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# Foreword to LatCrit 2017 Symposium: What's Next? Resistance Resilience and Community in the Trump Era

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# Foreword to LatCrit 2017 Symposium: What’s Next? Resistance Resilience and Community in the Trump Era.

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## I. INTRODUCTION

In the LatCrit tradition, storytelling is an important aspect of knowledge production.<sup>1</sup> The task of this symposium issue in general, and this Foreword in particular, is to tell the story of LatCrit XXI. The story of LatCrit XXI, and its theme What's Next, cannot be told without reference to the story of Election Day 2016. For many of us who voted against Donald Trump, the story of Election Day 2016 represents an important moment in the LatCrit Community.

On Election Day 2016, those who voted against Donald Trump included a coalition of people that exist in relation to the Democratic Party of the United States. The coalition, particularly its leftmost wing, can be hard to pin down. This coalition included a majority of young people<sup>2</sup> and the majority of African American, Asian American, and Latino voters.<sup>3</sup> It also included a variety of individuals whose political commitments fall to the left of the mainstream Democratic Party. We label ourselves in diverse ways and as Walt Whitman might say, we

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<sup>1</sup> In Critical Race Theory, the use of narrative is a methodology widely employed. E.g., Robert A. Williams, Jr., *Vampires Anonymous and Critical Race Practice*, 95 MICH. L. REV. 741 (1997) (utilizing storytelling to develop a concept of critical race practice). Storytelling narratives are also a crucial aspect of feminist legal theory written by women of color. E.g. PATRICIA J. WILLIAMS, *ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* (Harvard Univ. Press 1992) (employing narrative storytelling to highlight the tensions between race and rights). The LatCrit tradition exemplifies some of the most compelling and memorable examples of this style of legal scholarship. See e.g., Michael A. Olivias, 34 St. Louis U.J. 425 (1990), available at [http://www.elegantbrain.com/edu4/classes/readings/depository/race/delg\\_stef\\_2.pdf](http://www.elegantbrain.com/edu4/classes/readings/depository/race/delg_stef_2.pdf) (last visited March 20, 2018); Margaret Montoya, *Máscaras, Trenzas, Y Greñas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 17 Harv. J. of Law & Gender 185 (1994); Elvia Arriola, *Welcoming the Outsider to an Outsider Conference: Law and the Multiplicities of the Self*, 2 Harv. Latino L. Rev. 397 (1997). LatCrit has also pushed legal scholars to consider narrative and storytelling outside of the written word, particularly in popular culture. Pedro A. Malavet, *Literature and the Arts as Antisubordination Practice: LatCrit Theory and Cultural Production: Confessions of an Accidental Crit*, 33 U.C. Davis L. Rev. 1293, 1303 - 06 (2000) (recounting how storytelling in popular culture through music and visual arts plays a role in identity construction, culture, and politics).

<sup>2</sup> Data from the election reveals that the Senator Clinton won a majority among voters ages 18 - 29 and at least 50% of voters ages 30 - 44. Walbert Castillio & Michael Schramm, *How We Voted - By Age, Education & Sexual Orientation*, USA Today, November 9, 2016, at <http://college.usatoday.com/2016/11/09/how-we-voted-by-age-education-race-and-sexual-orientation/> (last visited March 20, 2018).

<sup>3</sup> Skye Gould and Rebecca Harrington, *7 Charts to Show Who Propelled Trump to Victory*, Business Insider (November 10, 2016), at <http://www.businessinsider.com/exit-polls-who-voted-for-trump-clinton-2016-11> (last visited March 20, 2018).

contain multitudes.<sup>4</sup> We are crits, progressives, social democrats, labor greens, socialists, communists, anarcho syndicalists, anarcho communalists, or some other ideology that maps to the left of the conservative neoliberal center that typifies mainstream politics in the United States. For many in this coalition, the story of Election Day 2016 is often told as a day of cautious optimism turned to confused disbelief and horror.

On Election Day, the people of the Center Left in the United States knew what we had to do. We (often ambivalently) proceeded to our polling place because in our core, we believe in the people and we believe in democracy. So we vote. Does it matter that after the votes are cast, Hillary Clinton will probably disappoint us? Scratch that. She would inevitably disappoint us. After all, Hillary Clinton was a solid center left democrat,<sup>5</sup> a position that is bound to disappoint those who believe in open borders for the free movement of people not just corporations, the dismantling of the prison industrial complex, universal health insurance, free college tuition, a strong social welfare system, the fundamental fact that money from big business corrupts politics. But we would come out and we would vote. Some of us, safely secure in our states or defiant in our principles, cast votes for third party candidates

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<sup>4</sup> This left coalition exists simultaneously in agreement and dissent with the Democratic Party of the United States. Although it often votes in solidarity with the party, it is deeply conflicted and its fundamental values are often contradicted by the constant triangulation around racism, classism, and xenophobia, the perpetual war mongering and unquestioning loyalty to the mythos of “the troops,” and the neoliberal market driven centrism that characterizes the Democratic Party. But this coalition, in all its contradictions mirrors the complex self in Walt Whitman’s *Song of Myself*. Whitman wrote, “Do I contradict myself?/Very well then I contradict myself/ (I am large, I contain multitudes).”

<sup>5</sup> There are debates or not about whether Senator Clinton was a significantly progressive enough candidate to satisfy the left wing of this coalition. Many believe that her presidential loss indicates a serious problem with centrism in the Democratic Party Agenda. Eric Bradner, *Amid 2020 Buzz, Warren Urges Democrats to Reject Centrist Policies and Move Leftward*, CNN.com, August 13, 2017, at <https://www.cnn.com/2017/08/12/politics/elizabeth-warren-netroots-nation/index.html> (last visited March 20, 2018); Richard (RJ) Eskow, *Why Centrism will Sink the Democrats (If they Have Not Already)*, Huffington Post.com (October 25, 2017), at [https://www.huffingtonpost.com/entry/why-centrists-will-sink-the-democrats-if-they-havent\\_us\\_59f0ada8e4b056c66b8893b0](https://www.huffingtonpost.com/entry/why-centrists-will-sink-the-democrats-if-they-havent_us_59f0ada8e4b056c66b8893b0) (last visited March 20, 2018). Many even see the future of the party tilting further left to more social democracy. Miles Kampf-Lassin, *Centrism is in a Death Spiral: Our Only Hope is to Let it Perish, In These Times* (July 9, 2017), at <http://inthesetimes.com/article/20314/centrism-mark-penn-andrew-stein-hillary-clinton> (last visited March 20, 2018); Alexander Blum, *American Centrism has Failed*, Quillette, November 9, 2017, at <http://quillette.com/2017/11/09/american-centrism-failed/> (last visited March 20, 2018).

who more closely reflected our values. But many of us inhaled sharply, sighed deeply, and pulled the lever for the Democrats again. In doing so, we often took cold comfort. After joining together to elect President Barack Obama, the first (historically verified) non-white president,<sup>6</sup> in this election, our coalition would vote to do something that seemed impossible until recently – elect the first woman president. Most of the polls told us this would happen. And for many reasons, most of them having to do with the fact that candidate Donald Trump seemed like a fraternity prankster stuck in a joke that went on too long, we believed them. According to many accounts by those in the know, it seemed like Candidate Trump never believed he would be elected president<sup>7</sup> and had no real desire to assume the office.<sup>8</sup>

But the polls were wrong.<sup>9</sup> Exit polls seemed to diverge from the information that pollsters had gathered. As we watched, some of us at parties with many comrades, and others solitary and alone in front of a computer screen or phone, we saw states that trended purple or blue in the false-light of the pre-election data machine became burgundy and then red when the actual votes were counted. Districts that President Barack Obama won once or even twice were lost to President Donald Trump.<sup>10</sup> And while Senator Hillary Clinton won as many votes as President Barack Obama did in the 2012 election,<sup>11</sup> and while she

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<sup>6</sup> There has often been speculation about other historical figures and for the oldest established families in the United States, some mixed race ancestry is likely. Mitchell Owens, *Surprises in the Family Tree*, *New York Times*, January 8, 2004, at <http://www.nytimes.com/2004/01/08/garden/surprises-in-the-family-tree.html> (last visited March 20, 2018) (quoting Dr. Ira B. Berlin, as noting that, “If any branch of your family has been in America since the 17th or 18th centuries, Dr. Berlin said, “it’s highly likely you will find an African and an American Indian.””

<sup>7</sup> Michael Kruse, *He Was Surprised as Anyone*, *Politico*, November 11, 2016, <https://www.politico.com/magazine/story/2016/11/donald-trump-wins-2016-biographers-214448>

<sup>8</sup> *Id.*

<sup>9</sup> The pools overestimated Senator Clinton’s performance in key states. They were right to predict that she would receive the most votes but they overestimated her performance in key battleground states. Carl Blalik and Harry Enten, *The Polls Missed Trump*. We Asked the Polls Why, *Five Thirty Eight.com*, (November 9, 2016), at <https://fivethirtyeight.com/features/the-polls-missed-trump-we-asked-pollsters-why/> (last visited March 20, 2018).

<sup>10</sup> Kevin Uhrmacher, Kevin Schaul and Dan Keating, *These former Obama strongholds sealed the election for Trump*. *The Washington Post* November 6, 2016

<sup>11</sup> David Lauter, *Clinton won as many votes as Obama in 2012 — just not in the states where she needed them most* *Los Angeles Times* DEC 09, 2016 <http://www.latimes.com/politics/la-na-pol-election-final-20161209-story.html>

exceeded the number of votes President Donald Trump received,<sup>12</sup> she failed to obtain them in the ever important battleground states that decide the election. But at the end of the night it became clear that the impossible had truly become possible. The people in crucial battleground states ensured that Candidate Donald Trump received a majority of the electoral college votes. Candidate Donald Trump became, in this moment, President Donald Trump. And in the cold light of the screens, it became clear that we slipped into *El Mundo Malo*.

*El Mundo Malo* is a concept that draws heavily on Mestizo *bruja* traditions of Chicano and LatinX people with indigenous heritage that live on both sides of the border. Fleshed out by Wiccan Shaman Starhawk,<sup>13</sup> we learn that typically, most of us exist in the world of *el mundo bueno* – we catch the hand rail as we go down the stairs, we pick up the baby before it reaches the hot pan on the stove, we pull back our friend before she crosses into a fast moving car’s path. But the veil between the worlds is gossamer thin. At any time, it is easy – so easy – to slip into *el mundo malo*. In *el mundo malo*, we break our necks on the stairs, the baby is blinded by the hot scalding water, and our friend is killed by the speeding car. *El mundo malo* is the world where timing is not on your side, where small pieces of bad luck snowball, and where the bad things keep coming. *El mundo malo* and *el mundo bueno* are part of the simultaneous dualism that anchors the worldview of some who practice the old indigenous traditions.<sup>14</sup> As in many non-Western worldviews, *brujas* embrace complexity, multiplicity, and contradiction. The realm of our existence is simultaneously and all at once good and bad, light and dark, beautiful and troubled, dangerous and safe. And many of us knew for certain, on November 8, 2016, that we had slipped, without notice, across the veil and into *el mundo malo*.<sup>15</sup> And once you

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<sup>12</sup> Sarah Begley Hillary Clinton Leads by 2.8 Million in Final Popular Vote Count Time December 20, 2016

<sup>13</sup> *Id.*

<sup>14</sup> Starhawk, *The Five Sacred Things* (year). *Brujas* are wise women and men, witches, mediums, shamans. There is an element of prophecy in legal advocacy and scholarship and at one might argue that we are descended from shamans, mediums, medicine women, witchdoctors, and wise women who know things. *LatCrits*, or “*LatCritters*,” have long challenged the cohesiveness and universality of the modalities of modernity. See Ediberto Roman, *Afterword: LatCrit VI, Outsider Jurisprudence and Looking Beyond Imagined Borders*, 54 *Rutgers L. Rev.* 1155, 1156 (2002) (characterising *LatCrit* as “an experiment of outsider scholarship that seeks to unmask the modalities of modernity.”).

<sup>15</sup> The veil between the worlds is thin and always subject to rupture. Many of us, perhaps, have long persisted in *el mundo malo* - we slipped into it awhile back. Maybe you trace it to the middle passage, or Wounded Knee, or the pacification of the Congo, or Jim

slip into *el mundo malo*, it takes some powerful magic, the magic of dreams, visions, and imaginations, to get back to the other side.

LatCrit XXI was an opportunity to join together with the LatCrit community and begin the process of making that powerful magic and fostering the dreams and visions that are so necessary for addressing the current state of politics and conditions in the legal academy. For many in the Critical and Progressive community of legal scholars, the events around November 8, 2016 constitute a crisis. We must all heed the crisis – of course – with our actions, our energy, our money, and our professional talents. The lives of wrongly incarcerated persons, the undocumented, and the vilified poor depend upon it. But dreaming, imagining, and re-envisioning is an essential part of the critical aesthetic and it is more crucial now than it has been before.

In the service of the fight against *el mundo malo*, however, dreams and visions are not enough. Persistent concerted actions are necessary to resist the status quo. This real life praxis of solidarity is one of the salient principles of LatCrit theory, a principled praxis from a positionality of anti-subordination that challenges practices and policies that, by intent or effect, enforce the secondary social status of historically oppressed groups.<sup>16</sup> In answer to this, those who resist and persist have marched in protests, intervened in our daily lives, taken up advocacy, written letters, made phone calls, given money, offered pro bono services, participated in teach ins, voted, and written scholarship to try to flip the world back to *el mundo bueno*. During these dark days, days in the shadow of *el mundo malo*, lawyers do their part. LatCrit has developed into a cohesive community of critical intellectuals who reveal and voice legal issues and analyze them by applying progressive principles and perspectives based on an ethos of anti-subordination and a strategic anti-essentialism.<sup>17</sup> Because of these commitments, the members of the LatCrit community are often experts on the dangers of *el mundo malo*. In our activism and praxis, we slog through *el mundo malo*, working with and advocating for the most vulnerable. The survivor of domestic violence, the

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Crow, or an internment camp, or the holocaust, or the founding of Israel, or some other event - maybe you feel it has been a more 20<sup>th</sup> Century endeavor, like something went wrong when Reagan was elected, or perhaps it was Bush v. Gore, or perhaps It started when we started deferring to Dubya, when we started putting up with torture, extradition, and mass surveillance.

