The Latino-American Crisis of Citizenship

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> To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.
> — *Brown v. Board of Education*[1]

INTRODUCTION

Citizenship is not just a legal status that binds us to our home country. It is also an ideal. Professor Kenneth Karst writes that equal citizenship "centers on" inclusion and belonging.[2] Other legal philosophers have also posited that citizenship is about membership,[3] equal participation,[4] and respectful dialogue.[5] Some scholars have despaired that a unified citizen community is impossible and that such a goal is inconsistent with the realities of political communities.[6] Indeed, Karst's description of citizenship is rather romantic. Nevertheless, the citizen community ideal is a critical one even if society cannot realize it perfectly. It helps to validate law's authority over the individual and to foster a healthy identity by encouraging a sense of security and belonging.

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[1] 347 U.S. 483, 494 (1954).

[2] *See* KENNETH KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 3-4 (1989).

[3] *See* Joel Handler, *Constructing the Political Spectacle: Interpretation of Entitlements, Legalization, and Obligations in Social Welfare History*, 56 BROOK. L. REV. 899, 967 (1990) (discussing necessity of citizenship rights for full membership); John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2228 (1992) (discussing goal of integrating all members of society while maintaining cultural autonomy).

[4] *See* Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1503 (1988) (discussing person's interest in equal participation in terms of public affairs and pursuit of common good).

[5] *See* Stephen M. Feldman, *Whose Common Good? Racism in the Political Community*, 80 GEO. L.J. 1835, 1871 (discussing Martin Luther King, Jr.'s emphasis that community survival depends on political dialogue).

[6] *See* CHANTAL MOUFFE, *Democratic Citizenship and the Political Community*, *in* DIMENSIONS OF RADICAL DEMOCRACY: PLURALISM, CITIZENSHIP, COMMUNITY 225, 234-35 (1992) (discussing how fully inclusive community and final unity can never be realized); *see also* Linda S. Bosniak, *Opposing Prop. 187: Undocumented Immigrants and the National Imagination*, 28 CONN. L. REV. 555, 588 (1996) (discussing exclusive nature of nation-state); Sanford Levinson, *Constituting Communities Through Words that Bind: Reflections on Loyalty Oaths*, 84 MICH. L. REV. 1440, 1446 (1984) (discussing how truly open community is almost contradiction in terms); Jamin Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1446 (1993) (noting that community's sense of social solidarism depends on exclusion of non-citizens).

This Article will examine how the United States government prevents many Latino-American[7] citizens from "belonging" to the United States collective by stigmatizing aspects of Latino-American identity. Although there is no single checklist of the influences that help make up Latino-American identity, many Latino-Americans share what can be called a "bordered" identity, which depends on a dual sense of place and people.[8] Many Latino-Americans feel the sense of place through cultural roots in the Latin country to which Latino-Americans have blood ties.[9] The sense of people is the concomitant empathetic connection that many Latino-Americans have with non-U.S. Latinos.[10]

Many Latino-Americans feel that they do not fully belong to the United States collective because certain government acts, such as repressive immigration enforcement tactics and language laws,[11] needlessly stigmatize non-U.S. Latinos and the Spanish language, thereby stigmatizing Latino-American identity. As this Article will demonstrate, these laws, their enforcement, and the surrounding political rhetoric stigmatically characterize Latino-Americans as pestilential invaders who speak a divisive, even dangerous, language. This stigmatization is very destructive and

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[7] I realize that "Latino-Americans" is male-gendered. Some Latino and Latina theorists overcome the Spanish preference for male versus female pronouns by using the term "Latina/o." I appreciate this, but find it distracting. As a Latina, I am well aware that I am indirectly privileging male identity here. However, for simplicity's sake, I will use "Latino" to refer to Latinos of both genders throughout this Article.

Additionally, I designate Latinos not residing in the United States as "non-U.S. Latinos" and references to "Latinos" are intended to refer to persons of Latino heritage of whatever citizenship.

Finally, although this Article is devoted to the crisis of citizenship of "American" Latinos, my goal is not limited to increasing the welfare of citizen Latinos. Instead, I am focusing on citizen Latinos for the sheer reason that undocumented and even "legal" non-citizen Latinos have little or no political clout in the United States. As I will develop below, I am advocating a jurisprudence which would alleviate the crisis of citizenship that is being experienced by many Latino-Americans. However, one of the key tools to solving this crisis is improving the treatment of non-U.S. Latinos.

[8] *See generally* Lisette E. Simon, Comment, *Hispanics: Not a Cognizable Ethnic Group*, 63 U. CIN. L. REV. 497, 520-22 (1994) (describing how Latin Americans perceive their own identity).

[9] *See id.*

[10] *See id.*

[11] Although undoubtedly other state acts also stigmatize Latino-American identity, this Article will focus on immigration and language laws.

it may lead to a Latino-American "crisis of citizenship" that is inconsistent with the vision of citizen community and equal status that was so eloquently evoked by Justice Warren in *Brown v. Board of Education*.[12]

This Article will explore different aspects of Latino-American identity, examine how the state shapes and stigmatizes that identity, and suggest reforms to rectify these ills. This Article first explains that lawyers and legal philosophers should care about Latino-American identity because the law already (mis)categorizes and, therefore, incorrectly defines Latino-Americans. Second, it analyzes how immigration policy, English-only laws, and racially charged rhetoric stigmatize Latino-American identity by reviewing case law and legislative records and by offering narratives to illustrate the crisis of citizenship phenomenon.[13] Finally, it prescribes various remedies for these ills, including a more accurate legal categorization of Latino-Americans, sensitized immigration law and rhetoric, and rejection of English-only laws pursuant to the First Amendment.

I. LATINOS AS A LEGAL CATEGORY AND AS A FELT IDENTITY

> Badges? We ain't got no badges! We don't need no badges.
> I don't have to show you any stinkin' badges!
> — *Treasure of the Sierra Madre*[14]

An initial issue is whether lawyers should care about the intricacies of the Latino-American identity and the effects of the law's intersection with that identity. The law already uses the term "Latino-American" as a legal category. Thus, it helps shape

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[12] 347 U.S. 483, 494 (1954) (arguing that race segregation results in irreparable damage to hearts and minds of those in community).

[13] I will, in fact, use narrative method at various points in this Article. Storytelling and narrative are jurisprudential methods that have been advanced by feminist and critical race theory scholars, as well as classical-legal theorists. One of my goals in this Article is to combine narrative method with a close look at doctrine. *See* Yxta Maya Murray, *Merit-Teaching*, 23 HASTINGS CONST. L.Q. 1073, 1086 (1996); *see also* MARTHA NUSSBAUM, LOVE'S KNOWLEDGE: ESSAYS IN PHILOSOPHY AND LITERATURE 287 (1990) (describing ability of stories to evoke emotions); PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 9 (1993) (suggesting that actual people telling stories in their own voices convey universal truths more effectively because they are somehow more legitimate).

[14] (Warner Bros. 1948).

Latino-American identity whether it intends to or not; therefore, lawmakers should use this power thoughtfully.

A. Latino-Americans as a Legal Category

The courts have not yet resolved the question of whether Latino-Americans are a race or an ethnicity. Equal protection case law reflects this ambiguity: courts vacillate between characterizing Latino-Americans as a racial or ethnic class or sidestep the issue almost entirely. For example, in *Hernandez v. Texas*,[15] a jury exclusion case, the Supreme Court characterized Mexican-Americans as an ethnic grouping.[16] The Court explained that its decision to forbid the exclusion of Mexican-Americans from jury selection did not mean that it was reviving the theory that the constitution "requires proportional representation of all ethnic groups of the community on every jury."[17] In *Hernandez v. New York*,[18] another equal protection claim involving jury selection and Latino-Americans, the Court described Latino heritage as both a race and an ethnicity.[19] Furthermore, in *Tijerina v. Henry*,[20] the Supreme Court dismissed an appeal in a case where a district court dismissed a class action complaint because the Latino petitioner's "definition of the class was 'too vague to be meaningful.'"[21] There, the class was specifically delineated as "Indo-Hispano, also called Mexican, Mexican-American and Spanish-American [which is] generally characterized by Spanish

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[15] 347 U.S. 475 (1954).

[16] *See id.* at 482.

[17] *See id.*; *see also* Ross v. Houston Indep. Sch. Dist., 699 F.2d 218, 221 n.5 (5th Cir. 1983) (recognizing with approval agency's recognition of Hispanics as separate ethnic group); United States v. Texas Educ. Agency, 467 F.2d 848, 852 (5th Cir. 1972) (noting that many Mexican-Americans in Texas are members of identifiable ethnic minority group); Cisneros v. Corpus Christi Indep. Sch. Dist., 467 F.2d 142, 149 (5th Cir. 1972) (describing Mexican-Americans as identifiable, ethnic minority); Gonzalez v. Sheely, 96 F. Supp. 1004, 1009 (D. Ariz. 1951) (describing Mexican ancestry as ethnic trait).

[18] 500 U.S. 352 (1991).

[19] *See id.* at 354; *see also* Castaneda v. Partida, 430 U.S. 482, 492 (1976) (speaking of discrimination against Latinos as discrimination on account of "race" or "color"); Pemberthy v. Beyer, 19 F.3d 857, 867 (3d Cir. 1994) (characterizing Latinos as racial or ethnic group); Diaz v. Silver, No. 95-CV-2591, 1997 WL 94175, at *4 (E.D.N.Y. Feb. 26, 1997) (finding Hispanic populations to be ethnically and racially diverse); Pagan v. Dubois, 884 F. Supp. 25, 28 (D. Mass 1995) (discussing racial and ethnic content of Latin-America).

[20] 398 U.S. 922 (1970).

[21] *See id.* at 923 (Douglas, J., dissenting).

surnames, mixed Indian and Spanish ancestry . . . and Spanish as a primary or maternal language.'"[22]

In contrast to the judiciary, the executive branch stands firm on its definition of Latino-Americans as an ethnic grouping, not a racial one. Statistical Directive 15 of the Office of Management and Budget uses five racial and ethnic categories for federal statistics and program administrative reporting: American Indian or Alaskan Native; Asian or Pacific Islander; Black; Hispanic; and White.[23] "Hispanics" are defined as "person[s] of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish culture or origin, regardless of race."[24]

Despite Directive 15's static and procrustean categories,[25] other laws and regulations which touch on Latino-American identity seem to reflect an understanding of the fluid nature of racial and ethnic identity. For example, the Equal Employment Opportunity Commission ("EEOC"), which depends upon these rigid categories, takes a comparatively expansive approach to defining an individual's race.[26] Although it permits administrators to

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[22] *Id.* at 922; *see also* Keyes v. School Dist. No. 1, 413 U.S. 189, 197-98 (1973) (focusing for purposes of equal protection, on "Hispanos" "cultural and economic deprivation and discrimination," and comparing their treatment to that of "Negroes"); People Who Care v. Rockford Bd. of Educ. Sch. Dist. No. 205, 111 F.3d 528, 538 (7th Cir. 1997) (defining "Hispanics" as "minorities").

[23] *See* Directive No. 15, Race and Ethnic Standards for Federal Statistics and Administrative Reporting, 43 Fed. Reg. 19,260, 19,262 (Off. Mgmt. & Budget 1978).

[24] *See id.* Directive 15 serves as "the de facto standard of state and local agencies, the private and nonprofit sectors, and the research community." *See* Simon, *supra* note 8, at 508 (describing state approaches to defining Latinos); Michael Omi, *Racial Identity and the State: The Dilemmas of Classification*, 15 LAW & INEQ. J. 7, 9-22 (1997) (discussing state-defined classifications of race and ensuing dilemmas).

In a recent development, however, the OMB announced that in 2000 they will allow people to check as many boxes as they like and will now use "Hispanic or Latino" as an ethnicity designation. *See* Julia Malone, *Census Oks Multiple Answers on Race, Rejects 'Multiracial'*, PITTSBURGH POST-GAZETTE, Oct. 30, 1997, at A8.

[25] These stylized, limited categories, moreover, may have their genesis in the slave system's practice of carefully coding black and white races according to a pseudo-scientific racial scheme. *See* A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967, 1975 (1989) (discussing Virginia legislature's definition of mullatto in 1682); *see also* CHARLES STAPLES, JR., THE LEGAL STATUS OF THE NEGRO IN THE UNITED STATES 240 (1940) (advocating "one drop rule"); JOEL WILLIAMSON, NEW PEOPLE 13, 97 (1980) (discussing famous "one drop rule").

[26] *See* EMPLOYMENT PRACTICES GUIDE (CCH) ¶ 403, at 606 (1987), *quoted in*, Higginbotham & Kopytoff, *supra* note 25, at 2021 n.232 (delineating culturally accepted

label individuals according to a visual survey, it also encourages administrators to obtain assistance from friends, the local community, and internal identification.[27] The EEOC's overall identification process appears to be grounded on the respect for self-identification and group affiliation.[28]

Federal courts have also expansively defined these categories in cases involving plaintiffs' standing under title VII racial or ethnic discrimination claims[29] or their qualification for

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criteria that observers may adapt to their particular needs).

[27] *See id.*

> A visual survey may be the most practical and secure way of identifying the race or sex of an individual . . . , but the observer would need to be adept to the characterizations of each racial group. Help in this area might be obtained from friends or acquaintances of the individual who would possibly be able to determine to which group the individual is regarded by persons in the local community as belonging . . . . Scientific definitions of race or anthropological origin are not generally of use in categorizing racial/ethnic minorities. As noted above, the enforcement agencies permit inclusion of individuals in the racial or ethnic group *they appear to belong, to identify with, or are regarded in the community as belonging to.*

Id. (emphasis added).

[28] *See* Equal Employment Opportunity Commission, 29 C.F.R. § 1606.1 (current through Oct. 14, 1997).

> The Commission defines national origin discrimination broadly as including . . . the denial of equal employment opportunity because of an individual's or his or her ancestor's place of origin; or because an individual has the physical, cultural or linguistic characteristic of a national origin group. The commission will examine with particular concern charges alleging that individuals have been denied equal employment opportunity.

Id.

[29] *See, e.g.*, Bennun v. Rutgers State Univ., 941 F.2d 154, 158 (3d Cir. 1991) (addressing § 1981 claim where defendants argued that plaintiff did not have standing to sue for ethnic discrimination). In *Bennun*, the appeals court approved the lower court's determination that plaintiff was Hispanic based on his birth in Latin American country where Hispanic culture predominates, his immersion in Spanish way of life, appearance, speech, and mannerisms. *See id.* at 173. Other courts have addressed the task of determining one's race. *See also* Franceschi v. Hyatt Corp., 782 F. Supp. 712, 720 (D.P.R. 1992) (refusing to set forth a limited definition of "Puerto Rican"); Oritz v. Bank of Am., 547 F. Supp. 550, 568 (E.D. Cal. 1982) (determining person's race by reference to having "character that is or may be perceived as distinct when measured against the group which enjoys the broadest rights"); Ulloa v. City of Philadelphia, 95 F.R.D. 109, 113 (E.D. Pa. 1982) (defining "Hispanic" as persons identifying themselves as of Mexican, Puerto Rican, Cuban, Latin American or Spanish descent); I.M.A.G.E. v. Bailar, 518 F. Supp. 800, 806 (N.D. Cal. 1981) (determining that plaintiffs belonging to class of "hispanic persons" could be included in that group by self-identifying on class certification issue).

inclusion in an affirmative action program.[30] These cases demonstrate the courts' recognition of the cultural, linguistic, and familial elements of ethnic and racial identity.[31] Furthermore, the Supreme Court has concluded that courts may not depend on static and flat conceptions of race or ethnicity when ascertaining whether parties have engaged in unlawful ethnic or racial discrimination. In *Saint Francis College v. Al-Khazraji*,[32] the Court held that individual physical appearance is not determinative of racial or ethnic affiliation in discrimination cases.[33] Rather, it is the discriminators' perception of the plaintiffs' races that is crucial for title VII purposes. To that end, courts may also analyze plaintiffs' identification with particular groups in order to determine whether they exhibit characteristics of the group to which they claim to belong.[34]

B. Latino as a Felt Identity

The instability of Latino-Americans' legal definition underscores a more fundamental ambiguity as well: the question of who is Latino-American. Interestingly, the answer to who is Latino-American may involve less controversy than trying to define an ethnic grouping. Although Latino-Americans disagree on the proper appellation,[35] Latino-American identity appears to be

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[30] *See, e.g.*, Peightal v. Metropolitan Dade County, 940 F.2d 1394, 1409 (11th Cir. 1991) (requiring "Hispanic" applicant to affirmative action plan to demonstrate her self-identification as Latino with visible evidence that she "culturally and linguistically identifies with the group . . . she claims.").

[31] *See supra* notes 26-28 and accompanying text (requiring that if person identifies with certain ethnic or racial group, he must show proof).

[32] 481 U.S. 604 (1987).

[33] *See id.* at 613.

[34] *See id.*

[35] *See, e.g.*, L. H. GANN & PETER J. DUIGNAN, THE HISPANICS IN THE UNITED STATES xi (1986) (noting that Americans of Mexican descent disagree on what to call themselves). *See* Soberal-Perez v. Schweiker, 549 F. Supp. 1164, 1166 n.3 (E.D.N.Y. 1982) (defining "Hispanic" as "pert[aining] to or deriving from the people, speech, or culture of Spain or of Spain and Portugal; often, specif[ically], Latin-American") (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 1182 (2d ed. 1960)); Stephen W. Bender, *Consumer Protection for Latinos: Overcoming Language Fraud and English-Only in the Marketplace*, 45 AM. U. L. REV. 1027, 1030 n.6 (1996) (noting controversy surrounding label "Hispanic"); Luis Angel Toro, *"A People Distinct from Others": Race and Identity in Federal Indian Law and the Hispanic Classification in OMB Directive No. 15*, 26 TEX. TECH L. REV. 1219, 1259 (1995) ("'Are we Hispanics, Latinos, Chicanos, Spanish, Mexican Americans, Cuban Americans, Puerto Ricans, etc., etc.? Who cares? Let's move on!'") (quoting *The Best and Worst of 1993*,

widely inclusive and fluid.[36] It is not statically determined by one single experience or commonality.[37] Rather, it is composed of a series of internal and external identity cues that bind Latino-Americans, tightly or loosely, to the larger ethnic collective.

First, there is the purely external cue of physical appearance:[38] sharp mestizo, rounded Spanish-flavored, or Afro-Latino facial features; yellow, brown, black, or copper colored skin; small bones; and black, dark-gold *rubia*, or burnt-sienna hair color. These are the signals of color and of physiognomy that people on the street will recognize.

Apart from physical appearance, actual and imaginative interaction and empathy with other Latinos is another fundamental part of bordered identity.[39] This empathy may stem from the

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HISPANIC, Dec. 1993, at 22); Frank Del Olmo, *Nuyoricans Know How to Party*, DENVER POST, June 22, 1997, at D2 (noting that shared love of Latin American culture unites most Latinos).

[36] *See* GANN & DUIGNAN, *supra* note 35, at xi (commenting on flexibility of Latino identity). For example, most Mexican-Americans agree that they are of mixed origin, forming part of la raza, a sense of common past and a common destiny. *See id.*

[37] *See* SUSAN E. KEEFE & AMADO M. PADILLA, CHICANO ETHNICITY 2-3 (1987) (discussing use of language preference attitudes toward Mexican and United States and identification with group label such as "Mexican" or "Chicano" as means of getting accurate statistics).

[38] *See* Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 3 (1994) (discussing society's tendency to categorize people by physical appearance).

[39] *See* KEEFE & PADILLA, *supra* note 37, at 95 (noting that Mexican cultural maintenance requires contact with others of Mexican descent throughout one's life).

My description of Latino-American identity is by no means intended as the definitive version of that identity. I point to empathy with non-U.S. Latinos and the Spanish language as two major references for that identity because of my own experiences, my discussions with other Latinos, and my exposure to Latino-American jurisprudence and literature which deals with these themes. Thus, I use narrative method in this Article, and I also point to the jurisprudence and literature that I have read.

Nevertheless, I understand that many Latino-Americans will not find that my description of identity resounds with them. *See, e.g.*, López, *supra* note 38, at 10 (describing author's experience as Latino-American in contrast to his brother's experience). López writes:

> I write as a Latino . . . . My older brother, Garth, and I are the only children of a fourth-generation Irish father . . . and a Salvadoran immigrant mother . . . Sharing a similar morphology, Garth and I both have light but not white skin. . . . Interestingly, Garth and I conceive of ourselves in different racial terms. For the most part, he considers his race transparent, something of a non-issue . . . and he relates most easily with the Anglo side of the family. I, on the other hand, consider myself Latino and am in greatest contact with my maternal family.

fact that Latino-Americans often have blood relatives in the "home country," similar physical appearances, and a sense of shared culture. Furthermore, actual and imaginative interaction with other Latino-Americans triggers and reinforces bordered identity.[40] For example, Latino-Americans who are surrounded by other Latinos whom they love and like will naturally empathize and identify with those people.[41] However, empathy for other Latinos is not reinforced only through actual communion. Interaction and empathy is also partly an imaginative process.[42] Latino-Americans understand that they are part of a large and loosely connected group.[43] A critical component of having Latino-American identity is appreciating one's connection to that large group.[44] Because it is impossible for Latino-Americans to meet all the other Latinos in the United States, Latino-Americans feel connected largely through their imaginations.[45]

In addition to appearance and interaction, the Spanish language provides another powerful cue for bordered identity. Spanish is the mother tongue: fluid, musical, and expressive. Even in its varied incarnations and dialects, it ties the speaker to a cultural and ethnic community.[46] As this Article will

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Id. My descriptions of a crisis of citizenship and my suggested reforms, thus, would not apply to those people.

Furthermore, appearance, empathy, and language are obviously not the only factors that inform Latino-American identity. This is in no way an exhaustive list.

[40] *See* KEEFE & PADILLA, *supra* note 37, at 95 (describing case study of girl who identified with different aspects of Mexican and American cultures).

[41] *See id.* at 55 (describing how different Mexican-Americans perceive cultural awareness and ethnic loyalty including identity and empathy).

[42] *See id.*

[43] *See id.*

[44] *See id.*

[45] This point appears too obvious to document. However, one example of this phenomenon is the current status of the Chicano political *movimiento* in the 1960s. According to F. Arturo Rosales, no Mexican-American can "escape its inheritance: not individuals that hated the *movimiento*, nor those that became too sophisticated for it, nor the ones who were indifferent to it. The *movimiento*'s legacy, in fact, affects a greater portion of the present-day US-Mexican population than when it was at its apogee." F. ARTURO ROSALES, CHICANO! 250 (1995). The impact of this legacy on modern Chicanos is an obvious consequence of the use of imagination, for Chicanos cannot relate to or be affected by the acts of their predecessors except through their imaginations.

[46] *See* MARILYN P. DAVIS, MEXICAN VOICES/AMERICAN DREAMS 284 (1990) (describing oral history of Mexican immigrants as giving individual sense of identity); KEEFE & PADILLA, *supra* note 37, at 67 (noting that one respondent to survey, Dolores Guerrero, felt that "knowledge of the Spanish language is an important part of being Mexican . . . . Although

demonstrate, Spanish is a central referent for Latino-American identity because its use is a concrete example of that identity's duality.[47]

C. *The Intersection of Legal Categories and Latino-American Identity*

Although the formation of Latino-American identity may be primarily a social phenomenon, legal categories and definition methods obstruct the process. Some of the legal approaches to Latino-Americans' categorization[48] are better suited to real life than others.[49] The judicial branch's confusion over whether Latino-Americans are an ethnic or racial group seems lax and almost sloppy and it places Latino-Americans in a curious "check 'Other'" nowhere land.[50] However, firm labels also pose their own problems. To the extent that the judiciary and the executive branches insist that Latino-Americans are an ethnic group, they risk subsuming Latino-Americans into the white category.[51] Alternatively, to the extent that these branches define Latino-Americans as a racial group, they may also exclude black Latino-Americans.[52]

Of all the possible legal definitions, the EEOC and the *Saint Francis* approach to the identification of Latino-Americans are the most attractive. The *Saint Francis* line of reasoning renders the race/ethnicity question practically moot. It centers on

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her primary language is English, the interview was conducted in a profuse mixture of both English and Spanish. '*Mi* doctor,' 'he was *muy enojado*'"); JAMES DIEGO VIGIL, BARRIO GANGS: STREET LIFE AND IDENTITY IN SOUTHERN CALIFORNIA 42 (1988) (describing Cholo language practices of employing mixture of Spanish, English, and "Spanglish" as affording more accessible mode of communication).

[47] *See infra* notes 227-36 and accompanying text (describing larger significance of Spanish to Latino-Americans).

[48] *See supra* notes 22-23 and accompanying text (discussing approaches taken by judiciary and executive branches in Latino-American categorization).

[49] *See* Toro, *supra* note 35, at 1250.

[50] *See id.* at 1225-30.

[51] *See id.* at 1228 (noting that designating "Hispanic" as white ethnic group is consistent with Census practices after 1930); Kenneth E. Payson, *Check One Box: Reconsidering Directive No. 15 and the Classification of Mixed-Race People*, 84 CAL. L. REV. 1233, 1241 (1996) (discussing Latinos as socially distinct racial group rather than ethnic group).

