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CULTURE, NATIONHOOD, AND THE HUMAN RIGHTS IDEAL

Berta Esperanza Hernández-Truyol*
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INTRODUCTION

This Symposium on Culture, Nation, and LatCrit Theory continues the exciting work of a very young but productive branch of critical movements. LatCrit is a theoretical movement initiated as a distinct discourse within critical legal theory. Its origins are traceable to the first colloquium organized with the purpose of having Latina/o law professors and their friends critically explore the position of Latinas/os within the Academy and society. It precipitated an inquiry concerning what the politics of identity mean through a Latina/o lens, which, by necessity, is a panethnic prism. This first colloquium took place during the 1995 Annual Meeting of the Hispanic National Bar Association in Dorado, Puerto Rico. That gathering started the momentum for the regular planning of *reuniones* that promote the interrogation of what it means to be Latina/o in our diverse world, which necessarily promotes the relating of the Latina/o condition to other groups' locations, interests, and issues. Indeed, a central goal and foundational premise of LatCrit is to be diverse and inclusive.[1]

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1. *See* Elizabeth M. Iglesias & Francisco Valdes, *Religion, Gender, Sexuality, Race and Class in Coalitional Theory: A Critical and Self-Critical Analysis of LatCrit Social Justice Agendas*, 19 CHICANO-LATINO L. REV. 503, 507–08 (1998); *see generally* Symposium, *Comparative Latinas/os: Identity, Law and Policy in LatCrit Theory*, 53 U. MIAMI L. REV. 875 (1999), 4 U. TEX. HISPANIC L. J. 1 (1999); Symposium, *LatCrit Theory: Naming and Launching a New Discourse of Critical Legal Scholarship*, 2 HARV. LATINO L. REV. 1 (1997). Thus, the original gathering and those that have taken place since are multiethnic, multiracial experiences where community transcends and embraces racial, ethnic, national, linguistic, sexual, gender, class, and religious differences and commonalities. Significantly, particularly in the context of the importance of literature in the Academy, this young movement has produced an expansive

Although LatCrit theory has concerned itself with the location of Latinas/os in society, as this Symposium evidences, it comprises many scholars from various and diverse disciplines and perspectives. Its interrogations do not stop within chartered geographies but rather traverse national, linguistic, racial, ethnic, sexual, cultural, historical, religious, and class borders and their multiple intersections. Thus, while LatCrit theory does not speak with one voice, it does have a unified purpose: to explore the boundaries of law, sociology, psychology, economics, history, anthropology, education, and other fields in a non-essentialist, anti-subordination posture that aims to liberate the human spirit so that all, from North and South, East and West alike, can share and enjoy full personhood around the global supper table. Because of these common goals, as Professor Francisco Valdes has articulated, "the multiple diverse critical legal scholars who have coalesced around the collective effort to articulate LatCrit theory have exhibited . . . [a] sense of shared groupness."[2]

This Symposium on nation and culture illustrates these LatCrit goals and advances them. The two main works and the commentaries on them are rich explorations and representations of the voices and concerns of LatCrit theory. This Foreword engages all the works by focusing on the concept of voice and silence. Part I

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and impressive series of published colloquia. *See* Symposium, *Comparative Latinas/os: Identity, Law and Policy in LatCrit Theory*, 53 U. MIAMI L. REV. 575 (1999); Symposium, *Difference, Solidarity and Law: Building Latina/o Communities through LatCrit Theory*, 19 UCLA CHICANO-LATINO L. REV. 1 (1998); Colloquy, *International Law, Human Rights, and LatCrit Theory*, 28 U. MIAMI INTER-AM. L. REV. 177 (1996–97); Symposium, *LatCrit: Latinas/os and the Law*, 85 CAL. L. REV. 1087 (1997), 10 LA RAZA L.J. 1 (1998); Symposium, *LatCrit Theory: Naming and Launching a New Discourse of Critical Legal Scholarship*, 2 HARV. LATINO L. REV. 1 (1997); Colloquium, *Representing Latina/o Communities: Critical Race Theory and Practice*, 9 LA RAZA L.J. 1 (1996). In addition, the proceedings of LatCrit V are slated for publication in the *Denver University Law Review* and the proceedings of LatCrit VI will be published in the *University of Florida Law Review*. *See generally*, THE LATINA/O CONDITION: A CRITICAL READER (Richard Delgado & Jean Stefancic eds., 1998); Berta Esperanza Hernández-Truyol, *Borders (En)gendered: Normativities, Latinas, and a LatCrit Paradigm*, 72 N.Y.U. L. REV. 882 (1997) [hereinafter Hernández-Truyol, *Borders (En)gendered*]; Berta Esperanza Hernández-Truyol, *Building Bridges: Bringing International Human Rights Home*, 9 LA RAZA L.J. 69 (1996) [hereinafter Hernández-Truyol, *Building Bridges II*] (suggesting the use of international human rights to establish Latinas'/os' claim to civil and political rights as well as to social, economic, and cultural rights), Berta Esperanza Hernández-Truyol, *Building Bridges III—Personal Narratives, Incoherent Paradigms, and Plural Citizens*, 19 CHICANO-LATINO L. REV. 303, 307–08 (1998) [hereinafter Hernández-Truyol, *Building Bridges III*] (aspiring to building of bridges between and among communities of color within the United States and suggesting the globalizing of those interests as a means of attaining full citizenship and enjoyment of human rights).

2. Francisco Valdes, *Foreword-Latina/o Ethnicities, Critical Race Theory, and Post-Identity Politics in Postmodern Legal Culture: From Practice to Possibilities*, 9 LA RAZA L.J. 1, 7 n.25 (1996).

locates the works in the axis of silence and power. Part II explores how critical theory and international human rights norms can be used to develop a progressive methodology to analyze and detect the exclusion or silencing of myriad voices. This Part develops a LatCritical Human Rights paradigm that, by internationalizing voice, serves as a useful tool to explore power-based silencing. Finally, in Part III, the authors illustrate how the proposed paradigm can focus the issues of culture and nation in a way that allows us to promote a non-essentialist, anti-subordination, inclusive personhood ideal.

I. SILENT COMPLICITY

This Symposium raises many important issues about silence, including an examination of the meaning of silence in power relationships. More specifically, Professor Margaret Montoya's article, *Silence and Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy and Discourse*, presents a heartfelt story about graffiti in the women's restroom at her school that depicted her in an extremely offensive and hurtful way.[3] She probes many difficult and pressing issues about the silence of minority and women students in our classrooms. Her article is a description and analysis of the struggle she and other subordinated people experience as we grapple with the question of whether we should publicly denounce hateful speech. Although many professors attest to the general silence of minority and women students, like Professor Montoya, we are not quite sure what it means and accordingly do not know how or even if we should stop and try to do something about it.

Joining Professor Montoya in grappling with the complex topic of the meaning of silence are Professors Steven Bender and Dorothy Roberts. Professor Bender, in his piece, *Silencing Culture and Culturing Silence: A Comparative Experience of Centrifugal Forces in the Ethnic Studies Curriculum*,[4] bolsters Professor Montoya's analysis about the irrelevance of minorities' voices to the majority culture.

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3. Margaret Montoya, *Silence and Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy and Discourse*, 5 MICH. J. RACE & L. 847 (2000), 33 U. MICH. J.L. REFORM 263 (2000).

4. Steven W. Bender, *Silencing Culture and Culturing Silence: A Comparative Experience of Centrifugal Forces in the Ethnic Studies Curriculum*, 5 MICH. J. RACE & L. 913 (2000), 33 U. MICH. J.L. REFORM 329 (2000).

Professor Bender's analysis of the problem of the "institutionalization" of minorities' silence reinforces Professor Montoya's observations about the complexity of the problems minorities face in trying to participate in meaningful ways in the discourse about the relationships among power, subordination, and identity.

In her essay, *The Paradox of Silence: Some Questions about Silence as Resistance*,[5] Professor Roberts focuses on the ambiguity surrounding the meaning of silence. She examines the difficulty we have as educators in knowing whether silence is resistance or whether it is a defense mechanism, often involuntarily imposed on minorities to protect ourselves from hostile voices.[6] Moreover, Professor Roberts highlights that hostile voices are heard by subordinated people everywhere: from the doctor, the welfare agent, and even the welfare law itself.[7] She agrees with Professor Montoya that our challenge perhaps is "not to figure out a theoretical distinction between subjugation and resistance, but to listen to those who have been silenced so that we might learn how to work toward a more just society."[8]

Professor Roberts is correct about the importance of listening to silenced people. This is readily apparent in Professor Gema Pérez-Sánchez's article, *Franco's Spain, Queer Nation?*,[9] an informative and thoughtful examination of the effort by Francisco Franco and his administration to repress socially deviant behavior, particularly homosexuality. Although seemingly unrelated to the topic of silence, silence is a significant aspect of the article. Specifically, Professor Pérez-Sánchez's article makes a significant contribution to the literature because of "the lack of historical studies about Spanish-speaking lesbians, gays, bisexuals, and transgendered people."[10] She speaks to the silence of other scholars who have chosen not to write about homosexuality in Franco's oppressive regime.

