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## Foreword: What's Next? Counter-stories and Theorizing Resistance

Tayyab Mahmud

Seattle University School of Law, mahmud@seattleu.edu

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## Foreword

# What's Next? Counter-stories and Theorizing Resistance.

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Tayyab Mahmud\*

Getting its history wrong is part of being a nation.<sup>1</sup>

[I]n human history there is always something beyond the reach of dominating systems, no matter how deeply they saturate society, and this is what makes change possible.<sup>2</sup>

First of all, epistemological decolonization, as de-coloniality, is needed to clear the way for new intercultural communication, for an interchange of experiences and meanings, as the basis of another rationality which may legitimately pretend to some universality.<sup>3</sup>

### I. INTRODUCTION:

The question “What’s Next?” stood precluded for a generation amidst the triumphalist declarations of “End of History.” The question had no space under the blazing epigraph of a neo-liberal phase of global capitalism: “There is No Alternative (TINA).” The fall of the Berlin Wall was deemed

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\* Professor of Law, Seattle University School of Law. This symposium would not have been possible without the leadership of Saru M. Matambanadzo, who spearheaded the planning of the LatCrit 2017 Conference in Orlando. I remain deeply indebted to the LatCrit community for their friendship, support, and intellectual engagements. Any errors are, of course, mine alone.

<sup>1</sup> E.J. HOBBSAWM, *NATIONS AND NATIONALISM SINCE 1780* 12 (1990) (quoting Ernest Renan).

<sup>2</sup> EDWARD W. SAID, *THE WORLD, THE TEXT, AND THE CRITIC* 246-47 (1983).

<sup>3</sup> Anibal Quijano, *Coloniality and Modernity/Rationality*, 21 *CULTURAL STUD.* 168, 177 (2007).

irrefutable testimony that Hegel’s blueprint of history’s upwards trajectory had arrived at its penultimate stage—liberal democracy as the capstone of a capitalist foundation. All questions of politics and power stood resolved. Globalization, fueled by financialized capitalism and orchestrated by “Washington Consensus,” was now both the road and the destination. “End of Ideology” was now a reality, political parties simply fund-raising machines and government simply a matter of managerial governance. Rapidly advancing information technology and tax-exempt charitable foundations would take care of any remaining challenges of collective life. Then amidst the celebration of the “End of History,” the bottom fell out of this house of cards. The “Great Recession” evaporated trillions of dollars into thin air and sent millions of human beings into unemployment and poverty. The financial crisis metastasized into pervasive fiscal crises, prompting declarations of “financial martial law” and renewed assaults on the working classes.<sup>4</sup> Lower incomes and increased poverty rendered the

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<sup>4</sup> Exemplary is the Michigan legislation, dubbed “financial martial law” by a legislator, which empowers the governor to declare a “financial emergency” in towns or school districts. He can then appoint an emergency financial manager who can fire local elected officials, break contracts, seize and sell assets, eliminate services—and even eliminate whole cities or school districts without any public input. Chad Celweski, *Michigan Senate Passes Emergency Manager Bill*, DAILY TRIB., Mar. 10, 2011, [https://www.dailytribune.com/sports/michigan-senate-passes-emergency-manager-bills/article\\_cd8d889b-5409-54c2-a810-c3cbbe20c900.html](https://www.dailytribune.com/sports/michigan-senate-passes-emergency-manager-bills/article_cd8d889b-5409-54c2-a810-c3cbbe20c900.html) [https://perma.cc/8N96-Z7U6]; Andy Kroll, *Behind Michigan’s “Financial Martial Law:” Corporations and Right-Wing Billionaires*, MOTHER JONES, Mar. 23, 2011, <http://motherjones.com/politics/2011/03/michigan-snyder-mackinac-center> [https://perma.cc/LJ73-3AYK]; Stephanie Condon, *Michigan Bill Would Impose “Financial Martial Law,”* CBS NEWS, Mar. 11, 2011, [http://www.cbsnews.com/8301-503544\\_162-20042299-503544.html](http://www.cbsnews.com/8301-503544_162-20042299-503544.html) [https://perma.cc/GJV2-PU69]. A primary objective of declaring financial emergencies is to give emergency managers “the ability to set aside contracts with public workers’ unions.” Monica Davey, *Detroit’s Mayor Says Budget Gap May Require Emergency Manager*, N.Y. TIMES, Nov. 4, 2011, at A15. These measures are helping states and local governments to replace public employees with contract workers “who will do the same job for less.” Motoko Rich, *A Hidden Toll as States Shift to Contract Workers*, N. Y. TIMES, Nov. 7, 2011, at A1. Concurrently, assaults on organized labor has picked up pace. See, e.g., Monica Davey, *Indiana Governor Signs a Law Creating a ‘Right to Work’ State*, N. Y. TIMES, Feb. 2, 2012, at

2000s a “lost decade.”<sup>5</sup> A sluggish economy, high unemployment, and low wages are the “new normal.”<sup>6</sup> The construct of precarity is at large to signify labor conditions of “permanent insecurity and precariousness.”<sup>7</sup> The search for culprits turned into a rush to round up the usual suspects.<sup>8</sup> Personal greed, corrupt financiers, imprudent investors, and unworthy homeowners, are the favored targets.<sup>9</sup> The deep economic insecurity and incessant instability spawned by the Great Recession has created the opening for foundational critiques of the existing order to be formulated and an opportunity for voices long silenced to be articulated.

Where the global financial crisis created the space for critical voices, the political aftermath of the crisis has injected urgency into the “What Next?” question. Political orders across the world have taken a hard right turn. While the world’s largest democracy, India, yielded the reigns of the state

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A12. Note the title of the an early national legislative response to the financial meltdown, i.e., *Emergency Economic Stabilization Act* (2008).

<sup>5</sup> Sabrina Tavernise, *Soaring Poverty Casts Spotlight on ‘Lost Decade,’* N. Y. TIMES, Sept. 14, 2011, at A1, A21.

<sup>6</sup> Fred Magdoff, *The Jobs Disaster*, MONTHLY REV., (June 1, 2011), <https://monthlyreview.org/2011/06/01/the-jobs-disaster-in-the-united-states/> [<https://perma.cc/WJ78-EYFM>]; Jason DeParle, Robert Gebeloff, and Sabrina Tavernise, *Older, Suburban and Struggling: “Near Poor” Startle the Census*, N.Y. TIMES, Nov. 19, 2011, at A1; Sabrina Tavernise, *Middle-Class Areas Shrink as Income Gap Grows, New Report Finds*, N. Y. TIMES, Nov. 16, 2011, at A16. For comparison of employment recovery following recessions between 1974 and 2011, see David McNally, *Slump, Austerity and Resistance*, in THE CRISIS AND THE LEFT 39, Fig. 1 (Leo Panitch, Greg Albo & Vivek Chibber eds., 2011); Sudeep Reddy, *Downturn’s Ugly Trademark: Steep, Lasting Drop in Wages*, WALL ST. J. (Jan. 11, 2011), <https://www.wsj.com/articles/SB10001424052702304248704575574213897770830> [<https://perma.cc/3YBB-Y9VA>].

<sup>7</sup> For productive discussions of precarity, see GARY STANDING, *THE PRECARIATE: THE NEW DANGEROUS CLASS* (2014); Tayyab Mahmud, *Precarious Existence and Capitalism: A Permanent State of Exception*, 44 SOUTHWESTERN L. REV. 699 (2015).

<sup>8</sup> See Timothy J. Sinclair, *Round Up the Usual Suspects: Blame and the Subprime Crisis*, 15 NEW POL. ECON. 91 (2010).

<sup>9</sup> See, e.g., GRETCHEN MORGENSON AND JOSHUA RANES, *RECKLESS ENDANGERMENT: HOW OUTSIZED AMBITION, GREED AND CORRUPTION LED TO ECONOMIC ARMAGEDDON* (2011). For the tendency to blame racial minorities, see andre douglas pond cummings, *Racial Coding and the Financial Market Crisis*, 1 UTAH L. REV. 1, 64–70 (2011).

to proto-fascists, the oldest democracy, Britain, instituted Brexit. From Austria to Brazil and from Ukraine to the USA, ultra-nationalism, xenophobia, protectionism, border control, militarism, and hyper-policing are at large. Hard-won civil, economic, and political rights are under assault. While climate change and environmental degradation threaten the very survival of the planet, and wars—both of the trade and weaponized varieties—knock at the door, a transnational superclass of “Davos Men” lords over the contemporary global,<sup>10</sup> and at hand is an ominous resurgence of genetic and racial explanations of history.<sup>11</sup> A new label, Alt-Right, has been coined to cover all the regressive forces in ascendancy across the planet. While financialized capitalism is adjusting to the post-meltdown era, on April 18, 2018, sounding an alarm on excessive global debt, the International Monetary Fund (IMF) reported that with \$164 trillion—three times the world’s GDP—owed, the world is deeper in debt than at the height of the financial crisis.<sup>12</sup> This conjuncture cries out for transformative critiques and articulation of alternative visions of collective life. Hence the question: What’s Next?

The LatCrit 2017 Conference invited participants to explore this question with particular reference to “Resistance, Resilience and Community in the Trump Era.”<sup>13</sup> This symposium presents a selection of papers delivered at

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<sup>10</sup> Peter Berger, *Introduction: The Cultural Dynamics of Globalization* in *MANY GLOBALIZATIONS: CULTURAL DIVERSITY IN THE CONTEMPORARY WORLD 1* (Peter Berger and Samuel P. Huntington eds. 2002).

<sup>11</sup> See, e.g., NICHOLAS WADE, *A TROUBLESOME INHERITANCE: GENES, RACE AND HUMAN HISTORY* (2014). This trend is closely related to the ubiquitous focus on climate and culture to the exclusion of power and political economy. See JEROD DIAMOND, *GUNS, GERMS AND STEEL: THE FATES OF HUMAN SOCIETIES* (1997); *CULTURE MATTERS: HOW VALUES SHAPE HUMAN PROGRESS* (Lawrence E. Harrison & Samuel P. Huntington 2000); FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (2006).

<sup>12</sup> Chris Giles, *IMF Sounds Alarm on Excessive Global Borrowing*, *FINANCIAL TIMES*, Apr. 18, 2018, <https://advance.lexis.com/api/permalink/0a4c613b-1ab7-47ec-b44d-007f3d32a764/?context=1000516>.

<sup>13</sup> For a detailed account of LatCrit XXI, see Saru Matambanadzo, Jorge Joig, & Sheila I. Velez Martinez, *Foreword to LatCrit 2017 Symposium: What’s Next? Resistance,*

the conference. One unifying thread of these papers is that they employ counter-stories as a method of socio-legal analysis and of developing critical social theory. This foreword will, first, engage the foundational challenge of post-Enlightenment critique to explore the possibility of transformative critique. Second, it will explore the epistemological valance of counter-stories as tools of social inquiry and guides for praxis. Third, it will demarcate the contours of capitalism, particularly in the neo-liberal era, that explicitly or implicitly frame all contemporary social inquiry. Fourth, it will interrogate the political uber-assemblage of modern imaginary, the nation, which furnishes the primary canvas for contending discourses about identity and association. Fifth, it will introduce the interventions that constitute this symposium. Finally, it will draw a few conclusions.

## II. CRITIQUE: GENEALOGY AND CHALLENGES

With LatCrit being a critical project, it is useful to be reminded of the scaffolding and challenges of post-Enlightenment critique. Critique holds the promise of uncovering the structures and operations of power in the service of anti-subordination and emancipation. To remain honest to its task, however, critique must move along two tracks concurrently: a relentless critique of power and self-critique. Ongoing self-critique is indispensable to ensure that ontological, epistemological, and programmatic frameworks of critique are conducive to the attainment of its task. This becomes particularly urgent when the subject of inquiry forms part of limit horizons of an age. I designate as limit horizons hegemonic ontological categories that, over time, so imprint the imaginary<sup>14</sup> of an age that even

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*Resilience and Community in the Trump Era*, U. MIAMI RACE & SOC. JUSTICE L. REV. (forthcoming).

<sup>14</sup> I use the concept of the “imaginary,” developed by Jacques Lacan and Cornelius Castoriadis, as an inclusive category that refers to culturally specific images, symbols, metaphors, and representations which constitute various forms of subjectivity. See Jacqueline Rose, *The Imaginary* in *THE TALKING CURE* (Colin MacCabe ed., 1981); CORNELIUS CASTORIADIS, *THE IMAGINARY INSTITUTION OF SOCIETY* (Kathleen Blamey trans., 1987).

critique remains imprisoned in the normalcy of these categories—an imprisonment that curtails the transformative potential of critique. Rather than being incidental or accidental, imprisonment in limit horizons is always already a predicament for critique. The very inaugural moment of modern critique reflects this inherent vulnerability, as exemplified by Kant. No sooner than proclaiming the foundational injunction of the Enlightenment—“dare to know”—he proceeds to declare that:

The origin of supreme power, for all practical purposes, is *not discoverable* by the people who are subject to it. In other words, the subject *ought not* to indulge in *speculations* about its origin with a view to acting upon them, as if its right to be obeyed were open to doubt....Whether in fact an actual contract originally preceded their submission to the states authority, whether the power came first, and the law only appeared after it, or whether they ought to have followed this order - these are completely futile arguments for a people which is already subject to civil law, and they constitute a menace to the state.<sup>15</sup>

Thus, legitimacy of the state and the law, grounded in the originary myth of a social contract, acts as a limit horizon for Kant, and render knowing not so daring after all.

The ever-alive agenda of productive critique of the law and society is to identify liminal spaces<sup>16</sup> where law, extra-legality, and illegality are braided to produce the other side of universality—“moral and legal *no man’s land*,

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<sup>15</sup> KANT’S POLITICAL WRITINGS 143 (Hans Reiss ed. 1991), *quoted in* SLAVO ZIZEK, FOR THEY DO NOT KNOW WHAT THEY DO: ENJOYMENT AS A POLITICAL FACTOR 204 (1991).

<sup>16</sup> “The attributes of liminality or liminal personae (‘threshold people’) are necessarily ambiguous, since this condition and these persons elude or slip through the network of classification that normally locate states and positions in cultural space. Liminal entities are neither here nor there, they are betwixt and between the positions assigned and arrayed by law, custom, convention, and ceremonial.” VICTOR W. TURNER, THE RITUAL PROCESS: STRUCTURE AND ANTI-STRUCTURE 95 (1969).

where universality finds its spatial limit.”<sup>17</sup> This warrants that outsider jurisprudence “rethink the lazy separations between past, present, and future.”<sup>18</sup> Contemporary conflicts that appear as new iterations of the binary divides between civilized versus uncivilized, reason versus faith, and modernity versus fundamentalism, only confirm the “presence of the past.”<sup>19</sup> This necessitates that critique must be positioned to shift focus, when needed, from “present futures to present pasts.”<sup>20</sup> In sum, when faced with intractable conflicts, heed to the admonition: “Always historicize!”<sup>21</sup>

Over the last two centuries, History, a linear, progressive, and Eurocentric history, has become the dominant mode of experiencing time and of being.<sup>22</sup> In this History, time overcomes space: a condition in which the “other” of Europe in geographical space will in time resemble Europe.

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<sup>17</sup> Denise Ferreira de Silva, *Towards a Critique of the Socio-Logos of Justice: The Analytics of Raciality and the Production of Universality*, in 7:3 SOC. IDENTITIES 421, 422 (2001).

<sup>18</sup> DEREK GREGORY, THE COLONIAL PRESENT 7 (2008).

<sup>19</sup> Etienne Balibar, *Racism and Nationalism* in RACE, NATION, CLASS: AMBIGUOUS IDENTITIES 38, 38 (Etienne Balibar & Immanuel Wallerstein eds., 1991).

<sup>20</sup> Andreas Huyssen, *Present Pasts: Media, Politics, Amnesia*, in GLOBALIZATION 55–57 (Arjun Appadurai ed., 2001).

<sup>21</sup> FREDERICK JAMESON, THE POLITICAL UNCONSCIOUS: NARRATIVE AS A SOCIALLY SYMBOLIC ACT 9 (1981).

