

LATINO HUMAN RIGHTS AND THE GLOBAL ECONOMIC ORDER

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Today we are at a crossroads in our nation. We have moved from a nation whose highest aspirations were reflected in a war on poverty to a nation which now appears focused on a war on the poor. From attacks on basic measures created to ensure fairness and inclusion, such as affirmative action and the Voting Rights Act, to the attacks and scapegoating of legal and illegal immigrants; not since after reconstruction have the dismantling of social supports been so evident. The Latino community faces harm and discrimination not only as it relates to ethnicity, but also as it relates to current anti-immigrant sentiment, gender (reflected in the denial and cut backs of social welfare supports), poverty (reflective of the impact of past and current discrimina-

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tion), and language (reflected in English only legislation).¹ All these circumstances of disenfranchisement and subjugation explicitly or implicitly communicate to Latinos—"you are subordinate, not a full partner in our society—you are outsiders whom we will control."

What is driving these attacks at this time of our world's and our nation's history? What can be done in response to effectuate an inclusive and fair society in the United States?

This paper will focus on the relationship between changes in global political, economic and informational structures, in relation to poverty, immigration and Latino human rights.

Part I of the paper posits the theory that the acceleration in the transnational movement of capital, information and people has created increased instability in the nations of our world. Further, this instability is in part, the result of the mismatch between the authority of private corporate decision-makers and public-democratic remedial constituents. As a result, these private corporate decision-makers have great advantages over public democratic decision-makers. It also posits that economic elites will take advantage of this instability to consolidate power and accumulate wealth at the expense of democratic, political, and human rights of those who are most disenfranchised.

Part II of this paper tests this theory using the circumstances in the United States as an example of its operation. It will discuss the specific domestic impact of the transition from a state-based economy to a global economy on the United States and how economic elites and their allies are using the circumstances in the United States to further their consolidation of power at the expense of the civil rights and social supports of those who are most disenfranchised, including Latinos. It will focus more particularly on the use of scapegoating by elites to attack Latino immigrants and the legal regimes which protect social, political and cultural rights of disenfranchised groups, while strengthening the group rights of economic elites.

Finally, Part III suggests some possible responses to the diminution of Latino human rights, including what can be done in response to attacks on civil rights and social supports.

I. TRANSITION TO GLOBAL ECONOMIC INTEGRATION

The world is moving toward global economic integration as a result of a number of factors, including the accelerated movement of capital (facilitated by increased speed of information and

1. See KEVIN R. JOHNSON, PUBLIC BENEFITS AND IMMIGRATION: THE INTERSECTION OF IMMIGRATION STATUS, ETHNICITY, GENDER AND CLASS, draft paper, pp 78-80 (1994)(on file with the author).

transfers of wealth), reduced political constraints, the accelerated movement of people, and the political and economic disintegration of the bipolar world. As global economic integration proceeds, the world is in a period of instability and transformation. This is the result, in part, of the democratic political structures that have failed to move toward integration at a speed comparable to that of global economic structuring. Consequently, those who rely on public political structures for fairness and equity are left with little redress and are subject to the self-interested decisions of private corporate elites.

A. *Trends Toward Global Integration*

There are two general trends in today's global society. First, there is a transnational movement of capital in certain sectors of the world economy (e.g., manufacturing) from stable areas of relatively high labor costs and social expenditures to stable areas with relatively lower labor costs and social expenditures.² Second, there is a transnational migration of people from areas with relatively low wages (or high poverty) to areas with relatively high wages (or lower poverty), as well as from areas with relatively low levels of civil and/or human rights (relatively high levels of oppression) to areas with relatively high levels of civil and/or human rights.³

2. See WALLACE C. PETERSON, *THE SILENT DEPRESSION* (1994), at 125-126 ("Routine production work — the kind found not only in manufacturing but in a multitude of data processing and other service industries can and is performed almost anywhere around the globe. So routine workers in advanced economies like the United States find themselves in competition with low-paid workers in third world nations. Such competition has exerted enormous downward pressure on the less educated during the last two decades. It is only the approximate 20% of highly educated workers. . . . who are doing well in the new and intensively competitive global economy. . . .") *Id.* at 187-196. (One fifth of all U.S. economic activity is tied to global economy, up from less than 10% in 1950; 80% of all manufacturing activity tied to global economy up from 20%.) *Id.* at 188. Drop in manufacturing percentage of U.S. employment from 35.3% in 1947 to 16.99% in 1990. *Id.* at 189. 2.5 million manufacturing jobs lost permanently since 1980. *Id.* at 190. Drop in rate of growth in the sale of manufactured goods in the U.S. after 1973. *Id.* at 191-192. Drop in rate of investment in manufacturing equipment from 1973 to 1990. *Id.* at 192.

3. See Arthur C. Helton, *Context of the Current Immigration Debate and Future Prospects*, 11 N.Y.L.J. OF HUMAN RIGHTS 451, 452 (1994) (one of many causes of migrant flight and movement in economic underdevelopment and wage differentials.); see also, Gregory C. Shaffer, *An Alternative to Unilateral Immigration Controls: Toward a Coordinated U.S.-Mexico Binational Approach*, 41 STAN. L. REV. 187, 195 (1988); see also, YAESMIN NUHOGLU SOYSAL, *LIMITS OF CITIZENSHIP: MIGRANTS AND POSTNATIONAL MEMBERSHIP IN EUROPE* 17-28 (1994). ("By 1990 foreigners in the western Europe made up between 3 and 16% of their host countries total population with [only 2 countries with less than 4% of total], whereas in 1960 foreigners amounted to more than 4% of total in only three countries . . ." *Id.* at 22. "Overall foreign populations show a demographic increase, in spite of decreasing opportunities for work" *Id.* at 24.

Thus, at the same time that wealth in certain economic sectors is moving out of higher wage western states, immigrants are moving into these same western states. Similarly, at the same time that people are moving out of lower wage, relatively repressive states, to the extent they are able, capital is moving into lower wage, repressive states.

Theoretically, if there were no other organizational forces in operation in the global order (*e.g.*, national ideologies, nation states, immigration barriers, ethnic rivalries), one would expect the following: (1) as wages (and social spending) declined, investment would increase; (2) as wages (and social spending) declined, emigration would increase; (3) as oppression increased emigration would increase; and (4) as wages decline oppression would increase to maintain social control.

As a consequence, global equilibrium would eventually be reached for (1) rates of investment and average wages, (2) average wages and no further emigration, (3) average wages and oppression (or human rights), and (4) oppression (or human rights) and no further immigration.

During this transition to global equilibrium, emigration would tend to act as a check on increased oppression and increased low wage investments in poor states. In addition, immigration would tend to occur at the same time that there is a decline in human rights and wages in relatively wealthier states. One could also note that as capital is moving to lower wage states from wealthier ones, equality rights that interfere with the flow of capital are being diminished. To the extent that migration is prohibited, one would expect even lower wages because there is no ability for workers to move to higher wage areas. To the extent that immigration is prohibited in wealthier states, one would still see, in the short term, a decline in wages and human rights as out investment and social control increases. In the long term, one might expect an even greater decline in wages and human rights abuses, because the closed door policy results in artificially depressed wages. Thus, the lower the prohibitions on migration are worldwide, the lower the incidents of human rights abuses and decline in wages should be worldwide. However, one would expect that the worldwide level of average wages and human rights would be substantially lower when world equilibrium was reached than currently exist in western countries.

Neither, scenario is optimistic nor fully realistic. The forces of capital investment and migration are limited by several other organizing forces: (1) the nation-state, national ideologies, national legal regimes, trade barriers, and immigration barriers; (2) ethnic identity (*e.g.*, language, culture); (3) international legal re-

gimes and organizations; and (4) quality of life demands of various populations and corporate elites. Nevertheless, these forces of global economic integration have, indeed, been transforming the world's economic structures. Moreover, this transformation was facilitated by the reduction of political constraints posed by the disintegration of the bipolar world.

B. *Political and Economic Disintegration of the Bipolar World*

Until recently two major blocks of nations have been competing for hegemonic control of the world—loosely defined as the Western block or American alliance and the Eastern block or Soviet alliance. These groupings were comprised of various states and nations—states being defined as the public corporate entities which exercised sovereignty over specific geographic territories and nations being defined as the identified social-cultural groups to which different peoples afforded allegiance.⁴ Although many states corresponded to nations, all did not.

The Soviet alliance generally operated as a supra-national corporate body made up of separate national components.⁵ The United States alliance generally acted as a coalition of nation-states.

These alliances provided their members with political and military security against the intrusion of the other block, identity as a member of their respective blocks, and political and economic integration within their respective blocks through favorable political and economic arrangements.⁶

The relative over-investment of capital in weapons by the two primary (or super) powers, the United States and the Soviet Union, have left them relatively diminished in terms of economic competitiveness.⁷ Thus, public corporate decisions (governmental decisions) to spend money on weapons, lead to relative economic decline as competitive market investments diminished in these two super powers. Moreover, private corporate choices within the United States further diminished its competitiveness by moving capital investment outside national boundaries.

