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Pulse: Finding Meaning in a Massacre Through Gay Latinx Intersectional Justice

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ARTICLE

PULSE: FINDING MEANING IN A MASSACRE THROUGH GAY LATINX INTERSECTIONAL JUSTICE

JUDITH E. KOONS*

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* Professor of Law, Barry University School of Law, Orlando, Florida. B.A., J.D., University of Florida; M.T.S., Harvard Divinity School. Copyright Judith E. Koons, 2016. I am indebted to Rebecca Norman for her excellent research assistance, to my spouse Ellen Tetlow for her generous heart and many talents, to Nancy Chi Cantalupo and Julia Grimke Young for their helpful comments, and to Dean Leticia Diaz and Barry University School of Law for their ongoing support. This article is dedicated to the victims, survivors, first responders, medical staff, and all those whose lives have been deeply touched by the massacre at Pulse nightclub.

I. INTRODUCTION

In the early morning hours of June 12, 2016, a hate-filled man calmly opened fire on the patrons of the Pulse nightclub in downtown Orlando, Florida.¹ Over the next three hours, he killed forty-nine men and women who had been celebrating Latin Night at the gay club.² Fifty-three persons were wounded.³ When police finally entered the club and killed the murderer, nothing could be heard but the sounds of cell phones ringing.⁴ One officer who entered that ghastly scene said it felt like all of the people on the floor were “playing dead.”⁵

We mourned. We mourned another mass shooting of innocents. We went to vigils⁶ and held up candles of hope. We held up photos of those slain.⁷ We built memorials with flowers, flags, photographs, banners, can-

1. Lizette Alvarez et al., *Orlando Gunman Was “Cool and Calm” After Massacre, Police Say*, N.Y. TIMES (June 13, 2016), http://www.nytimes.com/2016/06/14/us/orlando-shooting.html?_r=0 [https://perma.cc/G3KS-536N].

2. *Id.*; Marc Santora, *Last Call at Pulse Nightclub, and Then Shots Rang Out*, N.Y. TIMES (June 12, 2016), <http://www.nytimes.com/2016/06/13/us/last-call-at-orlando-club-and-then-the-shots-rang-out.html> [https://perma.cc/4ZF8-73R9].

3. Santora, *supra* note 2.

4. Madison Park & Chandrika Narayan, *Orlando Shooting Survivors Describe Scenes of Chaos*, CNN (June 13, 2016), <http://www.cnn.com/2016/06/12/us/orlando-shooting-as-it-happened> [https://perma.cc/B37F-RY3D].

5. Frances Robles, *“I Thought They Were Playing Dead”: Officers Are Haunted by Scene at Orlando Club*, N.Y. TIMES (June 23, 2016), <http://www.nytimes.com/2016/06/24/us/i-thought-they-were-playing-dead-officers-are-haunted-by-scene-at-orlando-club.html> [https://perma.cc/S4C7-KUY9].

6. Dewayne Bevil & Desiree Stennett, *Crowd Estimated at 50,000 Packs into Lake Eola Park for Pulse Vigil*, ORLANDO SENTINEL (June 19, 2016, 10:15 PM), <http://www.orlandosentinel.com/news/pulse-orlando-nightclub-shooting/os-pulse-vigil-lake-eola-20160619-story.html> [https://perma.cc/9KS8-D9LB].

7. See Andrew Gibson & Charles Minshew, *Orlando Nightclub Shooting: Read About the Victims*, ORLANDO SENTINEL (June 14, 2016, 4:29 PM), <http://www.orlandosentinel.com/news/pulse-orlando-nightclub-shooting/victims/os-pulse-nightclub-orlando-shooting-victims-htmlstory.html> [https://perma.cc/3ZEL-D3NU] (providing photographs of the victims). The forty-nine people who were killed at Pulse nightclub were: Stanley Almodovar III (23); Amanda Alvear (25); Oscar A. Aracena-Montero (26); Rodolfo Ayala-Ayala (33); Antonio Davon Brown (29); Darryl Roman Burt II (29); Angel L. Candelario-Padro (28); Juan Chevez-Martinez (25); Luis Daniel Conde (39); Cory James Connell (21); Tevin Eugene Crosby (25); Deonka Deidra Drayton (32); Leroy Valentin Fernandez (25); Simon Adrian Carrillo Fernandez (31); Mercedes Marisol Flores (26); Peter O. Gonzalez-Cruz (22); Juan Ramon Guerrero (22); Paul Terrell Henry (41); Frank Hernandez (27); Miguel Angel Honorato (30); Javier Jorge-Reyes (40); Jason Benjamin Josaphat (19); Eddie Jamoldroy Justice (30); Anthony Luis Laureano Disla (25); Christopher Andrew Leinonen (32); Alejandro Barrios Martinez (21); Brenda Lee Marquez McCool (49); Gilberto Ramon Silva Menendez (25); Kimberly Morris (37); Akyra Monet Murray (18); Luis Omar Ocasio-Capo (20); Geraldo A. Ortiz-Jimenez (25); Eric Ivan Ortiz-Rivera (36); Joel Rayon Paniagua (31); Jean Carlos Mendez Perez (35); Enrique L. Rios Jr. (25); Jean Carlos

dles, and crosses.⁸ We went to funerals. Too many funerals. At those funerals, we donned giant angel wings to block grieving families from those who spewed more homophobic hatred.⁹ We volunteered and contributed money to families of those who died, to those hospitalized, to first responders.¹⁰ We posted messages of hope on social media and passed along stories of heroism and sacrifice.¹¹ We talked about the victims, said each name, and cushioned it with a prayer. Mostly, we cried and began to search for meaning.

Nieves Rodriguez (27); Xavier Emmanuel Serrano Rosado (35); Christopher Joseph Sanfeliz (24); Yilmaly Rodriguez Solivan (24); Edward Sotomayor Jr. (34); Shane Evan Tomlinson (33); Martin Benitez Torres (33); Jonathan Antonio Camuy Vega (24); Franky Jimmy Dejesus Velazquez (50); Juan P. Rivera Velazquez (37); Luis S. Vielma (22); Luis Daniel Wilson-Leon (37); Jerald Arthur Wright (31). *Victims' Lives Remembered: Students, Partners, Trusted Friends*, N.Y. TIMES (June 16, 2016), <http://www.nytimes.com/interactive/projects/cp/us/orlando-shooting-victims/geraldoa-ortiz-jimenez> [<https://perma.cc/6LXL-YB48>] [hereinafter *Lives Remembered*].

8. See, e.g., Teresa Welsh, "Love Your Neighbor": Illinois Man Drives 1,200 Miles to Deliver Special Memorials to Orlando Victims, MIAMI HERALD (June 17, 2016, 6:48 PM) <http://www.miamiherald.com/news/nation-world/national/article84489142.html> [<https://perma.cc/YMY4-MW8R>] (telling the story of a man from Illinois who built forty-nine crosses and drove 1200 miles to bring them to Orlando); see also Gal Tziperman Lotan & Rene Stutzman, *Officials Honor Pulse Victims, Move 49 Crosses to History Center*, ORLANDO SENTINEL (July 12, 2016, 5:13 PM) <http://www.orlandosentinel.com/news/pulse-orlando-nightclub-shooting/os-orlando-pulse-shooting-transfer-20160712-story.html> [<https://perma.cc/S5XX-AR3W>] (reporting the relocation of items from makeshift memorials to the Orange County History Museum, where they will be part of a permanent collection).

9. Monivette Cordeiro, *Westboro Protest at Orlando Mass Shooting Victims' Funeral Fizzles Against "Angels,"* ORLANDO WEEKLY (Jun 19, 2016, 2:26 PM), <http://www.orlandoweekly.com/Blogs/archives/2016/06/19/westboro-protest-at-orlando-mass-shooting-victims-funeral-fizzles-against-angels> [<https://perma.cc/JSY6-FSJL>].

10. As of September 26, 2016, the OneOrlando Fund for victims and survivors of the massacre raised \$29.5 million, which will be disbursed to 299 family members and survivors. Kate Santich, *OneOrlando Fund to Give Families of Those Killed at Pulse \$350,000 Each*, ORLANDO SENTINEL (Sept. 26, 2016, 8:43 PM), <http://www.orlandosentinel.com/news/pulse-orlando-nightclub-shooting/os-one-orlando-fund-pay-out-20160926-story.html> [<https://perma.cc/4ECL-EBWS>]. The "GoFundMe" account established by Equality Florida for victims' families, physically injured survivors, and those in need of support raised over \$7 million in one month. *Support Victims of Pulse Shooting*, GOFUNDME, <https://www.gofundme.com/PulseVictimsFund> [<https://perma.cc/8YWV-TZW2>] (last visited Nov. 29, 2016).

11. E.g., Colby Itkowitz, *These Orlando Shooting Heroes Prove People Are Fundamentally Good*, WASH. POST (June 13, 2016), <https://www.washingtonpost.com/news/inspired-life/wp/2016/06/13/these-are-the-heroes-emerging-from-the-orlando-shooting> [<https://perma.cc/TZ4Q-QWX5>]. At the time of the shooting, there were about 320 people in the nightclub. Cari Romm, *What Happens Next for the Orlando Shooting Survivors?*, N.Y. MAG: SCIENCE OF US (June 17, 2016, 8:19 AM), <http://nymag.com/scienceofus/2016/06/what-happens-next-for-the-orlando-shooting-survivors.html> [<https://perma.cc/V73J-RZAP>].

Many roads in our nation's history converge in the Pulse massacre.¹² In the tragedy are the deep roots of the struggle for LGBTQ¹³ equality and the rutted tracks of immigration for people all over Latin America to make a home in central Florida.¹⁴ The massacre also reaches into the bowels of terrorism, with the shooter attributing his acts to the Islamic state.¹⁵ Further, the massacre raises significant questions of domestic security, the availability of assault weapons, and the immovability of gun control at the state and federal levels.¹⁶

12. Massacre is defined as “the act or an instance of killing a number of usually helpless or unresisting human beings under circumstances of atrocity or cruelty.” *Massacre*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/massacre> [<https://perma.cc/4UCA-63AZ>] (last visited Nov. 7, 2016).

13. The longer acronym, LGBTQIA, refers to a community of Lesbian, Gay, Bisexual, Transgender (or Transsexual), Queer (or Questioning), Intersex, and Asexual persons. *LGBTQIA Resource Center Glossary*, LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER, INTERSEX, ASEXUAL RESOURCE CENTER, <http://lgbtqia.ucdavis.edu/educated/glossary.html> [<https://perma.cc/2LC5-VAJH>] (last visited Nov. 4, 2016); Michael Schulman, *Generation LGBTQIA*, N.Y. TIMES (Jan. 9, 2013), <http://www.nytimes.com/2013/01/10/fashion/generation-lgbtqia.html> [<https://perma.cc/5CQA-4N8W>].

14. Ninety percent of the victims were of Hispanic descent. Lizette Alvarez & Nick Madigan, *In the Dead in Orlando, Puerto Ricans Hear a Roll Call of Their Kin*, N.Y. TIMES (June 14, 2016), <http://www.nytimes.com/2016/06/15/us/in-orlando-victims-puerto-ricans-hear-a-roll-call-of-their-kin.html> [<https://perma.cc/8DTC-LTEJ>].

15. The Associated Press, *Why Did [The Shooter] Attack Pulse?: Orlando Shooter May Have Struggled with Sexuality*, AL.COM (June 14, 2016, 7:36 AM), [http://www.al.com/news/index.ssf/2016/06/why_did_\[TheShooter\]_attack_pul.html](http://www.al.com/news/index.ssf/2016/06/why_did_[TheShooter]_attack_pul.html) [<https://perma.cc/FZ6G-MP9F>] (name omitted from hyperlink). As an ethical matter, the author has decided not to publish the name of the shooter. This article approaches the massacre as a massive hate crime, not necessarily as an act of terrorism, although it is understandable that it is viewed from that perspective. “[T]errorism is generally understood as premeditated violence perpetrated by a nonstate actor against noncombatants (civilians or off-duty soldiers) in pursuit of a political, religious, or social goal, designed to coerce a government or to intimidate or convey a message to a larger audience.” STEVEN PINKER, *THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED* 345 (Penguin Group 2011). Two key components of terrorism are “dread” and “unfathomability.” *Id.* at 345–46. While the massacre certainly triggered a sense of dread in many, the article will show that hate crimes are common occurrences in the United States; from this perspective, hate crimes are fathomable in a broad social sense. At the same time, the scale of the Pulse massacre is of such enormity that it reaches into the realm of the unfathomable. For additional discussion of hate crimes, see *infra* Sections II.B., II.C., and III.A. For additional discussion of terrorism, see *infra* Section IV.

16. Bart Jansen, *Weapons Gunman Used in Orlando Shooting Are High-Capacity, Common*, USA TODAY (June 15, 2016, 8:48 AM), <http://www.usatoday.com/story/news/2016/06/14/guns-used-kill-49-orlando-high-capacity-common-weapons/85887260> [<https://perma.cc/6Z7E-VF8W>]. The shooter used a Sig Sauer MCX semiautomatic rifle and a 9mm Glock semiautomatic model handgun that had been purchased about a week before the massacre. *Id.* The weapons and ammunition caused complex and severe injuries. Richard Luscombe & Jessica Glenza, *‘Trying to Deal with the Pain’: Orlando Survivors Face Long Road to Recovery*, GUARDIAN (July 3, 2016 6:00 AM), <https://www.theguardian>

As the “worst mass shooting” in the United States,¹⁷ the massacre stands as another exclamation point behind a pedigree of violence that seems to be escalating in our country and the world.¹⁸ The tragedy gives us pause to ask about home, community, connection, risk, and safety. It prompts us to ask about the world our children will inherit. Will they be able to play outdoors, go to a concert, or dance at a nightclub? Finally, it asks us to name our responsibility. How ought I respond to the very pointed challenges that have erupted at this pivotal time in our nation’s history?¹⁹

As its point of departure, this article shines its light on the violence at Pulse and, by way of a political, ethical, and philosophical inquiry, seeks to expose the history and forms of oppression that lurk in its underlayment. To begin its interrogation of this act of seemingly senseless violence, the article asks two questions: why a gay nightclub and why “Latin Night”? This article proposes that these facts are not happenstance, but are the keys to unlocking this underworld of massive violence.

To set the framework that critiques the violence underlying the massacre at Pulse, Part II.A first looks to the philosophical history of modern

.com/us-news/2016/jul/03/orlando-shooting-survivors-recovery-ar-15-ammunition [https://perma.cc/X5FC-892F]. For example, the Sig Sauer MCX (similar to the older AR-15 rifle) fires bullets at the speed of 3000 feet per second and uses a .223 caliber bullet that is designed to tumble when it hits its target. Randi Kaye, *A Closer Look at the Orlando Shooter’s Weapon*, WWLP.COM (June 21, 2016, 4:00 AM), www.wwlp.com/2016/06/21/a-closer-look-at-the-orlando-shooters-weapon [https://perma.cc/Y48S-QEGN].

17. The Pulse shooting has been described as the “worst mass shooting in United States history” as well as the “worst act of terrorism on American soil since Sept. 11, 2001, and the deadliest attack on a gay target in the nation’s history.” Lizette Alvarez & Richard Pérez-Peña, *Orlando Gunman Attacks Gay Nightclub, Leaving 50 Dead*, N.Y. TIMES (June 12, 2016), <http://www.nytimes.com/2016/06/13/us/orlando-nightclub-shooting.html> [https://perma.cc/W3LN-A7TN]; accord Richard Pérez-Peña, *Historians, Police and Others Argue What Makes Orlando Massacre “Worst,”* N.Y. TIMES (June 17, 2016), <http://www.nytimes.com/2016/06/18/us/historians-police-and-others-argue-what-makes-massacre-the-worst.html> [https://perma.cc/SJ7E-FQVF] (discussing attacks of mass violence in the United States and different categories of violent acts, such as genocide, riots, and military actions).

18. See Amy P. Cohen et al., *Rate of Mass Shootings Has Tripled Since 2011, Harvard Research Shows*, MOTHER JONES (Oct. 15, 2014, 6:00 AM), <http://www.motherjones.com/politics/2014/10/mass-shootings-increasing-harvard-research> [https://perma.cc/CZB9-CV3A] (reporting that the frequency of mass shootings in public with four or more victims has increased since 2011). *But see* PINKER, *supra* note 15, at xxii, 47–56 (presenting data on the trajectory of violence across history and arguing that “we may be living in the most peaceable era in our species’ existence”).

19. Cf. Ralph B. Potter, *Qualms of a Believer*, 69 SOUNDINGS 111, 111 (1986) (posing the key ethical question: “How ought I live?”); Judith E. Koons, *At the Tipping Point: Defining an Earth Jurisprudence for Social and Ecological Justice*, 58 LOY. L. REV. 349, 386 (2012) [hereinafter Koons, *Tipping Point*] (“For individuals seeking wisdom the guiding question is, how ought one live into this new era?”).

Western thought and the Enlightenment era.²⁰ In following this historical thread, Part II.B proposes that the acts of violence reflected in Pulse were not random, but were the product of socially constructed systems of oppression that make hate crimes toward gay and Latino communities not only imaginable but also possible and even inevitable.²¹ Drawing this point forward, Part II.C argues that the forms of sexuality-, gender identity-, race-, and ethnicity-based oppression underlying the massacre at Pulse also intersect in ways that animate one another.²²

This article then lifts its vision to its constructive side in Part III.A. With intersectionality²³ as its springboard, this article suggests that, just as forms of oppression are related, so are forms of justice. At the inter-

20. Dating from the mid-sixteenth century, the Enlightenment ushered in modernity, marked by a tectonic shift in European thought to privilege procedural rationality over religious dogma and metaphysical world views. ELISABETH SCHÜSSLER FIORENZA, RHETORIC AND ETHIC: THE POLITICS OF BIBLICAL STUDIES 35 (Fortress Press 1999) [hereinafter FIORENZA, RHETORIC]. Procedural rationality, in turn, honors objective knowledge, moral practical insight, and aesthetic judgment. *Id.* For a discussion of the Enlightenment era, see *infra* Section II.

21. See IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 61–62 (Princeton Univ. Press, 1990) (proposing that violent hate crimes are “always at the horizon of social imagination” and are embedded in a social context that “makes them possible”). For analysis of social constructionism and hate crimes, see discussion *infra* Sections II.A., II.B.

22. See ROBIN RYLE, QUESTIONING GENDER: A SOCIOLOGICAL EXPLORATION 55–56 (Pine Forge Press 2012) (discussing social structures such as race and class as embedded in a “matrix of domination . . . that . . . work with and through each other” in ways that are “interlocking and simultaneous”). For discussion of interstructured and dynamic systems of oppression, see *infra* Section II.C.

23. See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 (1991) [hereinafter Crenshaw, *Mapping*] (claiming the concept of intersectionality was first used “to denote the various ways in which race and gender interact to shape the multiple dimensions of Black women’s employment experiences”). For the first reported discussion of intersectionality in a law journal, see Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989) [hereinafter Crenshaw, *Demarginalizing*]. From a critical perspective, this article uses intersectionality in the sense of a confluence of multilayered systems of subordination and privilege that are mutually reinforcing in complex ways to oppress lives of individuals and social groups. From a constructive perspective, this article understands intersectionality as a key concept for the ongoing project of liberation and eschews the term post-intersectionality. See, e.g., Sumi Cho, *Understanding White Women’s Ambivalence Towards Affirmative Action, Theorizing Political Accountability in Coalitions*, 71 UMKC L. REV. 399, 403 n.29 (2002) (criticizing the use of the term “post-intersectionality”). Dynamic multiplicative expansions of the concept of intersectionality are part of the generative arc of the original idea and, as such, do not reject underlying premises or pose key correctives to usher in a “post” theoretical approach. See FIORENZA, RHETORIC, *supra* note 20, at 35 (defining postmodernity as critical thought that presents aesthetic, cultural, and political correctives to its modern predeces-

section of the gay and Latinx²⁴ communities is the unfinished business of remedying historic subordination and dismantling divisions constructed of fear, hatred, and privilege. The Pulse massacre pierced the conscience of the community and pointed toward ways relationships of respect can form in a heterogeneous public.²⁵ Drawing its inspiration from the victims and survivors of the massacre, Part III.B suggests forms of political action—legal protections for the LGBTQ community and respectful approaches to immigration reform—that are predicates to intersectional justice.²⁶

There is much to be learned from the patrons of Pulse. They were dancing. They were celebrating sexual, spiritual, aesthetic, cultural, and political connections in an inclusive and diverse community with a rich array of local and international identities.²⁷ This article urges such a spirit of interconnecting and liberatory joy to be part of the memories of the 49.²⁸ To embark on this endeavor, this article will first examine the philosophical underpinnings in Western thought of violence against subordinated people.

sor). For an application of intersectionality to the Pulse massacre, *see* discussion *infra* Section II.C.

24. According to Huffington Post, “Latinx is the gender-neutral alternative to Latino, Latina and even Latin@.” Tanisha Love Ramirez & Zeba Blay, *Why People Are Using the Term “Latinx,”* HUFFINGTON POST (July 5, 2016, 5:33 PM), http://www.huffingtonpost.com/entry/why-people-are-using-the-term-latinx_us_57753328e4b0cc0fa136a159 [https://perma.cc/LPB7-M4F9]. The term is used by “scholars, activists and an increasing number of journalists.” *Id.* Further, “Latinx is quickly gaining popularity among the general public [It] is inclusive of the intersecting identities of Latin American descendants.” *Id.* For additional discussion on intersectionality and people who identify as Latinx, *see infra* Section II.C.