<sup>22</sup> See generally GEORG WILHELM FRIEDRICH HEGEL, THE PHILOSOPHY OF HISTORY (J Sibree trans., 1956) (being the most important foundation for understanding linear, and necessarily teleological, progressive history). I use “History” to designate the hegemonic linear, progressive, Eurocentric history, while “history” is taken as the branch of knowledge that records and explains past events. For Hegel, the telos of History—the structure governing its progress through time—is the unfolding self-awareness of Spirit that is Reason. Hegel posits two moments of this self-awareness: that of Spirit embodied objectively in the rationality of religion, laws, and the State, and that of the individual subject. See generally *id.* Progressive self-awareness of the individual subject involves not only the recognition of the freedom of the self from the hold of nature and ascriptive orders, but most importantly, the realization of his oneness with the Spirit. For Hegel, this is true freedom, the end of History, and it culminates in the Prussian state where the real is the rational and the rational is the real. See productive discussions of Hegelian construct of History, see MICHEL DE CERTEAU, THE WRITING OF HISTORY (Tom Conley trans., 1988); Edward Soja, POSTMODERN GEOGRAPHIES: THE REASSERTION OF SPACE IN CRITICAL SOCIAL THEORY (1989); Robert Youm, WHITE MYTHOLOGIES: WRITING HISTORY AND THE WEST (1990).



History enables not only the justification of the West's world mastery, but also the appropriation of the "other" as a form of knowledge.<sup>23</sup> If History is the mode of being, the condition that presents modernity as possibility, the nation-state is the designated agency, the subject of History that will realize modernity.<sup>24</sup> This History is, of course, mindful of the racial and colonial divide that fractures humanity.<sup>25</sup> It is only nations in the fullness of their History that realize freedom. Those without History, uncivilized non-nations, have no claims or rights. Therefore, civilized nations have the right to destroy non-nations and bring Enlightenment to them. Never was the racialized colonial script given more coherence than when inscribed in the grammar of History and nation.<sup>26</sup> Social Darwinism is only an example of the mutually defining discourse of History, nation and race. The only justification for nationhood was whether a race could be shown to fit within the scheme of historical progress.<sup>27</sup> The universalization of History subjects other social and epistemic forms into its own overarching framework and finds them severely deficient. Levinas sees this as an effect of the concept of totality in Western philosophy, which produces all knowledge by appropriating and subsuming the "other" within itself.<sup>28</sup> As Tagore diagnosed,

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<sup>23</sup> See generally BERNARD COHN, COLONIALISM AND ITS FORMS OF KNOWLEDGE (1996); JOHANNES FABIAN, TIME AND ITS OTHER: HOW ANTHROPOLOGY MAKES ITS OBJECT (1983).

<sup>24</sup> See generally ERIC R. WOLF, EUROPE AND THE PEOPLE WITHOUT HISTORY (1982); ROBERT YOUNG, WHITE MYTHOLOGIES (2nd ed. 2004).

<sup>25</sup> See generally SAMIR AMIN, EUROCENTRISM (1989).

<sup>26</sup> The consolidation of modern international law unfolded within this milieu and partook of the grammar and vocabularies of History, nation, and civilization. See Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1, 1 (1999).

<sup>27</sup> See Hobsbawm, *supra* note 1, at 108; see also RICHARD HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT 172 (1955); GEORGE STOCKING, VICTORIAN ANTHROPOLOGY 32, 66, 235 (1987).

<sup>28</sup> See generally EMMANUEL LEVINAS, TOTALITY AND INFINITY (Alphonso Lingis trans., 1969).

[T]he true spirit of conflict and conquest is at the origin and in the center of Western nationalism...[i]t has evolved a perfect organization of power...[i]t is like the pack of predatory creatures that must have its victims...[w]ith all its heart, it cannot bear to see its hunting grounds converted into cultivated fields.<sup>29</sup>

The task of turning to history presents critique and outsider jurisprudence yet another challenge—that of history itself. The rise of capitalism and attendant age of colonial expansion of Europe was coterminous with consolidation of History—the unilinear, progressive, Eurocentric, teleological history—as the dominant mode of experiencing time and of being.<sup>30</sup> In History, time overcomes space—a process whereby the geographically distant Other is supposed to, in time, become like oneself; Europe’s present becomes all Others’ future. Embodying the agenda of modernity, History constitutes a closure that destroys or domesticates alterity of the Other. History, as a mode of being, becomes the condition that makes modernity possible, with the nation-state posited as the repository of agency (the subject of History) that would realize modernity. In Hegel’s canonical construction, nations attain maturity only when a people are fully conscious of themselves as subjects of History, and it is only such nations which realize freedom.<sup>31</sup> Those outside History, “non-nations,” have no claims or rights; indeed, nations have the right to bring Enlightenment to non-nations. History thus becomes a master code that informs the “civilizing mission” of Europe, posited as a world-historical task.

This frame of History produced a defining mold to modern assemblage of race. For example, Social Darwinism, a progeny of the modern constructions of reason, progress, and science, fixed upon race as the

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<sup>29</sup> RABINDRANATH TAGORE, NATIONALISM 18 (1985).

<sup>30</sup> See ROBERT J. YOUNG, WHITE MYTHOLOGIES: WRITING HISTORY AND THE WEST (1990); see also SAMIR AMIN, GLOBAL HISTORY: A VIEW FROM THE SOUTH (2010).

<sup>31</sup> See PRASENJIT DUARA, RESCUING HISTORY FROM THE NATION: QUESTIONING NARRATIVES OF MODERN CHINA 17–50 (1995).

repository of attributes that enable or prevent evolution towards civilization. It, thus, combined with History to write a legitimating script for colonialism. In the name of enlightened civilization, a hierarchy of “advanced” and “backward” races was posited. Cast in terms of “natural selection” and “survival of the fittest,” evolutionary racism “offered strong ideological support for the whole colonial enterprise . . . savages were not simply morally delinquent or spiritually deluded, but racially incapable.”<sup>32</sup> Thus, evolutionary racialism was “used to justify the worst excesses of expropriation and colonial rule.”<sup>33</sup> European “race-science”<sup>34</sup> consolidated the double binary of fair/dark and civilized/savage, by positing a progressive series of human races with differential mental endowments and civilizational achievements and potential. With the diagnosis accomplished, prescription quickly followed: “[n]ations in which the elements of organization and the capacity for government have been lost . . . are restored and educated anew under the discipline of a stronger and less corrupted race.”<sup>35</sup> History, then, became a record of progress of superior races and, by that standard, the stagnant, backward races had no History.<sup>36</sup>

The primary task of critique in general and outsider jurisprudence in particular is to interrogate and disrupt the master narrative of History. A necessary step in this direction is to uncover the historical record of subordination and oppression repressed by the Eurocentric narrative of progressive unfolding of law and progress-bearing modernity over the last five centuries.

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<sup>32</sup> GEORGE W. STOCKING, *VICTORIAN ANTHROPOLOGY* 237 (1987).

<sup>33</sup> *Id.* at 237.

<sup>34</sup> NANCY STEPAN, *THE IDEA OF RACE IN SCIENCE: GREAT BRITAIN 1800–1960* (1982).

<sup>35</sup> LORD ACTON, *NATIONALITY, MAPPING THE NATION* 31 (Gopal Balakrishnan ed., 1996) (first published in 1862).

<sup>36</sup> For a detailed discussion, see ERIC R. WOLF, *EUROPE AND THE PEOPLE WITHOUT HISTORY* (1982).

### III. COUNTER-STORIES AS CRITIQUE

Intersections of law with narrative and literature predate storytelling by outsider jurisprudence.<sup>37</sup> Indeed, we are told that “Law is the intersection of language and power.”<sup>38</sup> Narrative is a way of organizing, coping with, and even acting on the world. Stories carry power because they have the ability to convey truths even if the stories themselves are not the only ways of seeing the world. Stories represent experience and introduce alternative imaginaries. To make sense of law and to organize experience, people often tell stories. And these stories are telling.

Storytelling gives voice to untapped reservoirs of memory; memories buried under sedimented layers of hegemonic canons of socialization—often lost in the haze of ideology. Autobiographical storytelling is dangerous; the story can collide with everything previously believed, required, and sanctified. A story can touch what has never been touched; it can bring into relief what never come into the field of vision; and, it can oppose what never has been opposed. A story can be resistive, subversive and transformative, especially when it weaves a counter-narrative to settled

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<sup>37</sup> See, e.g., *Symposium: Law and Literature*, 39 MERCER L. REV. 739 (1988); *Symposium: Law and Literature*, 60 TEX. L. REV. 373 (1982); INTERPRETING LAW AND LITERATURE (Sanford Levinson & Steven Mailloux eds. 1988). Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1 (1984); Richard Sherwin, *A Matter of Voice and Plot: Belief and Suspicion in Legal Storytelling*, 87 MICH. L. REV. 543 (1988); Robin West, *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 N.Y.U. L. REV. 145 (1985); see also DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987); KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS* (1988); J.B. WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* (1985); J.B. WHITE, *THE LEGAL IMAGINATION* (1973); J.B. WHITE, *WHEN WORDS LOSE THEIR MEANING* (1984); Robert Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U. L. REV. 179 (1985); Robert Cover, *The Supreme Court, 1982 Term - Foreword. Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

<sup>38</sup> THE OXFORD DICTIONARY OF AMERICAN LEGAL QUOTATIONS IX (Fred R. Shapiro ed., 1993).

understandings, interpretations and worldviews. This potential spawns the transformative political dimension of storytelling.

The use of the “constitutive we” in the American legal tradition is prominent in the founding documents of American government, law, and nationhood. “We hold these truths to be self-evident,” begins the Declaration of Independence.<sup>39</sup> “We the People,” begins the Constitution.<sup>40</sup> These were texts of revolutionary times, when the assertion of a “we” was first an act of defiance, and then an act of construction. Constituting a “we” was an essential part of separating “us” from a firmly excluded and rejected “them.” Much of mainstream legal scholarship is written in consensual terms to an audience it constitutes as “we.” In the first sentences of the preface of *Law’s Empire*, for example, Ronald Dworkin writes: “We live in and by the law. It makes us what we are...We are subjects of law’s empire, liegemen to its methods and ideals, bound in spirit while we debate what we must therefore do.”<sup>41</sup> And Robert Cover begins *Nomos and Narrative* with: “We inhabit a nomos—a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void.”<sup>42</sup> “We” talk does not just appear at founding moments, when the construction of a new community is urgent, however. “We” talk is a persistent feature of legal discourse.<sup>43</sup> The “We” talk unavoidably tends to be a monologue, and thus elides that “to be means to communicate dialogically...a single voice ends nothing and resolves nothing. Two voices is the minimum for...existence.”<sup>44</sup> To account for diversities,

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<sup>39</sup> The Declaration of Independence (U.S. 1776).

<sup>40</sup> U.S. CONST. pmb1.

<sup>41</sup> R. DWORKIN, *LAW’S EMPIRE* vii (1986).

<sup>42</sup> Cover, *supra* note 37.

<sup>43</sup> Karl Llewellyn was well aware of this tendency when he wrote “Nowhere more than in law do you need armor against...ethnocentric and chronocentric snobbery—the smugness of your own tribe and your own time: We are the Greeks; all others are barbarians...Law, as against other disciplines is like a tree. In its own soil it roots, and shades one spot alone.” KARL LLEWELLYN, *THE BRAMBLE BUSH* 44 (1960).

<sup>44</sup> M.M. BAKHTIN, *PROBLEMS OF DOSTOEVSKY’S POETICS* 252–53 (1984).

intersectionalities, and multidimensionalities of all social formations, any productive public discourse must make room for multiple voices. This is where counter-stories come in.

The “We” discourse is part of “‘nationalist solidarity amnesia,’ a state-sanctioned form of national solidarity that supports, and is supported by, forgetting.”<sup>45</sup> Consent to basic structures or abstract legal rules is not enough to ensure the experience of justice on the ground in concrete cases. The experience of justice is intimately connected with one’s perceptions of “fact,” just as it is connected with one’s beliefs and values. Beliefs and values do not exist in a world of pure abstraction, but rather always operate with and on specific assumptions about and perceptions of the state of the world. Social theorists have long known that people differently situated in the social world come to see events in quite distinct and distinctive ways.<sup>46</sup>

Story-telling, by the outsider, the other, the marginalized, is loaded with transformative potential. If history is a story told by victors, stories from below, from the margins, are a counter-history. Renan famously said that nation-building “is an exercise in forgetting.” Not for nothing, narratives of history are exercises in erasure; erasure of pain, blood, and death that built social orders. What better antidote to forgetting and erasure than cultivation and articulation of memory. Stories from below and from the margins are articulated memories of the defeated and vanquished of yesterday. By confronting forgetting with memory, the calculus of yesterday’s victories and defeats is disrupted, and the settled equilibrium between victors and vanquished is unsettled. Out of this unsettling new possibilities raise their insistent heads: possibilities of re-readings of history; possibilities of de-naturalizing the present; and possibilities of reimagining futures. Above all,

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<sup>45</sup> RODANTHI TZANELLI, NATION-BUILDING AND IDENTITY IN EUROPE: THE DIALOGICS OF RECIPROCITY 48 (2008).

<sup>46</sup> See generally P. BERGER & T. LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY (1966); K. MANNHEIM, IDEOLOGY AND UTOPIA (1936); A. SCHUTZ & T. LUCKMANN, THE STRUCTURES OF THE LIFE-WORLD (1973).

storytelling makes decolonization of imaginaries possible, and, thus, opens the path towards the decolonization of imagination. Furthermore, taking cognizance of subaltern agency and deploying memory in transformative storytelling is an evocative site to engage the mutually constitutive relationship of the personal and the political. Being and the political are not static, contained, and unencumbered states or categories. The instability and contradictions of hegemonic discourses of consensus furnish grounds for the emergence of hybridized subjectivities, triggering a process whereby “other ‘denied’ knowledges enter the dominant discourse and estrange the basis of its authority.”<sup>47</sup> At work in counter-stories is an “enabling violation”<sup>48</sup> of “the colonized,” which animates subaltern agency to transform “conditions of impossibility into possibility.”<sup>49</sup>

Outcrits in general and LatCrit in particular took the path of storytelling forward.<sup>50</sup> Richard Delgado designates storytelling from a critical vantage

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<sup>47</sup> Homi Bhabha, *Signs Taken for Wonders: Questions of Ambivalence and Authority under a Tree Outside Delhi, May 1817*, 12 CRITICAL INQUIRY 144, 156 (1985).

<sup>48</sup> GAYATRI CHAKRAVORTY SPIVAK, THE SPIVAK READER 19 (Donna Landry & Gerald MacLean eds., 1996).

<sup>49</sup> GAYATRI CHAKRAVORTY SPIVAK, IN OTHER WORLDS: ESSAYS IN CULTURAL POLITICS 201 (1988).

<sup>50</sup> See, e.g., Jerome Culp, *Resposes: Telling a Black Legal Story: Privilege, Authenticity, “Blunders,” and Transformations in Outsider Narratives*, 82 VA. L. REV. 60 (1996); Jerome Culp, *Seventh Aspect of Self-Hatred: Race, LatCrit and Fighting the Status Quo*, 55 FLA. L. REV. 425 (2013). Jerome Culp, *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, 77 VA. L. REV. 539 (1991). Jerome Culp, *Water Buffalo and Diversity: Naming Names and Reclaiming the Racial Discourse*, 26 CONN. L. REV. 209 (1993); Jerome Culp, Angela Harris, & Francisco Valdes, *Subject Unrest*, 55 STAN. L. REV. 2435 (2003); Angela Harris and Marjorie Shultz, *A(nother) Critique of Pure Reason: Towards Civic Virtue in Legal Education*, 45 STAN. L. REV. 1773 (1992–93); Angela Harris, *Teaching the Tensions*, 54 ST. LOUIS U. L.J. 739 (2010); Angela Harris, *[Re]Integrating Spaces: The Color of Farmin*, 2 SAVANNAH L. REV. 157 (2015); Angela Harris, *Under Construction*, 50 VILL. L. REV. 775 (2005); Mari Matsuda, *When the First quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN’S RTS. L. REP. 7 (1989); Margaret Montoya, *Academic Mestizaje: Re/Producing Clinical Teaching and Re/Framing Wills as Latina Praxis*, 2 HARV. LATINO L. REV. 349 (1997); Margaret Montoya, *Silence and Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy and Discourse*, 33 U. MICH. J.L. REF. 263 (2000); Margaret Montoya, *Unbraiding Stories About Law, Sexuality, and Morality*, 24

point “counterstorytelling.”<sup>51</sup> Margaret Montoya calls the practice “Latina autobiography,” and designated it “an important cite of resistance.”<sup>52</sup> Sumi Cho and Robert Westley call counter-stories “subjugated knowledge.”<sup>53</sup> Lindsay Pérez Huber locates counter storytelling under the concept and methodology of *testimonio*,<sup>54</sup> and Marc–Tizoc Gozalez sees the counter-stories as archives of “critical ethnic legal histories.”<sup>55</sup> The expectation and aim of counter storytelling is to “shatter complacency and challenge the status quo” by telling stories about the normally silenced views of people from “outgroups” on social reality and thereby directly challenging (in viewpoint, content, tone, and style), the majority in-group’s “stock stories.”<sup>56</sup> The objective is to “subvert the dominant ideology...[To] challenge and expose the hierarchical and patriarchal order that exists

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CHICANA/O-LATINA/O L. REV. 1 (2003) Margaret Montoya & Christine Zuni Cruz, *Narrative Braids: Performing Racial Literacy*, 33 AM. INDIAN L. REV. 153; Margaret Montoya, *Name Narratives: A Tool for Examining and Cultivating Identity*, 32 CHICANA/O-LATINO L. REV. 113 (2014); Margaret Montoya, *Class in LatCrit: Theory and Praxis in a World of Economic Inequality*, 78 DENVER U. L. REV. 467 (2001); Margaret Montoya, *Defending the Future Voices of Critical Race Feminism*, 39 U. C. DAVIS L. REV. 1305 (2006).

