

# LATCRIT XI SYMPOSIUM: WORKING AND LIVING IN THE GLOBAL PLAYGROUND: FRONTSTAGE AND BACKSTAGE

## FOREWORD: EMERGING LATINA/O NATION AND ANTI- IMMIGRANT BACKLASH

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### I. INTRODUCTION

LatCrit XI,<sup>1</sup> *Working and Living in the Global Playground: Frontstage and Backstage*, convened at William S. Boyd School of Law, in Las Vegas

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<sup>1</sup> The LatCrit XI symposium is being published in two publications, this volume containing clusters on immigration, education, and language, and in 18 BERKELEY LA RAZA L. J. 1 (2007), containing the economics cluster. For prior LatCrit symposia, see Symposium, *Poised at the Cusp: LatCrit Theory, Outsider Jurisprudence and Latino/a Self-Empowerment*, 2 HARV. LATINO L. REV. 1 (1997) (LatCrit I); Colloquium, *International Law, Human Rights, and LatCrit Theory*, 28 U. MIAMI INTER-AM. L. REV. 177 (1996-97) (publishing the proceedings of the first LatCrit colloquium focused on international law); Symposium, *Difference, Solidarity and Law: Building Latina/o Communities Through LatCrit Theory*, 19 CHICANO-LATINO L. REV. iii (1998) (LatCrit II); Symposium, *Identity, Democracy, Communicative Power, Inter/National Labor Rights and the Evolution of LatCrit Theory and Community*, 53 U. MIAMI L. REV. 575 (1999) (LatCrit III); Symposium, *Rotating Centers, Expanding Frontiers: LatCrit Theory and Marginal Intersections*, 33 U.C. DAVIS L. REV. ix (2000) (LatCrit IV); Colloquium, *Spain, The Americas and Latino/as: International and Comparative Law in Triangular Perspective*, 9 U. MIAMI INT’L. & COMP. L. REV. iii (2000-01) (publishing the proceedings of the first and second colloquia held in Málaga, Spain on LatCrit theory and international and comparative law); Symposium, *Class in LatCrit: Theory and Praxis in a World of Economic Inequality*, 78 DENV. U. L. REV. 467 (2001) (LatCrit V); Symposium, *LatCritical Encounters with Culture, In North-South Frameworks*, 55 FLA. L. REV. 1 (2003); *Latinas/os and the Americas: Centering North-South Frameworks in Lat-*

Nevada, during October 2006 and called upon over 150 academics to focus on the impacts of globalization and immigration.<sup>2</sup> At no time has LatCrit's critical approach of interconnecting the structures of inequality, the market forces of globalization, and the cultural hostility towards outsider groups been more relevant.<sup>3</sup>

As this issue goes to press, backlash against immigrants, particularly Latina/o "illegals," is on the rise. The latest wave of local anti-immigrant legislation began a year ago, in April 2006, in San Bernardino, California with a ballot initiative aimed to deny employers of unauthorized workers access to city permits, grants, and contracts, as well as allow local police to seize vehicles that were used to pick up day laborers, ban landlords from renting units to undocumented persons, and make English the city's official language.<sup>4</sup> Despite the initiative's failure, other cities across the country began to target undocumented persons with similar tactics. Hazleton, Pennsylvania passed Ordinance 2006-40 titled *Illegal Immigration Relief Act Implementation Amendment*.<sup>5</sup> The ordinance seeks to sanction businesses and landlords by revoking the business permits, for five years, of anyone who employs an "illegal alien" and imposes a penalty on landlords renting to the undocumented.<sup>6</sup> Two restraining orders initially blocked the ordinance from taking effect, but the ensuing federal trial concluded in March and a decision has not been issued as this issue

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*Crit Theory*, 54 RUTGERS L. REV. 1 (2002) (LatCrit VI); Symposium, *Coalitional Theory and Praxis: Social Justice Movements and LatCrit Community*, 13 LA RAZA L. J. 113 (2002); 81 OR. L. REV. 587 (2002) (LatCrit VII); Symposium, *City and Citizen: Community-Making as Legal Theory and Social Struggle*, 52 CLEV. ST. L. REV. 1 (2005) (LatCrit VIII); Symposium, *Countering Kulturkampf Politics Through Critique and Justice Pedagogy*, 50 VILL. L. REV. 749 (2005); *Countering Kulturkampf Politics Through Critique and Justice Pedagogy, Race, Kulturkampf, and Immigration*, 35 SETON HALL L. REV. 1155 (2005) (LatCrit IX); Symposium, *LatCrit Theory: Economic In/Justice*, 26 CHICANO-LATINO L. REV. 1 (2006) (LatCrit X). For a complete list of the LatCrit symposia, including *South-North Exchanges on Theory, Culture and Law* ("SNXs") and the *LatCrit International and Comparative Law Colloquia* ("ICCs") symposia, see <http://latcrit.org>.

<sup>2</sup> For the call for papers, see <http://latcrit.org>.

<sup>3</sup> For a recent jurisprudential and historical explanation of LatCrit theory, see Berta Hernández-Truyol, Angela Harris & Francisco Valdés, *LatCrit X Afterword: Beyond the First Decade: A Forward-Looking History of LatCrit Theory, Community and Praxis*, 26 CHICANO-LATINO L. REV. 237 (2006). See also CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY (Francisco Valdes et al. eds., 2002).

<sup>4</sup> ACLU, *Local Anti-Immigrant Ordinance Cases*, <http://www.aclu.org/immigrants/discrim/27848res20070105.html> (last visited July 24, 2007).

<sup>5</sup> Hazleton, Pa., Ordinance 2006-40 (Dec. 26, 2006), available at [http://www.prdef.org/Civil/Hazleton%20legal%20documents/2006-40%20\\_IIRA%20Implementation%20Amendment\\_.pdf](http://www.prdef.org/Civil/Hazleton%20legal%20documents/2006-40%20_IIRA%20Implementation%20Amendment_.pdf); see also Michael Powell & Michelle Garcia, *Pa. City Puts Illegal Immigrants on Notice*, WASH. POST, Aug. 22, 2006, at A3.

<sup>6</sup> Hazleton, Pa., Ordinance 2006-40, *supra* note 5. For a sound sociological analysis as to why this premise was faulty, see Dr. Rubén G. Rumbaut, *Fed.R.Civ.P. 26(a)(2) Report On the City of Hazleton's Premise, in the Illegal Immigration Relief Act Ordinance, that Illegal Immigrants Contribute to Higher Crime Rates*, <http://www.aclupa.org/downloads/Rumbautreportonordinance.pdf> (last visited July 22, 2007).

goes to press.<sup>7</sup> Even though the ordinance has not taken effect, a number of Hazleton's immigrants have already left town.<sup>8</sup>

Across the country, local governments have considered ordinances modeled after Hazleton's.<sup>9</sup> For example, in Pahrump, Nevada, the ordinance local council enacted was so blatantly xenophobic that the city took the unconstitutional position of prohibiting residents from flying flags of foreign countries without also flying the U.S. flag at a higher level.<sup>10</sup> This ordinance was later repealed after a newly-elected city council reconsidered the ordinance unduly divisive<sup>11</sup> and the local Sheriff publicly announced that he would not enforce the township's ordinance.<sup>12</sup>

State legislatures nationwide are considering and passing legislation that is hostile to immigrants, particularly the unauthorized. Between May and December 2006, twenty-eight pieces of local anti-immigrant legislation passed in thirteen states, and forty-four other pieces were pending in seventeen states.<sup>13</sup> Missouri<sup>14</sup> and Oklahoma<sup>15</sup> now bar children who cannot secure a Social Security card from benefiting from in-state tuition at a state university. In Flor-

<sup>7</sup> The Hazleton case is *Lozano v. Hazleton*, 239 F.R.D. 397 (M.D. Pa. 2006). Information on this case is online at <http://www.aclu.org/hazleton>. Challenges to the ordinance focus on conflicts with the Constitution's Supremacy Clause and violations of Equal Protection and Due Process. Press Release, ACLU, Federal Trial Over Hazleton, PA's Anti-Immigrant Ordinances Concludes (Mar. 22, 2007), <http://www.aclu.org/immigrants/discrim/29164prs20070322.html>.

<sup>8</sup> *Council Passes English as Official Language Measure*, WBALTV.COM, Nov. 15, 2006, <http://www.wbalv.com/print/10314812/detail.html>.

<sup>9</sup> See ACLU, *Local Anti-Immigrant Ordinance Cases*, *supra* note 4.

<sup>10</sup> The Pahrump English Language and Patriot Reaffirmation Ordinance, Pahrump Town Ordinance No. 54 (2006), available at [www.pahrumpnv.org/Docs\\_2006/TOWN%20OFFICE2006/Recent%20Ordinances/English%20%20Patriot%20No.54%20C.pdf](http://www.pahrumpnv.org/Docs_2006/TOWN%20OFFICE2006/Recent%20Ordinances/English%20%20Patriot%20No.54%20C.pdf). This ordinance made English the official language of the government of Pahrump and created a hierarchy for flags on residential and commercial property within the township. The ordinance states no flags shall fly above that of the United States and no foreign flags may be flown by themselves without the accompaniment of an American flag.

<sup>11</sup> Ky Plaskon, *Pahrump Repeals Controversial English-Only Ordinance*, LASVEGASNOW.COM, Feb. 14, 2007, <http://www.lasvegasnow.com/Global/story.asp?S=6089557>.

<sup>12</sup> Press Release, Nye County Sheriff's Office, Official Statement by Sheriff Tony DeMeo on Pahrump Valley Townships PTO 54, known as the Pahrump English Language and Patriot Reaffirmation Ordinance of 2006 (Nov. 26, 2006).

<sup>13</sup> See FAIR IMMIGRATION REFORM MOVEMENT, OVERVIEW OF RECENT LOCAL ORDINANCES ON IMMIGRATION, (Nov. 2006), <http://www.immigrantsolidarity.org/Documents/Nov06OverviewLocalOrdinances/OverviewofRecentLocalImmigrationOrdinancesandResolutions.pdf>.

<sup>14</sup> S.B. 348, 94th Gen. Assemb., 1st Reg. Sess. (Mo. 2007) (summary of bill available at [http://www.senate.mo.gov/07info/BTS\\_Web/Bill.aspx?SessionType=&BillID=6818](http://www.senate.mo.gov/07info/BTS_Web/Bill.aspx?SessionType=&BillID=6818) (last visited Apr. 29, 2007)). This bill would bar undocumented persons from attending public universities.

<sup>15</sup> H.B. 1804, 51st Leg., 1st Sess. (Okla. 2007) (copy of most recent text available at [http://webserver1.lsb.state.ok.us/2007-08bills/HB/HB1804\\_ENGR.RTF](http://webserver1.lsb.state.ok.us/2007-08bills/HB/HB1804_ENGR.RTF) (last visited Apr. 29, 2007)). H.B. 1804 would prevent students who do not have legal immigrant status from attending Oklahoma colleges, getting in-state tuition, and receiving state financial aid and scholarships. See also Valerie Jobe, *Immigration Reform Would Effect OCCC: More Than 200 Students Receive Education Aid*, OKLA. CITY COMMUNITY COLLEGE PIONEER, Apr. 2, 2007, at 1, available at [http://www.occc.edu/pioneer/Archives/April\\_2\\_2007/pioneer\\_4\\_2\\_07.pdf](http://www.occc.edu/pioneer/Archives/April_2_2007/pioneer_4_2_07.pdf).

ida,<sup>16</sup> Colorado,<sup>17</sup> Missouri,<sup>18</sup> and Oklahoma,<sup>19</sup> access to driver's licenses is highly restrictive. Pennsylvania<sup>20</sup> makes access to marriage conditioned on a valid Social Security card. Arizona, Indiana, and Idaho have all recently enacted English-only laws.<sup>21</sup> Arizona,<sup>22</sup> Rhode Island,<sup>23</sup> and Missouri<sup>24</sup> deny public assistance to immigrants, in some cases, regardless of whether their presence is documented as legal.

