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CITIZEN AND CITIZENSHIP WITHIN AND BEYOND THE NATION

TAYYAB MAHMUD¹

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I. INTRODUCTION

As discourses of “Globalization” and “New World Order” swirl around academic and policy-making circuits, the question of citizenship presents itself with a renewed persistence and urgency. While masters of the universe unfold myriad stratagems of a neo-liberal reordering of capitalism as a global system, in vogue are propositions of withering away of the sovereign state, revival of civil society, and flowering of democratization and human rights. Concerns about exclusion and subordination are increasingly portrayed as debates of yesterday and all stand invited to join the brave new world of unbridled capital accumulation.

But then, just as the death of sovereignty was proclaimed,² it resurrected with a bang, vibrations of which echo in the caves of Bora Bora and the Mesopotamian valley.³ Empire has come out of the closet, bringing death in its train. Better yet, deaths of two types. Those that warrant incessant individualized obituaries, and those not even worthy of a body-count. The wretched of the earth are now wanted both dead and alive,⁴ alive to furnish labor power for growth engines of global capital, but

¹Professor of Law, Cleveland-Marshall College of Law, Cleveland State University. I would like to thank the faculty, staff, and students of Cleveland-Marshall College of Law for making the Eighth Annual LatCrit Conference possible. Special thanks to the Editorial Board of Cleveland State Law Review for all the hard work that went into the production of this Symposium Issue.

²See MICHAEL HARDT AND ANTONIO NEGRI, *EMPIRE* (2000).

³For the self-proclaimed right of “preeminence” and “preemption” reserved for the sovereign hyper-power, see THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (September 2002). For a perceptive exposition of the structural determinants of the new security posture of the United States, see EMMANUEL TODD, *AFTER THE EMPIRE: THE BREAKDOWN OF THE AMERICAN EMPIRE* (C. Jon Delogu trans. 2003). For a compelling response to the militarist empire, see ARUNDHATI ROY, *WAR TALK* (2003).

⁴Use of the expression “wanted dead and alive” is prompted by Peter Fitzpatrick, *Enduring Freedom* 5:4 THEORY AND EVENT (2002), at http://muse.jhu.edu/journals/theory_and_event/v005/5.4fitzpatrick.html. See also, Michael J. Shapiro, *Wanted, Dead or Alive* 5:4 THEORY & EVENT (2002), at http://journals.ohiolink.edu:6873/journals/theory_and_event/v005/5.4shapiro.html.

dead because shorn of political rights deemed an entitlement of the select. Just as capital unshackles itself from any remaining barriers to romp at will across national boundaries, ever-stringent immigration regimes are put in place to thwart movement of bodies seeking livelihood, justice, and dignity.

The disconnect between the proclaimed state of the world and the hard-edged reality signals that perennial questions historically embedded in Euro-centric modernity remain alive: the contradiction between promise of universality and practices of particularity; the historical symbiosis between liberalism and Empire; the exclusions presupposed in the project of modern nation-building; exclusions from the zone of citizenship built upon difference of race, gender, class, sexuality, national origin, language, and religion; the constructions of the modern structured in counter-distinction with the posited pre-modern and uncivilized "Other"; the very foundations of modern law resting upon a rejection of posited primitive; and the unilinear Eurocentric History masquerading as the only legitimate frame of being and experiencing time.

These are the very questions that undergird the stream of scholarship forged under the wide umbrella of Latina/o Critical Legal Theory (LatCrit). This movement, whose point of departure was the ground furnished by Legal Realism, Critical Legal Studies, Feminist Legal Theory, and Critical Race theory, has over time incorporated teachings of Queer Theory, Postcolonial Studies, Culture Studies, and Subaltern Studies. The three contributions to this cluster in the Symposium are worthy exemplars of this legacy as they open new avenues to broaden and deepen the project of critical legal scholarship. Jointly, the three interventions constitute a formidable spatial and temporal canvas. One explores the past, one interrogates the present, and one contemplates the future. One has the local as its focus, one examines the nation, and one's reach is global. Their spatial and temporal positionings alone make these essays worthy of serious attention by students and scholars of the law.