<sup>51</sup> Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2414 (1989).

<sup>52</sup> Margaret Montoya, *Máscaras, Trenzadas, y Greñas: Un/Masking the Self While Un/Braiding Latina Stories with Legal Discourse*, 15 CHICANA/O-LATINA/O L. REV. 1, 27 (1994).

<sup>53</sup> Sumi Cho & Robert Westley, *Critical Race Coalitions: Key Movements that Performed the Theory*, 33 U.C. DAVIS L. REV. 1377, 1406–07 (2000), reprinted as Sumi Cho & Robert Westley, *Historicizing Critical Race Theory’s Cutting Edge: Key Movements that Performed the Theory*, in *CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY* (Francisco Valdes, Jerome McCristal Culp, Jr. & Angela P. Harris eds., 2002), at 32. All subsequent citations will be to the reprinted version.

<sup>54</sup> Lindsay Pérez Huber, *Beautifully Powerful: A LatCrit Reflection on Coming to an Epistemological Consciousness and the Power of Testimonio*, 18 AM. U. J. GENDER SOC. POL’Y & L. 839, 848 (2010).

<sup>55</sup> Marc-Tizoc González, *Critical Ethnic Legal Histories: Unearthing the Interracial Justice of Filipino American Agricultural Labor Organizing*, 3 U. C. IRVINE L. REV. 991 (2013). See also George A. Martínez, *African-Americans, Latinos, and the Construction of Race: Toward an Epistemic Coalition*, 19 CHICANA/O-LATINA/O L. REV. 213 (1998).

<sup>56</sup> Delgado, *supra* note 51, at 2412, 2414, 2430, 2434.



within the legal academy and pervades the larger society.”<sup>57</sup> Counter-storytelling is mindful of W.E.B. Dubois’s admonition: “Don’t you understand that the past is the present; that without what *was*, nothing *is*?”<sup>58</sup> Counter-stories recast the past, and, thereby, reconstitute the present, and help us to reimagine the future. Counter-stories are not just addressed outwards; they are also a dialogue with oneself. As Jerome Culp urged us, “[w]e have to have a name, and in order to be understandable it has to have a history...if we are to be great, we have to be more than our histories, but at the same time have to learn from them.”<sup>59</sup>

Counter-stories underscore the insistence of political power and cultural authority in the “irreducible excess of the syntactic over the semantic.”<sup>60</sup> Counter-stories are the archive of counter-histories of the modern state written from the margins.<sup>61</sup> These narratives display a situational consciousness, where the telling of the individual story and the individual experience cannot but ultimately involve an implied story of the collectivity itself.<sup>62</sup> These narratives exemplify “wordliness,” where “sensuous particularity as well as historical contingency...exist at the same level of surface particularity as the textual object itself.”<sup>63</sup> Narrators of counter-stories, of necessity, underscore their positioning at the margins. As Julia Kristeva asks, “How can one avoid sinking into the mire of common sense, if not by becoming a stranger to one’s own country, language, sex and identity?”<sup>64</sup> To the charge that counter-stories may be arbitrary fragments,

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<sup>57</sup> Montoya, *supra* note 52, at 31 (citations omitted).

<sup>58</sup> W.E.B. DUBOIS, *THE WORLD AND AFRICA* 80 (1947).

<sup>59</sup> Jerome McCristal Culp, Jr., *Latinos, Blacks, Others, and the New Legal Narrative*, 2 HARV. LATINO L. REV. 479, 482 (1997).

<sup>60</sup> JACQUES DERRIDA, *DISSEMINATION* 221, 230 (1981).

<sup>61</sup> For examples of such historiography, see E.J. HOBBSAWM, *THE AGE OF CAPITAL 1848–1875* (1975); see also E.J. HOBBSAWM, *THE AGE OF EMPIRE 1875–1914* (1987).

<sup>62</sup> Frederick Jameson, *Third-World Literature in the Era of Multinational Capitalism*, 15 SOC. TEXT 65, 85–86 (Fall 1986).

<sup>63</sup> EDWARD SAID, *THE WORLD, THE TEXT AND THE CRITIC* 39 (1983).

<sup>64</sup> JULIA KRISTEVA, *A New Type of Intellectual: the Dissident, Women, Psychoanalysis, Politics*, in *THE KRISTEVA READER* 298 (Toril Moi ed., 1986).

one may answer in the words of Ernest Gellner, the canonical scholar of nationalism: “Nationalism is not what it seems, and above all not what it seems to itself...The cultural shreds and patches used by nationalism are often arbitrary historical inventions. Any old shred would have served as well.”<sup>65</sup> All footprints of life are fragmentary traces, but traces themselves bear witness to the drama of history. Counter-stories, even when based on fragmentary traces, embody cultural difference that emerges as resistance to hegemonic modes of representation.<sup>66</sup> Counter-story narratives assist “self-presentation,” a dramaturgical projection of a coherent self in society.<sup>67</sup> These narrative are mindful that “there is no innocent political methodology for intercultural interpretation.”<sup>68</sup> Counter-stories respond to the imperative that when participants in distribution struggles aim at redistribution of material resources, “cultural interpretations play a constitutive role.”<sup>69</sup> Counter-stories reject the Occidental Eurocentric proprietary and exemplary claim to the universal as an ontological completeness.<sup>70</sup> They disrupt the canonical “Western myths of origin, history, identity, and temporality.”<sup>71</sup> They help fashion ontological and epistemological departures that overturn “conceptual structures which become entrenched and which are used to exclude and undermine alternative ways of looking at the world.”<sup>72</sup>

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<sup>65</sup> ERNEST GELLNER, *NATION AND NATIONALISM* 56 (1983).

<sup>66</sup> P. GILROY, *THERE AIN'T NO BLACK IN UNION JACK* (1987).

<sup>67</sup> E. GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1987).

<sup>68</sup> C. GEETZ, *ROUTES: TRAVEL AND TRANSLATION IN LATE TWENTIETH CENTURY* 19 (1997).

<sup>69</sup> N. FRASER AND A. HONNETH, *REDISTRIBUTION AND RECOGNITION* 158 (2003).

<sup>70</sup> See N. Maldonado-Torres, *Thinking through the De-colonial Turn: Post-continental Interventions in Theory, Philosophy, and Critique—An Introduction*, *FALL TRANSMODERNITY* 1 (2011); see also N. Maldona-Torres, *DAPISH CHAKRAVARTY: PROVINCIALIZING EUROPE: POSTCOLONIAL THOUGHT AND HISTORICAL DIFFERENCE* (2000).

<sup>71</sup> KABIR AND WILLIAMS, *INTRODUCTION: A RETURN TO WONDERS*, in *POSTCOLONIAL APPROACHES TO THE EUROPEAN MIDDLE AGES: TRANSLATING CULTURES* 2 (A. J. Kabir & D. Williams eds., 2005).

<sup>72</sup> Maria Aristodemou, *Choice and Evasion in Judicial Recognition of Governments: Lessons from Somalia*, 5 *EUR. J. INT'L L.* 532, 551 (1994).

To be true to its vocation, the critical counter-stories project will have to posit a subject not reduced to a mere property and effect of discourse and a consciousness not equated with hegemony. We need to “think beyond narratives of originary and initial subjectivities and to focus on those moments or processes that are produced in the articulation of cultural differences.”<sup>73</sup> Of great utility here is Antonio Gramsci’s model of a fragmented composite subject that is constituted as an “inventory of traces” of multiple and fragmented hegemonies.<sup>74</sup> Similarly useful is to theorize a desiring subject who elides complete determination by the symbolic order by virtue of the surplus of the “[r]eal” over any symbolization.<sup>75</sup> Counter-stories help us to explore the ever-present tension between specific structures of domination and “lines of flight”—desires that escape hegemonic formations and thus bear the potential of transformation.<sup>76</sup> Counter-stories plot the fault lines between domination and desire where the “individual repeatedly passes from language to language.”<sup>77</sup> Counter-stories dig under modern technologies of power and bring into relief the surviving “‘polytheism’ of scattered practices[,] dominated but not erased by the triumphal success of one of their number.”<sup>78</sup> Counter-stories are nothing less

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<sup>73</sup> HOMI K. BHABHA, *THE LOCATION OF CULTURE* 1 (1994).

<sup>74</sup> See SELECTIONS FROM THE PRISON NOTEBOOKS OF ANOTONIO GRAMSCI 324 (Quintin Hoare & Geoffrey Nowell Smith eds. & trans., 1971) (describing “starting-point of critical elaboration”).

<sup>75</sup> See Slavoj Žižek, *THE SUBLIME OBJECT OF IDEOLOGY* 3 (1989).

<sup>76</sup> See GILLES DELEUZE & FELIX GUATTRARI, *ANTI-OEDIPUS: CAPITALISM AND SCHIZOPHRENIA* 9–16 (Robert Hurley et al. trans., 1989) (1972).

<sup>77</sup> GILLES DELEUZE & FELIX GUATTARI, *A THOUSAND PLATEAUS: CAPITALISM AND SCHIZOPHRENIA* 94 (Brian Massumi trans., 1987).

<sup>78</sup> MICHEL DE CERTEAU, *THE PRACTICE OF EVERYDAY LIFE* 48 (Steven Rendall trans., 1984).

than “insurrection of subjugated knowledges”<sup>79</sup> that are a tool to “bring[ ] hegemonic historiography to crisis.”<sup>80</sup>

#### IV. CAPITALISM AND ITS DISCONTENTS

Counter-stories neither emerge nor are articulated in a void. They unfold against the backdrop of the hegemonic order of the social formation and are situated against the backdrop of the hegemonic ideological ensemble of the time. Consequently, to evaluate the worth of counter-stories, it is imperative that foundational markers of hegemonic order and ideological ensemble be located. Only this will ensure that ontological, epistemological, and programmatic frameworks of critique are conducive to the attainment of its agenda. Hegemonic order and ideological assemblage serve as limit horizons of the age. Limit horizons are ontological categories that so imprint the imaginary of an age that even critique remains imprisoned in the normalcy of these categories—an imprisonment that curtails the transformative potential of critique. Capitalism and nationalism are foundational order and ideological ensembles at this conjuncture and must be accounted for to facilitate evaluation of contemporary counter-stories.

For over 400 years, capitalism at different stages of its unfolding has furnished the primary moorings of the modern world.<sup>81</sup> Hegemonic ideology portrays capitalism as a combination of entrepreneurial spirit and free wage labor that facilitates freedom from scarcity and liberal democracy. The historical record shows otherwise.

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<sup>79</sup> THOMAS KEENAN, *FABLES OF RESPONSIBILITY: ABBERATIONS AND PREDICAMENTS IN ETHICS AND POLITICS* 140 (1997) (quoting Michel Foucault).

<sup>80</sup> GAYATRI CHAKRAVOTY SPIVAK, *SUBALTERN STUDIES: DECONSTRUCTING HISTIOGRAPHY*, in *IN OTHER WORLDS: ESSAYS IN CULTURAL POLITICS* 198 (1988) [hereinafter *IN OTHER WORLDS*].

<sup>81</sup> For a comprehensive analysis of the nature and functioning of capitalism, see ANWAR SHAIKH, *CAPITALISM: COMPETITION, CONFLICT, CRISIS* (2016). For a detailed analysis of the structural relationship between capitalism and inequality, see THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (2014).

Capitalism was born in “the long sixteenth century,”<sup>82</sup> “dripping with blood and mud from head to toe.”<sup>83</sup> “Discovery” of the Americas created the field of possibility for the emergence and consolidation of capitalism, a world system since its inception. Plunder of precious metals and deployment of African slaves gave birth to capitalism as a new and global mode of production. Between 1500 and 1800, more than eight million slaves were transported from Africa to the Americas to work in mines and on plantations.<sup>84</sup> Slave labor and bullion extraction from Latin America, including 134,000 tons of silver between 1493 and 1800, triggered capitalism.<sup>85</sup> The very use of the word *capital*, in the sense of bases for capitalism as a new mode of production, first came into vogue in the era of capital-intensive but slave-hungry Antillean sugar plantations.<sup>86</sup> This historical record underscores the global nature of capitalism and refutes the presumption that capitalism necessarily procreates wage labor, free market, and liberal legality.

Accumulation by dispossession signifies that capitalism always relies on nonmarket legal and extralegal coercive forces to facilitate asymmetrical distribution of economic gain and pain.<sup>87</sup> In the geography of global

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<sup>82</sup> Anibal Quijano & Immanuel Wallerstein, *Americanity as a Concept, or the Americas in the Modern World System*, 44 INT’L SOC. SCI. J. 549 (1992).

<sup>83</sup> MARX, 1 CAPITAL at 760.

<sup>84</sup> SVEN BECKERT, *EMPIRE OF COTTON: A GLOBAL HISTORY* 36 (2014).

<sup>85</sup> Ward Barrett, *World Bullion Flows, 1450–1800*, in *THE RISE OF MERCHANT EMPIRES: LONG-DISTANCE TRADE IN THE EARLY MODERN WORLD, 1350–1750* 224, 237, 400 (J. D. Tracy ed., 1990); see generally, EDUARDO GALEANO, *OPEN VEINS OF LATIN AMERICA: FIVE CENTURIES OF PILLAGE OF A CONTINENT* (25th Anniversary ed. 1997).

<sup>86</sup> See FERNAND BRAUDEL, II *CIVILIZATION AND CAPITALISM, 15TH–18TH CENTURY* 232 (Sian Renolds trans., 1992) (crediting the 1766 publication—translated into English in 1774—of M. TURGOT, *REFLECTIONS ON THE FORMATION AND DISTRIBUTION OF WEALTH* (Anne-Robert Jacques Turgot trans., 2010 [1774])).

<sup>87</sup> See MICHAEL PERELMAN, *THE INVENTION OF CAPITALISM: CLASSICAL POLITICAL ECONOMY AND THE SECRET HISTORY OF PRIMITIVE ACCUMULATION* (2000); Jim Glassman, *Primitive Accumulation, Accumulation by Dispossession, Accumulation by ‘Extra-Economic’ Means*, 30:5 *PROGRESS HUM. GEOGRAPHY* 608 (2006); DAVID HARVEY, *THE NEW IMPERIALISM* 137–182 (2003); Michael Perelman, *Primitive*

capitalism, embracing different scales and spaces, accumulation by extra-economic means is facilitated by myriad legal and extra-legal regimes. These regimes range from global to local and formal to customary. Accumulation by dispossession was initiated by “*ex-novo* separation between producers and means of production”<sup>88</sup> secured by the extra-economic coercive power of the state and the law. For example, Enclosure Acts<sup>89</sup> and Game Laws<sup>90</sup> of England were coercive uses of law to dispossess rural farmers, hunters, and other subsistence producers, forcing them to seek a livelihood in the “free” wage market. Labeling this phenomenon as primitive accumulation, canonical critical political economy had relegated it to the prehistory of capitalism.<sup>91</sup> However, later scholarship on global political economy establishes that primitive accumulation is “a basic *ontological condition* for capitalist production, rather than just a historical precondition.”<sup>92</sup> These interventions highlight the continuing role of coercive political force in underwriting the purportedly extra-political realm of the market, and underscore that “production of value that enters into the circuits of capitalist accumulation through parasitization of formally

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*Accumulation From Feudalism to Neoliberalism*, 18:2 CAPITALISM NATURE SOCIALISM 44, 54 (2007).

