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Insisting on Critical Theory in Legal Education: Making Do While Making Waves

Francisco Valdes

In practice, Judge Olmos serves as an exemplar of everything, both right and wrong, with this nation, this state, and this institution: history illustrates both how America can provide opportunity through the very institutions that oppress and suffocate America's many Others. His example and legacy show us that we - you - not only can survive this conflicted reality, but also be empowered by your encounters and experiences with hostile social spaces and double-edged institutions, whether as law students or as lawyers. His example and legacy show us how one person with conviction can become an agent of social change - both before and after we receive our law degrees. His example and legacy not only bring us together today, but also challenge us to continue his work, and his sense of personal commitment to the cause of social justice, throughout the lands now known as the United States. And it is in this spirit that I join you here today.

In the mid-to-late 1970s, I was here, on this very campus, in the Rhetoric Department, across the way at Dwinelle Hall. At that time, I was preparing to graduate and, as they say, to commence my professional life. I mention this fact...
because I notice that the average age of this year’s entering law class is 24: at precisely the time that you were being born, I was trundling back and forth across this very campus, full of hopes and fears. And this coincidence sent me on a mental journey over time, prompting me to ruminate on the changes in zeitgeist, and on the links, between those times and these.

Back then, Bakke\(^1\) was the outrage. Little did we know the extent to which we would regress as a society since then. While during that time many of us lamented and resisted the seeming passing of the civil rights golden era, our reluctant dread of its demise simply could not, at that time, lead us to imagine the socially genocidal objectives of the backlash politics that since then have gutted equality policies, laws, and precedents, and which have taken us as a society from that point to this one in just a quarter century.

Since the time that I walked this campus as an undergraduate student, and during these 24 years of your average lifetimes, this nation has become engulfed by a culture war — or, to use Antonin Scalia’s quaintly vicious phrase, by a “Kulturkampf”\(^2\) — designed to reinscribe and reinforce inequality normatively and legally. We are in the midst of a formally declared social conflict — a declaration issued in 1992 directly from the podium of the Republican National Convention, since then escalated and waged, explicitly in those very terms, by majoritarian-identified backlash warriors — a conflict designed to eviscerate what little formal progress had been attained during the brief spring of the civil rights movement;\(^3\) and here, by the way, I include the progress achieved through the efforts of the Black Power Movement, the Women’s Liberation Movement, the Les-Bi-Trans-Gay Rights Movement, the Environmental Justice Movement, the Consumer Protection Movement, the Anti-War Youth Movement, and all of the other socially conscious, socially progressive formations of the 1950s to the 1990s. This ‘war’ indeed has changed society through and by law, using formal legal retrenchment as the license for, and engine of, increasingly virulent social backlash until, now, vulnerable communities and persons — immigrants, the poor, people of color, women, sexual minorities, the disabled — are under siege coast to coast. This ongoing war, and the changes in law and society that it has wrought, necessarily make warriors of us all, warriors in the same way that Judge Olmos was: warriors willing and able, day in and day out, to wage hand-to-hand combat.

This war is a nationwide, increasingly a global, phenomenon that affects adversely every vulnerable community of this country and world. Yet, in some ways, this very campus has been ground zero in the drive toward retrenchment in the United States, as evidenced effectively and poignantly by the brief overview of the struggle for diversity at Boalt prepared by the students of the Boalt Hall Student

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Association from files compiled by the Coalition for a Diversified Faculty. This

culture war, I know, is in your face, at this place, every day. And so it is humbling

for me to come here and speak to you about a social reality that you live routinely on

a personal level so acutely. But I do so, nonetheless, in the hope that we can connect

our local personal struggles to the structural dynamics and strategies that besiege us

all. And to do so – to ensure that we are not only willing but also able to wage hand-
to-hand combat – we need, I submit, not only action but also theory, critical theory.

I oftentimes hear calls to action that implicitly or explicitly dismiss or
devalue the centrality of theory to action, as if the choice before us is an either/or
dichotomy: this reductionist choice demands that we forego one or the other. Of

course, that is ludicrous. It would be self-defeating for vulnerable communities to

accept this bifurcation of theory and action, for theory must provide the substance of,
or vision behind, any call for action. One thing that outsider scholars have learned

from experiences both with essentialism and antiessentialism is that a

unidimensional sense of ‘identity’ – a sense of likeness or identification based on

race, ethnicity, gender, sexual orientation, religion or other similar axis – is no basis

for principled and enduring antisubordination projects and coalitions: Clarence

Thomas, Linda Chavez, Ward Connerly, Phyllis Schlafly, Roy Cohn and other such

characters time and again have driven home this point during the closing decades of

the past century. In short, critical theory is what permits us to go beyond the

crudities, limits and pitfalls of essentialist identity politics, and to articulate a

common and mutual commitment to a substantively egalitarian agenda of social

transformation – and to ground our individual and collective actions in the substance

of this agenda and to its underlying vision of a postsubordination society.

In my view, then, outsiders’ best prospects for prompting egalitarian social

transformation in the face of entrenched structures of privilege is in forging critical

action out of critical theory – an agenda for action crafted through a critical and self-
critical theorizing of the particular and recurrent structures of subordination that,

interconnected, operate internationally as systems of subordination. In my view,

critical theory is what provides a substantive platform for individual and collective

social justice action; theory both informs and grounds social struggle for social

change. Without theory, I submit, we risk becoming like the swimmer who flaps

around in the water, perhaps making big splashes but probably little headway.

Some of you might be wondering, “What do I mean by ‘critical theory,’

anyway?” I agree; the term generally is in need of demystification. Theory is not,

per se, nor need be, a bewildering swirl of thick jargon – though sometimes ‘jargon’
is exactly what the oppressed need to see and name a ‘normal’ or normalized reality.

By ‘critical theory’ I mean, at bottom, the effort to pierce conventional wisdom

through an interrogation of normalized notions, and to arrive at a transcendental

understanding of social constructions and realities – a more accurate understanding

of how and why something is the way it is in ways that transcend the premises,
imperatives and limitations of conventional explanations about dominant social

arrangements. Critical theory is the project that enables substantive analysis of the

personal and particular at structural and systemic levels. It is the process that makes

patterns out of particularities.

Thus, critical theorizing is the work of unpacking an apparent social reality
to better understand how it might be improved, both in micro and macro contexts.
Critical theorizing is the effort to go beyond surface appearances, immediate

emergencies, and personal experiences – not to forget those, not to ignore or neglect

those, but to go beyond those – so as to interconnect them in a coherent way
substantively, structurally, socially, historically. Critical theory is what allows us to devise a potent approach to social action so that our interventions are more likely to be substantively fruitful. After all, action simply for action’s sake is not what is most likely to better the lives of subordinated groups and persons in enduring, material ways.

Of course, I recognize that ‘theory’ can become a substitute for action. I understand that theory can become pedantic, obtuse, self-indulgent, effete. It can become an end unto itself, rather than a means toward an end. And for these reasons, I understand how and why some folks, maybe some of you here today, might disdain or fear theory, might view anything labeled as ‘theory’ with suspicion grounded in experience. These dangers are real, and their consequences obviously are harmful to marginalized, outsider communities. Without doubt, then, we must guard always against any tendency toward theory for theory’s sake, or toward art for art’s sake; besieged communities cannot subsist only on art, nor only on theory.