II. POSTCOLONIAL NATION-BUILDING AND ITS DISCONTENTS

Charles R. Venator Santiago aims to explore the relationship between the law, race, and nation-building. His focus is on the period of Hatian unification (1822-1844), and his project is to examine how in colonial settings law furnishes a contested terrain that produces a new and hybrid national identity among the colonized "as an expression of a clash of juridical cultures."⁵ He shows how a distinct Dominican national identity emerged during this period as a result of the interplay between colonial and postcolonial Spanish and French legal systems against the backdrop of race formation. He designates this process "legal transculturation" and uses it to describe "the nation building process as a 'contact zone' where multiple legal traditions and cultures, as well as other narratives, clash and engage in a mutually constitutive relationship resulting in a distinct national project."⁶

⁵Charles R. Venator Santiago, *Race, Nation-Building and Legal Transculturation During The Haitian Unification Period (1822-1844): A Dominican Perspective*, 52 CLEV. ST. L. REV. 63 (2005).

⁶*Id.*

Santiago takes issue with canonical Dominican nationalist narratives that repudiate the period of Haitian occupation as an external aberration and unrelated to the formation of a distinct Dominican identity and republic. By engaging in a more nuanced analysis of this particular colonial relationship, he argues that colonialism is a contested terrain that constitutes both the colonizer and the colonized. His position is in tune with the broader proposition of postcolonial studies that “Europe was made by its imperial projects, as much as colonial encounters were shaped by conflicts within Europe itself.”⁷ While colonialism by definition is a relationship of domination and subordination, it does not entail unidirectional determinism. As Subaltern Studies has brought into sharp relief, the colonized are never passive mimics of the colonial script; their strategies of resistance give rise to innovative vocabularies and relationships.⁸

Santiago’s brief survey of the history of Haiti and Dominican Republic substantiates Achille Mbembe’s thesis about postcolonial societies that “from the fifteenth century, there is no longer a ‘distinctive historicity’ of these societies, one not embedded in times and rhythms heavily conditioned by European domination.”⁹ European “discovery” of the “New World,” intra-European rivalries, and the Seven Years War are the pre-history of the two republics, whereby French law came to dominate the western region of the area involved, and Spanish law engulfed the eastern one. This is reminiscent of so many colonized lands and peoples who were passed from one master to another like so many bargaining chips on the European political chess board.

The French Revolution and its aftermath furnished a watershed in this history, one that Santiago captures well. The “Black Jacobins” of Haiti took the words of “Rights of Man & Citizen” far too seriously to realize that in the eyes of France the race of Haitian Blacks and Creoles rendered them ineligible for liberty, equality, and fraternity.¹⁰ Universality claims of the French Revolution could not accommodate abolition of slavery, granting of full citizenship rights to emancipated slaves, and prohibition of racial discrimination, mandated by the 1801 Constitution promulgated by the Haitian revolutionaries in the now-unified island. Suppression of the revolution and reinstatement of slavery by the French propelled establishment of the Haitian republic in the western part of the island by hitherto enslaved Blacks. Santiago examines the process of constitution-building to highlight the

⁷Ann Laura Stoler and Frederick Cooper, *Between Metropole and Colony: Rethinking a Research Agenda*, in TENSIONS OF EMPIRE: COLONIAL CULTURES IN A BOURGEOIS WORLD 1 (Frederick Cooper & Ann Laura Stole eds., 1997).

⁸For a comprehensive introduction to Subaltern Studies, see SELECTED SUBALTERN STUDIES (Ranajit Guha & Gayatri Chakravorty Spivak eds., 1988); MAPPING SUBALTERN STUDIES AND THE POSTCOLONIAL (Vinayak Chaturvedi ed., 2000); READING SUBALTERN STUDIES: CRITICAL HISTORY, CONTESTED MEANING & THE GLOBALIZATION OF SOUTH ASIA (David Ludden ed., 2001); THE LATIN AMERICAN SUBALTERN STUDIES READER (Ileana Rodriguez ed., 2001).

⁹ACHILLE MBEMBE, ON THE POSTCOLONY 9 (2001).