25. Iris Marion Young posits this view of democracy: “To promote a politics of inclusion, then, participatory democrats must promote the ideal of a heterogeneous public, in which persons stand forth with their differences acknowledged and respected, though perhaps not completely understood, by others.” YOUNG, *supra* note 21, at 119.

26. For a discussion of recommended political action regarding LGBTQ civil rights and immigration policy and discourse, *see infra* Sections III.B.1. & 2.

27. *See generally* Elizabeth M. Iglesias, *LatCrit Theory: Some Preliminary Notes Towards a Transatlantic Dialogue*, 9 U. MIAMI INT’L & COMP. L. REV. 1 29–31 (2001) [hereinafter Iglesias, *LatCrit Theory*] (tracing the development of critical theory in the United States and describing “human capacity for sexual/spiritual interconnection” and “transnational and intersectional identities” in the Queer and LatCrit movements).

28. *See generally id.* (focusing on the “commitment to a broad and inclusive emancipatory project” of the Queer and LatCrit movements). “The 49” refers to the forty-nine people who were murdered at Pulse nightclub.

II. FINDING MEANING: THE ROOTS OF VIOLENCE IN ENLIGHTENMENT THINKING

To critique the violence that undergirded the massacre at Pulse, this article first looks to the Enlightenment era, which produced patterns of thinking that shape modern Western law, philosophy, ethics, and everyday consciousness.²⁹ Beginning in the sixteenth century, Enlightenment philosophers turned from the authority of religious dogma to embrace Reason.³⁰ Dualistic structures of thought were the foundation of this fresh turn to rationality.³¹ Philosophers organized their thinking around binaries such as reason/passion,³² public/private,³³ and mind/body,³⁴ which became silently insinuated as prevailing structures of thought.³⁵ Western legal thinking reflects this dualistic pattern: judge/jury, plaintiff/defendant, law/facts, and direct/cross. Being true to its philosophical heritage, modern consciousness is also shot through with binaries: good/bad,

29. According to Issak Dore:

The major figures of the Enlightenment period, or Age of Reason (roughly from Hobbes to Kant), were aware that they were participants in a broad intellectual project that had two important and related goals, namely, to reject past claims to knowledge based on authority and to construct an edifice of knowledge based not on authority but on reason and science.

ISAAK I. DORE, *THE EPISTEMOLOGICAL FOUNDATIONS OF LAW* 296 (Carolina Acad. Press 2007).

30. See, e.g., GENEVIEVE LLOYD, *THE MAN OF REASON: "MALE" AND "FEMALE" IN WESTERN PHILOSOPHY* xviii (Univ. of Minn. Press 2d ed. 1993) (advising that the aspiration to Reason "lies at the very heart of our philosophical heritage"); see also DORE, *supra* note 29, at 295–96 (tracing intellectual movements from the decline of classical Greek thought with a "rationalist epistemology," to the "modern philosophers" in the Enlightenment period, which "dominated Western epistemology well into the twentieth century, when new [postmodern] philosophical currents began to challenge its premises"); Iglesias, *LatCrit Theory*, *supra* note 27, at 7–31 (sketching a "genealogical narrative" of postmodern legal theory to situate LatCrit theory in "seven strains of critical legal discourse": Critical Legal Studies (CLS), Critical Race Theory (CRT), Feminist Legal Theory (FemCrit), Critical Race Feminism, Asian Pacific American Critical Legal Scholarship (APACrit), Chicana/o Studies, and Queer Legal Theory (QueerCrit)).

31. LLOYD, *supra* note 30, at 78.

32. See YOUNG, *supra* note 21, at 111 (observing that Rousseau and Hegel envisioned a society in which "the ideal of normative reason . . . stands opposed to desire and affectivity").

33. CAROLE PATEMAN, *Feminist Critiques of the Public / Private Dichotomy*, in *THE DISORDER OF WOMEN: DEMOCRACY, FEMINISM, AND POLITICAL THEORY* 118, 120 (Stanford Univ. Press 1989).

34. See LLOYD, *supra* note 30, at 44–45 (analyzing the method of philosopher René Descartes in the context of his doctrine of "the radical separateness of mind and body," while acknowledging the egalitarian impulse that animated his method).

35. See, e.g., YOUNG, *supra* note 21, at 97 (critiquing the Enlightenment-based ideal of impartiality, which "generates a dichotomy between universal and particular, public and private, reason and passion").

tall/short, fast/slow, up/down, succeed/fail³⁶ Significantly, modern binarism is not neutral.³⁷ Linguists have proposed that, in binary thinking, each pair has a favored and disfavored pole.³⁸ That is, tall is preferred over short; fast is favored over slow; early is better than late.³⁹

A key construct in Enlightenment thinking that effectively legitimizes violence is the subject/object binary.⁴⁰ The dominant subject stands in the knowing, normative position.⁴¹ In binarism, everything else is an object. When an individual is defined as different from the subject (and is therefore an object), violence is justified.⁴² What is being attacked is not a thinking, feeling, and hurting human being, but an object that is devoid of family, feelings, hopes, and dreams.

Related to the subject/object binary is the early feminist idea of the “Other.”⁴³ As a “fundamental category of philosophical thought” in modernist thinking, otherness is defined by the dominant subject as that which is incidental and inessential to itself.⁴⁴ More perniciously, subject groups set up others in inferior and excluded positions. According to Simone de Beauvoir, who first articulated the concept of the Other in 1949:

In small-town eyes all persons not belonging to the village are ‘strangers’ and suspect; to the native of a country all who inhabit other countries are ‘foreigners’; Jews are ‘different’ for the anti-Semite, Negroes are ‘inferior’ for American racists, aborigines are ‘natives’ for colonists, proletarians are the ‘lower class’ for the privileged.⁴⁵

36. See *id.* at 99 (“In the history of Western thought this logic of identity has created a vast number of mutually exclusive oppositions that structure whole philosophies: subject/object, mind/body, nature/culture.”).

37. *Id.* at 114–16; see also MARY FIELD BELENKY ET AL., *A TRADITION THAT HAS NO NAME: NURTURING THE DEVELOPMENT OF PEOPLE, FAMILIES, AND COMMUNITIES* 21 (Basic Books 1997) (highlighting the work of psychologists and linguists regarding the gendered nature of binaries that structure our language).

38. BELENKY ET AL., *supra* note 37.

39. *Id.*

40. *E.g.*, DORE, *supra* note 29, at 846.

41. YOUNG, *supra* note 21, at 125–27.

42. See John Kavanaugh, *Challenging a Commodity Culture*, 111 *COMMONWEAL* 606, 608 (1984) (“Underlying all violence is a human being that has been reduced to the status of an object.”).

43. See SIMONE DE BEAUVOIR, *THE SECOND SEX* at xvi (H.M. Parshley ed. & trans., 1989) (1949) (“Thus humanity is male and man defines woman not in herself but as relative to him . . . she is the incidental, the inessential as opposed to the essential. He is the Subject, he is the Absolute—she is the Other.”).

44. *Id.* at xvii.

45. *Id.*

Binarism and its progeny—oppression—are at the root of violence.⁴⁶ As described by a postmodern scholar, violence is “a phenomenon of social injustice” that is systemic: “it is directed at members of a group simply because they are members of that group.”⁴⁷ Indeed, violence against gays, Latinos, and other groups that are marked as subordinated is “motivated by fear or hatred of those groups.”⁴⁸

Considerable scholarship has deconstructed and demonstrated the dangers of binarism.⁴⁹ However, just as subordination stubbornly plagues postmodern society, so its sad engine of pathetic and tired binaries keeps the fires of intra- and intergroup oppression going.⁵⁰ Stepping into the sticky web of binarism is but a beginning point toward critiquing violence directed toward subordinated groups and imagining social remedies.

From a binarist position, the patrons of Pulse were predominately comprised of two outsider groups historically constructed as Others—gays and Latinos.⁵¹ To further critique how these constructed identities often are the targets of violence, the next sections will discuss the social con-

46. See YOUNG, *supra* note 21, at 48–64 (pluralizing and systematizing the category of oppression by its five faces: exploitation, marginalization, powerlessness, cultural imperialism, and violence). Young also advises that “[Western cultural imperialism] . . . insists on only one subject position . . . identified with white bourgeois men.” *Id.* at 147. Groups that are oppressed “often exhibit symptoms of fear, aversion, or devaluation toward members of their own groups and other oppressed groups.” *Id.* Moreover, “[i]nsofar as members of these groups assume the position of subjects within the dominant culture . . . they experience members of their own group abjectly. Even more commonly, members of culturally imperialized groups fear and despise members of other oppressed groups.” *Id.* at 148.

47. *Id.* at 62.

48. See *id.* at 62–63 (“Sometimes the motive may be a simple will to power, to victimize those marked as vulnerable by the very social fact that they are subject to violence.”).

49. E.g., Nancy Ehrenreich, *Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems*, 71 UMKC L. REV. 251, 304 (2002); see also Pedro A. Malavet, *Reparations Theory and Postcolonial Puerto Rico: Some Preliminary Thoughts*, 13 BERKELEY LA RAZA L.J. 387, 397 n.56 (2002) (providing examples of various critiques of binarism by LatCrit scholars).

50. See e.g., Robert S. Chang & Neil Gotanda, *The Race Question in LatCrit Theory and Asian American Jurisprudence*, 7 NEV. L.J. 1012, 1014, 1018 (2007) (examining the slippage of race and ethnicity into LatCrit theory through a first-, second-, and third-order binary analytical model).

51. E.g., Berta Hernandez-Truyol et al., *Beyond the First Decade: A Forward-Looking History of LatCrit Theory, Community and Praxis*, 17 BERKELEY LA RAZA L.J. 169, 170–71 n.6 (2006). The shooter was also marked as an outsider, being Muslim from an immigrant Afghan family. Kyra Gurney et al., *[The Shooter’s] Immigrant Family Lived the American Dream—or So It Seemed*, MIAMI HERALD (June 18, 2016, 12:11 PM), <http://www.miamiherald.com/news/nation-world/national/article84370692.html> [<https://perma.cc/L8QD-XB9B>]. However, members of outsider groups can (and do) assume a dominant subject position and, as in this case, terrorize members of other outsider groups. See YOUNG, *supra* note 21, at 148 (evaluating the intersection of cultural imperialism and violence among members of outsider groups and noting “[e]ven more commonly, members of

struction of homophobia,⁵² hate crimes against people who are seen as non-white,⁵³ and intersections among these positionalities.⁵⁴

culturally imperialized groups fear and despise members of other oppressed groups . . .). For a discussion of internalized oppression and homophobia, see *infra* Section III.A.

52. See Ana Flávia do Amaral Madureira, *The Psychological Basis of Homophobia: Cultural Construction of a Barrier*, 41 INTEGRATIVE PSYCHOL. & BEHAV. SCI. 225, 225 (2007) (analyzing the complex relationships among sexuality, gender, culture, and power). Homophobia is “irrational fear of, aversion to, or discrimination against homosexuality or homosexuals.” *Homophobia*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/homophobia> (last visited Nov. 29, 2016) [<https://perma.cc/H2M6-VZXF>]. First used in 1969, “homophobia” later appeared in a book by George Weinberg in 1972 as part of the shift from viewing “homosexuality” as a personal pathology to a social conceptualization. GEORGE H. WEINBERG, *SOCIETY AND THE HEALTHY HOMOSEXUAL 1* (St. Martin’s Press 1972). Note, also, that the categories of race, gender, and class are understood as “socially constituted, culturally mediated, and politically maintained.” Judith E. Koons, *Making Peace with Difference: A Hermeneutic of Inclusive Conversation*, 12 TEX. J. WOMEN & L. 1, 7 (2002); see LEILA AHMED, *BORDER PASSAGE* 243–46 (Farrar, Straus and Giroux 1999) (recalling being redefined as “Arab” from Egyptian as a school girl); DE BEAUVOIR, *supra* note 43, at 267 (“One is not born, but rather becomes, a woman.”); MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES FROM THE 1960S TO THE 1990S*, at 71 (Routledge 1994) (defining race as “constructed and transformed sociohistorically through competing political projects”); ZORA NEAL HURSTON, *HOW IT FEELS TO BE COLORED ME 1* (Applewood Books 2015) (1928) (“I remember the very day that I became colored.”); Judith Lorber, “*Night to His Day*”: *The Social Construction of Gender*, in *FEMINIST FRONTIERS* 40 (Laurel Richardson et al. eds., 5th ed. McGraw-Hill 2001) (describing the social institution of gender). Approaching *sexuality* as socially constructed has a much more contested history. Jonathan Ned Katz, *ENVISIONING the World We Make, Social-Historical Construction, a Model, a Manifesto*, OUTHISTORY, <http://outhistory.org/exhibits/show/katz-writing-work/katz-vision-intro> [<https://perma.cc/T6ZH-QQVE>] (last updated Feb. 11, 2016) [hereinafter Katz, *Envisioning*]. Some gay activists (among others) began claiming, “We’re born that way” in the 1990’s. Donald F. Calbreath, *Is There a Gay Gene?*, CHRISTIAN RES. INST., <http://www.equip.org/article/is-there-a-gay-gene> [<https://perma.cc/929B-XM7F>] (last visited Nov. 24, 2016); see also Chandler Burr, *Homosexuality and Biology*, ATLANTIC MONTHLY (June 1997), <http://www.theatlantic.com/magazine/archive/1997/06/homosexuality-and-biology/304683> [<https://perma.cc/YZ9W-D24D>] (“Five decades of psychiatric evidence demonstrates that homosexuality is immutable, and nonpathological, and a growing body of more recent evidence implicates biology in the development of sexual orientation.”). Others have challenged the essentialist/constructionist debate as defaulting into a false “either/or” dichotomy. E.g., Ruthann Robson, *Lesbianism in Anglo-European Legal History*, 5 WIS. WOMEN’S L.J. 1, 3 n.9 (1990). Recently, Katz proposed: “[T]oday, in 2016, we are left with multiple, unresolved, conflicting interpretations of social construction theory. Clarifying and developing that theory [regarding sexuality] still offers, I suggest, a valuable means of understanding the human-produced world.” Katz, *Envisioning, supra*.

53. See *infra* Section II.B.

54. See *infra* Section II.C.

A. *The Social Construction of Homophobia and Border Anxiety: A Critical Review*

The language of sexuality arose in the late eighteenth century.⁵⁵ In the United States, the terms “heterosexual” and “homosexual” made their appearances in late nineteenth century medical texts.⁵⁶ Sigmund Freud had a significant impact on the social instantiation of a heterosexual/homosexual binary.⁵⁷ The category of normative heterosexuality was introduced by Freud, who considered heterosexuality as dominant, but also dependent on subordinate homosexuality.⁵⁸ As a result, “[h]eterosexual and homosexual appeared in public as Siamese twins, the first good, the second bad, bound together for life in unalterable, antagonistic symbiosis.”⁵⁹

From the onset of the Gay Liberation Movement to Queer theory and the marriage equality cases, American society has been in the grip of contestations to systems of subordination based on sexuality.⁶⁰ The increas-

55. JONATHAN NED KATZ, *THE INVENTION OF HETEROSEXUALITY* 172 (Penguin Group 1995) [hereinafter KATZ, *INVENTION*].

56. *Id.* at 19; *The History Psychiatry & Homosexuality*, LGBT MENTAL HEALTH SYLLABUS, http://www.aglp.org/gap/1_history [<https://perma.cc/T9M2-F22P>] (last visited Oct. 24, 2016). The words “homosexuality” and “heterosexuality” were generated in the late nineteenth and early twentieth centuries. KATZ, *INVENTION*, *supra* note 55, at 10. Dr. James Kiernan first used “homosexual” and “heterosexual” in a Chicago medical text in 1892. *Id.* at 19. In Europe, the word “homosexual” can be traced to a Prussian campaign in 1869. NEIL MILLER, *OUT OF THE PAST: GAY AND LESBIAN HISTORY FROM 1869 TO THE PRESENT* 13 (Vintage Books 1995).

57. Freud first used the phrase “heterosexual individuals” in 1905. KATZ, *INVENTION*, *supra* note 55, at 219 n.31. The word “heterosexuality” was first used by Freud in 1909. *Id.* at 219 n.33.

58. *Id.* at 65.

59. *Id.*; see also Ehrenreich, *supra* note 49 (noting that hierarchical binaries make meaning in relation to each other).

60. The Gay Liberation Movement is conventionally dated to June 28, 1969, when gays, lesbians, and transgender people refused to cooperate with police during a raid at the Stonewall Inn in Greenwich Village and engaged in riots over the next few days. *E.g.*, Lindsey Robertson, *10 Surprising Facts About the Stonewall Riots*, EARLY BIRD BOOKS (Oct. 7, 2014), <http://www.earlybirdbooks.com/10-surprising-facts-stonewall-riots> [<https://perma.cc/3L2E-J9PY>]. However, historians and commentators have catalogued “nearly two decades of patient, determined public activism” that were predicated to the Stonewall Riots. See Michael Kazin, *Gay Rights Before Stonewall*, DISSENT MAG. (Apr. 2, 2013), <https://www.dissentmagazine.org/blog/gay-rights-before-stonewall> [<https://perma.cc/86JW-JP2V>] (discussing the work of gay and lesbian activists in the mid-twentieth century, such as actor Harry Hay, Jr., who founded the Mattachine Society in 1951, and Phyllis Lyon and Phyllis Martin, who founded the Daughters of Bilitis in 1955). “Queer theory” was coined by Teresa de Laurentis in 1991, seeking to transform a derogatory term into “an inclusive umbrella for many GLBT people.” Laurie Rose Kepros, *Queer Theory: Weed or Seed in the Garden of Legal Theory?*, 9 TUL. L.J. & SEXUALITY 279, 281, 281 n.5 (2000). Nevertheless, de Laurentis later abandoned the phrase because Queer theory “had been adopted by

ing visibility of transgender people has also stood as an embodied representation of ambiguities in gender identity as well as the inadequacy of utilizing binarism to explain complex social phenomena.⁶¹ At the same time, such ambiguities are the very source of fear and perceived threats to groups that are clinging to their position of constructed dominance and enacting historic patterns of othering.

In Freudian thought, the ambiguity of the dependency of heterosexuality on homosexuality points to a “border anxiety” between the two categories.⁶² With some social constructs, such as race, the perceived differences may be visible.⁶³ However, the markers differentiating homosexuals from heterosexuals have become increasingly muted.⁶⁴ As a consequence, “[h]omophobia is one of the deepest fears of difference precisely because the border between gay and straight is constructed as

the mainstream forces and institutions it meant to resist.” *Id.* (citing Teresa de Lauretis, *Introduction to Queer Theory: Lesbian and Gay Sexualities*, 3 DIFFERENCES: AM. J. FEMINIST CULTURAL STUD., SPECIAL ISSUE 2, 1991, i, iii, xviii (1991)). There is no formulaic definition of Queer theory; however, it has been characterized as part of postmodern thought, honoring inclusiveness, embracing indeterminacy, focusing on the silent normative privilege of heterosexuality, and promoting social change. *Id.* at 281–84. The marriage equality cases are: *Obergefell v. Hodges*, holding that the Due Process and Equal Protection Clauses of the Fourteenth Amendment require states to issue marriage licenses to couples of the same sex and to recognize out-of-state marriages of same-sex couples; and *United States v. Windsor*, holding that the federal Defense of Marriage Act violates due process and equal protection guarantees of the Fifth Amendment. *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584, 2588 (2015); *United States v. Windsor*, 570 U.S. ___, 133 S. Ct. 2675, 2706 (2013).

61. See e.g., Kepros, *supra* note 60, at 285 (asserting that the “tidy binary” of heterosexual/homosexual “inaccurately describes the multiplicity of individual sexual behaviors” and also creates a hierarchy that “presupposes a fixed sexual identity”). According to the American Psychological Association:

Transgender is an umbrella term for persons whose gender identity, gender expression or behavior does not conform to that typically associated with the sex to which they were assigned at birth. Gender identity refers to a person’s internal sense of being male, female or something else; gender expression refers to the way a person communicates gender identity to others through behavior, clothing, hairstyles, voice or body characteristics.

AM. PSYCHOL. ASS’N, ANSWERS TO YOUR QUESTIONS ABOUT TRANSGENDER PEOPLE, GENDER IDENTITY AND GENDER EXPRESSION 1 (2011), <http://www.apa.org/topics/lgbt/transgender.pdf> [<https://perma.cc/8K72-T4VC>].

62. YOUNG, *supra* note 21, at 146.

63. See e.g., Sagri Dhairyam, *Racing the Lesbian, Dodging White Critics*, in *THE LESBIAN POSTMODERN* 31–32 (Laura Doan ed., Columbia Univ. Press 1994) (comparing “the uncontested invisibility of racial difference, incessantly inscribed on the colored body” with the “oft-evoked contrast between the visibility of race and the invisibility of queer sexuality [which] hierarchizes queer sexuality over race by ignoring the cultural terrorism that maintains race as a stable category”).