But these reasons and dangers ultimately do not and cannot justify our rejection of critical theory as a key tool in our antisubordination arsenal, nor can these reasons lead to our self-defeating acceptance of, or acquiescence to, the theory-versus-action dichotomy. Our approach, I repeat, must be to fuse theory to action; to make social justice synergies from the fusion of antiessentialist theory and antisubordination action; to combust personal and collective action out of critical theory. Our approach to social struggles must include the embrace of critical theory, for critical theorizing is what permits us to name, to understand, and then to combat the structures and systems of subordination that surround and stifle us.

For example, it might appear at first blush that today’s cultural warfare, of which I spoke earlier, is simply a massive outburst of majoritarian backlash, an outbreak of more-or-less random antisocial behaviors on the part of the overly-privileged or the socially-spoiled. But, in fact, this culture war has been successful in rolling back prior equality gains precisely because it is more, much more, than that. It is much more than a coincidental or opportunistic epidemic of antisocial arrogance and violence. Through critical theory we can begin to see and understand that, in fact, this culture war has been waged methodologically along three distinct yet interrelated, and mutually reinforcing, lines or prongs of attack. Deploying the tools and techniques of critical theory allows us to see and understand the architecture of this culture war. In turn, we can begin to map the patterns and dynamics of this war – and, thus, we can begin to design our actions more effectively to resist and counter these lines or prongs of attack. Briefly, these attacks have fallen into a discernible, and devastating, pattern that points to three convergent, interactive sociolegal offensives.4

The first of these is the use of majoritarian politics to shut the government’s door against outsider communities by turning government into a tool – a “mere instrument,” as Madison wrote5 – of rapacious and factious majorities – a line of

4. For a more detailed discussion of cultural war, retrenchment politics and backlash lawmaking, see Francisco Valdes, Afterword—Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multi-dimensionality, and Responsibility in Social Justice Scholarship, or Legal Scholars as Cultural Warriors, 75 DENVER U. L. REV. 1409, 1426-43 (1998); see also JAMES DAVIDSON HUNTER, BEFORE THE SHOOTING BEGINS: SEARCHING FOR DEMOCRACY IN AMERICA’S CULTURE WAR (1994).

5. See infra note 10 and accompanying text.
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attack that exploits the numerical, structural, economic and social capital that historically has been arrogated and accumulated by and for insider groups and neocolonial elites during a long history of unjust self-enrichment. At the federal level, this core effort is proximately traceable to the politics of Richard Nixon and his assertion of a “silent majority” but the watershed moment was the election of Ronald Reagan and the occupation of the White House by his savvy coterie of backlash zealots, who promptly and ruthlessly used every institutional means available to arm backslackers for the purpose of mounting roll-back and take-back campaigns against civil rights. However, perhaps the pivotal moment of triumph in the steady escalation of culture war through majoritarian electoral politics came in the 1992 congressional elections, which put into legislative office the standard bearers of the “Contract with America” and its agenda of social traditionalism and sociolegal retrenchment.\(^6\) Packaged in ‘democracy,’ this first line or prong of the culture war has repeatedly exploited ‘wedge’ issues to create sociopolitical polarization, and in the process to seize lawmaking power and consolidate the cultural supremacy of majoritarian, traditionalist elites.

This first prong has taken two principal forms. The first, as indicated by the historical notes above, has been the capture and domestication of the ‘representative’ branches of the federal and state governments. But when this conventional sort of electoral politics have fallen short, as they sometimes do, majoritarian cultural warriors have turned this first line of attack toward the abuse of devices that can circumvent conventional ‘checks and balances’ that, at least according to the framers of this country’s constitution, are supposed to guard us all against the tyranny of majoritarian factions — that is, the process of legislative lawmaking through representative deliberation that, as originally intended, was to produce, in Madison’s words, a “substitution of [popular demagogues and majoritarian whims with] representatives whose enlightened views and virtuous sentiments render them superior to local prejudices and to schemes of injustice.”\(^7\) It is this process of representative deliberation, a process designed to raise the act of making law above ‘popular’ passions and prejudices, that is supposed to save us as a nation from the evils of mob rule, most notably the evils of overbearing, overreaching, and oppressive majoritarian lawmaking. It was precisely this type of undemocratic majoritarianism that, from the Federalist framers’ ‘original’ perspective, had flared during the so-called ‘critical period’ of this nation’s founding — the post-independence and pre-constitutional period of the Articles of Confederation — and against which, key framers like James Madison supposed and claimed, the federal constitution of 1787 would protect their posterity — us, today, as a nation.\(^8\)

Yet, in today’s culture war, ‘popular’ referenda commandeer policymaking when elected officials hesitate to play backlash politics — and these spectacles stir up, bit by bit, a tension-filled sociopolitical climate that cows policymakers into ever-more compliant postures. At the state level, this ‘direct’ form of electoral attack has produced Prop 187, and then Prop 209, here in

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6. See Valdes, supra note 4, at 1429-30 and accompanying notes.


8. For a concise and classic analysis of this critical period, and how it set the stage for the shift to the constitution of 1787, see id. at 391-467.
California, which materially and symbolically have made criminals of the undocumented and resegregated this and other state law schools. This form of attack also is aptly illustrated by the ‘popular’ – actually, demagogic – campaigns to overturn judicial antidiscrimination rulings under the state constitutions of Hawaii and Alaska in same-sex marriage cases through a direct amendment of those states’ fundamental charters. These examples illustrate not only the breathtaking success and basic mean-spiritedness of today’s culture war, but also grave constitutional failures, for they are paragons of “popular tyranny” – they typify the oppression of the weak by the powerful, which the adoption of the constitution was supposed to prevent even, or, rather, especially when the name of ‘democracy’ is dragged out to justify majoritarian factionalism and its predictable output: abusive lawmaking; that is, lawmaking that abuses formal control over the State to contrive and arrogate ingroup privilege and impose outgroup disorganization, disempowerment and dispossession by legal fiat. Despite the promises and safeguards of the constitution and its framers, we live this reality today precisely in the form most feared at the time of the original framing: as the imposition of ‘democratic’ or ‘popular’ despotism – or “majoritarian tyranny” – that results, as Madison wrote to Jefferson during the critical period, in the “subjection of the minority to the caprice and arbitrary decisions of the majority, who instead of consulting the interests of the whole community collectively, attend sometimes to partial and local advantages.”

I take as a baseline principle, obviously, that the perpetuation of racist, xenophobic, sexist, homophobic and similar forms of legacies is not in “the interests of the whole” nation collectively. Of course, the practice of homophobia remains perfectly legal under federal and most states’ antidiscrimination laws, but the nation formally has repudiated racism, xenophobia and sexism in its civil rights law and constitutional mandates. It takes no genius to observe that culture wars fueled by racism, xenophobia and sexism, by definition, are not designed to “consult the interests of the whole [national] community collectively,” but rather to inflict intergroup inequality and social inequity by backlash lawmaking.

And, I note the views of the framers on the notions of ‘democracy’ and ‘popular lawmaking’ – complex topics – only in passing, and only because they are so often invoked in both judicial and political venues by backlashers to justify their sociolegal violence; I note it here only to keep any of you from being taken in by misleading appeals to ‘democracy’ and ‘original intent’ calculated to help legitimize morally, politically, and jurisprudentially the ongoing onslaughts of this culture war.

