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OF STATE, MARKET AND JUSTICE: LATCRITICAL CHALLENGES TO THEORY, PRAXIS AND POLICY

THE INTRODUCTORY COMMENTS OF FRANCISCO VALDES* TO ESSAYS BY

GEORGE A. MARTÍNEZ, SHAUN OSSEI-OWUSU, F.E. GUERRA-PUJOL, GARY
MINDA, AND TAYYAB MAHMUD

Anticipating the election of the first non-white male to the United States Presidency in November 2008, the organizers of the Fourteenth Annual LatCrit Conference (“LatCrit XIV”) selected a theme designed to invite timely critical thinking about the opportunities and pitfalls of that eventuality. Noting the biographical narrative of “the nation’s first ‘outsider’ President,” the call for papers notes, that “Mr. Obama ran a progressive campaign that echoed many core LatCritical values.”¹ But this conference theme—*Outsiders Inside: Critical Outsider Theory and Praxis in the Policymaking of the New American Regime*—solicited reflective analysis, noting the “serious challenges” facing any effort in progressive governance and asking, “what roles should outsider critical legal scholars and their scholarship assume . . . [to prevent our work] from being co-opted and corrupted.”² In their respective ways, the five authors whose essays comprise this “cluster”³ address this theme from various angles; however,

* Professor of Law, University of Miami. I thank, first, the authors and editors of this symposium, and of this cluster of essays, for the substantive and collaborative work that allows this publication. In addition, I thank all the LatCrit XIV Conference planners, including Planning Chair Professor Tony Varona, for the many labors leading up to the LatCrit XIV Conference, where these papers originally were presented. Finally, I thank the diverse, fluid and wide-ranging community of LatCrit scholars that has worked collectively for the past fourteen years to produce these cutting-edge conferences and publications. Our principled persistence during this time of inter/national calamity speaks for itself. All errors below are mine alone.

1. See *LatCrit XIV: Fourteenth Annual LatCrit Conference Call for Papers and Panels*, LATCRIT, 1, http://web2.uconn.edu/latcrit/documents/latcrit_xiv_call_for_papers_and_panels_final_march9.pdf (last visited Aug. 13, 2010) [hereinafter *Call for Papers*].

2. *Id.* at 2.

3. This symposium, like most LatCrit symposia, is presented in the form of “clusters” of essays organized around substantive themes. These clusters consist of

they all share several key characteristics that underscore the ongoing development of critical outsider jurisprudence⁴ and that collectively challenged us to confront new *and* old permutations of injustice under and by law.

Of course, all five authors share a critical or skeptical stance toward the topic of investigation, identifying issues necessary to reform the status quo to promote anti-subordination values and social justice through law across society. They all challenge us not only to continue our collective work but also to take these efforts to deeper and broader levels of intervention. Thus, in their respective ways, these five authors interweave law with culture, identity with power, individuals with systems, and politics with knowledge. In these and other ways discussed below, this cluster of essays exemplifies both the premises and values of this year's conference theme and of LatCrit theory more generally.⁵

essays that conform to the Symposium Submission Guidelines, which request that authors limit their texts. The Symposium Submission Guidelines are posted to the LatCrit website, www.latcrit.org, for easy reference. Information on LatCrit theory, including the full text of the inaugural LatCrit symposium based on the First Annual LatCrit Conference, can be obtained at the LatCrit website. For other LatCrit symposia, see, Annual LatCrit Symposia: List of Publications, Latina & Latino Critical Legal Theory, Inc., <http://latcrit.org> (from LatCrit homepage, follow "Published Symposia" under "Publications") (last visited Oct. 3, 2010). Information on LatCrit theory, including the full text of most of the LatCrit symposia based on our annual conferences or other academic events (such as the International and Comparative Colloquia and the South-North Exchanges) can also be obtained at the LatCrit website.

4. The term "outsider jurisprudence" was first used by Professor Mari J. Matsuda. See Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2323 (1989). Here, the term is preceded with "critical" to emphasize this key feature of the body of work to which LatCrit theory belongs. LatCrit theory is one strand in critical outsider jurisprudence, along with critical race theory, critical race feminism, Asian American scholarship, and Queer legal theory. See *infra* note 5 and sources cited therein (on LatCrit theory and its emergence in the mid-1990s); see generally Francisco Valdes, *Afterword—Theorizing "OutCrit" Theories: Coalitional Method and Comparative Jurisprudential Experience—RaceCrits, QueerCrits and LatCrits*, 53 U. MIAMI L. REV. 1265 (1999) [hereinafter Valdes, *Theorizing OutCrit Theories*] (drawing lessons for LatCrits from the experiences of other outsider efforts, principally those of RaceCrits and QueerCrits).

5. "LatCrit theory" is a jurisprudential subject position that encompasses richly diverse scholars and texts. "LatCrit theory" therefore comprises many scholars with varying views, making it somewhat misleading to speak of "LatCrit theory" in the singular. Nonetheless, the multiple diverse critical legal scholars who have coalesced around the collective effort to articulate LatCrit theory have "exhibited . . . [a] sense of shared groupness." See Francisco Valdes, *Foreword—Latina/o Ethnicities, Critical Race Theory, And Post-Identity Politics in Postmodern Legal Culture: From Practices To Possibilities*, in 9 LA RAZA L.J. 1, 7 n.25 (1996). LatCrits, like "Latina/os" and other social groups, are a collection of "different" individuals. See Sylvia A. Marotta & Jorge G. Garcia, *Latinos in the United States in 2000*, 25 HISP. J. BEHAV. SCI. 13 (2003); Luis Angel Toro, *"A People Distinct from Others": Race and Identity in Federal Indian Law and the Hispanic Classification in OMB Directive No. 15*, 26 TEX. TECH. L. REV. 1219, 1239 (1995) (critiquing the ramifications of the current labeling system in the United States, which "lumps together all people who can connect themselves to some "Spanish origin or culture" together as "Hispanics"); see also Jorge Klor de Alva, *Telling Hispanics Apart: Latino Sociocultural Diversity*, in THE

As the cluster title—*Structural Barriers: Keeping Outsiders Out*—signifies, a common theme running across these essays is the deployment of social structures to keep insiders in, outsiders out, and hierarchy in place. Though variegated, each of the structures examined and challenged in these essays establishes barriers to social mobility and civil liberty that operate in complex, multidimensional ways; though “different” in manifold respects, we see through these essays how each structure systematically maintains and fosters insider/outsider boundaries. Professor Martínez, for example, spotlights how changing conceptions of a state (from a nation state to a market state) likely will affect contemporary issues such as racial integration, racialized disparities, and immigration/assimilation.⁶ Shaun

HISPANIC EXPERIENCE IN THE UNITED STATES: CONTEMPORARY ISSUES AND PERSPECTIVES 107-36 (Edna Acosta-Belen & Barbara R. Sjostrom eds., 1988); SUZANNE OBOLER, *ETHNIC LABELS, LATIN LIVES* (1995); EARL SHORRIS, *LATINOS: A BIOGRAPHY OF THE PEOPLE* (1992); *LATINOS IN THE UNITED STATES: HISTORY, LAW AND PERSPECTIVE* (Antoinette Sedillo Lopez ed., 1995). See generally *THE LATINO/A CONDITION: A CRITICAL READER* (Richard Delgado & Jean Stephancic eds., 1998). Conventional labels used socially in the United States are captured formally in the current census, which amalgamates “Spanish/Hispanic/Latino” into a single category, and then subdivides it into subgroup varieties like “Mexican, Mexican Am., Chicano” and “Puerto Rican” and “Cuban.” See U.S. DEPT. OF COM., BUREAU OF THE CENSUS, Form D-1, Q 7 (2000) (on file with author). See generally Alex M. Saragoza, Concepcion R. Juarez, Abel Valenzuela, Jr. & Oscar Gonzalez, *History and Public Policy: Title VII and the Use of the Hispanic Classification*, 5 LA RAZA L. J. 1 (1992) (discussing federal adoption of the “Hispanic” label and critiquing the conglomeration of the Spanish-Hispanic-Latina/o labels into a single identity category). Therefore, from the very beginning, LatCrit scholars have grappled with racial, ethnic and other forms of “diversity” both within and beyond “Latina/o” communities. See generally *supra* note 3 (listing the LatCrit symposia).

