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# BUILDING BRIDGES — LATINAS AND LATINOS AT THE CROSSROADS: REALITIES, RHETORIC AND REPLACEMENT

by Berta Esperanza Hernández Truyol\*

*¡No me pongan en lo oscuro  
a morir como un traidor  
yo soy bueno, y como bueno  
moriré de cara al SOL!\*\**

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\* Associate Professor of Law, St. John's University School of Law; A.B. Cornell University, 1974; J.D. Albany Law School of Union University, 1978; LL.M. New York University School of Law, 1982. I would like to dedicate this article to my parents, Edelmiro and Eduvigis Truyol Hernández, who always encouraged me to reach for the stars and assured me that they were at my fingertips. Nothing I say here can convey my gratitude to Michael Olivas, Professor at University of Houston School of Law, for his constant support, now dating over a decade, and in particular for his comments on an early draft. Special thanks are also due to my colleague the Honorable Philip Roache, and to Manuel del Valle, Chief Administrative Law Judge for the New York State Division of Human Rights, for their comments on an early draft. Many thanks to Lori Iskowitz, St. John's Law '94, (self-acclaimed as the best research assistant in the world) for her indefatigable help, and *un millón de gracias* to Yolanda Ocasio, Word Processing Supervisor, and Rose Seijo, Word Processing Genius, without whom this manuscript never would have been a reality. Finally, thanks to the editorial staff at the *Columbia Human Rights Law Review* for their wonderful work and great patience. The Faculty Research Program of St. John's University School of Law provided support for this project.

This essay is my first attempt at the narrative form. Its contents are a combination of thoughts, concerns and reactions to my various experiences in the legal world over the last fifteen years. Prior to this, I never had felt comfortable enough to put these experiences on paper. Recent events allowed me to express these ideas and provided the necessary perspective to take this plunge. One event was the Southwest/Southeast People of Color Conference held in Albuquerque, New Mexico from April 29 to May 1, 1993, where I commented on an unpublished manuscript by Professor Adrienne Davis (co-authored with Trina Grillo and Stephanie Wildman), and a forthcoming article presented by Professor Margaret Montoya, *Máscaras, Trenzas y Greñas: Un/Masking the Self While Un/Braiding Personal Experience, Latina Heritage, and Legal Socialization*, 17 Harv. Women's L.J. (forthcoming 1994). Some of the ideas, thoughts and experiences presented here were first articulated at that conference. Two other events were my June 22, 1993 presentation at the Nassau County Bar Association on "Latinas/os and the Law," Berta Esperanza Hernández Truyol, Address at Nassau County Bar Association (June 22, 1993), and my September 25, 1993 presentation at the Hispanic National Bar Association Annual Meeting on "Latinas/os and Civil Rights," Berta Esperanza Hernández Truyol, Address at the Hispanic National Bar Association Annual Meeting (Sept. 25, 1993).

\*\* Poesias Completas de José Martí, ch. iv, Versos Sencillos 1891, at 141 (Ediciones Antonio Zamora ed., Buenos Aires, Brazil 1970). Author's translation:

*Las costumbres, raices y herencias que me  
hacen quien soy,  
Son colores de un arcoiris, acordes de  
un mismo son*

.....  
*Forgemos nuevos caminos, en la  
unión hay un gran poder  
Orgullosos de ser Latin[as /]os no importa  
de donde, todo podemos vencer!\*\*\**

## INTRODUCTION

Growing up I never *felt* different. This is most likely the product of my experience. I was born in Cuba, grew up in Puerto Rico — beautiful mosaics of Spanish speaking peoples of all colors and origins.<sup>1</sup> As to the possibility that somewhere, someone might consider me “different,” I was simply clueless.

Relatively recently I had a rude awakening, a shocking revelation that to many, as a latina,<sup>2</sup> I *am* different — an “outsider.”<sup>3</sup>

do not leave me in the dark  
to die as a traitor  
I am [a] good [person], and as [a] good [person]  
I shall die facing the SUN

\*\*\* Gloria Estefan & Emilio Estefan, Jr., *Hablemos la Misma Idioma [Let's Speak the Same Language]*, on *Mi Tierra [My Land]* (Epic 1993). Estefan & Estefan translation:

The customs, races and inheritances that made me who I am  
Are like the colors in a rainbow, different chords in one song

.....  
Let's forge some new paths with strength in our unity  
Proud of being Latin, it doesn't matter from where  
We can overcome anything

1. See Gerardo Marín & Barbara Van Oss Marín, *Research with Hispanic Populations* (1991) (noting that the label “Hispanic” is not universally accepted and that “‘Hispanic’ as an ethnic label is the product of a decision by the Office of Management and Budget (OMB) in 1978 to operationalize the label as ‘A person of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish culture or origin, regardless of race’”) *Id.* at 20 (citing 43 Fed. Reg. 19269 (1978)). The label “latina/o” has been proposed by social scientists as “more accurately reflecting the political, geographical, and historical links present among the various Latin American nations.” *Id.* at 21 (citations omitted).

2. As is widely known, there is ongoing discourse within the latina/o community regarding what the appropriate appellation is — the latina/o versus hispanic debate. As a latina I feel comfortable with that term as it is *me* — a woman who is a member of a particular ethnic group — all in one word. The term latino, currently the preferred label

The journey towards the recognition of my "otherness" started while attending college in upstate New York;<sup>4</sup> it is a work in progress. This transition to conscious realization has been a disquieting experience.

Inescapably, we have, and are enriched by, diverse characteristics as well as group and individual experiences. However,

for the group, presents a problem to me because it is not gender neutral. The term hispanic is troubling because it is a label imposed on the group by outsiders rather than a self-selected name. The use of the gendered "latino" would reinforce the notions of normativity that this essay rejects; using a gender neutral term like hispanic is not consonant with my goal to urge a replacement of existing false assumptions of normativity imposed linguistically by the group in power. This author's view is that latin<sup>a</sup>s/os will struggle for a while in the course of appropriating the power to decide what the "right" name ought to be. In any event, a label ought to be flexible and able to adapt to shifting socio/economic/legal/historical etc. concerns, e.g., negro to black to African-American. So, at the outset, I confess that for purposes of inclusion I will use the term latina/o. I apologize to the readers because I realize this term is cumbersome. For literature on the naming issue, e.g., the hispanic vs. latina/o debate, see Marín & Marín, *supra* note 1; David E. Hayes-Bautista, *Identifying "Hispanic" Populations: The Influence of Research Methodology Upon Public Policy*, 70 *Am. J. Pub. Health* 353, 355 (1980) (the term Hispanic is misleading and stereotypical); Alfred Yankauer, *Hispanic/Latino — What's in a Name?*, 77 *Am. J. Pub. Health* 15 (1987); *The Politics of Ethnic Construction: Hispanic, Chicano, Latino?*, 19(4) *Latin Am. Persp.* (1992) (for a comprehensive analysis and critique of the various labels; entire volume consists of articles addressing the issue of naming); see also Manuel del Valle, *National Origin and Alienage Discrimination, in Employment Discrimination Law and Litigation* (Merrick T. Rossein ed., 1993).

As part of this naming process, I also confronted what to call the "majority" group. "White" is inaccurate as it, again, is a term that excludes, e.g., latin<sup>a</sup>s/os. "Anglos" I find inaccurate as gendered and under-inclusive — it was not only the English (and those of English descent) who colonized, settled and became the "insider" group in this country; that group also included the French, German and Dutch just to name a few. So I use the term non-latina/o white (NLW) to refer to the so-called normative/majority group.

3. The terms "outsider" and "outsider jurisprudence" have been widely used by Professor Mari Matsuda. Mari J. Matsuda, *Legal Storytelling: Public Response to Racist Speech: Considering the Victim's Story*, 87 *Mich. L. Rev.* 2320, 2323-26 (1989). Professor Matsuda uses the term "outsider" to avoid the label "minority," which she believes "belies the numerical significance of the constituencies typically excluded from jurisprudential discourse." *Id.* at 2323. Outsider jurisprudence is defined as "a methodology grounded in the particulars of [the] social reality and experience [of persons of color]." *Id.* at 2324. She describes the methodology as "consciously both historical and revisionist, attempting to know history from the bottom . . . [It] rejects presentist, androcentric, Eurocentric, and false universalist descriptions of social phenomena, [and] offers a unique description of law." *Id.*

4. I must confess that this is Monday-morning quarterbacking. Although the journey started then, I did not realize that until many years later. Significantly, my college years were the first time I lived in the United States.

the underlying zero-sum game<sup>5</sup> approach to the legal significance of such characteristics and experiences results in equating diversity<sup>6</sup> — differences — with oppositionality. The traits that measure difference are universal: we all have a race, a gender, an ethnicity, a sexual orientation, a religious identity or lack thereof, a range of physical/mental abilities, a color, a class. The source of tension is the apparent need to have a “norm” (read: normal) regarding these universal traits to which everything else must be compared. In creating the norm, the labels for the universal traits become coded messages for good (the norm) and bad (the different).

Traditional legal thought — the purportedly objective, rational, neutral legal analysis — constituted the “norm,” the aspirational “neutral” (reasonable) person: a white,<sup>7</sup> formally educated, middle to

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5. Lester Thurow, *The Zero-Sum Society* (1980).

6. The word diversity can mean many things. *See, e.g.*, Sharon Elizabeth Rush, *Understanding Diversity*, 42 Fla. L. Rev. 1, 6 (1990). Professor Rush defines three different kinds of “diversity”: “facial diversity, hardship diversity, and ideological diversity. Facial diversity refers to a group that includes members who are not all of one race and gender.” *Id.* at 2. Hardship diversity

includes people whose lives are more difficult and who, as groups, generally do not share in the power structure because of various attributes or characteristics (other than being a man of color or a woman) they have that deviate from normative standards. For example, poor people, working class people, non-Christians, handicapped persons, homosexuals, the elderly, and many others outside the dominant and powerful groups in our society would fit this definition.

*Id.* at 3. In this essay diversity refers to group compositions, which would comport with Professor Rush’s definition of facial diversity but expand it to include some aspects of hardship diversity. The expanded version employed here includes ethnicity, sexual orientation, religion, class, color and ability.

7. The color characteristic raises particularly interesting questions. A student in my “Women in the Law” class captured the irony of excluding the color white from the concept of color when he asked, “So, is white colorless?” White, of course, is a color. *See, e.g.*, Webster’s *New World Dictionary* (David B. Guralnik, ed., 1977) (defining white as “1. having the color of pure snow or milk 2. of a light or pale color . . .”) (emphasis added). Nevertheless, persons classified as white are not considered “persons of color,” presumably because the latter are the “other” to the normative whites who crafted the original definitions. To be sure, this shows that what is “different” depends upon the context. For example, in Cuba or Puerto Rico the NLW would be the “other.”

It is noteworthy that there are beneficial values to using norms, such as the creation of expectations in conduct and predictability, desirable conditions in an ordered society. This essay does not eschew the use of norms, but rather rejects the ostensible

upper class, heterosexual, physically and mentally able, Judeo-Christian, Western European/Anglo male. Each trait a person has that diverges from the defined norm is a deviation. Every standard deviation from the norm<sup>8</sup> is a measure of difference — a degree of separation from the defined norm. The more different a person is, the greater the degree of perceived “otherness,”<sup>9</sup> the more of an “outsider” the person is vis à vis the normativas/os,<sup>10</sup> or vis à vis those who deviate less from the normativa/o mold. The concept of difference, of deviation from a norm, renders the norm static and engenders legal paralysis. Our system of precedent strengthens the reality and desirability of this neutral “everyperson.” It reinforces the rooted norm as the authentic mold for all comparison, as the legitimate analytical perspective.

In the last decade there has been an exciting proliferation of “outsider jurisprudence” — critical race theory<sup>11</sup> and feminist theory<sup>12</sup> as well as a rich collection of writings that focus on the particular concerns arising from the intersection of race and gender<sup>13</sup>

neutrality of the traits that have been used to construct normativity. A reconstruction of “normativity” using relevant characteristics is necessary.

8. This term is not used here in its formal statistical sense. Rather, it is used to measure the degree of an individual’s difference from the so-called norm. Each trait that differs from the “normal” is one deviation.

9. See Suzanne Oboler, *The Politics of Labeling: Latino/a Cultural Identities of Self and Others*, 19(4) *Latin Am. Persp.* 18 (1992) (discussing otherness within the latina/o population and exploring the many dimensions pursuant to which latinias/os may be viewed as the “other” in addition to the “hispanic” other: gender, class, race, place of birth (United States or foreign born), other Latin American nationalities, and language.)

10. Professor Richard Delgado coined the term “normativo.” See Symposium: *The Critique of Normativity: Reply: Moves*, 139 U. Pa. L. Rev. 1071-1075 (1991).

11. See Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 Va. L. Rev. 461 (1993).

12. See Paul M. George & Susan McGlamery, *Women and Legal Scholarship: A Bibliography*, 77 Iowa L. Rev. 87 (1991).

13. See, e.g., 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 (Professor Crenshaw explaining why black women’s experience extends beyond “only” racism or “only” sexism. She focuses on employment discrimination cases, where black women have had to choose between pursuing their claims as blacks or as women, to show the inadequacy of such a one-trait-at-a-time approach.); Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 Duke L.J. 365 (1991) (Like Professor Crenshaw, Professor Caldwell critiques the traditional court approach to race and gender as being mutually exclusive. She shows the shortcomings of the traditional approach by analyzing Rogers v. American Airlines, 527 F. Supp. 229 (S.D.N.Y. 1981), in which a black woman

— that critiques the prevalent notion of normal. These works expose the myth of neutrality, objectivity and rationality in the law. They challenge the propriety of the application of the exclusionary normative-centric model as the acceptable basis of legal analysis. In this wealth of literature, however, there appears to be a void: a critique or analysis of the law from the particular perspective of *latinas/os'* experience.<sup>14</sup>

This essay uses the narrative form to share experiences from one *latina's* perspective. The author aspires to show how *latinas/os*, a magnificently diverse group,<sup>15</sup> can be a critical factor in building the

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employee challenged the airline's policy that prohibited wearing braided hair. Using narrative to present her own experiences, Professor Caldwell urges an "intersection" analysis because only such an inclusive approach is appropriate to analyze the circumstances of a black woman as both black and female.); Adrienne Davis & Stephanie M. Wildman, *The Legacy of Doubt: Treatment of Sex and Race in the Hill-Thomas Hearings*, 65 S. Cal. L. Rev. 1367 (1992) (The authors use the Clarence Thomas Senate confirmation hearings to show societal assumptions about race and gender.).

14. To be sure, literature by *latinas/os* exists. For example, Professor Michael Olivas has written extensively on *latinas/os* and education. Moreover, one of the most prominent and prolific critical race theorists is a *latino*, Professor Richard Delgado. For examples of writings by or about *latinas/os*, see Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. Rev. 303-77 (1986); Felix Padilla, *On the Nature of Latino Ethnicity*, 65 Soc. Sci. Q. 651-64 (1984); Lourdes Miranda King, *Puertorriqueñas in the United States: The Impact of Double Discrimination*, 63 Civ. Rts. Dig. 20-27 (1974). Currently, Professor Antoinette Sedillo-Lopez is preparing an anthology of existing works: *Latinos and the Law: Latinos in the United States: History, Law and Perspective* (Antoinette Sedillo Lopez, ed., forthcoming 1994) (A working draft of the bibliography for that anthology is on file with the author.). However, not many *latina/o* law professors have employed the storytelling or narrative form or even written critical race scholarship. For example, the recently compiled bibliography of critical race work lists only seven writers with recognizably *latina/o* names, of whom six have used narrative. See Delgado & Stefancic, *supra* note 11, at 482-86 (Richard Delgado), 487 (Leslie G. Espinoza), 491-92 (Trina Grillo), 493 (Ian Haney-Lopez), 499-501 (Gerald P. Lopez), 503 (Michael A. Olivas), 510 (Gerald Torres). Of these, however, only four have specifically focused on the *latina/o* experience. These small numbers, of course, may be due to the tiny representation of *latinas/os* in law faculties in the United States. See *infra* notes 150-64 and accompanying text (discussing the presence of *latina/o* law professors in United States law schools). Moreover, as the *latina/o* experience by virtue of the diversity of the group is likely to be diverse, only when many of us reduce our experiences to writing will we be able to get a sense of its range and flavor.

15. See Marin & Marin, *supra* note 1 at 17 (noting that *latinas/os* are "not a monolithic group; there are important differences across individuals and among specific subgroups based on such characteristics as national origin, migration and generational history, religious faith, and linguistic preferences."); Marta Tienda & Vilma Ortiz, "Hispanicity" and the 1980 Census, 67 Soc. Sci. Q. 3 (1986).

bridges that can move the stubborn, static oppositionality (normative) perspective towards a "true universalist"<sup>16</sup> approach. I suggest latin<sup>as/os</sup> can do this because our diverse backgrounds have equipped us with a multiple perspective viewpoint.

In order to demonstrate how latin<sup>as/os</sup> can play a role in redefining "normal" according to the United States legal norms, it is necessary to understand who latin<sup>as/os</sup> are. To develop the groundwork for such understanding, Part I, "Realities: Who Are We?", reviews the demographics of latin<sup>as/os</sup> in the United States by focusing on statistics reflecting migration patterns — which provide the social context for the early latina/o presence in the United States — as well as education and employment data, in particular in the legal community. It starts with an overview of the legal structure, both international and domestic, that affords formal protection to individuals and groups. It continues with a brief survey of salient statistics concerning the three largest sub-groups of latin<sup>as/os</sup> in the United States: Mexicans, Puerto Ricans and Cubans. Next, it scrutinizes the latina/o presence in the legal community: law professors, law students, practitioners and judges. The Part concludes with a narrative that gives life to "who we are."

Part II, "Stumbling Blocks," reviews the typecasting that latin<sup>as/os</sup> must combat daily. A story at the outset illustrates the insidiousness of stereotyping. This Part also examines language as a source of the problem. In particular, it shows how facially neutral language has become coded with images that facilitate and perpetuate stereotyping. To be sure, no one is free from the sin of coding. A visual reality exercise, "the name game," reveals how deeply ingrained stereotypes are in everyone. Finally, to start deconstructing the code, and to demonstrate the need for a replacement perspective, the essay draws from the multi-layered latina/o experience. It considers, on the one hand, the latina/o as a presumed law-breaker in the drug

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16. See Matsuda, *supra* note 3, at 2324 (describing outsider jurisprudence as rejecting "false universalist descriptions"). Here, I use the term "true universalist approach" to describe a multiple perspective approach that asks many questions to solve problems — for example, what is the gender implication of a law/policy/rule or its application, what is the race implication? — rather than the single question; single-trait approach which courts and society use today, a reductionist and senseless approach that often leads to anomalous results. See, e.g., *Rogers v. American Airlines*, 527 F. Supp. 229 (1981) (black woman's challenge to company policy against braided hair style analyzed as a race claim or a sex claim). See generally Crenshaw, *supra* note 13 (discussing the difficulties inherent in judicial "single-axis" treatment of intersectionality); *infra*, part III.



trafficking and money laundering contexts. On the other hand, it reviews the latina/o as law enforcer as depicted in the recent *Lozano*<sup>17</sup> case. *Lozano* further illustrates the unique position of latin@s/os who often find themselves torn between two colors.<sup>18</sup>

Part III, "Replacement: Leaving Normal," presents an aspirational design for replacement of the present single-perspective system of norms and for building bridges by using a multiple perspective outlook/methodology. It suggests using the latina/o experience to build the foundation for a true universalist approach.<sup>19</sup>

### I. REALITIES: WHO ARE WE?

#### A. Legal Protections of Latin@s/os

Latin@s/os as "outsiders" are subject to differential treatment by the "majority" group. The bases for latin@s/os treatment as "others" have included surname, language (including accent), national origin,

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17. *Lozano v. Florida*, 584 So. 2d 19 (Fl. Dist. Ct. App. 1991). For a discussion see *infra* notes 252-75 and accompanying text.