64. See YOUNG, *supra* note 21, at 146.

the most permeable; anyone at all can become gay, especially me, so the only way to defend my identity is to turn away with irrational disgust.”⁶⁵

Turning away is done with abjection, a reaction of disgust toward an “abject” who is “just on the other side of the border” and “too close for comfort.”⁶⁶ The continuum of homophobia not only includes passive forms of abjection and intolerance born of fear, but also forms of loathing in which the abject must be expelled or eliminated to maintain the border of a perceived secure self.⁶⁷ These forms of homophobia may generate violent hate crimes such as the massacre at Pulse.⁶⁸

B. *Hate Crime Against Latina/os: More Border Anxiety*

In American political discourse, another form of border anxiety has surfaced, exemplified by the calls to build a *wall* between the United States and Mexico.⁶⁹ Laden with oppressive images of Mexican immigrants, the anti-immigration discourse has generated hate crimes against members of diverse Latin communities living in the United States.⁷⁰

A critique of this violence calls up Enlightenment thinking. In the historic gaze of the Enlightenment subject,⁷¹ the world is racially organized according to a white/black binary, which clearly divides people into classes with preordained sets of stratified societal rules and statuses.⁷² When

65. *Id.*

66. *See id.* at 144 (attributing the term “abject” to Julia Kristeva in her 1982 essay, *Powers of Horror: An Essay on Abjection*).

67. *Id.*

68. Young advises: “An account of racism, sexism, and homophobia that includes an understanding of the deep threats to identity that difference poses for many people helps account not only for such [violent] acts themselves, but for a social climate that makes them institutional possibilities.” YOUNG, *supra* note 21, at 144.

69. *E.g.*, Julia Preston et al., *What Would It Take for Donald Trump to Deport 11 Million and Build a Wall?*, N.Y. TIMES (May 19, 2016), <http://www.nytimes.com/2016/05/20/us/politics/donald-trump-immigration.html> [<https://perma.cc/A5K2-FLSH>] (emphasis added).

70. *See e.g.*, LEADERSHIP CONF. ON CIV. RTS. EDUC. FUND, CONFRONTING THE NEW FACES OF HATE: HATE CRIMES IN AMERICA 14 (2009), http://www.protectcivilrights.org/pdf/reports/hatecrimes/lccref_hate_crimes_report.pdf [<https://perma.cc/7UXQ-GFWC>] [hereinafter LEADERSHIP CONF., CONFRONTING] (“The increase in violence against Hispanics correlates closely with the increasingly heated debate over comprehensive immigration reform and an escalation in the level of anti-immigrant vitriol on radio, television, and the Internet.”).

71. *See* YOUNG, *supra* note 21, at 125–26 (identifying the modernist “knowing subject” as one who surveys in the mind’s eye “like a proud and watchful lord” and whose gaze “is a normalizing gaze” that assesses the objects of his gaze according to a hierarchy).

72. *See e.g.*, Francisco Valdes, *Afterword: Theorizing “OutCrit” Theories: Coalitional Method and Comparative Jurisprudential Experience*, 53 U. MIAMI L. REV. 1265, 1282 (1999) [hereinafter Valdes, *Afterword*] (critiquing the “Black/white paradigm of American political thought” that “ultimately truncates antiracist analysis because the paradigm does

people do not fit into that neat dualism, the Enlightenment subject becomes nervous, causing him to ask, “Where do you come from?” to tidy up his categorical world.⁷³ More recently, the Enlightenment subject divides everyone into white and non-white racial categories.⁷⁴ Although Latina/os comprise a multiplicity of racial, ethnic, and national origin identities, the Enlightenment subject attempts to reduce them to a binarist unity and seeks to exclude them from realms of protection, including citizenship.⁷⁵

Feeding on this division is American political rhetoric, which in many political corners has become virulently anti-immigrant and, as a corollary, anti-Latin.⁷⁶ The anti-immigrant/anti-Latin discourse correlates with a dramatic increase in hate crimes targeting Hispanics.⁷⁷ A report by the Bureau of Justice Statistics denotes the tripling of anti-Hispanic crimes in 2012.⁷⁸ Moreover, hate crimes perpetrated against Latina/os have be-

much more than valorize whiteness and demonize Blackness: it also occludes all other nonwhite/non-Anglo positions in the construction and operation of racial hierarchy within and across groups or cultures”).

73. See generally Nadra Kareem Nittle, *Myths and Stereotypes About Hispanics and Immigration*, ABOUT.COM, <http://racerelements.about.com/od/diversitymatters/a/Four-Myths-About-Latinos-And-Immigration.htm> [<https://perma.cc/PSD9-NCSF>] (last updated Aug. 1, 2016) (noting that whites and blacks are not perceived to be newcomers, but that “Asians and Latinos routinely field questions about where they’re ‘really from’”).

74. Valdes, *Afterword*, *supra* note 72.

75. See Raquel Reichard, *9 Things Latinos Are Tired of Explaining to Everyone Else*, MIC.COM (Mar. 4, 2015), <https://mic.com/articles/111648/9-things-latinos-are-tired-of-explaining-to-everyone-else#.ZvxWr8fmi> [<https://perma.cc/3YRX-6XJ7>] (“[Latina/os] are one of the most racially diverse ethnic groups in the world Despite media portrayals of olive-skinned Latinas with curly hair and curvy bodies, Latinos can be black, with Afro-textured hair, brown, Indigenous, Asian, light-skinned and straight-up ethnically ambiguous.”). Reichard also stated:

[I]t bears repeating that people in Latin America neither refer to themselves as Latino nor Hispanic. These, again, are words placed on them soon after their arrival in the U.S. For many people in Latin America, they are just Cuban, Ecuadorian, Bolivian or whichever country or indigenous population they belong to. . . . Wrapping everything of Latin American descent into one category, Latino, erases the major political, economic, racial and cultural differences of each country.

Id.; accord YOUNG, *supra* note 21, at 97–99 (arguing that the ideal of impartiality in modern thought congeals difference into the binary opposition of subject/object and results in expelling the other).

76. LEADERSHIP CONF., *CONFRONTING*, *supra* note 70, at 16.

77. See *id.* at 14–17 (correlating the role of “high profile national media personalities” with “the increase in hate crimes against Hispanics” and giving examples of the mainstream media’s being infiltrated by extremist anti-immigration groups and their hate speech).

78. Abby Haglage, *Hate Crime Victimization Statistics Show Rise in Anti-Hispanic Crime*, DAILY BEAST (Feb. 20, 2014, 9:00 AM), <http://www.thedailybeast.com/articles/2014/>

come increasingly violent.⁷⁹ In case after case, Latina/os have been kicked, beaten, stabbed, shot, and urinated upon.⁸⁰ One particularly disturbing case is the murder of nine-year-old Brisenia Flores, who was shot in the face at point-blank range as she was pleading for her life after her father was murdered by members of a Minuteman vigilante group.⁸¹

According to a hate crime report for the National Institute of Justice, that many of the targeted victims are not actually immigrants is “not relevant” to offenders, who rely on their *perceptions* of the victims as immigrants.⁸² One implication of this finding is that hate-filled perceptions of others who appear different from the subject percolate at the bottom of hate crimes. Related to this phenomenon is the notion of “implicit assumptions.”⁸³ A project by a consortium of psychologists has been gathering data on the prevalence of implicit assumptions about race, gender, religion, and other sites of constructed difference.⁸⁴ The project distinguishes between conscious and implicit attitudes: “Conscious experience provides an immediate, compelling, and incomplete account of the mind. Much of perception, thinking, and action occurs outside of conscious awareness or conscious control. Because of that, judgment and action can be unintentionally influenced by factors that we do not recognize,

02/20/hate-crime-victimization-statistics-show-rise-in-anti-hispanic-crime.html [https://perma.cc/5V8D-DUWK].

79. Russell Berman, *A Trump-Inspired Hate Crime in Boston*, ATLANTIC (Aug. 20, 2015), <http://www.theatlantic.com/politics/archive/2015/08/a-trump-inspired-hate-crime-in-boston/401906> [https://perma.cc/ZTU3-RVX6]; Haglage, *supra* note 78.

80. LEADERSHIP CONF., CONFRONTING, *supra* note 70, at 26–27; Carolina Moreno, *9 Outrageous Things Trump Has Said About Latinos*, HUFFINGTON POST (Aug. 31, 2015), http://www.huffingtonpost.com/entry/9-outrageous-things-donald-trump-has-said-about-latinos_us_55e483a1e4b0c818f618904b [https://perma.cc/TBW3-RAXQ].

81. Cristina Costantini, *Anti-Latino Hate Crimes Rise as Immigration Debate Intensifies*, HUFFINGTON POST (Oct. 18, 2011), http://www.huffingtonpost.com/2011/10/17/anti-latino-hate-crimes-rise-immigration_n_1015668.html [https://perma.cc/X6KU-CAWU].

82. MICHAEL SHIVELY ET AL., UNDERSTANDING TRENDS IN HATE CRIMES AGAINST IMMIGRANTS AND HISPANIC-AMERICANS 63 (2013), <https://www.ncjrs.gov/pdffiles1/nij/grants/244755.pdf> [https://perma.cc/LB6V-JMDH] (emphasis added).

83. *Implicit Social Cognition: Investigating the Gap Between Intentions and Actions*, PROJECT IMPLICIT, <https://www.projectimplicit.net/index.html> [https://perma.cc/DUF5-SJ5Z] (last visited Nov. 9, 2016).

84. According to Project Implicit,

Project Implicit is a non-profit organization and international collaborative network of researchers investigating implicit social cognition—thoughts and feelings outside of conscious awareness and control. Project Implicit is the product of a team of scientists whose research produced new ways of understanding attitudes, stereotypes and other hidden biases that influence perception, judgment, and action.

Id.

and may not value.”⁸⁵ Those who attack Hispanic people because they perceive them to be immigrants may be manifesting implicit bias—assuming that people who “appear” Hispanic are also (illegal or undocumented) immigrants.

Negative evaluations of subordinated groups occur both on conscious and unconscious levels. To elaborate, Iris Marion Young catalogues three levels of consciousness: discursive, practical, and basic security.⁸⁶ At the level of discursive consciousness, actions and interactions are verbalized, grounded on explicit verbal foundation, or can be verbalized easily.⁸⁷ In practical consciousness, actions and interactions are not verbalized, but are founded on “habitual, routinized background awareness” of the environment while the person is engaged in actions such as driving to the grocery store.⁸⁸ The basic security area includes matters of identity and autonomy, along with unconscious motivations.⁸⁹

Young suggests that bias against historically subordinated groups has receded from discursive consciousness and now takes place at the levels of practical consciousness and the unconscious.⁹⁰ A significant reason for the shift of bias into habitual and unconscious levels is the articulated public commitment in the United States to formal equality.⁹¹ Not only is outright discrimination prohibited, but many segments of the public also embrace formal equality as part of their belief systems and demonstrate that commitment in forms of public etiquette.⁹²

However, the anti-immigrant discourse illustrates a troubling trajectory in bias toward Latina/os. Bias against Hispanics has not simply dropped into the realms of the habitual and unconscious. Anti-Hispanic bias is also being widely expressed, and reproduced, in print and social images across many forms of media.⁹³ By some accounts, American society is no

85. *Lectures and Training*, PROJECT IMPLICIT, <https://www.projectimplicit.net/lectures.html> [<https://perma.cc/JCP3-L6YR>] (last visited Nov. 9, 2016).

86. See YOUNG, *supra* note 21, at 131 (adopting Anthony Giddens’ theory of subjectivity, as laid out in his 1984 book *The Constitution of Society: Outline of the Theory of Structurization*).

87. *Id.*

88. *Id.*

89. *Id.* at 131–32.

90. See *id.* at 133 (giving the example of a black man walking into a large room at a business convention and finding the noise level dropping).

91. *Id.* at 132.

92. *Id.*

93. See e.g., LEADERSHIP CONF., *CONFRONTING*, *supra* note 70, at 14–17 (providing examples of extremist anti-immigrant groups being given legitimacy by mainstream media); see also Moreno, *supra* note 80.

longer publicly committed to even discursive equality for Hispanics.⁹⁴ As a frightening consequence, discursive bias is feeding habitual and implicit bias, leaving Latina/os in positions of increased vulnerability.⁹⁵

C. *Intersectional Oppression: LBGTQ People of Color*

The confluence of discursive and non-discursive oppression of Latina/os leads to another point of the hate crime study for the National Institute of Justice. According to the report, many victims perceived to be immigrants are also members of other protected groups.⁹⁶ This finding underscores the claim that forms of oppression experienced by subordinated people are interstructured by race, color, ethnicity, class, sexual orientation, gender identity, and religion, to name a few of the predominant group identities claimed by and imposed on people.⁹⁷ Recognizing oppression as intersectional is a framework reflecting the lived reality of a person's constructed identities at the confluence of "intersecting and mutually reliant systems of oppression" and privilege.⁹⁸ Furthermore, the

94. Cf. Iglesias, *LatCrit Theory*, *supra* note 27, at 22 (critiquing the norm of formal equality and advising that "LatCrit theory grounds its commitment to anti-essentialist intergroup justice on a respect for difference, rather than a requirement of sameness").

95. See generally LEADERSHIP CONF., *CONFRONTING*, *supra* note 70, at 14–17, 26–27 (reporting an escalation in crimes directed toward Hispanics and the frequent appearance of extremist groups in the mainstream media); see also Costantini, *supra* note 81 (reporting that the number of radical right groups, including hate groups and nativist groups, increased in 2010).

96. See SHIVELY ET AL., *supra* note 82 (noting that victims "may be targeted based on their race, ethnicity or religion, but also perceived by perpetrators as an immigrant, further enhancing the bias motivation").

97. The notion of interstructured oppression has been used by Womanist theologians to analyze the relationship of race, gender, and class to the liberation struggle of black people. Marcia Y. Riggs, *The Logic of Interstructured Oppression: A Black Womanist Perspective*, in *REDEFINING SEXUAL ETHICS: A SOURCEBOOK OF ESSAYS, STORIES, AND POEMS* 97 (Susan E. Davies & Eleanor H. Haney eds., Pilgrim Press 1991). Developing "an alternative theological pedagogy" that challenged the prevailing norms in seminaries, black women theologians adopted the name "Womanist" as defined by Alice Walker: "From *womanish* (Opp. of 'girlish,' i.e., frivolous, irresponsible, not serious). A black feminist or feminist of color." KATIE GENEVA CANNON, *KATIE'S CANON: WOMANISM AND THE SOUL OF THE BLACK COMMUNITY* 136–37 (Continuum 1995); ALICE WALKER, *IN SEARCH OF OUR MOTHERS' GARDENS: WOMANIST PROSE* xi (Harcourt 1983). The concept of intersectionality, which is employed by legal scholars, includes "structural, political, and representational" dimensions of subordination. E.g., Crenshaw, *Mapping*, *supra* note 23. A helpful construct that reflects the dynamics of multilayered subordination is symbiotic systems of oppression, in which "subordinating systems mutually sustain each other in complex symbiotic ways." Ehrenreich, *supra* note 49, at 258, 277.

98. RYLE, *supra* note 22, at 55 (quoting Jane Ward's 2004 essay, "*Not All Differences Are Created Equal*": *Multiple Jeopardy in a Gendered Organization*).

intersection of oppressions is dynamic; the effects of forms of subordination on each other are symbiotic and magnifying.⁹⁹

However, the law (as well as popular imagination) tends to view bias as located on a single axis.¹⁰⁰ To give a classic example, some courts have required black women to choose between sex and race as the basis for employment discrimination claims.¹⁰¹ By failing to recognize the intersectional subordination of women of color in employment, those courts have required black women to disaggregate the integrity of their experience from aspects of constructed identity.¹⁰² Similarly, single mothers often experience the convergence of sex, class, and sometimes racial sub-

99. Each person may be considered to be positioned at intersecting sites of multiple identities of privilege and subordination that are fluid and magnifying, with the prominence of particular identities ebbing and flowing, depending on the fields of power that are at play. See Stephanie Wildman & Adrienne Davis, *Making Systems of Privilege Visible*, in *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* 23 (Stephanie Wildman et al. eds., 1996) (describing systems of privilege and subordination as “dynamic”); Dorothy E. Roberts, *BlackCrit Theory and the Problem of Essentialism*, 53 U. MIAMI L. REV. 855, 862 (1999) (discussing “fluid identities that shift according to context”). Through a similar lens focused on identity groups, they can be seen as “fluid, overlapping and coconstitutive entities,” which “problematizes the notion of inter-group conflict.” Ehrenreich, *supra* note 49, at 319–20.

100. See e.g., Crenshaw, *Demarginalizing*, *supra* note 23, at 140 (critiquing “how dominant conceptions of discrimination condition us to think about subordination as disadvantage occurring along a single categorical axis” of race or sex, for example).

101. *Id.* at 141–43, 148 (evaluating *DeGraffenreid et al. v. General Motors*, 413 F. Supp. 142 (E.D. Mo. 1976) and proffering that the court did not consider compound discrimination against Black women). Compare Bradley Allan Areheart, *Intersectionality and Identity: Revisiting a Wrinkle in Title VII*, 17 GEO. MASON U. CIV. RTS. L.J. 199, 234 (2006) (criticizing courts and the EEOC for not providing clarity in cases involving intersectional claims and concluding that Congress should “clarify the ‘race, color, religion, sex, or national origin’ language of the 1964 Civil Rights Act by adding the phrase ‘or any combination thereof’”), with Serena Mayeri, *Intersectionality and Title VII: A Brief (Pre-)History*, 95 B.U. L. REV. 713, 714, 730 (2015) (illustrating “what we now call intersectionality crucially shaped Title VII from its inception” but that “[t]wenty years later, judicial opinions containing thoughtful analysis of intersectional claims remain few and far between; legal theory and scholarship on intersectionality continue to vastly outpace actual Title VII doctrine”).

102. Crenshaw, *Demarginalizing*, *supra* note 23, at 148; see also Areheart, *supra* note 101 (concluding “the only way for a multiply-burdened person to obtain legal relief is to isolate and disaggregate the legally-protected characteristics that form the basis of her claim”). Ninety years ago, Zora Neal Hurston proposed:

[I]n the main, I feel like a brown bag of miscellany propped against a wall. Against a wall in company with other bags, white, red and yellow. Pour out the contents, and there is discovered a jumble of small things priceless and worthless . . . Perhaps that is how the Great Stuffer of Bags filled them in the first place—who knows?

HURSTON, *supra* note 52, at paras. 15–17.

ordination in the context of conflicts with work and family.¹⁰³ Considering the intersection of axes of subordination and their societal context also exposes the work/family nexus as a unique site of subordination “that reappears across many systems of oppression.”¹⁰⁴

A fluid model proposes that systems of subordination interact in symbiotic ways to support each other.¹⁰⁵ One example of the workings of symbiotic systems of subordination is reflected in the interactions of class, gender, and sexuality manifested in higher levels of domestic violence in the marriages of lower class heterosexual men.¹⁰⁶ Illustrating the contrasting ways systems of subordination can interact, another study finds that interactions of class and sexuality produce “multiple jeopardy” for poor gay men who experience multiplicative aggravating effects on health care.¹⁰⁷

A single axis focus was apparent in the immediate aftermath of the Pulse massacre. Despite a large majority of the victims being Latino, the initial media portrayal was largely as “an attack on the gay community.”¹⁰⁸ While a single axis identity approach can stir up identity politics and other forms of intra-group and inter-group contestations, in Orlando a Latina leader advised: “Yes, we stand in solidarity with the LGBT com-

103. Patricia Hill Collins advises that women of color “never fit” the binarist model of work (public) and family (private); Collins employs an intersectional model that challenges “the very constructs of work and family themselves.” Patricia Hill Collins, *Gender, Black Feminism, and Black Political Economy*, 568 ANNALS AM. ACAD. POL. & SOC. SCI. 41, 47 (2000).

104. *Id.* at 48.

105. Ehrenreich, *supra* note 49, at 277.

106. *Id.* at 292; see also Michelle Fine, *Crime Stories: A Critical Look Through Race, Ethnicity, and Gender*, 11 INT’L J. QUALITATIVE STUD. EDUC. 435, 445 (1998) (reporting the results of a study of low-income men in urban communities who, in losing economic power due to the shrinkage of public sector and unionized jobs and who, in asserting power in the domestic sphere, centered their stories on loss of privilege in a discourse of property rights).

107. See Gerry Veenstra, *Race, Gender, Class, and Sexual Orientation: Intersecting Axes of Inequality and Self-Rated Health in Canada*, 10 INT’L J. EQUITY HEALTH 1, 3 (2011) (applying intersectionality in a health study to illustrate that “multiple jeopardy pertained to poor homosexuals and (possibly) South Asian women who were at unexpectedly high risk of fair/poor self-rated health,” but not for other groups).

