

FOREWORD: THE DISPOSSESSED  
MAJORITY: RESISTING THE SECOND  
REDEMPTION IN *AMÉRICA POSFASCISTA*  
(POSTFASCIST AMERICA) WITH LATCRIT,  
SCHOLARSHIP, COMMUNITY, AND  
PRAXIS AMIDST THE GLOBAL PANDEMIC

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*Settle your quarrels, come together, understand the reality of our situation, understand that fascism is already here, that people are already dying who could be saved, that generations more will live poor butchered half-lives if you fail to act. Do what must be done, discover your humanity and your love in revolution.*

—attributed to George Jackson  
(Sept. 23, 1941 to Aug. 21, 1971)<sup>4</sup>

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<sup>4</sup> Gregory Armstrong, *Preface*, in GEORGE L. JACKSON, *BLOOD IN MY EYE* (1972, Black Classic Press 1990), at xviii. *See also* GEORGE JACKSON, *SOLEDAD BROTHER THE PRISON LETTERS OF GEORGE JACKSON* (1994).

*The constitution of terror is built in great measure on the resurrection of discredited constitutional doctrines that aim to bring back some very old (and raw) deals in American law and society. Oftentimes, this mammoth, ongoing project of resurrection is cloaked in a collection of Big Lies that operate together, within the United States and beyond it, that attempt to justify injustice. These Big Lies help to foment and keep in place the intellectual and political constitution of terror that today passes for the Rule of Law in the United States.*

—Francisco Valdes, *The Constitution of Terror: Big Lies, Backlash Jurisprudence, and the Rule of Law in the United States Today*<sup>5</sup>

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#### I. INTRODUCTION: SOCIALLY DISTANT YET CRITICALLY CONSCIOUS

In October 2019, the Biennial LatCrit Conference convened academics, activists, lawyers, students, and other social justice workers at the Georgia State University College of Law to discuss, collaborate, and strategize against the ongoing dispossession and silencing of the political voice of the majority of people in the United States.<sup>6</sup> Despite ubiquitous and long-standing efforts to disenfranchise people likely to vote against Republican Party candidates,<sup>7</sup> and the systematic exclusion of voters in U.S. territories,<sup>8</sup> the

<sup>5</sup> Francisco Valdes, *The Constitution of Terror: Big Lies, Backlash Jurisprudence, and the Rule of Law in the United States Today*, 7 NEV. L.J. 973, 976 (2007).

<sup>6</sup> *Call for Papers The Dispossessed Majority: Resisting the Second Redemption in América Posfascista (Postfascist America)*, LATCRIT (2019), <http://www.latcrit.org/content/conferences/latcrit-biennial-conferences/2019-latcrit-biennial-conference-cfp/> (last visited on June 14, 2020).

<sup>7</sup> See e.g., U.S. COMM’N ON CIVIL RIGHTS, VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION (2001), <https://www.usccr.gov/pubs/vote2000/report/>

majority of voters in the 2016 presidential election cast their ballots against Donald J. Trump.<sup>9</sup> Nevertheless, in the aftermath of the election, the Repub-

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main.htm (last visited June 18, 2020) (finding eligible Floridians were systemically denied their right to vote in the 2000 presidential election and urging the adoption of adequate legislation to remedy the denials); H. JUDICIARY COMM. DEMOCRATIC STAFF 109TH CONG., PRESERVING DEMOCRACY: WHAT WENT WRONG IN OHIO (2005) (finding disenfranchisement of Ohio voters in the 2004 presidential election and irregularities caused by intentional and illegal misconduct). Let it be forgotten, Black and other racialized minority voters disproportionately suffered state disenfranchisement in these critical elections. *Florida Election Bias 'Exposed in Report'*, GUARDIAN (June 5, 2001), <https://www.theguardian.com/world/2001/jun/05/uselections2000.usa>. (reporting on the U.S. Commission on Civil Rights report, *supra*, that “the assertion that minority voters were disenfranchised in the Florida election proved true; fifty-four percent of the rejected votes in Florida were cast by black Americans stemming from unequal access to modern polling machines.”). More recently, the Supreme Court has facilitated ongoing state efforts to disenfranchise people likely to vote against Republican candidates. *E.g.*, *Shelby County v. Holder*, 570 U.S. 529, 557 (2013) (holding the Voting Rights Act coverage formula and preclearance requirement unconstitutional); *Brakebill v. Jaeger*, 139 S. Ct. 10, 10 (2018) (Ginsburg, J., dissenting) (asserting that if the Eighth Circuit’s stay is not vacated, disenfranchisement is likely for twenty percent of usual voters who lack sufficient identification); *Rucho v. Com. Cause*, 139 S. Ct. 2484 (2019) (holding federal courts are incapable of hearing challenges to partisan gerrymandering); *Maggie Astor, A Look at Where North Dakota’s Voter ID Controversy Stands*, N.Y. TIMES (Oct. 19, 2018), <https://www.nytimes.com/2018/10/19/us/politics/north-dakota-voter-identification-registration.html> (discussing the *Brakebill* opinion’s adverse impact on indigenous peoples attempting to vote in North Dakota); Amy Goodman & Ari Berman, *Supreme Court Hands GOP Big Victory on Gerrymandering, Ensnaring “Massive Election Rigging”*, DEMOCRACYNOW.ORG (Jun. 28, 2019), [https://www.democracynow.org/2019/6/28/supreme\\_court\\_hands\\_gop\\_big\\_victory](https://www.democracynow.org/2019/6/28/supreme_court_hands_gop_big_victory) (discussing *Rucho*). See generally CAROL ANDERSON & RICHARD J DURBIN, ONE PERSON, NO VOTE: HOW VOTER SUPPRESSION IS DESTROYING OUR DEMOCRACY (2018); Victor Andres Rodríguez, *Section 5 of the Voting Rights Act of 1965 after Boerne: The Beginning of the End of Preclearance?*, 91 CAL. L. REV. 769 (2003).

<sup>8</sup> For example, the U.S. government excludes U.S. citizens living on the island of Puerto Rico from voting in federal elections. See Charles R. Venator-Santiago, *Puerto Ricans: The Liminal Latinos*, in *MINORITY VOTING IN THE UNITED STATES* (Kyle L. Kreider & Thomas J. Baldino eds., 2015), at 298. When U.S. citizens relocate from Puerto Rico to the mainland United States, they automatically can enjoy the right to vote in federal elections. *Id.* at 292. The U.S. government’s exclusion of Puerto Rican people from the rights of citizenship has a long history that is rooted in white supremacist racism. As Pedro Malavet explains, Congress deemed Puerto Rico ineligible for statehood because of its “mixed-race” population and the belief that the majority of Puerto Ricans descended from Black persons. See Pedro Malavet, *Reparation Theory and Postcolonial Puerto Rico: Some Preliminary Thoughts*, 13 BERKELEY LA RAZA L. J. 387 (2002). Although the history of Hawai’ian statehood has been embraced as a victory by liberal champions of multiculturalism, the Hawai’ian Islands were long perceived in a similar fashion by U.S. government officials. See Dean Itsuji Saramillio, *Colliding Histories: Hawai’i Statehood at the Intersection of Asians “Ineligible to Citizenship” and Hawai’ians “Unfit for Self-Government.”* 13 J. ASIAN AM. STUDIES 283 (2010) (examining how the dominant historical narrative of liberal inclusivity in Hawai’ian statehood obscures and normalizes settler colonialism).

<sup>9</sup> FED. ELECTION COMM’N, FEDERAL ELECTIONS 2016: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES (Eileen J. Leaman et al. eds., 2017). *Accord* New York Times, *Presidential Election Results: Donald J. Trump Wins*, N.Y. TIMES (Aug. 7, 2017), <https://www.nytimes.com/elections/2016/results/president> (reporting Hillary Clinton won 48 percent of the national popular vote against Donald Trump’s 45.9 percent).

lican-controlled federal government has acted daily to dispossess the majority of the nation's peoples,<sup>10</sup> with devastating consequences for the world.<sup>11</sup>

Latina and Latino Critical Legal Theory—LatCrit—was created twenty-five years ago when a small yet diverse group of law professors met in San Juan, Puerto Rico during the 1995 convention of the Hispanic National Bar Association.<sup>12</sup> They resolved to collaborate in order to produce critical sociolegal knowledge that would initially center on the multiply-diverse conditions and experiences of Latina/o/x peoples, critique how those communities suffered injustice under the color of law, and develop an intellectual and political program founded on the antisubordination principle.<sup>13</sup>

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<sup>10</sup> See, e.g., Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054 (codified as amended at 26 U.S.C.); Alicia Parlapiano, *How the 'Small-Business Tax Cut' Would Also Be a Tax Cut for the Wealthy*, N.Y. TIMES (Dec. 20, 2017), <https://www.nytimes.com/interactive/2017/12/20/us/politics/small-business-tax-cut-pass-throughs.html>; Michael D. Shear & Michael Tackett, *With Tax Overhaul, Trump Fulfills a Campaign Promise and Flexes Republican Muscle*, N.Y. TIMES (Dec. 20, 2017), <https://www.nytimes.com/interactive/2017/12/19/us/politics/tax-bill-house-live-vote.html>.

<sup>11</sup> See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392, 2447 (2018) (analogizing to *Korematsu* where there was “strong evidence” to support finding hostile motivations behind Trump’s Executive Order 13769, also known as his “Muslim ban”) (Sotomayor, J., dissenting); Protecting the Nation from Foreign Terrorist Entry into the U.S., 80 Fed. Reg. 20, 8,777 (Jan. 27, 2017); Vahid Niayesh, *Trump’s Travel Ban Really was a Muslim Ban, Data Suggests; What the Trump Administration’s Data Can and Can’t Tell Us About the True Effect of the Travel Ban*, WASH. POST (Sept. 26, 2019) <https://www.washingtonpost.com/politics/2019/09/26/trumps-muslim-ban-really-was-muslim-ban-thats-what-data-suggest/> (showing immigrant visa applications made by people identified by the U.S. from majority-Muslim nations were denied disproportionately as opposed to applications sought from Venezuela and North Korea). For other examples, see Michael Crowley, Edward Wong & Ana Swanson, *Rebuking China, Trump Curtails Ties to Hong Kong and Severs Them With W.H.O.*, N.Y. TIMES (May 29, 2020), <https://www.nytimes.com/2020/05/29/us/politics/trump-hong-kong-china-WHO.html>; Michael LaForgia & Walt Bogdanich, *Why Bombs Made in America Have Been Killing Civilians in Yemen*, N.Y. TIMES (May 16, 2020), <https://www.nytimes.com/2020/05/16/us/arms-deals-raytheon-yemen.html> (highlighting the War in Yemen and showing that under the Trump Administration foreign arms sales are pursued without regard to how weapons will be used); Mark Landler, *Trump Abandons Iran Nuclear Deal He Long Scorned*, N.Y. TIMES (May 8, 2018), <https://www.nytimes.com/2018/05/08/world/middleeast/trump-iran-nuclear-deal.html>; Office of the Attorney General, Memorandum for Federal Prosecutors Along the Southwest Border, U.S. Dept. of Justice (Apr. 6, 2018) <https://www.justice.gov/opa/press-release/file/1049751/download> (ordering a zero-tolerance policy for all immigration offenses prosecuted under 8 U.S.C. section 1325(a), which resulted in increased family separations at the borderlands). David E. Sanger & Edward Wong, *U.S. Ends Cold War Missile Treaty, With Aim of Countering China*, N.Y. TIMES (Aug. 1, 2019), <https://www.nytimes.com/2019/08/01/world/asia/inf-missile-treaty.html>; White House, Statement from the President Regarding the Intermediate-Range Nuclear Forces (INF) Treaty (Feb. 1, 2019), <https://www.whitehouse.gov/briefings-statements/statement-president-regarding-intermediate-range-nuclear-forces-inf-treaty/> (suspending U.S. obligations under the INF Treaty and beginning the process of withdrawing from it).

<sup>12</sup> Francisco Valdes, Foreword, *Latina/o Ethnicities, Critical Race Theory, and Post-Identity Politics in Postmodern Legal Culture: From Practices to Possibilities*, 9 LA RAZA L.J. 1, 7 n.28 (1996) [hereafter Valdes, *Latina/o Ethnicities*] (introducing the symposium publication of the 1995 HNBA colloquium). See also Francisco Valdes, Foreword, *Poised at the Cusp: LatCrit Theory, Outsider Jurisprudence and Latina/o Self-Empowerment*, 2 HARV. LATINO L. REV. 1 (1997) [hereafter Valdes, *Poised at the Cusp*] (introducing the symposium publication of the first annual LatCrit conference).

<sup>13</sup> See, e.g., Berta E. Hernández-Truyol, Angela Harris & Francisco Valdes, *Beyond the First Decade: A Forward-Looking History of LatCrit Theory, Community and Praxis*, 17

Twenty-five years later, the professors, lawyers, students, activists, and other social justice workers who constitute the LatCrit community and who deploy LatCrit theory and praxis continue to pursue, in diverse ways, the shared goal of critiquing the contemporary regime in order to help create a legal order where the aspiration of equal justice for all can become social reality.<sup>14</sup> As LatCrit reaches its twenty-fifth anniversary, we aspire for this symposium Foreword to remind its readers of LatCrit's foundational propositions and ongoing efforts to cultivate new generations of ethical advocates who can systemically analyze the sociolegal conditions that engender injustice and intervene strategically to help create enduring sociolegal, and cultural, change.<sup>15</sup>

First, however, we feel compelled to comment briefly on the sociolegal conditions that shape the responses of nation states to the global pandemic of Covid-19,<sup>16</sup> and of federal, state, and local governments to the mass protests against the homicide of George Floyd—and countless other Black, Indigenous, Asian, and Latinx peoples—by white men acting under the pretense of enforcing the law.<sup>17</sup> As we write this Foreword, over 14.5 million people

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BERKELEY LA RAZA L.J. 169 (2006); Pedro A. Malavet, Afterword, *Outsider Citizenship and Multidimensional Borders: The Power and Danger of Not Belonging*, 52 CLEV. ST. L. REV. 321, 333 (2005); Valdes, *Poised at the Cusp*, *supra* note 12, at 12; Francisco Valdes, *Rebellious Knowledge Production, Academic Activism, & Outsider Democracy: From Principles to Practices in LatCrit Theory, 1995 to 2008*, 8 SEATTLE J. SOC. JUST. 131, 145 (2009) [hereafter Valdes, *Rebellious Knowledge Production*]; Sheila I. Vélez Martínez, *Towards an Outcrit Pedagogy of Anti-Subordination in the Classroom*, 90 CHI.-KENT L. REV. 589 (2015).

<sup>14</sup> Francisco Valdes has described this goal as imaginable (and hence possibly attainable) by collaborating to develop a “postsubordination vision” of society. See Francisco Valdes, *Outsider Scholars, Legal Theory & Outcrit Perspective: Postsubordination Vision as Jurisprudential Method*, 49 DEPAUL L. REV. 831 (2000) [hereafter Valdes, *Postsubordination Vision*]. See also Francisco Valdes, *Insisting on Critical Theory in Legal Education: Making Do While Making Waves*, 12 BERKELEY LA RAZA L. REV. 148, 152, 159-163 (2005) [hereafter Valdes, *Making Waves*].

<sup>15</sup> See generally FRANCISCO VALDES, STEVEN W. BENDER & JENNIFER HILL, *CRITICAL JUSTICE: SYSTEMIC ADVOCACY IN LAW AND SOCIETY* (forthcoming 2020) [hereafter *CRITICAL JUSTICE*].

<sup>16</sup> See, e.g., *Coronavirus Disease (COVID-19) Pandemic* WORLD HEALTH ORGANIZATION, <https://www.who.int/emergencies/diseases/novel-coronavirus-2019> (last visited Jun. 11, 2020); *Coronavirus (COVID-19)*, CENTERS FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-nCoV/index.html> (last visited Jun. 11, 2020); *COVID-19 Dashboard*, CENTER FOR SYSTEMS SCIENCE & ENGINEERING (CSEE) AT JOHNS HOPKINS UNIVERSITY (JHU), <https://coronavirus.jhu.edu/map.html> (last visited Jun. 14, 2020) [hereafter *JHU CSEE DASHBOARD*].

<sup>17</sup> See, e.g., Dionne Searcey & David Zucchini, *Protests Swell Across America as George Floyd Is Mourned Near His Birthplace*, N.Y. TIMES (June 6, 2020), <https://www.nytimes.com/2020/06/06/us/george-floyd-memorial-protests.html>; Emily Stewart, *George Floyd's Killing has Opened the Wounds of Centuries of American Racism*, VOX (June 10, 2020), <https://www.vox.com/identities/2020/5/30/21275694/george-floyd-protests-minneapolis-atlanta-new-york-brooklyn-cnn>; OWN, *Stacey Abrams: “The Anguish is Real” from Where Do We Go From Here?*, YOUTUBE (June 9, 2020), [https://www.youtube.com/watch?v=M\\_QTi6ir\\_Hw](https://www.youtube.com/watch?v=M_QTi6ir_Hw) (characterizing the way that Derek Chauvin killed George Floyd by kneeling on Mr. Floyd's neck for over eight minutes as a technique that deer hunters use on their prey). Even when vigilantes, who might be characterized as not white, such as George Zimmerman (the killer of Trayvon Martin), whose mother is Peruvian, they nevertheless act like a white man under the color of law. See Cara Buckley, *Zimmerman Studied ‘Stand Your Ground’ in Class, Florida*

have been infected by the novel coronavirus, and over six-hundred thousand have died.<sup>18</sup> In the United States, more than 3.9 million people have contracted the novel coronavirus, and more than one-hundred-and-forty thousand have died from Covid-19.<sup>19</sup> Millions more have been asked, or ordered, to “shelter in place,” “self-quarantine,” or otherwise practice “social distancing.”<sup>20</sup> In turn, responses to the pandemic have resulted in historic dislocations of the global political economy and unprecedented unemployment numbers in the United States.<sup>21</sup> Far from being an equalizer, as some U.S. politicians and mainstream commentators have asserted,<sup>22</sup> the Covid-19 pandemic has made even more visible the systemic inequalities that communities of color have been struggling against,<sup>23</sup> and which critical scholars have

*Court Is Told*, N.Y. TIMES (July 13, 2013), <https://archive.nytimes.com/www.nytimes.com/2013/07/04/us/witnesses-tell-of-zimmermans-interest-in-law-enforcement.html>. So can white women. See Manny Fernandez & Marina Trahan Martinez, *A Dallas Police Officer Shot Her Neighbor, and a City is Full of Questions*, N.Y. TIMES (Sept. 18, 2018), <https://www.nytimes.com/2018/09/14/us/botham-jean-dallas-shooting-amber-guyger.html>; Marina Trahan Martinez, Sarah Mervosh & John Eligon, *Amber Guyger Is Sentenced to 10 Years for Murder of Botham Jean*, N.Y. TIMES (Oct. 8, 2019), <https://www.nytimes.com/2019/10/02/us/amber-guyger-sentencing.html>. To comprehensively list this parade of terror, of twenty-first century lynching, is beyond the scope of this Foreword. But see *The Counted*, GUARDIAN, <https://www.theguardian.com/us-news/series/counted-us-police-killings> (last visited Jun. 24, 2020) (comprehensively recording the number of people killed by police and other law enforcement agencies in the United States); *Fatal Force*, WASH. POST, <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/> (last visited Jun. 24, 2020) (reporting nationally on fatal shootings by police officers); *#SayHerName Campaign*, AFRICAN AM.POL’Y FORUM, <https://aapf.org/sayhername> (last visited June 18, 2020).

<sup>18</sup> WHO *Coronavirus Disease (COVID-19) Dashboard*, WORLD HEALTH ORGANIZATION, <https://covid19.who.int> (Jul. 21, 2020, 3:49pm CEST); JHU CSEE Dashboard, *supra* note 16.

<sup>19</sup> JHU CSEE Dashboard, *supra* note 16; *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES (Jul. 21, 2020, 8:54pm EST), <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>.

<sup>20</sup> *Social Distancing*, CENTERS FOR DISEASE CONTROL & PREVENTION (last reviewed May 6, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html>; *About Quarantine and Isolation*, CENTERS FOR DISEASE CONTROL & PREVENTION (last reviewed Jan. 27, 2020), <https://www.cdc.gov/quarantine/quarantineisolation.html>.

<sup>21</sup> See BUREAU OF LABOR STATISTICS USDL-20-1140, THE EMPLOYMENT SITUATION: MAY 2020 (U.S. Department of Labor 2020); BUREAU OF LABOR STATISTICS, THE IMPACT OF THE CORONAVIRUS (COVID-19) PANDEMIC ON THE EMPLOYMENT SITUATION FOR MAY 2020, <https://www.bls.gov/cps/employment-situation-covid19-faq-may-2020.pdf> (last visited June 18, 2020). See also Ben Casselman, *No, the Jobs Report Wasn’t Rigged. Here’s What Happened*, N.Y. TIMES (June 8, 2020), <https://www.nytimes.com/2020/06/08/business/economy/jobs-report-data.html>; Tiffany Hsu, *Sobering Jobs Outlook: ‘We’re Expecting a Long Haul’*, N.Y. TIMES (June 11, 2020), <https://www.nytimes.com/2020/06/11/business/economy/unemployment-claims-coronavirus.html>; Alicia Parlapiano, *The Economic Pain the Unemployment Rate Leaves Out*, N.Y. TIMES (June 5, 2020), <https://www.nytimes.com/interactive/2020/06/05/upshot/what-the-pandemic-unemployment-rate-leaves-out.html>; Nelson D. Schwartz, Ben Casselman & Ella Koeze, *How Bad is Unemployment? Literally Off the Charts*, N.Y. TIMES (May 8, 2020), <https://www.nytimes.com/interactive/2020/05/08/business/economy/april-jobs-report.html>.

<sup>22</sup> See, e.g., Bethany L. Jones & Jonathan S. Jones, *Gov. Cuomo is Wrong, Covid-19 is Anything but an Equalizer*, WASH. POST (Apr. 5, 2020), <https://www.washingtonpost.com/outlook/2020/04/05/gov-cuomo-is-wrong-covid-19-is-anything-an-equalizer/>.

<sup>23</sup> See, e.g., American Hospital Association, *The Disproportionate Impact of COVID-19 on Communities of Color, Statement for the Committee on Ways and Means of the U.S. House of Representatives* (May 27, 2020), <https://www.aha.org/testimony/2020-05-27-testimony-dis>

been documenting, for generations.<sup>24</sup> Atop the global warming and other climate changes caused by the corporations and nation states that accelerated the extraction and consumption of gas, oil, and other “natural resources” since the mid-twentieth century,<sup>25</sup> and the global resurgence of authoritarian

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proportionate-impact-covid-19-communities-color; Centers for Disease Control & Prevention, *COVID-19 in Racial and Ethnic Minority Groups* (last accessed June 18, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html> (reporting disproportionate illness and death among racial and ethnic boundaries); Mark Hugo Lopez, Lee Rainie & Abby Budiman, *Financial and Health Impacts of COVID-19 Vary Widely by Race and Ethnicity*, PEW RESEARCH CTR., <https://pewrsr.ch/2L15rwr> (last visited June 13, 2020); Erin K. Stokes et al., *Coronavirus Disease 2019 Case Surveillance—United States, Jan. 22–May 2020*, 69 MORBIDITY & MORTALITY WEEKLY REPORT 759, 763 (June 19, 2020) (finding disproportionate reported cases and hospitalizations for Covid-19 among Hispanic, Black, and American Indian peoples). See also BUREAU OF JUSTICE STATISTICS NCJ 254268, DATA COLLECTED UNDER THE FIRST STEP ACT, 2019 (2020) (showing forty-two percent of federal prisoners in 2018 were Black); E. ANN CARSON, BUREAU OF JUSTICE STATISTICS NCJ 253516, PRISONERS IN 2018, (U.S. Dep’t of Justice 2020) (finding the lowest imprisonment rate of Black prisoners since 1989 but noting that black men are imprisoned at 5.8 times the rate of white men); FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORT: TABLE 43, ARRESTS BY RACE AND ETHNICITY, 2018, (Dep’t of Justice 2019) <https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/tables/table-43/table-43-overview.pdf>. (reporting that over twenty-seven percent of people arrested in the United States in 2018 were Black or African American). William J. Sabol, Thaddeus L. Johnson & Alexander Caccavale, *Trends in Correctional Control by Race and Sex*, 32 FED. SENT’G REP. 157 (2020) (examining national trends in disparity by race and sex in probation, parole, jail, and prison populations). Patricia Cohen & Ben Casselman, *Minority Workers Who Lagged in a Boom Are Hit Hard in a Bust*, N.Y. TIMES (June 6, 2020), <https://www.nytimes.com/2020/06/06/business/economy/jobs-report-minorities.html> (discussing the vulnerability of Black and Latino people during the Covid-19 pandemic regarding disproportionate job losses and insufficient government support). See generally BIAS IN THE LAW: A DEFINITIVE LOOK AT RACIAL PREJUDICE IN THE U.S. CRIMINAL JUSTICE SYSTEM (J. J. Avery & J. Cooper eds., 2020).

<sup>24</sup> For a handful of historic texts documenting and critiquing the systemic injustice waged against communities of color under the ideology and practice of white supremacy, see W.E.B. DuBois, *THE SOULS OF BLACK FOLKS* (1903); W.E.B. DuBois, *BLACK RECONSTRUCTION IN AMERICA: TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860-1880* (1935); OLIVE GILBERT, *NARRATIVE OF SOJOURNER TRUTH* (1850, 1884, 1998); ALONSO S. PERALES, *ARE WE GOOD NEIGHBORS?* (1948) (documenting discrimination against Mexican Americans in Texas); UNITED STATES COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, *PERSONAL JUSTICE DENIED: REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS* (1982, 1983, 1997) (summarizing the commission’s findings regarding the internment of Japanese Americans during World War II), <https://www.archives.gov/research/japanese-americans/justice-denied>; IDA B. WELLS-BARNETT, *SOUTHERN HORRORS: LYNCH LAW IN ALL ITS PHASES* (1892); IDA B. WELLS-BARNETT, *THE RED RECORD: TABULATED STATISTICS AND ALLEGED CAUSES OF LYNCHING IN THE UNITED STATES* (1895). For a few recent analyses of systemic racial injustice in the United States, see, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* (2016); NICK ESTES, *OUR HISTORY IS THE FUTURE: STANDING ROCK VERSUS THE DAKOTA ACCESS PIPELINE, AND THE LONG TRADITION OF INDIGENOUS RESISTANCE* (2019); CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *MIGRATING TO PRISON: AMERICA’S OBSESSION WITH LOCKING UP IMMIGRANTS* (2019); RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017).

