

LATINOS, ASSIMILATION AND THE LAW: A PHILOSOPHICAL PERSPECTIVE

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I. INTRODUCTION.

In the popular television program called *Star Trek*, there is an extremely dangerous group of aliens known as the Borg.¹ They are part robot and part human. They have lost all individuality and are totally assimilated into the group, very much like insects.² Their greeting to all other life forms is greatly feared: "We are the Borg. Resistance is futile. We will assimilate you."³ Does the Borg scenario sound far-fetched? Is it merely science fiction? Maybe not. Something similar is happening right now in our own country. The dominant society seems to threaten Latinos and other minorities in Borg-like fashion with a demand to assimilate.

Generally, Americans believe that immigrants — including Latinos and other minority groups, should assimilate into the American mainstream.⁴ Thus, it is felt that Latinos have a duty to surrender the culture of their origins, and become "American."⁵ To enforce this desire, certain groups seek legal reme-

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1. See *Star Trek: First Contact* (Paramount Pictures 1997).

2. See *Star Trek*, *supra* note 1.

3. See *id.*

4. See Kevin R. Johnson, *Civil Rights and Immigration: Challenges for the Latino Community in the Twenty-First Century*, 8 *LA RAZA L. J.* 42, 79 (1995); See also Richard Delgado, *Rodrigo's Fourteenth Chronicle: American Apocalypse*, 32 *HARV. C.R.-C.L. L. REV.* 275, 296 (1997) (discussing pressure on Latinos to assimilate).

5. See Johnson, *supra* note 4, at 79; see also John O. Calmore, *Random Notes of an Integration Warrior*, 81 *MINN. L. REV.* 1441, 1472 (1997). Calmore writes that "melting pot assimilationism" required "immigrants to relinquish their 'un-Ameri-

dies.⁶ It is through these legal means that assimilationists hope to enforce an obligatory standard of assimilation.⁷ For example, the English only advocates seek to eliminate the use of Spanish⁸ and immigration restrictionists seek to curtail Latino immigration on the ground that they refuse to assimilate.⁹ Thus, the perception of an assimilation problem has generated efforts to enforce assimilation of Latinos through the law.

Although Latinos have been in the United States for many years, they have not been completely assimilated into mainstream American society.¹⁰ Separate Latino enclaves, as well as unique Latino cultural practices, demonstrate that Latinos have not fully assimilated.¹¹ This article responds to those who advocate the use of legal means to ensure Latino assimilation. This article argues that one should reject pressure to assimilate, and instead recognize the worth of distinctive cultural traditions of Latinos and other minorities. Moreover, this article uses philosophical literature to designate important limits on the demand for Latinos and others to assimilate into dominant society. Therefore, the primary question to be addressed is whether the law should be used to coerce Latino assimilation.¹²

In doing so, this article seeks to help construct a new theoretical framework called Latino Critical Theory.¹³ A recent per-

can' values and to adopt in their place America's core set of cultural and political values." *Id.* at 1472.

6. See Johnson, *supra* note 4, at 80; Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separation and Conflict in an Immigration-Driven Multiracial Society*, 81 CAL. L. REV. 863, 870 (1993).

7. See Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 278 (1992) ("American nativism has often taken the form of reinforcing the core culture through the law—using the law to restrict the expression of ethnic traits, including languages, different from those of the majority").

8. See *infra* notes 69-87 and accompanying text.

9. See *infra* notes 88-95 and accompanying text.

10. See Kevin R. Johnson, "Melting Pot" or "Ring of Fire"?: *Assimilation and the Mexican-American Experience*, 85 CAL. L. REV. 1261, 1279 (1997); DAVID E. HAYES-BAUTISTA, ET AL., NO LONGER A MINORITY: LATINOS AND SOCIAL POLICY IN CALIFORNIA 33 (1992) ("It is clear that Latinos are not assimilating the way European immigrants have traditionally assimilated") [hereinafter HAYES-BAUTISTA, NO LONGER A MINORITY].

11. See Johnson, *supra* note 10, at 1265.

12. Cf. Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779 (1994) (introducing into the legal literature the philosophical literature on the incommensurability of values).

13. For examples of Latino Critical Theory, see George A. Martínez, *Legal Indeterminacy, Judicial Discretion and the Mexican-American Experience: 1930-1980*, 27 U.C. DAVIS L. REV. 555, 617 (1994) (calling for Latinos to tell their stories so that their experience is reflected in legal discourse); George A. Martínez, *The Legal Construction of Race: Mexican-Americans and Whiteness*, 2 HARV. LATINO L. REV. 321 (1997); Johnson, *supra* note 10; Margaret E. Montoya, *Máscaras, Trenzas y Greñas: Un/masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 17 HARV. WOMEN'S L.J. 185 (1994); THE LATINO CONDITION: A CRITICAL READER

mutation of Critical Race Theory.¹⁴ Latino Critical Theory has emerged because of a perception that matters of concern to Latinos were not being addressed in race discourse.¹⁵

In Part II, this article describes how sociological explanations of race have focused on the assimilation of ethnic groups into a majority culture. It discusses the subsequent development of a specific ideology of assimilationism based on previous racial discourse that has established assimilation as a powerful norm in American society. Part II concludes by explaining that assimilationism has had dire legal consequences for people of color who have been unable to fully assimilate.

Part III of the article discusses the recent concern of some commentators regarding Latinos and their alleged refusal to assimilate. It examines various efforts to use law and government policy to force Latinos to assimilate or to punish Latinos for failing to do so.

Drawing on work in philosophy, Part IV argues that law should not be used to force Latinos and other groups to fully assimilate. Instead, the law should recognize the worth of distinctive cultural traditions of Latinos and other minorities.

(Richard Delgado & Jean Stefancic, eds. forthcoming New York University Press, 1998); Jean Stefancic, *Latino and Latina Critical Theory: An Annotated Bibliography*, 85 CAL L. REV. 1509 (1997); Elvia R. Arriola, *Latcrit Theory, International Human Rights, Popular Culture, and the Faces of Despair in INS Raids*, 28 U. MIAMI INTER-AM. L. REV. 245 (1996-97); Francisco Valdes, *Foreward: Latino/a Ethnicities, Critical Race Theory and Post-Identity Politics in Postmodern Legal Culture: From Practices to Possibilities*, 9 LA RAZA L.J. 1 (1996) (followed by forthcoming book).

14. Critical race analysts have sought to provide new approaches to issues of race. See CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT at xiii (Kimberlé Crenshaw et al. eds., 1995); CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed., 1995); 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, 2162-64 (1992) (observing that critical race theorists are the "new interpreters"). Interestingly, Edward Rubin recently has observed that critical race theory and contemporary law and economics have something in common — the "effort to locate law, social policy, and social change in a closely analyzed institutional context." Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1394 (1996). He therefore calls for a "new synthesis of discourse for legal scholarship." *Id.*

15. See e.g., Kevin R. Johnson, *Some Thoughts on the Future of Latino Legal Scholarship*, 2 HARV. LATINO L. REV. 101, 104 (1997) (contending that Latino Critical Theory promises to change the fact that Latinos are forgotten in constructive dialogue to improve race relations); Richard Delgado, *Rodrigo's Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary*, 75 TEX. L. REV. 1181 (1997) (black-white binary paradigm of civil rights contributes to the often invisible subordination of Latinos).

II. ASSIMILATION.

The sociology of race has focused on assimilation, the absorption of specific ethnic groups into a dominant culture.¹⁶ Indeed, assimilation theories still inform most research in this area.¹⁷ For example, sociologist Robert Park argues that immigrant groups proceed through stages of a "race relations cycle."¹⁸ According to Park, the race relations cycle takes the form of "contacts, competition, accommodation and eventual assimilation."¹⁹ In the contacts stage, immigrant groups enter into a host society, which generates competition between the host peoples and immigrant groups.²⁰ The accommodation stage requires immigrant groups to adjust to a new social organization.²¹ Park and other assimilation theorists contend that over time ethnic minorities will be assimilated into the dominant culture of their societies.²² For Park, assimilation is a process of absorption in which persons acquire the memories and attitudes of other groups and are thereby integrated into a shared cultural form of life.²³ According to this traditional model, it is thought that even racial minorities will eventually assimilate.²⁴

Since Park's path breaking study, many analysts of racial and ethnic relations have advocated an assimilationist approach.²⁵ For example, Milton Gordon sets forth a number of possible models for assimilation but,²⁶ emphasizes the "Anglo

16. See Joe R. Feagin & Clairece Booher Feagin, *Theoretical Perspectives in Race and Ethnic Relations*, in RACE AND ETHNIC CONFLICT: CONTENDING VIEWS ON PREJUDICE, DISCRIMINATION AND ETHNO VIOLENCE 29 (Fred L. Pincus and Howard J. Ehrlich eds., 1994). See also ROBERT BLAUNER, RACIAL OPPRESSION IN AMERICA 6 (1972) ("the assumption that assimilation and integration were the likely end-products of ethnic and racial diversity has dominated American sociology").

17. See Feagin & Feagin, *supra* note 16, at 29.

18. See *id.* 29-30. Robert Park has offered the most influential approach to the sociology of race. See BLAUNER, *supra* note 16, at 6.

19. ROBERT E. PARK, RACE AND CULTURE 150 (1950). See also MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960s TO THE 1980s (1986) (Park thought that ethnic enclaves were a stage that would eventually lead to assimilation).

20. See Feagin & Feagin, *supra* note 16, at 30.

21. See *id.*

22. See *id.* See also BLAUNER, *supra* note 16, at 6 (observing that in the United States the assimilationist perspective became standard).

23. See Feagin & Feagin, *supra* note 16, at 30.

24. See *id.* Interestingly, African-Americans were viewed as being even more inclined to assimilation than European immigrants because they were said to have no distinctive cultural practices. See BLAUNER, *supra* note 16 at 7. See also OMI & WINANT, *supra* note 19, at 17-18 ("Assimilation was viewed as the most logical, and 'natural,' response to the dilemma imposed by racism").

25. See Feagin & Feagin, *supra* note 16, at 30. Indeed, most theorists did not really think about the possibility that racial minorities might be interested in promoting their own cultures rather than be assimilated into the dominant society. See BLAUNER, *supra* note 16 at 7.

26. See Feagin & Feagin, *supra* note 16, at 30.

conformity”²⁷ model of assimilation. According to Gordon, Anglo conformity actually describes American society;²⁸ that is, immigrants in the United States have usually been inclined to shed the culture of their origins in favor of the mainstream Anglo-Saxon culture.²⁹ Most immigrants in American society have basically acquired the Anglo-Saxon culture.³⁰

The notion of immigrant groups giving up their culture ties into the notion of cultural invisibility. Anthropologist Renato Rosaldo has observed that it is possible to identify “zones of cultural visibility and invisibility.”³¹ Cultural majorities view themselves as a “people without culture.”³² In contrast, “cultural minorities” possess culture.³³ “Full citizenship and cultural visibility” appear together in an inverse relationship: when one grows, the other decreases.³⁴ Full citizens are without culture and those who lack full citizenship have culture.³⁵ Thus, the idea of the “melting pot” makes immigration a process where culture is lost.³⁶ The process of immigration deprives persons of the cultures of their native countries and puts them in a position “to become American citizens — transparent. . . people without culture.”³⁷ This process, then, generates “postcultural citizens of the nation state.”³⁸

27. *See id.*

28. *See id.*

29. *See id.* *See also* BLAUNER, *supra* note 16 at 129 (“Assimilation meant modifying or giving up certain ethnic institutions and culturally distinct values as the generations followed one another”).

