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Contestable Terrain at the Borders: "By the Time I Get to Arizona"

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**UNDER LAW OF COLOR: PRISONS, POST-RACISM, AND
PRESENT COMPLEXIONS**

**CLUSTER INTRODUCTION - CONTESTABLE TERRAIN AT
THE BORDERS: "BY THE TIME I GET TO ARIZONA"**

JUSTIN HANSFORD*

"I'm counting down to a day deserving, fitting for a King,
I'm waiting for a time when I can get to Arizona."¹

This cluster vigorously interrogates some of the most recently implemented legal norms that promote racial injustice. It does so by once again taking us to the border.² The cluster begins with Geiza Vargas-Vargas' *The Investment Opportunity in Mass Incarceration: A Black (Corrections) or Brown (Immigration) Play?*,³ addressing perhaps the most pressing issue facing communities of color who must contend with mass incarceration in the twenty-first century.

Why the plural? Vargas agrees that the mass incarceration project, or the new Jim Crow, has historically been directed primarily towards

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1. PUBLIC ENEMY, *BY THE TIME I GET TO ARIZONA* (Columbia Records 1991).

2. This is part of an ongoing engagement with rapidly developing events taking place at this site. See generally Kristina M. Campbell, *The Road to S.B. 1070: How Arizona Became Ground Zero for the Immigrants' Rights Movement and the Continuing Struggle for Latino Civil Rights in America*, 14 HARV. LATINO L. REV. 1 (2011); Frank Melone et al., *Arizona 1070: Straw-Man Law Enforcement*, 14 HARV. LATINO L. REV. 23 (2011); Andrea Christina Nill, *Latinos and S.B. 1070: Demonization, Dehumanization, and Disenfranchisement*, 14 HARV. LATINO L. REV. 35 (2011).

3. Geiza Vargas-Vargas, *The Investment Opportunity in Mass Incarceration: A Black (Corrections) or Brown (Immigration) Play?*, 48 CAL. W. L. REV. 351 (2012).

the black male, and effectuated through the war on drugs.⁴ However, as the justifications for the war on drugs itself lose efficacy, publicly traded corporations in the private prison industry have expanded their ambitions to include immigration detention. Thusly, Vargas argues that Latinos should prepare to be reimagined as valuable raw material for the private prison market.

Exhibit A is the Arizona anti-immigration statute S.B. 1070, the Support Our Law Enforcement and Safe Neighborhoods Act. This law makes it a misdemeanor for a person without immigration documents to move freely within the state.⁵ The national and indeed international controversy over its enforcement has led the United States Supreme Court to agree to hear the Department of Justice's challenge to the law during this term.⁶ One might surmise that S.B. 1070, if upheld, will result in a huge increase in the number of people who will face incarceration for failing to ubiquitously carry their immigration documents, especially if similar statutes become law nationwide. Vargas reveals how members of the private prison industry had a hand in drafting this law through proxy. She connects all of the dots. And the evidence directly contradicts arguments made by prominent defenders of the private prison industry who unconvincingly maintain that the creation of a market for the caging of human bodies does not manufacture an accompanying desire for increase in prisoners.⁷

Vargas uses a transactional law approach in her analysis. This is in contrast to other scholars on this issue who argue from privilege political or moral theory grounds,⁸ or scholars who argue from pragmatic grounds such as public accountability or public cost.⁹

4. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

5. S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

6. *United States v. Arizona*, 641 F.3d 339, 344 (9th Cir. 2011), *cert. granted*, 132 S. Ct. 845 (2011).

7. Most prominently, this work can be seen as a direct response to Alexander Volokh, *Privatization and the Law and Economics of Political Advocacy*, 60 *STAN. L. REV.* 1197 (2008).

8. E.g., Mary Sigler, *Private Prisons, Public Functions, and the Meaning of Punishment*, 38 *FLA. ST. U. L. REV.* 149, 160 (2010).

9. Sharon Dolovich, *State Punishment and Private Prisons*, 55 *DUKE L.J.* 437, 480-500 (2005).

Vargas' perspective is apropos, as indeed the private prison industry cannot be thoroughly interrogated until its values are sufficiently understood, and financial documents surveyed. Few activists against mass incarceration have the transactional skill set that Vargas does—she gained it from extensive experience on Wall Street. It has been over seven years since she convincingly demonstrated in an earlier work on the subject that “the financial success of private prisons is inextricably linked to a consistent supply of black bodies.”¹⁰ Even if she wasn't knowingly the “spook who sat by the door” during her time on Wall Street, Vargas' insights have the same incisive effect in this ongoing cause as if she were indeed the spook, and her value is manifest. This makes Vargas' concluding call for Black-Brown solidarity all the more impactful.

Arizona again takes center stage in *What a Load of Hope: The Post-Racial Mixtape*,¹¹ a rigorous piece by Jeremiah Chin that expands upon the ongoing LatCrit engagement with Critical Race Theory that has endured in the wake of President Obama's election.¹² Taking marching orders from Sumi Cho's important 2009 work on the topic,¹³ Chin does the foot-soldierly work of demonstrating the statutory and precedential manifestations of post-racial ideologies that have become law.