¹⁰See C.L. R. JAMES, THE BLACK JACOBINS: TOUSSAINT L’OUVERTURE AND THE SAN DOMINGO REVOLUTION (2d ed. 1963); CAROLYN E. FICK, THE MAKING OF HAITI: THE SAINT DOMINGUE REVOLUTION FROM BELOW (1990).

institutionalization of racial criteria for citizenship and property rights. All Hatian nationals were to be characterized under the generic category of blacks, and later all persons of African and Indo-American heritage were entitled to Hatian nationality and corresponding citizenship rights. Whites were prohibited from owning property, and later the owners' continuous use of the land was made the condition of eligibility for property rights.

A productive question arises here: what were the roots of the racially exclusivist polity the Hatians strove to establish? A search for an answer unavoidably takes us into the thicket of European colonial expansion which brings into sharp relief the exclusions built into modern notions of citizenship, sovereignty, representation, and the rule of law. To reconcile colonial domination and its attendant institutions of slavery and indentured labor with ideals of freedom and equality, a modern discourse of racial difference and hierarchy gained hegemony, whereby capacity and eligibility to freedom and progress were deemed biologically determined, thus legitimating colonialism as a natural subordination of "lesser" races by "higher" ones.¹¹ The Hatians were, thus, simply following the modern grammar of racial difference, only turning the prescribed racial hierarchy on its head. Though inverted, very much in play here is the hegemonic "epistemic graphing of imperialism."¹²

Santiago then picks up the thread to examine the phase of Hatian occupation of the whole island and the interface between Haitian version of a French legal order and the Spanish juridical regimes dear to the now subordinated Dominican elites. Here he develops the argument that the contested negotiation between the two legal orders and worldviews consolidated national identities of both the Haitians and the Dominicans. He terms his conclusions preliminary, and identifies lines of further inquiry. The central question he leaves us with is how discourses of race undergird formation of national identities as an expression of a clash of juridical cultures. As Santiago and others pursue this inquiry, they will find very productive the work of scholars who find that "the discourses of race and nation are never very far apart."¹³ We should remain mindful that the very birth of nationalism was "coeval with the birth of universal history,"¹⁴ and the nation remains a "capital paradox of universality."¹⁵ Where universality imagines the nation as unbound, actualization of the nation situates it in particularities of belonging.¹⁶ Inescapably, then, the process

¹¹See, Tayyab Mahmud, *Colonialism and Modern Construction of Race: A Preliminary Inquiry*, 53 U. MIAMI L. REV. 1219 (1999).

¹²GAYATRY CHAKRAVORTY SPIVAK, *A CRITIQUE OF POSTCOLONIAL REASON: TOWARDS A HISTORY OF THE VANISHING PRESENT* 34 (1999).

¹³Etienne Balibar, *Racism and Nationalism*, in *RACE, NATION, CLASS: AMBIGUOUS IDENTITIES* 37 (Etienne Balibar & Emmanuel Wallerstein eds., Chris Turner trans., 1991). See also *CRITICAL BEINGS: LAW, NATION AND THE GLOBAL SUBJECT* (Peter Fitzpatrick and Patricia Tuitt eds., 2004).

¹⁴PARTHA CHATTERJEE, *NATIONALIST THOUGHT AND THE COLONIAL WORLD: A DERIVATIVE DISCOURSE?* 2 (1993).

¹⁵J. Derrida, *Onto-Theology of National-Humanism (Prolegomena to a Hypothesis)*, 14 OXFORD LIT. REV. 71 (1992). See generally *MAPPING THE NATION* (Gopal Balakrishnan ed., 1996).

¹⁶See PETER FITZPATRICK, *MODERNISM AND THE GROUNDS OF LAW* 111-145 (2001).

of nation-building is a process of exclusion. Coherence of the nation rests on exclusion of what is its "Other"; better yet, the destruction or domestication of the alterity of the "Other."¹⁷ This "othering" is, in the final analysis raced – the process whereby the body, the place of origin, and consciousness are sutured to assign eligibility to membership in the nation, i.e. citizenship, the key to representation and protections of the law.¹⁸