30. *See* Feagin & Feagin, *supra* note 16, at 30.

31. *See* RENATO ROSALDO, *CULTURE & TRUTH: THE REMAKING OF CULTURAL ANALYSIS* 198 (1989).

32. *See id.* Critical white studies scholars have noted an analogous phenomenon in the area of race: white persons see themselves as raceless. *See* Barbara Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 *YALE L.J.* 2009 (1995). The tendency of whites to ignore their racial identity has been termed “transparency.” *See* IAN F. HANEY LOPEZ, *WHITE BY LAW* 157 (1996). For more on the analysis of whiteness see *CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR* (Richard Delgado & Jean Stefancic eds., 1997); Martínez, *supra* note 12; Kevin R. Johnson, *Racial Restrictions on Naturalization: The Recurring Intersection of Race and Gender in Immigration and Citizenship Law*, 11 *BERKELEY WOMEN’S L. J.* 142 (1996).

33. *See* ROSALDO, *supra* note 31, at 199.

34. *Id.* at 198.

35. *Id.*

36. *Id.* at 209.

37. *Id.* *See also* Sylvia R. Lazos Vargas, *Deconstructing Homo[genous] American: The White Ethnic Immigrant Narrative and Its Exclusionary Effect* 72 *TULANE L. REV.* 1493 (1998) (arguing that American society is based on a “homogeneity assumption” which holds that all Americans must assimilate into the dominant Anglo-American norm and that to proclaim difference is somehow un-American).

38. ROSALDO, *supra* note 31, at 209.

A. Assimilationism.

Within this context, an assimilationist ideology has developed³⁹ that sets the basic requirements for membership in American society.⁴⁰ Assimilationism can be thought of as the mirror image of multiculturalism.

Assimilationism has three principal elements.⁴¹ First, assimilationism requires one to abide by dominant norms or a core culture.⁴² Second, it rejects race consciousness.⁴³ Third, it repudiates the equal value of cultures.⁴⁴

Through these elements, assimilationism undermines efforts to achieve greater equality⁴⁵ and it regards such efforts as a danger to the well-being of society. Instead, assimilation encourages individual achievement that does not contest unfair foundational rules⁴⁶ and requires social groups to meet imposed standards that are sometimes unjust. Because these standards are viewed as "the basis of ordered liberty"⁴⁷ they are hard to critique and overcome; to many, these standards appear to be neutral and objective, rather than merely a form of racial power.⁴⁸ Hence, assimilation does not merely describe the world, but has now become the dominant rule.⁴⁹ According to assimilationism, assimilation is not simply a social end.⁵⁰ It is a requirement for achieving success.⁵¹

39. See Christopher Newfield and Avery Gordon, *Multiculturalism's Unfinished Business in MAPPING MULTICULTURALISM* 80 (Avery F. Gordon and Christopher Newfield eds., 1996).

40. See Newfield and Gordon, *supra* note 39, at 80; See also Calmore, *Random Notes of an Integration Warrior*, *supra* note 5, at 1475 ("The pressures of assimilation to adapt are unrelenting").

41. See Newfield and Gordon, *supra* note 39, at 80. "Racial assimilationism is a pillar of conservative cultural rule in America." Newfield and Gordon, *supra* note 39, at 107.

42. See Newfield and Gordon, *supra* note 39, at 80.

43. See *id.* Assimilationism is based on the view that "race has ceased to be a serious obstacle to the advancement of people of color." See Newfield and Gordon, *supra* note 39, at 108.

44. See *id.* at 80.

45. See *id.* at 81.

46. See *id.* Assimilationism "preempts full debate on cultural questions . . . by supporting a majority group making ground rules for everyone before discussion takes place." See Newfield and Gordon, *supra* note 39, at 107.

47. See Newfield and Gordon, *supra* note 39, at 81.

48. See *id.*

49. See John O. Calmore, *Exploring Michael Omi's "Messy" Real World of Race: An Essay for "Naked People Longing to Swim Free,"* 15 *LAW & INEQ. J.* 25, 65 (1997).

50. See Calmore, *Real World of Race*, *supra* note 49, at 65.

51. See *id.* 66.

B. *Law and Assimilationism.*

The ideology of assimilationism has had legal consequences. For example, the failure of certain immigrant groups of color to assimilate has been used to justify excluding certain groups from the United States. In the late 1800's, a popular movement in California called out for legislative action to exclude the Chinese from the state.⁵² In response, the United States Congress enacted certain statutes termed the "Chinese Exclusion Acts."⁵³ These laws were intended to stop the immigration of Chinese persons.⁵⁴

Subsequently, lawsuits were brought challenging the constitutionality of the Chinese Exclusion laws.⁵⁵ In rejecting such a challenge to one of the laws, the Supreme Court emphasized the failure of Chinese immigrants to assimilate into dominant American society and become less un-American.⁵⁶ The Court observed:

The differences of race added greatly to the difficulties of the situation . . . [T]hey remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country. It seemed impossible for them to assimilate with our people or to make any change in their habits or modes of living. As they grew in numbers each year the people of the coast saw . . . great danger that . . . our country would be overrun by them unless prompt action was taken to restrict their immigration.⁵⁷

52. See Kevin R. Johnson, *The New Nativism: Something Old, Something New, Something Borrowed, Something Blue*, in *IMMIGRANTS OUT!* 165, 168 (Juan F. Perea ed., 1997).

53. See Johnson, *supra* note 52, at 168.

54. See *id.* See generally BILL ONG HING, *MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY 1850-1990* 1-36 (1993); RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS* 79-131 (1989); Margaret H.R. Chon, *On the Need for Asian-American Narratives in Law: Ethnic Specimens, Native Informants, Storytelling and Silences*, 3 *ASIAN PAC. AM. L. J.* 4, 6 (1995).

55. See Johnson, *supra* note 52, at 168.

56. See *id.* See also Hing, *supra* note 6, at 915 ("At least part of the impetus behind the enactment of the Chinese Exclusion Act in 1882 was the belief that Chinese were unassimilable"); Robert S. Chang, *Toward an Asian-American Legal Scholarship: Critical Race Theory, Post Structuralism, and Narrative Space*, 81 *CAL. L. REV.* 1241, 1287 (1993) ("[T]he dominant group often . . . decries the unassimilability of Asian Americans").

57. *Chae Cahn Ping v. United States*, 130 U.S. 581, 595 (1889), (*The Chinese Exclusion Case*). See also Charles J. McClain, Jr., *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850-1870*, 72 *CAL. L. REV.* 529 (1984). McClain writes:

The Chinese, so the argument goes, unlike all other immigrant groups, did not come to this country with a desire to settle and assimilate, but rather with the intention to make a quick fortune and return home. It was this feature of their immigration, according to this view, that was most responsible for the misfortunes that were visited upon them.

The law has been used against other persons of color who refuse to or cannot assimilate. For example, anti-Japanese sentiment during World War II influenced the Supreme Court's decision in *Korematsu v. United States*.⁵⁸ In this notorious case, the Supreme Court held that it was permissible to put persons of Japanese descent, including Japanese-American citizens, in internment camps.⁵⁹ Clearly, the Japanese's failure to assimilate into the American Society influenced the Supreme Court's decision. In one case dealing with internment camps, the Court stated:

There is support for the view that social, economic, and political conditions which have prevailed since the close of the last century, when the Japanese began to come to this country in substantial numbers, have intensified their solidarity and have in large measure prevented their assimilation as an integral part of the white population. In addition, large numbers of children of Japanese parentage are sent to Japanese language schools outside the regular hours of public schools in the locality. Some of these schools are generally believed to be sources of nationalistic propaganda, cultivating allegiance to Japan.⁶⁰

Similarly, the Supreme Court did not permit an Indian immigrant to become a naturalized American citizen because the noncitizen would be unable to assimilate into American society.⁶¹ The Court explained:

It is a matter of familiar observation and knowledge that the physical group characteristics of the Hindus render them readily distinguishable from the various groups of persons in this country commonly recognized as white. . . [I]t cannot be doubted that the children born in this country of Hindu parents would retain indefinitely the clear evidence of their ancestry. . . What we suggest is merely racial difference, and it is of such character and extent that the great body of our people instinctively recognize it and reject the thought of assimilation.⁶²

Id. at 532-33 nn. 15-16 (quoting GUNTHER BARTH, BITTER STRENGTH: A HISTORY OF THE CHINESE IN THE UNITED STATES, 1850-1870, at 1 (1964)); Michael A. Olivas, *The Chronicles, My Grandfather's Stories, and Immigration Law: The Slave Trader's Chronicle as Racial History*, 34 ST. LOUIS U. L.J. 425, 430-39 (1990) (discussing the history of the Chinese exclusion laws).

58. *Korematsu v. U.S.*, 323 U.S. 214 (1944).

59. See Johnson, *supra* note 52, at 170. For more on the internment of Japanese Americans, See PETER IRONS, JUSTICE AT WAR (1983); MICH WEGLYN, YEARS OF INFAMY: THE UNTOLD STORY OF AMERICA'S CONCENTRATION CAMPS (1976).

60. *Harabayashi v. United States*, 320 U.S. 81, 96-97 (1943). In *Korematsu*, the Supreme Court relied on the reasoning in *Hirabayashi*. See Johnson, *supra* note 52, at 184; *Korematsu*, 323 U.S., at 216-19.

61. See Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Civil Rights: A "Magic Mirror" into the Heart of Darkness* 73 INDIANA L.J. 1111, 1127, n. 95, 1998.

62. *Thind v. United States*, 261 U.S. 204, 215 (1923).

Likewise, in 1924, Congress enacted the National Origin Quotas System⁶³ to stabilize in the ethnic makeup of America.⁶⁴ This law that established preferences “for immigrants from Northern and Western Europe”⁶⁵ in part reflected the concern that certain immigrants could not be assimilated into dominant society.⁶⁶ As the House Report explained, the purpose of the quota system was “to guarantee, as best we can at this late date, racial homogeneity in the United States.”⁶⁷ Thus, the law — fueled by the ideology of assimilation — has been used against people of color who have been unable to fully assimilate.

III. LATINOS AND ASSIMILATIONISM.

A number of commentators and others have recently been concerned with Latinos and their alleged refusal to assimilate into the dominant American society.⁶⁸ One of the most powerful demands for Latinos to assimilate is found in the English Only movement, which is perhaps best represented by the formation of an organization called U.S. English. This group has sought to establish English as our nation’s official language and has sought to bring about its exclusive use in American life.⁶⁹ The founders of U.S. English established the organization because they viewed the social and political initiatives of Latinos as a threat to the

63. See Immigration Act of 1924, ch. 190, 311(a), 43 Stat. 153, 159 (repealed 1952).

64. See Johnson, *supra* note 61 at 1127.

65. See *id.* at 1128; Hiroshi Motomura, *Whose Alien Nation? Two Models of Constitutional Immigration Law*, 94 MICH. L. REV. 1927, 1933 (1996); see also Gabriel Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273, 279-97 (1996) (discussing how quota system limited immigration from Asia).

