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Afterword - *Habeas Data*: Comparative Constitutional Interventions from Latin America Against Neoliberal States of Insecurity and Surveillance

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AFTERWORD

HABEAS DATA: COMPARATIVE CONSTITUTIONAL INTERVENTIONS FROM LATIN AMERICA AGAINST NEOLIBERAL STATES OF INSECURITY AND SURVEILLANCE

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[S]hall the recent history of the [Global] South become the imminent fate of the [Global] North? –The Critical Global Classroom (2004)[1]

INTRODUCTION

Habeas data is an extraordinary constitutional writ, unknown to many in the United States but featured in numerous late twentieth century Latin American constitutions.[2] Conceptualized, designed, ratified, and implemented by diverse peoples of different nation-states who shared the common fate of having survived decades of torture, terror, and other repressive practices under military *juntas* and other fascist regimes,[3] the writ of *habeas data* responded distinctively to these recent histories by providing individuals with fundamental rights to access personal information collected by

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1. LATCRIT, INC. & THE UNIV. OF BALT. SCH. OF LAW, THE CRITICAL GLOBAL CLASSROOM (2004), *available at* http://biblioteca.uprrp.edu/latcritcd/studentprograms/cgc/cgc2004/cgc_poster_2004.pdf.

2. *E.g.*, CONSTITUIÇÃO FEDERAL [C.F.] [Constitution] art. 5 (1988) (Braz.). *See also* Art. 43, CONSTITUCIÓN NACIONAL [Const. Nac.] (1994) (Arg.); CONSTITUCIÓN POLÍTICA DEL ESTADO [Constitution] art. 130, 131 (2009) (Bol.); CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 15 (1991) (Colom.); CONSTITUCIÓN DE LA REPÚBLICA DOMINICANA DEL 26 DE ENERO DE 2010 [Constitution] art. 70 (Dom. Rep.); CONSTITUCIÓN DE LA REPUBLICA DEL ECUADOR 2008 [Constitution] art. 92 (Ecuador); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA [Constitution] art. 30, 31 (1985) (Guat.); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE PARAGUAY [Constitution] art. 135 (1992) (Para); CONSTITUCIÓN POLÍTICA DEL PERÚ DE 1993 [Constitution] art. 2(5), 200(3) (Peru); CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA [Constitution] art. 28 (1999) (Venez.). *See generally* ÁNGEL R. OQUENDO, LATIN AMERICAN LAW 350, 386–415, 1077–97 (2d ed. 2011).

3. *See, e.g.*, NAOMI KLEIN, THE SHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM 72–143 (2007); PETER KORNBLUH, THE PINOCHET FILE: A DECLASSIFIED DOSSIER ON ATROCITY AND ACCOUNTABILITY *passim* (2d ed. 2013). *See generally* JUAN GONZALEZ, HARVEST OF EMPIRE: A HISTORY OF LATINOS IN AMERICA (rev. ed. 2011). For my use of the term "fascist regimes," see Rachel Anderson, Marc-Tizoc González & Stephen Lee, *Toward a New Student Insurgency: A Critical Epistolary*, 94 CALIF. L. REV. 1879, 1941–46 ("Democracy and Fascism (Marc-Tizoc's Third Letter)").

the state (and sometimes by private agencies of a public nature) and to challenge and correct such data, requiring the state to safeguard the privacy and accuracy of people's personal data.[4]

By such means, among others (e.g., truth and reconciliation processes and other extraordinary constitutional writs like *amparo* and similar writs of protection),[5] diverse Latin American peoples sought to recover their societies from those, often military officers and members of the traditional landed elite, who had disappeared, killed, tortured, and terrorized their citizenry with impunity in the final decades of the twentieth century.[6] Simultaneously, these third generation human rights were designed to safeguard the precious new democracies so that the terror of the dictatorships would never more recur.[7]

Why does it feel critical to remember these histories and to understand the constitutional remedies developed by those who reconstructed democracies in the aftermath of these regimes? Recent revelations about the technology, scale, and coordination of contemporary corporate and state surveillance throughout and beyond the United States have opened new opportunities to contextualize historically and to chart spatially our neoliberal states of insecurity and surveillance.[8]

While distinctive, the rights protected by *habeas data* are not unique to Latin America. Indeed, many countries and international unions, such as Germany, the United States, and the European Union, have developed a complex array of legal protections for data.[9] Nevertheless, the terrible

4. *See* ALEXANDRA RENGEL, PRIVACY IN THE 21ST CENTURY 150–51, 158–60 (2013); OQUENDO, *supra* note 2, at 386–415. *See also* Manuel Martinez-Herrera, *From Habeas Data Action to Omnibus Data Protection: The Latin American Privacy (R)Evolution*, WHITE & CASE (Sept. 2011), http://www.whitecase.com/articles-09302011/#.VM-wiUJN1FI; *Data Protection: Relation between Privacy Protection, Data Protection and Habeas Data*, DEP'T OF INT'L LAW ORG. OF AMER. STATES, http://www.oas.org/dil/data_protection_privacy_habeas_data.htm (last visited Feb. 22, 2015).

5. *See* KLEIN, *supra* note 3, at 112–13, 131–33 (discussing the truth and reconciliation reports issued by Argentina, Brazil, and Chile). *See generally* OQUENDO, *supra* note 2, at 277–386 (overviewing and discussing the writ of *amparo* and related writs of protection).

6. *Accord* KLEIN, *supra* note 3, at 80–143 (discussing Argentina, Brazil, Chile, and Uruguay); KORNBLUH, *supra* note 3, at *passim* (discussing Chile under Pinochet).

7. *Accord* KLEIN, *supra* note 3, at 112–13, 131–33 (discussing truth and reconciliation reports regarding Argentina, Brazil, and Chile).

8. *See, e.g.*, RICHARD A. CLARKE ET AL., THE NSA REPORT: LIBERTY AND SECURITY IN A CHANGING WORLD (Princeton Univ. Press 2014); GLENN GREENWALD, NO PLACE TO HIDE: EDWARD SNOWDEN, THE NSA, AND THE U.S. SURVEILLANCE STATE 90–169 (2014) (synthesizing the Pulitzer Prize winning reportage conducted by himself, Laura Poitras, and others in 2013–14 on the array of NSA surveillance programs and practices revealed by the classified documents leaked by Edward Snowden, who accessed them while working for the NSA consulting firm, Booz Allen Hamilton, as an infrastructure analyst).

9. *See* RENGEL, *supra* note 4, at 145–64 (discussing *inter alia* the International Covenant on Civil and Political Rights art. 17, Dec. 19, 1966, 999 U.N.T.S. 171; Human Rights Comm., General

twentieth century histories of Latin America constitute compelling socio-legal reasons for evolving the venerable writ of *habeas corpus* into the information-focused right of *habeas data* and for embedding *habeas data* into a foundational source of national law like the United States Constitution. Without *habeas data* rights being recognized as fundamental by the highest court of a jurisdiction, people may well lack effective means to learn what information their governments have collected about them.[10] Moreover, failing to constitutionalize rights like the writ of *habeas data* may contribute to "a dialogic default—a failure to contest economic [and other forms of] injustice within constitutional and political discourse."[11]

In this Afterword, I offer a critical intervention into the existing discourse of Anglophone legal scholars regarding bulk metadata collection and related programs.[12] While I claim neither expertise in national security law, nor in Internet privacy law, my conversations regarding *habeas data* with legal scholars based in the United States over the past decade have impressed on me that many scholars may be completely ignorant of this critical evolution in constitutional protections.[13] In light of the recent re-

Comment 16 on its 23rd Sess., U.N. Doc. HRI/GEN/1/Rev.1 (1994); Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data 95/46/EC, 1995 O.J. (L 281); Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector 2002/58/EC, 2002 O.J. (L 201)).

10. *See, e.g.*, Margaret B. Kwoka, *The Freedom of Information Act Trial*, 61 AM. U. L. REV. 217 (2011) (discussing how U.S. federal courts' disposition of FOIA claims at summary judgment have almost completely eliminated FOIA trials, and arguing that FOIA trials could increase pro-transparency outcomes).

11. Julie A. Nice, *No Scrutiny Whatsoever: Deconstitutionalization of Poverty Law, Dual Rules of Law & Dialogic Default*, 35 FORDHAM URB. L.J. 629, 633 (2008) (citation omitted). *See also id.* at 657–59 (discussing the dialogic theory of constitutional law).

