

Informality, Illegality, and Inequality

Jane E. Larson[†]

The history of countless nations illustrates how borderland regions frequently depart from the norms of interior zones. . . . Isolation, weak institutions, lax administration, and a different economic orientation prompt people on the periphery to develop homemade approaches to their problems. . . .

INTRODUCTION: FROM THE PERIPHERY TO THE CENTER

The United States-Mexico border historically has been characterized by its isolation from the core of both nations. The United States side has viewed the border as a place of lawlessness, poverty, backwardness, and ethnic difference, physically and culturally distant from either the Midwestern “heartlands” or the urban “melting pots.”² Mexicans, too, traditionally dismissed their northern borderlanders as *pocho*,³ tainted by their proximity to the United States.⁴ Margaret Montoya captures the view from both sides: “Border towns everywhere are different, incorporating the characteristics of the nation-states they link together, but nowhere are they as distinct from their respective core zones as along the United States/Mexico border.”⁵

Once on the periphery of both nations, today the United States-Mexico bor-

[†] Professor, Law School, University of Wisconsin-Madison. The North American Program of the Land Tenure Center, the University of Wisconsin Law School, and the University of Wisconsin Graduate School provided generous research support for this project. The academic communities of the University of Michigan Law School, The University of California at Los Angeles, Seton Hall Law School, and Lat Crit VI heard and commented on earlier versions of this Article. Among the many people of Texas who invited me into their work I especially thank Rebecca Lightsey, Amada (Aidé) Villareal and Martha Bazán; David Hall and Donna Harvey; Blanca Juárez; David Arizmendi and Lydia González Arizmendi; Amy Johnson; Lee Maril; John Henneberger; and Peter Ward. Fran Ansley, Mauricio García Villegas, Harvey Jacobs, Guadalupe Luna, Art McEvoy, Stewart Macaulay, Elizabeth Mertz, Thomas Mitchell, Leslye Amede Obiora, Boaventura de Sousa Santos, Gene Summers, Gerald Torres, Lucie White, Joan Williams, and especially Heinz Klug and Berta Hernández-Truyol provided valuable insight and support.

1. OSCAR MARTÍNEZ, TROUBLESOME BORDER 2 (1988).

2. To repeat the assessment is not to accept it uncritically.

3. *Pocho* is also used by Spanish speakers in the United States to describe a Mexican-American who is overly Americanized in speech and culture. CHAD RICHARDSON, BATOS, BOLILLOS, POCHOS, & PELADOS: CLASS AND CULTURE ON THE SOUTH TEXAS BORDER 2 (1999).

4. “Americans are largely unaware that Mexicans also view their northern border with concern, and at times even alarm.” Martínez, *supra* note 1, at 1. Border communities, such as Ciudad Juárez and Tijuana have long been criticized from Mexico City and the interior for their close ties to the United States. *Id.*

5. Margaret E. Montoya, *Lines of Demarcation in a Town Called Frontera: A Review of John Sayles’ Movie Lone Star*, 27 N.M. L. REV. 223, 223 (1997).

der is the vanguard of each country's experience of globalization.⁶ As the global context overtakes the nation-state, it is at the nation's points of contact with the world—the margins, the edges, the boundaries—that the global becomes local. In the borderlands we are witnessing the invisible hands and virtual realities of globalization manifest as material social forms.

Boaventura de Sousa Santos calls this process “localized globalism,” or “the specific impact of transnational practices and imperatives on local conditions that are thereby destructured and restructured in order to respond to transnational imperatives.”⁷ The free-trade enclave of the *maquilas* is one familiar localized globalism found at the border.⁸ Santos distinguishes such localized globalism from “globalized localism,” or “the process by which a given local phenomenon is successfully globalized,” such as the emergence of the English language as an international language of business or the worldwide spread of American music, fashion, and fast food.⁹

This idea of a plurality of “globalisms” helps explain an apparent paradox: Why has the border's emergence as an important region for investment and policy not transformed its social and economic marginality within the national context? If one common idea of globalization is that the process unifies or homogenizes the world (“the global village”), Santos contends instead that globalization replicates existing patterns of power and influence, with the core countries specializing in globalized localisms and the peripheral countries in

6. The popular understanding of globalization tends to emphasize its economic impact, even to the point of translating globalization as the worldwide ascendancy of capitalism. See, e.g., THOMAS FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* 308 (1999) (“With the end of the Cold War, globalization is globalizing Anglo-American-style capitalism”) See also PIERRE BOURDIEU, *ACTS OF RESISTANCE: AGAINST THE TYRANNY OF THE MARKET* 34-38 (1998) (noting that the idea of globalization “ratifies and glorifies the reign of what are called financial markets, in other words the return of a kind of radical capitalism, with no other law than that of maximum profit, an unfettered capitalism without any disguise, but rationalized, pushed to the limit of its economic efficacy by the introduction of modern forms of domination.”) Other definitions, however, reflect the wide-ranging expressions of globalization in political, normative, social, and cultural realms. DAVID HELD ET AL., *GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS AND CULTURE* (1999) defines globalization as fundamental change in the terms and context of social relations, “a process (or set of processes) which embodies a transformation in the spatial organization of social relations and transactions—assessed in terms of their extensity, intensity, velocity and impact—generating transcontinental or interregional flows and networks of activity, interaction, and the exercise of power.” *Id.* at 16. Anthony Giddens characterizes globalization processes as “the intensification of worldwide social relations which link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa.” *THE CONSEQUENCES OF MODERNITY* 64 (1990). Boaventura de Sousa Santos's work emphasizes globalization's local effects. See *TOWARD A NEW COMMON SENSE: LAW, SCIENCE AND POLITICS IN THE PARADIGMATIC TRANSITION* 258-68 (1995).

7. Boaventura de Sousa Santos, *Toward a Multicultural Conception of Human Rights*, 18 *ZEITSCHRIFT FÜR RECHTSZOLOGIE* 1, 4-5 (1997). An expanded version of this essay under the same title is found in *MORAL IMPERIALISM: A CRITICAL ANTHOLOGY* (Berta E. Hernández-Truyol, ed., forthcoming 2001).

8. Other localized globalisms are deforestation and depletion of natural resources to pay for the foreign debt; touristic use of historical treasures, wildlife, religious sites or ceremonies, and folk arts and crafts; ecological dumping; conversion of sustainable agriculture into export agriculture as part of structural adjustment; and the ethnicization of the workplace. *Id.*

9. *Id.*

Informality, Illegality, and Inequality

localized globalisms.¹⁰ To extend his point, if the United States' southern border historically was an internal Third World, its experience of globalization can be predicted to reinscribe its role on the periphery.

This prediction holds true. Notwithstanding economic development, the liberalization and intensification of trade, and strategic geographical location, the southern border is among the poorest regions of the United States.¹¹ More than half of that international boundary links Mexico with the State of Texas, and this is the most populated and economically vital stretch, with large trans-border urban areas at Brownsville/Matamoros, McAllen/Reynosa, Rio Grande City/Camargo, Laredo/Nuevo Laredo, and El Paso/Ciudad Juárez.¹² In recent years, the Texas sides of these "twin cities" have been among the fastest growing areas in the United States. Between 1990 and 2000, the county surrounding McAllen grew 48.5%, the county surrounding Laredo grew 44.9%, the county surrounding Rio Grande City grew 32.3%, the county surrounding Brownsville grew 28.9%, and the county surrounding El Paso grew 14.9%.¹³ Yet as the border region grows, its poverty only increases. Thirty-five percent or more of people living in the counties containing these burgeoning cities are poor, with poverty rates for children 10% or more higher than the overall poverty rate.¹⁴ (This compares to 16.7% of people in poverty for the State of Texas (23.6% of children),¹⁵ and 13.3% in poverty for the nation as a whole.)¹⁶ In 1980, by contrast, only 28% of people in these counties were poor.¹⁷ A state official aptly captures the seeming paradox of the border's development as "growth without prosperity."¹⁸

10. Santos is invoking world systems theory, which divides the world into core and peripheral areas. World systems theory argues that peripheral areas are drawn into modern economic relations with the core on terms that favor the core. See IMMANUEL WALLERSTEIN, *THE CAPITALIST WORLD-ECONOMY* 162 (1979).

11. See *infra* text accompanying notes 14-16. By comparison, the northern border of Mexico is a relatively prosperous region of that country.

12. Nearly all people at the border are congregated in twin cities, urban areas that are physically contiguous to one another on the opposite sides of the boundary line. Roberto Ham-Chande & John R. Weeks, *A Demographic Perspective of the U.S.-Mexico Border*, in *DEMOGRAPHIC DYNAMICS OF THE U.S.-MEXICO BORDER* at 1, 9 (John R. Weeks & Roberto Ham-Chande eds., 1992).

13. U.S. CENSUS BUREAU, *STATE AND COUNTY QUICK FACTS* (2000), available at <http://www.census.gov/servlet/BasicFactServlet> (Sept. 27, 2001) [hereinafter CENSUS BUREAU].

14. In Cameron County (Brownsville), 35.3% of people and 45.2% of children are in poverty. *Id.* In Hidalgo County (McAllen), 37.6% of people and 47.9% of children are in poverty. *Id.* In Starr County (Rio Grande City), 46.7% of people and 56.4% of children are in poverty. *Id.* In Webb County (Laredo), 32.6% of people and 42.3% of children are in poverty. *Id.* In El Paso County (El Paso), 27.8% of people and 38.6% of children are in poverty. *Id.* These are 1997 model-based estimates, the most recent available.

15. *Id.*

16. *Id.* Nineteen percent of the nation's children are in poverty. *Id.*

17. See LYNDON B. JOHNSON SCHOOL OF PUBLIC AFFAIRS, *COLONIA HOUSING AND INFRASTRUCTURE, CURRENT CHARACTERISTICS AND FUTURE NEEDS, POLICY RESEARCH PROJECT REPORT NO. 124*, at 10 (1997) [hereinafter *COLONIA HOUSING AND INFRASTRUCTURE*].

18. The phrase comes from *BORDERING THE FUTURE, REPORT OF TEXAS STATE COMPTROLLER OF PUBLIC ACCOUNTS* (July 1998), available at <http://www.window.state.tx.us/border/border.html>.

Among the border's "homemade approaches"¹⁹ to this growth without prosperity has been the emergence of informal housing—unregulated settlements known in the region as "colonias." In regional usage, a "colonia" is a semi-rural subdivision of substandard housing that lacks basic physical infrastructure, in particular, clean water, sanitary sewage or adequate roads.²⁰ More than 1500 colonias have been identified within the United States,²¹ virtually all of them in Texas.²² Colonias cluster around the state's booming border cities, with 75% of the colonia population living in the counties surrounding Brownsville, McAllen, Laredo, and El Paso, Texas.²³

Colonias are part of the large, growing and yet little-studied informal economy in the United States. Informal economic activity takes place outside the structures of governmental regulation, in particular labor, tax, health and safety, land use and environmental, civil rights, and immigration laws. Most colonia settlements are extra-legal rather than illegal: When residents and developers created existing colonias, subdivision and sale of rural land for residential construction without provision of basic infrastructure or access to public services was lawful, and no building codes set housing standards. Yet where the state fails to regulate activities that in other settings are regulated according to accepted patterns, a kind of informality develops, albeit one built on legal and material nonconformity rather than illegality.²⁴

One can observe informal housing production in the colonia pattern everywhere in urban areas of the developing world: In the *Distrito Federal* surrounding Mexico City, for example, more than 40% of the population live in *colonias populares* (popular housing) or *fraccionamientos ilegales* (illegal subdivisions).²⁵ Similar percentages are found elsewhere: "If we consider land

19. See the epigraph by Oscar Martínez. *Supra* note 1 and accompanying text.

20. The word in Spanish means simply "neighborhood," but has acquired the regional meaning described in the text. The term now also has a legal definition that emphasizes border location and substandard conditions. TEX. GOV'T CODE ANN. § 775.001(2) (Vernon Supp. 2001); TEX. WATER CODE ANN. § 17.921(1) (Vernon 1999).

21. This Essay focuses on informal housing settlements inside the United States. There are also thousands of such settlements along the Mexican side of the border. AUGUSTA DWYER, ON THE LINE: LIFE ON THE U.S.-MEXICAN BORDER 2-5, 49-65 (1994). See generally LUIS ALBERTO URREA, ACROSS THE WIRE: LIFE AND HARD TIMES ON THE MEXICAN BORDER (1993); LUIS ALBERTO URREA, BY THE LAKE OF SLEEPING CHILDREN: THE SECRET LIFE OF THE MEXICAN BORDER (1996).

22. There are 1495 officially designated colonias within Texas. TEX. WATER DEV. BD., WATER AND WASTEWATER SURVEY OF ECONOMICALLY DISTRESSED AREAS—DECEMBER 1996, available at <http://www.tdwb.state.tx.us> [hereinafter TDWB REPORT—DECEMBER 1996]. The U.S. government has identified about 15 other colonias in Doña Ana County, New Mexico, part of the El Paso-Las Cruces metropolitan region. U.S. GENERAL ACCOUNTING OFFICE, GAO/RCED-91-37, RURAL DEVELOPMENT: PROBLEMS AND PROGRESS OF COLONIA SUBDIVISIONS NEAR MEXICO BORDER 1 (Nov. 1990) [hereinafter GAO REPORT].

23. 1 COLONIA HOUSING AND INFRASTRUCTURE, *supra* note 17, at 1.

24. The definition used here is supported by leading theorists of informality, see, e.g., Manuel Castells & Alejandro Portes, *World Underneath: The Origins, Dynamics, and the Effects of the Informal Economy*, in *THE INFORMAL ECONOMY: STUDIES IN ADVANCED AND LESS DEVELOPED COUNTRIES* 3, 12 (Alejandro Portes & Manuel Castells et al. eds., 1989) [hereinafter THE INFORMAL ECONOMY].

25. William A. Doebele, *Land Policy*, in *SHELTER, SETTLEMENT, AND DEVELOPMENT* 110, 127

Informality, Illegality, and Inequality

tenure, infrastructure requirements and building standards, we find that an average of 40% and in some cases as much as 70% of the population of the major cities are living in illegal conditions.”²⁶ Thus, most urban housing worldwide develops outside of formal law and markets, either by means of land seizure or squatting, or by nonconforming subdivision that falls short of regulatory standards.

Regardless of location, housing production in the informal sector centers upon four principles: (1) the occupants do most of the work to construct a house (often the terms “self-help” or “self-built” housing are used); (2) constructed housing takes a nonstandard form; (3) the settlements or subdivisions into which the housing is clustered are illegal or nonconforming; and (4) the financing for housing production comes from private capital invested outside of formal credit markets or institutions.²⁷

Sociologists and anthropologists seek to capture the essence of informality by focusing on its social particularities, observing, for example, operations that are “small scale, labor intensive, requiring little capital, and locally based.”²⁸ These scholars observe that women, immigrants, and people of color are over-represented in the informal economy, presumably because they are vulnerable to exclusion from the formal economy.²⁹ Unpaid family labor, including child labor, is common.³⁰

To date, informal housing has been studied almost exclusively as a phenomenon of the developing world and not of the United States.³¹ Informal housing is hardly recognized as a fact in this country,³² much less treated in state policy as a legitimate means of housing production. Yet within our borderlands, more than 400,000 people now live in the informal housing settle-

(Lloyd Rodwin, ed., 1987) (citing United Nations estimates of 40% in 1980).

26. Edésio Fernandes & Ann Varley, *Law, the City and Citizenship in Developing Countries: An Introduction*, in *ILLEGAL CITIES: LAW AND URBAN CHANGE IN DEVELOPING COUNTRIES* 3, 3 (Edésio Fernandes & Ann Varley, eds. 1998) [hereinafter *ILLEGAL CITIES*] (citing A. DURAN-LASSERVE & V. CLERC, *REGULARIZATION AND INTEGRATION OF IRREGULAR SETTLEMENTS: LESSONS FROM EXPERIENCE* (World Bank, UMP Working Paper No. 6 (1996))).