66. See Johnson, *supra* note 61 at 1129; Hing, *supra* note 6, at 918 (“Anxiety over the continued entry of large numbers of allegedly unassimilable immigrants led to the restrictive immigration policies in the 1920s”).

67. H. Rep. No. 390, Cong., Sess. 13-14, 16 (192) (quoted in Edward P. Hutchinson, *Legislative History of American Immigration Policy 1798-1965*, at 484-85 (1981)). Native Americans also have faced great pressure to assimilate into the dominant society. See VINE DELORIA, JR. AND CLIFFORD M. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 8 (1983) (discussing plan by which Native Americans “would be brought into the mainstream of American Life”). Thus, Native American tribes have been barred from speaking their own languages and there has been an effort to take away their lands. See WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 79 (1995).

68. See, e.g., PETER BRIMELOW, *ALIEN NATION: COMMON SENSE ABOUT AMERICA’S IMMIGRATION DISASTER* 272-274 (1995). See also Hing, *supra* note 6, at 877 (“The Latino community, in particular, is frequently accused of not assimilating and not learning English”).

69. See Heidi Tarver, *Language and Politics in the 1980s: The Story of U.S. English*, in *RACE AND ETHNIC CONFLICT: CONTENDING VIEWS ON PREJUDICE, DISCRIMINATION, AND ETHNOVIOLENCE* 206-218 (Fred L. Pincus and Howard J. Ehrlich eds., 1994).

supremacy of English.⁷⁰ The decline of English and the ascent of other languages stemmed from a rejection of assimilationism.⁷¹ The "official English" movement seeks to halt the use of foreign language in the United States and "maintain the blessing of a common language."⁷²

The U.S. English movement, then, represents a direct attack on Latinos.⁷³ According to U.S. English, "'English is at the core' of the American identity."⁷⁴ English is necessary if one is to be an American.⁷⁵ U.S. English, then, presents English as the central vehicle for transforming people into Americans, and as the essential ingredient and marker of American identity.⁷⁶ To be Americanized is to go through a major change that affects even one's unconscious mind. As *Time* editor Henry Grunwald explained in U.S. English literature, "For many immigrants, the true act of naturalization occurs when they start having dreams in English."⁷⁷ "To be an American is to live in and through English."⁷⁸

According to the U.S. English account, the ability to speak English becomes the proof of one's loyalty to the country.⁷⁹ Americans must reject ethnic concerns.⁸⁰ Those who contest assimilation and insist on identifying with an ethnic group are said to be unpatriotic.⁸¹ A person who has assimilated and speaks English is therefore a loyal American.⁸²

70. See *id.* at 207. See also BILL PIATT, ¿ONLY ENGLISH? LAW AND LANGUAGE POLICY IN THE UNITED STATES (1990); Perea, *supra* note 7, at 369 ("Current official English laws symbolize the rejection of this nation's Hispanic heritage and culture").

71. See Tarver, *supra* note 69, at 207.

72. See *id.* at 208. See also MULTICULTURALISM: A CRITICAL READER 48 (David Theo Goldberg ed., 1994) (One particularly invidious project of conservatives "is to construct a common culture — a seamless web of textuality — bent on annulling the concept of the border through the delegitimization of foreign languages").

73. See Tarver, *supra* note 69, at 209. See also Perea, *supra* note 7, at 346 ("official English is a movement fueled by prejudice and fear and directed at Hispanics"); Antonio J. Califa, *Declaring English the Official Language: Prejudice Spoken Here*, 24 HARV. C.R.-C.L. L. REV. 293, 328 (1989) ("English-only proponents are worried about a perceived Hispanic threat").

74. See Tarver, *supra* note 69, at 209.

75. See *id.* at 210.

76. See *id.* See also Joshua A. Fishman, *Language and Ethnicity*, in LANGUAGE, ETHNICITY AND INTERGROUP RELATIONS 25-26 (Howard Giles ed., 1977) ("language is the quintessential symbol. . . [i]t is more likely than most symbols of ethnicity to become the symbol of ethnicity. Language is the recorder of paternity, the expresser of patrimony and the carrier of phenomenology. Any vehicle carrying such precious freight must come to be viewed as equally precious . . . in and of itself. The link between language and ethnicity is thus one of sanctity-by-association").

77. See Tarver, *supra* note 69, at 210.

78. See *id.*

79. See *id.* at 211.

80. See *id.*

81. See *id.*

82. See *id.*

U.S. English seeks to use the law to enforce such assimilation and cultural homogeneity. They seek to “(1) adopt a constitutional amendment establishing English as the official language of the United States, (2) repeal laws mandating multilingual ballots and voting materials, (3) restrict government funding of bilingual education, and (4) strengthen enforcement of English-language and civics requirements for naturalization.”⁸³ This amounts to an effort to use the law to enforce the ideology of assimilationism against Latinos.

Similarly, a number of employers have recently adopted “speak ‘English-only’ rules.”⁸⁴ These rules provide that only English may be spoken in connection with work.⁸⁵ Since the United States Court of Appeals have upheld the validity of these “speak ‘English-only’ rules,”⁸⁶ Latinos can be fired from their jobs for speaking Spanish.⁸⁷

Similarly, Latinos may also be punished in the context of jury duty if they have failed to speak only English during their court service. The Supreme Court has held that the Equal Protection clause permits a prosecutor to use preemptory challenges to exclude bilingual Latinos from jury service on the ground that as jurors they might not credit the court interpreter’s official English translations of the testimony of Spanish-speaking witnesses.⁸⁸

Beyond the failure to speak English only, the more general objection seems to be that Latinos have not assimilated because they have failed to adopt Anglo-Saxon ideals. “Anglo-conformity” has been the dominant notion of American assimilation.⁸⁹ Thus, immigrant groups have been expected to assimilate into

83. See *id.* at 208.

84. See Christopher David Ruiz Cameron, *How the Garcia Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving Speak English Only Rules As the Product of Racial Dualism, Latino Invisibility and Legal Indeterminacy*, 85 CAL. L. REV. 1347 (1997).

85. See Cameron, *supra* note 84, at 1351.

86. See *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980); *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993).

87. See Cameron, *supra* note 84, at 1351.

88. See *id.* at 1351-52. See also *Hernandez v. New York*, 500 U.S. 352 (1991); Alfredo Mirande, Now that I speak English, no me dejan hablar, [I’m not allowed to speak]: The Implications of *Hernandez v. New York*, 18 CHICANO-LATINO L. REV. 115 (1996); Deborah Ramirez, *Excluded Voices: The Disenfranchisement of Ethnic Groups from Jury Service*, 1993 WIS. L. REV. 761 (1993). This is consistent with a long history of punishing Latinos for speaking Spanish. Renato Rosaldo recalls that Mexican-American students were spanked for speaking Spanish in school. See ROSALDO, *CULTURE & TRUTH*, *supra* note 31, at 149; See also Margaret E. Montoya, *Law and Language: Image, Integration and Innovation*, 7 LA RAZA L.J. 147, 148 (1997) (describing how during the 1950s in New Mexico students were punished for speaking Spanish).

89. See Feagin & Feagin, *supra* note 16, at 30.

the dominant Anglo-Saxon culture.⁹⁰ To this end, it is expected that immigrant groups have acculturated into the Anglo-Protestant core culture.⁹¹ Latinos are overwhelmingly Roman Catholic.⁹² Some critics suggest that Latinos have not assimilated into the Anglo-Protestant core culture because they have remained Roman Catholic.⁹³ Indeed, according to some critics examining the extent to which Latinos have been converted to Protestantism can reveal the extent to which Latinos are americanized.⁹⁴

Because of this general failure of Latinos to assimilate Anglo-Saxon ideals, some critics have argued that laws should be enacted so as to bring about a drastic cutback of legal immigration of Latinos.⁹⁵ Currently, vast numbers of immigrants are Latinos.⁹⁶

It is important to place this current attack on Latino culture in historical context. Latino culture, particularly in the southwest, has been relentlessly criticized for over one hundred years.⁹⁷ The Latino personality and accomplishments often have been devalued and attacked.⁹⁸

The official Americanization programs, which took place from 1915 to 1929, are instructive on this point. Essentially, the programs were designed to assimilate immigrants from Mexico⁹⁹ and teach them English.¹⁰⁰ The programs sought to instill in Mexican immigrants fundamental American values.¹⁰¹ Toward that end, the programs attempted to teach Mexicans family planning because the government was concerned that unlimited Mexican population increases would lead to Anglo "race suicide."¹⁰²

90. *See id.*

91. *See id.*

92. *See* CAREY MCWILLIAMS, NORTH FROM MEXICO 69 (1990).

93. *See* BRIMELOW, *supra* note 68, at 272. *See also* MCWILLIAMS, *supra* note 92, at 194 (Even the Latino's religion "in such muscularly Protestant states such as Texas, served to set him apart").

94. *See* BRIMELOW, *supra* note 68, at 272.

95. *See id.* at 262. Since about 1920, some commentators have been concerned with immigration and "The Mexican Problem." *See* MCWILLIAMS, *supra* note 92, at 188. The "Mexican Problem" refers to problems that arise out of Mexican immigration. *Id.* Typically, these commentators have sought to provide research to demonstrate the inferiority of Mexicans. *Id.* For a far more generous attitude toward immigrants that is informed by a religious perspective, see MICHAEL SCAPERLANDA, *Who Is My Neighbor?: An Essay on Immigrants, Welfare Reform, and the Constitution*, 29 CONN. L. REV. 1587 (1997).

96. *See* Hing, *supra* note 6, at 870; STEVEN W. BENDER, *Consumer Protection for Latinos: Overcoming Language Fraud and English-Only in the Marketplace*, 45 AM. U. L. REV. 1027, 1031 (1996) (immigrants from Mexico represent the largest single group of immigrants in America).

97. *See* MCWILLIAMS, *supra* note 92, at 126.

98. *Id.*

99. *See* Hing, *Beyond the Rhetoric of Assimilation*, *supra* note 6, at 920.

100. *See id.*

101. *See id.*

102. *See id.*

They tried to persuade Mexican women to work outside the home so that they could fulfill the employment demand for domestic workers.¹⁰³ The Americanization programs also attempted to change the diet of the Mexicans such as substituting bread for tortillas.¹⁰⁴ Thus, the Americanization programs are notorious examples of how official government policy has been used to coerce assimilation of Latinos.

