated by U.S. impunity and the legal structures that enable it.

This section reflects on the broader significance of the different critical methodologies Professors Saito and Gott have so brilliantly employed. Section A identifies the key moves Professor Saito makes in her account of the Japanese Latin American internment and discusses their more general applicability in developing an anti-essentialist, anti-subordination project in and between LatCrit and APACrit theory. Section B explores the significance of Professor Gott's critical methodology to my current and ongoing efforts to conceptualize the parameters of the emerging, but as yet undelineated, field of international criminal law. In both sections, my objective is to highlight their methodological contributions to the continued evolution of critical race theory in legal scholarship.

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may provide the bridge that enables this necessary exchange to develop a more prominent position in anti-subordination scholarship. This is precisely the intention behind the panel discussion entitled *Mapping Intersections Between Critical Race Theory and International Law* that Professor Gott and I have organized for the American Society of International Law Meeting in March 1999. Promoting and producing critical scholarship at the intersections of NAIL/TWAIL and CRT is exactly the kind of work to be done as a joint project in and between LatCrit Theory and APACrit scholarship.

<sup>66</sup> See Gott, *A Tale of New Precedents*, *supra* note 1, at 270–71; Saito, *Justice Held Hostage*, *supra* note 1, at 326–34.

A. *Critical Historical Analysis as Anti-Essentialist, Anti-Subordination Method*

Rather than providing a descriptive overview of Professor Saito's article, my purpose here is to explain briefly *why* her article constitutes an excellent model for future work in and between LatCrit Theory and APACrit scholarship. Professor Saito makes three key methodological moves worth noting. First, she focuses her analysis on legal problems confronting Japanese Latin Americans, an otherwise marginalized and intersectional identity group. Second, she provides a detailed historical analysis of the economic and political processes that constructed these identities and positioned them at "the bottom" of their particular context. Third, she uses this particularized analysis to advance a future-oriented legal reform project at the intersections of international and domestic law. Through this analysis, Professor Saito produces precisely the kind of detailed and particularized account LatCrits and APACrits need in order to better understand the distinct, but interconnected, processes of racial formation and subordination that have constructed our commonalities and differences across different socio-legal spaces.

At an abstract level, Professor Saito's first move is not new. In fact, centering the legal problems and realities of marginalized and intersectional identities has a rich tradition in the evolution of critical legal theory precisely because it is an effective way of revealing otherwise invisible forms of oppression, structural violence and the limitations of legal remedies. Even so, the move from abstract generalities to particularized analysis is complex and difficult; not every one makes the move, nor makes it effectively; this shift, however, is absolutely crucial to the continued evolution of critical legal theory, and it is from this perspective that her work stands as a positive example.

Take, for instance, the Japanese Latin Americans on whom Professor Saito focuses her analysis. They have, until now, been completely invisible, not only in the dominant narratives of American national identity, the discourses that produced the Civil Liberties Act of 1998 reparations for Japanese Americans and the LatCrit debates over intra-Latina/o sameness and difference, but in *all* the relevant discourses. Her decision to analyze the legal question of reparations by focusing on their particular situation makes evident the need for critical legal theory to move from abstract and generalized *calls for* anti-essentialist critiques to their concrete and detailed *performance*. At the same time, her work illustrates the profound and far-reaching challenges confronting any anti-subordination project that is genuinely grounded in the anti-essentialist commitments of the intersectionality critique: this

is because there is always, as one discovers, another way, another place, to find "the bottom" of any particular context. If the story of the Japanese-American internment destabilizes World War II master narratives of American righteousness, liberty and justice for all, then the story of the Japanese Latin-American exclusion from the 1998 reparations and the government's recent efforts to settle the *Mochizuki* class action at a quarter of the damages paid to Japanese-American internees<sup>67</sup> illustrates why identity politics must be organized around a steadfast commitment to the values of anti-essentialism and anti-subordination and the further commitment to relentlessly seek out and assert the perspectives of the marginalized and intersectional identities at the bottom of any particular context.

Professor Saito's second move shows the value of historical analysis as anti-essentialist method. We cannot understand the broader significance of Japanese Latin-American intersectionality without understanding the historical events that produced this particular identity group. By excavating this history, Professor Saito reveals otherwise suppressed linkages between racial formation, the history of the international political economy and the socio-legal realities constituted by inter-state competition. Understanding the logic of white supremacy means understanding the configurations of the local/global political context, the structures of economic opportunity and the cultural norms and expectations that prompted the initial migrations from Japan to Peru and that later subjected Japanese Latin Americans to Peruvian and American racism. There is a history of racism degenerating into war crimes. The payoff for the telling is this: neither the meaning of WWII nor the struggle for domestic enforcement of international laws remains the same.