[52] For example, *la raza*, which means "the race" in Spanish, does not always seem to include black Latinos. *See* Angel R. Oquendo, *Re-Imagining the Latino/a Race*, 12 HARV. BLACKLETTER J. 93, 115 (1995) (discussing "*Raza*" as connection between Latinos in United States and indigenous peoples).

whether the individual is a member of a group against which society discriminates.[53] The EEOC emphasizes community as well as "physical, cultural or linguistic" characteristics,[54] thus recognizing the many ways in which Latino-Americans form identity: relating with other Latino-Americans, looking Latino-American, "acting" Latino-American, or speaking Spanish.[55]

Although attractive, the EEOC's method may be misleadingly seductive. The EEOC hands over much of the naming power to the minorities being labeled because they can explain to the state who they are by using their own lives as evidence. At first blush, this power seems to transform Latino-Americans and other minority groups into the autonomous self-made person that liberal ideology lionizes.[56] Like the self-made person and cultural feminism's "I Am Woman" Helen Reddy, Latino-Americans can independently define and declare themselves with a roar. However, the EEOC lacks the power to give all the autonomous identity to Latino-Americans that it professes to. At the same time that this federal agency appears to recognize the existence of the bordered identity by referencing the role of community, culture, and language in the formation of ethnic and racial identity, other state acts throw up barriers to the healthy development of that identity. These barriers arise when the government stigmatizes non-U.S. Latinos through immigration policies and rhetoric that treat and characterize non-U.S. Latinos as sub-human invaders. The government also forms and reinforces these barriers by stigmatizing the Spanish language through English-only laws that characterize the Spanish language as a dangerous and divisive weapon.

Many Latino-Americans have a bordered identity: they navigate the hyphen. Thus, Latino-Americans must build an identity either in opposition to a home country that derogates their *compadres* or side against Latinos with whom they would

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[53] *See* Saint Francis College v. Al-Khazraji, 481 U.S. 604, 613 (1987) (stating that Congress intended to protect from discrimination identifiable classes who are subject to intentional discrimination solely on race).

[54] *See supra* notes 22-23 and accompanying text (contrasting approaches of executive and judicial branches in defining term "Latin-Americans").

[55] Two of the ways that one may "act" Latino-American is through diet or celebration.

[56] *See* Omi, *supra* note 24, at 9 (discussing problems of state definitions of racial classification in light of ever-changing character of racial identification).

otherwise identify. Consequently, Latino-Americans must either internalize this stigma or reject the "community" that English-only laws seek to protect.

Laws that force Latino-Americans to choose a single identity exact a high price. These laws erode Latino-Americans' belief that they are fully included in the American collective by downgrading their identities within that community. In short, federal immigration policies and state English-only laws are creating a crisis of citizenship for Latino-Americans.

II. THE STIGMATIZATION OF LATINO-AMERICAN PEOPLE AND LANGUAGE

Because Latino-American identity is formed in part by interaction and empathy for non-U.S. Latinos, state acts that stigmatize non-U.S. Latinos and their language trigger a Latino-American identity crisis. The following sections will describe these derogatory state acts, at times using the narrative method to illuminate aspects of Latino-American identity and to show how certain immigration policies and English-only laws undermine it.

A. Immigration Policy

The United States's immigration policy presents a powerful and complicated challenge to bordered identity. In particular, it creates an identity paradox for Latino-Americans. The United States will protect and keep Latino-Americans, as it has promised to in the Constitution. Yet as a sovereign nation, it has the power and the legal duty to raid, oust, and even imprison non-U.S. Latinos within its borders who were not lucky enough to be born here or to have the proper papers.[57]

As previously discussed, some Latino-Americans have a powerful identification and empathy with non-U.S. Latinos.[58] Ilan Stavans writes about the "Latin American link"; "As emissaries, attaches, and ambassadors, we, far and away, keep in close

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[57] *See, e.g.*, Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 670 (1989) (stating that government has compelling interest in safety and integrity of national borders).

[58] *See supra* notes 9-10 and accompanying text (stating how language stigmatizes both types of Latinos).

touch" with "our siblings in the Caribbean and south of the border. . . . An umbilical cord keeps us eternally tied together."[59] The question for Latino-Americans, then, is how to feel secure as citizens when they see folks who look like them, talk like them, and even act like them, get arrested, rounded up like cattle, and then "repatriated" back into the "heart of the[ir] country?"[60] The answer is: they cannot.

However, unless society is going to advocate open borders,[61] this crisis of citizenship is going to have to be simply accepted at some level. The United States is a jealous and exclusive nation, and the resulting existential double bind is an inescapable symptom of Latino-American citizenship.[62] However, once the government acts beyond the call of the necessary police power and begins stigmatizing non-U.S. Latinos and Latin countries through humiliating raid procedures, derogatory border control practices, and dehumanizing denials of critical rights, that difficulty of identity escalates into a full-blown crisis. The government's acts, thus, threaten either to disconnect Latino-Americans from the American collective or to disassociate Latino-Americans from their Latin American roots.

Latino-Americans have been facing this dilemma for many years and still face it today. A review of immigration policy as it relates to Latino-Americans will help to track the events and notions that lead to this estrangement.

For, after all, what is more strange than an alien?

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[59] *See* ILAN STAVANS, THE HISPANIC CONDITION 32 (1995); *see also* ERNESTO GALARZA, BARRIO BOY: THE STORY OF A BOY'S ACCULTURATION 2 (1971) (describing author's self-identity and self-image as Mexican living in United States); MARY HELEN PONCE, HOYT STREET: MEMORIES OF A CHICANA CHILDHOOD 137 (1993) (noting that while author did not know grandparents and other relatives, she still recognized that it was important to remember *los muertos*); Mary Jane Rotheram-Bours, *Biculturalism Among Adolescents, in* ETHNIC IDENTITY: FORMATION AND TRANSMISSION AMONG HISPANICS AND OTHER MINORITIES 81, 83-85 (Martha E. Bernal & George P. Knight eds., 1993) (describing four multicultural types for Latino Americans).

[60] *See* 140 CONG. REC. S6456-01 (daily ed. June 7, 1994) (quoting Senator Diane Feinstein's argument that society must address repatriation issues and advocating strong border enforcement).

[61] *See e.g.*, Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POL. 251, 263 (1987) (concluding that United States has compelling responsibility to open borders).

[62] *See supra* note 57 and accompanying text (describing United States border enforcement policies).

1. Aliens and Wetbacks: The Legal History of Latino-American Immigrants

Latinos are, first and foremost, portrayed as "aliens."[63] Although other ethnic groups have integrated into the American citizenry, politicians and other officials continually characterize Latino-Americans as the example of the alien stranger who scuttles over the border secretly, has a cagey heart and a passive demeanor, and robs the nation of its hard-won wealth by draining the welfare, educational, and social security systems.[64] These characterizations have pejorative racial connotations.[65]

A look at the historical legal treatment of aliens reveals a long-standing perception that the border over which they crossed to arrive at American soil divides them from the general citizenry in ways so fundamental that their very characters are suspect. Aliens have not been trusted to have adequate morals and fidelity[66] or respect for the law[67] to participate fully in U.S. society. These perceptions of aliens' potentially sinister characters have helped set the stage for their preclusion from

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[63] Authors have devoted a good amount of literature to this construction. *See, e.g.*, Piri Thomas, *Alien Turf, in* GROWING UP LATINO: MEMOIRS AND STORIES 101-02 (Harold Augenbraum and Ilan Stavans eds., 1993) (discussing color and ethnicity wars amongst Italians and Puerto Ricans in New York City); Kevin R. Johnson, *Fear of an "Alien Nation": Race, Immigration, and Immigrants*, 7 STAN. L. & POL'Y. REV. 111, 116 (1996) [hereinafter Johnson, *Fear of an "Alien Nation"*] (noting how some scholars equate "Hispanics" with "immigrants"). Use of the term "alien" to describe foreign nationals can be found in American case law as far back as 1782. *See, e.g.*, Wilcox v. Henry, 1 U.S. (1 Dall.) 69, 71-72 (1782) (stating that alien enemies have no rights of action during war).

[64] *See, e.g.* Johnson, *supra* note 63, at 117 (noting that scholars discount evidence showing that immigrant workers, consumers, entrepreneurs, and taxpayers dramatically benefit economy); *New Myths and Old Realities About Immigrations*, L.A. TIMES, Feb. 21, 1993, at M4 (noting how Zoe Baird and Kimba Wood incidents raised concerns that immigrants take jobs and welfare).

[65] *See* Kevin R. Johnson, *Free Trade and Closed Borders: NAFTA and Mexican Immigration to the United States*, 27 U.C. DAVIS L. REV. 937, 968 (1994) (discussing majority view of new immigrants as different in terms of race, class, and ethnicity); *see also* Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1544 (1995) [hereinafter Johnson, *Public Benefits and Immigration*] (discussing historical role of race and ethnicity in attitudes toward new immigrants).

[66] *See* Trageser v. Gray, 20 A. 905, 908 (Md. 1890) (stating that legislature could only permit Native Americans to sell liquor).

[67] *See* Patstone v. Pennsylvania, 232 U.S. 138, 143-44 (1914) (upholding Pennsylvania statute protecting wild life and precluding unnaturalized foreign born residents from possessing guns used to kill wild game).

owning property,[68] having equal access to health and medical aid,[69] working for the public school system,[70] the police force,[71] or public works projects,[72] or even owning billiard halls,[73] arms for hunting,[74] or liquor licenses.[75]

Latinos, as the modern day usual suspects, hold a special place in the American legal system. Officials have used Latinos' tenuous status in the United states to justify both their exploitation in the labor market and the draconian measures that the government will use to oust them.[76] From the late 1940s to the

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[68] *See* Webb v. O'Brien, 263 U.S. 313, 321-22 (1923) (finding that state has power to deny aliens right to own land within its borders in absence of treaty to contrary); Terrace v. Thompson, 263 U.S. 197, 219-20 (1923) (upholding statute that precludes aliens who have not declared their intentions to become citizens from owning property); *Developments in the Law: Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1300-01 (1983) (noting that states commonly excluded aliens from owning land). *But see* Fujii v. California, 242 P.2d 617, 629-30 (Cal. 1952) (finding that California law that precluded aliens from owning property violated Fourteenth Amendment).

[69] *See* CAL. WELF. & INST. CODE § 14005 (West 1970) (conditioning right to welfare services on 1) citizenship; 2) legal presence in country for five years previous to application for Medi-Cal coverage; and 3) applying for citizenship); *cf.* Mathews v. Diaz, 426 U.S. 67, 67-68 (1976) (permitting Congress to deny public benefits coverage to permanent resident aliens who had been in United States for less than five years).

[70] *See* Ambach v. Norwick, 441 U.S. 68, 77-80 (1978) (upholding New York statute barring aliens from teaching public school only if those aliens had not articulated their intent to become permanent citizens because teachers instill fundamental values necessary to maintenance of democratic society).

[71] *See* Foley v. Connelie, 435 U.S. 291, 294-300 (1978) (upholding New York statute barring aliens from joining police force).

[72] *See* Heim v. McCall, 239 U.S. 175, 193-94 (1915). *But see* Bernal v. Fainter, 467 U.S. 216, 227-28 (1984) (guaranteeing aliens right to work as notary publics); Nyquist v. Mauclet, 432 U.S. 1, 12 (1977) (striking law barring alien residents from receiving state financed financial aid for higher education); Examining Bd. v. Flores de Otero, 426 U.S. 572, 601 (1976) (guaranteeing aliens right to work as civil engineers); *In re* Griffiths, 413 U.S. 717, 723-29 (1973) (guaranteeing aliens opportunity to work as attorney); Sugarman v. Dougall, 413 U.S. 634, 646-47 (1973) (ensuring aliens have opportunity to compete for state civil service jobs); Graham v. Richardson, 403 U.S. 365, 376 (1971) (striking down law denying permanent resident aliens welfare benefits); Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707, 747 (1996) (noting that courts apply heightened scrutiny to alienage classifications that do not come within "public function doctrine").

[73] *See* Ohio *ex rel.* Clarke v. Deckerbach, 274 U.S. 392, 397 (1927) (upholding ordinance barring aliens from owning pool rooms).

[74] *See* Patstone v. Pennsylvania, 232 U.S. 138, 143-46 (1914).

[75] *See* Trageser v. Gray, 20 A. 905, 908 (Md. 1890).

[76] *See, e.g.*, PIERRETTE HONDAGNEU-SOTELO, GENDERED TRANSITIONS; MEXICAN EXPERIENCES IN IMMIGRATION 20 (1994) (commenting that Americans found Mexicans desirable as laborers but not as citizens).

early 1960s, immigration policy-makers considered Mexicans, for example, to be a valuable addition to America's labor force because of their work in the fields and back kitchens.[77] The Bracero Program, which stemmed from a 1942 treaty between the Mexican and United States governments, permitted male Mexican citizens to perform agricultural work temporarily in the United States.[78] The next year, the U.S. Government enacted Public Law 45, which provided authorization and financing for the recruitment, transportation, and placement of these temporary workers.[79] However, because these Latinos were temporary, the law did not permit them to develop the personal roots in the United States that courts look for when considering an alien's right to citizenship.[80] The Bracero Program, with its emphasis on temporary and backbreaking work, reinforced the national perception of Latinos as being good for cheap labor[81] but unfit for inclusion in the American community.[82] Moreover, Latinos were dispensable.[83]

In 1954, there was a developing consensus in the United States that Mexicans, encouraged by the Bracero Program,[84]

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[77] *See id.* at 22-23 (stating that labor shortages during World War II made Mexican labor valuable).

[78] *See* RICHARD B. CRAIG, THE BRACERO PROGRAM 42-43 (1971).

[79] *See* Pub. L. No. 45, § 5(g), 57 Stat. 70, 73 (1943). The Bracero Program legislation was subject to several revisions, but largely remained intact until 1964. *See generally* CRAIG, *supra* note 78 (describing changes to Bracero Program over time).

[80] *See* Johnson v. Eisentrager, 339 U.S. 763, 770 (1950) (noting means of inculcating citizenship value: laying down roots and mirroring American community). Specifically, Justice Jackson wrote that aliens develop an ascending scale of rights as they increase their identity with United States society. *See id.*

[81] *See* Gerald P. Lopez, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615, 652 (1981) (noting that employer self-interest in securing steady, cheap, and willing labor is indirect evidence of American employers' involvement in recruitment of Mexican labor).

[82] *See id.* at 657 (commenting that United States's attitude toward Mexican laborers was that as long as use of Mexican labor was economically efficient, their temporary presence in United States was to be encouraged and tolerated).

[83] *See* Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 274 (1997) [hereinafter Johnson, *"Aliens" and the U.S. Immigration Laws*] (describing United States's need for disposable labor force).

[84] *See* Eleanor M. Hadley, *A Critical Analysis of the Wetback Problem*, 21 LAW & CONTEMP. PROBS. 334, 344 (1956) (noting that contract workers' positive experiences apparently drove others to want to join in United States employment opportunities, thereby contributing to spiraling illegal immigration).

were depressing wages and displacing potential native workers.[85] There was also a growing perception that the border was out of control based on Attorney General Herbert Brownwell's 1953 investigation of the situation, which he deemed "shocking."[86] In response, the federal government initiated "Operation Wetback" in 1954.[87] Operation Wetback created a special task force that used light planes, jeeps,[88] and the help of employers[89] to combat the "wetback problem" by apprehending over one million undocumented Mexicans and sending them back to Mexico.[90]

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[85] *See* Lopez, *supra* note 81, at 633. The catalyst for the mass deportation of undocumented Latino immigrants in the 1950s may also have stemmed from fears that the influx of Latinos would pose some kind of "racial threat" to the "homogeneity of the American people." *See* Gilberto Cardenas, *United States Immigration Policy Toward Mexico: An Historical Perspective*, 2 CHICANO L. REV. 66, 69-70 (1975). As Congressman Box asserted in 1928:

> The Mexican peon is a mixture of Mediterranean-blooded Spanish peasants with low-grade Indians who did not fight to extinction but submitted and multiplied as serfs. Into that was fused much negro slave blood. This blend of low grade Spaniard, peonized Indian and negro slave mixes with negros, mullatos and other mongrels, and some sorry whites, already here. The prevention of such mongrelization and degradation it causes is one of the purposes of our laws which the admission of these people will tend to defeat.

69 CONG. REC. 2817-28 (1928) (statement of Rep. Box).

[86] *See* Hadley, *supra* note 84, at 350.

[87] *See* HONDAGNEU-SOTELO, *supra* note 76, at 23 (noting that Immigration and Naturalization Service launched deportation campaign in 1954).

[88] *See* U.S. DEP'T. OF JUSTICE, ANNUAL REPORT OF THE IMMIGRATION AND NATURALIZATION SERVICE 14-15 (1955).

[89] *See* CRAIG, *supra* note 78, at 128.

[90] *See* U.S. IMMIGRATION & NATURALIZATION SERVICE, 1954 ANNUAL REPORT 29 (1954); *see also* JUAN RAMON GARCIA, OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954, at 227 (1980) (describing how Operation Wetback resulted in departure of 1,300,000 "illegals" before formal operations began); HONDAGNEU-SOTELO, *supra* note 76, at 23 (stating that Immigration and Naturalization Service's deportation campaign apprehended over one million undocumented Mexican workers); JULIAN SAMORA, LOS MOJADOS: THE WETBACK STORY 52 (1971) (noting that at its peak, Operation Wetback apprehended 1727 undocumented immigrants weekly); Giberto Cardenas, *United States Immigration Policy Toward Mexico: An Historical Perspective*, 2 CHICANO L. REV. 66, 81 (1975) (finding that during 1950s, as many as one-sixth of total "Mexican-origin" population in United States was deported); John A. Scanlan, *Immigration Law and the Illusion of Numerical Control*, 36 U. MIAMI L. REV. 819, 837 (1982) (arguing that cooperation of farmers based on government's promise to assist in hiring domestics and legally contracted braceros to replace wetbacks contributed to Operation Wetback's success); Alan K. Simpson, *The Immigration Reform and Control Act: Immigration Policy and the National Interest*, 17 U. MICH. J.L. REF. 147, 161 n.76 (noting that some deportations were effected by mistake).

This history illustrates only the beginning of the current Latino-American crisis of citizenship, but it is a critical component of that crisis. For example, I confronted that history when I first read the word "Wetback" in a Congressional record. As a Latina-American, I became physically sick and felt like crying. I hated the paper that the words were printed on; I hated the binding of the book; I hated the writers of the words; I hated the history; I hated the makers of that history. I wanted to burn the pages. I identify with Latinos, even Latino-Americans whom I will never know, on whom I will never lay eyes, and whom came over here decades before I was born. I felt personally attacked by that language, the denial of rights, and the intentional mixed-messages that Congress sent to the world. I felt personally insecure.

Kenneth Karst writes, "The harm of stigma is the harm of a 'spoiled identity.'"[91] At the moment of reading that history, my identity was spoiled. I felt alienated, hostile, lonely, and separated from my own country.

Fortunately, this crisis can be alleviated. Although the injustices of history will leave a scar over painful wounds, the United States could attempt to redress its past wrongs by treating Latino-Americans with integrity. Despite this opportunity, the United States continues to stigmatize Latino-Americans through its border enforcement practices, its raids, and its denial of rights to undocumented people.[92]

In the following sections, this Article addresses how these state acts stigmatize Latino-Americans and thus contribute to the crisis of citizenship. First, this Article examines certain border enforcement practices, primarily focusing on the Tortilla Curtain phenomenon and a failed border enforcement effort in San Diego. Second, it will describe the current law on raids. Finally, it will discuss the recent Ninth Circuit opinion *Barrera-Echavarria v. Rison*,[93] which denies critical rights to excludable aliens, and relate a personal narrative about my involvement in that case.

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[91] *See* KARST, *supra* note 2, at 25.

[92] *See id.* at 27.

[93] 44 F.3d 1441 (9th Cir. 1995).

2. The Tortilla Curtain and the Inverted Berlin Wall

Undocumented workers enter the United States through the California border in numbers that many perceive to be overwhelming and dangerous.[94] U.S. officials have made many efforts to block passage across the border, with two spectacular efforts in recent history. One is a nine-mile-long and ten-foot-high border fence that has been called the "Tortilla Curtain."[95] The other is a 1989 bungled effort on the part of the Immigration and Naturalization Service ("INS") to construct a fourteen-foot-wide and five-foot-deep ditch at the Otay Mesa crossing area along much of the border in California.[96]

Each of these efforts stigmatized Latinos. In the rhetoric surrounding both the Tortilla Curtain and Otay Mesa ditch, members of Congress and rallying citizens depicted Latinos as strange, almost inhuman creatures.[97] The reactions of Latino-Americans who participated in that political debate demonstrate the concomitant stress on bordered identity.

a. Tortilla Curtain

The Tortilla Curtain is the racially charged nickname that has been appended to the ten-foot-high chainlink fence erected along the United States-Mexico border.[98] Built in the late 1970s at the cost of over one million dollars,[99] the fence is now tattered and broken down in places. To some, it represents the division between Mexico and the United States. To others, it is

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[94] *See* Stephen Franklin, *A Mad Dash for Work: Wave of Mexican Aliens Risking Lives for U.S. Employment*, CHI. TRIB., June 29, 1992, at C1.

[95] *See id.*

[96] *See, e.g.*, Richard L. Berke, *Ditch Reflects Deep Border Tensions*, N.Y. TIMES, Mar. 6, 1989, at A12 (commenting that government plan to build four-mile ditch along Mexican-American border resulted in intense passions in both United States and Mexico).

[97] *See e.g.*, 132 CONG. REC. H4565-01 (daily ed. July 16, 1986) (statement of Rep. Dan Lungren) (alluding to terms such as "spider-holes" in describing places in which illegal immigrants hide from Border Patrol agents).

[98] *See* Patrick McDonnell, *Patching a Leaky Fence*, L.A. TIMES, Feb. 3, 1991, at B1 (describing renovation of chainlink fence along concentrated crossing zone of United States-Mexican border).

[99] *See* Lee May, *U.S. Plans to Dig Ditch at Border Otay Mesa Barrier Targeted at Illegal Vehicle Crossings*, L.A. TIMES, Jan. 25, 1989, at B1.

symbolizes of a failed immigration policy. From whatever ideological standpoint one views the fence, the entire project seems futile and strained.

Officials periodically rebuild and reinforce the Curtain, and the images and controversies that these activities trigger highlight the divide between non-U.S. Latinos and Latino-Americans. Sometimes those who reside legally in the United States portray Latino-Americans as inhuman in these exchanges.[100] The fence, which was "initially designed to keep out Mexican cattle,"[101] is now intended to keep out "coyotes," those who smuggle undocumented immigrants,[102] and aliens,[103] whose label conjures up images of a strange, outer-space scourge.[104] These descriptions evoke images of an inhuman pestilence that will bore into the pristine fabric of the nation or of a frightening, uncontrollable, and almost superhuman malevolent presence that will overtake the country. Undocumented workers hide in what are called "spider holes,"[105] and they are said to be like "an immense ar-

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[100] *See* SAMORA, *supra* note 90, at 130 (stating that hiring cheap alien labor has pitted Mexican-Americans against Mexicans).

[101] *See* McDonnell, *supra* note 98, at B1.

[102] *See, e.g.* James Pinkerton, *South Texas Seeks Help for INS*, HOUSTON CHRON., May 4, 1997, at 1 (defining "coyote"). The notion of the coyote has a whole mythology behind it, which white media accounts of coyote-smugglers appear to ignore. In Mexican folklore, the image of the coyote is often used in connection with the notion of the "trickster," a mythological figure who is simultaneously both creator and destroyer, giver and negator. *See* PAUL RADIN, THE TRICKSTER ix (1956); *see also* WILLIAM BRIGHT, A COYOTE READER 21 (1993) (commenting that coyote is trickster-transformer cultural hero); JOHN O. WEST, MEXICAN-AMERICAN FOLKLORE 89, 135 (1988) (noting that coyote is slang for agent for illegals, suggesting trickster in Mexican tales).

[103] This is the "term of art" for a person not a citizen of the United States. *See* 8 U.S.C. § 1101(a)(3) (1997).

[104] *See Informational Hearing on the Federal Government's Border Safety Enhancement Project (The Proposed Otay Mesa Ditch) Before the Senate Select Comm. on Border Issues, Drug Trafficking and Contraband*, 1989-90 Reg. Sess. 40 (Cal. 1989) [hereinafter *Hearing*] (commenting that people associate undocumented immigrants with "aliens" though term also relates to beings from outer space); William Monterroso, *Que Significa: Belonging to America*, 10 CHICANO L. REV. 47, 47 (1990) (discussing perspectives of being labeled "illegal" or "alien" in America).

[105] *See* 132 CONG. REC. H4565, H4567 (daily ed. July 16, 1986) (including Representative Lungren's statements regarding spider holes). Representative Lungren stated:

> I was in one place that maybe several thousand people live in, all living in holes that you might expect to see in the Third World, that you might expect to see in the poorest countries of the world, but I happened to see these in San Diego, CA, one of the wealthiest counties in the entire United States. I just do not

my poised to invade this country,"[106] "terrorists,"[107] or ephemeral ghost-type creatures who can "quickly fade into the cityscape"[108] and inhabit a border that officials describe as a "monster."[109] On a more pedestrian level, officials characterize undocumented Latino-Americans as soap-opera watching lazeabouts who threaten to undermine the integrity of the border.[110]

The means governmental and extra-governmental entities employ to regulate the Tortilla Curtain range from the high-tech to the basic.[111] Some of these techniques convey the image of undocumented Latinos as highly dangerous criminals or, again, as a pestilence that needs to be uncovered and driven out.[112] For example, sophisticated gadgetry such as the infrared scopes,[113] nightvision equipment, and data banks used in border enforcement programs[114] trigger James Bond like specters

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> see how the United States can countenance allowing people to live in those situations.

Id.

[106] *See id.* (citing Edward L. Fike, *The Border at Tijuana: "One Square Mile of Hell"*, SAN DIEGO UNION-TRIB., May 11, 1986, at C3).

[107] *See* Patrick McDonnell, *Tactic of Lighting Up Border Raises Tensions*, L.A. TIMES, May 26, 1990, at A1 (noting that terrorists are one reason for need for program to bring Mexicans into United States).

[108] *See* McDonnell, *supra* note 98, at B1.

[109] *See* 132 CONG. REC. H4565, H4567 (daily ed. July 16, 1986) (including statement of Representative Dan Lungren).

[110] *See* 142 CONG. REC. H5493, H5498 (daily ed. May 22, 1996) (including statement of Representative Duncan Hunter). Representative Hunter stated:

> We have an absolute right to maintain a border with integrity, tell people when they come across, through the front door. Do not come through our back door. Do not drive cocaine across hillsides into the southern reaches of California and Arizona. . . . Congressman, here are some illegal alien families making more money on welfare than we are making as GS-11's working for the Federal Government, and they have discovered the joys of daytime television, they are not working.

