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Legal paradigms: How jurisprudence affects insider/outsider status quo, outsider jurisprudence, and transformative directions.

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LEGAL PARADIGMS: HOW JURISPRUDENCE AFFECTS INSIDER/OUTSIDER STATUS QUO, OUTSIDER JURISPRUDENCE, AND TRANSFORMATIVE DIRECTIONS

THE INTRODUCTORY COMMENTS OF GUADALUPE T. LUNA* TO ESSAYS BY

MING H. CHEN, M. KATHERINE BAIRD DARMER, RICHAEAL FAITHFUL,
ERNESTO HERNÁNDEZ-LÓPEZ, ORLANDO I. MARTÍNEZ-GARCÍA, LUPE S.
SALINAS, AND JANELLE MARTINEZ

I. Introduction	393
II. Legal Formalism and Proposed New Directions	394
III. Conclusion	409

I. INTRODUCTION

The jurisprudence of Latina and Latino Critical Theory (“LatCrit Theory”) brings forth much needed layers of complexities and sophisticated nuances to legal formalistic studies.¹ Legal scholar Karl Llewellyn long ago declared, “Jurisprudence is as big as law, and bigger.”² Since the nineteenth century, jurisprudence has been defined as the “philosophy of law.”³ This definition evolved from earlier identifications distinguishing the “body of law” of specific countries.⁴ As applied here,

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1. For a present overview of LatCrit Theory, its goals and principles see, e.g., Francisco Valdes, *Rebellious Knowledge Production, Academic Activism & Outsider Democracy, From Principles to Practices in LatCrit Theory 1995 to 2008*, 8 SEATTLE J. FOR SOC. JUS. 131 (2009).

2. Karl Llewellyn, *A Required Course in Jurisprudence*, 9 AM. L. S. REV. 590, 591-92 (1940), as reprinted in JURISPRUDENCE 372 (1962).

3. See, e.g., JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED iii (1832) (describing general jurisprudence as the “philosophy of positive law”).

4. See John C. Gray, *Some Definitions and Questions in Jurisprudence*, 6 HARV.

jurisprudence is “the study of general theoretical questions about the nature of laws and legal systems, about the relationship of law to justice and morality, and about the social nature of law.”⁵

While additional definitions, characterizations, and philosophical boundaries exist, the jurisprudence of LatCrit Theory is primarily a form of legal insurgency with roots partially grounded in legal realism. LatCrit Theory further extends its analytical lens to complex moral dilemmas and baffling categories where malignant labels unjustly stereotype individuals on the basis of their race, gender, sexual orientation, and other identifications.

Against the above backdrop, this series of essays invites a reassessment of entrenched legal formalism within the jurisprudence of LatCrit Theory and LatCrit Symposium XIV’s aims and goals of employing critical outsider theory in the policymaking of the new American regime. Challenging false templates, these contributions show how rules are employed indiscriminately, without standards, and not only deny justice for maligned individuals and communities, but also harm democratic society. These essays illustrate the particularized harm inflicted on marginalized communities while further exposing the law’s oppressive mechanisms. In the process, the authors enumerate and clarify a realm of possibilities that dare to challenge prevailing harmful legal norms.

II. LEGAL FORMALISM AND PROPOSED NEW DIRECTIONS

The essays in this Cluster draw forth novel and valuable approaches to the law’s construction of language, race, disparate treatment, and the unequal relationship between two conflicting sovereignties. Additional insights emerge from appeals for expanding and reframing equal protection law and transformative gender issues. At their core, these essays incorporate the “outsider/insider” themes that were the central to the LatCrit XIV Conference. Accordingly, they all equally create knowledge and expand the jurisprudence of LatCrit Theory and its philosophical goals.

Several of the authors declare that their analytical approaches apply to all communities. Many articles incorporate astute multi-disciplinary intellectual reasoning. These approaches expose fissures within the impenetrable and rigidly applied jurisprudence of legal formalism that marginalizes communities. Each, moreover, questions the prevailing, rigid formal legal templates and, without restraint, advocates for their

L. REV. 21, 34 (1892-1893) (recognizing the usage and suggesting instead the use of the phrase “particular jurisprudence” for the decisions of a particular country).

5. DENNIS LLOYD & M.D.A. FREEMAN, LLOYD’S INTRODUCTION TO JURISPRUDENCE 5 (5th ed. 1985).

transformation.⁶ Thus, all of the essays extend a critical analysis of the status quo while petitioning the law to promote greater inclusiveness and fair treatment.