The term “LatCrit” was coined at a 1995 colloquium, held in Puerto Rico, on the relationship of critical race theory to “Latina/o” communities. From that colloquium, the annual conferences then flowed. And from the beginning, with a conference theme for LatCrit I focused on the limits and possibilities of Latina/o “panethnicity,” LatCrit scholars have highlighted the importance of community-building on terms that amount to antiessentialist, antistatist praxis at a collective level. Information on LatCrit theory, including the full text of the inaugural LatCrit symposium based on the First Annual LatCrit Conference, can be obtained at the LatCrit website, at www.latcrit.org. On the emergence of a “LatCrit” subject position, see Francisco Valdes, *Foreword—Poised at the Cusp: LatCrit Theory, Outsider Jurisprudence and Latina/o Self-Empowerment*, 2 HARV. LATINO L. REV. 1 (1997) [hereinafter Valdes, *Poised at the Cusp*] (introducing the papers and proceedings of the first LatCrit conference). For other accounts, see Berta Esperanza Hernandez-Truyol, *Indivisible Identities: Culture Clashes, Confused Constructs and Reality Checks*, 2 HARV. LATINO L. REV. 199, 200-05 (1997); Kevin R. Johnson & George A. Martínez, *Crossover Dreams: The Roots of LatCrit Theory in Chicana/o Studies, Activism and Scholarship*, 53 U. MIAMI L. REV. 1143 (1999). Cf. Margaret E. Montoya, *LatCrit Theory: Mapping Its Intellectual and Political Foundations and Future Self-Critical Directions*, 53 U. MIAMI L. REV. 1119 (1999); see also Elizabeth M. Iglesias & Francisco Valdes, *Afterword—Religion, Gender, Sexuality, Race and Class in Coalitional Theory: A Critical and Self-Critical Analysis of LatCrit Social Justice Agendas*, 19 CHICANO-LATINO L. REV. 503, 568-71 (1998) (discussing the choice of “LatCrit” as partly a political decision to identify as much as possible with people of color, indigenous people, and other traditionally subordinated groups in the construction of this new discourse and praxis).

6. George A. Martínez, *Bobbitt, the Rise of the Market State, and Race*, 18 AM. U. J. GENDER SOC. POL’Y & L. 587 (2010).

Ossei-Owusu trains our attention on the ways in which gendered relations and identities inform exercises of discretion in the criminal justice system as a whole, and through the successive stages that constitute it.⁷ Professor Minda then focuses on the economic meltdown of 2007-2008, in the wider context of corporate globalization, to consider how these events may further subjugate historical outsiders in and through trans-nationalized economies.⁸ Next, Professor Guerra-Pujol explores how “legislative wars of attrition” maintain the continued disenfranchisement of outsiders, specifically in the case of the status debates relating to Puerto Rico and Puerto Ricans.⁹ Finally, Professor Mahmud explores how the slums of Mumbai foster and exemplify contemporary forms of capitalism by simultaneously containing the poor and propping up the wealthy, both socially and legally.¹⁰ Clearly, these five essays span much cultural and intellectual terrain. Each drills into a specific area marked out by the conference theme. While providing different outlooks and approaches, these essays identify certain recurrent themes of law and power calling for activist scholarship and OutCrit praxis to challenge, disrupt and ameliorate the operation of privilege in the service of subordination.¹¹

In particular, each of these authors confronts the power of the state and its role in the construction of social in/justice, both domestically and transnationally. Although in different ways and from different angles, each of these authors investigates the capacity of the state to

7. Shaun Ossei-Owusu, *Gimme Some More: Centering Gender and Inequality in Criminal Justice and Discretion Discourse*, 18 AM. U. J. GENDER SOC. POL’Y & L. 607 (2010).

8. Gary Minda, *Lessons from the Financial Meltdown: Global Feminism, Critical Race Theory, and the Struggle For Substantive Justices*, 18 AM. U. J. GENDER SOC. POL’Y & L. 649 (2010).

9. F.E. Guerra-Pujol, *Insiders versus Outsiders: A Game-Theoretic Analysis of the Puerto Rican Status Debate and Other “Legislative Wars of Attrition”*, 18 AM. U. J. GENDER SOC. POL’Y & L. 625 (2010).

10. Tayyab Mahmud, *Slums, Slumdogs, and Resistance*, 18 AM. U. J. GENDER SOC. POL’Y & L. 685 (2010).

11. Because the “OutCrit” denomination is an effort to conceptualize and operationalize the social justice analyses and struggles of varied and overlapping yet “different” subordinated groups in an inter-connective way, “OutCrit” refers (at least initially) to those scholars who identify and align themselves with outgroups in this country, as well as globally, including most notably those who in recent times have launched lines of critical inquiry within legal culture, including critical legal studies. See generally *supra* note 4 (on outsider jurisprudence). Thus, while “outsider jurisprudence” may be, but is not always nor necessarily, “critical” in perspective, the OutCrit stance is by definition critical in nature. OutCrit positionality, then, is framed around the need to critique and combat, in collective and coordinated ways, the mutually-reinforcing systems of subordination and domination that construct both outgroups and ingroups. For further discussion of this designation, see Francisco Valdes, *Outsider Scholars, Legal Theory and OutCrit Perspectivity: Postsubordination Vision as Jurisprudential Method*, 49 DEPAUL L. REV. 831 (2000).

mold society and its culture through acts of law and policy.¹² This cluster of essays thus locates itself at the intersection of the state and of the potential for its power to subordinate or liberate, both locally and globally.

Overall, these essays collectively help to advance the LatCrit project of connecting “class” to other forms or categories of identity.¹³ In different ways, each of these essays shows the linkage of multiple and multidimensional identities both to political and to material realities, and to the co-constitutive interplay between identity, politics and materiality—

12. These authors thus build on the extensive corpus of LatCrit scholarship on these fundamental and perennial topics. See generally Research Toolkit, Latina & Latino Critical Legal Theory, Inc., <http://web2.uconn.edu/latcrit/pubindex.php> (from LatCrit homepage, follow “Scholarly Publications” select “Publications Index”) (last visited Oct. 3, 2010) [hereinafter Publications Index]. See also *supra* note 3 (listing the LatCrit symposia).

13. This collective effort is visible in our programmatic events and related publications over the past fourteen years. For instance, the LatCrit V program was focused on “Class in LatCrit: Theory and Praxis in a World of Economic Inequality.” See Symposium, *Class in LatCrit: Theory and Praxis in a World of Economic Inequality*, 78 DENVER U. L. REV. 467 (2001). The same is true for the prior year, when the LatCrit IV symposium included a cluster of essays on “Forging Identities: Transformative Resistance in the Areas of Work, Class and the Law.” For a discussion of these essays, see Maria L. Ontiveros, *Introduction*, 33 U.C. DAVIS L. REV. 1057 (2000). In addition, the LatCrit VI symposium featured a cluster of essays on class, economics, and social rights. For a discussion of those essays, see Jane E. Larson, Cluster Introduction, *Class, Economics and Social Rights*, 54 RUTGERS L. REV. 853 (2002). More recently, the South North Exchange (SNX), held in Bogotá in May, 2006, focused on “Free Market Fundamentalisms” to frame class construction in global terms. The papers of that SNX program are published as Symposium, *Free-Market Fundamentalisms and LatCrit Theory*, 5 SEATTLE J. SOC. JUST. 2 (2007). For more information on this and other SNX programs, visit the LatCrit website at www.latcrit.org. And, most recently, the LatCrit X theme and symposium also centered economic in/justice in our programmatic work. See Symposium, *LatCrit Theory: Critical Approaches to Economic In/Justice*, 26 UCLA CHICANO-LATINO L. REV. 1 (2006), 17 BERKELEY LA RAZA L.J. 1 (2006). Finally, next year’s conference theme returns to this topic: the LatCrit XV Conference theme called on LatCrit and allied scholars to examine “the color of the economic meltdown.” See *Call for Papers*, *supra* note 1. For other similar, individual essays published in the LatCrit symposia over the years, see 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); Roberto L. Corrada, *A Personal Re/View of Latino/a Identity, Gender and Class Issues in the Context of the Labor Dispute Between Sprint and La Connexion Familiar*, 53 U. MIAMI L. REV. 1065 (1999) (centering class issues and identities in searching exploration of the ethical conundrums confronting Latina/os professionals); Tanya K. Hernandez, *An Exploration of Class-Based Approaches to Racial Justice: The Cuban Context*, 33 U.C. DAVIS L. REV. 1135 (2000); Mary Romero, *Immigration, the Servant Problem, and the Legacy of the Domestic Labor Debate: Where Can You Find Good Help These Days!*, 53 U. MIAMI L. REV. 1045 (1998). For a more substantive elaboration, see Berta Esperanza Hernandez-Truyol, Angela P. Harris & Francisco Valdes, *Afterword—Beyond the First Decade: A Forward-Looking History of LatCrit Theory, Community and Praxis*, 17 BERKELEY LA RAZA L. REV. 169, 208-215 (2006) (calling for a continued LatCrit focus on “class” during the second decade of our collective work). For similar texts on class, law and identity, see also Publications Index, *supra* note 12.