Id.

[111] *See* 140 CONG. REC. S6456-01, S6456 (daily ed. June 7, 1994) (discussing different techniques used by border patrol agents to regulate immigration such as fencing, lighting, encrypted radios, and night scopes).

[112] *See id.* (stating that United States must enforce its borders).

[113] *See id.* (including statement of Senator Diane Feinstein on pending legislation that will provide for items such as fences and lighting, increased agents, and infra-red scopes for border regulation).

[114] *See* Miguel Perez, *Illegal Dreams at the Border: Operation Hold the Line Reducing Flow of*

of international intrigue and hazard that accompany only the most diabolical and dangerous of criminals. Furthermore, the more pedestrian measures such as the "human curtain" technique that border agents sometimes employ,[115] the reinforcement of the chainlink fence with military surplus steel barriers,[116] and the grass roots political activity of mostly white civilians who will sometimes shine headlights at Latino-Americans crossing the border as a form of protest,[117] underscore the perception that American society must fend off a tidal wave of "illegal" bodies.[118]

b. The Inverted Berlin Wall

The proposed Otay Mesa "Ditch" is an even more bizarre example of the costly and symbolic efforts that the U.S. government is willing to undertake in order to announce its division from Mexico. In 1989 the Federal Government asserted that it would build a ditch in response to Mexico's request for flood aid.[119] Alleviating rain runoff, however, was not the United States's only motivation to construct the ditch. Once it became

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Undocumented Immigrants, REC. (N.J.), Aug. 6, 1996, at 1 (describing success of Hold the Line, pilot border enforcement program in New Mexico, in that it has promoted allocation of federal funds to hiring more Border Patrol agents and acquiring new technologies).

[115] *See id.* (noting that human curtain technique has cut down on illegal entries where physical barriers have failed).

[116] *See* 142 CONG. REC. H5493-01, H5497 (daily ed. May 22, 1996) (citing Representative Duncan Hunter) (describing that landing mats and steel planks used in Desert Storm have been adapted for use in construction of border fence).

[117] *See* McDonnell, *supra* note 98, at B1.

[118] *See* STAVANS, *supra* note 59, at 23-24 (describing symbolic meaning of border). Stavans describes the border as:

> Flowing some 1,800 miles from southwestern Colorado to the Gulf of Mexico, the Rio Grande, the Rio Turbio, is the dividing line, the end and the beginning of the United States and Latin America. The river not only separates the twin cities of El Paso and Ciudad Juarez and of Brownville and Matamores, but also, more essentially, is an abyss, a wound, a borderline, a symbolic dividing line between what Alan Riding once forcefully described as "distant neighbors."

Id.

[119] *See Painful Lesson*, SAN DIEGO UNION-TRIB., Apr. 2, 1989, at C2 (describing proposed ditch Otay Mesa flood water problems). Rain runoff in the Otay Mesa area sometimes threatens to flood the Mexican side of the border. *See Hearing*, *supra* note 104, at 7 (noting comments of Senator Wadie P. Deddeh that Mexico requested project to mitigate flooding concerns in Mexico allegedly caused by developments in United States).

clear that the U.S. government intended to use the ditch to obstruct the passage of undocumented Mexicans into California, the project took on symbolic meaning which "stirr[ed] intense passions in both the United States and Mexico."[120] When the Mexican government learned of this dual purpose, it demanded that the United States suspend the project in "the spirit of cooperation and friendship that characterizes the relationship between the two nations."[121] Thereafter, opposing and supporting political camps in the United States rose up around both sides of the issue.[122]

Supporters of the ditch, who declared themselves "patriots" attempting to rescue the integrity of the border, maintained that the United States needed a border system that worked, unlike the Tortilla Curtain.[123] They claimed that authority for constructing it stemmed from the irrefutable sovereign power to "be able to say who [is] going to come legally and who [is] not allowed to come into the country."[124] In fact, the specter of the ditch created such a fervor in some of its supporters that they compiled wish lists of other measures to take to secure the border. For example, Peter Nunez, a partner in a major law firm and a representative of the Federation of Americans for Immigration Reform ("FAIR") suggested at an informational

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[120] *See* Richard L. Berke, *Ditch Reflects Deep Tensions Along Border*, N.Y. TIMES, Mar. 6, 1989, at A12.

[121] *See id.*; *see also A Moat in the Desert*, SACRAMENTO BEE, Mar. 10, 1989, at B8 (discussing objections raised to building of ditch along United States-Mexican borders).

[122] *See A Moat in the Desert*, *supra* note 121, at B8.

[123] *See id.*

[124] *See Hearing*, *supra* note 104, at 15 (discussing comments of Peter Nunez, partner at Brobeck, Pfleger & Harrison and representative of Federation for American Immigration Reform ("FAIR"), that apparent policy of United States over last 20 years is to permit physical obstacles as long as they do not really work). Dan Stein, executive director of FAIR, added that the "ditch proposal . . . 'is too little, too late, but it's better than nothing. . . . We're not xenophobes. Maybe you could call us futurists. But what the hell, we're patriots." Greg Gross, *Lobbyists Back Border Ditch Plan*, SAN DIEGO TRIB., Mar. 17, 1989, at B3. Finally, Elaine Brantinghman, an attendee at the Otay Mesa hearing, remarked:

> I'm very concerned about the type of testimony that we heard today. It is so — as I said in my note — so biased; it's so anti-American; it gave no solutions. I think Mr. Nunez was the only one who really gave any practical solutions, and this idea of having to consult with Mexico about everything we do, I think is leading us down the wrong path.

Hearing, *supra* note 104, at 47.

hearing conducted in the spring of 1989 that the government should build a "concrete thing that will be impenetrable by vehicles."[125] Furthermore, Nunez called for the militarization of the border.[126] As a Mexican-American himself, Nunez's participation in this debate illustrates the crisis of bordered identity; Nunez took great pains to distance himself from the Latinos on the other side of the border and align himself with the sovereign majority.[127]

Persuasive opponents confronted Nunez, however, calling the ditch an inverted "Berlin Wall."[128] These critics pointed out that the proposal was both ridiculous and ineffective because it would cover such a very small area and yet cause a great rift in international relations.[129] They also argued that a massive ditch

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[125] *See Hearing, supra* note 104, at 19.

[126] *See id.* at 4 (noting San Diego Assistant Sheriff Jack Drown's comments that sheriff's belief that high visibility of military personnel along border with accompanying technology is best and most cost-effective approach to securing border). Peter Nunez added "I would like somebody to think about the idea of a buddy system, for instance. If there were military personnel that could be assigned to the border, team them up with the Border Patrol agent so that you have the civilian law enforcement person at every instance where there's an arrest or a detention or an incident that takes place." *Id.* at 20.

[127] *See id.* at 15. Nunez debated with Senator Deddeh over the sovereign power to say "who was going to come legally and who was not going to be allowed to come into the country," and made an interesting gesture of distancing himself, in temporal terms, with the undocumented Latinos he advocated:

> Mr. Nunez: Decades ago, Congress formulated the policy that they would be able to say who was going to come legally and who was not going to be allowed to come into the country. That policy obviously exists only on paper. It only exists here on these books, because Congress has never authorized the appropriate resources in any manner.
>
> Chairman Deddeh: It applied to me, Mr. Nunez. I waited about nine years to get my visa to come in legally, so it applied to me.
> Mr. Nunez: And my father — it applied to my father too when he came in. But . . . . [a]t least in my father's case, it was a number of years ago and, you know, I mean, there's so many issues that can be discussed with the immigration problem per se.

Id.

[128] *See id.* at 37 (calling proposed ditch "sunken Berlin Wall"); Lee May, *Ecology Report Backs Planned Border Ditch*, L.A. TIMES, Apr. 14, 1989, at B1 (noting that Mario Moreno, associate counsel for Mexican American Legal Defense and Educational Fund, likened earthen channel to Berlin Wall).

[129] *See Hearing, supra* note 104, at 17 (discussing Senator Dan McCorquodale's skeptism that ditch can effectively deal with border crossing problems especially because larger ditch from old border did not prevent anybody from crossing).

would create even more danger to human life than already existed at the border, which is characterized by topological hazards as well as incidents of physical violence.[130] The most significant criticism, however, was that the ditch would magnify the divide between the two countries and solidify the message that Mexicans are not welcome on American soil.[131]

Although the ditch was quite shallow — only an extended pothole skimming the ground — soon both American and Mexican commentators began to see it as a line drawn in the sand.[132] The United States eventually abandoned the plans for the ditch partly because of the need to "build bridges instead of ditches."[133]

The majority's narratives surrounding these two particular border icons — the extant Tortilla Curtain and the failed Otay Mesa Ditch — are only part of the story of Latinos in the United States. However, their depiction of Latinos as a strange, almost inhuman invasion of darkness,[134] hungry mouths, thieves, and lazy channel-surfing welfare scammers impedes the healthy development of Latino-American identity. This identity depends upon an integrated sense of dual place and dual people. These majority or "master narratives"[135] are told in legislative hear-

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[130] *See id.* at 37 (quoting Roberto Martinez, Director of U.S.-Mexico Border Program for American Friends Service Committee, who expressed dissatisfaction with INS and government proposals and experiments that threaten U.S.-Mexican relations and endanger human life, and noting that shootings and beatings along border have increased over last four years).

[131] *See id.* at 46 (discussing Consul General Hermilio Lopez Bassols's comments that construction of ditch is unfriendly act). Critics of the ditch have been outspoken. *See id.* at 37 (noting that Roberto Martinez remarked, "What's next? Land mines and bunkers?"); Berke, *supra* note 120, at A12 (describing critics' facetious remarks that government will fill ditch with water and stock it with alligators and man-eating piranhas); May, *supra* note 128, at B1 (stating that Mario Moreno, associate counsel for Mexican American Legal Defense and Educational Fund, likened earthen channel to Berlin Wall, referring to it as symbol of oppression and calling on U.S. officials to work with Mexican and Central American governments to help remove causes of illegal immigration).

[132] *See A Crisis on the Border?*, WASH. POST, Jan. 28, 1989, at A20 (discussing need to protect open door policy from negative symbolism); *Painful Lesson*, *supra* note 119, at C2 (discussing expectation of Mexican reaction to unilateral American action).

[133] *See* S.J. RES. 24, 101st Cong. (1989).

[134] *See* Johnson, *Public Benefits and Immigration*, *supra* note 65, at 1545 (describing stereotype of illegal aliens as poor, brown, unskilled, young males sneaking into United States in dark of night).

[135] *Cf.* Lisa C. Ikemoto, *Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed "Los Angeles"*, 66 S. CAL. L. REV. 1581, 1582 (1993)

ings, and their narrators represent themselves as "patriots"[136] who are trying to protect the sovereign from foreign invasion, thus wrapping themselves in a cloak of racial and ethnic privilege.[137] Furthermore, when government policy creates so large of a divide between these Latino "aliens" and "We the People," it inevitably strains Latino-Americans' dual sense of place and people.[138] One may find illustrations of this point in official documents where Latino-Americans debate the merits of immigration reform on both sides of the issue. Some Latino-Americans distance themselves from the Latinos on the other side of the border and align themselves with the sovereign majority.[139] However, others identify with the undocumented immigrants because of their shared history and lineage, sometimes taking significant steps and making personal sacrifices in order to do so.[140]

The impression here is that Latino-Americans must make a choice. Either way, Latino-Americans must rip themselves from either the Latino or American foundation of their necessarily

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(using master narrative to describe white supremacy's prescriptive, conflict-constructing power that uses exclusionary concepts of race and privilege in ways that maintain intergroup conflict).

[136] *See* Kathleen Kerr, *Verbal War Over 'English-Only,' Heated Hearing on Suffolk's Official-Language Proposal*, NEWSDAY, Feb. 15, 1989, at 6 (describing clash between World War II veterans and members of Suffolk's Latino-American community at legislative hearing).

[137] *See* Ikemoto, *supra* note 135, at 1583 (construing stories surrounding Los Angeles riots as preserving authority of whiteness and requiring racial minorities to defend their relative non-whiteness).

[138] *See* Angela Harris, *Race & Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 582-86 (1990) (using phrase "We the people" in ironic manner).

[139] *See Hearing*, *supra* note 104, at 14-22 (discussing how Nunez supported building Otay Mesa ditch).

[140] *See* Jules Loh, *Land of Immigrants May Shut Open Door July 4: Prideful Independence Day Oratory Aside, Immigration Issue Divides Country as Fall Elections Approach*, L.A. TIMES, July 3, 1994, at A1 (retelling two stories of Silvestre Reyes, chief of Border Patrol in El Paso, whose grandfather crossed over border in 1913, and who has decreased illegal crossings "dramatically" by "station[ing] agents like cavalry pickets. . . day and night" and of Roberto Martinez, fifth-generation American, reared in barrios of San Diego, who quit his white-collar job to relearn Spanish and begin working for "the American Friends Service Committee on behalf of his distant countrymen."); *see also* Abel Salas, *In the U.S.A. (con papeles)*, HISPANIC, June 1996, at 26 (detailing author's perception of bias at border and, in particular, telling of discriminatory treatment that he received at hands of some Hispanic border agents when he intentionally wore clothes ("silver-tipped cowboy boots, a black western shirt, black jeans, and a white hat similar to those worn by leading Tejano musicians") that would identify him as "Mexican").

dual identities. To support the United States' sovereign power, or even to simply attempt to avoid the deleterious consequences of being labeled "Latino," Latino-Americans must distance themselves from their Latin heritage in temporal, spatial, or physical terms.[141] On the other hand, it may be equally hazardous to identify with Latinos because Latinos have been portrayed by the majority in such base terms.[142] Thus, Latino-Americans must navigate between two competing ethnic identities. The majority has designated one as an intruder or enemy, while the other forces Latino-Americans to deny their Latin heritage. The identity process can be characterized by an insecure and existential struggle to harmonize these opposing sides.

3. The Hunt

"Raids" and "sweeps" are another obstacle to Latino-American bordered identity. In a raid, INS officials infiltrate an area where they suspect undocumented immigrants will congregate, such as factories, sewing shops, and hotels.[143] Thus, the INS raids where undocumented immigrants appear to be working at jobs "that could be held by Americans."[144] While bearing weapons and blocking factory exit doors to prevent suspects from fleeing,[145] the INS will even target homes, schools, and streets.[146]

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[141] *See Hearing, supra* note 104, at 14 (describing comments by one Latino-American, Peter Nunez, as needing to distance legal and illegal immigrants); *see also*, Salas, *supra* note 140, at 26 (discussing Salas's experimentation with differences in appearances between Latino-Americans and Mexicans).

[142] *See* Johnson, *Public Benefits and Immigration, supra* note 65, at 1545 (describing stereotypes of Latinos as lazy, thieves, and "invasion of darkness").

[143] *See* Patrick J. McDonnell, *INS Raids Raise Immigrant Advocates' Fears*, L.A. TIMES, Feb. 5, 1996, at A3 (describing INS tactic of targeting work sites).

[144] *See* Mark Starr & Janet Huck, *Target: Illegal Aliens*, NEWSWEEK, May 10, 1982, at 45 (describing INS "Project Jobs" operation designed to remove illegal aliens from jobs that could be held by Americans, principally semi-skilled, blue-collar jobs paying more than minimum wage).

[145] *See* International Ladies' Garment Workers' Union, AFL-CIO v. Sureck, 681 F.2d 624, 626-27 (9th Cir. 1982) (describing "typical factory survey") *rev'd sub nom.* INS v. Delgado, 466 U.S. 210 (1984). *See, e.g.*, Eric Lichtblau & Gebe Martinez, *INS Raids Tactics to Be Investigated*, L.A. TIMES, Sept. 20, 1991, at A1 (discussing INS raid on low income, largely Latino apartment complex); Tracy Wilkinson, *Pattern of Conflict*, L.A. TIMES, Oct. 30, 1991, at A3 (describing INS raid on clothing manufacturer where armed agents entered warehouse under search warrant and asked each worker for documents).

[146] *See* David Reyes, *INS Agents Arrest 200 in Orange County Raids: Border Patrol Officers'*

The raid experience is often terrifying.[147] Armed officials selectively interrogate persons who exhibit supposedly Latino characteristics, such as facial appearance, hair coloring and styling, clothing, demeanor, vocation, language, and accent, despite the legal requirement that they interrogate all workers in a facility they raid.[148] These officers may derive probable cause from the suspect's silence.[149] If an individual looks or acts like an "alien," then the officials will demand to see their identification. If the paperwork is nonexistent or unsatisfactory, the suspect may be detained and deported.[150] The average INS agent arrests 500 undocumented immigrants a year, which, in the aggregate, is a significant number of people.[151]

The raid power illustrates the dramatic message that the rhetoric is reality: undocumented immigrants are illegals; they are aliens.[152] These pejorative, strained adjectives define Latino-

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Tactics at Crowded Apartment Complex Criticized After Biggest Sweep in 15 Years, L.A. TIMES, Sept. 19, 1991, at A1 (discussing arrest of 35 immigrant day-laborers standing on street corner); *see also* Velasquez v. Senko, 643 F. Supp. 1172, 1174 (N.D. Cal. 1986) (discussing allegations of INS's pattern of targeting predominantly Hispanic neighborhoods and businesses for searches and seizures of suspected illegal aliens); Lenni B. Benson, *By Hook or by Crook: Exploring the Legality of an INS Sting Operation*, 31 SAN DIEGO L. REV. 813, 814-17 (1994) (discussing INS raid process); Raoul Lowery Contreras, *Conscience and Contributions Key Factors in Immigration Case*, HOUS. POST, Oct 5, 1994, at A37 (discussing raids on schools and deportation of teenagers without notifying families); *infra* notes 147-55 and accompanying text (discussing search and seizure cases).

[147] *See Delgado*, 466 U.S. at 237 (Brennan, J., concurring in part and dissenting in part) (describing testimony of one legal alien as fearing violence by officers during INS raids).

[148] *See* United States v. Martinez-Fuerte, 428 U.S. 543, 559, 563 (1976) (allowing inspections at checkpoints based on appearance of Mexican ancestry); Gonzalez v. City of Peoria, 722 F.2d 468, 478, 480 (9th Cir. 1983) (discussing use of profiles); International Molders' and Allied Workers' Local Union No. 164 v. Nelson, 643 F. Supp. 884, 902 (N.D. Cal.), *modified*, 799 F.2d 547 (9th Cir. 1986) (describing Hispanic appearance as primary factor of INS and border patrol agents in selecting individuals to question); *see also* INS v. Lopez-Mendoza, 468 U.S. 1032, 1037 (1984) (discussing propriety of questioning in English and Spanish); Benitez-Mendez v. INS, 760 F.2d 907, 909 (9th Cir. 1985) (commenting that INS agents need objective facts during seizure under Fourth Amendment).

[149] *See* United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149, 153-54 (1923) (discussing evaluation of suspect's silence).

[150] *See* Hope Hamashige, *9 Laborers Held in Costa Mesa, Later Deported*, L.A. TIMES, Oct. 12, 1995, at B1 (describing detainment of 11 laborers in Costa Mesa because they did not have identification, nine of whom were sent back to Mexico within hours).

[151] *See Lopez-Mendoza*, 468 U.S. at 1044 (noting large number of arrests); *see also* Benson, *supra* note 146, at 813-59 (discussing sting operations generally).

[152] *See* Gonzales v. City of Peoria, 722 F.2d 468, 473 (9th Cir. 1983) (noting letter that implicitly defined "illegal alien" as alien who has entered United States in violation of 8

Americans' disparaged cultural place in the United States at the same time that they justify Latinos' limited rights. Non-U.S. Latinos are outlaws and strange foreigners; therefore, they can be deported at any time. In fact, the INS has conducted raids during the most culturally provocative and insensitive periods, such as before a Mexican independence celebration.[153] State legislatures, of which California's legislature is the most infamous with its passage of Proposition 187, are so incensed by Latino presence that they try to appropriate the raid function for themselves. Specifically, the legislature attempts to convert their educators and other civil servants into ersatz INS agents.[154]

Even more disturbing is the lack of Fourth Amendment protections during a raid. When armed federal immigration agents enter the workplace, stand at the door, and begin asking the most ethnic-looking employees intimidating questions about their citizenship, the suspects are not deemed to be "seized" unless they are physically restrained from moving. Thus, they have no Fourth Amendment claims.[155]

Furthermore, even if they are illegally arrested, the evidence derived from their detention will not be excluded at their deportation hearing. In the Supreme Court's view, suppression would permit the "criminal to continue in the commission of an ongoing crime."[156] The Court maintains that it has never suggested that the exclusionary rule could be so used.[157]

> [N]o one would argue that the exclusionary rule should be invoked to prevent an agency from ordering corrective action at a leaking hazardous waste dump if the evidence underlying the order had been improperly obtained, or to compel police

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U.S.C. § 1325).

[153] *See* Mike Todd, *Timing of Alien Roundup Criticized; Illegal Immigrants Arrested as Mexican Independence Celebrations Were Drawing Near*, AUSTIN AM.-STATESMEN, Sept. 15, 1996, at B1 (describing roundup of 621 aliens before Mexican independence celebration).

[154] *See* Cal. Proposition 187, *reprinted in* CALIFORNIA BALLOT PAMPHLET: GENERAL ELECTION NOV. 8, 1994, at 54 (1994).

[155] *See* INS v. Delgado, 466 U.S. 210, 218 (1984) (rejecting claim that workers were seized for Fourth Amendment purposes when INS placed agents at factory exits and questioned workers within factories); *see also* David K. Chan, *INS Factory Raids as Nondetentive Seizures*, 95 YALE L.J. 767, 772 (1986) (criticizing unduly narrow view of Fourth Amendment rights adopted in *Delgado*).

[156] *See Lopez-Mendoza*, 468 U.S. at 1047 (stating that continuing unregistered presence in United States is ongoing crime).

[157] *See id.* at 1046.

> to return contraband explosives or drugs to their owner if the contraband had been unlawfully seized.[158]

Thus, non-U.S. Latinos are further imagined as strange, exotic, and dangerous. Added to the list of images that are appended to their identity is the inference that they are as dangerous as hazardous waste, bombs, or drugs.[159]

How do Latino-Americans fit into this calculus? Raids and deportations injure bordered identity on several levels. First, when the state targets those with a Latino appearance,[160] it creates a significant amount of anxiety in some Latino-Americans who worry about their own illegal deportation.[161] Furthermore, raids also injure Latino-Americans because they may identify and empathize with the non-U.S. Latinos who are rounded up and deported. Additionally, raids timed to occur during culturally sensitive periods, such as the aforementioned raid during a Mexican independence celebration, can impose great stress on Latino-Americans by stigmatizing and penalizing the celebration of bordered identity.

Raids pose some of the greatest challenges to a Latino-American-centered jurisprudence because the United States's authority to expel foreigners is a integral aspect of its sovereign power. Raids and deportation are always going to stigmatize the immigrants whom the state raids and deports.[162] However, when the state abuses its raid power and conducts culturally insensitive raids, targets "ethnic-looking" Latino-Americans, and depersonalizes Latino-Americans in its raid rhetoric, Latino-Americans witness the derogation of their culture, their appearance, and their

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[158] *Id.*

[159] Undocumented people, immigration, and drug law violations are viewed as synonymous phenomenon in many cases. *See, e.g.*, United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985) (discussing concern for protection of border as encompassing both immigration and drug importation).

[160] *See* Reyes, *supra* note 146, at A1 (noting that workers who solicit work on street corners are also susceptible to raids); Starr & Huck, *supra* note 144, at 45 (suggesting economically privileged Latino-Americans do not run great risk of illegal deportation because blue collar undocumented workers are most often subject to raids).

[161] *See* James E. Garcia, *Nava Film Brings Back Memories of Border Stories*, AUSTIN AM.-STATESMAN, July 9, 1995, at C1 (describing Gregory Nava's Latino epic film *Mi Familia* about legal Mexican immigrant in 1930s who was illegally deported from California back to Mexico, then had her child in Mexico, and eventually made her way back to her family).

[162] *See* Reyes, *supra* note 146, at A1 (describing reactions of housing residents after Border Patrol threatened to break down doors and shoot guns).

people.[163] The difficulty of maintaining a solid, unified Latino-American identity, then, an identity that should be able to navigate a sense of dual place and dual people, begins to announce itself in earnest.

4. The Cuban Mariel and the Mini-Ritz Carlton: A Study in Immigrant Rights and Legal Fictions

The Fourteenth Amendment provides that persons shall be secure against state actions that deprive them of "life, liberty, or property, without due process of law."[164] Immigrants, however, stand on a different footing than citizens and may be accorded significantly fewer rights. In this section, this Article will briefly review the long-standing jurisprudence which creates and upholds this distinction. It will then relate a narrative which demonstrates how the denial of critical rights to some immigrants injures bordered identity.

Critical rights are meted out to persons based on the length of their stay in the United States. The degree of due process that undocumented immigrants receive depends upon how long they have been in contact with American soil. Immigration jurisprudence draws a thick line between "excludable" aliens and merely "deportable" aliens. Excludable aliens are those who officials have stopped at the border,[165] while deportable aliens are those who have already entered surreptitiously, without de-

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[163] *See supra* notes 143-55 and accompanying text (expressing how state abuse of raid power affects Latino-Americans).

[164] *See* U.S. CONST. amend. XIV, § 1.

[165] *See* 8 U.S.C. § 1182(a)(7) (1994) (stating that excludable aliens include aliens who lack proper entry documentation).

tection.[166] Deportable aliens have the greater rights.[167] As the Supreme Court held in *Leng May Ma v. Barber*,[168]

> Our immigration laws have long made a distinction between those aliens who have come to our shores seeking admission . . . and those who are within the United States after an entry, irrespective of its legality. In the latter instance the Court has recognized additional rights and privileges not extended to those in the former category.[169]

Those "additional rights and privileges," include procedural due process rights.[170]

In 1995, while I was clerking for the Ninth Circuit, I began to get an education on the slippery nature of rights as they extend to undocumented immigrants. At the same time, I received an illuminating insight into my own role in administering laws that harshly affect the lives of other Latino-Americans. Issues concerning Latino-Americans crossed my desk every day. I handled routine immigration cases, powder and crack cocaine cases, and Fourth Amendment border search cases. One case transfixed me most of all; it got me thinking about immigrants, particularly Latino-American immigrants, and the symbolic fictions that the United States is willing to employ to justify their continued mistreatment.