9. See Valdes, supra note 4, at 1437-38 and accompanying notes.

10. GORDON, supra note 7, at 502 (“Indeed, it was this factious majoritarianism, an anomalous and frightening conception for republican government, grounded as it was on majority rule, that was at the center of the Federalist perception of politics. In the minds of the Federalists the measure of a free government had become its ability to control factions, not, as used to be thought, those of a minority, but rather those of ‘an interested and overbearing majority’.”). James Madison, regarded by consensus as a key framer, wrote at the time that, “Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended ... from acts in which the Government is the mere instrument of the major number of the constituents” – that is, majoritarian despotism. Id. at 410-11. While Madison and other framers wrote in this vein sometimes when fretting over the potential loss of their private properties and relative social privileges in the post-independence, pre-constitutional “critical period,” their structural and theoretical fears were not thusly confined, the underlying fear was that the experience during the Articles of Confederation had shown the framers that “the people were as capable of despotism as any prince; public liberty was no guarantee after all of private liberty.” Id.
The current equation of today's 'popular' referenda with the 'traditional' ideals of 'democracy' in this country is, well, imprecise. While the framers and their inheritors oftentimes have betrayed the principles adopted in their constitution — in forms not limited only to their constitutional dalliance with slavery and with its legacies since then — it is not true that 'democracy' in this 'compound republic' was 'intended' to work this way — in ways that facilitate patterns of inter-group hierarchy and abuse, and that allow demagoguery to control policy and become Law — at least not as intended by the core group of nationalist-Federalists who caused the 1787 convocation of the constitutional convention in Philadelphia, who then controlled its proceedings and during that summer literally framed the seven articles of the constitution, and who then immediately afterward spearheaded the ratification campaigns that sold their blueprint to the rest of their generation in the form we still obey today; while that elite of white, (presumably straight), rich men of the framing generation certainly acted in resolutely self-interested and sometimes hypocritical ways, their basic views on this particular topic should provide no aid or comfort to backlash politicians and judges, nor to their masters or apologists.

This line of attack, both through conventional lawmaking as well as 'popular' lawmaking, has produced a torrent of legislation and referenda or propositions that have emasculated programs and policies designed to ameliorate social inequities. Quite explicitly, this line or prong of the culture war has been mobilized in the name of the 'angry white male' bent on taking back what he still imagines always to have been naturally, eternally and righteously his. Too often, this campaign has overwhelmed both the established branches of government and their deliberative processes, as well as progressive groups and organizations, at both the state and national levels of lawmaking. The cumulative result has been a substantial gutting of civil rights laws and the steady (re)normalization of a social environment increasingly hostile to immigrants, sexual minorities, racial and ethnic minorities, women, the poor, the disabled, and other Others.

The second line or prong of attack amounts to court-packing, pure and simple, but on a massive scale. During this culture war, both state and federal judiciaries have been re-stocked methodically in explicitly ideological and demographic terms and, using the banner of 'strict construction' when it comes specifically to civil and human rights, quite foreseeably to help circumvent principled judicial review of suspect state actions taken through the majoritarian line attack: at bottom, the purpose of this second line or prong is to neutralize the judiciary as a check on majoritarian backlash lawmaking, and thus to protect, even embolden, the cultural warfare of traditionally privileged factions and their footsoldiers.

For instance, the national judiciary has been restocked on the basis of race, gender, class and ideology under the extended rule of Republicans. Ditto for your

11. For a particularly incisive study of the Federalist campaigns to convolve the constitutional convention, to control the bulk of its proceedings, and to ensure ratification, see WILLIAM H. RIKER, THE STRATEGY OF RHETORIC: CAMPAIGNING FOR THE AMERICAN CONSTITUTION (1996).

12. See Valdes, supra note 4, at 1430, n.86 and sources cited therein.

state judiciary, as your recent governors have made a habit of appointing to the California judiciary almost exclusively straight white men who are Republicans and, typically, former prosecutors; Governor Deukmejian, using the electoral politics of popular referenda, even undertook to 'oust' from your state Supreme Court the only minority and female justices on the court – including former Justice Cruz Reynoso, who is here with us today, and whom we just heard a few minutes ago from Mary Louise Frampton was a mentor and ally of Judge Olmos:14 it takes little to imagine how Judge Olmos would have fared under this culture war ... by the way, can you see how close the connections between the personal, the professional and the political can get in this culture war?

And, don't think that the eight recent years of a 'new' Democrat in the White House has abated the backlashers' drive to pack the courts; instead, during this interlude they have stonewalled the appointments process, delaying for years Congressional action on the nominations of black, Latina/o and female nominees.15 Nor should you think that yours is the only affected state judiciary under this second line or prong of the culture war. On the contrary, the same confronts me – and us – in Florida, where an errant email from Governor Bush's assistant general counsel prematurely exposed – and supposedly halted – a secret plan to create a 'shadow system' to circumvent the established regional Judicial Nominations Commissions of Florida and to selectively recruit, screen and install state judges along explicitly ideological lines. Nonetheless, the established process was then promptly overhauled by the rabidly Republican state legislature of the moment – recall the first prong of this culture war – in order to abolish the Judicial Nominations Commissions and reconstitute them with appointees handpicked by, you guessed it, the governor!16 Now, the backlashers don't need a secret back alley to pack Florida's courts; now, they're set to do it brazenly, formally, as a matter of law. Make no mistake: the capture of the courts, and the seizure of control over their power of judicial review, is the clear and relentless purpose of this second line or prong of cultural warfare and backlash lawmaking.17


15. See, e.g., Frank Davies, Senate Stalling New U.S. Judges, MIA. HERALD, Feb. 6, 2000, at A1; Frank Davies, Two Gain Judgeships in Senate Vote: GOP Sought to Delay Approval of Hispanic, Woman Gore Says, MIA. HERALD, March 10, 2000, at 3A.

16. See, e.g., Lawyer for Gov. Bush Seeks Friendly Judges, MIA. HERALD, Oct. 2, 1999, at 7B; Lawyer for Gov. Bush Seeks Friendly Judges, MIA. HERALD, Oct. 2, 1999, at 7B; see also Bush to Sign JNC Bill, June 15, 2001, at 3 (reporting that, "Under the new bill, the governor gets five outright appointments to the JNCs, two of whom must be attorneys. He also appoints the four other seats from a slate of four candidates each submitted by the [state] Bar ... The governor can reject a Bar slate as many times as he wishes."). This ongoing attack on judicial independence on political grounds in Florida comes not only from the governor's mansion but also from the Legislature, which under the first prong of the culture war also has been captured by backlash ideologues who insist that the Florida Supreme Court kowtow to them. See generally, Jan Pudlow, Defending Judicial Independence, FLA. BAR NEWS, Jan. 15, 2001, at 1.