27. Adapted from a typology developed in MANUEL CASTELLS, *THE CITY AND THE GRASSROOTS: A CROSS-CULTURAL THEORY OF URBAN SOCIAL MOVEMENTS* 188-89 (1983).

28. Stuart Henry, *The Political Economy of Informal Economies*, 493 *ANNALS, AM. ACAD. POL. SOC. SCI.* 137, 140 (1987).

29. Castells & Portes, *supra* note 24, at 12, 25. For example, there is a close association between areas of high immigrant concentration and those places where the U.S. informal sector is most vigorous. *Id.*

30. See, e.g., HENRY A. SELBY ET AL., *THE MEXICAN URBAN HOUSEHOLD: ORGANIZING FOR SELF-DEFENSE* (1990).

31. The international literature on informal housing is large. A useful introduction and review is CATHARINE FARVACQUE & PATRICK MCAUSLAN, *REFORMING URBAN LAND POLICIES AND INSTITUTIONS IN DEVELOPING COUNTRIES* (1992).

32. *But see* PETER M. WARD, *COLONIAS AND PUBLIC POLICY IN TEXAS AND MEXICO: URBANIZATION BY STEALTH* (1998); Jane E. Larson, *Free Markets Deep in the Heart of Texas*, 84 *GEO. L.J.* 179 (1995); Guadalupe T. Luna, *Agricultural Underdogs and International Agreements: The Legal Context of Agricultural Workers Within the Rural Economy*, 26 *N.M. L. REV.* 9, 28-37 (1996).

ments known as colonias.³³ Further, growing evidence indicates that colonia-type development is beginning to move away from the border into other parts of Texas where low-wage labor, urbanization pressure, inadequate housing, cheap land, and minimal land use regulation come together.³⁴ Peter Ward speculates that similar patterns of informal settlement and housing provision may already exist throughout the United States, but that researchers have neither looked for such settlements, nor understood their character or significance when researchers came upon them.³⁵

In an earlier work on the colonias, I predicted that working poor households in the United States increasingly would turn to informal housing in order to survive the lack of basic social provision, in particular the squeeze between falling real wages and declining governmental support for either affordable housing or income maintenance.³⁶ This economic “squeeze” has only tightened throughout the 1990s, as policies of trade liberalization and government restraint in social welfare spending (all part of the globalization agenda) took hold. The growth of colonias in Texas during these years provides further evidence that informal housing production has emerged as a strategy for economic survival inside the United States.

This essay extends that analysis, situating the growth of informal housing within the broader context of globalization, and predicting that informal housing will continue to expand within the United States, moving beyond the borderlands. If this proves true, the confounding problems of informality, like the phenomenon itself, will move from the borderlands to the heartlands, and into the mainstream of legal and policy debate. In anticipation of these developments, this essay examines the confounding relationship between informality and the law.

The essay argues that fundamental values of legal culture stand in the way of a productive engagement with informality in the United States. Informality contradicts legality, and especially equality, as we conceive these values. From

33. According to state agencies, 392,188 people live in officially designated colonias within Texas. TDWB REPORT—DECEMBER 1996, *supra* note 22. Much smaller populations live in comparable settlements in Doña Ana County, New Mexico, part of the El Paso-Las Cruces metropolitan region. In 1990, the General Accounting Office estimated the New Mexico colonia population to be 14,600 people. GAO REPORT, *supra* note 22, at 1. These are official estimates; the population is likely larger. Jorge Chapa et al., *Enumeration, Housing Characteristics and Sampling Rates in the Colonias of the Texas Border Area: A Perspective on Census Data*, BUREAU OF THE CENSUS, RES. CONF. ON UNDERCOUNTED ETHNIC POPULATIONS, PROC. 247 (Washington, D.C.) (stating that colonia populations are likely to be undercounted in census and other official counts).

34. A handful of colonias have been identified hundreds of miles away from the border near the Texas cities of Houston and Austin. See LBJ SCHOOL OF PUBLIC AFFAIRS, RESIDENTIAL LAND MARKET DYNAMICS, ABSENTEE LOT OWNERS AND DENSIFICATION POLICIES FOR TEXAS COLONIAS 3 (2000).

35. For example, settlements of mobile and manufactured homes may be the colonia equivalent in other regions of the country. Ward suggests we should begin speaking more generically of “substandard subdivisions,” rather than the regionally specific “colonia.” Interview with Peter Ward, LBJ Sch. Pub. Aff., U. Tex., Austin, Tex. (Oct. 11, 1999).

36. See Larson, *supra* note 32, at 246.

Informality, Illegality, and Inequality

within this tradition, informality is an abuse of law, as well as tolerance of exploitation and inequality. Accordingly, informality creates the best argument for stepped-up regulation.

But under conditions of economic inequality, do ambitious and absolute regulatory standards advance or frustrate social justice? Legal scholars who wrestle with questions of poverty are just beginning to recognize this question as unavoidable.³⁷ This essay spotlights these preliminary and cautious inquiries, and generalizes their significance. It presents a converging critique of unattainable standards naming existing models of regulation as one reason the poor cannot provide for their basic needs. If these conventional legal strategies are not re-examined in light of the widening disparities of wealth that accompany a globalizing economy, the United States may be unable to avoid making unproductive, indeed unjust, policy even as informality grows.

This essay urges that regulatory policy in the United States support and neither punish nor prohibit those who shelter themselves informally. Following established terminology from the international literature, this strategy is termed “regularization.” Regularization is not a policy of wholesale deregulation. Nor does it imply negotiated or discretionary enforcement of rules that otherwise remain in general force. Instead, regularization scales back regulatory standards for some populations, and “legalizes” some illegal housing conditions, in a program aimed at encouraging self-help investment in shelter.

No level of government in this country follows a policy of regularization, and to get there from here would require changes in conventional political thinking as well as innovative reforms in law. Conventional regulation establishes universal standards and obliges full and immediate compliance. Regularization, in contrast, sets standards relative to the means available to the regulated, and enables flexible and general compliance, with the goal of progressive improvement rather than immediate, full and universal compliance. Regularization is an alternative regulatory strategy pioneered in the developing world and designed for conditions of extreme economic constraint.

What stands between the United States and such a policy? There will be debates about whether regularization, or one of the established choices of regulation or deregulation, is the best policy choice. This essay focuses instead on the meta-level barriers to considering any alternative to these established choices. Do “progressive” or “flexible” modes of regulation violate fundamental norms, specifically those of legality and equality, meaning these alternative approaches could not be translated into the legal system of the United States?

As this essay casts the conflict, these are theoretical problems. But like most legal issues, the conflict appears most vividly and urgently in practical form. Accordingly, after setting out the theoretical tensions between legality,

37. See *infra* text accompanying notes 138-151.

equality, and a progressive policy of regularization, this essay telescopes down into a tight frame on a specific policy issue: Should the regulatory regime of building codes be applied to the Texas colonias? The essay examines a published exchange that I had with Richard Delgado on this question. Delgado believes that to accept lesser regulatory standards in the name of pragmatism or opportunity may lend law's imprimatur to inequality. Thus, alternative models like regularization carry an unacceptable price. This essay reaffirms a critique of unattainable standards. To hold to formal equality in economic regulatory standards and enforcement will harshly burden those already hardest pressed to survive the new economic order.

This essay then expands out again, seeking to generalize the attributes of the regularization policy in order to identify a new model for regulation under conditions of extreme economic constraint, with the goal of finding a legal technology appropriate for regulating the informal economy. For this purpose, I borrow the "progressive realization" structure from international human rights law as a new regulatory form. Progressive realization commits government and the regulated to standards of adequate housing, but demands in compliance no more than that the regulated commit the maximum available resources. This is the meaning of equality under the alternative model. Compliance is always possible under the "maximum available resources" rule, and progress toward the standard always demanded by the "progressive realization" rule. This is the meaning of legality under the alternative model.

This essay proposes to build a domestic program for regulating housing quality and land development around the progressive realization of standards. Such a program would better balance the regulatory burden on diverse populations, the public interest in adequate housing, and an aspirational commitment to elevating living standards in pursuit of social equality. Linked to a comprehensive program of regularization, progressive realization places law behind, rather than against, the activities of informals, without sacrificing legality or equality.

Progressive realization is not an easy idea to incorporate into our legal tradition. Indeed, the United States has not adopted the international agreement that created the concept,³⁸ arguing that an obligation that creates anything short of absolute and immediate compliance is not really "law."³⁹ Granting the conceptual unfamiliarity of progressive realization, informality, too, is an unfamiliar problem. At the least, we must consider new legal strategies. For to consider how law should respond to informality is to face a basic question of political strategy in the brave new world of globalization: What does economic survival, not to mention social emancipation, look like for those people simultaneously

38. The International Covenant on Economic, Social and Cultural Rights, Dec. 19, 1966, 993 U.N.T.S. 3, 5.

39. See *infra* text accompanying note 215.

Informality, Illegality, and Inequality

at the vortex of global restructuring and yet marginalized within its new circuits of power?

I. COLONIAS AS INFORMAL HOUSING PRODUCTION.

There is no typical colonia; living conditions vary greatly depending on differences in age, size, location, service provision, security of land tenure and title, housing consolidation, settlement density, and community solidarity. But there are commonalities, defined importantly by the ways in which these settlements depart from the norms established by regulation in the United States for land and housing development, and by formal markets for housing finance and production. So, too, colonias follow the same dimensions of nonconformity as informal housing settlements throughout the world. Thus, colonias are not an ad hoc aberration peculiar to our borderlands, but rather a patterned alternative to what the United States knows as the “normal” practices of housing development. The following section explores this pattern of housing development, and how it is expressed in the colonias.

Typically, informal housing settlements grow on cheap land at the distant periphery of urban centers. Residents may bypass law altogether and squat on the land, or purchase lots from developers in illegal or otherwise nonconforming subdivisions. In either case, settlers and developers follow a conscious strategy of avoiding regulation. Nonconformity with law is a means of gaining access to land not otherwise available for development, and access to housing not otherwise affordable for the settler population.

Upon acquiring land, the settlers move quickly to construct temporary housing. Any improvements on the land, however provisional, manifest the settlers’ determination, despite legal uncertainties, to retain the land and develop it as housing. This “signaling” begins a nuanced political negotiation with the government and with public opinion. At this stage, the new occupants cannot claim good title, leaving their investment of time, labor, money and materials vulnerable. Yet, they must risk enough to force a political accommodation of their interests. Their goal is to prevent public authorities from enforcing existing regulations to evict, block the settlement, or control building patterns, or moving to enact new rules that would increase shelter costs before the residents have time to build.

After settlers make an initial claim by establishing and occupying a temporary shelter, the household begins the slow process of “consolidating” a permanent dwelling. Settlers typically build piecemeal, with the household providing both labor and capital. Self-builders usually have some construction skills, but not always technical expertise: When they build, they often use nonstandard materials, a shell of an existing structure of uncertain quality (such as a trailer or a shack), or improvised plans. As incremental construction progresses, money and time pressures may lead to further down-sizing or cutting of cor-

ners. Settlers purchase materials as money becomes available; when money is tight, the work stops. This kind of housing construction can take many years to complete, and families often live in provisional housing on a semi-permanent basis.⁴⁰ The resulting permanent structures rarely meet conventional building codes, and may endanger the family's safety and health. The speed of housing consolidation depends, obviously, upon household income, but also upon security of tenure⁴¹ and the rate at which public services such as water and wastewater come on line.⁴² Where land costs are high or are increasing, a newly-settling household may never "graduate" from a temporary to permanent shelter, and housing quality deteriorates further.

Due to their unregulated character, informal settlements, at their inception, usually lack access to water and sewer hookups, leading to improvised and inadequate solutions for the storage of drinking water, and the disposal of human waste. Perhaps more than any other aspect of nonconformity, water and waste problems threaten family and public health.

Depending on governmental policy, informal settlements may or may not gradually "regularize," shedding their illegal or nonconforming status and acquiring basic services and infrastructure. Regularization policies typically involve two components: Juridical or legal regularization clears or confers formal legal title to the land, and physical regularization provides infrastructure and access to public services. If the land was squatted or otherwise acquired without purchase, the government must step in to acquire the land by voluntary sale or eminent domain, and thereby establish the legal basis for transfer of title to individual lot-holders. Where land was purchased but the development does not conform to applicable land use regulations, the developer and/or settlers must bring the settlement into conformity or get it excepted from the law, or the government must change the law itself to reflect the reality.

Either coincident with or following legal regularization, governments may physically regularize the settlement by gradual provision and upgrading of a basic level of public services such as drinking water, sewage, street lighting, police and fire protection, roads, transportation links, etc. Some governments also facilitate housing consolidation as part of regularization programs, providing subsidized credit, technical support, and access to materials for self-builders/owners.⁴³

40. See Peter Ward, *The Practice and Potential of Self-Help Housing in Mexico City*, in SELF-HELP HOUSING: A CRITIQUE 175 (Peter Ward ed., 1982).

41. As used in this essay, the term "tenure" refers to the mode or system of holding lands or an interest in real property. Secure tenure, therefore, is the right to hold land that is recognized by the state and can be defended effectively against other claimants.

42. There is debate in the international development literature about the extent to which secure legal title is a predictor of housing investment in informal housing. See generally Stephen E. Hendrix, *Myths of Property Rights*, 12 ARIZ. J. INT'L & COMP. L. 183 (1995); Ann Varley, *The Political Uses of Illegality: Evidence from Urban Mexico*, in ILLEGAL CITIES, *supra* note 26, at 172-90.

43. For a detailed description of varying regularization approaches, see ALAN GILBERT & PETER

Informality, Illegality, and Inequality

This approach to housing production reverses what residents of the developed world know as the “normal” sequence of land and housing development, which begins with planning, followed by servicing, and concluding with housing construction. In informal housing, the homebuilding comes first, and everything else follows.

The Texas colonias developed by this pattern. A regulatory vacuum existed until 1995, allowing the development of substandard subdivision and self-building.⁴⁴ Rural land fell within the jurisdiction of counties rather than nearby municipalities. The State of Texas had traditionally delegated few powers to county governments to regulate either subdivision or housing quality, and denied the counties any power to plan or zone. Thus, developers acted entirely within the law when they bought and subdivided agricultural land outside (but close to) border cities, offering unimproved half- and quarter-acre parcels for sale to families willing to build their own shelter and do without piped water, flush toilets, and paved roads.⁴⁵ Developing a colonia in this legal setting meant little more than buying a field, drawing a grid, grading a few dirt roads, and opening a sales office.

Since 1995, Texas has tightened subdivision requirements with the express aim of blocking new colonias and growth in existing settlements. Most colonia subdivisions now existing developed in the pre-1995 period, although new buyers continue to move into empty lots in established subdivisions. Developers have added few new subdivisions under the post-1995 rules; simply put, the stricter regulations have priced the buyer population out of the market.

To date, housing quality in colonias remains unregulated. Most self-builders strive to achieve a brick- or concrete-block bungalow surrounded by a fence with access to water, wastewater, and electricity.⁴⁶ Yet the incremental process of owner-construction often begins with a provisional shelter in the form of a used trailer or mobile home, or a shack. Such shelter is often unsafe, overcrowded, or otherwise inadequate to family needs. The family slowly constructs the permanent structure nearby or even around the shell of the provisional structure. Lack of adequate water or sewer service undermines housing

M. WARD, *HOUSING, THE STATE AND THE POOR: POLICY AND PRACTICE IN THREE LATIN AMERICAN CITIES* (1985). See also sources cited *supra* note 26.

44. Within city boundaries Texas law conventionally regulates housing development, with requirements for provision of public services and infrastructure and for housing quality. This is true even of Houston, notable as the only large city in the United States that does not have conventional planning or zoning. See Larson, *supra* note 32, at 181-82 & n.11.