<sup>16</sup> Sarudzayi M. Matambanadzo, Francisco Valdes, and Sheila Velez, A erword: Kindling the Programmatic Production of Critical and Outsider Legal Scholarship, 1996-2016, 37 Whittier L. Rev. 439, 443 (2016).

<sup>17</sup> Margaret Montoya, Margaret E., *Foreword: LatCrit at Ten Years*, 26(2006). Chicana/o-Latina/o L.aw Review, Vol. 26, No. 1, (2006).

undocumented migrant child worker, the African American teenage girl sterilized without her consent, the disaffected youth of the reservation yearning for a chance to work at the casino, the child raped by her uncle, the community plagued by toxic chemicals in their water, and more. We fight against *el mundo malo* with these individuals in terms of civil rights, we teach against it in terms of tort reform, we speak against it in our scholarship and our advocacy. And where we can, we help to usher in *el mundo bueno* – whether it’s on admissions or appointments committees, through litigation, in our classrooms, in a local church, or in volunteering in service to others. And we show up to confront *el mundo malo* in all its various forms – offering legal information at airports, providing counsel at detention centers, and walking women into clinics. And we march – for dreamers, for black lives, for fifteen, and even – when we are ambivalent – for pink pussy poised to grab back.

In this Foreword, we strive to contextualize “LatCrit XXI: What’s Next?” against the backdrop of two crises: the current political crisis in the United States and the continuing crisis of scarcity that impacts the legal academy. Through examination of these crises, we will reveal how LatCrit scholars, in their efforts to build community and in their commitment to critical outsider scholarship, are part of the constellations of resistance that struggle against *el mundo malo*. We will argue that LatCrit has become a necessary institution for those seeking to engage in persistent resistance and dissent in the critical and progressive community of scholars at home and abroad. While there are many real material improvements in the lives of subordinated persons in the United States, there is no doubt that the Presidential Election of 2016, with its embrace of a candidate who spoke what dog whistles only alluded at, is part of a violent and destructive backlash against minorities who have long been subject to the violence of exclusion and disenfranchisement.<sup>18</sup>

First, we will examine the character of President Trump’s campaign and trace how the promises he made on the campaign trail have led to action during the first half of his administration. Second, we will examine how social movement actors from a variety of political

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<sup>18</sup> As Steve Bender has noted, the reality is that subordination has a cyclical character. See, Steve Bender, Now More Than Ever: Reflections on LatCrit at Twenty, 10 Charleston L. Rev. 173, 182 - 85 (2016). Even as some aspects of the lives of subordinated racial minorities have improved in the United States, there is a constant effort to roll back progress and re-entrench the power of the dominant heteropatriarchal white supremacist settler colonial project. *Id.* Politicians develop new technologies of oppression to blunt the positive impact law might have while strengthening the legal justifications for the current distribution of power and privilege.



positions and identity positions in constellations of resistance have engaged in persistent and active dissent to the actions of the Trump Administration and the current Republican Congress. Then we will describe how the Trump Administration has crafted the status quo in ways that impact educators and social movement activists who care about education. We will examine this with a special focus on how the current environment impacts the legal academy and how it has impacted LatCrit as an organization and forced us to answer the question – What’s next? – for the organization, for individuals, for the movement. Then we will look at how the symposium papers contributed an answer to the question of what is next. We will argue that the papers reveal how the false binary between private law and public issues serves to perpetuate subordination in hidden and insidious ways.

## II. UNPRECEDENTED, UNPRINCIPLED, UNPROFESSIONAL: THE RISE OF THE TRUMP ADMINISTRATION IN THE UNITED STATES

In many ways, the 2016 Presidential Campaign deviated from the facade of civility and seriousness that typically enshrouds the political process in the United States.<sup>19</sup> While the deployment of racism and nativism to win elections is hardly a new tactic in U.S. politics,<sup>20</sup> the bald and blatant public use of small-minded prejudices<sup>21</sup> against a

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<sup>19</sup> Leading authority in cultural studies, Douglas Kellner, describes the tumultuous combative early days of the Trump Administration as a “shock to the political system and the body politic unparalleled in recent history.” *American Horror Show Election 2016 and the Ascent of Donald Trump*, ix (Sense Books 2017).

<sup>20</sup> In the United States, populist parties have long coalesced around such sentiments. See Thomas F. Pettigrew, *Social Psychological Perspectives on Trump Supporters*, 5 *J. of Soc. and Political Psychology* 107 (2017) (citing the rise of nativist parties like the Know-Nothings in the United States and similar events in Europe).

<sup>21</sup> As detailed in the famous interview with political operative Lee Atwater, Republicans learned how to deploy racism using more subtlety than previous generations of Dixiecrats. See Rick Perlstein, *Exclusive: Lee Atwater’s Infamous 1981 Interview on the Southern Strategy*, *The Nation*, November 13, 2012, at <https://www.thenation.com/article/exclusive-lee-atwaters-infamous-1981-interview-southern-strategy/> (last visited March 21, 2018). Presidential candidates like Richard Nixon and Ronald Reagan deployed the Southern Strategy to win over the South. Ben Fountain, *America at the Crossroads: REagan, trump, and the Devil Down South*, *The Guardian* March 6, 2016, at <https://www.theguardian.com/us-news/2016/mar/05/trump-reagan-nixon-republican-party-racism> (last visited March 24, 2018). According to Harry van der Linden, “Trump promoted violence and appealed to racism, nativism,

diverse array of subordinated groups in concert stands out in relation to other elections in modern memory.<sup>22</sup> As a candidate, President Donald Trump stoked the flames of racism,<sup>23</sup> ableism,<sup>24</sup> xenophobia,<sup>25</sup> and sexism.<sup>26</sup> He promoted violence as an answer to dissent,<sup>27</sup> and adopted

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xenophobia, Islamophobia, ableism, and misogyny.” Trump, *Populism, Fascism, and the Road Ahead*, 20 *Radical Phil. Rev.* 355 (2017).

<sup>22</sup> In the current media ecology, pioneered by President Donald Trump’s use of Twitter before and after the election, discourse has been characterized as overly simplistic, impulsive, and uncivil. Brian L. Ott, *The Age of Twitter: Donald Trump and the Politics of Debasement*, 34 *Critical Studies in Media Communication* 59 (2017).

<sup>23</sup> Lisa Desjardins, *Every Moment in Trump’s Charged Relationship with Race*, PBS News Hour (August 22, 2017), <https://www.pbs.org/newshour/politics/every-moment-donald-trumps-long-complicated-history-race> (chronicling Trump’s racist rhetoric and actions from the campaign). This racist rhetoric continued after President Trump assumed the office. *See e.g.*, Philip Bump, *Trump’s Candidacy and Presidency have been Laced with Racist Rhetoric*, *Washington Post*, January 22, 2018, at [https://www.washingtonpost.com/news/politics/wp/2018/01/11/trumps-candidacy-and-presidency-have-been-laced-with-racist-rhetoric/?utm\\_term=.d7d1cbbd4c36](https://www.washingtonpost.com/news/politics/wp/2018/01/11/trumps-candidacy-and-presidency-have-been-laced-with-racist-rhetoric/?utm_term=.d7d1cbbd4c36).

<sup>24</sup> Donald Trump Criticized for Mocking Reporter with a Disability, *BBC News* (November 26, 2017), <http://www.bbc.com/news/av/world-us-canada-34931215/donald-trump-criticised-for-mocking-reporter-with-disability>. Some scholars have even argued that President Trump’s election was made possible because of ableism deeply embedded in white working class culture. Andrew Harnish, *Ableism and the Trump Phenomenon*, 32 *Disability & Society* 423 (2017).

<sup>25</sup> Kate Reilly, *Here are All the Times Trump Insulted Mexico, at http://time.com/4473972/donald-trump-mexico-meeting-insult/ Muslims, Linda Sarsour, Trumps Anti-Muslim Rhetoric Helps Unite America Against Him, at http://time.com/5124920/president-trump-anti-muslim-policies/, and Elie Watkins and Abby Phillips, Trump Decries Immigrants from “Shithole” Countries Coming to the US, at https://www.cnn.com/2018/01/11/politics/immigrants-shithole-countries-trump/index.html.*

<sup>26</sup> Claire Cohen, *Donald Trump Sexism Tracker: Every Offensive Comment in One Place*, *The Telegraph*, July 14, 2017, at <https://www.telegraph.co.uk/women/politics/donald-trump-sexism-tracker-every-offensive-comment-in-one-place/>. This sexism is often cited as the true reason for Senator Clinton’s loss of the presidency. Mel Robbins, *Hillary Clinton Lose Because of Sexism*, *CNN.com* (May 3, 2017), at <https://www.cnn.com/2017/05/03/opinions/hillary-clinton-interview-sexism-robbins/index.html>.

<sup>27</sup> During the campaign, there was a documented history of President Trump promoting violence against protesters and dissenters on the campaign trail. Louis Jacobson and Manuel Tobias, *Has Donald Trump Never “Promoted or Encouraged Violence” as Sarah Huckabee has Claimed*, *Politifact* (July 17, 2017), at <http://www.politifact.com/truth-ometer/statements/2017/jul/05/sarah-huckabee-sanders/has-donald-trump-never-promoted-or-encouraged-viol/> (last visited March 21, 2018). President Trump’s willingness to promote violence and force has resulted in a number of plaintiffs filing lawsuits against him. Tina Nguyen, *Trump’s Violent Campaign Rallies Come Back to Haunt Him against Him*, *Vanity Fair*, May 2, 2017, at <https://www.vanityfair.com/news/2017/05/donald-trump-campaign-rally-lawsuits->

a hostile stance toward those invested in environmental sustainability. During the election and after the election, women have also received a loud and clear message from Donald Trump and his campaign. Although candidate Trump seemed committed to promoting particular individual women in his administration,<sup>28</sup> he was also a notorious philanderer<sup>29</sup> who admitted to engaging in sexual assault.<sup>30</sup>

After the election, President Trump persisted in representing the worst aspects of the “American Id.”<sup>31</sup> President Trump has publicly expressed racist views,<sup>32</sup> and failed to disavow white supremacists<sup>33</sup> and Nazis.<sup>34</sup> Although President Trump and the operatives in his administration seem to lack a robust understanding of how disability

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incitement (last visited March 21, 2018). See also, Harry van der Linden, *Trump, Populism, Fascism, and the Road Ahead*, 20 *Radical Phil. Rev.* 355 (2017).

<sup>28</sup> President Trump’s cabinet contains two women – Elaine Cho, the Secretary of Transportation and Betsy DeVos the Secretary of Education. Nikki Haley, former governor of South Carolina, was also appointed United States representative to the United Nations. Lilley Goren, *Few Women Hold Key Positions in Trump Administration*, Brookings Institute (May 12, 2017), at <https://www.brookings.edu/blog/fixgov/2017/05/12/few-women-hold-key-positions-in-trump-administration/>. He has also reserved a prominent high-profile, but unofficial, role for his daughter Ivanka Trump. *Id.* In close advisory non-cabinet level positions, President Trump has promoted women like his communications director, Sarah Huckabee, and his former campaign manager, Kellyanne Conway. Ali Vitali, *Thw White House Women who’ve Got Trump’s Back*, NBC News.com (September 18, 2017), at <https://www.nbcnews.com/politics/white-house/white-house-women-who-ve-got-trump-s-back-n799646>.

<sup>29</sup> Melina Delkic, *How Many Times Has Cheated on His Wives? Here’s What We Know*, Newsweek, January 12, 2018, <http://www.newsweek.com/how-many-times-trump-cheated-wives-780550>.

<sup>30</sup> In a conversation with Access Hollywood, President Trump said he would grab women in their genitals and start kissing them without asking permission. Billy Bush, *Billy Bush: Yes Donald Trump You Said That*, New York Times, December 3, 2017, at <https://www.nytimes.com/2017/12/03/opinion/billy-bush-trump-access-hollywood-tape.html>.

<sup>31</sup> Keller, *supra* note 19 note 19 at xv.

<sup>32</sup> Patrick Wintour, Jason Burke, and Anna Livsey, *‘There’s No Other World But Racist’: Trump’s Global Rebuke for Shithole Remarks*, *The Guardian* (January 13, 2018), <https://www.theguardian.com/us-news/2018/jan/12/unkind-divisive-elitist-international-outcry-over-trumps-shithole-countries-remark>.

<sup>33</sup> Ta-Nehisi Coates, *The First White President*, *The Atlantic* (October 2017), <https://www.theatlantic.com/magazine/archive/2017/10/the-first-white-president-ta-nehisi-coates/537909/> (arguing that Donald Trump embraces a white supremacist ideology).

<sup>34</sup> Rosie Grey, *Trump Defends White Nationalist Protestors: ‘Some Very Fine People on Both Sides’*, *The Atlantic* (August 15, 2017), <https://www.theatlantic.com/politics/archive/2017/08/trump-defends-white-nationalist-protesters-some-very-fine-people-on-both-sides/537012/>.

insurance and social security function,<sup>35</sup> the Trump Administration's budget attacked crucial safety net programs designed to protect children,<sup>36</sup> the elderly,<sup>37</sup> and people with disabilities.<sup>38</sup> Furthermore, under the Trump administration, Attorney General Jeff Sessions issued a memo rescinding interpretations of anti-discrimination law that included protections for transgender persons in the workplace.<sup>39</sup> The Trump Administration has also rolled back civil rights protections for transgender individuals in terms of education<sup>40</sup> and military service,<sup>41</sup> earning President Trump the title of "the most anti-transgender president in American history."<sup>42</sup>

The Trump administration has shown outright hostility toward immigrants and refugees. First, he has instituted what may be an unconstitutional<sup>43</sup> travel ban against citizens from Chad, Iran, Libya,

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<sup>35</sup> Michael Hiltzik, Trump's Budget Director Revives a Fact Free Conservative Attack on Disability Recipients, LA Times, March 20, 2017, at <http://www.latimes.com/business/hiltzik/la-fi-hiltzik-mulvaney-disability-20170319-story.html> (discussing an appearance on Face the Nation where a Trump's budget director argued that disability insurance is "very wasteful" and not "part of what people think of" when they think of social security).