Santiago's contribution also highlights the continuing need of focused historical work in critical legal scholarship. Here we must remain alert to the admonition that "bad history is not harmless history [but] dangerous."¹⁹ Here the task is to deconstruct "the willed (auto)biography of the West [that] still masquerades as disinterested history."²⁰ Critical legal scholars must break free of linear Eurocentric history, one that choreographs "the mirror dance of colonial meaning-making,"²¹ and animates "the linear, progressivist claims of the social sciences – the major imperializing discourses."²² Critical legal scholars doing historical work will find productive departures suggested by Subaltern Studies.²³ This project aims to interrogate and destabilize hegemonic historiography, one that posits social change as a linear evolutionary process of transition, and assigns only dominant elites any agency for change. Subaltern Studies proposes that moments of transformation be pluralized and plotted as confrontations rather than transitions, and that the dominated subalterns be seen as the primary subjects and agents of social transformation.

III. INELIGIBLE BODIES AND MICROAGGRESSIONS

How are urban identities constructed and enacted in public spaces and how do they relate to the construction of citizenship? What is the nature of microaggressions suffered by victims of racist policies and practices of law enforcement agencies? What race, class, and citizenship privileges are in operation when selected spaces are permitted to elude the gaze of the law when policing them would risk jeopardizing

¹⁷See Peter Fitzpatrick, *'We Know What It Is When You Do Not Ask Us': Nationalism as Racism*, in NATIONALISM, RACISM AND THE RULE OF LAW 3 (Peter Fitzpatrick ed. 1995); PETER FITZPATRICK, MODERNISM AND THE GROUNDS OF LAW 111-145 (2001).

¹⁸See generally Peter Fitzpatrick, *Racism and the Innocence of Law*, in CRITICAL LEGAL STUDIES 119 (Peter Fitzpatrick and Alan Hunt eds. 1990); PETER FITZPATRICK, LAW AND THE PRIMITIVE (1999); DENISE FERREIRA DA SILVA, HOMO MODERNUS: A CRITIQUE OF PRODUCTIVE REASON (forthcoming; manuscript on file with author).

¹⁹ERIC HOBBSBAWN, ON HISTORY 277 (1997).

²⁰SPIVAK, *supra* note 12, at 208. See also ROBERT YOUNG, WHITE MYTHOLOGIES: WRITING HISTORY AND THE WEST (1990); MICHEL-ROLPH TROUILLOT, SILENCING THE PAST: POWER AND THE PRODUCTION OF HISTORY (1995); Ashis Nandy, *History's Forgotten Doubles*, HISTORY & THEORY, THEME ISSUE 34, May 1995, at 44; ERIC R. WOLF, EUROPE AND THE PEOPLE WITHOUT HISTORY (1982).

²¹MARY LOUISE PRATT, IMPERIAL EYES: TRAVEL WRITING AND TRANSCULTURATION 136 (1992).

²²HOMI BHABHA, THE LOCATION OF CULTURE 32 (1994).

²³See *supra* note 8.

interests of dominant groups? Professor Mary Romero and Ms. Marwah Serag position these questions as foundational to concerns about interplay of race and citizenship.²⁴ Deploying a remarkable facility with methods of social inquiry, they undertake a thorough and nuanced case study to uncover answers to these and related questions. The focus of their inquiry is the five-day operation conducted by the Tucson Border Patrol Sector and the Chandler Police Department in Arizona in 1997, locally referred to as the "Chandler Roundup." The operation entailed Mexican American and Latino residents of the area being subjected to racial affronts on account of police stops and raids without cause and interrogation about their immigration status. The study takes into account the operation itself, the community protest that it engendered, and the official reports about the operation prompted by the protest and issued by the Attorney General and the City of Chandler.

Romero and Serag deftly employ methods of social inquiry that while maintaining fidelity to canonical methodologies, are informed by the newer and productive approaches indicated by discourse and narrative analysis. Their treatment of witness accounts recorded in official reports is particularly instructive. They tease out of these narratives not only the operational modalities of law enforcement agencies, but also the nature and depth of injury to the victims of the operation. Study of power is often handicapped by the fact that the archive, which is by definition official, is produced as part of the knowledge/power complex.²⁵ Consequently, the challenge for critical scholars is to interrogate the archive equipped with carefully selected methodological tools, including readings against the grain. Many critical legal scholars have moved beyond the canon of traditional legal analysis to incorporate tools of historical, social, cultural and discursive analysis. This brilliant case study should prove very instructive to critical legal scholars in the continuing search and refinement of productive methodological approaches.

