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Unsettling the Border

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ABSTRACT

When scholars and lawmakers ask who should be allowed to cross borders, under what circumstances, on what ground, they often leave unexamined the historical formation of the border itself. National borders are taken for granted as the backdrop against which normative debates unfold. This Article intervenes in contemporary debates about border crossing by bringing the border itself into the frame of normative consideration. It does so by exploring the colonial dimensions of the national border and calling attention to the ways in which national borders circumscribe and constrain the political imaginary. Focusing on the United States in particular, this Article seeks to defamiliarize the southern border by resituating it within a widened context of settler colonialism and hemispheric domination. Rather than offer a normative case for building a wall or opening borders, this Article asserts that meaningful engagement with the border question requires that we unsettle the border by critically examining the colonial processes and epistemic formations that naturalize and legitimate it.

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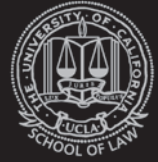


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INTRODUCTION

“A colony is a ravaged home. . . . [T]here is no going home
from a colony.”¹

—Ann Laura Stoler

Until recently, it was commonplace to suggest that the only thing liberals and conservatives can agree on when it comes to our immigration system is that it does not work. The United States’s immigration system has been described as broken for decades, and plans to fix it have been long stymied by failure to reach a compromise. But in the years since he announced his campaign for office, Donald Trump has almost singlehandedly reframed the immigration debate, recasting it in uncompromising terms of white nationalism. Characterizing migrants and refugees as “invaders,” Trump has argued that immigration threatens not only the physical security of white Americans, but the survival of the nation itself.²

Upon taking office, Trump and his administration implemented a series of viciously anti-immigrant policies, testing the norms of polite discourse and legal constraint, often leaving his critics bewildered at the apparent weakness of our public norms and the inability of our institutions to constrain him, particularly in his campaign to exclude or expel racialized immigrants. The Muslim ban, the separation of parents from children, proposals to end birthright citizenship—all of these were met with demonstrations of liberal outrage. But that outrage, however genuinely felt, has failed to give rise to either a sustained critique of white nationalism or a meaningful alternative to our contemporary border regime. It is the failure of liberal imagination that this Article seeks to address.

Critics of our contemporary border regime—especially those who advocate a more thoroughgoing analysis of its origins and effects—are often asked, *so are you in favor of open borders?* The question is often a gesture of dismissal rather than a genuine form of engagement.³ And it is almost always premature. Most of us who live in the United States do not have a very deep understanding of what our

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1. Ann Laura Stoler, *Colony*, in *POLITICAL CONCEPTS: A CRITICAL LEXICON* 45, 56 (J.M. Bernstein, Adi Ophir & Ann Laura Stoler eds., 2018).
 2. Eugene Scott, *Trump’s Most Insulting—and Violent—Language Is Often Reserved for Immigrants*, WASH. POST (Oct. 2, 2019, 12:21 PM), <https://www.washingtonpost.com/politics/2019/10/02/trumps-most-insulting-violent-language-is-often-reserved-immigrants/> [<https://perma.cc/ZA53-589M>].
 3. See Farhad Manjoo, Opinion, *There’s Nothing Wrong With Open Borders*, N.Y. TIMES (Jan. 16, 2019), <https://www.nytimes.com/2019/01/16/opinion/open-borders-immigration.html> [<https://perma.cc/KL84-UCKT>].

immigration policies are, what they do, how they came to be.⁴ I want to suggest that before we can meaningfully address the question of open borders, we need to unsettle borders—to defamiliarize, disenchant, and recontextualize borders by critically examining the historical processes, legal developments, and intellectual and discursive formations that naturalize and legitimate them.

I focus on the southern border because it has become a site of national obsession. But to be clear, with the term *border*, I am referring not only to lines on the map or the limits of territorial sovereignty, but also to an idea of the border, one that governs or contains our political, disciplinary, and normative framing of questions about migration and membership. Immigration is not just about reaching the border, and contemporary preoccupations with the border tend to obscure its shifting character, its diffusion through space, its externalizations and excisions, and its attachment to bodies.⁵ And like migration control itself, the border is itself part of a broader social formation, a racial economy, within which the practices and rationalities that now govern the management of human mobility have been shaped by the imperatives of colonial capitalism and the contradictions of settler nationalism.

I use the term *unsettling*, first, to invoke the growing body of scholarship devoted to exploring the still unfolding history of colonial capitalism and the settler nation in the Americas, including the work of legal scholars exploring the ways in which settler colonialism has shaped the development of US law.⁶ And

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4. See Masha Gessen, *Trump's Opponents Aren't Arguing for "Open Borders"—But Maybe They Should*, NEW YORKER (June 22, 2018), <https://www.newyorker.com/news/our-columnists/trumps-opponents-arent-arguing-for-open-bordersbut-maybe-they-should> [https://perma.cc/KEU4-YBQ6].
 5. See, e.g., ALISON MOUNTZ, *SEEKING ASYLUM: HUMAN SMUGGLING AND BUREAUCRACY AT THE BORDER* (2010); AYELET SHACHAR, *THE SHIFTING BORDER: LEGAL CARTOGRAPHIES OF MIGRATION AND MOBILITY* (2020).
 6. See, e.g., T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* (2002); STUART BANNER, *POSSESSING THE PACIFIC: LAND, SETTLERS, AND INDIGENOUS PEOPLE FROM AUSTRALIA TO ALASKA* (2007); PAUL FRYMER, *BUILDING AN AMERICAN EMPIRE: THE ERA OF TERRITORIAL AND POLITICAL EXPANSION* (2017); LAURA E. GÓMEZ, *MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE* (2d ed. 2018); MACERENA GÓMEZ-BARRIS, *THE EXTRACTIVE ZONE: SOCIAL ECOLOGIES AND DECOLONIAL PERSPECTIVES* (2017); DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* (2007); KUNAL M. PARKER, *MAKING FOREIGNERS: IMMIGRATION AND CITIZENSHIP LAW IN AMERICA, 1600–2000* (2015); AZIZ RANA, *THE TWO FACES OF AMERICAN FREEDOM* (2010); Bethany Berger, *Birthright Citizenship on Trial: Elk v. Wilkins and United States v. Wong Kim Ark*, 37 CARDOZO L. REV. 1185 (2016); Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797 (2005); Leila Kavar, *Legality and (Dis)membership: Removal of Citizenship and the Creation of 'Virtual Immigrants' in the 1967 Israeli Occupied Territories*, 14 CITIZENSHIP STUD. 573 (2010); Monika Batra Kashyap, *Unsettling Immigration Laws: Settler Colonialism and the U.S. Immigration Legal System*, 46 FORDHAM URB. L.J. 548 (2019); K-Sue Park, *Self-Deportation Nation*, 132

second, to suggest that we cannot adequately address, critique, or contest the violence of the US border regime without directly confronting the ways in which settler colonialism, as a social formation, has given shape not only to contemporary racial geographies and legal institutions, but the epistemological frames, disciplinary conventions, and political and ethical imaginaries that obscure their ongoing violence. Lawyers in particular often refer to questions as settled when those questions have been answered so deep in the past—or have been buried under the weight of so much authority—that they cannot be reexamined without risking some social or epistemic upheaval. But that is precisely the kind of reexamination I advocate here. Questions whose answers are well settled have not necessarily been answered correctly or put to rest. They are often the questions that continue to haunt our present.