<sup>36</sup> Jen Christensen, Trump's Budget Cuts Children's Health Insurance Program, CNN News (May 24, 2017), at <https://www.cnn.com/2017/05/24/health/chip-health-care-cuts-trump-budget/index.html>.

<sup>37</sup> Howard Gleckman, What Trump's Budget Would Mean for Senior, Forbes Magazine, February 18, 2017, at <https://www.forbes.com/sites/howardgleckman/2018/02/14/what-trumps-budget-would-mean-for-seniors/#186c583b58cf> (reporting that the President's proposals would freeze funding for programs serving seniors, reduce Medicare spending, and eliminate cost-sharing for the Medicare Part B Prescription Drug Program).

<sup>38</sup> Haley Sweetland Edwards and Chris Wilson, The Trump Budget Cuts Disability Benefits that Hurt Trump Counties Time, May 25, 2017, at <http://time.com/4788759/trump-budget-disability/>.

<sup>39</sup> Emma Green, The Department of Justice Takes a Stand Against Transgender Rights in the Workplace, The Atlantic ((October 5, 2017), at <https://www.theatlantic.com/politics/archive/2017/10/the-department-of-justice-takes-a-stand-against-transgender-rights-in-the-workplace/542154/>.

<sup>40</sup> Kory Turner & Anya Kamenetz, The Education Department Says it Won't Act on Transgender Student Bathroom Access, NPR (February 12, 2018), at <https://www.npr.org/sections/ed/2018/02/12/585181704/the-education-department-says-it-wont-act-on-transgender-student-bathroom-access>.

<sup>41</sup> W.J. Hennigan, Trump Announces he'll Bar Transgender People from Serving in the US Military, LA Times (July 26, 2017), at <http://www.latimes.com/politics/la-pol-updates-trump-tweets-transgender-military-service-htlmlstory.html>.

<sup>42</sup> Trump's Record of Action against Transgender People, Transequality.org, <https://transequality.org/the-discrimination-administration> (last visited March 11, 2018).

<sup>43</sup> The Ninth Circuit Court of Appeals, *Hawaii v. Trump*, 859 F.3d 741 (2017), *cert granted*, 502 U.S. \_\_\_\_, 137 S.Ct. 2080 (2017); *International Refugee Assistance Project v. Trump*, 837 F.3d 554 (2017), *cert granted*, 502 U.S. \_\_\_\_, 137 S.Ct. 2080 (2017).

North Korea, Syria, Venezuela, Somalia, and Yemen.<sup>44</sup> According to the Migration Policy Institute the changes in immigration policy and enforcement during the first year of the Trump administration are quite significant and concerning:

The most significant changes to date are the increase and broadening of immigration enforcement priorities, the elimination of temporary protections for noncitizens implemented by prior administrations, and the reduction in refugee admissions. The Trump administration has not only broadened the discretion of immigration enforcement agents to detain unauthorized immigrants far beyond those who have committed crimes, but it has also restored a nationwide system (known as Secure Communities) for identifying unauthorized immigrants stopped by local police and insisted on greater institutional cooperation from local law enforcement in identifying and holding them. In addition, the administration has cancelled several measures that currently shield more than 1 million unauthorized immigrants from deportation—from the Deferred Action for Childhood Arrivals (DACA) program to designations for Temporary Protected Status (TPS). The Trump administration, in its first year, also sharply reduced refugee admissions to their lowest levels since the formal U.S. refugee resettlement program was launched in 1980, and there are indications that it has slowed the processing of some family-based immigration applications, leading to a lower number of immigrant admissions overall.<sup>45</sup>

The administration has also changed the affirmative asylum adjudication priorities to allow USCIS “ to promptly place such

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(determining that the order violates the Establishment Clause by using nationality to enact religious discrimination).

<sup>44</sup> Ariane de Vogue, Supreme Court Sets Travel Ban Arguments for Final Day of Term, CNN.com (February 23, 2018), at <https://www.cnn.com/2018/02/23/politics/supreme-court-travel-ban/index.html>.

<sup>45</sup> Pierce, Sarah, Jessica Bolter, and Andrew Selee. 2018. *Trump's First Year on Immigration Policy: Rhetoric vs. Reality*. Washington, DC: Migration Policy Institute. P. 1

individuals into removal proceedings”<sup>46</sup> has vacated a decision that required full hearings for asylum seekers and is threatening to weaken the asylum protection for women survivors of domestic abuse.<sup>47</sup> Not satisfied with legislative action that expresses xenophobia and racism, President Trump became more explicit. President Trump expressed a racial preference for immigrants from the white Northern European nation of Norway, and disdain and contempt for immigrants from Haiti and Africa.<sup>48</sup>

President Trump’s administration is also one of the most unethical<sup>49</sup> and disorganized presidencies in the Modern Era. In terms of staff, President Trump’s administration has had high turnover. Key staff positions have been filled by individuals who have little experience in government<sup>50</sup> and, sometimes, no experience in the areas they have been asked to address.<sup>51</sup> The breadth and depth of the Trump Administration’s

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<sup>46</sup> <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-interview-scheduling>

<sup>47</sup> Jeff Bravin, Jeff Sessions to Rule on Asylum for Battered Woman, U.S. attorney general launches review of immigration-court precedent concerning domestic abuse victims, *The Wall Street Journal* March 12, 2018.

<sup>48</sup> Julie Hirschfeld Davis, et al., Trump Alarms Law Makers with Disparaging Words for Haiti and Africa, *N.Y. Times*, Jan. 11, 2018, at <https://www.nytimes.com/2018/01/11/us/politics/trump-shithole-countries.html> (labeling the non-European majority black country and continent “sh@th@l#s”).

<sup>49</sup> Donald Trump’s administration is rife with nepotism, Jamelle Bouie, What Exactly is Ivanka Doing? *Slate Magazine*, February 26, 2018, at <https://slate.com/news-and-politics/2018/02/ivanka-trump-makes-a-mockery-of-anti-nepotism-laws.html>. *See also*, Lachlan Markay, Make Nepotism Great Again: 20 Families Got Jobs in the Trump Administration, *The Daily Beast* November 20, 2017, at <https://www.thedailybeast.com/meet-the-trump-officials-making-government-a-family-business>, and many believe that his refusal to place his business interests in a blind trust violated the emoluments clause. Daniel Fisher, Don’t Expect Courts to Solve Donald Trump’s Conflict of Interests, *Forbes Magazine* January 12, 2017, <https://www.forbes.com/sites/danielfisher/2017/01/12/dont-expect-the-courts-to-solve-trumps-conflicts-of-interest/#334bb7e54865>

<sup>50</sup> Travis Waldron and Daniel Marans, Donald Trump’s Cabinet is on Track to be the Least Experienced in Modern History, *Huffington Post* November 24, 2016 at [https://www.huffingtonpost.com/entry/donald-trumps-cabinet-is-on-track-to-be-the-least-experienced-in-modern-history\\_us\\_5836f133e4b000af95edf18c](https://www.huffingtonpost.com/entry/donald-trumps-cabinet-is-on-track-to-be-the-least-experienced-in-modern-history_us_5836f133e4b000af95edf18c) (last visited March 21, 2018), Betsy DeVos, whose main experience in education is through private philanthropy, was widely regarded as unqualified for the position of Secretary of the Department of Education. *Id.*

<sup>51</sup> UN Ambassador Governor Nikki Haley is widely regarded as lacking experience in international relations. *Id.* And Dr. Ben Carson, President Trump’s pick to run the Department of Housing and Urban Development has no experience in housing development. *Id.* *See also* Dan Merica, Trump Education Pick Painted by Dems as Unqualified, *CNN.com* (January 18, 2017), at

ineptitude was on full display in response to Hurricane Maria in Puerto Rico.<sup>52</sup> In its feeble response to the Island, President Trump and his administration have abandoned the people of Puerto Rico in the wake of the devastation caused by Hurricane Maria. This abandonment of Puerto Rico cost thousands of lives,<sup>53</sup> as for a significant time after the storm the Trump Administration left millions of people without power and water.<sup>54</sup> And months after the hurricane, although FEMA ended food and water assistance,<sup>55</sup> the humanitarian crisis in Puerto Rico continues,<sup>56</sup> and almost 20% of the people on the Island still lack power.<sup>57</sup>

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<https://www.cnn.com/2017/01/17/politics/betsy-devos-education-nominee-donald-trump/index.html> (last visited March 21, 2018). Sometimes, President Trump's nominees have experience but it would place them in an adversarial position in relationship to the objectives of the agencies they head. For example, although this choice was not successful, President Trump first nominated an anti-union fast food executive, Andrew Puzder, to be secretary of the Department of Labor. Reuters, *Trump Names Fast Food Executive Andy Puzder to Head Department of Labor*, *The Guardian*, DEcember 8, 2016 at <https://www.theguardian.com/us-news/2016/dec/08/andy-puzder-labor-department-hardees-trump-cabinet> (last visited March 21, 2018). Even though Puzder's nomination failed, President Trump's administration appointed a Department of Labor with deep ties and sympathies for the interests of Big Business. Justin Miller, *Trump Stacks Labor Department with Friends of Big Business*, September 19, 2017, at <http://prospect.org/article/trump-stacks-labor-department-friends-big-business> (last visited March 21, 2018).

<sup>52</sup> Aurea Sotomayor et al., *The Cruellest Storm*, <https://www.commondreams.org/views/2017/09/30/cruellest-storm-200-academics-speak-out-puerto-rico>.

<sup>53</sup> Kevin Drum, *Trump's Feeble Hurricane Response Probably Cost Nearly a Thousand Lives in Puerto Rico*, *Mother Jones* (February 28, 2018), at <https://www.motherjones.com/kevin-drum/2018/02/trumps-feeble-hurricane-response-probably-cost-nearly-a-thousand-lives-in-puerto-rico/> (last visited Marh 11, 2018).

<sup>54</sup> John D. Sutter, *CNN.com*, (October 20, 2017), at <https://www.cnn.com/2017/10/18/health/puerto-rico-one-month-without-water/index.html>.

<sup>55</sup> Adrian Florido, *FEMA to End Food and Water Aid to Puerto Rico*, *NPR.org* (January 29, 2018), at <https://www.npr.org/sections/thetwo-way/2018/01/29/581511023/fema-to-end-food-and-water-aid-for-puerto-rico> (last visited March 11, 2018).

<sup>56</sup> Alan Gomez, *'A Travesty': 20% of Puerto Rico Lacks Water as FEMA Ends Hurricane Aid*, *USA Today*, January 30, 2018, at <https://www.usatoday.com/story/news/nation/2018/01/30/fema-ending-water-food-aid-puerto-rico/1079442001/> (last visited March 11, 2018).

<sup>57</sup> Rick Jervis, *6 Months after Hurricane Maria, Life in Puerto Rico is better - but will "Never be Normal Again," USA Today*, March 5, 2018, at <https://www.usatoday.com/story/news/2018/03/05/6-months-after-hurricane-maria-life-puerto-rico-better-but-far-normal/380127002/> (last visited March 11, 2018).

The Trump Administration has also decimated the administrative state, particularly in the context of environmental protections, and begun a serious attack on the federal social welfare safety net that protects the most vulnerable citizens of the United States. In terms of its environmental record, the Trump Administration has been less than interested in protecting the environment. President Trump has also engaged in a targeted effort to dismantle environmental protections. He decided to withdraw from the Paris Climate Accord,<sup>58</sup> “green-lighted” both the Keystone Pipeline and the Dakota Access Pipeline,<sup>59</sup> and rolled back the Clean Power Plan.<sup>60</sup> In addition, the Trump Administration proposed a budget that cut spending for the EPA, the State Department, Medicare, Subsidies for Medicaid and the ACA, Supplemental Nutrition Assistance, and Section 8 Housing.<sup>61</sup> And the Executive Branch is only one aspect of the picture. Under the Trump Administration, Congress passed a sweeping tax reform bill that reduced the corporate income tax from 35% to 21%.<sup>62</sup>

### III. CONSTELLATIONS OF RESISTANCE: HOW PERSISTING AND EMERGING SOCIAL MOVEMENT ACTORS ARE FIGHTING BACK

The story of “What’s Next,” however, is not merely one of despair and inaction in the face of an administration that has been widely

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<sup>58</sup> Valerie Volcovici, U.S. Submits Formal Notice of Withdrawal from Paris Climate Pact, Reuters, August 4, 2017, <https://www.reuters.com/article/us-un-climate-usa-paris/u-s-submits-formal-notice-of-withdrawal-from-paris-climate-pact-idUSKBNI1AK2FM>.

<sup>59</sup> Brian Naylor, Trump Gives Green Light to Keystone and Dakota Access Pipeline, NPR.org, January 24, 2017, <https://www.npr.org/2017/01/24/511402501/trump-to-give-green-light-to-keystone-dakota-access-pipelines>.

<sup>60</sup> Zak Colman, Trump Administration is Repealing Obama’s Clean Power Plan, Scientific American, October 10, 2017, <https://www.scientificamerican.com/article/trump-administration-is-repealing-obamas-clean-power-plan/>.

<sup>61</sup> Dylan Matthews, Trump’s 2019 Budget: What he Cuts, How Much he Cuts, and Why it Matters, Vox.com, February 12, 2018, <https://www.vox.com/policy-and-politics/2018/2/12/16996832/trump-budget-2019-release-explained>.