18. For a discussion of the different perspective of color that latin@s/os and NLWs have, see *infra* note 54.

19. This essay will not, because it cannot, provide information as to the racial composition of latin@s/os. Notwithstanding the overwhelming preoccupation with race in this country, accurate racial data is not available for the latina/o population because the census does not compile it. Experts agree, however, that most latin@s/os are of mixed racial heritage. See, e.g., Greenfield & Kates, *Mexican Americans, Racial Discrimination and the Civil Rights Act of 1866*, 63 Cal. L. Rev. 662, 683, 700 n.197 (1975) (noting that early statutes failed to classify Mexican-Americans as non-white because "such a classification would have presented diplomatic problems with Mexico, as illustrated by the protests from the Mexican government over the classification of Mexicans as a separate race from whites in the 1930 census," and that these protests ensued because the 1930 census presumed Mexicans to be non-white unless "definitely white," and explaining that the attempt to classify Mexicans separately was based on government attempts to restrict immigration); see also Marín & Marín, *supra* note 1, at 20; Woodrow Borah, *Race and Class in Mexico*, 23 Pacific Hist. Rev. 331, 337-38 (1954); Tienda & Ortiz, *supra* note 15, at 14. But see *infra* note 59 (explaining the "whitening" notion), Cuban Info. Sys. North-South Ctr. Univ. Miami, Cuba: Datos Comparativos de la Economía y Sociedad (1908-1958) (1993) [hereinafter *Datos*] (on file with author) (providing the following categories in the racial breakdown of the population: white, black, Asian, mulatto). Because of political and social factors, including confusion about the difference between race and ethnicity, accurate racial information has never been part of the census, nor is it presently being sought from latin@s/os. Nevertheless, some latina/o respondents appear voluntarily to self-identify both in terms of race and ethnicity. See *infra* note 54.

sex, alienage, and race and color.<sup>20</sup> As outsiders, however, they also have access to legal protections against discriminatory treatment both at the international and domestic levels. This essay identifies the instruments pursuant to which latin<sup>as/os</sup>, as an identifiable "outgroup," can obtain legal protections. These instruments alone, however, are useless to effect change without a shift in perspective that focuses on, and understands, the multidimensionality of the persons whose rights they purport to protect.

In addition to the domestic laws of the United States, including the Constitution, statutes and decisional law, numerous international instruments and decisions are available to latin<sup>as/os</sup> who experience unfavorable treatment because of their ethnic, cultural, language, national origin, sex, alienage, and/or race and color characteristics. The United Nations Charter declares as its purpose, among other things, "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion . . ." <sup>21</sup> Similarly, the International Bill of Rights, comprised of the Universal Declaration of Human Rights,<sup>22</sup> the International Covenant on Civil and Political Rights,<sup>23</sup> and the International Covenant on Economic, Social and Cultural Rights,<sup>24</sup> provide for the right to non-discrimination on the bases of, *inter alia*, sex, race, color, language, national origin, birth or other status.<sup>25</sup> In addition to these international covenants, regional human rights

20. See *Datos*, *supra* note 19; del Valle, *supra* note 2; Marín & Marín, *supra* note 1 (discussing differences among latin<sup>as/os</sup>); Oboler, *supra* note 9 (exploring various dimensions of "otherness" for latin<sup>as/os</sup>); Tienda & Ortiz, *supra* note 15.

21. U.N. Charter art. 1, para. 3.

22. Universal Declaration of Human Rights, G.A. Res 217A (III), U.N. Doc. A/810, at 71 (1948) [hereinafter Declaration]; see *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (various rights enumerated in the Declaration are binding as customary international law).

23. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976; *entered into force* for U.S. Sept. 8, 1992) [hereinafter Civil Covenant]. The United States ratified this covenant in 1993.

24. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3 (1966) (*entered into force* Jan. 3, 1976) [hereinafter Economic Covenant]. The United States has not ratified this Covenant and there are no plans to submit it to Congress for its advice and consent in the near future. Conversation with Jami Borek, Deputy Legal Advisor, United States Department of State, Feb. 1994 [hereinafter Borek Conversation].

25. See Declaration, *supra* note 22, art. 2; Civil Covenant, *supra* note 23, art. 2; Economic Covenant, *supra* note 24, art. 2.

instruments also protect persons from discrimination on these grounds.<sup>26</sup> The International Convention on the Elimination of All Forms of Racial Discrimination protects universal respect, fundamental freedom and human rights for all regardless of race, color, ancestry, and national or ethnic origin.<sup>27</sup> It is also significant that the Convention on the Elimination of All Forms of Discrimination Against Women protects the human rights and fundamental freedom of women, thus ensuring the equality of women of so-called minority ethnic and racial groups and thereby ensuring latinias' rights.<sup>28</sup> These instruments provide effective protections to latinias/os based on their gender, national origin, culture, ethnicity, race, color and language.

Significantly, the United States is not the sole jurisdiction with racial, ethnic, cultural or linguistic minorities. Indeed, language discrimination, one of the grounds upon which latinias/os may be cast as "outsiders," was addressed by the international community as early as 1935, when the Permanent Court of International Justice (PCIJ) ruled on the significance of treaties entered into at the end of the First World War to protect such minorities. In its Advisory Opinion on

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26. See European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221 (*entered into force* Sept. 3, 1953) [hereinafter European Convention] (Art. 14 assures enjoyment of enumerated rights without regard to, *inter alia*, sex, race, color, language, national origin, association with a national minority, birth or other status); American Convention on Human Rights, *opened for signature* Nov. 22, 1969, O.A.S.T.S. No. 36 (*entered into force* in July 18, 1978) [hereinafter American Convention] (Art. 1 ensures rights without regard to race, color, sex, language, national origin, birth on other social condition); African Charter on Human and Peoples' Rights, *adopted* June 27, 1981, 21 I.L.M. 59 [hereinafter Banjul Charter] (Art. 2 ensures enjoyment of rights without distinction as to race, ethnic group, color, sex, language, national origin, birth or other status).

27. International Convention on Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, pmbl. art. 1, 660 U.N.T.S. 195 (*entered into force* Jan. 4, 1969), [hereinafter Race Convention]. The United States, while not yet a signatory, is about to submit this Convention to the Senate for its advice and consent. Borek Conversation, *supra* note 24.

28. Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* Dec. 18, 1979, 1249 U.N.T.S. 13 (*entry into force* Sept. 2, 1981). The United States is not yet a signatory but in the near future plans to submit this Convention to the Senate for its advice and consent. Borek Conversation, *supra* note 24. Significantly, the United Nations Charter, *supra* note 21, art. 1, the Declaration, *supra* note 22, art. 2, the Civil Covenant, *supra* note 23, art. 2, the Economic Covenant, *supra* note 24, art. 2, the European Convention, *supra* note 26, art. 14, the American Convention, *supra* note 26, art. 1, the Banjul Charter, *supra* note 26, art. 2, and the Race Convention, *supra* note 27, pmbl., all proscribe discrimination on the basis of sex.

Minority Schools in Albania,<sup>29</sup> the PCIJ concluded that protection on the basis of language was to be afforded to minorities. Similarly, the European Court of Human Rights<sup>30</sup> has held that a Belgian statute prohibiting some children from having access to French-language schools based solely upon their parents' residence violated Article 14 of the European Convention and Article 2 of the First Protocol<sup>31</sup> to that Convention. These international disputes are like the disputes that arose involving segregation in education, often language based, that Mexican-Americans suffered in the United States.<sup>32</sup> Given the commonalities and the express protections of international human rights laws of the characteristics that may result in *latinas/os*' "otherness," it appears that these agreements, in conjunction with the domestic protections discussed below, ought to be used more aggressively to ensure equal rights with the majority group.

Similar to these international protections, domestic law — both statutory and decisional — provides technical legal assurances of equality to *latinas/os* as outsiders.<sup>33</sup> For example, the Constitution

29. *Minority Schools in Albania*, 1935 P.C.I.J. (ser. A/B. 64) No. 76 (Advisory Opinion of Apr. 6). Similar arguments have been made in United States Courts. *See, e.g.*, *Lau v. Nichols*, 414 U.S. 563 (1974) (failure to provide for needs of non-English speaking students denies effective participation in education).

30. *Compare* *Belgian Linguistic Case*, 1968 Y.B. Eur. Conv. on H.R. 832 with *Meyer v. Nebraska*, 262 U.S. 390 (1923) (Nebraska law forbidding instruction in language other than English in public or private schools is invalid as deprivation of liberty without due process).

31. Protocol 1, *opened for signature* Mar. 20, 1952, 213 U.N.T.S. 262 (*entered into force* May 18, 1954). Article 14 of the European Convention provides, in full, as follows: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." European Convention, *supra* note 26, art. 14. To reach its conclusion the Court read Article 14 of the European Convention together with Article 2 of the First Protocol to the European Convention. *Belgian Linguistic Case*, 1968 Y.B. Eur. Conv. on H.R. 832. Article 2 of the protocol provides that "[n]o person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions." First Protocol to the European Convention, *supra*.

32. *See, e.g.*, *Morales v. Shannon*, 516 F.2d 411 (5th Cir. 1975) (Mexican students segregated on the basis of language); *Westminster Sch. Dist. v. Mendez*, 64 F. Supp. 554 (S.D. Cal. 1946), *aff'd*, 161 F.2d 774 (9th Cir. 1947) (same); *Gonzales v. Sheely*, 96 F. Supp. 1004 (D.C. Ariz. 1951) (same).

33. Of course *latinas/os*, like other persons, also enjoy protection of statute-based anti-discrimination laws that are status-based, such as Age Discrimination in

ensures latin<sup>as/os</sup> equal treatment under the laws.<sup>34</sup> Other laws protect latin<sup>as/os</sup> against discrimination in housing,<sup>35</sup> employment,<sup>36</sup> and education.<sup>37</sup> In fact, latin<sup>as/os</sup> can find protection under these laws on various grounds: gender, race, color and national origin.

For latin<sup>as/os</sup>, however, technical protections notwithstanding, obtaining *real* protection via the law has not always been easy. Language discrimination, for example, has presented a slippery slope for a long time — it is sometimes recognized as an illegal basis for discrimination and sometimes dismissed because it does not constitute sufficient grounds for protection.<sup>38</sup> And, although latin<sup>as/os</sup> have been

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Employment Act, 29 U.S.C. § 621-634 (1988 & Supp. IV 1992) (prohibiting discrimination based on age), The Americans with Disabilities Act of 1990, 42 U.S.C. § 12101-12213 (1988 & Supp. II 1990) (prohibiting discrimination based on disability), Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended in scattered sections of 29 U.S.C.) (prohibiting discrimination based on handicap); Equal Pay Act of 1963, 29 U.S.C. § 206 (1988 & Supp. IV 1992).

34. U.S. Const. amend. V, XIV (Equal Protection Clauses).

35. *See, e.g.*, Fair Housing Act of 1968, 42 U.S.C. §§ 3601-3631 (1988) (prohibiting discrimination in the sale or rental of housing because of race, color, religion, sex, or national origin).

36. *See, e.g.*, Equal Employment Opportunity Act, 42 U.S.C. § 2000(e) (1988 & Supp. II 1990) (prohibiting discrimination in employment on grounds of an individual's race, color, religion, sex or national origin). For a comprehensive discussion of discrimination in employment based on national origin and alienage under Title VII as well as under 42 U.S.C. § 1981 see del Valle *supra* note 2.

37. *See, e.g.* Public Education, Chapter 21 of the Health and Welfare Act, 42 U.S.C. § 2000(c) (1988 & Supp. II 1990) (prohibiting discrimination in public education on grounds of race, color, religion, sex or national origin).

38. For example, English only rules present an interesting problem when analyzed in light of the prohibition against national origin discrimination. For a discussion on language based discrimination, see del Valle, *supra* note 2; Manuel del Valle, *Developing a Language-Based National Origin Discrimination Modality*, 4 J. of Hispanic Pol'y 53 (1989-1990); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 Yale L.J. 1329 (1991) (addressing the issue of accent discrimination and suggesting that Title VII should be used to combat accent prejudice); Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 Minn. L. Rev. 269, 281 (1992) (providing a history of English only movements, both in the United States and in Britain, and analyzing and evaluating the official English only movement. The author argues that "[o]fficial English laws . . . take an ethnic trait of the dominant culture, the English language, and give that trait legal, governmental sanction, creating second-class citizenship for Americans who possess different (hence unofficial), but equally American traits. Official English laws violate principles of equal citizenship at the core of the equal protection clause."); Juan F. Perea, *Hernández v. New York: Courts, Prosecutors, And the Fear of Spanish*, 21 Hofstra L. Rev. 1 (1992) (analyzing the *Hernández* decision, where the Court allowed the preemptory exclusion of bilingual latin<sup>as/os</sup> from juries considering

afforded protection under the Civil Rights Acts of 1866<sup>39</sup> and 1871,<sup>40</sup> courts have been less than consistent in effecting this protection<sup>41</sup> and sometimes have reached anomalous results because of the non-latina/o whites' (NLWs') unease with, and misunderstanding of, race/color/ethnicity variations and combinations. For example, a black Cuban's claim under § 1981 was held to state a race-based claim<sup>42</sup> while a white Cuban's claim under the same section was dismissed as not racially based.<sup>43</sup>

To be sure, such inconsistencies may be due to the NLWs' discomfort with and misconception of the variations and combinations of race, color and ethnicity that one individual can embody. The NLW society's notion of race is based on a black-white dichotomy. Thus, anything falling outside the duality is not clearly understood or, rather, wholly misunderstood. Consequently, the instinctive reaction is to make others fit into the "neat" black-white framework. The results are confused, like trying to fit the proverbial square pegs in round holes.

An early case challenging the systematic exclusion of persons of Mexican descent from juries as violative of the constitutional guarantee of equal protection provides a good illustration of this

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Spanish-language testimony. The author argues that such peremptory exclusion is not "race-neutral," considers some of the broader social harms created by *Hernández*, and evaluates several proposed solutions to the problem posed in *Hernández*.)

Finally in 1992, the EEOC promulgated National Origin Guidelines concerning "Speak-English-only rules," 29 C.F.R. § 1606.7 (1992), which provide in part, that because an English-only rule "disadvantages an individual's employment opportunities on the basis of national origin . . . [and] may also create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment . . . the Commission will presume that such a rule violates Title VII and will closely scrutinize it." *Id.* The employer, however, is allowed the business necessity defense.

39. 42 U.S.C. § 1981 (1988) (prohibiting discrimination on the basis of race).

40. 42 U.S.C. § 1983 (1988) (prohibiting deprivation of rights, privileges and immunities under color of law).

41. See Greenfield & Kates, *supra* note 19, at 670 n.36 (noting that "some factors indicate that Mexican-Americans might be considered 'white' for purposes of section 1981 and 1982.")

42. *O'Loughlin v. Procon, Inc.*, 627 F. Supp. 675 (E.D. Tex. 1986), *aff'd without op.*, 808 F.2d 54 (5th Cir. 1986).

43. *Mouriz v. Avondale Shipyards, Inc.*, 428 F. Supp. 1025 (1977). *But see* *Cubas v. Rapid Am. Corp.*, 420 F. Supp. 633 (E.D. Pa. 1976) (Cuban plaintiff alleged that Cubans could be considered a non-white racial group and court concluded that it could not rule out that discrimination against Cuban-American was racially based).

confusion. In *Hernández v. Texas*<sup>44</sup> the Court found that the petitioner met the burden of the group discrimination claim by establishing that persons of Mexican descent were a separate class from "whites."<sup>45</sup> Significantly, although NLWs have tended to perceive persons of Mexican descent as non-white, since 1930 independent state statutes have classified Mexicans as white. This is a result of the diplomatic protests from the Mexican government concerning the 1930 census classification of persons of Mexican descent as a race separate from whites.<sup>46</sup> As school desegregation cases reflect, however, notwithstanding the technical classification of those of Mexican descent as "white," the "common understanding" is that they are not white. In fact, in reviewing education cases, courts regularly likened latinas/os' position to blacks' status in finding illegal segregation in schools.<sup>47</sup>

Many legal opinions and statutes echo the popular stereotyping, homogenizing and misunderstanding of latinas/os that this essay discusses as part of the fabric of the normative rules of NLW society. Ironically, the bases of these biased views are the very laws that were crafted to protect out-groups. As the ensuing discussion explains, the problem lies in the perspective, the monocular point-of-view through which the adjudicatory bodies examine the issues. The problems and misunderstandings that result from analysis of complex conduct and peoples through a simplistic single-lens perspective can be solved, as this essay proposes, if we trade in the monocle for a prism that allows a multidimensional perspective that will result in an analytical framework that can accommodate the complexities of our society.

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44. 347 U.S. 475, 479 (1954).

45. See Greenfield & Kates, *supra* note 19, at 670, 671-76 (discussing legislative history of Civil Rights Act of 1866 and congressional discussions on what "race" and "color" mean), 676-80 (discussing scientific racial classifications), 683, 670 n.197 (discussing the inclusion of Mexicans as non-whites in 1930 census and their inclusion as whites after Mexican government protested the non-white designation).

46. *Id.* at 683. For a discussion of the perception of Mexicans as non-whites see *id.* at 694-710 (discussing the Congressional perspective which included references to Mexicans as "little brown peons" and as being members of a different race). For a discussion of discrimination against Mexican-Americans in education, employment, housing, and law enforcement, see *id.* at 710-27.

47. See, e.g., *Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189 (1973); *infra* note 58 (providing a description of "common" understanding test).

## B. Who We Are

## 1. Demographics of the Hispanic Population

Since the early 1800s persons of latina/o origin have been a substantial presence in the United States.<sup>48</sup> The 1980 census, however, represents the first time that a serious effort was made to improve the coverage of the latina/o population.<sup>49</sup> Social scientists consider the "most significant change" in the 1980 census the inclusion of a question that "required all households to indicate whether their

48. The United States absorbed the latina/o population of Florida in 1819 when it purchased that state. See S. Dale McLemore, *The Origins of Mexican American Subordination in Texas*, 53 Soc. Sci. Q. 656, 662 (1973). With the Treaty of Guadalupe Hidalgo of 1848, 9 Stat. 222, T.S. No. 207, Mexico recognized the loss of Texas after the Mexican-American War and, with the border shift, the treaty "created" the Mexican-American who, by virtue of being the conquered, could opt for United States citizenship. Article VIII of the treaty provided that Mexican citizens who inhabited the conquered territory and failed to declare their intention not to become United States citizens within a year of the ratification of the treaty would be deemed to have elected to become United States citizens. Thus, in 1848, by virtue of the border shift there was a substantial increase in the latina/o presence in the United States. Fifty years later, in the Treaty of Paris of 1898, 30 Stat. 1754, Spain ceded Puerto Rico to the United States after the Spanish American War. Treaty of Peace between the United States of America and the Kingdom of Spain, Dec. 10, 1898, U.S.—Spain, 30 Stat. 1754. Article IX of this treaty provided that the United States Congress would determine the political and civil rights of the peoples of Puerto Rico. In 1917, Congress made Puerto Ricans citizens of the United States by the Second Organic (Jones) Act of 1917, ch. 145, § 5, 39 Stat. 951, 953 (1917). Again, by virtue of being a victor in war, the United States increased the latina/o presence. See also *infra* notes 66-121 and accompanying text (discussing migration patterns).