Professors Ratna Kapur and Tayyab Mahmud enrich our understanding of Franco's oppression of sexual minorities in their essay, *Hegemony, Coercion, and Their Teeth-Gritting Harmony: A Commentary*

5. Dorothy E. Roberts, *The Paradox of Silence: Some Questions about Silence as Resistance*, 5 MICH. J. RACE & L. 927 (2000), 33 U. MICH. J.L. REFORM 343 (2000).

6. *See id.*

7. *See id.*

8. *Id.* at 5 MICH. J. RACE & L. at 931, 33 U. MICH. J.L. REFORM at 347.

9. Gema Pérez-Sánchez, *Franco's Spain, Queer Nation?*, 5 MICH. J. RACE & L. 943 (2000), 33 U. MICH. J.L. REFORM 359 (2000).

10. *Id.*

on Power, Culture, and Sexuality in Franco's Spain.[11] They provide a rich critique of Professor Pérez-Sánchez's presentation of her theoretical understanding of the relationship between State power and repression and offer alternative ways of understanding that part of Spain's history. Similarly, Professor Peter Kwan's piece, *Querying a Queer Spain Under Franco,*[12] supports the importance of Professor Pérez-Sánchez's analysis of the dearth of literature in this area and pleads for a more thorough explanation of her claim "that under Franco, Spanish nationalism was somehow dependent upon or even threatened by the Spanish gay community, . . . since . . . lesbians were simply invisible to Francoism and gay men were deeply fearful and closeted."[13]

Professor Kwan's insight provides a more subtle but important way in which all of the pieces in this Symposium are related to silence. The articles and comments speak volumes about the way in which complicity in silence promotes hegemony. Thus, not only is it important to listen to the people who have been silenced—Professor Montoya herself, those who want to teach about "difference," the sexual minorities under Franco's regime—but it is also important to ask: Why are majority members who believe in justice afraid to speak out when they see injustice?

As the following story highlights, most of us are not above speaking out. Recently, at our first faculty meeting of the year, one of the co-chairs of our appointments committee presented the hiring policy to us for adoption. Detailed in the proposed policy were our many curricular needs, as well as a statement that we are committed to diversity in hiring. Moreover, the co-chair emphasized that because two African American colleagues had resigned within the last two years and a third was on a two-year visit at another law school (and unclear as to whether she would return), it was especially important for us to diversify our faculty.

The immediate response to the co-chair's comments came from a colleague who opined that it seemed that an emphasis on diversity in hiring in recent years had interfered with our ability to fill curricular needs. He stated that our policy ought to be to hire the best qualified candidates who will teach the courses we need to have taught. Although the former chair of appointments noted

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11. Ratna Kapur & Tayyab Mahmud, *Hegemony, Coercion and Their Teeth-Gritting Harmony: A Commentary on Power, Culture, and Sexuality in Franco's Spain,* 5 MICH. J. RACE & L. 995 (2000), 33 U. MICH. J.L. REFORM 411 (2000).

12. Peter Kwan, *Querying a Queer Spain Under Franco,* 5 MICH. J. RACE & L. 989 (2000), 33 U. MICH. J.L. REFORM 405 (2000).

13. *Id.* at 5 MICH. J. RACE & L. at 992, 33 U. MICH. J.L. REFORM at 408.

that in the past, offers to diverse candidates were consistent with both quality and curricular coverage, few other colleagues expressed support for a curricular need approach to hiring and intimated that quality and diversity were mutually exclusive.

This sentiment evoked a rebuttal from Kenneth Nunn, our Associate Dean for Law Center Affairs, the only African American on the active faculty. He was clearly offended by the suggestions that to diversify the faculty we needed to lower our standards. Many, if not the majority of us, were also offended by the suggestion, which became apparent as we talked about it afterward.

Not surprisingly, the more vocal members of the faculty could not refrain from reiterating their beliefs. One comment in particular impugned the integrity of the entire appointments committee, however. A member of that committee immediately stated how the comment had offended her, and "I agree" came from across the room before the meeting was adjourned.

Shortly after the meeting, Professor Nunn resigned from his position as Associate Dean. He could not believe that none of us publicly supported him as he tried to defend the position that diversity and quality go together. In light of the general unsupportive environment of racial minorities at the law school, the absence of public support at the faculty meeting was too much for him. Silence through an omission can be as actively destructive and hurtful as any commission.

This underlying and powerful theme of silence and silencing permeates the works in this Symposium issue. All of the situations presented opportunities for the majority to speak against the injustices they witnessed. Oppressive regimes are allowed to exist because members of a powerful group, through their silence, act in complicity with the oppressors. Some may think their silence is ambiguous. As between the victim and the majority complicitor, however, it is clear who has the greater responsibility to break the silence in the face of injustice.

There are, however, two important caveats. First, we do not suggest the subordinated lack agency. To the contrary, as Professor Montoya's piece suggests, the disempowered can find empowerment in voice—even if the disempowered person opts for silence. Second, we are mindful of problems that can arise when "third parties" try to speak for others.[14] Questions about the speaker's qualifications to speak for a group of which he or she is not a

14. *See* SHARON E. RUSH, LOVING ACROSS THE COLOR LINE: A WHITE ADOPTIVE MOTHER LEARNS ABOUT RACE (2000).

member are legitimate. But the case of the silent complicitor is significantly different. He or she does not try to speak for those who have been unjustly silenced. Rather, the majority member speaks up about the injustice of silencing that promotes subordination. He or she distances himself or herself from the hegemony and actively denounces it.

Thus, the topic of silence is multifaceted. Depending on context, it can be evidence of oppression, resistance, or complicity. This Symposium is an opportunity to explore the global dimensions of silence in the international human rights arena.

II. RE/FORMING LAW: CRITICAL THEORY AND HUMAN RIGHTS

Critical Race Theory (CRT) generally, and LatCrit specifically as part of that philosophy, is a movement that at its core is committed to humanitarian conceptions of personhood—conceptions that transcend the limitations of current equality doctrine.[15] Human rights norms that reflect and dovetail with these CRT aspirations were first comprehensively embodied in a 1948 United Nations document known as the Universal Declaration of Human Rights.[16]

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15. *See, e.g.*, Hernández-Truyol, *Borders (En)gendered*, *supra* note 1 (discussing the normative perspective of equality doctrine). Equality narratives in the United States appear fixated on an "equality as sameness" model. This paradigm has generated an awkward jurisprudence on issues of race (particularly in the affirmative action context), sex (especially in the ongoing pregnancy debate), and gendered family hierarchies (notably in discussions about the public and private including essential but unpaid work). *See* RICHARD DELGADO, THE COMING RACE WAR? (1996); CHARLES LAWRENCE III & MARI J. MATSUDA, WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION (1997); James Carney, *Why Talk Is Not Cheap: The Turmoil of Clinton's Race Initiative Is the Latest Evidence of America's Black-White Distrust*, TIME, Dec. 22, 1997, at 32 (citing strife among members of the Initiative's advisory board, critics, and even White House staffers over the makeup and goals of the President's Initiative on Race); *see also* Geduldig v. Aiello, 417 U.S. 484 (1974); Berta E. Hernández, *To Bear or not to Bear: Reproductive Freedom as an International Human Right*, 17 BROOK. J. INT'L L. 309 (1991); Ann C. Scales, *Towards a Feminist Jurisprudence*, 56 IND. L.J. 375 (1981). Critical race and feminist theorists have challenged the validity and authority of an equality jurisprudence that aspires to and insists upon blindness with respect to race, sex, and class differences—a patently unworkable approach. A realistic reconsideration of the equality paradigm would acknowledge both sameness and difference, serve to resolve concerns about fairness and (in)justice, explain the real incongruity between the goals of full participation in society by all persons and the reality of the invisibility and marginalization of many individuals and groups, and unite, rather than divide, varied but often interdependent communities. *See* Berta Esperanza Hernández-Truyol, *Building Bridges—Latinas and Latinos at the Crossroads: Realities, Rhetoric, and Replacement*, 25 COLUM. HUM. RTS. L. REV. 369 (1994) (focusing on Latina/o community diversity within the United States); Hernández-Truyol, *Building Bridges II*, *supra* note 1, at 69.

16. G.A. Res. 217, U.N. GAOR, 3d Sess., pt. 1, U.N. Doc. A/810 (1948).

By declaring the universality of human rights, signatory nations broke the silence of complicity and committed themselves to speak up for the silenced minorities. This declaration was a revolutionary articulation and embrace of a plethora of individual rights central to personhood, including not only civil and political rights but also social, economic, cultural, and solidarity rights.[17] The Universal Declaration, together with CRT, provides a new voice which, in turn, facilitates an analytical construct from which to consider this Symposium's works.

The Declaration enables an approach to human dignity that serves to break global and local cycles of inequality. This originally hortatory pronouncement, now considered to be customary law,[18] serves as a blueprint for "globalizing localisms" and "localizing globalisms."[19] By globalizing a localism, we mean an analysis that

17. For writings on these topics by Richard Delgado, a leading critical race theorist, see, for example, RICHARD DELGADO, THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE (1995) [hereinafter DELGADO, THE RODRIGO CHRONICLES] and RICHARD DELGADO, WHEN EQUALITY ENDS (1999) [hereinafter DELGADO, WHEN EQUALITY ENDS].