<sup>88</sup> Massimo De Angelis, *Separating the Doing and the Deed: Capital and the Continuous Character of Enclosures*, 12:2 HISTORICAL MATERIALISM 57, 63 (2004).

<sup>89</sup> See JOHN BAKER, VI THE OXFORD HISTORY OF THE LAWS OF ENGLAND 1483–1558 650–52 (2003).

<sup>90</sup> See E. P. THOMSON, WHIGS AND HUNTERS: THE ORIGINS OF THE BLACK ACT 94, 99, 207, 261 (1975). WILLIAM BLACKSTONE, IV COMMENTARIES ON THE LAWS OF ENGLAND 174–75 (1775).

<sup>91</sup> The portrayal of primitive accumulation by critical political economists was marred by historicism, Eurocentricism, and anti-peasant prejudice of their milieu. See Glassman, *supra* note 87, at 608, 610–12.

<sup>92</sup> *Id.* at 615. For the scholarship that lead to this conclusion, see ROSA LUXEMBERG, THE ACCUMULATION OF CAPITAL 351 (A. Schwarzschild trans., 1968) (1923); HANNAH ARENDT, IMPERIALISM: PART TWO OF THE ORIGINS OF TOTALITARIANISM (1968); PAUL BARAN, THE POLITICAL ECONOMY OF GROWTH (1957); ANDRE GUNDER FRANK, CAPITALISM AND UNDERDEVELOPMENT IN LATIN AMERICA: HISTORICAL STUDIES OF CHILE AND BRAZIL (1967); IMMANUEL WALLERSTEIN, THE CAPITALIST WORLD ECONOMY (1979).

noncapitalist processes is a deeply embedded feature of capitalism.”<sup>93</sup> Moreover, these insights alert us that, since its origin, capitalism has been a global phenomenon that co-opts rather than displaces noncapitalist modes of production, and results in uneven development of different geographical zones within its ambit.<sup>94</sup> The enduring nature of accumulation by dispossession can be seen in the various forms of social capital that are required by capital but not paid by it. Examples include publically funded infrastructure, gendered and often racialized household and reproductive labor,<sup>95</sup> instrumental use of race, class, and nationality in immigration and land-ownership laws that consolidated agro-capital in California,<sup>96</sup> and new appropriation of the commons for private accumulation whereby “the global commons are being enclosed.”<sup>97</sup> The entire panoply of forms of value extraction by means other than commodified or “free” wage labor, makes for accumulation by dispossession. The unavoidable result of accumulation by dispossession is destruction, disruption, dislocation, insecurity, and instability of collective and individual life—the grounds of precarious existence.

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<sup>93</sup> Glassman, *supra* note 87, at 617.

<sup>94</sup> SAMIR AMIN, ACCUMULATION ON A WORLD SCALE: A CRITIQUE OF THE THEORY OF UNDERDEVELOPMENT (1974); SAMIR AMIN, UNEQUAL DEVELOPMENT: AN ESSAY ON THE SOCIAL FORMATIONS OF PERIPHERAL CAPITALISM (1976); Aiden Foster-Carter, *The Modes of Production Controversy*, 107 NEW LEFT REV. 47 (1978); HAROLD WOLPE, THE ARTICULATION OF MODES OF PRODUCTION: ESSAYS FROM ECON. AND SOC’Y (1980).

<sup>95</sup> See Claude Meillassoux, *From Reproduction to Production*, 1 ECON. AND SOC’Y 93 (1972); CLAUDE MEILLASSOUX, MAIDENS, MEAL AND MONEY: CAPITALISM AND THE DOMESTIC COMMUNITY (1981); Nona Y. Glazer, *Servants to Capital: Unpaid Domestic Labor and Paid Work*, 16:1 REV. OF RADICAL POL. ECON. 61 (1984); Cindi Katz, *Vagabond Capitalism and the Necessity of Social Reproduction*, 33 ANTIPODE 709 (2001); Nancy Hartsock, *Globalization and Primitive Accumulation: The Contributions of David Harvey’s Dialectical Marxism*, in DAVID HARVEY: A CRITICAL READER 183 (Noel Castree & Derek Gregory eds., 2006).

<sup>96</sup> See RICHARD WALKERS, THE CONQUEST: 150 YEARS OF AGRIBUSINESS IN CALIFORNIA 66 (2004).

<sup>97</sup> Hartsock, *supra* note 95, at 176; HARVEY, *supra* note 87, at 146–48.

Accumulation by dispossession also produces a reserve army of labor. While the “creative destruction”<sup>98</sup> of capitalism destroys traditional entitlements and subsistence economies and estranges direct producers from their means of labor, all those dislocated are not absorbed in new production process based on wage labor.<sup>99</sup> This unabsorbed labor is the so-called “surplus humanity”—populations separated from their non-capitalist means of subsistence but not integrated into the productive circuits of wage labor on a stable basis.<sup>100</sup> They are those who are “condemned to the world of the excluded, the redundant, the dispensable, having nothing to lose, not even the chains of wage slavery...the shadowy figures of the rejected, the marginal, the leftovers of capital’s arising, the wreckage and debris.”<sup>101</sup> This is the remainder of the “sacrifice of ‘human machines’ on the pyramids of accumulation.”<sup>102</sup> This reserve army of labor remains an enduring and indispensable feature of capitalism. At all stages and in all zones of its existence, capitalism produces and maintains “a disposable industrial reserve army, which belongs to capital just as absolutely as if the latter had bred it at its own cost.”<sup>103</sup>

Even after its incipient stage, capital accumulation requires some measure of unemployment.<sup>104</sup> Mainstream economists speak of the “natural

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<sup>98</sup> See JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM & DEMOCRACY*, 82–84 (1957).

<sup>99</sup> See Thomas I. Palley, *From Keynesianism to Neoliberalism: Shifting Paradigms in Economics*, in *NEOLIBERALISM: A CRITICAL READER* 20–23 (Alfredo Saad-Filho & Deborah Johnson eds., 2005); ROBERT SKIDELSKY, *KEYNES: THE RETURN OF THE MASTER* (2009).

<sup>100</sup> See Robert Pollin, *The “Reserve Army of Labor” and the “Natural Rate of Unemployment”*: *Can Marx, Kalecki, Friedman, and Wall Street All Be Wrong?*, 30:3 *REV. OF RADICAL POL. ECON.* 1 (1998); Fred Magdoff & Harry Magdoff, *Disposable Workers: Today’s Reserve Army of Labor*, 55:11 *MONTHLY REV.* (2004).

<sup>101</sup> KALYAN SANYAL, *RETHINKING CAPITALIST DEVELOPMENT: PRIMITIVE ACCUMULATION, GOVERNMENTALITY AND POST-COLONIAL CAPITALISM* 53 (2007).

<sup>102</sup> Ferruccio Gambino, *A Critique of the Fordism and the Regulation School*, 19 *COMMON SENSE* 42 (Ed Emery trans. 1996).

<sup>103</sup> Karl Marx, 1 *Capital* 783–84 (1976).

<sup>104</sup> The unemployed serve as an instrument of economic and political control over the working class. They can serve as a backlog of strikebreakers during boom times, expelled



rate” of unemployment, and its offsprings—”the non-accelerating inflation rate of unemployment,”<sup>105</sup> and the “labor force reserve.”<sup>106</sup> The reserve army of labor helps prevent significant wage increases and the corresponding decline of profits.<sup>107</sup> This dovetails with disciplinary uses of the poor and the underclass in capitalism at large.<sup>108</sup> The disciplinary function is underscored by the fact that reserve army is often sutured with regional inequality and racial and gender divides.<sup>109</sup>

Economists of all stripes recognize that the question of employment is not simply a matter of “free” labor markets, and that public policy plays a critical role in calibrating and managing unemployment.<sup>110</sup> Fiscal and

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during downturns, and reabsorbed in the next upward cycle. When a capitalist economy grows rapidly and the reserve army of the unemployed is depleted, workers utilize their increased bargaining power to demand raises in wages and distribution of income in their favor. Profits are put under pressure. This leads to reduction in investment, a fall in employment, and a replenishment of the reserve army of the unemployed. *See* Pollin, *supra* note 101 at 1; Magdoff, *supra* note 100.

<sup>105</sup> *See*, WENDY CARLIN AND DAVID SOSKICE, *MACROECONOMICS AND THE WAGE BARGAIN: A MODERN APPROACH TO EMPLOYMENT, INFLATION AND THE EXCHANGE RATE* (1990); *THE NATURAL RATE OF UNEMPLOYMENT: REFLECTIONS ON 25 YEARS OF THE HYPOTHESIS* (Rod Cross ed., 1995).

<sup>106</sup> “Labor Reserve Force is an estimate of the deviation of the actual labor force from the labor force that would be observed if the economy was continuously at full employment.” Wayne Vroman, *The Labor Force Reserve: a Re-estimate*, 9:4 *INDUSTRIAL RELATIONS: AM. J. OF ECON. AND SOC’Y* 379 (2008).

<sup>107</sup> David M. Gordon, *Six-Percent Unemployment Ain’t Natural: Demystifying the Idea of a Rising “Natural Rate of Unemployment,”* 54:2 *SOC. RES.* 223 (1987); David M. Gordon, *The Un-Natural Rate of Unemployment: An Econometric Critique of the NAIRU Hypothesis*, 78:2 *AM. ECON. REV.* 117 (1988).

<sup>108</sup> *See* Herbert J. Gans, *Positive Functions of the Undeserving Poor: Uses of the Underclass in America*, 22:3 *POLITICS & SOCIETY* 269 (1994); Miles S. Kimball, *Labor-Market Dynamics When Unemployment Is a Worker Discipline Device*, 84:4 *AM. ECON. REV.* 1045 (1994).

<sup>109</sup> DOREEN MASSEY, *Regionalism: Some Current Issues*, 6 *CAPITAL AND CLASS* 106 (1978); Richard Peet, *Inequality and Poverty: a Marxist-Geographies Theory*, 65 *ANNALS, ASSOC. OF AM. GEOGRAPHERS* 564 (1975); Richard Walker, *Two Sources of Uneven Development Under Advanced Capitalism: Spatial Differentiation and Capital Mobility*, 10 *REV. OF RADICAL POL. ECON.* 28 (1978).

<sup>110</sup> *See*, JOHN M. KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY* (1973); THOMAS I. PALLEY, *FROM KEYNESIANISM TO NEOLIBERALISM: SHIFTING PARADIGMS IN ECONOMICS*, IN *NEOLIBERALISM: A CRITICAL READER* 20–23

monetary policies are the primary instruments of this calibration. In the neoliberal era, these policy instruments are aimed at guarding against inflation rather than unemployment. Note that “[m]onetary policy involves a tradeoff between inflation and unemployment. Bond-holders worry about inflation; workers, about jobs.”<sup>111</sup> It is no surprise, then, that in the neoliberal era, the global working class has grown by at least two-thirds to over 3 billion—with half or more of this number making up the global reserve army.<sup>112</sup> Pervasive precariousness of employment and existence are a natural result.

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(Alfredo Saad-Filho and Deborah Johnson eds., 2005). Michal Kalecki was the first to clearly state, in an appropriately titled chapter “Political Aspects of Full Employment,” that a capitalist economy can be sustained at full employment but only if challenges to capitalists’ social and political hegemony could be contained by means of public policy. MICHAL KALECKI, *SELECTED ESSAYS ON THE DYNAMICS OF THE CAPITALIST ECONOMY* 138–45 (1971). The “challenge” was to devise a “solution,” even if a fascist one, to capitalism’s unemployment problem whereby workers would have jobs, but they would not be permitted to exercise the political and economic power that would otherwise accrue to them in a full-employment economy. Pollin, *supra* note 100, at 5. In the absence of state intervention, employment depended on the confidence of the capital, which gave the latter a powerful indirect control over government policy: everything which may shake the state of confidence must be carefully avoided because it would cause an economic crisis. But once the Government learns the trick of increasing employment by its own purchases, this powerful controlling device loses its effectiveness.

MICHAL KALECKI, *SELECTED ESSAYS ON THE DYNAMICS OF CAPITALIST ECONOMY 1933–1970* 139 (1971).

<sup>111</sup> JOSEPH E. STIGLITZ, *FREEFALL: AMERICA, FREE MARKETS, AND THE SINKING OF THE WORLD ECONOMY* 142 (2010). The monetary policy objectives as stated in the Federal Reserve Act require the Federal Reserve to “maintain long term growth of monetary and credit aggregates...so as to promote effectively the goals of maximum employment, stable prices, and moderate long-term interest rates.” STEPHEN H. AXILROD, *INSIDE THE FED: MONETARY POLICY AND ITS MANAGEMENT, MARTIN THROUGH GREENSPAN TO BERNANKE* 14 (2011). For key economic objectives and monetary policy indicators between 1960 and 2010, see *id.* at 209–10, Figs. B.1, B.2.

<sup>112</sup> AJIT K. GOSE, NOMAAN MAJI AND CHRISTOPHER ERNST, *THE GLOBAL EMPLOYMENT CHALLENGE* 9–10 (2008).

The neoliberal counter-revolution, afoot on a global scale, furnishes the context of contemporary counter-stories.<sup>113</sup> Neoliberalism aims to secure unfettered rights to private property and profits, it expands and deepens the logic of the market, it collapses the distinctions between culture and economy, it undermines state sovereignty and national autonomy, and it links local and global political economies to facilitate transnational accumulation of capital<sup>114</sup> Through new regimes of trade, finance, and property rights, a state's sovereignty transfers to international institutions and dominant states.<sup>115</sup> The result is the acceleration of accumulation by dispossession, enlargement of the surplus army of labor, and expansion of

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<sup>113</sup> See DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* (2007); ROBERT SKIDELSKY, *KEYNES: THE RETURN OF THE MASTER* (2009); Costas Lapavistas, *Mainstream Economics in the Neoliberal Era*, in *NEOLIBERALISM: A CRITICAL READER*, *supra* note 41, at 30–40; Gerard Dumenit & Dominique Levy, *The Neoliberal (Counter-) Revolution in NEOLIBERALISM: A CRITICAL READER 9* (Alfredo Saad-Filho & Deborah Johnson eds., 2005); William I. Robinson & Jerry Harris, *Towards a Global Ruling Class: Globalization and the Transnational Capitalist Class*, 64 *SCL. & SOC'Y* 11 (2000).

<sup>114</sup> See Boaventura de Sousa Santos, *Law: A Map of Misreading. Towards a Postmodern Conception of Law*, 14 *J. LAW & SOC'Y* 297 (1987); A. CLAIRE CUTLER, *PRIVATE POWER AND GLOBAL AUTHORITY: TRANSNATIONAL MERCHANT LAW IN THE GLOBAL POLITICAL ECONOMY* (Cambridge U. Press 2003); WILLIAM I. ROBINSON, *A THEORY OF GLOBAL CAPITALISM: PRODUCTION, CLASS, AND STATE IN A TRANSNATIONAL WORLD* (John's Hopkins U. Press 2004); *HISTORICAL MATERIALISM AND GLOBALIZATION* (Mark Rupert & Hazel Smith eds., 2002).