45. For a detailed account of the regulatory setting in which the Texas colonias emerged, see *id.* at 197-205. In some transactions, developers fraudulently promised buyers future access to water, sewer, and other services and infrastructure. See *id.* at 193-94. In the greater proportion of sales, however, buyers were fully aware of the tradeoff they were being offered. *Id.* at 194-95. Research suggests they did so with the expectation that the government could be politically mobilized at some future date to meet community infrastructure needs. *Id.* This expectation is based in part on familiarity with the housing policies and practices of Mexico, in which regularization of informal housing is the norm. *Id.*

46. *Id.* at 191-93.

quality. The resulting poor environmental conditions spread diseases such as dysentery, diarrhea, hepatitis, and cholera. Residents without water or sewer hookups improvise by drilling shallow wells, purchasing water and storing it, or taking water from nearby irrigation ditches. Human waste may be disposed of in a pit privy, outhouse, or by septic system.⁴⁷

While the regulatory climate favored development, colonias grew exponentially. Researchers have traced the first colonias in Texas to the 1950s and early 1960s, but physical isolation made these early settlements largely invisible for many years. Colonias grew at a steady pace throughout the 1970s, but their rate of growth exploded in the 1980s. The state first attempted to survey colonia populations in the late 1980s, but did not attempt a population count.⁴⁸ In 1990 the General Accounting Office, a research arm of Congress, reported 198,000 residents in 842 colonias located in six Texas border counties.⁴⁹ By 1993 the count was 250,000-300,000 people in 1100 colonias,⁵⁰ and by 1996, 340,000 people in more than 1400 settlements.⁵¹ The 2000 Census counts will likely reveal further growth, notwithstanding the no-growth policies in force.

During these years of open development before the 1995 moratorium, quarter-to-half-acre colonia lots cost an average \$100 down and \$50-\$150/month for an ultimate purchase price of \$10,000-\$12,000. Sellers conveyed lots by means of contract for deed, an installment arrangement for the purchase of land similar to a "rent-to-own" arrangement, offering seller financing backed by the powerful remedy of forfeiture.⁵² Interest rates were high, averaging 12 to 14%. The contract for deed mechanism worked by creating a source of financing for very low-income buyers otherwise priced out of formal credit markets.⁵³ Median household income in the Texas counties with concentrated colonia development ranges from \$14,000 to \$26,000,⁵⁴ about half of the

47. *Id.* at 185-91.

48. TEX. DEPARTMENT OF HUMAN SERVICES, THE COLONIAS FACTBOOK 1-4 tbl.1a (1988).

49. GAO REPORT, *supra* note 22.

50. Chapa et al., *supra* note 33, at 247.

51. TDWB REPORT—DECEMBER 1996, *supra* note 22.

52. The buyer takes immediate possession of the property and begins to make monthly payments, but does not get legal title or realize any equity in the property until the final installment has been paid. Should the buyer miss a payment, the seller can retake possession of the property, retain all payments previously made, and also resell the forfeited property at full price to another buyer.

53. In addition to offering financing, colonia developers shaped their collections practices to the local economy, offering contract-for-deed buyers flexibility in monthly payments. This is not typical business practice for formal credit institutions, including governmental lenders who target their programs towards low-income borrowers. Such flexibility is necessary for the significant part of the colonia population who earn income only seasonally and/or migrate for work with long absences from home. For their part, developers may be all too willing to delay payments, which simply allows them to earn interest on interest. It is not uncommon for a colonia buyer to make payments for years only to find he or she owes more than the original amount of the debt.

54. Median household income (estimated for 1997, the most recent figures available) for Cameron County (Brownsville) is \$21,699, for Hidalgo County (McAllen) is \$20,034, for Starr County (Rio Grande City) is \$14,178, for Webb County (Laredo) is \$23,386, and for El Paso County (El Paso) is \$25,866. CENSUS BUREAU, *supra* note 13.

Informality, Illegality, and Inequality

per-capita income for the rest of the nation.⁵⁵

In recent years, the state⁵⁶ and federal⁵⁷ governments have moved to provide water and wastewater service to existing colonias. These projects bring public services to many settlements, in particular the largest, most populous and easily accessible colonias. But at current funding levels, as many as 40% of residents of existing colonias may never be reached.⁵⁸ With the remedial focus on physical dimensions of these substandard settlements that cause broader environmental, public health and sanitation problems, other more localized deprivations that plague colonia residents, such as lack of garbage collection, street lighting, storm sewers and other flood control, and fire and emergency protection, have not been a policy priority. Services that would draw the colonias into the political and economic life of the municipalities they surround also have not been pursued, notably street paving or provision of public transport. Programs to address the social marginality and poverty of colonia residents exist, if at all, mostly through the efforts of non-governmental organizations. Even the legal definition of “colonia” adopted in Texas law focuses on inadequacy of water supply or sewer service, and not the other indicia of deprivation typical of a substandard subdivision.⁵⁹

With the problem thus constructed as a technical one of bringing in water and wastewater, and with future growth stopped, government officials can insist they are spending tax dollars to address a one-time emergency. Colonia policy in Texas does not represent any ongoing policy commitment to housing the poor. Government accepted the need to provide water and wastewater aid to existing communities only, and only on condition that local governments pre-

55. Median household income for the United States in 2000 is \$42,148. U.S. BUREAU OF THE CENSUS, MONEY INCOME IN THE UNITED STATES: 2000 (2001) (data from the annual income supplement to the Current Population Survey). The federal government considers a family of five to be in poverty if household income is less than \$20,819, and for a family of six, \$23,528. CENSUS BUREAU, *supra* note 13.

56. In 1989, the Texas legislature created the Economically Distressed Areas Program (“EDAP”), a project administered by the Texas Water Development Board. TEX. WATER CODE ANN. §§ 17.921-935 (Vernon 2000). The program provides financial assistance to bring water and wastewater services to areas such as colonias. The price tag for EDAP has gradually increased, with \$600 million in public money already pledged, and another \$400-500 million estimated as needed but not yet appropriated.

57. The Cranston-Gonzales National Affordable Housing Act of 1990 requires that the state set aside 10% of its Community Development Block Grant (CDBG) allocation towards projects for colonia areas located within 150 miles of the U.S.-Mexican border. Now called the CDBG Colonia Fund, the 10% set-aside is permanent. More than 75% of these funds are being used to provide water and wastewater system improvements. 1 COLONIA HOUSING AND INFRASTRUCTURE, *supra* note 17, at 76-77 & tbl 4.2.

58. TDWB REPORT—DECEMBER 1996, *supra* note 22.

59. According to Texas statute, “‘Colonia’ means a geographic area that: (A) is an economically distressed area. . . ; and (B) is located in a county any part of which is within 50 miles of an international border.” TEX. GOV’T. CODE ANN. § 775.001(2) (Vernon 2001). “‘Economically distressed area’ means an area in which: (A) water supply or sewer services are inadequate to meet minimal needs of residential users. . . ; (B) financial resources are inadequate to provide water supply or sewer services that will satisfy those needs; and (C) an established residential subdivision was located on June 1, 1989. . . .” TEX. WATER CODE ANN. § 17.921(1) (Vernon 2000).

vent any future colonia growth through demanding regulation and aggressive enforcement. For example, a water and wastewater project cannot receive funding if its home county has not adopted model subdivision rules.⁶⁰ By these model rules, no new residential subdivision may be approved without the developer providing access to water, sewage, and drainage before selling any lot.⁶¹ Now, counties have the power to cancel an already-approved subdivision if it is likely to be developed without infrastructure, and to require replatting⁶² under the tougher new rules.⁶³

Thus, the new colonia regulatory package has two goals: stopping new growth and modestly regularizing the physical configuration of existing settlements. The government openly aims the no-growth component at colonias, and not at regulating real estate development more generally. The tougher development requirements apply *only* to colonias and *only* in the border region,⁶⁴ leaving the rest of Texas free to pursue its historic hostility to land use regulation.⁶⁵ Away from the border, rural development in Texas remains virtually unregulated, and neither developers nor buyers of land and housing in these areas bear the burden of higher costs associated with the new standards.

II. THE HIGH COST OF OPPORTUNITY

Informality is a strategy by which people exploit themselves as a means of creating economic opportunity not otherwise available. This is a disconcerting concept, particularly when voiced in a celebratory, as opposed to critical, tone. The lack of economic opportunity for which informality compensates often results from discriminatory exclusion or marginalization. Women, immigrants, and people of color, for example, are overrepresented in all sectors of the informal economy because they are vulnerable to exclusion from the formal economy.⁶⁶

Consistent with this pattern, non-whites, the poor, and immigrants dominate

60. TEX. WATER CODE ANN. § 17.924 (Vernon 2000).

61. TEX. LOC. GOV'T CODE ANN. §232.023 (Vernon 2001). The Model Subdivision Rules, TEX. WATER CODE ANN. §16.343 (Vernon 2000), require that land subdivided into lots of five acres or less (modified from one acre or less in 1991) must provide adequate water and sewer infrastructure.

62. To "plat" a subdivision means to create a map that shows the location and boundaries of individual parcels of land subdivided into lots, with streets, easements, etc. also located. Texas statute defines "plat" as follows: "'Plat' means a map, chart, survey, plan, or replat containing a description of the subdivided land with ties to permanent landmarks or monuments." TEX. LOC. GOV'T CODE ANN. §232.021(8) (Vernon 2001). A plat is registered in the deed records of a governmental jurisdiction. Jurisdictions require proof of conformity with applicable subdivision regulations before the plat may be filed. TEX. LOC. GOV'T CODE §232.023. To require "replatting" allows the county to enforce tougher subdivision regulations retrospectively.

63. TEX. LOC. GOV'T CODE § 232.040.

64. TEX. LOC. GOV'T CODE §232 subch. B. Subdivision Platting Requirements in County near International Border imposes the development requirements and specifies they apply only to border counties.

65. See Larson, *supra* note 32, at 197-205.

66. See Castells & Portes, in THE INFORMAL ECONOMY, *supra* note 24, at 26.

Informality, Illegality, and Inequality

the colonia population. Latina/os comprise 82% of colonia residents,⁶⁷ compared to 32% of Texas residents and 12.5% of the nation.⁶⁸ But this is not a foreign or undocumented population; to the contrary, 85% of colonia residents are citizens and three quarters were born in the United States.⁶⁹ Yet, many are first- or second-generation immigrants who retain strong ties to Mexico.

The increase in accessibility of the housing market due to colonia development is worth remarking: Eighty-five percent of colonia households own their own homes,⁷⁰ compared to a national home ownership rate of 66.8% for households of all income levels, and 45.5% for Hispanics.⁷¹ When comparing similarly poor neighborhoods, the effect is even more striking: Nationally, only 27% of very low income families with children own their own homes.⁷²

By other measures, researchers have shown that colonias make housing *much* more affordable to poor families: Only twenty percent of households in areas of Texas with colonias face excessive housing costs compared 23% in areas of the state without colonias.⁷³ The effect is even greater among the extremely poor, with a smaller percentage of extremely poor households in the border counties facing unaffordable housing costs compared to similar families statewide. Sixty-seven percent of those across the state earning less than \$10,000 per year pay excessive housing costs, but only 50% of equally poor households in the border counties with concentrated colonia development bear a similar burden. And there are many more extremely poor households in the border region: Only sixteen percent of Texas households earn less than \$10,000 per year, compared to 35% of households in the border counties.⁷⁴

Colonias may exist because they create housing opportunity, but they do so by avoiding regulation and all its protections. Colonia land sales have been at once exploitative and accessible. Economically marginal buyers can access affordable single-family housing, as well as a means of financing that purchase, but only at high interest rates and without basic consumer protections. Likewise, although land use regulation and building codes would lift living conditions, the families who buy into existing colonias could not afford that better-quality housing and environment. Land costs in the new subdivisions devel-

67. 1 COLONIA HOUSING AND INFRASTRUCTURE, *supra* note 17, at 38.

68. CENSUS BUREAU, *supra* note 13. Colonia populations are not always markedly more Hispanic than the cities they surround: Cameron County (Brownsville) is 84.3% Hispanic; Hidalgo County (McAllen) is 88.3% Hispanic; Starr County (Rio Grande City) is 97.5% Hispanic; Webb County (Laredo) is 94.3% Hispanic; and, El Paso County (El Paso) is 78.2% Hispanic. *Id.*

69. 1 COLONIA HOUSING AND INFRASTRUCTURE, *supra* note 17, at 38.

70. Chapa et al., *supra* note 33, at 266.

71. U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, OFFICE OF POLICY DEVELOPMENT AND RESEARCH, ISSUE BRIEF III 3 (2000) [hereinafter HUD ISSUE BRIEF III].

72. U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, URBAN POLICY BRIEF NO. 2 (Aug. 1995) at <http://www.huduser.org/publications/urbaff/upb2.html> [hereinafter HUD URBAN POLICY BRIEF NO. 2].

73. 1 COLONIA HOUSING AND INFRASTRUCTURE, *supra* note 17, at 13, 28.

74. *Id.* at 13.

oped under the tough new requirements are so high, in fact, that many families cannot invest in housing construction after making monthly payments on the lot. As a result, housing quality is declining further, with more trailers and fewer houses evident.⁷⁵

Informality creates opportunity, but also limits it. Houses not built to code are not insurable, which exposes households to the threat of catastrophic loss. The contract for deed arrangement makes ownership legally uncertain, as do the irregular business practices of colonia developers. Finance institutions will not make home equity loans in colonias due to the uncertainty over ownership, which prevents self-builders from taking out loans against the property for improvements, even when they have a long record of timely payment under the contract for deed. Without clean title, many families put their life savings into houses that cannot easily be sold except in intra-colonia land markets, where prices will not match fair market value.

Home-ownership for the middle class in the United States is a wealth-accumulating investment, and also a basis for credit. By leveraging their investment, a middle-class family may move up into a better home or fund a major life opportunity, such as a child's education, a small business, or a secure retirement. Because of the legal uncertainty that currently accompanies informality, colonia housing investment cannot serve the same functions for poor families.⁷⁶

III. INFORMALITY IN THE GLOBAL CONTEXT

The growth of informality is evident in the United States not only in housing, but in other economic sectors as well. Social scientists have documented substantial informal labor, production, and commerce in goods and services in this country, including unlicensed street vendors,⁷⁷ garment sweatshops,⁷⁸ of-

75. Interview with David Arizmendi, Proyecto Azteca, in San Juan, Tex. (Aug. 4, 2000) [hereinafter Arizmendi Interview].

76. Melvin L. Oliver and Thomas M. Shapiro in *Black Wealth, White Wealth: A New Perspective on Racial Inequality* (1997), and Dalton Conley in *Being Black, Living in the Red: Race, Wealth, and Social Policy in America* (1999), argue that a family's ability to leverage investment in a house is closely linked to their human and social capital investment. Lack of such an asset among racial minority groups, they argue, is a significant determinant of enduring class division along racial lines in the United States.

77. Regina Austin has written extensively about informal economic activity in the urban African-American community, focusing on street vending. Regina Austin, "An Honest Living"? *Street Vendors, Municipal Regulation, and the Black Public Sphere*, 103 YALE L.J. 2119 (1994); Regina Austin, "A Nation of Thieves": *Securing Black People's Right To Shop and To Sell in White America*, 1994 UTAH L. REV. 147; Regina Austin, "The Black Community," *Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769, 1807-11 (1992). Related work on Mexican and Mexican-American street vendors in El Paso, Texas, is KATHLEEN STAUDT, *FREE TRADE? INFORMAL ECONOMIES AT THE U.S.-MEXICO BORDER* (1998), and on African immigrant street vendors in New York City is Rosemary J. Coombe, *The Cultural Life of Things: Anthropological Approaches to Law and Society in Conditions of Globalization*, 10 AM. U.J. INT'L L. & POL'Y 791 (1998).