In 1980, President Jimmy Carter made the misguided political move of inviting Cubans to this country. In response, Cuban

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[166] *See* Yamataya v. Fisher, 189 U.S. 86, 101 (1903) (defining deportable alien as one "who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here").

[167] *Cf. id.* at 101 (concluding that despite illegal status, if someone has entered country and has become part of country, then that person is entitled to have opportunity to be heard); *see also* Landon v. Plasencia, 459 U.S. 21, 25-27 (1982) (identifying several differences between deportation and exclusion hearing). The differences between such hearings are numerous. First, an exclusion proceeding is held at the port of entry, while deportation hearings are held near the residence of the alien within the United States. *See id.* Second, deportable aliens receive seven days notice of the charges against them, while there is no advance notice requirement for excludable aliens. *See id.* Third, deportable aliens may appeal decisions directly to the Court of Appeals, while excluded aliens must petition for a writ of habeas corpus. *See id.* Finally, deported aliens have a plethora of substantive rights that are denied to excluded aliens, such as the right to leave voluntarily, to designate the country of deportation, and the ability to seek suspension of deportation. *See id.*

[168] 357 U.S. 185 (1958).

[169] *Id.* at 187.

[170] *See id.* (stating that deportable aliens have procedural due process rights whereas excludable aliens have no procedural due process rights).

President Fidel Castro sent 125,000 immigrants to our shores.[171] Many of these immigrants had committed crimes of "moral turpitude"[172] in their home country or were mentally incompetent and, thus, were excludable under the provisions of the Immigration and Naturalization Act of 1952.[173] Alexis Barrera-Echavarria, a brick mason with a sixth grade education and a rap sheet,[174] was one of the 125,000 Cubans who came to the United States. He was "stopped at the border"[175] and deemed excluded[176] although officials still let him onto American soil by virtue of what is known as an "entry fiction." This doctrine provides that aliens, who are "physically . . . allowed within [the U.S.] borders pending a determination of admissibility . . . are [still] legally considered to be detained at the border and hence as never having effected entry into this country."[177] Barrera-Echavarria was thereafter granted parole,[178] but soon began to commit crimes: stealing cars, burglarizing, and committing armed robbery.[179] In 1985, after he finished serving his sentences in a state penitentiary, officials transferred Barrera-Echavarria to a series of federal prisons, including

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[171] *See* Mark D. Kemple, Note, *Legal Fictions Mask Human Suffering: The Detention of the Mariel Cubans Constitutional, Statutory, International Law, and Human Considerations*, 62 S. CAL. L. REV. 1733, 1735 (1989).

[172] *See id.* at 1736.

[173] *See* 8 U.S.C. §§ 1182(a), 1227(a) (1994) (setting forth conditions of exclusion and deportation); *see also* Kemple, *supra* note 171, at 1735-36 (describing Cuban boatlift of 1980); Michelle A. Satin, Note, *From Mariel into the Twenty-First Century: The Indefinite Detention of Cuban Excludable Aliens in the United States*, 22 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 139, 139 (1996) (discussing detention and exclusion of aliens from United States border during "Mariel Boatlift" incident of 1980).

[174] *See* Barrera-Echavarria v. Rison, 44 F.3d 1441, 1443-44 (9th Cir. 1995).

[175] *See id.* at 1443; *see also* Gisbert v. U.S. Attorney Gen., 988 F.2d 1437, 1442 (5th Cir. 1993) (noting that excludable aliens are those who are treated as though they had never entered country; they are "stopped at the border" according to this fiction).

[176] *See Barrera-Echavarria*, 44 F.3d at 1443.

[177] *Id.* at 1450.

[178] *See id.* at 1443; *see also* 8 C.F.R. § 212.12-13 (regulating immigration parole).

[179] *See Barrera-Echavarria*, 44 F.3d at 1444.

Leavenworth[180] and Lompoc[181] where the INS "detained" him for most of the next nine years. At that point his case came to the Ninth Circuit sitting en banc.[182]

Barrera-Echavarria made a due process claim. He emphasized that his continued detention included imprisonment in maximum security facilities where he endured "twenty-three hour lockdown" conditions[183] and was integrated with the rest of the prison population.[184] He further noted that this imprisonment could continue indefinitely until his death, despite the fact that he had already fully served out the terms for his crimes. Barrera-Echavarria argued that this indefinite detention violated his due process right to be free of unconstitutional punishment.[185] The court rejected his argument. The Ninth Circuit held that "[n]oncitizens who are outside United States territories enjoy very limited protections under the United States Constitution."[186] The court continued, "because excludable aliens are deemed under the entry doctrine not to be present on United States territory, a holding that they have no substantive right to be free from immigration detention reasonably follows."[187] Thus, immigrants held pursuant to the entry fiction possess virtually no rights recognized by the U.S. legal system.

As the law clerk assigned to this case, I struggled under the weight of precedent to try to find some way to get to a reasoned opposite result. The Supreme Court upheld the legality of continued exclusion in *Shaughnessy v. Mezei*.[188] Thus, the finding that continued detention was legal seemed a necessary concomitant:[189] short of throwing aliens back into the ocean, there

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[180] *See* Audio tape of Oral Argument of Barrera-Echavarria v. Rison, 44 F.3d 1441 (9th Cir. 1995) before the Ninth Circuit Court of Appeals in Pasadena, Cal. (Oct. 20, 1994) [hereinafter *Oral Argument*] (on file with author).

[181] *See Barrera-Echavarria*, 44 F.3d at 1443.

[182] *See id.* at 1443.

[183] *See Oral Argument*, *supra* note 180.

[184] *See id.* Barrera-Echavarria was the subject of several physical attacks in prison and was also the attacker on several occasions. *See id.* (noting that he was moved to Florida to "get away" from somebody who was assaulting him); *see also Barrera-Echavarria*, 44 F.3d at 1444 (noting that Barrera-Echavarria fought with other inmates).

[185] *See Barrera-Echavarria*, 44 F.3d at 1448-50.

[186] *Id.* at 1450.

[187] *Id.*

[188] 345 U.S. 206, 215-16 (1953).

[189] *See Barrera-Echavarria*, 44 F.3d at 1449-50 (stating that *Mezei*'s holding necessarily

seemed to be nothing else to do with dangerous excluded persons than to lock them up in a cell. However, holding that Barrera-Echavarria could be imprisoned for life[190] without an adjudication of guilt seemed to violate the very principles of the due process clause — precluding the state from depriving persons of life, liberty, and property without due process of law — unless the reasoning turns on little white lies — tricks of language and fictions — which cloud up the base truth of what the legal system is doing. That is, one had to believe that Barrera-Echavarria was not being punished; he was being detained. He was here; but he was not here as well, having been stopped at the border. *Barrera-Echavarria* triggered my own dual-identity crisis. On the one hand, my position as a law clerk required me to be judicially neutral even when that directive seemed to require me to talk in fantasy jargon about a harsh and bloody reality. On the other hand, my Latina heritage caused me to balk at the fact that almost every defendant I encountered was a person of color. The disturbing impact of draconian drug laws, a rigidly-interpreted Fourth Amendment, and an elusive due process clause affronted my Latina identity.

As with most bouts of cognitive dissonance, mine would be fairly easy to explain away at times, especially when it came to Barrera-Echavarria. Although Barrera-Echavarria and I differed dramatically, I still felt connected to him. Beyond a Spanish name, he had no other connection with me. He is male, I am female. He is Cuban, I am Mexican-American. He is a felon, I am law-abiding. Still, my discomfort lingered, no matter how far removed I was from him. At some level I still identified with the defendant. This identification manifested itself in a deep-seated objection: the only reason Barrera-Echavarria could be jailed without trial was because he was not a citizen. There were times I was sure that this was wrong, wrong in the most moral, passionate, pulpit-pounding sense of the word.

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determined that *Mezei*'s detention was legal).

[190] The INS regulations provide that certain detained Cubans will have an annual yearly review, but it is not clear whether the Due Process Clause requires this review. *See id.* at 1450 (finding that because Barrera-Echavarria has annual opportunity to show that he has changed his behavior since his previous review, this series of one-year periods of detention followed by opportunity to plead his case anew is constitutional).

At times I was convinced that Barrera-Echavarria's treatment was wrong because my family had come over the border, and it was only the happy accident of an American's attraction that separated my family's status from that of Barrera-Echavarria's. This made me identify with the defendant and fueled my distrust of the long-standing *Shaughnessy* principles.

At other times, however, I was not convinced that the government was mistreating Barrera-Echavarria. After all, it was the sovereign's right, my own country's right, to repulse violent invaders. And Barrera-Echavarria was a violent invader. In fact, he was brutal and really nothing like me in the least.

I continued having this internal debate with myself for weeks, long after I had finished the research and memo writing, until I attended the oral argument. It was then that I achieved a kind of resolution.

At oral argument, Barrera-Echavarria's lawyers contended that his imprisonment violated the due process clause because it was unconstitutional punishment, as opposed to mere "regulatory detention."[191] The Ninth Circuit ultimately disagreed with his position, but before rejecting the argument outright,[192] the court challenged counsel's plain assertion that simply because the government housed Barrera-Echavarria at Leavenworth and Lompoc, it was punishing him.

"[Barrera-Echavarria's incarceration is punishment] because it's excessive," Barrera-Echavarria's counsel argued.[193] "And it is excessive because of the length and the conditions of his detention."[194]

One judge took up this mantle swiftly. "There's no distinction here between being housed at Leavenworth and being housed at the Ritz-Carlton," she countered, critiquing the fact that counsel had not provided documented evidence of the punitive conditions of Barrera-Echavarria's confinement in the record.[195]

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[191] *See* Foucha v. Louisiana, 504 U.S. 71, 78-80 (1992) (noting that punishment without adjudication of guilt violates due process clause).

[192] *See Barrera-Echavarria*, 44 F.3d at 1448 (finding that Barrera-Echavarria had no constitutional right to immigration parole and no right to be free from detention pending his deportation).

[193] *See Oral Argument*, *supra* note 180.

[194] *See id.*

[195] *See id.*

Barrera-Echavarria's counsel stuttered a bit and then listed the assumed facts of prison life — lockdowns, restriction of movement, limited ability to communicate with friends and family — facts that were the backbone of the punishment claim.

Another judge entered the discussion. "How do we know that?" he queried.[196] "How do we know that there's not a mini-Ritz Carlton inside of Leavenworth, where he romps with his friends and watches television and just has a gay time?"[197]

A brief silence hit the courtroom; "Then I'd ask the court to take judicial notice of the facts of what I know to be true and what I believe the court knows to be true of the conditions of Leavenworth, which is one of the most notorious . . . ." Barrera-Echavarria's counsel began.[198]

"No, I don't think you can ask this court to take judicial notice of the conditions of Leavenworth," the second judge answered.[199] "I don't know the conditions of Leavenworth, [and] I don't think the [rest of the] court knows the conditions of Leavenworth unless we know on this record what those conditions are."[200]

Counsel's failure to get the prison conditions on the record ended the case. Barrera-Echavarria lost the appeal, and the court found his indeterminate incarceration constitutional on the authority of *Shaughnessy*.[201]

Although I soon began working on several new matters, the *Barrera-Echavarria* case stuck with me long after the oral argument and opinion writing process concluded. I pondered the meaning of the Ninth Circuit's holding. The *Barrera-Echavarria* decision speaks volumes of the American conception of Latino-American immigrants. If a jury trial "is among those 'fundamental principles of liberty and justice which lie at the base of all

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[196] *See id.*

[197] *See id.*

[198] *See id.*

[199] *See id.*

[200] *See id.*

[201] *See* Barrera-Echavarria v. Rison, 44 F.3d 1441, 1450 (9th Cir. 1995) (concluding that Barrera-Echavarria's detention was constitutional under *Mezei*); *see also* Shaughnessy v. Mezei, 345 U.S. 206, 215 (1953) (holding that continued exclusion does not deprive subject of any constitutional rights).

our civil and political institutions'"[202] and is "basic to our system of jurisprudence,"[203] how could our legal system deny that right to Barrera-Echavarria? Additionally, what does that denial say about how the legal system perceives Barrera-Echavarria?

The Supreme Court has permitted the state to temporarily detain individuals without trial in a narrow class of cases. *Korematsu v. United States*[204] established that the state may invoke national security to justify incarcerating individuals without trial.[205] Further, the state may detain juveniles under certain narrow circumstances because they, "unlike adults, are always in some form of custody. Children, by definition, are not assumed to have the capacity to take care of themselves."[206] In addition, the state may detain arrestees for a short period pursuant to their arrest,[207] and where courts determine by clear and convincing evidence that they are dangerous, officials may also detain them pending their trial.[208] Further, as the court found in its last term, officials may civilly confine repeat sex offenders indefinitely if they are found to be still dangerous.[209]

Korematsu may be seen as an embarrassing anomaly in this line of authority because the other cases solidly justify the deprivation of the jury trial right upon an implicit or explicit finding that an individual is dangerous or helpless.[210] In *Korematsu*, the government deemed American citizens of Japanese descent "suspect" and, therefore, potentially dangerous because of their race.[211] Thus, they could be detained without process.[212]

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[202] Duncan v. Louisiana, 391 U.S. 145, 148 (1968).

[203] *Id.* at 149.

[204] 323 U.S. 214 (1994).

[205] *See id.* at 216 (arguing that public necessity supports curtailing civil rights of single racial groups).

[206] *See* Schall v. Martin, 467 U.S. 253, 265 (1984).

[207] *See* Gerstein v. Pugh, 420 U.S. 103, 113-14 (1975).

[208] *See* United States v. Salerno, 481 U.S. 739, 755 (1987) (upholding detention pending trial under Bail Reform Act of 1984).

[209] *See* Kansas v. Hendricks, 117 S. Ct. 2072, 2079 (1997); Linda Greenhouse, *The Supreme Court: Sexual Predators; Likely Repeaters May Stay Confined*, N.Y. TIMES, June 24, 1997, at B11.

[210] *See generally Korematsu*, 323 U.S. at 223 (finding that implicit or explicit finding that individual is dangerous does not justify deprivation of jury trial).

[211] *See id.* at 217.

[212] *See id.* at 223 (stating that military urgency of war situation demanded that all citizens of Japanese ancestry be segregated temporarily from West Coast).

When we examine *Barrera-Echavarria* in light of this "detention" law, a frightening continuity becomes apparent. A similar use of race is seen in *Barrera-Echavarria.* In *Barrera-Echavarria,* the Ninth Circuit reiterated the Supreme Court's pat observation that excludable aliens "'stand on a different footing'"[213] than non-excludable aliens or U.S. citizens and held that they also could be detained without trial. The murkiness of *Barrera-Echavarria*'s analysis cannot hide that the legal system deems excludable aliens presumptively suspect because of their alienage. Because alienage is often a racialized category,[214] the same sense of racial distrust apparent in *Korematsu* informs *Barrera-Echavarria*'s holding.

The link between *Korematsu* and *Barrera-Echavarria* becomes even clearer when one examines the justifications given in both cases. Both *Korematsu* and *Barrera-Echavarria* depend on legal fictions to support their holdings, and those fictions may hide the raced content of those conclusions.[215] In *Korematsu,* the Supreme Court made the astounding and absurd announcement that despite any current connection with Japan,

> Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because . . . military authorities feared an invasion of our West Coast . . . [and] because they demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily.[216]

Thus, the court operated under the legal fiction that Korematsu's race had nothing to do with his relocation. In *Barrera-Echavarria,* the Ninth Circuit is more elegant about its evasions, yet its holding also offers absurd theater. First, the Ninth Circuit used the entry fiction, in which one must imagine Barrera-Echavarria is stopped and, presumably, is still levitating at the Florida border.[217] Second, the court transformed Leavenworth into the Ritz-Carlton at oral argument.

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[213] *See* Barrera-Echavarria v. Rison, 44 F.3d 1441, 1449 (9th Cir. 1995) (stating that excludable alien has no procedural due process rights).

[214] *See* Johnson, *Fear of an "Alien Nation," supra* note 63, at 116.

[215] *See Barrera-Echavarria,* 44 F.3d at 1441.

[216] *See Korematsu,* 323 U.S. at 223.

[217] *See Barrera-Echavarria,* 44 F.3d at 1450 (finding that while aliens may be physically within United States borders, law will legally treat them as being detained at border).

One may justify the legal fictions employed in *Barrera-Echavarria* on the grounds that such fictions "explain and, ultimately, [] persuade,"[218] us that the laws in effect are rational and just. For example, the entry fiction is an imaginative explanation of why the United States affords less rights to those demonstrably dangerous aliens who may be excluded.[219] Further, the Ritz-Carlton fiction constructed at oral argument underscores a very important point: that counsel failed to provide the necessary documentary evidence of the punishing conditions of Leavenworth[220] and Lompoc.[221] Courts cannot assume facts not in the record.[222] Nevertheless, the reluctance to at least recognize the reality of prison here is striking. When one examines *Barrera-Echavarria* in clear terms, and does not fictionalize, Barrera-Echavarria's degradation and stigmatization emerge. The entry fiction hides the fact that Barrera-Echavarria, who was living on United States soil, could be deprived of what otherwise appear to be a fundamental rights simply because an INS official

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[218] *See* Kathryn Abrams, *A Constitutional Law for the Age of Anxiety*, 73 CAL. L. REV. 1643, 1656 (1985) (reviewing GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW (1985)).

[219] *See also* 8 U.S.C. § 1182(a)(1-3) (1994) (stating that immigrants may be excluded on health-related, criminal, and security grounds). It should be noted that the new immigration laws are doing away with the term "excluded alien" and replacing it with "inadmissible alien." *See id.*; Johnson, *"Aliens" and the U.S. Immigration Laws*, *supra* note 83, at 274.

[220] *See* Maria Urelia, *Justice Can Be Elusive for Mariel Cubans*, ST. PETERSBURG TIMES, Aug. 20, 1989, at 1D (detailing conditions for Cuban Mariels confined in Leavenworth). Leavenworth inmates were subjected to overcrowded cells, diets of cold meals, and handcuffs even in the shower. *See id.*; *see also* PETE EARLEY, THE HOT HOUSE 95-107 (1992) (discussing Leavenworth's dealings with rioting detainees); James J. Fisher, *Prison Files Show Its Earliest Inmates: Leavenworth Took in Its First Civilians More than a Century Ago*, KAN. CITY STAR, Aug. 15, 1995, at A1 (detailing history of Leavenworth).

[221] *See* Robert J. McCartney, *Milken Faces Incarceration Sans Toupee: Financier Expected to Serve Time at Minimum-Security Prison Camp*, WASH. POST, Nov. 22, 1990, at A24 (noting that Lompoc, once known as "Club Fed" for its informal and relaxed atmosphere, was converted into higher-security prison). Other reports have cited inmates' testimony of assaults, murders, and high tension at the facility. *See* Harriet Chiang, *Freed Inmate Testifies in Martin Case*, S.F. CHRON., Dec. 14, 1989, at A25. Other prisons where excluded aliens are held have been described as having "brutal," "inhumane," and "intolerable" conditions, such as that in the Atlanta Penitentiary. *See* Mark D. Kemple, *Legal Fictions Mask Human Suffering: The Detention of the Mariel Cubans Constitutional, Statutory, International Law and Human Considerations*, 62 S. CAL. L. REV. 1735, 1740, 1741 n.25 & 26 (1989) (citing Atlanta Federal Penitentiary: Report of Subcomm. on Courts, Civil Liberties, and Administration of Justice of the Comm. on Judiciary, U.S. House of Representatives, 99th Cong., 2d Sess. 4 (1986) (detailing riots at facility)).

[222] *See* FED. R. APP. P. 10.

made the determination that aliens are less worthy of those rights. Similarly, the Ritz-Carlton story masks the painful reality of prison.[223] Thus, Barrera-Echavarria could be sent back to prison without even the dignity of the truth because he was an illegal and excludable alien.[224]

This analysis of *Barrera-Echavarria* is not confined to the Latino-American experience because the Ninth Circuit law obviously affects all undocumented people within the circuit. Nevertheless, the *Barrera-Echavarria* decision highlights the difference between Latino-American immigrants and "the rest of us." Some non-U.S. Latinos are less entitled to justice than the average person; recall, the Supreme Court held that the right to a jury trial is a "'fundamental principle[] of liberty and justice.'"[225] To the extent that Latino-Americans identify with non-U.S. Latinos as a part of their bordered identity and as I identified with Barrera-Echavarria, this caste system implicates us as well. Thus, Latino-Americans may not feel fully included within the U.S. collective.

Immigration law and policy has a significant effect on Latino-American identity because of its stigmatization of non-U.S. Latinos. To some degree, this is an inevitable result of the sovereign's exercise of its expulsion power because the state's very act of expelling or repelling Latino-Americans from our soil is stigmatic. However, the state often moves beyond its simple duty and, to put it plain, adds insult to injury. Culturally insensitive border enforcement and raid policies that characterize Latino-Americans as an inhuman threat provide unique identity-obstacles for Latino-Americans and frustrate the healthy development of the bordered self. Constitutional jurisprudence that stingily affords justice to Latino-American aliens does the same. Furthermore, to the extent that Latino-Americans identify with non-U.S. Latinos, these laws and policies erode the confidence that Latino-Americans wholly belong to and are safe in the United States.

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[223] *See supra* notes 219-20 and accompanying text (describing harshness of prison).

[224] One is reminded here of Bentham's attack on legal fictions. *See* Jeremy Bentham, *The Theory of Fictions, in* BENTHAM'S THEORY OF FICTIONS 141 (C.K. Ogden ed., 1951) ("What you have been doing by the fiction — could you, or could you not have done it without the fiction? If not, your fiction is a wicked lie: if yes, a foolish one.").

[225] *See* Duncan v. Louisiana, 391 U.S. 145, 148 (1968).

B. Language

While U.S. immigration policy contributes to the crisis of citizenship through its harsh treatment of Latino-American immigrants, the expanding enactment of English-only laws exacerbates that crisis. In 1956, when musing about writing in English instead of his native Russian tongue, the novelist and critic Vladimir Nabokov confessed:

> My private tragedy, which cannot, and indeed should not, be anybody's concern, is that I had to abandon my natural idiom, my untrammeled, rich, and infinitely docile Russian tongue for a second-rate brand of English, devoid of any of those apparatuses — the baffling mirror, the black velvet backdrop, the implied associations and traditions — which the native illusionist, frac-tails flying, can magically use to transcend the heritage in his own way.[226]

The "private tragedy" that Nabokov so poetically summons is being replayed on the American public stage through state language laws that privilege English above all other languages. In much the same manner that the federal government approaches to immigration and border control policy injure Latino-American identity, English-only laws infringe on that identity by limiting and stigmatizing the Spanish language, thus obstructing Latino-Americans' abilities to "transcend the heritage in [their] own way."[227] The laws both exemplify the different identity struggles that Latino-Americans encounter and are another cause of the Latino-American crisis of citizenship.[228]

To begin to understand the effect that English-only laws may have on Latino-American identity, consider the relationship between the Spanish language and that identity. An individual may have a Latino-American identity without speaking fluent Spanish or speaking any Spanish at all, but the language remains a central referent within the makings of that identity.[229]

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[226] VLADIMIR NABOKOV, *On a Book Entitled Lolita*, *in* LOLITA 318-19 (1955).

[227] *See id.*

[228] *See* Deborah Ramirez, *Forging a Latino Identity*, 9 LA RAZA L.J. 61, 61-67 (1996) (noting that people living in English-only environments develop different identities).

[229] For example, I have a sparse facility with Spanish. My conversations in that language will more likely be in truncated forms of Spanglish to members of my family, particularly my grandmother and my great-grandmother, and this hybrid is more likely to crop up when we are talking about particularly sensitive issues or when they cannot understand my English.

Many Latino-American writers have observed the primacy of Spanish in the formation and maintenance of their ethnic identities.[230] Mostly, it emerges as a private code — something to share between family members; something switched on when matters of the heart and family are raised. As Richard Rodriguez writes:

> But then there was Spanish. *Español*: my family's language. *Español*: the language that seemed to me a private language. I'd hear strangers on the radio and in the Mexican Catholic church across town speaking in Spanish, but I couldn't really believe that Spanish was a public language, like English. Spanish speakers, rather, seemed related to me, for I sensed that we shared — through our language — the experience of feeling apart from *los gringos*.[231]

Here, Spanish appears as a symbol of private ethnic identity. It connects speakers to family and to feelings, highlighting their difference from the majority.[232] Spanish plays an active role in

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I am depending on this language more and more, I find. My grandmother hails from a small town in Mexico and immigrated to this country when she was 30, completely unversed in English. As part of the acculturation process and to qualify for citizenship, she took English as a Second Language ("ESL") night classes in the late 1950s, and grew semi-fluent, although she never lost hold of her thick, musical accent. "It was part of becoming American," she told me once, speaking of the pains she took to become bilingual. "I was happy to do it."

But as she grows older, I've noticed that her English is in slow retreat. First it was a word here, a word there: "*pan*" instead of bread; "*corazon*" instead of heart. These days, although she can conduct a full, fluent discussion in English, she increasingly slips into conversational Spanish, especially when discussing family matters or health, as though those hard, spiny words couldn't ever really express what she meant, and now with the authority that comes with old age she has the luxury of speaking the way she wants. Or perhaps it is simply the vagaries of memory. Now sometimes, we'll have almost entire exchanges in Spanish, and her words will trip along quickly, coming easily and even making her laugh.