The master narratives of American national identity are calculated to lull the comfortable into believing that our government elites are not war criminals, but rather leaders of the free world. This belief in the inherent superiority of the United States' form and practice of government is one explanation why the struggle for international human rights has developed so slowly in this country.<sup>68</sup> Indeed, without Professor Saito's historical analysis, we might readily interpret the proposed settlement in *Michozuki* as evidence of a U.S. commitment

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<sup>67</sup> See Saito, *Justice Held Hostage*, *supra* note 1, at 337. The *Mochizuki v. United States* settlement offered each internee \$5000 as opposed to the \$20,000 offered each Japanese-American internee under the Civil Liberties Act of 1988. See *id.*

<sup>68</sup> See *id.* at 346-48 (noting popular belief that superiority of U.S. constitutional and civil rights regimes makes domestic enforcement of international human rights unnecessary).

to international law and its readiness to remedy wrongs as required by a genuine commitment to the rule of law. Only by decentering the master narrative of U.S. righteousness and excavating the suppressed histories of these Japanese Latin Americans, is the settlement visible as insult added to injury: not only is the harm hardly remedied, the wrong is in no way admitted.

Professor Saito's third move is to link her analysis directly to a future-oriented law reform project. In this way, her analysis goes far beyond mere historical revelation of the wrongs suffered by the Japanese Latin Americans. She focuses on the challenge of imagining how law should be marshaled today and transformed for tomorrow in order to afford a meaningful legal remedy for these kinds of wrongs, and more particularly, for the specific plaintiffs in the *Michozuki* class action. She reviews their various legal claims under domestic U.S. law, assesses their likely outcome in light of prior judicial interpretations of applicable legal doctrines and then proceeds to lay out in clear, concrete and comprehensive detail, the legal arguments that might most effectively be used to establish the requisite legal bases for moving the case into each of the various international forums she identifies and assesses. Indeed, her text reads, at times, like a lawyer's brief precisely because her objective and great accomplishment is to produce a work product that is directly relevant to the ongoing legal struggle being waged on behalf of this particular group, even as it links their particular case to a growing and increasingly universal struggle for human rights: Her thorough analysis and creative legal arguments exemplify how critical legal theory can be directly relevant to the process of social transformation through law.

In sum, Professor Saito's intervention is a path-breaking moment for launching a joint project in and between LatCrit Theory and APACrit Scholarship. These two movements in critical legal theory share parallel and intersecting projects that should be consciously identified and *collaboratively* pursued. Since its inception, the LatCrit movement has developed the practice of annual conferences with published proceedings in an intentional effort to "[t]ransform the production of legal scholarship from an experience of intellectual isolation into a practice of collective engagement and empowerment."<sup>69</sup> A moment's reflection would quickly generate an increasing number of issues that would certainly benefit from the production of collaborative analyses in and between LatCrit and APACrit scholarship.<sup>70</sup> A collabo-

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<sup>69</sup> Iglesias, *Foreword*, *supra* note 15, at 179.

<sup>70</sup> See, e.g., Robert S. Chang, *Racial Cross-Dressing*, 2 HARV. LATINO L. REV. 423, 423-24 (1997) (noting different historical trajectories that produced intersectional Asian/Latina/o identities).

rative project to explore these issues from an anti-subordination perspective would certainly be one way to transform the production of scholarship into a politically relevant and transformative practice.<sup>71</sup>

*B. Reconstructing the Rule of Law by Deconstructing the Role of National Security Ideology in the Production of Structural Violence*

Professor Gott's analysis provides a very different perspective on the significance of the internment cases. In one brilliant move of precedential transposition, he rereads the internment cases to reveal the instability of the domestic/international or internal/external dichotomy through which doctrinal outcomes in the field of foreign affairs and national security law are discursively organized and politically legitimated.<sup>72</sup> His analysis deploys an impressive array of critical methodologies and deconstructive trajectories well worth further discussion. My objective here, however, is necessarily more limited. In a nutshell, I want to illustrate the analytical power of Professor Gott's deconstructive methodology by focusing specifically on the way it might be used to map out an anti-essentialist, anti-subordination perspective on trends within the field of international criminal law.