With a rare exception, this group of compelling analytical assessments nonetheless fails to reference LatCrit Theory scholarship on issues concretely related to their thesis. While the essays lay out much needed knowledge and propose new intersections, the absence of causative linkages with the jurisprudence of LatCrit scholarship diminishes the theoretical framework introduced in earlier scholarly investigations on gender,⁷ race,⁸ language rights,⁹ sexual identities and orientation,¹⁰ equal protection analysis,¹¹ and anti-discrimination laws.¹² Without incorporating the requisite legal antecedents, LatCrit's goal of expanding and linking theoretical constructs with praxis is accordingly curtailed, if not stymied.¹³ Furthermore, without the requisite jurisprudential linkage the essays expose the difficulties of transforming subordinated communities.¹⁴ Despite this

6. See generally Margaret E. Montoya & Francisco Valdes, "*Latinas/os*" and the Politics of Knowledge Production: LatCrit Scholarship and Academic Activism as Social Justice Action, 83 IND. L.J. 1197 (2008) (discussing the origins and the goals of the LatCrit experiment); Francisco Valdes, Foreword: Poised at the Cusp: LatCrit Theory, Outsider Jurisprudence and Latina/o Self-Empowerment, 2 HARV. LATINO L. REV. 1 (1997) (reviewing LatCrit from a year after the movement's launch).

7. See generally Symposium, Rotating Center, Expanding Frontiers: LatCrit Theory and Marginal Intersections, 33 U.C. DAVIS L. REV. 751 (2000); Berta Esperanza Hernández-Truyol, Indivisible Identities: Culture Clashes, Confused Constructs and Reality Checks, 2 HARV. LATINO L. REV. 199, 199 (1997) (seeking to resolve the contraction between Latinas/os as being at once "indivisible yet diverse and varied").

8. See generally George A. Martínez, *The Legal Construction of Race: Mexican-Americans and Whiteness*, 2 HARV. LATINO L. REV. 321 (1997) (studying Critical Race Theory and its application to Mexican-Americans); Celina Romany, *Gender, Race/Ethnicity and Language*, 9 LA RAZA L.J. 49 (1996) (analyzing Critical Race Theory from a Puerto Rican lens).

9. See, e.g., 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).

10. See generally Anita Tijerina Revilla, *Raza Womyn Mujerstoria*, 50 VILL. L. REV. 799 (2005) (discussing the growth of a woman's movement at UCLA and the members' quest to develop a "woman-centered ideology"); Gema Pérez-Sánchez, *Franco's Spain, Queer Nation?*, 33 U. MICH. J.L. REFORM 359 (2000).

11. See, e.g., Shannon Gilreath, *Of Fruit Flies and Men: Rethinking Immutability in Equal Protection Analysis—With a View Toward a Constitutional Moral Imperative*, 9 U. PA. J. L. & SOC. CHANGE 1 (2006) (discussing the reluctance of courts to accept homosexuals as a suspect class for equal protection purposes).

12. See *id.* at 3-8.

13. See, e.g., Larry Catá Backer, *Measuring the Penetration of Outsider Scholarship Into the Courts: Indifference, Hostility, Engagement*, 33 U.C. DAVIS L. REV. 1173, 1177-79 (2000) (noting the importance of citing to previous scholarship in order to effect change upon the judicial system).

14. See, e.g., Pedro A. Malavet, *Afterword: Outsider Citizenships and Multidimensional Borders: The Power and Danger of Not Belonging*, 52 CLEV. ST. L. REV. 321, 331 (2005).

limitation, the essays reveal compelling insights within their own framework and promote LatCrit's core aspirations of generating knowledge and challenging the formalism of Anglo-American law that marginalizes outsiders.

In the first essay, Ming Hsu Chen addresses the repercussions of the United States' zealous application of complex, disparate, and conflicting approaches to fighting terrorism.¹⁵ Following the heinous September 11, 2001, World Trade Center attack, the United States reacted with a broad spectrum of questionable and incoherent anti-terrorism apparatuses that furthered discrimination against racial minorities and other marginalized groups. Increasingly, the nation's war on terror breaches constitutional principles without regard to the civil rights and liberties that have only recently been applied to racial and ethnic minorities. The current zeitgeist of the times thereby violates the civil rights of innumerable people of color across the nation and cleaves its southernmost geographical border.

For example, the Secure Fence Act of 2006 purports to protect the United States against the firestorm of terrorist entry into the nation.¹⁶ Yet federal and state officials have collapsed undocumented immigrants into the same category as terrorists.¹⁷ Although none of the terrorists who participated in the September 11 attacks arrived into the United States through its southern borders, the Secure Fence Act purports to aid in the war on terrorism. The Secure Fence Act not only detrimentally affects those seeking to emigrate through the southern border; it is engendering harm on the property owners of the region. Furthermore, the Act fails to block employers that violate the nation's immigration laws and human rights laws.

Efforts to restrict the livelihood of marginalized minorities are also visible at various state levels. While immigration law is primarily the domain of the federal government, states are also engaging in inflammatory anti-immigrant rhetoric, which impacts domestic groups of color. Increasingly, new forms of odious state laws are surfacing, such as the newly-signed Arizona law¹⁸ that expands the jurisdiction of law enforcement officers, without providing training on the complexities of

15. See Ming H. Chen, *Alienated: A Reworking of the Racialization Thesis After September 11*, 18 AM. U. J. GENDER SOC. POL'Y & L. 411 (2010).