including our work.¹⁴ Each, in different ways, documents and challenges

14. This linkage also has been a longstanding LatCrit labor. From the inception of this jurisprudential experiment, LatCrit theorists have endeavored to learn from prior or concurrent jurisprudential efforts, and thus have developed practices designed to ensure that our work is grounded in the cumulative insights of critical outsider jurisprudence. This effort to “perform the theory” includes practices such as “rotating the center” of our programmatic lines of inquiry and creating multi-year “streams of programming” to ensure that critical attention is focused on the varied specific aspects of subordination—as well as on the interlocking nature of systems of subordination—based on race, ethnicity, gender, class, sexuality, religion, geography, physical ability, and similar axes of identity employed in law and policy to engineer social hierarchies. See, e.g., Kevin R. Johnson, *Foreword—Celebrating LatCrit Theory: What Do We Do When the Music Stops?*, 33 DAVIS L. REV. 753 (2000) (reviewing the essays of the LatCrit IV symposium and evaluating LatCrit methodologies to identify some of the challenges facing LatCrit scholars); Athena D. Mutua, *Shifting Bottoms and Rotating Centers: Reflections on LatCrit III and the Black/White Paradigm*, 53 U. MIAMI L. REV. 1177 (1998) (discussing and assessing LatCritical techniques and methods of analysis and praxis in the context of the LatCrit III conference); Valdes, *Theorizing OutCrit Theories*, *supra* note 4, at 1299-1306 (discussing these and similar practices); see also Johnson & Martínez, *supra* note 5, at 1150-61 (reviewing LatCrit methodologies and premises in relationship to other civil rights movements, in particular Chicana/o scholarship and activism); Margaret Montoya & Francisco Valdes, *Afterword—“Latinas/os” and Latina/o Legal Studies: A Critical Review of Legal Knowledge-Production Models*, 4 FLA. INT’L U.L. REV. 187 (2008) (describing LatCrit approaches to identity, politics and theory as praxis); Stephanie L. Phillips, *The Convergence of the Critical Race Theory Workshop with LatCrit Theory: A History*, 53 U. MIAMI L. REV. 1247 (1998) (analyzing and comparing the methods and experiences of the Critical Race Theory Workshops that preceded the emergence of LatCrit events to those of the annual LatCrit conferences to adduce the continuities between the two); see also Dorothy E. Roberts, *BlackCrit Theory and the Problem of Essentialism*, 53 U. MIAMI L. REV. 855 (1998) (describing critical approaches to the study of “blackness” within LatCrit theory).

Multidimensional and coalitional analysis, designed to unpack the many dimensions of interlocking systems of subordination and provide platforms for collective resistance to them, is part of this ongoing effort. This type of analysis, of course, is rooted in the early insights of critical outsider jurisprudence regarding law and identity, including the pathbreaking concepts of multiplicity, anti-essentialism and intersectionality. See, e.g., Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN’S RTS. L. REP. 7 (1989); see also Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989). Various RaceCrit and LatCrit scholars have continued to develop concepts and tools of critical legal theory to build on these foundational concepts, striving progressively to better capture the dynamics of “identity politics” in law and society. See, e.g., e. christi cunningham, *The Rise of Identity Politics I: The Myth of the Protected Class in Title VII Disparate Treatment Cases*, 30 CONN. L. REV. 441 (1998) (on wholism); Berta Hernandez-Truyol, *Building Bridges—Latinas and Latinos at the Crossroads: Realities, Rhetoric and Replacement*, 25 COLUM. HUM. RTS. L. REV. 369 (1991) (on multidimensionality); Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561 (1997) (on multidimensionality); Peter Kwan, *Jeffrey Dahmer and the Cosynthesis of Categories*, 48 HASTINGS L.J. 1257 (1997) (on cosynthesis); Francisco Valdes, *Sex and Race in Queer Legal Culture: Ruminations on Identities and Inter-Connectivities*, 5 S. CAL. REV. L. & WOMEN’S STUD. 25 (1995) (on interconnectivity). See generally Charles R. Lawrence III, *Foreword—Race, Multiculturalism and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819, 834-35 (1995) (urging greater efforts along

myriad combinations of the state and of the market to perpetuate systems of subordination, based (still) on traditional identity categories, within and across various localities of the globe. More importantly, in the face of these micro/macro facts, each calls for remedial action—including action on our part. These authors thereby confirm, continue, and contribute to collective LatCrit commitments to critical knowledge production, internationalist and multidimensional forms of analysis, and counter-disciplinary kinds of academic activism.¹⁵

As a set, these essays reflect our continuing efforts to produce understanding *and* solidarity grounded in the practices, guideposts and functions that we set forth for ourselves at the very inception of this ongoing jurisprudential experiment to ensure its efficacy for the long term.¹⁶ These essays thereby remind us both of the basic values and aspirations that organize our collective efforts¹⁷ as well as of the increasing

these lines to promote multifaceted projects of social transformation).

15. See, e.g., Montoya & Valdes, *supra* note 14, at 201-47 (reviewing the techniques, as well as the precursors and origins, of LatCrit theory and method).

16. The four functions of LatCrit theory (and similar efforts) posited early on are: (1) the production of knowledge; (2) the advancement of social transformation; (3) the expansion and connection of anti-subordination struggles; and (4) the cultivation of community and coalition, both within and beyond the confines of legal academia in the United States. For further discussion of these four functions and their relationship to LatCrit theory, see Francisco Valdes, *Foreword—Under Construction: LatCrit Consciousness, Community and Theory*, 85 CAL. L. REV. 1087, 1093-94 (1997).

The seven guideposts accompanying these four functions are: (1) Recognize and Accept the Political Nature of Legal “Scholarship” Despite Contrary Pressures; (2) Conceive Ourselves as Activist Scholars Committed to Praxis to Maximize Social Relevance; (3) Build Intra-Latina/o Communities and Inter-Group Coalitions to Promote Justice Struggles; (4) Find Commonalities While Respecting Differences to Chart Social Transformation; (5) Learn from Outsider Jurisprudence to Orient and Develop LatCrit Theory and Praxis; (6) Ensure a Continual Engagement of Self-Critique to Stay Principled and Grounded; and (7) Balance Specificity and Generality in LatCritical Analysis to Ensure Multidimensionality. For an early assessment of LatCrit “guideposts” as reflected in the proceedings of the First Annual LatCrit Conference, see Valdes, *Poised at the Cusp*, *supra* note 5, at 52-59.

These guideposts (and the functions described earlier) of course are inter-related and, in their operation, interactive. Ideally, they yield synergistic effects. They represent, *as a set*, the general sense of this project as reflected in the collective writings of the symposium based on the First Annual LatCrit Conference. In addition to the seven guideposts noted above, an eighth was originally presented as a “final observation” based on the preceding seven: “acknowledging the relationship of LatCrit to Critical Race theory” and, in particular, the “intellectual and political debt that LatCrit theorizing owes to Critical Race theorists.” *Id.* at 57-60. As this symposium illustrates, these four functions and seven guideposts have helped LatCrit theorists to mine substantive insights and benefits that deepen, broaden and texture existing understandings of law and policy.