The results have been different for the Soviet alliance and the United States alliance. The Soviet alliance, in general, and

4. See generally, RODOLPHO STEVENHAGEN, *THE ETHNIC QUESTION*, Chapter 2 (1990) (for the distinction between nations and states).

5. It may be said that the Soviet Union, such as Yugoslavia and Czechoslovakia, was comprised of several nations groups, while the alliance was a supranational association of these components, as well as such nation-states like Poland.

6. See generally, Ole Weaver, *The Sovereignty Puzzle in E.U. Studies*, 48 J. INT'L AFFAIRS 387, 387-431 (1995) (for a discussion on the relationship between security, identity and integration).

7. See PETERSON, *supra* note 2 at 174-177.

the Soviet Union, in particular, declined in relative economic strength until the weight of their over-investment in instruments of war resulted in their political and economic disintegration—no longer having the resources to maintain control of their alliance. With the Soviet alliance shattered, the organizational forces of ethnic-based national movements has increased and has resulted in new nation-states and inter-national conflict.

With respect to the United States, the need to be a military guardian of the western alliance has diminished and economic competitiveness has tended to displace military competitiveness as an organizational force. Consequently, the position of the United States will likely be determined by its economic competitiveness, rather than its military prowess.

Finally, the remainder of the western alliance, no longer as dependent on the United States for military protection, is exerting itself economically.⁸ The creation of the European Union reflects the evolution of European nation-states into a confederation to increase its economic competitiveness and decrease the relative status of each of its component states.

Recognizing the lack of a dominant role for any nation-state, many nations similar to the European Union are looking to confederation as a method to increase organizational strength and competitiveness, combining both labor and capital on a larger scale. Thus, the world is in a period of transition with corporate forms and organization being defined by capital and economic competitiveness. The value of human life for those who are poor and oppressed is being undermined by the primacy given to the development of economic power and competitiveness, both within nation-states and between developing “western” confederations and the third world.

Third world countries, neither militarily nor economically competitive, remain in a difficult position. In fact, at the Cairo conference on population, the West had begun to define third world populations as the problem rather than inequitable world institutions. With the diminishing competitiveness among the super powers, no nation-state has sufficient organizational strength to define the world order.

C. *Global Economic Change and Consolidation of Power*

If trends continue, the world organization will transition from a bipolar world to a world organized by the movement of

8. The reduced dependency of the western alliance on the United States for military protection, does not, however, necessarily mean a reduced desire to use the United States for military protection.

capital, thereby causing the diminishment of the nation-state. The transition is likely to be painful and diversionary.

One may posit the following theory: At the same time that the bipolar world is disintegrating, economic decision makers will likely continue to disinvest from economic sectors which have traditionally provided gainful employment for middle and working class populations in western states (e.g., manufacturing). Instead, economic decision makers will invest in these same economic sectors, but in poorer states they have lower wages, fewer legal constraints, and fewer social investments. Consequently, their investment decisions will cause economic instability and insecurity for majority populations in western states.

Further, the migration driven by wage and development differentials, internal and external conflict, persecution, environmental degradation, economic displacement due to investment decisions, and improvements in communication and travel,⁹ will create social and cultural changes. Such changes will give rise to fears of losing social/cultural identity as well as economic and political security.

Economic elites will use the rise in political, economic and social/cultural insecurity to consolidate power by placing the blame for this insecurity on minority populations. This will happen in the form of attacks on equality rights, social welfare supports, and taxes which fund social welfare supports. Thus, economic elites will effectively tell majority populations that the reason they are suffering economically is because the "other" has equality rights, or because they are being taxed to pay for social supports of the "other," rather than explaining that the economic decline is largely caused by sectoral disinvestment and the transnational movement of capital. Instead of explaining these trends and developing real solutions, such as reinvestment, the elites will continue to use this opportunity to dismantle impediments to capital and social supports while fueling their own accumulation of wealth.

Elites in Europe and the United States will likely seek to blame declining wages not on the internationalization of the economy, but on chosen scapegoats—"the other"—by controlling the definition of the problem through control of social institutions, such as the media, political, educational, and economic institutions. Attention will be diverted away from the effects of globalization and placed on these scapegoats.¹⁰ One would ex-

9. See Helton, *supra* note 3, at 451-454 (1994). See also Catherine C. Orenstein, *Illegal Transnational Labor*, 48 J. INT'L AFFAIRS 600 (1995).

10. To the extent wages in third world nations are likewise being diminished, because of the competition with other poor nations, scapegoating against minorities such as indigenous people may also increase in these third world nations.

pect greater problems with such discrimination against minorities in relatively wealthier nations where wages of middle and working class populations are declining.

There will be increased investment in social control mechanisms, as well as increased discrimination and hate groups. In terms of societal mythologies, the poor, in addition to labor as a whole, will be defined as a problem rather than the distribution of power and wealth. Immigrants will be among the most vulnerable of groups.

Indeed, elites will use this period of limited popular awareness of global trends to consolidate power. First, the lack of general awareness will allow elites, who have captured state mechanisms, to cede sovereignty in favor of their economic goals and the elimination of constraints on capital, in the form international legal regimes such as GATT and the World Trade Organization. Second, even when awareness can be raised, the ability of elites to mobilize politically will likely give them a decided advantage over a popular democratic response, which requires enormous transaction costs to mobilize.

Finally, even if a democratic response can be mounted in one state, it may be insufficient because the authority of corporate decision makers may not be constrained by a single state because they can simply move their agenda transitionally. As a result, there will be a decline in national sovereignty in the interest of economic corporate power.

II. THE DOMESTIC IMPACT OF THE TRANSITION TO A GLOBAL ECONOMIC ORDER IN THE UNITED STATES

Are economic and political elites in the United States using the economic circumstances resulting from globalization of the economy to consolidate power? The expected impacts of globalization are, indeed, being reflected in the United States' domestic policy. Sectoral decline increasingly has given rise to the scapegoating and race-bating of minority populations. Barriers to capital are being eliminated, not only in terms of the elimination of the barriers to private corporate actors, but also in terms of the elimination of economic responsibility of people of wealth (or relative wealth) for social problems through the mechanisms of devolution and the elimination of social welfare supports. Wealth is being further transferred to the wealthiest in our society.

Perhaps more critical is the divestment of governing authority from democratic institutions. The reduction of the role of government, principally the federal government, is not a neutral act. Contrary to the assertions of those who support the elimina-

tion of federal authority (mainly those who control capital), the movement of decision making away from government does not reduce governance to the benefit of individual freedom and actors. Instead, the movement places governance in the control of private corporate decision makers who are in turn governed by the owners of capital, rather than public corporate decision makers governed by the public through democratic institutions. As was once remarked, giving control over the media to private corporations is to give control of your eyes and ears to these private corporations.¹¹ In the same way, giving control to private corporations to govern is to give away control of our community conscience to these corporations.

These trends have and will affect people of color in the United States, generally, and Latinos, specifically, by impacting immigration, language, domestic welfare, and other policies which define the rights of residents and ensure equality. They portend diminished freedom for most Americans, particularly the poor and people of color.

A. *Sectoral Disinvestment and Decline*

While the gross national product of the United States has increased substantially over the last 20 years, all the country's wealth has enured to the top quintal of the United States' population.¹² The other 80% has remained static or had a decline in real income,¹³ creating both economic pain and despair as well as the conditions for scapegoating and race-baiting, (*i.e.*, directing the pain and anger of unfulfilled expectations at those most disenfranchised: people of color, the poor, and immigrants).

In certain sectors of the economy, for example the area of industrial production, there has been a substantial disinvestment in the United States and a transnational movement of capital to third world or less developed countries driven by lower wages, lower costs due to lower social welfare expenditures, and lower environmental and labor projections.¹⁴ As a consequence, industrialized urban areas in the United States have lost well paid, gainful, lower skilled, employment opportunities previously relied upon by generations of working and middle class Ameri-

11. MARSHALL McLUHAN, UNDERSTANDING MEDIA 73 (1964).

12. See PETERSON, *supra* note 2, at 93-128 ("Between 1970 and 1990 families in the lower three-fifths of the income distribution scale lost ground, families in the fourth quintal from the bottom held their own, and families in the top 20% scored substantial gains." *Id.* at 99. (Share of income declined for each quintal of population from 1973 to 1990, except top quintal). *Id.* at 59. See also ROBERT REICH, THE CHOICE AHEAD 2 (1995) (on file with the author).

13. See PETERSON, *supra* note 2, at 99.

14. See generally PETERSON, *supra* note 2.

cans.¹⁵ Hence, there will be a decline in the real wages of the majority of the United States population.