To say that international criminal law constitutes a *field* is surely premature.<sup>73</sup> It is rather an imagined domain, whose conceptual parameters, substantive norms, procedures and institutional arrangements

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This would include issues bearing on the relationship between Asian Pacific American and Latina/o communities, issues particularly relevant to the intersectional identities that tend to be marginalized by *both* communities, as well as comparative analysis of the way white supremacist norms operate across our communities. See, e.g., Berta Esperanza Hernández-Truyol, *Building Bridges III—Personal Narratives, Incoherent Paradigms, and Plural Citizens*, 19 CHICANO-LATINO L. REV. 303, 327 (1998) (observing how "model minority" category operates in parallel ways to divide both Asians and Cubans, in particular; from other Latinas/os and Blacks).

<sup>71</sup> See, e.g., Sumi K. Cho, *Essential Politics*, 2 HARV. LATINO L. REV. 433 (1997). Indeed, it is worth noting that the research reflected in this symposium was made possible by a grant application Professor Sumi Cho submitted to the Original Legal Research Collaborative Project, under the federally-funded Civil Liberties Public Education Fund pursuant to the Civil Liberties Act of 1988 ("CLPEF"). This project seeks to coordinate Asian Pacific American and other critical legal scholars to produce new legal scholarship on the topics of internment, redress and reparations in furthering the CLPEF mission to sponsor, publish and disseminate research on the forced removal and internment of persons of Japanese ancestry. The significant substantive and methodological advances achieved in this symposium stand as positive examples of the ways in which the production of legal scholarship can be transformed from an individualistic endeavor grounded in self-oriented careerism to a collaborative project grounded in a community-building commitment to social justice, authentic inquiry and intellectual exchange.

<sup>72</sup> See *supra* notes 44–59 and accompanying text (addressing national security).

<sup>73</sup> See, e.g., INTERNATIONAL CRIMINAL LAW (Jordan J. Paust et al. eds., 1996) (only published casebook of teaching materials for law school course on international criminal law); see also Elizabeth M. Iglesias, *International Criminal Law* (1998) (unpublished original course materials, on file with author).

are fragmented across the multiple decentralized sites of an inter-state system that has only recently taken meaningful steps towards establishing an International Criminal Court with international jurisdiction.<sup>74</sup> In its absence, the field of "international criminal law" is really a four-faced hybrid: one face reflects the regime of ad hoc war crimes tribunals created on the strength of the United Nations ("U.N.") Security Council's authority to maintain international peace;<sup>75</sup> another reflects the intersection of international norms and domestic legal process as, for example, in the multilateral suppression conventions, that codify the vast majority of so-called "international" crimes, but depend on *domestic* criminalization and enforcement by state parties to these conventions;<sup>76</sup> a third face reflects the intersection of domestic norms and international legal processes as, for example, in the regimes of cooperation established through extradition, transfer of prisoners and/or Mutual Legal Assistance Treaties ("MLATs"); the final, and perhaps most controversial, face is reflected in the unilateral extraterritorial projection and enforcement of domestic criminal laws by dominant states.<sup>77</sup>

The pending question for LatCrit and APACrit Theory is how the development of international criminal law, along any of these four trajectories, is likely to impact anti-subordination values and agendas. While the answer is hardly self-evident, as it would require a sophisticated comparison of relatively embryonic regimes, Professor Gott's analytical framework does provide a revealing point of departure. Since the internationalization of criminal justice is likely to re-configure, and perhaps eventually eliminate, the line between the internal/external realms, the relevant question is *how* any particular reform tends to move this imaginary line. Does the domestic absorb

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<sup>74</sup> See Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 999; see also *Countdown to an International Criminal Court* (visited Mar. 13, 1999) <<http://www.ichrdd.ca/PublicationsE/countdownICC.html>> (providing "countdown" chart of countries signing and ratifying treaty).

<sup>75</sup> See Michael P. Scharf, *The Politics of Establishing an International Criminal Court*, 6 DUKE J. COMP. & INT'L L. 167, 169-70 (1995) (noting limitations of ad hoc tribunals).

<sup>76</sup> See, e.g., Rupa Bhattacharyya, *Establishing a Rule-of-Law International Criminal Justice System*, 31 TEX. INT'L L.J. 57, 68-69 (1996). "Suppression conventions" do not operate through international *criminalization*, but rather by promoting domestic criminalization in areas of international concern. See *id.* ("Thus, narco-trafficking, terrorism, trafficking in obscenity and prostitution, money laundering, counterfeiting, theft of art and archeological treasures and torture have all been the subject of so-called 'suppression conventions.'") (citations omitted).