17. See, e.g., Francisco Valdes, *Rebellious Knowledge-Production, Academic Activism, and Outsider Democracy: From Principles to Practices in LatCrit Theory, 1995 to 2008*, 8 SEATTLE J. SOC. JUST. 1 (2010) (reviewing LatCrit principles and practices).

complexities and challenges that anti-subordination struggles entail.¹⁸ They challenge all of us to redouble our ongoing LatCritical exertions. If these essays are any measure, the LatCrit experiment in critical outsider jurisprudence remains alive and well—and with many challenges all around.

To open the cluster, Professor George Martínez marshals the recent work of Phillip Bobbitt to question the continuing relevance of the nation state in the ongoing struggle for anti-subordination transformation. Tracking Bobbitt's theses, Professor Martínez posits that the state will be unable to protect its citizens from weapons of mass destruction; escape the reach of international law; control its economy; protect its culture; and protect itself from globalized policy emergencies, like global climate change. These five incapacities, Martínez predicts, mean that "the market state will then emerge to replace the nation state."¹⁹

With this fundamental proposition in place, Martínez provides examples of this shift that are already in the making. For example, he surveys recent Supreme Court opinions to illustrate how judges contribute to the elevation of the market over sovereignty.²⁰ He then turns to racial subordination, examining affirmative action and immigration case law before turning to employment discrimination and pleading standards to trace this shift away from the nation state and toward the market state.²¹ In this way, Martínez touches on questions of culture, economics and policy. In each instance, he finds that Bobbitt's views offer much explanatory power in these various areas of law, society and policy.

To conclude, Martínez returns directly to race and power. Only by viewing contemporary acts of racialization through the lens of the market state and its ideological imperatives can we hope to understand—much less counteract—the continuing morphing of white privilege through legal means, he argues. To Martínez, the critical bottom line is that "Bobbitt's theories explain much of what we observe in the area of race" today, and he therefore calls for critical outsider theorists to "take into account Bobbitt's theories regarding the changing nature of the state."²²

In this short essay, Martínez effectively questions the viability of the nation state, and thereby the relevance of critical investigations into its

18. See *infra* notes 19-84 (reviewing the essays and the issues they tackle).

19. Martínez, *supra* note 6, at 590.

20. *Id.* at 590-92.

21. *Id.* at 593-604.

22. *Id.* at 605.

role as a purveyor of in/justice. Rather than looking to capture, control, or transform the nation state, Martínez calls upon us all to focus on a trend towards the emergence of a different kind of state, a trend calling for different types of anti-subordination interventions. And this shift, Martínez makes plain, affects much more than formal acts of law or policy making; to Martínez, the fading nation state no longer can preserve the very thing said to distinguish one such structure from another: a distinct sense of national culture.²³ Thus, the analysis Martínez offers affects not only our view of law as a formal matter but also our view of its relationship to culture and cultural re/construction.

In the second essay, Shaun Ossei-Owusu focuses precisely on the nation state and, more specifically, on its agents of power. Focusing on gender and inequality in the criminal justice system, Ossei-Owusu extends in this essay an ongoing project into the use and abuse of discretion at various stages in the criminal justice system, and in the system as a whole.²⁴ This essay thus builds on prior work and presages similar follow-ups to compose a holistic picture systemically.

In this essay, Ossei-Owusu examines how different individuals employed by the state in the criminal justice system make discretionary decisions in a manner that implicates identitarian concerns: in a nutshell, does gender (or race) affect exercises of discretion in this particular system? Yes, concludes Ossei-Owusu, who aims “to offer a useful model that links discourse around gender and discretion and deviates from traditional approaches to crime and inequality.”²⁵

Ossei-Owusu begins by focusing on the discreet nature of discretion and its exercise. By focusing on the ways in which different individuals decide discretionary questions at various stages in the processes of criminal justice, we can examine individual acts as such. This discreetness, however, is cumulative, as Ossei-Owusu points out. Thus, each discretionary act successively builds on the prior ones, accumulating into systemic patterns that produce ultimate outcomes. Significantly, the discreet nature of these decisions render them invisible, or non-transparent, which facilitates abuses of discretion “because the power to conceal (intentionally and unintentionally) fundamentally guides and changes legal outcomes.”²⁶ By widening the lens of critical examination, “we being to see larger systemic problems as opposed to individual instances of misused discretion.”²⁷

23. *Id.* at 588.

24. Ossei-Owusu, *supra* note 7.

25. *Id.* at 612.

26. *Id.* at 613.

27. *Id.*

To capture how these particularities accumulate into patterns, Ossei-Owusu focuses on “institutional fields” and “bureaucratic patriarchy,” exploring how these concepts stand for “acquired dispositions, behaviors, learned habits, attitudes and/or tastes developed by institutional structures and fields . . . to recreate social order consciously and unconsciously through discourses, practices and dispositions that are often uncritically acknowledged.”²⁸ Thus, from the moment that employees enter a field or system, they are “trained” (or socialized) to acquire particular ways of exercising discretion, which then is executed individually yet systemically. When applied to gender, this insight into the “patriarchal socialization” of criminal justice builds on the historical monopoly of men over the coercive power of the state.

Having linked the particular to the systemic, Ossei-Owusu then examines a gamut of points through the criminal justice system to illustrate how this understanding of discretion plays itself out through the system incrementally, yet consistently and cumulatively. Examining both the role of police training as well as specific decisional points in the system, such as arrests and charging, Ossei-Owusu shows how discretion in the criminal justice system tends incrementally to reproduce gender inequality. To intervene effectively into this “business as usual” approach, Ossei-Owusu points to two critical actions: recognizing institutional cleavages and deploying interdisciplinary critiques.²⁹

Because discretion builds silently upon itself as the process unfolds, Ossei-Owusu emphasizes the need to locate points of cleavage in this otherwise seamless process to interrupt the accumulation of learned habits at different stages in the system that produce predictable ultimate outcomes. And, to locate these points of cleavages and understand how best to intervene at these precise points, Ossei-Owusu urges interdisciplinary research to uncover the best reform strategies. “A focus on the interstices of discretion and disproportionate impact can yield insights that produce actionable items for prospective reformers, as opposed to focusing on only disparate impact, which produces insights, but is restrained by conservative American jurisprudence.”³⁰

In this essay, Ossei-Owusu makes plain that the nation state retains the capacity to make or break human lives in the here and now. While the various trends addressed by Martínez that may portend the collapse of the nation state and the emergence of the market state are indeed evident in these times, Ossei-Owusu reminds us that the power of the nation state remains resilient and cannot be dismissed—at least not yet. These two

28. *Id.* at 614.

29. *Id.* at 622.

30. *Id.* at 623.

essays, together, create a challenging bottom line for OutCrit legal studies: both the traditional nation state and the inchoate market state require urgent critical counteraction.

The third essay in this cluster, authored by Professor F. E. Guerra-Pujol, confirms this challenging and dual bottom line. Exemplifying Ossei-Owusu's call for interdisciplinarity, Professor Guerra-Pujol employs game theory to examine the longstanding stalemate over the legal and constitutional status of Puerto Rico as a territory of the United States. In this essay, as in that authored by Ossei-Owusu, the nation state is front and center.

Guerra-Pujol begins by framing the standoff over Puerto Rican status as a "legislative war of attrition" to then employ game theory in this particular conflict and within the context of the Puerto Rico Democracy Act of 2009.³¹ This bill authorizes a series of referenda asking the people of Puerto Rico whether the island should continue its present political status under the United States Constitution or whether a different status should be established. So long as a majority of voters opt for the first choice, the referendum is repeated every eight years *ad infinitum*. When, and if, a majority opts for the second choice, a following referendum would offer three options: independence, statehood, or "sovereignty in association with the United States."³² It is this ongoing referendum process, which as yet remains a future possibility, that Guerra-Pujol aims to examine through game theory.

Using this model, Guerra-Pujol aims to uncover underlying logics or motives for various possible outcomes and their probability. Without aiming to predict a final outcome definitively, Guerra-Pujol examines different kinds of interactive configurations—that is, different kinds of political scenarios—to hypothesize likely outcomes under different circumstances.³³ This process produces substantive predictions rather than a specific outcome.