12. *See, e.g.*, FRANK PASQUALE, THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION (2015); Elizabeth Atkins, *Spying on Americans: At What Point Does the NSA's Collection and Searching of Metadata Violate the Fourth Amendment?*, 10 WASH. J. L. TECH. & ARTS 51 (2014); Yochai Benkler, *A Public Accountability Defense for National Security Leakers and Whistleblowers*, 8 HARV. L. & POL'Y REV. 281 (2014); Liane Colonna, *PRISM and the European Union's Data Protection Directive*, 30 J. INFO. TECH. & PRIVACY L. 222 (2013); Laura K. Donohue, *Bulk Metadata Collection: Statutory and Constitutional Considerations*, 37 HARV. J.L. & PUB. POL'Y 757 (2014); John Yoo, *The Legality of the National Security Agency's Bulk Data Surveillance Programs*, 37 HARV. J.L. & PUB. POL'Y 901 (2014).

13. Indeed, the only scholars who were already familiar with *habeas data* were experts in comparative constitutionalism, Latin American law, or intercultural human rights. I first learned about the doctrine of *habeas data* when I participated in the Summer 2004 Critical Global Classroom (CGC), an American Bar Association accredited summer study-abroad program, organized by Latina and Latino Critical Legal Theory, Inc. in collaboration with the University of Baltimore School of Law, and subsequently while enrolled in a Berkeley Law Spring 2005 course on Latin American Law taught by Visiting Professor of Law, Ángel R. Oquendo. *Cf.* OQUENDO, *supra* note 2 (the casebook that Óquendo published shortly after teaching the course in which I studied *habeas data*, related constitutional writs of protection, and other third generation cultural and economic rights); Anderson, Gonzalez & Lee,

portage of massive surveillance made possible by national security leakers[14] and whistleblowers like *inter alia* Chelsea Manning and Edward Snowden, Part II surveys several constitutional provisions for *habeas data* and discusses several of the leading cases that have developed the doctrine (primarily but not exclusively from Latin American countries).

However, I also mean for this Afterword to call upon activists, attorneys, scholars, and others who affiliate with Latina and Latino Critical Legal (LatCrit) theory, praxis, and community (and related schools of critical outsider jurisprudence),[15] to launch a collective interrogation of the entire panoply of new properties[16] (e.g., business records) and related incidents of our neoliberal states of insecurity and surveillance. Part I explains my conceptualization of "neoliberal states of insecurity and surveillance" and issues the call for collaboration to understand this aspect of the present situation and to reform the laws that legitimatize it. Finally, the Conclusion synthesizes my arguments and explains how they might advance LatCrit theory, praxis, and community in the course of the next twenty years.

I. NEOLIBERAL STATES OF INSECURITY AND SURVEILLANCE

By the phrase "neoliberal states of insecurity and surveillance," I mean to critique the political economies that demand, supply, and profit from the programs and practices that mainstream discourse typically terms "national security" and "state surveillance." Over the past decade, critical theorists, including legal scholars affiliated with various schools of critical outsider jurisprudence, have produced a sustained critique of neoliberalism.

supra note 3, at 1894 n.66, 1903 n.89 (mentioning my Summer 2004 enrollment in the CGC); Tayyab Mahmud & Francisco Valdes, *LatCrit Praxis @ XX: Law, Education, and Society*, 90 CHI.-KENT L. REV. 361, 385, 388 (2015) (discussing the CGC).

14. Benkler explains, "I purposefully avoid the term 'whistleblowing,' although 'accountability leaks' aim at that kind of leak, because the regulatory processes for internal whistleblowing threaten to cabin the debate to what would be legal under the existing whistleblower protection regime." Benkler, *supra* note 12, at 285 n.24.

15. *See* Mahmud & Valdes, *supra* note 13, at *passim* (discussing critical outsider jurisprudence). *See also* Marc-Tizoc González, *Critical Ethnic Legal Histories: Unearthing the Interracial Justice of Filipino American Agricultural Labor Organizing*, 4 U.C. IRVINE L. REV. 991, 1006–07 nn.35–39 (2013) (citing to numerous exemplars of Asian American Legal Scholarship, Critical Race Feminism, Critical Race Theory, and Latina & Latino Critical Legal (LatCrit) Theory). *See generally* Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. U. L. REV. 329 (2006); LATCRIT, http://www.latcrit.org (last visited Feb. 22, 2015).

16. For the foundational articulation of the theory of "the new property," see Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 734–37 (1964) (theorizing property interests from what Reich called the imperial distribution of government largesse, such as government income and benefits, government jobs, occupational licenses, government-mediated franchises ranging from taxi medallions to television channels, government contracts and subsidies, use of public resources, government services, etc.).

For example, David Harvey defines neoliberalism as "a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade."[17] Similarly, Martha McCluskey characterizes neoliberalism as "the core of law-and-economics theory, [which] establishes economic efficiency—represented by the 'free market'—as the primary route to public well-being."[18] Tayyab Mahmud adds:

> Neoliberalism makes increasing recourse to the law to displace Keynesian welfare states through liberalization, deregulation, and privatization, and uses the discipline of expanded markets to remove barriers to accumulation that earlier democratic gains had achieved. To secure unfettered rights to private property and profits, it expands and deepens the logic of the market, undermines state sovereignty and national autonomy, and links local and global political economies to facilitate transnational accumulation of capital.[19]

Despite the consensus of these scholars, however, journalist Naomi Klein makes the important observation that:

> the ideology is a shape-shifter, forever changing its name and switching identities. [Milton] Friedman called himself a "liberal," but his U.S. followers, who associated liberals with high taxes and hippies, tended to identify as "conservatives," "classical economists," "free-marketers," and, later as believers in "Reaganomics" or "laissez-faire." In most of the world, their orthodoxy is known as "neoliberalism," but it is often called "free trade" or simply "globalization."[20]

Klein continues:

> Only since the mid-nineties has the intellectual movement, led by the right-wing think tanks with which Friedman had long associations—Heritage Foundation, Cato Institute and the American Enterprise Institute—called itself 'neo-conservative,' a world view that has harnessed the full force of the U.S. military machine in the service of a corporate agenda.[21]

Thus, by "neoliberal," I include the theories, individuals, and institutions that promulgate self-justificatory views of putatively "free markets" in order to reshape societies by profiting "efficiently" from the new markets that they create in part through sustained political projects to dismantle twentieth century social welfare states in the United States and abroad.

17. DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 2 (2005).

18. Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 IND. L.J. 783, 784–85 (2003) (citation omitted).

19. Tayyab Mahmud, *Is It Greek or* Déjà Vu *All Over Again?: Neoliberalism and Winners and Losers of International Debt Crises*, 42 LOY. U. CHI. L.J. 629, 661 (2011) (citations omitted).

20. KLEIN, *supra* note 3, at 17.

21. *Id.* at 18.

According to Klein, Brazil in 1964, Indonesia in 1965, and Chile in 1973, were some of the first laboratories for neoliberalism, and in each case, the imposition of neoliberal policies involved military force, namely, *coup d'état*, with covert United States support.[22] Moreover, as Klein extensively documents in case studies ranging from Brazil in the 1960s to Iraq in the 2000s, the effect of imposing neoliberal policies under military force has consistently produced remarkable profits for certain members of the power elite,[23] while impoverishing and immiserating substantial segments of their societies.

Focusing on Latin America, consider for example that after the successful September 11, 1973, coup against Chilean President Salvador Allende, the imposition of neoliberalism immediately brought huge profits to "foreign companies and a small clique of financiers known as the 'piranhas,' who were making a killing on speculation" while doubling Chilean inflation and devastating its manufacturing industries.[24] Also, after the 1976 coup against Argentinean President Isabel Perón, the *junta*'s first minister of the economy dismantled workers' rights, lifted price controls, authorized foreign ownership of property, and liquidated hundreds of state companies.[25] Consequently, "within a year, wages lost 40 percent of their value, factories closed, [and] poverty spiraled."[26] Similarly, in 1985 in Bolivia, in an important evolution of what Klein calls "the shock doctrine," the newly elected president appointed "a top-secret emergency economic team charged with radically restructuring the economy."[27] Developing the plan covertly (e.g., informing only two members of the cabinet), the new Bolivian government quickly moved to radically overhaul the national

22. *Id.* at 80–87 (discussing the United States support for the coups in Brazil, Indonesia, and Chile). *Accord* JOHN DINGES, THE CONDOR YEARS: HOW PINOCHET AND HIS ALLIES BROUGHT TERRORISM TO THREE CONTINENTS 3–5 (2004) (discussing declassified government documents showing that the United States Central Intelligence Agency organized an attempted military coup against Chilean president Salvador Allende in 1970, which failed, and that within months of its creation the CIA knew of the creation of "Operation Condor," a secret international alliance between Argentina, Bolivia, Brazil, Chile, Paraguay, and Uruguay to track down alleged terrorists and subversives across borders to return them to their countries of origin and/or to assassinate them); KORNBLUH, *supra* note 3, at *passim*.