<sup>115</sup> See B. S. Chimni, *International Institutions Today: An Imperial State in the Making*, 15 *EUR. J. INT'L L.* 1 (2004); Nico Kirsch, *More Equal than the Rest? Hierarchy, Equality and US Predominance in International Law*, in *UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW* 135, 161 (Michael Byers & Georg Nolte eds., 2003); Hannah L. Buxbaum, *Conflict of Economic Laws: From Sovereignty to Substance*, 42 *VA. J. INT'L L.* 931, 957 (2002); JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* 475–77 (2000) ; B.S. Chimni, *WTO and Environment: The Legitimization of Unilateral Trade Sanctions*, *ECON. & POL. WKLY*, Jan. 12, 2002, at 133; B. S. Chimni, *India and the Ongoing Review of the WTO Dispute Settlement System: A Perspective*, *ECON. & POL. WKLY*, Jan. 30, 1999, at 264; Upendra Baxi, *Mass Torts, Multinational Enterprise Liability and Private International Law*, 276 *RECUEIL DES COURS* 272, 297, 312 (1999); Hu Zhenjie, *Forum Non Conveniens: An Unjustified Doctrine*, 48 *NETH. INT'L L. REV.* 143 (2001); Michael Anderson, *Transnational Corporations and Environmental Damage: Is Tort Law the Answer?*, 41 *WASHBURN L.J.* 399 (2002).

the informal sectors of economies.<sup>116</sup> Rural and urban areas are sutured in new networks to accelerate siphoning of value.<sup>117</sup> Every year since 2007, ten million hectares of arable land pass from public to private hands while 925 million people risk starvation in the face of increasing food prices.<sup>118</sup> Deeper penetration of market forces accelerates the migration of uprooted rural farmers to urban areas.<sup>119</sup> With the state rolled back, privatization becomes “the cutting edge of accumulation by dispossession.”<sup>120</sup> As flexible production shrinks regulated formal economies, informal shadow economies become the only source of livelihood for the urban poor. Today, the informal sector engages two-fifths of the economically active population of the global South.<sup>121</sup> This informal economy cultivates “myriad secret liaisons with outsourced multinational production systems.”<sup>122</sup>

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<sup>116</sup> See David Harvey, *Neoliberalism as Creative Destruction*, 610:1 ANNALS OF THE AM. ACAD. OF POL. AND SOC. SCI. 22 (2007); DANIEL YERGIN & JOSEPH STANISLAW, *THE COMMANDING HEIGHTS: THE BATTLE BETWEEN GOVERNMENT AND MARKETPLACE THAT IS REMAKING THE MODERN WORLD* (Simon & Schuster 1998).

<sup>117</sup> See P. J. TAYLOR, *WORLD CITY NETWORK: A GLOBAL URBAN ANALYSIS* (Routledge 2004); John Friedman, *Where We Stand: A Decade of World City Research in WORLD CITIES IN A WORLD-SYSTEM* 21–47 (Paul J. Knox & Peter J. Taylor eds., 1996); Julie Skurski & Fernando Coronil, *Country and City in a Post-colonial Landscape: Double Discourse and the Geo-Politics of Truth in Latin America* in *VIEW FROM THE BORDER: ESSAYS IN HONOR OF RAYMOND WILLIAMS* 231, 233 (Dennis Dworkin & Leslie Romnan eds., 1992).

<sup>118</sup> STEFANO LIBERTI, *LAND GRABBING: JOURNEYS IN THE NEW COLONIALISM* xi, 1 (2014).

<sup>119</sup> See LORI ANN THRUPP ET. AL., *BITTERSWEET HARVESTS FOR GLOBAL SUPERMARKETS: CHALLENGES IN LATIN AMERICA'S AGRICULTURAL EXPORT BOOM* (World Resources Institute 1995); JAN BREMAN, *FOOTLOOSE LABOR: WORKING IN INDIA'S INFORMAL ECONOMY* (2008); JAN BREMAN, *WAGE HUNTERS AND GATHERERS: SEARCH FOR WORK IN THE URBAN AND RURAL ECONOMY OF SOUTH GUJARAT* (Oxford U. Press 1994).

<sup>120</sup> DAVID HARVEY, *LIMITS TO CAPITAL* 157 (2015).

<sup>121</sup> U.N. HUMAN SETTLEMENTS PROGRAM [UN-HABITAT], *The Challenge of Slums: Global Report on Human Settlements* 103–04 (2003); JAN BREMAN, *THE LABORING POOR: PATTERNS OF EXPLOITATION, SUBORDINATION, AND EXCLUSION* 174 (2003).

<sup>122</sup> Mike Davis, *The Urbanization of Empire: Megacities and the Laws of Chaos*, 81:22 SOC. TEXT 9, 11 (2004).

Neoliberalism is an ensemble of interconnected ideas and practices. It rests on a theory of capitalist market fundamentalism—markets are optimal and self-regulating, and if allowed to function without restraint, they optimally serve all economic needs, efficiently utilize all resources, and generate full employment for everyone.<sup>123</sup> It mandates tight fiscal and monetary policies, unbridled private property rights, unencumbered markets, and free trade.<sup>124</sup> It is an ideology of the market and private interests as opposed to state intervention to safeguard collective interests.<sup>125</sup> It envisages the state limited to minimal executive and juridical functions necessary to secure private property rights and to support freely functioning markets.<sup>126</sup> By extension, neoliberalism deems globalization of free markets as the best way to extend these benefits to the whole world.<sup>127</sup>

The neoliberal project aims to unfold a new social order across the globe to reverse the setbacks that the economic power and political hegemony of the wealth-owning classes had suffered on account of Keynesian welfare in the West, socialism in Eastern Europe, and nationalism in the global

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<sup>123</sup> See DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* (2007); ROBERT SKIDELSKY, *KEYNES: THE RETURN OF THE MASTER* (2009); Costas Lapavistas, *Mainstream Economics in the Neoliberal Era*, NEOLIBERALISM: A CRITICAL READER 30–40; Gerard Dumenit & Dominique Levy, *The Neoliberal (Counter-) Revolution* in NEOLIBERALISM: A CRITICAL READER 9 (Alfredo Saad-Filho & Deborah Johnson eds., 2005); William Robinson & Jerry Harris, *Towards a Global Ruling Class: Globalization and the Transnational Capitalist Class*, 64 SCI. & SOC'Y 11 (2000); DAVID HARVEY, *THE ENIGMA OF CAPITAL AND THE CRISES OF CAPITALISM* (2010).

<sup>124</sup> See Thomas I. Palley, *From Keynesianism to Neoliberalism: Shifting Paradigms in Economics*, NEOLIBERALISM: A CRITICAL READER 20–29; Anwar sheikh, *The Economic Mythology of Neoliberalism* in *id.* at 41–49.

<sup>125</sup> David Harvey, *Neoliberalism as Creative Destruction*, 610:1 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 22 (12007).

<sup>126</sup> See Simon Clarke, *The Neoliberal Theory of Society*, NEOLIBERALISM: A CRITICAL READER 50–59; Susanne MacGregor, *The Welfare State and Neoliberalism*, *id.* at 142–48.

<sup>127</sup> See HO-JOON CHANG, *BAD SAMARITANS: THE MYTH OF FREE TRADE AND THE SECRET HISTORY OF CAPITALISM* (2008); HO-JOON CHANG, *KICKING AWAY THE LADDER: DEVELOPMENT STRATEGY IN HISTORICAL PERSPECTIVE* (2002); Matthew Sparke, *American Empire and Globalization: Postcolonial Speculations on Neocolonial Enframing*, 24:3 SING. J. OF TROPICAL GEOGRAPHY 373 (2003).

South.<sup>128</sup> Neoliberalism makes increasing recourse to the law to displace social welfare systems through liberalization, deregulation, and privatization, and uses the discipline of expanded markets to remove barriers to accumulation that earlier democratic gains had achieved.<sup>129</sup> To secure unfettered rights to private property and profits, it expands and deepens the logic of the market, collapses the distinctions between culture and economy, undermines state sovereignty and national autonomy, and links local and global political economies to facilitate the transnational accumulation of capital.<sup>130</sup> Through new regimes of trade, finance, and property rights, sovereignty of states transfers to international institutions and dominant states.<sup>131</sup> The hidden hand of the market continues to work in concert with the iron fist of the state in the service of accumulation by dispossession. Indeed, the ubiquitous “low-intensity conflicts” across the

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<sup>128</sup> See DANIEL YERGIN AND JOSEPH STANISLAW, *THE COMMANDING HEIGHTS: THE BATTLE BETWEEN GOVERNMENT AND MARKETPLACE THAT IS REMAKING THE MODERN WORLD* (1998); Harvey, *Neoliberalism*, *supra* note 113.

<sup>129</sup> For articulation of the case for neoliberal global political economy and related accounts of the law, see ROBERT KEOHANE, *AFTER HEGEMONY* (1984); Kenneth Abbot, et. al., *The Concept of Legalization*, 54 INT’L ORG. 401 (2000).

<sup>130</sup> See Boaventura de Sousa Santos, *Law: A Map of Misreading. Towards a Postmodern Conception of Law*, 14 J. L. & SOC’Y 297 (1987); A. CLAIRE CUTLER, *PRIVATE POWER AND GLOBAL AUTHORITY: TRANSNATIONAL MERCHANT LAW IN THE GLOBAL POLITICAL ECONOMY* (2003); WILLIAM ROBINSON, *A THEORY OF GLOBAL CAPITALISM: PRODUCTION, CLASS, AND STATE IN A TRANSNATIONAL WORLD* (2004); HISTORICAL MATERIALISM AND GLOBALIZATION (Mark Rupert & Hazel Smith eds., 2002).

<sup>131</sup> Carlos Aguir De Medeiros, *Asset-Stripping the State: Political Economy of Privatization in Latin America*, 55 *New Left Rev.* 109 (2009). See B. S. Chimni, *International Institutions Today: An Imperial State in the Making*, 15 *EUR. J. INT’L L* 1 (2004); N. Kirsch, *More Equal than the Rest? Hierarchy, Equality and US Predominance in International Law*, in *UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW* 161 (Michael Byers & Georg Nolte eds., 2003); H. L. Buxbaum, *Conflict of Economic Laws: From Sovereignty to Substance*, 42 *VA. J. INT’L L* 932, 957 (2002); B.S. Chimni, *WTO and Environment: The Legitimization of Unilateral Trade Sanctions*, *ECO. & POL. WKLY* 133, Jan. 12, 2002; B. S. Chimni, *India and the Ongoing Review of the WTO Dispute Settlement System: A Perspective*, *ECO. & POL. WKLY* 264, 30 Jan. 1999. Upendra Baxi, *Mass Torts, Multinational Enterprise Liability and Private International Law*, 276 *RECUEIL DES COURS* 297, 312 (1999).

Global South appear necessary to create a good investment climate for global capital.<sup>132</sup>

In the neoliberal era “[t]here’s a lot of money in poverty, and a few Nobel Prizes too.”<sup>133</sup> Here philanthropic foundations of global capital lead the way, with elite universities of the Global North not far behind.<sup>134</sup> The approach to poverty is framed by an insidious companion of neoliberal privatization—“NGO-ization of Everything.”<sup>135</sup> Creating the illusion of a “Third Way,”<sup>136</sup> ostensibly at a remove from the public and private sectors, corporate and foundation-endowed NGOs allow global capital to even “buy[] into resistance movements, literally as shareholders buy shares in companies, and then try to control them from within.”<sup>137</sup> Partial to technocratic responses to problems, NGO-ization elides historical, structural and political causes of poverty. The multiple manifestations of poverty are discrete problems hermetically sealed into their own silos, to be managed by supposedly apolitical technocrats. Fragmentation of solidarities between the subordinated within various manifestations of poverty is a direct result. All the while, ideology, discourses, and processes of NGO-ization facilitate abdication by and immunity to the state about matters related to poverty.

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<sup>132</sup> See generally, ARUNDHATI ROY, *CAPITALISM: A GHOST STORY* 13 (2014).

<sup>133</sup> *Id.* at 27.

<sup>134</sup> For a detailed study of private foundations in setting the agenda for public policies, see LINSEY MCGOEY, *NO SUCH THING AS A FREE GIFT: THE GATES FOUNDATION AND THE PRICE OF PHILANTHROPY* (2015); JOAN ROELOFS, *FOUNDATIONS AND PUBLIC POLICY: THE MASK OF PLURALISM* (2003); and GERALD COLBY, *THY WILL BE DONE: CONQUEST OF THE AMAZON, NELSON ROCKEFELLER AND THE EVANGELISM IN THE AGE OF OIL* (1996). For decisive involvement of university-based scholars in choreographing the turn to neoliberalism in the Global South and Eastern Europe, see JUAN GABRIEL VALDES, *PINOCHET’S ECONOMISTS: THE CHICAGO SCHOOL OF ECONOMICS IN CHILE* (1995) and JAPHY WILSON, *JEFFREY SACHS: THE STRANGE CASE OF DR. SHOCK AND MR. AID* (2014).

<sup>135</sup> Roy, *supra* note 132, at 33.

<sup>136</sup> See Joan Roelofs, *The Third Sector as a Protective Layer for Capitalism*, 47 *Monthly Rev.* 16 (1995).

<sup>137</sup> Roy, *supra* note 132, at 33.

This abdication and immunity do not, however, entail withering away of the state.

Neoliberalism does not displace the state as much as it reformulates it and restructures its options.<sup>138</sup> The neoliberal project is to turn the “nation-state” into a “market-state,”<sup>139</sup> one with the primary agenda of facilitating global capital accumulation unburdened from any legal regulations aimed at assuring the welfare of citizens. Social formations in the global South, situated in an asymmetrical relationship with global capitalism, are a particular target of this project. The neoliberal regimes, with their bedrock principles of private property rights and free trade, are a coercive mechanism to get states in the global South to adopt neoliberal economic and social policy frames conducive to global capital.<sup>140</sup> The enabling mechanism is “[t]he extension of the normative force of international standards by the device of conditionality.”<sup>141</sup> These regimes advance particular understandings of development and poverty that “disregard the social context of provision, the lived experiences of the poor and dismiss

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<sup>138</sup> Many perceptive observers reject the “state shrinking and declining” argument as political posturing of neo-liberals. In particular, they point to the expansion of the coercive apparatuses of the state and the shift of the state from a managerial mode befitting the Fordist era towards a neoliberal entrepreneurial mode. See, e.g., David Harvey, *From Managerialism to Entrepreneurialism: Transformation in Urban Governance in Late Capitalism*, 71 (B) GEOGRAFISKA ANNALER 3 (1989).

<sup>139</sup> Anthony Carty, *Marxism and International Law: Perspectives for the American (Twenty-First) Century?* in INTERNATIONAL LAW ON THE LEFT 169-70 (Susan Marks ed., 2008).

<sup>140</sup> These regimes include the WTO multilateral agreements including the Agreement on Trade Related Intellectual Property Rights (TRIPS), the Agreement on Trade Related Investment Measures (TRIMS), the General Agreement on Trade in Services (GATS), the Agreement establishing the Multilateral Investment Guarantee Agency (MIGA), and bilateral investment protection treaties (BITS). Together these regimes provide global capital ease of entry and investment, protection from national performance requirements, protection of expansive intellectual property rights, generous compensation in cases of expropriation, insurance against non-economic risks, and mechanisms to avoid national laws and dispute resolution fora.

<sup>141</sup> Vaughan Lowe, *The Politics of Law-making: Are the Methods and Character of Norm Creating Changing?* in THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW 212 (Michael Byers ed., 2000).



and/or reinforce the way in which deprivations are constituted.”<sup>142</sup> The mandate is to privatize public assets, roll back social services, and allow unbridled mobility of capital.<sup>143</sup> Now “[s]trait-jacketed within the global logic of capital and market and the global regime of property rights,” states in the global South “can no longer act as development states and engage in the management of poverty on their own.”<sup>144</sup> Instead, non-state actors representing interests of global capital play an active role in designing legal orders that circumscribe state sovereignty and autonomy.<sup>145</sup> Mandates of privatization make education, health, infrastructure, utilities, housing, and a range of state enterprises available for private appropriation.<sup>146</sup> By its insistence on the rollback of the state, privatization becomes “the cutting edge of accumulation by dispossession.”<sup>147</sup>

Neo-liberalism spawned the latest iteration of modernity’s suturing of law with global space by way of another master-narrative: globalization—a newly fashioned ensemble of norms, practices, and discourses to facilitate the geopolitics and geoeconomy of financialized capitalism.<sup>148</sup> Mainstream

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<sup>142</sup> R. Higgott & H. Weber, *GATS in Context: Development. An Evolving lex mercatoria and the Doha Agenda*, 12(3) REV. INT’L POL. ECON. 435, 442 (2005).

<sup>143</sup> For a detailed account of how the interests of the global South are jeopardized by concentration of finance capital and monetary regimes of the IMF, see JOSEPH STIGLITZ, *GLOBALIZATION AND ITS DISCONTENT* (2002).

<sup>144</sup> SANYAL, *supra* note 101, at 77.

<sup>145</sup> See generally GLOBAL LAW WITHOUT A STATE (Gunther Teubner ed., 1997). The exponential expansion of international commercial arbitration has created a space for private justice to serve global capital at the expense of the state. See BUXBAUM, *supra* note 115, at 938–39.