In short, Guerra-Pujol concludes through this analysis that the most relevant data boil down to two key assessments: the nature of the stakes involved in the conflict and the amount of cost to wage the fight. More specifically, Guerra-Pujol concludes that the probability of fighting is highest when the stakes are perceived to be largest; alternatively, the probability of fighting is least when the costs of conflict grow large.³⁴ These two metrics, and their interactive relationship to each other, provide the equation for predicting most likely outcomes.

31. See Guerra-Pujol, *supra* note 9.

32. *Id.* at 630.

33. *Id.* at 634.

34. *Id.* at 641.

Under this approach, predictive power of course depends on understanding the psychology of those involved in the conflict: because both metrics involve decisions based on perceptions (stakes and cost), critical analysts must understand the perceptions of the relevant decision-makers before we can predict their likely response to this calculus. As applied to the legislative war of attrition regarding the status of Puerto Rico, we cannot yet know how this equation ultimately may point to one or another outcome. However, as Guerra-Pujol concludes, this equation makes clear that questions relating to the nation state are not all together passé.

In this essay and its focus on legislative works of attrition over the sovereignty of a particular people, the nation state is a destination yet to be realized, rather than abandoned. Instead of a shrinking or fading historical artifact, the nation state with its power of (popular) sovereignty remains a goal cherished by many as part of the historical anti-subordination aspirations that many populations in localities around the world, including those in Puerto Rico, have yet to realize. But, if Martínez is correct—more importantly, if the voters of Puerto Rico conclude he is correct—then their perception of the stakes involved might lessen and likely outcomes thereby affected.³⁵ Or, vice versa, if they are unpersuaded by Bobbitt's and Martínez's argument, the resolve toward independence might stiffen.³⁶ Thus, this trio of essays provides a rich bundle of interrelated insights that LatCrit and allied scholars must grapple with in the future when working to unpack the power dynamics inhering in various scenarios locally and globally; each of these three essayists points to crucial elements in anti-subordination praxis³⁷ that LatCrit and allied scholars must take into account in helping to frame and support “different”³⁸ social justice struggles as effectively and efficiently as possible.

35. See Martínez, *supra* note 6.

36. *Id.*

37. See generally Montoya & Valdes, *supra* note 14, at 231-247 (describing LatCrit approaches to theory and praxis).

38. The “sameness” and “difference” discourse has attracted the attention of many scholars. See, e.g., MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW (1990); see also Regina Austin, *Black Women, Sisterhood, and the Difference/Deviance Divide*, 26 NEW ENG. L. REV. 877 (1992); Martha Albertson Fineman, *Feminist Theory in Law: The Difference It Makes*, 2 COLUM. J. GENDER & L. 1 (1992); Joan C. Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 1991 DUKE L.J. 296 (1991). The collective effort to mint concepts like anti-essentialism, multiplicity, intersectionality, cosynthesis, wholism, interconnectivity, multidimensionality and the like also reflects a similar grappling with issues of sameness and difference in various genres of contemporary critical legal theory. See *supra* notes 3 and 4 (on these issues and similar themes or concepts in critical outsider jurisprudence, including LatCrit theory).

In the next essay, Professor Gary Minda continues this interrogation of the state and its relevance to contemporary social justice struggles with an emphasis on internationalist interventions. Focusing on the context created by the “casino capitalism” that led to the worldwide economic meltdown of the past two years, Professor Minda urges critical outsider scholars to train our attention on global finance and its global power.³⁹ Arguing that the dynamics and processes of corporate globalization have outstripped the capacity of anti-subordination activists to generate social justice in traditional legal contexts, Minda urges that now is the time to embrace internationalism in LatCrit/OutCrit legal studies. In this way, Minda takes up a key priority for LatCrit theorists.⁴⁰

“The current financial crisis exposes the nature of the ‘justice’ we now face: a global system that is incapable of responding to the injustice caused by non-state actors and transnational institutions of globalization,” he observes.⁴¹ In other words, “a grammar of justice built on the premise of the legal responsibility of territorial states falls short of doing justice in a globalizing world.”⁴² In this essay, Minda

39. See Minda, *supra* note 8.

40. See, e.g., Hernandez-Truyol et al., *supra* note 13, at 204-08 (calling for continued LatCrit emphasis on internationalist analysis and action during our second decade of collective work). For a sampling of readings on transnationalism and internationalism in LatCrit theory, see Symposium, *International Law, Human Rights and LatCrit Theory*, 28 U. MIAMI INTER-AM. L. REV. 1 (1996-97). See also Max J. Castro, *Democracy in Anti-Subordination Perspective: Local/Global Intersections: An Introduction*, 53 U. MIAMI L. REV. 863 (1999); Gil Gott, *Critical Race Globalism?: Global Political Economy and The Intersections Of Race, Nation, and Class* 33 U.C. DAVIS L. REV. 1503 (2000); Ivelaw L. Griffith, *Drugs and Democracy in the Caribbean*, 53 U. MIAMI L. REV. 869 (1999); Berta Esperanza Hernandez-Truyol, *Building Bridges: Bringing International Human Rights Home*, 9 LA RAZA L. J. 69 (1996); Sharon K. Hom, *Lexicon Dreams and Chinese Rock and Roll: Thoughts on Culture, Language, Translation as Strategies of Resistance and Reconstruction*, 53 U. MIAMI L. REV. 1003 (1999); Ratna Kapur & Tayyab Mahmud, *Hegemony, Coercion and Their Teeth-Gritting Harmony: A Commentary on Power, Culture, and Sexuality in Franco's Spain*, 33 U. MICH. J.L. REFORM 411 (2000); Tayyab Mahmud, *Colonialism and Modern Constructions of Race: A Preliminary Inquiry*, 53 U. MIAMI L. REV. 1219 (1999); Mario Martinez, *Property as an Instrument of Power in Nicaragua*, 53 U. MIAMI L. REV. 907 (1999); Julie Mertus, *Mapping Civil Society Transplants: A Preliminary Comparison of Eastern Europe and Latin America*, 53 U. MIAMI L. REV. 921 (1999); Ediberto Roman, *Reconstructing Self-Determination: The Role of Critical Theory in Positivist International Law Paradigm*, 53 U. MIAMI L. REV. 943 (1999); Ediberto Roman, *A Race Approach To International Law (Rail): Is There A Need For Yet Another Critique Of International Law?* 33 U.C. DAVIS L. REV. 1519 (2000); Ediberto Roman, *A Race Approach to International Law (Rail): Is There A Need For Yet Another Critique Of International Law?* 33 U.C. DAVIS L. REV. 1519 (2000); Irwin P. Stotzky, *Suppressing the Beast*, 53 U. MIAMI L. REV. 883 (1999). For a more complete listing of similar citations, see LatCrit Scholarship Index at www.latcrit.org.

41. Minda, *supra* note 8.

42. *Id.* at 666.

thus addresses both the state and the “non-state actors” or “transnational institutions of globalization” that interact with the traditional nation state. Under this account, the nation state is corporatized and privatized but remains relevant—(presumably?) worth fighting for. But, as Minda argues, this fight must be globalized. In effect, Minda renews the call for a globalized anti-subordination praxis—long a LatCrit commitment—with an increased sense of urgency.⁴³

This triangular emphasis on the traditional territorial nation state, non-state actors, and transnational institutions of globalization of course invites consideration of all three, and of their myriad interactions, in the production of power or justice. In this way, Minda’s essay bridges the points of emphasis in the three prior essays; linking these points to each other, Minda urges LatCrit and related scholars to move from identity politics framed by nation states and their cultures to a “reframing” that extends analysis and action beyond traditional territorial (or other) borders.⁴⁴ In this way, Minda confirms the long standing LatCrit/OutCrit commitment to internationalism in *both* local *and* global projects.⁴⁵

In different ways, these four contributors link culture to law in their analyses of the state and its relationship to justice. For example, the way in which Martínez posits the impending incapacity of the nation state to “protect its culture”⁴⁶ brings into question the very concept—or value—of national “culture” as we now understand it. As a corollary, this proposition effectively questions whether the ferocious and destructive “culture wars” of recent decades are even relevant to a forward-looking analysis of law and justice under the nation state as we have known it in recent centuries.⁴⁷ Minda’s call for a “reframing”⁴⁸ of critical studies toward a transnational politics of anti-subordination seems at least to corroborate the decline of the nation state and thus perhaps its power to do good as well as evil. If so, this view similarly would question the utility or value of the nation state as a unit of analysis or frame of action in these culture wars, or in any other similar contestation over “social” policy at the national level. If so,

43. See Montoya & Valdes, *supra* note 14 (providing an overview and critical analysis of LatCrit commitments and practices); see also *supra* note 40 (providing a partial sampling of LatCrit texts on transnational and international issues).

