

AGAINST FASCISM: TOWARD A LATCRITICAL LEGAL GENEALOGY

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I. INTRODUCTION	233
II. PUBLIUS V. MEIN KAMPF: TOWARD A LATCRITICAL LEGAL GENEALOGY	243
A. <i>The Camarena Trilogy: The Doctrinal Creep of Fascism</i>	243
1. Reactivating the Legal Structure of Imperial Power: <i>United States v. Verdugo</i>	243
2. Rendering Treaties: <i>United States v. Alvarez- Machain</i>	244
3. Strategic Abdications of Original Understandings: <i>Sosa v. Alvarez-Machain</i>	247
B. <i>High Crimes Make Hard Cases: Deconstructing the Event</i>	249
III. MAKING THE CONSTITUTION SAFE FOR INVASIONS AND TORTURE: A SECOND PERSPECTIVE ON THE LEGAL GENEALOGY OF THE FASCIST TURN	250
IV. EVERYTHING NEW IS OLD: SEDIMENTED FASCISM AND THE NEED FOR A NEW LATCRITICAL UNDERSTANDING OF “THE PEOPLE”	252
V. CONCLUSION	254

I. INTRODUCTION

This article takes up the invitation of the LatCrit 2019 Biennial Conference organizers to resist the fascist turn in American politics.¹ The specter of fascism undoubtedly haunts America. The signifier of its most recent apparition is concentrated in the strangely engorged image of an orange-faced president. The 2016 election that produced Donald Trump has set upon the world a United States president, whose public appearances are marked by

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¹ *The Dispossessed Majority: Resisting the Second Redemption in América Posfascista (Postfascist America)*, LATINA & LATINO CRITICAL LEGAL THEORY, INC. (Oct. 18–19, 2019), <http://latcrit.org/content/conferences/latcrit-biennial-conferences/2019-latcrit-biennial-conference-cfp/>, archived at <https://perma.cc/A5KB-H3TJ>.

levels of deceit and disinformation unprecedented only, but significantly, in the degree to which his claims of unlimited presidential power have been punctuated by flagrant appeals to activate political violence among the white supremacist currents he calls his “base.”² Although this reiterated Julius manipulates the rhetoric of populism, anti-corporate globalization and libertarian suspicions of the so-called “deep state,” to rally to plutocratic effect the electoral support of white working-class voters, the organizers of this LatCrit conference are quite right to focus thematically on the situation of “the dispossessed majority.” Populist rhetoric notwithstanding, Trump’s installation as the 45th president of the United States after losing the popular vote by almost 3 million votes³ was self-evidently not an expression of majority will, but an epic misfire in the electoral college⁴ and a stunning success for Russian propaganda.⁵ In the absence of events of equal and counteracting force, the anti-democratic apparatus and treasonous disloyalty that propelled Trump into office will likely remain a reactionary presence in American politics,⁶ with significant implications for the future of the dispossessed majority in this country and across the globe.

The fascist turn effectuated in and through Trump’s presidency raises serious concerns regarding the potency of American legal institutions to resist the reconsolidation of totalitarian power. The centrality of law and legal consciousness to American national identity, to its institutional structures of power, to the ideological construction and historical unfolding of the coun-

² Samira Saramo, *The Meta-violence of Trumpism*, 12 EUROPEAN J. OF AM. STUD. (2017); Paul Bedard, *Spooked: Clinton claims Trump fans chant ‘Hang her in the streets’*, WASH. EXAMINER (Oct. 13, 2016, 8:24 AM), <https://www.washingtonexaminer.com/spooked-clinton-claims-trump-fans-chant-hang-her-in-the-streets>, archived at <https://perma.cc/27H8-36X6>; Sarah Childress, *Why Trump’s Violent Rhetoric Is Protected Speech*, FRONTLINE (Mar. 14, 2016), <https://www.pbs.org/wgbh/frontline/article/why-trumps-violent-rhetoric-is-protected-speech/>, archived at <https://perma.cc/P9P7-YNMT> (quoting associate professor of social psychology, Gabriel Lenz, “Trump’s rhetoric has few precedents in modern presidential politics.”).

³ Gregory Krieg, *It’s official: Clinton swamps Trump in popular vote*, CNNPOLITICS (Dec. 22, 2016, 5:34 AM), <https://www.cnn.com/2016/12/21/politics/donald-trump-hillary-clinton-popular-vote-final-count/index.html>, archived at <https://perma.cc/98JT-FQ3Z>.

⁴ Peter Beinart, *The Electoral College Was Meant to Stop Men Like Trump From Being President*, THE ATLANTIC (Nov. 21, 2016), <https://www.theatlantic.com/politics/archive/2016/11/the-electoral-college-was-meant-to-stop-men-like-trump-from-being-president/508310/>, archived at <https://perma.cc/6N2F-XL7H>.

⁵ Alicia Parlapiano & Jasmine C. Lee, *The Propaganda Tools Used by Russians to Influence the 2016 Election*, THE N.Y. TIMES, Feb. 16, 2018, <https://www.nytimes.com/interactive/2018/02/16/us/politics/russia-propaganda-election-2016.html>, archived at <https://perma.cc/2UD8-9RNX>.

⁶ Grace Panetta, *Despite low favorability ratings, Trump could have an even bigger electoral college advantage than he did in 2016*, BUSINESS INSIDER (Nov. 5, 2019, 11:51 AM), <https://www.businessinsider.com/trump-has-big-electoral-college-advantage-despite-low-favorability-2019-11>, archived at <https://perma.cc/5WNQ-Q3SQ>; Ian Millhiser, *The astounding advantage the Electoral College gives to Republicans, in one chart*, VOX (Sept. 17, 2019, 7:50 AM), <https://www.vox.com/policy-and-politics/2019/9/17/20868790/republicans-lose-popular-vote-win-electoral-college>, archived at ; Nate Cohn, *Trump’s Electoral College Edge Could Grow in 2020, Rewarding Polarizing Campaign*, THE N.Y. TIMES, Jul. 19, 2019, <https://www.nytimes.com/2019/07/19/upshot/trump-electoral-college-edge-.html>, archived at <https://perma.cc/Z9RH-JYVT>.

try's geopolitical, economic and cultural being-in-the-world has made law a central site of contestation for the LatCrit project. Since its inception, LatCrit theory has presented itself as an anti-essentialist, anti-subordination *intervention in the production of critical legal theory*.⁷ The *critical* element denotes a commitment to identifying, engaging, and transforming the most serious obstacles, the pervasive and decisive aspects of power, the dangerous, perilous, life-threatening, and precarious dimensions of domination and subordination—in a manner that is neither apologetic or complicit, nor hypercritical, but analytical, judicious, and searching. The *legal* element of the LatCrit intervention responds to the particularity of law as a sedimented repository of ideological formations and institutional structures of power. Law filters reality through the discursive articulation of legal categories and the coercive enforcement of the world that these categories seek to establish and maintain. Its hold on the future is grounded in the past, specifically the accumulated history of legal doctrines, interpretative methodologies, and the legal consciousness embedded in and effectuated by the repetition, reformulation, and reactivation of these doctrines and methodologies in the determination of legal outcomes and the organization of legal structures.