This climate of anti-immigrant hostility has been interpreted as anti-Latina/o hostility. A 2006 poll for the first time recorded that a *majority* of Latina/os nationwide believe that racism against them has increased.<sup>25</sup> In a provocative *New York Times* June 2006 op-ed, Frank Rich ruminates that

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<sup>16</sup> H.B. 7079, Reg. Sess. (Fla. 2006) (copy of bill details *available at* <http://www.myflorida.house.gov/Sections/Bills/billsdetail.aspx?BillId=33873&#top> (last visited Apr. 29, 2007)). This bill makes it necessary for driver's license applicants to show proof of current or pending legal immigration status. *See also* National Conference of State Legislatures, *Immigrant Policy: 2006 State Legislation Related to Immigration: Enacted and Vetoed*, Oct. 31, 2006, [www.ncsl.org/programs/immig/6ImmigEnactedLegis3.htm](http://www.ncsl.org/programs/immig/6ImmigEnactedLegis3.htm) [hereinafter National Conference of State Legislatures, *Immigrant Policy: 2006*].

<sup>17</sup> S.B. 110, 2006a Leg. Sess. (Colo. 2006) *available at* [http://www.leg.state.co.us/clics/2006a/csl.nsf/fsbillcont3/D3DB75F0268A0FD1872570CB0001E0BC?Open&file=110\\_enr.pdf](http://www.leg.state.co.us/clics/2006a/csl.nsf/fsbillcont3/D3DB75F0268A0FD1872570CB0001E0BC?Open&file=110_enr.pdf) (imposing a civil fine of at least \$50,000 for fabricating identification documents). *See also Immigrant Policy: 2006, supra* note 16.

<sup>18</sup> S.B. 1001, 93rd Gen. Assemb., 2nd Sess., (Mo. 2006) (copy of bill summary *available at* [http://www.senate.mo.gov/06info/BTS\\_Web/Bill.aspx?SessionType-R&BillID=71653](http://www.senate.mo.gov/06info/BTS_Web/Bill.aspx?SessionType-R&BillID=71653)) (barring persons not lawfully residing in the state from obtaining driver's licenses, permits, and renewal licenses). *See also* National Conference of State Legislatures, *Immigrant Policy: 2006, supra* note 16.

<sup>19</sup> *See* H.B. 1804, *supra* note 15.

<sup>20</sup> Wade Malcolm, *Marriage License Standards Differ in Area Counties*, THE TIMES-TRIBUNE (Scranton, Pa.), Apr. 6, 2007, *available at* [http://www.thetimes-tribune.com/site/news.cfm?newsid=18176919&BRD=2185&PAG=461&dept\\_id=416046&rfti=6](http://www.thetimes-tribune.com/site/news.cfm?newsid=18176919&BRD=2185&PAG=461&dept_id=416046&rfti=6). Luzerne, Lackawanna, and Wyoming counties in Pennsylvania now require a valid visa or permanent residence card when applying for a marriage license. *See also* Lackawanna County, *Applying for Your Marriage License* (2007), <http://www.lackawannacounty.org/viewDepartment.aspx?DeptID=79>.

<sup>21</sup> *See* H. Con. Res. 2036, 47th Leg., 2d Reg. Sess. (Ariz. 2006), *available at* <http://www.azleg.gov/legtext/47leg/2r/bills/hcr2036s.pdf>; S.B. 1172, 59th Leg., 5th Reg. Sess. (Idaho 2007) (making English Idaho's official language in March, 2007), *available at* <http://www3.state.id.us/oasis/S1172.html#billtext>; H.R.J. Res. 10, 115th Gen. Assemb., 1st Reg. Sess. (Ind. 2007) (proposing making English Indiana's official language), *available at* <http://www.in.gov/legislative/bills/2007/RES/HJ0010.1.html>.

<sup>22</sup> S.B. 1137, 47th Leg., 2d Reg. Sess. (Ariz. 2006), *available at* <http://www.azleg.gov/legtext/47leg/2r/bills/sb1137h.pdf> (restricting Arizona's comprehensive care of the elderly to citizens and those with legal immigration status); *see also* Arizona Proposition 200, State Legislatures, *Immigrant Policy: 2006, supra* note 16.

<sup>23</sup> H.B. 7120, Gen. Assemb., Jan. Sess. (R.I. 2006), *available at* <http://www.rilin.state.ri.us/BillText06/HouseText06/H7120.pdf> (ending new enrollment of non-citizen children in the Rhode Island Medicaid program as of Dec. 31, 2006). *See also* National Conference of State Legislatures, *Immigrant Policy: 2006, supra* note 16.

<sup>24</sup> *See* S.B. 348, *supra* note 14 (also barring receipt of public benefits by undocumented persons).

<sup>25</sup> *See* ROBERT SURO & GABRIEL ESCOBAR, PEW HISPANIC CTR., 2006 NATIONAL SURVEY OF LATINOS: THE IMMIGRATION DEBATE (2006), <http://pewhispanic.org/files/reports/68.pdf>.

Latina/os have become the new “gays.”<sup>26</sup> This is a succinct way of making the point that under the current climate of backlash politics it is now acceptable to target Latina/os for hate. It is no longer okay to call a Latina/o a “spic.” However, the politics of immigration divisiveness have made it okay to target Latina/os as those “who would support illegals,” are disloyal because they would proclaim their ethnicity by draping themselves in the flag of a Latin American country and are unassimilable because they speak a language other than English in public places. These are the politics of dominance, not of tolerance.

This current anti-immigrant and anti-Latina/o backlash can be explained in part by the changing demography of the Nation. The growth of Latina/o immigrants has been phenomenal since 1990. Latina/os are now America’s largest minority group.<sup>27</sup> Professor Lupe Salinas’ symposium contribution cites census statistics showing that while total United States population roughly doubled from 131.7 million in 1940 to 290.8 million in 2003, during this same time period, Latina/o population increased from about 1,400,000 to 39,900,000.<sup>28</sup> Latina/os also threaten the cultural and racial hierarchy. When the superiority of a dominant group is assailed, backlash is the result.

This current backlash also owes a great deal to the successful pro-immigrant civil rights marches of spring 2006.<sup>29</sup> More than five million demonstrators, mostly Latina/os, poured into the streets in over 1000 cities.<sup>30</sup> The images, which Fox News anchor Brit Hume in an unguarded moment called “a repellent spectacle,”<sup>31</sup> made visually clear the emerging importance of Latina/

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<sup>26</sup> Frank Rich, *How Hispanics Became the New Gays*, N.Y. TIMES, June 11, 2006, at Sec. 4-12.

The stars are in alignment for a new national orgy of rancor because Americans are angry. The government has failed to alleviate gas prices, the economic anxieties of globalization or turmoil in Iraq. Two-thirds of Americans believe their country is on the wrong track. The historical response to that plight is a witch hunt for scapegoats on whom we can project our rage and impotence. Gay people, though traditionally handy for that role, aren’t the surefire scapegoats they once were; support for a constitutional marriage amendment, ABC News found, fell to 42 percent just before the Senate vote. Hence the rise of a juicier target: Hispanics. They are the new gays, the foremost political piñata in the election year of 2006.

<sup>27</sup> Latina/os represent 14% of the population. See Press Release, U.S. Census Bureau, Nation’s Population One-Third Minority (May 10, 2006), available at <http://www.census.gov/Press-Release/www/releases/archives/population/006808.html>.

<sup>28</sup> Census demographers predict that by the year 2050 Latinos will increase to 67,000,000, or 24% of the population of the United States. See Lupe S. Salinas, *Immigration and Language Rights: The Evolution of Private Racist Attitudes into American Public Law and Policy*, 7 NEV. L.J. 895 (2007) (quoting THE WORLD ALMANAC AND BOOK OF FACTS 2005, 619 (Erik C. Gopel ed., 2005)).

<sup>29</sup> Sylvia R. Lazos Vargas, *The Immigrant Rights Marches (Las Marchas): Did the “Gigante” (Giant) Wake Up or Does It Still Sleep Tonight?*, 7 NEV. L. J. 780 (2007).

<sup>30</sup> Xochitl Bada et al., *Immigrant Rights Marches, Spring 2006* (2006), <http://www.wilsoncenter.org/news/docs/Spring%202006%20Protests.xls>; see also WOODROW WILSON INTERNATIONAL CENTER FOR SCHOLARS, INVISIBLE NO MORE: MEXICAN MIGRANT CIVIC PARTICIPATION IN THE UNITED STATES (Xochitl Bada, Jonathan Fox & Andrew Steele eds., 2006), <http://www.wilsoncenter.org/news/docs/Invisible%20No%20More1.pdf>.

<sup>31</sup> Rich, *supra* note 26.

os. These pro-immigrant marches, protesting H.R. 4437,<sup>32</sup> an immigration reform proposal containing punitive provisions against the undocumented persons,<sup>33</sup> were the largest civil rights marches that the country has ever witnessed, surpassing in *numbers* and space of time the civil rights marches of the 1960s. The marches visually made the point that this was a cross-section of an emerging America. The time when the United States can be recognized by all as a “Hispanic Nation”<sup>34</sup> may be close.

This Introduction seeks to outline the challenges that the current immigration quandary presents to United States policy, more generally, and to LatCrit jurisprudence and other academic disciplines. Part II summarizes the important sociological research, upon which LatCrit draws,<sup>35</sup> that irrefutably shows that laws made in America have created conditions in which immigrants frequently get caught in “immigration misery.”<sup>36</sup> Part III focuses on the undocumented immigrant population. Americans have legitimate concerns over controlling their porous borders and the large unauthorized population living in their midst. However, Latina/os, Asian Americans, and other cultural minorities are becom-

<sup>32</sup> Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. Rep. 4437, 109th Cong. (2005-06).

<sup>33</sup> The legislation toughened immigration laws by:

- (1) criminalizing “unlawful presence;” undocumented immigrants would have to serve jail time and would be barred from future legal status re-entry into the country;
- (2) suspending release practices, meaning that all alleged unlawful immigrants, including asylum-seekers, victims of human trafficking, victims of domestic abuse, and children who are apprehended along an international border or at a port-of-entry would be detained until such time as they are removed from the nation or otherwise provided immigration relief;
- (3) any person or organization who “assists” an individual without documentation “to reside in or remain” in the United States knowingly or with “reckless disregard” as to the individual’s legal status would be liable for criminal penalties and five years in prison. The bill also provides for seizure of assets of any person or organization assisting others, such as through a church or a social service organization;
- (4) mandating the use of expedited removal without providing an opportunity to appear before an immigration judge or qualified adjudicator, within 100 miles of the border and within fourteen days of a person’s entry into the country;
- (5) building a new seven hundred mile fence along the Southwest border;
- (6) authorizing state and local law enforcement to enforce federal immigration laws, and refusal to participate would subject local entities to the loss of federal funding;
- (7) barring asylum seekers and refugees who are convicted of a minor offense, such as petty theft, from permanent legal residence and eventual citizenship;
- (8) barring re-entry based on the new classification of document fraud as an aggravated felony;
- (9) holding any individuals determined by the Department of Homeland Security to be a “dangerous alien” indefinitely; and
- (10) eliminating the diversity visa lottery program.

See Immigrant Legal Resource Center, *Dangerous Immigration Legislation Pending in Congress*, [http://www.ilrc.org/resources/hr4437\\_general.pdf](http://www.ilrc.org/resources/hr4437_general.pdf) (last visited July 22, 2007).

<sup>34</sup> Brian Grow, *Hispanic Nation*, *BUS. WK.*, Mar. 15, 2004, at 58-70.

<sup>35</sup> See generally Francisco Valdes, *Poised at the Cusp: LatCrit Theory, Outsider Jurisprudence and Latina/o Self Empowerment*, 2 *HARV. LATINO L. REV.* 1 (1997) (discussing the interdisciplinary functions, guideposts, and methods that have emerged from LatCrit theory).