17. Continuing this line of attack with a vengeance, and echoing the resort to secrecy and circumvention that we recently confronted in Florida, the White House under 'George the Impostor' has announced that nominations for federal judgeships no longer would be submitted for professional evaluation to the main lawyers' group of the nation, the American Bar Association, to appease the quite
The jurisprudential results perhaps are most crisply exemplified by the Supreme Court itself, and by its patently contorted ‘opinions’ in culture war cases that, especially since the mid-to-late 1980s, have thrown new roadblocks in the way of this nation’s fitful progress toward social equality and social equity under the rule of law. This litany of backlash rulings include the politically transparent pronouncements embedded in Bowers,\(^\text{18}\) Croson,\(^\text{19}\) Wards Cove,\(^\text{20}\) McLean Credit Union,\(^\text{21}\) Lorance,\(^\text{22}\) Smith,\(^\text{23}\) Johnson Controls,\(^\text{24}\) Shaw,\(^\text{25}\) Rust,\(^\text{26}\) Casey,\(^\text{27}\) Adarand,\(^\text{28}\) and, more recently, the newly-minted rulings in Morrison,\(^\text{29}\) Kimel,\(^\text{30}\) and Garret,\(^\text{31}\) which strive mightily to constrict the social justice potential of the Violence Against Women Act, the Age Discrimination in Employment Act, and the Americans with Disabilities Act, respectively. Even technical or ‘procedural’ cases have been exploited from the federal bench as retrenchment opportunities, as Allen,\(^\text{32}\) Lujan\(^\text{33}\) preposterous assertion of backlash warriors that the Association is just a bunch of crazy liberals. See Amy Goldstein, Bush Set to Curb ABA’s Role in Court Appointments; Democrats Decry Move’s Motive as Ideological; Lawyers Group Has Been Accused by Right of Having a Liberal Bias, WASH. POST, Mar. 18, 2001, at A2; Amy Goldstein, Bush Curtails ABA Role in Selecting U.S. Judges, WASH. POST, Mar. 23, 2001, at A1. See also The White House and the Bar, N.Y. TIMES, Mar. 23, 2001, at A18. Obviously, this move increases the opportunity to select judges on the basis purely of political allegiance to the backlash agenda of elite-identified cultural warriors, hence consolidating their grip on the nation’s tribunals and jurisprudence.

\(^{19}\) City of Richmond v. Croson, 488 U.S. 469 (1988).
\(^{21}\) Patterson v. McLean Credit Union, 491 U.S. 164 (1989).
and other culture war rulings demonstrate. In each of these cases, sexual minorities, racial/ethnic minorities, religious minorities, women, environmentalists and/or the disabled, among other Others, invoked the law’s protection but were judicially rebuffed and pushed beyond conveniently redrawn jurisprudential borders. All of these cases occasioned backlash rulings made possible by the court-packing prong of the culture war; these ‘culture war cases’ not only have shored up in social, economic and cultural terms the supremacist politics and ideologies of ‘Euroheteropatriarchy’ that are based on race, ethnicity, nationality, religion, sex, sexual orientation and other such human constructions, but these rulings — in the form of backlash jurisprudence — also have further driven these invidious ideologies into core substantive areas of constitutional law.

As their shameful yet shameless pronouncements indicate, the ‘openly’ straight white men — and few women or minorities — installed as state and federal judges under this line of attack operate as foot soldiers in this culture war. Their basic assignment is to clip back existing precedents and substitute new and regressive case law in their place, to shield backlash legislation and demagogic referenda from honest and independent judicial review, and to chill or check the work of both state and federal officials — including other judges — who still take seriously the constitution’s formal guarantees of individual rights. This second line or prong of the culture war has produced the intended effect: turning the nation’s courts into rubber-stamp tribunals that can be counted on by majoritarian elites to enable sociolegal retrenchment and shield their backlash lawmaking from honest, principled and independent judicial scrutiny.

This sweeping manipulation of the nation’s judiciary and judicial powers, it bears briefly noting, also perverts original understandings of inter-group relations and social justice, in which an independent court system was to operate as an “intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority” by the constitution. In this design, majoritarian might — exercised typically but not


37. As Justice Brennan observed in his Allen dissent, "More than one commentator has noted that the [Supreme Court's doctrinal revisions are] no more than a poor disguise for the Court's [disdaining] view of the civil rights claims and claimants that apply to it for relief. Allen, 468 U.S. at 782 (Brennan, J., dissenting). For several such commentators, see sources cited supra notes 34 and 35.

38. See Gordon, supra note 7, at 462 (quoting Alexander Hamilton’s public writings, another framer regarded by consensus as key to the constitution, in the Federalist No. 78).
exclusively through the legislative branch at the behest of, in Madison’s words, the “majority of the Community”\textsuperscript{39} – was the danger to be checked by an independent and vigilant court system; in this capacity, the courts would serve as the bulwark against majoritarian encroachment of minority rights and benefits, against the oppression of the few by the many, or of the weak by the powerful. Because the Articles of Confederation and the “critical period” had made manifest to the Federalist framers how ‘democratic’ and ‘popular’ majorities can run amok, they sought a counterweight to the abuses that can be carried out under democracy’s banner. The enhancement of the judiciary as an independent and co-equal branch of government was part of the solution they crafted deliberately to protect minorities from majorities – a solution and legacy that today’s backlashers necessarily must subvert, and intentionally do, to neutralize the courts’ function as a check on their democratic despotism, and thus to bless and license juridically their waging of majoritarian culture war against outgroup communities. Again, this passing point about constitutional policy is relevant not because I think that “framers’ intent” or “original understanding” are compelling lenses through which to understand our histories and realities, but because they are the very mantras invoked disingenuously by majoritarian cultural warriors to justify their transgressions today.

The third line or prong of attack is the targeted control of the federal spending power to fund or de-fund particular programs or policies, as the case may be, in order to accomplish de facto roll-backs that cannot be effectuated wholesale, or directly. This third prong perhaps is best illustrated by the funding battles over abortion, legal aid for the poor, and social services for immigrants and so-called ‘welfare mothers,’\textsuperscript{40} but it also is shown in the current campaign, under the notorious Solomon amendments, to withhold federal funds – including financial aid to students – from universities and colleges that do not permit military recruiters and ROTC programs to bring discrimination onto university campuses due to the military’s institutionalized policies of discrimination on the basis of sex, gender and sexual orientation.\textsuperscript{41} Obviously, this prong of the culture war also works in tandem with the others, as illustrated by, say, Rust v. Sullivan,\textsuperscript{42} in which the Supreme Court rubberstamped the selective de-funding of programs that provide abortion-related information to thwart in practice, as much as possible, women’s right to informed and unfettered procreational choice; in this case, the first prong of the culture war produced the legislature with the will and animus to target women’s rights for systematic and strategic retrenchment, the second produced the courts that would undermine procreational rights jurisprudentially and shield discriminatory or abusive legislation from effective challenges, and the third line of attack produced the de-funding statute when other jurisprudential and legislative efforts to erase abortion altogether continued to falter despite intensifying traditionalist fire. Under this line of attack, working in tandem with the prior two lines of the culture war, programs and policies that serve as lifelines to vulnerable communities and groups – including

\textsuperscript{39} See supra note 10 (quoting James Madison).

\textsuperscript{40} See Valdes, supra note 4, at 1438-39, nn.120-26 and sources cited therein.

\textsuperscript{41} See Francisco Valdes, Solomon’s Shames: Law as Might and Inequality, 23 T. MARSHALL L. REV. 352 (1998).

