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)
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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. Often-times, 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.


I. INTRODUCTION: SOCIALLY DISTANT YET CRITICALLY CONSCIOUS

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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. Despite ubiquitous and long-standing efforts to disenfranchise people likely to vote against Republican Party candidates, and the systematic exclusion of voters in U.S. territories, the

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majority of voters in the 2016 presidential election cast their ballots against Donald J. Trump. Nevertheless, in the aftermath of the election, the Repub-
lican-controlled federal government has acted daily to dispossess the majority of the nation’s peoples,\textsuperscript{10} with devastating consequences for the world.\textsuperscript{11}

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.\textsuperscript{12} 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.\textsuperscript{13}


\textsuperscript{11}See, e.g., \textit{Trump v. Hawaii}, 138 S. Ct. 2392, 2447 (2018) (analogizing to \textit{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, \textit{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}, \textit{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, \textit{Rebuking China, Trump Curtails Ties to Hong Kong and Severs Them With W.H.O.}, \textit{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, \textit{Why Bombs Made in America Have Been Killing Civilians in Yemen}, \textit{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, \textit{Trump Abandons Iran Nuclear Deal He Long Scorned}, \textit{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, 


\textsuperscript{13}See, e.g., Berta E. Hernández-Truyol, Angela Harris & Francisco Valdes, \textit{Beyond the First Decade: A Forward-Looking History of LatCrit Theory, Community and Praxis}, 17
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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. 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.

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, 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.

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


been documenting, for generations. 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, and the global resurgence of authoritarian


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

Thus, as we practice social distancing, scholars who affiliate with LatCrit 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.29 Decolonial, mujerista, queer, and transnational, these visions can help diverse peoples contend with the current crisis, dismantle its enabling conditions, and trans-
form them systemically. For LatCrit, these visions are necessarily grounded in the principle of antisubordination.30

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.”31 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.”32 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 “ appréhended as injured or lost if they are not first apprehended as living.”33 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.”34

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.35 LatCrit theory has always recognized and consistently argued that Law is instrumental to dispossession and often colors antidemocratic means as “le-


32 Id.


34 Id. at viii.

Despite being carved above the entrance of the Supreme Court of the United States, and despite the centurial efforts to enact legal reform and social change in the United States, 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. 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.
requires antisubordination perspectives, including those long-cultivated by LatCrit theory, community, and praxis.\footnote{41} 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,\footnote{42} 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,\footnote{43} 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-)fascist regimes.\footnote{44} 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,\footnote{45} yet nevertheless valorize Fascism (albeit usu-
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, and Germany with Nazism, all peoples had survived—or not—the cultural, political, social, and technological “innovations” of (little-f) fascism. 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. Third, América Pos-


46 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).

47 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.”).

48 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 Más: Informe de la Comisión Nacional Sobre la Desaparición de Personas (1984), translated and reprinted as Nunca Más: THE REPORT OF THE ARGENTINE NATIONAL COMMISSION ON THE DIS-
fascista reframes the United States after the “judicial coup” of Bush v. Gore. 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. The candidacy and presidency of Donald J. Trump, myriad

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49 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.”).

50 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.


“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.

extrajudicial killings of people of color by police officers,52 vigilantism by people who identify with white supremacy (a.k.a., the “alt-Right,” and/or “white nationalism”),53 and recent efforts by federal officers to surveil and
detain protestors,\textsuperscript{54} are but the most obvious manifestations of what some commentators have begun to name, the “Second Redemption,”\textsuperscript{55} 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.\textsuperscript{56} 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.\textsuperscript{57} 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.\textsuperscript{58} A couple of months later, he partici-


\textsuperscript{58} 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, Lat Crit (Apr. 9, 2004), 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
participated 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.59

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.60 In other words, around 43% of the Chileans who voted supported his continued rule,61 which began with the September 11, 1973 coup d’état against the elected government of President Salvador Allende.62 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,63 including the practices that rendered


59 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.