<sup>36</sup> I am borrowing this term from Op-Ed., *Immigration Misery*, *N.Y. TIMES*, Mar. 15, 2007, at A26.

ing the “new gays,” or subject to increasing hostility, because it is okay to dehumanize illegals and those who would support them. Part IV shifts to the significance of the context of reception. Immigration law is federal, but the settlement of immigrants and their impacts on communities are entirely local. Local entities must make an effort to integrate immigrants civically and economically. That is one way of going forward. Part V discusses another important way of going forward is to focus on the second generation, and make sure that their access to educational opportunities allows the children of immigrants to get a foothold on the academic and economic ladder to success. Part VI resumes the discussion of immigrant backlash politics. Misunderstandings and resentments are the “natural state of things” when newcomers of colors in large colors quickly “take over” once homogeneous enclaves. Americans have historically had differences regarding what should be this country’s dominant cultural ideology, a mono-culture that assumes that Anglo-Protestantism is dominant or a multiculturalism that allows differing immigrant groups to fashion their own way of belonging.<sup>37</sup> Finally Part VII discusses some avenues for constructing bridges, creating new communities, and reframing the dialogue using the LatCrit ethic.

## II. IMMIGRATION MISERY: “MADE IN AMERICA”

The consensus in America over immigration law is succinct: immigration laws are broken. Responsibility for the “immigration misery” can only be placed on U.S. politicians and American political society. Our immigration laws, after all, are made in America.

America lives with the open secret that its physical borders are unsecured. In spite of building a seventeen mile, thirty foot wall and the planned addition of another seven hundred miles of wall along the border with Mexico,<sup>38</sup> illegal crossings remain active. The Department of Homeland Security keeps a record of apprehensions and deaths along the Southern border.<sup>39</sup> Although the numbers have dropped since the United States built a thirty foot wall, the number of apprehensions and deaths remain high.<sup>40</sup> From 1992 to 2002, the rate of deaths of unauthorized border crossings tripled.<sup>41</sup> Studies by sociologists have con-

<sup>37</sup> See generally Sylvia Lazos Vargas, *Deconstructing Homo[geneous] Americanus: The White Ethnic Immigration Narrative and Its Exclusionary Effect*, 72 TUL. L. REV. 1493 (1998).

<sup>38</sup> A new law, the Secure Fence Act, will extend this to 700 miles at a cost of close to \$6 billion. Jonathan Weisman, *With Senate Vote, Congress Passes Border Fence Bill: Barrier Trumps Immigration Overhaul*, WASH. POST, Sept. 30, 2006, at A1.

<sup>39</sup> See U.S. GEN. ACCOUNTING OFFICE, *ILLEGAL IMMIGRATION: STATUS OF SOUTHWEST BORDER STRATEGY IMPLEMENTATION* 22 (1999), <http://www.gao.gov/archive/1999/gg99044.pdf>; BILL ONG HING, *DEFINING AMERICA THROUGH IMMIGRATION POLICY* 184-92 (2004).

<sup>40</sup> Tyche Hendricks, *Border Security or Boondoggle? A Plan for 700 Miles of Mexican Border Wall Heads for Senate – Its Future Is Not Assured*, S.F. CHRON., Feb. 26, 2006, at A1.

<sup>41</sup> *When Less Is More: Border Enforcement and Undocumented Migration: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary*, 110th Cong. 3 (2007) (statement of Douglas S. Massey), available at <http://judiciary.house.gov/media/pdfs/Massey070420.pdf>.

cluded that the increased border security does not result in fewer undocumented immigrants in the country. Illegal crossings continue, but they are more costly.<sup>42</sup> First, counterintuitively, the risk of apprehensions has decreased, but crossings are more physically risky.<sup>43</sup> Second, *coyotes* can now charge more.<sup>44</sup> In spite of the concrete fences close to settled populations, determined undocumented immigrants can still get through the border – it only takes more attempts to be successful.<sup>45</sup> Even with enhanced security, for the most determined crossing the border, it is simply a matter of time, money, and determination. A LatCrit XI keynote speaker, Dr. Alejandro Portes, has concluded that our borders are unsecurable.<sup>46</sup> Rather, the effect of increased border security is to trap millions of undocumented immigrants in the United States.<sup>47</sup>

Because border crossings are so difficult, the customary to and fro migration stream from U.S. jobs to Mexican and Central American homelands has now become costly and risky.<sup>48</sup> Instead of going home during the off season or during economic downturns and returning when job conditions at home demand that earners go abroad to seek a living, undocumented immigrants elect to gamble and stay, hoping that further down the line they can bring their families back into the United States, most likely via an illegal border crossing.<sup>49</sup> The Mexican government recently released a study estimating that up to 150,000 children attempted to cross the border illegally in 2004.<sup>50</sup> One-third of

<sup>42</sup> *Id.* at 3-5. See also Wayne Cornelius, *Appearances and Realities: Controlling Illegal Immigration in the United States*, in TEMPORARY WORKERS OR FUTURE CITIZENS? JAPANESE AND U.S. MIGRATION POLICIES (Myron Weiner & Tadashi Hanami eds., 1998); Thomas J. Espenshade, *Undocumented Migration to the United States: Evidence from a Repeated Trials Model*, in UNDOCUMENTED MIGRATION TO THE UNITED STATES: IRCA AND THE EXPERIENCE OF THE 1980S 159 (Frank Bean et al. eds., 1990).

<sup>43</sup> Massey, *supra* note 41, at 4, 14-16. Apprehensions have dropped because immigrant unauthorized border crossings have been pushed into more remote and less hospitable desert areas of the border, which include Native American lands and parks. See also HING, *supra* note 39, at 184-87; Hendricks, *supra* note 40.

<sup>44</sup> Massey, *supra* note 41, at 18. Professor Massey estimates that in 2002 the cost of a border crossing had increased to \$1200 from around \$400 in 1992. Journalists report that the cost has increased to \$1500 in 2006. See Hendricks, *supra* note 40.

<sup>45</sup> See Espenshade, *supra* note 42.

<sup>46</sup> Alejandro Portes, *The New Latin Nation: Immigration and the Hispanic Population of the United States*, 116 REVISTA ESPAÑOLA DE INVESTIGACIONES SOCIOLOGICAS 55-96 (2006). Dr. Portes points to two factors. First, the human will aspect that overcomes the border barriers set up by the United States enforcement agencies. Second, the social pull of immigrant families who once settled in the U.S. want to reunify their families here, not in their home countries. *Id.* at 60-63.

<sup>47</sup> *Cf.* Massey, *supra* note 41, at 6 (“The desire of the United States to have its cake and eat it too – to integrate all North American markets except [labor] – has reduced the odds of border apprehension to a forty-year low, doubled the net rate of undocumented population growth in the United States, and transformed what had been a circular flow of male workers going to three states into a settled population of families scattered over 50 states, while driving down wages and undermining the working conditions for citizens and legal resident aliens.”).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> José Alejandro Sánchez, *150 Mil Niños Mexicanos Se Fueron de Manera Ilegal a EU Durante 2004*, LA CRÓNICA DE HOY, May 20, 2005, at N12; see also Sylvia Moreno, *A Set of Borders to Cross: For Children Seeking Immigrant Relatives in U.S., Journey Is Twofold*,

them were unaccompanied by family members or *coyotes*, and 60,000 were deported (which means that 90,000 successfully crossed the border illegally).<sup>51</sup> The population of undocumented immigrants has become increasingly composed of families of mixed status, and these families have “dug in” and become more settled.<sup>52</sup>

Americans want the porous Southern border sealed, and they are concerned about the large size of the settled undocumented immigrant population.<sup>53</sup> This heightened anxiety over safety is part of post-9/11 concern in the new era of global terrorism, which is not necessarily bigotry, and is a legitimate concern of “middle America.”<sup>54</sup>

But, anxiety over borders and the size of the undocumented immigrant population has made discussion of immigration issues highly charged. In this atmosphere, the Republican Congress, during the 2005-2006 session, began to discuss immigration reform in what would have been the first serious comprehensive overhaul since the Immigration Reform and Control Act (“IRCA”) of 1986. Predictably, the reform proposals were harsh. The Republican proposal would have criminalized all of the unauthorized and those who would “knowingly assist” them.<sup>55</sup> These criminalization provisions cast a wide net. There are not only the more than twelve million unauthorized persons,<sup>56</sup> but there are also their families, children, friends, clergy, co-workers, and service professionals who found themselves under threat. According to studies, the percentage of undocumented immigrants in any community is relatively small – no more than 10% in cities with large immigrant populations.<sup>57</sup> But the multiplier effect can

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WASH. POST, Oct. 23, 2006, at A1. Children brave dangers to join families in the United States. Immigration authorities are catching more people younger than eighteen trying to cross the border on their own.

<sup>51</sup> Sánchez, *supra* note 50.

<sup>52</sup> See Mark A. Leach & Frank D. Bean, *The Structure and Dynamics of Mexican Migration to New Destinations in the United States*, in *NEW FACES IN NEW PLACES: THE CHANGING GEOGRAPHY OF AMERICAN IMMIGRATION* (Douglas S. Massey ed., forthcoming 2007).

<sup>53</sup> See THE PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, PEW HISPANIC CTR., NO CONSENSUS ON IMMIGRATION PROBLEM OR PROPOSED FIXES: AMERICA’S IMMIGRATION QUANDARY (2006), <http://pewhispanic.org/files/reports/63.pdf>.

<sup>54</sup> See Tamar Jacoby, Essay, *Immigration Nation*, FOREIGN AFFAIRS 5 (2006).

<sup>55</sup> See H.R. 4437, *supra* note 32.

<sup>56</sup> See Jeffrey S. Passel, Pew Hispanic Ctr., *The Size and Characteristics of the Unauthorized Migrant Population in the United States* (2006), <http://pewhispanic.org/files/reports/61.pdf>; B. Lindsay Lowell & Roberto Suro, Pew Hispanic Ctr., *How Many Undocumented: The Numbers Behind the U.S.-Mexico Migration Talks* (2002), <http://pewhispanic.org/files/reports/6.pdf>.

<sup>57</sup> For example, Los Angeles County is the home of the country’s second largest immigrant population, only falling behind Miami-Dade County. As of the 2005 Census update, approximately 36% of the L.A. County population was foreign-born. See U.S. CENSUS BUREAU, LOS ANGELES COUNTY QUICKFACTS FROM THE U.S. CENSUS BUREAU (2007), <http://quickfacts.census.gov/qfd/states/06/06037.html>. Los Angeles County is also estimated to be the home to the largest undocumented population in the country. According to Pew Hispanic Center, approximately 30% of the foreign born are undocumented immigrants. See Passel, *supra* note 56. This would yield an estimate of approximately 9.8% of the population as being undocumented immigrants. A recent estimate for Las Vegas, Nevada, a city where the immigrant population has grown rapidly in the last decade and one-half, puts the unauthorized population at 121,290, or approximately 7.4 % of the population of Las Vegas in 2004. See William Cope & R. Keith Schwer, *Unauthorized Immigrants in Nevada*,

be large. Having settled into ethnic enclaves, undocumented immigrants form family units, social networks, and religious communities. It was this larger group, who are mostly U.S. citizens, who reacted with anger, fear, and hurt to H.R. 4437.<sup>58</sup> Latina/os, recent immigrants, workers, unionists, and teachers, along with undocumented immigrants rose en masse to declare this immigration reform to be immoral, unjust, and unworthy of America's humanist values and immigrant nation tradition.<sup>59</sup>

The congressional attempt in 2005 and 2006 to reform immigration law was botched and led to two unintended consequences. First, Americans had been content to ignore immigration hypocrisy. No more. The discussions of Spring 2006 made Americans aware of the many contradictions in the current regime. There is now more interest, as well as anxiety, about solving the immigration quandary.

Second, now the immigration debate is more deeply mired in ideological rhetoric, and xenophobic reaction has crept into the discussion of a very tough policy issue. While it is legitimate to be concerned about unguarded borders and how legal order is challenged when a large unauthorized population lives outside the laws, the debate has unleashed feelings of hostility towards immigrants and the ethnic and service communities who claim them as their own. The schisms between majority culture and the "multicultural values" group rather than being bridged, has widened. Those caught in the gulf are the millions of unauthorized, their families, and the communities who support them.