\textsuperscript{42} See supra note 26.
law students who need federal loans to secure an education—effectively are threatened or cut, even though backlashes may not have been able to muster the power to effectuate a direct, substantive take-back of the ‘right’ or ‘benefit’ under assault.

As this synopsis indicates, these three lines or prongs of attack, and their interaction, are mutually reinforcing, and they come full circle: majoritarian prerogatives over executives, legislatures and courts are exerted to ensure that all branches and levels of formal government become, again in Madison’s words, “the mere instrument[s] of the major number of constituents”43—in this instance, instruments of cultural warfare against minority and vulnerable groups—and that they bow in policy and practice to the imperatives of retrenchment and supremacy. When any branch or level of government balks, as the process of representative deliberation calls for, then resort to the spectacle of ‘popular’ referenda can discipline hesitant officials. And when majoritarian might falls short of outright take-backs, the spending power is used to suffocate our rights and strangle our progress. If, or when, outgroups even think of appealing the unjust results of ‘democratic’ or juridical pronouncements to a higher or supreme tribunal, they know that many, if not most, of today’s judges and justices have been installed in office precisely to rebuff their claims through rulings that etch onto the jurisprudential record an ostensibly authoritative ridicule of legitimate social justice claims. But, without taking the time to theorize critically the sociopolitical dynamics of this culture war, we might think that these three sets of concurrent and convergent events represent uncoordinated acts of social and legal violence. Yet they are not, and critical theory is what allows us to know this, for critical theory is what allows us to see the method behind this madness, and behind others.

Critical theory can help us to name, understand and combat the dynamics and strategies of this culture war on a national level, but it also can help us to contextualize local struggles. Critical theory is what allows us to connect the local to the national and the national to the global—and vice versa. Critical theory is what allows us to see how and why the personal is the political. Through critical theory, we can discern and map the interconnection of this front of this culture war to the many other fronts where the same war is being waged today. Critical theory thus gives us the tools and techniques to connect what is happening here—on this campus, in this community and throughout this state—to what is happening in other locales around the county and the world, for the struggles being waged here today also are being waged at the same time elsewhere from coast to coast, and beyond, too.

Critical theory allows us to see that, while in many respects this campus is and has been ground zero in this cultural warfare, there is a whole lot of other ground out there, and it is all in contest. Every day, cultural warriors awake to the local exigencies of the day. Every day, outsiders wage hand-to-hand combat to preserve, if not advance, yesterday’s gains. In this sense, this place is no different than the many other fronts of today’s culture war.

What certainly is different—and special—about this place is the students, who generation after generation refuse to forget or to give up. It is you and your predecessors on this campus—like Judge Olmos—who, since the 1960s at least, have insisted on making the institution accountable for its professed commitment to

43. See supra note 10 (quoting James Madison).
diversity, equality and opportunity. For this intergenerational history of activism, I commend, applaud, and encourage you. For this reason – because of this history of student activism – eyes all across the country are on you, and on this institution, to see how the future begins to unfold here. And through critical theory, we can connect this continuing local struggle, at Boalt specifically, to those that preceded you on this campus and in this community, as well as to those that continue simultaneously elsewhere. In other words, critical theory can help to explain why your campus and education – here and now – look, act and feel as they do.

Thus, it should come as no or little surprise that the law school curriculum resists the integration of critical theory into legal education: imagine if they taught us, as a matter of course in the first year, what we need to know to pierce through what they currently do teach us, as a matter of course, in the first year. Imagine if we could launch a discussion of doctrine and its unstated assumptions from that critical point, rather than have to construct that point from the margins of your education first, and also in the face of entrenched hostility. Imagine if deconstruction, in addition to doctrine, were part of formal legal education from the first year on. But, of course, providing us the critical tools to transcend – and disturb – conventional wisdom might not be in the interest of privileged groups who, on both individual and collective levels, benefit from the skewed allocation of benefits and burdens under existing sociolegal conventions, even as some disclaim – without disgorging – the inherited perks of structural privilege.

Institutional hostility to critical theory is manifested in many ways that affect your legal education, and that undermine our individual and collective capacities to follow in Judge Olmos’ footsteps. These ways include the devaluation of scholars and scholarship identified as critical theorists or theory, which, in turn, makes it unlikely that there will be faculty interested in advocating for, or in actually teaching, regular courses devoted to, or that incorporate, critical theory: there being no curricular need, there is no need to recruit interested faculty; and there being no interested faculty, curricular reform through the integration of critical theory has no ‘inside’ institutional advocate. And to the extent that some law schools grudgingly have approved formal courses or institutional projects that seek to center critical theory, they have cabined them in ‘boutique’ seminars, projects, or centers that reach relatively few students in relatively haphazard ways, and that help to defer or avoid a substantive and structural integration of critical theory into mainstream or ‘core’ courses.

A perennial question to interrogate and theorize, therefore, is: Why do law schools fail to insist on critical theory in legal education? Why do law schools decline to teach what they prize and reward most among faculty activities and accomplishments? Despite formally professed commitments to equality and equity, it fundamentally is not in the interest of the governing classes to share with the subordinated the educational tools to develop a critical consciousness of political marginalization, social invisibility, economic exploitation and cultural oppression. Because tokenism provides a bromide for bouts of majoritarian conscience – and, perhaps, also a temporary ‘safety valve’ for grave social ills – tokenism is practiced and tolerated in law schools across the land in various forms, ranging from

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admissions to curriculum to faculty recruitment. But, the obligations of formal equality recognized by this nation's governing elites simply do not extend to providing the masses of outsiders within this nation's borders with the knowledge and consciousness of remembrance, resistance and revolution.

For example, currently I am conducting a study of the curriculum of the law schools around the country to see how many schools, if any, actually teach how law and policy affect Latina and Latino communities – communities that are marginalized, invisibilized, exploited and oppressed in part by Anglocentric legal regimes, even though Latinas/os have been in the United States for as long as – indeed, longer than – the 'United States' has existed in the areas known today as Texas, New Mexico, California, Florida and Puerto Rico; in other words, Latinas/os have been ‘in’ the United States for as long as the border has migrated to and over them, and long before they – we – migrated over these shifted borders into the ever-expanding territories controlled by Anglo-American elites. Moreover, this knowledge not only is historical: demographic trends and trajectories predict an increasingly salient role for Latinas/os in the social and economic life of this country. By all accounts, law and lawyers increasingly will be required to engage Latina/o needs and interests in policymaking choices in the coming years and decades. Given this history and reality, a critical knowledge of 'manifest destiny' and imperial conquest, of coerced assimilation and economic exploitation, is crucial to understanding race/ethnicity relations in this ‘multicultural’ country, and hence crucial to theorizing and pursuing a transformative reform of law and policy as instruments to enhance – not degrade – the state of race/ethnicity relations.

Nonetheless, preliminary results indicate that only about a handful of law schools in the whole country – out of about 200-plus in total – have courses devoted primarily or partially to legal issues that are especially germane to one of the most rapidly growing segments of this country’s population. Despite much talk about the pressing need to prepare you – the lawyers of the future – to practice effectively in a multicultural and multiracial society, the population that is predicted to become the majority group in this state during this century remains conspicuously absent from your legal education. Despite a multitude of jazzy-sounding platitudes and slick brochures about gearing up for the Twenty First Century, when it comes to this basic issue of curricular coverage, law schools around the country have struck the pose of an ostrich.