44. Minda, *supra* note 8.

45. See *supra* note 14 and accompanying text (commenting on LatCrit efforts to cultivate internationalism in critical outsider jurisprudence).

46. See *supra* note 47 and accompanying text (on culture and the nation state).

47. See *infra* notes 57-75 and accompanying text (on the U.S. “culture wars” of recent decades).

48. See *supra* note 44 and accompanying text (on “reframing”).

Guerra-Pujol's conclusion that social or political conflict is most likely when "the stakes" are perceived to be highest⁴⁹—and vice-versa—would predict the impending decline, if not end, of contestations over the powers or resources of the waning nation state, such as the culture wars in this country. These three essays therefore challenge the apparent calculations and agendas that fuel the furious backlashing that characterizes cultural warfare in the United States. On the other hand, the gendered and racialized abuses of discretion in state actions within the criminal justice system that Ossei-Owusu unpacks⁵⁰ no doubt are heavily influenced by the identity politics and ideologies that fuel the culture wars,⁵¹ and thus point to the continuing power and relevance of the nation state in everyday lives today. Of course, only time will tell how the coming phases of anti-subordination struggle will unfold in this country or beyond, but no abatement in the phenomenon popularly called the "culture wars" appears in sight—at least not within the nation state still known as the United States.

On the contrary, ever since the passing of the historic moment that the LatCrit XIV conference theme celebrates,⁵² the press and media have been chock full of accounts from across the land that cultural tensions and conflicts should or have intensified even while morphing.⁵³ Some folks, it seems, just cannot stand the sight of a black family in the White House—they want, in their own words, their "country back."⁵⁴ In this framing of their claim, today's "birthers" and "tea baggers"⁵⁵ echo precisely the classic framings of the culture wars at their most proximate historical origin in this country.⁵⁶

49. See *supra* note 9 and accompanying text (on the dynamics of conflict).

50. See *supra* note 7 and accompanying text (on systemic failures of discretion in criminal justice system).

51. See *supra* notes 27-35 and accompanying text (on the identitarian politics of the culture wars).

52. See *supra* note 11 and accompanying text (on LCXIV and the conference theme).

53. See, e.g., ARTHUR C. BROOKS, *THE BATTLE: HOW THE FIGHT BETWEEN FREE ENTERPRISE AND BIG GOVERNMENT WILL SHAPE AMERICA'S FUTURE* (2010) (re/casting "big government" and "free enterprise" debates explicitly in culture war frameworks); JOE SCARBOROUGH, *THE LAST BEST HOPE: RESTORING CONSERVATISM AND AMERICAN PROMISE* (2009) (re/casting current issues in general along culture wars divides).

54. See, e.g., Kate Zernike, *Enthusiasm for Palin, and Echoes of 2008 Divide*, N.Y. TIMES, Nov. 22, 2009, at A10.

55. See, e.g., Michael Cooper, *Hawaii to Birthers: Enough is Enough*, N.Y. TIMES, May 14, 2010, at A10 (describing the movement of "birthers," who believe President Obama was born outside of the United States); Kate Zernike & Megan Thee-Brenan, *Discontent's Demography: Who Backs the Tea Party*, N.Y. TIMES, Apr. 15, 2010, at A1 (outlining the rise and foundations of the tea party movement).

56. The thoughts outlined in this section reflect a decade of attention to this phenomenon. Francisco Valdes, *Afterword—Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality, and Responsibility in Social*

These culture wars, which in the context of North American politics stretch back at least to the 1970s, express majoritarian resentment and backlash against Civil Rights gains and legacies of the New Deal and the Great Society.⁵⁷ Picking up steam in the late 1980s and 1990s, the formal declaration of cultural war proclaimed in 1992 that the very “soul of America” is at issue.⁵⁸ This backlashing, therefore, has not been waged or understood as a simple case of rough-and-tumble majoritarian politics as usual. On its very own terms,⁵⁹ it amounts to a multi-year, multi-faceted conflict waged expressly for the “soul” of the nation in the name of traditionally dominant interests.⁶⁰

In recent decades, the culture wars in this country have focused oftentimes, perhaps obsessively, on identitarian ideologies—white power, male privilege, heterosexist supremacy, moral hegemony.⁶¹ It is no

Justice Scholarship, or Legal Scholars as Cultural Warriors, 75 DENV. U. L. REV. 1409 (1998) [hereinafter Valdes, *Cultural Warriors*] (focusing on the implications of cultural warfare for sexual orientation scholarship specifically, and for all OutCrit scholars generally); Francisco Valdes, *Anomalies, Warts and All: Four Score of Liberty, Privacy and Equality*, 65 OHIO ST. L.J. 1341 (2004) [hereinafter Valdes, *Anomalies*] (focusing specifically on *Lawrence v. Texas* and generally on liberty-privacy as a central doctrinal terrain of social and legal retrenchment); Francisco Valdes, *Culture, “Kulturkampf” and Beyond: The Antidiscrimination Principle Under the Jurisprudence of Backlash*, in THE BLACKWELL COMPANION TO LAW AND SOCIETY 271 (Austin Sarat ed., 2004) [hereinafter Valdes, *Antidiscrimination*] (focusing broadly on three theoretical perspectives—backlash jurisprudence, liberal legalisms, and critical outsider jurisprudence—to compare their approaches to equality law and policy); Francisco Valdes, *Afterword—Culture by Law: Backlash as Jurisprudence*, 50 VILL. L. REV. 1135 (2005) [hereinafter Valdes, *Culture by Law*] (detailing backlash interventions in liberty-privacy jurisprudence); Francisco Valdes, “*We Are Now of the View*”: *Backlash Activism, Cultural Cleansing, and the Kulturkampf to Resurrect the Old Deal*, 35 SETON HALL L. REV. 1407 (2005) (surveying the political, jurisprudential and doctrinal aspects of the culture wars, as reflected in recent Supreme Court opinions); see Francisco Valdes, *The Constitution of Terror: Big Lies, Backlash Jurisprudence and the Rule of Law in the United States Today*, 7 NEV. L.J. 991 (2006-2007) (examining the premises and rhetoric of cultural warfare in law and society).

57. See JAMES DAVISON HUNTER, *BEFORE THE SHOOTING BEGINS: SEARCHING FOR DEMOCRACY IN AMERICA’S CULTURE WAR* (1994); JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1992).

58. For contemporary news accounts reporting this remarkable declaration, see Chris Black, *Buchanan Beckons Conservatives to Come “Home,”* BOSTON GLOBE, Aug. 18, 1992, at A12 and Paul Galloway, *Divided We Stand: Today’s “Cultural War” Goes Deeper than Political Slogans*, CHI. TRIB., Oct. 28, 1992, at C1.

59. For now-classic expositions of this backlash, see ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990) and RAOUL BERGER, *GOVERNMENT BY JUDICIARY* (1977). See also Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

60. See Valdes, *Cultural Warriors*, *supra* note 56, at 1434-43 (outlining these “prongs”).

61. Illustrating this point, news accounts, following the 2004 electoral cycle, reported that “abortion has become a prime target” of “[d]emocratic strategists and lawmakers” as they “[quietly] discuss how to straddle the nation’s Red-Blue divide” and that lawmakers have concluded that the “issue and the message need to be completely rethought,” because “along with gay marriage, abortion is at the epicenter of the culture wars, another example used by Republicans to highlight the Democrats’

coincidence, therefore, that twice in sexual regulation cases Antonin Scalia has invoked this very notion of cultural warfare—as a feature of his dissents from *Romer v. Evans*⁶² and *Lawrence v. Texas*.⁶³ Those cases suggest that high stakes and charged dynamics are involved in cultural warfare, at least from the perspective of its purveyors.