B. *Use of Race and Ethnicity to Effectuate Consolidation of Economic and Political Power of Elites*

Those of a mind to do so have used the insecurity created by the impact of global economic changes to consolidate power. This insecurity coupled with long existing racial, ethnic, gender, and cultural insecurity has been used to pit majority populations or relatively enfranchised populations against minority or relatively disenfranchised populations¹⁶ in efforts to eliminate certain rights or policies that are barriers to policies preferred by holders of capital.

The dynamics of how this takes place may be illuminated in part by Ole Weaver's discussion of the dynamics of European integration. While being distinct in terms of context, Weaver's discussion presents many parallels that should be helpful in our understanding of the dynamics of change in the United States.¹⁷ There is a fundamental relationship between identity, integration and security. According to Mr. Weaver "[a] nation will only allow integration when it is secure that its national identity will not be threatened."¹⁸ There are two types of security: "political security, which is about the organizational stability of states, systems of government and the ideologies that give government and states their legitimacy"; and "societal security," "those ideas and practices that identify individuals as a social group."¹⁹ In order for a nation-state to be secure, both "state security and societal security, the former having sovereignty as its ultimate criterion and the latter based on concern for identity. . . must not be up-

15. See PETERSON, *supra* note 2, at 49-66. (percentage of families with incomes between \$25,000 and \$74,999 declined between 1973 and 1990). *Id.* at 57. "Between 1979 and 1988 the number of jobs in the American economy grew by nearly seventeen million, but slightly more than one-half of these jobs paid an annual wage below the poverty level. Only 12% paid . . . over \$46,000." *Id.* at 193. Most of the job growth has benefitted the most educated. "This divergence—most of the middle class being left behind while the overclass breaks away—has been deepening for fifteen years. Last year alone, the top fifth of American households took home 48 percent of the nation's total income, and pocketed 72 percent of the entire growth in incomes. [Men who lacked college degrees]—which included nearly three out of four working men—[have] seen [their] economic prospects shifted over the past fifteen years; and [have] suffered a 12 percent decline in average incomes since 1979." ROBERT REICH, *THE REVOLT OF THE ANXIOUS CLASS* (1994)(speech transcript on file with author).

16. Women fall into the category of being a majority population but a relatively disenfranchised one.

17. Weaver, *supra* note 6.

18. *Id.* at 404.

19. *Id.* at 405.

set."²⁰ In addition to political and societal security, economic security, or believing that one is secure materially, is requisite for a nation-state to be secure. If there is no political, economic, and societal security, the state will not allow integration.

In the European context, these dynamics mediate the integration of various states into the European Union. As Weaver explains:

Integration is driven by a logic at the level of "high politics", [of] security and politics; while identity is the dangerous area where the project can self-destruct if it challenges the nations in an overly confrontational manner (by making Europe more nation-like). An identity basis for Europe is probably only possible if it penetrates, rather than confronts, national identities, giving European and national identities an interdependent relationship, where each is mutually present in the other's identity.²¹

That is, political integration can only take place if members of each member nation are allowed to retain security as to their identity and voluntarily accept rather than be coerced into accepting a new European identity.

In the United States these dynamics similarly mediate the integration of various, often distinct but overlapping, cultural groups into one public corporate state (*i.e.*, the United States). Thus, while the United States is not made up of distinct nation-states seeking integration, it is made up of members of various distinct communities, including a majority community and minority communities. Minority communities may simultaneously identify themselves as members of subgroups of the American population, as well as Americans in general. In part, the identity of a minority subgroup has been the result of the discriminatory treatment of these groups by majority populations. For example, the discriminatory treatment of African Americans or Latinos, because they are easily identified as African Americans or Latinos. However, another part has been the result of these subgroups seeking to maintain their identity voluntarily, because it is an integral part of the group's identity or provides some political, cultural, or economic security. For example, newly arrived immigrants that seek support from a community organization made up of members from that person's homeland.

Thus, if the majority population in the United States feels that its security is threatened politically, economically, or culturally, it may take steps to regain its security and resist its integration with others, especially if it perceives those "others" as the

20. *Id.*

21. *Id.* at 430.

cause of this threat. On the other hand, integration of non-majority communities into the United States' polity will be impeded unless these communities are voluntarily accepted by the majority population and they in turn voluntarily accept a new American identity.

Economic elites use the dynamics related to the insecurity of the majority population to formulate exclusionary policies in the guise of providing economic, political, and cultural security to the majority population. Elites will eliminate social welfare supports, such as medicaid and public assistance; tolerant mechanisms to integrate society, such as bilingual education and civil rights law; and constraints on capital, such as environmental, labor and consumer protection. These exclusionary policies, make it difficult if not impossible for minority and disenfranchised communities to integrate and accept an American identity which, out of insecurity, is excluding them. Consequently, Americans are pitted against Americans to the detriment of all except those who through manipulation are using the events to consolidate power.

C. *Impact on Public Policy and Human Rights*

We are moving from a society which had as its fundamental social policy paradigm incremental integration and inclusion of the disenfranchised and minority groups through remunerative adjustments, toward a society which has as its fundamental paradigm coerced integration through mechanisms of exclusion. Not only are these policies morally and materially harmful to the "other" or excluded groups, ultimately they can never succeed as mechanisms of integration, because these policies only increase bitterness and division in society. Like Europe, one cannot coerce integration based on economics and politics; rather, a true United States national identity, which allows for all groups in society to share in that society's vision, can "only be possible if it penetrates, rather than confronts"²² group identities, giving the United States and the group identities an interdependent relationship, where each is mutually present in each other's identity.

Unfortunately, the United States is being remolded from a first world country to a country with a first world and a third world sector. Those who command control of capital will reap the benefits of globalization and those who are employed by capital will be subject to the trends of downward leveling. Geographically, the changes are reflected in the political economy of third world urban areas and first world administrative/executive

22. *Id.*

centers for corporate decision makers. The efficacy of the nation-state as a unit of loyalty is being diminished.

Recent legislation known as the "Contract with America" and devolution are reflective of two fundamental transformations in American society: the removal of barriers and burdens to the movement of capital and the elimination of the redistributive effects of the democratic process and the transference of governance from the public to private sector. The first trend, removal of barriers and burdens to the movement of capital, is reflected in the same trends set forth above, which is related to efforts to increase competitiveness in the world economy. That is, the "Contract" seeks essentially to reduce social welfare spending, increase social control spending, eliminate regulatory controls, and consequently, vest further political and economic control of society to the top fifth of the nation's economic structure.

The second trend, the devolution of decisions and transference of governance, taken to its logical conclusion, eliminates the redistributive effects of the operations of public corporations, (*i.e.*, government), and further shifts policy decisions to those who have wealth. For example, with respect to devolution, if all taxing and spending were done at the local jurisdictional level, wealthy jurisdictions and their residents would not share in redressing the problems and burdens of the poor in U.S. society, while continuing to reap the benefits. Consequently, wealthy suburbs, poor cities, and perpetuated third world urban enclaves result.

¹ Put another way, there are two sources of corporate power for people in this country: private corporations, which are controlled by corporate shareholders who select corporate boards; and public corporations, which are controlled by voters who select representatives. For those without the power of wealth, the organized vote represents the main way to effectuate policy to ensure equality of opportunity and resources. To the extent decisions are devolved and there is geographic segregation by wealth, as is often the case, the externality of poverty cannot be redressed through public corporations because there is no tax base for the poor to share.

The elimination of federal and/or governmental authority is similarly a transference of corporate governance, but not the elimination of corporate governance. It is in reality a question of checks and balances and about which corporate entities (*i.e.*, public or private) should govern, rather than a question of whether a corporate entity governs. Unless all corporate entities are abolished, those that exist will exercise power and determine policy through public or private acts. At issue is how that power

is exercised and to what extent it will be governed by public corporate entities such as the federal, state, local, and international governance structures versus private corporate entities, such as publicly and privately held corporations and non-governmental organizations.²³ Democratic corporate forms are a check and a balance on private corporate forms. The reduction of authority in democratic forms then shifts the balance from democratic decision making to capital-based decision making. Consequently, noncapital-based group rights will be eroded in favor of capital-based group rights, including the erosion of national sovereignty. Latinos will be an especially vulnerable group because it is comprised of a large immigrant population.

What follows below is a discussion of how the public debate in the United States has been crafted to the detriment of non-capital based human and civil rights, illustrating its effect on Latinos as well as non-Latinos.

D. *Impact on Legal Regimes*

There are two general areas of community definition and incorporation for the Latino population in the United States. These are reflected in two general legal regimes. The first set of incorporative structures are those dealing with various degrees of legality of residence. Citizenship, similar to property, may be envisioned as a bundle of rights, varying from full societal participation, reflected in the term "citizen," to an illegal presence in the United States, reflected in the term "illegal alien." In between there are varying statuses, *inter alia*, persons residing under color of law (PRUCOL), refugees, and permanent legal resident aliens. These will be collectively referred to as "rights of residents."