23. *Compare* C. WRIGHT MILLS, THE POWER ELITE 3–4 (Oxford Univ. Press 2000) ("The power elite is composed of men [sic] whose positions enable them to transcend the ordinary environments of ordinary men and women; they are in positions to make decisions having major consequences. . . . For they are in command of the major hierarchies and organizations of modern society."), *with* Kerry A. Dolan & Luisa Kroll, *Inside the 2014 Forbes 400: Facts and Figures about America's Wealthiest*, FORBES (Sept. 29, 2014), http://www.forbes.com/forbes-400/.

24. KLEIN, *supra* note 3, at 97–98.

25. *Id.* at 108.

26. *Id.* at 109.

27. *Id.* at 182.

economy, cancelling price controls, cutting deeply into government spending, downsizing state companies, eliminating food subsidies, tripling the price of oil, freezing government wages, and opening the borders to unrestricted imports.[28] Consequently, unemployment increased significantly, real wages dropped dramatically, and "a small elite grew far wealthier while large portions of what had been the working class were discarded from the economy altogether and turned into surplus people."[29]

Returning to the larger point of explaining the phrase, "neoliberal states of insecurity and surveillance," it seems critical to question the putative nation-state in the twenty-first century and to highlight the troubling emergence of a globalizing "market-state."[30] As Francisco Valdes and Sumi Cho explain the concept:

> We use the term here to refer to the rise of global neoliberalism and market imperatives, and the decline of the traditional nation-state and liberal Keynesian policies with accompanying social safety nets, but view these shifting ascendancies as tied to a larger world economic system.[31]

Thus, instead of the conventional terms, "national security" and "state surveillance," I suggest using the phrase "neoliberal states of insecurity and surveillance" to highlight the complicity between people in nominally public and private spheres, who might never act in perfect congruence but nevertheless together serve the interests of the power elite.[32] In particular, I mean for the phrase to inflect critiques of putatively state surveillance with

28. *Id.* at 183.

29. *Id.* at 186–87.

30. *See* Francisco Valdes & Sumi Cho, *Critical Race Materialism: Theorizing Justice in the Wake of Global Neoliberalism*, 43 CONN. L. REV. 1513, 1519 n.6 (2011) (discussing the intellectual history of the market-state concept). *Accord* PASQUALE, *supra* note 12, at 10 ("We are increasingly ruled by . . . 'The Blob,' a shadowy network of actors who mobilize money and media for private gain, whether acting officially on behalf of business or of government. . . . But a market-state increasingly dedicated to the advantages of speed and stealth crowds out even the most basic efforts to make these choices fairer."); Mahmud, *supra* note 19, at 663 ("The neoliberal project is to turn the 'nation-state' into a 'market-state . . . .") (citation omitted).

31. Valdes & Cho, *supra* note 30, at 1519 n.6 (citations omitted).

32. *See* MILLS, *supra* note 23, at 4 ("The power elite are not solitary rulers. Advisers and consultants, spokesmen and opinion-makers are often the captains of their higher thought and decision. Immediately below the elite are the professional politicians of the middle levels of power, in the Congress, and in the pressure groups, as well as among the new and old upper classes of town and city and region."). *See also* PASQUALE, *supra* note 12, at 154–55 ("Private data brokers gladly serve as 'big brother's little helpers.' . . . [T]he NSA is only one part of the larger story of intelligence gathering in the United States, which involves over 1,000 agencies and nearly 2,000 private companies."); JEAN STEFANCIC & RICHARD DELGADO, NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S FUTURE *passim* (1996).

the effects of neoliberalism on the supermajority of people living within and outside of the United States, namely, social insecurity.[33]

As Löic Wacquant explains it, the end of the twentieth century heralded a "*new government of social insecurity*" in the United States, as workers were "caught up in the turbulence of economic deregulation and the conversion of welfare into a springboard toward precarious employment . . . during the period from 1973 to 1996, in the wake of the social, radical, and antistatist reaction to the progressive movements of the preceding decade . . . ."[34] Under Wacquant's analysis, the United States expanded and innovated the criminalization of poverty while "anchor[ing] precarious wage work as a new norm of citizenship at the bottom of the class structure . . . ."[35] Wacquant terms the resulting social structure, "a *carceral-assistential net* that aims either to render [marginal populations] 'useful' by steering them onto the track of deskilled employment . . . or to warehouse them out of reach in the devastated core of the urban 'Black Belt' or in the penitentiaries . . . ."[36] In his view, social policy and penal policy "already function in tandem at the bottom of the structure of classes and places."[37] For example, "*the fight against street delinquency now serves as a screen and counterpart to the new social question*, namely the generalization of insecure wage work . . . ."[38] While this Afterword cannot develop Wacquant's theorization fully, it should suffice to conclude this discussion by noting his use of Pierre Bourdieu's notion of "the 'Left hand' and the 'Right hand' of the state."[39] As Wacquant explains:

> The Left hand, the feminine side of Leviathan, is materialized by the "spendthrift" ministries in charge of "social functions"—public education, health, housing, welfare, and labor law—which offer protection and succor to the social categories shorn of economic and cultural capital. The Right hand, the masculine side, is charged with enforcing the new economic discipline via budget cuts, fiscal incentives, and economic deregulation.[40]

To his list of "the police, the courts, and *the prison as core constituents of the 'Right hand'* of the state, alongside the ministries of the economy and

33. *Accord* Mahmud & Valdes, *supra* note 13, at 377–80 (discussing the distribution of the gains and costs of neoliberalism as a successful strategy of the wealth-owning classes). *See generally* LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY (2009).

34. WACQUANT, *supra* note 33, at 11 (citations omitted) (emphasis in original).

35. *Id.*

36. *Id.* at 12 (emphasis in original).

37. *Id.* at 13.

38. *Id.* (emphasis in original).

39. *Id.* at 289.

40. *Id.*

the budget,"[41] I would add the various governmental intelligence agencies that rely in part on private corporations in order to effect electronic surveillance on a truly massive and unprecedented scale in and beyond the United States (i.e., within our neoliberal states of insecurity and surveillance).

II. THE EXTRAORDINARY WRIT OF *HABEAS DATA*

In his casebook, *Latin American Law*, Ángel R. Oquendo introduces the subject of "third generation rights" by focusing on "the informational right of *habeas data*."[42] He begins by excerpting relevant articles or provisions of the constitutions of Argentina, Brazil, and Venezuela, interleaving them with excerpts of relevant implementing statutes and judicial opinions from those countries as well as from Colombia, Costa Rica, Panama, and Peru.[43] Importantly, Oquendo's casebook translates excerpts from those constitutions, laws, and judicial opinions into English, and its appendix includes copies of them in their original languages (Portuguese and Spanish).[44]

In this Part, I discuss the writ of *habeas data*, drawing upon Oquendo's treatment of the subject and emplotting the relevant constitutional articles and provisions chronologically in order to sketch how various peoples of Latin American promulgated the writ of *habeas data* in Brazil (1988), Colombia (1991), Peru (1993), Argentina (1994), and Venezuela (1999). I then discuss several implementing statutes and judicial opinions interpreting some of the major contours of *habeas data* (e.g., whether its reach is limited to databases maintained by the government or instead may reach putatively private databases, if they are found to be of a public nature;[45] whether the writ may enable access to information that the government asserts should be restricted for reasons of security, national defense, foreign relations, or criminal investigation;[46] and whether *habeas data* should be interpreted narrowly as an individual right to obtain information about themselves only, or broadly to enable anyone to access information without having to prove a direct relationship to the data).[47] I conclude the Part by discussing two important Puerto Rican judicial opinions, from 1988

41. *Id.* (emphasis in original).
42. OQUENDO, *supra* note 2, at 350.
43. *Id.* at 386–415.
44. *Id.* at 387–415, 1077–97.
45. *See infra* notes 51–59 and accompanying text.
46. *See infra* notes 58–59, 83–87 and accompanying text.
47. *See infra* notes 74–78 and accompanying text.

and 1992 regarding *Las Carpetas*, the dossiers kept by the Puerto Rican Police Intelligence Division on alleged subversives.[48]

My overall intent is to sketch the contours of *habeas data* sufficiently to demonstrate how it might be useful for conceptualizing a fundamental reform of the United States law and policy that has enabled massive electronic surveillance of the sort reported by journalists like Glenn Greenwald, Laura Poitras, and others, discussed in *The NSA Report: Liberty and Security in a Changing World* (*NSA Report*), and addressed by a growing number of legal scholars based in the United States.[49] By itself *habeas data* cannot end massive electronic surveillance, but grounding an expansive version of the writ within the United States Constitution *would* provide a critical check on such policies and practices. Armed with *habeas data*, individuals would be better able to learn about the information being collected and kept on them under the color of law, to access such information, and to demand its correction or deletion when its retention by the government is not justified. Further, as I explain below, *habeas data* rights need not stop with databases kept by government agencies but can include databases found to be of a public nature. Thus, one version of my proposal to amend the United States Constitution to include rights of *habeas data* would express the individual's power to transcend the state action doctrine. Under this version, the writ would enable individuals to learn about, access, and demand the correction or deletion of data collected and retained by putatively private entities, upon an adequate showing that the databases are of a public nature and hence within the purview of the informational rights protected under *habeas data*. Also, while some people might find the notion of amending the United States Constitution to express new rights to *habeas data* improbable or even impossible to accomplish, the Puerto Rican case of *Las Carpetas* shows one way that United States' courts might vindicate similar rights through creative and ethical application of their common law powers of equity.[50]