This Article seeks to intervene in contemporary immigration discourse by bringing the border itself into question, into our framework of normative analysis. Part I situates this intervention within our contemporary moment, defined by the resurgent nationalism represented by the Trump administration's border wall. As liberals fail to project an alternative to border nationalism, others remind us that Trump is not an exception to but a continuation of settler colonialism and racial capitalism. Indigenous activists who have long resisted the division of their ancestral lands remind us that the wall is only the most recent outrage in a long, unbroken history of colonial invasion. Part II attempts to defamiliarize the southern border by resituating it within a broader imperial formation, recalling histories of conquest and expansion, processes that involved the continuous redrawing of territorial borders and demographic boundaries, and immigration policies intended to promote white settlement while frustrating racialized movement.

Insofar as unauthorized migration is presented within immigration discourse as a problem to be solved by the state, this Article inverts the conventional framing to argue that, in fact, it is the nation state that is the problem. In Part III, I argue that unauthorized migration is a “crisis” only because it confronts the nation state with the essential instability of our current world order, in which borders preserve and exploit inequalities produced by centuries of

HARV. L. REV. 1878 (2019); Carrie L. Rosenbaum, *Bringing Democratic Rule of Law to Immigration (in the Age of Trump)*, 97 DENV. L. REV. (forthcoming 2021); NATSU TAYLOR SAITO, *SETTLER COLONIALISM, RACE, AND THE LAW: WHY STRUCTURAL RACISM PERSISTS* (2020); Leti Volpp, *The Indigenous as Alien*, 5 U.C. IRVINE L. REV. 289 (2015); Jennifer M. Chacón, *Unsettling History*, 131 HARV. L. REV. 1078 (2018) (reviewing KELLY LYTLE HERNÁNDEZ, *CITY OF INMATES: CONQUEST, REBELLION, AND THE RISE OF HUMAN CAGING IN LOS ANGELES, 1771–1965* (2017)).

colonial capitalism.⁷ The unauthorized migrant, in turn, is neither a problem nor a crisis, neither a criminal nor a source of human capital, nor an object of humanitarian pity. Instead, she comes as a political agent, someone whose movement might lead us beyond the deadening impasses of border nationalism and colonial capitalism.

A colony is not a home, Ann Stoler writes, but a “ravaged home . . . rendered unhomely for those on whom it is imposed, as well as for those to whom it is offered as a stolen gift. There is no being ‘at home,’ only unsettled waiting for something else, for release from those unfulfilled promises and that anxious unfilled labor.”⁸ No border wall will make America great again, but neither will any proposed bipartisan compromise resolve our immigration crisis once and for all.

To imagine our way beyond current crises and impasse, we need not only to confront our colonial past, but also to proliferate alternative sources of political agency and authority, which in turn might lay the groundwork for addressing old questions anew. We might begin to imagine our way beyond the colony, Stoler suggests, by pursuing “new comparisons and convergences” across lines of division drawn by the settler colonial nation.⁹ I conclude by offering a few illustrations of such comparison and convergence among indigenous and immigrant activists who recognize in their shared experience a common grievance against settler colonialism and the potential to reimagine the terms of coexistence.

I. BEYOND BORDER NATIONALISM

“Nations and peoples are largely the stories they feed themselves. If they tell themselves stories that are lies, they will suffer the future consequences of those lies. If they tell themselves stories that face their own truths, they will free their histories for future flowerings.”¹⁰

—Ben Okri

In January of 2017, as one of his first acts as US President, Donald Trump signed an executive order authorizing the construction of a wall along the southern border of the United States.¹¹ The planned wall would cut across the ancestral

7. See generally Sheraly Munshi, *Immigration, Imperialism, and the Legacies of Indian Exclusion*, 28 YALE J.L. & HUMANS 51, 68 (2016).

8. Stoler, *supra* note 1, at 56.

9. *Id.*

10. BEN OKRI, BIRDS OF HEAVEN 21 (1996).

11. Julie Hirschfeld Davis, *Trump Orders Mexican Border Wall to Be Built and Plans to Block Syrian Refugees*, N.Y. TIMES (Jan. 25, 2017), <https://www.nytimes.com/2017/01/25/us/politics/refugees-immigrants-wall-trump.html> [<https://perma.cc/ZUP9-666Y>].

lands of the O'odham peoples, bisecting the Tohono O'odham reservation, which now straddles the US–Mexico border.¹²

In February of 2020, Ned Norris, Jr., Chairman of the Tohono O'odham Nation, warned the US Congress that construction of the border wall would destroy sacred O'odham sites.¹³ Others warned of irreversible environmental damage.¹⁴ The same day, construction crews blasted through a stretch of Organ Pipe National Monument. In September, as construction crews approached a sacred spring, O'odham activists succeeded in temporarily blocking construction of the wall.¹⁵ During the standoff, one protestor appealed to the construction workers:

Quit your job. Your job is temporary, and your damage is forever... We sing songs for our land to heal... We are crying for our water, for our people, for our future generations. This wall will fall just like you. O'odham will be here forever, regardless, on both sides of the border. We exist on both sides of... this imaginary line. We covered this whole area, our people. Indigenous tribes all along the border, we're not scared of you... and we'll be here cleaning up your mess.¹⁶