The second set of incorporative structures are those which have been developed over a period of 130 years, which concern the incorporation of non-majority, or in the case of women, disenfranchised populations. These include various civil rights laws, ranging from provisions prohibiting discrimination in various areas, such as employment, housing, public accommodations, education, contracting, and voting to provisions which promote the inclusion of historically disenfranchised and excluded groups, such as affirmative action. These are collectively referred to as "equality rights." What follows below is (1) a further description of these regimes (although not by any means an exhaustive treatment), (2) an analysis of the projected impact that globalization

23. See generally, Frug, *The City As A Legal Concept*, 93 HARV. L. REV. 1059 (1980) (discussing private/public distinction of corporations and choice of whether to promote democratic or hierarchical values).

of the economy will have on these regimes and consequently Latinos in the United States, and (3) how elites have framed the debate with respect to these rights in order to consolidate power and move toward policies favoring those who control capital over the general population.

E. *Rights of Residents*

The rights of residents in the United States are a function of their legal status, which is determined by place of birth, naturalization as citizens, and varying degrees of legal sanction such as permanent legal resident aliens and illegal aliens. It is also a function of the legal definition which determines the degree of inclusion afforded each distinct or overlapping legal status as a resident.

Citizenship is conferred in one of two general ways: (1) birth within the United States or a United States' territory or (2) naturalization after choosing allegiance to the United States and completing certain requirements. As a citizen, one is afforded the greatest number of rights that a resident may receive. These rights, with few exceptions (*e.g.*, conviction of a felony), are generally conferred for life. These include constitutionally conferred rights, such as the right to vote in federal, state, and local elections, equal protection of the laws, the right to travel, the right to due process of law, the right to free speech and assembly, the right to bare arms, the right to freedom of religion, the right to trial by jury, and the right not to be subject to cruel and unusual punishment.

In addition to these constitutionally conferred rights, statutory law may confer rights on citizens and distinguish between citizens and non-citizens. The degree to which statutory law may make a distinction between the two groups is, in part, determined by the level of government enacting the law and the nature of the right or limitation involved. With respect to non-citizens, state and local governments are limited both by federal equal protection requirements and federal immigration policy. In contrast, the United States federal government acts within greater authority. Sometimes known as the "plenary powers" doctrine, the national government generally has paramount power over immigration policy. Thus, while a state's distinction between citizens and non-citizens in public welfare benefits may be unconstitutional,²⁴ a similar distinction between citizens and non-citizens by the national government may be upheld against constitutional challenge.²⁵

24. *Graham v. Richardson*, 403 U.S. 365 (1971).

25. *Mathews v. Diaz*, 426 U.S. 67 (1976).

Nevertheless, states may make distinctions between citizens and non-citizens in terms of offering employment based on the nature of the job, as well as in certain other areas under the rubric of "special public interest."²⁶ Thus, states may require police officers,²⁷ school teachers,²⁸ and parole officers²⁹ to be United States citizens, but could not impose a general limitation on employers from hiring non-citizens.³⁰

What would one expect in terms of the impact of globalization of the economy to the rights of residents and those seeking to be residents? One would expect several trends. First, to the extent that necessary human capital is impeded, one would expect that in first world countries, immigration policy would be based increasingly on economic criteria rather than human rights criteria. For those immigrants seen as unnecessary human surplusage, one would expect that they would be excluded or increasingly scapegoated based on their definition as unnecessary burdens. Public resources to these persons would be cut off and inequality of treatment towards them heightened. Second, for countries seeking integration as unified trading blocks, one would expect an increasing portability of rights of residents, citizens or non-citizens, in that trading block.³¹ Third, for certain countries, in particular for third world countries, impediments to full participation rights of their residents may be eliminated. For example, countries which prohibited dual citizenship may change their laws and thereby gain influence through citizen expatriates who become citizens in their non-indigenous adopted countries.

How are these trends reflected in U.S. domestic relations and what mechanisms are used to effectuate these trends? From the scapegoating of immigrants to calls for a constitutional amendment to deny citizenship to U.S. born children of non-citizens, non-citizens have been defined by some as unnecessary, causing their rights to diminish. For other non-citizens, such as certain professional employees under NAFTA, mobility is being facilitated by lowering barriers to residency for economic purposes. Immigration policy is increasingly being driven by economic criteria.

F. *The Immigration Debate*

Over the past 20 years, increasing in intensity when the U.S. economy falters, both documented and undocumented immi-

26. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1537 (2d ed. 1988).

27. *Foley v. Connelie*, 435 U.S. 291 (1978).

28. *Amback v. Norwick*, 441 U.S. 68 (1979).

29. *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982).

30. *Truax v. Raich*, 239 U.S. 33 (1915).

31. See generally SOYSAL, *supra* note 3 (Chapter 8).

grants have become scapegoats for societal and economic malaise. This has been especially so for undocumented immigrants. They have been portrayed by the holders of capital as a hidden danger to U.S. society, being responsible for unemployment and lower wages for U.S. natives, as well as a drain in public resources through dependency on public benefit and welfare programs. This portrayal, as all stereotypes, denigrates and creates abstractions of living, breathing human beings, making it all the easier to treat particular immigrants as a lesser class of persons, unworthy of housing, medical attention or subsistence. Not only does this portrayal lead to discrimination and inequality—it is wrong.

Undocumented immigrants do not generally depress wages, cause unemployment, or drain public resources.³² Indeed, to the contrary, they contribute more to the public coffers than they receive. Further, they contribute enormously to the economy, in many instances increasing employment, which results in economic growth rather than economic decline.³³

Unfortunately, the mythical construct of the “parasitic immigrant,” has served the ends of those who have sought to avoid taking responsibility for society’s failures, and has led to the passage of such laws, as the Immigration Reform and Control Act of 1986³⁴ (prohibiting employment of the undocumented) as well as the Community Development Act of 1981³⁵ (prohibiting federal housing assistance to the undocumented). More recently, the President’s crime bill proposed an amendment that would require school systems to report their students or parents of their students who they suspect are undocumented aliens to the Immigration and Naturalization Service—notwithstanding the United States Supreme Court decision in *Plyler v. Doe*.³⁶

In California, Proposition 187 has passed. It seeks to prohibit state assistance in California to undocumented immigrants by restricting assistance for education and public health services with only exceptions in limited circumstances.³⁷ It will also “require local officials [like police officers, teachers, doctors and

32. See generally Roger Martinez, *Dispelling the Job Competition Myth: An Analysis of Undocumented Immigrants Impact*, 1 CHICANO LATINO POLICY PROJECT 3-6 (Jan. 1994) (Noting no sizeable effect by undocumented immigrants on natives’ employment opportunities or earnings).

33. *Id.*

34. 8 U.S.C. § 1101 (1988).

35. 42 U.S.C. § 1436(a).

36. 457 U.S. 202 (1982) (holding that undocumented alien children are entitled to a public education).

37. See NATIONAL COUNCIL OF LA RAZA AGENDA, VOL 12, NO.3, FALL/WINTER (1994/95).

nurses] to 'turn in' anyone suspected of being undocumented."³⁸ This is a direct example of how the errant myth has taken on momentous proportions, driven by the politics of fear.

What is the reality?

According to the Immigration and Naturalization Service (INS), the undocumented population in the United States is estimated to be 3.2 million people, slightly over 1% of the total population.³⁹ The participation rate of recent immigrants in public benefit programs is low. According to Michael Fix and Jeffrey Passel of the Urban Institute:

The 1990 Census indicates that the share of recent immigrants (*i.e.*, arriving between 1980 and 1990) using public assistance⁴⁰ is surprisingly low—3.8 percent . . . Moreover, *almost one half* of all immigrants entering during the decade who were using public benefits in 1989 entered from refugee-sending countries. We assume that the great majority of these persons entered as refugees. *Only 2.3 percent of immigrants entering from non-refugee sending countries during the 1980's were reported to be using public benefits in 1989—lower than welfare participation rate of natives (3.3 percent).*⁴¹

Thus, if we assume that undocumented aliens use public benefits at the same rate as legal aliens (which seems unlikely since undocumented aliens are generally ineligible for public benefits), there are at most 3.8% of 3.2 million persons or 121,600 persons nationwide obtaining public benefits who are ineligible to receive them.⁴² If we use the 2.3% participation rate of non-refugee aliens, undocumented aliens would only comprise 73,600 of the beneficiaries nationwide.