16. Secure Fence Act of 2006, Pub. L. No. 109-367, § 2(a)-(b), 120 Stat. 2638, 2638 (2006) (codified in scattered sections of 8 U.S.C.) (stating the purpose of the Act as "achieving operational control" and defining "operational control" as "the prevention of all unlawful entries into the United States, including entries by terrorists . . . , [and] instruments of terrorism . . .").

17. *Id.* (including "unlawful aliens" in the list of those unlawful entries to be prevented under "operational control").

18. Support Our Law Enforcement and Safe Neighborhoods Act, 2010 Ariz. Legis. Serv. 113 (West).

immigration law relevant to their new duties and in blatant breach of federal law.¹⁹ Ultimately, the majority of these new restrictive legal measures curtail civil liberties and civil rights and increase racial profiling of Latinas/os, many aggressively “presumed” undocumented.²⁰

The ad hoc anti-terrorist rhetoric, moreover, is additionally linked to yet other groups. In addition to profiling Latinas/os, law enforcement officers are also stereotyping and profiling individuals of Middle-Eastern background and descent. The host of negative externalities placed upon Arabs, Muslims, and South Asians has increased since the inexpressible disaster of September 11. As the first author, Ming Hsu Chen, asserts, immigration law provides a legal framework currently used in the war against terrorism, yet its attendant doctrine is tumultuous. In response to the previously sustained terrorist acts within its borders, the United States is promulgating additional legislation and harmful policies that are nonetheless structuring an incoherent “anti-terrorist” regime.

Ming Hsu Chen further warns that recent domestic events, ranging from the Fort Hood shootings to the attempted bombing of a Northwest Airlines jet, ensure even greater incidents of discrimination and profiling against Arabs, Muslims, and South Asians. In “*Alienated: A Reworking of the Racialization Thesis*,” Chen argues that increased discrimination against Arabs, Muslims, and South Asians should not be analyzed under a racialization theory.²¹ The essay contributes to our understanding of the process of stereotyping groups that are frequently excluded from legal studies. As Chen warns, the United States government’s heightened security measures portend of even greater scapegoating of Arabs, Muslims, and South Asians. Chen asserts that post-September 11 legal restrictions that increasingly target those presumed to be terrorists should be examined through a prism of alienation.²² This thesis challenges racialization doctrines that are tethered to immigration law and its inherent limitations. Specifically, immigration law’s creation of “insiders” generates harmful categories of “outsiders.”²³ In turn, this distinction promotes stereotyping

19. See *United States v. State of Arizona*, 703 F. Supp. 2d 980 (2010) (granting a preliminary injunction barring implementation of the Support Our Law Enforcement and Safe Neighborhoods Act).

20. See, e.g., Anthony E. Mucchetti, *Driving While Brown: A Proposal for Ending Racial Profiling in Emerging Latino Communities*, 8 HARV. LATINO L. REV. 1, 4, 25 (2005) (arguing that new federal laws should be enacted to address the frequent racial profiling of Latinas and Latinos).

21. Chen, *supra* note 15, at 412 (studying the backlash against Muslims from a national origin, rather than a racial, perspective and suggesting that current attempts to use immigration law to cope with post-September 11 tensions should be replaced by antidiscrimination law respecting national-origin).

22. *Id.* at 430.

23. See *id.* at 431.

and the “mischaracterizing [of] suspected terrorists as noncitizens and illegal aliens”²⁴ The result is a recklessness that harms both citizens and legal aliens. Chen rejects this harmful legal template while linking her alienation thesis to anti-discrimination law and its causative connections with national origin.

Chen’s compelling and well-researched essay is precise in its analytical structure. Its fluid engagement with the jurisprudence of Asian American law describes in compelling detail how the “processes of ‘alienation’ enable the government to detain, deport, and discriminate against its citizens and legal immigrants in ways wholly inconsistent with constitutional guarantees and antidiscrimination logic.”²⁵ The author’s praxis-driven arguments extend the alienation thesis to yet other communities, including Latina/os, that have long confronted scapegoating and other punitive measures.²⁶ While not directly assessing LatCrit Theory, this well-grounded essay directly reaches across the law’s narrow theoretical constraints in homeland security approaches. It opens a door that could promote alternatives to the war on terror without compromising the legal protections of individuals perceived as “outsiders” and stereotyped as “terrorists.” Chen thus cogently underscores that present governmental approaches to complex struggles sacrifice the values the nation once enjoyed.

LatCrit theorists have long challenged the absence of formal equality for marginalized communities.²⁷ As illustrated in the following two essays by Professor Darmer and Richael Faithful, many individuals and communities are not afforded the privilege of equal protection. Without contemplation of the issues that intersect with race, class, and other identifiers, opportunities for sought-after inclusiveness fail to emerge. In “*Immutability’ and Stigma: Towards a More Progressive Equal Protection Rights Discourse*,” Professor M. Katherine Baird Darmer opens the door to the added perplexities that occur when equal protection law fails a community. As a bonus, she offers alternative structures for contemplating the jurisprudence of outsider standing.²⁸

Currently, legal formalism denies the lesbian, gay, bisexual, and

24. *Id.* at 413.