All this makes the theoretical understanding of law a critical site of LatCrit intervention. As an intervention in the production of legal *theory*, LatCrit is heir to a wide range of critical methodologies – deconstruction, structural analysis, discourse analysis, class analysis, Critical Race Theory, Critical Legal Studies, Feminist Critical theory, Critical Race Feminism, Queer theory, Asian Pacific American Critical Legal Scholarship and Chicana/o Studies.⁸ This rich inheritance and ongoing theoretical work offers LatCrit theory the means to undertake multidimensional analysis informed by distinct, yet intersectional and overlapping perspectives from which to more fully assess the role of law and lawlessness in the material dispossession and political marginalization of the dispossessed majority and to promote the material transformation of legal structures, doctrines, and institutions toward a more objective justice. Still, at a time when the relevance of law to power, of reality to truth, of truth to justice, of justice to law have all been thrown into question, the move to situate the struggle for liberation in the struggle over law raises profound, perhaps decisive suspicion. Does the emancipatory project of LatCrit legal theory have a stake in the constitutional structures of republican government? Does it have a stake in the separation of powers, the jurisdiction of federal courts, the extraterritorial reach of constitutional restrictions on state power? Does it have a stake

⁷ Elizabeth M. Iglesias, *The Inter-Subjectivity of Objective Justice: A Theory and Praxis for Constructing LatCrit Coalitions*, 2 HARV. LATINO L. REV. 467 (1997); Elizabeth M. Iglesias, *Human Rights in International Economic Law: Locating Latinas/Os in the Linkage Debates*, 28 U. MIAMI INTER-AM. L. REV. 27 (1997); Elizabeth M. Iglesias, *Latcrit Theory: Some Preliminary Notes Towards A Transatlantic Dialogue*, 9 U. MIAMI INT'L & COMP. L. REV. 1 (The First Annual LatCrit Summer Colloquium, 2001).

⁸ For an early account situating LatCrit theory in a genealogy of critical theory in the American legal academy see Iglesias, *Latcrit Theory*, *supra* note 7.

in the battle over the domestic effect of international law or in the shifting conceptualization of international law from natural law to positivism? This is to say; can we see the stakes and stake out positions on these matters in the name of a LatCritical theory of emancipatory law?

The answers to these questions depend in part, of course, on the perspectives from which LatCrit wishes to be critical. In responding to the conference organizers' call for resistance, I wish to explore how the fascist turn might be combated in and through a LatCritical investment in a renewal of the Enlightenment project that motivated the constitutional design of the republican form of government that Trump's tenure in office seems determined to dismantle. Protagonist of enlightenment Trump is not, nor do we see any evidence he would desire the name or accept its mission. This most certain rejection of both name and mission would *not* be grounded on a *post*-Enlightenment vision. The policies and utterances issuing from the United States' first orange president do not reflect an aim to resolve or transcend the epic failures made manifest in the inability of the Enlightenment's legacy of reasoned institutions and institutionalized reason to prevent the rise of Nazism and Fascism or the ensuing genocides and crimes against humanity to which these movements subjected the world—*with no law to stop them*.⁹ On the contrary, the policies of this president or, perhaps more accurately, the longstanding collective for which he currently fronts, which predates and will surely outlast his presidency, have similarly found a ready context and opportunity to entrench themselves in the forms of state and economic power built up on and out of Enlightenment understandings and passed down as its institutional legacies, even as they seek relentlessly to strip these forms of any residual enlightenment substance through relentless attacks on the values of individual dignity, equality, democratic accountability, judicial independence, moderation, civility, reason and reasonableness, honesty, and the rule of law.¹⁰

How then is the renewal of a failed legacy worth LatCrit attention, let alone the investment of our intellectual capital and collective effort? Though a double negation can produce a positive charge, the enemy of an enemy is not by common enmity alone a friend and the emancipatory vision at the heart of the LatCrit project demands a more substantive foundation for its coalitional commitments. Still it is undeniably the case that fascism, of which Nazism is but a specific form, is antithetical to the commitments of

⁹ Matthew Lippman, *They Shoot Lawyers Don't They?: Law in the Third Reich and the Global Threat to the Independence of the Judiciary*, 23 CAL. WESTERN INT'L L. J. 257, 262–63 (1992) (noting that the German courts “timidly fell into lockstep formation behind the Nazi Party” in giving legal effect to the crimes by law of the regime); See generally MAX HORKHEIMER & THEODOR R. ADORNO, *DIALECTIC OF ENLIGHTENMENT: PHILOSOPHICAL FRAGMENTS* (Gunzelin Schmid Noerr ed., 2002).

¹⁰ Steven Rosenfeld, *Leading Civil Rights Lawyer Shows 20 Ways Trump Is Copying Hitler's Early Rhetoric and Policies*, THE SMIRKING CHIMP (Aug. 10, 2019, 6:41 AM), <http://www.smirkingchimp.com/thread/steven-rosenfeld/86013/leading-civil-rights-lawyer-shows-20-ways-trump-is-copying-hitler-s-early-rhetoric-and-policies>, archived at <https://perma.cc/X93Z-GL3L>.

both the LatCrit project and the Enlightenment project that produced for America a republican form of government.

Even at a most superficial level, a surface glance provides ready evidence of the fundamental incompatibility. Although in its Trumpian iteration, the fascist turn is opportunistic, derivative and undisciplined, the current it wishes to ride originates in a political philosophy that elevates the nation, the state, and in Hitler's case, "the race" above the individual. By contrast, LatCrit's commitment to anti-essentialist justice reflects and expresses the foundational insight that Latinx political identity, indeed identity itself, is complex, multidimensional, and intersectional.¹¹ This means that even as LatCrit theory originated in the imperative of combatting the invisibility of Latinx identities, material realities, and perspectives as legitimate points of reference for the critical analysis and transformation of law in all its dimensions, LatCrit theory has struggled to center and fulfill the double imperative of disaggregating relations of domination and subordination *within and among* the multiple diverse assemblages of Latinx identities and communities, and of fashioning critical interventions that advance the demands of intergroup justice and solidarity.¹² The LatCrit emphasis on anti-essentialist intergroup justice originates as a normative commitment grounded in a recognition that the struggle *against* subordination is and must be a struggle *for* objective justice.¹³ Effectuating an effective resistance against the fascist turn in American politics implicates the imperative of anti-essentialist intergroup justice precisely because the strategic objective of fascism is to leverage fear and hatred of difference to consolidate power.

Although the Enlightenment project informing the design of the United States Constitution was flawed by its original acquiescence to the union of free republics with slave states in ways that set it on a collision course with the consequences of its own self-betrayal, the republican forms the Enlightenment aspired to establish are much more aligned with and hospitable to LatCrit theory's emancipatory vision and objectives than the forms a fascist turn would fashion for America. While in its Trumpian iteration the fascist turn clothes itself in the mantle of populism, fascism in general and in its Nazi iteration reviles "the masses" and proclaims itself an aristocracy of and for "the best."¹⁴ The idea that the world is to be given to "the best people" is both a rejection of "the democratic mass idea" and an affirmative project to organize the state so it incorporates "*the endeavor of putting the heads above the masses and of subjecting the masses to the heads.*"¹⁵

¹¹ Iglesias, *Human Rights in International Economic Law*, *supra* note 7.

¹² Elizabeth Iglesias, *Identity, Democracy, Communicative Power, Inter/National Labor Rights and the Evolution of LatCrit Theory and Community*, 53 U. MIAMI L. REV. 575, 586–608 (1999) (seeking to ground inter-group coalitional alignments on a vision of substantive justice beyond interest convergence politics).

¹³ Iglesias, *The Inter-Subjectivity of Objective Justice*, *supra* note 7.

¹⁴ See, e.g., Adolph Hitler, *Mein Kampf*, in COMMUNISM, FASCISM AND DEMOCRACY 374, 380 (Carl Cohen ed., 2nd ed. 1972) (Nazism as proclaimed by Hitler rejects "the democratic mass idea" and "endeavors to give this world to the best people.").