This gaping gap, effectively depriving you of the opportunity to learn about the histories and legacies that inform and delineate Latinas/os' places and prospects in this Anglocentric country as part of your formal legal education, also deprives you of necessary knowledge to theorize socially transformative interventions as law students and lawyers. This gaping gap leaves you only with personal experience,

45. See Francisco Valdes, Barely at the Margins: Looking for Latinas/os in the Law School Curriculum – A Survey With LatCrit Commentary, 81 OR. L. REV. (forthcoming 2003). By comparison, five years earlier, in 1995, 66 law schools reported a total of 112 courses devoted “primarily” or partially to the study of law and sexual orientation or sexuality. See Francisco Valdes, Tracking and Assessing the (Non)Inclusion of Courses on Sexuality and/or Sexual Orientation in the American Law School Curriculum: Reports from the Field After a Decade of Effort, I NAT. J. SEX. ORIENT. L. 149 (1995).

46. In fact, the 2000 Census has produced headlines announcing that “Hispanics now equal blacks in population.” See Andres Viglucci, Hispanics Now Equal Blacks in Population, MIA. HERALD, Mar. 8, 2001, at IA.
effectively erasing the historical or social contexts through which to process your experience in a critical and self-critical fashion. This gaping gap does not make it impossible for us to act – for us to acquire hidden knowledge from the margins of our formal legal training – but this institutional neglect does make it necessary for outsiders to cobble from elsewhere the knowledge necessary for an informed and effective intervention. This gaping gap makes it more difficult for us to theorize the Latina/o condition, and hence more difficult to act in a manner likely to make a substantive and enduring difference.

Given the sociolegal landscape of these times, this entrenched status quo is not likely to change substantially anytime soon, at least not without great and sustained struggle. This struggle will require students to insist on critical theory in legal education, and to do so over and over again so that incremental progress is achieved, and then sticks. It will require that law school applicants ask recruiters about the inclusion and integration of critical theory in the curriculum, and to make it plain that final enrollment decisions can be affected, for the better or worse, by the school’s response to this question. This struggle also will require individual faculty members and administrators to support student requests and demands, and also to intervene proactively and strategically within the institution whenever possible, to expand opportunities for critical theory in various aspects of formal legal education. Clearly, this struggle is ongoing. In the meantime, faculty and administrators can and must, at a minimum, increase the use of seminar offerings and settings, as well as similarly discretionary opportunities for curricular action, to expand access to critical theory for today’s students in these virtually unilateral and relatively expeditious ways. And students should, at a minimum, enroll in these courses and talk them up to new students, supporting these marginal efforts in every possible way, both as students and as alumni. Which, of course, takes us back to the present status quo: the ghetto – the place from which we make waves while making do.

Of course, this ghetto of boutique seminars, projects, and centers that exists today is a wonderful and lively place. You should take advantage of these offerings and celebrate this progress, including right here, with the Center for Social Justice and the many activities that it offers to you. It is this ghetto, precisely, that allows us to make do while making waves – and while insisting on a real integration of critical theory in legal education. To make headway, however, it seems to me that we also must create a demand – a ‘market’ demand, if you will – for this kind of basic curricular reform as a substantive way to diversify American legal education and as a way to enhance its value to those of us who remain committed to the example and the legacy of Judge Olmos. If we instead are dismissive or fearful of theory, or indifferent to it in this context of institutional hostility, then we simply are acquiescing to an oppressive status quo that deprives us of a tool that we very much need to help foster and guide social change.

Now, notice that what I am doing is theorizing the importance of a particular type of curricular reform to your and our local struggles against the resegregation of this and similar institutions. Notice that I am using critical theory to interconnect this particular front in this culture war to other fronts, including the fronts that await me back home in Florida – where your Ward Connerly has taken his Orwellian campaign against equal opportunity in higher education. Notice that I am deploying critical theory to connect the apparently unconnected, and to link the micro to the macro. Notice that I am relying on theory and its critical insights to craft and motivate proactive action focused on a particular type of curricular reform. It is precisely this type of fusion – the fusion of theory and action – that I urge upon
you as a basic method for antisubordination projects and coalitions. It is the synergistic potential generated via this fusion that counsels against the bifurcation of action from theory.

Allow me briefly to describe two other examples, in which multiply diverse scholars have made the fusion of critical theory and antisubordination action a personal practice. The first is LatCrit theory, a collective project that last year celebrated its fifth anniversary. The second is a more recent project, which we are dubbing the Critical Global Classroom, and through which we are endeavoring to teach critical global studies in international and comparative law, outsider jurisprudence, and substantive public policy. Both examples, I hope, will help to further elucidate this fusion of theory and action, and the synergies it yields for contemporary antisubordination struggles; both are examples, in my view, of making waves while making do.

LatCrit emerged in 1995 from the legal academy of the United States, and in my view, most immediately from critical race theory. The ‘LatCrit’ subject position comes into being as a self-designated and self-conscious perspective on law and Latinas/os at a 1995 colloquium on Latina/o communities and critical race theory held, appropriately I think, in Puerto Rico. Since then, we have held five annual conferences and several colloquia, and each has generated a law review symposium devoted to the proceedings of these conferences and colloquia. In addition, two non-conference-related symposia have also come out, and each has been a joint publication in which a ‘mainstream’ law review teamed up with a law review of color to produce the symposium. The first of these, I’m happy to say, was published by your own California Law Review and La Raza Law Journal, and the second – modeled on the Cal-La Raza joint issue – is coming out now in the Michigan Journal of Law Reform and the Michigan Journal of Race and Law.


49. See supra note 48 and symposia therein cited. See also www.latcrit.org.
This ongoing collaboration with law reviews is crucial to the LatCrit project, I should emphasize at this point, because our enterprise entails not only the production of knowledge but its timely dissemination to the socially conscious for the purpose of proactive social justice action: LatCrits' basic purpose since 1995 has been not only to inaugurate and cultivate an absent and overdue discourse, not only to produce critical sociolegal knowledge on Latinas/os qua Latinas/os, but also to ensure that this knowledge is promptly made accessible to you—the future of our profession—so that this work would aid your self-empowerment as agents of social and legal transformation.

Indeed, from where I stand, LatCrit theory and praxis performs four functions: (1) the production of substantive knowledge; (2) the advancement of social and legal transformation; (3) the expansion and connection of social justice struggles; and (4) the cultivation of antiessentialist communities and antisubordination coalitions. To accomplish these four basic functions, LatCritters actively—albeit critically—studied the lessons of jurisprudential experiments that have preceded our own. The purpose was to ensure that LatCrit theorists would be able to develop and to practice—both internally and externally, both self-critically and critically—the lessons embedded in the jurisprudential experiences of outsiders in the legal academy of the United States.

Conceptually and substantively, LatCrit thus is part of what sometimes is described as 'outsider jurisprudence,' a category that, expansively viewed, might include critical legal studies, feminist legal theory, critical race theory, critical race feminism, Asian American legal scholarship and, more recently, queer and LatCrit theory. These different genres of outsider jurisprudence have in common a critical outsider perspective vis-à-vis law and society, and so perhaps we may refer to them, as a group, as 'OutCrits.' During the past decade or so, OutCrits of color have been increasingly active, as the collective record so richly shows. This record shows that OutCrits, in general, have striven to: represent marginalized viewpoints; espouse critical, egalitarian, progressive and diverse antisubordination projects; accept discursive and analytical subjectivity, political consciousness, and social responsibility; recognize and work with postmodernism; favor praxis; and seek community. This cumulative record serves as LatCrits' point of departure, both for theory and for action.