As a resident of Arizona, Chin is not afforded the luxury of distance from the belly of the beast of the new “Southwestern strategy.” However, his lens appears to benefit from the magnifying effect of close distance. Extending Cho's conceptual framework to Arizona S.B. 2281 (which ended ethnic studies in high schools), and

10. Geiza Vargas-Vargas, *White Investment in Black Bondage*, 27 W. NEW ENG. L. REV. 41, 61 (2005).

11. Jeremiah Chin, *What a Load of Hope: The Post-Racial Mixtape*, 48 CAL. W. L. REV. 369 (2012).

12. See generally Lindsay Perez Huber, *Building Critical Race Methodologies in Educational Research: A Research Note on Critical Race Testimonio*, 4 FLA. INT'L U. L. REV. 159 (2008); Maria C. Malagon, *Our Experiences, Our Methods: Using Grounded Theory to Inform a Critical Race Theory Methodology*, 8 SEATTLE J. SOC. JUST. 253 (2009); Veronica Nelly Velez, *Challenging Lies LatCrit Style: A Critical Race Reflection of an Ally to Latina/o Immigrant Parent Leaders*, 4 FLA. INT'L U. L. REV. 119 (2008).

13. Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589 (2009).

Proposition 107 (banning affirmative action), as well as to prominent Supreme Court cases, Cho's earlier theoretical work is braced, justified, and legitimized by Chin's case studies in post-racialism.

Speaking of Hip Hop, Chin's translation of events surrounding him is given double force through his mixtape analogy. Any Hip Hop connoisseur understands how remixed songs, featured on mixtapes, often superimpose lyrics from one song onto the musical background of another, mixing the emotional flavors evoked by the background music with substantive lyrical assertions that are foreign to the music. In Hip Hop, it is sign of respect to use another artist's beat on one's mixtape. How confusing it could be to youth of the Hip Hop generation, then, to see King's ideas serve as a frame for the arguments of those who historically have opposed his legacy?

But of course this post-racial "remix" is far more pernicious than any found on your local mixtape. In the words of Sumi Cho, post-racialism redefines the antidiscrimination principle from "anticaste" to "antidifferentiation."¹⁴ Any pleasure gleaned from apparent post-racialist obsequience shown to Dr. King evaporates once one realizes that the use of King's imagery is nothing more than clever ruse to occupy the moral high ground that he and other civil rights workers bled for. Nevertheless, the mix-tape analogy holds and does so with great illustrative force, even if this remix is a bad one, headed to the bottom of the charts.

Continuing with the tidy use of analogies is Angela Mae Kupenda's *(Re)complexioning a Simple Tale*.¹⁵ Her work emerged in reaction to the LatCrit XVI plenary, which discussed the desolation of the borderlands, both literally and doctrinally. Her work analogizes America's apparent attempt to "whiten" the law at its borders to her own teenaged attempt to "whiten" her skin through the use of toxic skin bleach.

Kupenda's work is the only one of the cluster that does not take us to the border geographically, but it does so conceptually in such depth that its inclusion still coheres. Kupenda begins with the jarring reminder that that the law as promulgated by the United States

14. *Id.* at 1615.

15. Angela Mae Kupenda, *(Re)complexioning a Simple Tale: Race, Speech, and Colored Leadership*, 48 CAL. W. L. REV. 399 (2012).

Constitution and the United States Supreme Court was initially designed to serve white propertied men. In fits and starts, inroads have been made by everyday people who dedicated their lives to change a section of the law here, and a piece of the law there, and to create space in the law for women, people of color, and other oppressed groups. Indeed, as the face of the nation changed, these changes in the law felt inevitable. However, the changes have been met with resistance from white supremacy, in the form of pushback in the "borderlands" of the law.

Kupenda uses the First Amendment and the subject of hate speech to elaborate on her idea, that "bleached white" legal norms should be "recomplexioned" on the borders. It's an interesting choice, because the First Amendment is foundational to claims to American exceptionalism and adherence to the values of freedom and liberty. It's contested terrain, terrain on which the cause of racial justice has been outright vanquished. The most powerful Blacks in American life today have fought the battle and lost. This includes the unlikely warrior Clarence Thomas, whose attempts to protect a small space on the border for hate speech towards blacks failed in *Virginia v. Black*.¹⁶ Interestingly, it's also a terrain as yet unclaimed by the first African American president Barack Obama who has never responded to the race based hate speech directed at him with anything other than equanimity. This includes the most recent racial attack, where Obama was compared to a dog on February 20, 2012, by Richard Cebull, Chief Federal Judge of the United States District Court for the District of Montana.¹⁷

Kupenda's skin bleaching analogy holds because, like Chin's mixtape analogy, the image used here helps us to conceptualize the consequences of the doctrinal developments in question. America's toxic bleach, just as artificial as any used for the skin, strikes us as likely to create similarly bleak consequences for the overall health and wellbeing of the nation's quest for equal justice under law.

16. 538 U.S. 343 (2003).

17. Bill Mears & MoniBasu, *Judge Unlikely to Face Removal for Racist Message About Obama*, CNN (Mar. 2, 2012), http://articles.cnn.com/2012-03-02/us/us_montana-judge-racist-message_1_racist-e-mail-chief-judge-president-obama?_s=PM:US.

The cluster of articles that follow this introduction share two distinctive qualities: innovation and an engagement with the borderlands. LatCrit XVI has made a real contribution by inspiring and publishing this scholarship, as it adds value to the academy.