Romero and Serag show that the "Chandler Roundup", besides being part of heightened surveillance of major points of entry of Mexican and Latino immigrants, was motivated by the desire of developers to rebuild the downtown area. The latter insight is in tune with many urban renewal schemes that result in the displacement of low income residents of targeted neighborhoods, often racial minorities, and the influx of commercial concerns and residents who would furnish demand for the new developments.²⁶ Some fundamental questions arise in this context: One, how public policy and private interests come together to advance designs that may be race-neutral on their face but have disparate impact on racial groups? Two, how changes in the global economic system and the resulting focus of developed economies on high-productivity and high-value adding sectors, are rendering the working class in

²⁴Mary Romero & Marwah Serag, *Violation of Latino Civil Rights Resulting from INS and Local Police's Use of Race, Culture and Class Profiling: The Case of the Chandler Roundup in Arizona*, 52 CLEV. ST. L. REV. 75 (2005).

²⁵See THOMAS RICHARDS, *THE IMPERIAL ARCHIVE: KNOWLEDGE AND THE FANTASY OF EMPIRE* (1996); and JACQUES DERRIDA, *ARCHIVE FEVER: A FREUDIAN IMPRESSION* (1996).

²⁶See REVITALIZING URBAN NEIGHBORHOODS (W. Dennis Keating ed., 1997); REBUILDING URBAN NEIGHBORHOODS: ACHIEVEMENTS, OPPORTUNITIES AND LIMITS (W. Dennis Keating and Norman Krumholz eds., 1999).

these societies marginal? Three, what impact this trend is having on racial minorities who are often relegated to the margins of the economy trapped in unemployment or low-skill and low-paying jobs? These questions necessitate that critical legal scholars pay more sustained attention to emerging trends in global political economy and their impact on subordinated social groups.²⁷

Romero and Serag's study shows that both at the planning and execution stage of the "Chandler Roundup," "Mexican appearance" was the criteria of who the law enforcement agencies would stop and interrogate. By exploring the implication of this fact, the study helps us understand the dynamics of identity formation and its relationship with citizenship rights. Contextual determinants, both material and discursive, demarcate the essential spatial and temporal frameworks within which identities are constituted. Within such frameworks identities are forged along the fault lines between operations of power and strategies of resistance. This process, of necessity, is a dynamic one. Identities are protean and are always in the making. Identities "[f]ar from being eternally fixed in some essentialized past, they are subject to the continuous 'play' of history, culture and power."²⁸ The deployment of "appearance" as the grounds of subjection to operations of power, reinforces the proposition that any examination of modern power must move beyond the mind/body and material/ideological distinctions entrenched in positivist and empiricist epistemology. Any relationship of domination and subordination entails violence exercised on living human beings.²⁹ Because human beings are not simply non-conscious biological entities, domination warrants more than physical violence to the flesh. Modern power/knowledge complex connects the body and its place of origin with consciousness in order to produce a subject available for subjection.³⁰

²⁷For productive insights on these issues, see ROGER WALDINGER AND MICHAEL LICHTER, *HOW THE OTHER HALF WORKS: IMMIGRATION AND THE SOCIAL ORGANIZATION OF LABOR* (2003); Laura Ho, Catherin Powell and Leti Volpp, (*Dis*)*Assembling Rights of Women Workers Along the Global Assembly Line: Human Rights and the Garment Industry*, 31 HARV. C.R.-C. L. L. REV. 383 (1996).

²⁸Stuart Hall, *Cultural Identity and Diaspora*, in *IDENTITY: COMMUNITY, CULTURE, DIFFERENCE* 225 (Jonathan Rutherford ed. 1990).

²⁹As Foucault explicates:

The body is also directly involved in a political field; power relations have immediate hold upon it; they invest it, mark it, train it, torture it, force it to carry out tasks, too perform ceremonies, to emit signs. The political investment of the body is bound up, in accordance with complex reciprocal relations, with its economic uses; it is largely as a force of production that the body is invested with relations of power and domination; but, on the other hand, its constitution as labor power is possible only if it is caught up in a system of subjection (in which need is also a political instrument meticulously prepared, calculated and used); the body becomes a useful force only if it is both a productive body and a subjected body.

MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 25-26 (1979).

³⁰Helpful here is Foucault's concept of "bio-power." Conceptualized as the link between microphysics and macrophysics of power, bio-power identifies forms of power exercised over humans taken as living beings. MICHEL FOUCAULT, *1 HISTORY OF SEXUALITY 1* (1981). Examination and designation of the body is a precondition to its regulation and subjection to modern power. It is in this context that Foucault, instead of speaking about the law as an autonomous domain, speaks instead of a "scientifico-legal complex" or of a "epistemologoco-

Critical legal scholars have forwarded the productive concept of “permanent foreigner” within the context of American racial scheme.³¹ The case-study by Romero and Serag furnishes further substantiation of this thesis of citizenship and illegality being racially and linguistically circumscribed. They show that Mexican-American and Latinos, irrespective of their legal status with regards to citizenship, were targeted with the assumption that they are in the U.S. illegally. With the demographic changes afoot, “permanent foreigners” are now the largest minority group in the U.S. How this will translate in terms of their placement within economic, political and cultural domains is a question that needs sustained examination by critical legal scholars.

Romero and Serag show that a spatial division marked the “Chandler Roundup.” Public roads, side walks, shopping centers, and even telephone booths were included in the sites targeted by the operation. However, kitchens of upscale restaurants, resort hotels, suburban yards, and gated communities remained immune. The implication is that presence and labor of Mexican American and Latinos in the latter spaces is indispensable for “normal” functioning of the system, while their presence in the policed sites is taken as a hindrance and threat to normalcy. This suggests two productive lines of further inquiry: one, a critique of political economy that would identify the material conditions of subordination that underwrite racism; and two, a critique of modern universality to identify “the other side of universality...[the] moral and legal no man’s land, where universality finds its physical limit.”³² Further exploration of these inter-related questions will help to invigorate the project of mapping the material and discursive structures of modern societies and explaining how they conjoin to form a matrix that sustains racism and its attendant processes.

The study by Romero and Serag also broadens the field of microaggressions as a subject of inquiry. They bring into sharp relief the pain, humiliation, fear, violation, embarrassment, and mortification registered and expressed by those targeted by the “Chandler Roundup.” Legal scholars are too often preoccupied with systemic and macro designs of power to take into account of microaggressions that victims of racism and other cycles of subordination are subjected to.³³ Besides, microaggressions become so pervasive as to become normalized and thus escape scrutiny. Often what is involved here is not just violations of formal legal rights but affronts to human dignity and self-respect. Behaviors that impact not only the social

juridical formation.” Michel Foucault, *Governmentality*, 6 I & C 5, 23 (1979). Similarly, for Agamben “the production of a biopolitical body is the original activity of sovereign power.” GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* 6 (Daniel Heller-Roazen trans., 1998).

³¹See, e.g., Keith Aoki, “Foreign-ness” & Asian American Identities: *Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes*, 4 ASIAN PACIFIC AM. L. J. 1 (1997); ROBERT S. CHANG, *DISORIENTED: ASIAN AMERICANS, LAW, AND THE NATION-STATE* (1999); and MIA TUAN, *FOREVER FOREIGNERS OR HONORARY WHITES? THE ASIAN ETHNIC EXPERIENCE TODAY* (1999).

³²Denise Ferreire da Silva, *Towards a Critique of the Socio-logos of Justice: The Analytics of Raciality and the Production of Universality* 7:3 SOCIAL IDENTITIES 421-2 (2001).