¹⁵ *Id.* (italics in the original).

In *MEIN KAMPF*, Hitler presented his version of a theory of the state. There he argued that the purpose of the folkish state was to preserve racial purity:

The highest purpose of the folkish State is the care for the preservation of those racial primal elements which, supplying culture, create the beauty and dignity of a higher humanity. We, as Aryans, are therefore able to imagine a State only to be the living organism of a nationality. . . The folkish State . . . has to put the race into the center of life in general. It has to care for its preservation in purity.¹⁶

The fascist state presented in *MEIN KAMPF* must make a sharp distinction between citizens and noncitizens. It must secure for the leaders of the state maximum freedom from limitations on the ability of the leaders to lead. Hitler called this the leadership principle, by which the fascist state limits parliamentary restrictions on the power of the executive.

The folkish State, therefore, has to free the entire leadership—especially the highest, that means the political leadership—from the parliamentary principle of the decision by majority, that means decision by the masses. . . There must be no decisions by majority, but only. . . *one man decides*.”¹⁷

The fascist state, according to Hitler, is to promote a fanatical nationalism, to enlighten the people, to free them and to deliver them from hopeless delusions of internationalism, from the illusion of democracy and specifically from belief in any possibility beyond possibilities achievable by national strength, national force, and national power. In *MEIN KAMPF*, Hitler specifically targeted reconciliation, mutual understanding, world peace, and the League of Nations as illusions the people must be enlightened to reject. According to Hitler, while “the contemporary world stresses internationalism instead of the innate values of race, democracy and the majority instead of the worth of the great leader[.]. . . there is no humanitarianism but only an eternal struggle. . .”¹⁸

Burt Neuborne notes that Trump is not only copying Hitler’s early rhetoric, but pursuing policies similar to the policies Hitler used to consolidate his power and establish a fascist state in Germany.¹⁹ Like Hitler, Trump’s policies reject international law as normative and binding, extoll American exceptionalism in order to promote the factional interests of a plutocratic elite disguised as extreme nationalism, embrace mass detentions and deportations, and mask international lawlessness and bad faith behind empty slogans and bombastic diatribes. That these policies have been brutally

¹⁶ *Id.* at 378.

¹⁷ *Id.* at 380–81.

¹⁸ *Id.* at 385–86.

¹⁹ Rosenfeld, *supra* note 10.

devastating to Latinx people both within and beyond the territorial boundaries of the United States can hardly be denied. In Trump's America, fear and hatred of difference has been directed quite virulently at Latinx people. In a report entitled *Trauma at the Border: The Human Costs of Inhumane Immigration Policies*, the United States Commission on Civil Rights documents the human impact of Trump's policies.²⁰ Trump's policies of mass detentions and deportations, family separation, and the indefinite detention of children in conditions tantamount to torture have drawn scrutiny and condemnation not only from domestic civil rights agencies,²¹ but in 2018, the Special Rapporteur on torture had occasion to remind the world that policies like the ones instituted by the Trump administration may give rise to individual criminal liability, for example, if it were found that policies determined to be torture were executed as part of a widespread and systematic attack directed against a civilian population.²²

Protagonist of enlightenment, Trump is not. On the contrary, his policies not only target the most vulnerable of and among us in ways that offend every principle of basic decency, they are also antithetical to the basic structures and commitments of the republican form of government established by the United States Constitution as an experiment in enlightened self-government. The same policies used to attack the human rights of Latinx peoples attack as well, the separation of powers, the independence of both the legislative and judicial branches, and the very idea of government under the rule of law. Thus, while the enemy of an enemy is not by that alone a friend, perhaps the LatCrit project has a positive role to play in renewing the republican forms that reflect the best the Enlightenment had to offer, while a renewed Enlightenment can play a positive role in effectuating the emancipatory aspirations that have animated LatCrit theory. Without, at this time, determining which is supplement to which, I believe it is possible that LatCrit and republican theory can be brought into productive engagement to more effectively resist the fascist turn.

To this end, I would, for a moment, like to turn away from the surface manifestations of this most recent iteration of fascism in America and ex-

²⁰ U.S. Commission on Civil Rights, *U.S. Commission on Civil Rights Releases Report: Trauma at the Border: The Human Cost of Inhumane Immigration Policies*, PR NEWswire (Oct. 24, 2019, 9:10 AM), <https://www.prnewswire.com/news-releases/us-commission-on-civil-rights-releases-report-trauma-at-the-border-the-human-cost-of-inhumane-immigration-policies-300944875.html>, archived at <https://perma.cc/KY7J-6CGT>.

²¹ See, e.g., *AFT Resolution: A Crime Against Humanity*, AM. FED'N OF TEACHERS (2018), <https://www.aft.org/resolution/crime-against-humanity>, archived at <https://perma.cc/EYS2-TZJR>; Mythili Sampathkumar, *Last surviving prosecutor at Nuremberg trials says Trump's family separation policy is 'crime against humanity'*, THE INDEP., Aug. 9, 2018, <https://www.independent.co.uk/news/world/americas/trump-border-crisis-nazis-nuremberg-trial-benferencz-family-separation-migrants-un-a8485606.html>, archived at <https://perma.cc/6427-A4ZM>.

²² Nils Melzer, *Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 16–18 (Feb. 26, 2018), https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session37/Documents/A_HRC_37_50_EN.docx, archived at <https://perma.cc/9Y85-LGJ3>.

amine its legal genealogy from a LatCritical perspective, focusing specifically on the way the domination of Latinx peoples, both within and beyond the territorial boundaries of the United States, provides a perspective necessary to see how the republican forms originally designed and defended in establishing the United States Constitution as an enlightenment promise of government under the rule of law have been rendered institutionally impotent to prevent Trump's fascist policies of mass deportations and indefinite detentions in violation of constitutional norms and international law, both customary and conventional as well as criminal. While the parallels drawn between Trump and Hitler are instructive and undeniable, my point is that the disjuncture between the republican forms of government initially established by the United States Constitution and the fascist state Trump would inflict on us if he is able to follow Hitler's steps is so vast that the threat we confront today would have had to be, and has in fact been, in the making long before Trump took office. Truly, the threat to republican government we confront today is the result of multiple layers of constitutional deconstruction without which Trump's policies and indeed his presidency itself would quite likely never have been inflicted upon the world. These layers of constitutional deconstruction are the sedimented work product of legal doctrines crafted by the real protagonists of "the deep state," who lobbied the United States Supreme Court from within and without to produce the systematic conversion of key elements of republican government into legal structures of imperial power.²³ This project did not originate with Trump, and though he rhetorizes and harangues against the deep state, its protagonists have made him a quite useful instrument of its further entrenchment. In order to understand its dimensions and its implications for the emancipatory objectives that inform the LatCrit project, it is important to place it in the context from which it arose—the original "Make America Great Again" agenda of the Reagan Administration of which Trump's America is a derivative simulacrum.²⁴

In the context of the U.S. presidency, Ronald Reagan was without question the original presidential simulacrat,²⁵ a b-rated movie actor turned politi-

²³ For an example of the way original understandings have been distorted in order to advance the fascist doctrine that only one man decides see Elizabeth M. Iglesias, *When Impunity and Corruption Embrace: How the Past Becomes the Future in the Struggle against Torture and Genocide*, 25 U.C. DAVIS J. INT'L L. & POL'Y 1 (2018–2019).