18. *See, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876, 883 (1980) (noting that, notwithstanding the distinction between binding treaties and non-binding pronouncements, the Universal Declaration of Human Rights is regarded as authoritative law by the international community); *see also* Statute of the International Court of Justice, 59 Stat. 1055, art. 38 (June 26, 1945) (providing that custom is a source of law); *cf.* The Paquete Habana, 175 U.S. 677, 700 (1899) (noting that "where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.").

19. *See* BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW COMMON SENSE: LAW, SCIENCE, AND POLITICS IN THE PARADIGMATIC TRANSITION 263 (1995) [hereinafter SANTOS, TOWARD A NEW COMMON SENSE] (defining "globalized localism" as "the processes by which a given local phenomenon is successfully globalized, be it the worldwide operation of TNC's, the transformation of the English language into *lingua franca*, the globalization of American fast food or popular music, or the worldwide adoption of American copyright laws on computer software" and explaining a "localized globalism" as "the specific impact of transnational practices and imperatives on local conditions that are thereby destructured and restructured in order to respond to transnational imperatives."). My use of the term "globalized localism" refers to the use of a domestic critical concept to inform international norms. The "localized globalism" phrase in this work refers to the use of an international human rights concept to develop, expand, and transform the context, concept, meaning, and application of critical theoretical constructs.

Currently, in both international and domestic spheres, it is virtually impossible to travel through a day without repeated confrontations with the term *globalization*. However, seldom will one encounter remotely similar definitions. *See id.* Professor Santos defines globalization as the "process by which a given local condition or entity succeeds in extending its reach over the globe and, by doing so, develops the capacity to designate a rival condition or entity as local." BOAVEUTURA DE SOUSA SANTOS, TOWARD A MULTICULTURAL CONCEPTION OF HUMAN RIGHTS, Zeitschrift für Rechtssoziologie 18.1 1, 3 (1997) [hereinafter SANTOS, TOWARD A MULTICULTURAL CONCEPTION]; *see also* Aihwa Ong, *Strategic Sisterhood or Sisters in Solidarity? Questions of Communitarianism and Citizenship in Asia*, 4 IND. J. GLOBAL L. STUD. 107 (1996) (defining globalization as "the intensified capitalist integration of the world."). I use the term globalization to refer to the processes by which inter-, intra-, and

takes a domestic movement, here specifically LatCrit Theory (as well as CRT generally), global by using the domestic movement to develop, expand, and transform the context, meaning, and application of international human rights norms. The flip-side of the project that "localizes a globalism" utilizes theoretical and substantive dimensions of human rights norms to develop, expand, and transform the context, meaning and reach of domestic critical discourses.

The globalization of domestic critical theory reconfigures the human rights idea, both domestically and internationally, and transforms it into a truly inclusive paradigm of dignity and personhood. Simultaneously, localizing international human rights norms and principles effects a paradigm shift in which domestic language of citizenship and equality, in other words, voice, speaks of incorporating international human rights notions of personhood and human dignity.[20]

The central aims for both human rights and critical theories is liberation and justice. This convergence of focus presents opportunities for mutual enrichment. Critical theory movements analyze the conditions of and seek to empower and give voice to non-normative or subaltern communities within majority societies.[21] These projects are also concerned that praxis—the effectuation of the theory so as to have meaning for real persons in real life[22]—parallels significant human rights developments regarding individual rights, including the rights of marginalized, often silenced groups—that is, ethnic, racial,[23] and religious[24]

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transboundary movements of capital, information, and persons serve to influence, affect, and change norms, traditions, and processes of learning, information and goods exchanges, and lifestyles.

20. *See* BERTA ESPERANZA HERNÁNDEZ-TRUYOL, HUMAN RIGHTS, GLOBALIZATION AND CULTURE: CENTERING PERSONHOOD IN INTERNATIONAL NARRATIVE, IN MORAL IMPERIALISM, A CRITICAL ANTHOLOGY (forthcoming 2001) [hereinafter HERNÁNDEZ-TRUYOL, HUMAN RIGHTS, GLOBALIZATION AND CULTURE]; Hernández-Truyol, *Building Bridges II*, *supra* note 1; Hernández-Truyol, *Building Bridges III*, *supra* note 1.

21. *See, e.g.*, CRITICAL RACE FEMINISM (Adrien K. Wing ed., 1997); CRITICAL RACE THEORY: THE CUTTING EDGE, (Richard Delgado & Jean Stefancic eds., 2d ed. 2000); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, (Kimberlé Crenshaw et al. eds., 1995) [hereinafter CRITICAL RACE THEORY: KEY WRITINGS]; THE LATINA/O CONDITION, *supra* note 1; THE POLITICS OF LAW, (David Kairys ed., 1998).

22. *See* ERIC YAMAMOTO, INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA (1999).

23. *See* International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 5 I.L.M. 350.

24. *See Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief*, G.A. Res. 36/55, U.N. GAOR 3d Comm., 36th Sess., 73d plen. mtg., U.N. Doc. A/RES/36/55 (1982).

minorities; indigenous/first nations peoples;[25] women;[26] children;[27] and the rights of peripheral states in the worldwide sphere.[28] Both domestic and human rights discourses engage notions of dignity and rights of persons in relation to the nation state, but they go beyond statism and include so-called private conduct and civil society.[29]

Indeed, considering the statist implication of norms, human rights law is an important component of a project of liberation. In its short formal existence, human rights law has effectively reconfigured the doctrine of sovereignty, the formerly omnipotent power of the state[30] to do as it wished with its nationals, wherever they might be, and with anyone who found himself or herself within its territorial jurisdiction.[31] Human rights law is revolutionary from a statist perspective in that it renders individuals subjects of international law, rather than just objects.[32] Under the human

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25. *See Technical Review of the U.N. Draft Declaration on the Rights of Indigenous Peoples*, U.N. ESCOR, 46th Sess., U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994).

26. *See* Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 19 I.L.M. 33.

27. *See* Convention on the Rights of the Child, G.A. Res. 44/25 (1990) (visited Oct. 9, 2000) <http://www.unicef.org/crc/crc.htm>.

28. *See* U.N. CHARTER, art. 2, para. 1 (explicitly providing that "[t]he Organization is based on the principle of the sovereign equality of all its Members"); *Report of the World Summit for Social Development*, U.N. Doc. A/CONF.166/9 (1995). *But see* Texaco Overseas Petroleum Co. v. Libyan Arab Republic, U.N. Int'l Arb. Trib, *translated in* 17 I.L.M. 1 (1978) (finding that U.N. General Assembly Resolution on Permanent Sovereignty Over Natural Resources (Res. 1803) which was supported by major western powers trumped a parallel resolution, U.N. General Assembly Resolution on Permanent Sovereignty Over Natural Resources (Res. 3171), which was strongly supported by developing countries).

29. *See, e.g., U.N. World Conference on Human Rights: Vienna Declaration and Programme of Action*, U.N. World Conference on Human Rights, 220th mtg., U.N. Doc. A/CONF. 157/24 (1993), *reprinted in* 32 I.L.M. 1661 (1993) (including a prohibition of private violence as well as economic violence); *see also* IRWIN P. STOTZKY, SILENCING THE GUNS IN HAITI (1997) (discussing the various aspects of society and human well-being in the context of the Haiti situation); Berta E. Hernández-Truyol, *Sex, Culture, and Rights: A Re/Conceptualization of Violence for the Twenty-First Century*, 60 ALB. L. REV. 607 (1997) (suggesting and providing numerous examples of the inter-connectedness of civil and political rights with social and economic rights, as well as the nexus of culture and economic violence against women).

30. *See* Louis Henkin, *An Agenda for the Next Century: The Myth and Mantra of State Sovereignty*, 35 VA. J. INT'L L. 115, 118 (1994).

31. For a detailed discussion of the impacts of globalization and sovereignty, see, for example, CHALLENGING BOUNDARIES: GLOBAL FLOWS, TERRITORIAL IDENTITIES (Michael J. Shapiro & Hayward R. Alker eds., 1996); DAVID HELD, DEMOCRACY AND THE GLOBAL ORDER: FROM THE MODERN STATE TO COSMOPOLITAN GOVERNANCE (1995); SASKIA SASSEN, GLOBALIZATION AND ITS DISCONTENTS: ESSAY ON THE NEW MOBILITY OF PEOPLE AND MONEY (1998); and SASKIA SASSEN, LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION (1996).

32. *See, e.g.*, The Nurnberg Trial, 6 F.R.D. 69, 110 (1946) ("Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals

rights idea, states are accountable for the treatment of all persons, citizens and non-citizens alike, within its borders.[33] Human rights law, then, is a morally compelling tool for denouncing sovereign actions that derogate the dignity and integrity of personhood and citizenship.[34]

The human rights model enables the aspiration to full personhood for all persons of all races and geographies. The regime is not perfect, however; it has structural flaws in its origins and applications that need reconstruction before it can serve its potential for emancipation of the human spirit. It is in this reconstitutive endeavor that local critical theory can inform global norms.