### III. ALIENS IN OUR MIDST: THE SUBORDINATION OF THE UNDOCUMENTED

U.S. demand for foreign labor, particularly for Latin American workers, is insatiable. Employer preference for immigrant workers can be documented.<sup>60</sup> Perhaps based on real performance or stereotypes, employers perceive immigrants and Latina/os as harder working, more punctual, and more submissive than their native counterparts.

Immigrant flows have proven to be surprisingly efficient in filling demand for unskilled labor. A decade and a half ago, immigrant labor flows fed mainly into the traditional gateway cities: Los Angeles, Dallas, and New York City.<sup>61</sup> Now, immigration growth is being experienced by virtually every state. In particular, cities that have had strong economies like Atlanta, Las Vegas, Phoenix, Nashville, and Durham are experiencing the strongest surge in immigration growth.<sup>62</sup> U.S. dependency on immigrants for the survivability of its key industries is long standing. Meatpacking,<sup>63</sup> construction,<sup>64</sup> agriculture,<sup>65</sup>

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U.N.L.V. CENTER FOR BUSINESS & ECONOMIC RESEARCH (June 22, 2006) (copy on file with author).

<sup>58</sup> See Lazos Vargas, *supra* note 29.

<sup>59</sup> *Id.*

<sup>60</sup> Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L.J. 961, 973, 976-80 (2006).

<sup>61</sup> Leach & Bean, *supra* note 52.

<sup>62</sup> See ROBERTO SURO & AUDREY SINGER, PEW HISPANIC CTR. & BROOKINGS INST., *LATINO GROWTH IN METROPOLITAN AMERICA: CHANGING PATTERNS, NEW LOCATIONS* (July 2002).

<sup>63</sup> See Lourdes Gouveia & Donald D. Stull, *Dances with Cows: Beefpacking's Impact on Garden City, Kansas, and Lexington, Nebraska*, in *ANY WAY YOU CUT IT: MEAT PROCESS-*

household help, landscaping, and agribusiness in rural America<sup>66</sup> are businesses that heavily depend on immigrant labor and where experts believe large proportions of the unauthorized are employed.<sup>67</sup> On the other side of the pull-push equation,<sup>68</sup> the push of immigrant labor to the United States is also explained by the failure of neo-liberal open trade regimes, now well established in Latin American countries, to fulfill the promise of economic expansion and good jobs. Latin American governments have not been able to create conditions that would allow the economy to grow at a pace that produces jobs for its youth, particularly uneducated youth. Unemployment is high. Underground economies are sizeable but provide unsteady employment. In addition, the pressure of free trade has placed once stable domestic industries under great pressure. For example, Mexico's native shoe industry has been driven to failure by the robust competition of goods made in China. Relief has come in the form of youths abandoning the Mexico labor markets and pursuing better opportunities in the U.S. labor market. They are following long established migratory patterns from rural Mexico to U.S. jobs which date back to before the U.S.-Mexico border wars of 1848.<sup>69</sup> In sum, labor migration has benefited both countries.

For most of America's tortured history with immigration statutory regimes, America has been unwilling to recognize its dependency on Mexican and Latin American manual and skilled labor. The number of authorized visas that immigrant workers can legally obtain to come to the United States to work is woefully inadequate.<sup>70</sup> Every year, industries that depend on the flow of immigrant workers, such as agriculture, fisheries, and grounds, lobby Congress

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ING AND SMALL-TOWN AMERICA 85 (Donald D. Stull, Michael J. Broadway & David Griffith eds., 1995).

<sup>64</sup> Saucedo, *supra* note 60. See also Christopher David Ruiz Cameron, *The Labyrinth of Solidarity: Why the Future of the American Labor Movement Depends on Latino Workers*, 53 U. MIAMI L. REV. 1089 (1999).

<sup>65</sup> See Phillip Martin, *Farm Labor in California: Then and Now* (Ctr. for Comparative Immigration Studies, CCIS Working Paper No. 37, 2001), available at <http://www.ccis-ucsd.org/PUBLICATIONS/wrkg37.pdf>.

<sup>66</sup> Sylvia R. Lazos Vargas, "Latino-ization" of the Midwest: *Cambio De Colores [Change of Colors] as Agromaquilas Expand into the Heartland*, 13 BERKELEY LA RAZA L. J. 343 (2002); Guadalupe T. Luna, *An Infinite Distance?: Agricultural Exceptionalism and Agricultural Labor*, 1 U. PA. J. LAB. & EMP. L. 487, 506 (1998).

<sup>67</sup> LOWELL & SURO, *supra* note 56.

<sup>68</sup> This is a concept from labor economics. What researchers contend is that U.S. capital and more specifically U.S. employers are the big magnet for both legal and illegal immigration from Mexico and Central America. U.S. wages "pull" immigrant labor to the United States. U.S. wages, even at minimum wage, can be six to ten times higher than prevailing wages in Mexico and most Central America, so even the relatively well-educated will seek out harsh jobs in hopes of attaining lifelong dreams of middle class comfort. See WAYNE CORNELIUS & PHILIP MARTIN, *THE UNCERTAIN CONNECTION: FREE TRADE AND MEXICO - U.S. MIGRATION* (1993); ALEJANDRO PORTES & RÚBEN B. RUMBAUT, *IMMIGRANT AMERICA: A PORTRAIT* 20-23 (1990).

<sup>69</sup> See HING, *supra* note 39, at 114-25; Portes, *supra* note 46, at 59-60.

<sup>70</sup> For example, on the first day that an employer could request a specialized H1-B visa for high skilled workers, the allocation was exhausted. See Press Release, Am. Immigration Lawyers Ass'n, *H-1B Quota Exceeded on First Day of Filing*, AILA Issues Response, (2007), available at <http://www.aila.org/content/default.aspx?docid=22020>.

to increase the number of H1 and H2 visas. Every year, traditionalist anti-immigration arguments – that these workers are displacing U.S. laborers, that immigrants take away more government benefits than they contribute, and that increased immigration can corrupt American culture – defeat the realist economic appeals to put legalized entry visas in line with economic forces. One of the most recent immigration reform proposals, Security Through Regularized Immigration and a Vibrant Economy Act of 2007 (“STRIVE”),<sup>71</sup> begins to approach a realistic number, but most likely still falls short of actual labor flows. STRIVE still underestimates the number, setting 400,000 unskilled worker visas per year, but with the ability to increase that number given economic conditions. Unfortunately this bill is given no chance of passage.

Push and pull forces combined with unrealistic U.S. immigration policy have created a huge unauthorized work force in the United States. The Mexican government reports that *over three quarters of Mexicans emigrating to the United States since 2000 do so without documentation.*<sup>72</sup> The most recent estimates of undocumented immigrants, based on U.S. Census, place the number between *ten and twelve million.*<sup>73</sup> Most believe that this number is too small.

Unrealistic immigration law and local laws have created an underclass, aliens in our midst, who can be legally subordinated.<sup>74</sup> “Backlash” reforms punish the undocumented.<sup>75</sup> The absence of citizenship has now become the new proxy for racialization and underclass status. Professor Lipman puts it this way:

My [Jewish] ancestors were the evil enemy who escaped the lethal wrath of the Nazis . . . Today when I hear broad proclamations of misinformation casting “illegal aliens” as the scapegoat for all of the nation’s problems, I fear the intoxicating power of simple propaganda. I fear . . . misguided frustration and hate.<sup>76</sup>

Professor Lipman’s contribution focuses on the legal subordination of undocumented immigrants and juxtaposes this against their economic contributions. Lipman observes that opponents of immigration often point to their

<sup>71</sup> Security Through Regularized Immigration and a Vibrant Economy Act of 2007, H.R. 1645, 110th Cong. (2007), authored by Representatives Luis Gutierrez (D-Ill.) and Jeff Flake (R-Ariz.).

<sup>72</sup> Elena Zuñiga Herrera, Secretaria General del Consejo Nacional de Población, Presentation made at Patzcuaro Michoacán, El Impacto Social de la Migración, (2005), available at <http://www.ime.gob.mx/ccime/VIrecomendaciones/CONAPO.ppt>.

<sup>73</sup> See Passel, *supra* note 56.

<sup>74</sup> For a sampling of LatCrit scholarship in this area, see Gilbert Paul Carrasco, *Latinos in the United States: Invitation and Exile*, in IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE 190 (Juan F. Perea ed., 1997); Raquel Aldana & Sylvia R. Lazos Vargas, “Aliens” in *Our Midst Post-9/11: Legislating Outsiderness Within the Borders*, 38 U.C. DAVIS L. REV. 1683 (2005) (reviewing BILL ONG HING, *DEFINING AMERICA THROUGH IMMIGRATION POLICY* (2003), KEVIN R. JOHNSON, *THE “HUDDLED MASSES” MYTH: IMMIGRATION AND CIVIL RIGHTS* (2003), and VICTOR C. ROMERO, *ALIENATED: IMMIGRANT RIGHTS, THE CONSTITUTION, AND EQUALITY IN AMERICA* (2004)); Kevin R. Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement*, 1993 BYU L. REV. 1139 (1993).

<sup>75</sup> Backlash politics was the focus of Latcrit IX. See *supra* note 1. See also *infra* notes 4-27 and accompanying text.

<sup>76</sup> Francine J. Lipman, *Bearing Witness to Economic Injustices of Undocumented Immigrant Families: A New Class of “Undeserving” Poor*, 7 NEV. L. J. 736 (2007).

belief that undocumented immigrants cost the United States more than they contribute. Yet, well-documented studies have established that undocumented immigrants contribute more than they take away.<sup>77</sup> A recent study from Texas put the figure of their contribution to the state of Texas in the billions.<sup>78</sup> Lipman argues that unauthorized workers pay billions of dollars in Social Security taxes; one estimate puts the number at an astounding \$6.4 billion.<sup>79</sup> Yet the current state of the law is that they are unlikely to qualify for Social Security benefits.<sup>80</sup> Under current law, only if unauthorized workers achieve legalization may they apply for benefits based on Social Security coverage earning.<sup>81</sup> However, the applicant has the burden of proving her earnings history, and only wages that are reported to the Social Security Administration can count towards benefits.<sup>82</sup> Lipman observes that current laws encourage employers to pay the unauthorized wages “under the table,” further debilitating the Social Security

<sup>77</sup> See BILL ONG HING, *TO BE AN AMERICAN: CULTURAL PLURALISM AND THE RHETORIC OF ASSIMILATION* 76-106 (1997) (synthesizing studies that show that the impact of immigrants, because of their reluctance to use public services, over the long term is a net benefit, mostly to the federal purse).

<sup>78</sup> CAROL KEETON STRAYHORN, *TEXAS COMPTROLLER OF PUBLIC ACCOUNTS, UNDOCUMENTED IMMIGRANTS IN TEXAS: A FINANCIAL ANALYSIS OF THE IMPACT TO THE STATE BUDGET AND ECONOMY* (2006), <http://www.window.state.tx.us/specialrpt/undocumented/undocumented.pdf> (reporting that “[u]nauthorized immigrants produced \$1.58 billion” in revenues which exceeded the \$1.16 billion in state services that they received; however, local governments bore the burden of uncompensated health care costs and law enforcement costs not covered by the state which was estimated at \$1.44 billion).

<sup>79</sup> According to Deputy Commissioner of Social Security James B. Lockhart III, at a hearing before the Subcommittee on Oversight of the House Committee on Ways and Means (2/16/06), wage items that are unable to be matched by reported Social Security numbers to the master record of assigned Social Security numbers are placed in the Earnings Suspense File. It is an electronic “holding file” that, as of the latest tax year on which information is available (2003), contained approximately 255,000,000 unmatchable W-2s. The administration tries to correct errors in order to match and post the W-2s, but as of October 2005, there were still 8.8 million in the file representing \$57.8 billion in wages. *Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways and Means*, 110th Cong. (2005) (statement of James B. Lockhart III, Deputy Comm’r of Soc. Sec.), available at <http://waysandmeans.house.gov/hearings.asp?formmode=view&id=4708>.