<sup>25</sup> See, e.g., ERLE C. ELLIS, *ANTHROPOCENE: A VERY SHORT INTRODUCTION* (2018) (discussing the competing conceptualizations of the end of the Holocene and how to name and date the start of the new geological era); ELIZABETH KOLBERT, *THE SIXTH EXTINCTION: AN UNNATURAL HISTORY* (2014) (reporting on the contemporary mass extinction process on Earth

politics,<sup>26</sup> the Covid-19 pandemic has dramatically heightened people's anxiety and uncertainty about their precarious and vulnerable situations.<sup>27</sup> This bodes particularly ill for the future of marginalized communities racialized as Black, indigenous, or otherwise "of color" (*a.k.a.*, BIPOC).<sup>28</sup>

Thus, as we practice social distancing, scholars who affiliate with Lat-Crit must remain critically conscious: we must recognize the multiple positions of privilege that we occupy, which allow us to reflect, write, and analyze "big pictures" while the vast majority of Earth's peoples struggle daily for survival or subsistence. Only after we have situated ourselves may we hope to understand critically the systemic inequality fostered by global racial capitalism in the twenty-first century and the importance of sharing postsubordination visions from the LatCrit political imaginary.<sup>29</sup> Decolonial, *mujerista*, queer, and transnational, these visions can help diverse peoples contend with the current crisis, dismantle its enabling conditions, and trans-

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and explaining how human civilization has catalyzed it); Meera Subramanian, *Anthropocene Now: Influential Panel Votes to Recognize Earth's New Epoch*, NATURE (May 21, 2019), <https://www.nature.com/articles/d41586-019-01641-5> (reporting that the Anthropocene Working Group of the Subcommittee on Quaternary Stratigraphy voted to recognize the Anthropocene epoch and to date its start to the mid-twentieth century based on the rapid increase of the human population, acceleration of industrial production, including agricultural chemicals, and the embedding of radioactive debris within sediments and glacial ice due to the first atomic-bomb blasts). See also Shalanda H. Baker, *Adaptive Law in the Anthropocene*, 90 CHL-KENT L. REV. 563 (2015); Carmen G. Gonzalez, *Beyond Eco-Imperialism: An Environmental Justice Critique of Free Trade*, 78 DENV. U. L. REV. 979 (2001); Jedediah Purdy, *Coming into the Anthropocene*, 129 HARV. L. REV. 1619 (2016).

<sup>26</sup> See, e.g., Anna Lüthmann & Staffan I. Lindberg, *A Third Wave of Autocratization is Here: What is New About It?*, DEMOCRATIZATION, <https://doi.org/10.1080/13510347.2019.1582029> (2019). See also Rachel Anderson, Marc-Tizoc González & Stephen Lee, *Toward a New Student Insurgency: A Critical Epistolary*, 94 CAL. L. REV. 1879, 1942-1945 (2006) (asserting that a revolution in democracy and fascism seemed to mark the first decade of the twenty-first century).

<sup>27</sup> On social anxiety, precarity and vulnerability, and the future of marginalized communities, see e.g., Loïc WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY (2009), at 11-13. See also JOE SOSS, RICHARD C. FORDING & SANFORD SCHRAM, DISCIPLINING THE POOR: DISCIPLINING THE POOR: NEOLIBERAL PATERNALISM AND THE PERSISTENT POWER OF RACE (2011), at 1 ("Thus, the most basic purpose of poverty governance is not to end poverty; it is to secure, in politically viable ways, the cooperation and contributions of weakly integrated populations."); Judith Butler, *Foreword*, in ISABEL LOREY, STATE OF INSECURITY: GOVERNMENT OF THE PRECARIOUS (2012, 2015), at vii ("[P]recarity is not a passing or episodic condition, but a new form of regulation that distinguishes this historical time. . . . [P]recarity has itself become a regime, a hegemonic mode of being governed, and governing ourselves."); Marc-Tizoc González, *Afterword: Habeas Data: Comparative Constitutional Interventions from Latin America against Neoliberal States of Insecurity and Surveillance*, 90 CHICAGO-KENT L. REV. 641, 648 (2015) (summarizing Wacquant's explanation of how the rise of precarious wage work and "the carceral-assistential net" at the end of the twentieth century heralded a "new government of social insecurity" in the United States).

<sup>28</sup> Some activists have recently rearticulated this assemblage of racialized communities under the acronym, BIPOC. See, e.g., Sandra E. Garcia, *Where Did BIPOC Come From?*, N.Y. TIMES (June 16, 2020), <https://www.nytimes.com/article/what-is-bipoc.html> (explaining why "BIPOC" foregrounds black and indigenous peoples).

<sup>29</sup> On postsubordination vision, see Valdes, *Postsubordination Vision*, *supra* note 14; Valdes, *Making Waves*, *supra* note 14.



form them systemically. For LatCrit, these visions are necessarily grounded in the principle of antisubordination.<sup>30</sup>

From an antisubordination perspective, it is plain to see that the state does not value all lives equally. Rather, an antisubordination perspective allows us to apprehend how the state renders communities of color invisible or faceless, as well as how it represents (distorts) our faces “as so many symbols of evil[.]”<sup>31</sup> In the context of the Covid-19 pandemic, an antisubordination perspective compels us to confront capitalism, colonialism, patriarchy, and racism, *inter alia*, rather than “to become senseless before those lives we have eradicated, and whose grievability is indefinitely postponed.”<sup>32</sup> In other words, an antisubordination perspective enables an epistemological and even ontological shift so that Black people are first and foremost apprehended as living. Black lives cannot be “apprehended as injured or lost if they are not first apprehended as living.”<sup>33</sup> Only when our Black, Brown, and otherwise racialized bodies are accepted as living human beings may we start to build a society where “violence [is] less possible, [and racialized] lives [are] more equally grievable, and, hence, more livable.”<sup>34</sup>

Working for lasting social change from an antisubordination perspective enables us to see the myriad laws, regulations, policies, and practices that, by intent or effect, enforce the inferior social status of historically- and contemporarily-oppressed groups. In turn, working with a perspective and principle of antisubordination can inspire us to develop practices and policies capable of redressing entrenched structures and systems of inequality.<sup>35</sup> LatCrit theory has always recognized and consistently argued that Law is instrumental to dispossession and often colors antidemocratic means as “le-

<sup>30</sup> See, e.g., Steven W. Bender & Francisco Valdes, *At and Beyond Fifteen: Mapping LatCrit Theory, Community, and Praxis*, 14 HARV. LATINO L. REV. 397, 402 (2011), *jointly pub'd in* 1 U. MIAMI RACE & SOC. JUST. L. REV. 177 (2011) and 22 BERKELEY LA RAZA L.J. 302 (2012); Pedro A. Malavet, *Literature and the Arts as Antisubordination Praxis: LatCrit Theory and Cultural Production: Confessions of an Accidental Crit*, 33 U.C. DAVIS L. REV. 1293 (2000); Vélez Martínez, *supra* note 13, at 586-87; Margaret E. Montoya & Francisco Valdes, “Latinas/os” and the Politics of Knowledge Production: *LatCrit Scholarship and Academic Activism as Social Justice Action*, 83 INDIANA L.J. 1197 (2008) [hereafter Montoya & Valdes, *Politics of Knowledge Production*]; Margaret E. Montoya & Francisco Valdes, “Latinas/os” and Latina/o Legal Studies: *A Critical and Self-Critical Review of LatCrit Theory and Legal Models of Knowledge Production*, 4 FIU L. REV. 187 (2009) [hereafter Montoya & Valdes, *Self-Critical Review*].

<sup>31</sup> JUDITH BUTLER, *PRECARIOUS LIFE: THE POWERS OF MOURNING AND VIOLENCE* (2004), at xviii.

<sup>32</sup> *Id.*

<sup>33</sup> JUDITH BUTLER, *FRAMES OF WAR: WHEN IS LIFE GRIEVABLE?* (2009, 2010), at 1.

<sup>34</sup> *Id.* at viii.

<sup>35</sup> See Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976); Reva B. Siegel, *The American Civil Rights Tradition—Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2004). See also Marc Tizoc Gonzalez et al., *Afterword, Change and Continuity: An Introduction to the LatCrit Taskforce Recommendations*, 8 SEATTLE J. SOC. JUST. 303, 304 (2009) (on LatCrit’s principle and praxis of antisubordination positionality); Vélez Martínez, *supra* note 13, at 585 (same).

gitimate.”<sup>36</sup> Despite being carved above the entrance of the Supreme Court of the United States,<sup>37</sup> and despite the centurial efforts to enact legal reform and social change in the United States,<sup>38</sup> the promise of “Equal Justice Under Law” has not been realized. Everyday headlines make plain that the U.S. constitutional commitment to “Equal Justice Under Law” remains illusory for myriad individuals and indeed for entire communities. Today’s front-burner legal issues and social struggles range from mass protest against white supremacist policing, to surviving unemployment amidst the global Covid-19 pandemic, to equal pay for equal work, mass incarceration, voter suppression, student debt, climate adaptation, family separation and immigrant detention, hunger, homelessness, healthcare access, ubiquitous surveillance and “big data” mining, and many more topical controversies.<sup>39</sup> Some are new, but most connect to past generations’ struggles against injustices and aspirations for social change. Law articulates power and thus has the potential to limit the powerful. For this reason, those who serve power work night and day to ensure that Law continues to serve their masters’ interests.<sup>40</sup> To dismantle and replace the “big lies” that purport to constitute “Law”

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<sup>36</sup> Francisco Valdes *Legal Reform and Social Justice: An Introduction to LatCrit Theory, Praxis and Community*, 14 GRIFFITH L. REV. 148, 151 (2005); Elizabeth Iglesias, *International Law, Human Rights, and LatCrit Theory*, 28 U. MIAMI INTER-AM. L. REV. 177, 182 (1996).

<sup>37</sup> See *The Court and Constitutional Interpretation*, SUPREME COURT OF THE UNITED STATES, <https://www.supremecourt.gov/about/constitutional.aspx> (last visited Jun. 23, 2020).

<sup>38</sup> E.g., U.S. Const. amends. XII, XIV, XV, XIX, XXIV; *Hernandez v. Texas*, 347 U.S. 475 (1954); *Brown v. Bd. of Ed.*, 347 U.S. 483 (1954), *supplemented sub nom. Brown v. Bd. of Educ.*, 349 U.S. 294 (1955); Civil Rights Act of 1866, 14 Stat. 27 (codified as amended in scattered sections of 42 U.S.C.); National Labor Relations Act, 29 U.S.C. §§ 151-169 (1984); Fair Labor Standards Act of 1938, 52 Stat. 1060 (codified as amended at 29 U.S.C.); Civil Rights Act of 1964, Pub. L. No. 88-352, § X, 78 Stat. 241 (codified as amended at 42 U.S.C.); Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437 (codified as amended at 52 U.S.C.). *But see Scott v. Sandford*, 60 U.S. 393 (1857), *superseded* (1868); *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by Brown v. Bd. of Ed.*, 347 U.S. 483 (1954); *Korematsu v. U.S.*, 323 U.S. 214 (1944), *abrogated by Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

<sup>39</sup> See, e.g., Steven Bender, *Now, More than Ever: Reflections on LatCrit at Twenty*, 10 CHARLESTON L. REV. 173, 178 (2016); Jonathan D. Glater, *Student Debt and Higher Education Risk*, 103 CALIF. L. REV. 1561 (2015); Valerie Gomez & Lindsay Pérez Huber, *Examining Racist Nativist Microaggressions on DACamented College Students in the Trump Era*, 11 CALIF. J. POL. & POL’Y 1 (2019), <https://escholarship.org/uc/item/09c4q90x>; González, *supra* note 27; Rashawn Ray, *Why are Blacks Dying at Higher Rates from COVID-19?*, BROOKINGS (Apr. 9, 2020), <https://www.brookings.edu/blog/fixgov/2020/04/09/why-are-blacks-dying-at-higher-rates-from-covid-19/>; Yolanda Vazquez, *Crimmigration: The Missing Piece Of Criminal Justice Reform*, 51 U. RICH. L. REV. 1093 (2017). See also sources cited, *supra* note 24 (listing historical and contemporary analyses of white supremacy and other forms of systemic racism).

<sup>40</sup> See, e.g., MICHAEL AVERY & DANIELLE MCLAUGHLIN, *THE FEDERALIST SOCIETY: HOW CONSERVATIVES TOOK THE LAW BACK FROM LIBERALS* (2013); AMANDA HOLLIS-BRUSKY, *IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION* (2015); Robert O’Harrow Jr., *A Conservative Activist’s Behind-the-Scenes Campaign to Remake the Nation’s Courts*, WASH. POST (May 21, 2019); Jeffrey Toobin, *The Conservative Pipeline to the Supreme Court*, NEW YORKER (Apr. 10, 2017). See also JANE MAYER, *DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT* (2016); C. WRIGHT MILLS, *THE POWER ELITE* (1956, 2000); NOMI PRINS, *ALL THE PRESIDENT’S BANKERS: THE HIDDEN ALLIANCES THAT DRIVE AMERICAN POWER* (2014); JEAN STEFANCIC & RICHARD DELGADO, *NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA’S FUTURE* (1996).

requires antisubordination perspectives, including those long-cultivated by LatCrit theory, community, and praxis.<sup>41</sup>

The Foreword proceeds as follows. In Part II, we define the concept of *América Posfascista* (Postfascist America), explain how it illuminates U.S. law and society in the first decades of the twenty-first century, and suggest how it resonates with the other LatCrit 2019 conference themes (*i.e.*, resisting the dispossession threatened by the Second Redemption). In Part III, we overview LatCrit's twenty-five years of producing theory, building community, and living praxis. In Part IV, we overview the symposium articles and discuss their relation to the conference themes. In Part V, we conclude with a brief discussion of the forthcoming LatCrit-affiliated book, *Critical Justice: Systemic Advocacy in Law and Society*,<sup>42</sup> and its promise to help educate people to advocate effectively and ethically for systemic justice.

## II. AMÉRICA POSFASCISTA (POSTFASCIST AMERICA)

Although infrequently used by U.S. law scholars,<sup>43</sup> scholars of Fascism, Nazism, and neo-fascism use the terms post-fascism and post-fascist to describe post-war efforts to dismantle the legacies of Italian Fascism and other (little-f) fascist regimes.<sup>44</sup> They also use the terms to describe purportedly new political parties (*e.g.*, Italy's *Alleanza Nazionale*) or social movements that claim to be post-fascist,<sup>45</sup> yet nevertheless valorize Fascism (albeit usu-

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<sup>41</sup> *Accord Valdes*, *supra* note 5. See also Tyson, Christopher J., *From Ferguson to Flint: In Search of an Antisubordination Principle for Local Government Law*, 34 HARV. J. RACIAL & ETHNIC JUST. 1, 2 (2018). See generally FRANCISCO VALDES & STEVEN BENDER, LATCRIT THEORY, COMMUNITY, AND PRAXIS (forthcoming 2021); FRANCISCO VALDES, JEROME MCCRISTAL CULP & ANGELA P. HARRIS, CROSSROADS, DIRECTIONS AND A NEW CRITICAL RACE THEORY (2002).

<sup>42</sup> CRITICAL JUSTICE, *supra* note 15.

<sup>43</sup> See Appendix 1, *infra* (chronologically listing thirty-nine articles, indexed in the Westlaw law review database from 1966 to the present, which use the terms post-fascism or post-fascist).

<sup>44</sup> *E.g.*, GURI SCHWARZ, AFTER MUSSOLINI: JEWISH LIFE AND JEWISH MEMORIES IN POST-FASCIST ITALY (2012), at vii-viii ("The aim of this book is to offer a reconstruction of the consequences of fascist anti-Semitic policies, analyzing the rebirth of Jewish life in post-war Italy, . . . A reflection on the Jewish condition in post-fascist Italy touches, in particular, on the problem of the continuity between Fascism and the post-war-period, as it entails evaluating the long-term effects of the racial persecution."). *Cf.* sources cited, *infra* notes 44-46, 48.

<sup>45</sup> *E.g.*, MARK BRAY, ANTIFA: THE ANTIFASCIST HANDBOOK (2017), at 64 ("While the threat of fascist skinheads declined in the mid-1990s, the specter of governmental fascism escalated as Silvio Berlusconi invited the MSI, which soon rebranded itself as the *Alleanza Nazionale* . . . to form a government with him in 1994. . . . In so doing, Berlusconi legitimized the MSI, which was now benignly considered 'post-fascist,' and contributed to the rehabilitation of Mussolini's legacy."); ROBERT O. PAXTON, THE ANATOMY OF FASCISM (2004), at 183 ("Berlusconi put together a coalition with two other outsider movements: Umberto Bossi's separatist Northern League and the MSI (now calling itself the *Alleanza Nazionale* and proclaiming itself 'postfascist'."); Tamir Bar-On, *Italian Postwar Neo-Fascism: Three Paths, One Mission?*, in ANALYSING FASCIST DISCOURSE: EUROPEAN FASCISM IN TALK AND TEXT (Ruth Wodak & John Richardson eds., 2013), at 42-43, 46, 50 (discussing how the *Alleanza Nazionale* claimed "post-fascism" when it replaced the overtly neo-fascist *Movimento Sociale Italiano* in 1995 and critiquing how it thereafter concealed and shielded overt neo-fascists);

ally covertly), and which regularly articulate nationalist, nativist and/or racist ideologies in their far-right politics.

In LatCrit theory, community, and praxis, the concept of *América Posfascista* (Postfascist America) describes at least three historical eras and one political aspiration. First, the whole world arguably became postfascist after World War II. While Italy dealt directly with dismantling (big-F) Fascism,<sup>46</sup> and Germany with Nazism, all peoples had survived—or not—the cultural, political, social, and technological “innovations” of (little-f) fascism.<sup>47</sup> Second, *América Posfascista* also names the late 1980s to early 1990s period when various Latin American peoples began to reclaim their democracies from their postfascist (in the first sense) dictatorships.<sup>48</sup> Third, *América Pos-*

Roger Griffin, *Fascism's New Faces (and New Facelessness) in the 'Post-Fascist' Epoch*, in *A FASCIST CENTURY: ESSAYS BY ROGER GRIFFIN* 181, 182 (Matthew Feldman ed., 2008) (“Gianfranco Fini articulated a widespread feeling when he described the formal transformation of the neo-Fascist *Movimento Sociale Italiano* [MSI] into the neo-populist *Alleanza Nazionale* [AN] in 1995 as the expression of the fact that in practical terms we all now live in a ‘post-fascist’ age.”).

<sup>46</sup> See, e.g., Asli Bâli & Aziz Rana, *Constitutionalism and the American Imperial Imagination*, 85 U. CHI. L. REV. 257, 260 (2018) (“The end of World War II was marked by American assistance to help postfascist Western European states resurrect market democracies.”); Kitty Calavita, *Workers Safety, Law, and Social Change: The Italian Case*, 20 LAW & SOC'Y REV. 189, 194 (1986) (“Since none of these parties has ever achieved an absolute majority in a national election, every government in the post-fascist period has been dependent on precarious coalitions.”); John H. Merryman, *The Italian Style III: Interpretation*, 18 STAN. L. REV. 583, 609 (1966) (“It has become a cliché to speak of a post-Fascist cultural renaissance in Italy.”) (citation omitted); Jonathan Simon, *Parrhesiastic Accountability: Investigatory Commissions and Executive Power in an Age of Terror*, 114 YALE L.J. 1419, 1454 (2005) (“The rise of these commissions corresponded to a shift away from the retributive justice sought by the first generation of post-fascist transitional regimes and toward a singular preoccupation with truth as a positive social value in itself.”); Mary L. Volcansek, *Appointing Judges the European Way*, 34 FORDHAM URB. L.J. 363, 367 (2007) (“When the Italian Constituent Assembly met in 1946 to write the post-Fascist constitution, it permitted selection of judges for the Constitutional Court to be political, positing that political appointment would be balanced by fixed term limits.”); James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J. 1279, 1284, 1322, 1396 (2000) (“The post-Fascist period is a latecomer in the making of law safeguarding European dignity. . . . The notion that the culture of legal dignity is simply a post-Fascist development in Europe, straightforwardly drawn from the traditions of high moral philosophy, thus will not do. . . . Post-Fascist European law—especially constitutional law—regularly made a point of insisting that all human beings were entitled to equal honor[.]”) (citation omitted).

<sup>47</sup> Cf. KEVIN PASSMORE, *FASCISM: A VERY SHORT INTRODUCTION* (2002, 2d ed. 2014), at 31-35 (contextualizing the antecedents of Fascism, Nazism, and similar social formations within “radical right” innovations to contain the rise of mass politics at the end of the nineteenth and start of the twentieth centuries); PAXTON, *supra* note 45, at 32-49 (discussing roots, preconditions, and precursors to the emergence of Fascism and related political movements, including *inter alia*, anti-Semitism; fear following the Bolshevik Revolution and reaction against parliamentary socialism; nationalist responses to late-nineteenth century industrialization, globalization, and the economic depression of the 1880s; the rise of mass party politics following manhood suffrage; Social Darwinism; and responses to losses in World War I); SCHWARZ, *supra* note 44, at vii (“All Europeans were, in different ways, survivors.”).

<sup>48</sup> For when various Latin American countries recovered their democracies, see, e.g., ZOLTAN D. BARANY, *THE SOLDIER AND THE CHANGING STATE: BUILDING DEMOCRATIC ARMIES IN AFRICA, ASIA, EUROPE, AND THE AMERICAS*, 143-77 (2012); NUNCA MÁ: INFORME DE LA COMISIÓN NACIONAL SOBRE LA DESAPARICIÓN DE PERSONAS (1984), *translated and reprinted as* NUNCA MÁ: THE REPORT OF THE ARGENTINE NATIONAL COMMISSION ON THE DIS-

*fascista* reframes the United States after the “judicial coup” of *Bush v. Gore*.<sup>49</sup> Finally, *América Posfascista* names the political aspiration that people in the United States can learn from the experiences of peoples from around the world, particularly in Latin America, in order to successfully repudiate today’s resurgence of authoritarianism, inverted totalitarianism, and post-fascism.<sup>50</sup> The candidacy and presidency of Donald J. Trump,<sup>51</sup> myriad

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APPEARED (Ernesto Sabato ed., 1986), [http://www.desaparecidos.org/nuncamas/web/english/library/nevagain/nevagain\\_001.htm](http://www.desaparecidos.org/nuncamas/web/english/library/nevagain/nevagain_001.htm) [hereafter NUNCA MÁS]); IGNACIO WALKER ET AL., DEMOCRACY IN LATIN AMERICA : BETWEEN HOPE AND DESPAIR 71-106 (2013). See generally CENTRAL INTELLIGENCE AGENCY, WORLD FACT BOOK, <https://www.cia.gov/library/publications/resources/the-world-factbook/> (navigate to particular countries, e.g., Argentina, Brazil, and Chile). See also González, *supra* note 27, at 642 (discussing how various Latin American peoples recovered their societies from post-fascist military dictatorships and attempted to safeguard their nascent democracies with, *inter alia*, third generation human rights to information like the writ of *habeas data* so that the terror of the dictatorships would never recur).

<sup>49</sup> See Jack M. Balkin, *Bush v. Gore and the Boundary between Law and Politics*, 110 YALE L.J. 1407, 1453–54 (2001) (analyzing *Bush v. Gore*, 531 U.S. 98 (2000), and noting, “the possibility that a president might be installed by a coup, judicial or otherwise, does not seem to have been explicitly provided for in the Constitution.”).

<sup>50</sup> Enzo Traverso’s adroit explanation of these phenomena resonates strongly with our conceptualization of *América Posfascista*:

Today the rise of the radical right displays a semantic ambiguity: on the one hand, almost no one openly speaks of fascism . . . On the other hand, any attempt to define this new phenomenon does imply a comparison with the interwar years. In short, the concept of fascism seems both inappropriate and indispensable for grasping this new reality. Therefore, I will call the present moment a period of *postfascism*. The concept emphasizes its chronological distinctiveness and locates it in a historical sequence implying both continuity and transformation; . . . This is why the notion of postfascism seems more appropriate. Notwithstanding its evident limits, it helps us to describe a phenomenon in transition, a movement that is still in transformation and has not yet crystallised.

ENZO TRAVERSO, *THE NEW FACES OF FASCISM: POPULISM AND THE FAR RIGHT* (David Broder trans., 2019), at 4, 6. Cf. SHELDON S. WOLIN, *DEMOCRACY INCORPORATED: MANAGED DEMOCRACY AND THE SPECTER OF INVERTED TOTALITARIANISM* (2008), at xiii:

“Inverted totalitarianism” projects power inwards. It is not derivative from “classic totalitarianism” of the types represented by Nazi Germany, Fascist Italy, or Stalinist Russia. . . . Inverted totalitarianism, in contrast, while exploiting the authority and resources of the state, gains its dynamic by combining with other forms of power, such as evangelical religions, and most notably by encouraging a symbiotic relationship between traditional government and the system of ‘private’ governance represented by the modern business corporation. The result is not a system of codetermination by equal partners who retain their distinctive identities but rather a system that represents the political coming-of-age of corporate power.