49. Statistical Handbook on U.S. Hispanics 2 (Frank L. Schick & Renee Schick eds., 1991) [hereinafter *Statistical Handbook*]; see, e.g., José Hernández et al., *Census Data and the Problem of Conceptually Defining the Mexican American Population*, 53 Soc. Sci. Q. 671 (1973) (noting that prior to the 1970 census, the Bureau of the Census "relied almost exclusively on objective criteria for defining the nation's Mexican American population" and explaining that the objective criteria used, such as foreign birth or foreign parentage, Spanish language, Spanish "Heritage," and Spanish surname resulted in many problems and limitations which led the Bureau of the Census to experiment with the use of subjective criteria — self-identification — by asking "Is this person's origin or descent? followed by the following five alternatives": (1) Mexican (1969 and 1970); Mexicano or Chicano (1971 and 1972); (2) Puerto Rican; (3) Cuban; (4) Central or South American; (5) other Spanish.); Tienda & Ortiz, *supra* note 15, at 4-6 (describing changes in the 1980 census intended "to improve the coverage of the Hispanic origin population"). Social scientists attribute the attempt to improve the latina/o count to "political and statistical reasons." *Id.* at 4.



members were of Spanish/Hispanic origin or descent.”<sup>50</sup> If the response was affirmative, the households were asked specifically whether the origin was Mexican, Puerto Rican, Cuban or other.<sup>51</sup> This inquiry resulted in the largest count of people of latina/o origin in the United States: approximately 14,600,000,<sup>52</sup> comprising approximately 6.54% of the country’s population.<sup>53</sup> Demographers estimated that 97% of all persons identifying themselves as latina/o at that time were white, most likely because latinas/os’ concept of whiteness differs greatly from the NLW idea of whiteness.<sup>54</sup>

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50. Tienda & Ortiz, *supra* note 15, at 4-5; *see also* Marín & Marín *supra* note 1, at 20 (noting that until 1940 the United States government studies confused ethnicity and race and listed Mexican as a race; that until 1970 the federal government tried to study “Hispanics” separately from other ethnic groups; and the 1970 census “used several definitions for the ‘Spanish heritage population.’ In the southwestern states, those individuals who were Spanish-surnamed or who spoke Spanish were considered ‘Hispanics.’ Puerto Rican birth or parentage was the criterion in the three mid-Atlantic states while only Spanish language fluency was used in the remaining states.”) (citing U.S. Bureau of the Census, 1929).

51. Tienda & Ortiz, *supra* note 15, at 5.

52. *Id.* at 5 (citing U.S. Bureau of the Census, 1982); *see also* Statistical Handbook, *supra* note 49, at 6. However, some estimate under-counting of the latina/o population by as much as 7% in the 1980 census. *Id.* at 1.

53. Statistical Record of Hispanic Americans 137 (Marlita A. Reddy ed., 1993) 137 [hereinafter Hispanic Record]; Marín & Marín, *supra* note 1, at 3 (giving the figure as 6.5%).

54. Marín & Marín, *supra* note 1, at 2 (noting that in the 1980 census about 3% of latinas/os identified themselves as being black); Statistical Handbook, *supra* note 49, at 2 (estimating that 95% of persons identifying themselves as latina/o are white. No basis for this estimate is provided). These figures are interesting given that “[a]s a matter of fact most latinas/os are racially mixed, including combinations of European White, African Black, and American Indian.” Marín & Marín, *supra* note 1, at 2. Thus it is very likely that *la comunidad latina* is not 95% or 97% “white” by NLW standards. *See generally* Gordon K. Lewis, Puerto Rico: Freedom and Power in the Caribbean, chs. 2, 13 (1965) (noting that compiled statistics on race, based upon NLW notions, were meaningless). As Professor Lewis has observed “whereas in the United States one drop of ‘colored’ blood designates one as a Negro, in Latin American and the Caribbean one drop of ‘white’ blood can launch an individual to social acceptance as white.” *Id.* at 283. This has resulted in what Professor Lewis calls “an amalgamative process between the races,” *id.* at 282, and might well account for the high percentage of reporting as “white” by latina/o persons in the 1980 census. In Puerto Rico, United States Census reports between 1899 and 1950 suggest the disappearance of blacks and mixed race persons from the population. *See* José Cabranes, *Citizenship and the American Empire* 98 n.475 (1979). A noted Puerto Rican anthropologist calls this process of racial self-identification (as “white”) “blanqueamiento” or whitening. Eduardo Seda Bonilla, *Requiem Por Una Cultura* 52 (1970). The reality of the latina/o notion of “white” as different from the NLW notion came to life in *Hernández v. Texas*, 347 U.S. 475 (1954). *See also* Marín & Marín,

Since this first attempt at a comprehensive count, the latina/o population in the United States has increased by 53%.<sup>55</sup> By 1991 it had grown to approximately twenty-two million, constituting about 9% of the total United States population.<sup>56</sup> At this rate of growth, it is

*supra* note 1, at 20 (noting that “[t]he confusion of ethnicity with race or national origin was prominent in the official government studies and data reports until the 1940 census when ‘Mexican’ stopped being listed as a race and Hispanics were enumerated as White.”); Tienda & Ortiz, *supra* note 15, at 14 (“Racially, the Hispanic population is predominantly white, especially if one assumes that those who wrote in Spanish as their racial category are mostly white or mestizo.”).

This Latina/o view of race can be juxtaposed to the NLW view. The social definition of race in the United States has been described as follows:

The ‘Negro race’ is defined in America by the white people. It is defined in terms of parentage. Everybody having a *known* trace of Negro blood in his veins — no matter how far back it was acquired — is classified as a Negro. No amount of white ancestry, except one hundred percent, will permit entrance to the white race . . . .

Gunnar Myrdal, *An American Dilemma* (2d ed. 1962). The case law supports this explanation of the “Anglo” view. See *Morrison v. California*, 291 U.S. 82, 85-86 (1934) (“‘white persons’ within the meaning of the statute are members of the Caucasian race, as Caucasian is defined in the understanding of the mass of men. The term excludes . . . American Indians . . . . Nor is the range of the exclusion limited to persons of the full blood . . . men are not white if the strain of colored blood in them is a half or a quarter, or, not improbably, even less, the governing test always being that of *common understanding*.”) (emphasis added).

Certainly, under these disparate concepts of whiteness held by NLWs and latinas/os, neither the majority of persons described by Tienda & Ortiz as “white” nor those described by Lewis would classify as white in the NLW sense — much less 95-97% of the latina/o population in the United States. Tienda & Ortiz, *supra* note 15, at 14; see also Borah, *supra* note 19 (noting that most persons of Mexican extraction are probably Indian); Greenfield & Kates, *supra* note 20.

It is interesting to note that early Spanish settlers’ views on race were in line with the NLW view. For example, in Mexico (New Spain) the Spanish, viewed as xenophobic based on their expulsion from Spain of Jews and Arabs, were a white minority who sought to identify “purenness of blood.” Hayes-Bautista, *supra* note 2, at 354. To achieve this end they established an “intricate racial classification system.” *Id.* Office holders had to be able to establish no “taint” of Indian, Arabic or Jewish blood and those “tainted” often were denied entry to schools and universities. Mestizos (mixture of Spanish and Indian) were particular targets of discrimination. *Id.*

55. The *Hispanic American Almanac: A Reference Work on Hispanics in the United States* 200 (Nicolas Kanellos ed., 1993) [hereinafter, *Hispanic American Almanac*].

56. *Id.* At that time the total United States population was 249 million. However, “the Census Bureau estimates that approximately 5.8% of the total Hispanic population,

predicted that the latina/o population of the United States will double in size by the year 2020.<sup>57</sup> If these prognostications are accurate, latinases/os will soon become the nation's largest ethnic group.<sup>58</sup>

Considering latinases/os' exponentially increasing presence and concomitant ability to make their voices heard, it is surprising that their potential roar remains a mere whisper. The explanation could lie, in part, in our diversity. Notwithstanding the uniform label, latinases/os speak in many different voices. In fact, although the generic term "latina/o" is used to designate a class, as is shown below, the term really classifies an "outsider" ethnic group that is far from homogeneous.<sup>59</sup> Consequently, because of the diversity within the classification, no single issue or agenda around latina(o)ness has caught fire.

A review of the make-up of the latina/o population in the United States reveals four major latina/o-origin subgroups. The subgroups are (1) Mexican, 12.6 million persons, constituting 62.6% of all latinases/os<sup>60</sup> — well over half of the latina/o population;<sup>61</sup> (2) Puerto Rican, numbering 2.5 million, or 13% of the latina/o population;<sup>62</sup> (3) Central or South American, also totalling 2.5 million, or 13% of the latina/o population;<sup>63</sup> and (4) Cuban, 1.1 million, or 5.3% of the latinases/os in the United States.<sup>64</sup> The balance of the population is

or 1.2 million people, were not counted in the 1990 census." *Id.* No explanation is provided for the estimated figure.

57. *Id.* at 201. The estimate is that in the year 2020 latinases/os in the United States will number approximately 43 million. Other estimates are even higher. For example, a 1986 estimation by the Bureau of the Census projects "that if Hispanic immigration and fertility remain relatively high with low mortality, the Hispanic population of the country by the year 2020 would reach 54.3 million." Marín & Marín, *supra* note 1, at 3. These estimates further suggest that by 2080 Hispanics could number 140.7 million. *Id.* at 4.

58. Hispanic American Almanac, *supra* note 55, at 199.

59. Latinases/os are diverse with respect to national origin, coming from 19 Spanish speaking countries in the Americas, Puerto Rico and Spain. Marín & Marín, *supra* note 1, at 4; see also Tienda & Ortiz, *supra* note 15 (noting that latinases/os are not a monolithic group).

60. Statistical Handbook, *supra* note 49, at 7. The figures are for 1989.

61. *Id.* at 1; Marín & Marín, *supra* note 1, at 4.

62. Statistical Handbook, *supra* note 49, at 7; Marín & Marín *supra* note 1, at 4.

63. Statistical Handbook, *supra* note 49, at 7. Clearly, this designation covers more than one country. Most of the Central/South American immigration is from Colombia, El Salvador, Guatemala, Honduras, Nicaragua and Peru. *Id.* However, specific country breakdowns are not available.

64. *Id.*; Marín & Marín, *supra* note 60, at 4.

classified as "other hispanic origins" — those whose origins are in Spain and those who identify themselves as "hispanic," Spanish, Spanish-American, or latina/o. This catch-all category is made up of 1.6 million, or 7.8% of the latina/o population.<sup>65</sup>

The migration history of these groups illustrates their varied roots. It promotes understanding about the diversity of latinas/os, and also the differences in their origins as they relate to the "majority" group. The following paragraphs briefly describe the circumstances surrounding these migrations — when and from where the flow came.

Prior to 1900, the number of people who migrated to the United States from Mexico was small.<sup>66</sup> In fact, the first Mexican-American presence in the United States resulted not from migration of people from Mexico to the United States, but rather from the shifting of the United States borders south — to include approximately 50% of Mexico's territory — as a result of the United States' victory in war.<sup>67</sup> The Treaty of Guadalupe Hidalgo<sup>68</sup> ended the Mexican-American War and created the Mexican-American peoples<sup>69</sup> as it "gave the 75,000 Mexicans living in what later became the states of California, Arizona, New Mexico, and Colorado . . . the option of moving south to Mexico or staying put and automatically becoming American Citizens."<sup>70</sup> Given "19th century reality, a distant federal

65. Hispanic American Almanac, *supra* note 59, at 207.

66. *Id.* at 204. Notwithstanding this fact, "[b]etween 1848 and 1940, Mexican descent individuals were the predominant and, in some areas, the only group of Hispanics in the U.S." *Id.* at 299.

67. Rodolfo Alvarez, *The Psycho-Historical and Socioeconomic Development of the Chicano Community in the United States*, 53(4) Soc. Sci. Q. 920, 924 (1973) ("By 1848 Mexico had lost approximately 50 percent of its territory . . . . With the signing of the Treaty of Guadalupe Hidalgo, the Mexican American people were created as a people: Mexican by birth, language and culture; United States citizens by the might of arms.")

68. Treaty of Peace with the Republic of Mexico, Feb. 2, 1848, U.S.-Mex., 9 Stat. 922.

69. Alvarez, *supra* note 67 at 924 (Alvarez calls this group the "creation generation"); Laura E. Gómez, *The Birth of the "Hispanic" Generation*, 19(4) Latin Am. Persps. 45, 47 (1992).

70. Gómez *supra* note 69, at 47; Article VIII of the Treaty of Guadalupe Hidalgo made Mexican residents in this newly-acquired territory United States citizens unless they took steps within a year to preserve this Mexican citizenship. It should be noted that in the war, Mexico also lost what is now Nevada, Utah and parts of Texas. Hayes-Bautista, *supra* note 2, at 354. Although the Treaty of Guadalupe Hidalgo guaranteed political and civil rights to those who inhabited the annexed territories, such guarantees were negated by state legislatures. For example, a California law, passed shortly after the discovery of gold in 1849, imposed as a foreign miners tax aimed at prohibiting

government, whether Mexican or American, probably made little difference to the residents of the region," with the consequence that very few persons in the newly annexed territory — estimated at only 2000 — opted to leave their homes and move south to the land that was still Mexico.<sup>71</sup> During the period of annexation, a Mexican-American ethnic identity probably did not exist.<sup>72</sup> However, social scientists posit that an identity emerged soon thereafter because "[f]ollowing incorporation of the Southwest into the United States in the mid-1800s there developed the experience of economic subjugation, followed by race and ethnic prejudice."<sup>73</sup>

Between 1900 and 1940, however, the numbers of Mexicans journeying to the United States began to increase and the "creation generation" gave way to the "migration generation."<sup>74</sup> Some reasons for this increase were the Mexican Revolution, poor economic conditions, and a rapid increase in the size of the Mexican population already within the United States.<sup>75</sup> Another reason for this new migration northward was the desire for higher wages associated with the need for manual labor in farms and ranches of the Southwest.<sup>76</sup> The dramatic increase of Mexicans coming north to the United States resulted in Mexican-Americans being the smaller of the Mexican-origin populations in the United States.<sup>77</sup>

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Mexicans and Chileans from owning or working in mining ventures. *Id.*

71. Gómez, *supra* note 69, at 47 (citations omitted).

72. *Id.*

73. Alvarez, *supra* note 67, at 924. Alvarez notes that "[a]ll of the factors necessary for the development of race prejudice against Mexicans, now Mexican Americans, were present after 1836 in Texas." *Id.* at 925. He lists, among the factors: the hostility engendered between fighting factions; the entrenchment of notions of racial inferiority in Texas settlers, most of whom were from the slave-holding South; and economic realities. *Id.*; see also Hayes-Bautista, *supra* note 2, at 354 (explaining that upon Mexico's independence from Spain in 1820 it abolished the racial classification system imposed by Spain; but after the United States conquest of about half of Mexico, "a new set of classifications was imposed, to continue the process of determining a person's ethnicity so that legal sanctions would be brought to bear upon a person so identified.").

74. Alvarez, *supra* note 67, at 926; Gómez, *supra* note 69, at 47.

75. Hispanic American Almanac, *supra* note 55, at 204.

76. Alvarez, *supra* note 67, at 926. Until the 1920s, the flow north was mostly through Texas. It was not until after the Second World War that the majority of Mexican immigration came through California. *Id.* at 927. For a discussion of why these immigrants should sociologically and culturally be considered migrants, see *id.* at 927-31.

77. Gómez, *supra* note 69, at 47.

Historians and sociologists saw a change in Mexican-American ethnic identity in the post-World War II through 1965 period,<sup>78</sup> with the group being labelled by a leading sociologist as the "Mexican-American" generation.<sup>79</sup> This generation, while identifying itself culturally with the United States,<sup>80</sup> lagged behind American society demographically in such areas as economics, years of education and annual income.<sup>81</sup> By the 1960s most of the Mexican-Americans were second or third generation, with a heightened consciousness about the desire to change the status of their community in the United States.<sup>82</sup> This group, the "Chicano generation," sought to fight discrimination in all areas of life.<sup>83</sup> Today, Mexicans still account for the largest number of latina/o immigrants to the United States, both legally and illegally.<sup>84</sup> The singular largest factor for the continued rate of immigration is the demand for cheap labor.<sup>85</sup> The majority of Mexican-origin latin@s settled in the Southwest, particularly in Texas, New Mexico, Colorado, Arizona, and California.<sup>86</sup>

The migrations from both Puerto Rico and Cuba, like the Mexican presence, originated from United States victories in war. As a result of the Spanish-American War, Puerto Rico and Cuba became possessions of the United States.<sup>87</sup> In 1902, Cuba achieved independence. Fifty years later, Puerto Rico obtained commonwealth status the benefits and desirability of which is still hotly debated.<sup>88</sup>

78. *Id.* at 48.

79. Alvarez, *supra* note 67, at 931; Gómez, *supra* note 69, at 48.

80. Alvarez, *supra* note 67, at 931.

81. *Id.* at 931-36. Alvarez notes that "[t]he Mexican-American Generation was far behind the black population as the black population was behind the Anglo on every measure of social achievement . . ." *Id.* at 932. Significantly, this condition remains unchanged. See *infra* notes 121-48 and accompanying text.

82. Alvarez, *supra* note 67, at 936; Gómez, *supra* note 69, at 48.

83. Alvarez, *supra* note 67, at 936-42; Gómez, *supra* note 69, at 48.

84. Statistical Handbook, *supra* note 49, at 20. "In 1988, over 40% of immigrants came from North and South America, nearly all of whom were Hispanics. Of these, more than 95,000 were Mexicans." *Id.* "At the beginning of 1989 it was estimated that 1.7-2.9 million Hispanic persons resided illegally in the U.S. The annual increase from 1989 on is projected to be 100,000-200,000 . . . Mexicans accounted for 96% of all apprehended illegal aliens." *Id.*

85. Hispanic American Almanac, *supra* note 55, at 204.

86. *Id.*; Marín & Marín, *supra* note 1, at 58.

87. Marín & Marín, *supra* note 1, at 7; Hispanic American Almanac, *supra* note 55, at 41.

88. Marín & Marín, *supra* note 1, at 7; see also José Calderón, "Hispanic" and "Latino": The Viability of Categories for Panethnic Unity, 19(4) *Latin Am. Persp.* 37, 38

The Treaty of Paris,<sup>89</sup> ratified the year after Puerto Rico's annexation, provided that Congress would define the political and civil rights of the people of the island. Congress did not make any determination until 1917. In that year, Congress made the Puerto Rican peoples United States citizens through the Second Organic Act of 1917, known as the Jones Act.<sup>90</sup> Puerto Rico's colonial status, Puerto Ricans' United States citizenship, and escalating economic relations between Puerto Rico and the United States, stimulated the first migrant wave of Puerto Ricans to the United States' mainland.<sup>91</sup> Once again, economic motives were at the root of this migration.<sup>92</sup>

The largest wave of Puerto Rican migration occurred after World War II, when the economy of Puerto Rico began to deteriorate.<sup>93</sup> At present, the flow to and from Puerto Rico has steadied, unlike the continuing influx of immigrants from Mexico.<sup>94</sup> The United States citizenship status of Puerto Ricans facilitates their movement between the island and the mainland. As a result, a large percentage Puerto Ricans return to the island.<sup>95</sup>

Like Mexican-Americans, Puerto Ricans have been the targets of ethnic and cultural attitudes of NLWs.<sup>96</sup> They encounter racial prejudice as it is defined by the United States, even though the latina/o perception of race differs.<sup>97</sup> As a noted writer has stated:

[T]oo often the Puerto Rican who regards himself at home as white rapidly discovers to his horror that the American scheme of ethnic identification classifies him as Negro; and his own fatal ambiguity in relation to the color problem

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(1992).