12. Fernanda Santos, *Border Wall Would Cleave Tribe, and Its Connection to Ancestral Land*, N.Y. TIMES (Feb. 20, 2017), <https://www.nytimes.com/2017/02/20/us/border-wall-tribe.html> [<https://perma.cc/9RVB-T3LW>].
13. *Tohono O'odham Chair Decries Ongoing Controlled Blasts for Border Wall Project*, ARIZ. PUB. MEDIA (Feb. 28, 2020), <https://www.azpm.org/p/azillhome/2020/2/28/166878-tohono-oodham-chair-decries-ongoing-controlled-blasts-for-border-wall-project> [<https://perma.cc/9C26-JMG4>].
14. Catherine E. Shoichet & Gregory Lemos, *Native American Burial Grounds Threatened by Blasts for Border Wall Construction, Arizona Congressman Says*, CNN (Feb. 12, 2020), https://lite.cnn.com/en/article/h_dd009ab254fddb7a05fc4ea348125f5 [<https://perma.cc/53HJ-CDQ7>]; Paulina Firozi, *Sacred Native American Burial Sites Are Being Blown Up for Trump's Border Wall, Lawmaker Says*, WASH. POST (Feb. 9, 2020), <https://www.washingtonpost.com/immigration/2020/02/09/border-wall-native-american-burial-sites> [<https://perma.cc/ZY85-RCTP>].
15. Rafael Carranza, *Feds File Charges Against 2 O'odham Women for Blocking Border Wall Construction*, AZCENTRAL (Sept. 15, 2020), <https://www.azcentral.com/story/news/politics/border-issues/2020/09/15/hia-ced-oodham-activitsts-federal-charges-trump-border-wall-protest/5806933002> [<https://perma.cc/N25C-XMYV>]; *O'odham Land Defenders Lead Indigenous Resistance to Trump's Border Wall Amid Militarized Crackdown*, DEMOCRACY NOW! (Oct. 12, 2020), https://www.democracynow.org/2020/10/12/organ_pipe_national_monument_border_wall [<https://perma.cc/H54R-NRA2>]; Perla Trevizo, *Tribes Seek to Join Immigration Reform Debate*, TUSCON.COM https://tucson.com/news/local/border/tribes-seek-to-join-immigration-reform-debate/article_d4fe1980-46d4-5e90-b690-ce78c5453bf1.html [<https://perma.cc/Y8TP-W2GM>];
16. O'odham Anti Border Collective, FACEBOOK (Sept. 22, 2020 11:26 PM), https://www.facebook.com/107198197415977/videos/2431157257181360/?__so__=channel_tab&__rv__=all_videos_card [<https://perma.cc/6DAZ-QCKY>]; see also Raphael Romero Ruiz, *Protest at Border Wall Site on Hia-Ced O'odham Territory Ends in Standoff, Scuffle*, AZCENTRAL (Sept. 21, 2020, 9:22 PM), <https://www.azcentral.com/story/news/>

The O'odham had lived in the Sonoran Desert for thousands of years before European settlers arrived. At the end of the Mexican-American War in 1848, the United States seized two-thirds of Mexico, nearly a million square miles of land stretching from the Rio Grande to the Pacific Ocean, land that now includes parts of Colorado and New Mexico, and all of Utah, Arizona, Nevada, and California. The international boundary line was drawn at the Gila River, north of O'odham lands. A few years later, the United States purchased additional lands from Mexico, shifting the international boundary line south of the Gila River, dividing O'odham land and people.¹⁷ O'odham living north of the border would be considered US citizens; those living south of the border would not. The O'odham themselves were never consulted about the division.¹⁸

The Purchase had little immediate effect on the lives of the O'odham, who continued to move freely across their ancestral lands. But by the turn of the twentieth century, the O'odham gradually lost territory on both sides of the colonial border to settlement, mining, and railroad construction.¹⁹ The O'odham have lost lands to a bombing range, what is now the Barry M. Goldwater Air Force Range, and to national parks, including Organ Pipe Cactus National Monument and Cabeza Prieta National Wildlife Refuge.²⁰

More recently, O'odham land has become the site of intensified border enforcement. In 1994, the Clinton administration heightened border enforcement in places like Tijuana–San Diego and Juarez–El Paso, forcing migrants from border towns and into the scorching desert, where migrants are likely to die of thirst or exhaustion. Indigenous critics underscore the cynicism with which the enforcement policy, called “prevention through deterrence,” simultaneously weaponizes sacred indigenous lands while exploiting human

local/arizona/2020/09/21/border-wall-tohono-oodham-protest-site-ends-standoff-scuffle/5861647002 [https://perma.cc/3N WG-ALD7].

17. See GREG GRANDIN, *THE END OF THE MYTH: FROM THE FRONTIER TO THE BORDER WALL IN THE MIND OF AMERICA* 149–53 (2019); DANIEL IMMERWAHR, *HOW TO HIDE AN EMPIRE: A HISTORY OF THE GREATER UNITED STATES* 77–78 (2019); RACHEL ST. JOHN, *LINE IN THE SAND: A HISTORY OF THE WESTERN U.S.–MEXICO BORDER* 48–50, 63–70, 75 (2011).

18. See *History & Culture*, TOHONO O'ODHAM NATION, <http://www.tonation-nsn.gov/history-culture> [https://perma.cc/WSM6-FFLE].

19. See *id.*

20. Nellie Jo David, *Migrant Trail Walk*, YOUTUBE (May 27, 2020), https://www.youtube.com/watch?v=Jpo4Y6vS5_I [https://perma.cc/CTC5-9477]; see also Ryan Deveraux, “We Are Still Here”: Native Activists in Arizona Resist Trump’s Border Wall, *INTERCEPT* (Nov. 24, 2019), https://theintercept.com/2019/11/24/arizona-border-wall-native-activists/?fbclid=IwAR0GDIaUTr2lv-xIVjZiadZdkB3fXg50uXe790p60j77cyeGAHVgq_4v8Nc [https://perma.cc/9N7S-F8R7].

vulnerability—thirst for water.²¹ One effect of the policy has been to channel unauthorized migration and drug trafficking over the O’odham reservation and neighboring towns, bringing further policing.²² Facing poverty and few prospects for employment, members of the tribe have been lured into working as coyotes or smuggling drugs.²³ Nearly every family has been touched by drug abuse.²⁴ Tribal members are routinely stopped by US Customs and Border Patrol, and those without American citizenship may be deported to Mexico even though they are enrolled members of federally recognized tribes.²⁵

Activists Nellie Jo David and Amber Ortega, organizers of the O’odham Anti-Border Collective, have led protests against wall construction, recognizing the convergence of colonial histories in the criminalization of migration, militarization of indigenous lands, and casual destruction of a fragile ecosystem.²⁶ Among other things, the border wall, which would replace an existing vehicle barrier, would prevent wild animals—deer, horses, coyotes, jackrabbits, among other animals the O’odham regard as their relatives—from moving freely and accessing the Quitobaquito Springs, an oasis in the desert, the only source of water for miles.²⁷

In November of 2019, as construction crews began pumping groundwater to mix concrete for the border wall, draining Quitobaquito of its water, David explained to a reporter, “we’ve been protesting, calling it out since Bush.”²⁸ Though many Americans seemed to stop paying attention—“they thought everything was fine”—border militarization only intensified during the Obama

21. *Tear Down the Walls w/ the O’odham Anti-Border Collective*, THE RED NATION PODCAST (Sept. 21, 2020), <https://soundcloud.com/therednationpod/tear-down-the-walls-w-the> [https://perma.cc/29FN-SWC9]; *Fighting Trump’s Border Wall w/ Nellie Jo David*, THE RED NATION PODCAST (Jan. 13, 2020), <https://soundcloud.com/therednationpod/fighting-trumps-border-wall-w> [https://perma.cc/L7HF-S6G9]; *O’odham Land Defenders Lead Indigenous Resistance to Trump’s Border Wall Amid Militarized Crackdown*, *supra* note 15; Treviso, *supra* note 15.