48. Noriega Rodríguez v. Hernández Colón, 130 P.R. Dec. 919 (P.R. 1992); Noriega v. Governador, 22 P.R. Offic. Trans. 613 (P.R. 1988). *See also* RAMON BOSQUE-PEREZ & JOSE JAVIER COLON MORERA, LAS CARPETAS: PERSECUCIÓN POLÍTICA Y DERECHOS CIVILES EN PUERTO RICO *passim* (1997) (discussing and presenting documents relating to *Las Carpetas* (the dossiers) kept by the Police Intelligence Division of the Commonwealth of Puerto Rico on alleged subversives); Pedro A. Malavet, *Reparations Theory and Postcolonial Puerto Rico: Some Preliminary Thoughts*, 13 BERKELEY LA RAZA L. J. 387, 419–421 (2002) (discussing legal challenges to political surveillance of alleged subversives). I thank Professor Sheila I. Velez Martínez, University of Pittsburg School of Law for informing me about *Las Carpetas* and encouraging my research into them.

49. *See* sources cited *supra* notes 8 & 12.

50. While a comprehensive discussion of how United States courts could derive *habeas data* rights from existing case law is beyond the scope of this Afterword, I plant the seeds of such work now with hopes of cultivating them in a future book project that will also discuss comprehensively the

A. Latin American Constitutional Rights to Habeas Data

1. The Brazilian Constitution of 1988

Oquendo introduces the writ of *habeas data* with Article 5(LXXII) of the 1988 Brazilian Constitution, which provides:

> The writ of habeas data shall be granted (a) to guarantee access to information concerning the claimant stored in the records of databases of entities of the government or of a public nature and (b) to rectify the data, unless the claimant prefers a nonpublic proceeding, whether judicial or administrative.[51]

As Oquendo explains its origins, the 1988 Brazilian Constitution reacted "against the secrecy and arbitrariness with which the dictatorship secured, kept, and utilized personal data . . . [and took] a clear position in favor of transparency and accuracy."[52] To formulate the writ, Brazil drew upon similar rights established by Article 35 of the 1976 Portuguese Constitution, Article 105(b) of the 1978 Spanish Constitution, the United States Freedom of Information Act of 1974 and Freedom of Information Reform Act of 1976, and the French Law on Information Technology and Freedom of 1/6/1978, as well as precedents from the German Constitutional Court.[53] In *Privacy in the 21st Century*, Alexandra Rengel adds, "The writ of habeas data is based on the 108th Convention on Data Protection of 1981 of the Council of Europe."[54] While the 1981 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data did not mention *habeas data* expressly, it nevertheless constituted an influential early international legal structure to protect personal data.[55]

Because a comprehensive articulation of the socio-legal origins of *habeas data* is beyond the scope of this Afterword, I accept the premise that Article 5(LXXII) of the 1988 Brazilian Constitution marks the beginning of *habeas data* in the Global South. It is important, however, to underscore that Brazil's constitutional innovation relied upon critical histories, perhaps forgotten by many (and buried by others), regarding various peoples' struggles against repressive state surveillance and/or terror, including peo-

origins and evolution of *habeas data* and related Latin American constitutional writs of protection. Marc-Tizoc González, *América Posfascista* (Postfascist America): Against Neoliberal States of Insecurity and Surveillance (working title).

51. OQUENDO, *supra* note 2, at 387 (translating CONSTITUIÇÃO FEDERAL [C.F.] [Constitution] art. 5 (1988) (Braz.)). *See also* OQUENDO, *supra* note 2, at 1077 (excerpting the original Portuguese article).

52. *Id.* at 387.

53. *Id.*

54. RENGEL, *supra* note 4, at 159 n.795.

55. *Id.*

ples of various European nations and the United States.[56] In its original Brazilian form, however, *habeas data* included two rights: first, a guarantee to access information about a claimant that is stored "in the records or databases of entities of the government *or of a public nature*" and second, "to rectify the data, unless the claimant prefers a nonpublic proceeding, whether judicial or administrative."[57] As suggested by my italicized emphasis, the reach of Brazilian *habeas data* may extend beyond records or databases owned or operated by the government to records or databases that are privately held but which are of a sufficiently "public nature" to render them subject to the writ. However, a related provision, Article 5(XXXIII), limits a person's right to access governmental records, "when the society's and the state's security requires secrecy."[58] Determining what databases are adequately of a public nature, and when the state's security requires secrecy, of course would be contested, with subsequent laws and judicial opinions refining their meaning in Brazil.[59]

2. The Colombian Constitution of 1991

In relevant part, Article 15 of the Colombian Constitution of 1991 provides that:

> All individuals have the right to personal and family privacy and to their good reputation, and the State has to respect them and to make others respect them. Similarly, individuals have the right to know, update, and rectify information gathered about them in data banks and in the records of public and private entities.
>
> Freedom and the other guarantees approved in the Constitution will be respected in the gathering, handling, and circulation of data.

56. *Compare* Donohue, *supra* note 12, at 766–83 (discussing the early 1970s exposés and Congressional inquiries into "covert domestic surveillance programs directed at U.S. citizens" like the Federal Bureau of Investigation counterintelligence program "COINTELPRO," multiagency watch list program "Project MINARET," Department of Defense telegraph interception program "Operation SHAMROCK," and CIA "Operation CHAOS," which ultimately led to the passage of the Foreign Intelligence Act of 1978), *with* Larry Rohter, *Exposing the Legacy of Operation Condor*, N.Y. TIMES LENS (Jan. 24, 2014), http://lens.blogs.nytimes.com/2014/01/24/exposing-the-legacy-of-operation-condor/ (discussing Portuguese photographer João de Carvalho Pina's photographic book, *Condor* (2014), and corresponding exhibition, which represents the legacy of Operation Condor in various Latin American countries, and follows from his earlier book *Por Teu Livre Pensamento* (*For Your Free Thought*) (2007), which represented the legacy of mid-twentieth century fascism in Portugal under the regime of António de Iliveira Salazar). *See also* Daniel J. Wakin, *Tracing the Shadows of Operation Condor*, N.Y. TIMES (May 28, 2010), http://lens.blogs.nytimes.com/2010/05/28/showcase-167/ (discussing Pina's photographic book projects).

57. OQUENDO, *supra* note 2, at 387 (emphasis added).

58. *Id.* at 387 n.45 (citing CONSTITUIÇÃO FEDERAL [C.F.] [Constitution] art. 5 (1988) (Braz.)).

59. *See id.* at 388–95 (excerpting a 2000 Brazilian case, *Banco do Brasil v. Botelho*, and discussing it in relation to Brazil's *Habeas Data* Act). *See also* OQUENDO, *supra* note 2, at 1077–83 (excerpting the *Botelho* opinion).

> Correspondence and other forms of private communication are inviolable. They may only be intercepted or recorded pursuant to a court order, following the formalities established by law.[60]

As expressed, individuals' "right to know, update, and rectify information gathered about them in data banks and in the records of public and private entities" is grounded in rights to personal and familial privacy, as well as rights to good reputation.[61] Moreover, the Colombian Constitution integrates *habeas data* rights throughout "the gathering, handling, and circulation of data," and the inviolacy of individuals' "correspondence and other forms of private communication . . . may only be intercepted or recorded pursuant to a court order," following legal formalities.[62]

In a 2002 opinion, the Constitutional Court of Colombia explained how "the writ of *habeas data* evolved into a procedural mechanism to achieve informational self-determination in a broad sense."[63] As the court explained, "the habeas data has turned from a limited guaranty into a right of broad scope."[64] In that case, the Constitutional Court of Colombia articulated a set of ten principles to guide the management of computer databases.[65] For example, under the principle of freedom, personal data should only be recorded and disclosed with the owner's free, prior, and express consent.[66] Thus, the sale or transfer of personal data is prohibited.[67] Under the principle of necessity, personal data registered into a database must be strictly necessary to fulfill the objectives associated with the database.[68] Under principles of truth and integrity, providing false or erroneous information is prohibited, and information must not be partially disclosed.[69] Under the principle of purpose, the collection, processing, and dissemina-

60. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 15 (1991), *available at* https://www.constituteproject.org/constitution/Colombia_2005.pdf.