108. See, e.g., Hal Boedeker, *Pulse Shooting May Spur Advances in Gay Community*, ORLANDO SENTINEL (June 18, 2016, 5:15 PM), <http://www.orlandosentinel.com/news/os-pulse-club-shooting-gay-history-20160618-story.html> [<https://perma.cc/MBM4-F7A3>]; see also Ruth Hunt, *Sky News Was Wrong: Orlando Shooting Was a Hate Crime Against the LGBT Community*, GLAMOUR (June 13, 2016), <http://www.glamourmagazine.co.uk/article/orlando-shooting-stonewalls-ruth-hunt-speaks-out> [<https://perma.cc/C8MM-X6F3>] (critiquing the refusal of a news anchor to acknowledge the massacre as a hate crime against the gay community).

munity and are not here to point fingers. But the fact that it's not stressed and not emphasized in central Florida . . . [is] really difficult."¹⁰⁹

Other Latino/a activists have insisted that recognizing the multiplicative axes of oppression based on sexuality, gender identity, ethnicity, national origin, and race is at the heart of coming to terms with the massacre.¹¹⁰ One commentator, who self-identifies as “an Afro-Latino gender-non-conforming immigrant,” noted that many layers of identity are implicated in the Pulse massacre: “As a Black body in Mexico, my worth and value as a human being has always been questioned. I cannot detach my Blackness, my femininity, my queerness, or my mental health from an analysis o[f] what happened in Orlando.”¹¹¹

To express the intersecting nature of these constructed identities, some activists, scholars, and journalists have embraced the term “Latinx,” which is “a gender-inclusive term to acknowledge people of Latin American heritage or descent.”¹¹² According to several journalists:

[Latinx is] part of a ‘linguistic revolution’ that aims to move beyond gender binaries and is inclusive of the intersecting identities of Latin American descendants. In addition to men and women from all racial backgrounds, Latinx also makes room for people who are trans, queer, agender, non-binary, gender non-conforming or gender fluid.¹¹³

109. Kevin Sullivan & Arelis R. Hernández, *Orlando's Latino Community Hit Hard by Massacre at Nightclub*, WASH. POST (June 13, 2016), https://www.washingtonpost.com/national/among-the-dead-in-orlando-massacre-many-from-the-latino-community/2016/06/13/8192e3a4-3186-11e6-8758-d58e76e11b12_story.html [<https://perma.cc/L86H-83HK>]; *accord* Elizabeth M. Iglesias, *Identity, Democracy, Communicative Power, Inter/National Labor Rights and the Evolution of LatCrit Theory and Community*, 53 U. MIAMI L. REV. 575, 581 (1999) [hereinafter Iglesias, *Identity*] (contextualizing essays that demonstrate “the continued centrality of identity politics in LatCrit discourse, making questions of intra-group hierarchy and inter-group justice of special salience”).

110. *See, e.g.*, Randall Jenson, *Our Pulse: On Residual Trauma Facing LGBTQ Latinx Communities*, OUT (June 21, 2016, 8:00 AM), <http://www.out.com/out-exclusives/2016/6/21/our-pulse-residual-trauma-facing-lgbtq-latinx-communities> [<https://perma.cc/7QDH-3WP6>] (arguing for an intersectional analysis as well as LGBTQ and racial justice protections).

111. Erika Cruz Guevarra, *What Queer Latinos Are Saying About the Orlando Shooting*, NPR (June 13, 2016 3:53 PM), <http://www.npr.org/sections/codeswitch/2016/06/13/481859852/what-queer-latinos-are-saying-about-the-orlando-shooting> [<https://perma.cc/AU5S-NTAR>].

112. Jenson, *supra* note 110; *see also* Ramirez & Blay, *supra* note 24. In academia, an emerging group of scholars has been forming around Queer and Latina/o positionalities; a Queer LatCrit orientation illustrates multiplicative interstructured oppression as well as opportunities for intersectional justice and liberatory projects. *See* Iglesias, *LatCrit Theory*, *supra* note 27, at 29 (noting the shared “commitment to a broad and inclusive emancipatory project”).

113. Ramirez & Blay, *supra* note 24.

“Latinx” jolts the gender, racial, and sexuality binaries that are constitutive of oppression.

The intersection of sexuality and family is fraught with a number of tensions relating to religion, tradition, and national origin.¹¹⁴ For some Pulse victims and survivors, the massacre resulted in their being suddenly, involuntarily, and very publicly “outed.”¹¹⁵ As described by one commentator:

Some victims may not have been out to their families; others may have been out and shamed, or shunned, by their families of origin for being their beautiful, true selves. If they were not committed to another by marriage or other legal union, these individuals’ bodies will be returned to people who may be related by blood but do not recognize and validate their true memories—instead of to their queer chosen families or partners. Some may be buried under names they stopped using long ago, under false gender designations, in masculine or feminine dress clothes they never would have worn anywhere on this earth.¹¹⁶

Many in the Latinx community understand the massacre as an act of hate violence that specifically targeted LGBTQ people of Latin heritage.¹¹⁷ The Pulse massacre was sexualized and racialized; it reverberates at the intersections of race, sexual orientation, national origin, gender identity, ethnicity, immigration status, class, gender, religion, and family. The effects of the massacre careen through and affect families, faith tradi-

114. See Collins, *supra* note 103, at 47–48 (“Ideas about family certainly contribute to the continued stigmatization of U.S. families headed by Black single mothers. But the significance of family goes beyond this. Ideas about family also operate as a cognitive scaffold used to construct intersecting systems of oppression.”).

115. Christina Cauterucci, *Sadly, Injustices for Queer and Immigrant Murder Victims Don’t End with Death*, SLATE (June 14, 2016, 2:35 PM), http://www.slate.com/blogs/outward/2016/06/14/after_a_shooting_like_orlando_s_pulse_queer_and_immigrant_victims_suffer.html [<https://perma.cc/BC3K-MGYB>].

116. *Id.*; see also Matt Thompson, *To Be Outed in the Worst Possible Way*, ATLANTIC (June 14, 2016), <http://www.theatlantic.com/national/archive/2016/06/coming-out-in-orlando/486935> [<https://perma.cc/43QT-XZKB>] (providing a personal reflection on the worst way to be outed as a gay individual: a phone call informing one’s family that their son or daughter was injured or murdered at a gay club); Billy Manes, “*Til Death Do Us Part*” . . . *The Battle for a Statewide Domestic-Partnership Registry Isn’t Just a Policy Fight. It’s Personal*, ORLANDO WEEKLY (Apr. 9, 2013), <http://www.orlandoweekly.com/orlando/til-death-do-us-part/Content?oid=2242468> [<https://perma.cc/KA3H-GZFX>] (sharing the story of the suicide of his partner, Alan, and the aftermath, in which Alan’s family unilaterally arranged for cremation of Alan’s body and took many household items, including two cars that Alan left to him). Billy Manes stated, “It would take an eight-month legal battle (and a nervous breakdown) for me to get back only part of what was rightfully, legally mine.” *Id.*

117. See Jenson, *supra* note 110 (“If Pulse were really about killing as many LGBTQ people as possible, Parliament House [another local club] was more popular and packed with people on Saturday nights in Orlando.”).

tions, physical and mental health systems, public and private workplaces, public accommodations, educational institutions, government policies and institutions, territories and countries, and a plethora of groups in civil society, including small and large LGBTQ, Latinx, and Muslim communities.¹¹⁸

Simply pulling the thread of immigration status reveals a tangled web of intersecting local, national, and transnational issues for Pulse victims and survivors. Many of the victims may have been gay, but over 90% were Latina/o.¹¹⁹ The countries of origin of the victims include the Dominican Republic, Ecuador, Mexico, and Venezuela.¹²⁰ In the immediate aftermath of the massacre, local lawyers from the Hispanic and Orange County Bar Associations assisted 350 survivors and family members, some of whom were from El Salvador, Honduras, Mexico, and Venezuela.¹²¹

Four of the persons murdered in the attack—Luis Sergio Vielma Asudillo, Juan Chávez Martínez, Miguel Ángel Honorato, and Joel Rayón Paniagua—were citizens of Mexico, at least two of whom were undocumented immigrants.¹²² An enormous array of challenges accompanied

118. For example, a number of U.S. citizens are queer Muslims and live at the intersections of sexuality and religion, where they confront homophobia and Islamophobia, among other oppressions. Leah Donnella, *What Queer Muslims Are Saying About the Orlando Shooting*, NPR (June 13, 2016, 3:54 PM), <http://www.npr.org/sections/codeswitch/2016/06/13/481853353/what-queer-muslims-are-saying-about-the-orlando-shooting> [https://perma.cc/6846-SRDH]. A representative of the National Queer Asian Pacific Islander Alliance advised, “For those of us who are LGBTQ and Muslim, we wait to see which of our identities we will be more fearful of disclosing in a world that questions our existence and intentions daily.” Then, too, “there are many Latino Muslims,” some of whom also identify as queer. Guevarra, *supra* note 111. After the massacre, many commentators cautioned against blaming Islam for the shooting. *Id.*; see also Sullivan & Hernandez, *supra* note 109 (reporting that local Hispanic leaders were collaborating on “an event to demonstrate solidarity between central Florida’s Latino and Muslim communities”).

119. Alvarez & Madigan, *supra* note 14.

120. *Lives Remembered*, *supra* note 7.

121. Priscilla Alvarez, *What Will Happen to the Orlando Victims Who Are in the U.S. Illegally?*, ATLANTIC (June 24, 2016), <http://www.theatlantic.com/politics/archive/2016/06/orlando-shooting-undocumented-immigrants/488381> [https://perma.cc/FL7D-RSZ4] [hereinafter Alvarez, *What Will Happen*].

122. David Agren, *Orlando Shooting: At Least Four Mexicans Among the Dead*, GUARDIAN (June 14, 2016, 12:37 AM), <https://www.theguardian.com/us-news/2016/jun/14/orlando-shooting-pulse-attack-four-mexicans-among-the-dead> [https://perma.cc/K2PP-6NQ6]. Luis Vielma worked on the Harry Potter ride at Universal Studios; Juan Chávez Martínez was a 25-year-old housekeeping supervisor who sent money to support his family in Mexico; Miguel Ángel Honorato came to the United States at the age of four, was married with three children, and managed his parents’ hospitality businesses; Joel Rayón Paniagua was a native of the Mexican state of Veracruz, worked in construction, and loved going to church, *tacos de pollo*, and dancing to *cumbia* music. *Id.*; Laura Bult, *Undocu-*

the murders, including the costs and logistics of repatriating the bodies, funeral arrangements, visa and other immigration issues, and impacts on families and loved ones.¹²³ Surviving undocumented immigrants faced a separate host of difficulties, including deportation possibilities, workplace statuses, availability of physical and psychological health care for multi-layered trauma, access to assistance programs, as well as financial, emotional, and religious issues affecting families and communities in their home countries.¹²⁴

For many immigrants at Pulse, documented and undocumented, a common theme running through each case is fear of deportation or fear of exposing undocumented family members who could be deported.¹²⁵ For this reason, many may be living in “the shadows” and fear interaction with authorities.¹²⁶ It is anathema to lose a loved one or to survive the deadliest shooting in the United States *and* be faced with fear regarding individual or family members’ immigration status. For example, immediately after the massacre, one surviving Latinx sought services at a community center and, in the process, revealed lack of immigration

mented Survivors of Orlando Shooting May Be Eligible for Visa, N.Y. DAILY NEWS, <http://www.nydailynews.com/news/national/undocumented-victims-orlando-shooting-eligible-visa-article-1.2677978> [<https://perma.cc/F2LN-694Q>] (last updated June 17, 2016, 4:09 PM); John Burnett, *Families of Undocumented Victims of Orlando Face Unique Challenges*, NPR (June 19, 2016 7:57 AM), <http://www.npr.org/2016/06/19/482668952/families-of-undocumented-victims-of-orlando-face-unique-challenges> [<https://perma.cc/VRT3-EZTN>].

123. See Jorge Rivas & Rafa Fernandez De Castro, *Undocumented Victims of Orlando Shooting Face Unique Challenges and Fears*, FUSION (June 14, 2016, 2:52 PM), <http://fusion.net/story/314007/undocumented-victims-pulse-orlando-shooting> [<https://perma.cc/B7TL-JKNS>] (discussing funeral, repatriation, visa, language, legal, mental health, financial, and work issues facing families of undocumented victims and survivors); see also Burnett, *supra* note 122 (identifying resources that have been made available for the family of Joel Rayón Paniagua).

124. See, e.g., Rivas & Fernandez De Castro, *supra* note 123 (detailing the issues facing undocumented survivors). Yesica Ramirez of the Farmworker Association of Florida stated, “For the family to be watching this back in their countries and not be able to help their sons is painful; this all hurts the family back home too.” *Id.*; see also Alvarez, *What Will Happen*, *supra* note 121 (exploring the possibility of obtaining U Visas for victims suffering from “substantial mental and physical abuse” who are willing to cooperate in investigations).

125. See Bult, *supra* note 122. A representative of the Florida and Southeast Operations for the Hispanic Federation advised, “The city of Orlando is saying that no one is going to be deported. Some of the families are afraid to come forward.” *Id.*; see also Cauterucci, *supra* note 115 (“[H]ow many other victims had undocumented family members forced to risk deportation, profiling, and violence by interacting with police officials?”).

126. Cauterucci, *supra* note 115; see also Rivas & Fernandez De Castro, *supra* note 123 (noting that uncertainty of immigrants’ legal status puts them at additional risk of being forced out of the shadows).

documentation to the team of workers.¹²⁷ Not knowing where to refer the person, the workers contacted the U.S. Department of Immigration and Customs Enforcement.¹²⁸ As a result, the person who sought services “now risks deportation because of the team’s failure to understand the real safety concerns of LGBTQ Latinx communities.”¹²⁹

Continuing to pull the thread connecting gay and Latinx identities exposes other alarming issues. Community leaders are concerned about the effects of the Pulse massacre on transgender youth of color, who occupy particularly vulnerable spaces in interlocking systems of subordination.¹³⁰ One such concern is that the Pulse massacre will prompt more “self-harm and suicide [to transgender-of-color youth] as the dominant narrative reveals that being LGBTQ is essentially unsafe.”¹³¹ In another case, a transgender woman of color stated that the continuing trauma of the Pulse massacre creates a “constant state of emergency, looking behind our backs and being on alert.”¹³²

A report from the National Coalition of Anti-Violence Programs supports the legitimacy of these concerns.¹³³ According to data collected in 2015, LGBTQ people of color, transgender, and people with non-conforming genders experience more hate violence than other survivors.¹³⁴ In reflecting on the massacre, perhaps the best question is that posed by a community activist: “[W]e must ask our Latinx brothers and sisters: What will help you heal?”¹³⁵ In the next section, this article suggests remedial approaches to forms of interstructured oppression that are manifest in the Pulse massacre. The recommendations include predicates for social healing, necessary political action on the state and federal levels, and forms of remembrance that celebrate intersectional justice.

127. Jenson, *supra* note 110.

128. *Id.*

129. *Id.*

130. *Id.*

131. *See id.* (referring to the rise of “a trans youth suicide contagion”).

132. *Id.*; *see also* Romm, *supra* note 11 (discussing the likelihood that the Pulse survivors will face post-traumatic stress disorder, among other challenges, in the wake of the attack).

133. *See* EMILY WATERS ET AL., *Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-Affected Hate Violence in 2015 12–13* (2016), http://www.avp.org/storage/documents/ncavp_hvreport_2015_final.pdf [<https://perma.cc/8USS-9EMB>] (referring to various studies that link symptoms of Post-Traumatic Stress Disorder to heterosexist oppression).

134. *See id.* (relaying data from 1,253 survivors of hate violence in 2015, including an increase of 11% in undocumented survivors from the previous year).

135. Jenson, *supra* note 110.

III. MAKING MEANING: WAYS TO HEAL

To honor the forty-nine who were murdered and the fifty-three who were physically injured, this section offers ways to redress intersecting forms of oppression as well as ways to remember their lives by engaging in purposeful political action. This article takes its cue from the Latin Night of dancing at Pulse. The patrons had engaged in an evening of sexual, cultural, aesthetic, and spiritual celebration; they were not passive victims of oppression.¹³⁶ They were dancing.

A. *They Were Dancing: Intersectional Justice*

Just as forms of oppression and systems of subordination are interstructured, so are forms of justice.¹³⁷ Just as racial justice is connected to and animates gender justice, these forms of justice are connected to and energize justice for persons and groups of all subordinated identities.¹³⁸ A single axis approach to liberation is insufficient. No member of a subordinated group can be free if our LGBTQ and Latinx brothers and sisters are not free.¹³⁹ With Pulse as the focal point, the importance of connecting LGBTQ liberation with racial justice cannot be overstated.

There are a number of ways to enliven intersectional justice. The first is simply to bring it to a discursive level.¹⁴⁰ Talk about justice—its significance, ways it is alive in a community, and ways that are anathema to justice. Because oppression has a foothold in discursive consciousness

136. See, e.g., Iglesias, *LatCrit Theory*, *supra* note 27, at 29 (discussing “the human capacity for sexual/spiritual interconnection”); see also Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 612 (1990) (recognizing “that wholeness of the self and commonality with others are asserted (if never completely achieved) through creative action, not realized in shared victimization”).

137. See Francisco Valdes, *Identity Maneuvers in Law and Society: Vignettes of a Euro-American Heteropatriarchy*, 71 UMKC L. REV. 377, 398 (2002) [hereinafter Valdes, *Identity*] (arguing that “because oppressions are symbiotic, so must be the struggles for liberation”).

138. See e.g., Zeba Blay, *Here's How Queer Latinx People Are Reacting to the Orlando Shooting*, HUFFINGTON POST (June 13, 2016, 1:47 PM), http://www.huffingtonpost.com/entry/heres-how-queer-latinx-people-are-reacting-to-the-orlando-shooting_us_575eaacde4b0ced23ca883a1 [<https://perma.cc/H9GZ-KM4X>]. A member of the Trans Queer Liberation Movement asserted, “We as queer and trans Latinx people need to see what happened in Orlando as a reminder that our human dignity, our lives, are connected to the liberation of black people, Muslim people, of women, of trans people.” *Id.*; see also Koons, *Tipping Point*, *supra* note 19 (recognizing the interplay of social and ecological justice).

139. Cf. Nan Dillard, *Ella's Song: “We Who Believe in Freedom Cannot Rest Until It Comes,”* ELLA BAKER CTR. FOR HUM. RTS. (Dec. 12, 2013), <http://ellabakercenter.org/blog/2013/12/ellas-song-we-who-believe-in-freedom-cannot-rest-until-it-comes> [<https://perma.cc/ZWM3-V3BJ>] (discussing Ella Baker's song and her encouraging perseverance in the fight for justice).

140. YOUNG, *supra* note 21, at 152.

and lurks in practical consciousness as well as in the unconscious, it is important that the values of and commitments to justice be embraced in all areas of human consciousness.¹⁴¹ To be committed to justice means to confront forms of oppression that are internalized as well as those that are part of interpersonal interactions and public discourse.¹⁴²

Constructing justice means to first make systems of oppression visible.¹⁴³ The scaffolding of systems of oppression includes discrimination, subordination, and privilege.¹⁴⁴ While discrimination is acknowledged in the law, and subordination is recognized among activists, the presence or role of privilege is rarely examined. Yet, privilege—normalized benefits that invisibly flow to those favored by race, gender, sexuality, or class—is the engine that keeps the roiling systems of oppression going.¹⁴⁵ White privilege, for example, has been called “an invisible package of unearned assets” that a white person counts on cashing each day, while remaining oblivious of its existence.¹⁴⁶

Privilege plays an important role in discursive, intersectional justice because it allows the bearers of privilege to “opt out of struggles against oppression if they choose.”¹⁴⁷ Opting out of liberatory struggles is often done with silence.¹⁴⁸ A white person can say nothing when a racist “joke” is uttered. A heterosexual does not need to intervene when someone snickers about the way a gay man, lesbian, or transgender person presents him- or herself.¹⁴⁹ A businessman may choose to remain silent when a male colleague calls a woman “dear” or other infantilizing term.¹⁵⁰ Moreover, people of class privilege may choose to stay out of

141. *Id.* at 131–33.

142. *See generally* Iglesias, *Identity*, *supra* note 109, at 608–17 (mapping “the dynamics of internal and external oppression within Latina/o communities”).

143. Wildman & Davis, *supra* note 99, at 23–24.

144. *See id.* at 19 (arguing that anti-discrimination focuses only on one part of the power system, the characteristic that is subordinated, “rather than seeing the essential links between domination, subordination, and the resulting privilege”).

145. *Id.* at 8, 14; *see also* ELIZABETH SCHÜSSLER FIORENZA, *WISDOM WAYS* 118–22 (Orbis Books 2001) (articulating the heuristic concept of kyriarchy, which “in classical antiquity was the rule of the lord, slave master, husband, elite freeborn, propertied, educated gentleman” that is “best theorized as a complex pyramidal system of intersecting multiplicative social structures of superordination and subordination, of ruling and oppression”).

146. Wildman & Davis, *supra* note 99, at 17–18.

147. *Id.* at 16.

148. *Id.*

149. *See id.* at 16–17 (describing the nature of privilege that allows an individual to select “the types of struggles in which to engage”).