<sup>77</sup> See, e.g., Brandon S. Chabner, Note, *The Omnibus Diplomatic Security and Antiterrorism Act of 1986: Prescribing and Enforcing United States Law Against Terrorist Violence Overseas*, 37 UCLA L. REV. 985 (1990) (arguing that United States should project its prescriptive and enforcement jurisdiction extraterritorially).

the international or the international absorb the domestic? Do current reforms along any of these four trajectories tend to consolidate the rule of law in the international realm or diminish the rule of law in the domestic? Unpacking the different ways in which transnational and intersectional identities might answer these questions in any particular instance would enable LatCrit and APACrit scholars to develop meaningful comparisons of the way these different trajectories are likely to reconfigure the internal/external dichotomy and, therefore, their comparative implications for any anti-subordination project that depends, at least in part, on the expectation that state power must be subject to the rule of law.<sup>78</sup> A few examples should illustrate the point.

Take, for instance, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").<sup>79</sup> This statute was passed ostensibly "to commemorate" the tragic deaths caused by the 1995 bombing of the Federal Building in Oklahoma City.<sup>80</sup> The national security threat posed by international terrorism was the claimed justification for a broad sweeping statute that aggressively expands the parameters of unreviewable state power, even as it simultaneously contracts the due process protections previously afforded individual interests in liberty, security and freedom from arbitrary and retaliatory state action. The statute, among other things, suspends judicial review of deportation orders entered against non-citizens convicted of an expanded class of crimes and requires mandatory detention of people facing deportation for a criminal conviction.<sup>81</sup> It establishes special "removal courts" with ex parte proceedings enabling the government to present classified national security secrets to support deportation of alleged terrorists, while denying the accused any opportunity to discover and, therefore, to rebut the contents of such communications. It contracts significant First Amendment rights of association by prohibiting individuals from

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<sup>78</sup> Like Professor Gott, I am mindful of the indeterminacy of the "rule of law" formulation and use it here only to reference basic substantive and procedural norms like due process and equal protection. While these norms are subject to interpretation, the point is that they are relevant points of reference only when power is subject to "the rule of law."

<sup>79</sup> See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8 U.S.C., 18 U.S.C., 28 U.S.C. and 42 U.S.C.); Roberta Smith, *America Tries to Come to Terms With Terrorism: The United States Anti-terrorism and Effective Death Penalty Act of 1996 v. British Anti-terrorism Law and International Response*, 5 CARDOZO J. INT'L & COMP. L. 249 (1997).

<sup>80</sup> See 142 CONG. REC. S3352-01 (daily ed. Apr. 16, 1996) (statement of Sen. Hatch) (urging Senate passage "in commemoration of the lives of those who died last year" in the Oklahoma City explosion).

<sup>81</sup> The statute has resulted in deportation orders that shock the conscience. See, e.g., Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97 (1998) (discussing cases).

providing financial support to organizations certified as "terrorist organizations" and unreasonably restricts the opportunity to challenge such designation.<sup>82</sup> It also contracts the accessibility of federal habeas corpus to death row prisoners and asserts extraterritorial jurisdiction over a wide range of conduct committed outside the United States.

Certainly, the AEDPA illustrates one model for the internationalization of criminal law and enforcement. In this model, the field of international criminal law will increasingly be defined by the extraterritorial assertion of U.S. criminal jurisdiction and by the police and/or military practices developed to enforce the extraterritoriality of federal criminal laws. Viewed through Professor Gott's analytical framework, however, AEDPA gives reason to doubt whether the world will be a safer and more just place if the development of this field is entrusted to the U.S. Congress. Professor Gott's approach instructs us to examine how AEDPA's provisions structure state power and accountability across the imagined dichotomy of the internal/external realms. The answer is clear. The statute's provisions contract the scope of due process protections guaranteed to individuals *within* the United States by discursively positioning its new special terrorist removal courts, expedited deportation hearings, ex parte proceedings and suspension of judicial review in the external realm: the people processed through these procedures are not *insiders*. They are terrorists and criminal aliens, foreigners whose very presence within the United States becomes the vehicle through which national security ideology legitimates the *domestic* expansion of state power and contraction of individual rights as a necessary response to the foreign penetration of the domestic realm. Never mind that the "spill over" effects of expanded state power and contracted constitutional rights may eventually overrun the domestic.