61. *See id.*

62. *Id.*

63. OQUENDO, *supra* note 2, at 409 (citing Corte Constitucional [C.C.] [Constitutional Court], septiembre 5, 2002, Expediente T-467467, Corte Constitucional, Republica de Colombia (Considerations, § 4(a)) (Colom.), *available at* http://www.corteconstitucional.gov.co/relatoria/2002/t%2D729%2D02.htm). The case name in Spanish is *Acción de tutela instaurada por Carlos Antonio Ruiz Gómez contra el Departamento Administrativo de Catastro (Alcaldía Mayor de Bogotá) y la Superintendencia Nacional de Salud*.

64. Corte Constitucional [C.C.] [Constitutional Court], septiembre 5, 2002, Expediente T-467467, Corte Constitucional, Republica de Colombia (Considerations, § 4(a)) (Colom.), *available at* http://www.corteconstitucional.gov.co/relatoria/2002/t%2D729%2D02.htm. The case name in Spanish is *Acción de tutela instaurada por Carlos Antonio Ruiz Gómez contra el Departamento Administrativo de Catastro (Alcaldía Mayor de Bogotá) y la Superintendencia Nacional de Salud*.

65. *Id.* § II.4(b).

66. *See id.*

67. *See id.*

68. *See id.*

69. *See id.*

tion of personal data should follow a clearly defined and constitutionally legitimate purpose.[70] Thus, personal data must not be collected without a clearly articulated purpose, and personal data should not be used or disclosed for purposes other than those for which they were originally collected.[71] The court also promulgated other rules according to principles of utiliutility, restricted circulation, inclusion, forfeiture, and individuality.[72]

Applying those principles, the court reversed the Labor Chamber of the Superior Court of the Judicial District of Bogotá, which had rejected an individual's challenge to two governmental agencies, the Administrative Department of the Capital District Land Registry and the National Health Oversight Board. The plaintiff alleged that searchable online databases published by these agencies were too easily accessible by common criminals and armed groups outside the law and thus violated his right to privacy, and put his and his family's rights to life, personal integrity, property, and liberty at risk.[73]

3. The Peruvian Constitution of 1993

In relevant part, Article 2(5) of the Peruvian Constitution of 1993 provides that:

> Every person has the right to request information, without cause, and to receive it from any public entity within the statutory period, at its respective cost, except for information affecting personal privacy, expressly protected by law, or on national security grounds.[74]

Article 2(6) provides that:

> Every person has the right to assurance that information services, whether computerized or not, either public or private, will not provide information affecting personal and family privacy.[75]

70. *See id.*

71. *See id.*

72. *See id.*

73. *See id.* §§ I.1, III.

74. CONSTITUCIÓN POLÍTICA DEL PERÚ DE 1993 [Constitution] art. 2(5) (Peru), *available at* https://www.constituteproject.org/constitution/Peru_2009.pdf. *Cf.* Oquendo, *supra* note 2, at 409. *See also* CONSTITUCIÓN POLÍTICA DEL PERÚ DE 1993 [Constitution] art. 200(3) (Peru), *available at* https://www.constituteproject.org/constitution/Peru_2009.pdf ("The writ to *habeas data*, which operates in case of an act or omission by any authority, official, or person, which violates or threatens the rights referred to in Article 2, paragraphs 5, and 6 of this Constitution . . . .").

75. *Id.* at art. 2(6). Also, Article 2(10) provides that:

> Every person has the right . . . to the secrecy and inviolability of private communications and documents.
>
> Communications, telecommunications, or any private correspondence may only be opened, seized, intercepted, or tapped by the authority of a warrant issued by a judge and with all the guarantees provided in the law. Any matter unrelated to the circumstances under examination shall be kept secret.

As Oquendo characterizes it, "In Peru, the writ [of *habeas data*] has fully expanded into a device to protect freedom of information generally."[76] As an example of the full expansion of *habeas data*, Oquendo discusses and excerpts two cases that began with requests for "information on the expenses of former [Peruvian] President Alberto Fujimori and his entourage during the 515 days that Fujimori spent abroad."[77] As the Constitutional Court of Peru explained it:

> The right to informational self-determination through *habeas data* comprises, first, the ability to judicially demand access to databases, whether computerized or not, whatever their nature, in which personal data may be stored. Such access can include learning what has been recorded, for what purpose, and who recorded the information, as well as which person(s) accessed the information.[78]

The court also noted that *habeas data* can enable an individual to update his record in order to ensure that it comprehensively and correctly represents the person, to rectify the information, to prevent its dissemination for purposes other than those for which it was originally recorded, and to delete such information that reasonably should not be stored.[79]

In the subsequent case, the court elaborated:

> The right to public information includes, additionally, the right to the truth, which translates into the right to obtain reliable and undisputed information from administrative agencies. . . . This guaranty therefore derives from the notions of human dignity, of a democratic and social state under the rule of law, as well as of a republican form of government. It has a collective dimension, which consists in the nation's right to know the facts and events that stem from the various manifestations of state and non-state violence. This entitlement also possesses an individual component, which amounts to the right to ascertain the circumstances under which human rights violations take place . . . .
>
> From a collective point of view, the entitlement at stake amounts to the people's right to receive necessary and timely information so as to develop a public, free, and informed opinion. Our precedents underscore that the access to public information is essential for democracy.[80]

Id. at art. 2(10).

76. OQUENDO, *supra* note 2, at 409.

77. *Id.* at 409–13 (citing Corte Constitucional [C.C.] [Constitutional Court], enero 29, 2003, Expediente Nº 1797-2002-HD/TC (Peru), and excerpting Corte Constitucional [C.C.] [Constitutional Court], noviembre 19, 2004, Expediente Nº 0959-2004-HD/TC (Peru) (2004)). The case names are formatted into English as *Rodríguez Gutiérrez v. Paniagua Corazao* and *Rodríguez Gutiérrez v. Toledo Manrique*, respectively.

78. Corte Constitucional [C.C.] [Constitutional Court], enero 29, 2003, Expediente Nº 1797-2002-HD/TC § 4 (Peru). The case name is formatted into *Rodríguez Gutiérrez v. Paniagua Corazao*.

79. *See id.*

80. OQUENDO, *supra* note 2, at 412–13 (excerpting an English translation of Corte Constitucional [C.C.] [Constitutional Court], noviembre 19, 2004, Expediente Nº 0959-2004-HD/TC (Peru) §§ 7, 11

Accordingly, the court ordered the executive branch to provide the requested information in a timely manner, provided the petitioner paid the relevant fee.[81]

4. The Argentinian Constitution of 1994

In relevant part, Article 43 of the Argentinian Constitution of 1994 provides that:

> Any person may commence [a writ of protection] action to obtain personal information stored in public as well as private registries and databases and to inquire into the purpose of keeping such files. If there is any falsehood or discrimination, the claimant may demand the suppression, rectification, confidentiality, or updating of the data. There shall be no violation of the secrecy of newspaper sources.[82]

According to Oquendo, "Argentines have drawn on the writ of *habeas data* to secure information about individuals who 'disappeared' while in the authorities' custody during the most recent military dictatorship (1976–1983)."[83] In an important judicial opinion interpreting and applying Article 43, the Supreme Court of Argentina held that notwithstanding an implementing statute, the writ of *habeas data* was available not only to an immediately concerned individual but also to the brother of a deceased person.[84] Accordingly, the court ordered the state to disclose any information it possessed regarding the decedent, including the location of his remains.[85]

In a subsequent case, the Supreme Court of Argentina held that the writ of *habeas data* could secure "personal data in the possession of the national security forces, even if the disclosures of that information [might] affect security, national defense, foreign relations, or a criminal investigation. The officials of the defendant institution should raise these defenses, if at all applicable, on a case-by-case basis."[86]

(2004)); *see also* OQUENDO, *supra* note 2, at 1093–97 (excerpting the original opinion in Spanish; the case name is formatted into *Rodríguez Gutiérrez v. Toledo Manrique*).

81. *See* OQUENDO, *supra* note 2, at 413.

82. OQUENDO, *supra* note 2, at 397 (translating Art. 43, CONSTITUCIÓN NACIONAL [Const. Nac.] (1994) (Arg.)). *See also* OQUENDO, *supra* note 2, at 1084 (excerpting the original Spanish article).

83. *Id.* at 398.

84. *Id.* at 398 (discussing Corte Suprema de Justicia de la Nación [CJSN] [National Supreme Court of Justice], 15/10/1998, "Urteaga, Facundo R. c. Estado Mayor Conjunto de las Fuerzas Armadas," La Ley [L.L] (1998-F, 237) (Arg.)).

85. *Id.* at 398.

86. *Id.* at 398 (quoting Corte Suprema de Justicia de la Nación [CJSN] [National Supreme Court of Justice], 16/9/1999, "Ganora, Mario Fernando y otra s/ hábeas corpus," ¶ 13 (Arg.)). In 2000, "the Argentine legislature finally adopted Law 25326 on the 'Protection of Personal Data.'" OQUENDO, *supra* note 2, at 398 (citing Law No. 25326, Oct. 30, 2000 (Arg.)).