IV. PHILOSOPHY, MULTICULTURALISM AND ASSIMILATIONISM.

Work in philosophy is relevant to the issue of Latino assimilation. Philosophers have begun to turn their attention to the issue of multiculturalism and the politics of recognition.¹⁰⁵ This section contends that their work may be used to put important limits on the demand for Latinos and other minorities to assimilate into dominant society. Drawing on the work of Charles Taylor, Part A argues that the politics of recognition or principles that value culture equally and the ideal of authenticity support the proposition that the law should not be used to force the assimilation of Latinos and other groups. Part B then argues that the politics of recognition may be used to critique the idea, advocated by some conservatives, that bilingual, bicultural education is harmful because it stands in the way of Latino assimilation. Drawing on Martin Heidegger's analysis of inauthentic human beings, Part C argues that the law should not be used to force Latinos to assimilate into the dominant group. Additionally, Part C contends that Latino cultural practices are "marginal practices" that should be preserved so as to attract authentic individuals. Relying on Johann Herder's notion of belonging, Part D maintains that Latino cultural practices establish a cultural pattern in which Latinos belong. Part D argues that the law should not be used to disconnect Latinos from their cultural pattern. Drawing again on Heidegger's philosophy, Part E attempts to explain the demand to assimilate as a response to anxiety. This portion of the article explains that the demand to assimilate is rooted in an outmoded nineteenth century conception of historical development. Part F suggests that the philosophical arguments placing limits on the demand for Latinos to assimilate are consistent with a line of Supreme Court cases which support the proposition that law should not be used to foster a homogenous people. Relying on the fundamental dictum of moral philosophy that ought implies can, Part G argues that because Latinos can-

103. *See id.*

104. *See id.*

105. *See* MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION (Amy Gutmann ed., 1994).

not fully assimilate, they can have no obligation to do so. Finally, drawing on the work of Jurgen Habermas, Part H asks to what extent Latinos can be required to assimilate. It concludes that Latinos cannot be compelled to surrender their own traditions or cultural form of life. All that can be expected of Latinos and other minority groups is the willingness to enter the political culture of the homeland.

A. *The Politics of Recognition and Authenticity.*

The politics of recognition and the ideal of authenticity militate against a demand for Latinos and others to fully assimilate. Today's political discourse often involves the "demand for recognition, " the demand to have one's culture and cultural identity appreciated and respected.¹⁰⁶ Minority groups and the "politics of multiculturalism" often generate this demand.¹⁰⁷ One leading philosopher, Charles Taylor,¹⁰⁸ ties the demand for recognition to a person's notion of their identity.¹⁰⁹ An individual's identity is partially determined "by recognition. . . or the misrecognition of others."¹¹⁰ Thus, persons can be harmed if the community portrays them in a disparaging way.¹¹¹ "Nonrecognition or misrecognition," then, "can be a form of oppression."¹¹² For

106. See CHARLES TAYLOR, *The Politics of Recognition* in MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION, *supra* note 105, at 25. See also AMY GUTMAN, *Introduction* in MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION, *supra* note 105, at 3 ("Public institutions, including government agencies, schools, and liberal arts colleges and universities, have come under severe criticism these days for failing to recognize or respect the particular identities of citizens"); K. ANTHONY APPIAH, *Identity, Authenticity, Survival: Multicultural Societies and Social Reproduction*, in MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION, *supra* note 105, at 149 ("much of modern social and political life turns on questions of recognition").

107. See TAYLOR, *supra* note 106, at 25. See also SUSAN WOLF, *Comment* in MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION, *supra* note 105, at 76 ("the predominant demand for recognition in multicultural contexts is the demand to have one's culture and one's cultural identity recognized as such, to have one's identity as an African-American or Asian-American or Native American appreciated and respected"); KYMLICKA, *supra* note 67, at 10 ("Modern societies are increasingly confronted with minority groups demanding recognition of their identity, and accommodation of their cultural differences").

108. "Charles Taylor is one of the best known and widely respected philosophers of the present age. In an era of specialization he is one of the few thinkers who has developed a comprehensive philosophy which speaks to the conditions of the contemporary age. . ." JAMES TULLY, *Preface* in PHILOSOPHY IN AN AGE OF PLURALISM: THE PHILOSOPHY OF CHARLES TAYLOR IN QUESTION (James Tully, ed., 1994).

109. See TAYLOR, *supra* note 106, at 25. For more on the philosophy of Charles Taylor, see PHILOSOPHY IN AN AGE OF PLURALISM: THE PHILOSOPHY OF CHARLES TAYLOR IN QUESTION, *supra* note 108.

110. See TAYLOR, *supra* note 106, at 25.

111. See *id.*

112. See TAYLOR, *supra* note 106, at 25. See also ISAIAH BERLIN, VICO & HERDER: TWO STUDIES IN THE HISTORY OF IDEAS 198 (1976) (Johann Herder recognized that "[m]en are made miserable not only by poverty, disease, stupidity or

example, the dominant society has long portrayed minorities in a negative light.¹¹³ Minorities have been induced to accept a demeaning self-image.¹¹⁴ Their self-hate then reinforces their own subordination.¹¹⁵

Given this, misrecognition can cause serious injury.¹¹⁶ Proper recognition, then, is essential if people are to thrive.¹¹⁷ The demand for equal recognition, generates a call for the equal value of cultures.¹¹⁸

The significance of recognition is related to a new conception of individual identity.¹¹⁹ This understanding of identity is related to the ideal of authenticity — “the ideal of being true to myself and my own particular way of being.”¹²⁰ On this view, our ethical well-being is derived from achieving genuine contact with our true nature.¹²¹

Johann Herder,¹²² an early proponent of the ideal of authenticity, argued that every person has an unique way of expressing his or her humanity.¹²³ According to Charles Taylor, the concept stipulates that “there is a certain way of being human that is my way. I am called to live my life in this way, and not in imitation of anyone’s life. I am called to be true to myself; if I am not, I miss the point of my life.”¹²⁴ This ideal of authenticity is an im-

the effects of ignorance, but also because they are misfits or outsiders or not spoken to”).

113. See TAYLOR, *supra* note 106, at 25-26; See also RICHARD DELGADO and JEAN STEFANCIC, *FAILED REVOLUTIONS: SOCIAL REFORM AND THE LIMITS OF LEGAL IMAGINATION* 3-21 (1994) (chronicling the negative images depicted in popular culture of each of the major subgroups of color); KEITH AOKI, “*Foreign-ness*” & *Asian American Identities: Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes*, 4 UCLA ASIAN PAC. AM. L. J. (forthcoming 1997) (describing stereotypical images of Asian-Americans).

114. See TAYLOR, *supra* note 106, at 26.

115. See *id.*

116. See *id.*

117. See *id.*

118. See TAYLOR, *supra* note 106, at 27. See also Gutmann, *supra* note 106, at 3 (“it is hard to find a democratic or democratizing society these days that is not the site of some significant controversy over whether and how its public institutions should better recognize the identities of cultural and disadvantaged minorities”).

119. See TAYLOR, *supra* note 106, at 28. See also ANTHONY V. ALFIERI, *Lynch-ing Ethics: Toward a Theory of Racialized Defenses*, 95 MICH. L. REV. 1063, 1103-04 (1997) (arguing for the importance of understanding the politics of identity).

120. See TAYLOR, *supra* note 106, at 28.

121. See *id.* at 29.

122. See also BERLIN, *supra* note 112, at 176 (“All regionalists, all defenders of the local against the universal, all champions of deeply rooted forms of life, both reactionary and progressive, both genuine humanists and obscurantist opponents of scientific advance, owe something, whether they know it or not, to the doctrines which Herder . . . introduced into European thought”).

123. See TAYLOR, *supra* note 106, at 30.

124. See *id.* See also APPIAH, *supra* note 106, at 161 (“the ethics of authenticity requires us to express what we centrally are”).

portant moral ideal.¹²⁵ This ideal is severely threatened by pressure to conform or assimilate.¹²⁶ Indeed, as Taylor explains, this ideal means that I should not attempt to live my life in accordance with conformity.¹²⁷

As Taylor notes, Herder views this ideal of authenticity as applying at two levels.¹²⁸ The ideal of authenticity applies not only to the individual person, but also to peoples (cultural groups).¹²⁹ Just like individuals should be true to themselves, a people "should be true to itself."¹³⁰ For example, colonialism should be reversed to give colonized peoples the opportunity to be true to their native cultures.¹³¹ Multiculturalism, or the politics of equal recognition, then, is based on the ideal of authenticity.

What does a politics of equal recognition mean? It asks us to acknowledge the distinct identity of persons or groups¹³² whose uniqueness has been unrecognized and absorbed into the dominant culture.¹³³ This assimilation of minority groups is a fundamental and clear violation against the value of authenticity.¹³⁴

The demand for equal recognition is founded on the notion that all persons are entitled to equal respect.¹³⁵ Thus, the ability to construct one's own individual identity or a group's cultural identity is entitled to respect.¹³⁶ One destroys identity by "forcing people into a homogenous mold that is untrue to them."¹³⁷

Multiculturalism, then, involves a demand that we all acknowledge the equal worth of cultures¹³⁸ and that we respect their distinctiveness.¹³⁹ As discussed, the demand is based on the

125. See TAYLOR, *supra* note 106, at 30.

126. See *id.*

127. See *id.*

128. See *id.* at 31.

129. See *id.*

130. See *id.*

131. See *id.* See also BERLIN, *supra* note 112, at 193 (For Herder, "colonial subjugation of native populations, ancient and modern, in and outside Europe, is always represented as being morally odious and as a crime against humanity").

132. See TAYLOR, *supra* note 106, at 38. See also APPIAH, *supra* note 106, at 150 ("The identities whose recognition Taylor discusses are largely what we can call collective social identities: religion, gender, ethnicity, 'race,' sexuality").

133. See TAYLOR, *supra* note 106, at 38.

134. See *id.*

135. See *id.* at 41.

136. See *id.* at 42.

137. See *id.* at 43.

138. Cf. BERLIN, *supra* note 112, at 207-08 (In Herder's view, "[c]ultures are unique: each presents a wonderful exfoliation of human potentialities in its own time and place and environment. We are forbidden to make judgments of comparative value, for that is measuring the incommensurable").

139. See TAYLOR, *supra* note 106, at 63-64. See also Terence Turner, *Anthropology and Multiculturalism: What Is Anthropology That Multiculturalists Should Be*

notion that recognition shapes human beings.¹⁴⁰ The idea that we owe equal respect to all cultures also is based on a presumption¹⁴¹ that "all human cultures that have animated whole societies over some considerable stretch of time have something important to say to all human beings."¹⁴² This presumption demands that we be prepared to engage in "comparative cultural study."¹⁴³ Most important, the presumption requires a concession that we are not yet close to being in a position to determine the value of the various and distinct cultures.¹⁴⁴

Given this analysis, it is possible to see clearly why it is wrong to use law to coerce assimilation of minority groups. Latinos and other minority groups distinctively live and they should be true to their own culture. Latinos and other minority groups have a cultural identity with a unique set of traditions that have sustained many people over many years. This culture is therefore of large significance. To force them to assimilate, then, is to fail to recognize that their cultures are unique and valuable. To force Latinos to acculturate is to sin against the ideal of authenticity. It is to force Latinos into a homogenous mold that is untrue to them. To coerce the assimilation of Latinos is to render their culture unrecognized and subject Latinos to the special harm that is generated by the failure to recognize.