78. See Fernández-Kelly & Garcia, *supra* note 24, at 247 (garment industries of Los Angeles and

Informality, Illegality, and Inequality

fice- and house-cleaners,⁷⁹ homeworkers,⁸⁰ and home manufacturing enterprises.⁸¹

Saskia Sassen contends the informal economy and the global economy are intrinsically linked.⁸² The dominant portrait of the global economy spotlights highly-skilled, well-paid professionals and the liberation of capital, information, and communication from the bounds of time and place. Sassen points out that the vast infrastructure of material support for this new economy, a support structure rooted in time and place, and serviced by a low-wage and increasingly female and immigrant workforce, remains in the shadows. These workers represent the globalization of labor at the lower end of the economy, according to Sassen, a parallel to the globalization of capital in the economy's upper echelons.⁸³

As the social distance between high- and low-wage workers grows (and this trend continues despite high rates of economic growth and wealth creation),⁸⁴ we can expect informality to expand. Households cannot subsist on below-poverty wages and must find ways to supplement their income, often by working off-the-books. Similarly, households cannot afford goods and services produced and sold in the formal economy, and so support a parallel economy of street vendors, peddlers, and flea markets. Housing, the single greatest consumer expense of families, will not escape this economic squeeze, or the strategies for surviving it.

The poor are already mostly excluded from formal sector markets in housing finance or construction, and hence from home ownership.⁸⁵ Even rental markets have become mostly unaffordable⁸⁶ to low-wage workers, particularly those with families. Despite a period of strong economic growth and declining

Miami); Alex Stepick, *Miami's Two Informal Sectors*, in THE INFORMAL ECONOMY, *supra* note 24, at 111 (referencing the Miami garment industry).

79. See Pierette Hondagneu-Sotelo, *Regulating the Unregulated?: Domestic Workers' Social Networks*, 41 SOC. PROBS. 50 (1994) (regarding immigrant housecleaners); Christian Zolniski, *The Informal Economy in an Advanced Industrialized Society: Mexican Immigrant Labor in Silicon Valley*, 103 YALE L.J. 2305 (1994) (regarding immigrant office cleaners).

80. See Jagna Sharff, *The Underground Economy of a Poor Neighborhood*, in CITIES OF THE UNITED STATES 19 (Leith Mullings ed., 1987) (discussing the activities of underground economy in Latina/o community on Lower East Side of Manhattan).

81. See Saskia Sassen-Koob, *New York City's Informal Economy*, in THE INFORMAL ECONOMY, *supra* note 24, at 74 (describing basement furniture manufacturer).

82. See SASKIA SASSEN, CITIES IN A WORLD ECONOMY at 121-23 (1994)

83. See SASKIA SASSEN, GLOBALIZATION AND ITS DISCONTENTS: ESSAYS ON THE NEW MOBILITY OF PEOPLE AND MONEY 79 (1998) [hereinafter GLOBALIZATION AND ITS DISCONTENTS].

84. See Frank Levy & Richard J. Murnane, *U.S. Earnings Levels and Earnings Inequality: A Review of Recent Trends and Proposed Explanations*, 30 J. ECON. LITERATURE 1333 (1992); U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS, THE EARNINGS LADDER (1994).

85. The national home ownership rate is 66.8% for households of all income levels, see HUD ISSUE BRIEF III, *supra* note 71, but only 27% for very low income families with children. See HUD URBAN POLICY BRIEF NO. 2, *supra* note 72.

86. The generally accepted standard for affordability established by Congress and HUD is 30% of income spent on housing costs.

unemployment in the late 1990s, the gap between the number of struggling families and the number of rental units affordable to them grew.⁸⁷ Only one of every three families at or below 30% of median income can find a rental unit that is both available and affordable.⁸⁸ Poor families pay an average of 58% of their income for housing.⁸⁹ Homelessness persists. In the year 2000, the U.S. Conference of Mayors reported a 17% surge of demand for emergency shelter housing, with families the population most affected.⁹⁰ The causes include lack of affordable housing and low-paying jobs.⁹¹ Where land is available, where household solidarity makes family labor available, and where laws are loose enough or enforcement can be negotiated, self-help housing provides one solution.

Although the ethnographic and theoretical literature on informal labor, production, and commerce inside the United States grows,⁹² researchers have hardly examined informal housing.⁹³ By contrast, since the 1970s scholars have vigorously investigated the informal housing sector of major cities of the developing world. These studies presume, explicitly or implicitly, that informal housing production coincides with the particularities of the economy, society, and politics in developing nations. In explaining the “illegal city,” scholars have pointed to (1) the limited resources of governments in developing countries, (2) legal cultures in which rules are often seen as symbolic or aspirational,

87. See generally NATIONAL LOW INCOME HOUSING COALITION/LIHIS, *OUT OF REACH: THE GROWING GAP BETWEEN HOUSING COSTS AND INCOME OF POOR PEOPLE IN THE UNITED STATES* (2000).

88. And two out of three of all poor families live in housing that costs more than they can afford. NANCY O. ANDREWS, *HOUSING AFFORDABILITY AND INCOME MOBILITY FOR THE POOR: A REVIEW OF TRENDS AND STRATEGIES, MEETING AMERICA'S HOUSING NEEDS 2* [hereinafter *HOUSING AFFORDABILITY*].

89. See *id.* at 2.

90. U.S. CONFERENCE ON MAYORS, *A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA'S CITIES, 2000: A 25-CITY SURVEY* 40 (Dec. 2000), available at www.mayors.org/uscm/hungersurvey/hunger2000.pdf.

91. *Id.*

92. Analysts of informality in other countries do include housing as a sector. *E.g.*, HERNANDO DE SOTO, *THE OTHER PATH* 17-57 (June Abbott trans., 1989); Allan Gilbert, *Introduction to HOUSING AND LAND IN URBAN MEXICO* (Allan Gilbert ed., 1989).

93. Even where such housing issues are examined, they are not conceptualized as “informal housing production,” and so the links between related housing practices are not understood. For example, the efforts of the urban homeless to erect semi-permanent shelters should be understood as a struggle to produce housing informally, and the determination of police to stop them an expression of state policy towards informality. See Gregory Townsend, *Cardboard Castles: The Fourth Amendment's Protection of The Homeless's Makeshift Shelters in Public Areas*, 35 CAL. W. L. REV. 223 (1999). Such efforts are criminalized in U.S. cities, typically by trespass where the property occupied is private, and by municipal ordinances prohibiting “camping” or “loitering” where the property is public. See generally Maria Foscarinis, *Downward Spiral: Homelessness and Its Criminalization*, 14 YALE L. & POL'Y REV. 1 (1996). Urban squatting, another informal housing practice, has never involved large numbers of people in this country, although it is important elsewhere in both developed and developing countries. On squatting in the U.S., see, e.g., Seth Borgos, *Low-Income Homeownership and the ACORN Squatters Campaign*, in *CRITICAL PERSPECTIVES ON HOUSING* 428 (Rachel G. Bratt, Chester Hartman & Ann Meyerson, eds., 1986); Brian Gardiner, *Squatters' Rights And Adverse Possession: A Search For Equitable Application of Property Laws*, 8 IND. INT'L & COMP. L. REV. 119, 141-48 (1997) (focusing on New York City and Los Angeles).

Informality, Illegality, and Inequality

and enforcers routinely bend the rules, and (3) political systems that lack meaningful accountability to the needs of the majority.⁹⁴ By inference, then, the rich and democratic countries that dominate the world economy and politics should be able to house their poor, enforce their laws, and make everyone play by the same set of rules. In sum, the conditions for informal settlement should not exist in the United States. This essay shows that informal housing *does* exist (and more than just marginally) in the United States. Thus, these conventional explanations cannot be fully adequate.

Policymakers commonly explain the Texas colonias as a Mexican pattern of settlement imported to the United States by Mexican immigrants. Although Mexican immigrants and those living in the bi-cultural world of the border have a distinct repertoire of survival strategies (one which includes familiarity with the idea of self-help housing), colonias did not emerge at the border because the border is culturally “other.”⁹⁵ Instead, we find informal housing at the border because this is the region of the United States most altered by the force of globalization. “Border urban areas are especially sensitive barometers of change because it is here that prevailing methods of production and patterns of consumption take spatial expression.”⁹⁶

The colonias are a structural response to the globalization of the U.S. economy, and its parallel effects of diminishing wages for labor and discouraging public investment in both housing and income maintenance. As such, there is nothing either temporary or aberrational about this housing pattern. Kathleen Staudt suggests that the turn to the informal economy (what she calls “the Mexican solution”) will not be confined to the border region in the coming years:

Globalization has enveloped the border area, but the demography and political economy of the border may spread to the heartlands. With more [empirical] studies . . . , we will learn whether globalization, and its attendant consequences, like

94. See Antonio Azuela & Emilio Duhau, *Tenure Regularization, Private Property and Public Order in Mexico*, in *ILLEGAL CITIES*, *supra* note 26, at 157 (“As long as a substantial part of the population gains access to land by a different set of processes from the rest of society, it is clear that not all individuals are subject to the same rules, regardless of whether or not those rules can be formally classified as ‘law.’ It is hard to think of cases where this does not entail the existence of profound social inequalities.”).

95. Other groups of working poor in the United States rely on informal housing. What are known as colonias in Texas are called “wildcat subdivisions” elsewhere, and are populated largely by whites. See, e.g., Mark Robichaux, *Just Deserts?: Arizona’s Rural Sprawl*, *THE WALL ST. J.*, Jan. 30, 2001, at 1. Trailer parks located in peri-urban areas occupy the same economic niche as colonia housing, with many of the same problems of substandard conditions. See, e.g., David Kelly, *Busts of Illegal Trailer Parks to Halt; County Heeds Protests on Behalf of Coachella Valley Farm Workers*, *THE PRESS-ENTERPRISE*, Jan. 7, 1999, at B1. Overcrowding of apartments (“doubling-up”) and illegal apartments carved out of basements or cellars are common forms of urban informal housing, but are clandestine practices, and thus difficult to investigate and assess as means of housing production.

96. Rebecca Morales & Jesus Tamayo-Sánchez, *Urbanization and Development of the United States-Mexico Border*, in *CHANGING BOUNDARIES IN THE AMERICAS: NEW PERSPECTIVES ON THE U.S.-MEXICAN, CENTRAL AMERICAN AND SOUTH AMERICAN BORDERS* 49, 49 (Lawrence A. Herzog ed., 1992).

downsizing, insufficient job opportunities, and informality, will in fact reproduce border life elsewhere. Is the "Mexican solution" . . . taking hold beyond the border? I believe that it is, and that this solution is a *global* one, as households respond to structural adjustment.⁹⁷

If informality increases and spreads, the problem of appropriate regulatory response can no longer be sidestepped. Many policy models exist. Mexico, for example, has built its current housing and social policy around informal housing production, abandoning an earlier prohibitionist stance that treated these settlements as illegal social ills to be eradicated. Mexico now not only tolerates informal housing, but seeks to stimulate its production. National, state, and local governments recognize the self-help settlements as a legitimate response to housing shortages and as a productive form of economic investment. The Mexican state offers regularization to such settlements in order to incorporate the housing and its residents into the urban fabric and the society, economy, and polity.⁹⁸ Many other countries of the developing world have put in place similar policies.⁹⁹

Such a policy approach has multiple goals, including solving the housing crisis for the working class, assuring social peace, and building political support. Although *ex post* provision of legal title and basic services costs more than systematically planned development, the mobilization of residents' sweat equity and contribution of user fees, as well as the increase in property values eventually reflected in tax revenues, ameliorate some of the expense of this policy.¹⁰⁰ Informal housing has become so common in Mexico that it has generated political movements.¹⁰¹ Such activism by "informals" ameliorates the disenfranchisement that living outside the law and accepted norms can represent in societies like our own where such activity remains clandestine for fear of prosecution, or stigmatized as criminal, marginal or pitiful.

In this country, to date, only border-state lawmakers have faced the practical as well as theoretical problem of whether to embrace or resist informal housing on a large scale. In the 1980s and 1990s, Texas, in particular, lacked the luxury of critical inquiry or extended debate before finding itself with an

97. Staudt, *supra* note 77, at 90.

98. The Mexican politics of informal housing has shifted towards bureaucratization and principles of entitlement. Under the PRI in its heyday, regularization was a political process, with public services extended to communities whose leaders disrupted the peace or promised political support. More recently, regularization has been routinized, with residents' labor contributions and user fees rather than politics determining eligibility. Staudt, *supra* note 77, at 124-26 (describing PAN administration in Ciudad Juárez); Peter M. Ward, *Political Pressure for Urban Services: The Response of Two Mexico City Administrations*, 12 DEV. & CHANGE 379 (1991) (comparing two PRI administrations in Mexico City).

99. See generally GEOFFREY PAYNE, URBAN LAND TENURE AND PROPERTY RIGHTS IN DEVELOPING COUNTRIES: A REVIEW (1997); Farvacque & McAuslan, *supra* note 31.

100. See generally Gareth Jones & Peter Ward, *Privatizing the Commons: Reforming the Ejido and Urban Development in Mexico*, 22 INT'L J. URB. & REGIONAL DEV. 76, 81-82 (1998).

101. See Staudt, *supra* note 77, at 65 (discussing the political strength and visibility of collective organizations of informal workers).

Informality, Illegality, and Inequality

informal housing sector so visible, so fast-growing, and with such urgent needs that legal and policy response could not be postponed. Texas adopted a moratorium policy that aimed to block the growth of any new colonias. The state also embarked on an expensive, but nonetheless limited, remedial program to address the worst physical deprivations of existing colonias. The overall thrust of the state's policy was to position the colonias as a temporary problem, the equivalent of large homeless shelters, and not permanent housing for a permanent and growing low-wage labor force essential to the region's free-trade economy.

One can easily criticize Texas's policy from a distance. But if the analysis of the effects of globalization that underpins this essay holds true, state and local governments throughout the country will have to confront the same policy challenge. Legal theorists must begin to pay attention to informality.

IV. INFORMALITY AND LAW

Although economic need and global restructuring drive informality, it is a direct product of the legal system. Its relationship to legality defines informality. Informality does not naturally inhere in productive activities.¹⁰² This distinguishes informality from criminality: Criminality involves illegal means to achieve illegal ends, such as drug trafficking; informality involves illegal means to achieve legal ends, such as building a house or running a small business.

But explanations for law's role in creating informality differ greatly. Economists, led by Hernando De Soto and those in the United States influenced by his work,¹⁰³ explain informality as a product of irrational or oppressive governmental regulation that makes entry into the formal market too burdensome or costly.¹⁰⁴ Their solution is deregulation. Sociologists Manuel Castells, Alejandro Portes, and Saskia Sassen, by contrast, see informality as a form of exploitation of labor through the withdrawal of law from an arena of economic activity. The state may either not regulate or not enforce regulations

102. Castells & Portes, in *THE INFORMAL ECONOMY*, *supra* note 24, at 26. *See also id.* at 15: Criminal activities possess. . . distinct characteristics that set them apart from those otherwise termed informal. . . . Those labeled "Criminal" specialize in the production of goods and services socially defined as illicit. On the other hand, the basic distinction between formal and informal activities proper does not hinge on the character of the final product, but on the manner in which it is produced and exchanged.

103. *See* De Soto, *supra* note 92. On De Soto's adoption by U.S. economists, see Jane Kaufman Winn, *How To Make Poor Countries Rich and How to Enrich Our Poor*, 77 *IOWA L. REV.* 899 (1992) (reviewing HERNANDO DE SOTO, *THE OTHER PATH* (1989)).

104. *See, e.g.*, George L. Priest, *The Ambiguous Moral Foundations of the Underground Economy*, 103 *YALE L.J.* 2259, 2271 (1994). Assessing the meaning of De Soto's research on informal sectors of the Peruvian economy, Priest writes: "The Peruvian informal economy. . . arose to satisfy unfulfilled demands. Constrained by governmental regulations that made acquiring urban land and housing virtually impossible through formal, legal means, the Peruvian informals created settlements through squatting and private investment." *Id.*

on the books. But by permitting exploitation, the state implicitly encourages informality and politically benefits from the resulting lower consumer costs and privatized solution to basic social provision.¹⁰⁵ Their solution is stepped-up regulation and enforcement. By either of these explanations, informality is an indigenous response to the unproductive use of law,¹⁰⁶ but the conflicting diagnoses of too much or too little law are not easily reconciled.