<sup>62</sup> Deidre Walsh, White House GOP Pass Sweeping Tax Bill, CNN.com, December 20, 2017, at <https://www.cnn.com/2017/12/20/politics/house-senate-trump-tax-bill/index.html>.



regarded as unprecedented,<sup>63</sup> unpredictable,<sup>64</sup> and unprincipled.<sup>65</sup> Instead, President Trump and his administration have been met with persistent resistance from activists and dissenters. Their response has not been one of hopelessness or passivity. Instead, active resistance, through organizing, projects, and advocacy, has emerged as a crucial part of center left politics. The counter-resistance offered by young driven movements by people of color like Black Lives Matter and the Dreamers, has been reinforced by white mainstream participants that

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<sup>63</sup> Julian E. Zelizer, What is Really Unprecedented about Trump?, *The Atlantic*, October 24, 2017, at <https://www.theatlantic.com/politics/archive/2017/10/what-is-really-unprecedented-about-trump/544179/> (noting that Trump's actions are often called unprecedented and arguing that Trump's perspective on politics is unconventional). Commentators have made claims about the uniqueness of Trump among U.S. presidents and argued that his administration strays from expected norms. Zachary Crockett, Donald Trump is the Only U.S. President Ever with No Political or Military Experience, *Vox* (January 23, 2017), <https://www.vox.com/policy-and-politics/2016/11/11/13587532/donald-trump-no-experience>; Jonathan Freeland, Don't Treat Donald Trump as If He is a Normal President. He is Not, *The Guardian*, January 14, 2017 at <https://www.theguardian.com/commentisfree/2017/jan/14/donald-trump-not-normal-president-congress-theresa-may>; Ben Cardin, Never Before has a President Ignored Such a Clear National Security Threat, *Washington Post* January 18, 2018, at [https://www.washingtonpost.com/opinions/never-before-has-a-president-ignored-such-a-clear-national-security-threat/2018/01/09/7b8d7596-f593-11e7-b34a-b85626af34ef\\_story.html?utm\\_term=.42ba9757c8af](https://www.washingtonpost.com/opinions/never-before-has-a-president-ignored-such-a-clear-national-security-threat/2018/01/09/7b8d7596-f593-11e7-b34a-b85626af34ef_story.html?utm_term=.42ba9757c8af).

<sup>64</sup> Linley Sanders, Trump is Unstable, Dangerous, and Could Start a Nuclear War, Scientists Warn, *Newsweek*, October 14, 2017, at <http://www.newsweek.com/president-trump-unstable-danger-nuclear-war-psychologists-warn-685029>; Dan Managan, Psychiatrists Warm Trump Becoming More Mentally Unstable, Putting U.S. and World at 'Extreme Risk,' *CNBC.com* (December 1, 2017), at <https://www.americanprogress.org/issues/democracy/news/2018/01/16/444997/cost-corruption-waste-abuse-president-trumps-cabinet/>; Allan Smith, The Debate Over Trump's Mental Stability is Reaching a Fever Pitch, *Business Insider* (January 9, 2018), <http://www.businessinsider.com/trump-mental-stability-really-smart-debate-2018-1>. Authors, Donald Trump is the Most Dangerous Man in the World, *Der Spiegel Online (DATE)*, <http://www.spiegel.de/international/world/donald-trump-is-the-most-dangerous-man-in-the-world-a-1075060.html>.

<sup>65</sup> Paul Waldman, The Trump Presidency: On Track to becoming the Most Corrupt in U.S. History, *Washington Post*, January 16, 2018, at [https://www.washingtonpost.com/blogs/plum-line/wp/2018/01/16/the-trump-presidency-on-track-to-becoming-the-most-corrupt-in-u-s-history/?utm\\_term=.0a06077c8351](https://www.washingtonpost.com/blogs/plum-line/wp/2018/01/16/the-trump-presidency-on-track-to-becoming-the-most-corrupt-in-u-s-history/?utm_term=.0a06077c8351); Sam Burger & Gwen Caleis-Haas, The Cost of Corruption: Waste and Abuse in President Trump's Cabinet, *The Center for American Progress* (January 16, 2018), at <https://www.americanprogress.org/issues/democracy/news/2018/01/16/444997/cost-corruption-waste-abuse-president-trumps-cabinet/>; Nina Burleigh, Trump Administration is the Most Corrupt Government in the United States, *Americans Believe*, *Newsweek* December 12, 2017, at <http://www.newsweek.com/trump-flynn-kushner-ivanka-corruption-ethics-744701>.

have joined the fray. From the Women's March in Washington D.C. that greeted President Trump on the day after his inauguration,<sup>66</sup> to the recent widely white middle-class youth marches against gun violence,<sup>67</sup> marches and demonstrations have become increasingly common as a form of resistance to the status quo. In addition, resistance has taken the form of advocacy. As the Trump Administration rolled out a series of (potentially unconstitutional)<sup>68</sup> travel bans against nations with significant Muslim populations, lawyers and youth activists descended upon international airports across the United States to offer information, advocacy, and other assistance for travelers seeking to enter the United States.<sup>69</sup> And, in spite of efforts by Secretary of Education Betsy DeVos to roll back sexual assault protections for women on college campuses, women have resisted the inevitability of rape culture that has simultaneously victimized and commodified women, girls, and boys on the basis of sexual availability and compliance through the #MeToo movement. The movement adopted the signal #MeToo, which was started by Tarana Burke, an African American activist trying to draw attention to the systematic sexual exploitations of women and girls of color.<sup>70</sup> The slogan #MeToo has been used by survivors to signal the pervasiveness of unwanted sexual contact. Regarding the sexual victimization of women as a systematic form of terrorism, coercive sexual conduct, from street harassment to sexual harassment to coercive and unwanted sex, has been publicly disclosed.<sup>71</sup> Individuals who have

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<sup>66</sup> Colin Dwyer *Womens March Floods Washington Sparking Rallies Worldwide* NPR January 21, 2017. For an intersectional look at the March see. Sydney Boothroyd, Rachele Bowen, Alicia Cattermole, Kenda Chang-Swanson, Hanna Daltrop, Sasha Dwyer, Anna Gunn, Brydon Kramer, Delaney M. McCartan, Jasmine Nagra, Shereen Samimi & Qwisun Yoon-Potkins (2017) (Re)producing feminine bodies: emergent spaces through contestation in the Women's March on Washington, *Gender, Place & Culture*, 24:5, 711-721,

<sup>67</sup> VIVIAN YEE and ALAN BLINDER *National School Walkout: Thousands Protest Against Gun Violence Across the U.S.* The New York Times MARCH 14, 2018

<sup>68</sup> See in general the BRIEF OF CONSTITUTIONAL LAW SCHOLARS AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS- APPELLEES AND AFFIRMANCE [http://www.robbsrussell.com/sites/default/files/appellate\\_pdf/FILED%20CA4%20AMICUS%20BRIEF%20-%20IRAP%20v%20Trump.pdf](http://www.robbsrussell.com/sites/default/files/appellate_pdf/FILED%20CA4%20AMICUS%20BRIEF%20-%20IRAP%20v%20Trump.pdf)

<sup>69</sup> JONAH ENGEL BROMWICH *Lawyers Mobilize at Nation's Airports After Trump's Order* The New York times JAN. 29, 2017

<sup>70</sup> Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, Ny Times (October 20, 2017), <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html>.

<sup>71</sup> The sheer scope of injury articulate by the #MeToo movement pushes the debate beyond non-consensual sexual acts like rape or sexual assault and challenges the narrowness of the conversation. Notions of wanted and unwanted sex and possibilities

engaged in such conduct, particularly in the entertainment field, have been subject to the disclosures of women who claim injury under the banner of #MeToo.

These various social movement actors, from activists to advocates to educators, seem engaged in disparate projects that address the varied assaults on decency, the rule of law, and progress by the Trump Administration. However, what might seem like a cacophony of disparate voices and disconnected projects actually creates constellations of resistance.<sup>72</sup> Various social movement actors, positioned at nodes of marginalization, have engaged in active resistance that includes demonstrations and marches,<sup>73</sup> education initiatives,<sup>74</sup>

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of pleasure beyond consent. See Robin West, *Consensual Sexual Dysphoria: A Challenge for Campus Life*, 86 *Journal of Legal Education* 804 (2017). See also Aya Gruber, *Consent Confusion*, 38 *Cardozo L. Rev.* 415 (2016) (mapping the contours of consent in law).

<sup>72</sup> This use of the constellation is inspired, in part, by Walter Benjamin's conception of the constellation. In the pursuit of knowledge, Benjamin argued that ideas can be gleaned by arranging things in relational constellations. While the things are heterogenous, possessing diverse characteristics, their relation to one another creates more cohesive meaning. Walter Benjamin, *Epistemo-Critical Prologue, The Origin of German Tragic Drama* (trans. John Osborn) (Verso 2009).

<sup>73</sup> Kocher, Austin (2017) "Thee New Resistance: Immigrant Rights Organizing in an Era of Trump," *Journal of Latin American Geography* 16(2): 165-171, Jodu Enda Donald Trump is the best -- and worst -- thing that's happened to modern American feminism CNN State July 2017 <http://www.cnn.com/interactive/2017/politics/state/womens-movement-donald-trump/teac>

<sup>74</sup> Leading up to the election, The Chronicle of Higher Education released a Trump 101 syllabus to explore his campaign academically. Following that, N.D.B. Connolly and Keisha N. Blain released a corrective one called the Trump Syllabus 2.0 that more fully considered Trump's campaign, focusing on xenophobia, racism, and sexism. More recently a Trump 3.0 is being crowd sourced. See Ellen Caldwell *Teaching Trumop: the Rise of the Crowd Source Syllabus* JSTOR Daily, December 1, 2016 <https://daily.jstor.org/teaching-trump-rise-crowd-sourced-syllabus/>

social media interventions,<sup>75</sup> lobbying,<sup>76</sup> labor strikes,<sup>77</sup> and other forms of agitating. Although these constellations of resistance are not always working together in solidarity, their combined movement has potentially created a public presence for resistance and sites of pressure for less motivated social movement actors to latch on to.

In the manufactured scarcity of the neoliberal now, social movement actors, from organizers to advocates to educators to activists, are beset by perpetual crises. These crises are characterized by the naturalization of markets that are defined not by exchange but by a paradoxical form of scarcity. The paradox of this scarcity is that it co-exists with seemingly intractable surpluses that fail to meet the demands of scarcity. Governments operate with a shortage of staff, but no shortage of politicians. Individuals at work are more productive<sup>78</sup> across the increased hours they work, and many companies are thriving with record-setting profits,<sup>79</sup> and yet employers refuse requests for wage increases with claims that money is scarce. As developers build new condominiums and land banks reclaim blighted properties, people remain homeless and underhoused due to a scarcity of homes to rent or purchase. Surplus workers go without jobs, while employers claim that there are not enough qualified workers. Surplus university faculty are relegated to precarious temporary roles as adjuncts because of scarcity

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<sup>75</sup> Megan K. Maas “I was Grabbed by My Pussy and It’s #NotOkay”: A Twitter Backlash Against Donald Trump’s Degrading Commentary Violence Against Women” (2018) <http://journals.sagepub.com/doi/10.1177/1077801217743340>.

<sup>76</sup> In the weeks following the inauguration of Donald Trump so many activists were calling their congressional representatives that the voicemails were at capacity and even emails bounced back. Kathryn Schulz What Calling Congress Achieves *The New Yorker* March 6, 2017 <https://www.newyorker.com/magazine/2017/03/06/what-calling-congress-achieves>. This lobbying campaign has continued for example in Pennsylvania: “Lots of Pennsylvanians angry about President Trump’s cabinet picks, refugee/immigrant travel ban, plans to repeal Obamacare, or all of the above, say they can’t get Sen. Pat Toomey — who supports all of the above — to hear, read, or respond to their concerns.” John Baer They demand to talk to Toomey. His office says its trying. *Democracy in action The Inquirer* February 6, 2018. <http://www.philly.com/philly/news/politics/412946843.html>

<sup>77</sup> Michelle Chen Immigrant Workers are ALready Fighting Back Against Trump *The Nation* January 24, 2017 <https://www.thenation.com/article/immigrant-workers-are-already-fighting-back-against-trump/>.

<sup>78</sup> MARTIN CRUTSINGER US Records Strongest US Worker Productivity in 3 Years *US News* Dec. 6, 2017 <https://www.usnews.com/news/business/articles/2017-12-06/us-productivity-jumps-3-percent-in-third-quarter>

<sup>79</sup> 2017 was a very lucrative year for big business economic growth at home and abroad boosted Wall Street at a faster pace than in previous years. Matt Egan Corporate America’s big, fat profitable year *CNN Money* December 22, 2017

in institutions of higher learning, while students seeking a place in higher education are shunted off to for-profit universities because there are not enough places in the inexpensive but high quality state university systems.