That Latinos may indeed be called to live life in the sort of distinctive and deeply significant way imagined by Herder and Taylor finds support in the work of the famous Mexican philosopher, José Vasconcelos. Vasconcelos argues that a "cosmic race" or "*raza cósmica*" will arise in order to accomplish the "divine mission of America."¹⁴⁵ The *raza cósmica* will be formed by the

Mindful of It? in MULTICULTURALISM: A CRITICAL READER, *supra* note 72, at 407 (multiculturalism is "primarily a conceptual framework for challenging the cultural hegemony of the dominant ethnic group. . . by calling for equal recognition of the cultural expressions of nonhegemonic groups").

140. See TAYLOR, *supra* note 106, at 64.

141. See *id.* at 66.

142. *Id.* Interestingly, Taylor observes that "there may be a religious ground for a presumption of the equal worth of different cultures." See STEVEN C. ROCKEFELLER, *Comment* in MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION, *supra* note 105, at 95. For a religious argument in defense of the idea of equal value of cultures, see *id.* at 95-97. See ALEKSANDR SOLZHENITSYN, *REBUILDING RUSSIA: REFLECTIONS AND TENTATIVE PROPOSALS* 21 (Alexis Klimoff trans., Farrar, Straus & Giroux 1991) ("Every people, even the very smallest, represents a unique facet of God's design").

143. See Taylor, *supra* note 106, at 73.

144. See *id.* See also Wolf, *supra* note 107, at 78-79 (observing that Taylor's position "would commit us to studying these cultures, to expanding our imaginations and opening our minds so as to put ourselves in a position to see what. . . is distinctively valuable in them").

145. PATRICK ROMANELL, *MAKING OF THE MEXICAN MIND: A STUDY IN RECENT MEXICAN THOUGHT* 133 (1952).

"synthesis" of the existing races.¹⁴⁶ Since, in his view, North America operates on the basis of "racial segregation," whereas Latin America operates on the basis of "*mestizaje*" or racial mixing, he contends that the cosmic race will arise from Latinos.¹⁴⁷

As for the providential "mission of America," Vasconcelos says that society goes through three distinct stages.¹⁴⁸ He describes them as "the material, the political and the aesthetic."¹⁴⁹ The mission of America is to produce an aesthetic society.¹⁵⁰ Such a society can only be achieved by an "emotional race" who is able to appreciate beauty. Because hybrid Latinos have a great sense of beauty, they have a duty to help bring about the aesthetic state.¹⁵¹ Indeed, Vasconcelos believes that, in the future, philosophy will belong to Latinos.¹⁵² Thus, the philosophy of Vasconcelos supports the proposition that Latinos are called to live in a distinctive way.

Border theorist Gloria Anzaldúa has recently developed a similar view that suggests that Latinos are called to live in a uniquely important way. Anzaldúa argues that borders can generate new types of human knowledge.¹⁵³ Latinos represent the new mestizo or person of mixed race.¹⁵⁴ By virtue of their mixed ancestry, such persons exist in the borderlands¹⁵⁵ and learn to understand and appreciate contradictions and ambiguity.¹⁵⁶ They are able to move between cultures.¹⁵⁷ According to Anzaldúa, Latinos, by virtue of their existence in the borderlands, have long been involved in cultural mixing.¹⁵⁸ Given this, Latinos are uniquely positioned to help generate new types of cultural knowledge.¹⁵⁹

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 134.

153. See GLORIA ANZALDÚA, *BORDERLANDS/LA FRONTERA: THE NEW MESTIZA* (1987); ROSALDO, *supra* note 31, at 216.

154. *Id.*

155. See also Ian F. Haney López, *Race, Ethnicity, Erasure: The Saliency of Race to Lat Crit Theory*, 85 CAL. L. REV. 1143, 1177 (1997) ("*la frontera* or 'the borderlands' has emerged as the preeminent contemporary metaphor of Mexican-American identity").

156. See ROSALDO, *supra* note 31, at 216.

157. *Id.*

158. *Id.*

159. *Id.*

B. *Bilingual/Bicultural Education and the Politics of Recognition.*

One of the key areas where Latinos have been charged with failure to assimilate is in the area of bilingual/bicultural education.¹⁶⁰ For example, Linda Chavez argues that the public schools were once used to assimilate the children of immigrants and transform them into Americans.¹⁶¹ She contends, however, that now the schools are not being used to Americanize and assimilate Latino children, but are instead being used to maintain their Latino culture and identity through bilingual and bicultural education.¹⁶² She maintains that bilingual/bicultural education is not a wise policy because it does not promote Latino assimilation.¹⁶³

The politics of recognition and multiculturalism allows us to better understand why this critique is mistaken. The demand for recognition is based on the idea that recognition shapes us. One of the most important thinkers in this movement is Frantz Fanon.¹⁶⁴ In his famous book *The Wretched of the Earth*,¹⁶⁵ Fanon argued that one of the primary methods that the colonizers used to subjugate the colonized was to project demeaning images of the colonized people.¹⁶⁶ To achieve freedom, the colonized must first disabuse themselves of these disparaging notions.¹⁶⁷ This idea — “that [the subordinated must] struggle for a changed self-image,” is very significant in the current discourse on multiculturalism.¹⁶⁸ It has generated a demand that minority groups and cultures should be included in the educational curriculum.¹⁶⁹ Absent such inclusion, students from minority groups are portrayed in a bad light.¹⁷⁰ Broadening the curriculum is

160. See LINDA CHAVEZ, *OUT OF THE BARRIO: TOWARD A NEW POLITICS OF HISPANIC ASSIMILATION* 9 (1991). For more on bilingual education, see Rachel F. Moran, *Bilingual Education As a Status Conflict*, 75 CAL. L. REV. 321 (1987); Martínez, *supra* note 13, at 606-611.

161. See CHAVEZ, *supra* note 163, at 9.

162. *Id.*

163. See *id.* at 10.

164. See TAYLOR, *supra* note 106, at 65.

165. FRANTZ FANON, *THE WRETCHED OF THE EARTH* (Constance Farrington, trans., Grove Press, 1963).

166. See TAYLOR, *supra* note 106, at 65.

167. *Id.* See also OMI & WINANT, at 93 (“social movements create collective identity by offering their adherents a different view of themselves and their world; different, that is, from the world view and self-concepts offered by the established social order”).

168. See TAYLOR, *supra* note 106, at 65.

169. *Id.*

170. See *id.* See also TURNER, *supra* note 142, at 415-16 (“The development of multiculturalism followed the revolt against the canon in English and American literary studies and the Eurocentric canon in history”).

therefore primarily necessary in order to give appropriate acknowledgment to those who have been left out.¹⁷¹

Given this analysis, we can better understand the demand by Latinos for bilingual and bicultural education. The dominant group has inculcated an image of inferiority in Latinos. For example, the Anglo colonizers in the American southwest produced disparaging discourses regarding Mexican-Americans. For instance, the historian David Weber writes:

Anglo Americans found an additional element to despise in Mexicans: racial mixture. American visitors to the Mexican frontier were nearly unanimous in commenting on the dark skin of Mexican mestizos, who, it was generally agreed had inherited the worst qualities of Spaniards and Indians to produce a 'race' still more dispicable than that of either parent.¹⁷²

Similarly, the dean of Texas historians, Walter Prescott Webb, wrote:

"Without disparagement it may be said that there is a cruel streak in the Mexican nature, or so the history of Texas would lead one to believe. This cruelty may be a heritage from the Spanish of the Inquisition; it may, and doubtless should, be attributed partly to the Indian blood."¹⁷³

Indeed, the Anglos constructed the Mexican-American as their opposite. For example, one commentator writes:

In the comparison the Anglos made, the cultural structure of Mexicans was the antithesis of theirs. Where whites were energetic, Mexicans seemed backward; where whites were ambitious and aggressive, Mexicans seemed apathetic and complacent; where whites considered themselves inventive, Mexicans seemed anachronistic; where whites knew their direction, Mexicans appeared to be going nowhere.¹⁷⁴

These discourses produced serious damage to Latinos causing Latinos to have a demeaning image of themselves. Modern

171. See TAYLOR, *supra* note 106, at 66.

172. FOREIGNERS IN THEIR NATIVE LAND: HISTORICAL ROOTS OF THE MEXICAN AMERICANS 59-60 (David J. Weber ed., 1973).

173. WALTER PRESCOTT WEBB, THE TEXAS RANGERS: A CENTURY OF FRONTIER DEFENSE 14 (1965).

174. ARNOLDO DE LEON, THEY CALLED THEM GREASERS: ANGLO ATTITUDES TOWARD MEXICANS IN TEXAS, 1821-1900 24 (1983). The description of the Mexican-American as the opposite of the Anglo finds a parallel in the work of scholars of western colonialism. See Martinez, *supra* note 12, at 344-45. For example, in describing the colonial discourse on the Orient, Edward Said observed how such discourse showed the Oriental to be the opposite of the Westerner. For instance, Said quotes England's representative in Egypt as follows:

"As I am only a diplomatist and an administrator, whose proper study is also man, but from the point of view of governing him. . . I content myself with noting the fact that somehow or other the Oriental generally acts, speaks, and thinks in a manner exactly opposite to the European."

EDWARD W. SAID, ORIENTALISM 39 (1978).

psychological research has established that Anglo stereotypes of Latinos are used by Latinos to describe themselves.¹⁷⁵ In order to achieve freedom and equality, Latinos must first revise those demeaning images. Bicultural or multicultural education is the way for Latinos to purge themselves of those depreciating self-images. Latino culture must be given due recognition.

C. *Inauthenticity, Assimilation and the One.*

Martin Heidegger is one of the major philosophers of the twentieth century.¹⁷⁶ His discussion of inauthentic human beings also seems relevant to the question of whether the law should be used to enforce homogeneity and complete assimilation.¹⁷⁷ Heidegger's general program in *Being and Time*¹⁷⁸ was to ascertain "the meaning of being."¹⁷⁹ People can comprehend the notion of being in two distinct ways, "authentically and inauthentically."¹⁸⁰ The authentic route provides us the best understanding of what it is to be.¹⁸¹ Heidegger provides an analysis of inauthentic human being.

By engaging in specific activities and tasks, we express our societal understanding of what it is to be.¹⁸² In Heidegger's view, we generally do so in an inauthentic way.¹⁸³ Part and parcel of this societal understanding of what it is to be an idea of the appropriateness of our goals and tasks and of the ways in which we

175. See Linda A. Jackson, *Stereotypes, Emotions, Behavior and Overall Attitudes Toward Hispanics by Anglos* 3, *Research Report* #10, the Julian Samora Research Institute, Michigan State University, East Lansing, Michigan, January 1995.

176. The writings of leading intellectuals such as Richard Rorty, Charles Taylor and Hubert Dreyfus have recently brought about a greater understanding of the importance of Heidegger. See Charles B. Guignon, *INTRODUCTION IN THE CAMBRIDGE COMPANION TO HEIDEGGER* 11 (Charles B. Guignon ed., 1993). Indeed, as this century ends, it is well recognized that Heidegger is one of the most significant philosophers of this century.