150. *See* Lilia M. Cortina et al., *What's Gender Got to Do with It?: Incivility in the Federal Courts*, 27 *L. & SOC. INQUIRY* 235, 254 (2002) (reporting results of a gender study in the Eighth Circuit federal courts that include evidence of “sex-role spillover,” in which

the discussion about “welfare queens.”¹⁵¹ In each of these examples, silence is a gift in which the holder of a privilege does not have to confront the uncomfortable realities of forms and ideologies of injustice. Yet, to begin to dismantlement systems of oppression requires that they be revealed and confronted.¹⁵²

One step requires the actor to recognize how sites of privilege and subordination work in the particularities of her or his life.¹⁵³ Depending on which site of power is dominant, a person may be privileged in some contexts yet subordinated in another.¹⁵⁴ For example: “A very poor person might have been the oldest child in the family and exercised power over her siblings. The wealthiest African American woman, who could be a federal judge, might still have racial, sexist epithets hurled at her as she walks down the street.”¹⁵⁵ Apprehending the particularities of a person’s points of privilege and subordination, and how they operate in different social spaces, is the beginning of developing the practice of self-reflection that enables collaboration for justice across coalitions with others of diverse communities.¹⁵⁶

An important predicate to participating in discursive justice is to recognize the phenomenon of internalized oppression, in which an oppressed person has “internalized the image of the oppressor and adopted his guidelines[.]”¹⁵⁷ A related concept is self-colonization, which has been defined as “the psychosocial processes by which humans embrace or reject, from within, the ideologies that are culturally instilled and structur-

women lawyers experience “infantilizing terms of address as *sweetheart*, *dear*, and *Miss Girl Lawyer*”).

151. See Nancy Fraser & Linda Gordon, *A Genealogy of Dependency: Tracing a Keyword of the U.S. Welfare State*, 19 SIGNS 309, 327 (1994) (tracing the racialization of the discourse of dependency, leading to the iconic demonization of the black, unmarried, teen-aged mother as a “powerful ideological trope” that serves to organize diffuse social anxieties).

152. See YOUNG, *supra* note 21, at 152 (issuing a call “to bring these phenomena of practical consciousness and unconsciousness under discussion, that is, to politicize them”); cf. Wildman & Davis, *supra* note 99, at 28 (highlighting the lack of awareness of privilege that perpetuates hierarchal oppression).

153. See generally Wildman & Davis, *supra* note 99, at 21–22 (asserting that people occupy differing sites of privilege and oppression).

154. *Id.* at 21–23.

155. *Id.* at 22.

156. Cf. Iglesias, *Identity*, *supra* note 109, at 617 (proposing that anti-subordination theory and praxis require, in part, valuing self and Others in ways that avoid reinforcing the oppressive attitudes and hierarchies that are sought to be transformed).

157. PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* 47 (Myra Bergman Ramos trans., Continuum 2005) (1970). Freire was a Brazilian educator and activist dedicated to liberation of oppressed people. Richard Shaull, *Foreword*, *PEDAGOGY OF THE OPPRESSED* 29, 47 (Myra Bergman Ramos trans., Continuum 2005) (1970).

ally maintained through societal institutions ranging from education, to mass media, religion, the family and other similar constructs.”¹⁵⁸

The classic approach to rooting out internalized oppression refers to a process of “conscientization” in which specific situations of injustice are recognized as internalized and political action taken.¹⁵⁹ Under the classic model, freedom requires the ejection of the image of the oppressor and its replacement with responsibility and autonomy.¹⁶⁰ Similarly, critical theorists issue this charge to those participating in liberatory movements:

[T]hink critically and self-critically about the ways in which individuals, including us, may or may not contribute to the recycling of ‘traditional’ and prevailing social inequalities; this call beckons self scrutiny to critique in structural as well as personal terms how we do, or do not, resist the institutionalized oppression both of ourselves and of those with whom we identify, as well as of ‘others’ around us, in active and proactive ways.¹⁶¹

Subordinated groups have embraced forms of conscientization in various civil rights movements.¹⁶² To be partners in the quest for justice, socially conscious civic and religious groups continue to invoke similar processes.¹⁶³ The process of reflection and action is educational—it leads to “learning to value Others, who are at the bottom or on the outside of their particular contexts” as well as learning “to value ourselves in a different way—in a way that does not reproduce the prejudices and hierarchies of the various supremacies we seek to transform.”¹⁶⁴

As a minimum, allowing internalized oppression to remain undisturbed can cause members of subordinated groups to undermine individual, in-

158. Valdes, *Identity*, *supra* note 137, at 395 n.68.

159. See FREIRE, *supra* note 157, at 35, 47, 87–88 (introducing the concept of conscientization); see also Paulo Freire & Donaldo P. Macedor, *A Dialogue: Culture, Language, and Race*, in BREAKING FREE: THE TRANSFORMATIVE POWER OF CRITICAL PEDAGOGY 199 (Pepi Leistyna et al., eds., 999) (defining conscientization, or critical consciousness, as “the ability to analyze, problematize (pose questions), and affect the sociopolitical, economic, and cultural realities that shape our lives”).

160. FREIRE, *supra* note 157.

161. Valdes, *Identity*, *supra* note 137, at 397 (referring to Ehrenreich, *supra* note 49).

162. See YOUNG, *supra* note 21, at 153–54 (discussing consciousness-raising groups, including those of second wave feminists and the Black Liberation Movement); see also EVELYN BROOKS HIGGINBOTHAM, *RIGHTEOUS DISCONTENT: THE WOMEN’S MOVEMENT IN THE BLACK BAPTIST CHURCH 186–88* (Harvard Univ. Press 1993) (characterizing the women’s movement of the Black Baptist church as employing a subversive “politics of respectability” to contest social structures and symbols of white supremacy in the early twentieth century).

163. See, e.g., Rachel Christensen, *Wrestling with Our Understandings Around Race*, 1ST UNITARIAN CHURCH OF ORLANDO, <http://www.orlandouu.org/beloved-conversations> [https://perma.cc/225S-RFPH] (last visited Nov. 9, 2016) (seeking greater understanding and spiritual development through conversations related to issues of race).

164. Iglesias, *Identity*, *supra* note 109, at 616–17.

tragroup, and coalitional quests for justice.¹⁶⁵ More specifically, self-colonization prompts members of outsider groups to engage in activities “that pit outgroups against each other, thus helping to keep in place the existing ‘structures and ideologies’ that subordinate all outgroups in ‘different’ yet common ways.”¹⁶⁶

The Pulse massacre takes the dynamics of oppression to another dimension by exposing the ugly truth of the dynamics of inner and outer homophobia and racism at their worst. According to some reports, the shooter seemed to have manifested extreme and contradictory forms of hatred based on sexuality and race.¹⁶⁷ One message of the massacre may be that the symbiotic effect of internalized homophobia and racial hatred with interlocking cultural systems of oppression can be a deadly combination that supports violence toward those who bear the demonized identities.¹⁶⁸ Consequently, it is imperative to meet this massacre with thorough-going exposure of the inner and outer workings of intersecting systems of oppression, combined with meaningful remedial political action.

The catastrophic nature of the Pulse massacre seems to have struck the consciences of a number of people who formerly were opposed or indif-

165. See generally *id.* at 581–82 (introducing essays that make “questions of intra-group hierarchy and inter-group justice of special salience in any LatCrit gathering”).

166. Valdes, *Identity*, *supra* note 137, at 395 n.68.

167. See e.g., David Shariatmadari, *[The Shooter’s] Interest in Gay Men Makes This No Ordinary Act of Terrorism*, GUARDIAN (June 14, 2016), <https://www.theguardian.com/commentisfree/2016/jun/14/omar-mateen-gay-men-terrorism-pulse-jackd-sexuality> [<https://perma.cc/84Z6-N5VT>] (relaying information about the shooter’s prior involvement with Pulse and gay dating websites and posing the complexities of possible internalized homophobia); see also Jenson, *supra* note 110 (noting that the shooter “was asking the hostages: ‘Are you guys black? I don’t have an issue with the blacks’”); Karen Ocamb, *Orlando Massacre and Gay Identity*, PRIDE (June 15, 2016), <http://thepridela.com/2016/06/orlando-massacre-and-gay-identity> [<https://perma.cc/3T4S-YSXC>] (questioning whether the shooter was “self-hating” who took “internalized homophobic rage” out on objects of his obsession). The shooter “may not have had issues with them for being black, but it seems that he had issues with them being Latinx.” Jenson, *supra* note 110.

168. See generally YOUNG, *supra* note 21, at 61–63, 147–48 (discussing systemic violence as a social practice that may be aimed at members of culturally imperialized groups and the fear and loathing that members of those groups may have toward oppressed people). Compare Nico Lang, *Coming Out Saves Lives: The Deadly Potential of Internalized Homophobia is All Too Real*, SALON (June 16, 2016, 5:59 PM), http://www.salon.com/2016/06/16/coming_out_saves_lives_the_deadly_potential_of_internalized_homophobia_is_all_too_real [<https://perma.cc/QY5S-BMN5>] (asserting that “[i]nternalized homophobia” has violent and deadly consequences for the LGBTQIA community), with Andrew Lawler, *Why the Orlando Shooter Fired*, SCI. MAG. (June 21, 2016, 6:00 AM), <http://www.sciencemag.org/news/2016/06/why-orlando-shooter-fired> [<https://perma.cc/GC7E-RCSU>] (proposing that no study has yet made “a direct link between internalized homophobia and violence toward others”).

ferent to the struggles of the LGBTQ community. Two powerful examples of remorse occurred in the wake of the massacre. In the first example, the Rev. Dr. Joel Hunter, senior pastor of the 20,000-member Northland Church in Orlando and an international leader of conservative evangelicals, advised the Religion News Service that “Evangelicals must repent of LGBT oppression.”¹⁶⁹ Reverend Hunter explained that “institutional forms of white Christianity” must recognize their complicity in the subordination of the LGBT community and promised that he would begin by examining his own heart.¹⁷⁰ Reverend Hunter also stated: “I’ve got to confess to my congregation that if there’s anything I’ve said that could have ever led to anything—the dismissal or denigration of any other population—God, I am so sorry for that.”¹⁷¹

Equally powerful is the statement of Teresa Jacobs, Mayor of Orange County, Florida, who had been an opponent of early efforts to pass an Orange County Domestic Partner Registry in 2012.¹⁷² In addressing the 50,000 people who gathered for a vigil for the Pulse victims, Mayor Jacobs said of the forty-nine who were murdered:

Each had dreams waiting to come true, each had aspirations left unfulfilled. And we, my generation and all of those that preceded us, we, we failed our brothers and our sisters, our sons and our daughters. We failed them when we were indifferent. We failed them when we were insensitive. And perhaps most of all, we failed them when we knew it was wrong, and we did nothing. If we’ve learned one thing, it’s that when hate is met with indifference, hate always wins. In many ways, my generation and the generations before were indoctrinated with beliefs and messages that fostered and perpetuated hate and prejudice, sometimes intentionally, but more often than not, without even realizing it. But today, enough is enough is enough! We cannot sit by and lose any more lives to senseless acts of violence. We cannot allow the deaths of 49 of our brothers and sisters to be in vain. We cannot let any more of our children grow up

169. Florence Taylor, *Megachurch Pastor Joel Hunter: “Evangelicals Must Repent of LGBT Oppression,”* CHRISTIAN TODAY (June 15, 2016), <http://www.christiantoday.com/article/megachurch.pastor.joel.hunter.evangelicals.must.repent.of.lgbt.oppression/88394.html> [<https://perma.cc/4LYK-DA56>]. Reverend Hunter also affirmed his hope that LGBT people can be “treated with respect—that they’re given every opportunity to live their full lives, that they’re as precious in the eyes of God as anyone who has ever been made.” *Id.*

170. *Id.*

171. *Id.*

172. See Email from Jeffrey Newton, Orange Co. Att’y, to Michael Slaymaker, Founder of Orlando Anti-Discrimination Ordinance Comm. (Feb. 10, 2012, 17:26 EST) (on file with author) (stating that Mayor Jacobs had questions regarding the constitutionality of an Orange County Domestic Partner Registry).

fearful—fearful of telling their parents, telling their pastors, telling their friends what is in their hearts. And we cannot let our children continue to grow up and lead secret lives—or even worse, lead hollow lives, all in an effort to be accepted and loved by the people around them. To our LGBTQ community, I tell you today, that you are not alone. You are not alone in your sorrow, and you are not alone in this fight. I am calling on every member of our straight community to open their hearts to acceptance, to embrace diversity, and to cherish our differences.¹⁷³

The Pulse massacre may have finally brought home to the hearts of many the important message that subscribing to or tolerating oppression, even silently and passively, creates a culture of enduring pain for so many others as well as a context that makes hate massacres like Pulse possible. Indeed, enough is enough!

B. *They Were Dancing: Intersectional Justice Through Political Action*

In the aftermath of terrible tragedies such as occurred in Orlando, expressions of remorse and unity across many traditional divisions often arise.¹⁷⁴ But some question whether they prompt lasting transformation.¹⁷⁵ To ensure that our community does not return to a “business as usual” tacit endorsement of oppression, actions must be taken by subordinated groups, allies, and government leaders. Their consciences must move them into political action. In particular, the massacre at Pulse raises two interlocking areas for political action: LGBTQ legal protections and immigration reform.¹⁷⁶

173. J. Bryan Lowder, *At Orlando Vigil, Teresa Jacobs Called Out Passive Homophobia for the Killer It Is*, SLATE (June 22, 2016, 5:36 PM), http://www.slate.com/blogs/outward/2016/06/22/teresa_jacobs_speaks_at_orlando_pulse_vigil_on_homophobia_we_failed_them.html [<https://perma.cc/CR94-LW7N>].

174. See e.g., Taylor, *supra* note 169 (discussing the crisis of conscience the Pulse massacre posed for an evangelical Pastor).

175. See, e.g., Barack Obama, Remarks by the President at Memorial Service for Fallen Dallas Police Officers (July 12, 2016), <https://www.whitehouse.gov/the-press-office/2016/07/12/remarks-president-memorial-service-fallen-dallas-police-officers> [<https://perma.cc/6AR8-2BQF>] (stating, “I’ve seen how a spirit of unity, born of tragedy, can gradually dissipate, overtaken by the return to business as usual, by inertia and old habits and expediency”).

176. See Alvarez, *What Will Happen*, *supra* note 121 (suggesting that immigration reform is needed to remedy the challenges the Latino community is facing after the Pulse shooting); see also Melanie Hunter, *Gay Rights Group Calls for End to ‘Anti-LGBT Laws’ in Wake of Orlando Mass Shooting*, CNS NEWS (June 13, 2016, 12:02 PM), <http://www.cnsnews.com/news/article/melanie-hunter/gay-rights-group-calls-end-anti-lgbt-laws-wake-orlando-mass-shooting> [<https://perma.cc/6XL4-52QQ>] (referring to the Pulse massacre as a basis for stopping anti-LGBT legislation).

i. Legal Protections for the LGBTQ Community

With marriage equality the law of the land, and many people sporting rainbow ribbons, it may seem that the struggle for LGBTQ liberation is over.¹⁷⁷ Consider, then, the firestorm of anti-gay bills that were filed in the wake of the marriage equality cases.¹⁷⁸ Since 2013, 254 bills were filed in state legislatures; in 2016, 200 bills were pending in thirty-four states to legalize forms of discrimination against LGBTQ people.¹⁷⁹ The tripartite focus of these bills is: (1) refusal of goods and services on religious grounds; (2) restrictions on the use of public bathrooms by transgender people; and (3) preemption by states of municipal ordinances protecting LGBTQ rights.¹⁸⁰ Although many of these hate bills were beaten back, twenty bills were passed by eleven states.¹⁸¹

First, most of the bills permit the invocation of “faith” or “conscience” as a basis to refuse to provide goods and services to LGBT persons.¹⁸² These bills, which are sometimes called Religious Freedom Restoration Acts,¹⁸³ allow a panoply of religious refusals, exemptions, accommoda-

177. Cf. Anna Merod, *After Attack in Orlando, A Look at Florida's LGBT Protections*, NBC NEWS (June 18, 2016, 4:51 PM), <http://www.nbcnews.com/storyline/orlando-nightclub-massacre/after-attack-orlando-look-florida-s-lgbt-protections-n594986> [<https://perma.cc/92RP-HN4T>] (acknowledging that although the Supreme Court affirmed marriage equality, the LGBT community faces ongoing, systemic discrimination).

178. See *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584, 2588 (2015) (holding the Fourteenth Amendment guarantees of Due Process and Equal Protection Clauses require issuance of marriage licenses to couples of the same sex and recognition of out-of-state marriages of same sex couples); *United States v. Windsor*, 570 U.S. ___, 133 S. Ct. 2675, 2696 (2013) (holding the federal Defense of Marriage Act unconstitutional under the due process and equal protection provisions of the Fifth Amendment). See generally Everdeen Mason et al., *The Dramatic Rise in State Efforts to Limit LGBT Rights*, WASH. POST (July 1, 2016), <https://www.washingtonpost.com/graphics/national/lgbt-legislation> [<https://perma.cc/6JW3-7RNZ>] (providing an overview of the anti-LGBT bills proposed in response to *Windsor*).

179. Mason et al., *supra* note 178; HRC Staff, *Siren: Today, Mississippi Senate to Vote on Appalling Anti-LGBT Legislation*, HUM. RTS. CAMPAIGN (Mar. 30, 2016), <http://www.hrc.org/blog/siren-today-mississippi-senate-to-vote-on-appalling-anti-lgbt-legislation> [<https://perma.cc/687N-5FV4>].

180. HUM. RTS. CAMPAIGN, PREVIEW 2016: PRO-EQUALITY AND ANTI-LGBT STATE AND LOCAL LEGISLATION 1, http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/2016_Legislative-Doc.pdf [<https://perma.cc/9Z5V-FWUB>] (last visited Oct. 9, 2016) [hereinafter HUM. RTS. CAMPAIGN, PREVIEW 2016].

181. Mason et al., *supra* note 178; HRC Staff, *supra* note 179.

182. HUM. RTS. CAMPAIGN, PREVIEW 2016, *supra* note 180.

183. See Jennifer Bendery & Michelangelo Signorile, *Everything You Need to Know About the Wave of 100+ Anti-LGBT Bills Pending in States*, HUFFINGTON POST (Apr. 15, 2016, 4:17 PM), http://www.huffingtonpost.com/entry/lgbt-state-bills-discrimination_us_570ff4f2e4b0060ccda2a7a9 [<https://perma.cc/6RX3-VS2P>] (discussing bills that allow any person or business to deny services to same-sex couples based on religious objections). En-

tions, and complicity-based conscience claims to be used against LGBT persons.¹⁸⁴ The bills cover a wide range of goods and services. Some bills would allow judges and court clerks to refuse to perform weddings or issue marriage licenses.¹⁸⁵ Others provide exemptions to government officials and private parties in the areas of adoption, foster care, facility rentals, wedding services, mental health counseling, and health care services.¹⁸⁶

These “religious freedom” bills allow religion to be misused as a smoke screen for discrimination.¹⁸⁷ Four arguments have been posed to reject

acted in 1993, the federal Religious Freedom Restoration Act, 42 U.S.C.A. §§ 2000bb–bb–4, has recently been applied to bar the federal government from requiring closely held for-profit corporations to comply with the Affordable Care Act by providing contraception insurance coverage to employees over the religious objection of the owners of the corporations. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. ___, 134 S. Ct. 2751, 2759 (2014). The Court left open applying the Religious Freedom Restoration Act in other contexts. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. ___, 134 S. Ct. 2751, 2783–85 (2014).

184. See HUM. RTS. CAMPAIGN, PREVIEW 2016, *supra* note 180, at 2 (reporting that the “largest number of anti-LGBT bills introduced in 2015 were religious refusal bills”); see also Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2519–20 (2015) (defining “complicity-based conscience claims” as “religious objections to being made complicit in the assertedly sinful conduct of others”).

185. In 2016, Mississippi enacted a sweeping “religious freedom” bill that included court clerks, foster care, school administration, counseling, facility rentals, and wedding services; the bill was declared unconstitutional just before it was to take effect. *Barber v. Bryant*, No. 3:16-CV-417-CWR-LRA, 2016 WL 3562647, LEXIS 86120 at *18–20 (S.D. Miss. June 30, 2016).

186. See Mason et al., *supra* note 178 (reporting bills relating to “college and university groups, health services, pre-emptive protections, and adoption and foster care”); see also Campbell Robertson, *Mississippi Law Protecting Opponents of Gay Marriage Is Blocked*, N.Y. TIMES (July 1, 2016), <http://www.nytimes.com/2016/07/02/us/mississippi-law-protecting-opponents-of-gay-marriage-is-blocked.html?smid=pl-share> [<https://perma.cc/T84T-MEVH>] (reporting the judicial orders striking a Mississippi law that would have shielded court clerks and others acting according to “religious beliefs” about sexuality and gender identity in the areas of “foster care, counseling, school administration, facility rentals and wedding services”).

187. See Elizabeth Reiner Platt, *States Attempting to Preempt LGBT-Friendly Municipalities*, COLUM. L. SCH.: PUB. RTS. PRIV. CONSCIOUS BLOG (Feb. 11, 2016), <http://web.law.columbia.edu/gender-sexuality/public-rights-private-conscience-project/blog> [<https://perma.cc/8BE5-GL82>] (arguing that proposed religious freedom bills are “right to discriminate” bills, by using religious freedom “as a sword rather than a shield”); see also *Barber v. Bryant*, No. 3:16-CV-417-CWR-LRA, 2016 WL 3562647, LEXIS 86120 57–59 (S.D. Miss. June 30, 2016) (discussing the legislative debate on the bill, including the admission that the government is not seeking to protect people of faith, but to ensure that LGBT citizens will not be able to sue businesses for declining to serve them).

demands for such religious accommodations.¹⁸⁸ The first invokes history and recognizes that similar attempts were made and resisted when the Civil Rights Act was adopted in 1964.¹⁸⁹ The second defrocks the argument that accommodations would help to ease conflicts in a period of social transition.¹⁹⁰ Two scholars note that conscience claims “can provide an avenue to extend, rather than settle, conflict about social norms in democratic contest.”¹⁹¹ The third argument insists that harms must be considered to persons who are denied goods or services in the public arena.¹⁹² The depth and breadth of material and dignitary harms that are inflicted in the name of presumed conscience claims are untenable.¹⁹³ The final argument against religious accommodations proposes that they are at odds with the underlying purpose of anti-discrimination laws, “which is to change norms.”¹⁹⁴ Attempts to give discrimination a norma-

188. See Louise Melling, *Religious Refusals to Public Accommodations Laws: Four Reasons to Say No*, 38 HARV. J.L. & GENDER 177, 179 (2015) (outlining the four arguments).