<sup>51</sup> See e.g., Peter Baker, *Rise of Trump Tracks Debate Over Fascism*, N.Y. TIMES (May 29, 2016), <http://www.nytimes.com/2016/05/29/world/europe/rise-of-donald-trump-tracks-growing-debate-over-global-fascism.html> (comparing Donald J. Trump’s statements to historical fascist leaders in light of the global resurfacing of neo-fascism); Rick Lyman, *After Years in the Shadows, Europe’s Neo-Fascists Are Stepping Back Out*, N.Y. TIMES (Mar. 20, 2017), <http://www.nytimes.com/2017/03/19/world/europe/europe-neo-fascist-revival-slovakia.html> (highlighting indications of extremist and new fascists globally); Cas Mudde, *The Trump Phenomenon and the European Populist Radical Right*, WASH. POST (Aug. 26, 2015), <https://www.washingtonpost.com/news/monkey-cage/wp/2015/08/26/the-trump-phenomenon-and-the-european-populist-radical-right/> (discussing the various ideologies publicized by President Donald J. Trump as a presidential candidate); Scott Shane, *Combative, Populist Steve Bannon Found His Man in Donald Trump*, N.Y. TIMES (Nov. 27, 2016), <https://www.nytimes.com/>

extrajudicial killings of people of color by police officers,<sup>52</sup> vigilantism by people who identify with white supremacy (*a.k.a.*, the “alt-Right,” and/or “white nationalism”),<sup>53</sup> and recent efforts by federal officers to surveil and

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2016/11/27/us/politics/steve-bannon-white-house.html (analyzing Steve Bannon’s reputation, relationship, and influence with President Donald J. Trump); Michael D. Shear et. al., *Critics See Stephen Bannon, Trump’s Pick for Strategist, as Voice of Racism*, N.Y. TIMES (Nov. 14, 2016), <https://www.nytimes.com/2016/11/15/us/politics/donald-trump-presidency.html> (discussing concerns that Steve Bannon’s would bring anti-Semitic, nationalist, and racist agendas to his role as a political official in the White House). For analysis of how *Trumpista* (Trumpian) politics relate to the increase of U.S. hate groups, see, e.g., Stephen Piggott, *Hate in the Race*, INTELLIGENCE REP. (Jul. 6, 2016, last updated Nov. 2, 2016), <https://www.splcenter.org/fighting-hate/intelligence-report/2016/hate-race>; Mark Potok, *The Year in Hate and Extremism*, INTELLIGENCE REP. (Feb. 15, 2017), <https://www.splcenter.org/fighting-hate/intelligence-report/2017/year-hate-and-extremism>. See generally *Hate Map*, S. POVERTY L. CTR., <https://www.splcenter.org/hate-map> (last visited June 24, 2020).

<sup>52</sup> See e.g., Mark Berman et. al., *Protests Spread Over Police Shootings. Police Promised Reforms. Every Year, They Still Shoot and Kill Nearly 1,000 People*, WASH. POST (June 8, 2020), [https://www.washingtonpost.com/investigations/protests-spread-over-police-shootings-police-promised-reforms-every-year-they-still-shoot-nearly-1000-people/2020/06/08/5c204f0c-a67c-11ea-b473-04905b1af82b\\_story.html](https://www.washingtonpost.com/investigations/protests-spread-over-police-shootings-police-promised-reforms-every-year-they-still-shoot-nearly-1000-people/2020/06/08/5c204f0c-a67c-11ea-b473-04905b1af82b_story.html) (analyzing trends in police shootings from 2015 to 2020); John Eligon, *Police Killings Have Harmed Mental Health in Black Communities, Study Finds*, N.Y. TIMES (June 21, 2018), <https://www.nytimes.com/2018/06/21/us/police-shootings-black-mental-health.html>; Sendhil Mullainathan, *Police Killings of Blacks: Here Is What the Data Say*, N.Y. TIMES (Oct. 16, 2015), <https://www.nytimes.com/2015/10/18/upshot/police-killings-of-blacks-what-the-data-says.html>; Rick Rojas & Richard Fausset, *Police Killings Prompt Reassessment of Laws Allowing Deadly Force*, N.Y. TIMES (June 14, 2020), <https://www.nytimes.com/2020/06/14/us/rayshard-brooks-Garrett-Rolfe-atlanta.html> (discussing efforts to re-examine police use of deadly force); Charlie Savage, *Justice Department to Streamline Tracking of Police Killings*, N.Y. TIMES (Aug. 9, 2016), <https://www.nytimes.com/2016/08/10/us/politics/justice-department-to-streamline-tracking-of-police-killings.html>. See generally *The Counted*, *supra* note 17; *Fatal Force*, *supra* note 17; *#SayHerName Campaign*, *supra* note 17.

<sup>53</sup> See, e.g., RORY McVEIGH & KEVIN ESTEP, *THE POLITICS OF LOSING: TRUMP, THE KLAN, AND THE MAINSTREAMING OF RESENTMENT* 224-25 (2019); Alan Feuer & Jeremy W. Peters, *Fringe Groups Revel as Protests Turn Violent*, N.Y. TIMES (June 2, 2017), <https://www.nytimes.com/2017/06/02/us/politics/white-nationalists-alt-knights-protests-colleges.html> (discussing the increased violence of far-right groups); Zolan Kanno-Youngs, *Homeland Security Dept. Affirms Threat of White Supremacy After Years of Prodding*, N.Y. TIMES (Oct. 1, 2019), <https://www.nytimes.com/2019/10/01/us/politics/white-supremacy-homeland-security.html> (reporting that the Department of Homeland Security has begun “to address white supremacist terrorism as a primary security threat”); Weiyi Cai Simone Landon, *Attacks by White Extremists Are Growing*, N.Y. TIMES (Apr. 3, 2019), <https://nyti.ms/2K3PPuN> (analyzing nearly 350 white extremist terrorism attacks in Europe, North America, and Australia from 2011 through 2017 and identifying “that at least a third of white extremist killers since 2011 were inspired by others who perpetrated similar attacks, professed a reverence for them or showed an interest in their tactics”); Potok, *supra* note 51 (reporting the Southern Poverty Law Center’s findings on hate and extremism). Beyond guns and bombs, vigilantes have begun to run into or over Black Lives Matters protestors, which has caused several deaths. See, e.g., Sarah Al-Arshani, *There Have Been at Least 19 Cases of Cars Driving through Demonstrators since Protests Began. Only 8 Drivers Have Faced Charges*, INSIDER (June 16, 2020), <https://www.insider.com/cars-hit-george-floyd-protesters-only-some-drivers-charged-2020-6>; Bill Hutchinson, *Protestor Dies after Struck by Speeding Car at Black Lives Matter Freeway Demonstration in Seattle*, ABC NEWS (Jul. 6, 2020), <https://abcnews.go.com/US/protester-dies-struck-speeding-car-black-lives-matter/story?id=71617592>; Mitch Smith, *James Fields Sentenced to Life in Prison for Death of Heather Heyer in Charlottesville*, N.Y. TIMES (Jun. 28, 2019), <https://nyti.ms/2FDINcq>.

detain protestors,<sup>54</sup> are but the most obvious manifestations of what some commentators have begun to name, the “Second Redemption,”<sup>55</sup> which we also apprehend under the concept of *América Posfascista* (Postfascist America), for reasons explained below.

### A. *Historical Origins of the Concept*

The concept of *América Posfascista* (Postfascist America) derives from earlier LatCrit projects and collaborations, which we briefly describe here before applying the concept to contemporary U.S. law and society and the LatCrit 2019 conference themes.

In the fall of 2002, following a handful of Berkeley Law students’ participation in the LatCrit VII conference at the University of Oregon School of Law, the *Berkeley La Raza Law Journal* was editing the LatCrit VII symposium.<sup>56</sup> That same semester, Francisco “Frank” Valdes and Margaret Montoya presented together on LatCrit theory, community, and praxis during the National Latina/o Law Student Conference.<sup>57</sup> Excited by their articulation of the ideas and promise of LatCrit, one of the coauthors, Marc-Tizoc, sought to learn more about LatCrit theory and to join its community: he applied for LatCrit’s Student Scholar Program (SSP) in 2003, was not selected, applied again, and joined the SSP 2004 cohort. Because of the SSP, Marc-Tizoc presented at LatCrit IX, *Countering Kulturkampf Politics through Critique and Justice Pedagogy* and participated in the planning retreat that followed the conference.<sup>58</sup> A couple of months later, he partici-

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<sup>54</sup> In mid-July 2020, federal officers in Portland, Oregon began detaining people in unmarked cars without explanation. N’dear Yancey-Bragg, Kristie Phillips & Lindsay Schnell, “*Secret Police Force*”: *Feds Reportedly Pull Portland Protestors into Unmarked Vehicles, Stirring Outrage*, USA TODAY (July 17, 2020), <https://www.usatoday.com/story/news/nation/2020/07/17/reports-federal-officers-detain-portland-protesters-unmarked-vans/5457471002/>.

<sup>55</sup> See, e.g., Eric Foner, *Voting Rights and the Second Redemption*, NATION (Dec. 3, 2015), <https://www.thenation.com/article/archive/voting-rights-and-the-second-redemption/>; Richard A. Primus, *Second Redemption, Third Reconstruction*, 106 CAL. L. REV. 1987 (2018); Kermit Roosevelt, *The Voting Rights Act and the Second Redemption*, NAT’L CONST. CTR. (Aug. 5, 2015), <https://constitutioncenter.org/blog/the-voting-rights-act-and-the-second-redemption/>; Adam Serwer, *Is This the Second Redemption?*, ATLANTIC (Nov. 10, 2016), <https://www.theatlantic.com/politics/archive/2016/11/welcome-to-the-second-redemption/507317/> [hereafter Serwer, *Second Redemption*]; Adam Serwer, *The Supreme Court Is Headed Back to the 19th Century*, ATLANTIC (Sept. 4, 2018), <https://www.theatlantic.com/ideas/archive/2018/09/redemption-court/566963/> [hereafter Serwer, *Back to the 19th Century*].

<sup>56</sup> Symposium, *Seventh Annual LatCrit Conference, Coalition Theory and Praxis: Social Justice Movements and LatCrit Community*, 81 OR. L. REV. 587 (2002) (Part I) & 13 BERKELEY LA RAZA L.J. 113 (2002) (Part II).

<sup>57</sup> See *Past Conferences*, NLLSA.ORG <https://www.nllsa.org/past-conferences> (last visited Jul. 11, 2020) (noting that Stanford Law School hosted the sixth annual National Latina/o Law Student Conference).

<sup>58</sup> See *LatCrit IX Tentative Program Schedule with Substantive Outline for the Ninth Annual LatCrit Conference (and Related Events)*, *Countering Kulturkampf Politics Through Critique and Justice Pedagogy*, LATCRIT (Apr. 9, 2004), [http://latcrit.org/media/medialibrary/2013/12/acix\\_final\\_program\\_2003.pdf](http://latcrit.org/media/medialibrary/2013/12/acix_final_program_2003.pdf). Prior to 2005, the annual LatCrit conference was held in May (near Cinco de Mayo) and lasted for three full days. See *id.* In 2004, a multi-day planning retreat, open to all conference attendees, followed the conference. See *id.* The LatCrit

pated in LatCrit's second (and final) year of its remarkable Critical Global Classroom (CGC), an American Bar Association-accredited summer study-abroad program, which educated students in comparative constitutionalism and truth-and-reconciliation movements while sojourning Chile, Argentina, and South Africa.<sup>59</sup>

As Marc-Tizoc walked the streets of, studied in, and interacted with his new friends among the CGC's participants in Santiago and Valparaíso, Chile; Buenos Aires, Argentina; and Cape Town, South Africa, the realization dawned on him that everyone above a certain age had survived a postfascist dictatorship—and that some of them had supported its rule. For example, in the Chilean national plebiscite of 1988, almost 55% of the votes were cast to end the rule of the dictator, Augusto Pinochet, who had sought an electoral mandate to remain the Chilean president.<sup>60</sup> In other words, around 43% of the Chileans who voted supported his continued rule,<sup>61</sup> which began with the September 11, 1973 coup d'état against the elected government of President Salvador Allende.<sup>62</sup> By 1988, Pinochet's regime was already infamous because of the murder, torture, and other acts of terror that it had enacted domestically, and abroad,<sup>63</sup> including the practices that rendered

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IX symposia were published in two volumes. Symposium, *Countering Kulturkampf Politics through Critique and Justice Pedagogy*, 50 VILLANOVA L. REV. 4 (2005) & 35 SETON HALL L. REV. 1155 (2005).

<sup>59</sup> See Anderson et al., *supra* note 26, at 1894 n.66, 1903 n.98 and accompanying text; González, *supra* note 27, at 641 n.1, 643 n.13 and accompanying text.

<sup>60</sup> TRIBUNAL CALIFICADOR DE ELECCIONES DE CHILE, SENTENCIA PLEBESCITO (1988), <http://www.tribunalcalificador.cl/resultados-electorales/> (select Plebiscitos, then click 1988 and Descargar). ACCORD CENTRAL INTELLIGENCE AGENCY, WORLD FACT BOOK (1989), at 60 (“on 5 October 1988, under a constitutionally mandated plebiscite, the voters rejected a further eight-year term for Gen. Augusto Pinochet by 54.7% to 43%”).

<sup>61</sup> TRIBUNAL CALIFICADOR DE ELECCIONES DE CHILE, *supra* note 60, at 11. About two percent of the ballots were either invalid or blank. *Id.*

<sup>62</sup> See, e.g., NAOMI KLEIN, THE SHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM 91-94 (2007) (discussing the coup); PETER KORNBLOH, THE PINOCHET FILE: A DECLASSIFIED DOSSIER ON ATROCITY AND ACCOUNTABILITY 113 (2003, 2d ed. 2013) (same); DAVID SPENER, WE SHALL NOT BE MOVED / NO NOS MOVERÁN: BIOGRAPHY OF A SONG OF STRUGGLE 17-26 (2016) (same). See also Laurence R. Birns, *Allende's Fall, Washington's Push*, N.Y. TIMES (Sept. 15, 1974), <https://www.nytimes.com/1974/09/15/archives/allendes-fall-washingtons-push.html> (discussing the disclosure that “William E. Colby, the Director of Central Intelligence, in secret testimony last April [1974], told Congress that the Nixon Administration had authorized more than \$8 million for covert Central Intelligence Agency activities between 1970 and 1973 in an effort to make it impossible for Dr. Allende to govern” prior to the coup d'état that overthrew Allende's presidency); González, *supra* note 27, at 646 (discussing the imposition of neoliberal economic policies following the coup). See generally *Chile – Coup d'État, 1973*, NAT'L SECURITY ARCHIVE, <https://nsarchive.gwu.edu/events/chile-coup-detat-1973> (last visited Jun. 24, 2020).

<sup>63</sup> See, e.g., David Binder, *Opponent of Chilean Junta Slain in Washington by Bomb in His Auto*, N.Y. TIMES (Sept. 22, 1976), <https://www.nytimes.com/1976/09/22/archives/opponent-of-chilean-junta-slain-in-washington-by-bomb-in-his-auto.html> (reporting on the assassination of former Chilean ambassador to the United States (and former Chilean defense minister), Orlando Letelier, by a car bomb on Sept. 26, 1976 in Washington, D.C.). His assistant, Ronni Moffitt, was also killed in the explosion.) *Id.* See also KORNBLOH, *supra* note 62, at 349-54, 404-16 (discussing the assassination and its attempted cover up).



*los desaparecidos*—the thousands of people whom the Pinochet regime “disappeared”—whose corpses were never recovered.<sup>64</sup>

As Marc-Tizoc sojourned Chile, Argentina, and South Africa, during the southern hemisphere’s winter, he pondered this and other insights regarding these transnational struggles for justice. Consequently, when he returned home to Oakland, California in August 2004 to resume his law school education, he viewed everyone above a certain age in a new light: who among them had actively supported or passively benefited from the white supremacy of Jim Crow, and related systems of sociolegal violence and subordination, while African American, Asian American, Chicana/o, Disabled, Feminist, Indigenous, Puerto Rican, and Queer peoples, *inter alia*, had struggled to obtain and enforce formal civil rights through “the radical ‘Power-Identity’ movements of the 1960s”?<sup>65</sup> With time, those experiences and others germinated into the concept of *América Posfascista*, which Marc-Tizoc began to articulate in different ways over the following years, including a co-authored law review article on insurgent student activism,<sup>66</sup> a panel presentation at the LatCrit XIII conference in 2008,<sup>67</sup> the AALS Mid-Year Workshop on Poverty, Immigration and Property in 2013,<sup>68</sup> and a LatCrit symposium article in 2015.<sup>69</sup>

Living near Oakland’s Lake Merritt while studying at Berkeley Law, the ideas engendered by Marc-Tizoc’s experiences during LatCrit IX and the CGC in 2004 germinated.<sup>70</sup> For example, during an informal conversation at

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<sup>64</sup> See, e.g., KLEIN, *supra* note 62, at 93-94 (“[M]ore than 3,200 people were disappeared or executed, at least 80,000 were imprisoned, and 2000,000 fled the country for political reasons.”) (citations omitted); KORNBLUH, *supra* note 62, at 162 (“During a ruthless seventeen-year dictatorship, the Chilean military would be responsible for the murder, disappearance and death by torture of some 3,197 citizens—with thousands more subjected to savage abuses such as torture, arbitrary incarceration, forced exile, and other forms of state-sponsored terror) (citing REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION (1990, Phillip E. Berryman trans., 1993), available at [https://www.usip.org/sites/default/files/resources/collections/truth\\_commissions/Chile90-Report/Chile90-Report.pdf](https://www.usip.org/sites/default/files/resources/collections/truth_commissions/Chile90-Report/Chile90-Report.pdf)) [hereafter RETTING COMMISSION REPORT].

<sup>65</sup> Anderson et al., *supra* note 26, at 1897 n.77 and accompanying text.

<sup>66</sup> See *id.*

<sup>67</sup> See *LatCrit XIII Tentative Program Schedule with Substantive Outline for the Thirteenth Annual LatCrit Conference (and Related Events), Representation and Republican Governance: Critical Interrogation of Election Systems and the Exercise of the Franchise*, LATCRIT (2008), at 11 (on file with authors) (including “Marc-Tizoc González, *Transgression en América Posfascista: Student Activism, Interdisciplinary Scholarship, Community Lawyering, and Critical Race Praxis*”). See also Marc-Tizoc González, *Multidimensional Solidarity: Community Lawyers, Interdisciplinary Scholars & Critical Race Praxis* (Aug. 6, 2007) (unpublished manuscript on file with authors).

<sup>68</sup> See Marc-Tizoc González, *Damning Our Children, Damning Ourselves: Multidimensional Analyses of the Impoverishment of Youth en América Posfascista* (in *Postfascist America*) (Jun. 8, 2013) (unpublished manuscript on file with authors); *Paper Presentations II, Workshop on Poverty, Immigration and Property*, AM. ASSOC. L. SCHS. (Jun. 11, 2013), [https://memberaccess.aals.org/eweb/DynamicPage.aspx?webcode=sesDetails&ses\\_key=2aa80e8b-4f76-4e89-9c81-bc2b866eeb4c](https://memberaccess.aals.org/eweb/DynamicPage.aspx?webcode=sesDetails&ses_key=2aa80e8b-4f76-4e89-9c81-bc2b866eeb4c).

<sup>69</sup> González, *supra* note 27.

<sup>70</sup> Cf. Anderson et al., *supra* note 26, at 1894 n.66 (discussing the germination of the concept of a “new student insurgency”).

LatCrit IX, Frank Valdes and Robert Westley introduced him to the notion of the “judicial coup” of 2001.<sup>71</sup> Recall that a bare majority of U.S. Supreme Court justices determined who won the 2000 presidential election,<sup>72</sup> when they imprudently asserted jurisdiction and enjoined Florida from continuing to recount the ballots that its supreme court had ordered.<sup>73</sup> In this light, and because of his compassion for and solidarity with *gente sin papeles* (i.e., people who lack an officially recognized immigration status), when Marc-Tizoc learned about “Operation Wetback,” the U.S. mass deportation program of 1954,<sup>74</sup> and the *Korematsu coram nobis* case,<sup>75</sup> he reappraised his apprehension about the 2002 “Special Registration” program (a.k.a., the National Security Entry-Exit Registration System (NSEERS)),<sup>76</sup> as not merely

<sup>71</sup> *Accord* Balkin, *supra* note 49, at 1453-54 (noting that, “the possibility that a president might be installed by a coup, judicial or otherwise, does not seem to have been explicitly provided for in the Constitution.”).

<sup>72</sup> *Bush v. Gore*, 531 U.S. 98 (2000).

<sup>73</sup> Balkin, *supra* note 49, at 1342 (“The Court’s intervention was not particularly necessary, despite the Court’s insistence to the contrary. Although there are prudential arguments for intervening and stopping the recounts on December 12, they make sense only if the Court was already committed to the view that George W. Bush should have won the election. If the results of the election were in genuine doubt, and neither candidate had a stronger claim to legitimacy, then the argument for intervention becomes unpersuasive.”).

<sup>74</sup> *See* 83 Cong. Rec. 8,126–53 (daily ed. June 14, 1954) (statement of Sen. Lehman); 83 Cong. Rec. 15,174–77 (daily ed. Aug. 19, 1954) (statement of Sen. Morse). *See also* JUAN R. GARCÍA, OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954 (1980); GARCÍA HERNÁNDEZ, *supra* note 24, at 48; Bill Ong Hing, *Entering the Trump ICE Age: Contextualizing the New Immigration Enforcement Regime*, 5 TEX. A&M L. REV. 253, 277 (2018); Fred L. Koestler, *Operation Wetback*, HANDBOOK OF TEXAS ONLINE, (last modified Mar. 25, 2016), <http://www.tshaonline.org/handbook/online/articles/pqo01>; Michael A. Olivas, *The Chronicles, My Grandfather’s Stories, and Immigration Law: The Slave Traders Chronicle as Racial History*, 34 ST. LOUIS U. L.J. 425, 435-39 (1990); *Wetbacks: Can the States Act to Curb Illegal Entry?*, 6 STAN. L. REV. 287 (1954). Upon learning about Operation Wetback, Marc-Tizoc attempted, but failed, to persuade his *Berkeley La Raza Law Journal* colleagues to memorialize its fiftieth anniversary with a symposium or colloquium. One fellow student editor denied that any governmental program ever bore the name. Unfortunately, even if some historical events are beyond the bounds of imagination, programs of mass detention and deportation continue to appeal to some U.S. politicians. *See, e.g.*, Eyder Peralta, *It Came Up In The Debate: Here Are 3 Things To Know About ‘Operation Wetback’*, NPR (Nov. 11, 2015), <https://www.npr.org/sections/thetwo-way/2015/11/11/455613993/it-came-up-in-the-debate-here-are-3-things-to-know-about-operation-wetback> (explaining candidate Trump’s reference to Operation Wetback).

<sup>75</sup> *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984) (granting Fred Korematsu’s petition for writ of *coram nobis* to vacate his conviction under the Japanese exclusion order because the government’s acts and omissions misled the courts regarding whether Japanese exclusion and internment were reasonably related to national security). *See also* Susan Kiyomi Serrano & Dale Minami, *Korematsu v. United States: A “Constant Caution” in a Time of Crisis*, 10 ASIAN L.J. 37, 38 (2003) (discussing *Korematsu* in light of the heightened tensions between national security and civil liberties that emerged after the terrorist attacks of September 11, 2001).

<sup>76</sup> *See* National Security Entry/Exit Registration System (NSEERS), 8 U.S.C. §§ 1301-1306 (2001); Registration and Monitoring of Certain Nonimmigrants from Designated Countries, 67 Fed. Reg. 57032 (Sept. 6, 2002), <https://www.govinfo.gov/content/pkg/FR-2002-09-06/pdf/02-22791.pdf>. *See also* Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1845 n.91 (2007) (“[O]n June 5, 2002, Attorney General John Ashcroft announced the National Security Entry-Exit Registration System (NSEERS), which required nearly all male non-immigrants who were at

redolent of the WWII-era curfew against and internment of Japanese immigrants and their U.S.-born children,<sup>77</sup> but also a stark example of how the U.S. government, in the dawn of the twenty-first century, actually rejected the lessons of *Korematsu*, Operation Wetback, and myriad other expressions of putatively-legal animus against racialized social groups. Similarly, for Marc-Tizoc, the Bush regime's enforcement of immigration law, particularly its profitable detention and deportation policies and practices,<sup>78</sup> and the spectacle of its infamous workplace raids,<sup>79</sup> evoked the famous poem by the German Lutheran pastor Martin Niemöller (1892–1984), *First they came for the Communists*.<sup>80</sup> In other words, in light of the concept of *América Posfascista*,

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least fourteen years of age and the nationals of certain designated countries to be fingerprinted and photographed upon entry, to report periodically to DHS for stays longer than thirty days, and to appear at one of several specified ports upon departure, so the departure could be recorded.”) (citing 8 C.F.R. § 264 (2006)); Kathryn Lohmeyer, *The Pitfalls of Plenary Power: A Call for Meaningful Review of NSEERS “Special Registration”*, 25 WHITTIER L. REV. 139, 141 (2003) (examining the NSEERS special registration requirements under U.S. and international law and policy); Eric Schmitt, *Traces of Terror: Immigration; Ashcroft Proposes Rules for Foreign Visitors*, N.Y. TIMES (Jun. 6, 2002), <https://www.nytimes.com/2002/06/06/us/traces-of-terror-immigration-ashcroft-proposes-rules-for-foreign-visitors.html> (reporting on Attorney General John Ashcroft's NSEERS proposal).

<sup>77</sup> See generally PERSONAL JUSTICE DENIED, *supra* note 24, at *passim*; JUSTICE DELAYED: THE RECORD OF THE JAPANESE AMERICAN INTERNMENT CASES (Peter Irons ed., 1989).

<sup>78</sup> See, e.g., LAUREN-BROOKE EISEN, *INSIDE PRIVATE PRISONS: AN AMERICAN DILEMMA IN THE AGE OF MASS INCARCERATION* (2008), at 137-68; RENEE FELTZ & STOKELY BAKSH, *BEYOND WALLS AND CAGES: PRISONS, BORDERS, AND GLOBAL CRISIS* 143-51 (Jenna M. Loyd et al. eds., 2012); GARCÍA HERNÁNDEZ, *supra* note 24, at 13, 123-24; Nick Miroff, *Controversial Quota Drives Boom in Immigrant Detentions*, WASH. POST (Oct. 14, 2003), [https://www.washingtonpost.com/world/controversial-quota-drives-immigration-detention-boom/2013/10/13/09bb689e-214c-11e3-ad1a-1a919f2ed890\\_story.html](https://www.washingtonpost.com/world/controversial-quota-drives-immigration-detention-boom/2013/10/13/09bb689e-214c-11e3-ad1a-1a919f2ed890_story.html) (describing how Department of Homeland Security officials meet the Congressionally-mandated quota of detained immigrants); Sadhbh Walshe, *‘Operation Endgame’ and the Profitable Purge of Legal Immigrants*, GUARDIAN (Jul. 11, 2012), <https://www.theguardian.com/commentisfree/2012/jul/11/operation-endgame-purge-legal-immigrants>.