This constant state of manufactured crisis has real consequences for institutions, particularly in the education sector. This crisis is the crisis of the dominant model of legal education that views law as a commodity and it is also the crisis of the imperial university.<sup>80</sup> Many law schools are facing difficult circumstances. And in some instances, law schools have closed<sup>81</sup> or stopped accepting students.<sup>82</sup> It has also meant that some law schools have shifted resources away from supporting scholarship and scholarly inquiry, particularly scholarship and inquiry perceived as “dangerous” or “challenging” to the status quo.<sup>83</sup> Law schools are also facing decreasing support from the profession, a breach of the social contract with biglaw<sup>84</sup>, and decreasing public investment. This turn has led some institutions to offer less support for law students working in the public interest and poverty law areas. In addition, as the number of

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<sup>80</sup> Margaret Jane Radin & Madhavi Sunder, *The Subject and Object of Commodification in RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE* 8 (Martha M. Ertman & Joan C. Williams eds., 2005). As Chatterjee and Maira have described in their groundbreaking work, the US academy is an imperial university where “intellectuals and scholarship play an important role—directly or indirectly, willingly or unwittingly” in rationalizing American exceptionalism and repression both domestically and internationally. Piya Chatterjee and Sunaina Maira *The Imperial University: Race, War and the Nation State in PIYA CHATTERJEE & SUNAINA MAIRA, THE IMPERIAL UNIVERSITY* 6-7 (2014)

<sup>81</sup> Valparaiso Law School, Whittier Law School, Charlotte Law School and Indiana Tech Law School are some of the law schools that have been forced to close their doors in the last years. STACI ZARETSKY Charlotte School Of Law Is Closing ‘Effective Immediately’. Above the Law Aug 15, 2017 <https://abovethelaw.com/2017/08/charlotte-school-of-law-is-closing-effective-immediately/>. It has also been announced that The University of Illinois at Chicago (UIC) and The John Marshall Law School (JMLS) are exploring the idea of JMLS becoming a part of UIC. See [jmls.uic.edu](http://jmls.uic.edu)

<sup>82</sup> STACI ZARETSKY Valparaiso Law School Will Stop Accepting New Students, May Wind Down (Updated) Will more law schools close in Valparaiso’s wake? Above the Law Nov 16, 2017

<sup>83</sup> Tayyab Mahmud, Athena Mutua & Francisco Valdes, *LatCrit Praxis @ XX: Toward Equal Justice in Law, Education, and Society*, 90 Chi.-Kent L. Rev. 361, 362 (2015).

<sup>84</sup> From a LatCrit perspective: “The current crisis in legal education has become visible because it has impacted the business of legal education. For women, students of color, rural communities and communities of color across the Global North and the Global South legal education has always been in crisis. A crisis of access to legal education, a crisis of engagement within the legal academia and a crisis of access to justice and legal services.” Sheila I. Vélez Martínez, *Foreword SNX 2014: Challenges to Justice Education: South-North Perspectives*, 9 Charleston L. Rev. 213, 217 (2015)

students applying to law school decreases, schools increasingly compete for students using “merit aid” scholarships while opportunities to provide need-based aid to the most disadvantaged students becomes increasingly out of reach.<sup>85</sup> And at the same time, the force of the U.S. News & World Report rankings pushes institutions away from responsive holistic evaluations of students, administrators, and faculty, and toward traditional measures of “meritocracy” that reproduce hierarchies of marginalization and oppression.<sup>86</sup> Focus on the LSAT, the grading curve, mainline law reviews, elite pedigree, and elite six-figure placement come to eclipse more substantive social justice related concerns. Under these conditions, the LatCrit community came together at LatCrit XXI to ask what should be next for the organization, its members, and the movement.

#### IV. GATHERING TOGETHER FOR LATCRIT XXI: WHAT’S NEXT?

LatCrit’s 2017 Biennial Conference theme, “What’s Next?” struggled to grapple with the challenges presented by the 2016 election. The LatCrit Conference was animated by the spirit of this resistance. In a community with a robust and proud contingent of scholars who hail from around the world (some who claim Latinx/Chicanx heritage, and others who follow the tenets of Islam), candidate Trump’s disparaging remarks about Mexican immigrants<sup>87</sup> and Muslim believers<sup>88</sup> made him

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<sup>85</sup> Jobs in the private sector, the non-profit sector, and government decrease in numbers as law school debt, through a combination of public divestment and an increasing demand by employers for students and educators to internalize the costs of ensuring that students have “practice experience” before they actually enter the practice, spirals out of control, reaching an average of \$140,000 dollars for graduates. *The Law School Student Debt Crisis*, N.Y. Times, (Oct. 24, 2015), available [http://www.nytimes.com/2015/10/25/opinion/sunday/the-law-school-debt-crisis.html?\\_r=0](http://www.nytimes.com/2015/10/25/opinion/sunday/the-law-school-debt-crisis.html?_r=0) (last visited 3/30/2016).

<sup>86</sup> For years, law schools, like higher education in general, have been affected by what Lani Guinier has called a “testocracy, disguised as a meritocracy”. According to Guinier the standardized tests measure student’s household income, ethnicity and level of parental education, narrowing the student body to those who come from particular households. LANI GUINIER, *THE TYRANNY OF THE MERITOCRACY* 15 (2015).

<sup>87</sup> During the campaign, Candidate Trump labeled immigrants of Mexican descent as rapists, criminals, and “bad hombres.” Janell Ross, *From Mexican Rapists to Bad Hombres, the Trump Campaign in Two Moments*, Wash. Post., October 20, 2016, at [https://www.washingtonpost.com/news/the-fix/wp/2016/10/20/from-mexican-rapists-to-bad-hombres-the-trump-campaign-in-two-moments/?utm\\_term=.0deaed2b8a3e](https://www.washingtonpost.com/news/the-fix/wp/2016/10/20/from-mexican-rapists-to-bad-hombres-the-trump-campaign-in-two-moments/?utm_term=.0deaed2b8a3e).

<sup>88</sup> Jenna Johnson and Abigail Hauslohner, “I Think Islam Hates Us”: A Time line of Trump’s Comments about Islam and Muslims, Wash. Post., May 20, 2017, at

deeply suspect. Although many in the LatCrit community were deeply ambivalent about Hillary Clinton, due to her demonstrated commitment to neoliberal “reforms” that had the potential to eliminate crucial social welfare programs, her historically tone-deaf embrace of the deployment of the carceral state against Black and Chicano youth, and a perceived hawkishness concerning the United States and its neo-imperial wars in the post-9/11 era, many also perceived her as the “lesser evil.” There was widespread agreement that President Trump was unacceptable.

In October 2017 more than 200 scholars, activists and students convened in Orlando, Florida to collectively discuss and strategize around “What’s next?” This question seemed like an imperative in the wake of the 2016 election. With a surreal outcome, it seemed that our political process had finally confirmed beyond deniability how the euro hetero patriarchy resists the advancement of diverse communities and is reluctant to share power. It has emboldened those who seek to promote violent forms of intolerance to step out of the shadows and into the light. The poor and economically marginalized struggle with increasingly exploitative neoliberal forms of welfare, privatized for the profit and protection of the powerful financial class. The fight against these powerful forces, in the classroom, in the courtroom, and in our daily lives, has poured into the streets as we struggle to navigate the onslaught of executive orders, legislation, and appointments designed to divide and conquer democracy itself. If any doubt remained previously, the post-2016 world makes plain every day that unbridled power trumps even fundamental principles with growing impunity. This extreme zeitgeist demands correspondingly fresh critical thinking and action. Fortunately, critical and outsider communities in legal academia have been planning strategically for the long term.

Determined to match the exigency of this moment, critical and outsider networks gathered at the Twenty-First Biennial LatCrit Conference in Orlando, Florida, to mobilize our resources and address innovatively the intensified challenges facing our diverse networks and communities. In this Foreword, we will provide the beginning of LatCrit’s response to *What’s Next* in the wake of the November 2016 election. When it comes to LatCrit, our objective has always been to fight back the darkness of *el mundo malo* and engender a world in which *el mundo bueno* is more pervasive for those who are vulnerable to the

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[https://www.washingtonpost.com/news/post-politics/wp/2017/05/20/i-think-islam-hates-us-a-timeline-of-trumps-comments-about-islam-and-muslims/?utm\\_term=.c748a2f05ecb](https://www.washingtonpost.com/news/post-politics/wp/2017/05/20/i-think-islam-hates-us-a-timeline-of-trumps-comments-about-islam-and-muslims/?utm_term=.c748a2f05ecb)

forces of settler colonialism, white supremacy, heteropatriarchy, and economic exploitation.

LatCrit XXI was, in part, a time for serious deliberation about the future of the organization and its portfolio of projects. As part of the conference, community members were asked to reflect on whether this should be the last gathering of its kind and/or whether LatCrit should, as an organization, re-purpose and reconfigure its biennial conferences. Since 1996, members of the LatCrit community have met at various locations across the United States for the annual and then the biennial conference. LatCrit members have also engaged in meetings in the Global South through the LatCrit Study Space Series and the South/North Exchange. The model of these events, in which full-time Global North law faculty subsidize students, fellows, and faculty from the Global South, has taken a serious hit in the era of neoliberal austerity that characterizes U.S. law schools. In a culture where law schools are under increasing pressure to discount tuition,<sup>89</sup> and in which mandatory compliance requires increasingly expensive and intensive forms of legal education,<sup>90</sup> relying on shrinking travel and research budgets is hardly a sustainable model. The conference drew upon old LatCrit traditions, like the hospitality suite, but also moved forward in important ways.

Due to the pressures of the new neo-liberal norms governing the university in general and law schools particularly, LatCrit is undergoing challenging times. The previous support that the organization has enjoyed by Deans who were invested in racial justice, critical theory, and scholarly production was less forthcoming than in previous years. Furthermore, due to the elimination of travel budgets and other conference support, many individuals who previously participated in the LatCrit conference were unable to attend. LatCrit is a community of stakeholders in which the board is only empowered to act when it serves the desires of the community and when the board is subject to the will of the community. Although this year's conference was attended by over one hundred and fifty faculty members, fellows, activists, students, and others, initial response to the Call for Papers was anemic. Proposals

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<sup>89</sup> Nacubo and AccessLex Institute, *Tuition Discounting Study of Private Law Schools 2016 (2017)* (reviewing data from 36 schools to find that the average tuition discount was approximately 39 percent), at

<sup>90</sup> For example, the ABA has recently implemented requirements that all students have six credits of experiential learning. Law schools are also under increasing pressure to provide opportunities for formative assessment. And unlike PhD programs and Master's programs, J.D. students can play only a limited role in teaching their classmates.



trickled in at a slow pace and did not reflect extraordinary enthusiasm for the event.

In order to meet these challenges, the Board of Directors adopted a more intensive intentional role in structuring the program. Historically, LatCrit has employed intentional methods that can be attributed to deliberate choices made by previous boards.<sup>91</sup> The creation of a LatCrit conference and the structure of its agenda is less an academic exercise and more an exercise in constructing opportunities for theoretical engagement and growth.<sup>92</sup> This year's conference relied not only on the submissions of interested participants but also on the solicitation of deep expertise and diverse perspective not only for the construction of the plenary panels, but also for the creation of the majority of concurrent sessions. This intensive engagement with structuring the program from a space of intentionality also enabled LatCrit to look to "What's Next?", while remaining mindful of what has passed. For example, a concurrent panel on the history of sexual orientation in law and being an "out" in the legal academy featuring some of the critical pioneers of the movement preceded a panel of exciting emerging voices in the field of sexual orientation in law addressing the question of "What's Next?" for the movement now that marriage equality has effectively become a reality. Organizers were able to structure numerous panels of overlapping interest for topics related to Feminist Legal Theory or Immigration Reform. In addition, the schedule addressed ongoing projects linking LatCrit to Class Crits and sessions that have even birthed other projects.

This led the board to make time and space for the question of whether the LatCrit conference is still a community priority and whether the organization should continue to host large scale biennial conferences.

Responding directly to the moment, the LatCrit community focuses and decides, together, how to respond programmatically to this moment. Rather than flinch or crouch, we instead choose to re-group, re-think, and re-affirm our commitment to long-term work that transcends moments, persons, or events. Determined to match the exigency of this moment, critical and outsider networks gathered at the Twenty-First Biennial LatCrit Conference in Orlando, Florida, to mobilize our

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<sup>91</sup> Margaret Montoya, Foreword: Class in LatCrit: Theory and Praxis in a World of Economic Inequality, 78 Den. U. L. R. 467, 468 – 69 (2001).

<sup>92</sup> *Id.*

resources and address innovatively the intensified challenges facing our diverse networks and communities.

## V. THE SYMPOSIUM PIECES: THE SPIRIT OF RESISTANCE AND PERSISTENCE ACROSS GENERATIONS

The authors in this volume expertly highlight from an Outcrit Perspective important themes in the agenda of “What’s Next?” for communities that have particularly endured backlash and further exclusion since the 2016 election. Authors in this volume tackle these issues from an an intersectional perspective.

### A. *The Insidious Relationship Between Public Law, Private Law and Subordination*

Strategies of subordination can be particularly insidious in the Private Law context. One of the recurring problems that litigants face is the unavailability of constitutional remedies against private actors.<sup>93</sup> Because of it, oftentimes we default to Public Law solutions. Nevertheless, as so many others, the private/public dichotomy is to some extent illusory.<sup>94</sup> The nearly obsessive tendency in legal analysis to make these types of formal distinctions needs to be resisted and rejected if we are to engage in a truly critical exploration of many of our current legal problems to find meaningful solutions.

Nearly all of the articles included in this Symposium address what would seem at first glance to be issues in the Public Law side of the divide. However, almost all of them also point to multiple points of contact with Private Law. In this regard, it is important that we recognize these tangential lines as potential avenues for multidisciplinary and multifaceted attacks. In this section, we attempt to draw a continuous thread between the different issues raised by some of the articles and how they interact with areas of Private Law in partially hidden ways.

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<sup>93</sup> See *United States v. Morrison*, 529 U.S. 598 (2000) (reaffirming the state action doctrine, as laid out in *United States v. Harris*, 106 U.S. 629 (1883) and *Civil Rights Cases*, 109 U.S. 3 (1883)).

<sup>94</sup> See generally Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. Penn. L. Rev. 1423 (1982); Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. Penn. L. Rev. 1349 (1982).