189. See *id.* at 185 (proposing that discrimination “rooted in religion should be rejected today, just as [it was] fifty years ago”).

190. See *id.* at 188 (advising that “following the Supreme Court’s decision in [*Burwell v. Hobby Lobby*], any accommodation in an anti-discrimination law will almost surely fan, not calm, conflict”).

191. Nejaime & Siegel, *supra* note 184, at 2520. The authors also note “[r]eligious accommodation claims of this kind may continue democratic conflict in new forms, or so at least some advocates hope.” *Id.* at 2521.

192. See Melling, *supra* note 188 (contending “[t]hat harm, which is often given little voice in the current debates, should weigh heavily because it damages a person’s sense of dignity and frustrates the promise of equality”).

193. See *id.* at 190 (arguing, for example, that it “takes but one metaphorical ‘Heterosexuals Only’ sign to make an LGBT person question whether society is in fact embracing her and her kind”). Another example of the harm that religious accommodations pose to the LGBTQ community is the Michigan pediatrician who refused to give a wellness exam to six-day old baby of lesbian mothers. Ed Mazza, *Pediatrician Refuses to Care for Baby with Lesbian Mothers in Michigan*, HUFFINGTON POST (Feb. 19, 2016, 12:35 PM), http://www.huffingtonpost.com/2015/02/18/pediatrician-refuses-lesbian-mothers_n_6710128.html [<https://perma.cc/F4CY-XG2V>]. According to one of the mothers, “It was embarrassing, it was humiliating and here we are, new parents trying to protect her. And we know this happens in the world and we’re completely prepared for this to happen other places. But not at our 6-day-old’s wellness appointment.” *Id.*; see also *Fact Sheet, Health Care Refusals Harm Patients: The Threat to LGBT People and Individuals Living with HIV/AIDS*, NAT’L. WOMEN’S L. CTR. (May 2014), http://www.nwlc.org/sites/default/files/pdfs/lgbt_refusals_factsheet_05-09-14.pdf [<https://perma.cc/95V3-YY88>] (stating that disparities in health care experienced by LGBT people are worsened when health care providers refuse to provide needed care due to personal or religious beliefs).

194. Melling, *supra* note 188. To allow the law to absorb and replicate discriminatory social norms would be to undermine the legitimacy of the law. See Judith E. Koons, *Gun-smoke and Legal Mirrors: Women Surviving Intimate Battery and Deadly Legal Doctrines*, 14 J.L. & Pol’y 617, 648–49 (2006) (critiquing Florida’s Stand Your Ground Act and illus-

tive toe-hold in the law must be rejected, while forward-looking proposals for intersectional justice must be encouraged.

Second, many of the bills are part of the latest generation of “bathroom wars,” restricting people from using facilities that are designated for another biological sex.¹⁹⁵ Targeting transgender people, the bills restrict, ban, and even criminalize the use of a public restroom that does not correspond to the sex noted on a person’s birth certificate.¹⁹⁶ Strong policy and privacy arguments have been made on behalf of transgender people.¹⁹⁷ In addition to failing to recognize the difference between sex and gender identity, the bills denigrate and pose enormous harm to members of the transgender community.¹⁹⁸ That men will pose as transgender persons to gain access to women’s bathrooms has been thoroughly debunked by experts in law enforcement and advocates for victims of sexual as-

trating the silent absorption of social norms—”pernicious ideas of gender hierarchy”—into criminal law).

195. See Mason et al., *supra* note 178 (stating that four “bathroom bills” were introduced in 2015 and thirty were introduced in the first months of 2016). One article notes: “For more than 100 years, Americans have projected their most profound fears about social change onto public restrooms.” Neil J. Young, *How the Bathroom Wars Shaped America*, POLITICO MAG. (May 18, 2016), <http://www.politico.com/magazine/story/2016/05/2016-bathroom-bills-politics-north-carolina-lgbt-transgender-history-restrooms-era-civil-rights-213902#ixzz4IIFrNU00> [<https://perma.cc/VST3-DN28>]. The article also observes that bathrooms have been a surprisingly powerful political lever: “They’ve been pivotal in many political arguments—and, in perhaps the most masterful harnessing of bathroom anxiety in American history, a largely invented controversy over unisex bathrooms in the 1970s ultimately killed off the almost-enacted Equal Rights Amendment to the Constitution.” *Id.*

196. E.g., Scott Skinner-Thompson, *Anti-Transgender Bathroom Bills Are Unconstitutional*, SLATE (Feb. 11, 2016, 12:53 PM), http://www.slate.com/blogs/outward/2016/02/11/anti_transgender_bathroom_bills_are_clearly_unconstitutional.html [<https://perma.cc/2QCT-BPNK>] (providing an example of a Virginia bill imposing a fine on a student who does not use the bathroom corresponding to the sex designated on the birth certificate).

197. See Scott Skinner-Thompson, *Outing Privacy*, 110 Nw. U. L. REV. 159, 159 (2015) (discussing a right to informational privacy).

198. See Olga Khazan, *The True Harm of Bathroom Bills*, ATLANTIC (May 19, 2016), <http://www.theatlantic.com/health/archive/2016/05/transgender-bathrooms-suicide/483351> [<https://perma.cc/2YZS-2ZME>] (reporting results of a Georgia State study that “being denied bathroom access is correlated with increased risk of suicide among trans people,” with a suicide-attempt rate of 47%, compared to 4% for the U.S. population at large); see also Kristie L. Seelman, *Transgender Adults’ Access to College Bathrooms and Housing and the Relationship to Suicidality*, 63 J. OF HOMOSEXUALITY 1378, 1379 (2016) (noting the heightened level of prejudice and discrimination faced by transgendered individuals). Gender identity “means the gender-related identity, appearance, mannerisms, or other gender-related characteristics of an individual, regardless of the individual’s designated sex at birth.” Equality Act, H.R. 3185, 114th Congress § 1101(a)(2) (2015).

sault.¹⁹⁹ The proper approach to recognize transgender people in a pluralistic society is education, not exclusion.²⁰⁰

Finally, the newest category of anti-gay bills includes those that preempt local government protections for members of the LGBT community.²⁰¹ As of early 2016, eight states had introduced intrastate preemption bills, with two states adopting the provisions.²⁰² Municipal preemption is a tool of special interest groups and has primarily been used by business and industry groups to oppose local ordinances that impose costs or other regulatory burdens.²⁰³ In the current anti-gay climate prevalent in some states, these bills are another species of an attempted “hostile takeover of human rights.”²⁰⁴ Some scholars warn that preemption laws may be “disguised as watered down and exemption-rife anti-discrimination laws.”²⁰⁵ Conversely, proponents argue that such bills are an attempt to ensure consistency and reduce unnecessary administrative costs on statewide businesses.²⁰⁶ However, these diluted civil rights bills are actually “back-door methods” of imposing the homophobic beliefs of

199. See Carlos Maza, *The Question Every Reporter Should Be Asking About Transgender Bathroom Bans*, MEDIA MATTERS (Mar. 24, 2016, 2:48 PM), <http://mediamatters.org/blog/2016/03/24/the-question-every-reporter-should-be-asking-ab/209527> [<https://perma.cc/N8PK-EDQB>] (“[H]ow is the government supposed to figure out a person’s biological sex?”). Some examples of the harmful and insensitive inquiries that the bathroom bills have unleashed were reported by Maza as follows: First, “a Louisiana woman who underwent chemotherapy and a bi-lateral mastectomy after a stage 2 cancer diagnosis was accused of being a man while standing in line to use a Walmart restroom”; Second, “a lesbian in Michigan was kicked out of a restaurant bathroom because she was mistaken for a man”; Third, “a Republican politician in Fayetteville, AR, questioned a cisgender [non-transgender] restaurant employee and asked her to prove that she was a biological woman.” *Id.* The term “cisgender” refers to “a person whose self-identity conforms with the gender that corresponds to their biological sex.” *Cisgender*, OXFORD LIVING DICTIONARIES, <https://en.oxforddictionaries.com/definition/cisgender> [<https://perma.cc/NKK2-7HL3>] (last visited Nov. 18, 2016); Sunnive Brydum, *The True Meaning of the Word “Cisgender,”* ADVOCATE (July 31, 2015, 6:00 AM), <http://www.advocate.com/transgender/2015/07/31/true-meaning-word-cisgender> [<https://perma.cc/5UNS-EANA>].

200. Harv. L. Rev., *Transgender Youth and Access to Gendered Spaces in Education*, 127 HARV. L. REV. 1722, 1736 (2014).

201. Mason et al., *supra* note 178.

202. Platt, *supra* note 187. Intrastate preemption is a basis for arguing “that a city’s authority in a particular area has been supplanted by state law.” Paul Diller, *Intrastate Preemption*, 87 B.U.L. REV. 1113, 1114 (2007).

203. Diller, *supra* note 202, at 1114–15, 1137.

204. Nina Martin, *Why North Carolina’s New Anti-LGBT Law is a Trojan Horse*, PROPUBLICA (Apr. 5, 2016, 6:00 AM), <https://www.propublica.org/article/why-north-carolina-s-new-anti-lgbt-law-is-a-trojan-horse> [<https://perma.cc/H2JK-TUMN>].

205. Platt, *supra* note 187.

206. *Id.*

the religious far right and will likely be used as the basis to block more welcoming ordinances from local governments.²⁰⁷

These anti-gay bills are part of a coordinated nationwide backlash by “Enemies of Equality” against decisions of the Supreme Court that opened marriage to same-sex couples.²⁰⁸ While some backlash was anticipated, the scale, extremist nature of some of the bills, and extent of national coordination were startling. The first wave of religious freedom bills was contemporaneous with the *Windsor* decision in 2013.²⁰⁹ In 2014, at the ultra-conservative Values Voter Summit, a strategy was engaged of “incrementally eroding LGBT rights” and “test-driving” anti-gay measures at the state and local levels.²¹⁰ Religious refusal bills were test-driven in twenty-eight states in 2015.²¹¹ When the Houston Equal Rights Amendment was defeated on the strength of an ad campaign demonizing transgender women and suggesting they were sexual predators who would be able to enter women’s bathrooms, another strategy was born.²¹² Anti-transgender bathroom bills appeared in twelve states in 2015.²¹³ The third strategy of municipal preemption was test-driven in six states in 2015.²¹⁴

Florida has typified the anti-gay response of many states. Four pieces of recent legislation demonstrate the lack of commitment—if not animus—of Florida politicians toward equal civil rights for people identifying as LGBTQ. First, despite having borne a long and destructive history of discrimination, members of the LGBTQ community are not included in the 1992 Florida Civil Rights Act.²¹⁵ Efforts to remedy such an enor-

207. *Id.*

208. See Jonathan Capehart, *Here They Are, the ‘Enemies of Equality’ for LGBT Americans*, WASH. POST (July 7, 2016), https://www.washingtonpost.com/blogs/post-partisan/wp/2016/07/07/here-they-are-the-enemies-of-equality-for-lgbt-americans/?utm_term=.ba1828136b67 [<https://perma.cc/P562-M9DL>] (reporting that LGBT advocates observed an “emerging coordination” of resistance to marriage equality across the nation and citing Matt McTighe, Executive Director of Freedom for All Americans, for the example that “17 bills in 14 states that target transgender Americans” used almost identical language).

209. Mason et al., *supra* note 178.

210. Bendery & Signorile, *supra* note 183.

211. HUM. RTS. CAMPAIGN, PREVIEW 2016, *supra* note 180, at 2; see also Emma Green, *Can States Protect LGBT Rights Without Compromising Religious Freedom?*, ATLANTIC (Jan. 6, 2016), <http://www.theatlantic.com/politics/archive/2016/01/lgbt-discrimination-protection-states-religion/422730> [<https://perma.cc/Q8KH-QGQT>] (indicating that at least twenty-six states considered some form of new religious freedom bill).

212. See Bendery & Signorile, *supra* note 183.

213. HUM. RTS. CAMPAIGN, PREVIEW 2016, *supra* note 180, at 2.

214. *Id.*

215. See FLA. STAT. § 760.01(2) (2016) (providing protection against discrimination based on “race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status” and not on sexual orientation or gender identity).

mous omission have been sidelined by the Florida legislature.²¹⁶ Most recently, the 2016 Florida Competitive Workforce Act, which would have amended the state Civil Rights Act to extend protections in employment, housing, and public accommodations to subgroups of the LGBT community was introduced, but failed to make it out of a Senate committee.²¹⁷ The rationale that was expressed by opponents was consistent with the strategy adopted at the Values Voter Summit.²¹⁸ Opponents argued that equal civil rights should not be given to members of the LGBT community because doing so would open access to women's restrooms by transgender persons.²¹⁹ Also, in lock-step with anti-gay jurisdictions, Florida legislators included broad language in the bill that invites religious accommodation arguments, rendering the "protections" granted to LGBTQ people tenuous if not illusory.²²⁰

Second, Florida politicians continue to introduce discriminatory measures against members of the LGBTQ community. For example, a "religious freedom" bill was recently introduced in Florida's House of Representatives.²²¹ While the bill died in committee, it provided wide-ranging immunity from liability for persons, closely held organizations, religious institutions, businesses owned or operated by a religious institution, health care facilities, health care providers, and private child-placing agencies that refuse to perform activities "that would be contrary to religious or moral convictions or policies."²²²

216. Jeff Weiner, *Central Florida GOP Leaders Call for Law Against LGBT Discrimination*, ORLANDO SENTINEL (Aug. 4, 2016, 5:30 PM), <http://www.orlandosentinel.com/news/politics/os-pulse-nightclub-orlando-republicans-20160804-story.html> [https://perma.cc/X2KR-CYDP].

217. S.B. 120, 118th Leg., Reg. Sess. (2016); *SB 120: Prohibited Discrimination*, FLA. S., <https://www.flsenate.gov/Session/Bill/2016/0120/?Tab=BillHistory> [https://perma.cc/59DM-T8LF] (last visited Nov. 5, 2016).

218. See *Behind Closed Doors: Fighting for Safety and Privacy After Government Bathroom Directives*, VALUES VOTER SUMMIT, <http://www.valuesvotersummit.org/break-out> [https://perma.cc/65TG-P2FN] (last visited Nov. 18, 2016) (providing a description of a session on the "bathroom directives" at the 2016 Summit, including the argument that the Obama administration's "radical interpretation of 'sex' to include 'gender identity'" creates a "perfect predatory environment").

219. See Michael Auslen, *LGBT Discrimination Ban Dies in Florida Senate*, MIAMI HERALD (Feb. 9, 2016, 7:40 PM), <http://www.miamiherald.com/news/local/community/gay-south-florida/article59410128.html> [https://perma.cc/F6VY-HNSJ] (relaying a concern propounded by opponents of the Florida Competitive Workforce Act that male predators would use women's restrooms while posing as transgender women).

220. See S.B. 120, 118th Leg., Reg. Sess. § 760.10(9)(c) (2016) (stating that sections addressing unlawful employment practices and public accommodations "do not limit the free exercise of religion guaranteed by the United States Constitution and the State Constitution").

221. H.B. 401, 118th Leg., Reg. Sess. (Fla. 2016).

222. *Id.* § 761.06(2)-(4).

Third, Florida joined the “bathroom wars” by considering the Single-Sex Public Facilities Bill in 2015.²²³ Among other provisions, the bill criminalized the use of public restrooms by transgender people by making it a second-degree misdemeanor to enter a restroom designated for another biological sex.²²⁴ In addition, the bill preempted local government enactments that would permit the gender-appropriate use of bathrooms by transgender people.²²⁵ While the bill eventually died in a committee, it received a favorable vote by another House committee.²²⁶

Fourth, in addition to failing to protect LGBTQ people from employment, housing, and public accommodations discrimination, the Florida legislature enacted a bill to protect Florida’s clergy from the task of marrying same-sex couples.²²⁷ A type of religious refusal bill, the legislation has been described as degrading, unnecessary, and reflective of the anti-LGBTQ animus harbored by many Florida politicians.²²⁸ The Pastor Protection Act went into effect eighteen days after the Pulse massacre.²²⁹

After the massacre at Pulse, politicians across Florida came forward to express condolences to the LGBTQ community in Orlando.²³⁰ Mean-

223. CS/CS/HB 583, 117th Leg., Reg. Sess. (Fla. 2015).

224. *Id.* § 760.55(2)(c).

225. *Id.* § 760.55(6).

226. CS/CS/HB 583–*Single-Sex Public Facilities*, MYFLORIDAHOUSE, <http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=53629> [Permalink unavailable] (last visited Nov. 5, 2016).

227. H.B. 43, 118th Leg. Reg. Sess. § 761.061(1)(a)–(i) (Fla. 2016). The bill also protected religious organizations from providing “services, accommodations, facilities, goods, or privileges.” *Id.* § 761.061(2).

228. Zak Cheney Rice, *Florida Politicians Offer Condolences After Orlando, Still Won't Pass Laws to Protect LGBT*, MIC.COM (June 14, 2016), <https://mic.com/articles/146126/florida-politicians-offer-condolences-after-orlando-still-won-t-pass-laws-to-protect-lgbt#.eoK4Cn7u5> [<https://perma.cc/3AND-NSVF>]; see Green, *supra* note 211 (calling the bills “legal red herring[s]”); see also Bendery & Signorile, *supra* note 183 (identifying fourteen Pastor Protection Acts as part of the national anti-LGBT coordinated effort).

229. H.B. 43, 118th Leg. Reg. Sess. (Fla. 2016); *What We Know: June 12, 2016 Pulse Night Club Shooting*, EVERYTOWN, <https://everytownresearch.org/know-june-12-2016-pulse-nightclub-shooting-orlando-florida/> [<https://perma.cc/UTG9-QCZU>] (last updated June 17, 2016, 3:00 PM).

230. Rice, *supra* note 228. State Senator Jeff Brandes posted on his Facebook page, “Praying for our Orlando neighbors.” Bryce Covert, *LGBT Survivors of Orlando Shooting Can Legally Be Fired Under Florida Law*, READERS SUPPORTED NEWS (June 14, 2016), <http://readersupportednews.org/news-section2/318-66/37446-lgbt-survivors-of-orlando-shooting-can-legally-be-fired-under-florida-law> [<https://perma.cc/A6QR-TYJK>]. Yet, Senator Brandes was also one of the Senators on the Judiciary Committee who voted against extending civil rights protections to the LGBTQ community. *Id.*; see also *Committee Vote Record*, at 1, FL. S. (Feb. 9, 2016), <https://www.flsenate.gov/Session/Bill/2016/0120/Vote/2016-02-09%200400PM~S0120%20Vote%20Record.pdf> [<https://perma.cc/K7KZ-3EB9>] (listing other Senators on the Judiciary Committee who voted against the measure: Senators Bean, Benacquisto, Simpson, and Stargel).

while, the civil rights bill that provided some protections to lesbians, bisexuals, and gays could not make it out of legislative committee.²³¹ One commentator noted that LGBTQ people who were able to survive the Pulse massacre on Sunday could be fired or refused service in public lodgings or restaurants on Monday without legal recourse under state law.²³² Furthermore, transgender people have no protection from ridicule and rejection when attempting to use a gender-appropriate bathroom.²³³ In addition, Florida's ongoing political determination to undermine marriage equality is demonstrated by the Pastor Protection Act and the introduction of other measures to diminish the social recognition, security, dignity, and sanctity of marriages between same-sex couples.²³⁴

A few expressions of hollow condolences to the LGBTQ community of Orlando are not enough. Florida politicians must act to begin to undo the legal architecture of oppression that supports hate crime.²³⁵ That begins with including the LGBTQ community in the state's Civil Rights Act. These protections must be provided without demeaning "potty protections" and without condoning harmful discrimination to appease right-wing political beliefs masquerading as religion. It is the task of subordinated groups to hold Florida's politicians accountable. Let them never forget the faces of the 49.

From a national perspective, Congress must move into action to redress burgeoning anti-LGBTQ state legislation, the ongoing harm to LGBTQ people, and the destructive societal effects of discrimination. In 2015, one bill was introduced that would turn the tide and begin the normalization of justice.²³⁶ Introduced by more than 200 cosponsors, the Equality Act is a comprehensive amendment of civil rights laws to prohibit discrimination on the basis of sexual orientation and gender identity.²³⁷ Discrimination is proscribed in public accommodations, public facilities, public education, programs and activities receiving federal funding, em-

231. Rice, *supra* note 228.

232. Covert, *supra* note 230.

233. See 2016 Equality Florida Legislative Insider Report, EQUALITY FLA. ACTION, INC. (Apr. 4, 2016), http://www.eqfl.org/2016_FLLeg [<https://perma.cc/Y3CR-AT6B>].