According to Fix and Passel, recent studies assessing the fiscal burdens of both documented and undocumented immigrants, systematically understate the tax collection from immigrants and overstate their service costs.⁴³ Moreover, such studies fail to take into account the impact of the full economic benefits generated by the consumer spending of immigrants. They also omit analogous tax receipt and expenditure analysis for natives, and overstate the size of the immigrant population (especially the undocumented) and the job displacement costs and impact of im-

38. *Id.*

39. *Immigrants and Welfare: New Myths, New Realities, 1993; Hearing before the Subcomm. on Human Resources of the House Comm. on Ways and Means, 103rd Cong., 1st Sess. 8 (1993)* (statements of Michael Fix and Jeffrey Passel) [hereinafter Fix & Passel].

40. Defined as SSI, AFDC and General Assistance.

41. Fix & Passel, *supra* note 39, at 5-6.

42. This number is also unrealistically high because refugees are generally allowed to obtain public benefits.

43. Fix & Passel, *supra* note 39, at 7.

migrants.⁴⁴ As an example, Fix and Passel reviewed different studies, including one study that, when estimation errors were corrected, showed "a significant surplus of revenues over social services costs."⁴⁵

Fix and Passel also concluded that "efforts to curb undocumented immigration by restricting access to public benefit programs are problematic."⁴⁶ First, according to Fix and Passel, "there is little evidence that undocumented immigrants come to the United States to use public benefits." Second, "[s]ince undocumented are barred from most programs to start, the opportunity for cost savings are limited." Third, implementation of the INS's Systematic Alien Verification for Entitlement (SAVE System) to verify welfare applicant's immigration status has not "had much of any impact on levels of undocumented immigration."⁴⁷

Moreover, where undocumented immigrants have been afforded benefits, there has been special justification. Thus, extending emergency health benefits under Medicaid and pre-natal and post-birth benefits under the Women, Infants and Children Program have "been based on the public interest calculation that it would be cheaper to make the services available than to withhold them."⁴⁸ Further, they point out that the Supreme Court's rationale in *Plyler v. Doe*⁴⁹ for requiring public funding of education for undocumented children, (*i.e.*, that the states should not visit the sins of parents on the children), applies to recent proposals to bar undocumented children from attending schools or receiving AFDC payments.⁵⁰ Finally, using untrained "bureaucrats, doctors, and other public employees" to determine the eligibility status of immigrants could very well lead to discrimination, especially given the experience in the employer sanction area.⁵¹

Other studies have also dispelled the myth of deleterious effects of undocumented immigrants on job opportunities and wages. Roger Martinez, in his recent and careful study of empirical evidence on undocumented immigrants' impact on the U.S. labor market reached, *inter alia*, several conclusions.⁵² First, "undocumented immigrants have no sizeable effect on native's em-

44. *Id.*

45. *Id.* at 7.

46. *Id.* at 9-10.

47. *Id.*

48. *Id.*

49. 457 U.S. 202 (1982).

50. FIX & PASSEL, *supra* note 39, at 10.

51. *Id.*

52. Martinez, *supra* note 32, at 4-16.

ployment or earnings.”⁵³ Second, “the comprehensive array of economic and statistical studies clearly demonstrate that natives are not in danger of job competition with undocumented immigrants.”⁵⁴ Third, “most studies suggest there is a weak complementary job-creating effect from immigrants on native employment.”⁵⁵ Fourth, “undocumented immigrants do not reduce the earnings of natives.”⁵⁶ Finally, “in certain instances undocumented immigrants insulate natives from the effects of national wage slumps, and in other cases undocumented immigrants have a positive effect on the wage rates for natives.”⁵⁷

Despite the overwhelming evidence that undocumented immigrants do not depress wages, diminish job opportunities, nor are a net cost to society, legislation over the years has attempted to prevent undocumented immigrants from obtaining employment and public benefits. This legislation has resulted in social and economic costs that outweigh the benefits in cost savings.

The Immigration Reform and Control Act (IRCA)⁵⁸ established employer sanctions to prevent employment of undocumented immigrants, as well as an INS computer verification system, known as the SAVE system. The SAVE system was to be used to verify the legal immigration status of those receiving AFDC, Medicaid, Unemployment Compensation, Food Stamps, Housing Assistance, and Title IV Educational Assistance.

When Congress enacted the SAVE system, it recognized that it could very well be cost ineffective. As stated by the House Committee on Energy and Commerce with respect to experience with the SAVE system:

Over the past two years, the INS has implemented SAVE pilot projects in a number of states, including Florida, Illinois, and Colorado. According to the National Governors' Association, however, the experience with SAVE to date indicates that the INS data are “incomplete and often inaccurate,” and that the capacity of verification to generate savings for the Federal and State government is “questionable.” The Governors cite the example of the SAVE pilot project in Colorado, which verifies eligibility for both employment compensation and income security programs, including AFDC. Of a total of 147,000 alien applicants in FY 1985, only 17 were found ineligible; savings were only \$3,046, compared with administrative costs, exclusive of staff time, of \$10,500. The Governors also point out

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified as amended at 8 U.S.C. §1101 (1988)).

that, although this verification mandate would apply in all states, the undocumented alien population is concentrated in only a few. According to a Census Department estimate of the distribution of this population in 1980, over 80 percent were residing in 5 States: California (estimated 50%); New York (11%); Texas (9%); Illinois (7%), and Florida (4%). The Committee is concerned that, even if mandatory verification in the states with relatively high percentages of undocumented aliens can be shown to be cost-effective, the imposition of this requirement in other states may well waste scarce federal resources.⁵⁹

Consequently, when Congress enacted IRCA, it included specific provisions to redress the possible cost ineffectiveness of the verification requirements, including provisions allowing a waiver of those requirements.⁶⁰

Based on those provisions, numerous states have sought and have been granted waivers with respect to IRCA's alien verification requirements. Thus, the Department of Agriculture has issued waivers to six states for the food stamp program including New York, Texas, and the District of Columbia. The Texas waiver was requested in March 1990 after determining the system was not cost effective.⁶¹ Nevertheless, recent trends have reflected further efforts to verify residency status, as well as exclude the undocumented in the U.S. from public benefits. Legislation after the California earthquake, for example, sought to limit certain assistance to the undocumented.

Not only do these mechanisms pose economic costs, but social costs as well. Discrimination has resulted from attempts to exclude undocumented immigrants from employment; and there is no reason to believe similar discriminatory results will not result from attempts to exclude undocumented immigrants from housing or other benefits. A March 29, 1990, GAO report required by IRCA verified that "employer sanctions have resulted in a widespread pattern of discrimination against Latinos, Asians, and others who look or appear foreign."⁶² According to the GAO report, "10% of the 4.6 million employers in the survey population began one or more practices resulting in discrimination against those who look or sound 'foreign.'"⁶³ Given that "at [the] time of survey, these employers had hired an estimated 2.9

59. House Rep. No. 99-682 (IV), *reprinted in* 1986 U.S.C.C.A.N. at 5819.

60. See §§ 121(c)(4)(B) and (C) of the Immigration Reform and Control Act of 1986.

61. ZIMMERMAN, *SAVE AND AUTOMATED VERIFICATION OF IMMIGRATION STATUS 20* (1990) (The Urban Institute) (on file with author).

62. National Council of La Raza Agenda, *Repeal of Employer Sanctions: Background Materials* (on file with author).

63. *Id.* at 1.

million employees which indicates that thousands if not millions, of job applicants have been affected.”⁶⁴ Further, “contrary to the anti-discrimination provisions of IRCA, another 9 percent of employers admitted to discriminating on the basis of citizenship status.”⁶⁵ In addition, “a hiring audit revealed that Hispanics were three times more likely to encounter unfavorable treatment by employers than Anglos, and that Anglos received 52 percent more jobs offers than equally qualified Hispanic U.S. citizens.”⁶⁶ “The GAO also indicated that it probably erred on the side of understating the extent of discrimination caused by employer sanctions in order to interpret the results as conservatively as possible.”⁶⁷ Thus, both the economic and social costs of mechanisms of exclusion are considerable.