²⁴ Sam Danglemond, *Who Was the First Politician to Use "Make America Great Again" Anyway?*, TOWN & COUNTRY (Nov. 14, 2018), <https://www.townandcountrymag.com/society/politics/a25053571/donald-trump-make-america-great-again-slogan-origin/>, archived at <https://perma.cc/9GC6-GXFM>; ronald reagan make america great again poster—Google Search, https://www.google.com/search?rlz=1C1GCEA_enUS875US875&q=ronald+reagan+make+america+great+again+poster&tbm=isch&source=univ&sa=X&ved=2ahUKewj_xKGU68nmAhVMc0KHZNjDmQQsAR6BAgIEAE&biw=1177&bih=713#imgrc=tmT5k-KXa9_HvM:

²⁵ By simulacrat, I mean a political leader who is entirely a creature of mass media's mediation of the relationship between the leader and the electorate. Unlike the "genuine" political leader, whose image reflects an actual grasp of the matters at issue, the simulacrat is more akin to a film actor. Broad understanding of the political and economic forces at stake in leadership and a commitment to the good of the whole are replaced by skill making effective

cal mouthpiece for a radically reactionary movement aimed at rolling back the achievements of the New Deal, the movements for civil and political rights, and the legal structures of the welfare state. The parallels linking Reagan to Trump have been noticed by commentators, some of whom quite explicitly connect the emergent rise of fascism in Trump to a long game informing Republican Party politics that made good use of Reagan as well in its quest to achieve further concentration of wealth through massive redistributions from the middle class and working poor to engineer the kind of material dispossession that makes the many more governable, that is, more amenable to the rule of the few.²⁶

The Reagan Administration's foreign policy agenda crystalized in the midst of the Cold War and was presented to the country as responding to a need for the United States to "kick the Vietnam syndrome."²⁷ According to Jeane J. Kirkpatrick, Reagan's Ambassador to the United Nations, who advocated United States support for authoritarian regimes if they towed the Washington consensus,²⁸ the Reagan Administration meant to kick the Vietnam syndrome by catalyzing a "conservative revival."²⁹ This revival was presented as a renewed confidence in American values, American power, and American determination "to protect ourselves—from war and defeat."³⁰ In the context of Reagan's Cold War politics, protecting ourselves by kicking the Vietnam syndrome meant that the United States would begin to engage robustly in the projection of American military power to prevent the spread of communism throughout the world and specifically in Central America. Reagan was determined to stop the so-called domino effect of the Cuban revolution triggering further revolutions and geopolitical realignments in favor of the Soviets. Projecting American power to prevent communism in Central America was an important part of reinvigorating America. On the cultural front, the project to kick the Vietnam syndrome and usher in a con-

appearances in the modes of mass communications. For a discussion of the transformations upon which the rise of simulacrats depends, see Walter Benjamin, *The Work of Art in The Age of Mechanical Reproduction*, in *THE CONTINENTAL AESTHETICS READER* (Clive Cazeaux ed., 2nd ed. 2011).

²⁶ Rmuse, *Reagan Started the GOP's Fascism Destroying America From Within*, POLITICUSUSA (Dec. 28, 2015), <https://www.politicususa.com/2015/12/28/reagan-started-gops-fascism-destroying-america.html>, archived at <https://perma.cc/7L8H-Z5AY>; Ira Stoll, *Attack of 'Fascism' Used Against Trump Was Made Against Reagan*, NEWSMAX (Nov. 11, 2019, 4:38 PM), <https://www.newsmax.com/ira-stoll/trump-ronald-reagan-impeachment-fascism/2019/11/11/id/941147/>, archived at <https://perma.cc/HB5F-5VTV> (suggesting that the parallels between Trump and Reagan are a credit to both men).

²⁷ See, e.g., Robert Parry, "Kicking the Vietnam Syndrome": *U.S. Interventionism and the Victory of 'Perception Management'*, GLOB. RESEARCH (Dec. 29, 2014), <https://www.globalresearch.ca/kicking-the-vietnam-syndrome-u-s-interventionism-and-the-victory-of-perception-management/5421897>, archived at <https://perma.cc/9KQY-M73Z>.

²⁸ Jeane J. Kirkpatrick, *Dictatorships & Double Standards*, COMMENTARY (Nov. 1979), <https://www.commentarymagazine.com/articles/dictatorships-double-standards/>, archived at <https://perma.cc/K8B4-X8RS>.

²⁹ David P. Fidler, *War, Law & Liberal Thought: The Use of Force in the Reagan Years*, 11 ARIZ. J. OF INT'L AND COMP. L. 45, 102 (1994) (quoting from Kirkpatrick's published works).

³⁰ *Id.*

servative revival meant that the “remasculinization” of the United States was underway.³¹ With Hollywood fully on board, images of Reagan as Rambo activated within American culture the fascist elements of militarism, hyper-masculinity and mythic heroism.³²

The Reagan Administration’s focus on reinvigorating the projection of American military power in turn entailed an increasing disregard for the United Nations Charter and the system of law it established. The U.N. Charter prohibits the use of force except in cases of self-defense, while the International Court of Justice (“ICJ”) defines self-defense as the right to use force in response to an armed attack.³³ Because the ICJ interpreted the Charter in terms of the language of the Charter and the historical understanding that the inherent right of self-defense was triggered by an armed attack, the Reagan Administration took the position that it was not in the national interest to continue to recognize the jurisdiction of the ICJ as a forum for resolving the dispute.³⁴ On April 8, 1984, the Reagan Administration announced that it had withdrawn the United States from the compulsory jurisdiction of the World Court, unilaterally—without Senate approval. Respect for the U.N. Charter was now relabeled “legalism” and rejected in favor of what was called “realism,” a move that helped rationalize, at least in the theoretical work of Reagan Administration thinkers, the projection of American power to overthrow the Sandinista government in Nicaragua.³⁵

All of this is background for understanding the layers of constitutional deconstruction that have produced the institutional conditions of possibility for the fascist policies pursued by the Trump Administration. In the next part, I want to reveal the jurisprudential context in which fascist principles have been making their unconstitutional home by focusing on three Supreme Court cases. Although these decisions may at first glance appear entirely unconnected, as they deal with very different issues of constitutional, treaty, and statutory interpretation, all three cases arose out of a common set of facts in which the domination and instrumentalization of Latinx peoples as

³¹ See, e.g., SUSAN JEFFORDS, *THE REMASCULIZATION OF AMERICA: GENDER AND THE VIETNAM WAR* (1989).

³² See, e.g., Reagan as Rambo—Google Search, https://www.google.com/search?rlz=1C1GCEA_enUS875US875&q=Reagan+as+Rambo&tbm=isch&source=univ&sa=X&ved=2ahUKEwiltfzpxtvmAhXQW80KHxWDWwQsAR6BAGJEA&biw=1200&bih=818.

³³ U.N. Charter, full text, Apr. 15, 2016, <https://www.un.org/en/sections/un-charter/un-charter-full-text/>, archived at <https://perma.cc/FMV6-C95W>; Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. (June 27), <https://www.icj-cij.org/en/case/70/judgments>, archived at <https://perma.cc/3QHM-4JLX>; Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1984 I.C.J. (Nov. 26), <https://www.icj-cij.org/en/case/70/judgments>, archived at <https://perma.cc/3QHM-4JLX>.

³⁴ *U.S. Walks Out of World Court Nicaragua Case*, L.A. TIMES, Jan. 20, 1985, <https://www.latimes.com/archives/la-xpm-1985-01-20-mn-10776-story.html>, archived at <https://perma.cc/7L5V-TCAA>.