234. See, e.g., Merod, *supra* note 177 (noting "a year after the Supreme Court legalized same-sex marriage nationwide, lesbian, gay, bisexual and transgender people still face systemic discrimination in Florida and around the country").

235. See generally Valdes, *Identity*, *supra* note 137, at 395 n.68 (discussing the "architecture of symbiotic structures of subordination," in reference to Ehrenreich, *supra* note 49).

236. Equality Act, H.R. 3185, 114th Congress (2015).

237. *Id.*; *The Equality Act*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/resources/the-equality-act> [<https://perma.cc/B2PP-H6UL>] (last updated Aug. 1, 2016).

ployment, housing, equal credit opportunity, and jury selection standards.²³⁸

The Act includes three noteworthy sections. One section provides that the federal Religious Freedom Restoration Act shall not be the basis for a claim or defense concerning a matter covered by the Act or otherwise “provide a basis for challenging the application or enforcement of a covered title.”²³⁹ The second provision ensures a person will not be denied access to a restroom that comports with the person’s gender identity.²⁴⁰ The third provision states the following finding:

A single instance of discrimination may have more than 1 basis. For example, discrimination against a married same-sex couple could be based on the sex stereotype that marriage should only be between heterosexual couples, the sexual orientation of the 2 individuals in the couple, or both. Discrimination against a pregnant lesbian could be based on her sex, her sexual orientation, her pregnancy, or on the basis of multiple factors.²⁴¹

This finding lays the basis for claims of intersectional discrimination.²⁴² The Equality Act is a comprehensive amendment of the Civil Rights Act that addresses key questions of religious freedom, access to bathrooms based on gender identity, and intersectional justice.²⁴³ Consequently, the Equality Act is a necessary step to stop the latest wave of legislative homophobia in the United States.²⁴⁴

238. Equality Act, H.R. 3185, 114th Congress §§ 3–7, 10–12 (2015). In addition, several sections expand the realm of public accommodations. *Id.* § 3(a)(2)(C)(4).

239. *Id.* § 1107.

240. *See id.* § 1101(b)(2) (“[A]n individual shall not be denied access to a shared facility, including a restroom, a locker room, and a dressing room, that is in accordance with the individual’s gender identity.”).

241. *Id.* § 2.

242. *See* Areheart, *supra* note 101 (recommending that Congress amend Title VII by adding the phrase “or any combination thereof” to the list of protected categories).

243. Equality Act, H.R. 3185, 114th Congress §§ 2, 1101(b)(2) (2015); *see also* Mary Emily O’Hara, *Civil Rights 2.0: What the Equality Act of 2015 Means for LGBT Americans*, DAILY DOT (July 23, 2015), <http://www.dailydot.com/layer8/equality-act-2015-lgbt-explained> [<https://perma.cc/5YLV-U24V>] (noting the scope of the Equality Act, including prohibiting states from discriminating against LGBT people based on the federal Religious Freedom Restoration Act).

244. This article recognizes the extended critique that has been lodged toward the rights discourse and concurs with a number of the premises of that critique. *See, e.g.*, Iglesias, *LatCrit Theory*, *supra* note 27, at 10–18 (tracing the evolution of the critique and support of rights discourse in critical theory); Judith E. Koons, *What is Earth Jurisprudence: Key Principles to Transform Law for the Health of the Planet*, 18 PENN ST. ENVTL. L. REV. 47, 58 (2009) (distinguishing legal and moral consideration from rights). At the same time, it is necessary for subordinated groups to have a basic floor of civil liberties that is recognized by the government—and certainly not to be legislated against—particularly

ii. Immigration: Redressing Racist Rhetoric and Fortified Borders

The faces of the Pulse massacre are gay and Latinx.²⁴⁵ Of the forty-nine who were killed in the Pulse massacre, twenty-three were Puerto Rican.²⁴⁶ Latin Night at Pulse took place during Gay Pride Month; the next day was National Puerto Rican Day.²⁴⁷ Since the economic downturn in Puerto Rico that began in 2006, thousands of Puerto Ricans have settled in the United States.²⁴⁸ Puerto Ricans—who are U.S. citizens of an unincorporated territory of the United States—have encountered systemic oppression stemming from colonization as well as race and class subordination.²⁴⁹

Many Puerto Ricans have chosen to live in Orlando, which has built a vibrant Puerto Rican community where “Spanish flows freely; the smells of Mallorca pastries and mofongo waft from bakeries and restaurants.”²⁵⁰ An estimated 400,000 Puerto Ricans have settled in Orlando, making it one of the “havens” for people of Puerto Rican descent in the United States.²⁵¹

Franky Jimmy DeJesus Velazquez, who was one of the 49, came to Orlando in 2010 “for the same reasons that have driven tens of thousands of Puerto Ricans in recent years: better jobs, health care, housing, friends,

where the groups are embedded in a history of demonization and in a cultural context of pervasive hate crimes.

245. Guevarra, *supra* note 111; Gibson & Minshew, *supra* note 7.

246. Alvarez & Madigan, *supra* note 14.

247. See Brian Latimer, *LGBT Pride Mixes with Deep Sorrow Over Orlando at Puerto Rican Day Parade*, NBC NEWS (June 12, 2016, 5:49 PM), <http://www.nbcnews.com/news/latino/lgbt-pride-mixes-deep-sorrow-over-orlando-puerto-rican-day-n590596> [<https://perma.cc/LZ9C-XR3Y>] (noting, for the first time in its 59-year history, the National Puerto Rican Day Parade honored LGBT Puerto Ricans). The Muslim Alliance for Sexual and Gender Diversity also observed another temporal intersection: the massacre “occurred during LGBTQ Pride month, which this year coincides with the Muslim holy month of Ramadan, typically a period of peace and intense self-reflection.” Donnella, *supra* note 118.

248. Mary Williams Walsh & Liz Moyer, *How Puerto Rico Debt Is Grappling with a Debt Crisis*, N.Y. TIMES, http://www.nytimes.com/interactive/2016/business/dealbook/puerto-rico-debt-crisis-explained.html?_r=1 [<https://perma.cc/LLQ3-RVJT>] (last updated July 1, 2016).

249. Francisco A. Rullan, “*The Puerto Rican Question*”: *Roman Influence on the Legal Relationship Between the United States and Puerto Rico and Some Lessons from Analogies to the Roman Republic*, 43 REV. JUR. U.I.P.R. 321, 324 (2009); Pedro A. Malavet, *Puerto Rico: Cultural Nation, American Colony*, 6 MICH. J. RACE & L. 1, 69–70 (2000) [hereinafter Malavet, *Puerto Rico*].

250. Alvarez & Madigan, *supra* note 14.

251. *Id.*; Lizette Alvarez, *Puerto Ricans Seeking New Lives Put Stamp on Central Florida*, N.Y. TIMES (Aug. 24, 2015), <http://www.nytimes.com/2015/08/25/us/central-florida-emerges-as-mainland-magnet-for-puerto-ricans.html> [<https://perma.cc/YU8S-BM3F>] [hereinafter Alvarez, *Puerto Ricans*].

relatives and, in his case, greater acceptance of his sexual identity.”²⁵² The “Puerto Rican diaspora,” propelled by a decade of deepening economic contraction, brought thousands of newcomers to the central Florida area.²⁵³ Many new residents have struggled, and some have returned to the island.²⁵⁴ However, the successive waves of migration from Puerto Rico are “transforming a corridor of Central Florida that is increasingly viewed as economically powerful, culturally diverse and politically pivotal.”²⁵⁵ Demonstrating one of the tensions reflected in the massacre, one Latina mused whether some of the Puerto Rican victims would still be alive if poverty had not forced them to leave Puerto Rico.²⁵⁶

A number of the victims and survivors of the Pulse massacre were documented and undocumented immigrants.²⁵⁷ Yet, due to the workings of implicit bias, all of the victims and survivors were likely perceived to be undocumented immigrants.²⁵⁸ Consequently, they were victims not only of this horrific hate crime, but their lives had likely been affected by anti-immigrant rhetoric infused with racism and xenophobia.²⁵⁹ As one noteworthy example, during the recent campaign, the candidate elected President of the United States called Latino immigrants “criminals” and “rapists.”²⁶⁰ In fact, the violent crime rate of immigrants—documented and undocumented—is significantly lower than the violent crime rates of people born in the United States.²⁶¹

252. Alvarez & Madigan, *supra* note 14. The news article describes Franky as “a proud Puerto Rican—a *jibarito*, a professional dancer on the island with a fierce devotion to *jibara*, a folkloric dance created long ago by workers on coffee plantations and inland farms. Latin Night at the club was a natural fit for him.” *Id.*

253. Kevin Brown & Tom I. Romero II, *The Social Reconstruction of Race and Ethnicity of the Nation’s Law Students: A Request to the ABA, AALS, and LSAC for Changes in Reporting Requirements*, 2011 MICH. ST. L. REV. 1133, 1161–62 (2011).

254. Alvarez & Madigan, *supra* note 14.

255. Alvarez, *Puerto Ricans*, *supra* note 251.

256. Jenson, *supra* note 110.

257. See Agren, *supra* note 122 (recognizing at least four victims as Mexican immigrants).

258. See Nittle, *supra* note 73; Reichard, *supra* note 75.

259. See Kevin R. Johnson, *It’s the Economy, Stupid: The Hijacking of the Debate Over Immigration Reform by Monsters, Ghosts, and Goblins (or the War on Drugs, War on Terror, Narcoterrorists, Etc.)*, 13 CHAP. L. REV. 583, 608 (2010) [hereinafter Johnson, *It’s the Economy*] (proffering that “racism and xenophobia often infect the dialogue over immigration in the United States”).

260. Moreno, *supra* note 80.

261. Josiah McC. Heyman, *Guns, Drugs and Money: Tackling the Real Threats to Border Security*, AM. IMMIGR. COUNCIL: IMMIGR. POL’Y CTR. 2–3 (2011), https://www.americanimmigrationcouncil.org/sites/default/files/research/Heyman_-_Drugs_Guns_and_Money_091211.pdf [<https://perma.cc/B8V7-F8JQ>].

The rhetoric of immigration has been examined through the lens of metaphor.²⁶² Kevin R. Johnson observed that the national discourse on immigration has been captured by restrictionist politicians who have created inflammatory and contrapuntal “metaphorical wars” on drugs and terror, blaming immigrants for both categories of social ills.²⁶³ In the discourse of immigration law, three metaphors are dominant: “IMMIGRANTS ARE ALIENS, IMMIGRATION IS A FLOOD, and IMMIGRATION IS AN INVASION.”²⁶⁴ Of these, the dominant legal metaphor is “alien,” which conveys three qualities: otherness, ethnicity, and illegality.²⁶⁵

Fear of the “Other” fuels anti-immigrant sentiment and discourse.²⁶⁶ To carry the critique further, the Other is considered to be “the foreigner,” who serves as the subordinating role in a native/alien binary.²⁶⁷ The role of the alien is distinctly racial; immigrants occupy “a racial caste of workers relegated to a secondary labor market.”²⁶⁸ In addition, the character of the alien has been distinctly criminalized; the history of immigration law is one of “crimmigration” that targets specific groups deemed undesirable due to race, national origin, or ethnicity.²⁶⁹

As discussed earlier, the surge in violent hate crimes toward Latina/os is linked to hateful anti-immigrant rhetoric.²⁷⁰ Some perpetrators of hate crimes against Latinos have directly attributed their violence to anti-immigrant speech.²⁷¹ In addition, some public figures have specifically

262. Johnson, *It's the Economy*, *supra* note 259, at 587; Keith Cunningham-Parmeter, *Alien Language: Immigration Metaphors and the Jurisprudence of Otherness*, 79 *FORDHAM L. REV.* 1545, 1156–57 (2011).

263. *See* Johnson, *It's the Economy*, *supra* note 259, at 600 (noting that the “dual wars” hide the true issues behind immigration, especially labor migration in a global economy).

264. Cunningham-Parmeter, *supra* note 262, at 1568 (emphasis in original).

265. *Id.* at 1568–69 (observing that “lawyers and judges refer to ‘aliens’ so frequently that few would identify the word as a metaphor”).

266. *See id.* at 1570–73 (reasoning that presenting immigrants as animals, diseases, and inanimate objects, together with widespread use of the “alien” metaphor “conceals immigrants’ personhood and potential for social contribution”).

267. Katherine L. Vaughns, *Fixation: An Obsessive or Unhealthy Preoccupation or Attachment*, 27 *J. CIV. RTS. & ECON. DEV.* 588, 610 (2014) (posthumous publication); Kevin R. Johnson, *Possible Reforms of the U.S. Immigration Laws*, 18 *CHAP. L. REV.* 315, 320 (2015) [hereinafter Johnson, *Possible Reforms*].

268. *Id.*

269. Mary Fan, *The Case for Crimmigration Reform*, 92 *N.C.L. REV.* 75, 82 (2013).

270. *See supra* Section II.B.

271. *See* Jonathan Greenblatt, *When Hateful Speech Leads to Hate Crimes: Taking Bigotry Out of the Immigration Debate*, *HUFFINGTON POST* (Aug. 21, 2016, 5:18 PM), http://www.huffingtonpost.com/jonathan-greenblatt/when-hateful-speech-leads_b_8022966.html [<https://perma.cc/3NXW-W7G3>] (relaying details of the assault on a Latino man in Boston,

called for killing immigrants. In 2011, an Alabama state senator advised that the solution to illegal immigration was to “empty the clip.”²⁷² In the 2012 Presidential campaign, a candidate proposed building an electrified fence on the border that would kill those attempting to cross.²⁷³

The “discourse of the wall” has pandered to anti-immigrant sentiment in disturbing and revelatory ways.²⁷⁴ Proposals to build a wall along the border between the United States and Mexico have both substantive and symbolic dimensions.²⁷⁵ Closing the border by building a wall (and policing the wall with enhanced criminalization policies) is advanced as a substantive “solution” to unauthorized entry from Mexico.²⁷⁶ Yet, it is only the southern border that is proposed to be closed.²⁷⁷ No proposal has been made to bar Canadians from entering the country.²⁷⁸ In the political discourse of the (Mexican) wall, “optics seem to take precedence over reality and domestic politics over foreign policy and diplomacy: the image of a fortified border becomes more important than its actual effectiveness.”²⁷⁹

The border between the United States and Mexico occupies a special place in geopolitical history.²⁸⁰ At 1,951 miles, it is the longest border in

including the assailant’s statement that “Donald Trump was right—all these illegals need to be deported”).

272. See EDIBERTO ROMÁN, *THOSE DAMNED IMMIGRANTS: AMERICA’S HYSTERIA OVER UNDOCUMENTED IMMIGRATION* 18 (N.Y. Univ. Press 2013) (referring to a 2011 speech by Alabama State Senator Scott Beason).

273. See *id.* at 18–19 (discussing a 2011 speech in Tennessee by Herman Cain).

274. Preston et al., *supra* note 69; see also ROMÁN, *supra* note 272, at 18–19 (detailing an instance in which Presidential candidate Herman Cain proposed creating an electrified border fence).

275. See Elisabeth Vallet & Charles-Philippe David, *Walls of Money: Securitization of Border Discourse and Militarization of Markets*, in *BORDERS, FENCES AND WALLS: STATE OF INSECURITY?* 146 (Elisabeth Vallet ed., 2014) (“A wall is not just a piece of masonry; it is at once a ‘process of differentiation,’ which . . . amalgamates all the discursive elements opposing the identity of the wall-building state (the Self/us/here) to that of its neighbor (the Other/them/there).”).

276. Preston et al., *supra* note 69.

277. See *id.* (explaining that the wall proposed by Trump would encompass the length of the southern border).

278. *Id.*

279. Elisabeth Vallet, *Introduction*, in *BORDERS, FENCES AND WALLS: STATE OF INSECURITY* 3 (Elisabeth Vallet ed., 2014); see also Preston et al., *supra* note 69 (reporting the warning of experts that the proposed wall would come at an astronomical expense and would defy the “logic of science, engineering, and law”).

280. See Chris Nwachukwu Okeke & James A.R. Nafziger, *United States Migration Law: Essentials for Comparison*, 54 AM. J. COMP. L. 531, 549 (2006) (recognizing the U.S.–Mexican border as the focus of immigration control and the longest, if not the only, major border between a developed and developing country).

the world between a developed and developing country.²⁸¹ After Mexico gained independence from Spain in 1821, about half of its territory was acquired by the United States through military action as well as purchase.²⁸² However, for most of the nineteenth and late twentieth centuries, migration from Mexico to the United States was welcomed.²⁸³ Commentators have observed that the shift to increased border enforcement and criminalization of (Mexican) immigrants occurred in the wake of the Oklahoma City bombing and the terrorist attack on the World Trade Center.²⁸⁴ Over a twenty-year period, Mexican migrants became the scapegoat for domestic and international terrorism.²⁸⁵

Yet, crime, drugs, and terrorism cannot be laid at the feet of Mexican migrants.²⁸⁶ Furthermore, fencing is rhetorically nothing more than “an easy and simple answer” that obscures “the underlying political, social, and economic factors at play on the border and between the United States and Mexico.”²⁸⁷ Through these lenses, immigration may be seen largely as a matter of the push and pull of labor needs and opportunities in a world that has “gone global” with porous national borders and increasingly integrated economies.²⁸⁸ The lure of jobs has pulled Mexican immigrants across the border, at great risk:

281. *Id.*; *Geography Statistics of United States of America*, WORLD ATLAS, <http://www.worldatlas.com/webimage/countrys/namerica/usstates/uslandst.htm> [<https://perma.cc/GE3L-MR9X>] (last visited Nov. 26, 2016).

282. Peter W. Schroth & Linda L. Foster, *Perspectives on Migration and Law in the United States*, 62 AM. J. COMP. L. 1, 7 (2014).

283. *Id.* at 7–8.

284. MICHAEL A. SCAPERLANDA, IMMIGRATION LAW: A PRIMER 4 (2009), [http://www.fjc.gov/public/pdf.nsf/lookup/immlaw09.pdf/\\$file/immlaw09.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/immlaw09.pdf/$file/immlaw09.pdf) [<https://perma.cc/7XXT-SXEJ>]; Ted Hesson, *Five Ways Immigration System Changed After 9/11*, ABC NEWS (Sept. 11, 2012), http://abcnews.go.com/ABC_Univision/News/ways-immigration-system-changed-911/story?id=17231590 [<https://perma.cc/WJD8-GCPB>].

285. See JORGE A. BUSTAMANTE ET AL., *Introduction*, in U.S.-MEXICO RELATIONS: LABOR MARKET INTERDEPENDENCE 4–5 (Jorge A. Bustamante et al., eds. 1992) (“While scientific accounts view migration as simply part of a broad, bilateral dynamic between Mexico and the United States, U.S. politicians have made Mexican immigrants ideological scapegoats and have blamed them for unemployment, criminal activities, epidemics, communist and terrorist aggression, threats to national sovereignty, and, most recently, narcotics trade.”).

286. Johnson, *It's the Economy*, *supra* note 259, at 600; see also Vaughns, *supra* note 267, at 613–14 (stating there is no credible evidence of terrorist infiltration along the Southwest border); Heyman, *supra* note 261 (reporting that immigrants have significantly lower violent crime rates than native-born populations).

287. Vaughns, *supra* note 267, at 598.

288. Johnson, *It's the Economy*, *supra* note 259, at 600; see also Vincent Boulanin & Renaud Ballais, *Towards a High-Tech “Limes” on the Edges of Europe? Managing the External Borders of the European Union*, in BORDERS, FENCES AND WALLS: STATE OF

[U]ndocumented migrants have trekked through the California and Arizona deserts in oppressive heat, rubbed garlic on their skin to ward off rattlesnakes, swum across the All-American Canal and Rio Grande River, or spent days hiking over the mountain ranges in frigid weather. They have suffocated in the airless trucks of smugglers, died in vehicle crashes, been struck by lightning, or drowned. Too often migrants have been preyed upon by their Mexican handlers (often called “coyotes”), U.S.-based contractors (frequently non-citizens), and criminals who assault, rob, and kill them.²⁸⁹

In one year, deaths of Mexicans in attempted border crossings exceeded the entire death toll of East Berliners attempting to cross the Berlin wall in its 28-year history.²⁹⁰

A more nuanced look at American border policy reveals that it has very little to do Mexican immigration.²⁹¹ Instead, the politics and discourse of the border have everything to do “with America’s view of itself and its place in the world.”²⁹² The U.S.–Mexico border has become “a symbolic stage upon which the nation’s insecurities and fears, hopes and dreams, are projected.”²⁹³ The border is a site of political contestation in which differing accounts of America’s global identity are mapped onto interlocking systems of discrimination, subordination, and privilege.²⁹⁴ One system pulls the levers of white privilege, where fears of job insecurity and a growing population of people of color move public policy forward.²⁹⁵ An interlocking, symbiotic system grinds the gears of racial and

INSECURITY? 231, 243 (Elisabeth Vallet ed., 2014) (describing the paradox of the blurring of borders by globalization and the accentuation of borders by fortified walls).

289. Okeke & Nafziger, *supra* note 280, at 549–50.

290. Vaughns, *supra* note 267, at 600.

291. *Id.* at 607.

292. *Id.* at 600.

293. *Id.* at 592.

294. See Vallet & David, *supra* note 275, at 143 (discussing the functions of border walls: “protection, pacification, separation, and even segregation” as well as security mechanisms and reflecting an orientation of domination).