Attempts to deny federal benefits to immigrants have not only been aimed at the undocumented, but the recent trend has been to deny benefits to legal residents that are not citizens. As explained by the Center for Immigrants Rights with respect to 1994 proposed welfare reforms:

Since last November, at least ten bills have been introduced by members of Congress to finance welfare reform by eliminating federal benefit programs—including Supplemental Security Income (SSI), Aid to Families with Dependent Children (AFDC), Medicaid, and Food Stamps—to legal immigrants. Particularly restrictive are H.R. 3500, a bill sponsored by House Republicans, and H.R. 4414 (the Independence for Families Act), sponsored by House Democrats calling themselves the “Mainstream Forum.” H.R. 4414 proposes to deny Medicaid, SSI, AFDC, and Food Stamps programs to all legal immigrants, while H.R. 3500 proposes a similar strategy, eliminating these four programs in addition to fifty-seven federal benefit programs, including school lunch, nutritional assistance for the elderly, job training, and housing assistance. . . . The Clinton administration’s welfare bill, introduced in July as H.R. 4605 in the House and S. 2224 in the Senate, also proposes to cut public benefits for legal non-citizens by extending sponsor deeming—the period in which an immigrant’s sponsor’s income is “deemed” to be available to the immigrant for various purposes including food, shelter, and health care from three years to five years for SSI, AFDC, and Food Stamps. Clinton’s plan also proposes to restrict non-citizens’ access to AFDC, SSI and Medicaid such that eligibility criteria for these programs conforms to narrowly defined criteria that currently exist for the Food Stamps program.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

Relative to other programs considered for cuts, the bulk of the benefit reductions in all of these bills place a disproportionate burden of responsibility on lawful immigrants to finance welfare reform. According to a statement released by the Office of Management and Budget, "The President's welfare reform proposal does not increase the deficit or raise taxes. It is fully paid for over five years, largely by reductions in entitlement spending." However, most of the projected savings in his proposal come from reductions in entitlement spending for legal immigrants (\$3.7 billion). By denying assistance to indigent and vulnerable persons (based solely on their immigration statuses), these strategies will accomplish little towards improving social and economic conditions that cause poverty. Rather than conceptualizing preventive approaches, these proposals promote crisis-oriented approaches toward the alleviation of these problems, which will clearly result in higher resource costs and burdens. By arguing that the deteriorating situation of citizens can be appropriately addressed by denying benefits to legal immigrants, these policy-makers fail to recognize how the fate of these two groups is co-dependent on the structure and function of the U.S. economy. The proposals offered frame these issues in stasis, neither contextualizing social welfare policies within the dynamics of the national economy, nor recognizing other important social variables in this regard.⁶⁸

Moreover, it is part of the Republican "Contract with America" to deny benefits to legally residing non-citizens. Their "Personal Responsibility Act" makes "most noncitizens ineligible for welfare programs."⁶⁹ As the Republicans further explain, the Act would "deny noncitizens most welfare benefits such as AFDC, Social Security, rental assistance, job training, and food stamps. The legislation makes exemptions for the aged."⁷⁰

The pattern of how those consolidating power use race and ethnicity can be seen in the immigration debate. The first step is to define the problem (*i.e.*, the cause of economic hardship) as the "other." They define immigrants generally, and Latinos specifically, as the cause for economic hardship for the majority population. The second step is the demonization of the "other" by overt and subtle racial appeals and the exaggeration of any true impacts of immigration for political effect. The third step is the translation of these attacks on the "other" to attacks on policies

68. Center for Immigration Rights, *Re-visioning Social Welfare Policy: Toward an Understanding of Immigrants' Use of Public Benefits* 1-2 (Sept. 1994)(on file with author).

69. RESTORING THE DREAM: THE BOLD NEW PLAN BY HOUSE REPUBLICANS 19-20 (Stephen Moore ed. 1995) (also devolving welfare policy with block grants and eliminating entitlement. The Personal Responsibility Act was passed in the House of Representatives 234-199).

70. *Id.* at 171.

and programs linked to the "other," thereby demonizing these programs. The final step is the political mobilization to eliminate the programs.

G. *Equality Rights*

There are also constitutional and statutory legal regimes within the United States which have been constructed over the past one hundred and thirty years which seek to promote equality and inclusion. They include constitutional prescriptions and prohibitions, ranging from the Civil War Amendments (prohibiting slavery, requiring the equal protection of the laws, guaranteeing the privileges and immunities of national citizenship, and prohibiting discrimination in voting on account of race) to more recent amendments guaranteeing the right to vote to women and those 18 years of age and older, and eliminating the poll tax.

They further include a wide range of statutory provisions, orders by the executive branch of the United States government, and administrative decisions that promote equality and inclusion. Among the most important of these legal regimes are Title VII of the Civil Rights Act of 1964⁷¹ which prohibits discrimination in employment; Title VI of the Civil Rights Act,⁷² which prohibits discrimination by recipients of federal funds; the Fair Housing Act,⁷³ which prohibits discrimination in housing and lending practices; and the Voting Rights Act of 1965, as amended,⁷⁴ which prohibits denial of equal electoral opportunity to protected classes, including African Americans, Latinos, Asians, Native Americans, and Alaska Natives.

Presidential executive orders have required that those contracting with the United States affirmatively include as goals the hiring of, and/or subcontracting to qualified minorities and women.⁷⁵

What effect would one expect the globalization of the economy have on equality rights? One would expect the trends to be two fold. First, to the extent that group based rights are an impediment to decisions by the holders of capital, these rights will be increasingly diminished within nation-states. This is based on the transcendent organizational force of multi-national holders of capital. Thus, while economic decisions by private corporate bodies are becoming increasingly transcendent of public corporate bodies, the corporate level of public political decision mak-

71. Civil Rights Act of 1964, 42 U.S.C. § 2000e (1964).

72. Civil Rights Act of 1964, 42 U.S.C. § 2000d (1964).

73. The Fair Housing Act, 42 U.S.C. § 3601, *et seq.*

74. Voting Rights Act, 42 U.S.C. §1971, *et seq.*

75. See 30 Fed. Reg. 12319 (1965)(requiring employers receiving federal funds to take affirmative action to hire underutilized groups).

ing which may be influenced by minority peoples, are either remaining the same, being vested in the nation state, or are devolving. At some point this may change based on transnational, organizational efforts. Thus, we may begin to see a second trend. In response, an increasing internationalization of the notion of rights from civil rights based on the conferring of rights by the nation state to human rights based on an inherent notion of rights conferred by personhood.

H. *The Group Rights Debate*

In the United States, the first process is clearly underway as non-capital based group rights (eg., affirmative action and inclusive voting rights mechanisms) are increasingly under attack. It is both being scapegoated as racial preferences and attacked for being affirmative action, based on the backlash effect of the elimination of restraints on capital.⁷⁶ While those who have sought to attack civil and human rights in the United States have framed their attack as one being against group rights, in fact, they are not against all group rights, but only those which are not predicated on being the holders of capital. That is, while affirmative action, bilingual education, and voting rights are being attacked ostensibly because they reflect group rights over individual rights, no attacks are being made by these same people against private corporations which reflect the group rights of holders of capital who act in concert under the legal protection provided by the private corporate form.⁷⁷

Instead, those who seek to attack civil rights and incremental policies of inclusion have used two basic approaches: (1) the denial or diminishment of the existence of past and present discrimination which has taken place against individuals, because they are members of a group and thus, merit a group remedy⁷⁸ and (2) similar to the pattern in the immigration debate, connecting the cause of economic hardship and depressed economic opportunity directly to affirmative action, civil rights and race, demonizes these protective measures as benefitting the "other"

76. Thus, the process of the growth in anti-affirmative action sentiment, has been described in a New York Times article as being a backlash that arose after companies had downsized their operations. White males saw their economic opportunities diminish and turned their anger at affirmative action, which they blamed for lost opportunities. Judith H. Dobzynski, *Some Action, Little Talk*, N.Y. TIMES, Apr. 20, 1995, at D1.

77. For example, share holders of corporations are generally protected from personal liability for the acts of the corporations of which they are part owners.

78. See Stanley Fish, *How the Right Hijacks the Magic Words*, N.Y. TIMES, Aug. 13, 1995, at 2. See also Testimony of Jorge Amsela, Center for Equal Opportunity Before the Judiciary Committee Subcommittee on the Constitution, Dec. 7, 1995, § 4, at 15.

and mobilizing politically to attack civil rights and affirmative action.

The truncation of history takes place in the form of using the concept of "color blindness," which had been used previously to respond to the official apartheid that existed against blacks in the United States to argue against remedies which would allow people of color and women a remedy against past discrimination. That is, if there is no current discrimination, no remedy should respond to the harms of the past and ensure that people of color whom have been disadvantaged by the past discrimination are given an equal opportunity in the present.

Effectively, those who are members of the racial and ethnic groups who have been most disadvantaged and disenfranchised by past discrimination are asked to accept the burden of this discrimination until "color blindness" operates over time to allow a remedy of the past.

The attacks have come both in the political and legal arenas. In California, opponents of affirmative action remedies are seeking to pass anti-affirmative action measures under the guise of the California Civil Rights Initiative.⁷⁹ In other states, legislative proposals have been made to do away with affirmative action,⁸⁰ and similarly, federal legislation has been introduced to eliminate federal affirmative action programs.⁸¹

Legally, several major cases have recently been decided in the federal courts against affirmative action. The United States Supreme Court, which is composed of nine justices, five of whom have voted in the majority against pro-affirmative action positions, have ruled against race based remedies in contracting,⁸² voting,⁸³ and refused to hear another case concerning affirmative action in education.⁸⁴ In each instance, these decisions have made it more difficult for minority groups to gain access to education, economic, and political opportunities.