³³For a productive departure, see Peggy C. Davis, *Law as Microaggression*, 98 YALE L. J. 1559 (1989).

existence of the victims but also potentially leaves scars on their psyche. One hopes that the thread of inquiry to lay bare these pervasive practices that often elude detection will be taken up by critical legal scholars. Similarly, we need to focus more on strategies of resistance adopted by the targets of micro and macro aggressions. This study implicitly points to some modes of resistance to macro aggressions, for example, community protests, law suits, petitions to public officials, and demands for public inquiries. We also need to explore the scope and varieties of the tactics subordinated individuals and communities deploy to resist and deflect microaggressions. The teachings of social scientists who focus on “weapons of the weak” may be very useful in this regard.³⁴ Having our social inquiries guided by the proposition that “resistance is never in a position of exteriority in relation to power,”³⁵ will enable us to keep in focus the agency and humanity retained by those subjected to of power.

IV. CITIZENSHIP BEYOND THE NATION-STATE

Berta Esperanza Hernandez-Truyol and Matthew Hawk in one bold stroke push the discussion of citizenship and legal subjecthood beyond the traditional confines of the nation-state as the exclusive unit of analysis of the question.³⁶ By focusing on the increasing problem of statelessness, and by forwarding a bold proposal for institutionalization of global citizenship, they challenge critical legal scholars to recognize the changing landscape of the international order and particularly the displacements currently unfolding global changes bring in their train. More pointedly, they issue a call for innovative legal responses to felt needs of the time.

The point of departure for Hernandez-Truyol and Hawk is a growing fracture between the theory and lived experience of citizenship in today’s world. As they point out, while historically “citizenship is centered on the nation-state, as a factual matter citizenship is increasingly non-national in character.”³⁷ They are also cognizant of the rise of legal regimes that increasingly deterritorialize legal subjecthood, for example, international human rights regimes, regional trading blocs, and establishment of the European Union. But while these developments have put into question the relationship of citizenship with territorial state sovereignty, they have left unattended the problem of statelessness. Hernandez-Truyol and Hawk aim to bring this problem into sharp relief, a project they see in tune with a wider concern about “those marginalized or disempowered within their own or foreign national

³⁴See JAMES C. SCOTT, *THE MORAL ECONOMY OF THE PEASANT: REBELLION AND SUBSISTANCE IN SOUTHEAST ASIA* (1976); Michael Adas, *From Avoidance to Confrontation: Peasant Protest in Precolonial and Colonial Southeast Asia*, 23 *COMP. STUD. IN SOC’Y & HIST.* 217 (1981); Michael Adas, *From Footdragging to Flight: The Evasive History of Peasant Avoidance Protest in South and Southeast Asia*, 134 *J. OF PEASANT STUD.* 64 (1986).

³⁵MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: VOLUME 1: AN INTRODUCTION* 95 (Robert Horley trans., 1978).

³⁶Berta Esperanza Hernandez-Truyol & Matthew Hawk, *Traveling the Boundaries of Statelessness: Global Passports and Citizenship*, 52 *CLEV. ST. L. REV.* 97 (2005).

³⁷*Id.* at 2. For historical accounts of disciplinary regimes of modern citizenship, see *THE INVENTION OF THE PASSPORT: SURVEILLANCE, CITIZENSHIP & THE STATE* (John Torpey et. al. eds., 1999).

borders – the poor, racial and ethnic minorities, indigenous populations, and women who at present lack equal status in any local or global community.”³⁸

Hernandez-Truyol and Hawk proceed with the premise that the *de facto* processes of deterritorialization of citizenship in the absence of a global structure of governance may imperil the rights of one and all. They propose, instead, a model of formal global citizenship, one that flows from the concept of dual or multiple nationalities, and which they believe is both practically and theoretically feasible. As a first step in building their model, the authors survey the field of citizenship theory. They see citizenship theory broadly coalescing around two poles: citizenship-as-legal status and citizenship-as-desirable-activity. They explore the respective legal and philosophical grounds of these two postures, and review recent critiques of the same. Here they draw upon both canonical conceptualizations and more recent departures in debates about citizenship in social and political theory. They see the limitations of citizenship theory issuing from the foundational divide between those who see the on-going process of globalization as heralding the demise of the nation-state and those who see the nation-state remaining the only secure framework for human rights including citizenship.