<sup>146</sup> *Id.* at 148–49, 158–59. See also David A. McDonald, *Environmental Racism and Neoliberal Disorder in South Africa* in THE QUEST FOR ENVIRONMENTAL JUSTICE: HUMAN RIGHTS & THE POLITICS OF POLLUTION 255 (Robert D. Bulland ed., 2005); Daniel R. Faber & Deborah McCarthy, *Neo-Liberalism, Globalization and the Struggle for Ecological Democracy: Linking Sustainability and Environmental Justice* in JUST SUSTAINABILITIES: DEVELOPMENT IN AN UNEQUAL WORLD 38 (Julian Agyeman et. al eds., 2003).

<sup>147</sup> HARVEY, *THE NEW IMPERIALISM*, *supra* note 87, at 157.

<sup>148</sup> See SAMIR AMIN, *CAPITALISM IN THE AGE OF GLOBALIZATION: THE MANAGEMENT OF CONTEMPORARY SOCIETY* (2014).

discourse about globalization represents the world as a seamless integrated whole, and globalization as inevitable. Globalization, like civilization, embodies modernity's claims about the direction and destination of history. The promise of progress and of overcoming space with time remains in place. However, global power relations remain embedded in the ensemble of globalization. Commitment to and participation in the global political economy is deemed the measure of a state's fitness for membership in the global community. The end of the Cold War is seen as capitalism's final victory over alternative models of collective life, thus signaling an "end of history."<sup>149</sup> The purported universality of capitalism, however, yields to its historical particularity in the claim that "the story of western civilization is now the story of mankind, its influence so diffused that old oppositions and antitheses are now meaningless."<sup>150</sup> The geo-legal space of globalization remains hierarchically organized and internally differentiated in that relations between particular spaces are shot through with power inequalities and unevenness. In this context "the global village...is the fantasy of the colonizer, not the colonized."<sup>151</sup> All this points to the apt summation that globalization of the neoliberal era is a "barely reworked variant" of imperialism."<sup>152</sup>

We have to move away from the conflation of structural tendency of capital towards homogenization with its actual historical realization. Rule of capital is not natural, unitary, or impelled by any unilinear logic. Rather, it adopts contradictory historical forms and generates multiple space-times. It is this multiplicity and unevenness that has generated today's crises and

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<sup>149</sup> See, e.g., FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (Free Press 1992).

<sup>150</sup> JOHN ROBERTS, *THE TRIUMPH OF THE WEST* 431 (Little, Brown 1985).

<sup>151</sup> LYNN SPIGEL, *THE SUBURBAN HOME COMPANION: TELEVISION AND THE NEIGHBORHOOD IDEA IN POSTWAR AMERICA*, in *SEXUALITY AND SPACE* 217 (Beatriz Colomina ed., 1992).

<sup>152</sup> ETIENNE BALIBAR, *RACISM AND NATIONALISM*, in *RACE, NATION, CLASS: AMBIGUOUS IDENTITIES* 25 (Etienne Balibar & Immanuel Wallerstein eds., 1991).

conflicts, presenting new challenges to intersections of law and geography at a global scale.<sup>153</sup> Global financial markets, the cutting edge of late capitalism, face a meltdown of grounds secured by deregulation. Fossil-fuel driven industrialization reaches the limits of accommodation that the environment can offer. Victims of neo-liberal restructuring of “national” economies seek alternative social compacts. Those subjected to globally differentiated sovereignties demand autonomy and self-determination. The post-colonial failures to reconcile indivisible sovereignty with demographic heterogeneity reach the breaking point. Refugees, migrant workers, “internally displaced persons,” and trafficked persons swell the ranks of the “constitutionally unclaimed.”<sup>154</sup>

Vigilance is warranted in the face of growing “cultural racism,” wherein “biological hierarchy” may seem to be displaced by “new cultural definitions of ‘race’ which are just as intractable.”<sup>155</sup> At large “new rhetorics of exclusion” founded in a “cultural fundamentalism,” that see the Global North “swamp[ed]” by “people with a different culture.”<sup>156</sup> For example, in Europe, the canonical bastion of liberal cosmopolitanism, where ostensibly “the first truly post-modern international political form” emerged,<sup>157</sup> ever sharper boundaries between ‘European’ and ‘non-European’ are being drawn. Indeed, the Maastricht Treaty brackets

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<sup>153</sup> For detailed analysis of the causes of the Great Recession and the subsequent financial meltdown, see PAUL KRUGMAN, *THE RETURN OF DEPRESSION ECONOMICS AND THE CRISIS OF 2008* (2009); JOSEPH E. STIGLITZ, *FREEFALL: AMERICA, FREE MARKETS, AND THE SINKING OF THE WORLD ECONOMY* (2010); RICHARD D. WOLFF, *CAPITALISM HITS THE FAN: THE GLOBAL ECONOMIC MELTDOWN AND WHAT TO DO ABOUT IT* (2010); ROBERT SKIDELSKY, *KEYNES: THE RETURN OF THE MASTER* (2009).

<sup>154</sup> Siba N. Grovogui, *The Secret Lives of the ‘Sovereign’: Rethinking Sovereignty as International Morality in THE STATE OF SOVEREIGNTY: TERRITORIES, LAWS, POPULATIONS* 261 (Douglas Howland & Luise White eds., 2008).

<sup>155</sup> PAUL GILROY, *THERE AIN’T NO BLACK IN THE UNION JACK: THE CULTURAL POLITICS OF RACE AND NATION* 60–61 (1987).

<sup>156</sup> Verena Stolcke, *Talking Culture: New Boundaries, New Rhetorics of Exclusion in Europe*, 36 *CURRENT ANTHROPOLOGY* 1, 3 (1995).

<sup>157</sup> J. G. Ruggie, *Territoriality and Beyond: Problematizing Modernity in International Relations*, 4 *INT’L ORG.* 140, 169 (1993).

“asylum,” “immigration,” and “nationals of third countries” in conjunction with “combatting unauthorized immigration, residence and work...terrorism, unlawful drug trafficking, and other serious forms of international crime.”<sup>158</sup> All this at a time when there are over 214 million international migrants in the world, of whom about half are migrant workers.<sup>159</sup>

Popular resistance to neoliberal globalization is confronted with the shrinkage of space for political action. As neoclassical economic theory masquerades as the general theory of the social, lords of the universe raise the specter of “excess of democracy.”<sup>160</sup> This “excess” is remedied by ever-new designs to move from government to governance and from representative to responsible government.<sup>161</sup> To ensure that this “excess” does not spill over, the new imperium deploys its trump card: an accelerating state of permanent exception and war, placing an ever-increasing number of bodies and spaces on the other side of universality—a moral and legal no man’s land.

Exceptions, lurking in the heart of storied universal norms of governance and conflict, are brought forth to save the global imperial order. Liberal constitutional protections shrink. Racist discourses, forged on the anvil of colonialism, are recycled in the service of the resurgent Empire. Identity-bestowing binaries fashioned in the classical age of colonialism are re-deployed unabashedly. Benign tropes of “the space of imperial sovereignty...is smooth,”<sup>162</sup> and “the world is flat,”<sup>163</sup> conveniently give

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<sup>158</sup> Maastricht Treaty, Art. K. 1.

<sup>159</sup> 2009 United Nations report, quote by Kristin Surak, *Guestworkers: A Taxonomy*, 84 *NEW LEFT REV.* 84, 85 (2013).

<sup>160</sup> Wolfgang Streeck, *The Crisis of Democratic Capitalism*, 71 *NEW LEFT REV.* 5, 7 (2011).

<sup>161</sup> Peter Mair, *Representative versus Responsible Government*, Max Planck Institute for the Study of Societies Working paper 09/8, Cologne 2009, <http://www.mpifg.de/pu/workpap/wp09-8.pdf> [<https://perma.cc/9ZYB-XS75>].

<sup>162</sup> MICHAEL HARDT & ANTONIO NEGRI, *EMPIRE* 190 (2001).

way to “clash of civilizations,” with the “disconnectedness” between a “functioning core” and a “non-integrating gap” designated the “ultimate enemy.”<sup>164</sup> We are now offered a “bifurcated world...inhabited by Hegel’s and Fukuyama’s Last Man...[and] Hobbes’s First Man.”<sup>165</sup> Binary geographies of danger and safety are deployed that see “bloody boundaries” between a “functioning core” and a “non-integrating gap,” with the “disconnectedness” between the two designated as the “ultimate enemy.”<sup>166</sup> An inverted map of the world is unfolded to offer prescriptions for “[g]eostrategic success,” namely, “prevent collusion and maintain security dependence among the vassals,...keep tributaries pliant and protected, and...keep the barbarians from coming together.”<sup>167</sup> A “new paradigm” is enunciated for a war of “uncertain duration” against “the enemies of civilization.”<sup>168</sup> One that “renders obsolete [and]...quaint” established rules of war.<sup>169</sup> Belated acknowledgment that “[t]he hidden hand of the market will never work without a hidden fist,”<sup>170</sup> leads to the prescription—“give war a chance.”<sup>171</sup> Of course, the war has to be in the name of liberty and freedom. After all, we stood warned some time ago that “[f]reedom requires

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<sup>163</sup> THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* (2006).

<sup>164</sup> THOMAS P. M. BARNETT, *THE PENTAGON’S NEW MAP: WAR AND PEACE IN THE TWENTY-FIRST CENTURY* 124 (2004).

<sup>165</sup> ROBERT D. KAPLAN, *THE COMING ANARCHY: SHATTERING THE DREAMS OF THE POST COLD WAR* 24 (2000).

<sup>166</sup> BARNETT, *supra* note 164, at 124.

<sup>167</sup> ZBIGNIEW BRZEZINSKI, *THE GRAND CHESSBOARD: AMERICAN PRIMACY AND ITS GEOSTRATEGIC IMPERATIVES* 32, 40, 215 (Basic Books 1997).

<sup>168</sup> NATIONAL SECURITY STRATEGY OF THE UNITED STATES Introduction, Section 5 (2002); Stephen P. Marks, *Branding the “War on Terrorism”: Is there a “New Paradigm” of International Law?*, 14 MICH. ST. J. INT’L L. 113 (2006).

<sup>169</sup> Memorandum from Alberto R. Gonzales to President George W. Bush (Jan. 25, 2002), <http://www.scribd.com/doc/8947254/Gonzales-Torture-Memo> [<https://perma.cc/XQD9-GHSC>].

<sup>170</sup> THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* 373 (Farrar, Straus, Giroux 1999).

<sup>171</sup> THOMAS L. FRIEDMAN, *LONGITUDES & ATTITUDES: EXPLORING THE WORLD AFTER SEPTEMBER 11*, 91 (2002).

and will require far greater living space than Tyranny.”<sup>172</sup> Faced with this brutal response to the crisis of Empire, the global subalterns are creating new geographies of resistance against all odds.<sup>173</sup> Counter-stories are one of the foundational weapons of this resistance.

## V. THE NATION AND ITS MARGINS

The phenomena of the nation and nation-state reflect a basic ambivalence concerning the question of authority that prevails in modern political discourse. On the one hand, this discourse ceaselessly questions the form and content of authority, its legitimacy, and proper boundaries. On the other, this discourse makes questions about the origin and ultimate grounds of the authority difficult to ask, let alone answer. The source of this ambivalence may be found in modern political discourse itself and in the critical spirit animating it. While it aspires to be critical, it imposes an inner limit to criticism—an inner limit demarcated by ontological limit horizons.

Since the French Revolution, the nation and nationalism have spread. Today, states everywhere legitimate themselves by using the ideology of the nation because the nation has become the normal, sole form of legitimate collective political existence. One implication of the nation-state furnishing the limit horizon of modern political existence is that of necessity, which circumscribes political struggles within the horizon of the state. Limit

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<sup>172</sup> GEOGRAPHY AND EMPIRE 271 (Anne Godlewska & Neil Smith eds., 1994) (quoting HENRY LUCE, *The American Century* (1941)).

<sup>173</sup> See Andre Singer, *Rebellion in Brazil*, 85 NEW LEFT REV. 19 (2014); Tariq Ali, *Between Past and Future*, 80 NEW LEFT REV. 61 (2013); Asef Bayat, *Revolution in Bad Times*, 80 NEW LEFT REV. 47 (2013); Kees Van Der Pijl, *Arab revolts and Nation-State Crisis*, 70 NEW LEFT REV. 27 (2011); GEOGRAPHIES OF RESISTANCE (Steve Pile & Michael Keith eds., 1997); ENTANGLEMENTS OF POWER: GEOGRAPHIES OF DOMINATION/RESISTANCE (Joanne P. Sharp et. al. eds., 2000); GLOBAL FLASHPOINTS: REACTIONS TO IMPERIALISM AND NEOLIBERALISM (Leo Panitch & Colin Leys eds., 2007); GLOBALIZATION AND THE POLITICS OF RESISTANCE (Barry K. Gills ed., 2000); NEW SOCIAL MOVEMENTS IN THE SOUTH: EMPOWERING THE PEOPLE (Ponna Wignaraja ed., 1993); JEREMY BRECHER, TIM COSTELLO AND BRENDAN SMITH, *GLOBALIZATION FROM BELOW: THE POWER OF SOLIDARITY* (2000); A MOVEMENT OF MOVEMENTS: IS ANOTHER WORLD REALLY POSSIBLE? (Tom Mertens ed., 2004).

horizons, by overwhelming the present, turn all history into history of the present. It is no surprise that “[h]istorical consciousness in modern society has been overwhelmingly framed by the nation-state.”<sup>174</sup> In the modern imaginary, the nation, while remaining a “capital paradox of universality,”<sup>175</sup> continues to masquerade as a limit horizon of collective political existence. The very form of the nation-state has come to be regarded as “the indispensable framework for all social, cultural, and economic activities.”<sup>176</sup> This is despite the fact that the question “what is a nation?” posed by Ernest Renan in 1882, still searches for a satisfactory answer.<sup>177</sup>

To appreciate the modern construct of a nation, one needs to be mindful of the mapping order of modern history. The late eighteenth/early nineteenth century, European proclivity of locating foundational legitimacy of the state in the latter’s congruence with the nation inaugurated the state-nation as a limit horizon. Beginning in the eighteenth century, the relationship between history and political order underwent a profound transformation from having been the very antithesis of order, the concepts of time and history became sources of sameness. Historical time is now tied to expectations of a new and different future, but of the future in which the most cherished traits of present identities are both conserved and refined. All that was solid may well have melted into air in this process, but everything fluid and gelatinous simultaneously became petrified. The period after the French Revolution has been noted as “a period when concepts of authority were removed from the dimension of contingency and inscribed

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<sup>174</sup> PRASENJIT DUARA, *RESCUING HISTORY FROM THE NATION: QUESTIONING NARRATIVES OF MODERN CHINA* 3 (1995).

<sup>175</sup> JACQUES DERRIDA, *THE OTHER HEADING: REFLECTIONS ON TODAY’S EUROPE* 71 (Pascale-Anne Brault & Michael B. Naas trans., 1992).

<sup>176</sup> PETER FITZPATRICK, *MODERNISM & THE GROUNDS OF LAW* 124 (2001) (quoting HANS KOHN, *THE IDEA OF NATIONALISM* 63 (1967)).

<sup>177</sup> See ERNEST RENAN, *WHAT IS A NATION?* in *NATION AND NARRATION* 8 (Homi K. Bhabha ed., 1990).

within the dimension of continuity.”<sup>178</sup> The net result of this change was that the concepts of state and history became closely intertwined. Not only was the state turned into a historical being and history interpreted as the successive unfolding of the state in time, but also the presence of the state became the condition of the possibility of history.

This historical understanding of the state and the state-centric understanding of history are closely related to another major change in the structure of social-political concepts: the fusion of the concepts of state and nation. From Vico to Herder, the nation was conceptualized as grounded in and reflecting manifest and irreducible differences between people.<sup>179</sup> The evolution of specific political communities is then described as if their individual histories conformed to a general scheme in spite of their actual diversity. Each community is seen to have an individual trajectory within this universal history. National history secures for the contested and contingent nation the false unity of a self-same national subject evolving through time. Status of the nation in the modern imaginary evidences that Enlightenment’s “untruth...consist[s]...in the fact that for Enlightenment the process is always decided from the start.”<sup>180</sup> Anderson designates this phenomenon “reversed ventriloquism,” the process whereby the voice of history is orchestrated by the nation in the present.<sup>181</sup> Because History is understood as the gradual realization of reason and the rise of the modern

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<sup>178</sup> See JENS BARTELSON, *THE CRITIQUE OF STATE* 38 (2001) (citing J.G.A. POCKOCK, *VIRTUE, COMMERCE, AND HISTORY: ESSAYS ON POLITICAL THOUGHT AND HISTORY CHIEFLY IN THE EIGHTEENTH CENTURY* 92–93 (1985)).