So, how does LatCrit represent a fusion of theory and action? To begin with, we must acknowledge and not lose sight of a bedrock fact: like other humans, LatCritters inhabit and animate multiple 'communities' at once and, from an antisubordination perspective, we thus must be proactive in multiple settings at once—hopefully, in synergistic ways. We inhabit, first, the communities of origin from which we emanate, yet we also inhabit the networks or groupings constructed by or through professional structures. We similarly inhabit, simultaneously, the political


formations or organizations with which we elect to identify, as well as the very community of LatCritters \textit{qua} LatCritters that gives life to this jurisprudential project and our collective aspirations. Through our work with or within each of these contexts or communities, we should and must seek always to perform the theory; in and through our work, we must seek and strive for the advancement of justice in each of these contexts or communities, ideally in interconnected ways. Thus, we view the substantive development and institutional establishment of ‘LatCrit’ as one way of challenging oppression within as well as without the legal academy: this work, called institution-building, is calculated to combat subordination within the academy as well as throughout society.

Consequently, we view the organization of programmatic events and the publication of related symposia as acts of resistance to the dominant forms of knowledge that have captured the legal academy of this country, and which leverage that captivity to produce legal regimes that buttress traditional – supposedly ‘original’ – sociolegal skews. Because these programmatic interventions confront and reject professional and intellectual, as well as social and political, systems of subordination, we view these and similar acts of resistance as a form of praxis within, and on behalf of, the many ‘communities’ that we inhabit simultaneously. We view this jurisprudential insurrection as a struggle over a key front in today’s culture wars: the legal academy and its production, legitimization and deployment of legal knowledge, theory and consciousness to craft social policy. It is in this particular front, which all of us here today share in common, that we operate – in ways that members of our other communities might not be able to, due to position and the like – as cultural warriors, as footsoldiers trying to stave off majoritarian attacks, and over time dismantle entrenched and interconnected webs of subordination. If outsiders in the legal academy don’t do this work, who will?

Therefore, in all of its manifestations and when at its best, LatCrit represents a conscious and conscientious effort to incorporate and to advance the gains and insights of other genres of outsider jurisprudence, as well as to amplify and enrich them, while centering Latinas/os in public policy and political discourse, and in legal scholarship – but doing so in a way that also centers the multiple diversities across and among ‘Latinas’ and ‘Latinos.’ LatCrit theory represents, in many ways, an effort to apply the lessons of outsider jurisprudence to the study of Latinas/os and the law; it represents, in some key ways, the practice of outsider jurisprudence as a method to help ground and guide the study of Latinas/os and the law. While substantively focused on multiply diverse Latina/o communities, LatCrit theory is a self-critical joint effort of many scholars to apply to ourselves and our works, as well as to law and society, the lessons of outsider jurisprudential experiments.\footnote{53. See generally Valdes, supra note 46, at 52-59. See also Elizabeth M. Iglesias, \textit{LatCrit Theory: Some Preliminary Notes Towards a Transatlantic Dialogue}, 9 U. MIAMI INT’L. & COMP. L. REV. 1 (2000).}

LatCrit, as a form of outsider praxis, has yielded substantive insights and benefits – the kinds of benefits that come from and facilitate a fusion of theory and action. This project, for instance, has confronted the generally prevalent stereotype that Latinas/os are ‘Hispanics’ while many, perhaps most, are not. We similarly have confronted the stereotype that Latinas/os are not Black, or not indigenous, or not queer – while many are. In LatCrit conferences and projects, we seek to center
these and similar multiple diversities as the lenses through which to study this category called ‘Latina’ and ‘Latino’ – both within and beyond the lands today known as the United States.  

From the beginning, therefore, LatCrit theorists approached this project in ways that not only center Latinas/os’ multiple internal diversities, but also in ways that situate Latinas/os in larger intergroup frameworks, both domestically and globally. Due in part to the lessons of outsider jurisprudence, LatCrits as a whole, I think, are convinced that we cannot understand, much less dismantle, the subordination of Latina/o persons and communities without understanding how the oppression of African-Americans, Asian-Americans, queers, Native Americans, disabled people, women, and poor people are interconnected with the oppression of Latinas/os ... because Latinas/os, after all, are also all of those things, and more.

Similarly, we are committed to the notion that progress for Latinas/os cannot come at the expense of progress made by other groups: while diverse viewpoints coexist within the discourse, a particularly significant and promising aspect of LatCrit, from the inception, has been the conscious and conscientious commitment to coalitional community building, as well as to coalitional discourse and scholarship. We all have to deal with questions of difference in this multicultural/multiracial society; we all have to learn about the histories and experiences that produce these current differences. But, to make a difference in law and society, outsiders also have to confront, theorize and engage issues of difference in constructive and self-empowering ways – in ways that promote social transformation and social justice. Remember, difference, like sameness, is not identity.

Over these past five years, LatCrit theorists, therefore, have experimented with various techniques of coalitional theory and practices based, again, in part on the cumulative OutCrit record. While always seeking to center the internal diversities of Latinas/os in intergroup frameworks, we also endeavor to anchor analysis and action to: (1) substantive principles of equity and justice, (2) applied critically to all context and all categories, (3) applied at all times self-critically to our own ideas, proposals, and projects, and (4) while avoiding destructive tendencies towards hypercriticality that undermine the transformative potential of principled antisubordination coalitions, critical coalitions. Employing the gains and limits of outsider jurisprudence as a point of departure, this effort represents, in a very personal way, an ongoing commitment to the practice of the insights posted by OutCrit legal theorists.

We have learned during this time that, in practice, this undertaking requires us to ‘rotate the center’ of our work or focus. It requires us, in other words, to ‘decenter’ ourselves from time to time in a principled and mutual process of personal and social change. And it requires us to expand our engagement of difference from the backward-looking study of ‘different’ group histories and experiences to the forward-looking articulation of postsubordination vision. These two methodologies are not mutually exclusive, let me underscore; while we need to learn and understand social histories and experiences to understand current differences, we also need to articulate and honor commitments to social justice for all – not just for those whom we think look or ‘are’ like us. In this process, we can craft a vision that unites us,

while respecting also the differences constructed out of history, ideology and experience. Looking to the lessons of other outsider jurisprudential experiments, LatCrit theory thus represents an effort to grapple with fundamental issues of coalitional community and solidarity, while interjecting Latinas/os into public policy debates more explicitly and constructively.55

I hope this summary overview of LatCrit theory helps to illustrate the importance of connecting theory to action – the importance of praxis. To the extent that LatCrit theory has succeeded in engaging implosive issues in programmatically constructive ways, it has done so in great measure because LatCrit theorists, as a whole, have taken seriously the critical theorizing that preceded this project. By using the cumulative theorizing of OutCrits as our point of departure, LatCrit theorists have displayed how the fusion of theory to action can help orient the creation and evolution of a collective project designed to produce social and institutional change.