First off, Dina Shek investigates the role of race in the context of medical-legal partnerships.<sup>95</sup> The main concern of her article is, of course, the health care realities of many patients who are treated unfavorably because of their race.<sup>96</sup> This would suggest issues of Public Law in most respects. However, Shek attacks this problem by reformulating the attorney-client relationship, a quintessentially private contractual relationship.<sup>97</sup>

In her article, entitled *Centering Race at the Medical-Legal Partnership in Hawai‘i*, Shek emphasizes that attorneys need to address racial problems in the healthcare arena by shifting their focus from working *for* the client to instead working *with* the client.<sup>98</sup> Shek explains the limitations of the traditional limited role of the attorney thusly:

Applying this analysis to the social determinants of health, it is insufficient to cling to the traditional arguments that, for example, attribute racial health disparities primarily to the long history of “segregated housing patterns and inferior employment opportunities for minorities in the United States.” This true but incomplete argument leads legal service providers to rely on traditional civil rights law solutions without considering the underlying “disease” of structural racism and its impact on the whole community. This narrow view also fails to consider the crucial role of implicit bias, including the role of provider bias.<sup>99</sup>

Furthermore, Shek’s approach to medical-legal partnerships challenges the profession to concentrate on a client’s strengths instead

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<sup>95</sup> Dina Shek, *Centering Race at the Medical-Legal Partnership in Hawai‘i*.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 2.

<sup>99</sup> *Id.* at 16 (citing DAYNA BOWEN MATTHEW, *JUST MEDICINE: A CURE FOR RACIAL INEQUALITY IN AMERICAN HEALTH CARE* 138 (2016) (“[P]olicies designed to eliminate racial discrimination in housing and employment [based on these assumptions] have historically failed.”) (citing David R. Williams & Toni D. Rucker, *Understanding and Addressing Racial Disparities in Health Care*, 21 *HEALTH CARE FINANCING REV.* 75, 75-90 (2000); David R. Williams et al., *The Concept of Race and Health Status in America*, 109 *PUBLIC HEALTH REP.* 26, 26-38 (1994)); Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *STAN. L. REV.* 317 (1987); *IMPLICIT RACIAL BIAS ACROSS THE LAW* (Justin D. Levinson & Robert J. Smith, eds., 2012)).

of her weaknesses.<sup>100</sup> This requires recognizing the capacity of our clients to identify their own problems adequately and accurately.<sup>101</sup> But more importantly, it also requires that we recognize and bolster our clients' ability to help themselves and direct their future.<sup>102</sup>

Shek proposes a model of rebellious lawyering<sup>103</sup> in the context of medical-legal partnerships that leverages self-advocacy and community power to further empower the clients and their communities.<sup>104</sup> It argues for the creation of a virtuous cycle in which the attorney empowers the client by serving as an educator: teaching clients not just how to navigate the Public Law world that they must traverse, but also the reasons why that legal reality takes the twists and turns that it does.<sup>105</sup> Shek explicitly and deliberately points out that “[a]s witnessed in our poverty law practice, ‘access to power . . . include[s] differential access to information (including one’s own history), resources (including wealth and organizational infrastructure), and voice (including voting rights, representation in government, and control of the media).’”<sup>106</sup> By providing clients with knowledge, as well as the skills necessary to exploit it, this form of rebellious lawyering serves to empower the clients and their communities, allowing them to better construct their realities as they move forward in their lives.<sup>107</sup>

Shek’s approach does not stop there. It also requires that the attorney work with other professionals (doctors, nurses, social workers, etc.) in a way that incorporates a more complete narrative of the clients’ realities and needs.<sup>108</sup> In this sense, it truly seeks to redefine not just the attorney-client relationship, but also the notion of professionalism itself. It not only requires that the attorney rethink his role, but also that other professionals reassess the way in which they interact with their patients or clients. As Shek herself casually puts it, “‘I just want to teach and work with people who believe that the communities we work with have the capacity and the right to lead themselves.’”<sup>109</sup> Hence, in Shek’s

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<sup>100</sup> *Id.* at 1-2.

<sup>101</sup> *Id.* at 3 & 18.

<sup>102</sup> *Id.* at 18.

<sup>103</sup> *See generally* Gerald P. López, *Rebellious Lawyering: One Chicano’s Vision of Progressive Law Practice* 37 (1992).

<sup>104</sup> Shek at 17-18.

<sup>105</sup> *Id.* at 23.

<sup>106</sup> *Id.* at 3 (citing Camara Phyllis Jones, *Confronting Institutionalized Racism*, *PHYLON* 7, 10 (2003)).

<sup>107</sup> *Id.* at 18-23.

<sup>108</sup> *Id.* at 2-3.

<sup>109</sup> *Id.* at 26.

article we see how a problem traditionally related to Public Law is addressed by redefining an institution of the Private Law sphere, the professional-client relationship.

Loretta A. Moore, Angela Mae Kupenda, Deidre L. Wheaton, Michelle D. Deardorff, and Evelyn J. Leggette join forces in their article, entitled *What We Can Do Now? Addressing Intersectionality Challenges in Work and Social Structures, the Single Academic Woman of Color as an Exceptional Case*, to directly answer the call of LatCrit XXI, and provide specific suggestions for what each one of us can do in our daily work routines to combat subordination.<sup>110</sup> “This paper asks what can we (as those from underrepresented groups) do now (as many of us still labor in possibly under acknowledged roles and institutions) to stop overlooking and to further empower intersectional groups as we work within our larger underrepresented groups.”<sup>111</sup>

In their article, the authors describe and analyze the peculiar difficulties faced by single women of color in academic and other male-dominated, white-predominant or marriage-normative, settings.<sup>112</sup> They ask us to realize and acknowledge that “[p]rofessors from underrepresented groups, and especially those with intersectional experiences, face complicated academic contexts and nuanced personal lives.”<sup>113</sup> However, they ask us to go further. They propose that “what we can do now is to examine more closely how, even within underrepresented and oppressed groups, we can better support each other and, hence, more fully support a mission of justice.”<sup>114</sup>

The article traces the struggle of single women of color all the way back from the postbellum period, through an analysis of the 1873 case of *Bradwell v. Illinois*,<sup>115</sup> to the present realities of such women in the legal academy. Interestingly, again, a problem that is usually addressed through (or, more often, goes unaddressed by) Public Law – the disparate treatment on the basis of gender, race and marital status – rears its head in the context of private relationships. The authors shed light on how the prevalent culture in the workplace, even in spaces that we typically consider progressive or more enlightened, such as Historically

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<sup>110</sup> Loretta A. Moore et al., *What We Can Do Now? Addressing Intersectionality Challenges in Work and Social Structures, the Single Academic Woman of Color as an Exceptional Case*.

<sup>111</sup> *Id.* at 2.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 4.

<sup>114</sup> *Id.* at 5.

<sup>115</sup> 83 U.S. 130 (1873).

Black Colleges and Universities, conspires to insidiously subordinate particular subgroups for arbitrary and indefensible reasons.<sup>116</sup>

In male dominated disciplines even at minority serving institutions, men of color are more normalized, while institutions frequently forget about the plight of their women, then certainly their women of color. And within women of color, we often forget that not all women are married, we forget so easily as marriage in academia is quite generally the norm. Thus, single academic women of color are forgotten even further.<sup>117</sup>

But perhaps more importantly, the authors push us to engage in praxis outside the law as such, and require us to take individual, personal, private action, in our day-to-day lives, that can make a marked difference in the lived experiences of others.

The broader point of this essay is for the academy to transform into a more inclusive place and serve as a societal model of advancement. Transformation may begin within underrepresented groups and must take into consideration how various non-normalized groups experience both the workplace structures and the social structures in formulating policies that include even the normally overlooked, exceptional cases, such as the single academic woman of color we consider here.<sup>118</sup>

In the end, the article demands of us what the United States Supreme Court professes on occasion to require of Equal Protection jurisprudence: that every person be treated as an individual. Kant's oft-cited proposition that humans be treated as ends and not means seems a worthy guiding principle in this regard.

Even exceptional cases are deserving of attention to facilitate their success at work, in their social structures and for institutional and societal transformation. This is something that underrepresented groups can do. We can explore the complexities within our non-normed groups and, hopefully, relieve some of the isolation, rethink

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 6.

<sup>118</sup> *Id.* at 8.

some of the norms that leave out the common experiences of so many people of color, and make a place for success at work and in social structures for all the single ladies.<sup>119</sup>

This is a job that touches each one of us specifically and distinctly. Furthermore, it is a responsibility we must fulfill on a daily basis.

Another bridge between Private and Public Law arises in the context of environmental regulation. In *Domestic Evolution: Amending the United States Refugee Definition of the INA to Include Environmentally Displaced Refugees*, Barbara McIsaac “proposes that the United States should amend the definition of refugee in the Immigration and Nationality Act (INA) to recognize . . . victims [of environmental harms] as refugees.”<sup>120</sup> In this context, it is interesting and transcendental to note that the environmental harms being suffered by many across the world are precisely the product of Private Law interactions between multinational corporate players.<sup>121</sup> Specifically, McIsaac traces most of the current displacement of individuals from their places of origin to the ravages of climate change that are already affecting many parts of the world.<sup>122</sup>

The obvious response is to consider these troubles as firmly rooted in the domain of Public Law. And, in fact, the particular solution proposed by McIsaac in her article lives and dies in that world.<sup>123</sup> Immigration Law will unavoidably have to deal with the consequences of climate change.<sup>124</sup> Nevertheless, it is also imperative that we realize that, in the absence of adequate Public Law protections, Private Law will rule the playing field. Hence, it has been the case for over a century that private actors have set the priorities of environmental policy according

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<sup>119</sup> *Id.* at 24.

<sup>120</sup> Barbara McIsaac, *Domestic Evolution: Amending the United States Refugee Definition of the INA to Include Environmentally Displaced Refugees* at 2.

<sup>121</sup> *Id.* at 3 (citing UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, May 9, 1992, 1771 U.N.T.S. 107 available at <https://unfccc.int/resource/docs/convkp/conveng.pdf> (last visited April 4, 2017); Holly Shaftel ed., *A Blanket Around the Earth*, NASA, <https://climate.nasa.gov/causes/> (last updated May 5 2017); CLIMATE CHANGE AND INDIGENOUS PEOPLES: THE SEARCH FOR LEGAL REMEDIES, 3-5 (Randall S. Abate & Elizabeth Ann Kronk eds., 2013); U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/ghgemissions/global-greenhouse-gas-emissions-data.html> (last visited 24 April 2017)).

<sup>122</sup> *Id.* at 14-20.

<sup>123</sup> *Id.* at 27-31.

<sup>124</sup> *Id.* at 14-20.

to their own private interests.<sup>125</sup> In fact, environmental harms provide the quintessential example of the insufficiency of Private Law.<sup>126</sup>

McIsaac's article shows us how the long chain of private/public interactions combine to subordinate huge swaths of people across enormous distances.<sup>127</sup> The absence of adequate environmental regulations throughout the 19<sup>th</sup>, 20<sup>th</sup> and 21<sup>st</sup> centuries forced the whole of humanity to rely on self-regulation by private actors. Those private actors utilized Private Law, both domestically and internationally, to further their own particular interests, thereby creating all sorts of harms to the human population at large that were not internalized as part of their costs of doing business.<sup>128</sup> These environmental harms resulting from the inability of Private Law to handle them have now created another Public Law problem by displacing millions of individuals from their homes.<sup>129</sup> Today we are experiencing all across the world the electoral consequences of a perceived mass immigration. The prospects for the resurgence of authoritarian, nationalist, blood and soil, regimes across Europe and America are the ultimate Public Law consequence of the failure of Private Law to deal with its own dirty laundry.

Perhaps the most striking example of how Public Law and Private Law conspire to subordinate individuals surfaces from a reading of Luhui Whitebear's article, entitled *VAWA Reauthorization of 2013 and a Continued Legacy of Violence Against Indigenous Women: A Critical*

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<sup>125</sup> *Id.* at 3 (citing UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, May 9, 1992, 1771 U.N.T.S. 107 available at <https://unfccc.int/resource/docs/convkp/conveng.pdf> (last visited April 4, 2017); Holly Shaftel ed., *A Blanket Around the Earth*, NASA, <https://climate.nasa.gov/causes/> (last updated May 5 2017); CLIMATE CHANGE AND INDIGENOUS PEOPLES: THE SEARCH FOR LEGAL REMEDIES, 3-5 (Randall S. Abate & Elizabeth Ann Kronk eds., 2013); U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/ghgemissions/global-greenhouse-gas-emissions-data.html> (last visited 24 April 2017)).

<sup>126</sup> See generally Garrett Hardin, *The Tragedy of the Commons*, 162 *Science* 1243 (1968).

<sup>127</sup> *Id.* at 14-20.

<sup>128</sup> *Id.* at 3 (citing UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, May 9, 1992, 1771 U.N.T.S. 107 available at <https://unfccc.int/resource/docs/convkp/conveng.pdf> (last visited April 4, 2017); Holly Shaftel ed., *A Blanket Around the Earth*, NASA, <https://climate.nasa.gov/causes/> (last updated May 5 2017); CLIMATE CHANGE AND INDIGENOUS PEOPLES: THE SEARCH FOR LEGAL REMEDIES, 3-5 (Randall S. Abate & Elizabeth Ann Kronk eds., 2013); U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/ghgemissions/global-greenhouse-gas-emissions-data.html> (last visited 24 April 2017)).

<sup>129</sup> *Id.* at 14-20.



*Outsider Jurisprudence Perspective*.<sup>130</sup> Whitebear tackles the question of the continued violence against indigenous women in the United States, in spite of Public Law advances such as the Violence Against Women Act (VAWA).<sup>131</sup>

Whitebear begins by explaining that:

Understanding the complexity of Indian Law in this country and the ensuing effects on Indigenous women, particularly in regards to missing and murdered Indigenous women, must always begin with a conversation about land. Our lands and bodies have been exploited, commodified, and violated in very connected and systematic ways. Federal law and policy builds a foundation that not only normalize this violence, they validate it.<sup>132</sup>

There are two important issues of Private Law that come to the foreground from Whitebear's description of the problem of violence against indigenous women. First, there is the relationship between indigenous women and the land. "Landscapes were destroyed and with them, the stories they told."<sup>133</sup> However, it was not only the stories, but the storytellers themselves that were subjected to violence in connection with that violence visited upon the land in which their stories had been built.<sup>134</sup>

The violence towards land and body cannot be separated. It is about who controls both. Because laws and policies sanction these actions, or lack thereof to punish people from acting these violences out, not only is dominance asserted, behavior is normalized. In North America, Indigenous women (and others) were subjected to this violence tremendously. Our bodies became objects to conquer and control.<sup>135</sup>

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<sup>130</sup> Luhui Whitebear, VAWA Reauthorization of 2013 and a Continued Legacy of Violence Against Indigenous Women: A Critical Outsider Jurisprudence Perspective.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 2.