In is in the context of this divide that Hernandez-Truyol and Hawk “propose a third way which, rather than attempting to chart a middle course, rejects the either/or approach and takes a both/and approach.”³⁹ Rather than seeing postnational global citizenship in lieu of a national one, they conceive of “a formal global citizenship as existing in tandem with, rather than as a replacement for or in opposition to, national citizenship.”⁴⁰ In their model, global citizenship would require assent of the states and would coexist rather than compete with national citizenship. They use the existing institution of dual nationality as the paradigm for exploring the viability and desirability of formal global citizenship. Their model, while based on the idea of the universality of human rights, does not propose or require a global government.

Hernandez-Truyol and Hawk advance four propositions as furnishing the framework for global citizenship. One, that such citizenship “must protect the trappings of personhood by being grounded in human rights norms.”⁴¹ Two, that “global citizenship must defer to the nation-state as the site of the individual’s ‘primary’ citizenship.”⁴² Three, that “global citizenship must be established by multilateral treaty.”⁴³ Four, a structure to review petitions for global citizenship be created; one that “would not encroach on sovereign prerogatives of states such as taxation, conscription, or prosecution.”⁴⁴ In this model then, “the global citizen will ultimately derive rights from the nation-state.”⁴⁵ The authors see the stateless and

³⁸Hernandez-Truyol & Hawk, *supra* note 36.

³⁹*Id.*

⁴⁰*Id.*

⁴¹*Id.*

⁴²*Id.*

⁴³*Id.*

⁴⁴*Id.*

⁴⁵*Id.*

those seeking redress for international wrongs as the chief beneficiaries of global citizenship.

In the last part of the paper, Hernandez-Truyol and Hawk examine the predicament of those incarcerated at Camp X in Guantanamo Bay, and argue that their model of global citizenship would provide the grounds to protect basic human rights of those prisoners. They conclude by acknowledging that their model is not an easy solution to the myriad problems of citizenship and that it does not comport fully with any particular citizenship theory. However, they argue that it nevertheless has significant advantages. Formal global citizenship, they argue would make clear to skeptics that globalization is a reality, would help the growth of social change under the rubric of democracy, and would engender a purposeful global discourse about the relationship of citizenship with national sovereignty and cultural difference.

The productive and instructive contribution of the Hernandez-Truyol and Hawk article for critical legal studies is not so much their specific prescriptions but the domains of productive research that they bring into sharp relief. The article invites, nay urges, engagement of critical legal scholars with the new departures in social theory, the changing nature of sovereignty, undergoing transformations of the international system, and the new phase of globalization. As this challenge is taken up by others with a progressive agenda, a primary task is to critically evaluate claims of end of history, demise of sovereignty, irrelevance of nation-states, benign nature of globalization, and empire without imperial control.⁴⁶ This will also entail deconstruction of concepts such as “nation,” “citizen,” “civil society,” and “sovereignty,” to examine the extent to which categories saturated with particularities of modern history of Europe have a universal purchase.

V. CONCLUSION

Over the last several years, LatCrit movement has inspired scholarship that has brought to the fore many questions and perspectives not often accommodated by mainstream legal scholarship in the United States. The articles in this cluster of the eighth symposium issue of LatCrit scholarship live up to that tradition. By engaging with questions of citizenship and nationhood in diverse spatial and temporal settings they have helped expand the scope of critical legal inquiry. One can be confident that many lines of further inquiry suggested by the authors will animate the work of others.

⁴⁶For a succinct exposition of the agenda of progressive forces in this regard see World Social Forum, *Porto Alegre Call for Mobilization*, in THE GLOBALIZATION READER 435 (Frank J. Lechner and John Boli eds., 2nd ed. 2004). For perceptive analyses of the issues involved, see Saskia Sassen, *The Repositioning of Citizenship: Emergent Subjects and Spaces for Politics*, in EMPIRE'S NEW CLOTHES: READING HARTD AND NEGRI 175 (Paul A. Passavant & Jodi Dean eds., 2004); Mark Laffery and Jutta Weldes, *Representing the International: Sovereignty After Modernity*, *Id.* at 121; Ruth Buchanan and Sundhya Pahuja, *Legal Imperialism: Empire's Invisible Hand?*, *Id.* at 73; JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS (2003); IMMANUEL WALLERSTEIN, THE DECLINE OF AMERICAN POWER: THE U.S. IN A CHAOTIC WORLD (2003).