Spanglish does me a kind service here. It helps me keep up with her. Not in the thrust-and-parry sense of legal language, of case-law talk, but in the sense of making sure I understand what she's saying, linguistically as well as emotionally. We'll trade phrases back and forth, sometimes with full, layered pauses in between, while we both struggle to get the meanings right and relish this form of communication. Talking in this way is more than the transfer of data points — "my joints ache here" or "that banana cake didn't come out quite right." Instead, it is a kind of love. Sometimes when we're speaking, I feel like we're wrapping history around us with our words.

[230] *See infra* note 231 and accompanying text (noting that Spanish language binds Latino families).

[231] *See* Richard Rodriguez, *Aria*, *in* GROWING UP LATINO: MEMOIRS AND STORIES 305, 309 (Harold Augenbraum & Ilan Stavans eds., 1993).

[232] *See, e.g.*, Margaret E. Montoya, *Law and Literature: Mascaras, Trenzas, y Grenas:*

the creation of a public ethnic identity as well. Speaking Spanish signifies solidarity among Latino-Americans.[233] It is often thought of as a sign of ethnic pride, even when it is spoken in seemingly non-political settings.[234] Spanish, in fact, has become a synecdoche for the larger cultural, racial, and ethnic identity of Latino-Americans[235] who can forge strong ties over this commonality of shared language.[236]

The use of language as a symbol of cultural identity, however, has its costs because just as Latino-Americans recognize it as an ethnic referent, so does the majority.[237] Usually commentators

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Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse, 17 HARV. WOMEN'S L.J. 185, 187 (1994) (commenting that author's mother spoke in Spanish when talking about gringos, Mexicanos, and relations between them); Sarah Ramirez, *When I Speak*, 6 LATINO STUD. J. 62, 63 (1995) (explaining that author's choice to not speak Spanish severed connection between herself and her family).

[233] *See, e.g.*, STAVANS, *supra* note 59, at 123, 125 (describing Spanish language as unifying force among Latinos); Rachel F. Moran, *Bilingual Education as a Status Conflict*, 75 CAL. L. REV. 321, 345 (1987) (noting that Hispanics may have used language as substitute for culture, customs, and values); Felix M. Padilla, *On the Nature of Latino Ethnicity*, 64 SOC. SCI. Q. 651, 653, 655, 658-60 (1984) (describing consciousness of uniqueness from other social groups due to language and culture).

[234] *See* Yniguez v. Arizonans for Official English, 69 F.3d 920, 935 (9th Cir. 1995) (noting that Maria-Kelly Yniguez, former employee of Arizona Department of Administration, challenged Arizona's English-only constitutional amendment, barring her from speaking Spanish to customers, and asserted that speaking Spanish with other bilinguals signifies "solidarity" or "comfortableness"), *vacated as moot*, 117 S. Ct. 1055 (1997).

[235] *See Yniguez*, 69 F.3d at 947-48 (noting that discrimination based on language is facade for discrimination against certain national groups); Moran, *supra* note 233, at 325 (describing language as proxy for status of culture, customs, and values); *see also* Hernandez v. New York, 500 U.S. 352, 354 (1991) (suggesting that languages sometimes are treated as substitute for race); Juan F. Perea, Hernandez v. New York*: Courts, Prosecutors, and the Fear of Spanish*, 21 HOFSTRA L. REV. 1, 44 (1992) (arguing that bilingualism is inherently linked to national origin in most cases).

[236] *See* STAVANS, *supra* note 59, at 145-46 (discussing resistance theory of Spanish).

[237] As a child, for example, I was persuaded that Spanish was a worthless burden that symbolized an inferior part of my heritage, although this may simply be a fancy, rationalizing, "20-20 vision in hindsight" way of explaining my resistance which doesn't adequately convey the truth of the matter. At seven years old, I wanted very much to be like my father, who often poked mean fun at my mother's use of Spanish and her habit of eating hot chilis with her meals. She still tried to teach me to be bilingual, and we would have heated, tortured lessons over the kitchen table, with me twirling my hair around one finger and snapping my gum, she bending over the books and scribbling tenses down with her pencil. I didn't want to have anything to do with such fuss. I'd rather be like my father, cooly sardonic, carefully Canadian, bland-tongued, and proud. After one too many of these episodes, I stalked to the bathroom and opened up the medicine cabinet, which contained, among other things, special occasion toiletries and other fancies such as a new, unopened bottle of French perfume from a rare trip to Paris. Devilish imp! I opened up the cabinet

write about these costs in the public context. As Professor Juan Perea writes:

> The mere sound of Spanish offends and frightens many English-only speakers, who sense in the language a loss of control over what they regard as "their" country. Spanish also frightens many Latinos, for it proclaims their identity as Latinos, for all to hear. The Latinos' fear is rational. Spanish may subject Latinos to the harsh price of difference in the United States: the loss of a job, instant scapegoating and identification as an outsider. Giving in to this fear and denying of one's own identity as a Latino is, perhaps, to begin to die of English.[238]

Recent events show that the legal system will even take pains to punish the use of Spanish in the home. For example, in 1995, a Texas district judge threatened to divest a mother of child custody if she didn't stop "abusing" her child by speaking Spanish in the home.[239] Speaking Spanish puts Latino-Americans at risk. To the English-speaking majority, Spanish conveys the message that Latino-Americans do not want to be here, that they will "take over,"[240] or that they are unintelligent,[241] immoral,[242]

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and grabbed the bottle in my chubby paw, cracked open the wax seal and poured down the whole hundred dollar mess into the whirling maw of the toilet. She never tried to teach me the language again.

I wish I had a more elegant story to tell about my conflicted history with the Spanish language and its relationship to my Latino-American identity. But my bratty shenanigans at least throw the complex issue of Latino language and ethnic identity into sharp, if base, relief.

[238] *See* Juan F. Perea, *Los Olvidados: On the Making of Invisible People*, 70 N.Y.U. L. REV. 965, 965-66 (1995).

[239] *See* Edward Rincon, *Espanol? Judge Needs to Hear Case for Bilingualism*, DALLAS MORNING NEWS, Sept. 10, 1995, at 6J. In 1995, Martha Laureano, a bilingual mother who claimed that her estranged husband was abusing their daughter, asked a Texas district judge for custody of her daughter. *See id.* However, Judge Sam Kiser, ordered Laureano, a naturalized, American citizen born in Mexico, to start speaking English to her daughter, on the grounds that to do otherwise would be "abusing that child and . . . relegating her to the position of a housemaid." *See id.* Afterwards, the judge apologized for his statements and rescinded the order, although only after the parents agreed to make sure that the child learned English. *See* Joel Williams, *Alteration of Language Order Hailed*, SAN ANTONIO EXPRESS-NEWS, Sept. 17, 1995, *available in* 1995 WL 9502339.

[240] The quoted phrase in the body is my own. *See* LINDA CHAVEZ, OUT OF THE BARRIO 87-88 (1991) (noting that misbelief that Hispanics have no desire to learn English fuels fears that United States will adopt bilingual language policies).

[241] *See, e.g.*, Chirori Santiago, *Discrimination 101: Teaching Kids to Cope with Prejudice Is the Most Important Lesson of All*, LATINA, Summer 1996, at 77 (stating that school administrators assume children with Spanish surnames are illiterate and place these students in remedial

or subversive.[243] These costs create powerful incentives to assimilate into a monolingual "Anglo" identity.[244] These sentiments have occasionally found expression in the law, where there have been some attempts to restrict or even punish the use of Spanish.[245] It has been curtailed or penalized on juries,[246] in schools,[247] in prison,[248] and in the workplace.[249] This Article

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classes).

[242] *See* DAVIS, *supra* note 46, at 395-96. Davis states:

> The thing is, I always thought that speaking Spanish was like a mortal sin. We couldn't speak Spanish in school. In the convent you were fined. It was a dollar every time you got caught speaking Spanish. It was like a bad language, something vile. Even your thoughts were in English.

Id.

[243] *See, e.g.*, Omar S. Castaneda, *Guatamalan Macho Oratory, in* MUY MACHO 35, 44 (Ray Gonzalez ed., 1996) (commenting on rejection of Latino speaking styles and subsequent negative effects on Spanish speakers).

[244] *See id.* at 49 (stating that Latino speaking style means challenging Anglo-American status quo and attendant power loss).

[245] *See* Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 278 (1992) (discussing law's restrictions on ethnic expression and reinforcement of mainstream culture).

[246] *See* Hernandez v. New York, 500 U.S. 352, 361 (1991) (holding that prosecutor did not violate Equal Protection Clause by removing disproportionate number of prospective Latino jurors); United States v. Flores-Rivera, 56 F.3d 319, 326 (1st Cir. 1995) (stating that use of English in United States courts may restrict number of eligible jurors, but serves legitimate purpose of conducting proceedings); Pemberthy v. Beyer, 19 F.3d 857, 868 (3d Cir. 1994) (holding that dismissal of five Spanish speaking prospective jurors, three of whom who were Latino, did not violate equal protection); *see also* 28 U.S.C. § 1865(b)(2)-(3) (1989) (requiring that all grand and petit jurors have ability to speak, read, write, and understand English).

[247] *See* Mark L. Adams, *Fear of Foreigners: Nativism and Workplace Language Restrictions*, 74 OR. L. REV. 849, 859 (1995) (noting that during World War I several states mandated use of English in public and private schools, and Iowa went so far as to require English for all telephone conversations, schools, and church services). Furthermore, "Into the 1950s, children who spoke Spanish in school were made to kneel on upturned bottle caps, forced to hold bricks in outstretched hands in the schoolyard, or told to put their nose in a chalk circle drawn on a blackboard." *Id.* at 860 n.72 (internal quotation marks omitted). These rules have now been abolished. *See id.* at 876.

[248] *See* Sisneros v. Nix, 95 F.3d 749, 751 n.2 (9th Cir. 1996) (holding that English-only rule challenge by Hispanic and Native American inmates was moot); *cf.* Kikumura v. Turner, 28 F.3d 592, 596 (7th Cir. 1994) (noting that English-only rule did not clearly violate Japanese-speaking inmate's First Amendment right, thus mandating injunctive and declaratory relief); Thongvanh v. Thalacker, 17 F.3d 256, 259 (8th Cir. 1994) (stating that Laotian prisoner's mail should have been translated by refugee service).

[249] *See* 29 C.F.R. § 1606.7(a)-(c) (1989) (stating that limited English-Only rule, properly promulgated, must be justified by business necessity); *see also* Garcia v. Spun Steak Co., 998 F.2d 1480, 1487 (9th Cir. 1993) (rejecting title VII claim on English-only rule), *reh'g denied*,

focuses on only one particular legal issue to analyze the exclusion of Latino-Americans from majoritarian America through misguided language policies: state English-only laws.

The modern English-only movement can be traced back to Senator S.I. Hayakawa and Dr. John H. Tanton[250] who in 1983 founded U.S. English, an organization dedicated to preserving English as the official language of the Union.[251] The movement began at the federal level. However, when Congress thwarted an attempt to get an English-only amendment into the federal Constitution, U.S. English advocates began lobbying at the state and local levels.[252] As of this writing, at least seventeen states have enacted English-only laws that set forth English as their official language.[253]

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13 F.3d 296 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 2726 (1994); Hong v. Children's Mem'l Hosp., 993 F.2d 1257, 1265 (7th Cir. 1992) (holding that plaintiff did not make out prima facie case of discrimination based on national origin in wrongful termination case where boss repeatedly told plaintiff to learn to speak English and English-only policy was in place); Garcia v. Gloor, 618 F.2d 264, 266 (5th Cir. 1980) (holding that English-only rule in workplace did not constitute national origin discrimination); Tanya J. Stanish, Comment, *English-Only Rules in the Workplace: Discrimination or Employer Prerogative? A Comment on* Spun Steak v. Garcia, 7 DEPAUL BUS. L.J. 435, 435 (1995) (supporting Ninth Circuit decision upholding English-only rules in workplace).

[250] Dr. Tanton is the founder of Federation for American Immigration Reform. This organization is behind some of the anti-immigrant measures discussed earlier. *See supra* notes 126-27 and accompanying text (discussing militarization of border).

[251] *See* JAMES CRAWFORD, HOLD YOUR TONGUE: BILINGUALISM AND THE POLITICS OF ENGLISH ONLY 4 (1992) (discussing origins and developments of English-only movements); RAYMOND TATALOVICH, NATIVISM REBORN? 10 (1995) (noting other English advocacy groups such as English First and American Ethnic Coalition); Jose Roberto Juarez, Jr., *The American Tradition of Language Rights: The Forgotten Right to Government in a "Known Tongue,"* 13 LAW & INEQ. J. 443, 449 n.9 (1995) (commenting that Sen. S.I. Hayakawa founded U.S. English in 1983).

[252] *See* Rachel F. Moran, *Irritation and Intrigue: The Intricacies of Language Rights and Language Policy*, 85 NW. U. L. REV. 790, 791 (1991) (discussing success of English-only movement in enacting English-only laws in at least 17 states and several cities); Aileen Maria Ugalde, *"No Se Habla Espanol": English-only Rules in the Workplace*, 44 U. MIAMI L. REV. 1209, 1229 & n.131 (1990) (citing proposed English Language Amendment, H.R.J. Res. 96, 99th Cong. (1985); S.J. Res. 20, 99th Cong. (1983); S.J. Res. 167, 98th Cong. (1983); S.J. Res. 72, 97th Cong. (1981)).

[253] *See* ARIZ. CONST. art. XXVIII, §§ 1, 2, 3, 4; CAL. CONST. art. III, § 6; COLO. CONST. art. II, § 30a; FLA. CONST. art. II, § 9; HAW. CONST. art. XV, § 4; NEB. CONST. art. I, § 27; ALA. CODE § 509 (1996); ARK. CODE ANN. § 1-4-117 (Michie 1987); GA. CODE ANN. § 50-3-100 (1981); 5 ILL. COMP. STAT. 460/20 (West 1997); IND. CODE § 1-2-10-1 (West 1997); MISS. CODE ANN. § 3-3-31 (1996); N.H. REV. STAT. ANN. § 3-c:1 (1995); N.C. GEN. STAT. § 145-12 (1996); N.D. CENT. CODE § 54-02-13 (1997); S.C. CODE ANN. § 1-1-696 (Law Co-op. 1996); VA. CODE ANN. § 7.1-42 (Michie 1997); WYO. STAT. ANN. § 8-6-101 (Michie

Advocates for English-only laws reason that enacting such measures promotes citizen unity,[254] helps immigrants,[255] preserves the American way of life,[256] and prevents ripping the "fabric of society"[257] or creating an unwieldy "Babel."[258] Other rationales for English-only laws are less coherent, but more passionate, and get at the root of exclusionary nativism.[259]

The goals of the English-only laws seem, at first blush, to have a lovely patriotic ring to them. The advocates strive for unity. They are working for cohesion, brotherhood, and rights. However, what does it mean to enact a law whose purpose is to promote unity? There are laws already on the books which have a similar aim. States have designated flowers, differently colored flags, and a plethora of anthems for this purpose. Society supposedly unites over these symbols; perhaps they promote a statehood culture that society uses as a common referent. However, English-only laws differ from other "culture" laws in important ways. When one closely examines their supporting rhetoric, disturbing strains of paranoid nativism emerge.[260] The zeal with

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1997).

[254] *See* TATALOVICH, *supra* note 251, at 11 (describing U.S. English as organization devoted to promoting English as official language of United States); Briseno, *Federal Court Ruling Fails to Cool English-Only Debate*, SAN DIEGO UNION-TRIB., Feb. 11, 1990, at B2 (noting comments of Stanley Diamond, chairman of U.S. English, that not using English destroys citizen unity); Mike Ward, *Effort Started to Make English Official Tongue*, L.A. TIMES, Sept. 12, 1985, at 1 (discussing petition in Monterey Park, California to make English official language because it unites Americans).

[255] *See* James Coates, *'English Only' Law Becomes a Matter of Interpretation*, CHI. TRIB., Jan. 15, 1989, at C6 (detailing supporter's views that English-only laws help immigrants succeed in their new land).

[256] *See* Kerr, *supra* note 136, at 6 (quoting World War II veteran who did not fight to bring foreign people back to United States).

[257] *See* William Trombley, *Prop. 63 — A New Battle in Historical War of Words*, L.A. TIMES, Oct. 21, 1986, at A3 (expressing concern over whether society can absorb so many non-English speaking people).

[258] *See* Yniguez v. Arizonans for Official English, 69 F.3d 920, 936 (9th Cir. 1995) (describing complaints by Arizonans for Official English that many languages create "Babel"), *vacated as moot*, 117 S. Ct. 1055 (1997).

[259] *See* Nancy San Martin & Gloria Perez, *War of Words in Dade over 2 Languages*, ORLANDO SENTINEL, May 18, 1993, at B5 (noting response of Enos Schera, vice president of Citizens for Dade United, to reject English-only law in Metro-Dade government in Florida). Schera is quoted as saying, "We're not having two languages. No way. Over my dead body." *Id.*

[260] *See* TATALOVICH, *supra* note 251, at 78-83 (discussing nativist sentiment in English-

which the laws' proponents lobby for enforced acculturation and assimilation poses a frightening dilemma for ethnic minorities who attempt to maintain a healthy and proud sense of their dual heritage.[261] Additionally, the recurring themes of ethnic or racial bias in the English-only debates and the prevailing connection of English-only laws to the goal of restricting the political rights of linguistic minorities demonstrate that all is not right in the bucolic regime that these advocates envision.

However, even if one accepts the most benign justification for these laws — the official story — the laws remain extremely disturbing for those who strive for the full inclusion of Latino-Americans into American society and the healthy development and maintenance of Latino-American identity. One may glean the official story for English-only laws from U.S. English's mission statement:

> A common language benefits a nation and all its people. In the United States, the language bond is more important than in most other nations because Americans are remarkably diverse in origin, race, lifestyle, ethnicity, religion, and culture. A common language bridges our differences and helps to promote:
>
> Social, political, and economic advancement;
> Equality of opportunity for all;
> Full participation in the democratic process by informed voters;
> Economic efficiency and strength;
> Shared values and national culture accessible to all.
>
> To achieve these aims, U.S. ENGLISH pursues two complementary goals: To make English the official language of the United States Government and to guarantee the right for all our people to learn English.[262]

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only laws).

[261] *See* Sarah Henry, *Fighting Words: California's Official-Language Law Promises to Preserve and Protect English*, L.A. TIMES, June 10, 1990 at A10 (describing lobbyists efforts regarding Proposition 63).

[262] TATALOVICH, *supra* note 251, at 11 (quoting U.S. English, U.S. English: Towards a Unified America).

Similar statements articulating the purposes of fostering citizen unity and preserving the English language can be found in the text of some state constitutional amendments.[263]

The English-only laws vary in their restrictions on the use of foreign languages and their promotion of the English language. Courts have deemed many of these laws to be merely symbolic.[264] However, some of them appear to be enacted with the hope of "end[ing] bilingualism,"[265] avoiding the need to provide official information in other languages,[266] and reasserting an English-only educational policy.[267] Recent case law suggests that the more an English-only law restricts the use of a foreign language, the more likely it is to run afoul of the First Amendment and be struck down under the Constitution.[268] Nevertheless, an English-only law need not explicitly bar the use of non-English languages to create an identity dilemma for Latino-Americans and other language minorities.[269]

In the same way that the rhetoric surrounding immigration reform configures Latino-Americans as a source of danger and annihilation, the rhetoric that surrounds English-only laws portrays foreigners as having the power to use language to destroy the sacrosanct preserve of the American way of life. The Califor-

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[263] *See* CAL. CONST. art. III, § 6(a) (noting that section's purpose is to preserve, protect, and strengthen English language and not to supersede any rights guaranteed to people under Constitution); N.C. GEN. STAT. § 145-12 (Michie Supp. 1994) (emphasizing need to protect English); TATALOVICH, *supra* note 251, at 266 (discussing comments of Georgia General Assembly regarding unifying role of English in lives of diverse people).

[264] *See* Yniguez v. Arizonans for Official English, 69 F.3d 920, 927 n.11 (9th Cir. 1995), *vacated as moot*, 117 S. Ct. 1055 (1997); *see also* Seth Mydans, *Pressure for English-Only Job Rules Stirring a Sharp Debate Across U.S.*, N.Y. TIMES, Aug. 8, 1990, at A12 (describing official and unofficial English-only policies adopted by states and private employers).

[265] *See* TATALOVICH, *supra* note 251, at 201 (noting Sen. Joseph Cocoran's hope that English-only law would end bilingualism).

[266] *See* NEB. CONST. art. I, § 27; *see also* ARIZ. CONST. art. XXVIII, § 3(1)(a) (declaring English as state's official language, although Ninth Circuit in *Yniguez* struck it down under First Amendment); TATALOVICH, *supra* note 251, at 216 (commenting on article in South Carolina newspaper that interpreted state's new English-only law as mandating no duty to provide driver's tests and elementary school classes in other languages).

[267] *See* TATALOVICH, *supra* note 251, at 216 (citing example of South Carolina's proposed Amendment One).

[268] *See Yniguez*, 69 F.3d at 933 (concluding that Arizona statute will be unconstitutionally overbroad if it violates First Amendment in substantial number of cases).

[269] *See id.* at 941. Although the barring of foreign languages has been (unconstitutionally, it seems) effected under the Arizona English-only law, it was used to preclude a state employee from speaking Spanish to applicants in the course of her employment. *See id.*

nia English-only initiative, like other English-only laws, stated that its purpose was "to preserve, protect and strengthen . . . English" by making it the official language of the state.[270] Aside from the fact that there is no indication that English is being weakened,[271] what is so startling about this movement is the national defense posture[272] of its advocates. These advocates believe that the supremacy of the English language and, with it, the sanctity of the American way of life are under attack.[273] Thus, English-only laws are configured as a weapon against the encroaching enemy of foreign languages and, by extension, those languages' speakers.[274] However, the unity that

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[270] *See* Sarah Henry, *Fighting Words: California's Official-Language Law Promises to Preserve and Protect English. The Question Is, Can the State Preserve and Protect Its Citizens' Civil Rights at the Same Time?*, L.A. TIMES MAG., June 10, 1990, at 10 (noting that California's passing of Proposition 63 made English state's official language).

[271] *See* Perea, *supra* note 245, at 373 n.161 (stating that between 94 and 96% of Americans speak English and that 85% consider English their native language) (citing JOSHUA A. FISHMAN ET AL., THE RISE AND FALL OF THE ETHNIC REVIVAL 129 (1985)).

[272] *See* CARL GUTIERREZ-JONES, RETHINKING THE BORDERLANDS: BETWEEN CHICANO CULTURE AND LEGAL DISCOURSE 56 (1995) (arguing that national defense stance against bilingual legislation scapegoats Spanish speakers).

[273] *See Joint Interim Hearing on Proposition 63: English as the Official Language Before the Senate Comm. on Elections and Assembly Task Force on Proposition 63*, 1986-87 Reg. Sess. 14 (Cal. 1986) [hereinafter *Report*]. At that hearing, Assemblyman Frank Hill asserted:

> The "Melting Pot" is one of the founding premises that this country was founded upon. Immigrants from all over the world stream to our shores, and somehow that massive humanity worked, and the reason that it worked was that there was a common threat that tied society together. Clearly, in early America as well as California today, that common thread was the English language. But, unfortunately, we see the English language under attack here in California, and you can go down and apply for a driver's license entirely in Chinese; you can apply for welfare today entirely in Spanish; we have ballots printed in two, and in some instances three different languages. Clearly, the supremacy of the English language is under attack.

Id. at 14. Further, Roger Hughes, spokesman for the California English campaign, stated, "[W]e would like to see them try to advance as far as they can in English . . . . They come to America. It's time to learn a new language. You talk about maintaining culture. It's time to learn a new culture. The way America runs its culture, its society, I think that's the best way to mainstream those kids." *Id.* at 260.

[274] It should be noted that many of the speakers and tracts quoted curiously try to separate the languages that they fight from the languages' speakers. *See supra* notes 266-67, 270 and accompanying text (discussing statements by proponents of South Carolina's proposed Amendment One and California's Proposition 63). This sanitization apparently is designed to give the impression that the fight for English-only is a neutral activity targeted at words, not people.

they so valiantly seek, in the end, is nothing more than a forced acculturation of linguistic minorities.[275] English-only proponents want linguistic minorities to bend to the majority's conception of a proper culture and language.[276] The tenor of their statements often portrays their cause as a battle where there is a necessary winner and loser.[277] This posture often sets the stage for the uglier biased motivations behind these laws to spring forth from the tongues and pens of their supporters.[278]

Moreover, at its root, the battle over English-only laws is about much more than culture. It is also about regulating the political speech of linguistic minorities and limiting access to political information to English speakers.[279] U.S. English asserts that among its primary objectives is the "issu[ance] [of] voting ballots and materials in English only"[280] and "functioning in

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[275] *See* Wendy Olson, *The Shame of Spanish: Cultural Bias in English First Legislation*, 11 CHICANO-LATINO L. REV. 1, 15 (1990) (stating that proponents of English-only legislation feel that American culture needs to be protected from non-English speakers, while sociologists and linguists see language as indicators of group identification).

[276] *See, e.g.*, David K. Fiedler, *Immigrants Must Pursue Assimilation*, L.A. TIMES, July 25, 1993, at B8 (arguing that immigrants must place American culture above their native culture).

[277] *See Report*, *supra* note 273, at 256-67 (statement of Roger Hughes, spokesman for California English Campaign). Hughes remarked, "A common language is absolutely necessary — necessary if our young adults are going to integrate into our society. And I keep hearing that we are already integrated. Nonsense, we are not." *Id.* at 251. Other speakers also discuss need for cultural assimilation. *See, e.g.*, Fiedler, *supra* note 276, at B8 (arguing that immigrants should elevate American culture above their native culture); Samuel Francis, *Fencing Out the National Culture*, WASH. TIMES, May 25, 1993, at F1 (advocating English-only and cultural assimilation of immigrants); Olson, *supra* note 275, at 19 (stating that English-only proponents define culture as Anglo culture); Robert M. Press, *English-Only Drive Mirrors Deeper Miami Unrest*, CHRISTIAN SCI. MONITOR, Oct. 20, 1980, at 1 (discussing animosity of proponents of English-only laws toward Spanish speakers and Spanish culture).