Despite law's role in defining the informal sphere, few legal scholars in the United States study informality.¹⁰⁷ One explanation is the familiar problem of "othering." The United States distances itself from development problems and solutions such as informal housing, as do its scholars. U.S. academics have somewhat revived law and development studies focused on bringing western law to democratizing countries around the world.¹⁰⁸ This new attention to law's role in development is hardly a dialogue, however, but instead a one-way transfer: The new scholarship expresses little sense that the United States has much to learn from policies like regularization pioneered in the developing world.¹⁰⁹

Further, informality by its nature tends to be covert, lessening the visibility and hence the priority of the issue. Informality only becomes visible when the number of informals grows or informals organize and make political claims for recognition. No one can say with certainty how many people work, buy, and find shelter within the informal economy in this country. Informals are further hidden from the mainstream because they are disproportionately non-white, immigrant, non-English speakers, and female. Taken together, these interrelated marginalities obscure the general theoretical significance of informality and allow scholars and policymakers to dismiss informality as ad hoc or random law evasion.

This may be too forgiving an assessment, however. If the fact of informality

105. See Castells & Portes, in *THE INFORMAL ECONOMY*, *supra* note 24, at 27:

Informalization is not a social process always developing outside the purview of the state; it is instead the expression of a new form of control characterized by the disenfranchisement of a large sector of the working class, often with the acquiescence of the state. For the latter, the loss of formal control over these activities is compensated by the short-term potential for legitimation and renewed economic growth that they offer.

106. Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 645 (1998).

107. Exceptions are cited in the footnotes of this Article.

108. This renewed scholarly engagement is encouraged and funded by engines of globalization such as the World Bank and the International Monetary Fund.

109. The observation is made by many, including Maxwell O. Chibundu, *Law in Development: On Tapping, Gouging and Serving Palm-Wine*, 29 CASE W. RES. J. INT'L L. 167, 213 (1997):

The new teaching, like the old, is justified and legitimated in tenors of the capacity to mold and adapt the internal policies of these emergent or transitional societies so that they conform to the prescriptions of the external factors. Conclusions as to the success or failure of law in the development processes of these societies are packaged and presented in tenors of the interests associated with the United States and the West.

In Santos's terms, this is an instance of a "globalized localism." See *supra* notes 7-9 and accompanying text.

Informality, Illegality, and Inequality

seems “foreign,” the phenomenon nonetheless poses familiar theoretical questions for law. Like zoning, rent control, the implied warranty of habitability, and housing discrimination, informal housing exemplifies the ways in which law shapes the social production of urban space. Likewise, informal housing represents an instance of social conflict around the law of property and land use analogous to familiar issues of exclusionary zoning, gentrification, and environmental justice.

Yet legal scholars’ neglect of informality implicates more than unfamiliarity and invisibility. Put simply, informals have no natural political allies in the law. Informals strive for legitimacy, meaning laws and policies that tolerate and even facilitate their activity. But informality contradicts foundational principles of legality and equality, and thus confounds legal scholars. On the one hand, informality is an abuse of law. Wherever informality gains legitimacy, it does so by using politics and social relations to get around rules to which others must conform. On the other hand, informality is exploitation and inequality. To legitimize informality is to accept substandard conditions for some that violate generally applicable norms of dignity, health, safety, or fairness. Unequal enforcement of law and double standards are hallmarks of illegitimacy in our legal system. Thus, the greatest barriers to engaging legal scholars with the issues of informality seem not so much political as meta-political: “You can’t think there from here.”

A. *Turning Illegality into Legality*

Consider the first claim that informality abuses lawfulness by tolerating those who use private negotiation or collective political clout to get around the law. From this perspective we could criticize regularization policies as conferring unfair benefits. The “price” of housing in the United States includes the cost of privately financing public infrastructure and services, with developers fronting the capital and passing the costs through to purchasers. Consumers pay for other public goods through increased prices, notably those resulting from zoning and planning, albeit less directly.¹¹⁰ But if some buyers purchase land and build houses without paying any of these costs, and later use politics to gain access to them at taxpayer expense, have they “gamed” the system?

Public choice theorists might deem this rent-seeking.¹¹¹ If informals be-

110. For example, aesthetic restrictions designed to protect the “character” of a neighborhood such as prohibition of multi-family units or of manufactured or mobile homes, minimum lot size restrictions, and density, setback and frontage regulations, are among the most costly regulatory regimes in terms of housing affordability. See generally WILLIAM A. FISCHER, *THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS* (1985).

111. Rent-seeking occurs when interest groups use their political capital to secure goods from the state. Rent-seeking derives from public choice theory, which understands political outcomes as depending on groups’ political capital rather than their political ideals. Organized interest groups expend their resources competing for political favors, such as tax breaks or subsidies, instead of putting them to

come highly organized, their political strategy may prevail over the large and unorganized group of people who acquire housing through conventional production and financing.¹¹² In fact, some evidence of the effectiveness of political organization among colonia residents in the legislative battles over colonia policy in Texas exists.¹¹³

Thus, what from one viewpoint might be an indication of democratic vigor—the organization of the poor and excluded into a political movement of informals—would, from this point of view, be a distortion of democracy. Engaging in “self-help” that creates a social problem whose solution requires *ex post* public intervention and public monies could be deemed strategic behavior. Where the political system rewards strategic behavior, the general populace may become cynical about lawfulness, and the law may thereby lose its legitimacy as a principled and even-handed authority. Politicized enforcement invites not just cynicism, but also corruption and a decline in voluntary compliance.

The conflict with legality need not be fatal, however. From doctrines like adverse possession, the law has some experience with turning illegality into legality without damaging its fundamental commitment to lawfulness. At the least, informality seems to be a problem with which our legal tradition is familiar.

B. *Legitimizing Inequality*

Perhaps the tolerance of exploitation and inequality intrinsic to informality presents the more grave problem for legal scholars. Do regularization policies, premised on legitimating informal housing, give the law’s imprimatur to that inequality? Will inequality, in turn, tend to increase?

Richard Delgado contends that policies predicated on tolerance of informality in housing production may be “pragmatic[.]” but can never be justified “as a matter of social principle. . . . [Such] theory is explicitly predicated on a

some productive use. In economic theory, rent-seeking is Kaldor-Hicks inefficient because it leads to an overall decline in social wealth. See generally Gordon Tullock, *Rent Seeking*, in THE NEW PALGRAVE: THE WORLD OF ECONOMICS 604, 604-09 (John Eatwell et al., eds. 1991).

112. Small cohesive groups have an advantage organizing for political activity over large, diffuse groups because they more easily overcome collective action problems. MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (2d ed. 1971). Thus small cohesive groups control political capital disproportionate to the interests they represent in a democratic and majoritarian society.

113. Texas colonia residents have created strong grassroots organizations, like Colonias Unidas in Starr County, as well as established supportive alliances with various NGOs, the United Farmworkers, and the churches. These groups have been key players in bringing local, state and federal political attention to colonia needs. See generally Roberto E. Villareal, *The Politics of Entrepreneurship: Mexican American Leadership in a Border Setting*, 2 J. BORDERLANDS STUD. 75 (1989). The point is relative, however. These groups have greater voice than do poor people generally; they do not, however, always prevail against other powerful and organized interests.

Informality, Illegality, and Inequality

legal acceptance of otherness, difference, and perhaps inferiority.”¹¹⁴ Directing his comments specifically to earlier work in which I urged caution in adopting the conventional regulatory approaches to housing quality in the colonias,¹¹⁵ Delgado compares this position to *Plessy v. Ferguson*.¹¹⁶

That earlier work argued against standard building codes and instead for minimal standards specifically designed to allow the self-building and incremental housing consolidation essential to the economic logic of informal housing:

Unrealistically high standards will exclude low-income families. . . . But if standards are too low, not only will health and safety be threatened, but any housing constructed quickly will deteriorate and be abandoned, once again constricting the supply of affordable housing. . . . To build decent, affordable, and long-lasting housing. . . , land use regulation must be stripped to its core.¹¹⁷

That article also proposed requiring only progressive compliance, and tying compliance to the credit and technical assistance necessary to make even these minimal standards attainable for colonia residents:

Imposing a building code on already-existing colonia housing should be progressive, mandating gradually higher construction standards over time. The progressive building code must be paired with access to credit for home improvement and technical assistance, as well as program incentives to mobilize owners' sweat equity. . . . Over a period of years, informal and substandard subdivisions gradually can be upgraded and regularized to meet basic but conventional standards of safety, security, quality, and amenity without dislocating the residents in place.¹¹⁸

Countering these proposals, Delgado calls for “equal enforcement of all housing, zoning, and sanitation codes”¹¹⁹ in the colonias: “[W]e need governmental enforcement, formally administered, under universal standards applicable to all.”¹²⁰ This means, he emphasizes, “No tradeoffs or exceptions, in other words. . . , of the kind Larson is willing to tolerate as a matter of pragmatic realism.”¹²¹ “Formality,” he insists, “tends to assure a better result, all other

114. See Richard Delgado, *Rodrigo's Twelfth Chronicle: The Problem of the Shanty*, 85 GEO. L.J. 667, 688 (1997) [hereinafter *The Problem of the Shanty*]. The essay has been reprinted in RICHARD DELGADO, *WHEN EQUALITY ENDS: STORIES ABOUT RACE AND RESISTANCE* (1999). As in other of his *Chronicles*, Delgado structures *The Problem of the Shanty* as a discussion between Professor and companion-interlocutors, in this instance, Rodrigo and Giannina. For simplicity's sake I attribute statements made by Professor, and also by Rodrigo and Giannina, to Delgado, unless he explicitly disclaims the position in the text. In this I do not treat the *Chronicles* as literature, a genre in which fictional characters are treated as virtually “real,” but instead assume that Delgado has written essay-commentaries that use narrative form, dialogue, and multiple voices as a technique for the exposition of the author's own ideas and analysis.

115. See Larson, *supra* note 32, at 247-50.

116. *The Problem of the Shanty*, *supra* note 114, at 688 (citing 163 U.S. 537 (1896)).

117. Larson, *supra* note 32, at 249.

118. *Id.* at 249-50.

119. *The Problem of the Shanty*, *supra* note 114, at 689.

120. *Id.* at 680.

121. *Id.*

things being equal.”¹²²

This invocation of *Plessy* serves as a reminder that a flexible or gradual regulatory standard can also be taken as a double standard,¹²³ and that double standard interpreted as a symbol of unequal civil status, indeed of a lesser humanity. Delgado argues that such standards for colonia housing treat residents differently in ways that perpetuate their exclusion and inferiority in both practical and symbolic ways. Not only will substandard housing conditions persist in colonias because of such policies, he argues, but such conditions will come to be considered “acceptable because they are normal for *them*—for the people who live there.”¹²⁴

This creates a slave-like class that can be hired for less: a positive advantage for the factories. Eventually, no white firm—not even a nonracist one—will hire a Mexican at full salary, even if he or she has a Ph.D. No school board will consider a pupil-assignment scheme that mixes Mexican and white kids. The idea simply won’t come to mind. . . . The very existence of the colonias enhances racial and social segregation of the rapidly growing Mexican population.¹²⁵

This critique of differential treatment focuses on law’s expressive function, specifically the messages of racial inferiority that the state’s legitimation of substandard housing will convey.

This debate over building codes in the colonias recapitulates long-standing struggles within legal theory over the issue of equal versus different treatment, or adherence to norms of formal versus substantive equality.¹²⁶ To frame that larger discussion simply: People who are different can be disadvantaged by treating them the same as others in contexts where they cannot live up to the accepted norm; but they can also be disadvantaged if they are treated as different in a way that reinforces traditional stereotypes or perpetuates their position of exclusion or inferiority.¹²⁷ In our exchange over building codes in the colo-

122. *Id.* at 681.

123. Nor is the threat imposed by this problem of the double standard easily contained. Not just building codes, but most zoning and planning restrictions and many environmental regulations, as well as some subdivision regulations and landlord-tenant reforms have demonstrable exclusionary effects.

124. *The Problem of the Shanty*, *supra* note 114, at 675.

125. *Id.* (internal citations omitted). Delgado is referring to norm theory in this symbolic claim. On norm theory, see generally Richard Delgado, *Rodrigo’s Eleventh Chronicle: Empathy and False Empathy*, 84 CAL. L. REV. 61 (1996).

126. The debate has been important to both feminist and critical race theory. Within critical race theory the issue is race consciousness, whether in legal doctrine and social policy (such as the debates over color-blindness versus affirmative action), see e.g., Neil Gotanda, *A Critique of “Our Constitution is Colorblind,”* 44 STAN. L. REV. 1 (1991), or in scholarship, Randall Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989) and Colloquy, *Responses to Randall Kennedy’s Racial Critiques of Legal Academia*, 103 HARV. L. REV. 1844 (1990). Within feminism the debate is cast as one over equal versus different or special treatment. E.g., Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity in the Workplace Debate*, 86 COLUM. L. REV. 1118, 1142-44 (1986). See generally Martha Minow, *The Supreme Court, 1986 Term: Justice Engendered*, 101 HARV. L. REV. 10, 31 (1987) (drawing a parallel between the feminist equal treatment/special treatment debate and the color-blindness/affirmative action debate in the racial equality context).

127. Joan Chalmers Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path*

Informality, Illegality, and Inequality

nias, Delgado advocates equal treatment and formal equality; I argue for special treatment and substantive equality.

Joan Williams points out that what is cast as an argument over equal versus special treatment is often really a disagreement over strategy rather than fundamental principle. This clarification is helpful. Both Delgado and I agree that everyone should be assured of decent housing notwithstanding ability to pay. We even agree more on the specific issue of housing quality standards than the rhetoric of our exchange suggests.

Delgado seems to concede that standard building codes are not appropriate for the colonias. He clarifies that in calling for uniform standards applicable to all, he does not mean “exactly the same” standards are appropriate for all communities: “But not as discrepant as now.”¹²⁸ Rather, his goal is basic or minimal standards, particularly for water and sewer services. “There should be written standards for such things, applied uniformly across the board. Beverly Hills will choose to be far above those basic standards. But we should make sure every community has water that meets the minimum level of cleanliness and sufficiency. Sewers, too.”¹²⁹

Although he specifically disclaims any “tradeoffs or exceptions,”¹³⁰ Delgado does not want to displace existing residents by implementing any new housing standards or zoning laws. He would grandfather existing housing and businesses, making only newcomers “toe the line.”

“What about housing and zoning ordinances?” Giannina asked.

“You said you wanted formal fairness. Would you condemn two-thirds of the houses because they are made of pieces of tin and plywood and don’t meet the housing code? And what about land-use zoning? If you prohibited people from operating businesses out of their homes, you would have to close down all the auto repair shops, laundries, and clothing piecework that go on now in the homes and neighborhoods. Half the income of the colonias would dry up. You’d start out doing the people a favor but end up harming them.”

“I’d grandfather in existing businesses,” Rodrigo answered, “so that no one would be thrown out of work. As for newcomers, I’d make them toe the line but offer loans and job assistance programs to enable them to set up legitimate businesses.”¹³¹

It is unclear if Delgado’s “grandfathering” solution is intended to apply to houses constructed in violation of building codes as well as to businesses located in violation of zoning ordinances. I am assuming that it does. But even if existing residents are exempted from new regulatory standards, enforcing only against “newcomers” does not answer the housing affordability crisis for the

Beyond Essentialism in Feminist and Critical Race Theory, 1991 DUKE L.J. 296, 298.

128. *The Problem of the Shanty*, *supra* note 114, at 680.