22. Randal C. Archibold, *Border Fence Must Skirt Objections from Arizona Tribe*, N.Y. TIMES (Sept. 20, 2006), <https://www.nytimes.com/2006/09/20/washington/20fence.html> [https://perma.cc/Z7CT-FZSB].

23. *Id.*

24. *Id.*

25. *Id.*; see also Santos, *supra* note 12; David Kelly, *A Tribe Caught in Middle*, L.A. TIMES (Mar. 21, 2004, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2004-mar-21-na-border21-story.html> [https://perma.cc/BW6N-9QY4]; Treviso, *supra* note 15.

26. Deveraux, *supra* note 20.

27. See Archibold, *supra* note 22. Verlon Jose, a member of the tribal council explains, “Animals and our people need to cross freely In our tradition we are taught to be concerned about every living thing as if they were people. We don’t want that wall.” *Id.* Oscar León, *Tohono O’odham Nation: ‘All These Areas Can Collapse’*, THE REAL NEWS NETWORK (Sept. 15, 2019), <https://therealnews.com/tohono-oodham-nation-all-these-areas-can-collapse> [https://perma.cc/DHF6-TRHK].

28. Deveraux, *supra* note 20.

administration—“we got checkpoints. We got more Border Patrol. We got more everything under the Obama administration.”²⁹ In September of 2020, David and Ortega were arrested for attempting to block border construction near the spring. They were detained at an Immigration and Customs Enforcement detention center, run by the private prison corporation, Core Civic.³⁰

O’odham lands are now the site of constant surveillance.³¹ In 2014, the US government awarded an Israeli company a \$145 million contract to build a network of fifty-three towers, integrating various drones, mobile sensors, cameras, and radars to track and record any movement across a stretch of the southern border, including O’odham land.³² Tribal members cannot leave or return to their land without passing through a checkpoint.³³ They are compelled to carry identification at all times to avoid detention or deportation.³⁴

Gated barriers divide the reservation land. The gates open regularly for family reunions and tribal celebrations, but for the O’odham, the barriers stand in the way of exercising a prior freedom—to migrate across ancestral lands, to visit family, to collect water.³⁵ For millennia, migration had been an essential strategy for O’odham survival in an arid desert, allowing for trade with adjacent tribes and flexibility in the face of political displacement and climatological disruption.³⁶ For more than 150 years, the O’odham have survived the cleaving of their land, the separation of their community, and the rupture of their community’s relationship to the land. Trump’s border wall is not an exceptional violence. Instead, it represents only the most recent violation in a long, unbroken history of colonial invasion.

In the wake of the 2016 election, many Americans found themselves suddenly caught off guard by the wave of white nationalism that swept into office

29. *Id.*

30. Ryan Deveraux, *Indigenous Activists Arrested and Held Incommunicado Following Border Wall Protest*, THE INTERCEPT (Sept. 16, 2020), <https://theintercept.com/2020/09/16/indigenous-activists-border-wall-protest> [https://perma.cc/5QEP-DANB].

31. See Oscar León, *The Government Can and Will Just Waive Any Rights That We Have Today*, THE REAL NEWS NETWORK (Oct. 1, 2019), <https://therealnews.com/government-can-waive-rights-tohono-oodham> [https://perma.cc/4XX6-L5GD]; David, *supra* note 20.

32. León, *supra* note 31. See Elibt Systems, <https://www.elibitsystems-us.com/homeland-security> [https://perma.cc/7DRG-Y3YA].

33. León, *supra* note 31.

34. *Id.*; Tay Wiles, *A Closed Border Gate Has Cut Off Three Tohono O’odham Villages From Their Closest Food Supply*, PAC STANDARD (Feb. 7, 2019), <https://psmag.com/social-justice/a-closed-border-gate-has-cut-off-three-tohono-oodham-villages> [https://perma.cc/3D2S-ET8V].

35. *History & Culture*, *supra* note 18.

36. Blake Gentry, Geoffrey Alan Boyce, Jose M. Garcia & Samuel N. Chambers, *Indigenous Survival and Settler Colonial Dispossession on the Mexican Frontier: The Case of Cedagi Wahia and Wo’oson O’odham Indigenous Communities*, J. LATIN AM. GEOGRAPHY 65, 66 (2019).

a candidate whose political promises consisted mainly of dismantling the achievements of his Black predecessor and humiliating racialized immigrants.³⁷ As Adam Serwer has argued, Trump's election seemed to soothe a psychic wound suffered by white Americans who feel they have experienced a decline in status in the past few decades—not in material terms primarily, but in cultural terms, feeling out of place within a social landscape transformed by post-civil rights era multiculturalism and “political correctness.”³⁸ If, within the contemporary ethos of colorblind liberalism, it was no longer acceptable to reject the candidacy of Barack Obama because he was Black, Donald Trump's birther lie offered a barely acceptable alternative basis for rejecting Obama—his qualification for citizenship, his foreign status—while synthesizing a set of grievances against Black, Muslim, and immigrant others. A racial resentment that could no longer be articulated in the old language of white supremacy found new expression in Trump's nationalist rhetoric and anti-immigrant agenda.³⁹

In response, a number of political commentators urged liberals to stop talking about immigration and “identity politics” and to start addressing the resentment of disaffected white Americans.⁴⁰ For instance, in a 2019 cover article published in *The Atlantic*, David Frum urged Trump's opponents to adopt a tougher position on immigration, warning, “if liberals won't enforce borders,

37. Throughout this Article, I have chosen to refer to citizens of the United States as “Americans,” as a matter of convention and convenience, but I acknowledge that peoples throughout the Americas also identify themselves as Americans, though most people in the United States do not recognize those beyond its borders as Americans. See, e.g., José Martí, *Nuestra America*, LA REV. ILUSTRADA DE NUEVA YORK (1891), reprinted in JOSÉ MARTÍ READER: WRITINGS ON THE AMERICAS 120 (Deborah Shnoorkal & Mirta Muñoz, eds., Elinor Randall et al. trans., 2d ed. 2007) (“The conceited villager believes the entire world to be his village.”). I also refer to a “we” and “us” that implies the settler majority in the United States, in which I include myself, which can avoid confronting histories of indigenous dispossession, but I acknowledge that, for others, these histories are inescapable.