60 Tribunal Calificador de Elecciones de Chile, Sentencia Plebiscito (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%”).

61 Tribunal Calificador de Elecciones de Chile, supra note 60, at 11. About two percent of the ballots were either invalid or blank. Id.


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

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.”65 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,66 a panel presentation at the LatCrit XIII conference in 2008,67 the AALS Mid-Year Workshop on Poverty, Immigration and Property in 2013,68 and a LatCrit symposium article in 2015.69

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.70 For example, during an informal conversation at

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64 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 200,000 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, Philip E. Berryman trans., 1993), available at https://www.usip.org/sites/default/files/resources/collections/truth_commissions/Chile90-Report/Chile90-Report.pdf) [hereafter RETTIG COMMISSION REPORT].

65 Anderson et al., supra note 26, at 1897 n.77 and accompanying text.

66 See id.


69 González, supra note 27.

70 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. Recall that a bare majority of U.S. Supreme Court justices determined who won the 2000 presidential election, when they imprudently asserted jurisdiction and enjoined Florida from continuing to recount the ballots that its supreme court had ordered. 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, and the Korematsu coram nobis case, he reappraised his apprehension about the 2002 “Special Registration” program (a.k.a., the National Security Entry-Exit Registration System (NSEERS)), as not merely

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71 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.”).


73 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.”).


75 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).

redolent of the WWII-era curfew against and internment of Japanese immigrants and their U.S.-born children, 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, and the spectacle of its infamous workplace raids, evoked the famous poem by the German Lutheran pastor Martin Niemöller (1892–1984), First they came for the Communists. In other words, in light of the concept of América Posfascista,
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,\(^{81}\) 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.\(^{82}\))

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".


\(^{82}\) 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

The draconian enforcement of U.S. immigration law constitutes a spectacle through which the government asserts social control.⁸³ Though the origins of spectacular forms of social control are venerable,⁸⁴ the United States innovated this form of scapegoating in the twentieth century. Consider the Mexican “repatriation” campaigns of the 1930s,⁸⁵ the internment of Japanese Americans from 1942 to 1946,⁸⁶ and Operation Wetback in 1954.⁸⁷ 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?⁸⁸ Nevertheless, contemporary government officials and their apologists “justified” the targeting of people under the color of federal immigration law, spurious claims of na-


⁸³ 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).

⁸⁴ 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.”).


⁸⁶ See, e.g., Justice Delayed, supra note 77; Personal Justice Denied, supra note 24; Serrano & Miyami, supra note 75.

⁸⁷ See sources cited, supra note 74.

⁸⁸ 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.\(^{89}\)

In contrast, consider the Immigration and Nationality Act of 1965 (INA).\(^{90}\) 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.\(^{91}\) Similarly, the Refugee Act of 1980 recreated U.S. asylum and refugee law,\(^ {92}\) 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.\(^ {93}\) Notwithstanding flaws in each of these laws from the standpoint of civil rights advocates,\(^ {94}\) 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.\(^ {95}\)

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89 Cf. sources cited and accompanying text, supra notes 74-75, 77.
and after September 11, 2001, the erosion of those standards became an avulsion.

The creation of the Office (later Department) of Homeland Security (DHS),96 reorganization of the Immigration and Nationality Service,97 and initiation of DHS Operations Endgame,98 Community Shield,99 and Streamline100 are but a few mechanisms through which the United States radically remade immigration law enforcement. Notwithstanding certain policy changes during the Obama Administration,101 the first two decades of the


have become normalized, 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.”

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 Schweitz, Searching for a New Sanctuary Movement, Dissent (Jun. 25, 2010), 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.”).

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-009bd74ed1_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.”).

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, Wetbacks, 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/1NlZAxO), “illegal” has been an invidious, pernicious, and
Like white privilege and the transparency phenomenon function as to race, 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. The United States began 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.