[278] *See* Martina Stewart, *English-Only Laws, Informational Interests, and the Meaning of the First Amendment in a Pluralistic Society*, 31 HARV. C.R.-C.L. L. REV. 539, 557 (1995) (stating motivation behind English-only law might be "racism, xenophobia, and profound fear of difference"); *see also* CHAVEZ, *supra* note 240, at 91 (discussing decision by Linda Chavez, well-known conservative Latina, to step down as president of U.S. English in response to anti-immigrant, anti-Latino memo, where John Tanton, U.S. English's founder, cites allegedly hyper-reproductive powers of immigrants as partial explanation for organization's motives).

[279] *See* Laura A. Cardero, *Constitutional Limitations on Official English Declarations*, 20 N.M. L. REV. 17, 37 (1990) (arguing that minorities not proficient in English may be effectively barred from voting if ballots are in English only).

[280] *See* Voting Rights Amendment, 42 U.S.C. § 1973aa-1a(b)(2)(A)(II) (1988) (requiring that counties with 10,000 adult citizens of voting age with limited English proficiency be given ballots in their native language); *id.* § 1973b(f)(2) (stating that "No voting qualifica-

English, except where public health, safety, and justice require the use of other languages."[281]

These accounts of the English-only movement and resulting laws demonstrate another obstacle to Latino-Americans' ability to develop and maintain a healthy sense of identity. If "[l]anguage and ethnic identity are related reciprocally"[282] and Latino-Americans regard Spanish as an important identity marker, then the states' quest for national unity through English-only laws that discount Spanish, force blind acculturation and political disenfranchisement, and foster ethnic and racial biases can only strain the process of navigating between two different ethnic references that are central to Latino-Americans' sense of self. Or, as has been stated much more succinctly by Earl Shorris, one may "die of English."[283]

At their very worst, English-only laws attempt to "control the transmission of [Latino] public discourse"[284] by denying Latino-Americans the ability to communicate to each other on political matters in their native tongue.[285] Such restrictions serve to un-

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tion or prerequisite to voting, or standard, or practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group"); *see also* Dell Richards, *American Trends: In California, Ballots Will Come in 6 Languages*, GANNETT NEWS SERVICE, Nov. 1, 1992, *available in* 1992 WL 9396077 (listing California counties offering non-English ballots).

[281] *See* Official State Language Initiative Constitutional Amendment, Argument in Favor of Proposition 63, *reprinted in* CALIFORNIA BALLOT PAMPHLET: GENERAL ELECTION, NOV. 4, 1986, at 46 (1986) (stating that government must protect English by issuing voting ballots and materials in English only, except where required by federal law); *see also* TATALOVICH, *supra* note 251, at 105 (noting that multilingual ballots in San Francisco successfully supported English-only movement in California).

[282] *See* William B. Gudykunst & Karen L. Schmidt, *Language and Ethnic Identity: An Overview and Prologue, in* LANGUAGE AND ETHNIC IDENTITY 1, 1 (William B. Gudykunst ed., 1988) (stating that language usage and ethnic identity influence one another).

[283] *See* EARL SHORRIS, LATINOS: A BIOGRAPHY OF THE PEOPLE 3 (1992) (suggesting that woman, who was condemned to nursing home where no one spoke Spanish, died of English because she had held onto Spanish language and culture); *see also* Perea, *supra* note 238, at 965 (describing "Death by English" as slow death of spirit whereby one's own identity is replaced, reconfigured, overwhelmed, or rejected by more powerful, dominant identity not one's own).

[284] *See* GUTIERREZ-JONES, *supra* note 272, at 55.

[285] *See* Yniguez v. Arizonans for Official English, 69 F.3d 920, 932 (9th Cir. 1995) (interpreting Arizona English-only law to preclude use of foreign languages by government officials and employees in legislative, executive, and judicial branches during performance of government business), *vacated as moot*, 117 S. Ct. 1055 (1997).

dermine Latino-Americans' political presence and respectability because the state itself is frowning upon the community that Spanish creates and the ethnic identity that it signals.[286] However, even where the state does not preclude Spanish, but instead it simply asserts that it is promoting, encouraging, and "preserv[ing]" English (a very unclear distinction), the message behind English-only laws still may make Latino-American identity hard to do.[287] The greater sense of vulnerability occurring in the unfriendly and bigoted atmosphere of English-only laws[288] and the implicit hierarchy that glorifies both Anglo language and values as superior to all others causes a crisis of citizenship.[289]

This brief glimpse into language policy further demonstrates that state acts stigmatize Latino-American identity and create a Latino-American crisis of citizenship. By using their very language, Latino-Americans seem to threaten the majority that perceives Latino-Americans as invading and severing the community that "citizens" strive to create. The majority's response to this threat is to stigmatize or, at its most extreme, silence Latino-Americans as a means of self-preservation. The end result is some Latino-Americans' sense of shame,[290] being second

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[286] *Cf.* DAVIS, *supra* note 46, at 395 (detailing sense of shame and disconnection that resulted in part from English-only rules in schools).

[287] *See* Alfredo Mirande, *En la Tierra del Ciego, El Tuerto Es Rey (In the Land of the Blind, the One Eyed Person Is King): Billingualism as a Disability*, 26 N.M. L. REV. 75, 85-86 (1996) (describing effect of English-only rules as "no Spanish" rules).

[288] *See, e.g.*, Susan Ferriss, *Spanish Speakers Hit Greyhound with Lawsuit*, S.F. EXAMINER, June 27, 1994, at A1 (citing incident exemplifying intolerance over multilingualism in California where San Francisco bus driver shouted at passengers and assaulted at least one of them because they spoke Spanish on bus); Elizabeth Llorente, *Pharmacy Worker Fired for Speaking Spanish on Job*, REC. (N.J.), June 23, 1994, at A3 (describing firing of four-year pharmaceutical employee in Jersey City after she objected to her workplace's English-only policy that was adopted after customer complained about Spanish); Lourdes Rodriguez-Florido, *Language Bias Charged Scrutinized School Said to Have English-Only Rule*, SUN-SENTINEL (Fort Lauderdale, Fla.), June 11, 1993, at 1B (detailing allegations of principal's hostile admonishments to teachers to stop speaking Spanish).

[289] *See* Perea, *supra* note 245, at 352, 355 (discussing that language politics can result in alienation, distancing, political impotence, and linguistic pressure to speak English instead of other languages based on implicit understanding that English is superior to all other languages); *cf.* Jeffrey D. Kirtner, Note, *English-Only Rules and the Role of Perspective in Title VII Claims*, 73 TEX. L. REV. 871, 897 (1995) (analyzing stigma felt by Latinos encountering English-only rules in workplace).

[290] *See* Olson, *supra* note 275, at 16.

class,[291] or even being invisible.[292] Again, these injuries can erode Latino-Americans' sense of belonging to the American collective, thus contributing to the crisis of citizenship.

III. PUGILISTS, FLAGS, AND THE FIGHT OVER WHAT IT MEANS TO BE "MEXICAN": A CASE STUDY IN THE CRISIS OF CITIZENSHIP

A central argument of this Article is that repressive immigration policies and English-only laws stigmatize Latino-Americans, thus creating a crisis of citizenship. However, it has not yet provided a detailed account of that crisis.

A crisis of citizenship is an emotional insecurity — the belief that one does not fully belong to the United States as a citizen with equal rights and status. When members of minority groups experience this crisis, one may expect several results.[293] First, the crisis may affect not only the individual minority person, but it also may damage intra-group relations because groups which are under siege may replicate the patterns of exclusion in self-defense.[294] Second, the crisis may affect the way that members of the group regard the state as an authority figure. When minorities believe that the state is not working in their interest and that it even derogates them, that skepticism severely undermines the compact of mutual rights and obligations between the citizen and the sovereign.[295]

This section will illustrate the Latino-American crisis of citizenship and its effects by using the story of a boxing match in 1996 between two famous Latino boxers as a case study. The narrative

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[291] *See id.* at 23.

[292] *See* Perea, *supra* note 245, at 368.

[293] *See* Bijan Gilanshah, *Multicultural Minorities: Erasing the Color Line*, 12 L. & INEQ. J. 183, 189 (1994) (discussing difficulty and effects of multiracial individuals' struggle to belong and be perceived as citizens).

[294] *See* J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2321 (1997) (describing role of individual within group and role as member of group).

[295] *See infra* notes 344-48 and accompanying text (discussing problems of continued alienation of Latino-Americans even after they become citizens).

method pioneered by critical race, feminist, and classical scholars[296] best conveys the power and complexity of the crisis demonstrated at that event.[297] The following story illuminates the intensity of the crisis of citizenship, and details its effects on inter-group relations and the relationship between Latino-Americans and the United States.

* * *

In the late spring of 1996, I became aware of an upcoming super lightweight title fight between Oscar De La Hoya, a twenty-two-year-old, gold-medal winning boxer from East Los Angeles, and Julio Cesar Chavez, a thirty-three-year-old Mexican national champion. This fight was a big-ticket event in the boxing world at large and a huge event in the Latino-American boxing community.[298] In Los Angeles, my hometown, the local take on the fight was that De La Hoya was almost committing heresy by taking on Chavez, who was *El Señor Grande* of Latino boxing.

In the months before the fight, folks couldn't stop talking about it. Nasty rumors and other trash-talking about De La Hoya abounded.[299] People lauded Chavez and predicted his quick victory, and the media and promoters capitalized on the hype, billing it as "The Ultimate Glory."[300] The high emotions surrounding the match were a clue that something big was going down in terms of identity politics. De La Hoya versus Chavez was not just a regular boxing match; it was a showdown between assimilated Latino-Americans and "real" Mexicans, with assimilated Latino-Americans being the presumptive losers.

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[296] *See* Nussbaum, *supra* note 13, at 49.

[297] *See, e.g.*, Gregory Rodriguez, *De La Hoya Won More than a Boxing Title*, OAKLAND POST, June 19, 1996, at 4B (describing De La Hoya's hybrid character as American and Mexican as model for young Latino-Americans who are uncertain how to see themselves).

[298] *See* Bruce Pascoe, *Chavez Is King According to Nogales Fans*, ARIZ. DAILY STAR, June 7, 1996, at 1C (describing anticipation of professional boxing match in Latino-American community between Mexican born and Mexican-American boxers).

[299] *See, e.g.*, Mark Kriegel, *The Great Almost White Hope Boxer Oscar De La Hoya*, ESQUIRE, Nov. 1996, at 78 [hereinafter Kriegel, *The Great Almost White Hope*] (describing incident where students from De La Hoya's alma mater threw eggs at him).

[300] *See* Bert Randolph Sugar, *Fight of the Century*, *in* ULTIMATE GLORY: THE WBC WORLD SUPER LIGHTWEIGHT CHAMPIONSHIP 14 (Jay Seidman ed., 1996) (referring to Chavez-De La Hoya match as "Fight of the Century").

A brief description of the two fighters illuminates their iconic status and their roles in the ethnic identity game. Chavez has a rags-to-riches mythology which is distinctly Mexican. A stern-eyed man with a bullet nose and a battered mouth, he was born the son of a conductor on a Sonoran railroad[301] in Culiacan, Mexico,[302] and was raised in an abandoned caboose.[303] He has ten brothers and sisters[304] and maintains ties with his humble beginnings by donating liberally to charities which service Mexico's poor.[305] Although he is a millionaire with multiple properties, high-performance sports cars, and a yacht,[306] his training regimen is pared down and no-nonsense.[307] Chavez eschews high-concept sports doctors and technology, preferring instead to spar and run long, solitary stretches to the mountaintop of his Mexico City gym.[308] He is a monolingual Spanish-speaker, and is also devoutly Catholic. At one point he stated that he attributes his boxing success to a vision he had in Tijuana of Christ on the cross.[309] In addition, he touts his role as Mexico's representative. In 1993, he stated, "When I fight, all of the eyes in Mexico are upon me. . . . It's a big responsibility. Sometimes, it seems I am defending the nation."[310]

De La Hoya, on the other hand, claims no such call to glory. His persona is glossy, aesthetic, and inextricably linked with his American identity as a brown-skinned Horatio Alger.[311] Movie-star handsome and cleanly groomed, he was born in East Los Angeles as the son of a shipping and receiving clerk.[312] De La

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[301] *See id.*

[302] *See* Norm Frauenheim, *Chavez, Whitaker: Repeat of Alamo?*, ARIZ. REPUBLIC, Sept. 8, 1993, at D1.

[303] *See id.*

[304] *See id.*

[305] *See* Sharon Robb, *Chavez Focuses on Charity Rather than Saturday's Foe*, SUN-SENTINEL (Fort Lauderdale, Fla.), Dec. 17, 1993, at 2C (describing Chavez's donation of $100,000 to buy Christmas toys and 2000 tickets for children).

[306] *See* Frauenheim, *supra* note 302, at D1.

[307] *See id.* (noting that Chavez trains naturally instead of using technology and sports medicine like "gringos").

[308] *See id.*

[309] *See* Clive Gammon, *Time to Hail Cesar!*, SPORTS ILLUSTRATED, Feb. 22, 1988, at 75.

[310] *See* Frauenheim, *supra* note 302, at D1.

[311] *See* Mark Kriegel, *Beauty and the Beast; Oscar De La Hoya Is a Golden Boy*, DAILY NEWS (N.Y.), Dec. 3, 1995, at 72 [hereinafter Kriegel, *Beauty and the Beast*].

[312] *See id.*

Hoya rose to national prominence when, brandishing both the Mexican and American flags, he won the gold medal in boxing at the 1992 Olympics in Barcelona.[313] The flag symbolism is telling. He keeps a one dollar food stamp in his wallet to remind himself of where he is from[314] and still listens to *ranchera* music. But De La Hoya also plays golf,[315] wants to be an architect when his boxing career is over,[316] and moved out of his East Los Angeles neighborhood to train in high-tech sumptuous style at his new home in Big Bear.[317]

The Los Angeles Latino-American boxing community is not happy with De La Hoya's mixed signals. When he appears in public, Latino-Americans often howl wicked cusses at him.[318] When De La Hoya made an appearance at his high school alma mater in 1996, some students threw rotten eggs toward his head in anger.[319]

The apparent hatred that some Latinos feel for De La Hoya is confusing for those Latino-Americans who identify strongly with him. To many, De La Hoya symbolizes the dream of Latino-American success, but to so many others, he represents inauthenticity and infidelity.[320] I wondered what caused this rift among Latino-Americans. After a while, I decided to do some investigating into that question.

Two weeks before the fight on June 7, 1996, I began visiting an East Los Angeles gym called L.A. Boxing to meet with a group of Latino-American fighters who all had strong opinions on the upcoming match as well as boxing in general. I hoped our discussions would give me a better grasp on the competing perceptions of Chavez and De La Hoya.

My first interview was with L.A. Boxing's floor manager, Frank Rivera. Rivera is a Mexican-American Los Angeles native with thick, dark hair and a tightly muscled frame. After rubbing

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[313] *See* Steve Springer, *De La Hoya Designs Life After Ring*, L.A. TIMES, Dec. 10, 1995, at C6.

[314] *See De La Hoya to Get $10 Million for Fight*, L.A. TIMES, Jan. 29, 1997, at C5.

[315] *See* Kriegel, *The Great Almost White Hope*, *supra* note 299, at 78.

[316] *See* Springer, *supra* note 313, at C6.

[317] *See De La Hoya to Get $10 Million for Fight*, *supra* note 313, at C5.

[318] *See* Springer, *supra* note 313, at C6.

[319] *See* Kriegel, *The Great Almost White Hope*, *supra* note 299, at 78.

[320] *See id.*

down one of his charges, Rivera sat down on a set of bleachers and gave me his take on the De La Hoya-Chavez rivalry. Much as I expected, he told me that De La Hoya, unlike Chavez, was not the hometown favorite; Rivera called Chavez a "national hero."[321]

"Chavez is an elite fighter, a national fighter from Mexico and Mexican fighters are known to be for business," he explained when describing Chavez's appeal.[322] "They don't talk much, go right for the body. 'I'll take it to you.'"[323] Rivera put his head down and mimed a right-hand body punch to illustrate. But when we got on the topic of De La Hoya, he put down his dukes and shrugged his shoulders dismissively. "Oscar's a golden boy. He came out of the Olympics with his flag and smile and beautiful robes."[324]

Sandwiched between Rivera's explanation of the local preference for Chavez over De La Hoya were small codes which revealed a particular inter-group tension. Chavez was a national hero and a national fighter, but what "national" meant at L.A. Boxing was Mexico, not the United States. Moreover, the jab about De La Hoya's beautiful robes was a cynical aside about De La Hoya's own assimilated ethnic identity. For a few years, De La Hoya strutted over the canvas wearing a fancy silk robe made of the spliced Mexican and American flags; the red, white and green shades flanking his left side and the old glory stars-and-stripes draping his right. However, this bow to biculturalism apparently was not well-received among Los Angeles Latino-Americans.[325] It seems that De La Hoya is not considered "authentic" enough or that at least as an assimilated Latino-American he pales in comparison with the undeniable brownness of Chavez.[326]

As Rivera kept talking, he relayed the ambivalent feelings that some Latino-Americans have about assimilation and the ways in which a strongly-felt Mexican identity forms even the subtler

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[321] Interview with Frank Rivera, Floor Manager of L.A. Boxing, in Los Angeles, Cal. (June 7, 1996).

[322] *Id.*

[323] *Id.*

[324] *Id.*

[325] *See* Kriegel, *Beauty and the Beast*, *supra* note 311, at 72.

[326] *See id.*

points of this subculture. When we moved on to the topic of boxing technique, he revealed that De La Hoya does not fight like an authentic "Mexican slugger" in the style of Roberto Duran or Chavez himself, who have been called "macho warrior[s]."[327] Instead Rivera insisted that De La Hoya has a "so-called American or classic style," which is defensive and "side-to-side or straight at you."[328] Furthermore, he took pains to inform me that De La Hoya's classic style was different than the black style of boxing, which is characterized by fancy dancing and "jiving."[329]

It seemed strange to me that Rivera would gauge another man's ethnic identity on the quality of his punch and that the cultural breakdown of styles hinted at what might otherwise seem to be dangerous stereotypes: the Mexican hothead, the cool American,[330] and the jiving African-American. However, the other fighters agreed with this assessment of fighting styles. Other contenders readily nodded when I relayed Rivera's description, and they further delineated the Mexican and American categories as those of "fighters" and "boxers." One seventeen-year-old contender named Juan Valdez from Zacatecas was familiar with the breakdown. "You can tell a boxer from a fighter," he told me when I caught him after a set. "A lot of guys from Mexico, they start getting cuts. They'll take three punches off you so they can hit you once. They don't care."[331]

"What about De La Hoya?" I asked him.

Valdez shook his head, as though the answer were plainly obvious. "Mexican guys have a lot of heart," he said. "But Oscar. Oscar's like a little girl."[332]

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[327] *See* Alan Goldstein, *Will Pride Take a Fall?*, BALT. SUN, June 7, 1996, at 10D (stating that both Chavez and Duran are macho warriors).

[328] Interview with Frank Rivera, *supra* note 321.

[329] *See generally* Kriegel, *The Great Almost White Hope*, *supra* note 299, at 78 (stating that De La Hoya's boxing style lacks certain macho characteristics).

[330] *See, e.g.*, Michael Katz, *Old Legends Hard to Beat*, DAILY NEWS (N.Y.), June 7, 1996, at 85. (citing three keys to Chavez winning: "Make him mad, Julio, make him Mexican, make him macho. By means fair or foul, get De La Hoya into a brawl"); Lyle Spencer, *Oscar Leaves Chavez Crowd and Era Behind*, PRESS-ENTERPRISE (Riverside, Cal.), June 6, 1996, at C01 (describing De La Hoya as cool, calculating, and resourceful).

[331] Interview with Juan Valdez, fighter, L.A. Boxing, in Los Angeles, Cal. (June 7, 1996).

[332] *Id.*

When asking welterweights careful questions about Mexican identity in between their bouts of battering each other in the ring, I began to realize that issues of gender and sexual orientation in the boxing world intertwine with those of ethnic and racial identity. For example, De La Hoya has assimilated aggressively. He allows himself to be marketed to the white community and he moved out of his old neighborhood to a richer, whiter enclave.[333] But that assimilation has cost him his membership in the *muy macho* Latino boxing community. These boxers' reaction has been to de-race him, resulting in De La Hoya's configuration as a cool American-style boxer, and also to feminize him, thus positioning him at the very bottom of the cultural hierarchy.[334] Consequently, he is a "little girl" and even "less" than that. De La Hoya is also widely known as a "pretty boy,"[335] a moniker with homophobic as well as sexist baggage, because of his handsome good looks and the effectiveness of his defensive maneuvers at keeping him that way, despite his proven ability to uglify his opponents with the alacrity and bloodthirstiness of a brute.[336]

In addition to their commentary on gender politics, the fighters predicted that there might be violence during or after the match. The fighters and one promoter I spoke to said there would be trouble, brawls, and streetfighting if De La Hoya earned the title. They warned me that I might be in danger if I saw the fight in a public location.

The rumors of riots seemed to be an expression of furious, even violent, political dissension, especially considering the King riots of 1992, the protest marches surrounding passage of Proposition 187,[337] the advent of Californian English-only

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[333] *See* Kriegel, *Beauty and the Beast*, *supra* note 311, at 72. Additionally, several times at L.A. Boxing I heard fighters complain that De La Hoya is a "made commodity" and that he "fights for Anglos." Many in the Latino community shared these sentiments. *See id.* at 78 (stating that De La Hoya is criticized by Latino community as being aspiring white boy and sell out).

[334] *See, e.g.*, Ilan Stavans, *The Latin Phallus*, *in* MUY MACHO 154 (Ray Gonzales ed., 1996) (stating that Hispanics have extremely low opinion of homosexuals and analogize homosexuals to mentally ill).

[335] *See* Tom Friend, *For Whitaker, Rejuvenation Is Worth the Fight*, N.Y. TIMES, Apr. 6, 1997, at 1; Greg Logan, *Each May Fight Each Other's Game*, NEWSDAY, Apr. 12, 1997, at A32.

[336] *See* Kriegel, *The Great Almost White Hope*, *supra* note 299, at 78.

[337] *See* Bob Pool, *Immigration Protest Ends in Scuffle Again*, L.A. TIMES, Aug. 11, 1996, at

ideology,[338] and the 1996 beating of undocumented immigrants by Riverside police officers in Los Angeles County.[339] Nevertheless, on the day of the fight, the only real riot was in the ring. Even though the Latino-American crowd's fervor smacked of violence, interestingly, its response to the two fighters battling it out for the title also had a vague resemblance to a referendum, although not to any referendum of which U.S. legal culture has ever taken witness.

There is a Mexican-American tradition of "raising the flag" in times of political and cultural crisis,[340] and the crowd's preference for Chavez over Da La Hoya was rife with flag raising imagery, both explicit and implicit. The fight, held in Las Vegas, was telecast around Los Angeles and I watched it in the Los Angeles Memorial Sports Arena, along with 16,000 other Southern California Latinos. Throughout the evening, I was continually reminded of the factors that contribute to Latino alienation in this country. Although I conducted no sociological study and cannot otherwise formally prove the causes of the reactions that I witnessed at the Sports Arena that night, I am convinced that the charged atmosphere was formed by a combination of the factors that this Article discusses. These include Latinos' anger and ambivalence fostered by divisive English-only laws and an immigration policy that estrange Latino-Americans from a sense that they, too, fully belong in the United States.

That night the Sports Arena was milling with Latinos and Latino-Americans. While waiting in line for a hot dog after buying my ticket, I saw red-haired *cholas* wearing baby T-shirts, black baggies and workboots; homeboys with shaved heads and pirate earrings; a maddogging *vato* wearing a gold necklace pendant in the shape of an Uzi; and gauchos wearing ten-gallon hats, gold chains, and Wrangler jeans. The smell of beer was everywhere and I heard the sounds of Spanish: the South Central clip, the Mexico City lilt, and the easy music of half-and-half Spanglish all

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[338] *See supra* notes 279-281 and accompanying text (discussing political movement in California to require voting ballots to be issued only in English).

[339] *See* Adam Pertman, *Police Beating of Immigrants Spurs Uproar, Investigations*, BOSTON GLOBE, Apr. 3, 1996, at 1.

[340] Interview with Professor Pierrette Hondagneu-Sotelo, Professor of Sociology at the University of Southern California, in Los Angeles, Cal. (May 14, 1996).

rising over the blare of the broadcast. Periodic images of the main event fighters flashed across the screen in between the pre-fight matches of the super flyweights and the heavyweights. The crowd screamed and waved when they saw a picture of Chavez and booed wildly whenever De La Hoya appeared.

"Why don't people like him?" I asked the woman sitting next to me after I noticed she was wearing a black and red "J.C. Chavez Fan Club" T-shirt.

She looked up at the screen thoughtfully for a second before answering. "People are upset at De La Hoya," she answered, shrugging. "When he moved to Big Bear, he abandoned East L.A. He abandoned his own people."[341]

When I later asked her where she was from, she looked at me straight on, almost defensively. "Here," she said, pointing to the ground. "The United States."[342]

The entire crowd, it seemed, agreed with her assessment of De La Hoya's betrayal. The mix of howls and cheers was almost deafening when De La Hoya, dressed in his flag-spliced robe and doing a thousand-yard stare, and Chavez, bouncing and nodding to his fans, finally made it up to the ring.

Both national anthems were played. When the Mexican anthem sounded over the arena, the entire crowd rose to its feet and sang along with Chavez, whose lips could be seen moving on the screen. When the American anthem came on, many people booed and gave the thumbs-down sign, while a few *Americano* die-hards yelled out the lyrics in protest. De La Hoya did not mouth any words. At this point, I was shifting around uncomfortably because I respond favorably to the American anthem, and the booing indictment of America hit too close to home. But at the end of the song, I was struck by the fact that everyone began cheering. Perhaps the cheers were because the fight was about to begin, or perhaps they were because of the ambiguity that the crowd felt about this country. I couldn't tell.