³⁵ Fidler, *supra* note 29, at 89 (describing the ICJ’s categorical analysis of the use of force prohibited by the Charter except in self-defense as example of legalism).

individuals and groups, whether within or beyond the United States, have played a decisive role.

II. PUBLIUS V. MEIN KAMPF: TOWARD A LATCRITICAL LEGAL GENEALOGY

A. *The Camarena Trilogy: The Doctrinal Creep of Fascism*

The three cases I want to focus on are: *United States v. Verdugo*,³⁶ *United States v. Alvarez-Machain*,³⁷ and *Sosa v. Alvarez-Machain*.³⁸ The first two cases have dissents, and the difference between the opinion of the Court and the dissents marks the battlefield—the theater of constitutional war. The third case is the most complicated and the most problematic precisely because there is no dissent, when dissent was entirely in order and necessary. Let's take each case, one at a time and then see what they show us all together as a trilogy.

1. Reactivating the Legal Structure of Imperial Power: *United States v. Verdugo*

In *United States v. Verdugo*, the Court addressed the question whether the 4th Amendment governs United States agents engaged in police actions beyond the territorial boundaries of the United States. The case involved a DEA agent investigating Mexican drug cartels. Enrique Camarena, known to his friends and colleagues as Kiki, was abducted, tortured and murdered while investigating the drug cartels in Mexico. Verdugo was suspected of being involved in his torture murder, and Kiki's friends and colleagues at the DEA were very interested in apprehending and convicting anybody involved in his abduction, torture, and murder. To this end, the DEA coordinated with Mexican police officials to have Verdugo's house in Mexico searched without a warrant. The search produced credible evidence, and the question was whether the warrantless search was governed by the Constitution such that Verdugo could assert 4th Amendment rights to suppress the evidence.

Writing for a plurality of the Court, then Chief Justice Rehnquist concluded that the 4th Amendment does not apply extraterritorially to protect Verdugo because Verdugo was "not one of the people."³⁹ In Rehnquist's view, the scope of the 4th Amendment's limitations on police action is determined by whether government action infringes on the rights of the people because the Framers' intent was to protect the people of this country against its government and not to protect the people of other countries. According to Rehnquist,

³⁶ *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

³⁷ *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

³⁸ *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

³⁹ *Verdugo-Urquidez*, 494 U.S. at 265.

“The people” protected by the Fourth Amendment, and by the First and Second Amendments and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.⁴⁰

Justice Brennan’s dissent invoked the Framers’ understanding that the rights enumerated in the Bill of Rights were unalienable, universal, and fundamental natural rights. These rights were not created by the federal government or the Constitution, but instead preceded both and provided each their grounds and legitimacy before the laws of nature and nature’s God. The form of government established by the Constitution was prohibited from violating the rights enumerated in the Bill of Rights, not because of the citizenship or the status of the rights holder, but because a government of limited power could not act outside the boundaries of the power conferred. The government established by the Constitution was never granted the power to violate the rights enumerated in the Bill of Rights. As Brennan put it:

[T]he Framers of the Bill of Rights did not purport to “create” rights. Rather, they designed the Bill of Rights to prohibit our Government from infringing rights and liberties presumed to be pre-existing. See, e.g., U.S. Const., Amdt. 9 (“The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people”). . . Bestowing rights and delineating protected groups would have been inconsistent with the Drafters’ fundamental conception of a Bill of Rights as a limitation on the Government’s conduct with respect to all whom it seeks to govern. It is thus extremely unlikely that the Framers intended the narrow construction of the term “the people” presented today by the majority.⁴¹

2. Rendering Treaties: *United States v. Alvarez-Machain*

United States v. Alvarez-Machain involved another Mexican national, who was wanted in the United States and apprehended in Mexico. His is a 1980s case of rendition. He was kidnapped in Mexico and brought to the United States to be prosecuted. The question before the Court was whether he could be prosecuted after Mexico objected to the fact that his apprehension had been rendered in violation of the United States Extradition Treaty with Mexico. Rehnquist again wrote the opinion for the Court with a dissent, in this case, by Justice Stevens.

According to Rehnquist, Alvarez-Machain could be prosecuted in federal court notwithstanding his rendition from Mexico because the extradition

⁴⁰ *Id.*

⁴¹ *Id.* (Brennan, J. dissenting).

treaty with Mexico did not expressly prohibit the parties to the extradition treaty from kidnapping each other's citizens.⁴² There was, in Rehnquist's reading, nothing in the language of the treaty that expressly provided that the state parties to the treaty would refrain from crossing territorial boundaries to kidnap each other's nationals, nor was there any reason to imply such a term notwithstanding the conceded fact that cross border incursions for purposes of rendering a national of the territorial state violated both the principle of territorial sovereignty under both the U.N. Charter and the Charter of the Organization of American States⁴³ as well as the human rights of the rendered individual as recognized by international human rights including the International Covenant on Civil and Political Rights.⁴⁴ Since territorial incursions for purposes of rendition were not expressly prohibited by the extradition treaty, they were not governed by the treaty, and Alvarez-Machain could therefore be prosecuted in federal court notwithstanding Mexico's objection.

This decision provoked a tremendous dissent by Justice Stevens. Although Stevens missed the opportunity to activate by reference the prohibition on extraordinary renditions as a matter of international civil and political human rights law, he did note that everything about international law prohibits the rendition of a foreign national as a matter of national sovereignty. He further noted that the refusal to recognize this prohibition as an implied term of the extradition treaty rendered the treaty nonsensical and was incongruous with prior precedents in which the Court had implied terms drawn from general principles of international law in its treaty interpretation. The dissent obviously did not prevail, but what is important here is to remember that the case I am making is that the emancipatory objectives of the LatCrit project have a stake in the republican institutions of the Enlightenment project that produced the Constitution, and that a renewal of these institutions could materially assist in the struggle against the fascist turn linking Trump's policies to Hitler's expressed vision of the elements of a fascist state.

In the interpretative battle over the extraterritoriality of the 4th Amendment, Rehnquist's opinion for the Court in *Verdugo* draws a sharp distinction between citizen and noncitizen. To be sure, Rehnquist's opinion casts the category of protected rights holder more broadly than formal citizenship, to include noncitizens with substantial connections to the United States. Nevertheless, Rehnquist's interpretation of the line between state power limited by the Constitution, and state power not so limited, is grounded on a sharp distinction between "the people" whose fundamental rights to liberty and

⁴² *Alvarez-Machain*, 504 U.S. at 663. According to Rehnquist, "[t]reaty says nothing about the obligations of the United States and Mexico to refrain from forcible abductions of people from the territory of the other nation, or the consequences under the Treaty if such an abduction occurs."

⁴³ *Id.* at 666.

⁴⁴ *United Nations: International Covenant on Civil and Political Rights*, 61 AM. J. OF INT'L L. 870 (1967).

security are protected by the 4th Amendment and the “non-people,” whose fundamental rights of liberty and security are not so protected.

This sharp distinction, which in our context recalls the exhortation of MEIN KAMPF that the fascist state must draw a sharp distinction between citizen and noncitizen, is itself to be sharply distinguished from the understanding of state power reflected in Brennan’s dissent, which invokes the Framers’ repeated assertions that the rights protected by the Constitution are natural, universal, and bestowed not by the Constitution but by the laws of nature and nature’s God. This original understanding, in Brennan’s view, requires extraterritorial application of the 4th Amendment to govern the extra-territorial projection of state power. In this view, the rights protected by the 4th Amendment limit the exercise of state power because state power was never authorized to violate such rights. Since the power of the state is limited by the Constitution that established and enumerated its powers, the state lacks the power to violate rights understood to pre-exist the formation of the government. Not emanating from, nor dependent upon the state, these rights do not depend upon the citizenship status of the rights holder, but rather belong to all persons by virtue of their human being.