38. Adam Serwer, *The Nationalist's Delusion*, ATLANTIC (Nov. 20, 2017), <https://www.theatlantic.com/politics/archive/2017/11/the-nationalists-delusion/546356> [https://perma.cc/2C9A-E5ZD]; accord Ta-Nehisi Coates, *The First White President*, ATLANTIC (Oct. 2017), <https://www.theatlantic.com/magazine/archive/2017/10/the-first-white-president-ta-nehisi-coates/537909> [https://perma.cc/XT6D-HYUS]; Toni Morrison, *Making America White Again*, NEW YORKER (Nov. 14, 2016), <https://www.newyorker.com/magazine/2016/11/21/making-america-white-again> [https://perma.cc/5FMH-UB5V]; Nell Irvin Painter, Opinion, *What Whiteness Means in the Trump Era*, N.Y. TIMES (Nov. 12, 2016), <https://www.nytimes.com/2016/11/13/opinion/what-whiteness-means-in-the-trump-era.html> [https://perma.cc/BW6Y-3Z2W].

39. Serwer, *supra* note 38.

40. E.g., Mark Lilla, Opinion, *The End of Identity Liberalism*, N.Y. TIMES (Nov. 18, 2016), <https://www.nytimes.com/2016/11/20/opinion/sunday/the-end-of-identity-liberalism.html> [https://perma.cc/NWS6-N6BS].

fascists will.”⁴¹ Frum acknowledged that both increased migration and resentment within immigrant-receiving countries has something to do with the asymmetries produced by global capitalism. The beneficiaries of migration to the United States, he observed, are not only migrants, seeking higher wages, but also employers who are able to pay migrant workers lower wages, which in turn depress the wages of working-class white Americans. But instead of addressing the economic policies that displace peoples and depress wages, Frum argued that liberals ought to address the emotional “costs” of migration, the psychic wounds suffered by white Americans for whom the presence of foreign peoples felt like a loss, rendering them strangers in their own land.⁴²

Peter Beinart, citing studies showing that white Americans feel antipathy toward nonwhite others, urged liberals to stop talking about diversity and “take seriously Americans’ yearning for social cohesion”—a yearning answered by Trump’s rhetoric of national allegiance and loyalty.⁴³ In 2018, Hillary Clinton cautioned her European counterparts that failure to restrict mass migration would further intensify the far-right movements gaining momentum in Europe:

I think Europe needs to get a handle on migration because that is what lit the flame.... I admire the very generous and compassionate approaches that were taken particularly by leaders like Angela Merkel, but I think it is fair to say that Europe has done its part, and must send a very clear message—“we are not going to be able to continue provide [sic] refuge and support”—because if we don’t deal with the migration issue it will continue to roil the body politic.⁴⁴

Identifying nativist feeling as a problem, ironically, these critics offer nativist policies as a solution.

41. David Frum, *If Liberals Won’t Enforce Borders, Fascists Will*, ATLANTIC (Apr. 2019), <https://www.theatlantic.com/magazine/archive/2019/04/david-frum-how-much-immigration-is-too-much/583252> [https://perma.cc/L7KV-K6LW]; accord James Kirchick, Opinion, *You Can Fight for Liberal Values Without Being Liberal on Immigration*, WASH. POST (Mar. 8, 2018, 12:50 PM), <https://beta.washingtonpost.com/news/democracy-post/wp/2018/03/08/you-can-fight-for-liberal-values-without-being-liberal-on-immigration/?outputType=amp> [https://perma.cc/S4WA-ZUXZ]; David Leonhardt, Opinion, *The Democrats Are Confused on Immigration*, N.Y. TIMES (Mar. 20, 2019), <https://www.nytimes.com/2019/03/20/opinion/democrats-immigration.html> [https://perma.cc/URB2-YWY6].

42. Frum, *supra* note 41.

43. Peter Beinart, *How the Democrats Lost Their Way on Immigration*, ATLANTIC (July/Aug. 2017), <https://www.theatlantic.com/magazine/archive/2017/07/the-democrats-immigration-mistake/528678> [https://perma.cc/K4UT-5BLZ].

44. Patrick Wintour, *Hillary Clinton: Europe Must Curb Immigration to Stop Rightwing Populists*, GUARDIAN (Nov. 22, 2018, 9:00 AM), <https://www.theguardian.com/world/2018/nov/22/hillary-clinton-europe-must-curb-immigration-stop-populists-trump-brexit> [https://perma.cc/V5SZ-LKEW].

Others have responded to the resurgence of white nationalism by tracing its historical roots. Historian Nell Painter observed that, for many Americans, the election of Trump “seemed to come from some place other than America,” as if its “meanness of spirit” had been blown in from “some hateful foreign country.”⁴⁵ But she and others remind us that white nationalism is not a foreign contagion; its roots run deep in American history. Henry Louis Gates, Jr. compared the “backlash” against the Obama presidency to the period of Redemption, when southerners succeeded in dismantling Reconstruction-era legislation.⁴⁶ Serwer traces fears of “white genocide” and racial “replacement” to the eugenics movements of the early twentieth century.⁴⁷ Pankaj Mishra compared the resurgence of a global white nationalism to its emergence more than a century ago, when W.E.B. Du Bois took notice of a new race consciousness sweeping the globe.⁴⁸ Du Bois identified the sudden, convulsive “discovery of personal whiteness” as a reaction to the threat posed by “the rising tide of color,” as his contemporary put it, the challenge to global white supremacy posed by mass migration and decolonization—early twentieth century movements undertaken by racialized people.⁴⁹

But the white nationalism that reveals itself with periodic violence has its roots in the ground itself, in the very construction and composition of the United States, a country founded in conquest, shaped by histories of territorial expansion, indigenous removal, and immigration policies that have tended to promote white settlement while frustrating “raced-migration.”⁵⁰ The white nationalism that has

45. Nell Irvin Painter, *In 'Stony the Road,' Henry Louis Gates Jr. Captures the History and Images of the Fraught Years After the Civil War*, N.Y. TIMES (Apr. 18, 2019), <https://www.nytimes.com/2019/04/18/books/review/stony-the-road-henry-louis-gates.html> [https://perma.cc/JT9M-N7NB] (book review).

46. HENRY LOUIS GATES, JR., *STONY THE ROAD: RECONSTRUCTION, WHITE SUPREMACY, AND THE RISE OF JIM CROW* (2019); see Charles M. Blow, Opinion, *A Backlash?*, N.Y. TIMES (May 3, 2008), <https://www.nytimes.com/2008/05/03/opinion/03blow.html> [https://perma.cc/RB5V-SUYK]; see also Adam Serwer, *Is This the Second Redemption?*, ATLANTIC (Nov. 10, 2016), <https://www.theatlantic.com/politics/archive/2016/11/welcome-to-the-second-redemption/507317> [https://perma.cc/3JR8-UQ8G].