One location at which local critical theory can effect a transformative interjection into the international human rights system and its norms is in presenting a foundation from which to challenge the Western/Northern hegemonic biases and assumptions[35] of international norms. Critical scholars have denounced such hegemonic underpinnings in local law of norms that were similarly articulated by and crafted in the image of Western/Northern power elites. In the domestic arena, critical theorists have successfully challenged the objectivity and fairness of a system of laws crafted by a powerful few that is then imposed on all, even those who had no voice in creating the system.[36]

Critical writings in the United States have given voice to "others"; they have deconstructed the legal master narrative to reveal its elitist and exclusionary foundation in a specific class (wealthy, propertied, educated), race (White), and sex (male).[37]

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who commit such crimes can the provisions of international law be enforced."). The Nurnberg and Tokyo tribunals were created to address human rights atrocities committed during World War II and to punish violators. *See* Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1, 9–10 (1982); *see generally*, LOUIS B. SOHN, CASES ON UNITED NATIONS LAW 898–967 (1956).

33. *See* Berta Esperanza Hernández-Truyol & Kimberly A. Johns, *Global Rights, Local Wrongs, and Legal Fixes: An International Human Rights Critique of Immigration and Welfare "Reform"*, 71 S. CAL. L. REV. 547 (1998); Berta Esperanza Hernández-Truyol, *Reconciling Rights in Collision: An International Human Rights Strategy*, *in* IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 13, 39 (Juan F. Perea ed., 1997).

34. *See* Celina Romany, *Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, 6 HARV. HUM. RTS. J. 87 (1993).

35. *See* SANTOS, TOWARD A NEW COMMON SENSE, *supra* note 19, at 346.

36. *See, e.g.*, DELGADO, WHEN EQUALITY ENDS, *supra* note 17, at ch. 6 (discussing inherent unfairness of formal and informal legal structures for outsiders).

37. *See* Richard Delgado, *Legal Storytelling: Storytelling for Oppositionists and Others: A Plea for Narrative*, *in* CRITICAL RACE THEORY: THE CUTTING EDGE, *supra* note 21, at 64 (describing the "stories . . . told by the ingroup . . . [that] provide it with a form of shared reality in which its own superior position is seen as natural"); Lisa C. Ikemoto, *Traces of the*

This local experience suggests that a reconstruction of the human rights model to transform it into a truly inclusive one appropriate in today's global context is in order. For example, a critical analysis of universal norms reveals that these international ideas and ideals were crafted within specific and narrow social, economic, historical, and cultural spaces. Such contextualization places in stark relief the effective imposition on many states of the perspective, needs, desires, interests, and experiences of a few powerful people effectively silencing the subaltern, the poor, and the subordinated.[38]

Master Narrative in the Story of African American/Korean American Conflict: How We Constructed "Los Angeles", 66 S. CAL. L. REV. 1581 (1993).

> The success of the White Man's control of the world is debatable; but his success in making other people act just like him is not. No culture that has come in contact with Western industrial culture has been unchanged by it, and most have been assimilated or annihilated, surviving only as vestigial variations in dress, cooking or ethics.

STEPHANIE M. WILDMAN, PRIVILEGE REVEALED 112 (1996) (citing Ursula K. Le Guin, *Feeling the Hot Breath of Civilization*, N.Y. TIMES BOOK REV., Oct. 29, 1989, at 11); *see also* DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987) (discussing the myth of egalitarian, color-blind constitution); Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539 (discussing the need for Black women's voices so that issues cease to be viewed from White middle class perspective); Derrick Bell, *White Superiority in America: Its Legal Legacy, Its Economic Costs*, 33 VILL. L. REV. 767 (1988) (arguing that courts reflect White supremacy and discussing economic costs of racism); Jerome McCristal Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, 77 VA. L. REV. 539 (1991) (arguing that the failure to present personal experiences reinforces majoritarian perspective); Adrienne D. 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) (arguing that the hearings reflect patriarchal assumptions about women); Richard Delgado, *Norms and Normal Science: Toward a Critique of Normativity in Legal Thought*, 139 U. PA. L. REV. 933 (1991) (critiquing the dominant school of normative jurisprudence); Richard Delgado, *Shadowboxing: An Essay on Power*, 77 CORNELL L. REV. 813 (1992) (discussing the dominant culture's preference for "objective" norms because they are of benefit to the empowered as they define the meaning of the rules); Neil Gotanda, *A Critique of "Our Constitution is Color Blind"*, 44 STAN. L. REV. 1 (1991) (arguing that the color-blind approach promotes White supremacy); Linda S. Greene, *Multiculturalism as Metaphor*, 41 DEPAUL L. REV. 1173 (1992) (arguing that the Supreme Court's "normative vacuum" results in failure to enforce equality and inclusion); Margaret M. Russell, *Race and the Dominant Gaze: Narratives of Law and Inequality in Popular Film*, 15 L. STUD. F. 243 (1991) (noting that movies reinforce and replicate popular culture's view of racial subordination); Robert A. Williams, Jr., *Columbus's Legacy: Law as an Instrument of Racial Discrimination Against Indigenous Peoples' Rights of Self-Determination*, 8 ARIZ. J. INT'L & COMP. L. 51 (1991) (arguing that the Supreme Court's jurisprudence dealing with American Indians comes from medieval European tradition and law of colonization brought by Columbus and seeks to legitimate cultural racism).

38. An example of the exclusionary process for defining human rights is the adoption of the Universal Declaration of Human Rights. The Universal Declaration was signed by only 48 states, with 8 states abstaining (including Saudi Arabia, the USSR, South Africa, and Yugoslavia). Today with 185 independent states belonging to the community of nations, the

Besides unearthing the hegemonic origins of international norms, a critical theory intervention into the human rights ideas and system can also provide a forum to explore the role of culture in the international arena. Indeed, it can afford a landscape in which to have a serious holistic engagement of the relativism versus universalism debate.[39] For instance, critical theory questions the validity of the universalization of normative standards that were formulated prior to the entrance of the former colonies into the community of nations.[40] It can influence a post-colonial perspective for reconstituting appropriate standards, rather than supporting the acceptance of the interpretation that patently fostered the interests of the colonizers. Critical theory can be a lens through which international human rights documents are scrutinized to reveal the hegemonic influences.[41] Once we expose the non-neutral context in which human rights documents were crafted, we can reconstruct the rules and redeploy their application in an inclusive and just manner. The once silenced minorities can then speak to an audience willing to listen and act upon their demand for justice and equality.

The adoption of the Universal Declaration reflected a commitment by states to enter into one treaty incorporating a collection of indivisible, interdependent, and inviolable rights that

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majority of which never voted on the Declaration, this document is nevertheless broadly accepted as embodying a plethora of customary universal human rights norms. *See* Berta Esperanza Hernández-Truyol, *Human Rights Through a Gendered Lens: Emergence, Evolution, Revolution in* WOMEN'S INTERNATIONAL HUMAN RIGHTS: A REFERENCE GUIDE (Kelly Askin & Dorean Koenig eds., 1998) [hereinafter Hernández-Truyol, *Human Rights Through a Gendered Lens*]; Berta Esperanza Hernández-Truyol, *Reconciling Rights in Collision in* IMMIGRANTS OUT!, *supra* note 33, at 257–59 (describing customary norms and international human rights law); *see also* Statute of the International Court of Justice, *supra* note 18, at art. 38 (citing custom as one of the primary sources of international law).

39. For a more detailed analysis of the Universalism-Relativism debate, see Guyora Binder, *Cultural Relativism and Cultural Imperialism in Human Rights Law*, 5 BUFF. HUM. RTS. L. REV. 211 (1999) and Berta Esperanza Hernández-Truyol, *Women's Rights As Human Rights—Rules, Realities and the Role of Culture: A Formula for Reform*, 21 BROOK. J. INT'L L. 605 (1996).

40. *See* R. ANAND, INTERNATIONAL LAW AND THE DEVELOPING COUNTRIES (1987); M. SHAW, INTERNATIONAL LAW (2d ed. 1986); *see generally* Hernández-Truyol, *Human Rights Through a Gendered Lens*, *supra* note 38.

41. Critical analysis, whether or not expressly framed as such, unpacks in the business context the master narrative of the law and economics ideology too. *See, e.g.*, Claire Moore Dickerson, *Cycles and Pendulums: Good Faith, Norms, and the Commons*, 54 WASH. & LEE L. REV. 399, 401, 422 (1997) (arguing that the commercial terrain is not level); Claire Moore Dickerson, *From Behind the Looking Glass: Good Faith, Fiduciary Duty and Permitted Harm*, 22 FLA. ST. U. L. REV. 955, 969, 977, 1003 (1995) (arguing that the law and economics perspective harms the weaker party and that structural inequality is built into partnerships under the statute drafted and supported by the law and economics scholars).

include not only civil and political rights, but also social, economic, cultural, and solidarity rights.[42] As many human rights theorists recognize, all levels of rights are necessary for human flourishing.[43] Unfortunately, the North/South and East/West as well as capitalism/communism divides resulted in the bifurcation of the unified system envisioned in the *Declaration* into two separate conventions: the International Covenant on Civil and Political Rights (ICCPR) and the Covenant on Economic, Cultural, and Social Rights (Economic Covenant).[44]

Beyond the geopolitical underpinnings and ramifications of this split, critical theorists can offer additional insights for this division. For one, a critical analysis unmasks the power imbalance among the actors. During the meetings concerning a single human rights convention, the Western/Northern states, reflecting their "equal access" liberal republican ideology, were comfortable only with the grant of civil and political rights, that is, those "negative" rights of individuals to be free from governmental interference.[45] These same states, however, rejected undertaking any positive obligations involving granting social, economic, and cultural rights.[46]

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42. The Universal Declaration included rights to life, liberty, nondiscrimination, and others such as the prohibition of slavery, inhuman treatment, arbitrary arrest, and arbitrary interference with privacy which are considered civil and political in nature. *See* International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, arts. 6, 7, 8(1)–(2), 15, 16, 18, 999 U.N.T.S. 171 (including rights such as the right to life; freedom from torture or cruel, inhuman, or degrading treatment or punishment; freedom from slavery and servitude; nonapplicability of retroactive laws; right to recognition as a person before the law; and the right to freedom of thought, conscience, and religion). The Universal Declaration also included rights such as the right to social security, full employment, fair working conditions, an adequate standard of living, and participation in the cultural life of the community which are considered economic, social, and cultural in nature. *See* International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3.