In the debate over the rendition of *Alvarez-Machain*, we again discern the outlines of a battle front. Whereas Hitler’s promotion of fanatical nationalism underwrote his attack on international understanding, reconciliation and specifically the League of Nations, the Framers’ case for union was grounded on the pursuit of peace and the belief that peace was more likely to be secured by union of the states than by the independence that pursuit of fanatical nationalism would have caused any one or all of them to demand. The United States is a deeper and more extensive union of states than the League of Nations and reflects the belief that the foundation of prosperity is peace and the foundation of peace is union. Thus, in *Federalist Paper 3*, John Jay wrote that the single most certain cause of just war against a state was its violation of treaties and direct aggression against the territorial sovereignty of another state.⁴⁵ In this paper, Jay grounded his case for union of the separate states under one national government on the argument that union would limit the likelihood that any one state would engage in treaty violations or direct aggression against foreign countries. A key argument for union was to prevent the states from triggering just cause of war against the people through the violation of treaties. Union would achieve this by centralizing the interpretation of treaties in the federal courts under one Supreme Court and by taking the power to declare or conduct war away from the states.

It is worth noting that *Alvarez-Machain*’s rendition was executed after a change of view occurred within the executive branch.⁴⁶ As Justice Stevens notes, “at one point” it was the considered position of the Office of Legal Counsel that searches and seizures conducted without consent within the

⁴⁵ John Jay, *Federalist 3*, in THE FEDERALIST PAPERS 36 (Clinton Rossiter ed., 1961).

⁴⁶ *Alvarez-Machain*, 504 U.S. at 686, n.34 (Stevens, J. dissenting).

territorial boundaries of another state violated international law and ought not to be conducted without consent of the foreign state. This opinion was subsequently revised and the Office of Legal Counsel was caused to issue a new opinion concluding that the president had the authority to override customary international law. This change of opinion happened in 1989 under the tenure of none other than Trump's current Attorney General William P. Barr.⁴⁷ Stevens point is that executive reinterpretations of a treaty to allow for actions that the treaty in no way authorizes should not influence the Court's interpretation, which should construe the treaty according to established canons of treaty interpretation.⁴⁸ This call for the fair judicial interpretation of treaty obligations is precisely the role imagined for the Court to secure the United States from the consequences of treaty violations that would give other countries just cause to war against us,⁴⁹ while Rehnquist's deference to the executive's violations of international law moves us closer to the fascist theory of the state.⁵⁰

3. Strategic Abdications of Original Understandings: *Sosa v. Alvarez-Machain*

Sosa v. Alvarez-Machain was decided without dissent. The case involves a situation similar to the other two. In fact, to be precise, after *Alvarez-Machain* was rendered, he was tried in the United States and acquitted. He then brought a lawsuit under the Alien Tort Claims Act against the Mexican official who participated in his abduction from Mexico. The question presented was whether he as an alien could sue in United States federal court for a tort committed against him in violation of the law of nations. His claim was that rendering him was a violation of the law of nations and that he therefore had grounds to bring a lawsuit under the Alien Tort Claims Act. The unanimous decision by the Supreme Court was that he could not.

What is so fascinating about the Court's decision in *Sosa* is the fact that *Alvarez-Machain* could not bring an action under the Alien Tort Claims Act because according to the Court, our current-day understanding of international law *has changed* since the Framers' generation. According to the Court,

[T]he prevailing conception of the common law has changed since 1789 in a way that counsels restraint in judicially applying internationally generated norms. When § 1350 was enacted, the accepted conception was of the common law as 'a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute.' *Black and White Taxicab & Transfer Co. v. Brown and Yellow Taxicab & Transfer Co.*, 276

⁴⁷ *Id.* (Stevens, J. dissenting).

⁴⁸ *Id.* at 686 (Stevens, J. dissenting).

⁴⁹ Jay, *supra* note 45 at 36.

⁵⁰ *See, e.g.,* Hitler, *supra* note 14, at 385–86.

U.S. 518, 533, 48 S.Ct. 404, 72 L.Ed. 681 (1928) (Holmes, J., dissenting). Now, however, in most cases where a court is asked to state or formulate a common law principle in a new context, there is a general understanding that the law is not so much found or discovered as it is either made or created.⁵¹

The Framers' generation believed that when the judiciary examined the law of nations in order to determine whether there was a private cause of action, the judge was engaged in the practice of discovering the law. We now understand the judicial process differently. Now we understand the inescapable discretion judges exercise when they engage in this kind of analysis. We do not say they are discovering the law. We say they are making the law. As a result, the Court is going to look very carefully and limit the instances in which judges engage in law making to cases in which the violation is recognized as having the same status as violations recognized in the 18th century, for example, piracy and violations of safe conducts, thus dramatically limiting the actions that may be brought by aliens by virtue of a federal court finding a cause of action under the law of nations.

This understanding substantially restricts the direct relationship between federal courts and international law. As such, it is a significant departure from original understandings of what the federal courts were supposed to do with respect to international law. The earliest debates within the Washington Administration provide a good vehicle for understanding the status of the law of nations as federal law directly applicable to domestic cases by state and federal courts.⁵² Without a federal statute criminalizing violations of the international law of neutrality, George Washington ordered the criminal prosecution of individuals involved in assisting the French in belligerent acts against the English. To stop violations of the obligations of neutrality under the law of nations, Washington issued the Neutrality Proclamation and ordered the district attorneys to prosecute anyone found in violation of the law of nations with respect to neutrality.⁵³ In issuing the Neutrality Proclamation, Washington was taking care that the law of nations be faithfully executed. In taking jurisdiction over such prosecutions, the federal courts were recognizing the direct effect of international law as justiciable federal law. This is a very robust integration of international law as federal criminal law, and it is self-evidently the original understanding. However, the Court has now decided that our current understanding of "common law not as discoverable reflection of universal reason but, in a positivistic way, as a product of human choice," warrants departure from these original understandings in a manner that will shut the doors of the federal courts to claim-

⁵¹ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

⁵² See, e.g., David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932 (2010).

⁵³ *Id.* at 1020–39.

ants seeking remedies for tortious conduct in violation of the law of nations.⁵⁴

B. *High Crimes Make Hard Cases: Deconstructing the Event*

Now the question is what these three cases have to do with each other or with the LatCrit call to resist the fascist turn? What do these cases have to teach us about the way fascist doctrines insinuate themselves within the legal forms and structures of government established by the Constitution? To answer these questions, we need to recontextualize the cases in the event that precipitated them. This is the event that connects and grounds them. The three cases are all interconnected as a matter of fact because they all arise from the torture murder of DEA Agent Kiki Camarena. At the time of his murder, Camarena was in the process of investigating a Mexican cartel.⁵⁵ It was an unthinkable event that a DEA agent would be captured and tortured in Mexico. Camarena was abducted in 1985 in broad daylight across the street from the United States Consulate, and there is evidence that his abductors believed they could do this without fear of retaliation because Camarena was deemed “unprotected.”⁵⁶ He was deemed unprotected because he had pushed to shift the focus of the DEA’s investigation away from drug trafficking on the streets to the flow of money and money laundering, and part of the Mexican cartel he was investigating was involved with the CIA in the transfer of weapons to support the Contra war against the Sandinista government in Nicaragua.⁵⁷ The Contras were being funded and supplied in part through the participation of the drug cartels in the flow of money and weapons. The Contra operation was one of the biggest scandals of the Reagan administration. It broke in 1986, about a year after Camarena’s murder, resulting in the Iran-Contra hearings and the appointment of an Independent Counsel.⁵⁸ Camarena is believed to have been in the process of discovering the network of interconnections linking the Mexican cartel to the CIA and the covert operation to supply the Contra war, and so at this level, Camarena’s murder was a casualty of an agenda of preserving an unlawful covert operation.⁵⁹

⁵⁴ *Sosa*, 542 U.S. at 729.