The dynamics of backlash law and politics generally have pointed to three interactive and mutually-reinforcing prongs of majoritarian attack against minority interests: (1) concentrating accumulated or entrenched resources to prevail in majoritarian contests and take control of public policy, both in the form of representative elections and “direct” referenda; (2) leveraging success in the first prong to pack the federal courts with ideological appointees committed to reversing despised precedents, undoing “liberal” legislation, and shielding backlash policymaking from meaningful judicial scrutiny; and (3) targeting the spending power, which is used in tandem with the other two prongs, to “starve” social lifelines to vulnerable groups, especially when the first two prongs fail to undo or reverse liberal legacies.⁶⁴ Rather than working in neat or linear ways, these prongs are worked in various ways and contexts to pursue consistently reactionary agendas.⁶⁵

In law and jurisprudence, this culture war backlash has been spearheaded through organizations like the Federalist Society, which was formed by now-prominent cultural warriors like Antonin Scalia.⁶⁶ In policy and politics, as recent history teaches, culture war agendas have been formed and advanced by politicians like Richard Nixon, Ronald Reagan and George W. Bush.⁶⁷ Using law and politics, backlash warriors slowly but

supposed moral relativism.” See Debra Rosenberg, *Anxiety Over Abortion: Pro-Choice Democrats Eye a More Restrictive Approach to Abortion as One Way to Gain Ground at the Polls*, NEWSWEEK, Dec. 20, 2004, at 38 (reporting conclusions of this reassessment were espoused and endorsed by that year’s party standard-bearer, John Kerry); see also Richard Lacayo, *Abortion: The Future Is Already Here*, TIME, May 4, 1992, at 27 (observing that more than a decade ago, much of formal constitutional right to reproductive choice had been eroded in practice by constant and multifarious backlash assaults aimed at *Roe v. Wade*, 410 U.S. 113 (1973)). Whether or not these particular conclusions are sound, they serve to illustrate how sex and sexuality, along with race, nationality and ethnicity, have been positioned at the “epicenter” of backlash kulturkampf. See generally Charles P. Kindregan, Jr., *Same-Sex Marriage: The Cultural Wars and the Lessons of Legal History*, 38 FAM. L.Q. 427 (2004).

62. 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (arguing that the Constitution is silent on the issue of “preferential laws” towards homosexuals and is a matter of cultural debate and should be “resolved by normal democratic means”).

63. 539 U.S. 558, 586 (2003) (Scalia J., dissenting) (criticizing the Court’s decision to overturn *Bowers v. Hardwick*, 478 U.S. 186 (1986), by applying a “rational-basis” analysis to invalidate a Texas law making homosexual sodomy illegal).

64. *Id.*

65. See *infra* notes 74-75 and accompanying text (on backlash agendas).

66. See Valdes, *Antidiscrimination*, *supra* note 56.

67. See Valdes, *Cultural Warriors*, *supra* note 56.

surely have striven to restructure the nation's perspective on its own values and history.⁶⁸ Using identity wedge politics to polarize “ins” and “outs,” they have endeavored to redraw the legal landscape in favor of power and privilege, spanning categories of doctrine from anti-trust to civil rights.⁶⁹ Indeed, they have aimed to restructure the very structure of power, mainly to suit themselves, their sponsors and their allies.

Of course, the culture wars find “different” groups positioned “differently” vis-à-vis core constitutional commitments like formal equality and key structural issues like democracy and judicial review, and thus vis-à-vis their formal and actual retrenchment through backlash.⁷⁰ These differentials mean that the specific aspects or techniques of cultural warfare have been tailored for and directed at “different” groups in group-specific ways—ways that account for each group's standing in relationship both to formal law and to social reality.⁷¹ Nonetheless, experience indicates that the overarching pattern of backlash politics (and jurisprudence) constitutes the pursuit of a self-subscribed “anti-antidiscrimination” agenda in which judicial power and majoritarian power combine to roll back “liberal” gains of the past century.⁷² It therefore is no coincidence that legal observers of

68. See Valdes, *Culture by Law*, *supra* note 56.

69. See Valdes, *Anomalies*, *supra* note 56; see also *infra* notes 75-81 (on backlash and retrenchment).

70. Consequently, numerous scholars have critiqued judicial willfulness or other institutional misbehaviors in the context of both race/ethnicity and sex/gender. See, e.g., Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928 (2001); Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953 (1996); see also Marina Angel, *The Glass Ceiling of Women in Legal Education: Contract Positions and the Death of Tenure*, 50 J. LEGAL EDUC. 1 (2000); Richard H. Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537 (1988); Richard Delgado, *Affirmative Action as Majoritarian Device: Or, Do You Really Want to be a Role Model?*, 89 MICH. L. REV. 1222 (1991); Richard Delgado, *Minority Law Professors' Lives: The Bell-Delgado Survey*, 24 HARV. C.R.-C.L. L. REV. 349 (1989); Rachel F. Moran, *Commentary: The Implications of Being a Society of One*, 20 U.S.F. L. REV. 503 (1986); *infra* notes 71-73 (providing similar critiques of judicial civil rights rollbacks).

71. See, e.g., Nicolas Espiritu, *(E)Racing Youth: The Racialized Construction of California's Proposition 21 and the Development of Alternate Contestations*, 52 CLEV. ST. L. REV. 189 (2005) (focusing on cultural warfare against youth of color in California through use of proposition system in that state); Ruben J. Garcia, *Comment, Critical Race Theory and Proposition 187: The Racial Politics of Immigration Law*, 17 CHICANO-LATINO L. REV. 118, 122 (1995) (deconstructing racialized political dynamics of that early Proposition); Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629, 650-58 (1995) (analyzing racial rhetoric and politics of Proposition 187). See generally Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender and Class*, 42 UCLA L. REV. 1509 (1995) (analyzing identity politics and social consequences of recent legal “reforms”).

72. See Jeb Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141 (2002) (evaluating current judges' manipulation or disregard of precedent and canons

many different stripes have long been detailing and critiquing willful judicial and political misbehavior in furtherance of culture war agendas against minority civil rights.⁷³

Yet, these four essays should prompt us to question the relevance or importance of the stakes involved in a contestation over culture framed along the lines of the nation state. From the perspective of those who initiate and wage cultural warfare, it would seem evident from word and deed that the stakes, as they perceive them, are very high indeed; recall that the original declaration of cultural warfare specified that the very “soul” of the nation state was in issue.⁷⁴ But, after reflecting on these four essays, the question must be: should we care? And if so, should we care very much? Or just a little? The nation state, after all, cannot protect—much less control—“culture.”

To help deepen these questions, and nudge critical consideration of

of interpretation in pursuit of their anti-antidiscrimination political agenda).

73. See, e.g., Keith Aoki, *The Scholarship of Reconstruction and the Politics of Backlash*, 81 IOWA L. REV. 1467 (1996); Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); Kenneth L. Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75; Stephanie M. Wildman, *The Legitimation of Sex Discrimination: A Critical Response to Supreme Court Jurisprudence*, 63 OR. L. REV. 265 (1984). See generally Kevin M. Clermont et al., *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP. RTS. & EMP. POL’Y J. 547 (2003) (focusing on judicial bias against plaintiffs in employment discrimination cases); Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947 (2002) (also focusing on judicial bias against plaintiffs in employment discrimination cases); William B. Gould, IV, *The Supreme Court and Employment Discrimination Law in 1989: Judicial Retreat and Congressional Response*, 64 TUL. L. REV. 1485 (1990) (focusing on retrenchment in that key term of the Supreme Court); Charles R. Lawrence, III, *“Justice” or “Just Us”: Racism and the Role of Ideology*, 35 STAN. L. REV. 831 (1983) (focusing on race and white supremacy); Nancy Levit, *The Caseload Conundrum, Constitutional Restraints and the Manipulation of Jurisdiction*, 64 NOTRE DAME L. REV. 321 (1989) (critiquing interposition of jurisdictional and prudential barriers to deflect civil rights actions); Robert P. Smith, Jr., *Explaining Judicial Lawgivers*, 11 FLA. ST. U. L. REV. 153 (1983–1984) (surveying techniques of judicial manipulation of facts and doctrine); Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 293 (1992) (noting that “liberal activist judges” are the frequent targets of backlashes, who “promise that their replacements will not be so free-wheeling”); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983) (questioning the premises and practices of judicial review in recent decades); C. Keith Wingate, *A Special Pleading Rule for Civil Rights Complaints: A Step Forward or a Step Back?*, 49 MO. L. REV. 677 (1984) (critiquing heightened rules of pleading that various federal judges had erected to rebuff civil rights claimants).