25. *Id.*

26. *See id.* at 430.

27. *See, e.g.,* Symposium, *Class in LatCrit: Theory and Praxis in a World of Economic Inequality*, 78 DENV. U. L. REV. 467 (2001) (discussing the need to reexamine current laws and policies to determine their effect on Latina/os and other subordinated communities).

28. *See* M. Katherine Baird Darmer, “*Immutability’ and Stigma: Towards a More Progressive Equal Protection Rights Discourse*,” 18 AM. U. J. GENDER SOC. POL’Y & L. 439 (2010).

transgender (“LGBT”) communities equal treatment and inclusiveness. Although some states now afford marriage rights to same sex couples, the Federal Defense of Marriage Act presents conflicts and harmful mixed messages.²⁹ Additionally the damage to the LGBT community stems from their discriminatory treatment in the employment setting. Constitutional law scholars also recognize that the equal protection template lack precise and consistent definitions and applications.³⁰ In pursuing equality for LGBT communities, the author astutely traces the jurisprudence of equal protection and due process along with its attendant limitations.

Professor Darmer’s significant essay demonstrates the wavering and incomprehensive case law interpretations that prevent inclusiveness for lesbian, gay, bisexual, and transgender people. Darmer also supplies the reader with varying judicial interpretations of what qualifies as formal equality, illustrating a conflicting template for LGBT communities. She questions the legal formalistic rules that require a suspect class categorization and exclude certain populations from the equal protection framework. For example, she asserts that immutability, *inter alia*, is “analytically” troublesome, stigmatizes aggrieved individuals, and is “loaded with heteronormative assumptions.”³¹ This essay nonetheless argues that equal protection doctrine “offers the strongest possibilities for securing meaningful rights for the members of the LGBT community.” Professor Darmer adds to a growing body of scholarship that rejects equal protection law’s requisite finding of immutable characteristics.³² She explains that this requisite is unnecessary for identifying a suspect classification, arguing that equal protection law’s “other prongs” should be extended to aggrieved individuals.

Discussing this theory in the context of constitutional analysis of key United States Supreme Court decisions and subsequent rational basis review under the Equal Protection and Due Process Clauses, Darmer challenges harmful rulings affecting LGBT individuals. The essay addresses the limitations of case law that preclude developing “robust protections for LGBT” individuals.³³ It reveals how law can structurally harm a core group of the nation’s constituents. Responding to LatCrit

29. See Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (defining marriage for the purposes of federal law not to include same-sex unions).

30. See, e.g., DONALD E. LIVELY ET AL., CONSTITUTIONAL LAW: CASES, HISTORY, AND DIALOGUES 631 (2d ed. 2000) (explaining that equal protection can be defined as either the right to an opportunity or the right to be treated with the same respect as another and that there are different analyses to determine who is “similarly situated”).

31. Darmer, *supra* note 28, at 453.

32. See, e.g., Gilreath, *supra* note 11 (discussing how sexual orientation is not given Equal Protection status in the United States).

33. Darmer, *supra* note 28, at 442.

Theory's fundamental thrust for inclusiveness of all marginalized communities, this essay contributes to the Theory's foundational base and investigations. It reveals the disparate equal protection law structures and offers the promise of transformation for communities confronting conflicting applications of legal formalism.

The inherent spatial limitations of LatCrit Symposium XIV proceedings hindered fuller development of Darmer's thesis. A broader jurisprudential framework in a subsequent essay could provide additional context on the harm the affected communities face. Although the author acknowledges that immutability is not consistently recognized, an extension of her thesis could help shape the parameters of yet another subsequent article. Many LGBT communities, both domestically and internationally, face injuries on the basis of outdated rationales that should have remained in the dark ages. A subsequent essay would immeasurably enhance the plight of the overshadowed communities confronting a realm of legal harm from imprecise equal protection templates.

Rachel Faithful's essay brings forth yet another critical concern of equality formulas that directly fail the evolving conception of gender. The framework of her analysis draws from the "New Ideas in Sexuality and Gender Law" Conference workshop in which participants asked: "what is gender and how is the current legal regime responsive to gender?" Accordingly, Faithful's essay, *"(Law) Breaking Gender: In Search of Transformative Gender Law,"* responds with full force to the LatCrit Conference "Outsiders Inside" theme.³⁴

Against this backdrop the author advances knowledge on the slowly evolving field of "transformative gender law." Of equal importance, the author advances critical theory by offering a series of questions. Specifically, Faithful asserts that traditional anti-discrimination law is non-responsive in normalizing equality for outsider groups.³⁵ In rejecting the "current legal regime" response to gender base discrimination, the author observes "formal equality" law has "become incoherent."³⁶ In contrast, she advocates for a proactive construct to ensure "justice in a new civil rights era."³⁷

Faithful's engaging essay defines the term "gender outlaws" as "individuals who break social expectations about how to exist as a man or a woman."³⁸ The "tight tension . . . between permissible and impermissible

34. Richael Faithful, *(Law) Breaking Gender: In Search of Transformative Gender Law*, 18 AM. U. J. GENDER SOC. POL'Y & L. 455 (2010).