⁵⁵ Juan Diego Quesada, “*The CIA Helped Kill DEA Agent Enrique ‘Kiki’ Camarena*,” *Say Witnesses*, EL PAÍS, Oct. 15, 2013, https://elpais.com/elpais/2013/10/15/inenglish/1381856701_704435.html, archived at <https://perma.cc/CY4G-V5FY>.

⁵⁶ William Branigin, *Trial in Camarena Case Shows DEA Anger AT CIA*, THE WASH. POST, Jul. 16, 1990, <https://www.washingtonpost.com/archive/politics/1990/07/16/trial-in-camarena-case-shows-dea-anger-at-cia/e91baa2d-7231-47c3-94f4-30196209ecd0/>, archived at <https://perma.cc/T6NS-5D9R>.

⁵⁷ Jason McGahan, *How a Dogged L.A. DEA Agent Unraveled the CIA’s Alleged Role in the Murder of Kiki Camarena*, LA WEEKLY, Jul. 1, 2015, <https://www.laweekly.com/how-a-dogged-l-a-dea-agent-unraveled-the-cias-alleged-role-in-the-murder-of-kiki-camarena/>, archived at <https://perma.cc/FD42-Q4PT>.

⁵⁸ COVER UP: BEHIND THE IRAN CONTRA AFFAIR (David Kasper and Barbara Trent 1988).

⁵⁹ Branigin, *supra* note 55.

Does it make sense to separate the doctrinal innovations of the Supreme Court's decisions in the three cases that emerged from the event of Camarena's torture murder from the context of the covert operation, whose plausible deniability were threatened by Camarena's investigations? To be sure, the doctrines articulated in these cases intervene in jurisprudential debates that predate the event of Camarena's torture murder, but the interpretations that prevailed in these cases did much to undermine the limitations the laws of the United States and the law of nations impose on the projection of United States power outside the territorial boundaries of the United States and to tighten restrictions on the federal courts' authority to render executive power accountable to either regime of law. This in turn operated to expand the freedom of the executive from the law, while simultaneously abdicating United States treaty obligations to a technical parsing that was laughably absurd and restricting the role of federal courts in developing and enforcing the law of nations.

The fact that the Court's decisions did these things in the apparent service of enabling and shielding Kiki's friends and colleagues in their quest to avenge his torture murder makes it easy to be confused about the significance and import of these cases. If these three cases are about securing justice for Kiki Camarena, then it is worth noting that the event that triggered the actions that led to these cases reaching the Supreme Court was the torture murder of a DEA agent that likely never would have happened if the Reagan Administration were not then conducting an illegal covert operation to overthrow the government of Nicaragua, or if in conducting such operation, it were not collaborating with criminal elements among the Mexican drug cartels, or if in collaborating with such criminal elements, it had not prioritized the plausible deniability of a covert operation over the life of this DEA agent. From this perspective, the Court could have better protected both Kiki Camarena and the rule of law if it had taken jurisdiction over the many cases through which private citizens, foreign nationals, and members of Congress sought to challenge and put a halt to the illegal "covert operations" of the Reagan Administration.⁶⁰ But the event of Kiki Camarena's torture murder is not the only context in which the three decisions raise concerns about the kind of government emerging from this time.

III. MAKING THE CONSTITUTION SAFE FOR INVASIONS AND TORTURE: A SECOND PERSPECTIVE ON THE LEGAL GENEALOGY OF THE FASCIST TURN

In the closing paragraph of his opinion for the Court deciding that the 4th Amendment does not apply to an extraterritorial search of a foreign national's home in his own country, Rehnquist asserted the need not to hamper

⁶⁰ *Dellums v. Smith*, 797 F.2d 817 (9th Cir. 1986); *Sanchez-Espinosa v. Reagan*, 568 F. Supp. 596 (D.D.C. 1983); *Sanchez-Espinosa v. Reagan* Center for Constitutional Rights, <https://ccrjustice.org/node/1628>, archived at <https://perma.cc/7N4Y-7R5J>.

the projection of American military power: "Situations threatening important American interests may arise halfway around the globe, situations which in the view of the political branches of our Government require an American response with armed force."⁶¹ His concern seemed to be that if the American military were to enter a foreign country and conduct search and seizure operations, soldiers and commanders might find themselves confronting 4th Amendment liability. Justice Brennan dismissed these concerns as ridiculous, not only for the obvious reason that a military invasion is not a police action, but for doctrinal reasons restricting application of the exclusionary rule in cases of exigent circumstances and restricting the recognition of *Bivens* liability in cases counseling hesitation.⁶² Interestingly, *Verdugo* was argued November 7th, 1989, a little more than a month before the invasion of Panama on December 20th of that year, and decided by the Court on February 28th of 1990 about a month after the invasion officially ended. During this invasion, Manuel Noriega was apprehended and subsequently prosecuted in the United States on charges of racketeering, drug trafficking, and money laundering.

The Panama invasion folds back on the foundation laid by the United States' departure from the law of the U.N. Charter which limits the use of force to instances of self-defense precipitated by an armed attack because in the invasion of Panama, as in the covert operations against Nicaragua, the United States did not suffer an armed attack. Instead, the administration of George H.W. Bush offered a shifting assortment of threadbare justifications for the invasion of Panama.⁶³ This was later followed in the 21st century with the invasion of Iraq, now predicated on the Bush Jr.'s theory of preemptive self-defense. The Reagan Administration's desire to kick the Vietnam Syndrome by projecting military power in defense of U.S. interests notwithstanding the law of the U.N. Charter can now in retrospect be seen as an important turning point away from the commitment to government under the rule of law which constitutes an increasingly recognized threat to the security of Latin American nation-states.⁶⁴

The doctrinal changes effectuated through the Court's decisions in the three cases arising out of Camarena's torture murder operate within this broader context in which the U.S. executive has been moving away from respect for the law of the U.N. Charter, its treaty obligations and the constitutional limits on executive power. The desire to preserve the deniability of a covert operation to overthrow a foreign government resulted in the torture murder of a DEA agent which in turn triggered a series of retaliations by

⁶¹ *United States v. Verdugo-Urquidez*, 494 U.S. 259, 275 (1990).

⁶² *Id.* at 292–93 (Brennan, J. dissenting).

⁶³ Louis Henkin, *The Invasion of Panama under International Law: A Gross Violation*, 29 COLUM. J. TRANSNAT'L L. 293 (1991).

⁶⁴ Julian Borger, *Latin Americans fear precedent set by legal justification for Syria Intervention*, THE GUARDIAN, APR. 2, 2019, <https://www.theguardian.com/world/2019/apr/02/latin-americans-fear-precedent-set-by-legal-justification-for-syria-intervention>, archived at <https://perma.cc/N8AD-SV6B>.

executive officials. These retaliatory actions in the form of warrantless searches and illegal renditions violated established constitutional doctrines, treaty obligations and customary international law, to which the Supreme Court responded by changing its interpretation of constitutional law, treaty obligations and the justiciability of violations of the law of nations in ways that departed even further than the executive violations from the fundamental values and principles of the legal order established by the Constitution—moving in each case away from the original understandings reflected in the principles articulated in the Federalist Papers and closer to institutionalizing legal elements Hitler ascribed to the fascist state in *MEIN KAMPF*: these include the sharp distinction between citizen/noncitizen, the leadership principle which liberates the leader from the limitations imposed by law, the rejection of international law, and emphasis on national force.