While this phenomenon appears to be attributed to many factors, such as hyphenated surnames, employer reporting errors, and so forth, other sources discuss the huge contributions made by undocumented workers. Eduardo Porter reports that “[a]s the debate over Social Security heats up, the estimated seven million or so illegal immigrant workers in the United States are now providing the system with a subsidy of as much as \$7 billion a year.” See Eduardo Porter, *Illegal Immigrants Are Bolstering Social Security with Billions*, N.Y. TIMES, Apr. 5, 2005, at A1. This makes up 10% of the surplus in Social Security for 2004. Even though it is difficult to gauge how much of the Earnings Suspense File is generated by undocumented workers, the article addresses claims by sources that undocumented worker contribution is great, including a statement by Stephen C. Goss, the Social Security Administration (“SSA”) Chief Actuary. Goss said that the SSA assumes “about three-quarters of other-than-legal” workers pay payroll taxes and contribute to Social Security. “Other-than-legal” is the SSA’s term for undocumented/unauthorized worker. Director of CIS (Center for Immigration Studies) in Washington, D.C. came to the conclusion using the Census Bureau data that about 3.8 million households headed by unauthorized workers contributed around \$6.4 billion to Social Security in 2002.

<sup>80</sup> See Lipman, *supra* note 76, at 750-51.

<sup>81</sup> *Id.* at 751-52.

<sup>82</sup> *Id.* at 753.

system and creating for the future a massive underclass of working class retirees who may eventually become authorized immigrants, through reforms to immigration laws, but nonetheless will not be covered by the Social Security safety net because of current barriers that have been written into the law. In spite of working hard, this group is likely to be part of a future economic underclass, who may remain in the United States.

Equal Employment Opportunity Commission (“EEOC”) attorney Bill Tamayo raised another situation in the opening session of LatCrit XI in which the legal system inequitably exploits the unauthorized and treats and brands them as an underclass of humans.<sup>83</sup> Under Tamayo’s direction, the EEOC has been able to recover against employers under civil rights laws. At LatCrit IV, Tamayo announced that the EEOC had successfully recovered damages against a supervisor of agricultural workers who “sexually harassed” his female unauthorized workers by raping them.<sup>84</sup> Tamayo’s experience is that juries do not place as much economic value on the injuries of the unauthorized.<sup>85</sup> Tamayo observes is that jury awards are lower based for cases valuing injuries to the unauthorized by virtue of their status alone.<sup>86</sup> His challenge to the LatCrit community was how can a litigator overcome a jury’s prejudice against an unauthorized victim, and jurors’ feelings that the victim should not have been here in any event?<sup>87</sup>

Professor Marisa Cianciarulo describes the plight of a far more desperate kind of unauthorized “worker,” sex slaves, and makes a straightforward law reform argument.<sup>88</sup> According to United Nations statistics over ten million children, both girls and boys, are sex slaves<sup>89</sup> who are trafficked into the country, held captive in populated areas, and used in the sex trade under deplorable conditions. The estimate from experts is that these children will likely last as sex slaves for only two to four years, and most will die, not escaping their situation.<sup>90</sup> These victims are also unauthorized to be in this country; however, the Victims of Trafficking and Violence Protection Act (“VTVPA”) enacted in 1992 created a T visa for victims of sex trafficking.<sup>91</sup> As several commentators

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<sup>83</sup> BILL ONG HING, JOAQUIN AVILA, MARIA BLANCO, HECTOR VILLAGRA & BILL TAMAYO, LATCRIT XI OPENING ROUNDTABLE: ACADEMICS & PRACTITIONERS ON LEGAL ISSUES AFFECTING IMMIGRATION (Oct. 3, 2006) [hereinafter LATCRIT XI OPENING ROUNDTABLE].

<sup>84</sup> William R. Tamayo, *The Role of the EEOC in Protecting the Civil Rights of Farm Workers*, 33 U.C. DAVIS L. REV. 1075 (2000).

<sup>85</sup> Tamayo at LATCRIT XI OPENING ROUNDTABLE, *supra* note 83.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> Marisa Silenzi Cianciarulo, *Modern-Day Slavery and Cultural Bias: Proposals for Reforming the U.S. Visa System for Victims of International Human Trafficking*, 7 NEV. L. J. 826 (2007).

<sup>89</sup> UNITED NATIONS OFFICE ON DRUGS AND CRIME, TRAFFICKING IN PERSONS: GLOBAL PATTERNS (2006), [http://www.unodc.org/pdf/traffickinginpersons\\_report\\_2006ver2.pdf](http://www.unodc.org/pdf/traffickinginpersons_report_2006ver2.pdf).

<sup>90</sup> Cianciarulo, *supra* note 88.

<sup>91</sup> The trafficking visa statute has been codified at 8 U.S.C. § 1101(a)(15)(T) (2000), I.N.A. § 1101(a)(15)(T), thereby earning the nickname “T visa.” See Cianciarulo, *supra* note 90, at 827 n.5.

have noted, the Act does not fulfill its promise of protecting the victims of sex trade. Professor Cianciarulo argues the Act is in need of reform.<sup>92</sup>

The VTVPA has a “law enforcement” orientation, and it fails to appreciate the human vulnerability of the victims of sex trafficking. The VTVPA by its terms extends benefits of a T visa only to victims who were “coerced or forced” into the sex trade, a troublesome requirement given that sex trafficking, at least at the beginning, may involve a voluntary element on the part of the victim.<sup>93</sup> Second, Professor Cianciarulo argues that the T visa’s requirement that the victim cooperate with international investigations is unrealistic given the psychological state of the victims and their fear of their abusers.<sup>94</sup>

These three valuable contributions continue the ongoing work of LatCrit and immigration scholars focusing on the legal subordination of the unauthorized, their families, and their social networks. Immigration laws “made in America” have created misery, and they can also be amended to treat all within our borders, whether invited or not, more humanely.

#### IV. CONTEXT OF RECEPTION: GOOD AND BAD CHOICES FOR LOCAL GOVERNMENTS

Immigration is an economic phenomenon, as Part II has argued, a product of globalization. Immigration is also a human and social phenomenon. Immigration law and policy should also aim to regulate the process by which immigrants settle into new communities. Surveys show that immigrants intend to stay and make American communities their future home. This intent was vociferously expressed in the Spring 2006 marches, when immigrants proclaimed that they “loved” America and staked their claim to be part of the U.S. polity by stating “WE are America.”<sup>95</sup> Immigration policy must also focus on ensuring that new members are incorporated positively into the communities that they join.

Assimilation and acculturation refer to long-term processes that span generations. Assimilation refers to the process of adopting and taking on as one’s own the cultural values and behaviors, such as language, dress, or speech, of the native group.<sup>96</sup> The goal of assimilation is for the incoming immigrant group no longer to stand out as different, or alternatively to “melt into” the dominant group so successfully that recognizable ethno-cultural behaviors and

<sup>92</sup> Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000), *reauthorized*, Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (2003).

<sup>93</sup> Cianciarulo, *supra* note 88, at 830 nn.22-26 (citing Paul Meyer, *Sex Slaves or Capitalists?: Arrest of 42 S. Korean Women in Dallas Brothel Raids Stirs Debate on How Trafficking Laws Used*, DALLAS MORNING NEWS, May 8, 2006, at A1).

<sup>94</sup> Cianciarulo, *supra* note 88, at 831 nn.34-36; *see also* Lisa Lynn Chapman, *The Revictimization of Human Trafficking Victims* (unpublished student paper from the Race, Gender and Sexual Orientation Seminar, Boyd School of Law, UNLV, Fall 2006) (on file with author).

<sup>95</sup> *See* Lazos Vargas, *supra* note 29.

<sup>96</sup> *See* MILTON M. GORDON, *ASSIMILATION IN AMERICAN LIFE: THE ROLE OF RACE, RELIGION AND NATIONAL ORIGIN* 60-72 (1964).

attributes are weak identifiers of distinctiveness.<sup>97</sup> Acculturation refers to a process whereby the incoming immigrant group retains its cultural distinctiveness and is able to integrate socioeconomically into the host community.<sup>98</sup>

The modern pattern is one of “segmented” assimilation.<sup>99</sup> Immigrants who come from elite backgrounds with education, capital, and encountering no discrimination do very well.<sup>100</sup> However, immigrants with little education, low human capital, and a hostile environment may experience a process of failed adaptation or “downward assimilation.”<sup>101</sup>

The research on segmented assimilation emphasizes that adaptation, assimilation, and acculturation are not *individual* processes, as Glazer and Moynihan proposed in *The Melting Pot* published in the 1960s.<sup>102</sup> Rather Rumbaut and Portes propose that structural factors as well as governmental policies, the “contexts of reception,” “the policies of the receiving government, the conditions of the host labor market, and the characteristics of their own ethnic communities,” will dictate successful or unsuccessful trajectories processes of adaptation, acculturation, or assimilation.<sup>103</sup> Individual talents and motivation matter. However, institutions, social networks, and local contexts create environments where immigrants will find the adaptation process easier or more difficult. As Portes and Rumbaut put it, “social context renders

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<sup>97</sup> Nathan Glazer, *Multiculturalism and Public Policy*, in VALUES AND PUBLIC POLICY 113, 141 (Henry J. Aaron et al. eds., 1994) (“American culture overwhelmingly leads to assimilation and homogenization.”); see also Lazos Vargas, *Deconstructing Homo[geneous] Americanus*, *supra* note 37 at 1510 (explaining that the goal of assimilation for individual members of minority groups “depends on their ability to fully integrate into American society. [T]he minority utilitarian argument also contains a hope that, by fully assimilating into the majority core culture, minorities would not only become economic successes but also would be subject to less prejudice and discrimination.”).

<sup>98</sup> See GORDON, *supra* note 96. Based on field observations and rigorous critiques of the existing assimilation/acculturation models, Milton Gordon described an assimilation/acculturation model as having dimensions of time, as well as “depth.” He described eight stages or aspects of the assimilation/acculturation process: (1) the entry group changes its cultural patterns to those of the host group (acculturation); (2) the entry group gains access into social institutions and forms of social organization of the dominant culture (structural assimilation); (3) the entry group conforms with cultural conduct patterns of dominant culture (behavioral assimilation); (4) intermarriage (marital assimilation); (5) the entry group self-identifies with the values and norms of the dominant community (identification assimilation); (6) absence of prejudice by the host group (attitude-receptional assimilation); (7) absence of discrimination by the host group (behavior receptional assimilation); (8) the entry group participates in the civic life of the dominant group as equals (civic assimilation). See *id.* at 68-76. Gordon, however, viewed assimilation and acculturation as the end-point of this process. See *id.* at 115-23. See also KEVIN R. JOHNSON, *HOW DID YOU GET TO BE A MEXICAN?: A WHITE/BROWN MAN’S SEARCH FOR IDENTITY* (1998) (making an argument in favor of acculturation).

<sup>99</sup> Alejandro Portes & Min Zhou, *The New Second Generation: Segmented Assimilation and Its Variants*, ANNALS AM. ACAD. POL. & SOC. SCI. 74 (1993).

<sup>100</sup> ALEJANDRO PORTES & RUBÉN G. RUMBAUT, IMMIGRANT AMERICA: A PORTRAIT 18-20, 57-85 (1990).

<sup>101</sup> *Id.* at 94-108.

<sup>102</sup> NATHAN GLAZER & DANIEL PATRICK MOYNIHAN, BEYOND THE MELTING POT: THE NEGROES, PUERTO RICANS, JEWS, ITALIANS, AND IRISH OF NEW YORK CITY viii-xxxiii (2d ed. 1970).

<sup>103</sup> PORTES & RUMBAUT, *supra* note 100, at 85.

individualistic models insufficient because it can later, in decisive ways, [create a] . . . link between individual skills and their expected rewards.”<sup>104</sup>

Under this view, local governments can shape receiving environments to increase the chances of individual immigrants adapting and “making it” in the local communities into which they have settled.<sup>105</sup> Local leadership can choose to fashion welcoming environments that will benefit the entire community. Or they can choose not to intervene, and let the politics of resentment, dominance, and backlash take their course unchecked.<sup>106</sup> Particularly in areas where immigration has been rapid, choosing the politics of assimilation and acculturation, over the politics of division, is a choice that benefits the entire community.