47. Adam Serwer, *White Nationalism's Deep American Roots*, ATLANTIC (Apr. 2019), <https://www.theatlantic.com/magazine/archive/2019/04/adam-serwer-madison-grant-white-nationalism/583258> [https://perma.cc/6M9T-TRM8].

48. W.E.B. DU BOIS, *The Souls of White Folk*, in *DARKWATER: VOICES FROM WITHIN THE VEIL* 29, 29–31 (1920); see also Pankaj Mishra, Opinion, *The Religion of Whiteness Becomes a Suicide Cult*, N.Y. TIMES (Aug. 30, 2018), <https://www.nytimes.com/2018/08/30/opinion/race-politics-whiteness.html> [https://perma.cc/W3PH-RYZC].

49. DU BOIS, *supra* note 48, at 29; see LOTHROP STODDARD, *THE RISING TIDE OF COLOR AGAINST WHITE WORLD-SUPREMACY* 281 (1920).

50. Radhika Vyas Mongia uses the term “raced-migration” to refer to the voluntary migration of nonwhite peoples to white metropolises at the turn of the twentieth century, the problem that gives rise to modern formulations of the nation state and migration control. Radhika Vyas

suddenly overwhelmed immigration discourse—and political discourse generally—is not merely a corruption of immigration discourse. Instead, immigration policy has played a critical role in creating and maintaining a racial state, which is itself the source of white nationalist ideology. White nationalism, in other words, is bound up with the border itself.

In recent years, the term “white nationalism” has become associated with the expressive racism of the far right. But the same term might also be used to identify a more muted, less scrutinized set of assumptions and attitudes shared by a wider, respectable majority of white Americans. The antiracist movement of the 1960s brought an end to segregation in the United States and European imperialism in Asia and Africa. While these movements effectively banished forms of racial classification from lawmaking and public discourse, they did not abolish racism, nor did they entirely dismantle racial structures and arrangements. Instead, in the United States, the achievements of the civil rights era—namely, the principle of race-neutrality—would give way to a new racial regime in which existing racial arrangements would be preserved without explicit reference to race.⁵¹

The Immigration and Nationality Act of 1965,⁵² for instance, abolished the racial bar and national quotas, but established in their place “per-country limit[s],” which are race-neutral on their face but disproportionately limit migration from countries that are poor, unstable, and nonwhite—the migration that constitutes our current “crisis.”⁵³ The decolonization movements that culminated in national independence throughout Asia and Africa brought an end to formal empire but not the structural and material inequality that empire left in its wake. For this reason, Etienne Balibar has characterized the resurgence of European nationalism in the postcolonial era as a form of “neo-racism.”⁵⁴ While European imperialism had been structured in explicit terms of racial hierarchy, the neo-racism of the postcolonial era was preserved by the nation state system. This neo-racism, he writes, “does not postulate the superiority of certain groups or peoples in relation

Mongia, *Race, Nationality, Mobility: A History of the Passport*, 11 PUB. CULTURE 527, 528–29 (1999).

51. See generally EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM & RACIAL INEQUALITY IN CONTEMPORARY AMERICA* (3d ed. 2010); DAVID THEO GOLDBERG, *ARE WE ALL POSTRACIAL YET?* (2015).

52. Pub. L. No. 89-236, 79 Stat. 911.

53. Sherrilyn Munshi, *Manners of Exclusion: From the Asiatic Barred Zone to the Muslim Ban*, in DEEPENING DIVIDES 118, 138–39 (Didier Fassin ed., 2020).

54. Etienne Balibar, *Is There a 'Neo-Racism'?*, in *RACE, NATION, CLASS: AMBIGUOUS IDENTITIES* 17, 17 (Etienne Balibar & Immanuel Wallerstein eds., Chris Turner trans., 1991).

to others but ‘only’ the harmfulness of abolishing frontiers.”⁵⁵ Racism, instead, disappears into the naturalized horizon of national borders.

This sort of nationalism, the lite nationalism we might call *border nationalism*, distinguishes itself from the white nationalism of the far right in that it disavows the expressive racism of white supremacists. But it leaves unexamined a global racial order shaped by centuries of colonialism and empire. Even those who strenuously disavow the expressive white nationalism of Donald Trump or Victor Orban, for instance, take for granted the contemporary division of the world—into white spaces of relative affluence and security, on the one hand, and nonwhite spaces of relative impoverishment and instability, on the other.

Within the United States, border nationalism takes for granted the whiteness of the contemporary nation space. If Benedict Anderson has taught us to recognize flags and monuments—those grandiose symbols that punctuate the landscape with deliberate meaning—as self-conscious sites of national identification, then critical indigenous scholars turn our attention to the landscape itself—the naturalized space of the nation—shaped by histories of white settlement, native elimination, racial subordination, exclusion, and the strenuous avoidance of those same histories.⁵⁶

Carolina Miranda observes that when most Americans think of California, they conjure images of chopped salads and peroxide blondes, but seldom Chinese railworkers, Mexican growers, or the indigenous Tongva.⁵⁷ If white nationalism is the term we reserve for the kind of identification represented by Confederate flags, border nationalism is the political unconscious, the deep structures of feeling or common sense cultivated by social landscapes, legal institutions, and political discourse that tend to naturalize a contemporary racial geography. The proposed wall appears to most Americans as an obscene monument to white nationalism, but those same Americans often take for granted the social landscapes and racial geographies cut by the border itself.

The O’odham remind us that there is nothing natural or inevitable about the United States’s contemporary borders. Nor is there anything natural or inevitable

55. *Id.* at 21; see also Justin Desautels-Stein, *A Prolegomenon to the Study of Racial Ideology in the Era of International Human Rights*, 67 UCLA L. REV. 1536 (2021).

56. BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (rev. ed. 1991). See generally JEAN M. O’BRIEN, *FIRSTING AND LASTING: WRITING INDIANS OUT OF EXISTENCE IN NEW ENGLAND* (2010); MARK RIFKIN, *SETTLER COMMON SENSE: QUEERNESS AND EVERYDAY COLONIALISM IN THE AMERICAN RENAISSANCE* (2014); Manu Goswami, *Rethinking the Modular Nation Form: Toward a Sociohistorical Conception of Nationalism*, 44 COMPAR. STUD. SOC’Y & HIST. 770 (2002).

57. See Carolina A. Miranda, *Remapping LA*, GUERNICA (Feb. 19, 2019), <https://www.guernicamag.com/remapping-la> [<https://perma.cc/U6Q6-L3PJ>].

about the United States's assertion of a unilateral right to restrict the movement of others. The O'dham remind us not only of their community's prior and persistent claim to lands now situated within the United States, they also remind us of their prior claim to move freely across those same lands.⁵⁸ That freedom of movement, though formally recognized by the United States, is one that predates the United States and the nation state system—and is exercised independently of it. The violence with which O'dham land defenders and water protectors have been removed from the path of border wall construction reminds us that the nation state is a state of continuous violence.