IV. EVERYTHING NEW IS OLD: SEDIMENTED FASCISM AND THE NEED FOR A NEW LATCRITICAL UNDERSTANDING OF “THE PEOPLE”

The deepest structure connecting these cases is one that goes even further back in time, but also reaches forward into today, and will likely stretch beyond this moment into the future if nothing is done to reverse its trajectory. What is the significance of the doctrines these cases destabilized and the innovations they established? Legal doctrines tend to have a life of their own insofar as they can be separated from the context in which they are first introduced. If we examine the reasoning of Rehnquist’s opinion in *Verdugo*, we see that the 4th Amendment is not applicable extraterritorially to protect Verdugo because Verdugo was determined not to be one of “the people.” Brennan correctly rejected this formulation of the reasoning that informs the 4th Amendment, but none of the Justices noted the uncited case that lurks in the background. That uncited case is *Dred Scott v. Sandford*.⁶⁵ In this case, on the eve of the American Civil War that would end the totalitarian power afforded slave-owners by the positive laws of the slave states, the Supreme Court decided that Dred Scott was unable to bring a lawsuit in federal court to challenge the legality of his enslavement because he was not one of the people.

The Court’s opinion in *Dred Scott* reveals the original betrayal of the Enlightenment project that from the beginning set the country on a collision course, pitting the logic of republican political science against the totalitarian logic of chattel slavery. The great compromises that established the union of slave and free states established a form of government understood to be republican, a government of limited power, limited by the consent of the governed and the prior existence of inalienable and universal rights endowed to all by the Creator of all, but there were exceptions. In the case of *Dred Scott*, the exception was for slavery and for slaves, to whom totalitarian power could be applied because, in the words of Chief Justice Taney, they were not,

⁶⁵ *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

nor ever could become, a part of the people. *Dred Scott* was not cited in *Verdugo*, but that is the genealogical origin of the logic of totalitarian power—a power not limited by the consent, nor deployed for the benefit of those whom it purports to govern. From this perspective, the exception made for chattel slavery is the breach through which totalitarian power insinuated itself into the logic of republican institutions, subverted the trajectory of its Enlightenment origin and established the original fascism. Rehnquist’s opinion in *Verdugo* reveals how a doctrine buried deep within the sedimented layers of our constitutional history can at any moment be reactivated for a new mission.

Of course, nobody cares about Verdugo to the extent he was a torture murderer, but the doctrine decided in the case that denied the extraterritorial application of the 4th Amendment to the warrantless search of his home in Mexico continues to have a life of its own. In May 2019, the Supreme Court granted *certiorari* in the case of *Hernandez v. Mesa*.⁶⁶ The case involves a cross-border shooting in which a United States border patrol officer shot and killed a Mexican national in Mexico. The Mexican national was a 15-year-old boy, who was shot while playing a game with friends on the Mexican side of a cement culvert. The game involved running up the culvert to touch the barbed-wire fence separating Mexico from the United States and then running back.⁶⁷ After detaining one of Hernandez’s friends, Agent Mesa, standing on the United States side of the border, fired at least two shots at Hernandez, striking him in the face. The shot killed him, and his parents filed suit against Mesa, seeking damages under *Bivens* for violation of the 4th Amendment’s prohibition against unreasonable seizures and for violation of substantive due process under the 5th Amendment.⁶⁸ The case is relevant here because one of the issues presented is whether Hernandez could invoke the protections of the 4th Amendment against unreasonable seizures in order to assert a damages claim for a constitutional violation under *Bivens*.

In denying Hernandez’s *Biven*’s claim for unreasonable seizure, the 5th Circuit’s reasoning relied heavily on *Verdugo*, expressly declining the invitation to eschew Rehnquist’s reasoning in favor of the “practical and functional test” articulated by Justice Kennedy’s concurrence. In *Verdugo*, Justice Kennedy disavowed placing any weight on the reference to the right of “the people” in the text of the 4th Amendment, asking instead whether a warrant requirement imposed on extraterritorial searches would be “impracticable and anomalous.”⁶⁹ According to the 5th Circuit, “Justice Kennedy expressed no disagreement with the majority’s justifications.”⁷⁰ On petition for rehearing *en banc*, the 5th Circuit *en banc* determined that under *Verdugo*, a Mexican citizen with no significant voluntary connection to the United States may

⁶⁶ *Hernandez v. Mesa*, 139 S. Ct. 2636 (2019).

⁶⁷ *Hernandez v. United States*, 757 F. 3d 249 (5th Cir. 2014).

⁶⁸ *Bivens v. Six Unknown Fed. Bureau of Narcotics*, 403 US 388 (1971) (recognizing judicial remedy for damages for violations of constitutionally protected interests).

⁶⁹ *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277–78. (1990).

⁷⁰ *Hernandez v. United States*, 757 F. 3d 249, 265 (5th Cir. 2014).

not assert a claim under the 4th Amendment.⁷¹ Equally compelling was the question whether Hernandez could assert a claim for violation of substantive due process under the 5th Amendment on a showing that Mesa showed callous disregard by using excessive deadly force when Hernandez was unarmed and of no threat. Since the 5th Amendment is said to apply by its terms to “persons,” rather than “the people,” the reasoning of *Verdugo* does not preclude finding constitutional protection, but that protection may be denied if victims of cross border shootings are whipsawed between the doctrine of *Verdugo*, which denies them 4th Amendment protections for unreasonable seizures outside the territorial boundaries of the United States, and *Graham v. Connor*,⁷² which requires that claims grounded on excessive force be pled under the 4th Amendment and not under substantive due process of the 5th Amendment.

Thus, while the court’s refusal to protect the privacy and security of Verdugo’s home may not have triggered any moral outrage, the doctrine established in that case continues to play out in ways that reveal its fundamental indecency when Mexican nationals killed in Mexico by United States border patrol officers shooting from across the border are denied a constitutional remedy because, not being part of the people, their interest in life, liberty, and security is not protected by the United States Constitution. Here we see the consequences of a binary that divides the victims of state power into the people versus the non-people. It is a different context from *Verdugo*, a different context from *Dred Scott*, but the structure of power asserted is the same, that a power, not limited by the Constitution, can be exerted by agents of the United States.

V. CONCLUSION

In closing, the three cases that constitute the Camarena Trilogy need to be reversed. These are not the only cases that need to be reversed, but it is important that we begin thinking about the need to reverse the perversions that have been introduced into United States jurisprudence as dangerous precedents for the consolidation of a legal form of totalitarian power under the guise of Constitutional interpretation. Constitutional law is a site where real changes are effectuating a betrayal of the structure of power established by the Constitution—the structures of power that we need in order to have a nation under law. It is important that we fight for this at the level of legal concepts, to understand that this is what is at stake and to fight for the legal elements that distinguish totalitarian power from republican government everywhere and anywhere that it appears. This is the only way to prevent the reiteration of fascism from consolidating and promote instead the promise of a new birth of freedom, for all under a rule of law that respects the human rights of all.

⁷¹ *Hernandez v. United States*, 785 F.3d 117 (5th Cir. 2015).

⁷² *Graham v. Connor*, 490 U.S. 386 (1989).