<sup>79</sup> See, e.g., IMMIGRATION RAIDS: POSTVILLE AND BEYOND, HEARING BEFORE THE SUB-COMM. ON IMMIGRATION, CITIZENSHIP, REFUGEES, BORDER SECURITY & INT'L L. OF THE H. COMM. ON JUDICIARY, 110TH CONG. 77-99 (Jul. 24, 2008) (Testimony and Prepared Statement of Erik Camayd-Freixas, Professor of Modern Languages, Florida Int'l Univ.), <https://www.govinfo.gov/content/pkg/CHRG-110hhrg43682/pdf/CHRG-110hhrg43682.pdf> (commenting on the arrest, prosecution, and conviction of 297 undocumented workers who were detained following a raid of Agriprocessors, Inc., in Postville, Iowa, the largest kosher slaughterhouse and meat packing plant in the United States, and critiquing the judicial process as marred by myriad irregularities, which undermined the defendants' due process rights and defenses against federal felony charges of identity theft) [hereafter “*Camayd-Freixas Statement*”]. See also Marc-Tizoc González, *La Gran Lucha: Latina and Latino Lawyers, Breaking the Law on Principle, and Confronting the Risks of Representation*, 13 HASTINGS RACE & POVERTY L. J. 61, 72, 86-91 (2016) (critiquing the court proceedings following the Agriprocessors raid and citing to numerous other legal analyses of it).

<sup>80</sup> The poem continues:

“And I did not speak out  
 Because I was not a Communist  
 “Then they came for the Socialists  
 And I did not speak out  
 Because I was not a Socialist  
 “Then they came for the trade unionists  
 And I did not speak out

how the U.S. government mistreated *gente sin papeles* during the Bush years, presaged, and threatened to normalize, its extension of coercion, duress, and other forms of violence to other vulnerable groups and possibly throughout the populace.

### B. *Postfascist America and U.S. Law and Society*

Initially, some people with whom Marc-Tizoc shared his conceptualization of *América Posfascista* disagreed with its applicability to the United States. Others cautioned him not to articulate this controversial framing (particularly before he obtained tenure). Nevertheless, in his view, the draconian enforcement of U.S. immigration law, state and “peri-state” white supremacist legal violence,<sup>81</sup> and the exponential growth of electronic surveillance during the Bush, Obama, and Trump presidencies—all during the Orwellian U.S. “War on Terror/ism”—mounted compelling evidence of the concept’s validity. Below, therefore, we use the concept of *América Posfascista* to reframe the enforcement of U.S. immigration law and the white supremacy of state and peri-state legal violence against people racialized as “of color,” non-White, BIPOC, etc. (For reasons of brevity, we defer discussion of the exponential growth of electronic surveillance vis-à-vis *América Posfascista* for another time.<sup>82</sup>)

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Because I was not a trade unionist  
 “Then they came for the Jews  
 And I did not speak out  
 Because I was not a Jew  
 “Then they came for me  
 And there was no one left  
 To speak out for me”.

For discussion of the poem’s provenance, see Harold Marcuse, *The Origin and Reception of Martin Niemöller’s Quotation ‘First They Came for the Communists . . .’*, in REMEMBERING FOR THE FUTURE: ARMENIA, AUSCHWITZ, AND BEYOND (Michael Berenbaum, Richard Libowitz & Marcia Sachs Littell eds., 2016), at 173-200. See also Megan Garber, ‘First They Came’: The Poem of the Protests, ATLANTIC (Jan. 29, 2017); Harold Marcuse, *Martin Niemöller’s Famous Quotation: “First They Came for the Communists . . .”*, U.C. SANTA BARBARA DEPT. OF HISTORY (Sept. 12, 2000, last updated Apr. 23, 2019), <http://marcuse.faculty.history.ucsb.edu/niemol.htm>. For a slightly different version, see; *Martin Niemöller’s Quotation ‘First They Came for the Socialists. . .’*, U.S. HOLOCAUST MEMORIAL MUSEUM (last edited Mar. 30, 2012), <https://encyclopedia.ushmm.org/content/en/article/martin-niemoeiller-first-they-came-for-the-socialists>.

<sup>81</sup> For the term “peri-state,” see JUSTIN AKERS CHACÓN & MIKE DAVIS, NO ONE IS ILLEGAL: FIGHTING RACISM AND STATE VIOLENCE ON THE U.S.-MEXICO BORDER (2006), at 16 (comparing state violence with “private or peri-state violence” and listing examples of the latter form of violence as including corporate police and private detective agencies like the Pinkertons, organized white supremacists like the Ku Klux Klan, and vigilantes like the Order of Caucasians). For legal violence, see IAN F. HANEY LÓPEZ, RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE (2003), at 9 (“‘Law’ for Chicanos, and in turn this book, means the police and the courts, and legal violence refers principally to the physical force these institutions wield.”). See also Ian F. Haney López, *Protest, Repression, and Race: Legal Violence and the Chicano Movement*, 150 U. PA. L. REV. 205, 207, 242-44 (2001) (explaining how legal violence contributed to the racial formation of Chicanos in the 1960-70s).

<sup>82</sup> But see González, *supra* note 27 (arguing that the Latin American jurisprudence of *habeas data* can help people in the United States modestly check the power of Big Data). On

## 1. Spectacles of Social Control: The Draconian Enforcement of U.S. Immigration Law

The draconian enforcement of U.S. immigration law constitutes a spectacle through which the government asserts social control.<sup>83</sup> Though the origins of spectacular forms of social control are venerable,<sup>84</sup> the United States innovated this form of scapegoating in the twentieth century. Consider the Mexican “repatriation” campaigns of the 1930s,<sup>85</sup> the internment of Japanese Americans from 1942 to 1946,<sup>86</sup> and Operation Wetback in 1954.<sup>87</sup> Would anyone today honestly dispute that they constitute low points in respecting constitutional due process, and other human rights, vis-à-vis the enforcement of U.S. immigration law? And who today would endorse the racist (white supremacist) and xenophobic (nativist) ideologies that animated these mass deportation and internment efforts?<sup>88</sup> Nevertheless, contemporaneous government officials and their apologists “justified” the targeting of people under the color of federal immigration law, spurious claims of na-

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the exponential growth of Big Data and electronic surveillance, see, e.g., RICHARD A. CLARKE ET AL., *THE NSA REPORT: LIBERTY AND SECURITY IN A CHANGING WORLD* (2014); LAURA K. DONOHUE, *THE FUTURE OF FOREIGN INTELLIGENCE: PRIVACY AND SURVEILLANCE IN A DIGITAL AGE* (2016); CYRUS FARIVAR, *HABEAS DATA: PRIVACY VS. THE RISE OF SURVEILLANCE TECH* (2018); GLENN GREENWALD, *NO PLACE TO HIDE: EDWARD SNOWDEN, THE NSA, AND THE U.S. SURVEILLANCE STATE* (2014); DAWN E. HOLMES, *BIG DATA: A VERY SHORT INTRODUCTION* (2017); YASHA LEVINE, *SURVEILLANCE VALLEY: THE SECRET MILITARY HISTORY OF THE INTERNET* (2018); BRUCE SCHNEIER, *DATA AND GOLIATH: THE HIDDEN BATTLES TO COLLECT YOUR DATA AND CONTROL YOUR WORLD* (2015); VIKTOR MAYER-SCHÖNBERGER & THOMAS RAMGE, *REINVENTING CAPITALISM IN THE AGE OF BIG DATA* (2018); FRANK PASQUALE, *THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION* (2015); EDWARD SNOWDEN, *PERMANENT RECORD* (2019); SHOSHANA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER* (2019).

<sup>83</sup> See, e.g., SOSS ET AL., *supra* note 27, at 309 (“The term *social control* refers broadly to the means by which collectives secure adherence to ideational and behavioral norms and curtail disruptive forms of deviance.”) citations omitted). See also *id.* at 129-38 (evaluating social control theory in light of an empirical study about state and local implementation of Temporary Aid for Needy Families).

<sup>84</sup> Cf. JOEL F. HANDLER, *THE POVERTY OF WELFARE REFORM* (1995), at 148 (“We continue to live in a world of symbolic politics. The stereotype of the nineteenth-century immigrant single mother living in sin, the gesture of the early mothers’ pensions programs, the disdain for the underclass welfare mother of today are all symbols, less to ‘reform’ the deviants than to make society feel good about itself. Majoritarian society affirms its norms by stigmatizing others. Punishing the deviants and rewarding the virtuous, even if few in number, is a ceremonial exercise for the myth of control.”).

<sup>85</sup> See FRANCISCO E. BALDERRAMA & RAYMOND RODRÍGUEZ, *DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930s* (1995, rev. ed. 2006). See also Hing, *supra* note 74, at 276-77; Kevin R. Johnson, *The Forgotten “Repatriation” of Persons of Mexican Ancestry and Lessons for the “War on Terror”*, 26 PACE L. REV. 1 (2005).

<sup>86</sup> See, e.g., JUSTICE DELAYED, *supra* note 77; PERSONAL JUSTICE DENIED, *supra* note 24; Serrano & Miyami, *supra* note 75.

<sup>87</sup> See sources cited, *supra* note 74.

<sup>88</sup> But see Peralta, *supra* note 74 (explaining candidate Trump’s positive reference to Operation Wetback during a presidential debate).

tional security, and the racialization of their Mexican or Japanese national origin and/or heritage.<sup>89</sup>

In contrast, consider the Immigration and Nationality Act of 1965 (INA).<sup>90</sup> Reflecting its enactment during the heyday of President Johnson's Great Society programs and the triumphs of the civil rights movement, the INA overhauled the pre-existing authorities and constituted a new foundation for immigrants' due process rights.<sup>91</sup> Similarly, the Refugee Act of 1980 recreated U.S. asylum and refugee law,<sup>92</sup> and the Immigration Reform and Control Act of 1986 evidenced another substantial attempt to reform immigration law in order to accommodate the U.S. industries that rely on immigrant labor while providing an historic opportunity for the workers to regularize their immigration status.<sup>93</sup> Notwithstanding flaws in each of these laws from the standpoint of civil rights advocates,<sup>94</sup> together they set new standards for due process and respect for human dignity within the system of U.S. immigration law.

Unfortunately, their promise was betrayed: in the last decade of the twentieth century, Operation Gatekeeper (1994) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) began to erode the new foundation of rights and responsibilities in U.S. immigration law,<sup>95</sup>

<sup>89</sup> Cf. sources cited and accompanying text, *supra* notes 74-75, 77.

<sup>90</sup> Pub. L. 89-236, 79 Stat. 911 (Oct. 3, 1965). For an excellent history of immigration law and policy from the 1920s to 1965, see MAE NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* (2004).

<sup>91</sup> See, e.g., Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990).

<sup>92</sup> Pub. L. 96-212, 94 Stat. 102 (Mar. 7, 1980).

<sup>93</sup> Pub. L. 99-603, 100 Stat. 3359 (Nov. 6, 1986).

<sup>94</sup> See, e.g., GARCÍA HERNÁNDEZ, *supra* note 24, at 45-46; Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411 (1997); Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 GEO. MASON L. REV. 669 (1997); Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000); Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, 332-36 (2000).

<sup>95</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009 (Sept. 30, 1996). See also JOSEPH NEVINS, *OPERATION GATEKEEPER: THE RISE OF THE "ILLEGAL ALIEN" AND THE REMAKING OF THE U.S. - MEXICO BOUNDARY* (2001); *OPERATION GATEKEEPER: AN INVESTIGATION INTO ALLEGATIONS OF FRAUD AND MISCONDUCT*, U.S. DEPT. OF JUSTICE OFFICE OF THE INSPECTOR GENERAL (Jul. 1998), <https://oig.justice.gov/special/9807/>; Kristina Davis, *Operation Gatekeeper at 25: Look Back at the Turning Point that Transformed the Border*, SAN DIEGO UNION-TRIBUNE (Sept. 29, 2019); Donald Kerwin, *From IIRIRA to Trump: Connecting the Dots to the Current US Immigration Policy Crisis* 6 J. MIGRATION & HUM. SEC. 192 (2018) (discussing how the IIRIRA severely punished US citizens and noncitizens of all statuses by eroding the rule of law, eliminating due process from the overwhelming majority of removal cases, curtailing equitable relief from removal, and mandating insurmountable, technical roadblocks to asylum.) In addition, IIRIRA created new immigration-related crimes, conflated criminality with being out of immigration status, conditioned family reunification on income, and created the 287(g) program, which invites state and local law enforcement agencies to help enforce immigration law and has increased fear of police amongst many immigrant communities. See *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT (last updated Jul. 15, 2020). See also GARCÍA HERNÁNDEZ, *supra* note 24, at 68;

and after September 11, 2001, the erosion of those standards became an avulsion.

The creation of the Office (later Department) of Homeland Security (DHS),<sup>96</sup> reorganization of the Immigration and Nationality Service,<sup>97</sup> and initiation of DHS Operations Endgame,<sup>98</sup> Community Shield,<sup>99</sup> and Streamline<sup>100</sup> are but a few mechanisms through which the United States radically remade immigration law enforcement. Notwithstanding certain policy changes during the Obama Administration,<sup>101</sup> the first two decades of the

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Ingrid V. Eagly, *Prosecuting Immigration*, 104 Nw. U. L. REV. 1281, 1290 n.42, 1341(2010); Luz E. Herrera & Pilar Margarita Hernández Escontrías, *The Network for Justice: Pursuing a Latinx Civil Rights Agenda*, 21 HARV. LATINO L. REV. 165, 219-20 (2018); Hing, *supra* note 74, at 280-82; Kevin R. Johnson, *A Case Study of Color-Blind Rhetoric: The Racially Disparate Impacts of Arizona's S.B. 1070 and the Failure of Comprehensive Immigration Reform*, 1 L.J. SOC. JUST. 3, 15 (2011); Gerald P. López, *Don't We Like Them Illegal?*, 45 U.C. DAVIS L. REV. 1711, 1782, 1786-88 (2012); Mary Romero, *Are Your Papers in Order?: Racial Profiling, Vigilantes, and "America's Toughest Sheriff"*, 14 HARV. LATINO L. REV. 337 (2011). See generally CÉSAR CUAUHTEMÓC GARCÍA HERNÁNDEZ, *CRIMMIGRATION LAW* (2015).

<sup>96</sup> See *Creation of the Department of Homeland Security*, U.S. DEPT. OF HOMELAND SECURITY (last updated Sept. 24, 2015), <https://www.dhs.gov/creation-department-homeland-security>.

<sup>97</sup> See *Celebrating the History of ICE*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT (last updated Mar. 1, 2019), <https://www.ice.gov/features/history#content1>.

<sup>98</sup> See U.S. DEPT. OF HOMELAND SECURITY BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT, *ENDGAME OFFICE OF DETENTION AND REMOVAL STRATEGIC PLAN, 2003 – 2012 DETENTION AND REMOVAL STRATEGY FOR A SECURE HOMELAND* (Aug. 15, 2003), <https://www.hsdl.org/?view&did=470051>. See also Carly Goodman, *Angry that ICE is Ripping Families Apart? Don't Just Blame Trump. Blame Clinton, Bush and Obama, Too.*, WASH. POST (Jun. 11, 2018), <https://www.washingtonpost.com/news/made-by-history/wp/2018/06/11/angry-that-ice-is-ripping-families-apart-dont-just-blame-trump-blame-clinton-bush-and-obama-too> (discussing how ICE's *Endgame* coincided with a doubling of the immigration enforcement budget "from \$6.2 billion in 2002 to \$12.5 billion in 2006").

<sup>99</sup> See *Operation Community Shield: Efforts to Dismantle Violent Street Gangs Remain a Priority 10 Years On*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, <https://www.ice.gov/features/community-shield> (last updated Nov. 2, 2017); See also Jennifer M. Chacón, *Whose Community Shield: Examining the Removal of the Criminal Street Gang Member*, 2007 U. CHI. LEGAL F. 317, 327-33 (2007) (discussing the origin and evolution of Operation Community Shield).

<sup>100</sup> See U.S. DEPT. OF HOMELAND SECURITY OFFICE OF THE INSPECTOR GENERAL, *STREAMLINE: MEASURING ITS EFFECT ON ILLEGAL BORDER CROSSING*, OIG-15-95 (May 15, 2015), [https://www.oig.dhs.gov/assets/Mgmt/2015/OIG\\_15-95\\_May15.pdf](https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-95_May15.pdf). See also JOANNA LYDGATE, CHIEF JUSTICE EARL WARREN INST. ON RACE, ETHNICITY & DIVERSITY, UNIV. CALIF., BERKELEY L. SCH., *ASSEMBLY-LINE JUSTICE: A REVIEW OF OPERATION STREAMLINE* (Jan. 2010), [https://www.law.berkeley.edu/files/Operation\\_Streamline\\_Policy\\_Brief.pdf](https://www.law.berkeley.edu/files/Operation_Streamline_Policy_Brief.pdf); Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. *SIDE BAR* 135, 142-43, 145-47 (2009) (discussing Operation Streamline and the Ninth Circuit's holding that its mass plea agreement procedures could violate Federal Rule of Criminal Procedure 11); Eagly, *supra* note 95, at 1327-29, 1351-52 (discussing Operation Streamline's institutional effects on the administration of justice); Marisa Franco & Carlos Garcia, *The Deportation Machine Obama Built for President Trump*, NATION (Jun. 27, 2016), <https://www.thenation.com/article/archive/the-deportation-machine-obama-built-for-president-trump/>; Joshua Partlow, *Under Operation Streamline, Fasttrack Proceedings for Illegal Immigrants*, WASH. POST (Feb. 10, 2014).

<sup>101</sup> See, e.g., JANET NAPOLITANO, U.S. DEPT. HOMELAND SEC., *EXERCISING PROSECUTORIAL DISCRETION WITH RESPECT TO INDIVIDUALS WHO CAME TO THE UNITED STATES AS CHILDREN* (Jun. 15, 2012), <https://www.dhs.gov/xlibrary/assets/sl-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> (creating the Deferred Action for Childhood Arrivals (DACA) program). While the Obama Administration created

twenty-first (Christian) century featured a parade of terror: ICE raids on homes and workplaces,<sup>102</sup> desperate people literally claiming sanctuary within churches,<sup>103</sup> and even dragnets around schools (to waylay parents)

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the DACA program and replaced the spectacular workplace immigration raids of the Bush era with targeted removal actions that relied on innovations in electronic surveillance, the Obama Administration did not stop, or even reduce, mass deportation, but rather increased it. *See, e.g.*, Muzaffar Chishti, Sarah Pierce & Jessica Bolter, *The Obama Record on Deportations: Deporter in Chief or Not?*, MIGRATION POL'Y INST., (Jan. 26, 2017), <https://www.migrationpolicy.org/article/obama-record-deportations-deporter-chief-or-not>; Franco & Garcia, *supra* note 100; César Cuauhtémoc García Hernández, *Abolish Immigration Prisons*, N.Y. TIMES (Dec. 2, 2019), <https://nyti.ms/2qc1dLK>; Gardiner Harris, *U.S. Plans Raids in New Year to Fight Surge in Border Crossings*, N.Y. TIMES, (Dec. 24, 2015), <https://nyti.ms/1kiUnuM>; Michael D. Shear, *Obama, Citing a Concern for Families, Orders a Review of Deportations*, N.Y. TIMES, (Mar. 13, 2014), <https://nyti.ms/NbK234>; Michael D. Shear & Julie Preston, *Obama Pushed 'Fullest Extent' of His Powers on Immigration Plan*, N.Y. TIMES, (Nov. 28, 2014), <https://nyti.ms/1ys7Jsj>.

<sup>102</sup> *See, e.g.*, GARCÍA HERNÁNDEZ, *supra* note 24, at 50-53, 72-73; TANYA MARIA GOLASH-BOZA, DEPORTED: POLICING IMMIGRANTS, DISPOSABLE LABOR AND GLOBAL CAPITALISM 138, 168, 175, 181-84, 194-97, 236 (2015); BILL ONG HING, ETHICAL BORDERS: NAFTA, GLOBALIZATION, AND MEXICAN MIGRATION (2010), at 1-5, 8, 59, 116-17, 120, 126-132, 161, 167, 174, 180, 183-84; ICE WORKPLACE RAIDS: THEIR IMPACT ON U.S. CHILDREN, FAMILIES AND COMMUNITIES, HEARING BEFORE THE SUBCOMM. ON WORKFORCE PROTS. OF THE H. COMM. ON EDUC. AND LABOR, 110TH CONG. 2-5 (May 20, 2008) (Statement of Rep. Lynn C. Woolsey), <https://www.govinfo.gov/content/pkg/CHRG-110hhrg42334/pdf/CHRG-110hhrg42334.pdf>; *Camayd-Freixas Statement*, *supra* note 79 (regarding the ICE raid on Agriprocessors, Inc. in Postville, Iowa); Muzaffar Chishti, Sarah Pierce & Jessica Bolter, *Shifting Gears, Trump Administration Launches High-Profile Worksite Enforcement Operations*, MIGRATION POL'Y INST., (Jan. 24, 2018), <https://www.migrationpolicy.org/article/shifting-gears-trump-administration-launches-high-profile-worksite-enforcement-operations>; Bess Chiu, Lynly Egyes, Peter L. Markowitz & Jaya Vasandani, *Constitution on ICE: A Report on Immigration Home Raid Operations*, CARDOZO IMMIGRATION JUST. CLINIC (2009), <http://www.cardozo.yu.edu/immigrationjustice/>; Caitlin Dickerson, Nick Corasaniti & Edgar Sandoval, *ICE Launches Raids Targeting Migrant Families*, N.Y. TIMES, (July 14, 2019), <https://nyti.ms/2LimJaF>; González, *supra* note 79, at 86-91 (critiquing the court proceedings following the Agriprocessors raid and citing to numerous other legal analyses of it); Adam Harris, *When ICE Raids Homes*, ATLANTIC, (Jul. 17, 2019), <https://www.theatlantic.com/family/archive/2019/07/when-ice-raids-homes-immigration/594112/>; Nick Miroff, *ICE Raids Targeting Migrant Families Slated to Start Sunday in Major U.S. Cities*, WASH. POST, (June 21, 2019), [https://www.washingtonpost.com/immigration/ice-raids-targeting-migrant-families-slated-to-start-sunday-in-major-us-cities/2019/06/21/f2936318-942e-11e9-b570-6416efdc0803\\_story.html](https://www.washingtonpost.com/immigration/ice-raids-targeting-migrant-families-slated-to-start-sunday-in-major-us-cities/2019/06/21/f2936318-942e-11e9-b570-6416efdc0803_story.html); Lisa Rein, Abigail Hauslohner & Sandhya Somashekhar, *Federal Agents Conduct Immigration Enforcement Raids in at least Six States*, WASH. POST, (Feb. 11, 2017), [https://www.washingtonpost.com/national/federal-agents-conduct-sweeping-immigration-enforcement-raids-in-at-least-6-states/2017/02/10/4b9f443a-efc8-11e6-b4ff-ac2cf509efe5\\_story.html](https://www.washingtonpost.com/national/federal-agents-conduct-sweeping-immigration-enforcement-raids-in-at-least-6-states/2017/02/10/4b9f443a-efc8-11e6-b4ff-ac2cf509efe5_story.html); Katherine Q. Seelye & Jess Bidgood, *'Don't Open the Door': How Fear of an Immigration Raid Gripped a City*, N.Y. TIMES, (Apr. 6, 2017), <https://nyti.ms/2oOzV8Q>.

<sup>103</sup> *See, e.g.*, Rose Cuison Villazor, *What Is A "Sanctuary"?*, 61 SMU L. REV. 133, 134-35, 138-42 (2008) (discussing the movement in the 1980s for churches to provide sanctuary and other forms of assistance to Central American asylum applicants). *See also* AM. CIV. LIB. UNION FOUND., SANCTUARY CONGREGATIONS AND HARBORING FAQ (Apr. 13, 2017), [https://www.sanctuarynotdeportation.org/uploads/7/6/9/1/76912017/sanctuary\\_fa\\_q\\_4\\_13\\_2017.pdf](https://www.sanctuarynotdeportation.org/uploads/7/6/9/1/76912017/sanctuary_fa_q_4_13_2017.pdf); Barbara Bezdek, *Religious Outlaws: Narratives of Legality and the Politics of Citizen Interpretation*, 62 TENN. L. REV. 899 (1995) (analyzing how participants in the 1980s Sanctuary Movement resisted and reframed the law as interpreted by government officials and courts); Kristina M. Campbell, *Operation Sojourner: The Government Infiltration of the Sanctuary Movement in the 1980s and Its Legacy on the Modern Central American Refugee Crisis*, 13 U. ST. THOMAS L.J. 474 (2017) ("discussing the federal government's covert infiltration and criminal prosecution of people involved in the 1980s Sanctuary Movement



have become normalized,<sup>104</sup> at least for people whose social position—particularly regarding citizenship, national origin, race, and ethnicity—enable them to feel that immigration law enforcement only affects “other people,” who are racialized, marginalized, and criminalized under the brutally succinct, and post-fascist, slur, “illegal.”<sup>105</sup>

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and its impact on the new sanctuary movement); Jorge L. Carro, *Sanctuary the Resurgence of an Age-Old Right or A Dangerous Misinterpretation of an Abandoned Ancient Privilege?*, 54 U. CIN. L. REV. 747 (1986) (contextualizing the 1980s Sanctuary Movement historically and legally, examining whether it is consistent with prior Judaic, Anglo-Saxon and English concepts of church sanctuary, and determining the constitutional implications of the government’s response); González, *supra* note 79, at 80-81 (citing to early legal scholarship on the 1980s Sanctuary Movement); Daniel Schwarz, *Searching for a New Sanctuary Movement*, DISSENT MAGAZINE (Jun. 25, 2010), [https://www.dissentmagazine.org/online\\_articles/searching-for-a-new-sanctuary-movement](https://www.dissentmagazine.org/online_articles/searching-for-a-new-sanctuary-movement); Thomas Scott-Railton, *A Legal Sanctuary: How the Religious Freedom Restoration Act Could Protect Sanctuary Churches*, 128 YALE L.J. 408 (2018) (analyzing how current religious accommodation doctrines may provide greater legal protections for sanctuary churches today than were available during the 1980s sanctuary movement); Rose Cuison Villazor & Pratheepan Gulasekaram, *Sanctuary Networks*, 103 MINN. L. REV. 1209, 1228-35 (2019) (“Thus far, none of the churches that have offered sanctuary have faced legal challenges from the Trump Administration. A policy issued under the Obama Administration treats churches, like schools and hospitals, as ‘sensitive locations’ in which ICE would not enforce immigration law.”) (citations omitted); John Washington, *Another Way to Keep Families Together: Join the New Sanctuary Movement*, NATION (Jun. 28, 2018), <https://www.thenation.com/article/archive/another-way-keep-families-together-join-new-sanctuary-movement/>. See generally *Sanctuary Movement*, <https://www.sanctuarynotdeportation.org> (last visited Jul. 17, 2020) (“A growing movement of immigrant and over 1100 faith communities doing what Congress and the Administration refuse to do: protect and stand with immigrants facing deportation.”).