89. Dec. 10, 1898, U.S.—Spain, 30 Stat. 1754.

90. 39 Stat. 951 (1917). Section 5 of the Jones Act declared and deemed all citizens and natives of Puerto Rico citizens of the United States unless within six months of the effective day of the Act they opted to retain their "present political status." *Id.* at § 5.

91. Hispanic American Almanac, *supra* note 55 at 204. However, "[p]rior to 1940, Puerto Ricans didn't migrate to the United States in large numbers." *Id.*

92. For a detailed history of Puerto Rican migration, see Lewis, *supra* note 54.

93. Hispanic American Almanac, *supra* note 55, at 44.

94. *Id.* at 45. "Today, Puerto Rican immigration is not as intensive as in past years, nor does it compare to the continuing and massive immigration from Mexico. But Puerto Ricans continue the movement back and forth, and such proximity keeps the fervor of their identity alive." *Id.*

95. See Lewis, *supra* note 54, at 6.

96. *Id.* at 4.

97. See *id.* (discussing the disparate perceptions of race).

receives a new emphasis by the shame and degradation he experiences.<sup>98</sup>

Like other migrant "outsider" groups, "puertorriqueñas/os" also lag behind their NLW counterparts in social indicators of success such as education and income.<sup>99</sup>

Finally, the Cuban migration, the most recent of the latina/o migrations, was driven by factors quite different from the Mexican and Puerto Rican migrations. Although some Cuban presence in Florida and New York dates to 1870,<sup>100</sup> Cubans have come to the United States as refugees mainly to flee the socialist revolutionary regime of Fidel Castro. The reasons for the flight were politically and economically based: the first to flee were the educated, professional, and wealthy classes who had the most to lose economically from the imposition of a socialist economic regime. In this sense, the Cuban influx is unique. In addition, as refugees, their entry is radically different from that of other latinas/os. Their presence has not been subject to quotas. Particularly during the cold war years, Cubans have received substantial government assistance and preferential treatment as they have been used as part of the war against communism.<sup>101</sup>

The recent and significant Cuban influx occurred in three identifiable stages, the first being in 1959 and the latest in 1980.<sup>102</sup> This twenty year period accounted for a migration equivalent to approximately 10% of the total population of the island.<sup>103</sup>

The first large exodus from Cuba, comprising slightly over one-third of the Cuban migration, took place between 1959 and 1962 — a direct reaction to Castro's overthrow of the Fulgencio Batista dictatorship and subsequent declaration that Cuba was a socialist

98. *Id.* at 2.

99. See *supra* notes 77-95 and accompanying text (discussing the demographics of the Puerto Rican population).

100. Marín & Marín, *supra* note 1, at 9.

101. For some literature on the history of the Cuban presence see Juan Clark, *Cuba: Mito y Realidad, Testimonios de Un Pueblo [Cuba: Myth and Reality, Testimonies of a Peoples]* (1992); Andres Oppenheimer, *Castro's Final Hour* (1992); Marifeli Pérez-Stable, *The Cuban Revolution* (1993); Alejandro Portes & Alex Stepick, *City on the Edge: The Transformation of Miami* (1993); David Rieff, *The Exile: Cuba in the Heart of Miami* (1993). For a comprehensive bibliography, see Jesse J. Dossick, *Cuba, Cubans and Cuban-Americans, 1902-1991: A Bibliography* (1992).

102. See generally, Clark *supra* note 101, at xxxi-xxxvi.

103. *Id.* at xxi-xxxii.



state.<sup>104</sup> The majority of these refugees were middle or upper class, educated professionals and skilled technicians, as well as high level functionaries of the overthrown government and other dissidents.<sup>105</sup> A second wave of Cubans, comprising approximately 46% of the total Cuban migration, came to the United States between 1965 and 1973.<sup>106</sup> Although this group was more representative of a cross-section of the Cuban population in terms of class, race and education than the first wave, it too left for political reasons.

The third and the final wave of Cubans migrated to the United States in the early 1980s.<sup>107</sup> It constituted 17% of the Cuban migration.<sup>108</sup> This stage commenced when the Cubans took advantage of the withdrawal from the Peruvian embassy of the military guard that was in charge of protecting diplomatic missions. A bus-load of Cubans crashed through the gates of the embassy in Havana and over 11,000 Cubans seeking asylum entered the embassy grounds in a period of forty-eight hours.<sup>109</sup> Thereupon Castro, whose policy was to permit only very regulated emigration, declared that whomever wanted to leave could do so. Acting upon such declaration, Miami Cubans organized flotillas that, over a five month period, brought 125,000 Cubans to the United States.<sup>110</sup> This last group of Cubans, known as "Marielitos" because the flotilla converged on Mariel Harbor,<sup>111</sup> was a very different group from the first wave. Unlike the very educated, professional 1959-1962 group, the 1980 Cubans were

104. Hispanic American Almanac, *supra* note 55, at 204; Clark, *supra* note 101 at xxxii.

105. Clark, *supra* note 101, at xxxii; Hispanic American Almanac, *supra* note 55, at 204.

106. Clark, *supra* note 101, at xxxii. This wave started when Castro again allowed persons to leave the island via the Camarioca boatlift and continued with the "Freedom Flights" between Varadero and Miami aimed at reuniting families. Castro formally put an end to the Freedom Flights on April 6, 1973. *Id.*

107. Hispanic American Almanac, *supra* note 55 at 204. "Unlike the first wave, most of these immigrants were from the poorer classes and were not as welcome or as well treated." *Id.*

108. Clark, *supra* note 101, at xxxii.

109. *Id.* Two days after the rush on the Peruvian embassy the military guard was restored. *Id.*; see also Hispanic American Almanac, *supra* note 55, at 50. For a detailed account of this wave of migration see Juan Clark, *The 1980 Mariel Exodus: An Analysis and Prospect* (1981).

110. Clark, *supra* note 101, at xxxii-xxxiii. Professor Clark notes that in this period during which 125,000 persons left Cuba, approximately two million of the total population of the island of 9.5 million asked for permission to leave. *Id.*

111. Hispanic American Almanac, *supra* note 55, at 50.

from the working class. The class difference, and probably the circumstances of their departure,<sup>112</sup> resulted in the "Marielitos" not being as welcome or as well treated — either by the United States or by their first-wave compatriots — as the first migration.<sup>113</sup>

Like their Mexican and Puerto Rican counterparts, Cubans have settled in a concentrated geographic location, mostly in Florida.<sup>114</sup> Notwithstanding these initial geographic distribution patterns, all three of these latino/a groups are now spreading out from their original places of concentration.<sup>115</sup> Mexicans are moving to the Midwest, the Pacific Northwest, and recently to Florida and the East Coast;<sup>116</sup> Puerto Ricans are moving beyond New York,<sup>117</sup> and Cubans are relocating to places other than Miami.<sup>118</sup>

In addition to these three main groups of latina/o migrants, Central and South American immigrants from states such as Guatemala, Nicaragua, and Peru began entering the United States in large numbers in the 1960s and 1970s to escape social and political unrest and instability in their home countries.<sup>119</sup> Initially, these immigrants were concentrated in California and New York, but like the three major latina/o groups they too are dispersing.<sup>120</sup>

112. Some Marielitos were said to have criminal records or a history of mental illness.

113. Indeed, among the first wave refugees, the use of term Marielito to refer to the 1980 refugees is one of derision.

114. Hispanic American Almanac, *supra* note 55, at 46.

115.

The major net flows of Hispanics within the United States are from the Northeast and Midwest to Florida, Texas, and California; from New York to neighboring states in the Northeast; and from California to neighboring states in the West. Cuban Americans are becoming increasingly concentrated at somewhat higher levels in Florida, while Central and South Americans are becoming more concentrated in California and New York. People of Mexican origin are tending to disperse from the Southwest, while Puerto Ricans are moving away from their center of concentration in New York City . . . In absolute numbers, Hispanics have dispersed to a greater number of states and in wider areas within those states.

*Id.* at 335.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 299.

120. *Id.* at 335.

Regrettably, latin<sup>as/os</sup>, including second and third generations as well as new immigrants, have failed to attain the same educational achievements as their non-latina/o counterparts. Approximately 12.5% of latin<sup>as/os</sup> over the age of twenty-five have completed fewer than five years of education, as compared to 1.6% of non-latinas/os.<sup>121</sup> Despite the increasing size of latina/o populations, high school completion statistics have worsened.<sup>122</sup> Only 51.3% of latina/o adults have a high school education, as compared with 80.5% of non-latina/os.<sup>123</sup> The sub-group breakdown is: only 44% of Mexican-Americans, 56% of Puerto Ricans, and 64% of Cubans have completed four years of high school.<sup>124</sup>

The figures for higher education, not unexpectedly, are equally disappointing. Only 9.7% of latin<sup>as/os</sup> have a college education, in contrast to 27.3% of non-latinas/os.<sup>125</sup> This means that, in 1990, a mere 29% of latina/o high school graduates went on to college.<sup>126</sup> Although such figures reflect an increase over the 1985 figure of 26.1%,<sup>127</sup> it pales in comparison with the 39.4% of NLW high school graduates in 1990 who attended college (up from 34.4% in 1985);<sup>128</sup> and to the black figures which increased from 26.1% to 33% in that period.<sup>129</sup>

There are differences of scholastic achievement within the latina/o sub-groups. Mexicans have the lowest median school years completed, with 10.8.<sup>130</sup> The median school years completed for Puerto Ricans is 12.0,<sup>131</sup> and Cubans, Central/South Americans, and "other latin<sup>as/os</sup>" all have a median of 12 school years completed.<sup>132</sup>

As a result of these educational disparities, latin<sup>as/os</sup>, regardless of gender, are more likely than non-latinas/os to be

121. *Id.* at 203.

122. In fact, high school graduation rates dropped from 62.9% in 1985 to 54.5% in 1990 (compared with non-latina/o white rates of 83.6% in 1985 and 82.5% in 1990; and black rates of 75.6% and 77%). Michael Olivas, *The Condition of Latinos and the Law*, 55 *Tex. B. J.* 1183, 1183 (1992).

123. *Hispanic American Almanac*, *supra* note 65, at 203.

124. Olivas, *supra* note 122, at 1183.

125. *Hispanic American Almanac*, *supra* note 55, at 203.

126. Olivas, *supra* note 122, at 1183.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Statistical Handbook*, *supra* note 49, at 35.

131. *Id.*

132. *Id.*

employed in service, farming, and manual labor industries, and less likely to be in managerial/professional occupations.<sup>133</sup> As of 1988, 39.9% of latina/o workers were employed in white collar jobs,<sup>134</sup> 17.6% were employed in service jobs,<sup>135</sup> 5.5% in agriculture/forest jobs,<sup>136</sup> and 37.0% in blue collar jobs.<sup>137</sup> Mexicans had the lowest percentage of workers in white collar jobs (34.8%) and the highest percentage of workers in blue collar jobs (40.7%).<sup>138</sup> Cubans had the highest percentage of workers in white collar jobs (58.9%) and the lowest percentage of workers in blue collar jobs (28.5%).<sup>139</sup> Puerto Ricans fell in between, with 45.9% of workers in white collar jobs and 35.6% of workers in blue collar jobs.<sup>140</sup>

Moreover, in light of such job distribution, it is not surprising that the median family income of latinas/os is lower than that of non-latinas/os. Latinas/os have a median family income of \$20,306<sup>141</sup> while the median family income of non-latinas/os is \$32,274.<sup>142</sup> Paralleling their proportionately higher concentration in white collar jobs, Cubans are the latinas/os with the highest median income — \$27,294 as of 1987.<sup>143</sup> Also reflecting job concentration to some degree, Mexicans had a median income of \$19,968,<sup>144</sup> and Puerto Ricans had the lowest median income, at \$15,185.<sup>145</sup>

These education figures, job distribution data and income levels reflect the disadvantaged origins of a large part of the latina/o population in the United States. It also serves to explain latinas/os' inability to improve their position in United States society, which is further illustrated by their inability to attain the scholastic achievement that might assist in their advancement. The data also give context to latinas/os' consequent exclusion from the power elite that makes, enforces and interprets the law and operation of society.

133. *Id.* at 148.

134. *Id.* at 161 (table G2-1: Occupation of Hispanic Workers Ages 16 and Over; 1980 to 1988).

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 197.

142. *Id.*

143. *Id.* at 36.

144. *Id.*

145. *Id.*

With this in mind, it is understandable why latinas/os have been unable to influence change with respect to the NLW single-trait perspective in the legal context.

It is noteworthy that gender further stratifies the statistical ladder, with latinas invariably at the bottom. Latinas have a lower level of education than non-latinas and are over-represented in the least skilled jobs paying the lowest wages.<sup>146</sup> In the mid-1980s, 23% percent of latina/o families had women as heads of the household; of these, over 50% existed below the poverty line income level.<sup>147</sup> As one author has noted, "[l]atino families headed by women have the lowest income and highest poverty rate of all family types . . . ."<sup>148</sup> Thus, latinas are the faces that *look up to* what Professor Bell describes as "Faces at the Bottom of the Well."<sup>149</sup>

These data provide a general landscape of the diverse nature of latinas/os in the United States as well as an explanation for our educational and economic estrangement from NLW society. The diversity of origins and status also leads to differences in latinas/os immediate concerns. While the concerns can be class-based, the geographic dispersion and isolation of different groups also has resulted in the virtual absence of a "national leadership" that can represent the latinas/os as a "community." The latina/o political community has functioned more at a local level, with local leaders and grassroots organizations. To be sure, we are all immensely proud of Henry Cisneros, Judge Carmen Beauchamp Ciparick, Federico Pena, Ileana Ros-Lethinen, Judge Sonia Sotomayor, and Gerald Torres, to name a few of our national figures. Indeed, perhaps they represent the start of a latina/o national perspective. The information also contributes to a construction of a framework from which to review the more particularized position of latinas/os in the legal field.

## 2. Latinas/os in the Legal Field

In looking at who we are, it is pertinent to take a special look at latinas/os in the legal profession. Rules made largely by lawyers,

146. Judith A. Winston, *Mirror Mirror on the Wall: Title VII, Section 1981, and the Intersection of Race and Gender in the Civil Rights Act of 1990*, 79 Calif. L. Rev. 775, 779 n.20 (1991) (providing statistics regarding the status of latinas).

147. *Id.* at 779.

148. *Id.*

149. Derrick Bell, *Faces at the Bottom of the Well* (1992). Professor Bell uses the title of the book to reflect the status of African-Americans in United States' society.

argued by lawyers, and interpreted by lawyers, govern society. To be sure, it is "the law" that protects persons of latina/o origin against discrimination based on culture, language, race, sex, national origin, and/or color in areas such as housing, employment, and education. Yet, notwithstanding the laws on the books, the education and employment status of latinas/os is significantly below that of both their NLW and black counterparts. Therefore, it is appropriate to review latina/o representation and participation in the powerful and influential legal establishment.

a. Professors of Law

It is fitting to begin the sketch of this landscape with a look at latinas/os in the legal academy. After all, law schools are the training ground for the lawyers. Thus, it is germane to know who is training them. Of course, it follows that who is being trained is relevant as it constitutes the pool from which the practitioners and judges emerge.

When I started teaching law in 1982, there were twenty-two full time, tenure-track latina/o law professors in fifteen law schools in the entire country;<sup>150</sup> five were at the University of New Mexico (UNM).<sup>151</sup> Of the twenty-two, only two of us were women. Professor Michael Olivas, a leading latino scholar and expert on latinas/os in education, often joked that meetings of latina/o law professors always were held in Albuquerque in order to ensure that a plane crash would not dispose of 25% of the latina/o law teachers in the country.

More recent figures show improvement but, considering the general size of the latina/o population, remain surprisingly small. In the 1992-93 school year there were ninety-four latinas/os in full-time, tenure-track positions in sixty-two law schools throughout the nation — thirty-three women and sixty-one men.<sup>152</sup> Of these men and women, fifty-one are Mexican, seventeen are Puerto Rican, seventeen

150. Denise Hawkins, *Hispanic Group Issues 'Dirty Dozen' List to Influence Hiring Decisions*, *Black Issues in Legal Education*, July 1, 1993 at 13. These figures, and all others reported in this article, exclude the faculty of the three law schools in Puerto Rico.

151. *Id.*

152. Michael A. Olivas, *The Education of Latino Lawyers: An Essay on Crop Cultivation*, 14 *Chicano-Latino L. Rev.* 1901, 1914 tbl. 7 (forthcoming 1994). An unofficial count we took at the September 1993 Annual Meeting of the Hispanic National Bar Association suggests that for the first time, the number of latinas/os teaching at law schools will break (barely) the 100-mark.

are Cuban, and nine are "other latinias/os."<sup>153</sup> Three law schools have four latina/o professors each,<sup>154</sup> two schools have three latina/o professors each, twenty-five schools have two latina/o professors each, and thirty-three schools have one latina/o professor each.<sup>155</sup> The law schools that are producing these professors are a small handful. Of the ninety-four latinias/os presently in full-time law teaching, almost two-thirds come from the same nine law schools that are the traditional "feeder" schools for the majority law teachers.<sup>156</sup>

Significantly, there is no relationship between large concentrations of latinias/os in the population and latina/o representation in law faculties. For example, despite the fact that latinias/os comprise 24.3% of the population of New York City<sup>157</sup> and 12.3% of the state population,<sup>158</sup> only four law schools, all in the New York metropolitan area, have full time, tenure-track latinias/os on their law faculties: Brooklyn Law School, the City University of New York at Queens, New York Law School and St. John's University.<sup>159</sup> Moreover, New York boasts three "national" law schools: Columbia and New York University in New York City, and Cornell in Ithaca. None has a single full-time, tenure-track latina/o on the law faculty.

These 1992-93 figures represent an increase of thirteen latinias/os from the 1991-92 school year when there were a total of eighty-one latinias/os — fifty-eight men and twenty-three women<sup>160</sup> — in tenure track positions in fifty schools. These figures reveal that 125 accredited law schools, over 64% of all schools, had no full-time, tenure-track latina/o on their faculties.<sup>161</sup>

153. *Id.*

154. *Id.* The three law schools with four latina/o faculty members are University of New Mexico, University of Houston, and Texas Southern University.

155. *Id.*

156. *Id.* The 94 latina/o law professors received their Juris Doctorates from: Harvard (18), Berkeley (9), Yale (7), Georgetown (4), Minnesota (4), University of New Mexico (3), Texas (3), Utah (3), Columbia (3), 9 schools with 2 each, and 25 schools with 1 each.

157. U.S. Bureau of Census, 1990 Census.

158. *Id.*

159. Of these four, CUNY School of Law at Queens College is the only school with more than one latina/o on the law faculty.