107 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. Scholars have thoroughly documented, theorized, and critiqued the racially disparate impact of criminal law enforcement in the United States, including the growing criminalization of activities highly associated with impoverished, racialized, and otherwise marginalized peoples. 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.
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,112 people who credibly claim the privileges, immunities, and other properties of Whiteness113 act as peri-state vigilantes under the color of “Stand Your Ground” laws,114 for which 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 J ONES (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, OREEORIGINOL.COM, https://www.oreeoriginol.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-originol/Con-tent?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-originol-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.


114 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. ON CIVIL RIGHTS, EXAMINING THE RACE EFFECTS OF STAND YOUR GROUND LAWS AND RELATED ISSUES


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

First reported by \textit{The Guardian} in February 2015,\footnote{Spencer Ackerman, \textit{The Disappeared: Chicago Police Detain Americans at Abuse-Laden 'Black Site'}, GUARDIAN (Feb. 24, 2015); Philipp Batta, Mae Ryan & Spencer Ackerman, \textit{‘It’s a Domestic Black Site’: Inside One Protester’s Secretive US Police Detention}, GUARDIAN (Feb. 24, 2015) (discussing a protester’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, \textit{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).} Homan Square exemplifies postfascism in the United States. Unlike \textit{los desaparecidos} of Argentina, Chile, and other countries of Latin America during their late-twentieth-century dictatorships,\footnote{See, e.g., sources cited, supra notes 17, 24, 51-54, 111-12.} or the extraordinary rendition of people during the ongoing U.S. War on Terror/ism,\footnote{On \textit{los desaparecidos} of Chile, see, e.g., \textit{Klein}, supra note 62, at 93-94; \textit{Kornbluh}, supra note 62, at 162; \textit{Rettig Commission Report}, supra note 64. On those of Argentina, see \textit{Nunca Más}, supra note 48.} neither military coup, nor ex-
tratterritorial warfare contextualizes it. Instead, for at least a decade, 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. 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. Until journalists, who were investigating a former Chicago police detective who became a military interrogator at the Guantánamo Bay prison, 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. Moreover, “At least one man was found unresponsive in a Homan Square ‘interview room’ and later pronounced dead.”


120 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.’”).

121 Ackerman, supra note 117.

122 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.”).

123 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 expose 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 theVietcong as a military policeman in Vietnam on black suspects in Chicago.”).

124 Ackerman, supra note 117.

125 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. Police records identified eighty-two percent of them racially as Black, twelve percent as Hispanic, and six percent as White. Despite substantial investigative journalism, and ongoing civil rights litigation, 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.

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, ICE “detention facilities,” which an

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127 Id. According to the 2010 census, Chicago’s demographics were 33% Black, 29% Hispanic, and 32% White. Id.
129 See Said, supra note 117, at 864 n.278 (“While several individuals detained in secret at Homan Square have sue 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).
130 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. 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).
131 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 four hours of Artesia.”) (citations omitted); Zachary Manfredi & Joseph Meyers, Isolated and Un-
increasing number of immigrant rights advocates have begun to call concentration camps, or federal and state prisons and jails, to discern that legal
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violence on a massive scale has become normalized in U.S. society. Indeed, nineteen years into the U.S. War on Terrorism, such violence may seem not violent at all but instead merely a “natural,” if unpleasant, phenomenon akin to morbidity, mortality, or “slow death.” In such ways, the ideology of América Posfascista (Postfascist America) functions to “justify” current sociological conditions, deny their continuity with past projects of openly white supremacist terror, and obscure how they interrelate with the ongoing protection of racial capitalism.

NORTHWEST: JAPANESE AMERICANS AND JAPANESE CANADIANS IN THE TWENTIETH CENTURY (Louis Fiset & Gail Nomura eds., 2005), at 183-207; Gonzalez, supra note 79, at 69; Edward Schumacher-Matos & Lori Grisham, Ed the Japanse Internment, NPR (Feb. 10, 2012), https://www.npr.org/sections/ombudsman/2012/02/10/14669 1773/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 J. FORUM 130 (Nov. 7, 2019); Sean McClive, It’s Time to Abolish ICE, NATION (Mar. 9, 2018), https://www.thenation.com/article/archive/its-time-to-abolish-ice/

134 Compare DANIELLE KAEBLE & MARY COWHIG, BUREAU OF JUSTICE STATISTICS, CORRECTONAL 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).