<sup>179</sup> See generally ISAAH BERLIN, *VICO AND HERDER: TWO STUDIES IN THE HISTORY OF IDEAS* (1976); GEORGE G. IGGERS, *THE GERMAN CONCEPTION OF HISTORY: THE NATIONAL TRADITION OF HISTORICAL THOUGHT FROM HERDER TO THE PRESENT* (1968); J.G. HERDER OF SOCIAL AND POLITICAL CULTURE (F.M. Barnard ed., 1969); *THE NEW SCIENCE OF GIAMBATTISTA VICO* (Thomas Bergin & Max Fisch rev. trans., 3rd ed., 1968) [hereinafter *NEW SCIENCE OF VICO*].

<sup>180</sup> MAX HORKHEIMER & THEODOR ADORNO, *DIALECTIC OF ENLIGHTENMENT* 24 (John Cumming trans., 1993).

<sup>181</sup> BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGINS AND SPREAD OF NATIONALISM* 198 (rev. ed., 1991).



nation-state, it takes on meaning and intelligibility only from the vantage point of the nation-state. If the present is only intelligible in the light of History, the present also signifies that nation-statehood has become an inescapable part of the modern condition and the sole source of its intelligibility.<sup>182</sup> It is not surprising that the idea of the nation-state was conceptualized as a natural species of being.<sup>183</sup> A conceptual limit horizon can hope for no better.

We have to be mindful that even today, “coherence is sought in a nation through the excluding of what is thus ‘other’ to it.”<sup>184</sup> Balibar frames this process of coherence as one of exclusion in racial terms: a division of humanity “into two main groups, the one assumed to be universalistic and progressive, the other supposed irremediably particularistic and primitive.”<sup>185</sup> As explicit racist divisions become politically discredited, a cultural divide is posited between the nation and its “other.” Gilroy terms this “cultural racism,” wherein “biological hierarchy” stands displaced by “new, cultural definitions of ‘race’ which are just as intractable.”<sup>186</sup> Lately, at large are “new rhetorics of exclusion” founded in a “cultural fundamentalism.”<sup>187</sup>

Today, related questions of identity, recognition, and participation unavoidably confront “a fundamental ambivalence about the normative

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<sup>182</sup> See generally HEGEL, *supra* note 22; see also SHLOMO AVINERI, *HEGEL’S THEORY OF THE MODERN STATE* (1972); FRED R. DALLMAYR, *G.W.F. HEGEL: MODERNITY AND POLITICS* (1993).

<sup>183</sup> See generally John S. Dryzek & David Schlosberg, *Disciplining Darwin: Biology in the History of Political Science*, in *POLITICAL SCIENCE IN HISTORY: RESEARCH PROGRAMS AND POLITICAL TRADITIONS* (James Farr et al. eds., 1995).

<sup>184</sup> FITZPATRICK, *supra* note 176, at 125.

<sup>185</sup> Etienne Balibar, *Is There a Neo-Racism* in ETIENNE BALIBAR & IMMANUEL WALLERSTEIN, *RACE, NATION, CLASS: AMBIGUOUS IDENTITIES* 25 (Christ Turner trans., 1991).

<sup>186</sup> PAUL GILROY, *THERE AIN’T NO BLACK IN THE UNION JACK: THE CULTURAL POLITICS OF RACE AND NATION* 60 (1987).

<sup>187</sup> See generally Verena Stolcke, *Talking Culture: New Boundaries, New Rhetorics of Exclusion in Europe*, 36 *CURRENT ANTHROPOLOGY* 1 (1995).

horizons of collective identity in the modern polity.”<sup>188</sup> No national culture pre-existed the centralization of power and the political organization of social life into a coherent whole.<sup>189</sup> Beneath the rhetoric of unity, solidarity, Enlightenment rationality, and modern nationhood remain grounded in exclusions and conflict because the Global North has always been constituted through the negation of otherness and active de-humanization of difference.<sup>190</sup>

Nations are not created in a communicative void. Their spatiotemporal existence has always been in counter-distinction with their others: rival ethnic groups, racial difference, colonizers, and former rulers. Nations depend on narration addressed both inwards and outwards.<sup>191</sup> National identities are fostered through imagining, which enables individuals to see themselves as part of an invisible cultural whole.<sup>192</sup> Imagined communities are seen products of print-capitalism, which created a popular platform of nationhood through effective democratization of communication, with the discourse available and address to all potential members of the community, because “it is always open to new speakers, listeners and readers.”<sup>193</sup> The nation operates as a closed community in order to preserve its coherence. The fiction of fixity, the myth of an unchanging, perennial, and primordial nation is always supported by the construction of exclusive histories.<sup>194</sup> This univocal and inclusive picture of national narration is rejected by post-colonial theorists as being “modular,” informed by the experience of the

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<sup>188</sup> GERARD DELANTY, *INVENTING EUROPE* 1 (1995).

<sup>189</sup> Louis Althusser, *Ideology and Ideological State Apparatus* in *MAPPING IDEOLOGY*, 106–07, 123–32 (S. Zizek ed., 1994).

<sup>190</sup> *Id.* at 5; EDWARD SAID, *ORIENTALISM* (1978); EDWARD SAID, *CULTURE AND IMPERIALISM* (1994).

<sup>191</sup> HOMI BHABHA, *NATION AND NARRATION* (1990); EDWARD SAMPSON, *CELEBRATING THE OTHER: A DIALOGIC ACCOUNT OF HUMAN NATURE* (1993); Anna Triantafyllidou, *National Identity and the ‘Other’*, 21:4 *ETHNIC AND RACIAL STUD.* 593 (1998).

<sup>192</sup> ANDERSON, *supra* note 181.

<sup>193</sup> *Id.* at 146.

<sup>194</sup> ERNEST GELLNER, *NATIONS AND NATIONALISM* 125 (1985).

Global North, and blind to nation-building in the post-colonial Global South.<sup>195</sup> In the colonized formations, nationalist enunciations are the product of bifurcated discourses addressed to the nation and its rulers, in which different arguments are strategically mobilized for different interlocutors. This conception of nationalist narration places it in a field of conflict and contestation. This conflict is productive in that it produces for the subaltern dialogically something new.<sup>196</sup> Similarly, Fanon, emphasizing the role of recognition in identity-formation, urges the colonized to reject the colonizer's suggestion that the colonized wear a "white mask" and be like to colonizers.<sup>197</sup> Here non-recognition and misrecognition are a sign of oppression; a repressed community attains national status when it develops an internal, independent, voice.<sup>198</sup> The task of critique and counter-stories is to disrupt the discourse of the bounded nation and national frontier. We have to recognize that

The frontier is both an opening and a closing. It is at the frontier that there takes place the distinction from and liaison with the environment. All frontiers, including the membrane of living beings, including the frontier of nations, are, at the same time as they are barriers, places of communication and exchange. They are the place of dissociation and association, of separation and articulation.<sup>199</sup>

Critique must underscore the impossibility of viewing the nation as a uniform symbolic force, because "neither centers, borders, cultural

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<sup>195</sup> PARTHA CHATTERJEE, NATIONALIST THOUGHT AND THE COLONIAL WORLD 20–22 (1986).

<sup>196</sup> PETER HITCHCOCK, DIALOGICS OF THE OPPRESSED (1993).

<sup>197</sup> FRANTZ FANON, BLACK SKIN, WHITE MASKS (1970); FRANTZ FANON, THE WRETCHED OF THE EARTH (1967).

<sup>198</sup> CHARLES TAYLOR, PHILOSOPHICAL ARGUMENTS 225 (1995).

<sup>199</sup> EDGAR MORIN, LA METHODE: LA NATURE DE LA NATURE 203–04 (1977), quote in Geoffrey Bennington, *Postal Politics and the Institution of the Nation* in NATION AND NARRATION 121, (Homi Bhabha ed., 1990).

products, nor language can fix national identity.”<sup>200</sup> In its irresolution, the construct of the nation is not alone today; “sense of words like ‘nation’, ‘people’, ‘sovereignty’...[and] ‘community’ are leaking out of so many cracked vessels.”<sup>201</sup> The task at hand is to read the nation and nationalism in ways that create an estrangement effect, whereby the texts of the nation and nationalism are deprived of their seemingly natural and self-evident air to lay bare their contrived and contingent nature. The need is to trigger alternative narratives of the nation that contest the hegemony of Eurocentric History. Counter-stories embody this critical project.

## VI. LATCRIT 2017 COUNTER-STORIES

Jerome McCristal Culp, Jr., law professor, scholar, and a leading voice in enunciating Critical Race Theory, was a critical part of the LatCrit organization and community.<sup>202</sup> Since his untimely departure, the Jerome McCristal Culp, Jr. Memorial LatCrit Lecture is a plenary event at every LatCrit conference. At LatCrit XXI, Professors Angela P. Harris<sup>203</sup> and

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<sup>200</sup> R. Bennett, *National Allegory or Carnavalesque Heteroglossia? in Bakhtin and the Nation* 183 (San Diego Bakhtin Circle 2000).

<sup>201</sup> ON JEAN-LUC NANCY: THE SENSE OF PHILOSOPHY 13 (Darren Sheppard et al. eds., 1997).

<sup>202</sup> His life and work reflected many of the ideals that animate the project known as LatCrit. His work in Critical Race Theory, especially his work on race and autobiography and the possibility of a black subject position from which to engage in critique, inspired the new generation of legal scholars entering the academy in the early 1990s. Professor Culp’s relentless critique of institutions and individuals serves as a model for how one can simultaneously be a part of institutions and communities while working to transform them.

<sup>203</sup> The vast corpus of Professor Angela P Harris’ scholarship includes the following: *Care and Danger: Feminism and Therapy Culture*, in *STUDIES IN LAW, POLITICS, AND SOCIETY, SPECIAL ISSUE—FEMINIST LEGAL THEORY*, (Maxine Eichner & Clare Huntington eds., 69th ed., 2016); *CRIMINAL LAW: CASES AND MATERIALS* (with Cynthia Lee) (3rd ed., 2014); *RACE AND RACES: CASES AND RESOURCES FOR A MULTIRACIAL AMERICA* (with Juan Perea, Richard Delgado, Jean Stefancic & Stephanie Wildman) (West Publishing 3rd ed., 2014); *RACE AND EQUALITY LAW* (Ashgate Press 2013); *Critical Race Theory in LAW AND SOCIAL THEORY* (Reza Banakar & Max Travers eds., 2013); *PRESUMED INCOMPETENT: THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA* (with Carmen Gonzalez, Yolanda Flores Niemann, & Gabriella

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Gutierrez y Muhs)(Utah State Press 2012); ECONOMIC JUSTICE: RACE, GENDER, IDENTITY, AND ECONOMICS (with Emma Coleman Jordan) (Foundation Press 2nd ed. 2011); *Economies of Color*, foreword to SHADES OF DIFFERENCE (Evelyn Glenn ed., 2009); RACE AND RACES: CASES AND RESOURCES FOR A MULTIRACIAL AMERICA (with Juan Perea, Richard Delgado, Jean Stefancic & Stephanie Wildman)(West Publishing 2nd ed., 2007); PLACE IS IN THE MARKETPLACE: GENDER AND ECONOMICS (with Emma Coleman Jordan) (Foundation Press 2005); CULTURAL ECONOMICS: MARKETS AND CULTURE (with Emma Coleman Jordan) (Foundation Press 2005); WHEN MARKETS FAIL: RACE AND ECONOMICS (with Emma Coleman Jordan) (Foundation Press 2005); *Power and Resistance in Contemporary Legal Education* (with Donna Maeda) in DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM (critical edition with commentary, 2004); CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY (with Francisco Valdes & Jerome McCristal Culp) (Temple University Press 2002); *Foreword to GYPSY LAW: ROMANI LEGAL TRADITIONS AND CULTURE* (Walter O. Weyrauch, ed.) (University of California Press 2001); *Critical Race Theory* in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES (2001); *Women of Color and the Law* in FEMINIST JURISPRUDENCE, WOMEN, AND THE LAW: CRITICAL ESSAYS, RESEARCH AGENDA, AND BIBLIOGRAPHY (Betty Taylor, Sharon Rush, & Robert J. Munro, eds. 1999); *Forcible Rape, Date Rape, and Communicative Sexuality: A Legal Perspective* in DATE RAPE: FEMINISM, PHILOSOPHY, AND THE LAW (Leslie Francis, ed., 1996); *Intersectionality, Race-Gender Subordination, and Education* (with Zeus Leonardo) in REV. OF RES. IN EDUC. (forthcoming 2018); *Animal Rights: From Why to How* (transcript of panel), 22 ANIMAL L. 225 (2016); *Introduction to From Precarity to Positive Freedom: ClassCrits At Seven*, 44 SW. L. REV. 621 (2015); [Re]Integrating Spaces: The Color of Farming, 2 SAVANNAH L. REV. 157 (2015); *Introduction to Presumed Incompetent: Continuing the Conversation (Part I)*, 29 BERKELEY J. GENDER L. & JUST. 183 (2014); *Vulnerability and Power in the Age of the Anthropocene*, 6 WASH. & LEE J. ENERGY CLIMATE & ENV'T 1 (2014); *Living With Racism in Education and Society: Derrick Bell's Ethical Idealism and Political Pragmatism* (with Zeus Leonardo), 16 RACE ETHNICITY & EDUC. 470 (2013); *Compassion and Critique*, 1 COLUM. J. RACE & L. 326 (2012); *Toward Lawyering as Peacemaking: A Seminar on Mindfulness, Morality, and Professional Identity*, 61 J. LEG. EDUC. 647 (2012); *Rotten Social Background and the Temper of the Times*, 2 ALA. C.R. & C.L. L. REV. 131 (2011); *Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation*, 37 WASH. U. J. L. & POL'Y 13 (2011); *Teaching the Tensions*, 54 ST. LOUIS L.J. 739 (2010); *Teaching Criminal Law from a Critical Perspective* (with Cynthia Lee), 7 OHIO ST. J. CRIM. L. 261 (2009); *Theorizing Class, Gender, and the Law: Three Approaches*, 72 LAW & CONTEMP. PROBS. 37 (2009); *Turning the Angel: The Uses of Critical Legal History*, 1 FREEDOM CTR. J. 45 (2009); *Should People of Color Support Animal Rights?* 5 J. ANIMAL L.15 (2009); *From Color Line to Color Chart?: Racism and Colorism in the New Century*, 10 BERKELEY J. AFR. AM. L. & POL'Y 52 (2008); *Book review, Transgender Rights* (edited by Paisley Currah, Richard M. Juang, & Shannon Price Minter), and *Whipping Girl: A Transsexual Woman on Sexism and the Scapegoating of Femininity*, 36 WOMEN'S STUD. Q. 315 (2008); *Loving Before and After the Law*, 76 FORDHAM L. REV. 2821 (2008); *From "The Art of*

Margaret Montoya E. Montoya,<sup>204</sup> two from among the rank of pioneers of Critical Race Theory and LatCrit, jointly delivered the Memorial Lecture. Their respective parts of the joint lecture open this symposium issue.