160. Michael Olivas, *The Condition of Latinos in the Law* (March 1992) (unpublished manuscript, on file with author).

161. *Id.*; Ken Myers, *Hispanic Bar Raps 'Dirty Dozen'—Institutions Without Latinos*, Nat'l L.J., Nov. 9, 1992, at 4; Sandra Goldsmith, *HNBA's Dirty Dozen*, ABA Student Law. Mar. 1993, at 3. Of these fifty, three schools employed four; twenty-two schools had two; twenty-five schools have one. Olivas, *supra* note 160.

Having established the numbers of latin<sup>as</sup>/os in legal education, it is important to note that we are not only "qualified," but our credentials are rather outstanding. In fact, the profile of latin<sup>as</sup>/os in legal education compares very favorably to the profile of the academy as a whole with respect to criteria "normatively" deemed significant. For example, of the latina/o law professors 29% have graduate degrees (including LL.M., M.A., Ph.D.); 47% were on law review; and 26% had judicial clerkships.<sup>162</sup> On the other hand, the data gathered by the Association of American Law Schools (AALS) shows that of the non-minority candidates hired only 32% were members of law review and a mere 10.6% had advanced degrees.<sup>163</sup> These stellar credentials, however, have not resulted in a ground swell of demand.<sup>164</sup>

#### b. Law Students

Having an understanding of the composition of latin<sup>as</sup>/os in law faculties, it is germane to review latin<sup>as</sup>/os' law school enrollment figures. Given the education figures for latin<sup>as</sup>/os presented above, it is not surprising that law school enrollment figures are very disappointing, although there has been some improvement over the years.<sup>165</sup>

In the 1969-70 school year there were 144 law schools with a latina/o enrollment of 538 out of a total enrollment of 64,416.<sup>166</sup> Thus, while latin<sup>as</sup>/os comprised approximately 4.4% of the United States population,<sup>167</sup> they represented a mere .84% of its law students. In the 1975-76 school year there were 163 law schools with a total

162. Olivas, *supra* note 152, tbl. 7.

163. Leslie Espinoza, *Masks and Other Disguises: Exposing Legal Academia*, 103 Harv. L. Rev. 1878, 1882 n.21 (1990).

164. It is important to note that these statistics, while revealing, are not conclusive because they reflect the credentials of the successful candidates. Nevertheless, there is no reason to believe that the general pool of latina/o candidates lacks the necessary credentials to succeed in procuring a law teaching job.

165. The improvement is in the percentage of latin<sup>as</sup>/os in law schools. If one considers the dramatic increase in the latina/o population, however, there is no real increase.

166. Olivas, *supra* note 160, tbl. 3.

167. In 1969, there were approximately 9 million persons of Spanish origin in the United States. United States Census Bureau, *Statistical Abstract of the United States: 1971* (92d ed. 1971) Series P-20, No. 213. The total population of the United States was 202,677,000. *Id.*



enrollment of 111,047.<sup>168</sup> Of these only 1,743, or 1.57%, were latina/o.<sup>169</sup> By contrast, in 1975 latinas/os comprised approximately 5.1% of the population.<sup>170</sup> The figures for the 1980-81 year, when there were 171 law schools, were only slightly better.<sup>171</sup> The law school enrollment total was 119,501,<sup>172</sup> with latinas/os constituting 3,013 or 2.52% of the students.<sup>173</sup> This enrollment figure reflects a disproportionate under-representation of the latina/o population which at that time accounted for 6.5% of the population of the United States.<sup>174</sup>

Unfortunately, a decade later, a review of the statistics reveals that, compared to the growth of the latina/o population, latina/o enrollment in law schools has decreased. In 1990-91, with 175 law schools, the total student enrollment was 127,261.<sup>175</sup> That school year, latinas/os totalled 5,038, or 4% of all law students,<sup>176</sup> at a time when the country's latina/o population had grown to 9% of the total population.<sup>177</sup> Thus, the slight numerical increase has failed to make a dent in the gorge. Compiling these figures was a depressing, albeit sobering experience. The numbers are astounding.

### c. Practitioners and Judges

Given these figures on latina/o enrollment in law schools, the de minimis representation of latinas/os in the profession is anything but surprising. In 1980 out of the total 600,000 lawyers in the United States only 8,900 or 1.5% were latina/o.<sup>178</sup> The 1990 census figures

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168. Olivas, *supra* note 160, table 3.

169. *Id.*

170. In 1975 there were approximately 11 million persons of Spanish origin in the United States. U.S. Bureau of the Census, *Statistical Abstract of the United States: 1976*. (97th ed. 1976) Series P-20, No. 290. The total population of the United States was 215,973,000. *Id.*

171. Olivas, *supra* note 160, tbls. 2 and 3.

172. *Id.*

173. *Id.*

174. *Hispanic Record*, *supra* note 58, at 132.

175. Olivas, *supra* note 152, tbls. 2, 3.

176. *Id.*

177. *Hispanic Record*, *supra* note 58, at 132.

178. Linda E. Davila, *The Underrepresentation of Hispanic Attorneys in Corporate Law Firms*, 39 *Stan. L. Rev.* 1403, 1404 n.7 (1987).

show that while the total number of lawyers and judges had increased to 747,077,<sup>179</sup> latinas/os totalled 18,612 or 2.49%.<sup>180</sup>

The representation of latinas/os in the profession is even more disparate when one considers the latina/o presence in the large "elite" firms. For example, a 1987 survey of the 151 biggest law firms in the United States revealed that latinas/os made up less than 1% of the attorneys in those firms.<sup>181</sup> Of course, the number of latina/o partners was even more dismal.<sup>182</sup>

A 1990 report on minority partners in the 21 largest law firms in Chicago, a city with a large latina/o population, shows equally discouraging figures. The Chicago report reveals that in the period from 1987 through 1990, of the 250 new partners at those firms, only two were latina/o.<sup>183</sup> In fact, in 1989 there were only eight latinas/os among the approximately 2,000 partners in those 21 firms.<sup>184</sup>

Most recently, a 1992 National Law Journal survey of the nation's 251 biggest law firms shows that the situation for latinas/os is not improving in any noticeable manner.<sup>185</sup> The total number of lawyers in the surveyed firms included 65,429 comprised of 25,382 partners, and 36,867 associates.<sup>186</sup> Of the total number of attorneys, 17,111 or 26.2% were women, 1,311 or 2% were blacks, and 757, or barely 1.2%, were latina/o.<sup>187</sup> The figures are even more disparate at the level of partner. Of the total 25,382 partners, only 150, or barely 0.6%, were latina/o.<sup>188</sup> The silver lining, if any, is that this figure is actually double what the figure was in 1981, when latinas/os were only 0.3% of all partners surveyed.<sup>189</sup>

179. Racial and Ethnic Study of U.S. Census Bureau. Equal Employment Opportunity File, Supplemental Report, 1990 Census. Of these, 564,332 or 75.54% were male and 182,745 or 24.46% were female.

180. *Id.*

181. Davila, *supra* note 178, at 1404 n.10.

182. *Id.* at 1406.

183. David Rubenstein & Jennifer Juarez Robles, *Law Firms Still Lag in Minority Hiring*, 19 Chicago Rep. 2 (1990).

184. *Id.* at 3.

185. Claudia MacLachlan & Rita Henley Jensen, *Progress Glacial for Women, Minorities*, Nat'l L.J., Jan. 27, 1992, at 1. This survey shows that minorities now hold 2.4% of the partnerships in the 251 biggest firms. Consistent with these low figures there are still 44 firms that have no minority partners, and 61 firms that have only one. *Id.* at 31.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 32.

At the associate level, the figures do not offer much comfort. Of the 36,867 associates, only 596 or just under 1.6% are latina/o.<sup>190</sup> This is a small improvement over the 1981 statistics, which showed that latinias/os were a mere 0.6% of all associates surveyed.<sup>191</sup>

The small number of latina/o law students and latina/o lawyers, of course, also leads to a small number of latina/o judges. The figures confirm what one has come to expect, even for areas with very high latina/o concentrations. In 1980, there were a total of 27,845 judges in the United States<sup>192</sup> of whom 553, or 1.9%, were latina/o.<sup>193</sup> That year New York, one of the states that has a claim to a large latina/o population, was doing worse than the country as a whole. New York had a total of 2,259 judges<sup>194</sup> of whom 30, or 1.3%, were latina/o.<sup>195</sup>

A decade later the figures remained virtually unchanged in spite of the 53% recorded increase in the latina/o population.<sup>196</sup> In the United States, out of a total of 32,394 judges,<sup>197</sup> 1,098 or 3.3% were latina/o.<sup>198</sup> Figures for New York State were even worse considering that statewide latinias/os comprised 12.3% of the population and almost double that figure — 24.3% — in New York City.<sup>199</sup> In 1990, there were a total of 2,970 judges of whom 65, or a mere 2.1%, were latina/o,<sup>200</sup> in the federal system there were none until the 1992 appointment of Sonia Sotomayor to the Southern District of New York. Furthermore, although latinias/os comprise 13.8% of the population in the Eastern District of New York,<sup>201</sup> that district boasts no latina/o federal judges and the first latina magistrate was only recently appointed in the fall of 1993. On January 4, 1994 the Honorable Carmen Beauchamp Ciparick was sworn in to serve as the first latina/o person ever appointed to the Court of Appeals, New York's highest court.

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190. *Id.* at 31.

191. *Id.* at 32.

192. U.S. Bureau of the Census, 1980 Census.

193. *Id.*

194. *Id.*

195. *Id.*

196. *See supra* note 157 and accompanying text.

197. *See supra* note 157 and accompanying text.

198. *See supra* note 157 and accompanying text.

199. *See supra* notes 162-63 and accompanying text.

200. U.S. Census Bureau; 1990 Census.

201. *Id.*

The numbers of latin<sup>as</sup>/os in the legal profession are simply unacceptable. Yet, they reflect the societal view of the proper place for latin<sup>as</sup>/os. I remember when, as an undergraduate, I first voiced my interest in pursuing a legal career with the career placement office at my college.

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*During my senior year in college, I went to the career placement office to find out about law schools — the when, where and how to apply. Sure, my Mom is a lawyer by profession but she studied in Cuba, at the University of Havana, had never lived in the United States (mainland that is — remember I grew up in Puerto Rico), and, at the time, she was living in the Netherlands with my Dad and younger brother. I had a good sense that she could not help me with this one. So I waited to see a counselor, and asked him what I should do to apply to law schools, noting that Cornell's Law School in beautiful Myron Taylor was out because I simply was not going to submit my tropical self to another Ithaca winter. He said, "You don't want to be a lawyer, you want to be a teacher or something like that." "No," I said, "I want to go to law school, really." "No," he said, "you should think of teaching. I mean, you speak English really well and . . . well . . . you speak Spanish too, right? Think of the help you could be to your, um . . . ." "But my mom . . . ." I insisted, with words falling on un-listening ears. Finally, I gave up and left, realizing that I was not going to realize my dreams in this office. But I refused to give up.*

To this day I am not sure whether he thought law was inappropriate for me because I was a "girl" or because I was latina or if the combination was simply lethal. My best estimate is the combination, particularly because of the talk about being Spanish-speaking. All the same, I consider myself lucky because I figured out what I had to do, although perhaps not in the best or most efficient way. Nonetheless, I wonder how many of us have overtly or covertly been told "law is not your place," or "you won't be able to make it in law." And who knows how much this keeps our numbers down. Ironically enough, technically the counselor's "advice/direction" turned out to be right on the money — I am a teacher, and happily so. But somehow, I think being a law professor is not what he had in mind for me in the teaching sphere.

The minuscule numbers of latin<sup>as</sup>/os in the law profession reflect the sad fact that at all levels of education and employment, latin<sup>as</sup>/os must make dramatic improvements merely to close the gap

that exists between them and other students and workers. The figures regarding latin<sup>as/os</sup> and education and employment, and the debilitating consequences of these, namely in the absence of any significant numbers of latin<sup>as/os</sup> in the legal field, indicate that the latina/o community would do well to coalesce around education and employment issues.

However, education cuts both ways. The above data on latin<sup>as/os</sup> in the law profession, the data on the latina/o population at large, and my own experience patently show that much education needs to take place *about* latin<sup>as/os</sup>. The following section explores some myths about which latin<sup>as/os</sup> have to educate others — myths that need replacement.

### 3. The Myth of Oneness: Educating Normal

A critical factor that repeatedly is ignored by lumping persons in a generic "hispanic" category that purports to constitute latin<sup>as/os</sup> is the diversity of the latina/o population. For example, the federal forms that request information about a person's racial and ethnic identity usually provide the following options:<sup>202</sup> black (not of hispanic origin),<sup>203</sup> white (not of hispanic origin),<sup>204</sup> hispanic.<sup>205</sup> As the forms seek information in the conjunctive, implicitly recognizing that ethnic identity and racial identity are two separate, co-existing traits, it is particularly ironic that latin<sup>as/os</sup> are deprived of the opportunity to identify as ethnic, *i.e.*, latina/o, including subcategory identification such as Cuban, Mexican, Puerto Rican, *as well as to*

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202. The forms include categories other than the ones discussed in the text, such as Asian/Pacific Islander and Native American. However, this essay focuses on latin<sup>as/os</sup> and will comment on the three categories — hispanic, white (not of hispanic origin), and black (not of hispanic origin) — that expressly include or exclude latin<sup>as/os</sup>. To be sure, it is at best ignorant to suggest, as the other categories by their silence imply, that the other categories, such as Asian, cannot include latin<sup>as/os</sup>. For example, Alberto Fujimori, the president of Peru, is of Japanese origin but also classifies as latino. Moreover, the "Asian" category like the "hispanic" category, suffers from being under- and over-inclusive as it encompasses persons of many cultures and languages. While recognizing this category's shortcomings, it is beyond the scope of this article to engage in that critique although many of the observations made in this article about the diversity of latin<sup>as/os</sup> also applies to the diversity of the Asian peoples.

203. Message: "they" are not black.

204. Message: "they" are not white.

205. Message: "they" are all the same but not black and not white.

identify by race.<sup>206</sup> As multiple-layered selves we are denied part of our personhood when we have to deny part of who we are. Our experience simply cannot be sanitized to fit a mold in the creation of which we were not considered.

Two specific points are noteworthy with respect to the consequences of the existing classification scheme. First, and of critical importance, the disjunctive nature of the categories with which latinas/os are expected to identify collapses and simultaneously excises latina/o ethnicity from the black or white races and places latinas/os as separate from both. Second, such myopic categorization not only proscribes latinas/os from claiming their racial identification, be it black or white, but also, by virtue of listing only black and white as "not of hispanic origin," renders invisible latinas/os of other racial and ethnic backgrounds such as Asian, Indios, Mestizos and so on.

Certainly, the insensitivity and the under- and over-inclusiveness of any generic latina/o categorization, the invisibility in which it results, and the homogenization it engenders further the myth of a monolithic latina/o identity.<sup>207</sup> What is tragically wrong with this picture is that latinas/os, in reality, are a racially and culturally

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206. Not one source of the many reviewed in preparation of this article provided a breakdown of latinas/os by race, although some data were available regarding breakdowns by country of origin. In fact, some social scientists critiquing the label "hispanic" posit that latina/o populations reject the term because of the racial divisions within the population. See Martha E. Giménez, *U.S. Ethnic Politics: Implications for Latin Americans*, 19(4) *Latin Am. Persp.* 7, 11 (1992) ("Both in the 1980 and the 1990 census, many respondents refused to go along and wrote their nationality in the space reserved for 'Other' race."); Oboler, *supra* note 9, at 24-5, 28-30.

207. For a discussion of the homogenizing effect of the classification scheme see Oboler, *supra* note 9, at 25-28; Giménez *supra* note 206, at 10-11.

diverse group.<sup>208</sup> These experiences inform our perceptions differently. Consider who WE are.

### *Tortillas*

*I moved to Albuquerque back in the summer of '82. That is the year when I started teaching at the University of New Mexico. I had been out there to find a place to live in the spring. I fell in love with New Mexico the first time I landed there, in November 1991 when I visited the university to interview for the teaching slot. It felt like home, the familiar Spanish influence, the rice and beans, the sunlight and the bright clothing. That summer I arrived the day before the closing —*

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208. See, e.g., Calderón, *supra* note 88; Giménez, *supra* note 206; Marín & Marín, *supra* note 1. A recent study of children of immigrants by Professor Alejandro Portes of Johns Hopkins University, which included Cuban-Americans largely from Miami and Mexican-Americans largely from San Diego, shows the diversity of the subgroups. See Deborah Sontag, *A Fervent 'No' To Assimilation In New America*, N.Y. Times, June 29, 1993, at A10.

Non-latino/o groups also were interviewed: Haitian-Americans in Miami; Filipino-Americans and Vietnamese-Americans in San Diego. The discrepancy between the figures for Cuban-Americans on the one hand, and non-latino groups on the other, is attributed to the fact that in Miami latina/o immigrants are deemed to "dominate the political and business life," whereas in San Diego "anti-immigrant sentiment is considered high and power remains largely with a white elite." *Id.* The article notes that in Miami, 45% of all children experienced discrimination, which "broke down to 66% for Haitian-American children, but only 29% for the Cuban-Americans attending predominantly Cuban-American private schools." *Id.* The researchers reported that in the private Cuban schools in Miami the "concept of discrimination was so alien that students practically didn't understand the question." *Id.*

A couple of observations are noteworthy. First, the comment about the Cuban-Americans in private schools leaves one to question whether the results might have been different in public schools, which might not be predominantly Cuban-American, or, for that matter, in private schools that are not predominantly Cuban-American. It appears that being in "your own" environment creates a norm from which one does not, in fact, deviate — recall I did not know I was, or would be, considered by some to be different. Nonetheless, it should be noted that this was not the case in schools where most of the immigrant children were black. Under those circumstances students consistently viewed discrimination as pervasive. It is not clear, however, whether in these schools most of the students were black or whether only most of the immigrant children were black. This difference could be significant. Second, and even more compelling considering the premise of this article, the study apparently did not break down the responses according to race or gender (or class for that matter, although the selection of private Cuban-American schools could send a coded message). However, the pictures accompanying the article were telling, particularly considering the polarity of the Miami data: a black Haitian-American girl and an apparently white Cuban-American boy.