The arena then grew almost quiet while both fighters disrobed and the referee recounted the rules of the match; but when the fighters ran out from their corners and began jab-

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[341] Interview with attendee at simulcast of Chavez-De La Hoya fight, in Los Angeles, Cal. (June 7, 1996).

[342] *Id.*

dancing around each other, the place went wild. De La Hoya threw the first punch — a sharp, fast stick right for the face. Although Chavez began bleeding from an old wound almost immediately, the crowd chanted his name so loudly that I could feel my eardrums vibrate. I looked around and saw the Mexican flag everywhere: huge, oversized green, red, and white squares of cloth draped over bodies and waving in the air, twisting around hands and hanging from the rows.

All that cheering didn't help Chavez, though. De La Hoya looked great — lean, strong, and quick. His American boxing style guided the entire fight as he kept Chavez at bay and surgically made his moves.

The next three rounds were bloody and one-sided. The old wound on Chavez's brow kept getting pummeled. Blood poured out of the cut, blinding his left eye, streaming down his cheek, dotting his chest and his belly, and even smearing his white trunks. Then, two minutes and thirty-seven seconds into the fourth round, the referee stopped the fight. Chavez had bled too much. It was not until I saw De La Hoya's bright face beaming out to the camera that I understood that it was over. People started getting up; not a crowd anymore, just a series of folks folding up their flags, throwing away their trash, and filing out with slightly bent shoulders and raised eyebrows. The few De La Hoya fans were suddenly visible, standing up straight and looking up at the TV. When De La Hoya got on for his interview, they started laughing and high-fiving like they had just won something themselves. I was fairly ecstatic myself.

There was no riot. There was no trouble. Except for a man walking by me and yelling out expletives deriding De La Hoya and a long-haired *rubia* cussing a blue streak to her friend, everyone I saw on the way back to my car was peaceful yet disappointed and trying to get home. I was moving briskly down the sidewalk and trying not to show my glee, but the longer I walked alongside the crowd and watched the resigned looks on people's faces, the heavier and sadder I began to feel. De La Hoya, I had thought, was the underdog; he's got the hyphen; his hometown hates him; he was David taking on the big Goliath. Now, though, I realized that Chavez was always the real underdog: that with his Old World style and aging body, the

man never had a chance, and despite all the bluffy big talk of the Latino boxing community, everyone there knew that too.

When a group of us hit a stoplight and waited for the crosstraffic to pass, people kept their eyes to the ground and no one talked.

"Don't forget Chavez!" a man behind me said in a little voice, and a couple folks laughed in agreement, but mostly everyone seemed tired and suddenly quiet.

And it was right then, when I heard how silent it was, that I began to wish for the first time that the old man had won.

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This story is instructive on two levels. First, it illuminates aspects of the Latino-American identity struggle that the stated goals and surrounding rhetoric of immigration and English-only laws render invisible. Those goals and rhetoric designate Latino-Americans as invaders and community destroyers. Although many, if not all, Latino-Americans share the desire to repel invaders and create community, the struggle is made doubly difficult by the facts that they are, or are close enough to, the popular invading enemy, and that their community is not one that the majority values.

This leads to an extremely complicated identity process, which is, on some levels, explained by the phenomenon of double-consciousness, discussed by W.E. Dubois when he described the African-American experience. "It is a peculiar sensation," Du Bois writes,

> this double-consciousness, this sense of always looking at one's self through the eyes of others, of measuring one's soul by the tape of a world that looks on in amused contempt and pity. One ever feels his two-ness, an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength keeps it from being torn asunder.[343]

Many Latino-Americans share this sense of "two-ness," and their reaction is to solder together the two sides into one whole. The first order of business for Latino-Americans is to choose with

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[343] W.E.B. DUBOIS, THE SOULS OF BLACK FOLKS 3 (1940).

which side of the hyphen to identify and to make sure that their choice is indisputably clear.

The De La Hoya story fleshes this out in sometimes painful detail. The state stigmatizes Latino people and the Spanish language through its rhetoric, policies, and actions. The government portrays Latinos as a drain on the system; congenitally lazy but hard-working when seeking American jobs; speakers of a useless language; dangerous and meek at the same time; a scourge of cowardly scavengers who invade home territory and need to be trapped and sent back.

So who would not prefer Chavez, who represents nothing less than Mexico itself and its beloved tongue? Who would not love his take-no-prisoners fighting style? Or admire his refusal to learn English? Chavez is both an embodiment of all that folks fear in Mexicans — a dangerous thug who speaks in code and can buy and sell us ten times over — and a simultaneous rehabilitation of that image. He is a role model of Latino-American dignity and pride, as an in-your-face Mexican brother who knows how to take a punch.

But there is more to the Chavez versus De La Hoya story than the canonization of a Mexican idol. There is something worse at work here. His valorization has a tricky concomitant: the rejection of De La Hoya and his representation of successful Latino-American assimilation. The United States plays a dangerous game when it dirties the Latino-American image because the resulting response of some Latino-Americans is a parallel one — the rejection of that which rejects Latino-Americans. This is the core of the crisis of citizenship. Thus, assimilation becomes an evil to be avoided, and defectors are traitors to the race. This leads to a strained relationship between Latino-Americans and their home country, brought home by Frank Rivera and his jab about De La Hoya's spliced robes and demonstrated to me in deafening terms at the Sports Arena when I heard thousands of Latinos booing the American anthem.

An additional danger lies in this rejection as well because the crisis of citizenship does not just injure the relationship between Latino-Americans and the sovereign; it also warps inter-group dynamics. Latino-Americans emphatically reject Anglo values when they identify a core Latino identity and then mandate its constant reinforcement. Those who suffer from a crisis of citi-

zenship may need such markers for stability and even self-esteem, but the maintenance of a clear and visible Mexican identity comes at the cost of that identity's intrinsically fluid, changing, and dynamic nature. Again, the De La Hoya story demonstrates this. I can remember no other situation where I encountered so much dogma about what it meant to be Latino-American. The wisdom was that Latino men are aggressive and macho while Latinas are soft, smiling, and passive. Latinos who act or fight in a non-Latino way are white, a potential slur, girls, a definite slur, or gay, an even worse slur. In an attempt to grab hold of Mexican identity and keep it safe in the face of xenophobia and racism, the Latino-American community faces a new, and different dilemma: it risks recycling ethnic, gender, and sexual orientation stereotypes. In the end, Latino-Americans may simply wind up reinforcing the cycle of exclusion.

The majority does not recognize this struggle for identity. Yet, the realization that what one sees in the mirror has been identified as an enemy triggers a fight for self. As James Baldwin so beautifully said:

> It comes as a great shock . . . to discover that the flag to which you have pledged allegiance . . . has not pledged allegiance to you. It comes as a great shock to see Gary Cooper killing off the Indians and, although you are rooting for Gary Cooper, that the Indians are you.[344]

The narrative is jurisprudentially instructive for a second reason. Latino-Americans' potential crisis of citizenship may erode the state's authority over them and, thus, decrease the power of the law. The relationship between the individual and the state is one based on faith: faith that the state will do right by Latino-Americans the same way that Latino-Americans expect to do right by it. As phrased by H.L.A. Hart, the "internal point of view" is the optimal state of the law, where individuals believe that conformance with the rules set forth by the state is the "right" or "morally good" thing to do.[345]

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[344] *See* James Baldwin, Speech at Cambridge Union Society of Cambridge University During a Debate with William F. Buckley, Jr. (Feb. 16, 1965), N.Y. TIMES MAGAZINE, Mar 7, 1965, at 32.

[345] *See* H.L.A. HART, THE CONCEPT OF LAW 88, 98-100 (1961).

The crisis of citizenship frustrates this internal point of view; if Latino-Americans lose faith that the state is acting in their interests, then they are less likely to believe that the state's rules are right. Consequently, Latino-Americans may be less inclined to follow the rules from a sense of duty and instead comply merely as a way of avoiding criminal sanctions. As Hart puts it, those with the "external point of view" "treat[] the [law] merely as a natural sign that people will behave in certain ways, as clouds are a sign that rain will come."[346] In this manner, those with the external point of view "will miss out [on] a whole dimension of the social life" that the internal view provides.

The worst case scenario evoked by the crisis of citizenship is that stigmatizing state acts could so alienate some Latino-Americans from their sense of belonging that they could be transformed into Oliver Wendell Holmes's "bad man." The bad man "cares only for the material consequences which . . . knowledge enables him to predict, not as a good [man], who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience."[347] The twist in the case of Latino-Americans, however, is not that they would become psychotically utilitarian, but that they would find the social compact with the state to be an insufficient "reason[] for [their] conduct," and would reject the system that rejects them.

Put simply, if the state characterizes certain strains of Latino-American identity as inferior, or even "illegal," how will Latino-Americans regard the state's authority over them? Possibly, they will regard it as an outlaw would. Consider for example, the assessments of Oscar Zeta Ocosta, who powerfully describes the rage and alienation that some Latino-Americans feel: "I have never, to this day, had any respect for [the American] flag or that country," he writes. "You can blame it on my childhood experiences. Politics has nothing to do with it. I have no ideology. I've been an outlaw out of practical necessity ever since. And I have never backed off from a fight."[348] Although some will attribute this hostility to a mental or character flaw of Latino-

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[346] *Id.* at 87-88.

[347] *See* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

[348] *See* Oscar Zeta Ocosta, *The Autobiography of a Brown Buffalo*, *in* GROWING UP LATINO: MEMOIRS AND STORIES 193, 199 (Harold Augenbraum & Ivan Stavans eds., 1993).

Americans like Ocosta, one may also explain it as a natural by-product of stigmatizing policies. Accordingly, we should create a jurisprudence that will redress these ills. It is to these matters that this Article now turns.

IV. GETTING PRESCRIPTIVE

The critical issue arising from all this narrative description is how to redress the Latino-American identity dilemma. This Article advocates a jurisprudence that takes into account the experiences of Latino-Americans and a concomitant effort to impress the lessons of Latino-American life upon the case law.

A jurisprudential model that reflects the tensions previously described must recognize Latino-Americans' bordered identity. Procrustean categories which inartfully and inadequately label Latino-Americans as a Hispanic ethnicity or race do little to reflect bordered identity.[349] Furthermore, exercises of state power that insult, devalue, and stigmatize Latino-Americans because of their alien or language status place an intense pressure on Latino-Americans to reject one part or another of their identities and may even shame Latino-Americans out of their sense of shared citizenship. Latino-Americans, who witness de-humanizing border enforcement practices[350] and culturally humiliating raid policies,[351] who are pressured not to speak Spanish in public space,[352] and who learn that their ethnic *compadres* are being deprived of what appear to be critical rights,[353] simply cannot feel like they belong in the way that "real" citizens are supposed to belong. As Kenneth Karst points out, belonging is a core part of citizenhood.[354]

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[349] *See supra* notes 16-65 and accompanying text (discussing lack of legal definition of "Latino-American" and resulting difficulty in forming Latino-American identity).

[350] *See supra* notes 94-96 and accompanying text (describing Otay Mesa ditch and Tortilla Curtain).

[351] *See supra* note 153 and accompanying text (discussing INS raid at Mexican Independence Day celebration).

[352] *See* Coates, *supra* note 255, at C6.

[353] *See* Duncan v. Louisiana, 391 U.S. 145, 156-58 (1968) (stating that jury trial is fundamental right of individual charged with serious criminal offenses).

[354] *See* Kenneth Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 248 (1983) (describing different values associated with citizenship, including respect, participation in moral community, and responsibility to community). *See generally* KENNETH KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION (1989) (stating belonging is basic

The recognition of Latino-American bordered identity suggests different normative implications. In particular, there are three areas where change may address the needs of Latino-Americans and, perhaps, other bordered people as well: legal categories, immigration law and policy, and language law.

A. Legal categories

Our current insistence on categorizing Latino-Americans as Hispanics, who are a race or an ethnicity, clumsily and inaccurately describes Latino-Americans and inevitably excludes some members of that group.[355] However, answering the current labeling problem with a new and different brand name will not necessarily solve the problem. Although a review of literature on this subject indicates that many people of Latino-American descent favor the term "Latino,"[356] Latino-Americans widely disagree on the proper appellation.[357] To the extent that lawmakers insist on narrowly defining the class and always referring to Latino-Americans as a particular race, they risk alienating different types of Latinos, such as black Latinos. The law also risks alienating other Latino-Americans if it insists on referring to Latino-Americans as an ethnicity, thereby ignoring their non-white status.[358]

The solution to this dilemma may not actually be that different from current practice, although it does demand more thought. Today's anti-discrimination jurisprudence responds to the red flags of racial and ethnic classifications.[359] The Latino-

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human necessity); Kenneth Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 337 (1993) (discussing gains cultural minorities realize upon obtaining citizenship).

[355] *See supra* notes 19, 29, 30 and accompanying text (describing court opinions dealing with difficulty of classifying Latino-Americans).

[356] *See* Del Olmo, *supra* note 35, at D2; *see also* Toro, *supra* note 35, at 1224 (indicating that "Latino" may be preferred term but in terms of legal categories, solutions eliminate superclassifications like "Hispanic," "Latinos," or "Asian/Pacific Islander," not replacing them with other superclassifications).

[357] *See supra* notes 12-34 and accompanying text (discussing various attempts among Latino groups to determine identity).

[358] *See supra* note 35 and accompanying text (noting that designation of "Hispanic" as ethnic group ignores social reality that Latinos are generally perceived as non-white).

[359] *See* Fullilove v. Klutznick, 448 U.S. 448, 491 (1980); *see also* University of California v. Bakke, 438 U.S. 265, 290 (1978) (applying stringent examination of racial and ethnic classifications).

American experience challenges these distinct categories and the ensuing confusion is apparent in the case law.[360] The confusion stems from the shifting status of Latino-American identity. An individual may perceive the term "Latino-American" as either a racial or ethnic designation, or both. The legal categorization of Latino-Americans could benefit from this insight. If courts addressing discrimination against Latino-Americans took a cue from the flexible approach of the EEOC and focused on the perceptions of the complainant,[361] they would more accurately describe the equal protection or other anti-discrimination issues before them.

This type of investigation would help courts accurately and respectfully name Latino-American identity, thereby more fully including Latino-Americans within the state's commitment to anti-discrimination. Moreover, the focus on the complainants' perceptions would not necessarily be merely semantic. Discrimination based on race and ethnicity may substantively mean two different things. For example, racial discrimination against Latino-Americans may mean discriminatory reactions to Latino-Americans who have Mestizo or Afro-Latino features. On the other hand, ethnic discrimination may mean discriminatory reactions to evidence of Latino-American culture, including language, accent, behavior, and clothing. Courts have been blind to these distinctions because they are blind to the different strands of Latino-American identity. Addressing these issues will help clarify how discrimination based on language, accent, dress, and manner are cognizable claims of ethnic discrimination.[362]

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[360] *See supra* notes 29-30 and accompanying text (discussing cases dealing with either race or ethnic standard to classify Latino-Americans).

[361] *See supra* note 26-28 and accompanying text (describing EEOC's expansive approach to defining race).

[362] *See, e.g.*, United States v. Taylor, 92 F.3d 1313, 1330 (2d Cir. 1996) (holding evidence of prosecutor striking juror from panel because of perceived "Hispanic accent" did not violate equal protection); *see also, e.g.*, Hernandez v. New York, 500 U.S. 352, 361 (1991) (stating that disproportionate impact is not enough to make prosecutor's action per se violation of Equal Protection Clause); *supra* note 246 (describing other cases where language discrimination is not equal to ethnicity discrimination).

B. Immigration Law and Policy

As discussed above, Latino-Americans may become alienated and ostracized from the American collective because of insensitive deportations, dehumanizing rhetoric, and the denial of critical rights to undocumented people.[363] Nevertheless, an examination of current doctrine reveals little support for a mandatory immigration policy that would not stigmatize Latino-Americans.

Despite the apparent lack of support, there may be a solid doctrinal argument for immigration reform in the context of the INS's selection method. As already noted, the INS heavily contributes to a Latino-American crisis of citizenship when its agents select individuals for questioning based at least in part on their Latino-American physical appearance. In so doing, the agents reinforce the message that Latino-Americans are presumptively outsiders in U.S. society.[364] Courts have stated that race-based selection for questioning is a violation of the Fourth Amendment and of the Equal Protection clause.[365] However, the real impediment in this area is the courts' narrow construction of seizure for Fourth Amendment purposes and the requirement of explicit evidence of impermissible animus.[366] Currently, the

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[363] *See* Coates, *supra* note 255, at C6.

[364] *See supra* notes 148-51 and accompanying text (describing INS agents' use of physical appearance common to Latino-Americans to selectively interrogate persons when conducting raids). The Supreme Court has held that searches and seizures solely premised on Latino appearance violate the Fourth Amendment. *See* United States v. Brignoni-Ponce, 422 U.S. 873, 885-86 (1975). However, the Court has held that many police investigation techniques fall outside the scope of the Amendment. *See* INS v. Delgado, 466 U.S. 210, 215-16 (1984); United States v. Martinez-Fuerte, 428 U.S. 543, 555 (1976); *see also* Robert Alan Culp, *The Immigration and Naturalization Service and Racially Motivated Questioning: Does Equal Protection Pick Up Where the Fourth Amendment Left Off?*, 86 COLUM. L. REV. 800, 802 (1986) (reviewing Supreme Court cases involving issues of racially motivated Fourth Amendment violations).

[365] *See Brignoni-Ponce*, 422 U.S. at 885-86; Benitez-Mendez v. INS, 760 F.2d 907, 909 (9th Cir. 1985) (holding that where INS agents detained field workers, in spite of inability to articulate facts supporting reasonable suspicion that worker was illegally in country, violated Fourth Amendment); *see also* United States v. Taylor, 956 F.2d 572, 578-79 (6th Cir. 1992) (suggesting that DEA agents who surveil individuals based on race violate due process and equal protection); International Molders' and Allied Workers' Local Union No. 164 v. Nelson, 643 F. Supp. 884, 902 (N.D. Cal. 1986), *modified*, 799 F.2d 547 (9th Cir. 1986) (holding Equal Protection violation may occur where INS and border patrol agents use Hispanic appearance as factor in selecting whom to question).

[366] *See Delgado*, 466 U.S. at 232-39 (stating that non-detentive interrogations at factories

INS's mere questioning of suspects will not give rise to a Fourth Amendment claim on the ground that suspects would not reasonably feel detained.[367] Reforms in this area, which the realities of bordered identity should influence, would require that courts expand their definition of seizure to look beyond whether agents verbally threaten suspects, display force,[368] or obstruct passageways[369] and instead recognize the long and troubled history of INS agents' questioning of "Latino-looking" people.[370] To some Latinos, a mere conversation with an INS agent, especially in the classic raid context of the workplace, may create anxiety and fear, thus eliminating the Latino-American suspect's feeling that he is free to leave.[371] Furthermore,

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do not have to be accompanied by reasonable articulable suspicion and that where armed and uniformed agents were stationed at exits as other agents questioned workers, there was no seizure); Gonzalez v. City of Peoria, 722 F.2d 468, 480 (9th Cir. 1983) (holding that disproportionate impact of police enforcement policies does not establish violation of Equal Protection Clause; plaintiffs must prove either explicit or implicit intent to discriminate); *International Molders'*, 643 F. Supp. at 902 (discussing use of Hispanic appearance as one factor in selecting who to detain as acceptable so long as not excluding other factors or basing selection on hunches rather than articulable suspicion of alienage).

[367] *See Delgado*, 466 U.S. at 216; Florida v. Bostick, 501 U.S. 429, 436 (1991) (finding that questioning on bus is not seizure). *But see* United States v. Wison, 953 F.2d 116, 123 (4th Cir. 1991) (stating that persistent questioning converted mere questioning into seizure).

[368] *See, e.g., Delgado*, 466 U.S. at 228 (enumerating relevant factors used in determining whether seizure has occurred: surrounding circumstances, including threatening presence of several officers, display of weapon by officer, physical touching, or use of language or tone indicating that compliance with officer's demand is compelled); United States v. Mendenhall, 446 U.S. 544, 554 (1980); United States v. Grant, 920 F.2d 376, 382 (6th Cir. 1990) (stating that agent's behavior and physical touching indicated seizure occurred); United States v. Clardy, 819 F.2d 670, 672 (6th Cir. 1987) (discussing detention where agent required suspect to lay spread-eagle); *International Molders'*, 643 F. Supp. at 901 (describing case where agents detained individual and told her she was "obstructing justice" prior to hour-long interrogation).

[369] *See Delgado*, 466 U.S. at 218; United States v. Carrasquillo, 877 F.2d 73, 76 (D.C. Cir. 1989) (stating that officers who approached defendant on train and asked him questions did not seize him because he was free to leave or refuse to answer questions); United States v. Hammock, 860 F.2d 390, 393 (11th Cir. 1988) (finding no Fourth Amendment violation where police officers entered bus and asked defendant questions because defendant's path to bus's exit was not obstructed nor did police act in threatening manner); Pearl Meadows Mushroom Farm, Inc. v. Nelson, 723 F. Supp. 432, 448 (N.D. Cal. 1989) (involving seizure where officials required workers to stay put, and one official grabbed worker when worker tried to leave room).

[370] *See Delgado*, 466 U.S. at 212 (describing INS agents use of intimidating questions directed at factory workers).

[371] *See* United States v. Mendenhall, 446 U.S. 544, 544 (1980) (noting that mere

lawmakers could reform the Equal Protection jurisprudence's heavy burden to show illegal animus. At least one scholar has suggested shifting to a test that permits inferences based on agents' demonstrated predilections to target Latino-Americans, instead of requiring agents to confess that they harbor illegal animus.[372] Such a shift would be a great relief for Latino-Americans since it would recognize the reality that many Latino-Americans perceive[373] and reduce some of the strain on their hyphenated identity.

However, there is no apparent doctrinal support for curbing the state's authority to raid in the first place, limiting its choice of place or time to raid or otherwise forcing it to conform to any standard of civility in its regulation of the border. The state's essentially unmitigated power to regulate its borders is considered central to statehood itself. As the Supreme Court asserted in *Harisiades v. Shaughnessy*,[374] "That aliens remain vulnerable to expulsion after long residence is a practice that bristles with severities. But it is a weapon of defense . . . inherent in every sovereign state. Such is the traditional power of the Nation over the alien and we leave the law on the subject as we find it."[375]

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conversation with federal agents may cause some to feel they are not free to leave).

[372] *See* Culp, *supra* note 364, at 811 (stating that there is little doubt that INS officers often rely on Hispanic appearance when targeting suspects).

[373] *See, e.g., Delgado*, 466 U.S. at 233 (commenting that INS agents contend that they do not selectively question persons on basis of any reasonable suspicion about alienage); *International Molders'*, 643 F. Supp. at 902 (indicating that record is full of evidence that agents see Hispanic appearance as primary factor in determining which individuals to question).

[374] 342 U.S. 580 (1951).

[375] *Id.* at 587-88; *see also* Pyler v. Doe, 457 U.S. 202, 225 (1982) (noting inherent power of sovereign to close borders); Faddoul v. INS, 37 F.3d 185, 189 (5th Cir. 1994) (noting that nation's right to control border access is central to sovereignty); Catholic Social Services, Inc. v. Meese, 813 F.2d 1500, 1504 (9th Cir. 1987) (stating that national sovereignty depends on controlling borders), *vacated on other grounds*, 820 F.2d 289, 289 (9th Cir. 1987).

The depth of this power also apparently includes the power to restrict benefits to legal aliens. Consider, for example, the recently-enacted Personal Responsibility Act of 1995, which denies cash welfare benefits, food stamps and Medicaid to legal immigrants. *See* Robert Pear, *Clinton Objects to Key Elements of Welfare Bill*, N.Y. TIMES, Mar. 26, 1995, at A1. There have been some assertions that the Act is unconstitutional. *See* Ed Pastor, Chairman, House Hispanic Caucus, *Anti-Immigrant Initiatives Unconstitutional*, CONGRESSIONAL PRESS RELEASE, Mar. 30, 1995.

Moreover, there is no real constitutional pressure to change our laws concerning the detention of excluded immigrants such as Barrera-Echavarria.[376] Lower courts overwhelmingly support the INS's permission to indefinitely detain excluded immigrants.[377] A transformation of this law on constitutional

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One potential limitation to this seemingly boundless authority is states' ability to appropriate the federal immigration function. Proposition 187, the infamous California initiative voted into law in 1996, requires state police, social workers, educators, and health professionals to report suspected undocumented people to the INS in an effort to deny public benefits to illegal immigrants and to facilitate the reporting of undocumented people. In a recent development, however, the Federal District Court found Proposition 187 unconstitutional. *See* Patrick J. McDonnell, *Prop. 187 Found Unconstitutional; Law: Decision Means Anti-Illegal Immigration Measure Won't Be Implemented, Barring Appeal. But Initiative's Supporters Condemn Outcome, Plan Plea to Higher Court.* L.A. TIMES, Nov. 15, 1997, at A1.

One side note should be made here. This Article's thesis seems to point in the direction of a call for open borders. At one point the United States did have a relatively open immigration policy. *See* Peter H. Schuck, *The Transformation of Immigration Law (1776-1875)*, 84 COLUM. L. REV. 1, 7 (1984); Dave McCurdy, *The Future of U.S. Immigration Law*, 20 J. LEGIS. 3, 4 (1994). *But see* Gerald L. Neuman, *The Lost Century of American Immigration Law* 93 COLUM. L. REV. 1833, 1883 (1993) (discussing state laws that sought to repel or punish immigrants). Further, some modern scholars have advocated an open-border policy. *See, e.g.*, R. George Wright, *Federal Immigration Law and the Case for Open Entry*, 27 LOY. L.A. L. REV. 1265, 1297 (1994) (suggesting that open-border policy could benefit American society). However, this Article's prescriptions do not go that far; it is pragmatic. Many citizens may balk at highly restrictive immigration policies. *See, e.g.*, Kevin R. Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement*, 1993 B.Y.U. L. REV. 1139, 1148 (1993) (predicting that restrictionist policies will lose support given nation's democratic ideals). Nevertheless, no majority support for an open border policy appears to exist and, indeed, an immigrant's rights advocate risks losing her audience when she begins touting the benefits of open borders. *See id.* at 1147-48 n.28 (citing study suggesting that proposal to open borders will face significant hostility); *see also* Linda S. Bosniak, *Opposing Prop. 187: Undocumented Immigrants and the National Imagination*, 28 CONN. L. REV. 555, 571 (1996) (stating that advocates of immigrant rights attempt to avoid being accused of favoring "open borders" so as to participate in political debate).