5. The Venezuelan Constitution of 1999

Article 28 of the Venezuelan Constitution of 1999 provides that:

> All individuals have a right to access information and data about themselves and about their property stored in official as well as private registries. Secondly, they are entitled to know the purpose of and the policy behind these registries. Thirdly, they have a right to request, before a competent tribunal, the updating, rectification, or destruction of any database that is inaccurate or that undermines their entitlements. The law shall establish exceptions to these principles. By the same token, any person shall have access to information that is of interest to communities and groups. The secrecy of the sources of newspapers—and of other entities or individuals as defined by law—shall be preserved.[87]

As Oquendo notes, Article 28 established the Venezuelan writ of *habeas data*, which expressly permits access to information stored in official and private registries.[88] Moreover, the Venezuelan writ of *habeas data* expressly provides that individuals "are entitled to know the purpose of and the policy behind these registries."[89] Also, it expresses a right to "updating, rectification, or destruction of any database that is inaccurate or that undermines their entitlements."[90] Finally, Article 28 expresses that "any person shall have access to information that is of interest to communities and groups," and it declares that, "[t]he secrecy of the sources of newspapers—and of other entities or individuals as defined by law—shall be preserved."[91]

One could go on, either discussing additional constitutions that promulgate the writ of *habeas data*, or commenting in detail on subsequent legislation or judicial interpretation of the various versions of *habeas data*. For purposes of this Afterword, however, while the above discussions of *habeas data* in the constitutions of Brazil (1988), Colombia (1991), Peru (1993), Argentina (1994), and Venezuela (1999), may be relatively brief, together I believe that they suggest a range of possibilities for amending the United States Constitution to promulgate *habeas data* rights. While broad versions of *habeas data* may seem improbable or even impossible to adopt today, below, I discuss in some detail the equitable relief ordered by Puerto Rican courts in the late 1980s to early 1990s as they considered *Las Carpetas*, the dossiers kept by the Commonwealth of Puerto Rico's Police Intelligence

87. *Id.* at 396 (translating CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA [Constitution] art. 28 (1999) (Venez.)). *See also id.* at 1083 (excerpting the original Spanish article).

88. *See id.* at 396.

89. *See id.*

90. *See id.*

91. *See id.*; *see also id.* at 397 (translating CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA [Constitution] art. 58 (1999) (Venez.), and noting that it has no state action requirement).

Division on alleged subversives. In my view, the cases ordering disclosure of *Las Carpetas* provide persuasive authority for how United States' courts could organically evolve *habeas data* rights, grounded in their common law powers of equity.

B. Las Carpetas*: Police Dossiers on Alleged Puerto Rican Subversives*

In *Noriega v. Governador*, David Noriega Rodríguez, a member of the Puerto Rican House of Representatives, sought injunctive relief against the Commonwealth of Puerto Rico, its governor, and its superintendent of police. Noriega Rodríguez sought to require the police superintendent to provide, "The list of citizens and entities classified as 'subversives' and who have files or dossiers in the Police Intelligence Division" and "[t]he prevailing criteria or rules that govern the inclusion of citizens or entities in said 'subversive' classification."[92] In an early ruling, the Superior Court of Puerto Rico issued a temporary restraining order against the defendants, enjoining them "from destroying, burning, mutilating, or altering any list of persons classified as subversives, who have files or dossiers in the Intelligence Division of the Police of Puerto Rico."[93]

In a separate claim, which was consolidated into the *Noriega* opinion, "attorney Graciany Miranda Marchand sued the Superintendent of Police, the Director of the Police Intelligence Division, and the Secretary of Justice alleging that his name appeared on a list that the Police prepared and kept on alleged subversives, and also that the Police had a file on him."[94] Miranda Marchand[95] petitioned the court to compel the defendants to provide him:

> without delay or excuses, all documents kept in their custody on the person of petitioner[,] . . . [t]o declare illegal [ultra vires] and unconstitutional the practice of keeping lists and files on persons not involved in a [bona fide] criminal investigation[,] . . . [and] [t]o order defendants to permanently abstain in the future from [such] practice[s.][96]

In a July 20, 1987, hearing on the matter, the defendants admitted that Miranda Marchand's name appeared in their files and promised to deliver to him any related dossier once they had determined that it did not contain

92. Noriega v. Governador, 22 P.R. Offic. Trans. 613, 620 (P.R. 1988).

93. *Id.* at 621.

94. *Id.*

95. In keeping with Latin America usage, I refer to individual parties by both of their surnames. While usage may differ contingent on nationality, generally in Latin American, a person's first surname is paternal and the second surname is maternal. Occasionally, however, the opposite is true.

96. *Noriega*, 22 P.R. Offic. Trans. at 621 (bracketed additions in original).

confidential information; if it did, the defendants agreed to submit his dossier for the court to determine the confidentiality issue.[97]

The next day, however, the Governor of Puerto Rico, Rafael Hernández Colón, issued the "Executive Order of the Governor of the Commonwealth of Puerto Rico to Create a Council for the Protection of the Privacy Rights of Citizens and for the Security of the Commonwealth of Puerto Rico, and to Provide the Facilities and Human Resources Necessary for Such Purposes" (Council Executive Order).[98] Citing this authority, on July 22, 1987, the defendants moved for the court to deny Noriega Rodríguez's request for the list of citizens and entities classified as subversives and to stay its order concerning Miranda Marchand for a reasonable term, so that the newly declared Council for the Protection of the Privacy Rights of Citizens and for the Security of the Commonwealth of Puerto Rico (Council) could be constituted, review the list, and examine the dossiers.[99] Within a week, the Superior Court of Puerto Rico held a hearing on the defendants' motion, and issued its opinion on July 31, 1987.[100]

The July 31 superior court opinion is worth quoting extensively. It began by declaring:

> illegal and unconstitutional the practice of keeping files, dossiers, lists, index cards, etc., on persons, groups and organizations, solely and exclusively based on their political or ideological beliefs, absent evidence to link these persons with the commission of or intent to commit a crime, because it violates the freedom of speech and of association and the right to privacy, and because it constitutes an affront to the dignity of the human being.[101]

The court also declared "such practice as totally alien to our democratic system of government," issued a permanent injunction against the defendants "so that they cease and desist, immediately and permanently, from the practice described," and ordered the defendants to deliver "any and all documents" in their custody to Miranda Marchand and to "all other persons in a similar situation" which were "kept in any dossier, file or index card, opened solely and exclusively on the basis of said person's political beliefs."[102]

As to Miranda Marchand in particular, the court ordered the delivery of his personal dossier within fifteen days following the date of its notice of

97. *Id.* at 622.
98. *Id.* at 622.
99. *Id.* at 623.
100. *Id.*
101. *Id.*
102. *Id.*

judgment.[103] As to other persons, the court reserved jurisdiction to determine a later date and mechanism of delivery in consultation with the parties or through appointing a panel of special masters.[104] As to governmental assertions of confidentiality, the court ordered that any such documents "shall be kept in a sealed envelope and sent immediately to this Court for adjudication."[105] Overall, the court "strictly enjoined [the government] from retaining a copy of the aforementioned documents, reproduced by any of the above-mentioned means."[106] Thus, the court ordered the defendants to furnish to individuals the date on which their file was opened, the criteria used to open the file, and its use, if any, by the police. For example, the Puerto Rican police must admit whether it had informed any other person, organization, or entity that it had deemed the individual "subversive," and if so to provide the name of such persons or entities, as well as the date when the police provided the data.[107] Finally, the government ordered the defendants to provide the court, within fifteen days of its order, with a "list of the names of all persons or entities on which the Police of Puerto Rico kept a file, which files were opened solely for political considerations," the number of pages in each file and its exact location, the total number of records, files per file cabinet, and number of file cabinets.[108] Toward that end, the court also ordered the Superintendent of the Police of Puerto Rico to safeguard all such documents, as well as any further documents regarding its surveillance policies and practices, against allegedly subversive persons or entities, and it repealed the governor's Council Executive Order.[109]

Over the next months, the matter went through several additional rounds of motion for reconsideration and appeal until September 14, 1987, when the Superior Court of Puerto Rico issued a judgment providing for a comprehensive ten-part rule in order "to facilitate the delivery of the illegally kept files to the persons concerned (calculated by the Government at 74,000) . . . ."[110] In turn, the governmental defendants continued appealing the matter, attempting to avoid delivering to the court the index of the allegedly subversive people and entities on whom the police kept its secret

103. *Id.* at 624.
104. *See id.* at 624.
105. *Id.*
106. *Id.*
107. *See id.*
108. *See id.*
109. *See id.* at 625.
110. *Id.* at 626–32.

dossiers.[111] Less important than the precise procedural posture of the case, for purposes of this Afterword, the central point to understand is the government's insistence that the Council Executive Order and the Council it would constitute should be entrusted to review *Las Carpetas* and to determine the procedures for their distribution to affected individuals, provided that such files did not contain information that the government alleged to be confidential.[112]