135 Compare DANIELLE KAEBLE & MARY COWHIG, BUREAU OF JUSTICE STATISTICS, CORRECTONAL 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).

136 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: 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, which presents itself domestically more like Huxley’s Brave New World than Orwell’s 1984, 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. As with other traditionally-subordinated communities, the combination of longstanding occupancy and persistent marginality fueled an in-

demics and activists have continuously sought to expand and develop.\textsuperscript{148} 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.\textsuperscript{149} 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.\textsuperscript{150} 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.\textsuperscript{151} 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.\textsuperscript{152} In short, we grounded the substantive insights and gains of prior and contemporary movements toward critical outsider jurisprudence.\textsuperscript{153} 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.\textsuperscript{154} Fundamentally, “OutCrit” signifies a position of multidimensional

\textsuperscript{148} “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).


\textsuperscript{151} 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).

\textsuperscript{152} 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 Demands of Law and Social Movements, 123 YALE L.J. 2740, 2744 n.6 (2015) (defining social movements in the context of “contention’s 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”).

\textsuperscript{153} See Hernández-Truyol et al., supra note 13, at 186; Valdes, supra note 148, at 1270-71.

\textsuperscript{154} 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.155

The LatCrit experiment in critical outsider jurisprudence156 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.157

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.158 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.159

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.160 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 Intergroup 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-

155 See generally Valdes, Unpacking Hetero-Patriarchy, supra note 144 (describing some of the sex/ gender and sexual orientation norms that underlie and animate androssexism and heterosexism to produce the patriarchal form of homophobia—heteropatriarchy—that still prevails in Euroamerican societies, including the United States, today).
157 Valdes, Rebellious Knowledge Production, supra note 13, at 145.
159 Id. at 443.
pled and Grounded; and (7) Balance Specificity and Generality in LatCrit Analysis to Ensure Multidimensionality.  

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.”  

For example, LatCrit programs have organized programmatic innovations combining notions like “rotating centers” and “shifting bottoms” 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. 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.  

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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161 Bender & Valdes, supra note 30, at 403-04.
162 Matambanadzo et al., supra note 158, at 443.
163 See Bender & Valdes, supra note 30, at 409.
164 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).
165 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).
166 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 and expanding scholarship on race and ethnicity in conversation with the larger legal literature in Critical Legal Studies and Critical Race Theory. 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. 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-
white binary.” As part of these challenges, LatCrit scholars have undertaken efforts to theorize race in conversation with ethnicity and reveal the false promise of color blindness in a world characterized by diversity and complexity. LatCrit scholars have also provided theoretical explication for the rise of post-racialism, examining how the post-racial turn impacts marginalized individuals.

In alignment with LatCrit’s commitment and values, 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


171 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.”


173 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.174 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.175 Although this has commitment has at times provoked controversy,176 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.177 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.”178 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.179 Ms. Preciado’s essay addresses a recurrent theme in the LatCrit literature by focusing on discrimination

175 “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.
176 Aoki & Johnson, supra note 167, at 1160-61.
177 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.
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, courts, government institutions, work and the basic trappings of citizenship 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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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. Activities and programs include many institutions such as departments, agencies, special purpose districts, and entities stemming from state and local governments. They also include government-funded educational institutions. The EEOC has interpreted the Title VI prohibition against national origin discrimination to protect individuals who have limited proficiency in English.

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. 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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189 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, 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. 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.

190 Steven A. Ramirez, Hate on the Ballot: Election 2020 and the Quest for a Diverse and Inclusive Democracy, 22 HARV. LATINX L. REV. — (2020).
191 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. 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.