Various arguments have been used in the public arena by opponents of affirmative action. Explicit in these arguments is

79. See, e.g., Nicholas Leman, *What Happened to the Case for Affirmative Action*, N.Y. TIMES MAGAZINE, June 11, 1995 (on affirmative action); Peter Schrag, *The Preferential Treatment Backlash*, S.D. UNION TRIBUNE, Aug. 21, 1994, at 63 (on California Civil Rights Initiative).

80. See, e.g., S. 5071, 218th Leg., 1995 NY 1st Sess., H.B. 360, 179th Leg., 1995 Pa. Sess.

81. The federal legislation termed the "Equal Opportunity Act of 1995", H.R. 2128, 104th Cong., 1st Sess. (1995) was introduced by Representative Charles Canady.

82. *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995).

83. *Shaw v. Reno*, 113 S. Ct. 2816 (1993); *Miller v. Johnson*, 115 S. Ct. 2475 (1995).

84. *Podberesky v. Kirwan*, 38 F. 3d 147 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 2001 (1995).

the use of race. That is, because affirmative action sometimes provides for race-conscious goals, race-consciousness is evident in these programs. Thus, the programs can easily be attacked on the basis of race, while obscuring the real intent of such programs. Affirmative action may be defined as modest remedial adjustments which seek to provide qualified members of minority or disenfranchised groups an equal opportunity to obtain employment, contracts, scholarships, and other opportunities. The general concept of affirmative action is that minority group members in a given qualified pool should have an equal opportunity to get a job. Those who are against affirmative action frame their attacks as "you, member of the majority, are being denied a job because they, the 'other', are being benefitted by affirmative action." Thus, in the real absence of overall economic opportunity where everyone can have gainful employment, innocents are pitted against one another.

Dwindling economic opportunity heightens this tension as competition for scarce gainful employment opportunities increases. Consequently, global economic trends which diminish gainful employment opportunities are a catalyst to this tension. What has generally been missing in the public debate, however, is the development of a solution that both redresses the disproportionate lack of economic opportunity for those historically discriminated against, and that also protects innocent members of the majority population. The solution should ensure the following: (1) the burden of the remedy should not fall either on those most disadvantaged or those who are innocent, but on society as a whole⁸⁵ and (2) the economy must provide gainful employment opportunities for all Americans. This framework eliminates a majority of the tension caused by remedial programs, such as affirmative action. Used in conjunction with remedial affirmative action measures, programs that additionally reinvest in divested sectors of the economy, and programs which ensure everyone a decent, livable wage, even if they require public expenditures, begin to present true solutions. These types of

85. For example, if a majority worker in a jurisdiction has been displaced in order to remedy past discrimination by the jurisdiction, the worker who is displaced should be compensated out of the jurisdiction's general revenues. Put another way, the cost of the remedy should be spread to society as a whole. The degree of societal cost spreading, of course, depends on the degree to which the settled expectations of majority individuals are upset. If a person in a large pool has not been selected for a job as the result of a needed remedy, no special compensation may be required. If a person failed to receive a promotion from a smaller pool, some greater compensation may be required. If a person who has seniority is laid off in order to maintain minority employment levels (which is not permitted under Supreme Court doctrine, *see Fire Fighters Local Union No-1784 v. Stotts*, 467 U.S. 561 (1984)) even greater compensation would be required.

programs, however, constrain capital and are likely to be opposed by the holders of capital.⁸⁶

The impact of attacks on civil rights and affirmative action not only effects Latinos because they undermine civil rights and affirmative action, but also because they undermine programs which have in the past sought to specifically ensure the inclusion of Latinos. Thus, bilingual education and bilingual assistance in voting and other areas are being attacked.⁸⁷ In doing so, those leading the attacks have both used the theme that everyone must conform to the majority culture—and thus, cast Latinos as the “other”—and have asserted that bilingual assistance and education is too costly and an unnecessary expense.

The pattern of activities used by those seeking to consolidate power is also evident in the group rights debate. Race is all too often used to pit one innocent American against another. Economic mechanisms which could be used to remedy past discrimination, such as the cost spreading of remedies and reinvestment to improve the overall economy, are not raised. Nor is global economic restructuring acknowledged as a cause of the decline in economic opportunity.

I. *Social Welfare, Environmental, and Other Rights*

In addition to equality rights, there are legal rights and regimes which in the past have insured worker safety, subsistence, and the maintenance of the environment. Attempts have been made to undermine these legal regimes, as would be expected if one were seeking to favor the decisions of the holders of capital over non-capital based rights, and to remove constraints on capital.

Thus, at the same time that scapegoating immigrants and attacks on affirmative action have been attempted, other predictable outcomes of globalization have begun to occur in the United States including: (1) an increase in social control spending, including increased spending for prisons, and the criminalization of various behaviors not previously criminalized at the federal

86. Some have argued that economic based affirmative action should be used to remedy past discrimination. Simply put, economic based affirmative action will address economic based discrimination, but is both underinclusive and overinclusive as a remedy to race-based discrimination. That is, there are people of color who are not poor who have been subject to discrimination based on race and persons who are poor who have not been disadvantaged based on race. Further, even assuming all race based discrimination is reflected in class, unless all poor people were assisted, it will be an inadequate remedy for racial discrimination, since the disproportionate disadvantage of minorities would not be addressed. Thus, race and gender based affirmative action is and remains a necessary remedy.

87. Thus, English-only legislation has been proposed. *See, e.g.*, H.R. 123. As well as the defunding and elimination of bilingual education. *See* H.R.1005.

level;⁸⁸ (2) a reduction in trade barriers with the passage of NAFTA and the GATT; (3) a reduction of sovereignty with the passage of GATT; (4) discussions of confederation in the Americas; (5) the removal of controls on banking;⁸⁹ (6) the downward leveling of the nations' regulatory apparatus;⁹⁰ (7) the elimination of entitlement for medicaid (health care for the poor) and public assistance;⁹¹ and (8) drastic cuts in social welfare expenditures.⁹²

The attacks on these programs and legal regimes have been, in part, framed as: (1) being needed to reduce expenditures in order to be competitive; (2) as attacks on big government (*i.e.*, the expenditure of your money by those others who wish to control your lives); and (3) attacks which may involve racial coding (*i.e.*, the expenditure for your money for those others on welfare).

Proposed changes to other legal regimes and policies similarly reflect efforts by those who hold capital to fashion domestic policies in a manner that both ensures their own economic benefit at the detriment of social welfare supports and protective legal regimes.

III. THE FUTURE AND POSSIBLE RESPONSES

We live in a dangerous time. Once a transition is made to a new global order, the pain and suffering of the poor and those who are disenfranchised may not improve as counter-forces to the elites in power may become even more diminished with the diminution of the nation state. Those who seek human rights and economic justice and those who stand in the way of "economic progress," may be defined as the "other," regardless of class or ethnic origin. The poor, in the United States and much of the world, including Latinos as well as other people of color, are most at risk. What can we do against a wave of economic and political reconfiguration that will value the economic gain of those in power over equality and justice, that will promote harm in our societies, that will actively promote exclusion and/or define the poor as the problem, and discard those who are econom-

88. Thus, as part of the Republican "Contract with America", spending was proposed to be increased to 10.5 billion dollars. *See RESTORING THE DREAM, supra* note 69, at 18.

89. *See* Anthony D. Taibi, *Banking, Finance, And Community Economic Empowerment: Structural Economic Theory, Procedural Civil Rights, And Substantial Racial Justice*, 107 HARV. L. REV. 1463, 1535-36 (1994).

90. *Id.* at 169-172.

91. Center on Budget and Policy Priorities, "Contract" Would Ultimately Deny Benefits to Five Million Poor Children, *Report Finds*, (press release) Nov. 22, 1994 (analyzing Personal Responsibility Act).

92. *See RESTORING THE DREAM, supra* note 69, at 153-157.

ically obsolescent in the eyes of the world? We know the operation of power; it first attempts to coopt and then coerce. We know we are in a difficult struggle. First and foremost, we cannot lose hope and must continue to vigilantly work for justice. The question is how.

A. *General Approaches*

At the outset, we must realize that checks and balances will help limit the accumulation of power by elites who have the power to move capital. Nation-states and international organizations, such as the non-aligned nations, can provide limits to international action. Serious questions are raised about how Latinos should organize—by confederation of Latino states, by language, by joining an American hemisphere confederation with the United States, by joining a confederation with non-aligned states, etc.

Moreover, our discussion in part reflects that power is shifting from the national level to the transnational level, and from the national level to the state and local level. Unfortunately, in a global system, local and state government economies have even less impact on transnational actors than dwindling nation-states. Thus, in terms of long term trends, the vacuum developing at the national level portends badly for the Latino community. Transnational decisions based on the goal of short-term profit will be even less tempered than before.

What are the points of intervention to facilitate the empowerment of the Latino community? What are the strategic responses to today's hostile environment?