35. *See id.* at 460.

36. *Id.* at 456.

37. *Id.*

38. *Id.*

deviation” from artificial and social constructions causes scholars to analogize gender to “performance.”³⁹ She observes that performance theory “explains gender as the expression of a set of assigned characteristics, designated feminine or masculine, which define ‘female’ or ‘male’ performance.”⁴⁰ As Faithful asserts, “Some individuals, however, refuse their assigned roles or go off-script” beyond the norms assigned to male/female designations.⁴¹ Employing the term “gender variant people,” she provides necessary details of a community of “individuals who make gender non-conforming choices that affect their way of being.”⁴² This template, as the author illustrates, shows the law shaping and defining a legal limbo for the affected communities.

Advancing her observations, Faithful asks: (a) “how do we understand dynamic gender performance;” (b) “how do we address ethical concerns;” and (c) “how do we begin to shape the law” to fully respond to such complexities?⁴³ These questions guide her essay in compelling terms, beginning with a substantive analysis of the limitations of formal equality models. Yet Faithful also challenges the strategy of activists who buy into legal equality formalism.⁴⁴ This strategy derives in part from the extent that gender is traditionally tethered to an immutable characteristic. This gender approach to equality breaks down in protecting variant gender expression.⁴⁵ Ultimately, this tension leaves gender variant people on the outside of traditional legal analysis.

Underscoring her argument, Faithful addresses each of these three questions with substantive evidence, beginning with gender regulation. The excessiveness of gender regulation is, as she asserts, “tantamount to criminalization” and exposes the “limitations of identity-based protections.”⁴⁶ The heavy-handed policing approach to expression-based individuals causes many to commit “survival crimes” as a result of the poverty they witness.⁴⁷ This process in turn creates a “punishment paradox” with how gender variance is ignored or, at times, muted in the law.⁴⁸ The thrust of this section is to underscore how “non-existent people

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 455 n.1.

43. *Id.* at 457.

44. *Id.* at 465.

45. *Id.* at 468.

46. *Id.* at 461.

47. *See id.* at 461 n.27.

48. *Id.* at 463.

experience criminalization.”⁴⁹

Faithful asserts that many scholars have “abrogated their ethical imperative to evaluate fully the impact of [] proposals on marginalized gender outlaws.”⁵⁰ Drawing on scholarly contributions from outside the legal venue, she rejects prevailing anti-discrimination law as unresponsive to legally injured individuals. The author furthermore raises concern with critical scholars who employ incisive gender regulation critiques, yet condemn gender variant clients.⁵¹ Against this framework she lays out three critical deficiencies of anti-discrimination law that range from: (a) being founded upon narrow categories; (b) being untenable; and (c) remaining “inherently dangerous.” Adding to the work of scholarly investigations on marginalized communities leads the author to underscore the need to change cultural norms around gender.

Faithful provides valuable insights into outsiders who face peril within longstanding, formalistic approaches to anti-discrimination law. The author’s baseline rejects prevailing law that is tethered to gender discrimination law and has achieved a measure of justice for innumerable groups. This approach reveals an awkward tension between critical legal theory and the positivist legal theories that commonly dominate other discriminatory frameworks.

This essay holds our attention by demonstrating in concrete detail the tenacious gap where and when harm targets gender outlaws. Accordingly, in underscoring a community that has yet to find inclusiveness, the essay falls forcefully within the jurisprudence of LatCrit theory. Yet in rejecting longstanding law that has benefited others, the essay raises a significant question as to whether “gender outlaws” can also be of a particular and protected class that would allow a measure of protection. While not providing the sought after remedy, the article could open beneficial trajectories for the affected class. In sum, the essay’s value is in showing another generation of themes and issues that require our collective vigilance. Leaning on and sharing what others have tried to build with similar concerns and constraints could create innovative jurisprudential spaces where, sadly, the force of law bears heavily on marginalized and distressed communities.

Faithful’s essay obligates additional jurisprudential scholarship, as it is unacceptable in a nation that promotes democracy to restrain the liberty of the individuals highlighted. Perhaps a follow-up article could offer attention to the contradictions of normative approaches with yet other

49. *Id.* at 464.

50. *Id.*

51. *Id.*

jurisprudential theories that would underscore the innovative arguments this essay presents. For example, the common law has been analyzed under a legal realist perspective. One question that should be asked is whether a body of case law exists that has provided legal remedies and thus assurances to the affected classes? The essay moreover would benefit not only in citing to the jurisprudence of LatCrit theory, but also in recognizing the work of LatCrit authors who seek transformation for marginalized groups.