<sup>133</sup> *Id.* at 3-4.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 5.

The plight of both land and body, then, was inexorably tied to the laws that establish ownership of such lands and such bodies.<sup>136</sup> This lies firmly in the world of Property Law.

With respect to the land, the rules of Real Property allowed and even rewarded the cited violence against the land.<sup>137</sup> But as the law of trespass can quickly teach us, the rules of Real Property Law can have some dramatic and immediate effects upon the persons that inhabit or traverse real property.<sup>138</sup> As Whitebear points out, the propertization of the land led to the commodification of the persons who inhabited that land.<sup>139</sup> The rules of Private Law, then, were applied to those persons, and those rules permitted and sanctioned violence against them.<sup>140</sup>

This sad state of affairs continues to this day.<sup>141</sup> Even after the approval, and the reauthorization, of the VAWA, indigenous women in the United States are constantly subjected to violence in ways that others in our society are not.<sup>142</sup> The application of VAWA to indigenous women is littered with loopholes and jurisdictional limitations.<sup>143</sup> As Whitebear explains: “With all of the loopholes described, it is safe to say, the hunting ground is still open. Indigenous women are still prey and still considered disposable objects of desire.”<sup>144</sup> The disturbing reality that underlies this problem is that when some presumptive subjects of Public Law are not recognized as persons in the same manner and to the same extent as others, these subordinated souls become the *objects* of Private Law.

The problem of persons being treated as the objects of Private Law is also central to Charles R. Venator-Santiago’s *Interest Convergence and the Extension of U.S. Citizenship to Puerto Rico*.<sup>145</sup> In his article, Venator-Santiago applies interest convergence theory to the grant of United States citizenship to Puerto Ricans at the turn of the 20<sup>th</sup> century.<sup>146</sup> He argues that there were multiple reasons why it became in the United States’ white elites’ interest to grant citizenship to Puerto

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<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *See generally* Restatement (2nd) of Torts, secs. 329 et seq.

<sup>139</sup> Whitebear at 2.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 2-3 & 7-10.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 10-14.

<sup>144</sup> *Id.* at 14.

<sup>145</sup> Charles R. Venator-Santiago, *Interest Convergence and the Extension of U.S. Citizenship to Puerto Rico*.

<sup>146</sup> *Id.*

Ricans.<sup>147</sup> Particularly of note, however, is the fact that what perhaps becomes the primary reason according to Venator-Santiago involves the treatment of Puerto Rican persons as objects in the private commercial and economic hijinks of that white elite.<sup>148</sup>

“White elites also believed that granting citizenship to Puerto Ricans would help industrialize Puerto Rico and enhance their economic and commercial interests in the island.”<sup>149</sup> In this sense, Puerto Rican persons are characterized as consumers and a cheap labor force that could be more thoroughly exploited for economic benefit by those who held the control and power over Private Law. Venator-Santiago provides evidence of this intent from the legislative history of some of the relevant federal statutory enactments.<sup>150</sup> “Presumably providing for the collective naturalization of Puerto Ricans would cement the relationship between the island and the mainland making it easier to invest, trade, and sustain long-term commercial endeavors in the island.”<sup>151</sup>

The narrative laid out by Venator-Santiago, then, speaks to how private interests can directly affect Public Law. It is precisely the interest in having Puerto Rican persons become objects of United States Private Law that leads to a change in their status as subjects of Public Law. Puerto Ricans become citizens not because of their worth as persons, but because of their worth as objects in commercial and economic trade.

In this context, it becomes impossible to ignore the current predicament of the Puerto Rican people. After more than 100 years of being the objects of United States economic interests, Puerto Ricans are now awakening to the reality that their citizenship is to a great extent a one-way street, and that the flow of traffic leads away from their interests. The recent crises in Puerto Rico have laid bare a seemingly interminable trail of broken promises. That is what happens when a people are not treated as persons, but rather as objects.

Finally, while on the topic of broken promises, we come to the article in this Symposium that is most directly related to Private Law. In *Breaking Bad Promises*, Frank Guerra-Pujol raises an old question that acquires renewed interest today: “is a promise morally binding irrespective of the content or substance of the promise?”<sup>152</sup> Guerra-Pujol

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 11.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 11 (citing 1908 House Report accompanying H.R. 393, Representative Henry A. Cooper (R-WI)).

<sup>152</sup> Frank Guerra-Pujol, *Breaking Bad Promises* at 3.

explains how “an immoral promise poses a potential ‘moral antinomy’ or moral paradox: the moral obligation to perform an immoral action.”<sup>153</sup> He then points us to two proposed solutions to this moral paradox, both of which he finds insufficient:

Broadly speaking, theorists have offered two plausible solutions to the breaking bad problem. One solution is simply to deny that an immoral promise is a promise. The other is to concede that an immoral promise is, in fact, a promise, but not a morally obligatory or binding one. Neither solution, however, is persuasive.<sup>154</sup>

The inadequacy of these solutions to the moral paradox of immoral promises has taken on special poignancy in the era of President Donald Trump.

In his zeal to satisfy and stir up a constituency whose ideological commitments often include racism, xenophobia, misogyny, anti-Semitism, white supremacy, violence, and other immoral attitudes and behaviors, Trump has made all sorts of promises to create immoral public policy.<sup>155</sup> Both during the presidential campaign and during his Presidency, Trump has promised to discriminate against persons on the

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<sup>153</sup> *Id.* at 3.

<sup>154</sup> *Id.* at 3 (citing J. E. J. Altham, “Wicked promises,” in Ian Hacking, editor, *Exercises in Analysis*, Cambridge U. Press (1985); Seana Valentine Shiffrin, “Immoral, conflicting, and redundant promises,” in R. Jay Wallace, Rahul Kumar, and Samuel Freeman, editors, *Reasons and Recognition: Essays on the Philosophy of T.M. Scanlon*, Oxford U Press (2011)).

<sup>155</sup> See David Leonhardt and Ian Prasad Philbrick, Donald Trump’s Racism: The Definitive List, N.Y. Times, <https://nyti.ms/2EKws1Z> (Jan. 15, 2018); Greg Sargent, Why is Trump reluctant to condemn white supremacy? It’s his racism — and his megalomania., Washington Post, [https://www.washingtonpost.com/blogs/plum-line/wp/2017/08/14/why-is-trump-reluctant-to-condemn-white-terrorism-its-his-racism-and-his-megalomania/?utm\\_term=.9280dba49f3d](https://www.washingtonpost.com/blogs/plum-line/wp/2017/08/14/why-is-trump-reluctant-to-condemn-white-terrorism-its-his-racism-and-his-megalomania/?utm_term=.9280dba49f3d) (Aug. 14, 2017); Susan Chira, Who Likes Trump’s Tweets and Why, N.Y. Times, <https://nyti.ms/2trmtw9> (Jun. 29, 2017); Claire Cohen, Donald Trump sexism tracker: Every offensive comment in one place, The Telegraph, <https://www.telegraph.co.uk/women/politics/donald-trump-sexism-tracker-every-offensive-comment-in-one-place/> (Jul. 14, 2017); Michael A. Memoli, Trump’s silence on a documented rise in episodes of anti-Semitism is ‘mind-boggling,’ group says, L.A. Times, <http://www.latimes.com/politics/washington/la-na-essential-washington-updates-trump-silence-on-anti-semitic-incidents-1487286542-htmlstory.html> (Feb. 16, 2017); Niraj Chokshi, Assaults Increased When Cities Hosted Trump Rallies, Study Finds, N.Y. Times, <https://nyti.ms/2FNBRGN> (Mar. 16, 2018); Meghan Keneally, A look back at Trump comments perceived as encouraging violence, ABC News, <http://abcnews.go.com/Politics/back-trump-comments-perceived-encouraging-violence/story?id=48415766> (Jul. 3, 2017).

basis of their religious beliefs.<sup>156</sup> He has also promised to minimize and ignore civil rights violations of persons on the basis of their race.<sup>157</sup> Trump's immigration policies promise to destroy families and communities.<sup>158</sup> His environmental policies promise to further stoke the fires of climate change.<sup>159</sup> His foreign policies promise to disregard the suffering of fellow human beings across the world.<sup>160</sup> His financial and regulatory policies promise to turn back the clock before the Great Recession.<sup>161</sup> His tax policies promise to further enrich the few on the backs of the most vulnerable in our society.<sup>162</sup> And he also has acted and, to one extent or another, fulfilled some of those immoral promises.

So the question that must necessarily be posed is whether a failure to fulfill such promises would be even more harmful to our society as a profound betrayal of democracy. We should not ignore the consequences that a wholesale breaking of these promises could engender. According to recent polling, a significant portion of the population in the United States, over one third, approves of the Trump Presidency and the immoral promises he has made.<sup>163</sup> If Trump were to abandon that constituency, what would happen next?

Perhaps an even more troubling question, as the Mueller investigation continues to hang above all our heads as the proverbial sword of Damocles, is whether the removal of Trump from office would be treated by this Trumpista constituency as the breaking of the promise

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<sup>156</sup> David Leonhardt and Ian Prasad Philbrick, *Donald Trump's Racism: The Definitive List*, N.Y. Times, <https://nyti.ms/2EKws1Z> (Jan. 15, 2018).

<sup>157</sup> Sherrilyn Ifill, *President Trump's First Year Was an Affront to Civil Rights*, Time, <http://time.com/5106648/donald-trump-civil-rights-race/> (Jan. 17, 2018).

<sup>158</sup> Susan Church, *Trump immigration policies destroy families*, Boston Globe, <https://www.bostonglobe.com/opinion/2018/01/31/trump-immigration-policies-destroy-families/3UuAacsFIYbSNVKt5ZzD8I/story.html> (Jan. 31, 2018).

<sup>159</sup> Michael Greshko et al., *A Running List of How Trump Is Changing the Environment*, National Geographic, <https://news.nationalgeographic.com/2017/03/how-trump-is-changing-science-environment/> (Mar. 16, 2018).

<sup>160</sup> Michael H. Fuchs et al., *If Trump Forgets About Human Rights in Asia, the World Will Suffer*, Foreign Policy, <http://foreignpolicy.com/2017/11/02/if-trump-forgets-about-human-rights-in-asia-the-world-will-suffer/> (Nov. 2, 2017).

<sup>161</sup> Ben Protess & Julie Hirschfeld Davis, *Trump Moves to Roll Back Obama-Era Financial Regulations*, N.Y. Times, <https://nyti.ms/2k4I1Ht> (Feb. 3, 2017).

<sup>162</sup> Reuben Fischer-Baum et al., *Republicans say it's a tax cut for the middle class. The biggest winners are the rich.*, Washington Post, [https://www.washingtonpost.com/graphics/2017/business/what-republican-tax-plans-could-mean-for-you/?utm\\_term=.0041bc5cdf99](https://www.washingtonpost.com/graphics/2017/business/what-republican-tax-plans-could-mean-for-you/?utm_term=.0041bc5cdf99) (Jan. 30, 2018).

<sup>163</sup> FiveThirtyEight, *How Popular is Donald Trump*, <https://projects.fivethirtyeight.com/trump-approval-ratings/> (last visited on Mar. 20, 2018).

of democratic accountability that our Constitution has made to them. Would such a broken promise be the beginning of the end of our Union?

Trump's use of immoral promises and threats also raises some interesting questions regarding the limits of national self-interest. Trump constantly engages in what some might consider negotiation tactics that involve immoral and broken promises, as well as immoral threats.<sup>164</sup> In particular, Trump's foreign policy seems to be based on these kinds of techniques.<sup>165</sup> Consider Trump's recurring promise/threat to attack North Korea with nuclear weapons.<sup>166</sup> Also consider his threat to abandon the United States' long time allies, such as South Korea and Japan, or the members of the North Atlantic Treaty Organization.<sup>167</sup> And what about his promise to build a wall between the United States and Mexico, and make Mexico pay for it?<sup>168</sup> How is this promise related to his threat to abandon the North American Free Trade Agreement?<sup>169</sup>

It might very well be the case that what Trump is doing with all of these promises and threats is nothing but a negotiation tactic, a tactic that would include ruthlessly breaking any and all promises made. And it might be the case that in some instances these tactics may lead to beneficial outcomes for the interests of the United States. Would such outcomes justify the making, and the breaking, of such immoral promises? And what happens after that? Will the credibility of the United States before the rest of the world be irreparably damaged?

The relevance of Guerra-Pujol's article, however, does not end there. His commentary on broken promises sheds light on a more

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<sup>164</sup> See Neil Irwin, *Art of the Bluff: The Limits of Trump's Negotiation Strategy*, N.Y. Times, <https://nyti.ms/2qaIoDI> (Apr. 27, 2017); Ronald Brownstein, *How Donald Trump is negotiating like a hostage-taker*, CNN, <https://www.cnn.com/2017/10/17/politics/donald-trump-negotiating-strategy/index.html> (October 17, 2017).

<sup>165</sup> *Id.*

<sup>166</sup> Evan Osnos, *Donald Trump and North Korea: Big Button, Small President*, The New Yorker, <https://www.newyorker.com/sections/news/donald-trump-and-north-korea-big-button-small-president> (Jan. 3, 2018).

<sup>167</sup> Toni Clarke, Trump questions NATO, Asia nuclear weapons ahead of Washington summit, Reuters, <https://www.reuters.com/article/us-usa-election-trump/trump-questions-nato-asia-nuclear-weapons-ahead-of-washington-summit-idUSKCN0WT0MZ> (Mar. 27, 2016); Jesse Johnson, *Trump rips U.S. defense of Japan as one-sided, too expensive*, The Japan Times, <https://www.japantimes.co.jp/news/2016/08/06/national/politics-diplomacy/trump-rips-u-s-defense-japan-one-sided-expensive/#.WrHNx2Z7m34> (Aug. 6, 2016).