<sup>104</sup> See, e.g., Hing, *supra* note 74, at 305-06 (discussing ICE activity at an elementary school in New York and a preschool in San Francisco). See also Emma Brown, *‘Your Child is Safe’: Schools Address Deportation Fears among Immigrant Families*, WASH. POST (Mar. 19, 2017), [https://www.washingtonpost.com/local/education/your-child-is-safe-schools-address-deportation-fears-among-immigrant-families/2017/03/19/5f8877ae-09be-11e7-93dc-00f9bdd74ed1\\_story.html](https://www.washingtonpost.com/local/education/your-child-is-safe-schools-address-deportation-fears-among-immigrant-families/2017/03/19/5f8877ae-09be-11e7-93dc-00f9bdd74ed1_story.html) (“Officials in Sacramento, Denver, Chicago and Miami have declared their schools havens, out of reach of ICE agents without special permission or a warrant. . . . Historically, ICE agents have avoided schools. A 2011 memo says they are barred from arresting or interviewing people at schools, churches, hospitals and other “sensitive locations,” unless there is an imminent threat or they seek approval. . . . Another man was detained in Los Angeles about a half-mile from a charter school after he dropped off his daughter.”); Trevor Hughes, *Immigration Agents Accused of Targeting Parents Taking Their Kids to School*, USA TODAY (Feb. 27, 2020), <https://www.usatoday.com/story/news/nation/2020/02/27/ice-criticized-detaining-parents-school-trump-enforcement-push/4891529002/> (“Immigrant rights activists said there were three incidents in Colorado in the past week in which fathers were stopped before or after dropping their kids off. School officials at a district outside Portland, Oregon, said ICE agents arrested a father last week shortly after his kids got on the school bus. This month, ICE agents detained a mother after she dropped her child off at a South Philadelphia school.”); Julia Preston, *Groups Protest Operation by Immigration Agents*, N.Y. TIMES (Oct. 17, 2012), <https://nyti.ms/R5mXOP> (“An operation by federal immigration agents in Detroit set off protests from Latino and church groups on Wednesday after the officers stopped two illegal immigrants as they were dropping off their children at school.”).

<sup>105</sup> Beyond asserting a claim about a person’s immigration status, the slur “illegal” makes an ontological claim that the target is a living, breathing, walking crime. Further, in its U.S. context, it assumes the target is part of an undifferentiated and racialized mass (typically Brown and/or Mexican). From its first usage in a judicial opinion, *Waisbord v. United States*, 183 F.2d 34, 35 (5th Cir. 1950), and law review article, *Webbacks*, *supra* note 74, at *passim*, to the present day (see, e.g., Emily Bazelon, *The Unwelcome Return of ‘Illegals’*, N.Y. TIMES (Aug. 18, 2015), <https://nyti.ms/1NFZAZO>), “illegal” has been an invidious, pernicious, and

Like white privilege and the transparency phenomenon function as to race,<sup>106</sup> the privileges that accrue around citizenship, ethnicity, national origin, and race enable many people in the United States to ignore or downplay the spectacular legal violence of ICE raids and related practices of immigration law enforcement. In contrast, for people whose families or communities feature mixed immigration status, or who otherwise affiliate with and care about the sociolegal conditions of immigrants, despite being nominally legal, immigration law enforcement in the twenty-first century is one of the starkest emblems of postfascism in the United States. White supremacist state and peri-state legal violence offer others.

## 2. White Supremacist State and Peri-State Legal Violence

Sociolegal scholars have long critiqued the unprecedented expansion of imprisonment and related forms of social control.<sup>107</sup> The United States began

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racialized insult. In the framing of *América Posfascista* (Postfascist America), the social function of the slur “illegal” is particularly revealing:

The hostility to universal citizenship is, I submit the main characteristic of fascism. And the rejection of even a tempered universalism is what we now see repeated under democratic circumstances[.] . . . There is logic in the Nazi declaration that communists, Jews, homosexuals, and the mentally ill are non-citizens and, therefore, non-human. . . . These categories of people, as the Nazis saw them, represented types crucial to the Enlightenment project of inclusion. . . . And since, thanks to Enlightenment, citizenship (membership in the political community), nationality, and humanity had been synthetically merged, being expelled from citizenship meant, quite literally, exclusion from humanity. Hence civic death was necessarily followed by natural death, that is, violent death, or death *tout court*. Fascist or Nazi genocide was not preceded by legal condemnation . . . it was the “naturalization” of a moral judgment that deemed some types of human condition inferior.

G.M. Tamás, *On Post-Fascism: The Degradation of Universal Citizenship*, BOSTON REV. (Jun. 1, 2000), <http://bostonreview.net/world/g-tamas-post-fascism>. Thankfully some mainstream publishers and politicians have begun to repudiate it. See, e.g., Bazelon, *supra*; Christine Haughney, *The Times Shifts on ‘Illegal Immigrant,’ but Doesn’t Ban the Use*, N.Y. TIMES (Apr. 23, 2013), <https://nyti.ms/1l1fm1B>; Stephen Hiltner, *Illegal, Undocumented, Unauthorized: The Terms of Immigration Reporting*, N.Y. TIMES (Mar. 10, 2017), <https://nyti.ms/2maFpsz>; and Mihir Zaveri, *This Lawmaker Wants to Remove the Words ‘Illegal Alien’ from the Law*, N.Y. TIMES (Feb. 13, 2020), <https://nyti.ms/39xbpQ8>. For further discussion on the term “illegal,” see Cynthia Lane, *Earliest Use of Term ‘Illegal Alien’* (May 10, 2013) (unpublished memo on file with authors); López, *supra* note 95.

<sup>106</sup> See, e.g., Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 582, 604 (1990) (“In this society, it is only white people who have the luxury of ‘having no color’; only white people have been able to imagine that sexism and racism are separate experiences.”). See also BARBARA J. FLAGG, *WAS BLIND, BUT NOW I SEE: WHITE RACE CONSCIOUSNESS & THE LAW* (1998); STEPHANIE M. WILDMAN ET AL., *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* (1996); Stephanie M. Wildman & Adrienne D. Davis, *Language and Silence: Making Systems of Privilege Visible*, 35 SANTA CLARA L. REV. 881 (1995); Barbara J. Flagg, “*Was Blind, But Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993); and Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implications of Making Comparisons Between Racism and Sexism (or Other-Isms)*, 1991 DUKE L.J. 397 (1991).

<sup>107</sup> See, e.g., ALEXANDER, *supra* note 24; RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* (2007); ELIZABETH

this process in the 1970s, doubled the correctional population in the 1980s, and continued dramatically to increase it until about 2007.<sup>108</sup> Scholars have thoroughly documented, theorized, and critiqued the racially disparate impact of criminal law enforcement in the United States,<sup>109</sup> including the growing criminalization of activities highly associated with impoverished, racialized, and otherwise marginalized peoples.<sup>110</sup> Beyond the now-normalized disparate racial impact of criminal law enforcement, the past decade or so has brought massive popular outrage and increased scholarly attention to today's analogues to twentieth century lynching—the killing of peoples racialized as not-White by police officers whose claims to have been acting in the line of duty, often in alleged self-defense, are repudiated by video recordings of those interactions that “go viral” online.<sup>111</sup>

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HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA (2016); MARC MAUER, RACE TO INCARCERATE (1999, 2006); JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007); WACQUANT, *supra* note 27; BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2006); FRANKLIN E. ZIMRING, GORDON HAWKINS & SAM KAMIN, PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA (2001). *See also* Angela Davis, *Masked Racism: Reflections on the Prison Industrial Complex*, COLORLINES (Sept. 10, 1998), <https://www.colorlines.com/articles/masked-racism-reflections-prison-industrial-complex> [hereafter Davis, *Prison Industrial Complex*]; Mike Davis, *Hell Factories in the Field*, NATION (Feb. 20, 1995) [hereafter Davis, *Hell Factories*]; Eric Schlosser, *The Prison Industrial Complex*, ATLANTIC (Dec. 1998), <http://www.theatlantic.com/magazine/archive/1998/12/the-prison-industrial-complex/4669/>.

<sup>108</sup> *See* BUREAU OF JUSTICE STATISTICS, KEY STATISTICS: TOTAL ADULT CORRECTIONAL POPULATION, 1980–2016, <https://www.bjs.gov/index.cfm?ty=KFdetail&iid=487#> (last visited Jul. 6, 2020). The year when the decline began for people in prison or jail or under parole or probation varies. *See id.*

<sup>109</sup> *See, e.g.*, ALEXANDER, *supra* note 24; BIAS IN THE LAW, *supra* note 23; GILMORE, *supra* note 107; KAARYN S. GUSTAFSON, CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY (2011); HINTON, *supra* note 107; MAUER, *supra* note 107; LUPE S. SALINAS, U.S. LATINOS AND CRIMINAL JUSTICE (2015); SIMON, *supra* note 107; SOSS ET AL., *supra* note 27; WACQUANT, *supra* note 27; WESTERN, *supra* note 107; ZIMRING ET AL., *supra* note 107; Davis, *Prison Industrial Complex*, *supra* note 107; Victor M. Rios, *The Hyper-Criminalization of Black and Latino Male Youth in the Era of Mass Incarceration*, 8 SOULS 40 (2006); Sabol et al., *supra* note 23.

<sup>110</sup> *See, e.g.*, Marc-Tizoc González, *Hunger, Poverty, and the Criminalization of Food Sharing in the New Gilded Age*, 23 AM. U. J. GENDER & SOC. POL'Y & L. 231 (2015) [hereafter González, *New Gilded Age*]; Marc-Tizoc González, *Criminalizing Charity: Can First Amendment Free Exercise of Religion, RFRA, and RLUIPA Protect People who Share Food in Public?*, 7 U.C. IRVINE L. REV. 291 (2017) [hereafter González, *Criminalizing Charity*]; Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643 (2009); Sara Rankin, *Punishing Homelessness*, 22 NEW CRIM. L. REV. 99 (2019). The criminalization of activities highly associated with impoverished and otherwise marginalized peoples followed the end of the venerable Anglo-American law of vagrancy. *See* RISA L. GOLUBOFF, VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S (2016).

<sup>111</sup> *See, e.g.*, Mike Baker et al., *Three Words. 70 Cases. The Tragic History of 'I Can't Breathe.'*, N.Y. TIMES, (June 29, 2020), <https://www.nytimes.com/interactive/2020/06/28/us/ficant-breathe-police-arrest.html>; Alex Horton, *In violent protest incidents, a theme emerges: Videos contradict police accounts*, WASH. POST, (June 6, 2020), <https://www.washingtonpost.com/nation/2020/06/06/police-protester-incidents-video/>; Farhad Manjoo, *Cameras Won't Stop Police From Killing*, N.Y. TIMES, (June 3, 2020), <https://www.nytimes.com/2020/06/03/opinion/george-floyd-video-police.html>. Bay Area Rapid Transit Officer Johannes Mehserle's killing of Oscar Grant on January 1, 2009 is a foundational

While some people may disagree that the mass communication of these homicides constitutes a contemporary analogue to past practices of white supremacist lynching (*e.g.*, arguing that today’s police killings occur “spontaneously” rather than being adequately premeditated to enable a lynch mob to gather), their iteration derives from sociolegal institutions and systems that are identifiably White, are highly resistant to reform, and effect a state of terror: people who feel safe on the White side of the color line are free to respond in a variety of ways (*e.g.*, shock, outrage, glee), but people who inhabit the wrong side of the tracks understand profoundly that contact with a police officer could result in humiliation, injury, or even death (*i.e.*, feelings of anxiety, dread, fear, and/or terror). Moreover, as George Zimmerman’s killing of Trayvon Martin exemplifies,<sup>112</sup> people who credibly claim the privileges, immunities, and other properties of Whiteness,<sup>113</sup> act as peristate vigilantes under the color of “Stand Your Ground” laws,<sup>114</sup> for which

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example of this phenomenon. *See, e.g.*, Demian Bulwa & Rachel Swan, *10 years since Oscar Grant’s death: What happened at Fruitvale Station?*, S.F. CHRONICLE (Dec. 28, 2018), <https://www.sfchronicle.com/bayarea/article/10-years-since-Oscar-Grant-s-death-What-13489585.php>; Jamilah King, *On the Anniversary of Oscar Grant’s Death, We Can Now Finally Say Goodbye to a Decade of Police Violence*, MOTHER JONES (Jan. 1, 2020), <https://www.motherjones.com/crime-justice/2020/01/oscar-grant-death-decade-criminal-justice-police-shootings/>; KQED News Staff, *It Started With Oscar Grant: A Police Shooting in Oakland, and the Making of a Movement*, KQED (Jun. 5, 2020), <https://www.kqed.org/news/11823246/it-started-with-oscar-grant-a-police-shooting-in-oakland-and-the-making-of-a-movement-2>; Jesse McKinley, *In California, Protests After Man Dies at Hands of Transit Police*, N.Y. TIMES (Jan. 8, 2009), <https://www.nytimes.com/2009/01/09/us/09oakland.html>; Jesse McKinley, *Officer Guilty in Killing That Inflamed Oakland*, N.Y. TIMES (July 8, 2010), <https://www.nytimes.com/2010/07/09/us/09verdict.html>; Peter Rothberg, *Justice for Oscar Grant*, NATION (Jan. 14, 2009); Jill Tucker, Kelly Zito & Heather Knight, *Deadly BART Brawl – Officer Shoots Rider*, 22, SFGATE (Jan. 2, 2009), <https://www.sfgate.com/bayarea/article/Deadly-BART-brawl-officer-shoots-rider-22-3178373.php>. For a phenomenal memorialization of people killed by police in the United States, see *Justice for Our Lives*, OREEORIGINAL.COM, <https://www.oreeoriginal.com/justiceforourlives.html> (last visited Jul. 15, 2020) (presenting an open-source, digital portrait series of people whom police have killed). *See also* Sarah Burke, *The People’s Portraitist: Oree Original*, East Bay Express (Aug. 9, 2016), <https://www.eastbayexpress.com/oakland/the-peoples-portraitist-oree-original/Content?oid=4932865>; Jessica Jones & Kelly Whalen, *Portraitist Oree Original Honors People of Color Killed by Law Enforcement*, KQED (Jan. 16, 2017), <https://www.kqed.org/arts/12622802/portraitist-oree-original-honors-people-of-color-killed-by-law-enforcement>. For other efforts to document people whom U.S. police kill, see *The Counted*, *supra* note 17; *Fatal Force*, *supra* note 17; *#SayHerName Campaign*, *supra* note 17.

<sup>112</sup> *See, e.g.*, Buckley, *supra* note 17; Tamara F. Lawson, *A Fresh Cut in an Old Wound – A Critical Analysis of the Trayvon Martin Killing: The Public Outcry, the Prosecutors’ Discretion, and the Stand Your Ground Law*, 23 U. FLA. J.L. & PUB. POL’Y 271 (2012).

<sup>113</sup> *Cf.* Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993). For example, popular discourse has recently begun to name and shame the “Karens” and “Barbecue Beckys” for their willingness to weaponize ideologies of white feminine vulnerability in order to direct police against Black persons. *See, e.g.*, Karen Grigsby Bates, *What’s in a Karen?*, NPR CODE SWITCH (Jul. 15, 2020), <https://www.npr.org/2020/07/14/891177904/whats-in-a-karen>; Cady Lang, *How the ‘Karen Meme’ Confronts the Violent History of White Womanhood*, TIME (Jul. 6, 2020), <https://time.com/5857023/karen-meme-history-meaning/>.

<sup>114</sup> *See, e.g.*, Lawson, *supra* note 112, at 286-89, 299-303, 306-10 (critiquing Florida’s Stand Your Ground law). *See also* NOEL A. CAZENAVE, *KILLING AFRICAN AMERICANS: POLICE AND VIGILANTE VIOLENCE AS A RACIAL CONTROL MECHANISM* (2018); U.S. COMM’N ON CIVIL RIGHTS, *EXAMINING THE RACE EFFECTS OF STAND YOUR GROUND LAWS AND RELATED ISSUES*

vested interest groups lobbied.<sup>115</sup> While homicides by white supremacists within or without the state police forces are not new and have long and bloody histories, digital and online technologies enable people on the ground to compel U.S. society as a whole to confront these dreadful spectacles of legal violence—and then to petition the government for a redress of grievances.

Thankfully, many activists, journalists, and scholars have taken up the task of documenting, theorizing, and critiquing these dreadful spectacles of legal violence.<sup>116</sup> Here, therefore we focus on a relatively understudied phenomenon that is terribly reminiscent of the postfascist dictatorships of Latin America—the “disappearance” of people arrested by police in Chicago and held incommunicado at Homan Square.

### 3. “Analogous to the CIA’s Black Sites”: Homan Square, Chicago

First reported by *The Guardian* in February 2015,<sup>117</sup> Homan Square exemplifies postfascism in the United States. Unlike *los desaparecidos* of Argentina, Chile, and other countries of Latin America during their late-twentieth century dictatorships,<sup>118</sup> or the extraordinary rendition of people during the ongoing U.S. War on Terrorism,<sup>119</sup> neither military coup, nor ex-

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(Feb. 2020), <https://www.usccr.gov/pubs/2020/04-06-Stand-Your-Ground.pdf>; Aya Gruber, *Race to Incarcerate: Punitive Impulse and the Bid to Repeal Stand Your Ground*, 68 U. MIAMI L. REV. 961 (2014); Adeoye Johnson, *Neighborhood Watch: Invading the Community, Evading Constitutional Limits*, 18 U. PA. J.L. & SOC. CHANGE 459 (2016); Angela Onwuachi-Willig, *Policing the Boundaries of Whiteness: The Tragedy of Being “Out of Place” from Emmett Till to Trayvon Martin*, 102 IOWA L. REV. 1113 (2017).

<sup>115</sup> See, e.g., Susan Ferriss, *NRA Pushed ‘Stand Your Ground’ Laws across the Nation*, CTR. FOR PUB. INTEGRITY (Mar. 26, 2012, updated May 19, 2014), <https://publicintegrity.org/education/nra-pushed-stand-your-ground-laws-across-the-nation/>; Abby Goodnough, *Florida Expands Right to Use Deadly Force in Self-Defense*, N.Y. TIMES, (Apr. 27, 2005), <https://www.nytimes.com/2005/04/27/us/florida-expands-right-to-use-deadly-force-in-self-defense.html>; Adam Weinstein, *How the NRA and Its Allies Helped Spread a Radical Gun Law Nationwide*, MOTHER JONES (Jun. 7, 2012), <https://www.motherjones.com/politics/2012/06/nra-alec-stand-your-ground/>. See also Lawson, *supra* note 112, at 302 n.92 (commenting on the Florida Stand Your Ground law’s legislative history).

<sup>116</sup> See, e.g., sources cited, *supra* notes 17, 24, 51-54, 111-12.

<sup>117</sup> Spencer Ackerman, *The Disappeared: Chicago Police Detain Americans at Abuse-Laden ‘Black Site’*, GUARDIAN (Feb. 24, 2015); Philipp Batta, Mae Ryan & Spencer Ackerman, *‘It’s a Domestic Black Site’: Inside One Protester’s Secretive US Police Detention*, GUARDIAN (Feb. 24, 2015) (discussing a protestor’s detention, interrogation, and denial of access to his attorneys in Homan Square after being arrested during the May 2012 protests against NATO). See also Wadie E. Said, *Law Enforcement in the American Security State*, 2019 WIS. L. REV. 819, 863-65 (2019) (discussing the unconstitutionality of the incommunicado police detentions at Homan Square and comparing them with the New York Police Department’s post-9/11 dragnet surveillance of the city’s Muslim community).

<sup>118</sup> On *los desaparecidos* of Chile, see, e.g., KLEIN, *supra* note 62, at 93-94; KORNBLUH, *supra* note 62, at 162; RETTIG COMMISSION REPORT, *supra* note 64. On those of Argentina, see NUNCA MÁS, *supra* note 48.

<sup>119</sup> See *Rendition Circuit*, RENDITION PROJECT, <https://www.therenditionproject.org.uk/flights/renditions/index.html> (accessed Jul. 16, 2020). See also Duncan Campbell & Richard Norton-Taylor, *US Accused of Holding Terror Suspects on Prison Ships*, GUARDIAN (Jun. 1, 2008), <https://www.theguardian.com/world/2008/jun/02/usa.humanrights>; Rachel Donadio, *Italy Convicts 23 Americans for C.I.A. Renditions*, N.Y. TIMES (Nov. 4, 2009), <https://>

traterritorial warfare contextualizes it. Instead, for at least a decade,<sup>120</sup> the Chicago Police Department used a nondescript warehouse complex as a secure “off the books” interrogation and detention center in broad daylight—though behind chain-link fences, brick walls, and locked doors.<sup>121</sup> After physically detaining people, ostensibly on suspicion of crime, police took them into custody and initially or eventually transported them to Homan Square without entering them into the booking databases.<sup>122</sup> Until journalists, who were investigating a former Chicago police detective who became a military interrogator at the Guantánamo Bay prison,<sup>123</sup> learned what was transpiring at Homan Square, only the survivors and their attorneys knew that Chicago Police Department practices at the site included: keeping detained people out of the booking databases, shackling them for prolonged periods, beating them, holding them (including at least one minor) without legal counsel for between 12 and 24 hours, and denying defense attorneys’ express requests to access their clients at the facility.<sup>124</sup> Moreover, “At least one man was found unresponsive in a Homan Square ‘interview room’ and later pronounced dead.”<sup>125</sup>

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www.nytimes.com/2009/11/05/world/europe/05italy.html; Claudio Gatti, *Boeing Unit to Face Suit in CIA Seizures*, N.Y. TIMES, (May 29, 2007), <https://www.nytimes.com/2007/05/29/business/worldbusiness/29iht-rendition.4.5915950.html>; Lisa Hajjar, *The Counterterrorism War Paradigm versus International Humanitarian Law: The Legal Contradictions and Global Consequences of the US “War on Terror”*, 44 L. & SOC. INQUIRY 922 (2019); Leila Nadya Sadat, *Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror*, 75 GEO. WASH. L. REV. 1200 (2007); Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333 (2007); Scott Shane, Stephen Grey & Margot Williams, *C.I.A. Expanding Terror Battle Under Guise of Charter Flights*, N.Y. TIMES, (May 31, 2005), <https://www.nytimes.com/2005/05/31/us/cia-expanding-terror-battle-under-guise-of-charter-flights.html>.

<sup>120</sup> Tanya Basu, *Behind ‘the Disappeared’ of Chicago’s Homan Square*, ATLANTIC (Feb. 24, 2015) (“We think it [Homan Square] started during [former Chicago Police Department Superintendent] Phil Cline’s time around 2006 or 2007 until about 2011 when the city had roving special units [that worked out of Homan Square.]”) See also Ackerman, *supra* note 117 (“On a smaller scale, Homan Square is ‘analogous to the CIA’s black sites,’ said Andrea Lyon, a former Chicago public defender and current dean of Valparaiso University Law School. When she practiced law in Chicago in the 1980s and 1990s, she said, ‘police used the term “shadow site” to refer to the quasi-disappearances now in place at Homan Square.”).

<sup>121</sup> Ackerman, *supra* note 117.

<sup>122</sup> See, e.g., Ackerman, *supra* note 117; Basu, *supra* note 120 (“At Homan Square they don’t process paperwork about your arrest. You’re just gone. No one knows. At some point they have to do the paperwork and prosecute you. After they get your confession, you wind up back in the paperwork.”).

<sup>123</sup> See Spencer Ackerman, *Guantánamo Torturer Led Brutal Chicago Regime of Shackling and Confession*, GUARDIAN (Feb. 18, 2015). See also Tracy Siska, *The Chicago Police Used Appalling Military Interrogation Tactics for Decades*, GUARDIAN (Feb. 19, 2015) (contextualizing the *Guardian* exposé on former detective Richard Zuley within preceding decades of abusive interrogation and coerced confession practices by other Chicago Police Department officers, including “highly decorated Chicago Police Commander Jon Burge who, during his 23-year tenure on the force from 1970 to 1993, used the techniques he learned from interrogating the Vietcong as a military policeman in Vietnam on black suspects in Chicago.”).

<sup>124</sup> Ackerman, *supra* note 117.

<sup>125</sup> *Id.* See also Zach Stafford & Spencer Ackerman, *A Death in Police Custody: What Really Happened at Chicago’s Homan Square*, GUARDIAN (Apr. 12, 2016).