Professor Ernesto Hernandez-Lopez's essay addresses the plight of "outsiders" currently held by the United States in a questionable leasing arrangement in the sovereignty of the nation of Cuba. Sovereignty denotes supreme self-rule, but here this notion is in tension with the use of Cuban soil by the United States to hold "prisoners." Hernandez-Lopez's essay studies the problem from within the contextual framework of American Imperialism. The essay reveals how racial hierarchies are employed to justify the continuation of the United States' colonization of another sovereign. It further tackles how racial hierarchies are used to justify the imprisonment of individuals on land not held in fee simple ownership.

In much appreciated detail, Professor Hernandez-Lopez's essay, "*Guantánamo Outside and Inside the U.S.: Why is a Base a Legal Anomaly?*" brings to this Cluster a substantive analysis of the prisoners within Guantánamo Bay, Cuba.⁵² The unequal relationship between Cuba and the United States expedited the United States' ability to build and maintain an "insider empire" within the geographical borders of another country. In essence, Professor Hernandez-Lopez details the full scope of American imperialism on the prisoners held inside of Guantánamo. Incorporating the "Outsiders Inside" theme of this year's LatCrit, the author lays out a disturbing number of facts that underscore a "legal black hole."⁵³ This innovative article brings to the forum of law a much needed discussion and engagement on the anomaly of a U.S. naval military base in Guantánamo. At its core the author highlights the extent to which the naval station is simultaneously outside and inside American law.⁵⁴ The author breaks down and illustrates how the United States fundamentally needs Guantánamo to perpetuate its continued colonialism of Cuba and the region.

The facts driving the essay's investigation center around a lease signed with Cuba for a tract of land specifically for the use of the United States. The 1903 lease, however, is structurally deficient to Cuba's detriment. The

52. Ernesto Hernandez-Lopez, *Guantánamo Outside and Inside the U.S: Why is a Base a Legal Anomaly?*, 18 AM. U. J. GENDER SOC. POL'Y & L. 471 (2010).

53. *Id.* at 472.

54. *See id.* at 473.

signatories of the lease signed the document without determining an end date of occupation, and further, the lease failed to define the purpose of Guantánamo.⁵⁵ The context surrounding the lease shows that this “understanding” surfaced during the time in which the United States’ empire building quest was bearing fruit.⁵⁶ For example, United States troops arrived on Guantánamo in 1898—following the conquest of the former Spanish territories.⁵⁷

The author’s well-researched history of the United States’ presence on Cuban soil underscores the Conference outsider/insider themes. Specifically, the author illustrates how the naval base houses Cubans, Haitians, and “suspected terrorists” *inside* the physical jurisdiction of the United States as a result of the defective arrangement. Detainees, however, remain “*outside* rights protections in American and international law.”⁵⁸ Aside from the detainees housed in Guantánamo, there are other groups subjected to American imperialism that nevertheless, as the author asserts, receive very little attention. For example, Professor Hernandez-Lopez introduces the Uighur and their continued imprisonment in Guantánamo. The Uighurs are “Turkic Muslims from China” and not “enemy combatants.”⁵⁹ Yet the Uighurs have not been returned to China, because they could face “torture or human rights abuse.”⁶⁰ So far diplomatic efforts to release the Uighur population have proven unsuccessful.⁶¹

In a baffling series of legal maneuvers that began with a judicial order to release the Uighurs, subsequent litigation to date has failed to secure their release into the United States.⁶² The status of the Uighurs as outsiders inside the American empire offers a glimpse of possible opportunities for change that could occur under the current administrative regime. This thoughtful essay provides much appreciated insight from a wealth of authorities including the scholarship and jurisprudence of LatCrit. It shows the inherent nature of American imperialism as one that structurally and forcefully changes the societal norms of another nation for its own gains. In order to provide a measure of change within the framework of slow-moving legal principles, the essay shows how colonialism is not limited to past historical studies but continues with full force in the present.⁶³ Much

55. *Id.* at 494-97.

56. *Id.*

57. *Id.* at 495.

58. *Id.* at 500.

59. *Id.* at 473.

60. *Id.*

61. *Id.*

62. *Id.*

63. *See id.* at 476; *see also* Tayyab Mahmud, *Colonialism Inquiry and Modern Construction of Race: A Preliminary Inquiry*, 53 U. MIAMI L. REV. 1219 (1999)

can be accomplished by re-directing reified mine fields of the prevailing legal order. Through rigorous research, the author illustrates how opposing harms can both widen and close gaps between what is possible and what is achievable.⁶⁴ The essay's value, however, is in how it illustrates that much terrain has to be traversed before any form of movement theory is facilitated within the legal framework of what the current administration inherited from the previous administration.

Discussion of landlord-tenancies involving two nations and contrasting these with the U.S. approach to Guantánamo would benefit from yet another article. The article might address how this strange tenancy has affected Cuban society and culture. It could also attempt to re-examine the rationale of the United States that its presence in Guantánamo was that Cuba was not "prepared" to self-govern.⁶⁵ Distinguishing the political changes spawned after the United States "forcibly" entered this arrangement also invites additional inquiry; for example, what happened during those early years when the Platt Amendment permitted changes within Cuba's own constitution? What do the Cubans of today have to say about this unequal and pervasive influence on their island?