177. For a recent effort to apply Heidegger's philosophy to the problem of interpretation in law, See George A. Martinez, *Some Thoughts on Law and Interpretation*, 50 *SMU L.REV.* 1651 (1997).

178. *MARTIN HEIDEGGER, BEING AND TIME* (John Macquarrie & Edward Robinson trans., 1962).

179. See Harrison Hall, *Intentionality and World: Division I of Being and Time*, in *THE CAMBRIDGE COMPANION TO HEIDEGGER*, *supra* note 179, at 135. See also Guignon, *supra* note 176, at 2 ("Heidegger's lofty ambition was to rejuvenate philosophy (and, at the same time, Western culture) by clearing away the conceptual rubbish that has collected over our history in order to recover a clearer, richer understanding of what things are all about").

180. See Hall, *supra* note 179, at 135.

181. See *id.* See also Charles B. Guignon, *Authenticity, Moral Values, and Psychotherapy*, in *THE CAMBRIDGE COMPANION TO HEIDEGGER*, *supra* note 176, at 215, (Heidegger's idea of authenticity points "to a way of life that is higher than that of average everydayness").

182. See Hall, *supra* note 179, at 136.

183. See *id.* See also Guignon, *supra* note 181, at 227 ("Inauthenticity is characterized by falling and forgetting.")

carry them out.¹⁸⁴ In general, this sense is expressed in social norms of behavior.¹⁸⁵ These norms reveal themselves in such statements as "One just doesn't do that," "One doesn't do that here, in that manner," or "One always. . ." and so on.¹⁸⁶ For Heidegger, these norms are omnipresent as the possible expressions of the societal notion of what it is proper or fitting to do.¹⁸⁷

By "understanding" Heidegger "means taking a stand on."¹⁸⁸ "In selecting a specific activity, "we take a stand on our own being."¹⁸⁹ Whenever we choose from among the possibilities presented by our culture, we "exhibit an understanding. . . of what it is to be a human being."¹⁹⁰

According to Heidegger, we are always and everywhere selecting from among the culturally determined alternatives for acting.¹⁹¹ In so doing, we often choose to do "what One does."¹⁹² "When we choose to interpret our being in the public way — living in the world of the One, . . . "doing what One does," "we 'fall' into the inauthentic way of being."¹⁹³

When we fall into an inauthentic way of being, we act as One acts. We engage in activities and interpret the world according to determined social norms.¹⁹⁴ This limits the possibilities for action to what lies within the realm of a standard world — *i.e.*, the typical, the usual or that which is appropriate.¹⁹⁵ The inauthentic person does precisely what anyone would do in that kind of circumstance.¹⁹⁶ Inauthenticity means we fall into the "anonymity and dispersion of the one."¹⁹⁷

When the law forces Latinos and other minorities to fully assimilate, it forces them to become inauthentic in Heidegger's

184. See Hall, *supra* note 179, at 136.

185. See *id.*

186. See *id.*

187. See *id.*

188. See *id.* at 137.

189. See *id.* at 137. See also Guignon, *supra* note 176, at 9 ("[T]aking a stand is said to be a 'projection' of possibilities of meaningfulness for things and ourselves").

190. See *id.* at 137. See also Guignon, *supra* note 181, at 225 ("[I]n taking a stand on its own life, Dasein takes over some range of possibilities as definitive of its identity — some set of personality traits, life-styles, roles, or attitudes — and exists as a 'being-toward' the realization of a final configuration of possibilities for its life overall").

191. See Hall, *supra* note 179, at 137.

192. See Hall, *supra* note 179, at 137.

193. See *id.*

194. See HUBERT L. DREYFUS, BEING-IN-THE-WORLD: A COMMENTARY ON HEIDEGGER'S BEING AND TIME, DIVISION I 328 (1991).

195. *Id.* at 234. See also Guignon, *supra* note 181, at 226 ("[I]nvolvement in public forms of life can have a pernicious effect. It threatens to level all decisions to the lowest common denominator of what is acceptable and well adjusted").

196. *Id.* at 235. See also Guignon, *supra* note 181, at 226 ("Inauthentic Dasein is dispersed into a multiplicity of humdrum routines, drifting with the latest fads . . .").

197. *Id.* at 313.

sense. It is forcing minorities to live as One lives. Given this, the law forces Latinos and others to “[choose] the one for its ‘hero.’”¹⁹⁸ The law should instead allow Latinos to be authentic. It should not be used to force Latinos into the “nullity of inauthentic everydayness.”¹⁹⁹

Heidegger has more to say that is instructive on the issue of assimilation. There is a negative function of the “One.” “Averageness” suppresses all significant distinctions.²⁰⁰ The average interpretation of the world and the averageness of norms and behavior insures that every exception exists only for a short time and is then eliminated.²⁰¹ Heidegger describes this destruction of all important distinctions as ‘leveling.’²⁰² Thus, inauthentic human beings “have taken over the banality and leveling of the public” or the “One.” Consequently, they can only act in the standard ways of dealing with everyday things.²⁰³ The One has the effect of leveling — encouraging “generality and banality.”²⁰⁴

According to Heidegger, there are certain “marginal practices” that have not been leveled.²⁰⁵ These can be activities that were important long ago.²⁰⁶ These practices may once have been at the center of their societies but now they are not the sorts of things that One typically does.²⁰⁷ These marginal practices are therefore appealing to authentic persons.²⁰⁸ Marginal practices provide fresh ways of understanding and acting.²⁰⁹

The cultural practices of Latinos and other minorities may be such marginal practices. They may have been central in their original cultures, but in the United States they are not what One normally does. We should seek to preserve Latino culture as marginal practices so that they are available to attract authentic individuals. Because such practices are not the normal thing to do, they offer fresh and nonbanal ways of acting.

Indeed, there is good reason to suppose that Latino marginal cultural practices may also serve to attract authentic individu-

198. *Id.* at 315.

199. *Id.*

200. *Id.* at 157.

201. *Id.*

202. *Id.* See also Guignon, *supra* note 181, at 226 (“This ‘leveling down’ of all possibilities obliterates the kind of two tiered sense of life that lets us distinguish higher from lower, crucial from trivial, central from peripheral”).

203. See DREYFUS, *supra* note 194, at 320.

204. *Id.* at 328.

205. *Id.* at 329.

206. *Id.*

207. *Id.*

208. *Id.* See also Hubert L. Dreyfus, *Heidegger on the Connection Between Nihilism, Art, Technology, and Politics* in THE CAMBRIDGE COMPANION TO HEIDEGGER, *supra* note 197, at 310 (“Heidegger holds that we must learn to appreciate marginal practices”).

209. See DREYFUS, *supra* note 194, at 329.

als. Latinos have longer life spans than Anglos.²¹⁰ Latinos have significantly “lower death rates than Anglos” for a number of major diseases, including heart disease, cancer, and stroke.²¹¹ Latinos die of these diseases “at a rate nearly forty percent lower than that of Anglos.”²¹² Why is this the case? Most theorists explain that Latinos can expect to live longer and tend to be healthier than Anglos because they engage in Latino cultural practices — the “habits of the Latino heart.” These practices include the great value placed on family,²¹³ a solid work ethic, a religious attitude toward life²¹⁴ and the importance of community.²¹⁵ For example, social scientists have determined that one’s family and societal relations best explain the state of one’s health.²¹⁶ The fact that Latinos place a great importance on the family is clearly a major factor that contributes to their excellent health status.²¹⁷ Latinos also eat healthier foods.²¹⁸ In their meals, Latinos tend to emphasize vegetables instead of meats.²¹⁹ A religious attitude toward life also generates a longer life-span.²²⁰ In comparison with Anglos, “Latinos are twice as likely to be a member of an organized church,” and Latinos are overwhelmingly Roman Catholic.²²¹ Latinos are much more likely to go to church.²²² A religious outlook can reduce anxiety and promote a strong sense of satisfaction.²²³ Thus, Latino cultural practices result in a healthier and longer life. These cultural practices are marginal practices in Heidegger’s sense. The law should not be used to suppress these practices. They should be available to attract authentic individuals.

210. See HAYES-BAUTISTA, NO LONGER A MINORITY, *supra* note 10, at 21; David E. Hayes-Bautista, *How to Retire in Style*, San Jose Mercury News, May 22, 1997.

211. See Hayes-Bautista, *How to Retire in Style*, *supra* note 210.

212. See *id.*

213. HAYES-BAUTISTA, NO LONGER A MINORITY, *supra* note 10, at 18 (“Latinos demonstrate one of the strongest commitments to family in comparison to other ethnic/racial groups”); McWILLIAMS, *supra* note 92, at 69 (observing that Latinos have “an extremely cohesive family unit”).

214. See HAYES-BAUTISTA, NO LONGER A MINORITY, *supra* note 10, at 34 (“religion is overall very important for Latinos”); McWILLIAMS, *supra* note 92, at 69 (noting that for Latinos religion “has always been a central, unifying, cohesive force in their culture”).

215. See Hayes-Bautista, *How to Retire in Style*, *supra* note 210.

216. See *id.*

217. See *id.*

218. See *id.*

219. See *id.*

220. See *id.*

221. See *id.*

222. See *id.*

223. See *id.* For a classic philosophical statement of the position that human beings are better off if they have religious faith, See William James, *The Will to Believe*, in PHILOSOPHY: THE BASIC ISSUES 51, 55-57 (E. .D. Klemke, A. David Kine and Robert Hollinger eds., 1982).

There is reason to suppose that Latino or other minority group practices may attract authentic individuals. For example, jazz music is a minority group cultural or marginal practice that has served as a way for persons to become more authentic. Black artists have developed new innovations in jazz. Their music was an adaptation that grew out of living in a world that was isolated from the dominant white society.²²⁴ As Cornel West explains, jazz music is a black musical tradition where black persons have achieved authenticity.²²⁵ In jazz music, blacks and even whites found a way to become more authentic and unconventional.²²⁶ Thus jazz — a marginal practice in Heidegger's terms — provides an example for how marginal minority practices may serve to attract authentic persons.

Another example is found in how the "beat writers" of the 1950s rebelled against the "deathly pallor" of mainstream cultural practices.²²⁷ As sociologist Todd Gitlin explains, the beats "grooved" on the culture of "Mexicans and blacks."²²⁸ For example, Jack Kerouac, the beat "poet laureate of the endless American highway"²²⁹ writes:

At lilac evening I walked with every muscle aching. . . in the Denver colored section, wishing I were a Negro, feeling that the best the white world had offered was not enough ecstasy for me, not enough life, joy, kicks, darkness, music, not enough night. . . I was only myself, Sal Paradise, sad, strolling in this violet dark, this unbearably sweet night, wishing I could exchange worlds with the happy, true-hearted, ecstatic Negroes of America.²³⁰

Thus, minority group practices have functioned to attract persons attempting to act in ways that the One does not normally act.

In order to avoid inauthenticity, we should therefore seek to preserve Latino culture and practices and not force Latinos to fully assimilate.