Conversely, rather than attempting to resolve the problem of international lawlessness by designing reforms that will strengthen rule of law norms in, and through, the development of an effective, impartial international criminal justice system, AEDPA invokes the rhetoric of national security to support its "findings" that the President "should use all necessary means, including covert action and military force, to disrupt, dismantle and destroy international infrastructure used by international terrorists, including overseas terrorist training facilities and safe havens."<sup>83</sup> In this way, AEDPA reconstitutes the international

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<sup>82</sup> See Antiterrorism and Effective Death Penalty Act of 1996 § 302(a), 8 U.S.C. § 1189 (1996); see also Robert Plotkin, *First Amendment Challenges to the Membership and Advocacy Provisions of The Antiterrorism and Effective Death Penalty Act of 1996*, 10 GEO. IMMIGR. L.J. 623 (1996).

<sup>83</sup> § 324, 110 Stat. at 1255.

as a realm of power politics and state impunity, a construction also reflected in the denial of extraterritorial application to fundamental constitutional norms, such as the Fourth Amendment's prohibitions against warrantless searches and government abductions, that would presumably be applicable to state actions performed within the United States.<sup>84</sup> According to AEDPA's national security rhetoric, not only must the *internal* foreign threat be exposed and expelled through expedited, ex parte and unreviewable procedures, the threat must be tracked to its origins and eliminated by any means necessary.<sup>85</sup> Never mind that the Oklahoma City bombing AEDPA was meant to "commemorate" was not the work of foreign terrorists, but of a small group of right-wing criminals, born to the privileges of their U.S. citizenship; never mind also that the threat of international terrorist attacks in the United States is more a useful fiction than a verified fact.<sup>86</sup>

If AEDPA offers one view into the way the field of international criminal law may evolve, the U.S. War on Drugs offers another. Rather than pursuing substantive international consensus and inter-state cooperation through multilateral suppression conventions, the United States has pursued a policy of promoting the "harmonization" of domestic criminal law regimes through unilateral economic coercion. To this end, it has leveraged its foreign assistance programs to secure major changes in the drug enforcement policies, criminal justice procedures and institutional arrangements of countries throughout the Americas and the Caribbean. Many of the "reforms" prescribed for foreign aid recipients would be of doubtful constitutionality within the United States, as for example, requirements that these governments deploy their military personnel in domestic enforcement operations.<sup>87</sup>

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<sup>84</sup> See *United States v. Alvarez-Machain*, 504 U.S. 655, 657 (1992) (holding that extraterritorial abduction did not bar prosecution of abducted individual); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274 (1990) (holding Fourth Amendment inapplicable to warrantless search of Mexican national's residence by DEA agents in Mexico). To be sure, recent assaults on the Fourth Amendment render the "presumable" increasingly uncertain.

<sup>85</sup> The relentless invocation of national security provides ever thinner cover for the criminal acts through which this country's elites have chosen to pursue their peculiar vision of national security. The destruction of the pharmaceutical factory in Sudan will undoubtedly go down in history as further evidence of the complete lawlessness, impunity, ignorance and disregard for human life with which this country chooses to "secure" its interests. See Sheryl McCarthy, *High Crimes? What About Sudan Bombing?*, *NEWSDAY*, Sept. 24, 1998, at A58.

<sup>86</sup> See David B. Kopel & Joseph Olson, *Preventing a Reign of Terror: Civil Liberties Implications of Terrorism Legislation*, 21 *OKLA. CITY U. L. REV.* 247, 256 (1996) (citing that FBI reports only two international terrorist incidents in the United States in the last 11 years: the 1993 World Trade Center bombing and a demonstration "sit-in" at Iranian Mission in the U.N. by Iranian dissidents).

<sup>87</sup> See Arthur L. Berney, *Cocaine Prohibition: Drug Induced Madness in the Western Hemisphere*,

Again, the justification for these seeming disjunctures between U.S. internal constitutional requirements and its external policies is that drug-trafficking is a national security threat. Missing from these narratives of domestic vulnerability to foreign-orchestrated conspiracies to poison the heartland of America is any recognition or effort to expose to legal accountability the government elites, who have substantially facilitated the growth of international drug trafficking through their collaborations with, protection of and assistance to, known drug traffickers involved in this government's "anti-communist" crusades throughout Central America and elsewhere in Asia and Latin America.<sup>88</sup> From this perspective, the destructive impact of the War on Drugs on constitutional rights *within* the United States<sup>89</sup> can now be seen as a direct consequence of the impunity with which the government pursues its "national security interests," *by any means necessary*.