Between August 5, 2004 and June 30, 2015, Chicago police took over *seven thousand* people to Homan Square.<sup>126</sup> Police records identified eighty-two percent of them racially as Black, twelve percent as Hispanic, and six percent as White.<sup>127</sup> Despite substantial investigative journalism,<sup>128</sup> and ongoing civil rights litigation,<sup>129</sup> following *The Guardian* exposé of Homan Square, much remains to be learned—and widely disseminated—about the creation of this particular domestic “black site” and its relationship to prior and contemporaneous practices, across the United States, of sequestering people after physical arrest but before formally processing them.<sup>130</sup>

Of course, one only has to look at immigration enforcement practices that deprive or interfere with people’s right to counsel and ability to communicate with their family members,<sup>131</sup> ICE “detention facilities,”<sup>132</sup> which an

<sup>126</sup> *Homan Square: A Portrait of Chicago’s Detainees*, GUARDIAN (Oct. 19, 2015) <https://www.theguardian.com/us-news/ng-interactive/2015/oct/19/homan-square-chicago-police-detainees>.

<sup>127</sup> *Id.* According to the 2010 census, Chicago’s demographics were 33% Black, 29% Hispanic, and 32% White. *Id.*

<sup>128</sup> See *Homan Square*, GUARDIAN (last visited Jul. 9, 2020), <https://www.theguardian.com/us-news/homan-square> (archiving links to investigative journalism on Homan Square by *The Guardian* and other publishers).

<sup>129</sup> See Said, *supra* note 117, at 864 n.278 (“While several individuals detained in secret at Homan Square have sued the city for their treatment, the lawsuits remain pending.”) (citing *Mann v. City of Chicago*, No. 15 CV 9197, 2017 WL 3970592 (N.D. Ill. Sept. 8, 2017) (partially granting and partially dismissing plaintiffs’ discovery motion in consolidated class actions against the city of Chicago for harms suffered at Homan Square)). See also Vergara v. City of Chicago, 939 F.3d 882, 886-87 (7th Cir. 2019) (affirming the district court’s order granting defendants’ motion to dismiss and holding that the plaintiffs’ allegations of police intimidation and threats of retaliation did not support their claim of equitable estoppel against the defendants’ statute of limitations defense); *Perez v. City of Chicago*, No. 13-CV-4531, 2019 WL 7290848, at \*1 (N.D. Ill. Dec. 27, 2019) (denying plaintiffs’ motion for class certification).

<sup>130</sup> See, e.g., Ackerman, *supra* note 117 (“[A] retired Washington DC homicide detective, James Trainum, could not think of another circumstance nationwide where police held people incommunicado for extended periods. ‘I’ve never known any kind of organized, secret place where they go and just hold somebody before booking for hours and hours and hours. That scares the hell out of me that that even exists or might exist,’ said Trainum, who now studies national policing issues, to include interrogations, for the Innocence Project and the Constitution Project.”); Basu, *supra* note 120 (“Basu: What about Homan Square-like locations around the country? Siska: I don’t know, but I would say that the creation of the fusion centers on a federal level gives me pause about how widespread Homan Square places are around the country.”); Janet Moore, *Reviving Escobedo*, 50 LOY. U. CHI. L.J. 1015, 1040 (2019) (“In the early winter of 2015, protesters reacted to media coverage indicating that police were ‘disappearing’ detainees from across the city inside a West Side police station instead of allowing them access to counsel, family, and friends. The hubbub ‘left many experienced criminal defense and civil rights attorneys scratching their heads’—not because the allegations were unfounded, but because the problem was not limited to a single site. To the contrary, these attorneys explained, years after the Burge debacle, incommunicado detention remained system-wide and so ingrained that it was an everyday practice for police to ‘routinely play cat-and-mouse games with detainees and their right to legal representation at district stations and detective area headquarters all over the city.’”) (citations omitted).

<sup>131</sup> See, e.g., Lindsay M. Harris, *Contemporary Family Detention and Legal Advocacy*, 21 HARV. LATINX L. REV. 135, 147- (2018) (“Artesia, like the majority of detention centers nationwide, is located in a remote location, far from urban centers where access to attorneys could be more easily secured. Indeed, no immigration attorneys were located within three hours of Artesia.”) (citations omitted); Zachary Manfredi & Joseph Meyers, *Isolated and Un-*

increasing number of immigrant rights advocates have begun to call concentration camps),<sup>133</sup> or federal and state prisons and jails,<sup>134</sup> to discern that legal

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*reachable: Contesting Unconstitutional Restrictions on Communication in Immigration Detention*, 95 N.Y.U. L. REV. 130, 133 (2020) (“Immigration detainees are routinely held in isolated, rural facilities under conditions that greatly inhibit their ability to secure legal representation, communicate with attorneys, gather evidence, and receive visits from family or friends.”) (citing Patrick G. Lee, *Immigrants in Detention Centers are Often Hundreds of Miles from Legal Help*, PROPUBLICA (May 16, 2017), <https://www.propublica.org/article/immigrants-in-detention-centers-are-often-hundreds-of-miles-from-legal-help>). See also Michael A. Olivas, “*Breaking the Law*” on Principle: An Essay on Lawyers’ Dilemmas, Unpopular Causes, and Legal Regimes, 52 U. PITT. L. REV. 815, 821, 824-26 (1991) (discussing earlier instantiations of these longstanding practices).

<sup>132</sup> Compare U.S. DEP’T OF HOMELAND SEC., U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT FISCAL YEAR 2019 ENFORCEMENT AND REMOVAL OPERATIONS REPORT (2020), at 3, 5-6, <https://www.ice.gov/sites/default/files/documents/Document/2019/eroReportFY2019.pdf> (reporting an average daily population in the custody of ICE Enforcement and Removal Operations of 50,165 in fiscal year 2019 (Oct. 1, 2018 to Sept. 30, 2019) and describing its “nationwide network of detention facilities”); with GARCÍA HERNÁNDEZ, *supra* note 24, at 77-93 (describing the “immigration prison archipelago”); Tara Tidwell Cullen, *ICE Released its Most Comprehensive Immigration Detention Data Yet*, NAT’L IMMIGRANT JUST. CTR. (Mar. 13, 2018), <https://immigrantjustice.org/staff/blog/ice-released-its-most-comprehensive-immigration-detention-data-yet> (discussing the data depicted in Garfield et al., *infra*, which was obtained through a FOIA request by the Immigrant Legal Resource Center); Leanna Garfield, Shayanne Gal & Andy Kiersz, *Migrant Detention Centers in the US Are Under Fire for Their ‘Horrorifying’ Conditions*, BUS. INSIDER (Jul 5, 2019), <https://www.businessinsider.com/ice-immigrant-families-dhs-detention-centers-2018-6> (depicting 1,478 “adult detention centers” that ICE operates, or with which it contracts, not including CBP facilities); *Immigration Detention 101*, DETENTION WATCH NETWORK, <https://www.detentionwatchnetwork.org/issues/detention-101> (last visited Jul. 16, 2020) (reporting that the United States “detained” 359,520 people in fiscal year 2016 when it had 39,000 “detention beds”).

<sup>133</sup> See, e.g., *Camayd-Freixas Statement*, *supra* note 79, at 85 (“The NCC [National Cattle Congress] is a 60-acre cattle fairground that had been transformed into a sort of concentration camp or detention center.”); GARCÍA HERNÁNDEZ, *supra* note 24, at 88 (“DHS takes pains to say they are ‘detention centers,’ ‘servicing processing centers,’ or ‘residential centers’—anything but jails or prisons.”); Charles M. Blow, *Trump’s ‘Concentration Camps’*, N.Y. TIMES (Jun. 23, 2019), <https://nyti.ms/2ZEaJ6z>; Edwin Lindo, Brenda Williams, & Marc-Tizoc González, *Uncompromising Hunger for Justice: Resistance, Sacrifice, and LatCrit Theory*, 16 SEATTLE J. SOC. JUST. 727, 818 (2019) (“[T]he Frisco 5 hunger strike proffers profound lessons to bring authority beneath the rule of law in other contexts, particularly the contemporary U.S. concentration camps that are popularly (and euphemistically) known as immigrant detention centers.”) (citations omitted); Intercept, *An Interview with Nancy Pelosi Challenger Shahid Buttar and a Look at the History of Fascist Movements in the U.S.*, INTERCEPT (Jul. 8, 2020), <https://theintercept.com/2020/07/08/an-interview-with-nancy-pelosi-challenger-shahid-buttar-and-a-look-at-the-history-of-fascist-movements-in-the-u-s/>; Caroline Kelly, *Ocasio-Cortez Compares Migrant Detention Facilities to Concentration Camps*, CNN (Jun. 18, 2019), <https://www.cnn.com/2019/06/18/politics/alexandria-ocasio-cortez-concentration-camps-migrants-detention/index.html>; Eric Levitz, *With Trump’s Migrant Camps, the History We Should Fear Repeating Is Our Own*, N.Y. MAGAZINE (Jun. 20, 2019), <https://nymag.com/intelligencer/2019/06/aoc-holocaust-why-migrant-detention-centers-are-concentration-camps-explained.html>; Olivas, *supra* note 131, at 820-26 (1991) (comparing the U.S. concentration camps for Japanese Americans during WWII with the U.S. border facilities and tent-shelters established for unaccompanied Central American children seeking asylum in 1989); Adam Serwer, *A Crime by Any Name*, ATLANTIC (Jul. 3, 2019), <https://www.theatlantic.com/ideas/archive/2019/07/border-facilities/593239/>. While some people may object in good faith to calling today’s immigrant “detention centers” concentration camps, similar objections have been raised against the WWII concentration camps into which the U.S. government forcibly “interned” Japanese Americans. See, e.g., Roger Daniels, *Words Do Matter: A Note on Inappropriate Terminology and the Incarceration of the Japanese Americans*, in NIKKEI IN THE PACIFIC



violence on a massive scale has become normalized in U.S. society. Indeed, nineteen years into the U.S. War on Terror/ism, such violence may seem not violent at all but instead merely a “natural,”<sup>135</sup> if unpleasant, phenomenon akin to morbidity, mortality, or “slow death.”<sup>136</sup> In such ways, the ideology of *América Posfascista* (Postfascist America) functions to “justify” current sociolegal conditions, deny their continuity with past projects of openly white supremacist terror, and obscure how they interrelate with the ongoing protection of racial capitalism.<sup>137</sup>

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NORTHWEST: JAPANESE AMERICANS AND JAPANESE CANADIANS IN THE TWENTIETH CENTURY (Louis Fiset & Gail Nomura eds., 2005), at 183-207; González, *supra* note 79, at 69; Edward Schumacher-Matos & Lori Grisham, *Euphemisms, Concentration Camps and the Japanese Internment*, NPR (Feb. 10, 2012), <https://www.npr.org/sections/ombudsman/2012/02/10/146691773/euphemismsconcentration-camps-and-the-japanese-internment>; (distinguishing between U.S. WWII internment camps that complied with the Geneva Convention, versus the U.S. concentration camps established for Japanese Americans, including U.S. citizen minors, under Executive Order 9066); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 339, 365, 374 (1987). Like the concept of *América Posfascista* (Postfascist America), avoiding euphemism and instead contextualizing the situation historically is controversial and politically contested. If one accepts the comparison, then it follows that the United States should abolish the conditions that give rise to today’s concentration camps. Cf. García Hernández, *supra* note 101 (arguing for the United States to shut down its immigration prison system and redirect the billions of dollars it spends jailing migrants to instead protect immigrants’ and asylees’ due process rights); Julianne Hing, *What Does It Mean to Abolish ICE?*, NATION (Jul. 11, 2018), <https://www.thenation.com/article/archive/mean-abolish-ice/>; Peter L. Markowitz, *Abolish ICE . . . and Then What?*, YALE L.J. FORUM 130 (Nov. 7, 2019); Sean McElwee, *It’s Time to Abolish ICE*, NATION (Mar. 9, 2018), <https://www.thenation.com/article/archive/its-time-to-abolish-ice/>.

<sup>134</sup> Compare DANIELLE KAEBLE & MARY COWHIG, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2016, NCJ 251211 (Apr. 2018), at 2 (reporting a total adult correctional population of 6,613,500 as of Dec. 31, 2016, including 4,537,100 adults under probation or parole, 1,505,400 in prison, and 740,700 in jail), with E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, NCJ 253516, PRISONERS IN 2018 (Apr. 2020), at 3 (reporting 1,465,158 adult prisoners at the end of 2018); and ZHEN ZENG, BUREAU OF JUSTICE STATISTICS, JAIL INMATES IN 2018, NCJ 253044 (Mar. 2020), at 2 (reporting 738,400 adults in jail at mid-year 2018).

<sup>135</sup> Cf. IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996), at 160-64 (explaining how law (e.g., legislative acts and judicial interpretations) “naturalizes” race); Tamás, *supra* note 105 (discussing the “naturalization” of the moral judgment that deemed some groups of people fatally inferior in Fascist Italy and Nazi Germany).

<sup>136</sup> Cf. Lauren Berlant, *Slow Death (Sovereignty, Obesity, Lateral Agency)*, 33 CRITICAL INQUIRY 754 (2007) (“The phrase *slow death* refers to the physical wearing out of a population and the deterioration of people in that population that is very nearly a defining condition of their experience and historical existence.”). For an excellent review of the slow death literature and a persuasive application of the concept to family separation under U.S. immigration law, see Stephen Lee, *Family Separation as Slow Death*, 119 COLUM. L. REV. 2319 (2019).

<sup>137</sup> On racial capitalism, see, e.g., Robin D.G. Kelley, *What Did Cedric Robinson Mean by Racial Capitalism?*, BOSTON REV. (Jan. 12, 2017), <http://bostonreview.net/race/robin-d-g-kelley-what-did-cedric-robinson-mean-racial-capitalism> (summarizing that Robinson’s conception of racial capitalism challenged the Marxist idea that capitalism was a revolutionary negation of feudalism and glossing his explanation that capitalism emerged from a European feudal order that was already suffused with racialism against Irish, Jewish, Roma, Slav, and other peoples who had survived colonial processes of invasion, conquest, dispossession, enclosure, expropriation, slavery, and proletarianization within Europe’s existing racialized hierarchies). For a different conception of racial capitalism, see Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2153-54 (2013) (“Each of these incidents involves what I will call racial capitalism — the process of deriving social or economic value from the racial identity of another per-

In sum, beyond the concept's utility to reframe the post-World War II era and the Latin American struggle to reclaim democracy at the end of the twentieth century, *América Posfascista* (Postfascist America) names an aspiration that has become increasingly salient since 2001's judicial coup and the parade of terror that led up to—and followed—2016's presidential election:<sup>138</sup> what can we, scholar-activists who identify with subordinated social groups and affiliate with LatCrit theory, community, and praxis, do to engender and cultivate an emergence that disrupts today's big data / corporate / dark money / military / neoliberal / pharmaceutical / power elite / rightwing / technocrat hegemony long enough to reckon seriously with, dismantle, and begin to uproot the institutions that promote and naturalize the American Empire,<sup>139</sup> which presents itself domestically more like Huxley's *Brave New World* than Orwell's *1984*,<sup>140</sup> but is understood globally as posing a tremendous threat to civilization?

In other words, what can we do to transcend the reemergence of *América Posfascista* (Postfascist America) in the United States and across the hemisphere?

### III. RESISTING THE SECOND REDEMPTION: TWENTY-FIVE YEARS OF LATCRIT THEORY

LatCrit theory emerged in 1995 as a response to the long historical presence yet general sociolegal invisibility of Latinas/os in the United States.<sup>141</sup> As with other traditionally-subordinated communities, the combination of longstanding occupancy and persistent marginality fueled an in-

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son. . . . [I]n this Article, my focus is on the version of racial capitalism in which a white individual or a predominantly white institution derives social or economic value from associating with individuals with nonwhite racial identities.”)

<sup>138</sup> See, e.g., David Frum, *This Is Trump's Fault: The President is Failing, and Americans are Paying for His Failures*, ATLANTIC (Apr. 7, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/americans-are-paying-the-price-for-trumps-failures/609532/>; Mehdi Hasan, *The A to Z of Things Trump Could and Should Have Been Impeached For*, INTERCEPT (Dec. 19, 2019), <https://theintercept.com/2019/12/19/a-z-trump-impeachment/>; Ben Parker, *Lest We Forget the Horrors: A Catalog of Trump's Worst Cruelties, Collusions, Corruptions, and Crimes*, MCSWEENEY'S (Jun. 24, 2020), <https://www.mcsweeneys.net/articles/the-complete-listing-so-far-atrocities-1-759>; Serwer, *Second Redemption*, *supra* note 55, <https://www.theatlantic.com/politics/archive/2016/11/welcome-to-the-second-redemption/507317/>; Marc A. Thiessen, *The 10 Worst Things Trump Did in 2018*, WASH. POST (Jan. 2, 2019); Marc A. Thiessen, *The 10 Worst Things Trump Did in 2019*, WASH. POST (Dec. 30, 2019); Matthew Yglesias, *What Trump Has Actually Done in His First 3 Years*, VOX (Dec 2, 2019), <https://www.vox.com/policy-and-politics/2019/12/2/20970521/trump-administration-achievements>.

<sup>139</sup> For analyses of the United States as an empire, see, e.g., MICHAEL HARDT & ANTONIO NEGRI, *EMPIRE* (2001); CHALMERS JOHNSON, *THE SORROWS OF EMPIRE: MILITARISM, SECRECY, AND THE END OF THE REPUBLIC* (2007); ALFRED W. MCCOY, *POLICING AMERICA'S EMPIRE: THE UNITED STATES, THE PHILIPPINES, AND THE RISE OF THE SURVEILLANCE STATE* (2009); NEIL SMITH, *AMERICAN EMPIRE: ROOSEVELT'S GEOGRAPHER AND THE PRELUDE TO GLOBALIZATION* (2004). For critiques of its contemporary manifestations, see sources cited, *supra* note 82.

<sup>140</sup> ALDOUS HUXLEY, *BRAVE NEW WORLD* (1932); GEORGE ORWELL, *1984* (1949).

<sup>141</sup> Malavet, *supra* note 13, at 333; Valdes, *Poised at the Cusp*, *supra* note 12, at 9.

creasing sense of frustration among contemporary Latina/o legal scholars, some of who already identified with the Critical Race Theory (CRT) scholarly approach.<sup>142</sup> CRT postures and methodologies remain integral to LatCrit: the social construction of race, intersectionality, the relationship between traditional legal scholarship with politics and other forms of power, the importance of embracing subjectivity, and the creation of a project of social justice and transformation.<sup>143</sup>

The Latina/o-identified approach to outsider jurisprudence developed as a movement related to CRT. LatCrit and CRT stem from related experiences of subordination under the color of law and have been developed in response to the evolving ideologies and practices of Euroheteropatriarchy (*i.e.*, capitalism, colonialism, homophobia, nativism, patriarchy, white supremacy, etc.).<sup>144</sup> Therefore, “LatCrit theory views itself as a ‘close cousin’ to CRT—a cousin that always welcomes CRT, both in spirit and in the flesh, to its gatherings.”<sup>145</sup> LatCrit has also benefited greatly from the pioneering work of critical feminist legal theories and critical queer approaches that were fundamental in challenging the jurisprudential architecture of traditional institutions like the family (assumed to be heterosexual and patriarchal)<sup>146</sup> and the putatively objective and universal perspective of law, and its rational actors, (assumed to be white and cis-male).<sup>147</sup> The influence of these sister critical postures became key to the theory, community, and praxis that LatCrit aca-

<sup>142</sup> See, e.g., Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies have what Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301 (1987) (describing underlying reasons for the schism between CLS and CRT); Francisco Valdes, *PostColonial Encounters in the PostPinochet Era: A LatCrit Perspective on Spain, Latinas/os and “Hispanismo” in the Development of International Human Rights*, 9 U. MIAMI INTL & COMP LAW REV. 189, 199 (2001). On CRT, see generally DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* (1973, 6th ed. 2008); KHIARA M. BRIDGES, *CRITICAL RACE THEORY: A PRIMER* (2018); KIMBERLÉ CRENSHAW ET AL., *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (1995); RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* (2000, 3d ed. 2017) [hereafter DELGADO & STEFANCIC, CRT INTRODUCTION]; RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: THE CUTTING EDGE* (1995, 3d ed. 2013) [hereafter DELGADO & STEFANCIC, CRT CUTTING EDGE]; VALDES ET AL., *supra* note 41.

<sup>143</sup> Bender & Valdes, *supra* note 30, at 407.

<sup>144</sup> See, e.g., Francisco Valdes, Keynote Address, *Recalling Race, Gender and Sexuality: OutCrit Reflections on Legal Education, Social Identities and the “Rule of Law” – A Call Toward Collective Insurrections*, 4 GEO. J. GENDER & L. 881, 883 (2004) (“Euro-heteropatriarchy names the neo-colonial character of the complex cultural ideologies asserted by and through the entrenchment of traditionalist identity politics in the substance of law and policy.”) [hereafter Valdes, *Collective Insurrections*] (citing Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender & Sexual Orientation to Its Origins*, 8 YALE J.L. & HUMAN. 161 (1996) [hereafter Valdes, *Unpacking Hetero-Patriarchy*]).

<sup>145</sup> Francisco Valdes, *LatCrit: A Conceptual Overview*, LATCRIT.ORG, <http://latcrit.org/content/about/conceptual-overview/> (last visited Jul. 10, 2020).

<sup>146</sup> Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983). See also MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 230-33 (1995).

<sup>147</sup> See Robin West, *The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN’S L.J. 149 (2000) (arguing that women’s hedonic lives are different than men’s and that legal subjectivity does not reflect the experiences of women’s physiological connectedness). See also Christine Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279, 1316 (1987).

demics and activists have continuously sought to expand and develop.<sup>148</sup> For the past twenty-five years, LatCrit has programmatically critiqued myriad manifestations of the sociolegal constructions of sex, gender, and sexuality, together with race, and class, as multidimensional, interlocking, and co-synthetic categories and systems.<sup>149</sup>

From the beginning, LatCrit scholar-activists embraced the antisubordination principle, which earlier outsider critical legal scholars had established as a normative anchor and substantive successor to the antidiscrimination principle.<sup>150</sup> We took up the ongoing interrogation of existing sociolegal identities, as constructed over time and space, to pursue the CRT insights of intersectionality and anti-essentialism.<sup>151</sup> We accepted that social justice, in the form of systemic and cultural transformation, is the ultimate marker of relevance for the production and articulation of critical theory and other forms of knowledge.<sup>152</sup> In short, we grounded the substantive insights and gains of prior and contemporary movements toward critical outsider jurisprudence.<sup>153</sup> For example, strategic anti-essentialism relates to the pursuit of equality in a way that transcends the traditionally dominant social meaning of identity constructs in order to embrace differences multidimensionally.<sup>154</sup> Fundamentally, “OutCrit” signifies a position of multidimensional

<sup>148</sup> “LatCrit theory may be understood as an effort to practice Queer ideals while employing CRT insights and tools”, combined with feminist methods and values. Francisco Valdes, *Theorizing “OutCrit” Theories: Coalitional Method and Comparative Jurisprudential Experience-RaceCrits, QueerCrits and LatCrits*, 53 U. MIAMI L. REV. 1265, 1305 (1999).

<sup>149</sup> Multidimensionality theory considers the multiple sociolegal dimensions of subordination and how their accompanying harms vary rather than being universal. Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 633-34 (1997). See also Marc-Tizoc González, *Latina & Latino Critical Legal (“LatCrit”) Theory, Multi-dimensional Analysis and the Elimination of Bias in the Legal Profession* (2008, 2020) (unpublished CLE handout, on file with authors); Peter Kwan, *Jeffrey Dahmer and the Cosynthesis of Categories*, 48 HASTINGS L.J. 1257 (1997); Athena Mutua, *Multidimensionality Is to Masculinities What Intersectionality Is to Feminism*, 13 NEVADA L.J. 341 (2013); Bender & Valdes, *supra* note 30.

<sup>150</sup> See, e.g., Fiss, *supra* note 35; Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 319 (1987).

<sup>151</sup> See, e.g., Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989) [hereafter Crenshaw, *Demarginalizing the Intersection*]; Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics and Violence against Women of Color*, 43 STAN. L. REV. 1241 (1991) [hereafter Crenshaw, *Mapping the Margins*]; Harris, *supra* note 106.

<sup>152</sup> Bender & Valdes, *supra* note 30, at 403; Suzanne B. Goldberg, *Multidimensional Advocacy as Applied: Marriage Equality and Reproductive Rights*, 29 COLUM. J. GENDER & L. 1 (2015) (discussing the relationship between extralegal advocacy and litigation to secure marriage equality); Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2744 n.6 (2015) (defining social movements in the context of “contentious politics,” which include a focus on mobilizing] popular will., building on networks of social solidarity, and finding sites for narrative resistance in which to transpose/transport grievances into causes that resonate with the larger culture’s narratives of justice”).

<sup>153</sup> See Hernández-Truyol et al., *supra* note 13, at 186; Valdes, *supra* note 148, at 1270-71.

<sup>154</sup> See, e.g., Crenshaw, *Demarginalizing the Intersection*, *supra* note 151, at 141-67; Crenshaw, *Mapping the Margins*, *supra* note 151, at 1245-99; Harris, *supra* note 106, at 585-

struggle against the specific kinds of racist, nativist, sexist and homophobic ideologies that elites combine to produce and perpetuate Euroheteropatriarchy.<sup>155</sup>

The LatCrit experiment in critical outsider jurisprudence<sup>156</sup> works daily to live up to its core vision: a community of activist scholars with a continuing commitment to the construction of an alternative model of legal knowledge production that stands in contrast to the imperial model of mainstream traditions—an outsider and critical, or OutCrit, jurisprudence.<sup>157</sup>

While neither constituting a canon, nor an attempt to develop a metanarrative, LatCrit theory is constructed, in part, through functions, guideposts, and postulates that reflect the ways in which some of the earliest adherents of this enterprise viewed the larger jurisprudential, societal, and political moment, during which they conceived of LatCrit subject positions.<sup>158</sup> Since then, and as amplified or modified in practice by the accumulation of two and a half decades of experiences, community praxis, and knowledge production, these early anchors serve as substantive and structural grounding for our collective initiatives in community-building, coalition-building, and institution-building through LatCritical praxis.<sup>159</sup>

The four “functions” of LatCrit theory posited early on are the: (1) “Production of Knowledge”; (2) “Advancement of [Sociolegal] Transformation”; (3) “Expansion and Connection of [Antisubordination] Struggles”; and (4) “Cultivation of Community and Coalition,” both within and beyond the confines of legal academia in the United States.<sup>160</sup> The seven “guideposts” accompanying these four functions are: (1) Recognize and Accept the Political Nature of Legal “Scholarship” Despite Contrary Pressures; (2) Conceive Ourselves as Activist Scholars Committed to Praxis to Maximize Social Relevance; (3) Build Intra-Latina/o Communities and Inter-Group Coalitions to Promote Justice Struggles; (4) Find Commonalities While Respecting Differences to Chart Social Transformation; (5) Learn from Outsider Jurisprudence to Orient and Develop LatCrit Theory and Praxis; (6) Ensure a Continual Engagement of Self-Critique to Stay Princi-

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616 (1990); Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN’S RTS. L. REP. 7, 7-10 (1989).