74. See *supra* note 56 and accompanying text (on the formal “declaration” of cultural warfare in the 1990’s).

them, the cluster concludes with a powerful essay on injustice, power, the state and the market from a transnational perspective. Using the slums Mumbai and their representation in the recent film, *Slumdog Millionaire*, Professor Tayyab Mahmud examines in his essay the social, legal and material construction of culture and community in a concrete, contemporary site of the global South.⁷⁵ His aim is to examine the structural determinants of outsider-hood, like in the case of Mumbai's slum-dwellers, as well as the policy frameworks that create the context for resistance to those very structures and their consequences. Thus, Professor Mahmud's critical examination of power and resistance in this fifth essay aims to engage and embellish the very relationship of state to culture, identity and market that prior authors in this cluster also have featured.

Setting the stage for this analysis, Mahmud lays out a brief history of slum construction in Mumbai, concluding that the slum of Dharavi "is a liminal zone of regulatory vacuum, where predatory entrepreneurs, corrupt politicians, and state functionaries operate unfettered by law or public scrutiny."⁷⁶ This space in turn provides the structural context of resistance to its injustice, in the form of corporate globalization and the kind of "casino capitalism" that Minda described earlier.⁷⁷ Underscoring themes and trajectories sounded both by Martínez and Minda, Mahmud chillingly describes masses of dispossessed outsiders as "surplus humanity" shoved into an "informal economy" of insecurity, all in the name of "progress" as neo-liberal and corporate globalization marches on.⁷⁸

In Mumbai (and elsewhere?), these dynamics produce a "diminished state capacity" that allows the process of "accumulation by dispossession" to mushroom in the name of "free" markets; Mahmud observes that, by the 1990s, these forces had altered "electoral representative democracy" into a "free market democracy" that renders voters into consumers and the state into just another market.⁷⁹ Here, at the intersection of state, market, identity and in/justice, is where Mahmud, Martínez and Minda meet. Noting the complicity of judges and other legal institutions in this recalibration, Mahmud brings the inter-related dynamics of state, society, market, and law back full circle.

Having shown how economic, political, social, and legal forces have combined in this socio-legal setting to produce it, Mahmud turns to resistance against it from below—from those at the bottom of this stratification process. To do so, he emphasizes the contingency and

75. Mahmud, *supra* note 10.

76. *Id.* at 689.

77. *Id.* at 689-95.

78. *Id.* at 685.

79. *Id.* at 696-97.

limitation of all efforts in the anti-subordination struggle. He notes that “the field of possibilities of resistance and transformative political action” spans all sectors of society.⁸⁰ Most importantly, he observes that “resistance of the oppressed may take multiple and even contradictory forms.”⁸¹ As a bottom line, Mahmud reminds us that, “in conditions of extreme marginality, survival itself is resistance.”⁸²

Working within and through the informal sectors of society that slums and other marginalized spaces represent, Mahmud observes that resistance must avail itself specifically both of “civil” society as well as “political” society—that is, the existing network of established NGO’s as well as the more “grass roots” organizations that local outsiders can organize on their own terms and operate directly on the ground.⁸³ To be effective, however, recall that “resistance of the oppressed *may take multiple and even contradictory forms.*”⁸⁴ Thus, the use of religious or cultural festivals, as well as the use of elections and political systems, embraces the “field of possibilities” that outsiders living in informal settings must activate in order to check the processes of corporate globalization and neo-liberal mandates; again, tactical multidimensionality, *and even contradiction*, are part and parcel of anti-subordination struggle. With this nuanced perspective, Mahmud urges anti-subordination activists to take advantage *both* of markets as well as of states—in order to examine the field of possibilities of resistance *and* transformative political action, slum-dwellers and other outsiders must engage in daily struggle at the local level, even while striving to understand the transnational forces and dynamics that help to shape local conditions, limitations, and injustices.

Mahmud shows us yet again the continuing power of the nation state to make and break fortunes as well as lives. Moreover, he effectively provides a compelling invitation to consider how cultural warfare knows no boundaries or borders. In other words, in this essay, focused on a particular place and time in the Global South, Mahmud depicts a socio-legal conflict structured in ways reminiscent of the North American culture wars of the past several decades: in both contexts, identitarian politics based on class and/or other forms of status and categorization are practiced as a contestation over opportunity, culture and community. Although the configuration of identity politics in different locations of the globe no doubt reflect local histories, circumstances, and trajectories, the recurrence of similar conflicts or contestations based on identities and waged (in great

80. *Id.* at 701.

81. *Id.* at 700.

82. *Id.* at 703.

83. *Id.* at 708-09.

84. *Id.* at 700 (emphasis added).

measure) through law, calls for critical examinations of law and society that help to tease out the globalized patterns formed by these localized particularities. It is *this* type of critical project—seeking to connect the local to the global in order to understand both better—that LatCrit scholars have long espoused and labored to produce.⁸⁵ In sum, Mahmud’s description and critique of the Mumbai slums (or similar “liminal spaces”) effectively call upon us to examine how “domestic” frames of cultural warfare are paralleled in other nation-states, and across them, in order to create increasingly inter-linked patterns of local hierarchy; as globalization replicates hierarchy, as particularities add up to patterns, as the local and global converge in multiple locations across the globe, this specific call to multidimensional criticalities also represents a basic and urgent standing challenge to LatCrit/OutCrit scholars everywhere.

Collectively, the five essays in this cluster provide some helpful snapshots of particular situations that help us discern broader structures and systems. In these multiple settings, each detailed according to local circumstance, the twin dynamics of the state and the market interact over and over again; and, in each instance, at least in the eyes of the authors in this cluster, the stakes are nothing less than justice itself. From a critical anti-subordination perspective, these are high stakes indeed—the sort worth fighting for. Clearly, then, social justice activists located in many “different” settings across the globe have much to learn from each other if they hope to understand, much less counteract, the complex forces and shifting dynamics of power outlined in this cluster of essays.

This quintet of essays ultimately points toward a dual and complex bottom line: we live today in a time of great change, of unrelenting flux, wherein the nation state remains a resilient and powerful actor even as countervailing forces challenge the domination of this planet by the system of nation states that arose in recent centuries. Clearly, as Martínez and Minda point out, the supremacy of the traditional nation state is most certainly in question. Nonetheless, as Ossei-Owusu and Mahmud remind us, the durable powers of the nation state still allow it to impose itself on its inhabitants with undiminished efficacy. Perhaps Guerra-Pujol’s exercise with game theory provides a provisional capstone for our thinking today, and for our actions beyond this moment: to the extent that he predicts that the ferocity of socio-political conflict is based chiefly on perceptions over value and cost, these essays, when read jointly, urge each of us to re/consider the value to *us* of the nation state (and its capacity to do good or bad) and how much we are willing to “pay” for that value, if any.

85. See generally *supra* notes 5, 12-17 (explaining LatCrit theory and outlining LatCrit efforts to study “domestic” and “foreign” issues in contextualized and connected ways).

From a LatCritical perspective, this provisional conclusion provides a forward-looking lens for realistic and sustainable follow-up action.⁸⁶ At bottom, this cluster of essays thus provides a timely confirmation of longstanding LatCrit orientations toward “personal collective praxis” in border-busting ways.⁸⁷ But, these authors also show us that our commitments and practices require us to take up ever-increasing and ever-expanding challenges: read together, these five essays call upon us to expose and oppose state-sponsored injustice “domestically” *as well as* to renew and intensify parallel efforts *across* national borders. Nothing less will do. This is the fundamental challenge that these authors place in front of us as we look ahead to the work before us. The bottom line they set for us, and for all social justice advocates in the academy, is both simple and daunting: only our continued and renewed commitment to anti-subordination academic activism can ensure the ongoing efficacy of this important, imperfect and never-ending work.

86. For the past fourteen years, the LatCrit community has operated a “portfolio of projects” for just this kind of action-oriented purpose. For more information on the LatCrit Portfolio of Projects, see www.latcrit.org.

87. See *supra* notes 14 and 17 (discussing LatCrit approaches to knowledge-production and academic activism).