129. *Id.*

130. *Id.*

131. *Id.* at 684.

local population. Only by permitting colonias to grow, *i.e.*, giving newcomers the same opportunity existing residents have taken, can colonias ease the housing crisis for the working poor of the region. Thus, Delgado and I may be close to agreement on the issue of minimal standards, but we disagree on the broader policy question whether to encourage or resist informal housing. Is informal housing a solution to, or only a symptom of, widening inequality?

The core of the disagreement may not be equal versus special treatment, but rather political strategy, specifically, how to proceed if a fundamental change of the existing order is not on the horizon. As Joan Williams puts the question, “what to do when they are forced to settle (as they often must) for half a loaf.”¹³² Our divergent answers depend crucially, I believe, on differing assessments of the political culture within which we operate.

Delgado opts for vigilant adherence to the principles and political victories that existing laws represent. “We can enlarge the pie for the poor people of the colonias by standing with them in a program of resistance and activism. . . . At some point, government will come around.”¹³³ I opt for flexible alternatives to accommodate and build on, rather than resist, informality. The current climate of growing and entrenched economic inequality and diminished political will for government programs may be a fundamental change of the terms of the social contract. I cannot support holding poor families hostage to their need for shelter while we struggle to force government to keep promises it no longer intends to honor.

C. *Converging Critiques of Unattainable Standards*

Similar debates over legal strategy and differing visions of the politically possible occurred in the mid-1980s as progressive lawyers and activists sought answers to the intensifying housing crisis, symbolized then by the rise of urban homelessness. The major federal subsidy for low-income housing was, and remains today, the Section 8 Existing Housing program.¹³⁴ Section 8 gives recipients vouchers that allow them to rent private housing at prevailing market rates. The recipient pays 30% of income toward housing and the government subsidizes the balance of the rent.

Created in 1974, Congress never fully funded the Section 8 program, and thereby never accepted the responsibility of assuring adequate housing for every person without regard for ability to pay. Resistance to full funding rests on political reluctance to intervene in the private housing market, as well as pragmatic concerns about the cost of such an entitlement. In turn, the costs of fully funding the entitlement reflect the level of need, but also the cost of the

132. See Williams, *supra* note 127, at 311.

133. *The Problem of the Shanty*, *supra* note 114, at 687-88.

134. 42 U.S.C. § 1437F (2001).

Informality, Illegality, and Inequality

strict quality standards required for rental units to be eligible for the subsidy. Without full funding, Section 8 houses some low-income people in quality affordable shelter, but leaves most poor people with no housing assistance at all. The government rations assistance by means of waiting lists often tens and even hundreds of thousands of names long.¹³⁵

Various alternative policies could address this shortfall, including expanding the supply of cheap housing by reducing housing quality standards.¹³⁶ HUD revised Section 8 housing quality standards in the 1980s with respect to single-room occupancy (SRO) housing,¹³⁷ but left unchanged standards applied to rental housing for families.

Lucie White has struggled with the related questions of how high quality standards affect accessibility and affordability of legal services for the poor,¹³⁸ and of child care for poor working families.¹³⁹ Each setting presents the same quandary: Are proposals to step back from equal enforcement of demanding regulatory standards a symptom of, rather than a solution to, widening inequality?

White asks whether the legal services that society provides for low-income people should be the same as, or different from, the legal services purchased by high-income clients. Is endorsing the principle of equal legal services the best means of promoting social equality? “What do we think,” she asks, “of a social welfare regime that promotes equality and anti-subordination by promising, but never delivering, an elite quality and level of social (and legal) service to poor people through state bureaucratic arrangements?”¹⁴⁰

White recognizes that moving away from an equal standard represents a loss. “[L]etting go of the goal of a uniform level of service for all persons car-

135. See, e.g., Lucie E. White, *Representing “The Real Deal,”* 45 U. MIAMI L. REV. 271, (1990/91).

136. If you can’t expand the supply of affordable housing, the obvious other alternative is to increase income through wages, welfare, or taxes. In the 1990s there were small increases in income from greater employment, a rising minimum wage, and increases in earned income tax credit. The cost of housing, however, outstripped these small income gains. In the most recent period, for example, rents increased at twice the general rate of inflation (and thus of wages). Further, income became more insecure with the welfare reforms of the 1990s. See U.S. DEPT. OF HOUSING AND URBAN DEVELOPMENT, *THE WIDENING GAP: NEW FINDINGS ON HOUSING AFFORDABILITY IN AMERICA 2-3* (June 2000).

137. SROs are an essential housing resource for urban single adults. Most observers attribute a meaningful part of the rise of urban homelessness in the 1980s to reductions in the supply of SRO housing and the failure to replace it. One partial response was to rewrite the housing standards to preserve and promote the growth of SRO housing. E.g., Stewart B. McKinney Homeless Assistance Act, 42 U.S.C. § 11401 (1988) (amended 1996) (mandating rental assistance for SRO dwellings under the Section 8 Moderate Rehabilitation program, 42 U.S.C. § 1437F (2001)).

138. Lucie White, *Specially Tailored Legal Services For Low-income Persons in The Age of Wealth Inequality: Pragmatism or Capitulation?*, 67 FORDHAM L. REV. 2573 (1999) [hereinafter *Pragmatism or Capitulation?*].

139. Lucie White, *Quality Child Care for Low-Income Families: Despair, Impasse, Improvisation*, in *HARD LABOR: WOMEN AND WORK IN THE POST- WELFARE ERA* 116 (Joel F. Handler & Lucie White eds., 1999) [hereinafter *Despair, Impasse, Improvisation*].

140. *Pragmatism or Capitulation?*, *supra* note 138, at 2579.

ries the message that we have given up on the struggle for equality, and have resigned ourselves to living out our lives on an increasingly wealth-divided globe.”¹⁴¹ But she also sees potential gains through the political work of innovating alternative strategies for assuring decent quality and affordability through collaborative work with the communities to be served.

Letting go of the normative goal of a uniform level of service delivery for all persons will force us to acknowledge the depth of the current trend toward great wealth inequality. Letting go of that goal will force us to focus our practical know-how, research, and policy on the challenges to survival and well-being that are faced by those at the bottom. Letting go of that goal will force us to give up on the illusion that we further, rather than undermine, social equality by providing an elite level of services to a select few.¹⁴²

White examines the same questions in light of the growing demand for child care services affordable to the low-income parents pressed into full-time wage work by welfare reform.¹⁴³ The existing policy consensus is that a professionalized work force and higher licensing standards, combined with government subsidies, will best meet child care needs. White suggests, instead, that we let go of rigid notions of professionalism and regulation in favor of more creative and flexible, but yet more uncertain, approaches for ensuring what she calls “good enough” and “reliably decent” care that poor workers can afford.¹⁴⁴ “Only such a shift in thinking,” White contends, “will help us to avoid catastrophic outcomes for the less affluent and powerful among us.”¹⁴⁵

White acknowledges the dangers of such a strategy: “It will not be easy for us to give up on bold social democratic visions about universal child care, or to make hard judgements about when loosening up on licensing requirements or professional standards, for instance, contributes to poor-quality care options for poor children.”¹⁴⁶ Yet, she concludes that a reluctance to experiment with alternatives to equal standards “will ensure a huge gap between officially endorsed quality standard and day-to-day practices in our least powerful communities, a gap that may become increasingly hard to close.”¹⁴⁷

141. *Id.*

142. *Id.*

143. *See Despair, Impasse, Improvisation, supra* note 139, at 116.

144. *See id.* at 118-19. Examples of some of the innovations White proposes include encouraging peer networks of low-income, home-based child care providers; supporting well-designed parent education and involvement programs in low-income neighborhoods and day care centers; partnerships between day care centers and providers in different socioeconomic, ethnic, or geographic areas within a city or region; eclectic, well-supervised volunteer programs that supplement a day care center’s core teaching staff with a variety of differently skilled helpers; local bond issues or linkage programs for raising capital for facility improvement loans, and the like. *See id.* at 119. “[T]hese new innovations will produce more reliably decent child care for all families, regardless of income, because they draw upon interpersonal connection and social commitment, as well as monetary compensation, professional ideology, and regulatory oversight, to ensure good enough care.” *Id.* at 120.

145. *Id.* at 118.

146. *Id.*

147. *Id.*

Informality, Illegality, and Inequality

In support of her claims, White observes that some progressive scholars of health care delivery in the context of global wealth inequality also encourage departure from equal and elite standards.¹⁴⁸ These scholars challenge the idea that a single normative vision of “equal health care” across the wealth spectrum is appropriate for current conditions. Such a notion will fail in the short run because it will not guide practice, research, and policy to address the urgent health needs of low income populations. And it will fail in the long-term because, rather than helping move society toward greater institutional equality, a norm of health care service implicitly based on elite practices and institutions will perpetuate “the bifurcated institutional practices that construct and maintain societal stratification.”¹⁴⁹

Taken together, these critiques challenge the existing progressive consensus on regulation across a broad range of social welfare settings, from housing to legal services, child care, and health care. The premise of these converging critiques is that the current trend toward great wealth inequality and limited governmental responsibility for basic social provision is enduring and fundamental. Where the price for maintaining equal and elite standards is rationing of essential goods and services, these critics suggest we consider revising those standards to meet what White calls the “exploding universe of need.”¹⁵⁰

This critical skepticism of conventional regulatory strategies is pragmatic but also normative, grounded in the recognition that existing standards were not fashioned by or for poor communities, and may be inappropriate for their circumstances or contrary to their values. Rather than generalizing from elite institutions and practices in the interest of promoting an abstract idea of equality, White, for example, argues:

[W]e may be better off endorsing the idea that the social needs of disfranchised groups should be addressed *sui generis*, in ways that reflect their own experiences of need, their embedded historical and cultural realities, the societal power landscapes from their perspectives, their capacities, and their normative aspirations.¹⁵¹

No one disagrees that much would be lost were we to abandon the aspirational claims to social equality embodied in the commitment to universal standards. The ideal of law that equal standards evokes, by which the role of the state is to manage society according to universal ideals, is counterposed against the vision of these critical skeptics, in which standards are negotiated through the medium of practice and social relations at the local level, and by which law’s role is “to support the public by adjusting policies to reinforce observed

148. See *Pragmatism or Capitulation?*, *supra* note 138, at 2578-79 (citing and discussing WOMEN, POVERTY, AND AIDS: SEX, DRUGS AND STRUCTURAL VIOLENCE (Paul Farmer et al. eds., 1996)).

149. *Id.* at 2579.

150. *Id.* at 2578.

151. *Id.*

practice on the ground.”¹⁵² Delgado recognizes this when he comments that my argument for accommodating rather than resisting informality is “trying to adjust the people to their situation rather than the other way around.”¹⁵³

It is an article of faith, cultivated in U.S.-trained lawyers as part of their history and identity, that law should lead the society rather than follow, that law is an engine of social change. Equality and liberty have been the key arenas of this vision of law as ahead of or against society. Racial desegregation, voting rights, gender equality, and reproductive rights are the issues most often cited as evidence that law can and should move society forward, in advance of majority or popular sentiment.¹⁵⁴

This distinctly American vision of progressive lawmaking has as its central mission “the alteration, the deviation, and the transformation” of social practice.¹⁵⁵ Law enforces an aspirational standard against the majority’s will and contradicts “observed practice on the ground.” The hope is that those the state coerces to accept the new standard in one generation will grow to accept and even welcome the change in the next. Children educated in the integrated schools of *Brown v. Board of Education* will grow up accepting a multi-racial public world as normal, and perhaps even desirable.

This is an avowedly progressive, but also an elitist, model of law and its relationship to social change. Thus, we find the countering perspective that law should conform closely to observed practices of society explicitly voiced in post-colonial societies.¹⁵⁶ Where lawmaking leads society, the voices of the elite empowered to speak through law (whether in litigation, legislation, or policy debate) necessarily will be heard more clearly than those whose voices are expressed in the constitution of everyday life. This is true no matter how laudable or progressive the purposes behind the aspirational standard being advanced.

In between these competing views of law leading and law following, can

152. John Gillespie, *Land Law Subsystems? Urban Vietnam as a Case Study*, 7 PAC. RIM L. & POL’Y J. 555, 589 (1998).

153. *The Problem of the Shanty*, *supra* note 114, at 686.

154. *But see* GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991) (questioning the role attributed to law as opposed to politics on the ground in bringing about these particular social changes). The debate over law’s role in social change is extensive, joined with particular critical skepticism by Critical Legal Studies scholars.

155. Robin West, *The Aspirational Constitution*, 88 NW. U. L. REV. 241, 263 (1993) (elaborating the idea that a constitution primarily in the hands of Congress rather than the Court would be a more progressive constitution). A related account of the “symbolic efficacy of law” in Latin America is found in MAURICIO GARCÍA VILLEGAS, *LA EFICACIA SIMBÓLICA DEL DERECHO* (1993).

156. *E.g.*, Thomas A. Gihring, *From Elitism to Accountability: Towards a Re-formation of Nigerian Town-Planning Law*, 10 QUARTERLY J. ADMIN. 411, 419-421 (1976):

Development controls should not restrict development initiative, but rather should themselves adapt to the natural process of urban growth. . . . Both British and Nigeria[n] experience has demonstrated that the cumbersome process of reviewing applications often results in curtailing development progress. . . . The existing legislation has achieved no higher purpose than the reinforcement of elitism in the exercise of power.

Informality, Illegality, and Inequality

we retain the aspirational ambition of law without sacrificing the poor to elite dreams? Can law mobilize social change without unfairly burdening those for whom the aspirational standard is currently unattainable? In describing her vision of “aspirational” law, Robin West says “[i]t exists, very generally, to construct a bridge. . . between those present aspirations and our future, not between our present predicaments and our past.”¹⁵⁷

If we look to our past, we find the exhausted (and exhausting) debate between strategies of equal or special treatment, with no evident resolution.¹⁵⁸ The future looks somber because economic privation intensifies the effects of unattainable standards, even as government downscales its redistributive efforts as well as its faith in social progress. Under these conditions of constraint, can legal strategies maintain law’s aspirational force without recreating its past predicaments of unattainable standards?

V. “TAKE WHAT THE COMMUNITY IS DOING AND MAGNIFY IT, EXTEND IT.”¹⁵⁹

Looking to the bottom—adopting the perspective of those who have seen and felt the falsity of the liberal promise—can assist critical scholars in the task of fathoming the phenomenology of law and defining the elements of justice.¹⁶⁰

Scholars often overlook the strategic and theoretical resources of people engaged in the struggle about which the scholar thinks and prescribes. This is as true of equality theory as any other area of legal theory. Mari Matsuda urges critical legal theorists to attend closely to the perspectives of people she calls by the Gramscian term, “organic intellectuals.”¹⁶¹ Such people have lives shaped by the oppression that critical legal theory seeks to address, have engaged in the search for critical self-knowledge through close examination of their own circumstances, and have made a politics of the knowledge gained by working with others in organized movements for change.¹⁶² “There is a standing concept in movements for social change,” she writes. “One needs to ask who has the real interest and the most information.”¹⁶³ This is an argument for linking abstract theory to concrete experience, and also a reason to restore empiricism as ordi-

157. West, *supra* note 155, at 262-63.

158. Joan Williams admits there is no easy answer to the thorny problem of divergent strategies within movements for social justice and transformation. But she suggests that reframing the dispute in terms of disagreements over strategy rather than basic commitments to equality will allow progressives to avoid being diverted by fruitless internal arguments. See Williams, *supra* note 127, at 323.

159. Arizmendi Interview, *supra* note 75.

160. Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987) [hereinafter *Looking to the Bottom*].

161. *Id.* at 325.

162. See Mari J. Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 S. Cal. L. Rev. 1763, 1778-79 (1990) [hereinafter *Pragmatism Modified*]. “Subordinated status plus critical consciousness-raising is the condition that produces the knowledge I seek. . . . It is a knowledge that is increasingly available to us as we enter the age of the post-colonial university.” *Id.* at 1780.

163. *Looking to the Bottom*, *supra* note 160, at 346.

nary scholarly practice.¹⁶⁴ But more importantly, Matsuda argues that we must treat such indigenous actors *as theorists*, studying the ways they have interpreted their experiences, and respecting the strategy and choices behind the politics they have made of their condition.