<sup>155</sup> See generally Valdes, *Unpacking Hetero-Patriarchy*, *supra* note 144 (describing some of the sex/ gender and sexual orientation norms that underlie and animate androsexism and heterosexism to produce the patriarchal form of homophobia—heteropatriarchy—that still prevails in Euroamerican societies, including the United States, today).

<sup>156</sup> Mari Matsuda coined the phrase, “outsider jurisprudence.” See Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2323 (1989).

<sup>157</sup> Valdes, *Rebellious Knowledge Production*, *supra* note 13, at 145.

<sup>158</sup> Sarudzayi M. Matambanadzo, Francisco Valdes & Sheila Velez, Afterword, *Kindling the Programmatic Production of Critical and Outsider Legal Scholarship, 1996-2016*, 37 WHITTIER L. REV. 439, 443 (2016).

<sup>159</sup> *Id.* at 443.

<sup>160</sup> Francisco Valdes, *Under Construction—LatCrit Consciousness, Community, and Theory*, 85 CALIF. L. REV. 1087, 1093-94 (1997), reprinted in 10 LA RAZA L.J. 1, 7-8 (1998).

pled and Grounded; and (7) Balance Specificity and Generality in LatCritical Analysis to Ensure Multidimensionality.<sup>161</sup>

LatCrit theory's rich and diverse rooting includes not only a critical perspective on the world but also a self-critical assessment of our shared pasts. Molded by a critical and self-critical assessment of history and experience, "LatCrit theory, from its very inception, has been self-consciously devoted to practicing pioneering OutCrit commitments and techniques with integrity, as the review of our programmatic record . . . from the past two decades indicates."<sup>162</sup> For example, LatCrit programs have organized programmatic innovations combining notions like "rotating centers"<sup>163</sup> and "shifting bottoms"<sup>164</sup> that recognize and center diverse marginalities in our conference programs and other projects in principled and ethical ways at different times and over time. This combination of rotating centers and shifting bottoms provides a framework for situating "different" sociolegal problems or populations at the center of our programmatic inquiries depending on situational factors that help to contextualize and ground our practices. In this way, diversely-situated individuals and groups can and should take a leading role in exposing and combatting interlocking systems of injustice, while at the same time recognizing that, depending on circumstances, a "different" outsider community might find itself "at the bottom" or at the center.<sup>165</sup> This programmatic framing reminds us all and always that history, politics, and context define and determine "the bottom"—as well as the demands of equal justice praxis grounded in this mutual recognition.<sup>166</sup> With those ideas in mind, we now turn to discuss the essays published in this symposium.

#### IV. THE LATCRIT 2019 SYMPOSIUM ESSAYS

The LatCrit project has rested on three foundational pillars of engagement: theoretical knowledge production, community building, and praxis.

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<sup>161</sup> Bender & Valdes, *supra* note 30, at 403-04.

<sup>162</sup> Matambanadzo et al., *supra* note 158, at 443.

<sup>163</sup> See Bender & Valdes, *supra* note 30, at 409.

<sup>164</sup> Athena Mutua coined the "shifting bottoms" metaphor "to suggest there are many groups that suffer from oppression and that they suffer differently. Specifically, Blacks are at the bottom (the most disadvantaged) of a colorized racial category, although there are other racial categories and perhaps, multiple racial systems. The bottom shifts among these categories and systems, often in relation to particular issues." Athena D. Mutua, *Shifting Bottoms and Rotating Centers: A Reflection on LatCrit III and the Black/White Paradigm*, 53 U. MIAMI L. REV. 1177, 1177 n.2 (1999).

<sup>165</sup> See DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL* (1992). Bell uses this term, however, to contrast the power and wealth of the ruling elite with the larger group of the economically and socially disadvantaged. See also Matsuda, *supra* note 133 (arguing that people at the bottom, such as those who experience racial discrimination, should be the source of normative law); Jack Miles, *The Struggle for the Bottom Rung: Blacks vs. Browns*, ATLANTIC (Oct. 1992), <https://perma.cc/ZKM7-F347> (discussing the Los Angeles riots and economic competition between Latinos and African-Americans, as well as attitudes about immigration).

<sup>166</sup> See Mutua, *supra* note 164, at 1177.

Praxis, in the form of political engagement and legal advocacy, has served a central role in the LatCrit project. For LatCrit, political engagement with the contemporary moment has been a driving force for undergirding our conversations and community engagements. The membership of LatCrit strives to include law professors, lawyers, students, and activists in conversations concerning the struggle of subordinate groups. Furthermore, LatCrit scholars, like those in its sister organization, the Society for American Law Teachers, reject the presumption that legal scholarship should adopt an apolitical veneer. Instead, these overlapping communities of scholars are profoundly political and explicitly engaged in a struggle against the dominant power narratives of the status quo and a struggle for creating the sociolegal conditions for systemic justice. Thus, the LatCrit conference organizers structure the Call for Papers and the conference program in a way that accounts for contemporary political struggles that lead to the subordination of minority groups who differ from the dominant majority in terms of race, ethnicity, citizenship status, gender, sexual orientation, disability status, and/or citizenship. In addition, the LatCrit conference consistently holds space for the inclusion of local activists. Finally, many LatCrit members are engaged in direct client services whether in their roles in the academy or as pro bono lawyers serving their communities. Some LatCrit members have even run for elected office or served in other ways.

A key aspect of the LatCrit project has been producing scholarship that highlights the experiences and perspectives of Latino/a/x persons in the United States<sup>167</sup> and expanding scholarship on race and ethnicity in conversation with the larger legal literature in Critical Legal Studies and Critical Race Theory.<sup>168</sup> LatCrit scholars have also worked vigorously and persistently to diversify the legal academy and tell the stories of outsiders within the U.S. legal academy.<sup>169</sup> In line with these commitments, LatCrit scholars have critiqued and engaged with the dominant tropes of liberal legalism in the U.S. legal academy, an institution which has historically excluded the perspectives of racial and ethnic minorities. LatCrit scholars have also challenged the orthodoxies of traditional critical race theory, which often relied upon the assumption that racial subordination in the late twentieth century could be adequately understood through a lens that presumed the “black-

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<sup>167</sup> See Keith Aoki & Kevin Johnson, *An Assessment of LatCrit Theory Ten Years After*, 83 INDIANA L. J. 1151 (2008); Montoya & Valdes, *Self-Critical Review*, *supra* note 30, at 190-97.

<sup>168</sup> LatCrit has produced a substantial amount of scholarship in conversation with Critical Race Theory. See Kevin R. Johnson, *Roll over Beethoven: “A Critical Examination of Recent Writing About Race”*, 82 TEX. L. REV. 717, 732 (2004) (examining the links between Critical Race Theory and LatCrit). LatCrit is also in tension with Critical Race Theory and shares some similarities with Critical Legal Studies. See Elizabeth M. Iglesias, *LatCrit Theory: Some Preliminary Notes Towards A Transatlantic Dialogue*, 9 U. MIAMI INT’L & COMP. L. REV. 1, 15-16 (2001).

<sup>169</sup> See e.g., Robert S. Change & Adrienne D. Davis, *An Epistolary Exchange: Making Up is Hard to Do: Race/Gender/Sexual Orientation in the Law School Classroom*, 33 HARV. J. L. GENDER 1 (2010).

white binary.”<sup>170</sup> As part of these challenges, LatCrit scholars have undertaken efforts to reorient race in conversation with ethnicity and reveal the false promise of color blindness in a world characterized by diversity and complexity.<sup>171</sup> LatCrit scholars have also provided theoretical explication for the rise of post-racialism, examining how the post-racial turn impacts marginalized individuals.<sup>172</sup>

In alignment with LatCrit’s commitment and values,<sup>173</sup> the student editors of the *Harvard Latinx Law Review* selected the essays published in this symposium volume. The three essays chosen for publication, which were

<sup>170</sup> See, e.g., DELGADO & STEFANCIC, CRT INTRODUCTION, *supra* note 142, at 77; Ian F. Haney López, *Race and Erasure: The Salience of Race to LatCrit Theory*, 85 CALIF. L. REV. 1153 (1997), reprinted in 10 LA RAZA L.J. 57 (1998); Juan F. Perea, *The Black/White Binary Paradigm of Race: The “Normal Science” of American Racial Thought*, 85 CALIF. L. REV. 1213, 1215 (1997), reprinted in 10 LA RAZA L.J. 127 (1998) (demonstrating how the Black/White binary paradigm excludes Latinos/as). In turn, some LatCrit scholars have critiqued the critique of the Black/White Binary. See, e.g., Leslie Espinoza & Angela P. Harris, Afterword, *Embracing the Tar-Baby: LatCrit Theory and the Sticky Mess of Race*, 85 CALIF. L. REV. 1585, 1597 (1997), reprinted in 10 LA RAZA L.J. 499, 510 (1998) (discussing how the Black/White paradigm that Perea and others critique reveals an important truth about the racial structure of social, economic, legal life); Anthony Paul Farley, *All Flesh Shall See it Together*, 19 CHICANO-LATINO L. REV. 163, 171 (1998) (arguing that critiques of the Black/White binary serve white supremacy).

<sup>171</sup> According to Angela Harris:

LatCrit theory, by rejecting the focus on color discrimination as the essence of racial discrimination, reminds us that language and culture are often as important as skin color in separating privileged groups from oppressed ones. Racial hierarchy may be maintained by excluding those who do not physically conform: those whose skin color is dark, or whose eyes are distinctively shaped. Racial hierarchy is also preserved, however, by the establishment and maintenance of (white) cultural norms, norms to which those with the “choice” are pushed to aspire.”

Leslie Espinoza & Angela P. Harris, Afterword, *Embracing the Tar-Baby: LatCrit Theory and the Sticky Mess of Race*, 85 CALIF. L. REV. 1585, 1627 (1997), reprinted in 10 LA RAZA L.J. 499 (1998). See also Mutua, *supra* note 164, at 1179 (proposing that LatCrit embrace a practice of “shifting bottoms” as a complement to the practice of “rotating centers”). See also Devon W. Carbado, *Race to the Bottom*, 49 UCLA L. REV. 1283, 1285 (2002) (arguing that the central Critical Race Theory Methodology of looking to the bottom in analyzing race is difficult to execute due to “(1) the multiracial nature of racism, (2) complexities created by gender, class, and sexual orientation, and (3) the complicated relationship between politics and identity”); Robert S. Chang & Neil Gotanda, *The Race Question in LatCrit Theory and Asian American Jurisprudence*, 7 NEV. L.J. 1012, 1029 (2007) (examining the “race question” in its theoretical complexities of ethnicity versus race); Kim D. Chanbonpin, *Between Black and White: The Coloring of Asian Americans*, 14 WASH. U. GLOBAL STUD. L. REV. 637, 640 (2015) (examining how colorism impacts discourse on Asian American identity by complicating common understandings of the Black/White binary).

<sup>172</sup> E.g., Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589 (2009) (analyzing post-racialism as an ideology). See also Tanya Katerí Hernández, *The Value of Intersectional Comparative Analysis to the “Post-Racial” Future of Critical Race Theory: A Brazil-U.S. Comparative Case Study*, 43 CONN. L. REV. 1407 (2011) (examining the U.S. ideology of “post-racialism” with a comparative law lens); Spearit, *Enslaved by Words: Legacies & Limitations of “Post-Racial” Language*, 2011 MICH. ST. L. REV. 705, 707 (2011).

<sup>173</sup> LatCrit is an extraordinarily intentional theoretical project. The groundwork and commitments of the community in terms of knowledge production, community building, and other forms of praxis have been mapped and articulated throughout its existence. See, e.g., Montoya & Valdes, *Politics of Knowledge Production*, *supra* note 30, at 1205.



among a larger group submitted by conference participants, represent the priorities and interests of these student editors. LatCrit has historically embraced radical democratic notions of participation and eschewed a hierarchical “star system” in which a few members of the community are elevated to the guarantees of prestige while many others are shoved to the periphery.<sup>174</sup> Historically, LatCrit symposiums have published nearly all of the submitted symposium essays in the volume in order to avoid the creation of an exclusive hierarchical star-system within its community.<sup>175</sup> Although this has commitment has at times provoked controversy,<sup>176</sup> the LatCrit symposia have generally fulfilled our commitment to publish the works submitted by its conference participants. This is part of the LatCrit’s community commitment to a “democratic” (big tent) model of knowledge production characterized by openness in terms of participation and subject matter.<sup>177</sup> For this reason, the LatCrit board of directors (Board) and the broader community made no attempt to influence the students’ decisions and supported their choices, even though it meant leaving several works of scholarship by LatCrit luminaries out of this volume. Within LatCrit, this is a necessary aspect of intergenerational transfer. The LatCrit Board did so because “[f]or more established scholars and the LatCrit community, ethical praxis means a willingness affirmatively to yield center stage to newcomers.”<sup>178</sup> This decision, to support the choices and leadership of our student editors is consistent with LatCrit values. In addition, LatCrit has always strived to support students and create a pipeline of leadership and opportunity for future faculty and activists who are committed to critically engaging with struggles against subordination. Part of this commitment and promise manifests in providing opportunities for student scholars to lead and trusting the decisions they make as leaders.

The first article is by Julie Preciado, who is one of two 2019 recipients of the LatCrit Student Scholar Program.<sup>179</sup> Ms. Preciado’s essay addresses a recurrent theme in the LatCrit literature by focusing on discrimination

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<sup>174</sup> See e.g., Francisco Valdes, *LatCrit 2013: Resistance Rising: Theorizing and Building Cross-Sector Movements*, 12 SEATTLE J. SOC. JUST. 983, 995 (2014).

<sup>175</sup> “The institutional practice of generally publishing all papers submitted represents a deep . . . commitment by LatCrit theory to the egalitarian and anti-hierarchical treatment of scholars.” Aoki & Johnson, *supra* note 167, at 1155. This process and others combine to instantiate LatCrit’s radical commitment to democratic participation and non-hierarchical engagement among scholars. Montoya & Valdes, *Politics of Knowledge Production*, *supra* note 30, at 1205 (responding to Professors Aoki and Johnson). Unlike liberal legal theory or elite vanguard theoretical communities, LatCrit has rejected models of exclusivity and instead cultivated openness and community building.

<sup>176</sup> Aoki & Johnson, *supra* note 167, at 1160-61.

<sup>177</sup> See Montoya & Valdes, *Self-Critical Review*, *supra* note 30, at 199. The LatCrit model incorporates many substantive aspects of what Montoya and Valdes characterize as the “vanguard” model of scholarship but without reproducing narrow exclusivity or a hierarchical “star system.” See *id.* at 232-33.

<sup>178</sup> Elizabeth M. Iglesias & Francisco Valdes, Afterword, *Institutionalizing a Post-subordination Future*, 78 DENVER U. L. REV. 1249, 1304 (2001).

<sup>179</sup> See generally *LatCrit Student Scholar Program*, LATCRIT, <http://latcrit.org/content/ssp/> (last visited Jul. 11, 2020).

against racial and ethnic minorities in access to the basic trappings of citizenship. In such essays, scholars analyze and critique legal institutions and practices that deny racial and ethnic minorities access to various social goods that are promised or guaranteed by law. For example, LatCrit commentators have argued for increased access to education,<sup>180</sup> courts,<sup>181</sup> government institutions,<sup>182</sup> work,<sup>183</sup> and the basic trappings of citizenship<sup>184</sup> for those racial and ethnic minorities whose primary language is not English. LatCrit scholars in this work reveal how the denigration and exclusion of minority language speakers is used as a proxy for persistent types of racial and ethnic discrimination, most often against Asian and Latina/o/x persons. They also reveal how the exclusion of those who speak English as a second language from the foundational social and civic goods of citizenship has negative consequences not only for the impacted individuals but also for the creation of an inclusive and pluralistic democratic society in which diversity is valued as a strength.

Like these works, Ms. Preciado's essay brings a LatCrit lens to the realm of the state-based regulatory frameworks governing how personal injury insurance companies construe the necessity of medical interpreters for individuals with limited English proficiency. State governments often require personal injury insurance policies for all drivers. Such policies are especially important to individuals with limited English proficiency because they often lack access to employer-sponsored health insurance. Ms. Preciado argues that individuals with limited English proficiency require access to medical interpreters and that insurance companies should go above and beyond the bare minimum coverage required.

As a foundation for the analysis, Ms. Preciado examines how Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race,

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<sup>180</sup> Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 85 CALIF. L. REV. 1449 (1997), reprinted in 10 LA RAZA L.J. 363 (1998) (that merit standards necessarily embody race-conscious social preferences existing at the time the standards were developed); Rachel F. Moran, *Bilingual Education as a Status Conflict*, 75 CALIF. L. REV. 321, 325 (1987) (describing how participants in the bilingual education controversy have used language as a proxy for the status of their culture, customs, and values) [hereafter Moran, *Status Conflict*]. See also Rachel F. Moran, *The Politics of Discretion: Federal Intervention in Bilingual Education*, 76 CALIF. L. REV. 1249 (1988) [hereafter Moran, *Politics of Discretion*].

<sup>181</sup> Jasmine B. Gonzales Rose, *Language Disenfranchisement in Juries: A Call for Constitutional Remediation*, 65 HASTINGS L.J. 811, 815 (2014) (proposing juror language accommodation as a viable solution for remedying the problems posed by the language requirements).

<sup>182</sup> José Roberto Juárez, Jr., *The American Tradition of Language Rights ¡Que Viva Texas!: The Forgotten Right to Government in a "Known Tongue"*, 1 SCHOLAR 45 (1999).

<sup>183</sup> Christopher David Ruiz Cameron, *How the García Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 CAL. L. REV. 1347, 1354 (1997), reprinted in 10 LA RAZA L.J. 261 (1998) (arguing that English-only workplace policies that appear to be neutral regulations actually effect language discrimination against bilingual employees).

<sup>184</sup> Steve W. Bender, *Direct Democracy and Distrust: The Relationship between Language Law Rhetoric and the Language Vigilantism Experience*, 2 HARV. LATINO L. REV. 145, 170-72 (1997) (analyzing civil rights litigation challenging restaurant and tavern policies banning Spanish).

color, and national origin in terms of access to federal agencies and to programs and activities that receive federal funds. Any activity or program that receives federal funding assistance may not discriminate on the basis of race, color, or national origin in terms of access to participation or benefits.<sup>185</sup> Activities and programs include many institutions such as departments, agencies, special purpose districts, and entities stemming from state and local governments.<sup>186</sup> They also include government-funded educational institutions.<sup>187</sup> The EEOC has interpreted the Title VI prohibition against national origin discrimination to protect individuals who have limited proficiency in English.<sup>188</sup>

Starting from this ground, Ms. Preciado identifies and analyzes a gap in how private entities providing personal insurance protection fail persons with limited English proficiency. Private entities are only subject to the requirements of Title VI if they receive federal assistance, or if they are engaged in providing the kind of services that government entities typically provide.<sup>189</sup> Personal injury protection procured in the form of no-fault accident insurance often does not entail adequate access to medical interpreters for injured persons even though such services are medically necessary to ensure the best health outcomes. Insurance providers of personal injury protection policies often regard payments for the services of a medical interpreter as beyond the scope of reasonably necessary medical care. If such services are claimed, as Ms. Preciado discusses, insurance companies often deny coverage for them. Without reimbursement payments, in order to receive interpretation support, individuals who have limited English proficiency must often rely on personal resources like family members or bilingual staff lacking professional training in medical interpretation.

The next two essays in the symposium are from long-time LatCrit scholar comrades who have engaged in their scholarship directly with political questions, analyzing the current conflicts of the moment through a lens that centers the subordination of racial and ethnic minorities. The LatCrit project has long pushed against the boundaries, norms, and expectations of the “liberal” legal academy, challenging even the propriety presumptions of the Critical Legal Studies movement and Critical Race Theory. Within the LatCrit community, there is recognition that scholarship and its production are inherently political. From what topics are considered “serious,” to what journals one should place the scholarship in, to who is permitted/encouraged to write scholarship, among other things, are all deeply political questions tied to the history of subordination and the dominance of particular groups

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<sup>185</sup> 42 U.S.C. § 2000d.

<sup>186</sup> 42 U.S.C. § 2000d-4a (1A - 1B).

<sup>187</sup> 42 U.S.C. § 2000d-4a (2A - 2B).

<sup>188</sup> Title VI, Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, EEOC Final Guidance, 69 Fed. Reg. 1763 (January 12, 2004), *available* <https://www.archives.gov/eo/laws/title-vi.html>.

<sup>189</sup> Julie Preciado, *Interpretive Services for LEP Insured is “Reasonable and Necessary”*, 22 HARV. LATINX L. REV. — (2020).

like women, the poor, racial and ethnic minorities, LGBT people, disabled persons, and all people deemed “other” and “outsider” from the body politic.

These essays, from LatCrit veterans, engage with the LatCrit tradition of pushing the boundaries of scholarship to encompass more activist-oriented writing. Many members of the legal academy prefer that scholarship adhere to particular rules of engagement. Under these rules, disagreements about scholarly questions are not political in nature, but are a matter of reasoning or argument. Disagreements about scholarly questions are not motivated by power, selfishness, cruelty, or prejudice, but by equally valid and equally permissible world views that have a duty to debate in the public sphere or marketplace of ideas. Scholarship should not be political. Scholarship should not be advocacy. And, heaven forbid, scholarship should not compare anyone, ever, to Hitler. In contrast to legal scholarship from above that pretends our contemporary struggles with voting rights, immigration, antidiscrimination, reproductive justice, equality, and the rule of law are mere disagreements between ideologically similar parties united by liberal values and shared legal institutions, these essays confrontationally name the political nature of these disagreements. These essays are polemic and provocative in nature. And even with their limitations, they continue the LatCrit challenge to expand the boundaries of scholarship.

In a wide-ranging and provocative polemic, *Hate on the Ballot: Election 2020 and the Quest for a Diverse and Inclusive Democracy*,<sup>190</sup> Professor Steven A. Ramirez makes the case for legal intervention against the policies and rhetoric of President Trump and his administration. In the essay, Ramirez argues that the election of President Donald J. Trump has correlated with a demonstrable rise in hatred, hostility, and violence against racial and ethnic minorities. He argues that this increase in racial and ethnic conflict poses a threat to national security and that, for this reason, legal intervention, through the form of judicial oversight, is required.

For Ramirez, the violence and cruelty correlating with President Trump’s administration comes both from private citizens encouraged by his rhetoric and state actors executing his policies. Ramirez argues that there is a close relationship between the rise of President Trump’s racist rhetoric and the demonstrated increase in hate crimes and violence against individuals of racialized minority groups. Relying on damning data from the U.S. Department of Justice, Ramirez demonstrates how the rise of President Trump’s rhetoric correlates with a significant increase in documented hate crimes against marginalized minority groups.<sup>191</sup> Situating this insight in a larger literature about how President Trump’s inflammatory rhetoric has led to a rise in hostility and violence toward marginalized minority groups, Ramirez argues that the evidence suggests that this rhetoric has fueled private actors

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<sup>190</sup> Steven A. Ramirez, *Hate on the Ballot: Election 2020 and the Quest for a Diverse and Inclusive Democracy*, 22 HARV. LATINX L. REV. — (2020).

<sup>191</sup> *Id.* at manuscript 6. (Manuscript on file with the authors).

to engage in hate crimes and violence. He argues that this close relationship will predictably result in unprecedented violence and crime against historically marginalized minority groups at the hands of majority group members who are emboldened by President Trump's rhetoric.

As Ramirez notes, this violence is not limited to the actions of private citizens. President Trump's administration has acted in ways that perpetuate violence against politically powerless and very vulnerable minorities in the form of its policies concerning asylum seekers at the U.S.-Mexico border. Ramirez details the ways in which President Trump's exclusionary and bigoted policies harm asylum seekers at the southern border whose putative crime is their desperate attempt to exercise their legal rights (domestically and internationally) to flee state-sanctioned violence and explains that their actual transgression, under President Trump's administration, is being racialized as people of color in the United States. For Ramirez, this ideology or belief has led President Trump's administration to embrace cruelty as it has detained families, separated children from parents, and left asylum seekers with legitimate claims for migration in a legal limbo animated by a criminally animated "zero tolerance" policy that makes no sense in application to people who are seeking to exercise rights to asylum guaranteed by international (and domestic) law. Much to the dismay of people around the world, children detained at the border, who constitute the most vulnerable asylum seekers, have been spectacularly traumatized by President Trump's administrative actions. Under the Trump administration, children seeking asylum have been subject to cruelty and traumatized from detention in squalid living conditions, emotional neglect, physical violence, and sexual abuse. Fearing for the stability of democracy and the future of the national unity and security, Ramirez urges the federal judiciary to intervene in circumstances which, in the past, might have felt urged to restraint.

Ramirez's essay highlights two essential insights from the critical legal imagination: the important force of normativity in law and legal institutions and the precarious and perilous nature of democracy for minorities in the U.S. legal system. First, legal institutions, regardless of the intent of the nation's founders or the designs of those executing them, have normative force because the meaning of legal order is structured by official communications and interpretive commitments.<sup>192</sup> While many may argue that the President's influence is not so far-reaching, the office of the president occupies a crucial space in the imagination of U.S. citizens. The president's words and actions, whether from podium or Tweet, exercise normative force in the life of the nation. Second, as Ramirez illustrates in his essay, democracy in the United States is an endeavor rife with paradox and tension for minority groups.