*late, with my dog in tow. I got into Albuquerque after 10:00 p.m. and was hungry. Starving, really. And when I am hungry I have to eat. But with being in a new place and all, and the excitement of the closing, the furniture arriving etc. I figured a light meal would do. So I went into the only place I found open and ordered a tortilla, a plain tortilla. There, I was so happy, I could even order food in Spanish. The waitress looked at me kind of funny and asked, simply, "Are you sure all you want is a tortilla?" "Yes," I said. "Plain?" she asked. "Yes," I said, "it's late." So with a shrug of the shoulders she disappeared and promptly returned and put this plate in front of me. Sitting on the plate was this flat thing, white, warm, soft. My turn to ask, "And what is this?" "Your order ma'am." And we stared at each other. I ate this thing, although I did not quite know how I was supposed to do that. I got funny looks when I went at it with fork and knife. I ate, I paid, I left — still hungry and now confused. Clarity occurred several days later when I was formally introduced to the tortilla — that Mexican tortilla anyway, one that I learned to love even plain (well, with some melted butter). But that was not the tortilla I had in mind. That first night I wanted my tortilla, a simple omelette to those of us from the Caribbean.<sup>209</sup>*

This is a simple story about complex and diverse peoples. Here we were dealing with the same word: tortilla, and the same language: Spanish. Yet our different cultures give the word different meanings. The existing approach, one that would consider us both the *same* notwithstanding our common "language" and other cultural similarities, excludes. It denies the different cultural experiences of latinas/os and falsely homogenizes by making us the "same" when we are not. It creates a generic "hispanic" that in reality does not exist. Such a single-trait perspective (and whose point-of-view is it anyway?) creates oppositional stances that do everyone a disservice by misinforming. A latina/o can be black, and no less latina/o, just as a woman can be latina/o and no less woman. Prevalent single-trait, uni-

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209. Even ordinary occurrences depict latinas/os' diversity. Early in the summer of 1993 I met Judge Reynaldo Rivera for lunch. We got together to chat about St. John's, his alma mater, Puerto Rico (we knew each other then), and the weather. We met in his chambers at the courthouse, and walked to a quaint outdoor cafe in Brooklyn Heights. One of the specials was black bean soup. Judge Rivera and I were wondering what to eat and were commenting on the soup. At this point a neighboring diner piped up and said, "La sopa de habichuelas negras esta bien buena. O bueno, la sopa de frijoles negros como dicen los Cubanos." [Translation: The black bean (habichuelas) soup is really good. Or well, the black bean (frijoles) soup as Cubans call it.]



perspective methodologies prevent the constructive bridge-building that could occur if the focus were on true universality — the fact that we all possess certain traits, although some of our “formats” have let us go through life without focusing on them, such as the “white” race/color — rather than oppositionality — where the homogenizing can create conflicts between persons who have some cultural commonalities that include regional differences. These differences should not make us adversaries. On the other hand, a multiple-perspective approach promotes understanding between/among different peoples by affording them the comfort to talk with each other armed with the knowledge that they will have different perspectives based on their life experiences. A multiple-perspective approach therefore promotes understanding instead of generating conflict. The next Part explores these issues by depicting the dangers endemic to the existing myths and presuppositions about latinás/os and the role that language plays in perpetuating the myths and in masking the realities.

## II. RHETORIC: STUMBLING BLOCKS

### A. Typecasting

Stereotyping is one of the greatest problems latinás/os must battle to debunk the myth of a monolithic latina/o.<sup>210</sup> Stereotyping puts people in boxes and creates images that result in false presumptions being accepted as incontrovertible truths. To be sure, we have seen how this problem plagues all women and men of color. Latinás/os can not escape its trap.

#### *The Meat Market*<sup>211</sup>

*I had an interview I will never forget. It was back in 1981, my first participation in the recruitment conference, back in the days when it was held in Chicago. I had been running around, up and down, a day full of thirty minute interviews scheduled back to back. My 2:00 p.m. interview<sup>212</sup> was with one of the good, progressive schools. My*

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210. For a discussion on the stigmatizing effect of labels, see Giménez, *supra* note 206, at 8-10, 12-14.

211. As many reading this essay probably know, this is the unofficial name for the annual law faculty recruitment conference.

212. This true story is set in Chicago, 1981, the first time that I attended the recruitment conference as an interviewee. I left teaching for the private practice of law

*interviewers were four, what I would then have described as older (but today would describe as middle-aged), white men in lawyer uniform: wing-tips, pin-striped suits, white shirts, red and blue striped ties, dark socks, grey hair parted to the side, and wire-rimmed glasses. I arrived at the door, wearing my costume: a camel hair suit, blouse, pumps, leather briefcase. I knocked. El Jefe<sup>213</sup> (read: dean) answered my knock. There was a pause as el Jefe and his three colleagues first looked at each other and briefly stared at me, in silence. Then they looked me up and down once, twice, three times. Silence. "Uh," said el Jefe as he proceeded to the door, "you must be at the wrong room. We are scheduled to see a Miss Ber . . . uh Ber . . . uh . . . Ber (mumble, groan) HERnandez." (Unpronounceable name indeed!) My turn. Pause. Extend hand, grip firmly. "I am Berta Esperanza Hernández," I introduced myself and proceeded to enter the interview suite and shake hands with the other three interviewers. Once everyone was seated we engaged in the usual, obligatory preliminary chit-chat. We talked law, how exactly would I teach labor law, as I recall. Some ten or fifteen minutes into the interview (which considering its beginnings was proceeding unexpectedly smoothly) el Jefe asked, "Excuse me, do you mind telling us if you are from an academic background?" Young, yes; naive, yes; I still had radar. So I pointed to their hands (each one was holding a copy of my resume), and noted that the resume fully covered my educational experience. "No, no," el Jefe said, speaking for all of them, "we mean are you from an academic (emphasis here with arched eyebrows) background?" I too can play, I thought. "I am afraid I don't understand. I went to law school at . . ." Again the question (with very arched eyebrows). Again my answer adding, "High School I attended in San Juan, Puerto Rico. St. John's Prep." Until finally el Jefe asked, "Well, er, I, what we mean, is, er, well is your father a professional?" There it was, he **said** it. "My father is a banker, my mother is a lawyer," I replied. Pause. Long Pause. Very Long Pause. "Um. Er. Well," said el Jefe, "I am afraid that with your background our Chicano students would not be able to relate to you. We are afraid they would*

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in 1987 and thus when my lights went on and I sought to return to teaching in 1990, I had the dubious distinction of being an interviewee at the conference again.

The specific time given in the story is probably not accurate; I do not recall the exact time of the interview I am describing and I have long since parted with any records that could establish it. I clearly recall that it was not my first interview, nor was it my last.

213. Translation: the boss.

*consider you elite.<sup>214</sup> Pause, again; long pause again, but this time it was mine. At which point I calmly (I think) stood up and, while shaking their startled hands and doing goodbye I said, "Well, I guess we do not have anything else to talk about then."*

I can only speculate why the four interviewers concluded, erroneously, first that I was not me; and second, that their Chicano students would be unable to relate to me or, for that matter, I to them.<sup>215</sup> However, it is plain that their conclusions, incorrect as they may have been, were driven initially by their pre-conceived image of what a latina law professor should look like (and whatever that might have been, I was not it) and were influenced by their presuppositions as to what her family should be like (and mine, obviously, was not it).<sup>216</sup> One thing was clear to me: their view depended upon coded ethnicity-gender and class assumptions. First, their image of latinas was one that did not look like me, and I hate to disappoint any who might infer I look "different," I am really rather typical looking, if a bit on the tall side: 5'8", dark hair, dark eyes, olive skin. Maybe it was my lawyer uniform that threw them off; although, I must confess, almost everyone who goes to the recruitment conference wears some variant of this uniform. Moreover, latinas/os from educated, professional families did not quite fit their image of who latinas/os are supposed to be. And perhaps because I did not fit their image on either count they decided my "difference" was that I was not Chicana. This is the tragic flaw of homogenizing and stereotyping:<sup>217</sup> somebody else's image of who we are, what our families are like, what we do and what we look like *makes* us the image. It is this imagery — gender, race, ethnic,

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214. CLICK! See, Ms Magazine, "No Comment" section.

215. I state with conviction, based on experience, that the second conclusion was erroneous. In the four years I taught at the University of New Mexico Law School, I encountered numerous Chicana/o students. Not once was either of my parents' professions cited as a communication barrier or even a source of discomfort. In fact, I cannot recall an instance when the topic came up.

216. I must add I do not know of *anyone else* who ever has been asked about their parents' education in a professional interview. Furthermore, I continue to have nagging thoughts regarding what their images were.

217. See Giménez, *supra* note 206; Oboler, *supra* note 9. For a gripping personal account of what it is like to be a "minority" law student, lawyer and law professor, see Harry T. Edwards, *Personal Reflections on Thirty Years of Legal Education for Minority Students*, Paper presented at Minority Alumni Weekend, University of Michigan Law School, (Nov. 5, 1993) (copy on file with the author).

color and class stereotyping — that falsely imprisons all of us. And I mean all. Latinas/os too. Read on . . . .

### *Counting*

*At a meeting, latina/o colleagues were trying to put together a list of who we were. Because the "final" list was so thin, we started combing available records to see if there was someone we missed. I looked at the list carefully and noticed a name missing. The name skipped was someone I knew rather well, we had been in undergraduate school together. In fact our parents had known each other from their university days. So I volunteered, "We failed to include Maria."<sup>218</sup> The chair of that meeting recognized but failed immediately to place the name. So the chair took a moment to collect her/his thoughts and said, "yes, I know who that is. But she doesn't count, she's Cuban." Not knowing whether to laugh or cry I sat in shocked silence and thought "And ain't I a Cuban?"<sup>219</sup>*

Again, as with the interviewers, a Cuban was deemed not to be one of "us," even among a group of latinias/os. This, of course, is the result of the diversity present even among latinias/os. For example, sometimes the first wave of Cuban refugees, because of their education and professional status, are viewed more like the majority, the privileged.

Thus, one can see that inter-latina/o presumptions about subgroups — subgroups that the majority denies by virtue or the notion of the monolithic latina/o — also exist. Such stereotyping, I fear is the product of this country's divisive race-relations outlook which, consciously or not, minority groups adopt too often as the appropriate model. This model is one that we would be better off changing. Significantly, the majority does not care one bit if you are Cuban, first wave or not, or Mexican or Puerto Rican or anything else. The funny name, the accent, the different culture and the brown skin are enough — you are an "outsider." I suggest below that to effect necessary change we must focus on the role language plays in this pernicious stereotyping.

218. The story is real; the name is not.

219. See, e.g., bell hooks, *Ain't I a Woman: Black Women and Feminism*, (1981) (the phrase "Ain't I a Woman" came from a Sojourner Truth speech).

## B. The Role of Language

"Language matters. Law matters. Legal language matters."<sup>220</sup> Pigeonholing creates, entrenches and perpetuates a myth of normativity. Latinas/os, like African-Americans, in United States society bear the burden of this stereotyping. The result is hurtful and counterproductive; it prevents a replacement system where every person is viewed as her/himself rather than as a false negative image. Language, by (mis)informing perceptions, is a prime co-conspirator in the deceptive imagery of stereotyping. In order to clarify the complicity of language in this scheme, it is imperative to understand its power and control.<sup>221</sup> A visual reality exercise — in essence a word imaging drill — reveals the hidden power of words. Below is a list of words. Read one word at a time. Once you read it, visualize it — allow yourself to see the image evoked by the word. Do not intellectualize; just read the word and imagine the picture.<sup>222</sup>

220. Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 *Notre Dame L. Rev.* 886, 887 (1989). Professor Finley discusses the importance in our society of language, especially legal language and reasoning, neutrality, dualisms, and the patriarchal framework in which all of these concepts are embedded. She argues that language is socially constructed;

[r]ather than being neutral or naturally ordained, it reflects the world views and chosen meanings of those who have had power to affect definitions and create terms . . . Careful attention to the language we use can reveal hidden but powerful assumptions framing the way people think about the world. The persistence of the language then entrenches the way of thinking that it expresses.

*Id.* at 887.

221. See Catharine A. MacKinnon, *Desire and Power* (1983). In *Feminism Unmodified: Discourses on Life and Law*, Professor MacKinnon discusses how language is used and viewed by people, and attempts to develop a "politics of language." Catherine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law*, 47-57 (1987). Specifically, Professor MacKinnon says of "gender-neutral" terms, that

[w]e notice in language as well as in life that the male occupies both the neutral and the male position. This is another way of saying that the neutrality of objectivity and of maleness are coextensive linguistically, whereas women occupy the marked, the gendered, the different, the forever-female position.

*Id.* at 55. I suggest here that the same is true for ethnicity.

222. The description that follows each word is not solely my creation. It is a

- doctor<sup>223</sup>
- lawyer<sup>224</sup>
- druggie<sup>225</sup>
- nurse<sup>226</sup>
- gangster<sup>227</sup>
- fire fighter<sup>228</sup>
- police officer<sup>229</sup>
- inmate<sup>230</sup>
- judge<sup>231</sup>
- illegal alien<sup>232</sup>

The summoned images are consistent. The visual reality is gendered, racialized, and ethnicized, and it is negative in so far as "outsider" group images emerge. Sadly, this is quite predictable, and

composite of predominant reactions from friends, colleagues, students who kindly volunteered as guinea pigs to assist in the development of this list.

223. The responses to this word are quite interesting, reflecting a generational gap. To the young, the image is that of Doogie Howser, M.D.; the word evokes images of Marcus Welby, M.D., Dr. Kildare or Ben Casey, M.D. for boomers and beyond. *Ben Casey* (ABC television broadcast, 1961); *Doogie Howser* (ABC television broadcast, 1989); *Dr. Kildare* (NBC television broadcast, 1961); *Marcus Welby, M.D.* (ABC television broadcast, 1969).

224. Again, there is a generational gap in the naming but not in the image. The range is from Perry Mason to Arnie Becker and Douglas Brackman. *L.A. Law* (NBC television broadcast, 1986); *Perry Mason*, (CBS television broadcast, 1957)

225. Here, the images vary slightly with some describing the druggie as a young to middle-aged African-American male and some describing druggie as a young to middle-aged latino.

226. Again, there was no single household television-generated model. The descriptions, however, are uniform: attractive, blonde, white female.

227. Generally described as an Italian-American male (e.g., Al Capone).

228. Young, tall, strong, white male. Interestingly, the New Yorkers tended to see this as an ethnic white, predominantly of Irish descent.

229. Again a young, tall, strong, white male but with a broader ethnic mix including Italians and Jews.

230. A druggie, rapist, or murderer with the latter two looking much like a druggie.

231. Distinguished looking, older, grey-haired white male.

232. Almost uniformly seen as latinas/os, although some people have begun to relate the term to Asians. This could be due to the recent grounding in Queens harbor of the boat which illegally brought Chinese persons into the United States. To me, this term is particularly interesting. Aside from the image it invokes as a matter of Pavlovian reflex, if one reflects on the term, it calls to mind a being from another world. It is intriguing that the more dignified term of undocumented worker or undocumented foreigner is not used.

also very scary. Because we do not exist in a vacuum, everything has a context that skews the supposedly neutral information we impart or receive. Note, however, that although all the words are neutral, the associating imagery is not.

A consequence of the imaging of language is that even so-called neutral rules, by virtue of language — written, spoken, or even body language — have a non-neutrality built in.<sup>233</sup> This results in language that feeds into, reinforces and perpetuates racial, ethnic and gender biases. The concept of neutrality is exposed as fiction or simply a bad joke. The imaging drill unmasks the built-in gender, racial and ethnic code that is continuously inflamed and exploited in daily life. The code serves to explain why we called the trial of four Los Angeles police officers the “Rodney King trial”. Never mind that he was the one

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233. See generally Alexander T. Aleinikoff, *A Case For Race Consciousness*, 91 Colum. L. Rev. 1060 (1991) (rejecting the ability of the law to achieve neutrality because perceptions are dependent on experience and culture, which result in different ways of organizing and processing information in a race conscious fashion); Carrie Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. Miami L. Rev. 29 (1987) (discussing how some groups have been excluded from the “making, explication, interpretation, and practice of law,” and how this affects women who practice law today in the world of the middle to upper class white males). Professor Menkel-Meadow believes that “the future of our society lies with the challenge of whether we can learn to use the voices of the excluded to create innovative adaptations to these troubling times, and to learn that those outside have much to tell us about ourselves and about the ways we draw our lines. The inclusion of new voices in the legal profession is one concrete way to make new voices in the law.” *Id.* at 52-53; see also, Martha Minow, *The Supreme Court 1986 Term Foreword: Justice Engendered*, 101 Harv. L. Rev. 10, 14 (1987). Minow discusses and explores what she views as three versions of the

dilemma of difference, illustrating how they arose in the contexts of religion, ethnicity, race, gender, and handicapping conditions in cases before the Supreme Court during the 1986 term . . . [Turn]s to the influence in these cases of unstated assumptions about points of reference and starting points for analysis, assumptions that are continually reinforced by established modes of thought, language, and patterns of legal reasoning.

Minow, *supra*, at 15. Minow also notes that the court occasionally seeks out the views of groups unlike themselves, but that such efforts are not always successful. She urges the judiciary to “make a perpetual commitment to approach questions of difference by seeking out unstated assumptions about difference and typically unheard points of view.” *Id.* at 16. A continuing theme in the article is the dilemma/riddle of neutrality.

beaten to a pulp and that his attackers were the ones on trial. Who remembers their names? King was the big, black, scary guy.<sup>234</sup>

Thus, even if facially neutral words are image laden, we can anticipate words that, patently, are not neutral but are used so commonly that we are immune from their insidiousness. Consider, for example, words or expressions such as "blackmail" — where "extortion" would work;<sup>235</sup> "Chinese wall" — where "legal separation without communication" would do; "Mexican duel" — where "simultaneous draw" is clearer; "chiefs and indians" — where "bosses and workers" is just as easy; "illegal alien" (which to me conjures images of E.T. of the Steven Spielberg movie), where "undocumented worker/foreigner" is a more acceptable term. These common expressions are laden with racial, ethnic and gender images and presuppositions. The assumptions are based upon racial, ethnic and gender stereotypes so ingrained in our society that they unconsciously become co-conspirators with "neutral" language/expressions creating "codes" which, in turn, reinforce racialized, ethnicized and gendered myths. Having gone full circle, the myths that are accepted as factual and neutral truths/statements perpetuate a norm of "us" against "them," a divisive mentality that infects law and society.<sup>236</sup> So, it is not surprising that

234. Cf. Cornel West, *Race Matters* (1993).

235. In the same vein consider the terms "black market," "black-balling," "black sheep," denigration — all convey the same message: black is bad. The opposite, white, by implication, and as a matter of other common expressions, such as "white knight," then, is good.

236. See generally Hilary Charlesworth, Christine Chinkin, & Shelley Wright, *Feminist Approaches to International Law*, 85 *Am. J. Int'l L.* 613 (1991). This article outlines the male organizational and normative structure of the international legal system, applies feminist analyses to various international legal principles, and argues that

both the structures of international lawmaking and the content of the rules of international law privilege men; if women's interests are acknowledged at all, they are marginalized. International law is a thoroughly gendered system . . . . A feminist account of international law suggests that we inhabit a world in which men of all nations have used the statist system to establish economic and nationalist priorities to serve made elites, while basic human, social and economic needs are not met. International institutions currently echo these same priorities. By taking women seriously and describing the silences and fundamentally skewed nature of international law, feminist theory can identify possibilities for change.

*Id.* at 614-15; see also Finley, *supra* note 220 47-57.



under the present system the “thems” end up either invisible or bad. What will it take to realize that the “them” is all of “us”?<sup>237</sup>

No one should feel safe with an “us” and “them” perspective. The myths exist about everyone. In this respect, one of the largest misconceptions is that the “us” need to band together to protect ourselves from the “thems.” Moreover, the majority perceives the laws enacted to protect the so-called others — all women and men of color — as in reality providing “special rights.” This story is simply an inflammatory lie. The rules technically safeguard everyone. Reality *includes* — we all have a race, we all have a gender, we all have an ethnicity, we all have a sexual orientation, we all have a color, we all have varying degrees of abilities, and we all can be easily classified into socio-economic or religious categories. However, the myth — where, magically, “race” ends up meaning black, “gender” meaning female, “ethnic” meaning latina/o, “sexual orientation” meaning gay or lesbian, “ability” meaning *disability*, religion meaning non-Judeo/Christian, and “color” meaning non-“white” in the NLW sense — *excludes*. Thus arises the fiction that engenders friction; latinas/os as “illegal aliens,” “welfare mothers,” “drug addicts,” “gang members,” “drug traffickers and money launderers,” trying to cheat honest living (read: NLW) citizens from their jobs or tax dollars.