Matsuda observes that this method often leads to concepts of law “radically different from those generated at the top.”¹⁶⁵

Those who are oppressed in the present world can speak most eloquently of a better one. Their language will not be abstract, detached or inaccessible; their program will not be undefined. They will advance clear ideas about the next step to a better world. The experience of struggling. . . has taught much about struggle, about how real people can rise up, look power in the eye and turn it around.¹⁶⁶

How do the colonia’s own theorists analyze the political question of building codes and self-builders, and more broadly whether informal housing is a solution to, or a symptom of, inequality? Many grassroots groups oppose adoption of building codes in the counties.¹⁶⁷ When Texas was crafting sweeping colonia legislation for introduction in the 1995 legislative session, for example, Attorney General Dan Morales floated a provision that would have given the border counties the power to adopt building codes. The provision was part of Morales’s determined efforts to publicize and eradicate substandard conditions in the colonias. Self-help groups all along the border region organized as *Iniciativa Frontera*,¹⁶⁸ and allied with statewide officials, experts, and non-governmental organizations in the Border Coalition for Low-Income Housing, to educate legislators and state policymakers on their opposition.¹⁶⁹ Colonia residents recall riding buses from the border to Austin in order to confront state officials on the issue.

In 2001, the Texas Legislature again came close to enacting legislation that would have empowered counties to regulate building standards. The bill’s explicitly described purpose was “to prevent the proliferation of colonias and sub-

164. See also Larson, *supra* note 32, at 235 (“Absent the prism of lived experience, pure theory or politics (no matter how amenable the moral premises, or elegant the analytic structure) can generate dangerously simplified prescriptions.”).

165. *Looking to the Bottom*, *supra* note 160, at 346-47.

166. *Id.*

167. On the opposition of many community organizations in the colonias to expanding county regulatory power, see Interview with Blanca Juárez, Colonia Ombuds for Starr County and a founder of Colonias Unidas, in Rio Grande City, TX (Aug. 15, 2000) [hereinafter Juárez Interview]; Arizmendi Interview, *supra* note 75. This position is supported by non-governmental organizations active in communities at the border, including the Texas Low-Income Housing Information Service (TxLIHIS) and its Border Coalition for Low-Income Housing. Interview with John Henneberger in Austin, TX (March 16, 2001).

168. Arizmendi Interview, *supra* note 75. *Iniciativa Frontera* included Sparks Housing (El Paso County), Las Americas (Cameron County), Proyecto Azteca (Hidalgo County), Colonias Unidas (Starr County), and La Gloria Development Corporation (Webb County). *Id.*

169. Juárez Interview, *supra* note 167; Interview with Amada (Aidé) Villareal, Starr County Colonia Assistance Corporation, Rio Grande City, TX (Oct. 15, 1999).

Informality, Illegality, and Inequality

standard housing developments.”¹⁷⁰ In hearings, the bill sponsor, Sen. Eddie Lucio, described the legislation as a tool “to prevent proliferation of colonias, maintain reasonable standards, and provide decent quality of housing.”¹⁷¹ Significantly, Sen. Lucio represents the border and has often been a progressive advocate for colonia interests. Ironically, his bill was defeated at the last moment by unexpected opposition from conservative property rights groups opposed to land use regulation for any purpose.¹⁷²

Conventional building codes cannot be viewed as neutral standards either in theory or practice. Building codes control new construction and remodeling of existing structures.¹⁷³ Today’s building codes are descended from those first enacted in the early twentieth century when Progressive reformers of the tenement house movement pushed for basic sanitation standards. Thus, codes originated as politically progressive and humanitarian reform measures.¹⁷⁴

But the modern codes in force in virtually every jurisdiction of this country establish standards that far exceed what is required for health and safety, as explained by their genealogy. Model codes shape existing codes. Trade groups play an active role in writing and revising model codes. When the federal government entered the housing finance arena through its insurance programs, inclusion of building standards in the federal underwriting process made these model codes the template for regulation.¹⁷⁵ Most jurisdictions adopt one or more of the handful of model codes, in whole or in part, often simply by reference.¹⁷⁶

These codes protect health and safety but also endorse middle class values about housing configuration, appearance, and amenity. Some local jurisdictions further heighten standards for explicitly exclusionary purposes. By requiring

170. S.B. 517, 77th Leg., Reg. Sess. (Tex. 2001), <http://www.capitol.state.tx.us> (last visited Oct. 16, 2001) (adding Chapter 236 to amend Local Government Code). S.B. 517 passed the State Senate on March 6, 2001, and was referred to the House, where it passed out of committee but was stopped before a full floor vote. Texas Legislature Online, Bill History for S.B. 517, <http://www.capitol.state.tx.us> (last visited Oct. 16, 2001). The bill’s purpose is described in § 236.001 of the legislation. S.B. 517, 77th Leg., Reg. Sess. (Tex. 2001), <http://www.capitol.state.tx.us> (last visited Oct. 16, 2001). The bill would have allowed counties to adopt rules that affect the size of lots; the height, number of stories, size and numbers of buildings on a lot; the percentage of a lot that may be occupied; and the location of buildings or other structures on a lot. *Id.* The bill also would have allowed counties to adopt uniform building, plumbing, and electrical standards. *Id.*

171. Hearing, Subcommittee on Border Affairs, Senate Committee on Business & Commerce, Texas Legislature, Feb. 20, 2001.

172. Telephone Interview with John Henneberger, Texas Low-Income Housing Information Service (July 10, 2001).

173. Narrowly defined, “building” codes address the structure of buildings; supplemental codes address such issues as plumbing and electrical systems. For simplicity I refer herein to the whole package of housing quality standards as “building codes.”

174. Eric Damian Kelly, *Fair Housing, Good Housing or Expensive Housing? Are Building Codes Part of the Problem or Part of the Solution?*, 29 J. MARSHALL L. REV. 349, 350 (1996).

175. *Id.* at 350-51.

176. Due to the complexity of building regulation, only the largest jurisdictions develop their own building codes. *Id.* at 351.

high-skill labor, costly materials, and labor-intensive techniques, codes close out self-builders and advance the economic interests of the construction and building materials industries and of labor unions.¹⁷⁷ Thus, the model code process is a confluence of economic interests for whom affordability is not a core policy goal.

David Arizmendi, a long-time community organizer and a nonprofit provider of self-help housing in the Hidalgo County colonias, believes “you cannot impose housing quality standards on people without giving them the resources to meet them.”¹⁷⁸ No one knows what percentage of existing colonia houses meet building codes, but a survey in Cameron Park, an older, relatively well-consolidated colonia near Brownsville, Texas, found that four-fifths of the housing did not meet code standards. Just 184 of 1,088 existing homes met code standards. Of the others, 558 were substandard and 346 were dilapidated and beyond repair.¹⁷⁹ Cameron Park almost certainly has better quality housing than other colonias because of its age and consequent degree of housing consolidation, and because of significant investment in infrastructure and housing by government and nongovernmental organizations. The Cameron Park example suggests that virtually all colonia houses would fail to comply with code standards, many would be seriously deficient, and a significant portion would have to be razed and rebuilt. Though one colonia provides admittedly slim evidence, it suggests most colonia housing will fail to meet prevailing standards. Even if existing structures were grandfathered, code standards would rule out the typical construction practices for any new housing, including new or incomplete construction on already-purchased lots.

In sum, prevailing building standards would make it illegal for families to build affordable colonia housing. And if families tried to build, they would be targeted disproportionately by such standards for enforcement and penalty. Such codes would have the same practical effect as making informal housing outright illegal.

Blanca Juárez, colonia resident and founder of Colonias Unidas, a self-help group in Starr County, tries to educate policymakers in the debate over building codes by moving from the abstract to the concrete: “It’s a house or no house,” she says. “Do you honestly believe these people will leave their houses just because they aren’t safe or healthy?”¹⁸⁰ In 1999, Juárez testified before the Texas Legislature in support of a bill allowing residents to hook up to available utility services even if they lived in an illegal or substandard colonia. She recalls the testimony on that day as follows:

177. *See id.*

178. Arizmendi Interview, *supra* note 75.

179. *See* James Pinkerton, *Water Project Up and Running, But Most Still Lack Running Water*, HOUS. CHRON., Nov. 6, 1994, at A1 (reporting on study by Cameron County).

180. Juárez Interview, *supra* note 167.

Informality, Illegality, and Inequality

They were saying “those people need to get out of those colonias, they are not livable.” Why would people leave their houses just because they don’t have electricity and water? Where would they live, under a bridge? On balance, no water or electricity is better than no house.¹⁸¹

Juárez anticipates and is careful to dispel any beliefs that colonia residents are ignorant or insensitive to tradeoffs their condition forces on them.

It isn’t that they don’t want to have a healthy life, and it isn’t that they are used to living without anything. Like they keep saying, “Oh, they’re from Mexico, and they’re used to living without water or electricity.” Well not all people in Mexico live with nothing, and not everyone in a colonia is from Mexico.¹⁸²

Those who live in existing colonias, and the many who would buy into such settlements if development opened up again, face a “double bind” that is a ubiquitous feature of oppression. Marilyn Frye describes the double bind as “situations in which options are reduced to a very few and all of them expose one to penalty.”¹⁸³ Because there is no good choice (only better and worse choices), the double bind does not easily lend itself to arguments of principle or “either/or” solutions. Juárez captures the dilemma with characteristic immediacy:

People here want good houses. I would like to live next to Bill Clinton, but the truth is that I can’t, I just can’t. So I am going to build whatever I can. I am not living under a bridge, and I am not asking the government to give me a house. I am just doing the best that I can to make a house for my children and to live as good a life as I can.¹⁸⁴

For Juárez and Arizmendi, solutions to colonias problems lie in helping residents rather than penalizing them for their living conditions. In the absence of political will to resolve the double bind, these local theorists believe that building up from the “homemade solutions” of self-builders offers the best solution. “The answer will have to come from the community,” Arizmendi says. “You have to take what the community is doing and magnify it, extend it.”¹⁸⁵

The community has responded to the lack of affordable housing by building colonias. Thus, what might seem contradictory or paradoxical from a scholar’s perspective—to support self-help housing knowing it leads to substandard conditions—is pragmatic, coherent, and strategic from the perspective of the colonia’s own theorists. As Matsuda reminds us, “[A]pparent logical inconsistency in intellectual argument is not inconsistency in the real world. Intellectual ar-

181. *Id.*

182. *Id.*

183. Marilyn Frye, *Oppression*, in *POWER, PRIVILEGE, AND LAW: A CIVIL RIGHTS READER* 60, 60-61 (Leslie Bender & Dann Braveman eds., 1995). On the double bind in law, see generally MARGARET JANE RADIN, *CONTESTED COMMODITIES* (1996); Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699 (1990).

184. Juárez Interview, *supra* note 167.

185. Arizmendi interview, *supra* note 75.

guments may be paradoxical; real experiences cannot be.”¹⁸⁶

Consistent with the view that “[y]ou have to take what the community is doing and magnify it, extend it,” Arizmendi now heads a housing project grounded in the principle of self-help and self-building. Proyecto Azteca¹⁸⁷ coordinates self-help homebuilding in the colonias of Hidalgo County, near McAllen, Texas. Collectives of householders build 900 square-foot, three-bedroom ranch houses of conventional frame construction that are affordable to families with very low incomes. Proyecto Azteca requires a family to commit a member to work full-time for eight weeks with a collective work team that builds a house for each family under the guidance of skilled builders. This commitment of sweat equity, combined with substantial subsidies from the federal government and private foundations, allows Proyecto Azteca to charge each family about \$16,000 for the completed house, with a family’s monthly mortgage payments ranging from \$90 to \$150.¹⁸⁸

Proyecto’s houses meet minimum construction standards and are designed for sturdiness and function. The houses also contain many design touches and small amenities.¹⁸⁹ “We want it to feel like your dream house,” says Arizmendi.¹⁹⁰ This innovative model of housing provision has garnered national awards and been replicated elsewhere. Yet the model depends upon subsidies for land and building materials, and therefore on significant and continued funding from government and private foundations. The unsubsidized cost of constructing Proyecto’s basic houses would be \$55,000, even factoring in the labor contributed by the self-builders.¹⁹¹ This price exceeds the means of the colonia population.

Although production has doubled in the past two years, Proyecto has built fewer than 300 houses in ten years.¹⁹² The organization “rations” through a waiting list many thousands of names long (just as public housing programs do), and by policy decisions to concentrate house construction in particular colonias as part of a broader community development agenda.¹⁹³ Proyecto Azteca is committed to facilitating self-help development rather than resisting it, but the organization can barely begin to fill the need.

So what is happening to the population unable to afford housing built in accordance with the strict new standards imposed by Texas law? Local observers note one perverse effect of the 1995 moratorium on new colonias is a decline in

186. *Looking to the Bottom*, *supra* note 160, at 341.

187. Located in San Juan, Texas, Proyecto Azteca is affiliated with the United Farmworkers.

188. Arizmendi Interview, *supra* note 75.

189. The standard house design is the joint product of a committee of construction specialists and owner-builders. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

Informality, Illegality, and Inequality

housing quality. Developers have created few new subdivisions under the tougher development rules because the required infrastructure has markedly increased the price of a lot. With land prices higher, those who do buy into the new, fully-serviced subdivisions have little left over to invest in housing construction or consolidation. Those who cannot afford lots in the new subdivisions either rent or live on internally subdivided lots in older colonias. Without the incentive of ownership, the renters do not build permanent dwellings.¹⁹⁴ Those who buy the tiny lots carved out by internal subdivision suffer overcrowding and may lack sufficient space to replace a trailer with a house, or to construct a safe septic system. As a result of the 1995 law, the number of dilapidated trailers in both older and new colonias has increased.¹⁹⁵ Some families are living on raw land in unplatted subdivisions without access to electricity or water; because such developments are not platted, under current law, they may never get access to these basic services.¹⁹⁶

With this evidence before us, the debate over building codes in the colonias can no longer be an abstract question of equality theory. Attention to the voices and choices of community leaders offers no single answer, as activists speak in the language of “both/and” rather than “either/or.” “People here want good houses. . . but the truth is that [they] can’t [buy a good house]. . . . So I am going to build whatever I can.”¹⁹⁷ “[Y]ou cannot impose housing quality standards on people without giving them the resources to meet them.”¹⁹⁸ The translation of these insights into legal policy must respect and not attempt to erase the tension between those multivocal positions. Matsuda argues that theorists can make claims for justice, but they can be proved right or wrong only through pragmatic method, “through intuition, guided by reason, tested against the lives of real people.”¹⁹⁹ Matsuda reminds us, “At the end of our theoretical struggle is someone’s life.”²⁰⁰

VI. REGULATING UNDER CONDITIONS OF EXTREME ECONOMIC CONSTRAINT

Deregulation, as well as regulation as we know it, is a simplified prescrip-

194. *Id.*

195. *Id.*

196. Texas Local Government Code section 232.023 mandates that subdivisions in the border region certify in the platting process their conformity to the Minimum State Standards and Model Political Subdivision Rules adopted pursuant to Texas Water Code section 16.343. Without such proof of conformity, no resident of an unplatted, an illegally platted, or a nonconforming subdivision can get access to public utilities. *See* TEX. LOC. GOV'T CODE § 232.029. Under a 1999 statute, Texas Local Government Code section 232.029(c), some occupants of homes built in pre-1996 subdivisions that cannot meet the tougher standards, but whose utility service already has been extended, may get access to utilities in limited conditions.

197. Juárez Interview, *supra* note 167.

198. Arizmendi Interview, *supra* note 75.

199. *Looking to the Bottom*, *supra* note 160, at 360.