LatCrits' fusion of theory and action, as I described earlier, is not limited to the production of knowledge, texts and programs – vital though these functions are. Rather, this fusion is exemplified by LatCrits' ongoing effort to mount new and practical interventions in the social and professional spaces that we inhabit; in other words, this fusion, manifested in the initiation and sustenance of concrete projects, is one significant example of LatCrit praxis. These activist efforts, guided by OutCrit and LatCrit theorizing, are designed to produce substantive and institutional social justice change through the practice of theoretical insights, and of the commitments that flow from critical theory and its insights. The second example, the Critical Global Classroom, illustrates the point. First, however, a prefatory note.

Originally, our vision for this initiative included housing it in a summer study-abroad program in Spain that I used to co-direct with my friend and colleague, Lisa Iglesias, for the University of Miami School of Law. The basic idea was to join the device of a summer study-abroad program with the concept of a critical global classroom. The basic concept and purpose are to give all of you – all of you, as well as all law students across the country – an opportunity to do what you can’t do at your ‘home’ institutions: undertake an in-depth exploration of critical theory on a comparative and international scale, and beyond the ghetto of boutique offerings – which, let us recall, only some schools actually offer on an ongoing basis. Thus, the two need not be linked: the ‘Critical Global Classroom’ as a concept can work within any number of summer study-abroad programs. While it would have been ideal to continue with the progress that Lisa and I were making with the Spain program at Miami, institutional politics have shut down that possibility – yet again. In the spirit of making do while making waves, we presently are investigating alternative possibilities with faculty at various other law schools, where this project might be received with less institutional hostility than has been the case at Miami.

The idea of employing a summer study-abroad program as the venue or vehicle for the Critical Global Classroom proceeds from the recognition that, as noted earlier, most law schools minimize or marginalize curricular opportunities to study, and be exposed to, critical theory or outsider jurisprudence. It is this formal, entrenched curricular structure that we seek to circumvent – and to do so from the

institutional margins that we occupy. Yet again, the challenge for us is: How do we make waves while making do, given the institutional and social politics of these times? The summer study-abroad setting is well suited to this intervention because enrollment in summer programs is available to students all over the country. While law schools continue their curricular neglect of critical theory, we can create a lifeline to interested students from coast to coast with just one, well-designed summer program. Consequently, we dubbed this initiative the ‘Critical Global Classroom’ to underscore the fact that we are attempting to construct a formal classroom setting, devoted to serious sociolegal study, that is global in its purview and critical in its approach—a formal classroom and curriculum devoted to critical global studies in law, theory and policy.

Informed by critical and self-critical theorizing, this initiative also is synergistic with other LatCrit projects already underway. For instance, last year we established a LatCrit student-faculty listserv, which operates as a kind of informal ‘cyber classroom’ devoted to LatCrit theory and, more generally, to outsider jurisprudence. We also have prepared a LatCrit Primer, including a suggested table of readings, to help students in diverse locales to form local reading groups, and then to conduct a series of interactive discussion sessions. The listserv and the Primer have been theorized to work hand in hand: students around the country can use the Primer as a common set of texts, which can form the basis not only of local discussion in the reading group sessions, but also as the basis of cyber exchanges among students as well as faculty. Thus, we mail the Primers upon request to interested students, and encourage them to go beyond its introductory texts. As a result, students at law schools in every time zone of the country have formed their own reading groups, and from time to time they post and exchange comments on the listserv; they engage other students across time and space via the internet because they are doing the same readings and because they have similar interests and outlooks. At the same time, we also are working to institute something akin to a LatCrit student writing ‘competition’—for lack of a better description—that will open opportunities for interested students across the country to present their works at the LatCrit conferences, and to publish them in LatCrit symposia, as a way of helping students, particularly students of color, to position themselves for entry into the legal academy. All of these efforts, I hope you have noticed, are well theorized—they all respond to a theory of curricular entrenchment, social politics and structural dynamics, all of which combine to impede transformative legal reform.56

Notice that, in fact, all of these projects are examples of theory fused to action. And notice that none of these interventions would have been imaginable, or conceived, but for the techniques, insights and imperatives of OutCrit theorizing. Each, in different ways, reflects the cumulative gains of outsiders in the legal academy of the United States. Each, in a host of ways, seeks to promote social change through the practice of principles derived from OutCrit theories. Each, at bottom, represents an effort to contest and reform the contours of legal education; each insists on critical theory in formal legal education as one means toward mobilizing social transformation. And, invoking the example of Judge Olmos, each of these initiatives is an opportunity for you to work collaboratively with like-

56. Information on these and similar initiatives are posted from time to time to the LatCrit website at www.latcrit.org.
minded activist scholars to circumvent — transcend — the substantive and curricular strictures of your legal education.

Don’t get me wrong: this work is not a pretty sight. Both theory and action are complex and daunting tasks, especially in the context of majoritarian cultural warfare. The challenges are myriad and constant, ranging from the threshold task of raising sufficient funds for our activities, to convincing people that collective projects are worth their personal investments, and many other sorts of material, political and institutional obstacles. The work is never done, either; it just keeps on coming at you. And sometimes the situation gets to be overwhelming. But forgetting or slighting theory in the name of action, or action in the name of theory, hardly can ever be the best recourse for outsider theorists and activists — especially in the context of majoritarian cultural warfare.

I began this Lecture by positing the need to fuse social justice action to critical theory. I illustrated this need by using ‘critical theory’ to deconstruct the culture war that envelopes us, to show how it represents a strategically sophisticated and tactically coordinated assault on multiple Others, and to show also how theory allows us to chart the linkages that interconnect the local, national and international fronts of this warfare. I then pointed out how the knowledge necessary to understand and unpack this multifaceted culture war, and similar sociolegal phenomena, systemically is denied in the context of your formal legal education, thus undermining your individual and collective capacity to envision and mount effective social justice interventions. Focusing on curricular reform, I next turned to LatCrit theory and the Critical Global Classroom to showcase two current and fragile examples of how a small group of activist OutCrit scholars in the legal academy of the United States banded together to produce knowledge by inaugurating a previously nonexistent critical discourse on Latinas/os and the law, and additionally to record the production of this knowledge by ensuring its timely publication in legal periodicals. More specifically, I proffered these actions as interventions theorized to bring critical theory to you, today’s socially conscious law students, despite the formidable structural barriers posed by the strictures of the formal legal curriculum. These actions, both personal and collective, are made conceivable and possible by the insights and techniques of critical theory, critical theorists and critical theorizing. They illustrate, as I hope you can see, the need for praxis that I posited at the outset. In each instance, these illustrative examples represent ongoing efforts to make do while making waves.

In conclusion, then, we need critical and self-critical theory to make sense of a deranged world, a world deranged by social injustice everywhere and crying out for social justice action all the time, a world where resegregation equals equality and where strict scrutiny applies to white men under the guise of so-called reverse discrimination, but not to sexual minorities, who, still today, are denied even formal equality under a ‘de jure’ regime of straight white male supremacy. Critical theory is what allows us to carve out a wholesome sense of self and community out of a world deranged by abuses of power and privilege. Critical theory, finally, is what nurtures us when we become exhausted and just cannot do another thing. It is what can inspire social hope in the face of personal or immediate despair. Critical theory, my friends, is what permits us to make waves while making do, and vice versa.

Thank you.