Rhetoric — language — thus presents a dilemma. It creates a categorization problem, it masks issues and it transmogrifies reality. This result is clear in race and national origin cases under 42 U.S.C.

237. Angela Amato, a student in my International Law Course, told this story in her final paper *Italy: A Scandalous Political System And Its Adverse Effects On Italian-Americans* (unpublished paper on file with author). It illustrates the extent the reach of the “them” and “us” mentality beyond the black-white, NLW-latina/o dichotomies.

#### A Student's Story

*My father, a first generation Italian American recalled his family driving from Brooklyn, NY to Mastic Beach on Long Island in 1940 to look at a house that was for sale. Excited about the prospect of owning a summer home on Long Island, all his brothers and sisters (eleven in total) piled into the borrowed station wagon for a ride out to paradise. Everyone had pooled their money together for the down payment. Nothing stood in the way of their dream — the American Dream, to own your own home. As they approached the baby blue clapboard farmhouse, they noticed a sign displayed prominently on the front lawn. It read 'For Sale by Owner. No Guineas Allowed.' In silence, they drove back to Brooklyn and that is where they remained for decades.*

§ 1981. The courts simply do not get it — latin@s do not fit neatly in the white/black dichotomy. Yet the adjudicators simply cannot let go of the tidy, established categories. Indeed, they try to fit the square "latina/o" peg in the round "race" hole — denying, masking and obfuscating reality and failing to arrive at the "best" solution to complex problems by insisting on a single-trait approach.<sup>238</sup>

Exclusionary practice has created language boxes in which we are now trapped in the name of traditional legal analysis. If we use the old language — the established, falsely neutral categories — we reinforce the so-called normative. Yet it is patent that the normative is not neutral; rather it excludes those who deviate from the norm. When the non-normativ@s seek to operate in the defined universe, they trip on the established, gendered, racialized and ethnicized definitions. Yet the non-normatives are so well trained that, just like their normative counterparts, they have assimilated the code even though they have had no say in creating it. This explains the uniformity of vision at the sound of the neutral words. To be sure, this can and will change only when experience exposes us to different images such as doctors, lawyers, judges and police officers who are female, black, latina/o and the many possible combinations and permutations of those traits.

This non-neutrality of language keeps stereotypes well-nurtured. And, of course, as our rules or laws depend on language in their application or interpretation, they simply miss the mark insofar as they apply heavily meaning-laden language and a single-trait legal approach to new or different issues.<sup>239</sup> The rules work with the rhetoric. The rules mandate that things be called by their given names; however, this does not necessarily result in calling things by their right names.

The language trap — the ability of words to create false images with which we all respond — is evident in analysis of "equality" questions: is it sameness, is it difference, is it unequalness?<sup>240</sup> These

238. See *supra* notes 39-47 and accompanying text (discussing courts' treatment of ethnicity as color or race and sometimes reaching anomalous results). See generally Espinoza, *supra* note 163.

239. See *Rogers v. American Airlines, Inc.*, 527 F. Supp. 229 (S.D.N.Y. 1981); Crenshaw, *supra* note 13; Davis & Wildman, *supra* note 13.

240. See generally Catharine A. MacKinnon, *Towards a Feminist Theory of the State* (1989); Leslie Bender, *From Gender Difference to Feminist Solidarity: Using Carol Gilligan And An Ethic of Care in Law*, 15 *Vt. L. Rev.* 1 (1990) (arguing from the position of "gender difference theory," a school of feminist theory that acknowledges women's

categories are meaningless. Consider, for example, the 1991 Civil Rights Act, which expanded the available remedies for discrimination by allowing recovery of compensatory and punitive damages.<sup>241</sup> This Act, which purports to grant and protect gender equality, on its face says women are unequal — they are worth less.<sup>242</sup> Significantly then, anyone representing a latina would be better off trying to state a claim on the basis of race/color either under the 1991 Act or § 1983<sup>243</sup> (which does not cover women at all) so as not to limit the possible damage recovery. Thus, in reprogramming responses to language it is imperative to recognize that a clear slate does not exist. The following section considers some of the language codes specifically pertinent to latinas/os.

### C. Typecasting, Language and Latinas/os: Torn Between Two Colors

Latinas/os have been direct targets of coded images on both sides of the law. Below, two particular settings are considered. First, the essay presents the latina/o as a presumed law-breaker. Second, the piece presents and exposes the precarious position of a latina/o as law-enforcer.

First, by way of example, consider questions concerning “drugs.” The courts, rather than rely on actual facts to establish guilt, regularly use “indicia” to infer and find culpability.<sup>244</sup> This occurs

gender differences).

241. Civil Rights Act of 1991, 42 U.S.C. § 1981 (1988); Civil Rights Act of 1991, 42 U.S.C. § 2000(c) (1988). To be sure, the 1991 Act did more than this. Among other things, it overturned seven United States Supreme Court decisions of the 1980s that had severely limited the reach of Title VII.

242. See Civil Rights Act of 1991, 42 U.S.C. § 1981(a) (1988). Although there is no limitation on the damage recovery for race discrimination, recovery for sex discrimination is limited. This provides an interesting dilemma for a woman of color who suffers discrimination as such: one part of her is worth more than another. See Crenshaw, *supra* note 13; Caldwell, *supra* note 13; United States v. Burke, 112 S. Ct. 1867, 1872-74 (1992).

243. Civil Rights Act of 1871, 42 U.S.C. § 1983 (1988).

244. See Berta E. Hernández, *RIP to IRP — Money Laundering And Drug Trafficking Controls Score A Knockout Victory Over Bank Secrecy*, 18 N.C. J. Int'l L. 235 (1993). The article reviews the evolution of bank secrecy laws and comments on the erosion of individual privacy rights effected by the domestic and international efforts to curb drug trafficking and money laundering. The author argues that,

frequently in the drug-trafficking and money laundering area.<sup>245</sup> If a wealthy Latin American banker comes into a United States bank and deposits a large sums of money,<sup>246</sup> what does the United States banker (or banker's agent) do? The laws now require all United States banks to "know your customer"<sup>247</sup> or be held responsible for breaking

with the emergence of international cooperation in the fight against drug trafficking and money laundering, the long embraced principle of bank secrecy, along with the individual's right to privacy it protected, ceded to the interests of global anti-drug enforcement . . . . Because of the evolution of strict regulations that often are stacked in the government's favor and the increased use of indicia checklists to ascertain the wrongfulness of conduct, innocent persons are virtually defenseless and unfairly suffer.

*Id.* at 293-98 (The article, using a hypothetical case study, shows how latinas/os are trapped by this approach.).

245. *Id.* at 240, 270-71, 295-303.

246. For a hypothetical example of the problem that may arise see *id.* at 293-98.

247. See, e.g., 54 Fed. Reg. 45, 769 (1989). The Board of Governors of the Federal Reserve System expects financial institutions to incorporate the following "know your customer" policy into their business policies:

1. Financial institutions should make a reasonable effort to determine the true identity of all customers requesting the bank's services.
2. Financial institutions should take particular care to identify the ownership of all accounts and of those using safe-custody facilities.
3. Identification should be obtained from all new customers.
4. Evidence of identity should be obtained from customers seeking to conduct significant business transactions.
5. Financial institutions should be aware of any unusual transaction activity or activity that is disproportionate to the customer's known business.

With respect to personal accounts, Banks adhere to the following principles:

- \* No account should be opened without satisfactory identification, such as:
  - a passport or registration card
  - a driver's license with a photograph issued by the State in which the bank is located
- \* Together with consideration of the customer's residence or place of business.
 

If it is not in the territory served by the bank, questions should be raised as to why the customer is opening an account at that location.
- \* Consider the source of funds used to open the account. Large cash deposits should be questioned.

the law.<sup>248</sup> The law applies a "willful blindness" standard to decide the bank's knowledge about its customer and her/his business dealings.<sup>249</sup> So, is this person depositing large sums a drug dealer in business disguise? A money launderer? He is wearing a gold chain and bracelet after all.<sup>250</sup> Do you send for the authorities? Do you provide the authorities with all of this person's (your client's) financial information?<sup>251</sup>

On the other hand, the latina/o as a law enforcer faces a completely different set of traps. Consider, specifically, the plight of a latina/o police officer as presented in the recent *Lozano* case.<sup>252</sup> In

- \* For large accounts, ask the customer for prior bank reference and write a letter to the bank asking about the customer.
- \* When business accounts are opened, Banks should use the following practice:
  - Business principals should provide evidence of legal status (e.g., sole proprietorship partnership, or incorporation or association) when opening a business account.
  - Check the name of a commercial enterprise with a reporting agency, or check prior bank references.
- \* For large commercial accounts, obtaining the following information is suggested:
  - A financial statement of the business
  - A description of the customer's principal line of business
  - A list of major suppliers and customers and their geographic locations
  - A description of the business's primary trade area, and whether international transactions are expected to be routine
  - A description of the business operations i.e., retail versus wholesale, and the anticipated volume of cash sales.
- \* While the size of financial institutions may vary, it is incumbent upon all institutions to adopt and follow policies and procedures appropriate to their size, location, and type of business.

In 1992, so-called "death penalty" legislation was signed into law which provides that a financial institution may lose its ability to do business if convicted of a money laundering violation. The act allows rather drastic measures including the revocation of the charter of a United States bank. See Housing and Community Development Act of 1992, Pub. L. No. 102-550, 106 Stat. 3672 (1992).

248. Hernández, *supra* note 244, at 260-73, 299-301.

249. *Id.* at 260, 264.

250. The description intentionally draws on stereotypes, e.g., male with gold chain and bracelet.

251. Hernández, *supra* note 244, at 260.

252. *Lozano v. Florida*, 584 So. 2d 19 (Fla. Dist. Ct. App. 1991). The case is used to show the unique position in which latinas/os may find themselves vis à vis non-latina/o whites and non-latina/o blacks. The discussion is not intended to suggest that

that case, a Dade County police officer, Lozano, shot two motorcyclists in Miami.<sup>253</sup> The shooting led to extensive rioting.<sup>254</sup> He was tried the first time in Dade County and convicted of manslaughter.<sup>255</sup> Lozano appealed the conviction and the Florida Court of Appeals reversed for a new trial.<sup>256</sup> First, the appeals court found error in the denial of Lozano's motion for a change of venue because the "uncontroverted evidence presented by Lozano required a holding that the case could not then be fairly tried in Dade County."<sup>257</sup> Essentially, the court concluded that the community and the jury were "justifiably concerned with the dangers which would follow an acquittal but which would be obviated if . . . the defendant was convicted."<sup>258</sup> The fear that a response to a "not guilty" verdict would result in an eruption of violence is an "impermissible factor" and thus it was error to deny the request for a change of venue.<sup>259</sup> Such failure to grant change of venue thus mandated reversal and a new trial.<sup>260</sup>

The venue for the new trial became crucial. First, it was sent to Orlando,<sup>261</sup> then to Tallahassee,<sup>262</sup> and then back to Orlando.<sup>263</sup> The reason for this back and forth was the racial composition of the population of Tallahassee and Orlando and the inevitable impact of such populations on the jury pool.<sup>264</sup> The jury picked to sit in judgment in the second trial consisted of an African-American woman, a latino, a latina, and three non-latino/a whites — one white male and two white females.<sup>265</sup> Lozano was acquitted.<sup>266</sup>

latinas/os are free from being racist, sexist, classist, heterosexist, etc.

253. *Lozano*, 584 So.2d at 21.

254. *Id.*

255. *Id.* at 20.

256. *Id.* The court concluded that while the "evidence was amply sufficient to support the verdicts, and therefore reject[ed] Lozano's contention that he is entitled to an acquittal as a matter of law, [the court found] that errors committed by the lower court require[d] that a new trial be conducted." *Id.* at 21.

257. *Id.* at 22.

258. *Id.*

259. *Id.* at 23 (citing *Estelle v. Williams*, 425 U.S. 501, 505 (1976)).

260. *Id.*

261. Mike Clary, *2 Miami Officers Acquitted; City Remains Calm*, L.A. Times, May 29, 1993, at A1.

262. *Id.*

263. *Id.*; see also Joe Baker, *Trials are Like 'Perry Mason': The Lozano and King Cases Show Only Too Well How The Legal System Doesn't Trust Jurors*, Orlando Sentinel Trib., June 6, 1993, at G1.

264. Clary, *supra* note 261, at A1.

265. El Nuevo Herald, May 15, 1993, at A1. As usual, the race of the latinas/os is

There were no riots but the police were fully prepared for them. In fact, authorities delayed the announcement of the verdict for four hours after jurors signaled they had reached a decision in order to give Miami police and National Guard troops time to assume riot ready positions in particular Miami neighborhoods.<sup>267</sup>

These facts were critical to the fear of riots: the victims were black; Lozano is latino, Colombian to be precise.<sup>268</sup> Significantly, the available newspaper accounts generally only described Lozano by name and as a police officer,<sup>269</sup> a few reports mentioned that he is Colombian.<sup>270</sup> It is interesting that although at least one press report described him as white,<sup>271</sup> I did not find one that described him as latino. The media's message was clear: Lozano was a good guy, a "white knight," a protector of the people. On the other hand, the media's portrayal of the victims consistently evoked negative stereotypes: black men riding motorcycles.<sup>272</sup> The implicit message was that the bad guys were up to no good.

Moreover, one can speculate that had the latina/o role been one of suspected law-breaker (bad-guy?) rather than law-enforcer (good-guy?) the rhetoric would have been markedly different. Under such circumstances the description probably would have been as consistent as the description of the suspected law-breakers in the Lozano case.

The juxtaposition of the uniform description of the victims to the varied descriptions of Lozano is quite revealing of the latina/o quagmire. The case as a whole exposes the precarious latina/o experience. Latinas/os are "torn between two colors" with many

unknown. Moreover, newspaper reports failed to provide the ethnicity of the whites or the blacks, although one may deduce that it was not latina/o

266. Clary, *supra* note 266, at A1.

267. *Id.*

268. The racial/ethnic mix of the Miami police department is 47.6% latina/o; 29.2% non-latina/o whites; and 22.9% black. The city's racial/ethnic composition is 62.5% latina/o; 12.2% non-latina/o whites; 24.6% blacks. Interestingly, the description of the blacks did not say non-latina/o. However, given the reporting patterns, I assume that the black population figures are for non-latina/o blacks.

269. See, e.g., Don van Natta, Jr., *Attorney Penned Policeman Poem; Lozano Jurors Wept Over "Fabrication"*, Houston Chron., May 30, 1993, at A2; Clary, *supra* note 261, at A1.

270. See, e.g., Deborah Sharp, *Trial Has Miami on 'Yellow Alert': Racial Tensions Run High*, USA Today, May 26, 1993, at A3; Baker, *supra* note 263 at G1.

271. See Jack Reed, *Miami Officer's Trial Goes to Jury*, St. Petersburg Times, May 28, 1993, at B1.

272. *Id.*; see also van Natta, *supra* note 269, at A2.

actually only “fitting” somewhere in between — a *café con leche* “brown.” The aftermath of the *Lozano* case provides a good example of the divisiveness a black-white dialectal has, the oppositional perspective it urges. The press reported that when Lozano was found guilty after the first trial, “[b]lack officers cheered and gave each other high fives . . . .”<sup>273</sup> Non-black officers viewed the decision as handcuffing the police and saw the black officers’ reaction as disloyal.<sup>274</sup> In fact, the head of the Hispanic Officers Association confessed that this reaction, which can be interpreted as an expression of racial allegiance over professional allegiance, either caused or brought to the surface divisions that had not existed previously. He said “[b]efore, we (Hispanic Officers) probably had better working relations with black officers than we did with Anglo officers — but not now.”<sup>275</sup>

This schism in which *latinas/os* fall is everywhere. Language is harmful when it stereotypes in a destructive and isolating way. The poisonous nature of this “you do not belong there” is exacerbated because it comes not in terms of a dichotomy of black-white relations but rather in terms that touch deeply on *latinas/os*’ multi-dimensionality. *Latinas/os* are continually bombarded with the “you are not *us*” message. The myth tells *latinas/os*: you are not white, not black, not Asian, not Indian. The reality is that *latinas/os* can be *all* of the above.

The result of the complete “otherness” perspective is a silencing of *latina/o* voices by all, a total banishment. On the one hand, so-called NLWs perceive *latinas/os* as “minorities” — the “other,” an “other” who speaks a different language to boot.<sup>276</sup>

On the other hand, non-*latina/o* blacks see *latinas/os* as “not black,” and perhaps even as white. Professor Derrick Bell clearly articulated this view in a recent address in which he noted that “there is every reason to believe that Spanish-speaking . . . immigrants, *like their European predecessors*, will move beyond the bottom of the society

273. Richard Cole, *Officer's Conviction Splits Dade Police*, *St. Petersburg Times*, December 24, 1989, at B1.

274. *Id.*

275. *Id.*

276. The English-only movement, with its attendant coded hatred and fear of the other, that which is not understood, is a prime example of the tensions endemic to this adversarial approach. See, e.g., Juan F. Perea, *English-Only Rules and the Right to Speak One's Primary Language in the Workplace*, 23 *J. of L. Reform* 265-318; Larry Rohter, *As Hispanic Presence Grows, So Does Black Anger*, *N.Y. Times*, June 20, 1993, at A1, A27.



and leave blacks in the role society has designated for them . . . .<sup>277</sup> Certainly Professor Bell does not, as he cannot, believe the myth that all latin<sup>as/os</sup> are of European heritage or that they are all white. The history of intermarriages in, for example, the Southwestern states, Puerto Rico, Cuba, and the Republica Dominicana attest otherwise. It is plain that there are many latin<sup>as/os</sup> of African heritage, Asian heritage and Indian heritage. Nor can, or should, recent latina<sup>o</sup> immigrants be likened to "their European predecessors" even if they are of distant European heritage. As Professor Bell surely knows, dramatically different issues are at play today than there existed in the colonial period or the earlier twentieth century European immigrations.<sup>278</sup> Nevertheless, the perception exists that because latin<sup>as/os</sup> are not black, there is a dissonance, a lack of sharing of issues and concerns between latin<sup>as/os</sup> and blacks. In reality, this is a great misperception. For example, as the figures presented in the demographics section show, employment and education are two major concerns shared by the black and the latina<sup>o</sup> communities. Nevertheless, the existence of the misperception as a reality — the view that these communities do not share issues and concerns — strengthens oppositionality.

A June 27, 1993 New York Times article provides a specific example of the tensions engendered by the scripting of latin<sup>as/os</sup> as adversaries of blacks. The piece, entitled *As Hispanic Presence Grows, So Does Black Anger* noted the growing resentment of blacks in Miami against latin<sup>as/os</sup> who "take their jobs."<sup>279</sup> The article suggests that the tension is aggravated as the city's latina<sup>o</sup> population grows to dominate the economic and political life.<sup>280</sup> As one black woman interviewed put it, "[t]hey are taking over, and I am a victim of that . . . ."<sup>281</sup> This echoes the complaints of her white counterparts about

277. Derrick Bell, *The Permanence of Racism*, 22 Sw. U. L. Rev. 1103 (1993) (emphasis added).

278. See, e.g., Sontag, *supra* note 208, at A10 ("[T]oday's other children of immigrants are far different from the earlier 20th-century immigrant's children, who felt they had to reject the Old World to get ahead in the New. Today's children are predominantly Hispanic, Asian and Caribbean, facing racial barriers that did not exist for their European predecessors and economic barriers that threaten to condemn them to a swelling underclass. Fifty years ago, the children of European immigrants were joining an expanding American industrial work force; today's second generation Americans find their prospects for advancement in the working class limited.")