Indigenous presence and persistence remind us of the “ongoing life” of settler colonialism, as Audra Simpson has written, as well as its “simultaneous failure.”⁵⁹ Settler colonialism is not, as is often imagined, a prehistory to the establishment of our contemporary liberal democracy. Settler colonialism is, instead, ongoing and constitutive of US liberal democracy. In Patrick Wolfe's formulation, “invasion is a structure not an event.”⁶⁰ Rather than an event that we can consign to a finished past, colonial invasion gives rise to a complex set of legal institutions, social arrangements, political rationalities, and cultural narratives that maintain themselves, in part, by obscuring their origins and naturalizing their effects. It is a founding violence that is never transcended; instead, it eventually saturates the society it inaugurates.⁶¹ And yet settler colonialism remains a “failure,” in Simpson's account, because it remains incomplete. As she writes, national identity within settler democracies rests on the generalized “presumption that the colonial project has been realized: [L]and has been dispossessed; its owners have been eliminated or absorbed.”⁶² The colonial past is imagined to be neatly severed from our national present, further removed by the passage of

58. Similarly, Leanne Betasamosake Simpson writes of her Nishnaabeg community, “[w]e are travelers, moving throughout our lands [now Canada] rather than settling in one place. . . . [T]his was reflected in our politics and governance, in our diplomacy with other nations, and even in the protection of our land. Stable governing structures emerged when necessary and dissolved when no longer needed.” LEANNE BETASAMOSAKE SIMPSON, *AS WE HAVE ALWAYS DONE: INDIGENOUS FREEDOM THROUGH RADICAL RESISTANCE* 2–3 (2017); see also AUDRA SIMPSON, *MOHAWK INTERRUPTUS: POLITICAL LIFE ACROSS THE BORDERS OF SETTLER STATES* 124 (2014) [hereinafter SIMPSON, *MOHAWK INTERRUPTUS*].

59. SIMPSON, *MOHAWK INTERRUPTUS*, *supra* note 58, at 33.

60. Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RSCH. 387, 388 (2006).

61. See Achille Mbembe, *Necropolitics*, 15 PUB. CULTURE 11, 11–14 (2003); Patrick Wolfe, *Introduction*, in *THE SETTLER COMPLEX: RECUPERATING BINARISM IN COLONIAL STUDIES* 1 (Patrick Wolfe ed., 2016); Alex Trimble Young, *The Settler Unchained: Constituent Power and Settler Violence*, 124 SOC. TEXT 1 (2015) (tracing the profusion of gun violence in the United States to frontier logics).

62. SIMPSON, *MOHAWK INTERRUPTUS*, *supra* note 58, at 11.

time, as though what had been done in the past can never be undone in the future. But as indigenous persistence reminds us, none of this has ever been true.

In her study of resistance among the Iroquois (Haudenosaunee), whose confederacy spans the US–Canadian border, Simpson explores the political dimensions of everyday practices, including border crossing.⁶³ Many Iroquois refuse to display their Canadian passports at the Canadian border. Instead, they insist on traveling with passports issued by the Haudenosaunee Confederacy, invoking rights to Iroquois movement, guaranteed by the Jay Treaty of 1794 signed by the United States and Great Britain.⁶⁴ By refusing to display their Canadian passports, Iroquois endure the irritation and hardship of political nonrecognition, risking immigrant detention, but they also refuse the national identity imposed on them by colonial governments. By traveling on their own terms, with their own passports, Iroquois border crossers confront the United States and Canada with their forgotten histories of conquest.⁶⁵

Simpson reads such acts of defiance as part of a broader “politics of refusal,” which she offers as an alternative to a politics of “recognition,” so widely embraced within postcolonial societies as a meaningful corrective to historical violence—though the recognition of indigenous difference has itself been a primary technique of colonial governance.⁶⁶ Claiming for themselves a freedom of movement that is prior to, outside of, and independent of state dispensation, these indigenous activists invoke alternative forms of sovereignty, sources of self-determination.

How might an acknowledgement of indigenous priority—a prior relation to both land and movement—unsettle the nation state frame through which questions about immigration are often raised? What do settlers and recent immigrants owe to the indigenous peoples from whom this land was stolen? What

63. See *id.* at 117–29.

64. *Id.* at 1–2, 7.

65. Simpson offers two particularly vivid illustrations of indigenous insistence on a right to travel without dispensation from colonizing nation states. In 2010, three Mohawks of Kahnawà:ke, returning from a climate change conference in Bolivia, refused to return home on “emergency travel documents” issued by Canada. They suffered detention until authorities allowed them reentry using their Iroquois Confederacy passports. *Id.* at 18–19. The same year, the Iroquois Nationals Lacrosse Team refused to participate in the World Lacrosse League Championship in Manchester, England after the United Kingdom refused to recognize the Haudenosaunee passport. *Id.* at 25.

66. *Id.* at 11–12. See generally GLEN SEAN COULTHARD, *RED SKIN, WHITE MASKS: REJECTING THE COLONIAL POLITICS OF RECOGNITION* (2014); ELIZABETH A. POVINELLI, *THE CUNNING OF RECOGNITION: INDIGENOUS ALTERITIES AND THE MAKING OF AUSTRALIAN MULTICULTURALISM* (2002). Consider the ways in which federal recognition of tribal membership, for instance, in the form of the Dawes rolls, mediates and overwhelms practices of indigenous self-identification.

do we owe to indigenous peoples who moved freely across an undivided continent? And how might questions like these help us to reframe contemporary immigration debates and to imagine our way beyond the impasse that has defined immigration debates, the dead ends of settler nationalism, and colonial capitalism?

These questions cannot be answered without acknowledging indigeneity as an ethical and epistemic starting point. I use the term indigeneity not to refer to a particular ethnographic subject, but to recognize a form of political agency that exceeds the liberal democratic nation state frame.⁶⁷ Indigeneity, in this sense, is not a fixed identity, but a political practice—the work of preserving and proliferating relationships between peoples and land that are not reducible to, remain outside of, and continuously challenge colonial modernity.⁶⁸ It is a politics of persistence that exposes the colonial roots of the modern state and the essential restlessness of colonial capitalism that continuously uproots people, turning homelands into zones of extraction while forcing displaced peoples to labor in the service of a global economy that reproduces and intensifies racialized inequality and instability.⁶⁹

II. REMAPPING THE CRISIS

Colonial occupation . . . was a matter of seizing, delimiting, and asserting control over a physical geographical area—of writing on the ground a new set of social and spatial relations. [This] was, ultimately, tantamount to the production of boundaries and hierarchies, zones and enclaves; the subversion of existing property arrangements; the classification of people according to different categories; resource extraction; and, finally, the manufacturing of a large reservoir of cultural imaginaries.⁷⁰

—Achille Mbembe

For the past decade, unauthorized migration has been described as a “crisis.” In 2014, the sudden increase in the number of women and children fleeing

67. See, e.g., THE RED NATION, THE RED DEAL: INDIGENOUS ACTION TO SAVE OUR EARTH, 2 (identifying indigeneity as “a political condition that challenges the existence and domination of colonial nation-states”).