43. *See* AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999); THE QUALITY OF LIFE, (Martha Nussbaum & Amartya Sen eds., 1993).

44. *See* Hernández-Truyol, *Human Rights Through a Gendered Lens*, *supra* note 38.

45. *Id.*; *see also* Mary G. Dietz, *Context is All: Feminism and Theories of Citizenship*, DAEDALUS, Fall 1987, at 1, 4–5. Interestingly, and perhaps ironically, the liberal vision, while stuck on civil and political rights even at the expense of the greater societal good, recognized the inviolability premise: "Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. . . . The rights secured by justice are not subject to political bargaining or the calculus of social interests." *Id.* at 4 (*quoting* JOHN RAWLS, A THEORY OF JUSTICE 3–4 (1971)). Negative rights are those that focus on the individual's personal rights with the consequent effect of placing limits on actions of governments. In contrast, positive rights and those that articulate a social bill of rights have attached to them positive government obligations. *See generally* Charles Taylor, *Human Rights: The Legal Culture, excerpted in* INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 173, 174–76 (Henry J. Steiner & Philip Alston eds., 1996).

46. *See* Dietz, *supra* note 45, at 4 ("The life of liberalism . . . began in capitalist market societies, and as Marx argued, it can only be fully comprehended in terms of the social and

In contrast, both the newly-emerging, so-called third world states as well as the communist "second world" states saw negative rights as the master's tools that would not only entrench colonialism but also maintain the bourgeoisie's power over the masses.[47] Former colonies and the communist bloc firmly held that true liberation and freedom could only result from the grant of positive rights: social, cultural, and economic. Negative rights would perpetuate silence; positive rights would give voice.[48]

This tension between North/West on the one hand, and the South/East and communist bloc on the other, resulted in the dichotomization of rights contrary to the Declaration's holistic indivisibility and interdependence of rights aspiration. To date, the United States refuses to ratify the Economic Covenant. Even those Western states that have ratified the Economic Covenant, view it not as an obligation to *create* economic rights but rather as an obligation to enforce in a non-discriminatory manner those rights the state recognizes; some states, citing to the language used in the Economic Covenant, even perceive the enumerated rights as hortatory.[49] Using power as an axis for a critical evaluation of the process that resulted in the bifurcation of rights leads to the conclusion that the resulting structure simply reflects the institutionalization of the West's narrative; the dominant voice prevailed, the subordinated remains silenced. A reconstruction is imperative before there can be a universal platform for human rights discourse in which no participant is silenced.

The hegemonic Western interpretation misleads one to believe that only civil and political rights, the so-called "first generation" rights, are the "real" international human rights. Indeed, the roots of civil and political rights lie in the American Declaration of Independence and the French *Declaration des Droits de L'Homme* [Rights of Man], documents resulting from the late eighteenth century political and social uprisings that sought to identify

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economic institutions that shaped it."); Hernández-Truyol, *Human Rights Through a Gendered Lens*, *supra* note 38.

47. *See* Hernández-Truyol, *Human Rights Through a Gendered Lens*, *supra* note 38.

48. *See id.*; *see also* The Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960, G.A. Res. 1514, 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc. A/4684 (1960).

49. *See* Feldbrugge v. The Netherlands, 99 Eur. Ct. H.R. (ser. A) (1986); *see also* Martin Scheinin, *Economic and Social Rights as Legal Rights*, *in* ECONOMIC, SOCIAL AND CULTURAL RIGHTS 41, 43 (Asbjorn Eide et al. eds., 1995).

impermissible governmental intrusions into individual lives.[50] Yet, as critical thinkers have underscored, it is important to recall that these eighteenth-century social and political revolutions coexisted with slavery, the decimation of indigenous peoples, and with women's status as chattel, which are hardly positions of equality or equal access but rather are classic examples of how power can be used to silence.[51] Thus, while all agree that civil and political rights such as the rights to non-discrimination, liberty, and security of the person are not only desirable but necessary, current interventions into equality discourses require a recognition of their exclusionary beginnings to ensure that all persons benefit from this historical legacy. To be sure, as critical theorists would emphasize, a comprehensive review not only of the documents but also of the position of the majority of the states in the community of nations makes plain that economic, social, and cultural rights are not, and should not be, a second class of rights, even if they are known as the second generation.[52]

Thus, critical theoretical interventions are valuable resources to inform global discourses. These locally derived insights provide the tools for exposing the hegemonic foundations of global human rights norms much as they have served to expose the non-neutrality of local laws. In addition, by revealing the flawed origins and application of norms, the local critical conversations provide a framework within which to reconstruct the international idea in a counter-hegemonic, multidimensional, multicultural, inclusive manner. In these reconstructive efforts it is imperative to ensure that new notions of justice with paramount respect for personhood

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50. In contrast, while also based on revolution—the anti-colonialist and post-socialist revolutions—the champions of social, economic, and cultural rights sought to impose positive obligations on states for the well being of communities and society.

51. *See* Romany, *supra* note 34, at 90 ("[T]he presence of patriarchy in these emancipatory structures [of liberalism] reveals the gap between liberal concepts and reality."); *see also* Hernández-Truyol, *Human Rights Through a Gendered Lens*, *supra* note 38; Ursula Vogel, *Marriage and the Boundaries of Citizenship*, *in* THE CONDITION OF CITIZENSHIP, 79 (Bart van Steenbergen ed., 1994).

52. *See* International Covenant on Social, Cultural and Economic Rights, *supra* note 42. At this juncture, it is appropriate to mention that an ongoing debate exists between the Critical Legal Studies school and the Critical Race Theorists regarding the value of rights. *See, e.g.*, Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 304 (1987) (criticizing critical legal studies); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1364–71 (1984) (noting rights are unstable); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, *in* CRITICAL RACE THEORY: THE CUTTING EDGE, 84, 86 (Richard Delgado ed., 1995) (noting importance of rights language); *see also* Robert W. Gordon, *Some Critical Theories of Law and their Critics*, *in* THE POLITICS OF LAW, *supra* note 21, at 641, 657–58.

do not become synonymous with or exclusive to any group or ideology.[53] The process of reconstruction must be transformational, dynamic, and ongoing in a profoundly *un*hegemonic way. The majority must act and speak up or remain silent complicitors at best.

We have shown in a general way how the local insights can serve to develop, expand, and transform the global notions of human rights. Here, for clarification, we offer a few particular examples of the utility of such local interventions. One example pertains to the idea of non-discrimination based on sex, which is embraced by virtually all human rights instruments including the U.N. Charter. The reality of this protection starts to crumble if one looks beyond the non-discrimination clauses to some of the substantive provisions granting specific rights. While Article 2(1) of the ICCPR mandates sex equality, Article 20 provides that "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."[54] On its face, Article 20 does not proscribe, and thus allows, sex-based advocacy of hatred. Canons of construction—both domestic from contract law and international from the Vienna Convention on the Law of Treaties—provide that the general cedes to the specific. Therefore, the omission of sex from Article 20 signifies that sex-based violence if at all undesirable, at least does not rise to the evil of ethnic, race, or religion-based hatred. Such omission is deeply troubling because the world recognizes that sex-based violence and other forms of sex inequalities are prevalent and persistent global problems.[55] Sex-equality notions are silenced; sex-based hatred is given exclusive public voice.

Certainly, a critically informed analysis suggests that the inconsistency in the provisions within the ICCPR be resolved so as to maximize the protections against discrimination. Moreover, a critical analysis would also challenge the rules of interpretation that serve to undercut the human rights ideal. Local theory thus is an invaluable tool for the reconstruction of global norms in a fashion sensitive to the intersections of race, sex, ethnicity, class, religion, language, and sexuality. Such critical theoretical interventions are not only appropriate but also necessary for a truly

53. *See* Ong, *supra* note 19, at 109 (defining globalization as "the intensified capitalist integration of the world"); Iris Marion Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, *in* THEORIZING CITIZENSHIP 184–95 (Ronald Beiner ed., 1995) (proposing a principle of group representation).

54. International Covenant on Civil and Political Rights, *supra* note 42, at art. 20.

55. *See Human Development Report 1995*, U.N. Development Programme (1995).

workable human rights model. Women and others who are victims of sex-based discrimination are entitled to an equal voice in a just society.

As critical theorists, the hegemonic foundations of international human rights norms evident in the construction of sex, race, and racial power in the Convention on the Elimination of All Forms of Racial Discrimination (Race Convention or CERD) are particularly intriguing.[56] CERD contains a general nondiscrimination provision that includes sex. Its preamble refers to a provision of the Universal Declaration that includes sex. Yet, the Race Convention's reference to the Declaration deletes sex from the inclusive reference.