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<sup>192</sup> Cover notes:

The normative universe is held together by the force of interpretive commitments—some small and private, others immense and public. These commitments—of officials and of others—do determine what law means and what law shall be.

Democracy has the potential, through coalition, collaboration, and the building of community, to foster tolerance, solidarity, and equality across difference. It has the potential to promote pluralism and diversity as well. And yet, as Critical Race Theory has repeatedly demonstrated, democracy presents the possibility of political, social, and economic precarity for those in the minority population as well. A majority group bent on consolidating the economic and social gains of white supremacy and settler colonialism, through the exclusion or exploitation of racial and ethnic minorities who also make-up the body politic, may be quite successful in its efforts. For this reason, it is possible that the process of democracy can create precarity for those who lack significant numbers, money, or power to influence it.<sup>193</sup> And while coalitions can create benefits for these groups, often these benefits are extracted for the benefit of the majority without regard of the costs that minority groups might incur for them.

In this symposium's final essay, Professor Elizabeth M. Iglesias takes up the conference call for papers to offer visions of resisting fascism as a starting point for thinking through the current moment. Similarly to Professor Ramirez, Professor Iglesias also delivers a vibrant indictment of the current presidential administration in her essay, *Against Fascism*.<sup>194</sup> In her essay, Professor Iglesias connects how President Trump and his Republican enablers use the structures created by "Republican Constitutionalism" in order to undermine the substance of the foundational Enlightenment-based norms. The Trump administration engages in "relentless attacks on the (Enlightenment) values of individual dignity, equality, democratic accountability, judicial independence, moderation, civility, reason and reasonableness, honesty and the rule of law."<sup>195</sup>

Given the dire state of democratic institutions under Republican Constitutionalism and the rise of ethnonationalist forms of fascism in the current moment, Professor Iglesias proposes a move that may seem counter-intuitive to some. She argues that the struggle against fascism may require efforts to tentatively rehabilitate and revive connections between the LatCrit project and the Enlightenment project of Republican Constitutionalism. As part of this engagement with resisting fascism, Professor Iglesias argues that fascism is essentially antithetical not only to the emancipatory LatCrit project and its antisubordination imperative but also to the Enlightenment-inspired project of Republican Constitutionalism.

To this end, Professor Iglesias constructs a genealogical account of the move toward fascism that connects the current political fascist turn and the Trump Administration with their historical antecedents. Drawing on Nazism as a paradigmatic example of the fascist mode of doing politics, Professor Iglesias's essay reveals what the current fascist turn shares with previous

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<sup>193</sup> LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* (1994) (arguing minorities should have a fair chance to exercise their policy preferences through procedural devices like cumulative voting).

<sup>194</sup> Elizabeth M. Iglesias, *Against Fascism*, 22 HARV. LATINX L. REV. — (2020).

<sup>195</sup> *Id.* at manuscript page 3. (Manuscript on file with the authors).

articulations of fascism.<sup>196</sup> Iglesias argues that the current fascist turn by the Trump administration shares several traits with the Nazis. Both movements disguise anti-democratic impulses behind populist rhetoric. Both movements promote nationalism and national exceptionalism as foundational principles to organize law and governance. And both administrations engage in extradition and deportation based upon imagined forms of nationalized racial purity.

In constructing her genealogical account of contemporary U.S. fascism, Professor Iglesias also connects President Trump's administration to the Reagan Administration's efforts to expand U.S. hegemony. Later, she even expands her analysis to connect the current moment of fascist creep to the totalitarian protections for the rights of slave masters in *Dred Scott v. Sanford*.<sup>197</sup> *Dred Scott*, for Iglesias, represents the powerful using doctrine to include some members and exclude others from the community of persons. While Iglesias regards this as a failure of the Enlightenment project, some scholars in LatCrit may greatly differ (*i.e.*, finding racialized inclusion and exclusion to be entirely consonant with European Enlightenment).

As part of this analysis, Professor Iglesias focuses on the Supreme Court's *Camarena* Trilogy of cases:<sup>198</sup> *U.S. v. Verdugo-Urquidez*,<sup>199</sup> *U.S. v. Alvarez-Machain*,<sup>200</sup> and *Sosa v. Alvarez-Machain*.<sup>201</sup> Using the *Camarena* Trilogy to illustrate what she characterizes as the doctrinal creep of fascism in federal courts, Iglesias argues that this line of cases should be overturned. The *Camarena* Trilogy emerged from a single incident in which agents of a Mexican drug organization abducted, tortured, and murdered DEA agent Enrique S. "Kiki" Camarena.<sup>202</sup> Agent Camarena had turned his investigation from street drug deals to tracing money laundering. Because the money laundering investigation would have revealed the Reagan administration's covert operations in Nicaragua to support the Contra War against the Sandinista government, members of the cartel targeted Agent Camarena. These cases were the result of the Reagan administration's unlawful and covert efforts to expand the U.S. government's sphere of influence during the Cold War.

For Professor Iglesias, the *Camarena* Trilogy illustrates how fascism creeps through and corrupts Enlightenment-based institutions like courts. Ultimately, the *Camarena* Trilogy undermines crucial limits that had been in place under U.S. law and the law of nations.<sup>203</sup> In addition, the *Camarena* cases also limit judicial authority to check the executive branch. For example, in *Verdugo*, the Supreme Court refused to expand the protections of the 4th Amendment's prohibition against unreasonable searches and seizures and

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<sup>196</sup> *Id.* at manuscript page 4 – 6.

<sup>197</sup> 60 U.S. 393 (1857).

<sup>198</sup> Iglesias, *supra* note 194.

<sup>199</sup> 494 U.S. 259 (1990).

<sup>200</sup> 504 U.S. 655 (1992).

<sup>201</sup> 542 U.S. 692 (2004).

<sup>202</sup> Iglesias, *supra* note 194.

<sup>203</sup> *Id.*

the 5th Amendment's Due Process Clause beyond the borders of the United States. According to Professor Iglesias, Chief Justice Rehnquist's majority opinion in *Verdugo* explicitly reveals the ways in which Republican Constitutionalism can be manipulated as a tool of subordination and exclusion for people who are not U.S. citizens. In her view, *Verdugo* was excluded from the 4th Amendment protections because he was "not to be one of the people."<sup>204</sup>

The *Camarena* line of cases reverberates throughout the Supreme Court's jurisprudence. Professor Iglesias links *Verdugo* to *Hernandez v. Mesa*, in which a U.S. Border patrol agent shot and killed, Sergio Adrián Hernández Güereca, a 15-year-old Mexican national, while he was playing on the Mexican side of the border.<sup>205</sup> His parents sued for damages under the theory that Mesa violated Hernández's 4th and 5th Amendment rights. The Supreme Court majority, however, refused to expand access to a constitutional right of action against federal officers for constitutional violations, which it had established in *Bivens v. Six Unnamed Federal Narcotics Agents*,<sup>206</sup> to encompass protections for violations of constitutional law arising from a cross-border shooting. The majority explains that in the case of a cross-border shooting, preserving the separation of powers militates in favor of allowing the executive branch to administer national security and engage in diplomacy and cautions against expanding a judge-made cause of action to provide relief in this case.<sup>207</sup> The majority opinion buries the logic of *Verdugo* in the principles of Republican Constitutionalism (*viz.*, preserving the separation of powers) and thereby masks that *Hernandez* embraces the spirit of *Verdugo*: the community of persons accorded constitutional protections does not include non U.S. citizens on the other side of the border—even when that distance is short enough to shoot across.

While Professor Iglesias presents an impassioned plea for strategic solidarity and investment in the Enlightenment project by individuals committed to LatCrit's emancipatory antisubordination project, the Supreme Court's recent decision in *Hernandez v. Mesa*<sup>208</sup> reveals how troubling it can be to embrace the architecture of the Enlightenment-inspired Republican Constitutionalism and the U.S. government for those committed to LatCrit's emancipatory antisubordination project. Like other emancipatory projects grounded in outsider conditions and experiences, LatCrit's commitment to deconstructing binary ways of thinking about race, ethnicity, gender, and sexual orientation, containing the cacophony of multiple perspectives, and struggling against multiple forms of subordination between and among groups aligns it firmly with fundamental critiques of the European Enlightenment.

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<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> 403 U.S. 388 (2019).

<sup>207</sup> Iglesias, *supra* note 194.

<sup>208</sup> 589 U.S. 140 (2019).



While strategic alliances and investment may be possible and advisable in some circumstances, a large-scale embrace of the Enlightenment project without maintaining the spirit of emancipatory antisubordination critiques may compromise foundational objectives for the LatCrit project while bolstering the strength and legitimacy of the Enlightenment project's hegemony. When the foundations of the rule of law start with conquest;<sup>209</sup> take a journey through slavery, coverture, imperialism, and Jim Crow; and end, in the current moment, with a neoliberal, white supremacist, and postfascist carceral state, fealty to the rule of law may come at the expense of advancing liberation and emancipation. Often it has been resistance to the status quo and law breaking of Republican Constitutionalism that has led to progress toward the emancipatory project. Furthermore, in the 21st Century, given the work of poststructuralism and critical theory to dismantle the cohesiveness and alleged objectivity and neutrality of the Enlightenment project, it is not clear that an identifiable Enlightenment-based project exists in light of the current political moment.<sup>210</sup> The Enlightenment project is less a cohesive whole than a series of institutions with particular nodes of power and tools that can be deployed in service of one set of interests or another. This is one of the central insights of the Critical Legal Studies movement, and it can be extended for thinking about the underlying values of the Enlightenment project: norms of the Enlightenment project, like legal rules, can be flipped and manipulated to accrue benefits to some and impose costs on others. In contrast, emancipation and antisubordination require subverting the tools of the Enlightenment, pushing beyond binary conceptions of cost and benefit, and advancing toward ideas long-practiced by indigenous peoples' ways of being in the world (*e.g.*, use over ownership, abundance over growth, need over ability to pay). Perhaps fealty to the Enlightenment project in the service of anti-fascism may be productive in the short term, but it must be undertaken from a place that resists the naturalization of the Enlightenment project as a universal good.

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<sup>209</sup> Jedediah Purdy, *Property and Empire: The Law of Imperialism in Johnson v. M'Intosh*, 75 GEO. WASH. L. REV. 329 (2006) (arguing that *Johnson* is the leading American case in the law of imperialism). See also LINDSAY G. ROBERTSON, CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLE OF THEIR LANDS (2005) (examining how Justice Marshall's attempt to clarify title in the United States had ramifications beyond the U.S. borders). Even today, White settler colonialism remains a persistent force in the United States. Alyosha Goldstein, *When Nation takes Place: Proprietary Regimes, Anti-Statism, and U.S. Settler Colonialism*, 107 S. ATLANTIC Q. 833 (2008). But see *McGirt v. Oklahoma*, 591 U.S. — (2020) (rejecting Oklahoma's claim that Congress disestablished the Muscogee (Creek) Nation's reservation and placing parts of northwest Tulsa in "Indian country" over the state's objections).

<sup>210</sup> But see Steven D. Smith, *Recovering (from) Enlightenment?*, 41 SAN DIEGO L. REV. 1263, 1264 (2004) (arguing for some continuity between the historical Enlightenment and the "rule by reason" often invoked by authorities in constitutional law); John A. Powell & Stephen M. Menendian, *Remaking Law: Moving Beyond Enlightenment Jurisprudence*, 54 ST. LOUIS U. L.J. 1035, 1037 (2010) (arguing that Enlightenment assumptions and practices have been an enduring force in shaping Anglo-American law and American constitutional law). See also Suzanna Sherry, *The Sleep of Reason*, 84 GEO. L.J. 453, 455 (1996).

V. CONCLUSION: TOWARDS *CRITICAL JUSTICE* AND SYSTEMIC ADVOCACY

Qué hacer to transcend the reemergence of *América Posfascista* (Postfascist America) in the United States and across the hemisphere? We have to act collectively towards an emancipatory and enduring lived justice for all. Persistent concerted actions are necessary to subvert systemic injustice. LatCrit theory calls for a principled antistatist praxis that challenges laws, regulations, policies, and practices that, by intent or effect, enforce the subordinate sociolegal status of historically oppressed groups.<sup>211</sup> LatCrit scholars have performed the theory in and through the practices that shape our discourse and gatherings to generate knowledge and action towards a postsubordination society. At this juncture, it is more evident than ever that persistent concerted actions are necessary to subvert systemic injustice.<sup>212</sup>

One of the most pressing practical questions for those within the legal academy who seek emancipatory social justice is how to educate a rising generation of lawyers to become more effective advocates for systemic reform to achieve equal justice in everyday life for *all*. If justice is to become available to everyone, then calls for justice from outsider communities must be acknowledged and answered. U.S. law has often been constructed and operated as a complementary system to create and protect systemic social and material inequalities based on racialized social identities. However, law can be refashioned into a tool fit for work towards equal justice.

For the past decade LatCrit scholars have been collaboratively crafting a new framework for understanding and combatting the constantly shifting yet persistent forms of systemic injustice. The concept of “critical justice” has emerged from this process as an intentional and action-oriented interrogation of the sociolegal conditions that create and protect unequal justice in order to orient effective and ethical systemic advocacy that can progressively bend U.S. law and culture towards a lived justice for all.<sup>213</sup> To achieve these goals, law professors must teach how to look beyond courts and the law school in order to learn from the ways that communities, movements, lawyers, and other advocates have successfully worked together to achieve change. Critical Justice praxis thus builds on the core competencies of legal education but does not privilege them over developing out-of-court skills, strategies, and goals.<sup>214</sup>

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<sup>211</sup> Matambanadzo et al., *supra* note 158, at 443.

<sup>212</sup> Accord Valdes, *supra* note 36.

<sup>213</sup> Matambanadzo et al., *supra* note 158, at 443.

<sup>214</sup> For instance, in its conception of “social impact advocacy,” discussed here, the authors have designed *Critical Justice* to teach students how to plan issue campaigns for social change in conjunction with (or without) legal action, as well as how to plan for community economic development projects that serve material needs of particular localities or populations. See generally Scott Cummings, *Empirical Studies of Law and Social Change: What is the Field? What are the Questions?*, 2013 Wis. L. REV. 171 (2013) (outlining a tenuous, even vexed, relationship between legal culture and social justice).

Next year, LatCrit will release its coursebook project to help effect a transformation of the legal academy so that it becomes a space that furthers access to justice both inside and outside of the academy,<sup>215</sup> *Critical Justice: Systemic Advocacy in Law and Society*.<sup>216</sup> The opening phrase, “Critical Justice,” asserts the vision and object of the project: a condition of lived reality, both symbolically and materially, that ensures “equal justice for all” as measured from “the bottoms” of societal castes. The phrase also connotes the application of insights from the critical schools of legal knowledge, such as CRT and LatCrit, to interrogate the shortcomings of law, and its complicity in persistent group inequalities. The term “Systemic” frames both the nature of persistent problems and of enduring solutions to them; it spells out the kind of “Advocacy” needed today. “Systemic Advocacy” invokes the imperative for lawyers and non-lawyers to act in concert and collaboration with organized groups, both within and more often beyond the courtroom. Finally, the closing title reference to “Law and Society” acknowledges that systemic injustice operates both internally and externally to law. Systemic injustice distorts law and injures society as well. To make and protect progress, systemic advocacy mixes community projects that build power to change the culture or its consequences with legal projects that seek specific and enforced legal results through adjudication and/or policymaking.

LatCrit’s Critical Justice textbook relies on upcoming generations of activist students and lawyers to implement the critical theory and praxis breakthroughs of the past and future. Much of that praxis has been short-term and ameliorative in focus. So too have been some recent LatCrit conferences and programs reactive to the culture wars and the 2016 U.S. presidential election, which have demanded much attention to shore up the critical community and support outsider groups under attack. But critical outsider jurisprudence illuminates how the sociolegal systems of the status quo produces outcomes like the 2016 U.S. presidential election not as aberration but by design. Backlash is a predictable systemic defense that indicates the system is threatened, and that the seeds of systemic change for the long haul have been planted. Moreover, as *Critical Justice* argues, even short-term ameliorative measures that consume so much time and energy in the moment can point toward a postsubordination future—when connected to community

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<sup>215</sup> See generally ROBIN WEST, JUSTICE, POLITICS, AND THE DEMANDS OF PROFESSIONALISM 1-42 (2013) (noting that justice has been progressively absent from law school curricula and scholarship and calling for a paradigmatic change to return justice as a central tenet of legal education).

<sup>216</sup> *Critical Justice* consists of seven parts and seventeen chapters that present law as one of many social systems that reproduce collective inequality by institutional design and sometimes through automatic routines. The authors have designed the textbook to help advocates understand persistent social problems, and solutions to them, in material, systemic, and historical terms that focus on identities, groups, interests, and power. To do so, it presents critical theory as actionable knowledge in diverse social, economic, and legal contexts.

projects that build power to change the prevailing culture. LatCrit as a community is committed to that multifold intentionality in all it undertakes.<sup>217</sup>

*Con safos*.<sup>218</sup>

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<sup>217</sup> See Francisco Valdes & Steven W. Bender, *Organizing Academic Activism: LatCrit Theory, Community, and Praxis* (2020) (unpublished manuscript on file with authors).

<sup>218</sup> Originating in Chicana/o cultural practices like writing graffiti in the barrio, the phrase *Con Safos* (a.k.a., “c/s”), invokes protection and safeguards for the art to which it is appended. See, e.g., JOSÉ ANTONIO BURCIAGA, *DRINK CULTURA: CHICANISMO* (1993), at 6 (“The c/s sign-off means *con safos*, and translates literally as ‘with safety.’ It was meant as a safety precaution, a barrio copyright, patent pending. No one else could use or dishonor the graffiti. It was an honorable code of conduct, a literary imprimatur. Like saying ‘amen,’ it ended discussion. Above all, it meant, ‘anything you say against me will bounce back to you.’”). See also *id.* at 6-8 (discussing the phrase further); Sylvia Ann Grider, *Con Safos: Mexican-Americans, Names and Graffiti*, 88 J. AM. FOLKLORE 132 (1975), <http://www.jstor.com/stable/539192> (same); Antonio Villaseñor-Baca, *Editor’s Note / About*, CON SAFOS MAGAZINE (last visited Jun. 29, 2020), <https://consafosmag.com/about/> (same).

## APPENDIX 1.

*Chronological listing of articles in the Westlaw law review database that use the term “post-fascis\*”.*  
(Jun. 30, 2020).<sup>219</sup>

Article	Number of Citations
John H. Merryman, <i>The Italian Style III: Interpretation</i> , 18 STAN. L. REV. 583, 609-10 (1966).	10
Kitty Calavita, <i>Worker Safety, Law, and Social Change: The Italian Case</i> , 20 LAW & SOC'Y REV. 189, 194 (1986).	1
Mary L. Volcansek, <i>The Judicial Role in Italy: Independence, Impartiality and Legitimacy</i> , 73 JUDICATURE 322, 322-23 (1990).	3
Peter Berkowitz, <i>Liberal Zealotry</i> , 103 YALE L.J. 1363, 1371 (1994).	2
Philip M. Nichols, <i>Outlawing Transnational Bribery Through the World Trade Organization</i> , 28 LAW & POL'Y INT'L BUS. 305, 344 n.165 (1997).	28
Zorica Mrsevic, <i>When the Home Is Where the Hurt Is: Domestic Violence in Serbia</i> , 1 J. GENDER RACE & JUST. 529, 544 n.40 (1998).	1
Amy Jo Everhart, <i>Predicting the Effect of Italy's Long-Awaited Rape Law Reform on "The Land of Machismo"</i> , 31 VAND. J. TRANSNAT'L L. 671, 683 (1998).	6
By Megan J. Ballard, <i>The Clash Between Local Courts and Global Economics: The Politics of Judicial Reform in Brazil</i> , 17 BERKELEY J. INT'L L. 230, 244 n.64 (1999).	18
Matthew W. Finkin, <i>Quatsch!</i> , 83 MINN. L. REV. 1681, 1705 n.95 (1999).	8
Philip M. Nichols, <i>The Myth of Anti-Bribery Laws as Transnational Intrusion</i> , 33 CORNELL INT'L L.J. 627, 640 n.68 (2000).	30
James Q. Whitman, <i>Enforcing Civility and Respect: Three Societies</i> , 109 YALE L.J. 1279, 1284, 1322, 1396 (2000).	104
Garrett Epps, <i>Circles of Exile: A Response to Professor Forbath</i> , 51 DUKE L.J. 465, 469 n.17, 470 n.31 (2001).	0

<sup>219</sup> This listing derives from *List of 39 results for adv: post-fascis\**, WESTLAW (Jun. 9, 2020) (on file with authors) (listing thirty-nine law review articles from 1966 to the present that use the words, post-fascism or post-fascist).

Vivian Grosswald Curran, <i>Fear of Formalism: Indications from the Fascist Period in France and Germany of Judicial Methodology's Impact on Substantive Law</i> , 35 CORNELL INT'L L.J. 101, 104 (2002).	33
Malgorzata McElfresh, <i>European Union Sanctions Against Austria: Was an Assault on Austria an Assault on Democracy?</i> , 79 U. DET. MERCY L. REV. 449, 471 (2002).	0
David Abraham, <i>Comments on the University of Miami-University of Leipzig Bi-National Conference in Leipzig</i> , 10 U. MIAMI INT'L & COMP. L. REV. 1, 8 (2002).	0
Maria Grahn-Farley, <i>The Ideology of Genus &amp; the Ghost of Heidegger</i> , 29 BROOK. J. INT'L L. 1, 6 (2003).	3
Michele Totah, <i>Fortress Italy: Racial Politics and the New Immigration Amendment in Italy</i> , 26 FORDHAM INT'L L.J. 1438, 1476 n.165 (2003).	8
Jonathan Simon, <i>Parrhesiastic Accountability: Investigatory Commissions and Executive Power in an Age of Terror</i> , 114 YALE L.J. 1419, 1454 (2005).	14
Charles H. Martin, <i>Comparative Human Rights Jurisprudence in Azerbaijan: Theory, Practice and Prospects</i> , 14 J. TRANS-NAT'L L. & POL'Y 215, 218-19 (2005).	0
Professor Giovanni Cordini, <i>The Society of Information and Constitutional Laws</i> , 30 S. ILL. U. L.J. 429, 440-41 (2006).	0
Robert A. Kahn, <i>Cross-Burning, Holocaust Denial, and the Development of Hate Speech Law in the United States and Germany</i> , 83 U. DET. MERCY L. REV. 163, 193 (2006).	15
Mary L. Volcansek, <i>Appointing Judges the European Way</i> , 34 FORDHAM URB. L.J. 363, 367 (2007).	14
Martin Klimke, <i>40/68—"We Are Not Going to Defend Ourselves Before Such A Justice System!"—1968 and the Courts</i> , 10 GERMAN L.J. 261, 270-71 (2009).	0
Louis F. Del Duca, <i>Introduction of Judicial Review in Italy—Transition from Decentralized to Centralized Review (1948-1956)—A Successful Transplant Case Study</i> , 28 PENN ST. INT'L L. REV. 357, 360-61, 363 (2010).	1
Deirdre Ziegenfuss, <i>Zingari or Italiani?: Discrimination Against Roma in Italy and the European Court of Human Rights</i> , 43 GEO. WASH. INT'L L. REV. 555, 564 (2011).	1
Andrea J. Rush, <i>Lautsi v. Italy: Deference to State Sovereignty from on High as the Cross Remains Nailed to Italian School Walls</i> , 20 TUL. J. INT'L & COMP. L. 533, 539 (2012).	0
Adina Rosenfeld, <i>Admissibility of DNA Evidence: Italy Under Attack</i> , 40 S.U. L. REV. 197, 203 (2012).	1

Saki Bailey & Ugo Mattei, <i>Social Movements as Constituent Power: The Italian Struggle for the Commons</i> , 20 <i>IND. J. GLOBAL LEGAL STUD.</i> 965, 999 (2013).	4
Conrado Hübner Mendes, <i>Chapter 8 Political Deliberation and Constitutional Review</i> , 18 <i>IUS GENTIUM</i> 121, 122 (2013).	0
Giovanni Capoccia, <i>Militant Democracy: The Institutional Bases of Democratic Self-Preservation</i> , 9 <i>ANN. REV. L. &amp; SOC. SCI.</i> 207, 209, 222 (2013).	1
Marc-Tizoc González, <i>Habeas Data: Comparative Constitutional Interventions from Latin America Against Neoliberal States of Insecurity and Surveillance</i> , 90 <i>CHI.-KENT L. REV.</i> 641 650 n.50 (2015).	3
Brandon Gatto, <i>Race Law Revisited: A Brief Review of Anti-Semitism and the Role of Lawyers in Fascist Italy</i> , 24 <i>DIG., NAT'L ITALIAN A.B.A. L.J.</i> 1, 10 (2016).	0
Alessandro Corda, <i>Sentencing and Penal Policies in Italy, 1985-2015: The Tale of a Troubled Country</i> , 45 <i>CRIME &amp; JUST.</i> 107, 116, 137, 171 (2016).	0
Maryellen Fullerton, <i>Asylum Crisis Italian Style: The Dublin Regulation Collides with European Human Rights Law</i> , 29 <i>HARV. HUM. RTS. J.</i> 57, 73 (2016).	8
Ignacio de la Rasilla, <i>A Very Short History of International Law Journals (1869-2018)</i> , 29 <i>EUR. J. INT'L L.</i> 137, 154 (2018).	0
Asli Bâli & Aziz Rana, <i>Constitutionalism and the American Imperial Imagination</i> , 85 <i>U. CHI. L. REV.</i> 257, 260 (2018).	2
Janice R. Bellace, <i>ILO Convention No. 87 and the Right to Strike in an Era of Global Trade</i> , 39 <i>COMP. LAB. L. &amp; POL'Y J.</i> 495, 504 (2018).	0
Margaret Hu, <i>Bulk Biometric Metadata Collection</i> , 96 <i>N.C. L. REV.</i> 1425 (2018).	3
Signe Rehling Larsen, <i>European Exceptionalism?—A Response to Alexander Somek's the Cosmopolitan Constitution</i> , 19 <i>GERMAN L.J.</i> 1529, 1530-1541 (2018).	0