The author's discussion of the Platt Amendment and the 1902 Reciprocity Treaty urgently underscores the need for follow up treatment to examine the pervasiveness of American imperialism within the realm of a landlord-tenant relationship. While falling outside the scope of this essay, an exploration of United States intrusiveness in other countries may be useful in construing the Cuban-United States relationship. Imperialism has long enabled the dominance of the United States and consequently, a follow up investigation on how a leasehold has impacted Cubans' socioeconomic status could produce a viable argument to abrogate this level of intrusion.

This next essay addresses the application of mathematics to the study of law. Presenting some fascinating mathematical models, attorney Orlando I. Martínez-García, in "*The Person in Law, The Number in Math: Improved Analysis of the Subject as Foundation for a Nouveau Regime*," argues for replacing the "definitions of natural and artificial persons."⁶⁶ Martínez-García calls for "importing" the numerical system into legal analysis.⁶⁷ Thus, numbers would be employed to define the natural and artificial

(discussing how the effects of colonialism are still present in the modern notions of citizenship and sovereignty).

64. See generally Hernandez-Lopez, *supra* note 52.

65. *Id.* at 493.

66. Orlando I. Martínez-García, *The Person in Law, The Number in Math: Improved Analysis of the Subject as Foundation for a Nouveau Regime*, 18 AM. U. J. GENDER SOC. POL'Y & L. 503 (2010).

67. *Id.* at 541.

conceptions of the person in law.⁶⁸

The essay is introduced as a “thought-piece” and is creative in comparing and illustrating contrasts between the proposed mathematical models and the framework of the jurisdiction of Puerto Rico. Specifically, the civil and penal codes of Puerto Rico provide conflicting definitions of a “person.”⁶⁹ The first is identified as natural and deriving from birth.⁷⁰ The artificial person, however, also includes corporations and associations (the “person in the justice system is a human being or a corporation”).⁷¹ Therefore, corporations, although not falling under the traditional definition of “person,” may also be plaintiffs and defendants in civil suits.⁷² Such firms range from individuals to businesses to governments and government officials.⁷³ Further conflicts in various codes also add a third definition of a person, the “juridical person.”⁷⁴

Martínez-García’s fundamental concern is that the criminal system “establishes a nominal distinction between criminal and civil law.”⁷⁵ This distinction “substantially affects the role of the [subject].”⁷⁶ The author emphasizes that “crimes involve wrongs against the state, and the person who brings the action is a public prosecutor rather than a private individual.”⁷⁷ Thus the state can impose “monetary penalties on criminal offenders” and can also “imprison those found guilty of crimes.”⁷⁸ In essence, the author asserts that an insider has at her disposition the resources of the state to “decide . . . when to prosecute or acquiesce in order to preserve ‘insider’ hegemony.”⁷⁹

The prevailing system as employed by “insiders” is a “diplomatic way of disguising the exercise of force and oppression against ‘outsiders’” “through the broad and ambiguous conception of the person.”⁸⁰ To counter the abuses, “ambiguities,” and “internal inconsistencies” that the above brings forth causes the author to present a mathematical model with application to the law. Several mathematical models are provided, and,

68. *Id.*

69. *Id.* at 523-30.

70. *Id.* at 523.

71. *Id.*

72. *See id.*

73. *See id.*

74. *Id.* at 524.

75. *Id.*

76. *Id.*

77. *Id.* at 524-25.

78. *Id.* at 525.

79. *Id.*

80. *Id.*

while elegant in their approach, they also generate an array of contemplations.

The essay is concise in its argument for greater consistency in how to employ numbers, as opposed to conflicting definitions and standards in defining a “person” in law. The author suggests that mathematical models emphasize the consistency that is presently lacking in Puerto Rico’s contradictory legal approaches. Certainty is a much-valued tenet in Anglo-American law and, through *res judicata* it increases reliance and facilitates markets.

The author’s stance towards creating a “*Nouveau Régime*” further illustrates how rules are employed indiscriminately while empowering those at the top through the sacrifices of those at the bottom. Moreover, the essay makes an understated plea for certainty that could derive from the elegance of mathematical models. This approach, aside from its insightful thesis, raises several questions. A mathematical model relies on a constructed thesis. That thesis, as law and economics theory reveals and as the author asserts, could bring forth artificial constructions and false equations if a model is incorrectly constructed. In many instances gains may be made by very few while proving injurious to innumerable others. While the author’s approach is innovative and brings a thoughtful inquiry to long established, harmful norms in Puerto Rican law, realized harms to vulnerable and at risk communities have the potential of expediting yet greater injury when real life experiences are reduced to “models.” The essay nonetheless broadly illustrates the unfortunate and dire consequences of legal indeterminacy.