D. *Latinos and the Notion of Belonging.*

Philosopher Johann Herder's concept of belonging is relevant to the question of Latinos and the retention of their cultural

224. See Calmore, *supra* note 14, at 2156.

225. See Cornel West, *Charlie Parker Didn't Give a Damn*, 8 NEW PERSP. Q., Summer 1991, at 60, 63; Calmore, *supra* note 14, at 2133.

226. See West, *supra* note 225, at 63; Calmore, *supra* note 14, at 2135 n.20 ("Jazz was born in rebellion against traditional forms and institutions").

227. See TODD GITLIN, *THE SIXTIES: YEARS OF HOPE, DAYS OF RAGE* 47 (1987).

228. See *id.* at 47 n. 230.

229. See *id.*

230. JACK KEROUAC, *ON THE ROAD* 148-49 (New York: Signet, 1957) cited in GITLIN at 47.

practices.²³¹ By belonging, Herder means group co-operation.²³² For Herder, each culture can be identified in terms of central patterns.²³³ To be a part of a group is to think and behave in a particular manner.²³⁴ "The ways in which a people. . . speak or move, eat or drink. . . their laws, their music, their social outlook. . . their theology, have patterns in common which they do not share. . . with the similar activities of some other groups."²³⁵ Thus, Herder thought there are cultural patterns that are, for example, unmistakably Italian.²³⁶ "To fit into such a pattern is to belong."²³⁷ Thus, an Italian who is separated from Italian culture while traveling abroad will not feel at home.²³⁸ In Herder's view, if one does not feel at home, one cannot be truly creative.²³⁹ Indeed, according to Herder's account, to cut people off from the cultural patterns and practices to which they belong, is to "degrade, dehumanize and destroy them."²⁴⁰ Thus, to force groups to assimilate into a dominant language or culture would destroy what is most important in life.²⁴¹

The application of Herder's philosophy to Latinos is fairly straightforward. The cultural practices of Latinos amount to a cultural pattern in Herder's sense. Thus, the "habits of the Latino heart" (e.g., the use of Spanish language)²⁴², the importance of family and religion²⁴³ — establish a cultural pattern that is unmistakably Latino. Latinos belong in such a social pattern. To cut off Latinos and other minority groups from their respective

231. See BERLIN, *supra* note 112, at 195.

232. See *id.*

233. See *id.*

234. See *id.*

235. See *id.*

236. See *id.* at 196.

237. See *id.* This account bears some similarity to the view of contemporary political philosophers who have argued that cultural identity is especially appropriate to serving as the basis for people's self-identification because it is rooted in belonging instead of achievement. See KYMLICKA, *supra* note 67, at 89. For example Avishai Margalit and Joseph Raz contend that identification is more secure, less liable to be threatened if it does not depend on accomplishment. Although accomplishments play their role in people's sense of their own identity, it would seem that at the most fundamental level our sense of our own identity depends on criteria of belonging rather than on those of accomplishment. Secure identity at that level is particularly important to one's well being. Avishai Margalit & Joseph Raz, *National Self-Determination*, 87 J. PHIL. 439, 447-49 (1990).

238. See BERLIN, *supra* note 112, at 196.

239. See *id.*

240. See *id.* at 197.

241. See *id.* See also *id.* at 176 ("Herder is an early and passionate champion of variety: uniformity maims and kills"); KYMLICKA, *supra* note 67, at 85 (moving between cultures is a costly process).

242. See Angel R. Oquendo, *Re-imagining the Latino/a Race*, 12 HARV. BLACK-LETTER L. J. 93, 94 (1995) (the Spanish Language is a source of unity among Latinos).

243. See HAYES-BAUTISTA, NO LONGER A MINORITY, *supra* note 10, at 35 (family, religion and language are very stable components of Latino identity).

cultural patterns by using the law to force them to assimilate to a single universal pattern of culture would be to seriously injure Latinos and other groups. The law, then, should not be used to exile Latinos and other groups from the social and cultural patterns in which they belong.

The philosophical argument that individuals who are cut off from their culture experience significant harm finds support in the work of scholars who have documented the costs to Latinos and other minority groups in attempting to assimilate. For example, Kevin Johnson has eloquently described the great stresses and psychological damage that Latinos experience when they suppress their Latino identity and attempt to blend in with the Anglo mainstream.²⁴⁴ He writes:

The 'melting' pot or 'tossed salad' metaphor for immigrant assimilation fails to fully capture the experiences of racial minorities in the United States. Rather, racial minorities find themselves in a 'ring of fire'. . . The fire is hot and even those fortunate enough to avoid touching it and survive are hurt. All Latinos in the United States, even those who successfully navigate through the flames, are scarred. Many are not so lucky, however, but suffer immense pain, perhaps even self destruction, as they get too close, or even touch the ring and are burned, sometimes beyond recognition. . . they are unidentified, nameless casualties of the 'ring of fire' known as the assimilation process.²⁴⁵

Such pain is analogous to the psychological difficulties that Blacks who attempt to pass for white experience.²⁴⁶

The existence of separate ethnic and racial communities also supports Herder's notion that Latinos and other groups belong to certain cultural patterns. For instance, scholars have documented how Latinos and other minority groups often live in separatist communities — Latino barrios and Chinatowns.²⁴⁷ In part, they live in such enclaves because they feel more comfortable in a place where they understand the language and culture.²⁴⁸

244. See generally Johnson, *supra* note 10; KEVIN R. JOHNSON, *LIFE IN THE BORDERLANDS: A WHITE BROWN MAN'S SEARCH FOR IDENTITY* (Temple University Press, forthcoming 1998).

245. *Id.* at 1277.

246. See Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1710-12 (1993) (describing pain her grandmother experienced by "passing" in order to work in the day as white); EVERETT V. STONEQUIST, *THE MARGINAL MAN* 189-90, 193-99 (1937) (discussing psychological problems and mental conflicts resulting from "passing" and being mistaken for another race). See also Leonard M. Baynes, *Who Is Black Enough for You? The Stories of One Black Man and His Family's Pursuit of the American Dream*, 11 GEO. IMMIGR. L. J. 97, 123 (1996) (discussing negative consequences of "passing").

247. See Hing, *supra* note 6, at 897.

248. See *id.* See also DAVID G. GUTIERREZ, *WALLS, AND MIRRORS: MEXICAN AMERICANS, MEXICAN IMMIGRANTS, AND THE POLITICS OF ETHNICITY* 21-22 (1995)

This is consistent with Michael Omi and Howard Winant's observation that minorities have developed cultures of resistance.²⁴⁹ Racial minorities have sought to use their own cultural traditions as a shield against the racial stresses imposed of the dominant culture.²⁵⁰

In this regard, Herder argues that human beings thrive only in a happy situation "where the group to which they belong has developed a fruitful relationship with the environment by which it is shaped and which in turn it shapes."²⁵¹ In such circumstances, the person is well-adjusted to the natural surroundings.²⁵² Perhaps for these reasons, Latinos — particularly, Mexican-Americans — have tended to live in the borderlands of the American southwest. In the southwest, the Mexican heritage cannot be "beaten out of the land."²⁵³ Mexican-Americans have a special relationship to the natural environment and the cultural form of life of the area.²⁵⁴ Mexican-Americans are attracted to the southwestern borderlands by their historical connection to this region.²⁵⁵

E. *Why the Demand for Assimilation?*

Why is there a push for assimilation into dominant society? Heidegger's philosophy suggests that the push toward assimilation or becoming lost in the One is a response to anxiety. When one conforms to the practices of the One, one falls into inauthenticity.²⁵⁶ In choosing inauthenticity, however, a person chooses a safe area where one "can dwell in tranquilized familiarity."²⁵⁷ Thus, it is anxiety that causes one to choose inauthenticity.²⁵⁸ Human beings flee anxiety by choosing inauthenticity — embrac-

("[T]he process of ethnic enclavement evolving in the region also involved a strong desire among Mexican-Americans themselves to maintain boundaries between their communities and the Norteamericanos. Their decision to live in separate areas stemmed in part from their effort to maintain some semblance of their former community life"); GRISWOLD DEL CASTILLO, *THE LOS ANGELES BARRIO, 1850-1890: A SOCIAL HISTORY* 150 (1979) (arguing that in some ways "the creation of . . . barrio(s) was a positive accomplishment. The barrio gave a geographic identity, a feeling of being at home, to the dispossessed and the poor. It was a place, a traditional place, that offered some security in the midst of . . . social and economic turmoil").

249. See OMI & WINANT, *supra* note 19, at 73.

250. See *id.* See also Angela P. Harris, *Foreward: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 763 (1994) (discussing resistance culture).

251. See BERLIN, *supra* note 112, at 206.

252. See *id.*

253. See MCWILLIAMS, *supra* note 92, at 62.

254. *Id.*

255. *Id.*

256. See DREYFUS, *supra* note 194, at 315.

257. *Id.* at 308.

258. *Id.* at 313. See also Guignon, *supra* note 181, at 228-29 ("In his well-known description of anxiety, Heidegger suggests that our ordinary preoccupations in the busy-ness of the world are actually a form of 'evasion' or 'fleeing.' We throw our-

ing the social norms of the One.²⁵⁹ Heidegger suggests that we should fight against the temptation to flee and instead “make an authentic choice to face anxiety.”²⁶⁰

Beyond this, a certain conception of historical development rooted in the nineteenth century has generated a push toward assimilation. According to this conception, progress demands that smaller cultures are absorbed into larger cultures.²⁶¹ Thus, in the last century, both leftists and liberals argued that the major countries were the vehicles of positive change.²⁶² For example, John Stuart Mill wrote:

Experience proves it is possible for one nationality to merge and be absorbed into another: and when it was originally an inferior and more backward portion of the human race the absorption is greatly to its advantage. Nobody can suppose that it is not more beneficial to a Breton, or a Basque of French Navarre, to be brought into the current of the ideas and feelings of a highly civilized and cultivated people – to be a member of the French nationality, admitted on equal terms to all the privileges of French citizenship. . . than to sulk on his own rocks, the half savage relic of past times, revolving in his own little mental orbit, without participation or interest in the general movement of the world.²⁶³

On this view, smaller minority groups were underdeveloped and could only become modern by giving up their native culture and assimilating into the larger nation.²⁶⁴ Significantly, this position supplied a rationale not only for absorbing minorities into the larger state but also for colonizing other people elsewhere.²⁶⁵ This conception of historical development is based on a key assumption — “progress and civilization require assimilating ‘backward’ minorities to ‘energetic’ majorities.”²⁶⁶ This nineteenth century assumption, however, is no longer viewed as valid.²⁶⁷ For example, the contention that the Czechs could not take part in modernity except by being absorbed into Germany has proven false.²⁶⁸ Similarly, other groups, the Flemish, Quebecois and

selves into the turbulence of day-to-day chores and they-roles in order to avoid facing up to something we find threatening”).

259. See DREYFUS, *supra* note 194, at 315.

260. *Id.* at 316.

261. See WILL KYMLICKA, *THE RIGHTS OF MINORITY CULTURES* 5 (1995).

262. *See id.*

263. JOHN STUART MILL, *UTILITARIANISM, ON LIBERTY, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 395 (H.B. Acton ed., 1972).