But most often local governments do not make choices. Instead their actions are without thought. They rely on the assumptions of the culture of those in charge that most likely assumes that everyone in the community is predominantly middle class, White, and culturally Anglo Protestant. The changing demography of state agencies’ clientele plagues almost every state where there has been significant immigrant growth; for example, North Carolina, Georgia, Arizona, Utah, Nevada, Colorado, Nebraska, and Iowa are states that have changed demographically in the last fifteen years.<sup>107</sup> This disconnect creates conflicts that have very real impacts on the lives of immigrants.

Professor Annette Appell’s contribution to this symposium illustrates one such case. In *“Bad” Mothers and Spanish Speaking Caregivers*, Professor Appell relates the journey of Maria, a grandmother who speaks English with very limited proficiency and worked as a housekeeper in a hotel on the Las Vegas Strip in her quest to retain custody of her grandchild.<sup>108</sup> Her daughter, as Professor Appell describes, is a drug-addicted prostitute who had already relinquished her five other children to their grandmother.<sup>109</sup> In spite of a clear state policy favoring adoption by kin, state social workers operated under their cultural and class biases.<sup>110</sup> They first failed to communicate with Maria in Spanish, the language in which she was skilled<sup>111</sup> (in spite of federal regulation

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<sup>104</sup> *Id.* at 93.

<sup>105</sup> See Lazos Vargas, *supra* note 66; see also Little Hoover Commission, We the People: Helping Newcomers Become Californians 23 (2002), <http://www.lhc.ca.gov/lhcdir/166/report166.pdf>; Illinois Coalition for Immigrant and Refugee Rights, For the Benefit of All: Strategic Recommendations to Enhance the State’s Role in the Integration of Immigrants in Illinois (2006), <http://www.icirr.org/naeo/docs/recsum.doc>.

<sup>106</sup> See BILL ONG HING, DEPORTING OUR SOULS: VALUES, MORALITY, AND IMMIGRATION POLICY 172-78 (2006).

<sup>107</sup> The states that have doubled Latino/a population between the 1990 and 2000 Census are North Carolina (393%), Arkansas (337%), Tennessee (278%), Nevada (216%), Idaho (92.1%). See BUREAU OF CENSUS, CENSUS 2000 BRIEF: OVERVIEW OF RACE AND HISPANIC ORIGIN 4 tbl. 2 (2001), <http://www.census.gov/prod/2001pubs/c2kbr01-3.pdf>.

<sup>108</sup> Annette R. Appell, *“Bad” Mothers and Spanish-Speaking Caregivers*, 7 NEV. L. J. 759 (2007).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

requiring state agencies to provide for translation services).<sup>112</sup> Lack of language skills by the state workers obviously led to miscommunication, which negatively affected Maria's petition to adopt her grandchild.<sup>113</sup> Second, state workers had a culturally cramped view of family and who good mothers could be. Professor Appell concludes that the assimilationist force of the child welfare system drove the agency to favor whiter, more middle class family; the English speaking family with a higher socio-economic status. Fortunately, the Thomas and Mack Legal Clinic at William S. Boyd School of Law took the case and was able to win it before the Nevada Supreme Court, allowing Maria to keep her family intact.<sup>114</sup> But there are many more cases out there where state bureaucrats blithely continue policies that mask unstated assumptions of what kinds of families and cultures are in the "best interest of the child."

#### V. THE SECOND GENERATION : LATCRIT THEORY IN EDUCATION

Children of immigrants, documented or not, are the most important demographic cohort of the future. Because of their numerosity, their incorporation will affect the future economic welfare of the United States. This is the generation that will drive future economic growth. A majority of the second generation are U.S. born, a majority speak English, but many need help in English language proficiency, and a majority have at least one parent who is foreign born and may be an undocumented immigrant.<sup>115</sup>

Portes notes that children of recent immigrants are "growing up in an environment of extreme disadvantage."<sup>116</sup> As LatCrit has long recognized, schools are key institutions that can either neutralize such extreme disadvantage or make it worse. As *Brown vs. Board of Education* noted, no other social institution has as its core the mission of providing children with the tools for their civic assimilation and incorporation.<sup>117</sup> Because education is so critical to helping the second generation achieve its version of the American dream, LatCrit scholars, Charles Calleros,<sup>118</sup> Margaret Montoya, Michael Olivas, and this author have devoted significant time and effort to working with local community leaders to improve local K-12 education systems. Other LatCrit scholars, like Guadalupe Luna and Leticia Saucedo have, prior to their academic careers,

<sup>112</sup> See Dep't of Health & Human Servs, Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 68 Fed. Reg. 47,311, 47,312 (Aug. 8, 2003).

<sup>113</sup> Appell, *supra* note 108.

<sup>114</sup> *Id.*

<sup>115</sup> RICHARD FRY, PEW HISPANIC CTR., THE CHANGING LANDSCAPE OF AMERICAN PUBLIC EDUCATION: NEW STUDENTS, NEW SCHOOLS (2006), <http://pewhispanic.org/files/reports/72.pdf>.

<sup>116</sup> THE NEW SECOND GENERATION 4 (Alejandro Portes ed., 1996); see also M. Patricia Fernández Kelly & Richard Schauffler, *Divided Fates: Immigrant Children and the New Assimilation*, in THE NEW SECOND GENERATION, *supra*, at 30, 51-53.

<sup>117</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1953). One way to interpret *Brown* very broadly is that school segregation has no place in the Constitution because segregation provides Black children with a lesser public schooling that has become central to citizenship.

<sup>118</sup> Charles R. Calleros, *Patching Leaks in the Diversity Pipeline to Law School and the Bar*, 43 CAL. W. L. REV. 131 (2006).

played an important role in litigation efforts to improve educational opportunities for Latino children.

LatCrit has influenced education scholarship because LatCrit theory provides a useful frame of analysis.<sup>119</sup> It is through knowledge and critique that individuals can come to understand what changes need to be made. Thus, an academic discipline, such as education, could become less “racist,” or *less biased* toward the White racial experience in its assumptions, norms, and established practices.<sup>120</sup> Educators must always be asking whether practices that educators of good faith have established and fashioned generation after generation are racially and culturally biased.

In this year’s conference, organizers created a LatCrit track for education scholars in which over ten papers were presented. Lindsay Perez Huber and Maria Malagon have memorialized their presentation in the Symposium’s contribution, *Silenced Struggles: The Experience of Latina and Latino Undocumented College Students in California*. The article addresses the challenges that Latina/o students, many of whom are first and second generation students, face in California’s K-12 public education system.<sup>121</sup> Latina/o students often leave the school system at critical junctures and fail to realize their dream of an education.<sup>122</sup> Perez Huber and Malagon provide useful documentation of critical transition spots in the educational pipeline and suggest strategies that can positively affect academic success.<sup>123</sup> Perez Huber and Malagon also document the individual struggles of undocumented students, estimated in California to be between 5000 and 8000, trying to make it through the system.<sup>124</sup> Family support, financial assistance, and a welcoming campus environment are key areas where these students need help.<sup>125</sup> Educators and institutions can, through their actions, communicate “si se puede,” (yes we can) as Perez Huber and Malagon demonstrate.

The second LatCrit Education symposium contribution, *Be Careful What You Ask For: Educación Para Toda/os, the Perils and the Power*, deals with the backlash climate that students experienced at the University of Utah when the Utah legislature was considering whether to charge in-state tuition to undocumented immigrant students.<sup>126</sup> The authors use narrative scholarship to explain how all Latina/o students were racialized during this period. This contribution usefully documents the dynamics of racialization of Latina/o students

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<sup>119</sup> See, e.g., RACE IS . . . RACE ISN’T: CRITICAL RACE THEORY AND QUALITATIVE STUDIES IN EDUCATION (Laurence Parker et al. eds., 1999); INTERROGATING RACISM IN QUALITATIVE RESEARCH METHODOLOGY (Gerardo R. López & Laurence Parker eds., 2003).

<sup>120</sup> See Sylvia R. Lazos Vargas, *Critical-Race-Theory-in-Education: Theory, Praxis, and Recommendations*, in *Introduction to INTERROGATING RACISM*, *supra* note 119.

<sup>121</sup> Lindsay Perez Huber & Maria Malagon, *The Experience of Latina and Latino Undocumented College Students in California*, 7 NEV. L.J. 841 (2007).

<sup>122</sup> Peter Schmidt, *Academe’s Hispanic Future: The Nation’s Largest Minority Group Faces Big Obstacles in Higher Education, and Colleges Struggle to Find the Right Ways to Help*, CHRON. HIGHER EDUC., Nov. 28, 2003, at A8.

<sup>123</sup> *Id.* at A8-A9.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at A8.

<sup>126</sup> Jessica Solyom, Jeremiah Chin & Kristi Ryuujin, *Be Careful What You Ask For: Educación Para Toda/os, the Perils and the Power*, 7 NEV. L.J. 862 (2007).

through student interactions, debates in public spaces, student newspaper coverage, and classroom settings. This piece provides yet more evidence, if it is needed, to support the proposition that there is a strong relationship between how the majority culture constructs Latina/o identity and immigration legal issues, and it does so by poignantly documenting how the immigration debate impacts Latina/o youth in educational settings, which should be “safe” spaces for them.

## VI. OLD HATE IN NEW BOTTLES: TARGETING CULTURAL MARKERS

To circle back to the opening comments of this introduction, one of the disheartening developments is that LatCrit scholars must still devote significant time and energy to what Professor Steven Bender calls, “resurgent xenophobia against Latina/o and Asian immigrants.”<sup>127</sup> The contributions to this symposium are striking in their unanimity that distrust and hostility towards immigrants and Latina/os is rampant. For example, Professor Lipman writes, “racism is a toxic mind-set . . . the American People . . . must . . . not repeat . . . tragic historical mistakes and shameful treatment of [racial] immigrants.”<sup>128</sup> Professor Lupe Salinas writes, “what is it about the ability to speak Spanish that threatens so many?”<sup>129</sup> Dean Darnell Weeden, writes about a “new form of discrimination [targeted] at members of a group that decline to accept the opportunity to assimilate to dominant cultural norms.”<sup>130</sup>

Poignantly, the concerns of the contributors to the LatCrit XI symposium are reminiscent of the themes struck a decade ago in the LatCrit I and II symposia.<sup>131</sup> Back then, Latcrit contributors analyzed the ill effects of backlash polit-

<sup>127</sup> Steven W. Bender, *Old Hate in New Bottles: Privatizing, Localizing, and Bundling Anti-Spanish and Anti-Immigrant Sentiment in the 21st Century*, 7 NEV. L. J. 883 (2007); see also Ruben J. Garcia, *Across the Borders: Immigration Status and Identity in Law and LatCrit Theory*, 55 FL. L. REV. 511, 533 (2003) (anti-immigrant sentiment as a reflection of continued xenophobia towards “newcomers”).

<sup>128</sup> Lipman, *supra* note 76.

<sup>129</sup> Salinas, *supra* note 28.

<sup>130</sup> L. Darnell Weeden, *The Less than Fair Employment Practice of an English-Only Rule in the Workplace*, 7 NEV. L.J. 947 (2007).

<sup>131</sup> Steven W. Bender, *Direct Democracy and Distrust: The Relationship Between Language Law Rhetoric and the Language Vigilantism Experience*, 2 HARV. LATINO L. REV. 145 (1997); Christopher David Ruiz Cameron, *How the García Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 CAL. L. REV. 1347 (1997); Keith Aoki, *Introduction: Language Is a Virus*, 53 U. MIAMI L. REV. 961 (1999); William Bratton, *Law and Economics of English Only*, 53 U. MIAMI L. REV. 973 (1999); Drucilla Cornell, *The Imaginary of English Only*, 53 U. MIAMI L. REV. 977 (1999); Sharon K. Hom, *Lexicon Dreams and Chinese Rock and Roll: Thoughts on Culture, Language, and Translation as Strategies of Resistance and Reconstruction*, 53 U. MIAMI L. REV. 1003 (1999); Catharine Peirce Wells, *Speaking in Tongues: Some Comments on Multilingualism*, 53 U. MIAMI L. REV. 983 (1999); Madeleine Plasencia, “*Suppressing the Mother Tongue*”, 53 U. MIAMI L. REV. 989 (1999); Yvonne A. Tamayo, *Literal Silencing/Silenciando La Lengua*, 53 U. MIAMI L. REV. 995 (1999); John Hayakawa Torok, *Finding the Me in LatCrit Theory: Thoughts on Language Acquisition and Loss*, 53 U. MIAMI L. REV. 1019 (1999). William Bratton and Drucilla Cornell expanded their contribution in a concurrent law review piece. Drucilla Cornell & William W. Bratton, *Deadweight Costs*

ics and the increased racialization of Latina/os that occurs when “hate is unleashed” against those who are culturally different.