These examples leave no doubt that Professor Gott's internal/external metaphor provides a particularly compelling way of understanding the significance of recent federal anti-terrorist legislation, the regimes of extraterritorial il/legality through which the United States is projecting its War on Drugs throughout the Americas, and the relentless assault on fundamental domestic civil liberties accompanying both these initiatives.<sup>90</sup> While reassertions of the internal/external dichotomy may successfully disguise the totalitarian function of national security ideology in any particular socio-legal context, the deconstruction of this dichotomy across different legal domains will enable us to see structural and systemic interconnections in the way power is being reconfigured and, therefore, will better position us to

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15 B.C. THIRD WORLD L.J. 19, 58-60 (1995); Sandi R. Murphy, Note, *Drug Diplomacy and the Supply Side Strategy: A Survey of United States Practice*, 43 VAND. L. REV. 1259, 1305 (1990). Both authors note that the U.S. aid-leveraged conditionalities require Latin-American governments to implement drug enforcement measures that undermine democratic possibilities, by (1) empowering the most reactionary factions in the government and military and (2) delegitimizing elected political leaders, who are viewed as puppets of a foreign power, rather than as representatives of the people's interests or the nation's constitutional values.

<sup>88</sup> See, e.g., ALFRED W. MCCOY, *THE POLITICS OF HEROIN: CIA COMPLICITY IN THE GLOBAL DRUG TRADE* (1991); PETER DALE SCOTT & JONATHAN MARSHALL, *COCAINE POLITICS: DRUGS, ARMIES, AND THE CIA IN CENTRAL AMERICA* (1991).

<sup>89</sup> See John A. Powell & Eileen B. Hershenov, *Hostage to the Drug War: The National Purse, the Constitution and the Black Community*, 24 U.C. DAVIS L. REV. 557, 580-90 (1991); see also David Rudovsky, *The Impact of the War on Drugs on Procedural Fairness and Racial Equality*, 1994 U. CHI. LEGAL F. 237, 250-51 (citing report that 70% of motorists stopped by Sheriff's drug squad in Volusia, Florida were Black or Hispanic; 80% of cars searched were driven by Blacks or Hispanics; only 1% of those stopped received traffic citation; and over 500 motorists were subjected to searches and frisks without cause; by comparison, only 5% of drivers on this stretch of Interstate 95 were Black and Hispanic).

<sup>90</sup> See, e.g., Berney, *supra* note 87, at 36-42; Kopel & Olson, *supra* note 86, at 267.

assess the cumulative impact of national security ideology for any anti-subordination project that depends, at least in part, upon ensuring the legal accountability of government elites.

Finally, the works by Professors Saito and Gott provide a welcome opportunity to reflect on a more general question about the relevance of critical legal scholarship to the project of social transformation. The relevance of Professor Saito's piece is self-evident and immediate; it is a kind of legal analysis that produces, and gives a scholar's authority to, new and untested legal arguments that can then be used to advance the legal interests of particular groups in specific lawsuits. Professor Gott's work, by contrast, offers a kind of legal analysis that is unlikely to be immediately applicable in any particular litigation struggle because it is, in effect, a deconstructive attack on the fundamental assumptions and conceptual frameworks that are used to rationalize the decisions reflected in legal doctrine. Though very different, both kinds of analysis are crucially important to ensuring that anti-subordination legal scholarship retains its critical edge and political integrity. Indeed, each contributes to the project of social transformation through law: creative legal advocacy promotes social transformation by finding new ways to redeploy existing laws in existing forums informed by a realistic assessment of the limitations of substantive legal doctrine; the deconstructive critical analysis of law, by contrast, reminds us of the many ways in which the struggle *through law*, can distract us from the even more fundamental struggle *over law*—over the assumptions it embraces and deploys, the misrepresentations it affirms, the impunity it disguises and the power/lessness it creates and allocates among different groups in different socio-legal contexts. Deconstructive analysis, is in short, not so much a call for social transformation *through law* as it is a call for the transformation *of law*.<sup>91</sup> These two excellent articles show why anti-subordination legal scholarship needs both kinds of analysis.

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<sup>91</sup> For a more extensive elaboration of this point, see Iglesias, *Global Markets*, *supra* note 60.