200. *Pragmatism Modified*, *supra* note 162, at 1770.

tion that will not increase affordability or quality of housing for the poor. Neither conventional strategy will extend law's reach so as to integrate informal economic activity. Eliminating government regulation removes a powerful tool for collective action in the struggle for economic justice. Government enforcement of unattainable standards burdens those already on the margins and increases reliance on informal solutions. How can law facilitate more adequate housing for populations under conditions of extreme economic constraint without mandating unattainable standards?

Legislatures could enact laws for purely symbolic purposes, with no intent to require compliance. This is not an accepted use of law within the United States (although it occurs in practice). Within our legal tradition, where law does not demand compliance, the rule of law symbolically and publicly falters. From the perspective of a rule of law regime characteristic of a liberal democracy, law's effectiveness depends on its enforcement. Laws exist to regulate conduct and not for symbolic uses.²⁰¹ By longstanding norms of judicial power, a court that is unable to prescribe an adequate remedy will refuse to hear a case.²⁰²

Likewise, U.S. law contains few mechanisms for delayed or gradual enforcement based on the recognition of the immediate unattainability of the legal standard. When the U.S. Supreme Court declared racial segregation of the public schools to be illegal in *Brown v. Board of Education*, and then imposed remedies requiring only "all deliberate speed" in compliance, the Court undermined its own ruling.²⁰³

Where compliance places an economic burden on a regulated party who lacks the resources to comply, is there any alternative to enforcement consistent

201. Cf. Dolores Donovan, *Codification in Developing Nations: Ritual and Symbol in Cambodia and Indonesia*, 31 U.C. DAVIS L. REV. 693,732-733 (1998) (writing about the symbolic uses of law):

From the perspectives of ritual and symbol, enforcement of the written law in Cambodia and Indonesia is not a necessary condition to its effectiveness in serving the purposes for which it was enacted. . . . A government that enacts laws for their symbolic value is likewise absolved of any immediate duty of implementation or enforcement. The symbolic view of codification, like the ritual one, can serve as a cover for a multitude of sins. Not the least of the advantages of the symbolic view of law is that it allows a government to pick and choose the laws that it will enforce. The choices may be made in the interests of fairness, as in the case of a decision to delay enforcement of a newly-enacted law criminalizing polygamy, or the choices may be made in the interests of suppressing political dissent, as in the case of a decision immediately to enforce a newly-enacted law criminalizing allegedly irresponsible criticism of a government. Selective enforcement of the sort common in developing nations does not necessarily mean that the unenforced laws were enacted cynically or without any true intention of establishing the rule of law.

202. See generally DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 392-97, 395, 415-16 (2d ed. 1994); DAVID SCHOENBROD ET AL., REMEDIES: PUBLIC AND PRIVATE 86-89 (2d ed. 1996).

203. The Supreme Court first held the plaintiffs entitled to relief in *Brown v. Board of Education*, 347 U.S. 483 (1954). Following reargument on the appropriate form of relief, the Court decided *Brown v. Board of Education*, 349 U.S. 294, 300 (1955) (*Brown II*). On the ensuing rule of law crisis, compare Note, *Developments in the Law—Equal Protection: Judicial Remedies*, 82 HARV. L. REV. 1065, 1133 (1969), with ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 254-68 (2d ed. 1986).

Informality, Illegality, and Inequality

with the rule of law? Where the remedy is equitable (as an injunction), a court may delay relief under some circumstances. Typically, the delay is short and its availability is dependent on the equities of the case at hand.²⁰⁴ Such an equitable remedy could not be fashioned for general application in the case of the colonias. Yet, the acceptance of equitable flexibility indicates our legal tradition's recognition of the problem of unattainable standards, particularly when the law imposes positive economic obligations.

Sociological observers of small claims court note that judges sometimes manipulate continuances in order to enable parties to work things out, and sometimes to allow defendants to come up with funds to pay off landlords or creditors, thereby avoiding the harsh and final remedy of eviction or repossession.²⁰⁵ In the executive branch, prosecutorial discretion allows law enforcers to decline to require compliance. Similarly, by the "law on the ground" in force in large U.S. cities, regulators systematically ignore housing code violations and occupancy limit violations that might take scarce low-income housing out of service. But all these discretionary mechanisms preserve the illegality of the underlying conduct and, thus, the vulnerability of the violator. So, too, neither formal nor informal exercises of enforcement discretion use law to bring about aspirational changes in housing quality.

Commentators have argued for the creation of gradual or flexible forms of regulation that can bring informal economic activities "within the regulatory framework while minimizing costs to entrepreneurs."²⁰⁶

Policies . . . could be designed so as to induce an "upgrading" of informal activities by bringing these activities within the regulatory framework while minimizing costs to entrepreneurs. Upgrading is likely to demand greater flexibility in the implementation of existing codes and acknowledgment by city officials that compliance may require several phases. Lower thresholds of regulatory compliance would be applied to new, small-scale businesses in low-income communities than to well-established businesses that have had an opportunity to recover start-up costs.²⁰⁷

But the legal form for this flexibility remains unspecified.

To find a model for enforcing the "progressive realization" of a currently unattainable legal standard, we must look to international human rights law.²⁰⁸ The International Covenant on Economic, Social and Cultural Rights ("Eco-

204. In nuisance cases, for example, the decree may allow the defendant time to work out some change in his or her activities that would minimize the nuisance, rather than require cessation of operations at once, provided the public interest is not threatened. *E.g.*, *Wisconsin v. Illinois*, 278 U.S. 367, 418-19 (1929). See generally W. Page Keeton & Clarence Morris, *Notes on "Balancing the Equities,"* 18 TEX. L. REV. 412 (1940).

205. See JOHN M. CONLEY & WILLIAM M. O'BARR, *RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE*, 82-112 (1990). The authors observe that in informal courts, judges vary greatly in both styles and approaches to the law.

206. GLOBALIZATION AND ITS DISCONTENTS, *supra* note 83, at 166.

207. *Id.*

208. I am indebted to Heinz Klug and Berta Hernández-Truyol for help in formulating this proposal.

conomic Covenant")²⁰⁹ recognizes the human right of all people to "an adequate standard of living . . . including adequate food, clothing and housing, and to the continuous improvement of living conditions."²¹⁰ By ratifying the Economic Covenant, parties undertake an obligation to assure their people this basic sustenance.

One hundred twenty-seven nations have signed the Economic Covenant, including many nations in which most of the people lack adequate housing.²¹¹ Does this mean that the positive rights guaranteed by the Economic Covenant are not really part of international law at all, but merely symbolic expressions of aspiration?

Indeed, the Economic Covenant does not guarantee immediate provision of adequate housing to all persons. As a practical matter, economic rights cannot be implemented in all the same ways as civil and political rights, and the Economic Covenant recognizes this.²¹² The Economic Covenant requires these rights to be "progressively . . . realiz[ed] . . . to the maximum of . . . available [governmental] resources." Thus, the Economic Covenant takes resource constraints into account; the rich nation must provide more than the poor one.²¹³ In many instances, citizens will only gradually realize the right relative to the nation's economic resources.

Furthermore, the Economic Covenant does not impose universal standards for measuring compliance. States parties to the agreement may have differing standards for judging the adequacy of shelter, and the right may be guaranteed in a wide variety of political settings with no particular steps mandated for its full realization.

By this model, there are no immediately enforceable rights to full compliance from all regulated parties. Some commentators have argued that these measures of enforceability are the markers of a legal right, and they therefore regard the commitment to progressive realization of the Economic Covenant rights as something less than law.²¹⁴ Since 1981, the United States has main-

209. International Covenant on Economic, Social and Cultural Rights, Dec. 19, 1966, 993 U.N.T.S. 3, 5.

210. *Id.* at art. 11(1).

211. These are the signatories as of Dec. 31, 1993. BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW: SELECTED DOCUMENTS* 410 (1995).

212. States have direct power to establish structures that protect their citizens' civil and political liberties, such as police, courts and constitutions, but they cannot create the natural or social resources to feed and house those citizens by the same measures. Yet states do have the power to influence the creation of wealth, and even more directly, to distribute and redistribute wealth by structures such as property law, social welfare, and taxation. So the unenforceability of economic rights can be overstated.

213. *TRANSNATIONAL LEGAL PROBLEMS* 361 (Henry J. Steiner et al. eds., 4th ed. 1994).

214. On the debate, see JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 164-202 (1989); Philip Alston & Gerard Quinn, *The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights*, 9 *HUM. RTS. Q.* 156, 165-66 (1987); Louis Henkin, *International Human Rights and Rights in the United States*, in *HUMAN RIGHTS IN INTERNATIONAL LAW* 25, 33 (Theodore Meron ed., 1984); Louis B. Sohn, *The New International Law: Protection of the Right of Individuals Rather than States*, 32 *AM. U. L. REV.* 1, 19-20

Informality, Illegality, and Inequality

tained that economic, social and cultural rights “belong in a qualitatively different category from other rights, that they should not be seen as rights but as goals of economic and social policy.”²¹⁵

In general, negative rights provide the norm of legal rules in our tradition rather than positive rights. Negative rights prohibit the state from doing something, such as denying benefits without due process, or restricting freedom of religion. Positive rights generally refer to rights imposing an affirmative obligation on the state. The approaches governments use to assure these two kinds of rights generally differ, with programs of distribution and redistribution used for positive rights and programs of enforcement employed for negative rights.

Yet, if the law focuses on enforceability generally, as opposed to immediate and full compliance, the principle of progressive realization and the requirement of commitment of maximum available resources *do* bind parties equally and in legally enforceable ways. The principle of progressivity requires that states parties create programs and policies to address the housing need, and make steady progress over time to increase access to adequate housing. These standards obligate equally. The requirement of progress consistent with available resources imposes an “immediate and readily identifiable obligation upon states parties,” permits measurement, and hence allows for meaningful enforcement.²¹⁶

The United Nations monitors compliance with the Economic Covenant. The Economic Covenant obliges parties in annual seasons to submit reports to the Secretary General regarding the progress of implementation. Individuals cannot petition for violations²¹⁷ (although this right exists for civil and political rights), and the United Nations lacks the authority for independent investigation or sanction against non-complying countries.

Because of this dearth of enforcement powers, as much as the positive rights critique, skeptics have concluded that the Economic Covenant is weak. Nonetheless, if the progressive realization model were adapted for domestic regulatory purposes, effective enforcement mechanisms could be adopted.

“Progressive realization” provides a regulatory conception for imposing aspirational standards while calibrating compliance obligations to available economic resources. Adapting this legal technology for a domestic regulatory regime, government may evenhandedly include the poorest colonia and Beverly

(1982).

215. U.N. GAOR 3d Comm., 36th mtg. at 6, U.N. Doc. A/40/C.3/SR.36 (1985), quoted in Alston & Quinn, *supra* note 214, at 158. See also Cass Sunstein, *Against Positive Rights: Why Social and Economic Rights Don't Belong in the New Constitutions of Post-Communist Europe*, E. EUR. CONST. REV., Winter 1993, at 35-36 (arguing against the inclusion of positive rights in constitutions).

216. Alston & Quinn, *supra* note 214, at 165-66.

217. An optional protocol, entered into force in 1976, permits petitions from individuals and non-governmental organizations. Few states have chosen to adopt it. Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 6 I.L.M. 383.

Hills²¹⁸ under a universal housing standard, obliging compliance from residents in each setting according to their realistic capacity to meet the standard.

The progressive realization model understands equality and legality differently than the conventional approaches described above.²¹⁹ The model respects formal equality by establishing a single legal standard of adequate housing, and measuring compliance from each person by the single standard of commitment of maximum available resources. The model respects legality because compliance is always possible under the “maximum available resources” rule. Finally, the model marries aspiration and attainability by committing both government and people to a common norm of decent housing for all persons, and requiring continuing progress toward the standard by the “progressive realization” principle. Such an approach would respect foundational commitments of the legal tradition, and preserve law’s role as a “bridge. . . between those present aspirations and our future.”²²⁰

A domestic program for regulating housing quality and development built around the progressive realization of standards would better balance the regulatory burden on diverse populations, the public interest in adequate housing, and an aspirational commitment to elevating living standards in pursuit of social equality.²²¹ Retooling a standard from international law for domestic application fits with the globalized character of the social practices present in the colonias. And to the extent that informality is linked more broadly to globalization, any national effort to find regulatory tools appropriate to its character should sensibly draw on international experiences, practices, and ideas. When governments impose positive economic obligations on themselves, they do so by a mechanism that incorporates attainability as a limiting principle. Where states are the regulated parties, the ideal of the equality of nations means they respect realistic differences among themselves in terms of resources available for compliance. Is there any reason that domestic government should not limit its powers in the same ways and extend the same respect for real difference when it is dealing not with a peer nation, but instead with its people?

To encourage compliance with modified regulations and enforcement practices, local regulators can offer self-builders technical and financial assistance as part of the long-term upgrading process. At any point when the household seeks governmental assistance, the regulatory structure may assess whether it has met the dual compliance obligations of continuous progress toward the

218. See *The Problem of the Shanty*, *supra* note 114, at 680 (suggesting this is the measure of equality).

219. See *supra* text accompanying notes 111-28.

220. West, *supra* note 155, at 262-63.

221. The progressive realization model is a third way between the “crystals” and “mud” of American legal rules. See Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988) (describing back-and-forth pattern of blurring clear and distinct property rules with muddy doctrines of “maybe or maybe not,” and reverse tendency to try to clear up blur with new crystalline rules).

Informality, Illegality, and Inequality

standard and the commitment of maximum available household resources. By this approach, enforcement becomes a cooperative effort at progress rather than a punishment of the poor for where they live or the limits of their resources.

Linked to such a comprehensive program of regularization, progressive realization places law behind, rather than against the activities of informals, without sacrificing legality or equality. Equality means that the government and people recognize a single standard of housing adequacy and commit to undertake progressive steps to realize it. Legality means that compliance is relative to resources, and progress toward the standard is always required, even though full realization may never be achieved.

CONCLUSION

Viewed from the perspectives of legality and equality, the subject of informality is a minefield. Even so, lawyers and legal scholars must take the lead in formulating policy responses to informality. As this essay argues, informality is a phenomenon defined not just by legal standards, regulation policy, and enforcement practice, but importantly by law's internal ideals.

By my skeptical claims in this essay about a conflict of interest between legal ideals and informal realities, I do not wish to discourage constructive engagement by legal scholars. Indeed, I hope to encourage and guide it. Particularly within critical jurisprudential traditions, there exist theoretical and methodological approaches that may allow engaged scholars to think a way through the confounding obstacles of our shared legal culture.

In particular, theorizing about informality must build from the particular before reaching for the universal. Generalized and abstract concerns about legality and equality must be replaced by concrete engagement with the historical and social particularities of the informal sector as it exists in our midst. Theory that explains and predicts, and policy proposals that work, will stem from concrete social investigation and engagement; conversely, those that fail—or worse, do active harm—will likely stem from preconceived ideological conceptions. As such, informality takes on the force of a lived critique of our existing understandings as legal scholars.

To investigate the economic, social, and political contexts within which informality develops and spreads, legal scholars must use interdisciplinary tools, particularly those of the social sciences, including history, sociology, anthropology, economics, geography, cultural and area studies. In this essay, I have focused on the sociology and political economy of globalization as it impacts the housing strategies of poor, mostly Latina/o, working populations at the U.S.-Mexico border. Out of the effort to find some form by which law can engage informality on its own terms emerges the “progressive realization” model. It is an alternative model of the relationship between law and society that, not coincidentally, corresponds to the analysis and strategic choices of those en-

gaged in the struggle for survival in the colonias.

Within this particular socio-geography of economic restructuring, I have argued, we can find threads of workable resistance strategies in the face of globalization. Informality is proving an avenue of economic survival and even wealth-creation for some workers hard-pressed by the new mandates of cheap labor and privatized provision of the necessities of life.

Those threads snap easily, however, under the force of misguided law and its enforcement. Social investigation can tell the story, and social theory can connect it to larger structures of politics and economy. It is legal thinkers, however, who must bring that theory down to the ground in the shape of policy frameworks and specific regulatory interventions.