Adjudicating the matter at hand almost a year later, in its November 21, 1988, opinion, the Supreme Court of Puerto Rico framed "the fundamental issue before our consideration [as determining] which are the adequate remedies to vindicate the constitutional rights of thousands of citizens and entities, whose rights have been violated by the Government for decades."[113] The Court elaborated, "[I]n addressing this case we must give priority to the vindication of the constitutional rights of the 74,000 persons affected. In so doing, we must decide how would these rights be best protected."[114] Further, the Court reflected, "[T]hat, particularly during the last decade, the injunction in Puerto Rico has become the most effective means to safeguard our fundamental rights. . . . [I]t 'is the energetic arm of justice for the protection of the citizens against the excesses of public officers who acting under the guise of authority cause irreparable injuries to them . . . .'"[115] The Court then cited to several United States federal court opinions respecting the "equitable power to deal with records, lists, files, and documents illegally obtained by the Government."[116] After disposing of several other arguments raised by the government on appeal, including trial court error for failing to certify a class action, failing to exhaust administrative remedies through the Council, and mootness,[117] the Court then reviewed the trial court's remedy (its comprehensive ten-part rule of September 14, 1987).[118]

Ultimately, the Court affirmed the trial court's September 14, 1987, judgment, finding "no grounds to disturb the trial court's judgment."[119] It

111. *See id.* at 632–33.

112. *See id.* at 633–34 (discussing the Solicitor General's arguments on appeal).

113. *Id.* at 634.

114. *Id.* at 635.

115. *Id.* at 635 (citations omitted).

116. *Id.* (citing Socialist Workers Party v. Attorney General, 666 F. Supp. 621, 623 (S.D.N.Y. 1987)); *see also id.* at 635–36 (discussing *inter alia* Chastain v. Kelley, 510 F.2d 1232, 1235 (D.C. Cir. 1975); Paton v. La Prade, 524 F.2d 862, 868–69 (3d Cir. 1975)).

117. *Id.* at 636–638 (bracketed additions in original).

118. *See id.* at 639–40.

119. *Id.* at 640.

reasoned that the remedy was "elaborate and detailed. It is the result of a pondered, calm, and prudent analysis of the issue and of the viable alternatives."[120] Moreover, "the remedy does not undermine or is repugnant to the separation of powers doctrine."[121] Instead, the Court found that, "A basic principle would be breached if we were to allow the Council alone to design, put into effect, and determine the relief that should be afforded to those persons whose fundamental rights the Government violated."[122] Finally, the Supreme Court of Puerto Rico concluded that:

> By reversing the judgment and leaving the Council alone to implement the remedies, we would be promoting a state of mistrust and suspicion in those 74,000 persons directly affected, *and in the rest of the population that believes in and supports a democratic government* that should at all times respect and protect the fundamental rights that underlie our social structure. . . . This is the only way in which we can close this sordid chapter in our collective history.[123]

I have detailed one of the principal cases involving *Las Carpetas* in order to highlight the kinds of situations for which judicial remedies related to *habeas data* have provided an effective remedy within a territory under the jurisdiction of the United States.[124] Faced with an executive branch that had admitted to the unconstitutionality of its decades-long policies and practices of police surveillance against alleged subversives (primarily, but not exclusively, individuals and entities promoting the independence of Puerto Rico from the United States),[125] under *Noriega v. Governador*, the Puerto Rican judiciary enjoined collecting and retaining information that constituted *Las Carpetas*, constructing a comprehensive remedy by which individuals, whom the police had deemed subversive, could obtain their original files, with the government ordered not to retain a copy.[126]

120. *Id.* at 639.

121. *Id.*

122. *Id.*

123. *Id.* at 639, 640 (emphasis added) (citation omitted).

124. The coloniality of United States power that initially conquered and colonized, but later only partially incorporated Puerto Rico, is beyond the scope of this Afterword. *But see generally* PEDRO A. MALAVET, AMERICA'S COLONY: THE POLITICAL AND CULTURAL CONFLICT BETWEEN THE UNITED STATES AND PUERTO RICO (2007); EDIBERTO ROMÁN, THE OTHER AMERICAN COLONIES: AN INTERNATIONAL AND CONSTITUTIONAL LAW EXAMINATION OF THE UNITED STATES' NINETEENTH AND TWENTIETH CENTURY ISLAND CONQUESTS (2006). On the "coloniality of power," see Anibal Quijano, *Coloniality of Power, Eurocentrism, and Latin America*, 1 NEPANTLA: VIEWS FROM SOUTH 533 (2000).

125. *Noriega*, 22 P.R. Offic. Trans. at 642 (Negrón García, J., concurring); *id.* at 648 (Hernández Denton, J., concurring).

126. *See id* at 628–31 (expressing the court's rules for the permanent disposition of index cards and records; creation, retention and destruction of receipts issued when individuals obtained their original file; rules for adjudicating governmental claims regarding files containing allegedly privileged information; and remittance to the court of unclaimed cards and records).

Of course the story did not end there, and for purposes of this Afterword, I will comment on one additional case involving *Las Carpetas*, which the Supreme Court of Puerto Rico decided in 1992.[127] In *Noriega Rodríguez v. Hernández Colón*, the Court denied the Puerto Rican government's February 2, 1989, request for confidentiality over information contained in *Las Carpetas* regarding: (1) the identity of undercover agents, confidants, informants, and other information sources, (2) the identity of third parties whose names were included in the files, and (3) the investigative techniques.[128]

Prior, the Commission appointed by the Superior Court of Puerto Rico (to which the Puerto Rican Supreme Court had remanded jurisdiction in *Noriega v. Governador*) had partially approved the government's request, ruling in its favor on the first (identity of undercover agents, informants, etc.) and third (investigative techniques) bases but ruling against the government as to the identity of other third parties.[129] The government's main argument was that the court must comply with Puerto Rican Rules of Evidence 31 and 32.[130] Rule 31 provided a privilege against the disclosure of "official information," or information "gained in confidence by a public officer or employee in the performance of his duty," which had neither been officially disclosed, nor was publicly accessible until the moment in which the privilege was invoked.[131] Rule 32 provided a privilege for a public entity against disclosing:

> the identity of a person who has provided information regarding the violation of a law of the Commonwealth of Puerto Rico or the United States, if the information is given in confidence by the informant to a law enforcement officer, representative of an agency responsible for the administration or enforcement of a law that was allegedly violated, or any other person for the purpose of the transmission to such officer or representative.[132]

In reversing the Commission's ruling, which was in favor of the government's request for confidentiality as to the identity of its agents and informants, the Supreme Court of Puerto Rico discussed the right of Puerto Rican citizens to access information as integral to democratic self-governance, which should only be limited by "the most urgent public ne-

127. Noriega Rodríguez v. Hernández Colón, 130 P.R. Dec. 919 (P.R. 1992). I thank Julio Menache for assistance translating portions of the opinion from Spanish into English. Responsibility for any errors in translation, however, is mine alone.

128. *Id.* at 928.

129. *See id.* at 927.

130. *See id.* at 939–40.

131. *Id.* at 939.

132. *Id.* at 939–40.

cessity."[133] The Court elaborated on the "close correspondence between the right to free expression and freedom of information," explaining that "[w]ithout knowledge of facts one cannot judge them."[134] Therefore, to prevail against the right to freedom of information, the Court required that the government prove "the existence of compelling interests of higher rank than the values protected by the right to freedom of information for citizens."[135]

In the Court's view, Rule 31 was not controlling because on its face the privilege required that "official information" be acquired by an official acting in the "performance of his duty."[136] Thus, it was inapposite "because no official has the 'duty' of violating the constitutional rights of a citizen."[137] As to Rule 32, the Court underscored that it expressly required "that the information provided by the informant be 'aimed at discovering the violation of a law of the Commonwealth of Puerto Rico or the United States of America.'"[138] In contrast, except for a few cases regarding clandestine groups to which violent acts had been attributed, the government had stipulated that the information collected by the police had nothing to do with the commission of public offenses.[139] The Court also explained why public policy militated against the government's position: the privilege established by Rule 32 was intended to protect those who provide information about the commission of a crime, not to conceal those who coerce, persecute, and restrict the exercise of fundamental constitutional rights.[140] Here, however, undercover police agents and informants knew that they were investigating and monitoring people for purely ideological reasons.[141] Thus, disclosing their identities would militate against the return of such practices in the future; in contrast, granting the government's request for confidentiality would set a precedent that might well encourage the return of "this nefarious practice."[142] Finally, the Court highlighted the practical difficulty with the government's request, namely, "[t]he process of excluding the names of undercover agents and informants would delay delivery for years, lead to thousands of disputes, involve unjustifiable costs and,