<sup>168</sup> Ron Nixon & Linda Qiu, *Trump's Evolving Words on the Wall*, N.Y. Times, <https://nyti.ms/2DiAG0K> (Jan. 18, 2018).

<sup>169</sup> Jeremy Diamond, *Trump: I will use NAFTA negotiations to make Mexico pay for the wall*, CNN, <https://www.cnn.com/2018/01/11/politics/donald-trump-nafta-mexico-wall/index.html> (Jan. 11, 2018).

profound reality that permeates much of our Private Law today. Guerra-Pujol notes that “[m]any legal theorists, for example, recognize that contract law, in the words of Professor Shiffrin, ‘has not ... fully internalized the significance of contracts being promises.’”<sup>170</sup> And it is in this rejection of the significance of contracts as promises that our Private Law might be doing much of its most significant damages.

The failure of our Private Law to internalize costs stands as the central reason why the theory of efficient breach, and so much else about the Law and Economics theoretical machinery, is defective.<sup>171</sup> Guerra-Pujol’s article points to our Private Law’s failure to internalize the cost of moral failings.<sup>172</sup> It also points to our failure to internalize human suffering. It points to our failure to internalize human enjoyment, as well.

Why do we fail to internalize such central matters in our Private Law? Perhaps it is because these things are difficult to measure. Such a reality is undeniable. But the logical fallacy lies in the next leap in the argument, that says: “if I can’t measure them, they don’t exist.” If I cannot get their measure, they do not exist. If I cannot understand them, they do not exist. And so from a failure of measurement we make the leap to xenophobia. From a very private inability to understand particular things, a whole society jumps into the abyss of public denial of the other.

Our whole scheme of Public Law, the most fundamental understanding of our constitutional democracy, is being torn asunder. Some of the work necessary for this macabre undertaking is being done by the apparently more innocent machinations of tweaks in our Private Law. We must confront these threats, and the articles that form part of this Symposium propose some avenues for such a defense.

### *B. Personal Narrative as an Important Tool of LatCrit Theory and Community Resistance*

A crucial area of LatCrit Scholarship has focused on the connection between the personal and the structural to help us understand how the personal or individual experience is part and parcel of dominant cultural,

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<sup>170</sup> Guerra-Pujol at 2 (citing Seana Valentine Shiffrin, “Are contracts promises?,” in Andrei Marmor, editor, *Routledge Companion to Philosophy of Law*, Routledge (2012)).

<sup>171</sup> See Charles Fried, *Contract As Promise* (1981); Seana Shiffrin, *Could Breach of Contract Be Immoral?*, 107 Mich. L. Rev. 1551 (2009); Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 Harv. L. Rev. 708, (2007).

<sup>172</sup> *Id.*

material, and political arrangements.<sup>173</sup> The remaining essays in this volume connect the authors' experiences with broader societal dynamics, shedding light on yet another illusory dichotomy, so that the personal and the structural are understood as integrated, rather than bifurcated, aspects of social reality.<sup>174</sup>

The importance of personal narrative and storytelling has been a characteristic of LatCrit theory. Borrowing from Margaret Montoya, “[t]he narratives that focus on the experiences of the outsider empower both the story teller and the story listener by virtue of its opposition to the traditional forms of discourse.”<sup>175</sup> Narratives also play an important role in disrupting the “masters discourse.”<sup>176</sup> As Frank Valdes has explained Outcrit scholar storytelling:

Captures otherwise ignored insights and that encourages students by example to learn structural lessons from personal experiences and narratives. This point thus includes the connection of historical and social knowledge with personal experience and knowledge; this connection envisions a combination of intellectual and experiential knowledge that helps to contextualize the personal in larger cultural frames. This point of connection thus provides one example of the ways in which the collective work of OutCrit scholars may and should be incorporated into the ongoing development of critical approaches to legal education.<sup>177</sup>

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<sup>173</sup> Francisco Valdes, *Outsider Jurisprudence, Critical Pedogogy and Social Justice Activism: Marking the Stirrings of Critical Legal Education*, 10 *Asian Am. L.J.* 65, 95 (2003).<sup>[1]</sup><sup>[2]</sup>

<sup>174</sup> *Id.*

<sup>175</sup> Margaret Montoya Máscaras, *Trenzas y Greñas: Unmasking the self while embracing Latina Stories and Legal Discourse*, in *CRITICAL RACE THEORY 522* (Temple University Press 2000).

<sup>176</sup> Robert S. Chang & Adrienne D. Davis, *An Epistolary Exchange: Making Up Is Hard to Do: Race/Gender/Sexual Orientation in the Law School Classroom*, 33 *Harv. J.L. & Gender 1*, 12 (2010) On the power of master narratives, see Lisa Ikemoto, *Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed “Los Angeles,”* 66 *S. CAL. L. REV.* 1581 (1993)

<sup>177</sup> Francisco Valdes, *Outsider Jurisprudence, Critical Pedogogy and Social Justice Activism: Marking the Stirrings of Critical Legal Education*, 10 *Asian Am. L.J.* 65, 95 (2003).<sup>[1]</sup><sup>[2]</sup> See also Margaret Montoya, *Celebrating Racialized Legal Narratives*, in



In the final two symposium pieces, the authors engage in interdisciplinary analyses that disrupt the rigidity of the boundaries between the public and private both in terms of professional identity and then in terms of the construction of the self: Elvia Arriola, *Remarks Upon Receiving the Critical Pioneer Award at Latina/o Critical Legal Theory Conference, XXI-Biennial, October 2-4, 2017, Orlando, Florida*; and Esther M. Claros Berlioz, *Liberation Through Aesthetics*. Both Arriola and Claros Berlioz use narrative in their essays as a vehicle to speak the truth to the “power”—the dominant American society. As Pedro Malavet explains: LatCritters embrace and celebrate the narrative. More specifically, LatCrit scholarship must include and does include storytelling, because it is both antinormative and antiessentialist. In fact, our failure to use narrative would contribute to the preservation of privilege and, thus, to normativity and essentialism.<sup>178</sup>

Claros Berlioz shares an intimate narrative of struggle to belong, to navigate identity and legal status and how this impacts her relationship with her art:

As I traversed betwixt and between (Turner, 1987) different positions over the years, I have been forced to become proficient in knowing the delineations of my legal status. It has always been about the long game; it is a marathon, not a sprint. I told myself that, once I secured my place in this country, I would go back to making art. What I failed to see was that I was literally shutting off a part of myself. I didn’t know any better and no one was telling me anything different. The world of impermanence that comes with non resident alien status is a world known and understood fully by few people I know.<sup>179</sup>

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CROSSROADS, DIRECTIONS AND A NEW CRITICAL RACE THEORY 243  
(Francisco Valdes, Jerome McCristal Culp, Jr. & Angela P. Harris eds., 2002).<sup>[17]</sup>

<sup>178</sup> Pedro A. Malavet, *Literature and the Arts as Antisubordination Praxis: LatCrit Theory and Cultural Production: The Confessions of an Accidental Crit*, 33 U.C. DAVIS L. REV. 1293, 1301-02 (2000).

<sup>179</sup> See Esther M. Claros Berlioz *Liberation Through Aesthetics*.

One of the goals of LatCrit has been to challenge and add context to racialized histories. This particular LatCrit intervention has often been achieved through narrative methodology.<sup>180</sup> It has also served as a tool to provide counter-stories-narratives that represent the lived experiences of socially marginalized segments of society which reflect experiences not typically represented within the “stock stories.” Claros Berlioz shares her narrative as part of her praxis because she recognizes the important role that the narratives of “others” played in helping her find her way and her voice: “These artists shared their journeys toward healing after they sought to connect and expose their vulnerabilities for others to see. Their work has helped me find my way amidst the darkness, but most importantly, it has further inspired my praxis.”<sup>181</sup> As Elvia Arriola has commented elsewhere:

If one has experienced discrimination directly based on gender, race and class and has felt silenced and disempowered to create real social change, the simple act of reading an article that uses storytelling or personal narrative and validates our experiences of outsiderhood or discrimination embodies, for some readers, the voice of freedom.<sup>182</sup>

At the Conference, the LatCrit community recognized Elvia Arriola with the inaugural Critical Pioneer Award to honor her lifetime of unique and groundbreaking contributions to the advancement of critical outsider knowledge, community, and praxis. Elvia is the author of more than forty-five articles, essays and book chapters ranging widely on the topics of feminist legal theory and history, LGBT/queer legal theory, LatCrit theory and the impact of globalization and free trade policy on working women and families at the Mexican border. She is Executive Director of Women on the Border, Inc., a nonprofit organization dedicated to advancing awareness of the impact of NAFTA on women in the global factories at the U.S.-Mexico border known as “maquiladoras.” But even for a hero like Elvia, the road was difficult; challenging the white man’s spaces of power came with a cost. And as the artist in Claros Berlioz did

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<sup>180</sup> Mario L. Barnes, LatCrit Theory, Narrative Tradition and Listening Intently for a “Still Small Voice”, 1 U. MIAMI RACE & SOC. JUST. L. REV. 1 (2011).

<sup>181</sup> See Claros Berlioz, Liberation Through Aesthetics.

<sup>182</sup> Elvia R. Arriola, Welcoming the Outsider to an Outsider Conference: Law and the Multiplicities of Self, 2 HARV. LATINO L. REV. (No. 5) 397, 414 (1997).

for her, Elvia shared her story with us so that we would recognize ourselves in her.

I might as well have been working in a haunted house where the ghosts of defenders of Southern style racial and ethnic segregation whispered in the ears of several of my not-so-welcoming colleagues: that I was wrong for the school, they were right to fight against affirmative action, it was perfectly OK to target me as unqualified, that they could derail my tenure candidacy because after all, I wasn't good enough for UT, and my scholarship wasn't good enough because I relied heavily on feminist/gender theory and history. My narrative of What Happened reminded us that doing critical theory is risky, that it *does challenge* the established power structure, still largely controlled by white men, and that costly rejection is always possible. And rejection can take the form of daunting and sometimes vicious racial, sexual and gendered politics of identity surrounding an application for promotion and tenure.<sup>183</sup>

She further shares how, for her, LatCrit was a community of support that allowed her to carry on and continue to inspire all of us:

My own journey to healing from not getting tenure at the high ranking law school where I began my career took an incredibly long time. It was financially costly to me (in therapy hours) and to my spouse (in supporting multiple residences) for us to be working and living in two different states for over 15 years. Was it worth it? Yes, because following LatCrit I, I was able to thrive in meaningful scholarly projects that allowed me to step into a professional identity as a Latina, feminist/gender theorist. I especially felt supported in my research topics rather than questioned as to whether I was doing "real scholarship." Members of this LatCrit *familia* helped me emotionally and some literally helped me

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<sup>183</sup> Elvia Arriola, Remarks Upon Receiving the Critical Pioneer Award at Latina/o Critical Legal Theory Conference, XXI-Biennial, October 2-4, 2017, Orlando, Florida at 1.

find another academic home where I was quickly tenured. That kind of community support was profoundly important to me but it has been one of the highlights of the service produced by the LatCrit community. Institutionalizing support for the vulnerable law professor of color in the Junior Faculty Development Workshop has made LatCrit a significant player in efforts to increase the hiring and retention of qualified, productive, talented Latina/os in the legal academy. Our presence has enriched our lives while enhancing diversity in the legal academy.<sup>184</sup>

It is Elvia's work that has been a gift to all of us and has inspired not only the legal academy but our lives.

## VI. CONCLUSION

It seems only fitting to close this Symposium Foreword with Elvia's call for action:

But our work is not over. As we celebrate now our more than 20 years as a scholarship conference, we need to see that the original questions are still important for guiding our research, writing and our teaching. Our initial trajectory sought to place the Latina/o experience into mainstream journals and stake a claim to legitimacy of research topics for publishable writings worthy of tenure. Yes, those perspectives remain just as important. Except that now we are facing a new set of crises amidst a hostile political culture where people of color are not just Presumed Incompetent, they are *Presumed Illegal*. Therefore an agenda for research, for writings that aid civil rights activists and lawyers demands our best thinking, our careful investigations and our clearest sensitivity to such questions as: Is our research relevant to the most vulnerable communities literally being targeted.<sup>185</sup>

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<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

“What’s Next?” is a hard question to answer while one remains trapped in the inexorable labyrinths of *el mundo malo*. It is exceedingly hard to keep calm and carry on when the machinations of an invisible antagonist seem omnipresent and inescapable. It is hard to stir to action our fellow humans when the oppressive forces are insidious and covert. But it is precisely in the midst of such struggle, when hope escapes us and “there’s a darkness upon us that’s covered in light,”<sup>186</sup> that we most need to pay attention to Elvia’s wisdom:

Yes, it is hard. Sometimes we have to cry. And then we need to get up and do something. We need to hold each other up and nurture the warrior spirit of love and resistance. And we must not drink the poison of resentment or swallow the lies about our incompetence or lack of worth.<sup>187</sup>

What is next is more of the same. The struggle. But what is next is also something completely different. Because the mechanisms of oppression morph and evolve. And so must we. But we have an advantage, we are in this together. We struggle for communion. We strive to cross back over to *el mundo bueno*, together. We dream, together. We imagine, together. We envision, together. We act, together. And in unity there is strength.

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<sup>186</sup> The Avett Brothers, “Head Full of Doubt/Road Full of Promise”, *I AND LOVE AND YOU* (American Recordings 2009).

<sup>187</sup> Elvia Arriola, Remarks Upon Receiving the Critical Pioneer Award at Latina/o Critical Legal Theory Conference, XXI-Biennial, October 2-4, 2017, Orlando, Florida at 1.