The Sixth Amendment provides the backdrop to the next article, “*The Right to Confrontation Compromised: Monolingual Jurists Subjectively Assessing the English-Language Abilities of Spanish-Dominant Accused*” by Lupe Salinas and Janelle Martinez, which studies how individuals who speak languages other than English have witnessed a lack of due process in facing their accusers.⁸¹ The Sixth Amendment of the federal constitution is generous within its scope. It provides an accused the right to confront their accusers as well as provide witnesses with causative links to the Fifth and Fourteenth Amendments. Yet in contrast with enlightened nations that provide their constituents the ability to learn multiple languages, the United States harbors an intense animosity against foreign languages.

When litigants with limited in English proficiency and confront criminal charges, without the assistance of a capable and qualified interpreter fairness and due process deficiencies loom. Here, Salinas and Martinez lay

81. Lupe Salinas & Janelle Martinez, *The Right to Confrontation Compromised: Monolingual Jurists Subjectively Assessing the English-Language Abilities of Spanish-Dominant Accused*, 18 AM. U. J. GENDER SOC. POL’Y & L. 543 (2010).

out the historical and legal perils non-English speakers confront without competent interpreters.⁸² In conjunction with monolingual courts, a confluence of harmful influences and practices can impede the right to a fair trial. The authors underscore the importance and necessity of an interpreter for non-English speaking defendants at trial to assure the full application of the Sixth Amendment to the Constitution. As construed through case law on the Fifth and the Fourteenth Amendments, the Sixth Amendment right to confront accusations is rendered meaningless where limited English proficient defendants lack interpreters.⁸³

In compelling detail the authors emphasize the difficulties that surface for non-English speakers, with a heavy focus on Spanish speaking populations. The increasing population of Spanish speakers further mandates vigilance on the issue of Sixth Amendment application. Accordingly, the authors urge researchers to conduct empirical studies on the reality of non-English defendants and the weak application of the Federal Interpreter Act.⁸⁴ The authors compellingly discuss how a non-English speaking defendant can neither confront accusers nor provide a capable defense without the aid of competent interpreters. Unfortunately, as they assert, there is a wide disparity between legislative recognition of the right to an interpreter and judicial application of that right. Lacking uniform standards, monolingual judges have derailed the intent of such legislation. Adding to a defective judicial process are instances when courts expect defense attorneys to provide interpreter services to their clients during the course of a trial.⁸⁵ The burden on Spanish-speaking attorneys who are representing their clients is rendered more difficult and elevates the risk of defective representation. Accordingly, the authors enumerate a series of shifting and contradictory judicial errors where courts refused to acknowledge or substantively apply the right to an interpreter.

The authors' invaluable analysis of case law deficiencies spans a realm of circumstances where defendants are materially harmed because courts refuse to adhere to legislation regarding interpreters. As the authors explain, there are nineteen Spanish dialects.⁸⁶ Therefore, depending on whether an attorney is from the same region as the person who lacks fluency in English, that individual may not be able to confront her accusers with full knowledge of the charges. Additionally, the absence of clearly articulated judicial standards has, in turn, manifested into inaccurate and unjust judicial rulings.

82. *See generally id.*

83. *See id.* at 554.

84. *See id.* at 545.

85. *See id.* at 549.

86. *See id.* at 558.

Language is closely linked with identity and, as a result, language has received extensive LatCrit scholarly attention.⁸⁷ This essay illustrates that greater attention must be placed on language barriers as they apply to all affected populations. This emphasis is paramount to the field of linguistic study if LatCrit theory is to expand its jurisprudential and scholarship base.

III. CONCLUSION

Professor Calmore once asserted that “it is important to develop, quite conscientiously, a progressive agenda that makes social justice the center of our work.”⁸⁸ This Cluster reveals the law’s role as a culprit in constructing harmful legal situations for various communities, and in response to identifying such problems, these essays present social justice models and possibilities of progressive lawyering. They accomplish a “progressive agenda” and thereby create inroads and possibilities to transform the rigidity of stale laws that fail democratic legal systems.⁸⁹ While not all essays referenced the various jurisprudential intersections that could promote even greater praxis, all add to LatCrit’s theoretical aim and successfully steer us toward newer visions and capacities within the reach of law.⁹⁰ This process is crucial, not only in drawing attention to legally isolated communities, but also in advancing the LatCrit Project.

87. See, e.g., Bender, *supra* note 9, at 146.

88. John O. Calmore, *Social Justice Advocacy in the Third Dimension: Addressing the Problem of “Preservation-Through-Transformation,”* 16 FLA. J. INT’L L. 615, 616 (2004).

89. See Ediberto Román, *Afterword: LatCrit VI, Outsider Jurisprudence and Looking Beyond Imagined Borders*, 55 FLA. L. REV. 583, 601 (2003) (explaining how LatCrit’s current momentum is promoting a progressive agenda geared towards social justice).

90. See, e.g., *id.* at 600-01.