More disturbing, however, in an analysis of hegemonic power in the international sphere is the definition of racial discrimination in the Race Convention: "any distinction, exclusion, restriction or preference based on race, color, *descent, or national or ethnic origin* which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field or public life."[57] This definition, by including descent, national, and ethnic origin as racial classifications, effectively internationalizes and institutionalizes the U.S. social construction of the race model—the binary Black/White paradigm. Moreover, the definition in CERD does not take sex into account. It also effectively racializes ethnicity and national origin and has the potential to effect erasures of classifications that are not Black or White.[58]

The LatCrit movement has specifically challenged the conflation of identity factors. Race as a synonym for multiple differences is a wholly inadequate paradigm for Latinas/os, whose multidimensionality and multiracialness within the United States identity borderlands can locate Latinas/os as both racial and ethnic others.[59] Any model that identifies difference as racial and places race within the Black/White binary not only reflects the dominance of, but also adopts as "neutral, rational, ... [and] just" the

56. *See* International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 23.

57. *Id.* at 353 (emphasis added).

58. *See* DELGADO, WHEN EQUALITY ENDS, *supra* note 17, at ch. 8 (discussing how the Black-White binary erases Latinas/os from the aspirations of civil rights efforts).

59. *See* Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CAL. L. REV. 1213, 1219 (1997), 10 LA RAZA L.J. 127, 133 (1997).

North/West perspective—the "perpetrator perspective"[60] in the international arena. Such a construct universalizes as normative the particularities of the White, heteropatriarchal conception of normal. A critical intervention into such a conflation of race with other identity components will give true meaning to the indivisibility and interdependence[61] structure of the human rights model, which accepts rights as holistic. Such a reconstituted ideal becomes invaluable as a tool to eradicate injustice and give Latinas/os and all racial minorities an equal voice.

Other vestiges of the foundational inequalities resulting from the hegemonic origins of the human rights regime persist. Women lack full citizenship in all states of the global community. Similarly, this construct denies full citizenship to racial, sexual, and ethnic minorities within first world states, all people in third world states, and indigenous peoples in all states—North and South, East and West. Thus, notwithstanding the equality rhetoric, many persons around the globe experience a widespread pattern of inequality in access to education, health, and nutrition; in participation in the social, political, and economic spheres; and in access to wealth, resources, technology, and wages. These conditions provide a clear opportunity to use local critical theory discourses to transform international human rights principles in a manner that will promote global justice.[62] Our voices can make a difference for ourselves and for those who remain silent either as evidence of fear or as acts of resistance.

This observation identifies the polarization of the economic development of states as a location in which a critical theoretical intervention can inform human rights discourse. A critical unveiling of the origins of human rights concerns also shows the source of the pervasive inequalities attendant to market

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60. CRITICAL RACE THEORY: KEY WRITINGS, *supra* note 21, at xiv.

61. *See* Rhonda Copelon, *The Indivisible Framework of International Human Rights: Bringing it Home*, *in* THE POLITICS OF LAW, *supra* note 21, at 216, 216–17; *see also* DELGADO, THE RODRIGO CHRONICLES, *supra* note 17, at 95 (discussing the interdependence of "housing, food, medical care, education, and other basic needs," which are second generation rights, with first generation civil and political rights); Hernández-Truyol, *Human Rights Through a Gendered Lens*, *supra* note 38.

62. *See* Romany, *supra* note 34, at 89 ("International society can thus be viewed as a blown-up liberal state which legislates in accordance with liberal humanistic values and which accepts as part of a social contract those values which refer to the essential dignity and freedom of human beings."); Young, *supra* note 53, at 16 ("[T]here is a deep similarity between the underclass problem in rich countries and the problem of poor countries. . . . [T]hey too are economically 'not needed and politically harmless, but challenge our moral foundations.'").

economies, and to the economic locations of states as core or peripheral, developed or underdeveloped, North or South.[63]

As previously noted, the polarization of the political interests of states resulted in the severance of the human rights vision into civil and political rights on the one hand and social, economic, and cultural rights on the other.[64] Currently, economic globalization is having an effect on these historical developments. For example, programs of aid to underdeveloped states were destined for failure, as they were not only highly bureaucratized but were implemented without a thorough comprehension of the various cultures and needs of diverse peoples and of the problems in the societies receiving aid.[65] Current turmoil surrounding WTO meetings underscores the persisting economic divide.[66] But it is flawed to compartmentalize economics from civil and political rights. Recent post-Cold War events reveal that great civil and political discord flows if not directly, at least in part, from economic instability and inequality.[67] The attendant consequences are increased nationalism, ethnic strife, civil war, and human rights abuses, which are challenges that the international community is struggling to resolve, regrettably without marked success.[68] Significantly,

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63. *See, e.g.*, SANTOS, TOWARD A NEW COMMON SENSE, *supra* note 19, at 427 ("[T]he core-periphery hierarchy in the world system is the result of unequal exchange, a mechanism of trade imperialism by means of which surplus-value is transferred from the periphery to the core."); *see also* DELGADO, WHEN EQUALITY ENDS, *supra* note 17, at ch. 3 (discussing impact on quality of life of non-regulation of housing market).

64. *See supra* notes 38–45 and accompanying text.

65. *See, e.g.*, David M. Trubek, *Back to the Future: The Short, Happy Life of the Law and Society Movement*, 18 FLA. ST. U. L. REV. 1, 23–24 (1990); *see also* DELGADO, WHEN EQUALITY ENDS, *supra* note 17, at ch. 3 (discussing the impact of non-regulation on colonies within the United States). *But see* Jane E. Larson, *Free Markets Deep in the Heart of Texas*, 84 GEO. L.J. 179 (1995) (suggesting that proper response to informal economics is gradualized formalization to which Larson refers as "regularization" and rejecting "either or" options of "outright deregulation" or "uniform regulation").

66. *See* Sam Howe Verhovek, *After Riots, Seattle Is Chagrined Yet Cheerful*, N.Y. TIMES, Dec. 6, 1999, at A28 (describing the protests by critics of the WTO, who believe the organization puts the interests of multinational corporations over concerns of ordinary people and the environment); *Prague Protests Turn Violent* (Sept. 26, 2000) <http://www.cnn.com/2000/WORLD/europe/09/26/prague.meeting.03/index.html> (describing the anti-capitalist riots that erupted during the IMF and World Bank meeting in Prague, based on the belief that the IMF and World Bank's structural, economic, and loan policies are responsible for all of the economic problems of the third world).

67. *See* SASSEN, GLOBALIZATION AND ITS DISCONTENTS, *supra* note 31.

68. *See id.*; *see also* Ralf Dahrendorf, *The Changing Quality of Citizenship*, *in* THEORIZING CITIZENSHIP, *supra* note 53, at 16–17 (noting that post communist states do not have a "bourgeoisie" concerned both about civil rights and economic growth which results in a confusion that, in turn, makes persons seek a "citizenship" that is formulated on a desire to belong to a homogeneous group—a "deplorable" result as "the true test of the strength of citizenship rights is heterogeneity.").

the failure is attributable, in part, to the powerful states' unwillingness to speak up for and listen to the less powerful states' voices.

Effectively, it would be of great assistance in seeking full citizenship for all persons to acknowledge that economic and civil and political realities are quite common across the North/South or East/West divides. Every first world state has an internal third world, specifically, inner cities, "new underclasses," racial and ethnic minorities, the disenfranchised, economically marginalized persons, and citizens whose race, sex, sexuality, class, religion, linguistic ability, or nationality "others" them. The "silent" damage of oppression reverberates around our largely unjust world. Critical theorists have been analyzing these concerns as local matters. The vast and rich literature generated by those examinations provides valuable suggestions for corrective measures for the global challenges and conversations existing at the international level.[69] Similarly, critical analyses could develop, expand, and transform the globalization discourse, and provide it with a broader mission, one that could work to eradicate barriers in the understanding of globalization's both positive and negative consequences.

Beyond reconceptualizing the discourse of economic globalization, critical theory may have valuable input into crafting the solutions for other conflicts that involve diverse peoples. Critical movements can be instrumental in ensuring that human rights discourse does not simply become an echo of the master narrative, but rather that these discourses assure that it incorporates respect and appreciation for different cultures.

Significantly, however, just as critical theory can contribute to the development and transformation of human rights discourse, the international human rights complex can provide a valuable and useful intervention into critical theory discourse in numerous ways. To elucidate this exciting possibility, we show how such an incorporation of an internationalist view can enrich analysis.

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69. *See generally*, CRITICAL RACE FEMINISM, *supra* note 21; CRITICAL RACE THEORY: KEY WRITINGS, *supra*, note 21; CRITICAL RACE THEORY: THE CUTTING EDGE, *supra* note 21; GLOBAL CRITICAL RACE FEMINISM (Adrien K. Wing, ed. 2000); THE LATINA/O CONDITION, *supra* note 1.

Specifically, we use the writings of this Symposium as examples of the utility of a reconstructed human rights paradigm.