In this current issue, Professor Darnell Weeden argues that employer rules mandating English only should fall under Title VII protection.<sup>132</sup> Borrowing from the work of Kenji Yoshino,<sup>133</sup> he argues that the right to live free of discrimination should include the right to have to assimilate compulsorily and follow dominant cultural norms.<sup>134</sup> In making this argument, he follows other writings of LatCrit scholars in arguing that language should be a proxy for national origin and protected from discrimination under Title VII.<sup>135</sup> Professor Lupe Salinas’s contribution argues that the meaning of “race” includes language.<sup>136</sup> Racism against Latina/os has historically, and is currently evidenced, in hostility towards speaking Spanish in public spaces.<sup>137</sup> Professor Salinas adds that “Latinos will not likely relinquish their Spanish language. . . . [Spanish is] their medium of communication, strikes against most fundamental of the civil rights of people.”<sup>138</sup> Professor Thomas Kleven makes a more far-reaching claim, that liberal societies are obligated to provide bilingual education to children who are non-native speakers and ensure proficiency not only in the majority’s language but also in the linguistic minority’s language as well.<sup>139</sup> Kleven draws on the philosophical frameworks of democracy liberal theorists such as John Rawls and Seyla Benhabib to posit that liberal democracies are ethically obligated not to subordinate the cultural identities of minorities, and in fact to support the construction of non-subordinated identities in order that cultural

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*and Intrinsic Wrongs of Nativism: Economics, Freedom, and Legal Suppression of Spanish*, 84 CORNELL L. REV. 595 (1999).

<sup>132</sup> Weeden, *supra* note 130.

<sup>133</sup> Kenji Yoshino, *Covering*, 111 YALE L. J. 769 (2002).

<sup>134</sup> Weeden, *supra* note 130.

<sup>135</sup> See Cameron, *supra* note 131 (arguing for broader interpretation of Title VII with respect to workplace rules); Juan F. Perea, *Democracy and Distrust: An Essay on American Language, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269 (1992); Tamayo, *supra* note 131.

<sup>136</sup> Salinas, *supra* note 28. Salinas following anecdote brings this proposition to life. He recounts:

In January 2003 in Houston, Texas, Harry Huang, a high school valedictorian candidate, angry at some Latinos over a personal incident, criticized them by stating: “They can’t speak English. They speak their filthy Spanish that nobody wants to hear. *The differences between races are real, and Mexicans are at the bottom.*”

*Id.* at 904 n.58.

<sup>137</sup> Joe R. Feagin, *Old Poison in New Bottles: The Deep Roots of Modern Nativism, in IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES*, *supra* note 74 at 13; Perea, *supra* note 135 (discussing historical development of ordinances against language use by language minorities). See generally Sylvia R. Lazos Vargas, *Judicial Review of Initiatives and Referendums in Which Majorities Vote on Minorities’ Democratic Citizenship*, 60 OHIO ST. L. J. 399, 462-73 (1999) (discussing dynamics of backlash against Latina/os in relations to English only ordinances).

<sup>138</sup> Salinas, *supra* note 28.

<sup>139</sup> Thomas Kleven, *The Democratic Right To Full Bilingual Education*, 7 NEV. L.J. 933 (2007).

minorities be able to co-participate equally in the pursuit and enjoyment of goods that society has to offer.<sup>140</sup>

Majority groups, then as now, are calling into question the loyalty of Latina/os in their version of American multiculturalism. In the early 1990s the culture wars went into remission. In the late 1990s the kulturkamps targeted gays. Post 9/11, the culture wars focus on undocumented immigrants, and beyond that, Latina/os, Asian Pacific Islanders, and other identifiable ethnic minorities.<sup>141</sup>

As Americans, we construct concepts and narratives of who we are, where we come from, and what makes us unique.<sup>142</sup> White Americans, African Americans, Asian Americans, and Latina/os compose their own versions of the American narratives of who they are and how they belong and fit within the civic community. For example, for White ethnic Americans, the narrative is of European immigrants coming to America, making it through individual effort, and assimilating into the melting pot.<sup>143</sup> For African Americans, the narrative is one of surviving and persevering through slavery, Jim Crow, and Whites' harassment through lynchings, with spirituality and dignity intact,<sup>144</sup> and having to continue to fight racism, both subtle and overt, to make it into the middle class.

Latina/os are now reconfiguring the American immigrant narrative to be more inclusive and to reflect their group identity and cultural values. Their version of the American immigrant narrative is one of acculturation, not assimilation. Latina/os are loyal Americans, who have fought courageously in

<sup>140</sup> *Id.* at 936-37 nn.8-11 and accompanying text (citing Seyla Benhabib, *Toward a Deliberative Model of Democratic Legitimacy*, in *DEMOCRACY AND DIFFERENCE* 67, 69 (1996) and JOHN RAWLS, *A THEORY OF JUSTICE* 62 (1971)). For a similar argument drawing on Rawlsian liberal framework that democratic liberal theory requires majorities not to subordinate minorities, see Sylvia R. Lazos Vargas, *Democracy and Inclusion: Reconceptualizing the Role of the Judge in a Pluralist Democracy*, 58 *MD. L. REV.* 150 (1999).

<sup>141</sup> See Lazos Vargas, *Judicial Review of Initiatives and Referendums*, *supra* note 137 (tracing English-only ordinances, anti-gay civil rights initiatives, and anti-immigrant initiatives beginning in the 1960s); Bender, *supra* note 131. Here is Professor Bender's brief history of backlash politics: During the 1980s, resurgent xenophobia against Latina/o and Asian immigrants revived interest in English language laws, prompting fourteen states to enact comprehensive language laws by legislation or initiative in the 1980s. Although the anti-Spanish movement lost momentum in the late 1980s, the same anti-immigrant sentiment behind California's Proposition 187 in 1994 ushered in another brief golden age for anti-Spanish laws, leading to their adoption in several more states. *Id.* See also Steven W. Bender, *Sight, Sound, and Stereotype: The War on Terrorism and Its Consequences for Latinas/os*, 81 *OR. L. REV.* 1153, 1154-1155 (2002) (profiling of Latina/os as a threat to national security).

<sup>142</sup> Lazos Vargas, *supra* note 37, at 1511. I will describe this concept as follows:

The hold of ethnocentrism is directly related to the important role that culture plays in how societies think about themselves. Cultural character endures over time, forms the psychological and sociological anchor of a society, and becomes the traditions and norms that capture the essence of what a people are and understand themselves to be.

*Id.* (citations omitted).

<sup>143</sup> *Id.* at 1505-39.

<sup>144</sup> See SHERRILYN IFILL, *ON THE COURTHOUSE LAWN: CONFRONTING THE LEGACY OF LYNCHING IN THE TWENTY-FIRST CENTURY* (2007); see also Sylvia R. Lazos Vargas, *Critical Race Theory and Autobiography: Can a Popular "Hybrid" Genre Reach Across the Racial Divide?*, 18 *LAW & INEQ.* 419 (2000).

every major war, even as they retain their distinct culture, religion, and language.<sup>145</sup> The marches of 2006 added a new twist. The protest marches were about carving out a legitimate place in American society for all immigrants, whether documented or not, based on the value of their labor and their contributions in building up of America.<sup>146</sup> This claim is based on the humanist tradition of valuing the dignity of labor and treating each individual humanely, regardless of a legal construct.<sup>147</sup>

These narratives of America compete with each other. A monocultural version excludes those who do not fit within this vision.<sup>148</sup> English-only laws reaffirm cultural monism and reassert the dominance of the assimilation norm. When cultural minorities wish to assert their rights to retain and continue to express their own distinct culture, majorities' rejection may not necessarily be expressing prejudice, but their dominant narrative of what it means to be an American.<sup>149</sup> Culture and language are closely linked to how we think of ourselves, how we identify ourselves, and how we position ourselves within the civic community. By rejecting multiple ways of belonging, the dominant majority forecloses the cultural minority's inclusion and coexistence on terms that recognize its full humanity and sense of self.<sup>150</sup> This is a cultural ideological conflict, which should be expected in culturally diverse societies as they struggle to construct social meaning as to who they are and where they came from. Each group clings to its narrative of belonging and will want to assert the dominance of its version as a way to reaffirm who it is and how it belongs.

Prejudice often creeps into this conflict. For example, Professor Bender muses provocatively that "the debate today over undocumented immigration is a proxy for the discussion of the 'Mexico problem.'" <sup>151</sup> This "Mexico problem" is an overt way of expressing ethnic prejudice that Professor Bender claims is "so self-evident" that he "refuses to cite authority."<sup>152</sup>

However, discussing the "Mexico problem" is necessary to understand the nature of the prejudice towards immigrants and how it spills over to identifiable ethnic minorities, mainly Latina/os, Asian Americans, and Arab-Americans. Seen this way, some gratitude is owed to the trenchant critics of "Hispanic immigration," such as Samuel Huntington, a Harvard scholar, who has written a controversial opus, *Who Are We?*<sup>153</sup> The answer to this tantalizing question is that WE should not be an America dominated by Latina/os. The problem with "Hispanic immigration," Huntington says, is that unlike earlier immigrants, Latina/os will not assimilate because they are "comfortable with their

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<sup>145</sup> See generally RODOLFO ACUÑA, *OCCUPIED AMERICA: A HISTORY OF CHICANOS* (3d ed. 1988).

<sup>146</sup> See Lazos Vargas, *supra* note 29.

<sup>147</sup> *Id.*

<sup>148</sup> See Lazos Vargas, *supra* note 137, at 468-69.

<sup>149</sup> *Id.*

<sup>150</sup> See PORTES & RUMBAUT, *supra* note 100, at 212-24 (identities being formed in the face of rejection).

<sup>151</sup> Bender, *supra* note 127.

<sup>152</sup> *Id.*

<sup>153</sup> SAMUEL P. HUNTINGTON, *WHO ARE WE? THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY* (2004); Samuel P. Huntington, *The Hispanic Challenge*, *FOREIGN POLICY*, Mar./Apr. 2004, at 30 [hereinafter *Hispanic Challenge*].

own culture and often contemptuous of American culture.”<sup>154</sup> Mexicans threaten our “Anglo-Protestant culture” because Latina/os (or Mexicans) will not assimilate as other ethnic groups have done in the past.<sup>155</sup> The American dream is one created by an Anglo-Protestant society; there can be no “Hispanic” version, or “Americano dream.”<sup>156</sup> The large immigration from Mexico, a culture so fundamentally different from Anglo-Protestant culture, threatens polarization.<sup>157</sup> Unless this immigration is stemmed, America will be composed of “two peoples with two cultures.”<sup>158</sup>

Huntington’s alarm-raising essay illustrates both competing cultural visions and ethnic prejudice. What he objects to is that the new second generation of Latina/os is assimilating or acculturating *in its own manner*, and rejecting the “melting pot” assimilation.<sup>159</sup> The Huntingtons of this world, of which there are many, view melting pot assimilation as the *only way* by which immigrants can show their civic loyalty and commitment to and conformity with American culture (the kind of “America we have known for more than three centuries”).<sup>160</sup> But as well, Huntington is expressing ethnic prejudice, because he accuses Latina/os of “refusing to assimilate,” without any empirical evidence, and this refusal, he claims, threatens the stability of the majority culture.