192 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.\footnote{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).} 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.\footnote{Elizabeth M. Iglesias, Against Fascism, 22 Harv. Latinx L. Rev. — (2020).} 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.”\footnote{Id. at manuscript page 3. (Manuscript on file with the authors).}

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
articulations of fascism.\textsuperscript{196} 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 \textit{Dred Scott v. Sanford}.\textsuperscript{197} 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 (\textit{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 \textit{Camarena Trilogy} of cases:\textsuperscript{198} \textit{U.S. v. Verdugo-Urquidez},\textsuperscript{199} \textit{U.S. v. Alvarez-Machain},\textsuperscript{200} and \textit{Sosa v. Alvarez-Machain}.\textsuperscript{201} Using the \textit{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 \textit{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.\textsuperscript{202} 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 \textit{Camarena Trilogy} illustrates how fascism creeps through and corrupts Enlightenment-based institutions like courts. Ultimately, the \textit{Camarena Trilogy} undermines crucial limits that had been in place under U.S. law and the law of nations.\textsuperscript{203} In addition, the \textit{Camarena} cases also limit judicial authority to check the executive branch. For example, in \textit{Verdugo}, the Supreme Court refused to expand the protections of the 4th Amendment’s prohibition against unreasonable searches and seizures and

\begin{thebibliography}{99}
\bibitem{196} Id. at manuscript page 4 – 6.
\bibitem{197} 60 U.S. 393 (1857).
\bibitem{198} Iglesias, \textit{supra} note 194.
\bibitem{199} 494 U.S. 259 (1990).
\bibitem{200} 504 U.S. 655 (1992).
\bibitem{201} 542 U.S. 692 (2004).
\bibitem{202} Iglesias, \textit{supra} note 194.
\bibitem{203} Id.
\end{thebibliography}
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.”

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. 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*, 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. 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* 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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204 Id.
205 Id.
207 Iglesias, supra note 194.
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, 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. 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.


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 antisubordination praxis that challenges laws, regulations, policies, and practices that, by intent or effect, enforce the subordinate sociolegal status of historically oppressed groups.211 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.212

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.213 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.214

211 Matambanadzo et al., supra note 158, at 443.
212 Accord Valdes, supra note 36.
213 Matambanadzo et al., supra note 158, at 443.
214 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. Critical Justice: Systemic Advocacy in Law and Society 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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215 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).

216 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,217

Con safos.218

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

218 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).219*

<table>
<thead>
<tr>
<th>Article</th>
<th>Number of Citations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Matthew W. Finkin, <em>Quatsch!</em>, 83 MINN. L. REV. 1681, 1705 n.95 (1999).</td>
<td>8</td>
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<td>Garrett Epps, <em>Circles of Exile: A Response to Professor Forbath</em>, 51 DUKE L.J. 465, 469 n.17, 470 n.31 (2001).</td>
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</tbody>
</table>

219 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).
<table>
<thead>
<tr>
<th>Author</th>
<th>Title</th>
<th>Citation</th>
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<tbody>
<tr>
<td>David Abraham</td>
<td>Comments on the University of Miami-University of Leipzig Bi-National Conference in Leipzig, 10 U. Miami Int’l &amp; Comp. L. Rev. 1, 8 (2002).</td>
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<td>Martin Klinke</td>
<td>40/68—“We Are Not Going to Defend Ourselves Before Such A Justice System!”—1968 and the Courts, 10 German L.J. 261, 270-71 (2009).</td>
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<tr>
<td>Author(s)</td>
<td>Title</td>
<td>Journal/Volume/Publication Details</td>
</tr>
<tr>
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<td>-------------------------------------------------------</td>
</tr>
<tr>
<td>Conrado Hübner Mendes</td>
<td><em>Chapter 8 Political Deliberation and Constitutional Review</em></td>
<td>18 Ius Gentium 121, 122 (2013).</td>
</tr>
<tr>
<td>Margaret Hu</td>
<td><em>Bulk Biometric Metadata Collection</em></td>
<td>96 N.C. L. Rev. 1425 (2018).</td>
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