First, by providing a construct in which rights are indivisible and interdependent, the human rights framework helps move beyond a comparative sameness/difference approach to equality.[70] International human rights classifications constitute a more expansive and, consequently, more useful measure of an individual's attainment of dignity, integrity, and full citizenship. For example, the global standards for non-discrimination include categories such as language, culture, and social origin. In regard to providing the bases for any protections at all,[71] many local environments, including the United States, contest and reject these categories. Moreover, a human rights indivisibility and interdependence analysis requires that these categories as a whole be the measure of an individual's equality, rather than the single-trait fragmented analysis of United States jurisprudence.

Second, while critical theory scrutinizes and rejects normative concepts that have institutionalized the "perpetrator perspective," it has not always succeeded in its enterprise without imposing another perpetrator's viewpoint. Critical theory has provided invaluable insights into the consequences of normalizing the dominant viewpoint: the exclusion of all women of certain classes, and of racial, ethnic, religious, and sexual minorities. For example, critical race theory was founded upon the desire to effect "a left intervention into race discourse and race intervention into left discourse."[72] The resulting implementation of this approach, however, was underinclusive and marginalized women of color, Latinas/os, and others whose multidimensional identities, including sex, race, color, ethnicity, religion, sexuality, national origin, language, citizenship, and culture may alienate them not only from the norm, but also from a single-dimensional view of "other."[73]

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70. For a brief discussion of the interdependence/indivisibility perspective, see Rhonda Copelon, *The Indivisible Framework of International Human Rights: Bringing it Home*, *in* THE POLITICS OF LAW, *supra* note 21, at 216, 216–17; Hernández-Truyol, *Gendered Lens*, *supra* note 38.

71. *See* Hernández v. New York, 500 U.S. 352 (1991) (addressing issues of language-based discrimination); Rust v. Sullivan, 500 U.S. 173 (1990) (refusing to extend constitutional protections regarding right to abortion to include public funding for the same); Hopwood v. Texas, 84 F.3d 720 (5th Cir. 1996) (concerning race and culture issues).

72. CRITICAL RACE THEORY: KEY WRITINGS, *supra* note 21, at xiv.

73. *See, e.g.*, Perea, *supra* note 59 (noting how the Black/White paradigm does not serve Latinas/os well in the struggle for attainment of equality).

Indeed, the emergence of several Critical modalities underscores the need for and desirability of the indivisibility/interdependence approach to rights and justice. The international human rights prototype provides a blueprint for a multidimensional critical paradigm that can be utilized to effect a participatory society in which all persons can fully exercise and enjoy their rights and obligations as equal citizens. Any system that prohibits or impedes participation by any particular group, which may render that citizenry subordinate, raises issues concerning the legitimacy of the process itself,[74] as well as the body guiding or implementing the process, be it the state, or civil society as defined by the family, school, or an ethnic, social, racial, or religious community. After all, a truly legitimate civil and pluralistic society is one that seeks the opinions and entertains the desires of all of its governed peoples, not just of the elite. No one is silenced in such a society.

Moreover, the multilingualism of the international human rights tradition is a useful addition to domestic critical theory. A body that listens only to one language from its people not only silences groups within its realm that speak different tongues, but also silences outside groups who share the language. Thus, importing the human rights discourse's acceptance of multilingualism serves to promote local acceptance of the voices of othered groups.

This Part explored the relationships of critical race theory to human rights law. Part III reviews how the main works and the comments in this Symposium, without specifically articulating a human rights agenda or even contextualizing their themes within the international human rights framework, embrace the central human rights personhood ideal. This analysis elucidates how globalizing critical theory and localizing human rights norms can redefine notions of participation so that all persons can enjoy their full complement of human rights.

III. RETOOLING THE NARRATIVES

The two central works of this Symposium, and their accompanying comments serve to illuminate how a LatCrit human

74. *See* THOMAS FRANCK, THE POWER OF LEGITIMACY AMONGST NATIONS (1990); Thomas Franck, *The Emerging Rights to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992); Saskia Sassen, *Toward a Feminist Analytics of the Global Economy*, 4 IND. J. GLOBAL L. STUD. 7 (1996); *see also* Hernández-Truyol, *supra* note 39.

rights paradigm can be a valuable intervention into the antisubordination project. First, Professor Montoya's basic desire "to deepen the analysis of the interplay between the subordinating aspects of being silenced and the liberatory aspects of silence, its expressive and performative aspects that are part of our linguistic and racial repertoires"[75] is facilitated by the human rights construct, which protects not only language[76] but also minority cultures within majority communities[77] and families.[78]

Professor Montoya's work provides examples of language's links to subordination.[79] She explores the negatives of silencing in the African American,[80] Latina/o,[81] and gay/lesbian communities.[82] Yet these examples would be well served by critically informed international human rights analysis that offers the disempowered a framework from which to raise their voices. Similarly, the liberatory aspects of silence are reinforced by the international human rights prohibitions against hate speech—a protection much broader than exists in the United States because of its rejection of hate speech prohibition.[83] These protections, it seems, supply support to Professor Montoya's observation that "[l]anguages are not neutral vehicles for the transmissions of thoughts [but] . . . are imbedded in the history and struggles of the people who use them."[84]

By protecting culture and cultural practices of minorities, the human rights paradigm also supports Professor Montoya's vision. Her ideal that silence, beyond being empowering can "disturb and disrupt . . . linguistic hegemony,"[85] is well served by the proposed critically informed human rights model. The interdependence and indivisibility envisioned in such a format can collaborate with her desire to unveil the inherent racialized and gendered nature of silence/language and the concommitant cultural tropes and hierarchies these perform. These norms can serve to empower

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75. Montoya, *supra* note 3, at 5 MICH. J. RACE & L. at 850, 33 U. MICH. J.L. REFORM at 266.
76. *See* International Covenant on Civil and Political Rights, *supra* note 42, at art. 2.
77. *See id.* at art. 27.
78. *See id.* at art. 23.
79. *See generally* Montoya, *supra* note 3.
80. *See id.* at 5 MICH. J. RACE & L. at 849, 33 U. MICH. J.L. REFORM at 265.
81. *See id.* at 5 MICH. J. RACE & L. at 873–79, 33 U. MICH. J.L. REFORM at 289–95.
82. *See id.* at 5 MICH. J. RACE & L. at 849, 33 U. MICH. J.L. REFORM at 265.
83. *See* International Covenant on Civil and Political Rights, *supra* note 42, at art. 19.
84. Montoya, *supra* note 3, at 5 MICH. J. RACE & L. at 850, 33 U. MICH. J.L. REFORM at 266.
85. *Id.*

outsiders' language. Professor Montoya suggests norms be used to destabilize hegemonic power, privilege, and the centripetal forces of inclusion, multiculturalism, and cross-cultural dialogue.[86] These forces, in turn, can serve as sources of understanding the ambiguities of silence.

This critically retooled human rights paradigm also serves to harmonize Professor Montoya's thesis with the commentators' observations. Professor Bender, for example, while recognizing the power of silence to bring out the voices of the disempowered, also shows how silence can be used to further entrench the disempowerment of the subordinated.[87] In doing so, he concludes that "Professor Montoya's focus on the silencing of race and gender in the law school classroom as the culprit for this 'pernicious' change leads me to question whether my own focus on race and culture makes the false promise to my students of the relevance of race in legal education."[88]

Accepting the potential irrelevance of race in legal education because the ethnic studies major might be confused, intimidated, and ultimately silenced by the apparent irrelevance of this background[89] is a disservice to the student and the Academy alike. The human rights model, and its indivisibility premise, makes race and language relevant. Moreover, it makes race, language, and culture central identity factors that are protected against subordinating practices. The LatCrit human rights model provides the inspiration Professor Bender seeks for the "progressive lawyer who aspires to use law as a means of achieving and ensuring social justice[.]"[90] Rather than spirit-breaking, it is a spirit-fulfilling approach. A critical human rights lens would likely have resulted in a different outcome in *Hernández v. New York*,[91] a case that deeply troubles Professor Bender. Under a human rights lens, the court's misapprehension of the relationship between language and ethnicity and language discrimination would not, indeed could not, occur as language and ethnicity are protected categories. Moreover,

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86. *See id.*

87. *See generally* Bender, *supra* note 4.

88. *Id.* at 5 MICH. J. RACE & L. at 920, 33 U. MICH. J.L. REFORM at 336.

89. *See* Montoya, *supra* note 3, at 5 MICH. J. RACE & L. at 894–98, 33 U. MICH. J.L. REFORM at 310–14.

90. Bender, *supra* note 4, at 5 MICH. J. RACE & L. at 922, 33 U. MICH. J.L. REFORM at 338.

91. 500 U.S. 352 (1991) (allowing for the peremptory exclusion of bilingual jurors); *see also* Juan F. Perea, *Latina/o Identity and Pan-ethnicity: Toward Latcrit Subjectivities: Five Axioms in Search of Equality*, 2 HARV. LATINO L. REV. 231 (1997).

under the proposed model, language or ethnic discrimination would constitute, by definition, prohibited racial discrimination.

Professor Roberts's commentary illustrates how human rights norms would enrich analysis. By focusing on how culture and cultural tropes within minority communities can further subordinate the disempowered, Professor Roberts notes that silences may have multiple meanings.[92] However, she questions whether silence can be a strategy of resistance because of the difficulty of distinguishing silencing and silence as resistance,[93] and "the complications of incorporating the study of silence into resistance scholarship."[94] By observing how silence potentially constitutes complicity in subordination, Professor Roberts, without having engaged in a human rights analysis, nevertheless underscores its value. The indivisibility and interdependence approach of the critical human rights model, by eschewing an either-or dichotomizing approach and instead taking a both-and view,[95] allows the evaluation of silence as both liberating and subordinating.