295. See Johnson, *It's the Economy*, *supra* note 259, at 600, 602, 604, 608 (contending that immigration is at heart about labor migration, including impacts of immigration on citizens, exploitation of undocumented workers, a “new Jim Crow” of undocumented workers, largely of-color, and a discourse infected by racist nativism). One observation is that:

[A]s international migration continues from less developed to more developed regions of the world, the growing nascent migrant population is likely to change the racial and cultural mix of immigrant receiving societies. Depending on the speed and magnitude of change, the resident population reacts in different degrees of nativism and intensity towards the increased heterogeneity brought about by immigration.

Peter S. Li, *World Migration in the Age of Globalization: Policy Implications and Challenges*, 33 N.Z. POPULATION REV. 1, 14–15 (2008).

class subordination, in which criminalized immigrants are demonized in public discourse and punished by policies ensuring they are detected, detained, and deported.²⁹⁶ The wall symbolizes this contestation in a classic closed-door embodiment of “Us versus Them.”²⁹⁷

The antidote to anti-immigration rhetoric and the “pro-wall” border policy is to recognize that there are two parties to the border—the United States and Mexico. Our nation has a special relationship with Mexico that should be reflected in a border policy of respect and shared responsibility.²⁹⁸ According to the late Professor Katherine L. Vaughns, “[i]nstead of building another physical barrier, the resumption of regional partners in border and migration management seems like a logical, realistic alternative choice.”²⁹⁹ Mexico already has a cooperative relationship with the United States in trade and security matters.³⁰⁰ To meet national security concerns, policies that focus on the indicia of risk of migrants seeking to enter the country, as well as better identification and tracking of entrants, would be far more effective than engaging in the futile, expensive, and discriminatory theatrics of trying to exclude people of color.³⁰¹ The United States must meet the pressing forces of globalization from an ethical stance that reflects our commitment to “building multi-stakeholder responses” to the complex phenomena of immigration.³⁰²

Constructively examining our nation’s immigration policies and boundaries, it is apparent that we created those borders and policies and can remake them to reflect the values, diversity, and vibrancy of an America in the twenty-first century. The proper role of the United States of America is to be a partner to our territories and other countries in the world. This

296. Shirley Lin, “*And Ain’t I a Woman?: Feminism, Immigrant Caregivers, and New Frontiers for Equality*,” 39 *HARV. J.L. & GENDER* 67, 99, 113–14 (2016); see also Johnson, *It’s the Economy*, *supra* note 259 (describing the discourse on immigration “as nothing less than hateful and frightening”); Schroth & Foster, *supra* note 282, at 1 (noting the focus of immigration law on “stigmatizing and criminalizing Mexicans in particular”).

297. Vallet & David, *supra* note 275.

298. Vaughns, *supra* note 267, at 613.

299. *Id.*

300. *Id.*

301. Fan, *supra* note 269, at 82–83; Johnson, *Possible Reforms*, *supra* note 267, at 326.

302. See Ian Goldin, *Globalization: The Good, The Bad and the Uncertain*, *GLOBALIST* (Feb. 1, 2012), <http://www.theglobalist.com/globalization-the-good-the-bad-and-the-uncertain> [<https://perma.cc/D6S3-UBZA>] (arguing that “[i]f the benefits of globalization are to continue to outweigh the risks that rapid integration exacerbates, understanding systemic interconnections and building multi-stakeholder responses are vital”); see also BUSTAMANTE ET AL., *supra* note 285 (exploring the labor market interdependence of Mexico and the United States).

is an imperative not only of intersectional justice, but also of the demands of an interconnected world.

Similarly, from this perspective, the binaries, borders, and divisions that are the grounds of race, gender, sexuality, and national origin subordination come into better relief. These divisions are also of our own making, and we can unmake and recreate relationships, not only with other countries, but also within our body politic. A commitment to intersectional justice requires political action that exposes and dismantles the hurtful ways in which we have categorized ourselves and others. With shared responsibility and respect for perceived differences, we can make a new heterogeneous public for the twenty-first century.³⁰³ That response is worthy of the 49.

IV. CONCLUSION: BINARIES, BORDERS, AND SHARED RESPONSIBILITY

They were dancing. They were doing the *salsa*, *bachata*, *reggaeton*, *jibara*, and other forms of Latin and club dancing.³⁰⁴ They were celebrating sexuality, culture, inclusion, and liberation in a space where a Latino can take the hand of another man and dance.³⁰⁵ They were dancing in a site of safety—a sacred space—constructed out of decades of struggle and infused with political meaning.³⁰⁶

303. See YOUNG, *supra* note 21, at 119 (discussing “the ideal of a heterogeneous public, in which persons stand forth with their differences acknowledged and respected, though perhaps not completely understood, by others”); Iglesias, *LatCrit Theory*, *supra* note 27, at (grounding a “commitment to anti-essentialist intergroup justice on a respect for difference, rather than a requirement of sameness”); Lin, *supra* note 296, at 71 (analyzing the organization “of immigrant and minority caregivers nationwide for ‘rights, respect, and recognition’”).

304. See generally Malavet, *Puerto Rico*, *supra* note 249, at 263 (discussing the role of music, including the *jibaro seis*—“the music of the true *jibaro*, the poor peasant farmer of Puerto Rico”—as an integral part of the culture that makes “the Puerto Rican nation”); Reichard, *supra* note 75 (discussing the diversity of Latin culture and dancing, including *bachata* and *cumbia*).

305. Guevarra, *supra* note 111.

306. To the gay Latinx community, places like Pulse on Latin Nights are “sacred spaces for our community. They’re spaces of respite, of safety, of camaraderie, of community.” *Activist: Latinx LGBTQ Community & Its Stories of Survival Should Be at Center of Orlando Response*, DEMOCRACY NOW! (June 14, 2016) http://www.democracynow.org/2016/6/14/activist_latinx_lgbtq_community_its_stories [<https://perma.cc/VKP2-FPVH>]; see also Dale Carpenter, *The Unknown Past of Lawrence v. Texas*, 102 MICH. L. REV. 1464, 1525 (2004) (noting the political significance of gay bars in the United States); Patrick Sisson, *How Gay Bars Have Been a Building Block of the LGBTQ Community*, CURBED (June 17, 2016, 11:11 AM) <http://www.curbed.com/2016/6/17/11963066/gay-bar-history-stonewall-pulse-lgbtq> [<https://perma.cc/4Z37-PRKQ>] (“[G]ay nightlife has always served as vital space for community building and escaping societal persecution.”). The co-owner of Pulse, Barbara Poma, opened the nightclub as “a safe space for the local LGBTQ community” and as a tribute to her brother, John, who died from AIDS. Kenrya Rankin, *What*

To honor the victims and survivors of the massacre at Pulse, this article has critiqued the systems of subordination, particularly those at the intersections of sexuality and ethnicity, that underlie hate crime. This article proposes that ideologies and structures of privilege and subordination must be dismantled by acknowledging the false binarist divisions that we have created and by taking action to create systems of intersectional justice.

The predicates for intersectional justice lie within individual consciences as well as in the values, norms, and laws expressed by a society.³⁰⁷ Individuals should pledge to root out internalized forms of oppression and form coalitions across traditional divisions to face and undo systems of subordination.³⁰⁸ Commitments to intersectional justice must flow from the discursive arena of our pluralistic civil society and into political action.³⁰⁹

To open the door to LGBTQ intersectional justice, Congress must adopt the Equality Act and set a clear national policy of nondiscrimination against members of the LGBTQ community in all of the protected civil rights areas.³¹⁰ Florida politicians must put their condolences into action by including the LGBTQ community in the state's Civil Rights Act.³¹¹ The Florida legislature must do its job of making amends to the LGBTQ community without including bathroom provisions that demean transgender people or "religious freedom" exemptions that are a pretext for discrimination. Finally, to orient toward Latinx intersectional justice, the nation must eschew immigration policies that run counter to constitutional values as well as those that undermine an ethical and pragmatic engagement with the rest of our increasingly interconnected world. Policies must be engaged that responsibly focus on an accurate assessment of the risk posed by those seeking entry while emphasizing respect and shared responsibility with neighboring countries.

In the aftermath of the massacre, a wide variety of groups stepped forward to express diverse commitments to justice. First, concerned citizens

You Need to Know About the Orlando Massacre, the Latinx LGBTQ Community and Islamophobia, COLORLINES (June 13, 2016, 10:41 AM), <https://www.colorlines.com/articles/what-you-need-know-about-orlando-massacre-latinx-lgbtq-community-and-islamophobia> [<https://perma.cc/U6FJ-V6GY>]; see also James West, *Orlando's Pulse Nightclub Was Founded by a Woman Whose Brother Died from AIDS*, MOTHER JONES (Jun. 14, 2016, 12:06 PM), <http://www.motherjones.com/politics/2016/06/orlando-gay-nightclub-massacre-lgbt-community-history> [<https://perma.cc/42W7-29VD>] (noting that "Pulse" refers to John's heartbeat).

307. See text and accompanying notes *supra* Section III.A.

308. See text and accompanying notes *supra* Section III.A.

309. E.g., YOUNG, *supra* note 21, at 152.

310. Equality Act, H.R. 3185, 114th Congress (2015).

311. FLA. STAT. §§ 760.01–760.11 (2016).

from Latino, immigrant, LGBTQ, African-American, labor, reproductive rights, and faith communities came together across traditional boundaries to advocate for gun control.³¹² On the eve of the one-month anniversary of the massacre, sixty protestors participated in a “sit-in for the 49” in the lobby outside a U.S. senator’s office in downtown Orlando.³¹³ Singing protest songs and creating a memorial of forty-nine roses and slips of paper with the names of the dead, the protestors planned to occupy the space for forty-nine hours.³¹⁴ The protestors presented the Senator’s staff with demands, including rejecting financial contributions from the National Rifle Association, imposing universal background checks, and adopting legislation to prohibit semiautomatic assault weapons and large-capacity ammunition feeding devices.³¹⁵ The peaceful sit-in ended after nine-and-one-half hours when police officers were summoned by the owners of the building; ten of the protestors were arrested.³¹⁶ According to several activists, the Pulse massacre represented “a tipping point,” mandating political action by communities that are disproportionately affected by gun violence.³¹⁷ The sit-in can also be seen as part of a broader “intertwining” of groups that are coming together to advocate for community services and substantive justice.³¹⁸ For example, over thirty organizations joined together after the massacre to form *Somos Orlando*, focusing on providing culturally competent mental health services and

312. Billy Manes, *In the Wake of the Pulse Massacre, the LGBT Community Inadvertently Intersects with the Gun-Rights Battle*, WATERMARK ONLINE (July 28, 2016), [tp://www.watermarkonline.com/2016/07/28/in-the-wake-of-the-pulse-massacre-the-lgbt-community-inadvertently-intersects-with-the-gun-rights-battle](http://www.watermarkonline.com/2016/07/28/in-the-wake-of-the-pulse-massacre-the-lgbt-community-inadvertently-intersects-with-the-gun-rights-battle) [<https://perma.cc/4QTB-U6AT>] [hereinafter Manes, *In the Wake*]; Monivette Cordeiro, *Protesters Hold Sit-In at Marco Rubio’s Orlando Office for 49 Victims Killed at Pulse*, ORLANDO WEEKLY, (July 11, 2016, 12:08 PM), <http://www.orlandoweekly.com/Blogs/archives/2016/07/11/protesters-hold-sit-in-at-marco-rubios-orlando-office-for-49-victims-killed-at-pulse> [<https://perma.cc/FJ7K-5URX>].

313. Kate Santich & Gal Tziperman Lotan, *10 Arrested in Sit-In at Marco Rubio’s Orlando Office Building*, ORLANDO SENTINEL (July 11, 2016, 10:08 PM), <http://www.orlandosentinel.com/news/breaking-news/os-pulse-shooting-rubio-sit-in-20160711-story.html> [<https://perma.cc/D8XX-F4S3>].

314. *Id.*; see also Cordeiro, *supra* note 312 (showing video of the protestors singing “#SomosOrlando, esta noche tenemos que ganar”).

315. Santich & Lotan, *supra* note 313.

316. *Id.*

317. Manes, *In the Wake*, *supra* note 312; Joseph Wenzel IV, *CT Lawmakers Push for More Gun Control After Deadly Orlando Nightclub Shooting*, KMOV.COM (June 13, 2016), <http://www.kmov.com/story/32208104/ct-lawmakers-push-for-more-gun-control-after-deadly-orlando-nightclub-shooting> [<https://perma.cc/QNX2-HSCQ>].

318. See PAUL HAWKEN, *BLESSED UNREST 11–12* (Viking 2007) (describing the “intertwining” and “coalescence” of “hundreds of thousands of organizations” across the world that are converging around “environmental activism, social justice initiatives, and indigenous cultures’ resistance to globalization”).

meeting other needs of the Hispanic community.³¹⁹ At the state level, eighty-five organization—"a wide swath" of concerned civic groups—recently signed on to the Florida Coalition to Prevent Gun Violence that was launched by Florida's League of Women Voters.³²⁰

Second, Orange County Mayor Teresa Jacobs, who made a moving statement of penitence to the LGBTQ community at a vigil three days after the massacre,³²¹ propelled her words into action six weeks later.³²² Jacobs spearheaded a resolution, signed by twenty other central Florida Republicans, to support legislation banning discrimination against the LGBTQ community.³²³ The resolution states: "We the undersigned do hereby resolve that all Americans should be treated with equality, dignity and respect, and support efforts of Florida businesses and individuals to pass legislation banning discrimination based on sexual orientation or gender identification."³²⁴ Reaction was mixed. Nadine Smith, the CEO of Equality Florida, advised:

Mayor Teresa Jacobs has made good on her promise to be a voice for equality and to challenge others in her party to stand on the side of equal protection for LGBT people. This is a moment when the state of Florida can become a beacon in the South and make amends for the state's long, dark history of state sanction[ed] persecution and legalized discrimination.³²⁵

319. Joshua Barajas, *Orlando Shooting Sheds Light on Mental Health Disparities in Florida's Latino Community*, PBS NEWSHOUR (June 20, 2016, 3:01 PM), <http://www.pbs.org/newshour/updates/orlando-shooting-sheds-light-on-mental-health-disparities-in-floridas-latino-community> [https://perma.cc/LKK3-85KJ]; Harry Sayer, *Central Florida Groups Unite to Help Hispanic Community After Orlando Mass Shooting*, ORLANDO WEEKLY (June 13, 2016, 6:54 PM), <http://www.orlandoweekly.com/Blogs/archives/2016/06/13/central-florida-groups-unite-to-help-hispanic-community-after-orlando-mass-shooting#> [https://perma.cc/G5GC-UR7W].

320. See Manes, *In the Wake*, *supra* note 312 (noting that members of the coalition are "from all walks of life: faith-based groups, health, education, LGBTQ, Hispanic, AfricanAmerican and civic organizations").

321. Lowder, *supra* note 173.

322. Frank Torres, *Orange County Republican Leaders Sign Anti-Discrimination Resolution*, ORLANDO POL. OBSERVER (July 28, 2016), <http://orlando-politics.com/2016/07/28/orange-county-republican-leaders-sign-anti-discrimination-resolution> [https://perma.cc/D4PZ-TXE4].

323. *Id.*; Jeremy Williams, *Orange County Republicans Support LGBT Non-Discrimination Bill*, WATERMARK ONLINE (July 29, 2016), <http://www.watermarkonline.com/2016/07/29/orange-county-republicans-support-lgbt-non-discrimination-bill> [https://perma.cc/49LB-Y8CA].

324. Michael K. Lavers, *Orlando-Area Republicans Back Fla. Anti-Discrimination Bill*, WASH. BLADE (July 29, 2016, 11:34 AM), <http://www.washingtonblade.com/2016/07/29/orlando-area-republicans-back-fla-anti-discrimination-bill> [https://perma.cc/G8R8-2FE5].

325. *Id.*

Others were more restrained, noting that “[t]here’s much more to the story . . . especially when you consider that there are many federal Republicans actively trying to roll back something as benign as marriage equality in coming years.”³²⁶ However, as one activist stated, “. . . a good start is a good start.”³²⁷

Third, in the days following the massacre, a video was anonymously posted on social media under the name of Keep Dancing Orlando; the video includes central Florida businesses, firemen, police officers, school employees, theater groups, and ordinary citizens dancing to an upbeat, popular song.³²⁸ The video invites others to upload their own videos on social media.³²⁹ An avalanche of videos has since been posted on Facebook by groups ranging from the Zebra Coalition to the Orange County Comptroller’s Office, and from the University of Central Florida College of Medicine to the First Unitarian Church of Orlando.³³⁰ The Orange County’s Sheriff’s Department posted its video on July 1st; within five days, it had been viewed 2.9 million times.³³¹

The video demonstrates the way to face down terrorism and hate crime. In terrorism, the central focus is to leverage “the psychology of fear” by hitting the mental buttons of unfathomability and dread.³³² In

326. Williams, *supra* note 323. Mary Meeks, civil rights attorney and LGBT activist, questioned the specificity of the language and noted that one of the signatories, U.S. Representative John Mica, voted against the federal Employment Non-Discrimination Act. Weiner, *supra* note 216; *see also* Billy Manes, *OK, We’ll Bite: Rubio is Hosting an Anti-LGBT Event in Orlando Just Two Months After the Pulse Massacre*, WATERMARK ONLINE (July 29, 2016), <http://www.watermarkonline.com/2016/07/29/ok-well-bite-rubio-hosting-anti-lgbt-event-orlando-just-two-months-pulse-massacre> [<https://perma.cc/6QK5-JP97>] (critiquing a gathering in Orlando of anti-LGBT public figures on the two-month anniversary of the massacre).

327. Williams, *supra* note 323.

328. *Keep Dancing Orlando*, FACEBOOK, <https://www.facebook.com/KeepDancingOrlando> [<https://perma.cc/7JXC-MYW6>] (last visited Dec. 5, 2016) [hereinafter *Keep Dancing Orlando*]. The Orlando Sentinel reported that “[t]he video was created by Push, an Orlando-based digital creative firm that does a lot of work in advertising and public relations.” Matthew J. Palm, *Video’s Uplifting Message: Keep Dancing Orlando*, ORLANDO SENTINEL (June 22, 2016), <http://www.orlandosentinel.com/entertainment/arts-and-theater/the-artistic-type/os-keep-dancing-orlando-video-20160622-story.html> [<https://perma.cc/ZP8B-3N3V>].

329. *Keep Dancing Orlando*, *supra* note 328.

330. *Id.*

331. Bridgette Norris, *Watch the Orange County Sheriff’s Office Bust a Move for the “Keep Dancing Orlando” Challenge*, ORLANDO WEEKLY (July 5, 2016), <http://www.orlandoweekly.com/Blogs/archives/2016/07/05/watch-the-orange-county-sheriffs-office-bust-a-move-for-the-keep-dancing-orlando-challenge> [<https://perma.cc/GSR6-DNM4>].

332. PINKER, *supra* note 15, at 345–46. One definition of “unfathomable” is “impossible to comprehend.” *Unfathomable*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/unfathomable> [<https://perma.cc/A69P-S876>] (last visited, Nov. 9, 2016). It

hate crimes, fear creates loathing and objectification of others who are perceived to be different.³³³ Yet, the Keep Dancing Orlando movement sings out not to let the Pulse massacre set up stations of fear in individual and community psyches.³³⁴ The video is an anthem: it refuses to let the massacre immobilize us, to push LGBTQ and Latinx people back into spaces of hiding, or to rob us of the joy of living. It calls to the human spirit to celebrate every day of life and points the way to remember the 49.³³⁵ After all, they were dancing.³³⁶

can also be defined as “[i]ncapable of being fully explored or understood.” *Unfathomable*, OXFORD DICTIONARIES, <https://en.oxforddictionaries.com/definition/us/unfathomable> [<https://perma.cc/F2VS-SYZQ>] (last visited Nov. 7, 2016). Dread is defined as “[g]reat fear or apprehension.” *Dread*, OXFORD DICTIONARIES, http://www.oxforddictionaries.com/us/definition/american_english/dread [<https://perma.cc/87G6-S8XA>] (last visited Nov. 7, 2016). This article approaches the massacre as an immense hate crime. See text and accompanying notes *supra* Section II.

333. See text and accompanying notes *supra* Section II.

334. *Keep Dancing Orlando*, *supra* note 328.

335. See Thompson, *supra* note 116. A second-generation immigrant and gay man who grew up in Orlando advised, “I will never be safe, but I will forever be proud—of myself, of the family that brought me here, of anyone who can dance in the face of hate, and love in the face of anger.” *Id.*

336. See Alvarez & Madigan, *supra* note 14 (telling the story of one of the 49 victims, Franky Jimmy DeJesus Velazquez, who was a professional dancer devoted to the folkloric dance of *jibara*); see also Christal Hayes, *Pulse Survivor Dances for First Time After Being Shot Six Times*, ORLANDO SENTINEL (July 30, 2016, 11:15 PM), <http://www.orlandosentinel.com/news/pulse-orlando-nightclub-shooting/survivors/os-angel-colon-zumba-orlando-20160730-story.html> [<https://perma.cc/VQ8U-5Y8F>] (discussing Pulse nightclub survivor Angel Colon’s appearance at an Orlando Zumba convention, where he danced for the first time since the shooting).