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*War” to “Being Peace”:* *Mindfulness and Community Lawyering in a Neoliberal Age* (with Margaretta Lin & Jeff Selbin), 95 CAL. L. REV. 2073 (2007); *Afterword: Beyond the First Decade: A Forward-Looking History of LatCrit Theory, Community, and Praxis*, 26 CHICANA/O-LATINA/O L. REV. 237 (2006) (with Berta Hernandez-Truyól & Francisco Valdes); *From Stonewall to the Suburbs? Toward a Political Economy of Sexuality*, 14 WM. & MARY BILL RTS. J.1539 (2006); *Vultures in Eagles’ Clothing: Conspiracy and Racial Fantasy in Populist Legal Thought*, 10 MICH. J. RACE & L. 269 (2005); *Love and Architecture: Race, Nation, and Gender Performances Inside and Outside the State*, 52 CLEV. ST. L. REV. 121 (2005); *Under Construction* (tribute to Jerome M. Culp, Jr.), 50 VILL. L. REV. 775 (2005); *Theorising Law and Political Economy: A Seminar on Law, Markets, and Culture*, 14 GRIFFITH L.J. 174 (2005); *Afterword: Bad Subjects: The Practice of Theory and the Constitution of Identity in Legal Culture*, 9 CARDOZO WOMEN’S L.J. 515 (2003); *Introduction to Cluster III, LatCrit Symposium*, 55 FLA. L. REV. 319 (2003); *Reforming Alone?* (Book Review of DEBORAH RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION*), 54 STAN. L.REV. 1449 (2002); *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CALIF. L.REV. 1923 (2000); *Foreword to Beyond Equality: Power and the Possibility of Freedom in the Republic of Choice*, 85 CORNELL L. REV. 1181 (2000); *Gender Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777 (2000); *Building Theory, Building Community*, 8(3) SOC. & LEGAL STUD. 313 (1999); *Afterword to Embracing the Tar Baby: LatCrit Theory and the Sticky Mess of Race* (with Leslie Espinoza), 85 CALIF. L. REV. 1585 (1997); *Criminal Justice as Environmental Justice*, 1 J. OF GENDER, RACE AND JUST. 1 (1997); *Afterword to Other Americas*, 95 MICH. L. REV. 1150 (1997); *Comment in Seductions of Modern Culture*, 8 YALE J.L. & HUMAN. (1996); *Foreword to The Unbearable Lightness of Identity*, 11 BERKELEY WOMEN’S L.J. & AFR. AMN. L. & POL’Y REP. 207 (1996); *Foreword to The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741 (1994); *“A(nother) Critique of Pure Reason”:* *Toward Civic Virtue in Legal Education* (with Marjorie M. Shultz), 45 STAN. L. REV. 1773 (1993); *Representing La Mestiza*, 6 BERKELEY WOMEN’S L.J. 107 (1991); *The Jurisprudence of Victimhood*, 1991 SUP. CT. REV. 7; *Race and Essentialism in Feminist Legal Theory*, 42 STANFORD L. REV. 581 (1990); *On Doing the Right Thing: Education Work in the Academy*, 15 VT. L. REV. 125 (1990); *Re-reading Punitive Damages*, 40 ALABAMA L. REV. 361(1989); *What Reconstruction Jurisprudence Means to Me*, CLS (Newsletter of the Conference on Critical Legal Studies), Nov. 1989, at 83.

<sup>204</sup> Professor Margaret E. Montoya’s published works include *HLS 200: A Latina’s Story About the Bicentennial*, HARV. LATINX L. REV. (forthcoming 2018); *Addressing Implicit Bias to Improve Cross-Cultural Care* (with Brenda Pereda, M.D.) CLINICAL OBSTETRICS & GYNECOLOGY J. (forthcoming 2018); *The Story Behind a Letter in Support of Professor Derrick Bell*, 75 U. PITTSBURGH L. REV. 1 (2014) (jointly authored with Cheryl Nelson Butler, Sherrilyn Ifill, Suzette Malveaux, Natsu Taylor Saito, Nareissa L. Smith

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& Tanya Washington); *Professor Mari Matsuda: Storytelling and Voice. A Tribute*, 18 UCLA ASIAN PACIFIC-AM. L.J. 111 (2013); *Máscaras y Trenzas: Reflexiones. Un Proyecto de Identidad y Analysis a Través de Veinte Años* 36 HARV. J. OF L. & GENDER 469 (2013) and appearing concurrently in UCLA CHICANA/LATINA/O L. REV. (May 2014).; Opinion, *Spanish is Part of NM Cultural Capital*, ABQ JOURNAL, June 30, 2013, <http://www.abqjournal.com/212421/opinion/spanish-is-part-of-nm-cultural-capital.html> [<https://perma.cc/94B6-R4QF>]; *Latinos and the Law: Land, Water and Housing* in NATIONAL PARK SERVICE ADVISORY BOARD, AMERICAN LATINO SCHOLARS EXPERT PANEL AMERICAN LATINOS AND THE MAKING OF THE UNITED STATES: A THEME STUDY (2013); *Legal Education, Social Justice and the Law School Dean: Latinas at the Center*, 48 CAL. W. L. REV. 417 (2012); *Narrative Braids: Performing Racial Literacy* (with Prof. Christine Zuni Cruz & Mr. Gene Grant) 33 AMER. IND. L.J. 153 (2008) and published concurrently in 1 FREEDOM CTR. J. 60 (2009); *Guadalupe in New Mexico* in RELIGION AS ART (Steve Loza ed., 2009); *"Latinas/os" and Latina/o Legal Studies: A Critical and Self-Critical Review of LatCrit Theory and Legal Models of Knowledge Production* (with Francisco Valdes), 4 FLA. INT'L L.J. (2009); *Uniendo Comunidades by Learning Lessons and Mobilizing for Change*, 27 CHICANA/O-LATINA/O L. REV. 1 (2008); *"Latinas/os" and the Politics of Knowledge Production: LatCrit Scholarship and Academic Activism as Social Justice Action* (with Francisco Valdes) 83 INDIANA L. REV. 1197 (2008); *Involving Minors in Research: Law and Ethics within Multicultural Settings* (with Dr. Luis Vargas) in HANDBOOK OF SOCIAL RESEARCH ETHICS (Donna M. Mertens & Pauline Ginsberg eds., 2008); *Antígona: A Voice Rebuking Power*, 75 U. MO. KAN. CITY L. REV. 1171 (2007); *LatCrit at Ten Years*, 26 U.C.L.A. CHICANA/L-LATINA/O L. REV. 1 (2006); *Defending the Future Voices of Critical Race Feminism*, 39 UC DAVIS L. REV. 1305 (2006); *Who Gets In? The Quest for Diversity after Grutter*, 52 SUNY BUFFALO L. REV. 531 (2004); *Un/Braiding Stories about Law, Sexuality and Morality*, 24 CHICANA/O-LATINA/O L. REV. 1 (2003); *Why the U. of Michigan Flap Matters to UNM*" (with Samantha Adams & Julie Sakura), THE ABQ TRIBUNE, April 9, 2003, p. C-1; *Seeking Educational Self-Determination: Raza Studies for Revolution* (with Marcos Pizarro) in EQUITY AND EXCELLENCE IN EDUCATION, (Dolores Delgado Bernal & Claudia Ramirez Wiedeman eds., 2002); *The Future of Civil Rights: A Dialogue*, FOCUS ON LAW STUDIES, VOL. XVII, No. 2 (SPRING 2002); *Foreword to Class in LatCrit: Theory and Praxis in a World of Economic Inequality*, 78 U. DENVER L. REV. 467 (2001); *Celebrating Racialized Narratives* in CROSSROADS, TRAJECTORIES AND A NEW CRITICAL RACE THEORY (Frank Valdes, Angela Harris & Jerome Culp eds., 2002); *A Brief History of Chicana/o School Segregation: One Rationale for Affirmative Action in 12 BERKLEY LA RAZA* L.J. (2002); *Silence and Silencing: Their Centripetal and Centrifugal Forces in Cultural Expression, Pedagogy and Legal Discourse* in 33 MICHIGAN J. L. REFORM 263 (2000) and 5 MICH. J. OF RACE & L. 847 (2000); *LatCrit Theory: Mapping Its Intellectual and Ideological Foundations and Future Self-Critical Directions* in 53 U. MIAMI L. REV. 1119 (1999); *Religious Rituals and LatCrit Theorizing*, 19 CHICANA/O-LATINA/O L. REV. 417 (1998); *Border/ed Identities: Narrative and the Social Construction of Legal and Personal Identities* in CROSSING BOUNDARIES: TRADITIONS AND TRANSFORMATIONS IN LAW AND SOCIETY RESEARCH (Austin Sarat, Marianne Constable, David Engel, Valerie Hans & Susan Lawrence eds.,

Professor Harris explores three “rhymes, rhythms and harmonies” between Professor Culp and Professor Montoya, who she characterizes as “two pillars of critical race theory.’ She highlights their central role in the development of LatCrit, their career as tellers of personal, autobiographical stories, and the substantive themes that connect their work: the concept of racialized space, a commitment to feminist method, and a commitment not just to tearing down the old, but building the new. She then ties these themes to the question posed by the 2017 LatCrit Conference—”What Next?” While underscoring the urgency of the task ahead for outcrits, she emphasizes the responsibility towards community and the social at large. The call is to build theory and praxis responsive to histories, predicaments and dreams of the marginalized and the oppressed. She inspires all outcrits to ever remain mindful that

[C]ritical theorists are creative people—people who are trying to dream the future into being. As creative people, we have a chance for the things we make to live on beyond our physical bodies...all of us who live in human bodies have an afterlife. Everything that we say and do lives on in the lives of those who come after us, whether we are aware of our influence or not.

Professor Montoya characterizes LatCit as her “academic home...refuge, safe space, and spa for my mind, heart, and spirit,” one that opened “a space for me and my voice.” After acknowledging Prof. Culp’s use of

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1998); *Voicing Differences*, 4 CLINICAL L. REV. 147 (1997); *Lines of Demarcation in a Town Called Frontera: A Review of John Sayles’ ‘Lone Star’*, 27 N.M. L. REV. 223 (1997); *On “Subtle Prejudices,” White Supremacy and Affirmative Action: A Reply to Paul Butler*, 68 U. COLO. L. REV. 891 (1997); *Academic Mestizaje: Re/Producing Clinical Teaching and Re/Framing Wills as Latina Praxis*, 2 HARV. LATINO L. REV. 349 (1997); *Border Crossings in an Age of Border Patrols: Cruzando Fronteras Metaforicas*, 26 N.M. L. REV. 1 (1996); *Voices/Voces in the Borderlands: A Colloquy on Re/Constructing Identities in Re/Constructed Legal Spaces*, 6 COLUM. J. GENDER & L. 387 (1996) (co-authored with Melissa Harrison); *Máscaras, Trenzas, y Greñas: Un/Masking the Self While Un/Braiding Latina Stories with Legal Discourse*, 17 HARV. WOMEN’S L.J. 185 (1994) and 15 CHICANA/O-LATINA/O L. REV. 1 (1994); *Law and Language(s): Image, Integration, and Innovation*, 7 LA RAZA L.J. 1 (1994).



“autographical moments,” she proceeds to “braid together fragments of [Professor Culp’s and Professor Harris’] stories.” She recounts how these stories are an enduring testament to “LatCrit-inflected antisubordination theory and practice.” She then introduces the concept of “fractal fragments”—mathematical structures or objects that exhibit similarities across different scales of focus. So when we write personal stories “we instantiate the concept of fractality. The stories function as shorthand for the many details across many units.” She finds fractal fragments “a particularly effective technique for communicating multilayered information, such as the lived experience of subordinated people...The context and subtext of our individual stories, our fractal fragments...link to other stories.” [6] She proceeds to offer a thoughtful and moving call to arms to the LatCrit community to walk along the path brought into relief by critical pioneers like Professors Culp and Harris.

Professor Jose Gabilondo takes up the question of transgender equality and proposes that one’s understanding about one’s gender be treated the same as religious faith because both beliefs about faith and about one’s gender are subjective, constitutive of the person, and subject to no test of truth, coherence, or consistency. He traces how the word gender came to supplant the word sex when what is meant is one’s somatic state and the conflation of gender, sex, and sexual orientation. The result, he argues, is confusing verbal ambiguity with existential freedom and the position that self-declaration alone determines one’s gender, regardless of corroborating somatic indicators of sex. He is concerned that this ambiguity leads to positing sexual orientation as fluid, even compulsory fluidity. He believes that the case for transgender equality would be strengthened by limiting gender to mean only one’s self-awareness and self-interpretation of one’s sexed characteristics. He proposes a truce in the cultural and policy battles around rights of the transgender along constitutional guidelines of exercise of religion—the state should protect free exercise of gender while avoiding endorsing any particular idea about what gender is or how it arises. He then

lays out how this approach would apply to two areas of current conflict—whether to compel the use of unsexed pronouns and access to public bathrooms. He acknowledges that at this point his proposal lacks backing of political or a recognized Constitutional right to exercise of gender. However, he is confident that incremental steps in the direction he proposes are viable. Finally, he invites more thoughtful and systematic discussion of issues that attend the question of transgender equality. While Prof. Gabilondo's article strictly would not be counted as story-telling, it is unmistakably inflected by his personal struggles of growing up as a gay teenager. Indeed, he expressly refers of these struggles as the backdrop to his residing the unstable category “man,” and his embrace for “the new space for gender.”

The article by Professor Daniel G. Solorzano, Professor Lindsay Perez Huber, and Ms. Layla Huber-Verjan breaks new ground in legal scholarship by the very fact it is authored by three individuals whose intersecting lives span three generations. Indeed, this gives their interwoven personal stories an added punch. While they place themselves within the CRT tradition of “counterstorytelling,” they expressly distinguish their story from the canonical counter-stories of CRT with composite characters engaged in a storyline. They narrate how exposure to Critical Race Theory placed the question of microaggression on their agenda of inquiry. Their direct engagements with education policy, litigation, and pedagogy related to racism and personal interactions signaled the urgency to assemble effective responses to racial microaggressions. The fruit of these labors is the concept and practice of microaffirmations—subtle verbal and non-verbal strategies that people of color consciously engage with other people of color that affirm each other's value, integrity, and shared humanity.

The counter-story of Professors Brenda Williams, Edwin Lindo, and Marck-Tizoc Gonzalez, one that may prove to be a landmark in outsider jurisprudence, makes the mutually constitutive assemblage of the personal and the political palpable. The article builds around a first-hand account of

putting one's life on the line in pursuit of justice. The narrative reports and build on Prof. Lindo's hunger strike to protest extrajudicial killings of five persons of color by the police in San Francisco. Here justice emerges located beyond the zone of the law in a field of contestation and struggle. Reaching as far back as the fifth century and as far away as India and Ireland, the article reports the use of hunger strikes as a time-honored weapon of the weak. Resistance and struggle emerge as practices of self-sacrifice. The article deftly braids personal with the political and theory with praxis.

### VIII. CONCLUSION

LatCrit assigns us the task of deploying critique as a strategic practice. Note that "strategy suits a situation; a strategy is not a theory."<sup>205</sup> And theory itself "is exactly like a box of tools... by means of which...to move 'obstacles' or 'blockages' and to lever open discursive space for political/intellectual work."<sup>206</sup> LatCrit aims to align with the subordinated, identifying them as our community. Community "is not historical as if it were a permanently changing subject within...a permanently flowing time...But history is community, that is, the happening of a certain space of time-as a certain spacing of time, which is the spacing of a 'we.'"<sup>207</sup> We must take seriously Nancy's challenge, namely that "history—if we can remove this word from its metaphysical, and therefore historical, determination—does not belong primarily to time, nor to succession, nor to causality, but to community, or being-in-common."<sup>208</sup> We must refuse to live a life of "living without an alternative," mindful that a "world without

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<sup>205</sup> Gayatri Chakravorty Spivak, *In a Word: Interview*, 1 DIFFERENCES 124, 127 (1989).

<sup>206</sup> DAVID SCOTT, REFASHIONING FUTURES: CRITICISM AFTER POSTCOLONIALITY 96 (1999) (quoting Gilles Deleuze).

<sup>207</sup> Jean-Luc Nancy, *Finite History*, in THE STATES OF "THEORY": HISTORY, ART, AND CRITICAL DISCOURSE 161–62 (David Carroll ed., 1990).

<sup>208</sup> *Id.* at 149.

alternatives needs selfcriticism as a condition of survival and decency.”<sup>209</sup> We should bear in mind that far from being a rigid, all-encompassing, and unchallenged structure, “[a] lived hegemony is always a process...continually to be renewed, recreated, defended, and modified.”<sup>210</sup> There are always non-hegemonic or counter-hegemonic values at work to resist, restrict, and qualify the operations of the hegemonic order. If we accept that no hegemony can be so penetrative and pervasive as to eliminate all grounds for contestation or resistance, this leaves us with the question of how we are to identify and configure such grounds. One tool available to critical theory is counter-stories to construct subjectivity through negation and the related conceptualization of experience. The project involves an effort to recover the experiences, the distinctive collective traditions, identities, and active historical practices of subaltern groups in a wide variety of settings—conditions and practices that have been silenced and erased by hegemonic historiography. The nation-state is never quite able to eliminate alternative constructions of belonging and identity. These alternative constructions must be marshaled to fashion a counter-narrative to allocate subjecthood and marginalization differentially. Counter-stories are, and will remain, a most valuable tool in this struggle.

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<sup>209</sup> Zygmunt Bauman, *Living Without an Alternative*, 62 POL. Q. 35, 35–44 (1991).

<sup>210</sup> RAYMOND WILLIAMS, *MARXISM & LITERATURE* 112 (1977).