Each wave of new immigrants has chosen to incorporate itself into the American mainstream in its own way.<sup>161</sup> In America, a nation of immigrants, each individual immigrant family has made choices: whether to maintain traditions from the homeland; to opt for a new national identity or to cling to the national identity of the homeland; to abandon religious beliefs learned in the homeland or become secularized America-style; to insist that their children remain emotionally and linguistically linked to their parents through language, religion and tradition, or to let them be American children where their choices are not bounded by their parents’ views of what is possible.<sup>162</sup> To condemn one group of immigrants for making a set of choices that another set of immi-

<sup>154</sup> *Hispanic Challenge*, *supra* 153, at 44.

<sup>155</sup> *Id.* at 31.

<sup>156</sup> *Id.* at 45.

<sup>157</sup> *Id.* at 44.

<sup>158</sup> See also John B. Judis, *Border War*, THE NEW REPUBLIC, Jan. 16, 2006, at 15 (documenting in his account of Arizona’s combustible immigration politics, the dominant fear in that border state has less to do with immigrants stealing jobs (which are going begging in construction and agriculture) than with their contaminating the culture through “Mexicanization.”). See also Rich, *supra* note 26.

<sup>159</sup> See generally *Hispanic Challenge*, *supra* note 153; see also Ashley Pettus, *End of the Melting Pot? The New Wave of Immigrants Presents New Challenges*, HARV. MAG., May-June 2007, at 44.

<sup>160</sup> This view of the kind of assimilation that new entrants must show seems to dominate Americans’ cultural and political views. See Anthony Mughan & Pamela Pazton, *What Must Immigrants Do to Assimilate? A Focus Group Exploration* (Paper presented at EPOP conference, Sept. 12-14, 2003).

<sup>161</sup> See generally JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925* (1988); Feagin, *supra* note 137.

<sup>162</sup> The psychological literature on acculturation/assimilation emphasizes the individual choice aspect of this trajectory. See Ricardo Ainslie, *The Plasticity of Culture and Psychodynamic and Psychosocial Processes on Latino Immigrant Families*, in LATINOS REMAKING AMERICA 289-301 (Marcelo M. Suarez-Orozco & Mariela M. Paez eds., 2002).

grants would not have arguably misperceives the nature of the immigrant experience and how deeply personal it is. In Rawlsian terms,<sup>163</sup> for one group to impose upon another its way of being is deeply oppressive and anti-liberal.<sup>164</sup> Each group of immigrants must come to terms with becoming an American – within its capacities and its histories. Huntington and those like him seem to reject Latina/o immigrants simply because they are too numerous.<sup>165</sup>

The Huntingtons of this world, because they are in a position of political dominance and numerical majority, can react to what they perceive to be immigrants' "wrong choices" by using their majority power to enact ordinances and laws that reassert their dominance. When majorities perceive "a direct challenge to the normal order of things, to ideas deeply embedded in American civic culture," the reaction is to silence minorities.<sup>166</sup> Whenever group identity dynamics are triggered, the results are negative for minorities, indeed because they are the minority.<sup>167</sup> These are the politics of "raw majoritarianism."

LatCrit has fashioned a way out from this seeming stand-off. In the Second Annual Jerome Culp lecture, memorialized in this symposium, Professor Francisco Valdes challenges a series of "Big Lies."<sup>168</sup> He states that those who would interpret American democracy as "majority wins" democracy, or "raw majoritarianism," set the stage for today's backlash kulturkamps.<sup>169</sup> He refuses to legitimate a restrictive version of democracy; rather he would point to the Founders' preoccupation with the "tyranny of the majority" and republican principles that posit that majority impulses must be checked.<sup>170</sup> Further, Valdes argues, that at the core of American republicanism is the principle that democratic institutions should not be controlled or "mold[ed] in the image . . . of elitist rulers."<sup>171</sup>

The "Mexican problem" can be reframed. In post-9/11 world, when we fear "aliens in our midst," Americans want to be assured that the immigrants who now share their space have adopted key civic values.<sup>172</sup> Civic, not cultural, incorporation is required. Immigrants must incorporate the ethic of being loyal to American political values of democracy, mutual tolerance, and obedience to the rule of law, and conform to American understandings of "human equality and popular consent, and . . . religious liberty."<sup>173</sup>

If loyalty to American citizenship and values is the entry fee into American political and civic society, then arguably the 2006 pro-immigrant marches

<sup>163</sup> JOHN RAWLS, *POLITICAL LIBERALISM* (rev. ed. 1996)

<sup>164</sup> See Sylvia R. Lazos Vargas, *Democracy and Inclusion: Reconceptualizing the Role of the Judge in a Pluralist Democracy*, 58 MD. L. REV. 150, 160-184 (1999).

<sup>165</sup> See generally *Hispanic Challenge*, *supra* note 153.

<sup>166</sup> See Lazos Vargas, *Judicial Review of Initiatives*, *supra* note 137, at 470.

<sup>167</sup> *Id.* at 470-71.

<sup>168</sup> Francisco Valdes, *Second Annual Jerome Culp LatCrit Lecture: The Constitution of Terror: Big Lies, Backlash Jurisprudence and the Rule of Law in the United States Today*, 7 NEV. L.J. 973 (2007).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> Matthew Spalding, The Heritage Found., *Making Citizens: The Case for Patriotic Assimilation*, in FIRST PRINCIPLES SERIES 11 (Mar. 16, 2006), available at [http://www.heritage.org/Research/PoliticalPhilosophy/upload/95152\\_1.pdf](http://www.heritage.org/Research/PoliticalPhilosophy/upload/95152_1.pdf).

<sup>173</sup> *Id.*

have shown that the majority of Latina/o immigrants are willing to pay this price. In the pro-immigrant marches, many first and second generation Latina/o immigrants draped themselves in the American flag, sang the American anthem, recited the pledge of allegiance, and declared “We love America.”<sup>174</sup>

Perhaps the quid pro quo is that the majority become more tolerant and will be willing to turn away from the politics of fear to the politics of trust.

#### VII. GOING FORWARD THE LATCRIT WAY: BUILDING BRIDGES, CREATING NEW COMMUNITIES, REFRAMING THE DIALOGUE

How should the conflicts of ongoing shifting demographics be solved? The answer lies in touching base with what LatCrit theory has established as its jurisprudential method. In the LatCrit X Afterward, Professors Berta Hernández Truyol, Francisco Valdes, and Angela Harris offer a detailed description of LatCrit as an academic movement and intellectual effort. First, LatCrit posits four functions: (1) the production of knowledge, (2) the advancement of social transformation, (3) the expansion and connection of antiracism struggles, and (4) the cultivation of community and coalition.<sup>175</sup> Second, in fulfilling these functions, there are seven guideposts (challenges and/or tools to be aware of or have in mind): (a) recognize and accept the political nature of legal “scholarship” despite contrary pressures, (b) conceive ourselves as activist scholars committed to praxis to maximize social relevance, (c) build intra-Latina/o communities and inter-group coalitions to promote justice struggles, (d) find commonalities while respecting difference to chart social transformation, (e) learn from outsider jurisprudence to orient and develop LatCrit theory and praxis, (f) ensure a continual engagement of self critique to stay principled and grounded, and (g) balance specificity and generality in LatCrit analysis to ensure multidimensionality.<sup>176</sup>

First, LatCrit’s interdisciplinary approach offers a way to understand backlash initiatives and ordinances as an ongoing and dynamic social and political context. Racial and ideological conflicts lie just below the surface in pluralistic democracies. Conflicts, particularly those rooted in race, ethnicity, religion, and class, do not go away. It may be more realistic to manage them. LatCrit and critical race theories are invested in finding that common ground. For example, Eric Yamamoto’s work on racial reconciliation focuses on healing in going forward and in acknowledging the harms and injuries.<sup>177</sup> Fran Ansley’s work on social movements emphasizes framing and reframing cultural and class conflicts to find common humanistic ground.<sup>178</sup> I have advocated a judicial interpretive method that opts for creating space for greater political dia-

<sup>174</sup> Lazos Vargas, *supra* note 29.

<sup>175</sup> Hernández-Truyol et al., *supra* note 3 at 255 (citing Francisco Valdes, Foreword – *Under Construction: LatCrit Consciousness, Community and Theory*, 85 CAL. L. REV. 1087 (1997)).

<sup>176</sup> *Id.* (citing Francisco Valdes, *Poised at the Cusp: LatCrit Theory, Outsider Jurisprudence and Latina/o Self-Empowerment*, 2 HARV. LATINO L. REV. 1 (1997)).

<sup>177</sup> ERIC YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST CIVIL RIGHTS AMERICA* (1999).

<sup>178</sup> Fran Ansley, *Inclusive Boundaries and Other (Im)possible Paths Toward Community Development in a Global World*, 150 U. PA. L. REV. 353, 358, 361 (2001).

logue in order to help majorities and minorities wrestle with ideological difference issues.<sup>179</sup>

Most of the contributions in this symposium fall in the “rights” strain of critical theory.<sup>180</sup> They aim to refashion legal doctrine so that it becomes inclusive of minorities’ rights and perspectives. All of the contributions to this symposium dealing with culture and language reject monocultural visions in favor of multicultural coexistence. As well, the Second Jerome Culp lecture, delivered by Francisco Valdes and memorialized in this Symposium, presents a cogent “OutCrit” attack on the “Big Lies” that dominate constitutional interpretive theory.<sup>181</sup> It is an alternative view well worth digesting and ingesting.

LatCrit also focuses on the particular.<sup>182</sup> LatCrit XI offered a new format within the conference in which academics and lawyer activists had the opportunity to collaborate in future projects.<sup>183</sup> When academics meet and work with social action litigants, the synergy can be impacting. Civil Rights lawyer Maria Blanco solicited help in thinking through how Latina/os and African Americans could forge better coalitions in the fight for immigrant rights. Hector Villagra asked the participants to spend time on how preemption doctrine could be used to attack local backlash ordinances. Joaquin Avila encouraged the professors to use their research to “fact-find” in potential voting rights projects litigation.

Building bridges and coalitions occurred when LatCrit XI opened its academic doors to the local community by creating a “local track,” sponsored by the Nevada Immigrant Resource Project and the University of Nevada, Las Vegas, to encourage a dialogue of what immigration has meant to the local community. This “conference within the conference” project brought into the LatCrit venue over sixty members of the local community. The conference was a venue for the production of local knowledge and a place where local activists could become informed by the insights of LatCrit academics.

One last thought: I believe that Latina/os and immigrants are in the midst of a historic social movement. As this issue goes to press it is unclear whether this Congress will be able to enact politically “comprehensive” immigration reform. Yet immigration reform that is proportional, just, and humane will do more to “advance social transformation” and “expand anti-subordination struggles.” Steven Bender reminds us that advances in civil rights have happened when social action litigation complemented a social movement; for example, the civil rights revolution of the 1960s, or the expansion of farm workers’ rights under Cesar Chavez’s leadership.<sup>184</sup> This grass roots movement has the potential to do something that a law review article can never do: get to the roots of

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<sup>179</sup> See Lazos Vargas, *Judicial Review of Initiatives*, *supra* note 137, at 515; Sylvia Lazos Vargas, *Does a Diverse Judiciary Attain a Rule of Law that is Inclusive?: What Grutter v. Bollinger Has to Say About Diversity on the Bench*, 10 MICH J. RACE & L. 101,109 (2005); Lazos Vargas, *Democracy and Inclusion*, *supra* note 164, at 171.

<sup>180</sup> See Angela P. Harris, *Foreward – The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 749–60 (1994) (in critical race theory there is an ongoing tension between idealist-liberal perspectives and deterministic-materialist analyses).

<sup>181</sup> Valdes, *supra* note 168, at 997.

<sup>182</sup> See Hernández Truyol et al., *supra* note 3, at 255.

<sup>183</sup> LATCRIT XI OPENING ROUNDTABLE, *supra* note 83.

<sup>184</sup> See generally STEVEN W. BENDER, *ONE NIGHT IN AMERICA: ROBERT KENNEDY, CESAR CHAVEZ, AND THE FIELD OF DREAMS*, ch. 15 (publication forthcoming).

the immigration dysfunction that has left cultural and ethnic minorities vulnerable to the politics of domination and backlash. Should LatCritters stand by and watch? This may be time to abandon the academic mantle and “cultivate community and coalition.”