264. See KYMLICKA, *THE RIGHTS OF MINORITY CULTURES*, *supra* note 261, at 5-6.

265. *See id.* at 6.

266. *See id.*

267. *See id.*

268. *See id.*

Basques – also have been able to resist assimilation and exist as thriving modern cultures.²⁶⁹

F. *Law and Fostering a Homogeneous People.*

The current drive to enforce a perceived obligation to assimilate and construct a homogenous people is ironic in view of a well-known line of Supreme Court cases. Historically, public education has served as the main tool for Americanizing and assimilating immigrants into the United States.²⁷⁰ The public schools have served as the instruments for teaching people how to behave properly.²⁷¹ The Supreme Court has noted that educational institutions are inclined to promote standardization and has imposed limits on the enforcement of conformity. For example, in *Meyer v. Nebraska*²⁷², the Supreme Court struck down state laws that forbade the teaching of foreign languages before the eighth grade. Similarly, in *Pierce v. Society of Sisters*,²⁷³ the Supreme Court invalidated a state law that required all students to attend public schools. According to Laurence Tribe, these cases stand for the proposition that the state has no power to “foster a homogeneous people.”²⁷⁴

Dominant culture should continue to follow this fundamental principle set forth in these Supreme Court cases. This principle is consistent with the philosophical arguments set forth above which support the idea that one should not force Latinos and other minority groups to assimilate. We should not use the law against Latinos and others to foster a homogeneous people.

G. *Is There a Moral Obligation to Fully Assimilate?*

I have noted that there is a perceived obligation for Latinos and other minorities to assimilate.²⁷⁵ But is there such a moral obligation? It is a familiar moral principle that one can be “morally obligated to do *x*” if and only if “one *can* do *x*.”²⁷⁶ Thus, one can be morally obligated to do *x* if and only if it is “physically and psychologically possible” for that person to do *x*.²⁷⁷ Latinos have

269. *See id.*

270. *See* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1318 (2d ed. 1988).

271. *See id.* at 1318.

272. 262 U.S. 390 (1923).

273. 268 U.S. 510 (1925).

274. *See* TRIBE, *supra* note 270, at 1320.

275. *See* JOHNSON, *supra* note 4, at 79.

276. *See* RICHARD B. BRANDT, *ETHICAL THEORY* 517-18 (1959); Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 *IOWA L. REV.* 449, 511 (1992) (a duty exists only if the duty is capable of being performed).

277. *See* BRANDT, *supra* note 276, at 518.

been unable to fully assimilate.²⁷⁸ Indeed, there is good reason to believe that Latinos and other racial minorities cannot fully assimilate into dominant society. The various racial minorities — e.g., African Americans, Asian-Americans and Native Americans — have found it impossible to fully assimilate into American Society²⁷⁹ Like other minority groups, Latinos have been unable to fully assimilate into dominant U.S. society.²⁸⁰ Isolated Latino enclaves in many communities show that assimilation has not been accomplished.²⁸¹ Latinos continue to suffer from economic inequalities.²⁸² Indeed, few argue that Latinos and other minorities will be absorbed into mainstream society in the way that white ethnic immigrant groups of generations past were able to do.²⁸³ The key distinguishing characteristic is that Latinos and other subordinated minority groups are racialized.²⁸⁴ Racialized individuals or groups are those regarded as naturally inferior.²⁸⁵

Thus, a major reason that Latinos and other minority groups are unable to assimilate is that the dominant group rejects them.²⁸⁶ For example, it is widely reported that all white country clubs refuse to admit Latinos and other minority groups.²⁸⁷ Moreover, research demonstrates the existence of glass ceilings that Latinos and other racialized groups face in the corporate

278. See Johnson, *supra* note 10, at 1265.

279. See OMI & WINANT, *supra* note 19 at 20 (with respect to racial minorities, "structural barriers continued to render the immigrant analogy inappropriate and the trajectory of incorporation did not develop as the ethnicity paradigm had envisioned"); Lazos, *supra* note 37 at 1563 ("race, whatever its form, will continue to be a key factor in creating salient. . . boundaries that divide Americans into racial groups and thwart the ability of racialized minorities to assimilate").

280. See Johnson, *supra* note 10, at 1265.

281. See *id.*

282. See *id.*; Carey Goldberg, *Hispanic Households Struggle Amid Broad Decline in Income*, N.Y. TIMES, Jan. 30, 1997, at A1 (reviewing U.S. Government data showing that Latinos are poorer than African-Americans).

283. See 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, 1228 (1995); FOREIGNERS IN THEIR NATIVE LAND: HISTORICAL ROOTS OF THE MEXICAN AMERICANS, *supra* note 172, at 1 ("sociologists have found Mexicans so slow to Americanize that they label Mexicans 'unassimilable'") citing LEO GREBLER, JOAN W. MOORE, RALPH GUZMAN, ET AL., THE MEXICAN-AMERICAN PEOPLE: THE NATION'S SECOND LARGEST MINORITY 10 (1970).

284. See Toro, *supra* note 283, at 1229; TOMAS ALMAGUER, RACIAL FAULTLINES: THE HISTORICAL ORIGINS OF WHITE SUPREMACY IN CALIFORNIA (1994) (discussing the historical forces that contributed to the racialization of Mexican-Americans in California); TAKAKI, *supra* note 54 (explaining the historical forces that racialized Asian-Americans). See also OMI & WINANT, *supra* note 19, at 64 ("we employ the term racialization to signif[y] the extension of racial meaning to a previously racially unclassified relationship").

285. See Toro, *supra* note 283, at 1229.

286. See Hing, *supra* note 6, at 896.

287. See *id.*

world.²⁸⁸ Therefore, the dominant group is unwilling to permit full assimilation.

This conclusion is consistent with a major research project on Chicano identity.²⁸⁹ In a study by Susan Keefe and Amado Padilla, they found that ninety-seven percent of the time whites socially interacted only with other whites.²⁹⁰ In order to maintain this level of interaction with whites, "Anglos must actively discriminate against Chicanos in personal relations."²⁹¹ Moreover, whites disapprove of intermarriage with Latinos.²⁹² The efforts of Anglos to avoid Latinos provides powerful support for the view that Latinos may never be assimilated.²⁹³

Another reason that Latinos have been unable to assimilate fully is that mainstream society perceives Latinos and their distinctive Latino culture as foreign.²⁹⁴ Latinos are seen as aliens who are not truly American.²⁹⁵

Given all of this, there is good reason to suppose that Latinos and other minorities cannot fully assimilate into dominant white society. "Ought" implies "can." Since Latinos and other minorities cannot fully assimilate into dominant society, there can be no moral obligation to do so.

H. *Limits on Assimilation.*

Clearly, there are philosophical limits on the demand to assimilate. To what extent can a democratic society which seeks to take seriously the ideals of authenticity and the politics of recognition demand that Latinos and other minorities assimilate? The work of Jurgen Habermas, a major contemporary philosopher, is helpful on this point. He has identified two levels of assimilation.²⁹⁶ One type of assimilation requires allegiance to constitutional principles that are consistent with the moral and political

288. *See id.*

289. *See* SUSAN E. KEEFE & AMADO M. PADILLA, CHICANO ETHNICITY 52 (1987).

290. *See* TORO, *supra* note 283, at 1250 (citing KEEFE & PADILLA, *supra* note 289, at 174).

291. KEEFE & PADILLA, *supra* note 289 at 175, *quoted in* TORO, *supra* note 283, at 1250.

292. *See* TORO, *supra* note 283, at 1250.

293. *Id.*

294. *See* JOHNSON, *supra* note 10, at 1282.

295. *See* MARTÍNEZ, *supra* note 12 ("The Mexican-American is discursively produced as foreign"); JOHNSON, *supra* note 10, at 1282; JUAN F. PEREA, *Los Olvidados: On the Making of Invisible People*, 70 N.Y.U. L. REV. 965, 977 (1995). Asian-Americans are also often characterized as "foreign." *See* PAT K. CHEW, *Asian Americans: The "Reticent" Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 33-38 (1994); CYNTHIA KWEI YUNG LEE, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN L. REV. 267, 429-38, 441-52 (1996).

296. *See* JURGEN HABERMAS, *Struggles for Recognition in the Democratic Constitutional State*, in MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION,

culture of the society.²⁹⁷ A second type of assimilation is the "willingness to become acculturated" (i.e. to conform to the cultural traditions of the dominant group).²⁹⁸ This second kind of assimilation cuts into the cultural form of life of the immigrants' origins far more significantly than the first kind.²⁹⁹ Therefore, in order to fully recognize citizens as equals, a democratic constitutional state can demand of Latinos and other minorities only the first type of assimilation.³⁰⁰ The state can require only that Latinos and other minority groups be prepared to participate in the political culture of the nation.³⁰¹ They cannot be required to relinquish the cultural practices and traditions of their origins.³⁰²

CONCLUSION.

Should we be the Borg? Should we be robots or insects³⁰³ that demand that everyone assimilate into the One? This article argues that we should resist those who demand in Borg-like fashion that Latinos and other minorities assimilate into the dominant group. Drawing on philosophical literature, this article argues that it is wrong to use the law to foster a homogeneous people. It is wrong to force Latinos and other minorities into a homogeneous mold that is not true to their distinctive cultures. Instead, the article contends that there is no moral obligation for

supra note 104, at 107-148. For additional work on Habermas, *see generally* THE CAMBRIDGE COMPANION TO HABERMAS (Stephen K. White ed., 1995).

297. *See* HABERMAS, *supra* note 296, at 138.

298. *See id.*

299. *See id.*

300. *See id.* at 139.

301. *See id.*

302. *See id.* This multicultural approach is based on a theory of justice which regards access to one's culture as something to which one is reasonably entitled. *See* KYMLICKA, *supra* note 67, at 86. This approach should not be viewed as a threat to liberal democracy. *See id.* at 193. Indeed, Will Kymlicka has shown that liberal theorists implicitly agree that people are justified in expecting to engage in their distinctive cultural practices. *See id.* at 86. For example, John Rawls has explained the difficulty of leaving one's culture:

[N]ormally leaving one's country is a grave step: it involves leaving the society and culture in which we have been raised, the society and culture whose language we use in speech and thought to understand ourselves, our aims, goals and values; the society and culture whose history, customs, and conventions we depend on to find our place in the social world.

JOHN RAWLS, POLITICAL LIBERALISM 222 (1993). Thus, liberals have recognized that one's relationship to one's culture is usually too important to relinquish. *See* KYMLICKA, *supra* note 67, at 87. Given this, many demands of ethnic groups are consistent with liberal ideals. *See id.* at 193.

303. Virtually every group of animals displaying higher forms of social organization is notorious for its xenophobic response to outsiders. *See* EDWARD O. WILSON, SOCIOBIOLOGY: THE ABRIDGED EDITION 122 (1980). For example, sociobiologist E.O. Wilson writes: "Nothing in the day-to-day social life of an ant colony, no matter how stressful, activates the group like the introduction of a few alien workers." *Id.* at 122.

Latinos and other minority groups to fully assimilate. At most, all that can be expected of Latinos and other groups is the willingness to participate in the political culture of America.