[376] *See Developments in the Law, supra* note 68, at 1300-01 (noting resistance to allowing aliens to own property); Johnson, *Public Benefits and Immigration, supra* note 65, at 1544 (discussing attitudes towards new immigrants); Monterroso, *supra* note 104, at 47 (discussing treatment of those labeled "illegal" or "alien"); Pool, *supra* note 337, at B1 (voting to make California English-only state).

[377] *See* Gisbert v. U.S. Attorney General, 988 F.2d 1437, 1446 (5th Cir. 1993) (finding implicit authority for Attorney General to detain excluded aliens); Fernandez-Roque v. Smith, 734 F.2d 576, 580 n.6 (11th Cir. 1984); Palma v. Verdeyen, 676 F.2d 100, 104 (4th Cir. 1982) (stating that Congress has not expressly denied Attorney General's authority to detain excluded alien indefinitely); *see also* Reno v. Flores, 507 U.S. 292, 303 (1993) (permitting pretrial detention of alien juveniles pending deportation hearing); Alvarez-Mendez v. Stock, 941 F.2d 956, 963 (9th Cir. 1991) (finding indefinite detention permitted

grounds would probably require a sea change of social consciousness that demands different answers to such basic questions as: Will we value the lives of aliens? Is indefinite detention fundamentally unfair? Is detentive incarceration punishment?[378]

Nevertheless, other dilemmas remain for Latino-Americans that nonlegal avenues may redress. Dehumanizing political rhetoric used by state actors and so-called patriots[379] in addition to stigmatizing state action, such as insensitively timed raids[380] or absurdist border-enforcement methods, are just a few examples.[381] Although these acts and words are not illegal, they appear to violate voluntary standards of political morality, which require that political debators "argue in terms that are 'accessible' to all citizens"[382] and refrain from asserting that

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where immediate exclusion not practical); Justiz-Cepero v. INS, 882 F. Supp. 1582, 1584 (D. Kan. 1995) (stating that it is generally accepted theory that Attorney General has authority to detain indefinitely excludable aliens not immediately deportable); Rodriguez v. Thornburgh, 831 F. Supp. 810, 812 (D. Kan. 1993) (finding that Congress contemplated extended detentions of excludable aliens); In re Mariel Cuban, 822 F. Supp. 192, 196 (M.D. Pa. 1993) (stating that there is no statutory limit to length of time for excludable alien detentions). *But see* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1387 (10th Cir. 1981) (stating that federal courts consistently held deportable aliens in custody for more than few months must be released).

[378] Some courts have answered these questions differently than the majority of the circuits. *See, e.g.*, Barrera-Echavarria v. Rison, 21 F.3d 314, 319 (9th Cir. 1994) (finding that indefinite, administrative imprisoning of persons is intolerable), *rev'd*, 44 F.3d 1441 (9th Cir. 1995)(en banc); *Rodriguez-Fernandez*, 654 F.2d at 1387 '(holding that "Certainly imprisonment in a federal prison of one who has been neither charged nor convicted of a criminal offense is a deprivation of liberty in violation of the Fifth Amendment, except for the fiction applied to these cases that detention is only a continuation of the exclusion. This euphemistic fiction was created to accommodate the necessary detention of excludable and deportable aliens while their cases are considered and arrangements for expulsion are made."); *see also* Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Live of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 1004 (1995) (suggesting that Due Process Clause should protect all people at or within our border, even those detained by government).

[379] *See supra* note 97 and accompanying text (noting statements of politicians dehumanizing Latino-Americans).

[380] *See supra* note 153 and accompanying text (stating that INS has conducted raids at culturally provocative times, such as during Mexican Independence festivals).

[381] *See supra* notes 94-133 and accompanying text (discussing United States government's erection of ten-foot chainlink fence and abandoned proposal of ditch to fortify borders).

[382] *See* Kurt Lash, *Voluntary Restraint and the Wormhole Effect*, 29 LOY. L.A. L. REV. 1401, 1402 (1996) (discussing political morality in context of religious political speech).

certain individuals are "intrinsically superior to one or more [] fellow citizens."[383]

These restraints are described by John Rawls as the rule of "public reason," which requires public inquiry to demonstrate "respect for the precepts governing reasonable political decision."[384] It also requires that citizens and public officials be bound by a "duty of civility . . . when they engage in political advocacy in a public forum; it also governs the decisions that officials make and the votes that citizens cast in elections."[385] For example, this duty would restrain the use of racial epithets in public political dialogue.[386]

It is true that there is much disagreement about what the rule of public reason would require[387] and its potentially exclusive and free speech-impeding effects.[388] Nevertheless, slightly modified standards of political morality could be employed to guard against the Latino-American crisis of citizenship — they could be applied so that political dialogue and actions are fair to all. The standards would apply to discussion and action that

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[383] *See* BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 116 (1980); JOHN RAWLS, A THEORY OF JUSTICE 18 (1971) (discussing restrictions of arguments for principles of justice); Ronald Dworkin, *Liberalism, in* PUBLIC AND PRIVATE MORALITY 113-143 (1978); Lash, *supra* note 382, at 1410 (discussing philosophies looking at principles of justice). Much discussion of political morality and its restraints on public discourse has focused on religious speech in public forums. *See* Symposium, *The Religious Voice in the Public Square*, 29 LOY. L.A. L. REV. 1411, 1427 (1996).

[384] *See* John Rawls, *The Domain of the Political and Overlapping Consensus*, 64 N.Y.U. L. REV. 223, 224 (1989); Lawrence B. Solum, *Novel Public Reasons*, 29 LOY. L.A. L. REV. 1459, 1459 (1996).

[385] *See* Solum, *supra* note 384, at 1464; *see also* Michael J. Perry, *Religious Arguments in Public Political Debate*, 29 LOY. L.A. L. REV. 1421, 1458 (1996) [hereinafter Perry, *Religious Arguments*] (suggesting that ideal of public reason governs citizens, not just officials).

[386] *See* Michael J. Perry, *Religious Morality and Political Choice: Further Thoughts — and Second Thoughts — on Love and Power*, 30 SAN DIEGO L. REV. 703, 706 (1993) (arguing that permitting citizens to do something is not same as saying they should do it); Lawrence B. Solum, *Constructing an Ideal of Public Reason*, 30 SAN DIEGO L. REV. 729, 746 (1993) (noting that racist statements denying free and equal status of citizens do not follow rule of public reason).

[387] For example, Rawls' suggestion that the rule of public reason applies to discussions of "constitutional essentials" has drawn criticism. Kent Greenawalt asserts that such a distinction between constitutional essentials and other subjects may be difficult to draw in real life. *See* Kent Greenawalt, *On Public Reason*, 69 CHI.-KENT L. REV. 669, 687 (1994); Solum, *supra* note 384, at 1461.

[388] *See* Perry, *Religious Arguments supra* note 385, at 1425 (disfavoring religious over secular arguments would violate core meaning of free exercise norm).

relate not just to citizens, but to non-citizens as well. They would also apply to state action that needlessly stigmatizes non-citizens.[389] In addition, these standards would require political speakers to abandon the use of dehumanizing slurs directed at undocumented immigrants in political dialogue; require officials to cease conducting raids at insensitive times and places, such as during ethnic celebrations, or around facilities where immigrants acquire health or other necessary services;[390] and require officials otherwise to cease deploying immigration control policies in ways that deny immigrants' basic humanity.

Perhaps as a sign of encouragement, evidence of these standards is already apparent. For example, lawmakers no longer freely refer to undocumented Mexicans as "wetbacks" in the congressional record.

C. Language Law: A Focus on the First Amendment

As this Article has noted, English-only laws may have a detrimental effect on Latino-Americans because they stigmatize an aspect of their bordered identity. These laws implicate equal protection, due process, title VII, and First Amendment concerns, although the courts have not responded favorably to these legal challenges. Some jurisdictions have refused to recognize the link between ethnicity and language. Consequently, they will not strike down language laws as violative of the Equal Protection Clause on the seemingly unimpeachable

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[389] "Needlessly" because the ideal of public reason strives to include the whole polity and, thus, requires a balancing act. Presumably, if the State acts in ways that stigmatize undocumented Latinos and that the American collective as a whole still believes are necessary to maintain sovereignty — the act of deportation — then it may not violate public reason. However, if no good comes from the State act, and it is solely stigmatic, then its exclusive effects on Latino-Americans may require that the State cease acting in that manner.

[390] There is another strong policy argument, of course, against raiding at medical facilities: it discourages those with communicable diseases from seeking treatment. *See* Kimberly A. Moy, *County Retains Clinic Services for Illegal Immigrants*, SACRAMENTO BEE, Mar. 13, 1997, at B4 (reporting Supervisor Illa Collin's fears that immigration checks would stop undocumented immigrants from seeking medical treatment, thereby contributing to spread of contagious diseases); Mary A. Mitchell, *City, State Thumbs Nose at Immigration Laws*, CHI. SUN-TIMES, Jan. 19, 1997, at 12 (noting remarks of Susan Sher, Chicago's City Corporation Counsel, who explained policy of providing necessary services rather than questioning immigrant's member status).

grounds that the "common, national language of the United States is English" and that the United States has an unequivocal and demonstrated "national interest in English as the common language."[391] Due Process claims are made less often in the English-only context than in the immigration context. After considering the perception that English is the overwhelmingly preferred language in the United States, it is difficult to argue that non-restrictive English-only culture laws are arbitrary.[392] Furthermore, many courts have rejected title VII challenges to non-symbolic English-only regulations in the workplace.[393]

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[391] *See* Frontera v. Sindell, 522 F.2d 1215, 1219-20 (6th Cir. 1975) (rejecting equal protection challenge to language restrictions in civil service exams); *see also* Soberal-Perez v. Heckler, 717 F.2d 36, 44 (2d Cir. 1983) (upholding English-only social security notices under Equal Protection Clause); Carmona v. Sheffield, 475 F.2d 738, 739 (9th Cir. 1973) (upholding state's English-only law). *But see* Hernandez v. New York, 500 U.S. 352, 371 (1991) (finding that language proficiency may be treated as surrogate for race under equal protection analysis). For arguments that language discrimination does violate equal protection, see Olson, *supra* note 275, at 23-28; Juan F. Perea, *English-only Rules and the Right to Speak One's Primary Language in the Workplace*, 23 U. MICH. J.L. REFORM 265, 268 (1990); Perea, *supra* note 245, at 356-57.

[392] *See Carmona*, 475 F.2d at 738 (rejecting due process claim against English-only law).

[393] *See* Garcia v. Spun Steak Co., 998 F.2d 1480, 1484-85 (9th Cir. 1993) (upholding employer's English-only rule where 24 of 33 employees spoke Spanish); Jurado v. Eleven-Fifty Corp., 813 F.2d 1406, 1411 (9th Cir. 1987) (upholding radio station's English-only rule as applied to bilingual deejay on ground that employee could comply with regulation); Garcia v. Gloor, 618 F.2d 264, 271 (5th Cir. 1980) (upholding employer English-only rule that only permitted employees to speak Spanish during breaks or when conversing with Spanish-speaking customers, on ground that language is not immutable characteristic and, thus, not precluded by title VII's prohibition on national origin discrimination); Flores v. Hartford Police Dep't, 25 Fair Empl. Prac. Cas. (BNA) 180, 186 (D. Conn. 1981) (permitting English-only rule at police academy); *see also* Toure v. United States, 24 F.3d 444, 445 (2d Cir. 1994) (finding no right to notice of administrative seizure in French language); Hong v. Children's Mem'l Hosp., 993 F.2d 1257, 1265 (7th Cir. 1993) (finding no prima facie case of discrimination based on national origin in wrongful termination case where boss repeatedly told plaintiff to "learn to speak English" and English-only policy was in place); *Soberal-Perez*, 717 F.2d at 35 (finding no right to social security notice in Spanish language). *But see* Saucedo v. Brothers Well Serv. Inc., 464 F. Supp. 919, 922 (S.D. Tex. 1979) (striking English-only workplace rule under disparate impact theory). *See also* David T. Wiley, *Whose Proof?: Deference to EEOC Guidelines on Disparate Impact Discrimination Analysis of "English-Only" Rules*, 29 GA. L. REV. 539 (1995) (describing cases). *But see* Gutierrez v. Municipal Court, 838 F.2d 1031, 1045 (9th Cir. 1988) (upholding district court's issuance of preliminary injunction against enforcement of employer's rule forbidding use of languages other than English), *vacated as moot*, 490 U.S. 1016 (1989); Carino v. Univ. of Okla. Bd. of Regents, 750 F.2d 815, 819 (10th Cir. 1984) (holding that adverse employment decisions may not be based on employee's accent where accent does not interfere with employee's ability to perform job); Guidelines on Discrimination Because of National Origin, 29 C.F.R § 1606.7(a) (1994) (commenting that English-only

The First Amendment, in contrast, may hold promise for challenges to English-only laws. However, under some views of the First Amendment there may not be a solid basis for such challenges unless an English-only law explicitly restricts speech. In *Yniguez v. Arizonans for Official English*,[394] later vacated by the Supreme Court on mootness grounds,[395] the Ninth Circuit struck down article XXVIII of the Arizona Constitution, which "was the most restrictive English-only law in the nation."[396] Article XXVIII required that the state of Arizona and "all political subdivisions of this state shall act in English and no other language."[397] *Yniguez* concerned the claim of Maria-Kelly Yniguez, an employee of the Arizona Department of Administration, who brought suit after she determined that the constitutional amendment prohibited her from speaking Spanish on the job.[398] The Ninth Circuit sided with Yniguez, finding that article XXVIII's prohibition was impermissible under the First Amendment overbreadth doctrine because "[t]he provision at issue here 'promotes' English-only by means of proscribing other languages and is, thus, wholly coercive."[399] However, the court also indicated that English-only laws that are "primarily symbolic," such as the English-only laws in California and Hawaii, may not be unconstitutional because they "have little practical effect."[400] Thus, according to *Yniguez*, the First Amendment may not provide relief except in the most extreme cases.[401]

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rules can create atmosphere of inferiority, isolation, and intimidation based on national origin which could result in discriminatory working environment); Jeffrey D. Kirtner, Note, *English-Only Rules and the Role of Perspective in Title VII Claims*, 73 TEX. L. REV. 871, 874 (1995) (noting that courts have found no significant impacts on bilingual Hispanic employees from English only rules).

[394] 69 F.3d 915, 920 (9th Cir. 1995) (en banc), *vacating as moot* 117 S. Ct. 1055 (1997).

[395] *See* 117 S. Ct. 1055.

[396] *See* Stewart, *supra* note 278, at 553.

[397] ARIZ. CONST. art. XXVIII, § 1(2).

[398] *See Yniguez*, 69 F.3d at 924.

[399] *Id.* at 946.

[400] *See id.* at 928; *see also* Puerto Rican Org. for Political Action v. Kusper, 490 F.2d 575, 577 (7th Cir. 1973) (finding language law merely cultural and nonrestrictive).

[401] Many thoughtful articles have been written about English-only laws' First Amendment implications. *See* Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 944, 1018, 1034 n.285 (1996) (discussing English-only school rules in terms of parents' speech rights); Donna M. Greenspan, *Florida's Official*

Nevertheless, an understanding of bordered identity may demonstrate why English-only laws are unconstitutional under other First Amendment theories. Once one realizes how Spanish informs Latino-American identity and expression, for example, English-only laws appear inconsistent with the First Amendment theories that center on the values of self-realization,[402] autonomy,[403] and social tolerance.[404] Although a full-blown jurisprudential attack on language laws is beyond the scope of this Article, a brief sketch of an additional First Amendment theory that focuses on free speech and its role in self-

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English Amendment, 18 NOVA L. REV. 891, 916 (1994); Stewart, *supra* note 278, at 553 (commenting that English-only law in *Yniguez* violates informational approach under First Amendment, which preserves debate and exchange of ideas); Karla C. Robertson, Note, *Out of Many, One: Fundamental Rights, Diversity, and Arizona's English-Only Law* 74 DENV. U. L. REV. 311, 326 (1996) (noting that English-only laws may violate legislators' speech rights); Cecilia Wong, Note, *Language Is Speech: The Illegitimacy of Official English After* Yniguez v. Arizonans for Official English, 30 U.C. DAVIS L. REV. 277, 306-07 (1996) (arguing that choice of language is constitutionally protected speech).

[402] *See, e.g.*, First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 804 (1978) (White, J., dissenting) (stating that First Amendment protects speech as means of self-expression, self-realization, and self-fulfillment); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that First Amendment protects "sphere of intellect and spirit"); MELVILLE NIMMER, NIMMER ON FREEDOM OF SPEECH § 1.03, at 1-49 (1984) (arguing that one may realize self-fulfillment only if one may speak without restraint); MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 11-12 (1984) (emphasizing that free speech serves one true value of individual self-realization); STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY AND ROMANCE 167 (1990) (noting that individual dignity is First Amendment value); Lawrence B. Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 NW. U. L. REV. 54, 80 (1988) (commenting that freedom of speech may promote self-realization).

[403] *See, e.g.*, Herbert v. Lando, 441 U.S. 153, 183 n.1 (1979) (stating that free speech is necessary in society that accords individual autonomy equal and incommensurate respect); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 137 (1993) (noting efforts to understand First Amendment as protection of autonomy); Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 233 (1992) (stating free speech based on autonomy); Thomas M. Scanlon, Jr., *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 217-18 (1972) (noting that restrictions on free speech inhibit individual autonomy).

[404] *See* Charles Calleros, *Paternalism, Counterspeech, and Campus Hate-Speech Codes: A Reply to Delgado and Yun*, 27 ARIZ. ST. L.J. 1249, 1251 n.11 (1995) (discussing freedom of expression as promoting tolerance); *see also* LEE C. BOLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA 10 (1986) (discussing tolerance as goal of freedom of speech); NAT HETOFF, FREE SPEECH FOR ME — BUT NOT FOR THEE: HOW THE AMERICAN LEFT AND RIGHT RELENTLESSLY CENSOR EACH OTHER 167 (1992) (noting that speech codes aimed at words create hostile atmosphere); Calleros, *supra*, at 1251 n.12 (arguing that purpose of First Amendment is tolerance and moral courage).

government demonstrates how language laws circumscribe expression and identity and, therefore, potentially violate the Constitution.

Some free speech theorists and members of the judiciary contend that the First Amendment is designed to foster self-governance. Such thinkers, who are usually associated with Professor Alexander Meiklejohn, advance the free speech ideal as a means to achieve an informed citizenry because universally accessible information is critical to a citizen's ability to participate in a self-governing society.[405] As such, "all evidence bearing on public decisions must be available to the community without any intervening 'preselection' on the basis of truth or falsity."[406] As Meiklejohn writes, "the principle of the freedom of speech . . . is a deduction from the basic American agreement that public issues shall be decided by universal sufferage. . . . [And] [o]ur deepest need. . . . is the demand that whatever truth may become available shall be placed at the disposal of all the citizens of the community."[407]

State enacted English-only laws stigmatize the Spanish language and its speakers.[408] The result is its decreased use in the

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[405] *See* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 75 (1960) (commenting that First Amendment's purpose is to endorse understanding of problems with which self-governing society must deal); *see also* SUNSTEIN, *supra* note 403, at 133 (noting that political speech is entitled to fullest protection of free speech); Kenneth Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 23 (1975) (noting First Amendment purpose of informed choices by citizens); Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle* 30 STAN. L. REV. 299, 300 (1978) (commenting that First Amendment protects only speech that takes part in representative democratic process); William Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 14-20 (1965) (noting First Amendment's central meaning of censorial power of people over government); Harry Kalven Jr., *The New York Times Case: A Note on "the Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 204-10 (1964); *cf.* Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 9 (noting Meiklejohn's belief in informed citizenry); Solum, *supra* note 402, at 55 (explaining theory of First Amendment of freedom of speech).

Meikljohn's assessments of the First Amendment have found support within the judiciary. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 273-74 (1964) (commenting that power of people to act as sovereign is central meaning of First Amendment); *see also* Solum, *supra* note 402, at 69 (collecting cases on issue).

[406] *See* Ingber, *supra* note 405, at 9 (citing Thomas Scanlon, *Rawls' Theory of Justice*, 121 U. PA. L. REV. 1020, 1041-44 (1973)).

[407] *See* MEIKLEJOHN, *supra* note 405, at 27, 75.

[408] *See* Coates, *supra* note 255, at C6 (discussing effects of Colorado's English-only

public eye, which reduces the amount of information available and necessary for robust debate and political decision-making. One may argue that English-only laws do not affect self-governance because the First Amendment's reach under Meiklejohn's description only extends to political speech[409] and a choice of language is not political speech. However, because of English-only laws and other demonstrations of anti-immigrant sentiment, an individual's choice of a foreign tongue has become political. In a climate where non-English is said to threaten "equality of opportunity," "shared values," and "national culture,"[410] speaking Spanish becomes, for Latino-Americans, a rebellious affirmation of their identity. This statement is as political as other recognized reflections on "American values," such as criticisms of the draft,[411] Republicans,[412] judges,[413] public figures,[414] or attendance at the national convention of the Communist Labor Party.[415] English-only laws, on the other hand, repress that speech whether they directly prohibit it or simply favor English. Thus, they debase Spanish and discourage its use. These laws thereby violate the First Amendment's prohibition of the government's regulation of "speech in ways that favor some viewpoints or ideas at the expense of others."[416]

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constitutional amendment); Pool, *supra* note 337, at B1 (examining ramifications of approval of English-only amendment by California voters).

[409] *See* David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 351 (1991) (noting that Meiklejohn's view only justifies persuasion principle in political speech).

[410] *See supra* note 254-59 and accompanying text (describing justifications asserted by proponents of English-only laws).

[411] *See* Cohen v. California, 403 U.S. 15, 24 (1971) (stating that right of free expression is intended to put decision as to what views shall be voiced in public hands in hope of creating more capable citizenry and more perfect polity).

[412] *See* Texas v. Johnson, 491 U.S. 397, 399 (1989) (addressing flag burning protest against Reagan administration).

[413] *See* Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964) (noting that speech concerning public affairs is essence of self-government).

[414] *See* Hutchinson v. Proxmire, 443 U.S. 111, 133-34 (1979) (noting that Congress has aimed to ensure debate on public issues that First Amendment was designed to protect); New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (commenting that constitutional safeguard was fashioned to ensure unfettered interchange of ideas for bringing about political and social changes desired by people).

[415] *See* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (noting that those who won independence believed that freedom to think and to speak are indispensable means to discover and spread political truth).

[416] *See* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 394

This repression of speech results in what First Amendment self-governance advocates fight against. By branding English as better and other languages as worse or even dangerous, the ensuing discouragement of foreign speech leads to the preselection of what kind of information citizens will receive.[417] For example, if the state shames a person out of saying "*cuando me entere de que la Proposicion 187 pasó, me sentí muy triste,*" — "when I heard that Proposition 187 passed, I was very sad" — in public space, it deprives listeners of "evidence [that] bear[s] on public decisions."[418] If the listener understands Spanish, she hears a report of the speaker's feelings. The listener also hears a gesture of Latino-American solidarity and an evocation of Latino-American social, political, and familial history. This exposure may bear on the listener's political views about the Proposition.[419] On the other hand, if the listener does not understand Spanish, she is still confronted with an obvious sign of Latino-American identity. Further, if the listener chooses to ask for an interpretation, then she may inform her political viewpoint and take a tiny step inside another culture, a journey that Latino-Americans and other non-white groups set out on all the time.[420]

Finally, to the extent that English-only laws actually prohibit the use of non-English languages in public office or on voting ballots,[421] then the blinding censorship that Meiklejohn warns against is fully achieved. If non-English speakers are unable to understand political dialogue, then they are unable to participate in it and that makes everyone poorer.

(1993).

[417] *See* Perea, *supra* note 391, at 291.

[418] *See* Meiklejohn, *supra* note 405, at 296.

[419] *See supra* notes 405-18 and accompanying text (explaining importance of free speech to citizen's participation in governance and special meaning included in message's language).

[420] *See generally* Sheryl McCarthy, *Dancing Separately down the Same Path of History*, NEWSDAY, Oct. 7, 1996, at A30 (relating story of African-American and Irish-American assimilation); *see also* Carrie Chang, *Voice of Immigrant Kids*, SACRAMENTO BEE, Oct. 5, 1997, at F1 (conveying how immigrant children interpret their experiences as assimilative tools).

[421] Such actions would violate the Voting Rights Act. *See supra* note 280 and accompanying text (discussing Voting Rights Act).

CONCLUSION

Citizenship is not just a legal status, it is an ideal vision of membership, equal status, and belonging. Many Latino-Americans, however, do not feel anywhere close to being equal members of the American political community because repressive immigration practices and English-only laws stigmatize their identity and state actors derogate them in public speech. The resulting turmoil that Latino-Americans experience is nothing less than an existential crisis of citizenship.

The first step in solving this crisis is to establish what elements help make up Latino-American identity. Two such critical aspects are a sense of place and a sense of people. Language laws limit both because the Spanish language is a central connection between Latino-Americans and their Latino heritage. Repressive immigration policies also inhibit bordered identity by stigmatizing the foreign side of the Latino-American hyphen. In order to have a fuller inclusion of Latino-Americans into the national political community, these practices must end.