133. *Id.* at 937.
134. *Id.* at 937–38.
135. *Id.* at 938.
136. *Id.* at 940.
137. *Id.*
138. *Id.*
139. *See id.*
140. *See id.* at 942.
141. *See id.*
142. *Id.*

above all, undermine the reason for the delivery of the files."[143] As the Court concluded, "There is no evidence or reason to believe that disclosing the identities [of the undercover police agents and informants] would entail risks to their lives."[144]

CONCLUSION

Today, thanks to the accountability leaks made by Edward Snowden and others, people throughout the world know that the United States government (and its putatively private corporate "little brothers") has been surveilling everyone it can—often without regard for individualized suspicion.[145] If it seems unbelievable today that a United States court might order the disclosure of governmental records kept not merely on alleged subversives but instead on the entire populace, *Noriega v. Governador*, *Noriega Rodríguez v. Hernández Colón*, and related judicial opinions regarding *Las Carpetas*, stand as a hopeful reminder that courts *can* enforce a rule of law that promotes the right to freedom of information and concomitant values of transparency and democratic self-governance. As concurring Justice Negrón García, wrote in *Noriega v. Governador*:

> The so-called "subversives-lists" are remoras on our democracy. They are official access keys to subtle, direct or indirect, and indiscriminate repression. Besides being a simple documental catalogue, in their essence, the lists and records attach a humiliating and ignominious stigma that threatens the dignity, the privacy, and the rights of freedom of expression and of association of thousands of citizens.[146]

Justice Negrón García continued:

> This old practice should have never been enthroned. Although it is typical of terrifying fascism or emasculating dictatorships, it has on occasions cropped up in countries of democratic tradition. . . . In order to achieve its total eradication, prevent it from happening again or from catching on in new generations, it must be strongly and unanimously condemned. It threatens the most basic civil, human, and constitutional rights. It lends itself to persecutions, witch-hunts, and to silencing just

143. *Id.* at 943.

144. *Id.* at 950 (citation omitted).

145. *See* GREENWALD, *supra* note 8, at 94 ("the literal, explicitly stated aim of the [United States] surveillance state: to collect, store, monitor, and analyze all electronic communication by all people around the globe."); *see id.* at 95–118 (discussing several of the programs by which the NSA and other U.S. intelligence agencies effect this goal). *Accord* Benkler, *supra* note 12, at 285–86, 300–11 (discussing accountability leaks and NSA bulk surveillance); Donohue, *supra* note 12, at *passim* (discussing the NSA's bulk collection of metadata).

146. Noriega v. Governador, 22 P.R. Offic. Trans. 613, 644 (P.R. 1988).

> claims. It is equivalent to substituting force for law, totalitarianism for democracy.[147]

While some commentators may not know of the terrible histories of the Global South that engender fierce opposition to neoliberal states of insecurity and surveillance, Justice Negrón García's concurrence articulates a stirring condemnation of not only *Las Carpetas* but all such government policies and practices. While government officials, agents, and informants may well cloak their practices under the color of law, in his view they impinge "on the right to dissent, the natural and irreplaceable raw material that nurtures the roots of the tree of democracy."[148]

I agree with Justice Negrón García's understanding and believe that amending the United States Constitution to feature a robust version of the writ of *habeas data* would effect a significant change in the culture of impunity that seems to animate neoliberal states of insecurity and surveillance. Indeed, since first learning about *habeas data* over the past decade, while sojourning Chile, Argentina, and South Africa in LatCrit's Critical Global Classroom and under subsequent studying with Oquendo, I have wrestled with how to write effectively about the critical insights that *habeas data* may hold for socio-legal discourse, in particular LatCrit theory, praxis, and community.

Notwithstanding self-reservations about my ability to discuss *habeas data* adequately, in this Afterword I have finally endeavored to intervene into the discourse of predominantly United States legal scholars who write in English, as well as to challenge critical socio-legal scholars who affiliate with LatCrit theory, praxis, and community to learn or refresh our recollections about the terrible histories of Latin American dictatorships. We would all do well to recall, study, and discuss not only the circumstances that gave rise to the writ of *habeas data* but also to understand its variegated Latin American jurisprudence. In order to establish violent, effective, social control, fascist dictatorships of Latin America surveilled a relatively small part of the populace, but these regimes of terror deformed their entire societies, often with the direct support of the United States government and to the benefit of private corporations based in the United States. Without a next generation right like *habeas data*, I fear that United States jurisprudence will be inadequate to the task of dismantling our present neoliberal states of insecurity and surveillance.

147. *Id.* at 645 (citing *FBI Kept a File on Supreme Court*, N.Y. TIMES, Aug. 21, 1988, http://www.nytimes.com/1988/08/21/us/fbi-kept-a-file-on-supreme-court.html).

148. *Id.* at 645.

Indeed, with Chelsea Manning serving her sentence in military prison, Edward Snowden functionally exiled in Russia, Julian Assange languishing in the Ecuadorian embassy in London, and Aaron Swartz dead by his own hand, the rule of law colors with private corporate ownership "business records," and other personal data, derived from natural persons.[149] At the same time, a variety of governmental agencies in a plethora of partnerships with such corporations conduct massive electronic surveillance on an unprecedented scale, collecting precisely those "business records" that have been recognized by law as the property of a private corporation.[150] Responding naively to such revelations, however, the *NSA Report* recommends that, "the storage of bulk telephony meta-data by the government . . . [should transition] as soon as is reasonably possible to a system in which such meta-data is held instead either by private providers or by a private third party."[151] This recommendation misunderstands the nature of neoliberal states of insecurity and surveillance. Rigorous investigative journalism has made it abundantly clear that the United States government has obtained massive amounts of personal information under secret forms of private-public partnerships.[152] Thus, now, as in the years leading to the exposure of the FBI's Counterintelligence Program, and related domestic surveillance programs,[153] people of good will are at a crossroads in our histories.

To pose a binary choice: will we continue acquiescing to neoliberal states of insecurity and surveillance (a.k.a., the black box society), or will we revolutionize the present socio-legal situation so that we may readily access information collected and kept by various government agencies, as well as by putatively private entities, in order to learn what they keep in our files, for what purposes they have collected information on us, and with concomitant rights to challenge, correct, and petition for the deletion of

149. Donohue, *supra* note 12, at 797–800 (discussing Congressional amendment of the Foreign Intelligence Surveillance Act in 1988 and 2001 to include the production of certain kinds of business records, and the expansive collection practices authorized under the 2003 United States Attorney General guidelines).

150. *See, e.g.*, PASQUALE, *supra* note 12, at 158 ("What we need to face up to is that pervasive surveillance, unified into massive databases by powerful corporate and government actors, is an effort to find out 'what makes us tick' on a societal level.").

151. CLARKE ET AL., *supra* note 12, at xxvi, 67–71 (discussing Recommendation 5).

152. *See, e.g.*, GREENWALD, *supra* note 8, at 90–169 (discussing surveillance programs conducted by the NSA and other intelligence agencies, including those of foreign nations allied with the United States).

153. *See, e.g.*, Donohue, *supra* note 12, at 766–83 (discussing such programs and their exposure by journalism and Congressional investigation).

such data? In other words, might people in the United States successfully petition the government for redress in one or more of the following ways?

(1) Might existing constitutional rights be evolved through litigation to enable individual natural persons to review and correct "business records" and related information that the federal government has obtained?

(2) If constitutional jurisprudence is inadequate to the task, then is it politically feasible to graft a robust version of the writ of *habeas data* into the United States Constitution through an amendment?

(3) If constitutional litigation or amendment is unavailing, then might federal or state law be litigated, or promulgated, to provide for *habeas data* rights—for example, extending Freedom of Information Act laws, or emerging litigation regarding state DNA databases, and/or the privatization of criminal records in the employment law context?

(4) Finally, if domestic venues are unavailing, or slow, how might international human rights law and norms be deployed to lobby effectively for the creation of robust *habeas data* rights in the United States?

The recent history of the Global South may well have become the future of the Global North, but if people in the United States and other parts of the Global North educate ourselves critically in the terrible histories of the Global South, in particular the Latin American struggles through which diverse peoples sought to recover their societies from fascist military dictatorships, we might find cause for "critical hope" in the form of the extraordinary writ of *habeas data*.[154] While *habeas data* by itself will not abolish neoliberal states of insecurity and surveillance, working together to educate the public and struggling to demand an amendment to the United States Constitution to express *habeas data* rights would be a worthwhile endeavor for the coming decades of LatCrit theory, praxis, and community.

Con safos.

154. *See* PAOLO FREIRE, PEDAGOGY OF HOPE: RELIVING PEDAGOGY OF THE OPPRESSED 2 (Robert R. Barr trans., Continuum Publ'g Co. 2004) (discussing the need for critical hope, "based on the need for truth as an ethical quality of the struggle").

STUDENT NOTES