At the transnational level, a critical point of intervention and leverage centers around opening up the United States' borders for trade. Each time a trade barrier is removed, the United States may require in return increased wages, environmental and labor standards for developing countries, and promote upward leveling. Thus, as the NAFTA debates illustrate, many sought conditioning the opening up of borders on better labor and environmental standards for Mexican workers and localities. Domestically, concessions can and should be sought from corporations who profit from moves overseas. For example, a 25% tax on profits from overseas investments derived from trade agreements could be required and earmarked to be invested in disinvested sectors and geographic areas in this country. If the investment directly resulted in a loss of jobs domestically, these profits could be targeted in the short term to job replacement. This could be done through community development banks, community development financial institutions, and other such mechanisms. Trans-

nationally, labor and the divested sectors could also be organized toward their mutual benefit *vis a vis* capital investors.

The transnational implication for a western hemispheric trade zone with open trade has great implications for the Latino community. First, protection against language discrimination could be requested as a concession by Latin American countries for the price of opening up their borders for trade. They could also ask for an equivalent, or more equal, treatment for their workers and localities in terms of wages, as well as labor and environment standards. They could, for example, move toward upward leveling of wages by requiring the same minimum wage as U.S. workers receive. Second, psychologically the notion and reality of western hemispheric portable rights could be extremely empowering to the Latino community in the United States, as Latinos would be the majority population in the hemisphere. Of course, the dignity and equality of treatment of all Latinos and non-Latinos alike must be assured.

Where feasible, the use of democratic processes should be promoted. Democratic structures allow those without wealth to influence governmental policy, which may in turn influence private corporate decisions. Moreover, governments expend capital and public corporate decisions (governmental decisions) may be redirected to invest in poor communities and thus, develop the economic bases of such communities. Such investments, as well as investments in "human capital," through education, nutrition, housing, and health care should be cost effective and promote economic justice.

Finally, substantive legal rights for people should be promoted both at the international and national level. Thus, where feasible, statutory, constitutional, and treaty protection for civil and human rights should be adopted. These should include both procedural and substantive rights (*e.g.*, voting rights, rights to equal treatment and non-discrimination, rights to speak one's own language; rights to housing, employment and education; rights to fair treatment in criminal matters, etc). These rights should extend to indigenous populations in all countries, including Latin American countries. All people should be afforded dignity and equality. The same forces that are at play globally are at play in Latin America and must be responded to vigilantly.

Domestically, the anger and pain caused by the restructuring of the global economy must be redirected to its cause. Rather than scapegoating immigrants, people of color, and the poor, the impact of globalization and its resultant disinvestment must be made clear. Further, it must be made clear that the transference of government decision making to non-democratic decision mak-

ers favors capital based decisions over non-capital based decisions. Those most affected by the impacts of globalization—minorities, labor, environmentalists, and the poor—must be made to recognize and develop coalitions against the common genesis of the attacks on civil rights, human rights, social welfare supports, and protective regulations. Constituents that are most effected must be organized to respond.

Substantively, for every barrier to capital eliminated, for example, the current proposals for relaxation of banking regulations, one should seek concessions toward reinvestment in divested sectors and localities. Thus, one should require investment in economically impacted areas and the hiring of the unemployed. Similarly, with changes in welfare policy, one should seek concessions for investment in human capital (eg., requiring training and education, and training to work, or school to work programs). Similarly, efforts must be made at national, state, and local levels.

One must promote a whole counter-institutional organizational effort based on human dignity, including: creation of non-destructive economic enterprises, locally controlled banking and investment institutions, health care, job development and educational institutions.

B. *Empowering The Latino Community*

How can the Latino community, which is disproportionately poor, effectuate these strategies? There are two fundamental ingredients in obtaining power in poor communities by combining (1) knowledge with (2) people who are organized.⁹³ With an organized and knowledgeable base of representative voices, the Latino community can express the community's viewpoint and effect public policy. One avenue for this representative voice is elective representatives. The other is representational institutions such as non-governmental organizations, and other similar intermediary institutions such as churches, unions, Latino related academics, and the media (both English and Spanish language), which give voice to the community. The Latino voice is strengthened to the extent these various voices are consonant. Thus, networking is obviously essential. Moreover, the Latino voice in harmony with other similarly interested groups, such as other people of color and immigrants, adds to the ability of the community to act.

Based on its ability to effectuate policy and coalesce, both internally and externally, the community also must develop its

93. The principles are those of the late Harry Fagan, whose efforts toward social justice were many. Any error in their usage are mine.

economic base. By developing its political and economic bases, the community will begin to replace a cycle of poverty with a cycle of empowerment.

IV. CONCLUSION

The world is moving toward global economic integration. Capital is leaving certain sectors in western countries and moving to third world countries because of lower wages and a less protective, regulatory environment. As a consequence, traditional opportunities for gainful employment for middle and working class families are being diminished. Wages are stagnant and declining. The economic suffering caused by the unfulfilled expectations of middle and working class families create a predicate for scapegoating those defined as the "other." At the same time as capital is moving out of certain sectors in western countries, people are migrating from poor countries to wealthier countries.

Political and economic elites, with the mind to do so, use this climate self-servingly to accumulate wealth and power. It is difficult to respond to the scapegoating because of a lack of public disclosure on global economic restructuring and a mismatch on capital-based forms of decision making and democratic forms of decision making. For example, capital-based decision-makers have advantages of low transaction cost in mobilizing and implementing global decisions while democratic based decision-makers must be directed through mass movements of their electorates who must possess a sufficient knowledge base to redress the negative impact of capital-based decisions. Moreover, democratic decision-makers are constrained by geographic limitations to their decision-making authority. What must be kept in mind is that a shift away from democratic governmental decision making to "private" decision making is not neutral because it cedes power to private corporate decision-makers. It does not lead to an enhancement of the power of individuals who will have more power to effectuate decisions through democratic forms, if they are not owners of capital, but is an enhancement of power of capital-based decision makers *vis a vis* government and/or individuals.

In the United States, examples of how elites use the present circumstances to obtain or maintain power is reflected in a number of different policy areas. Among others, their efforts are manifested in the immigration and affirmative action debates.

Immigrants have been scapegoated as the cause of economic hardship in the United States. In California, this is especially so for Latinos, as reflected in Proposition 187. The first step has been to define the problem—the cause of economic hardship—as

the "other," by defining immigrants generally, and Latinos specifically, as the cause for economic hardship for the majority population. The second step has been to demonize the "other" by overt and subtle racial appeals and the exaggeration of any true impacts of immigration for political effect. The third step has been to translate these attacks on the "other" to attacks on policies and programs linked to the "other," thereby demonizing these programs. The final step has been to mobilize politically to eliminate the programs.

Similarly, those who seek to attack civil rights and incremental policies of inclusion, such as affirmative action, have used two basic approaches. First, they have denied or diminished the existence of past and present discrimination which has taken place against individuals, because they are members of a group, and thus, merit a group remedy. Second, as in the immigration debate, they link the cause of economic hardship and depressed economic opportunity directly to affirmative action and civil rights, and thus to race. After making that linkage, they demonize these protects as benefiting the "other" and mobilize politically to attack civil rights and affirmative action. There are similar patterns of linkage and attack with regards to social welfare, environmental, and other rights.

To ensure human rights and economic justice regardless of class or ethnic origin, several approaches can be taken. Nation-states may seek a *quid pro quo*—opening up their borders for trade. That is, as the cost of opening up their borders to trade and investment, countries may ask for wages, environmental, and labor regulations comparable to the those of the most advanced western state. Toward this goal, there will be an upward leveling of those attributes, rather than a downward leveling. They may ask for other concessions, such as protection against language discrimination and portable rights. One should promote substantive legal rights and community-based, democratically controlled economic and education institutions. Finally, the Latino community must be organized politically, academically, and institutionally.

Poor countries as well as poor people are at a disadvantage. If they do not succumb to co-optation, will they succumb to coercion? Justice is substantive, not merely organizational. Actions to promote justice cannot and should not be diminished for the self-interest of some at the expense of others. Thus, whatever structural responses are attempted, we must not lose sight of justice for all and dignity for all. Hopefully, these ideas may begin a dialogue of hope in a climate all too often colored by despair. As it was once written:

Some day there will be a king who rules with integrity, and national leaders who govern with justice. Each of them will be like a shelter from the wind and a place to hide from storms. They will be like streams flowing in a desert, like the shadow of a giant rock in a barren land. Their eyes and ears will be open to the needs of the people. They will not be impatient any longer, but they will act with understanding and say what they mean. No one will think that a fool is honorable or say that a scoundrel is honest. A fool speaks foolishly and thinks up evil things to do. What he does and what he says are an insult to the LORD and he never feeds the hungry or gives thirsty people anything to drink. A stupid person is evil and does evil things; he plots to ruin the poor with lies and to keep them from their rights. But an honorable person acts honestly and stands firm for what is right.

(Isaiah 32:1-8)