As Boaventura Santos has said, "people have the right to be equal whenever difference makes them inferior, but they also have a right to be different whenever equality jeopardizes their identity."[96] The human rights approach permits this ideal by disallowing the deployment of silence as a tool of subordination but using culture and proscriptions against discrimination to enable and protect silence as a liberating form of expression.

Professor Pérez-Sánchez's article also presents a valuable opportunity to show the utility of the critically informed human rights analysis. In particular, the piece shows the usefulness of the human rights norm to challenge discriminatory state practice and offers a context in which to depict the utility of an expanded and transformed human rights regime and ideology.[97] In describing Franco's active focus on containing homosexuality, Professor Pérez-Sánchez illustrates how a repressive state apparatus can effectively persecute and silence minorities—in this instance sexual minorities. Principally, a central and critical aspect of the human rights idea is that persons are subjects, rather than objects in the

92. *See generally* Roberts, *supra* note 5.
93. *See id.* at 5 MICH. J. RACE & L. at 928, 33 U. MICH. J.L. REFORM at 344.
94. *Id.*
95. *See* HERNÁNDEZ-TRUYOL, HUMAN RIGHTS, GLOBALIZATION AND CULTURE, *supra* note 20.
96. SANTOS, TOWARD A MULTICULTURAL CONCEPTION, *supra* note 19, at 13.
97. *See generally* Pérez-Sánchez, *supra* note 9.

international legal system.[98] With this paradigm in place a state, here Spain, is accountable for how it treats citizens. Therefore, in the posited historical framework, Franco's persecution of homosexuals, even if they were Spanish subjects, warrants scrutiny by the international community because such persecution runs afoul of established norms. A failure to scrutinize Franco's persecution of homosexuals is silent complicity.

Focusing on whether persecution of persons based on their affectional orientation violates human rights norms,[99] we posit that the answer is an unqualified yes. First, the non-discrimination provisions of the Universal Declaration,[100] the ICCPR,[101] and the Economic Covenant[102] all proscribe discrimination on the basis of "race colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[103] Discriminating against citizens on the grounds of their sexuality could constitute, under a critical interpretation and construction of this provision, discrimination on the basis of sex, political or other opinion, birth, or other status. Similarly, human rights norms provide for a right to equality.[104] Flowing from our analysis of the non-discrimination clauses, it follows that discrimination on proscribed grounds effects a denial of equal status.

Significant in the context of Franco's repression of homosexuals is the protection of persons against degradation.[105] A state's laws and other conduct effecting isolation and degradation of its citizens are anathema to the human rights ideas of personhood and dignity. As such, rendering sexual others as subhuman constitutes state-sponsored degrading treatment proscribed by human rights norms. In particular, to consider a person illegal and

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98. *See supra* note 42 and accompanying text.

99. *See* James D. Wilets, *Conceptualizing Private Violence Against Sexual Minorities as Gendered Violence: An International and Comparative Law Perspective*, 60 ALB. L. REV. 989 (1997); James D. Wilets, *International Human Rights Law and Sexual Orientation*, 18 HASTINGS INT'L & COMP. L. REV. 1, 66 n.295 (1994).

100. *See* Universal Declaration of Human Rights, *supra* note 16, at art. 2.

101. *See* International Covenant on Civil and Political Rights, *supra* note 42, at art. 2.

102. *See* International Covenant on Social, Cultural and Economic Rights, *supra* note 42, at art. 2, 3.

103. Universal Declaration of Human Rights, *supra* note 16, at art. 2; International Covenant on Civil and Political Rights, *supra* note 42, at art. 2, cl. 1; International Covenant on Social, Cultural and Economic Rights, *supra* note 42, at art. 2, cl. 2.

104. *See* Universal Declaration of Human Rights, *supra* note 16, at art. 7; International Covenant on Civil and Political Rights, *supra* note 42, at art. 7; International Covenant on Social, Cultural and Economic Rights, *supra* note 42, at art. 3.

105. *See* Universal Declaration of Human Rights *supra* note 16, at arts. 5, 7; International Covenant on Civil and Political Rights, *supra* note 42.

dangerous[106] because of his or her affectional orientation is a classification that places a human being in fear for his or her safety. Any person under these conditions is rightly concerned that he or she will be arrested and subjected to aversion therapy. Such threats are effective silencers for many homosexuals. Indeed, to live in such fear is a deep affront to one's dignity as well as to one's feeling of safety and security.[107]

Moreover, the rights to liberty[108] and to freedom of movement[109] are also at risk. Spain's security measures[110] mandated confinement of homosexuals in special institutions,[111] permitted "confinement in a re-education institution, [created a] prohibition from residing in a place or territory designated [by the court], and [required] submission to the surveillance of the delegates."[112]

Another right exists that is significant in the context of Professor Pérez-Sánchez's work. It is contained in Article 27 of the ICCPR, which provides: "In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture. . . . to use their own language."[113] Sexual minorities are not expressly listed within Article 27. Nonetheless the intent of the provision is to protect minorities from the tyranny of the majority.[114] As sexual minorities' rights have been recognized and as the human rights community has deemed it fit to extend its system's protections, a critical reading of Article 27 should include sexual minorities. Moreover, especially in light of Professor Pérez-Sánchez's approach to homosexuality both as performativity[115] and as a counter-culture,[116] it is appropri-

106. *See* Pérez-Sánchez, *supra* note 9, at 5 MICH. J. RACE & L. at 958 n.56, 33 U. MICH. J.L. REFORM at 374 n.56.

107. *See* Universal Declaration of Human Rights, *supra* note 16, at art. 3 (calling for the right to life, liberty, and security of the person); International Covenant on Civil and Political Rights, *supra* note 42, at art. 9 (calling for the right to liberty and security of the person).

108. *See* International Covenant on Civil and Political Rights, *supra* note 42, at art. 9; Universal Declaration of Human Rights *supra* note 16, at art. 3.

109. *See* International Covenant on Civil and Political Rights, *supra* note 42, at art. 12; Universal Declaration of Human Rights, *supra* note 16, at art. 13.

110. *See* Pérez-Sánchez, *supra* note 9, at 5 MICH. J. RACE & L. at 960, 33 U. MICH. J.L. REFORM at 376.

111. *See id.* at 5 MICH. J. RACE & L. at 964 n.85, 33 U. MICH. J.L. REFORM at 380 n.85.

112. *Id.* at 5 MICH. J. RACE & L. at 959 n.58, 33 U. MICH. J.L. REFORM at 375 n.58.

113. International Covenant on Civil and Political Rights, *supra* note 42, at art. 27.

114. *See id.* (protecting minorities from imposition of majority norms); *see also* Hernández-Truyol, *Women's Rights as Human Rights*, *supra* note 39.

115. *See* Pérez-Sánchez, *supra* note 9, at 5 MICH. J. RACE & L. at 944–45, 33 U. MICH. J.L. REFORM at 360–61.

116. *See id.*

ate to afford the "social group" homosexuals with cultural protections. In fact, the appropriateness of this approach is underscored in the last part of Professor Perez-Sánchez's work in which homosexuals are presented as a group or community in need of protection against discrimination because of their cultural tropes.[117]

This human rights framework also is useful in evaluating the comments on Professor Pérez-Sánchez's work. Professors Kapur and Mahmud wish that Professor Pérez-Sánchez had been more forthcoming with her conception of state and state power and had focused more on the "relationship between coercion and ideology" as well as the "demarcation of the public and the private."[118] The suggested critical human rights lens, however, renders these observations less pointed, for a state is responsible for human rights violations, whether they are effected by commissions or omissions. The latter brings into stark relief the role of the public/private divide. If the private sector—civil society—is acting in such a way so as to systematically effect prohibited discriminations, the failure of the state to intervene results in state responsibility.

Moreover, the human rights model incorporates not only the international comparative angle but also feminist theory[119] and critical race frameworks—providing diverse axes in which to engage in analysis. Finally, Professor Pérez-Sánchez's use of literature that Professor Kwan views as laudable is effectively built in to the human rights model. Of course, this too is a metaphor that Professor Kwan seems to find somewhat puzzling in the work on which he comments. Literature is a proxy for culture. Culture, as we have discussed, is protected in the international arena. Cultural expressions break dangerous and harmful silences.

CONCLUSION

The human rights model we have envisioned serves as a valuable analytical tool for nation and culture. The main works of this Symposium and their respective comments unveil the complexities of

117. *See id.* at 5 MICH. J. RACE & L. at 971–86, 33 U. MICH. J.L. REFORM at 387–403.

118. Kapur & Mahmud, *supra* note 11, at 5 MICH. J. RACE & L. at 998, 33 U. MICH. J.L. REFORM at 414.

119. *See, e.g.*, Hernández-Truyol, *Borders (En)gendered*, *supra* note 1 (analyzing the role of culture in Latina/o identity).

language and silence, resistance and subordination, performativity and the rule of law. Neither nation nor culture can be used as a shield to insulate the state from responsibility and accountability for the oppression of any person within its jurisdiction, or as a sword to eviscerate the rights of those within its reach.