279. Rohter, *supra* note 276, at A1.

280. *Id.*

281. *Id.*

the evils of "affirmative action programs" (code: "minorities" meaning blacks *and* latinas/os) because they take jobs away from deserving whites.<sup>282</sup>

This rivalry perspective can create differences that do not exist, exacerbate differences that might exist, and eclipse the existence of similarities and shared concerns. The created images reinforce the vision of latinas/os as foes of both whites and blacks.

The tragic flaw of the approach that drives the normative-driven oppositionality is that rather than trying to find a novel solution for a new dilemma — the existence of peoples in this society who do not fit squarely into the dichotomous black-white model's structure — it merely seeks to utilize the pre-existing model. The black or white model does not fit the latinas/os, just like the black or woman model does not fit the black woman. Simply to throw latinas/os into the pot and stir is simplistic, inappropriate, and naive.

Latinas/os bring different issues into play than the black-white polarity that gave rise to the civil rights movement. Here slavery is not the issue; that was theoretically solved by the Thirteenth Amendment.<sup>283</sup> Nor is the problem the consequence of slavery, a problem that still lacks a solution. Nor is formal equal access to public accommodations, housing, employment and education the issue. Technically, the 1964 Civil Rights Act crafted the tools to solve that problem, although making these wonderful paper rights a reality is a struggle latinas/os share with the black community. On the other hand, latinas/os need to grapple with the present-day issues of language and immigration. Latinas/os must do battle in order to work — either prove you have a green card when you are a citizen/legal

282. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *California Fed. Sav. & Loan Ass'n. v. Guerra*, 479 U.S. 272 (1987).

283. Although latinas/os were not slaves in this country as the history of this country views the condition, some were subject to slave-like conditions, e.g., the subjection of Mexicans to peonage. See Greenfield & Kates *supra*, note 19, at 669 n.29; Lewis, *supra* note 54, at 7 (referring to Oscar Handlin's *The Newcomers: Negroes and Puerto Ricans in a Changing Metropolis* (1959) ("Provid[ing] exhaustive and depressing documentation of the economic and social *enslavement* of the latest migrant body [Puerto Ricans] in American history"). Moreover, it is noteworthy that latinas/os are not free from having to confront the issue of slavery exactly as it is known in the United States. Slavery existed in Cuba (see, e.g., Carlos Márquez Sterling & Manuel Márquez Sterling, *Historia de la Isla de Cuba*, ch. 7 (1975)) and Puerto Rico (see, e.g., Lewis, *supra* note 54, at 58-59). In fact, these Caribbean Islands were among the last countries to abolish slavery — Puerto Rico in 1873 (Lewis, *supra* note 54, at 58), and Cuba in 1880 (Sterling & Sterling, *supra* at 119).

resident or find a way to live without one and still be labelled lazy or a welfare cheat.<sup>284</sup> Additionally, we must face the problems caused by the inhuman conditions in which migrant workers live as well as the problems that result from the creation of an uninsured, underclass of persons who provide domestic help, such as nannies, housekeepers, and gardeners. To be sure, this is not an issue unique to latinas/os as we may well see analogous problems arise among some of the new groups of immigrants to the United States; so much the more important it becomes that latinas/os who have a long history in this country start working on building bridges.

Latinas/os' racial diversity also presents a novel issue, often unspoken, certainly as unresolved and complicated as the dilemma involving the intersection of race and gender. Their racial diversity injects yet another layer to the essentialism<sup>285</sup>/intersectionality<sup>286</sup> discourse. Latina/o blacks, for example Afro-Cubans, may identify more with the racially mixed Cuban population than with racially homogeneous (but culturally diverse) English-speaking black population.<sup>287</sup> Rather than identify solely on the basis of race, Afro-Cubans also identify with their linguistic and cultural heritage.<sup>288</sup>

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284. An extended discussion concerning the problems that can result by virtue of the creation of an entire under-class of workers in the domestic and child-care arena, such as a citizenry that lacks health care and retirement protection, is beyond the purview of this essay. It is noted here, however, as one of the new issues of concern to recent latina/o (as well as other) immigrants.

Moreover, more recent black immigrants from, for example, Haiti share the language issues with latinas/os. Of course, Asian, East European, Russian and other immigrants share this issue as well.

285. Essentialism is the critique by feminists of color of white feminists who talk only of gender and not race. See, e.g., Catharine A. MacKinnon, *From Practice to Theory, or What is a White Woman Anyway?*, 4 Yale J.L. & Feminism 13 (1991) (responding to criticism that her work is essentialist); *Open Letters to Catharine MacKinnon*, 4 Yale J.L. & Feminism 177 (1991) (Letters to Catharine MacKinnon criticizing a speech she gave at the conference, "Feminism in the '90s: Bridging the Gap Between Theory and Practice" as essentialist); see also, Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 Stan. L. Rev. 581 (1990) (arguing that gender and race essentialism silence those who traditionally have been prevented from speaking out. She criticizes the writings of white feminists as being essentialist because they ignore the problems of black women.).

286. The idea of "intersectionality" analyzes the intersection of race and gender. See, e.g., Crenshaw, *supra* note 13; Caldwell, *supra* note 13; Davis & Wildman, *supra* note 13.

287. Rohter, *supra* note 276, at A1, A27.

288. This is not to suggest that there is no gender issue here. To the contrary, as with the race/gender intersectionality discourse, gender, as well as other matters such

This identification, however does not, as it can not, render Afro-Cubans "not black."

Yet another angle to *latinas/os* as "others" is that some appear "white" in the "Anglo" sense.<sup>289</sup> These particular traits inform some *latinas/os* of what it feels to look like the privileged *normativa/o*. Of course, this "white look" does not make one bit of difference if the initial interaction is on paper, as are most applications for employment or to institutions of higher education. Given that there appears to be a very clear image in our society of what a *latina/o* looks like, such initial paper contact may well conjure up the stereotypic images of what an applicant should look like. This is very likely the reason the good progressive law school's four interviewers thought I was not me — not that I look "white" in the NLW sense by any stretch of the imagination; but there must have been something about me in my lawyer "costume" that threw them off. And then, of course, because my *parents* are educated professionals — much, I might add, like the parents of most colleagues I have had in my sixteen years in the legal profession — in the eyes of the four interviewers, I somehow did not fit the mold, which I imagine requires having pulled myself out of the working class by being the first in my family to enjoy the privilege of higher education.

In fact, my experience while in legal costume is rather amusing. Even the clerks at my local grocery store talk to me in English and tell me I "don't *look* hispanic," when every other day we speak in Spanish. And when some of the *latina/o* messengers at my old law firm met me they would ask if I was Hernández by marriage. Imagine that, even my name deemed me a stranger to those with similar sounding names!

To complicate matters, even in uniform many *latinas/os* will not have the appearance of normativity. For example, those of us not "white" in the NLW sense will always "look" like outsiders, and those of us with Spanish-accented English will always "sound" like

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as sexual orientation, class, ability, and religion cannot be ignored. The conflation of traits informs the number of intersections that one must consider before any situation can be fully analyzed.

289. A former student of mine told me that depending on her choice of clothing and make-up, her study group would comment, "Maria, you don't look Cuban today." Implied, of course, is that otherwise she looks "normal." Moreover, there is the message that a particular look is the one viewed to be the Cuban look.

outsiders.<sup>290</sup> Thus, until the notion of difference as “otherness” is viewed as an enrichment rather than a shortcoming, latin<sup>as/os</sup> will remain outsiders. This is regrettable because their heterogeneity could provide knowledge to heal this country’s racial and ethnic tensions.

These are particularly difficult issues without easy answers. If the law has difficulty understanding the concept of a “blackwoman,” what can it do with a “blackCubanwoman” concept? Or a *Puertorriqueña trigueña*? By restricting analysis to a single-trait approach, the law isolates and disempowers latin<sup>as/os</sup> by creating a landscape where both NLWs and (non-latina/o) blacks see latin<sup>as/os</sup> as “other.” Such an exclusionary approach misinforms as it induces misperceptions, creates expectations, and generates images that are, at best incomplete and at worst false. Yet the myth — the sham images — proliferates. Latin<sup>as/os</sup> are reduced to race-less homogeneity belonging nowhere. The reality of a culturally and racially diverse peoples is invisible.

This article proposes that oppositionality be turned on its head. Rather than focus on otherness, it urges that true universality be explored. A starting point is to concede that the categories we have today simply do not work. These categories are loaded language in neutral costume: deceptive, duplicitous and insidious. Such language, while purporting to be a declaration of fact is instead based on pre-defined false-truth images. Because of their diversity, latin<sup>as/os</sup> have myriad of appearances — all of them true latina/o appearances. Our English may be heavily Spanish-accented or not, and for us this is not a matter of choice. However, I must confess that while I am told that I do not have a trace of Spanish-accentedness in my English, I love to move from my “unaccented” version to its “accented” form (a form it takes when I converse in English with my *Mami*<sup>291</sup> in front of non-Spanish speaking company) while delivering a paper in academic or legal circles. The looks I receive are precious.

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290. Professor Margaret Montoya has voiced a different concern about latin<sup>as/os</sup> who look “white.” She is fearful that the appearance’s temptation, like the language trap, may have consequences if it infiltrates beyond the surface. The richness of the latina/o diversity can be lost if some start to believe they are their mask. This would result in “one becoming the ideological, rhetorical, linguistic and cognitive disguise one once merely wore resulting in the merg[ing] of the private self with the publicly contrived face, and can entail a silencing of the personal voice and a muting of cultural identifiers.” Montoya, *supra* note \* at \_\_\_.

291. Translation: mom.

Rather than have us "torn between two colors," with alienating, isolating consequences, the diverse experience of latin<sup>as/os</sup> can be used to bridge gender, racial, ethnic, cultural, and linguistic differences to translate experiences and expressions. The last part of this essay focuses on how latin<sup>as/os</sup> can play a major role in enhancing communication and understanding between and among groups that perceive each as the "other."

### III. REPLACEMENT: LEAVING NORMAL

#### *Building Bridges*

*I always have started out as the only latina lawyer or law professor in a work-place.<sup>292</sup> Often, too, the women emerged as my support group — as if the gender commonality provided the necessary bridge. I remember in one of my myriad careers, I arrived as usual — the only latina. I could sense the otherness with which I was viewed by both black and white. One colleague directly asked once, "You don't really consider yourself hispanic, do you?" This changed when one day I had a close friend come to the work-place to put on a special event. Unbeknownst to all, my friend is African-American. Once he arrived it was kind of obvious he was black. After the event, which by the way was a smashing success, the black colleagues for the first time saw me, or at least started seeing me as me: also one of "them" — a person of color.*

This article exposes the concept of neutrality as a lie.<sup>293</sup> Building bridges is a suggested replacement for oppositionality. This replacement demands a total reconstruction, one that debunks the old cast which only sculpts Dr. Kildares or Doogie Howsers as doctors, and Perry Masons or Douglas Brackmans as lawyers. The reconstruction, the replacement, has to be accomplished with a new vision, a true universalist image. This image should be a multidimensional one informed by the variety of experiences that describe the realities of a fully diverse people. This approach uses multiple perspectives rather

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292. When I started teaching at the University of New Mexico there were four latin<sup>os</sup> on the faculty. I was the only latina until a couple of years later, when Antoinette Sedillo López joined the faculty. Elsewhere, I have been the only latina/o.

293. See, e.g., *supra* notes 150-64.

than a single-trait perspective. It needs elasticity but not inflexibility or infirmity.

We need to decode the language so that we start calling things by their right names — names that can accommodate diversity and that can be changed if they cease to work. Two items are critical to this endeavor's success. First is the need to recognize and accept that the language we use carries a lot of baggage: as the visual reality exercise exposed, language is replete with coded messages and thus fails to portray reality accurately. Second, everyone must participate in the renaming. We must avoid a system whose appellations are designated by "founding fathers,"<sup>294</sup> who fail to reflect the diversity of our society. A replacement, including a decoding of language, creates meaningful classifications: relevant ones that do not operate in a vacuum. Classifications must be contextually legitimate. Latinas/os can reveal and lay claim to their multiple selves and fit corrective lenses on the myopic view of difference as a deviation from the "norm." Continuum, a concept that latinias/os can help by virtue of their diversity, must replace the illegitimate hierarchical norms that measure worth based on the degrees of separation from the so-called normative and depend on an inapplicable dichotomy.<sup>295</sup>

The true universalist perspective, of course, is a threatening challenge to this myth of neutrality. Take, for example, pregnancy in the equality context. A truly rational, legitimate perspective would view this as an ability, not a disability. It is only labeled as such because the normativos, here in the gendered sense, simply can not do it. Therefore it is different, valueless, the quintessence of masking.

Here is how latinias/os can help. We can build bridges as we have been doing for years. We are used to being black, white, brown, and every other color and shade. We can help create an understanding within the color spectrum, for we have been doing it among ourselves for years. We speak Spanish, English, Spanglish, regional dialects and indigenous tongues. We can translate. Again, we have been doing it among ourselves for years. We can promote an understanding of differences by engendering understanding of commonalities: we have been doing it among ourselves for years.

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294. It should be noted that perhaps the narrowness of our present day labels can be attributed to their designation by a homogeneous group of white, male, upper middle class, formally educated, property-owning (including land, wives and slaves) founding fathers.

295. Frances Olsen, *Feminism And Critical Legal Theory: An American Perspective*, 18 Int'l J. Soc. L. 199 (1990).

Yet these commonalities are not sameness or homogeneity. Nevertheless this commonality combined with our differences has informed us of multiple perspectives. I *am* latina, female and ethnic. When addressing a latina/o audience I can no more check my gender at the coat-room than I can check my ethnicity when I am addressing a women's issues audience. To be sure, this does not simplify my existence. But ignoring my multiple levels would certainly complicate it.

The lesson to learn is that people, a composite of their race, gender, ethnicity, class, religion, sexual orientation, ability, and color are complex. Rarely can we find the best answer (at least for a time) by asking only one obvious question, such as "What is the effect of a practice on an ethnic group?" Rather we will reach the better resolution by asking many questions, including questions that address the conflation of traits. To be sure, undertaking such a course is ambitious, difficult, and likely to be painful as we force ourselves to confront prejudices we would just as soon ignore. Such a multi-layered methodology is certain to result in some mistakes. But as long as the mistakes are honest and made in a quest to learn, to do better and to do good, in short, to effect necessary change and to better the condition of all peoples, the mistakes will be forgiven and corrected, and we will all grow.

These are critical bridges, and the law is as good a place as any to start. For how can we defend someone we do not understand? How can we protect rights if we can not explain their existence? How can we solve problems if we do not grasp what causes them? How can we create necessary laws if we do not know what the needs are?

In this light, I would urge that we can craft more impressive, relevant, and necessary rules if we look at the diversity of our shared experiences. However, we must eschew anyone's exclusion from power in our effort to create the replacement. We know what happened. We know how it happened. Cognizant of our differences and our commonalities, as well as of our traditional absence, our involuntary, imposed exile from the law, let us create a model where all voices and colors are present. How else can we diagnose society's real problems?

How do we begin? Build bridges. Look at the latina/o invisibility by virtue of its exclusion from the majority and the minority. Create a new visibility that includes a variety of dimensions that incorporate multiple perspectives.



## CONCLUSION

*Alcachofas*

*Hemos visto que el análisis tradicional jurídico es defectuoso porque carece una perspectiva capaz de incorporar múltiples dimensiones. En su lugar está atascado en una modalidad normativa, lineal, estática, angosta. Tal análisis percibe a las personas como si fueran cebollas. Aunque este análisis reconoce que cada persona, como la cebolla, tiene muchas dimensiones, puede ver solamente una dimensión a la vez. Este sistema que nos deja ver solamente una característica personal a la vez, aunque sepamos que existen muchas más, es defectuoso e inadecuado ambos por su inexactitud y sus limitaciones: nos permite analizar múltiples características solamente aisladas una de las otras; o sea, el género se tiene que separar del análisis de la raza y así una por una se analizan las características como el color, el origen nacional, etc. El problema con tal análisis, lo falso del resultado al cual se llega, es que cuando no se pueden analizar juntas las características que co-existen, no puede haber una representación verosímil de una persona. Tal perspectiva simplemente no refleja la realidad, ya que cada persona es una combinación de muchas dimensiones. Por lo tanto, la sugerencia que aquí se plantea es un reemplazo total, una revolución analítica que permita consideración simultánea de las muchas dimensiones de cada persona. Esto lo podremos lograr si reconocemos que las personas somos más parecidas a las alcachofas que a las cebollas. Aunque, como la cebolla, la alcachofa tiene muchísimos niveles, es distinta a la cebolla porque tiene muchísimas hojas pequeñas, cada una diferente, como las muchas características que cada persona humana posee, pero con un corazón que representa nuestro ser — la combinación de todas las hojas, líneas y círculos.*

In another linguistic form. . .

We have seen that traditional legal analysis is flawed because it lacks a multidimensional framework; it is stuck on a narrow, static, linear normative mode. Such analysis deals with people as if they were onions. Although it recognizes that, like onions, people are multi-layered, it can see only one layer at a time. This system, which allows us to grapple only with one layer at a time, is defective and inadequate both because of its inaccuracy and its limitations. While it recognizes many dimensions it ignores multi-dimensionality. Such tunnel vision

results in the isolation and separation of the dimensions. Thus, in traditional analysis, consideration of gender is isolated from race, which is isolated from color, which is isolated from national origin, and so on. But the flaw, the defect and deceit of this system is that in never permitting simultaneous analysis of more than one layer it is incapable of scrutinizing the truth about any person. Such perspective cannot reflect reality for anyone because each one of us is a combination of our many dimensions. Thus, the suggestion here is for total replacement, an analytical revolution that recognizes that each one of us is the collective of our many dimensions. This is possible if we recognize that persons are more like artichokes than like onions. Although, like onions, artichokes have many layers, unlike onions, artichokes also have many small leaves, each one different, at many levels like the myriad characteristics of every person. An artichoke also has a heart that represents the person's being, the multi-dimensionality — the conflation of all the leaves, lines and circles.

Thus, replacement rejects unidimensionality — the approach that mandates dealing with one layer at a time — and embraces a multiple perspective approach, true universality, as a recognition of the existence of many layers in every human being. This rejection avoids the latina/o conundrum of “white (not of latina/o origin)” and “black (not of latina/o origin)”; the “blackwoman” conundrum of only black or only female; the “blackCubanwoman” conundrum of only black, only female or only Cuban. In its stead it embraces the acceptance that we are black latinas/os, white latinas/os, mestizas/os, indias/os, and chinas/os; muslim, christian, santeras/os and jews; male and female; lesbian/gay and heterosexual; rich and poor; physically able and physically challenged; and so on. Rather than ask a single question in a complex setting, I urge that we take the challenge and ask as many questions as necessary to find the best answer in that complex setting. Latinas/os not only can use our experience to teach this, we also can learn from it. For example, strong lobbying groups could serve to empower latinas/os by influencing the lawmakers in the making of the laws, and result in much-needed socio-economic and educational advancement. Our lack of cohesion, largely based on our perceived differences among sub-groups, has slowed latinas/os down on this front. Acceptance of our diversity will let us progress.

Latinas/os, because of our many components, have lived multi-dimensionally, and thus know the multi-layered approach although we have not necessarily translated it into actual proposals for change. Let us now share it with the rest of society and get on with building bridges to a new place where respect and understanding reign.