68. See, e.g., GÓMEZ-BARRIS, *supra* note 6, 2–5; Audra Simpson, *On Ethnographic Refusal: Indigeneity, ‘Voice’ and Colonial Citizenship*, 9 JUNCTURES 67 (2007).

69. See SIMPSON, *MOHAWK INTERRUPTUS*, *supra* note 58, at 1–35; J. Kēhaulani Kauanui, “A Structure, Not an Event”: *Settler Colonialism and Enduring Indigeneity*, LATERAL (2016), <https://csalateral.org/issue/5-1/forum-alt-humanities-settler-colonialism-enduring-indigeneity-kauanui> [https://perma.cc/9NMX-6AST].

70. Mbembe, *supra* note 61, at 25–26.

violence in Central America and turning themselves in at the US border, was routinely referred to as a “crisis,” prompting the Obama administration to adopt unusually punitive measures, including family detention. The following year, when hundreds of thousands of men, women, and children risked their lives to cross the Mediterranean Sea to reach Europe, the UN High Commissioner for Refugees designated 2015 “[t]he year of Europe’s refugee crisis.”⁷¹

The language of crisis is sometimes used to acknowledge the extreme vulnerability of migrants forced to flee their circumstances. More often it is used to identify unauthorized migration as a problem for the existing global order, specifically, states’ claims to control cross-border mobility. Social theorists have taught us that the language of crisis is often invoked to legitimate the suspension of normal order and the assertion of repressive state power.⁷² In the immigration context, the language of crisis has reliably paved the way for new forms of securitization and surveillance, interdiction, and detention, among other strategies intended to evade humanitarian obligation, avoid public scrutiny, and break the will of already desperate people.⁷³

But what is often presented to us as a crisis of unruly people is really a crisis of state power—a crisis of authority, legitimacy, and control. The problem with unauthorized migration, in other words, is not that it threatens national security, as Trump asserted and as the US Supreme Court has long maintained.⁷⁴ Instead, the border crisis exposes the essential instability of nation state borders. The European border crisis exposes the devastating failure of the international system of nation states and border regime, which took shape after the decline of formal empire and has worked to preserve its defining asymmetries.⁷⁵ The caging and confining of refugees in various remote, offshore, and outsourced centers expose

71. William Spindler, *2015: The Year of Europe’s Refugee Crisis*, UNHCR (Dec. 8, 2015), <https://www.unhcr.org/en-us/news/stories/2015/12/56ec1ebde/2015-year-europes-refugee-crisis.html> [https://perma.cc/S3QP-JW9C].

72. See, e.g., STUART HALL, CHAS CRITCHER, TONY JEFFERSON, JOHN CLARKE & BRIAN ROBERTS, *POLICING THE CRISIS: MUGGING, THE STATE, AND LAW AND ORDER* (1978); Jaya Ramji-Nogales, *Migration Emergencies*, 68 HASTINGS L.J. 609 (2017).

73. See, e.g., Mongia, *supra* note 50; MOUNTZ, *supra* note 5; SEEMA SOHL, *ECHOES OF MUTINY: RACE, SURVEILLANCE & INDIAN ANTICOLONIALISM IN NORTH AMERICA* (2014); Smita Ghosh, *Locking Up & Locking Out* (unpublished manuscript) (on file with author).

74. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2421 (2018) (holding that because the Trump administration offered some plausible national security justification for its ban, “quite apart from any religious hostility, we must accept that independent justification”); *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 572, 634 (4th Cir. 2017) (observing that the Trump administration’s revised “travel ban” recites “vague words of national security, but in context drips with religious intolerance, animus, and discrimination”), *vacated sub nom. Trump v. Int’l Refugee Assistance*, 138 S. Ct. 353 (2017).

75. See Munshi, *supra* note 7, at 68.

the extraordinary violence that liberal democracies are prepared to unleash, often in the name of preserving national integrity.⁷⁶

In the United States and other parts of the white settler world, borders were first raised to prevent racialized others from freely entering what were supposed to remain “white men’s countries.”⁷⁷ As Aileen Moreton-Robinson has written, “it takes a great deal of work to maintain Canada, the United States, Hawai’i, New Zealand, and Australia as white possessions.”⁷⁸ The United States remains a white possession by perpetuating indigenous dispossession; it claims exclusive sovereignty by denying indigenous sovereignty; and it maintains its essential whiteness, within a continent once inhabited exclusively by indigenous peoples, by restricting others’ mobility across its national borders.

Unauthorized migration across the United States’s southern border signals the untenability of a border imperialism that has allowed the United States to take advantage of the social, economic, and ecological instability it generates while securing itself against the consequences of its own policies.⁷⁹ Unauthorized migration—or rather, *self*-authorized migration—is not a problem solved by defending the prerogatives of the nation state. As I argue in the Part III, unauthorized migrants are not problems but political agents, leading a movement that advances the unfinished project of decolonization by challenging the borders that preserve colonial asymmetries.⁸⁰ But here, I want to bring into focus the image of the United States that is unsettled by unauthorized migration: the bordered nation.

A. Relocating a White Nation

In his book *How to Hide an Empire*, historian Daniel Immerwahr refers to the familiar representation of the United States—the outline of the contiguous forty-eight states—as the “logo map.”⁸¹ Maps often lie, as geographers

76. See generally MOUNTZ, *supra* note 5; Tendayi Achimue & Aslı Bâli, *Race and Empire: Theory Within, Through and Across National Borders*, 67 UCLA L. REV. 1386 (2021).

77. See generally MARILYN LAKE & HENRY REYNOLDS, *DRAWING THE GLOBAL COLOUR LINE: WHITE MEN’S COUNTRIES AND THE QUESTION OF RACIAL EQUALITY* (2008).

78. AILEEN MORETON-ROBINSON, *THE WHITE POSSESSIVE: PROPERTY, POWER, AND INDIGENOUS SOVEREIGNTY* xi (2015).

79. See HARSHA WALLA, *UNDOING BORDER IMPERIALISM* (2013).

80. See Nicholas De Genova, *The Incurable Subject: Mobilizing a Critical Geography of (Latin) America Through the Autonomy of Migration*, 16 J. LATIN AM. GEOGRAPHY 17(2017); Joseph Nevins, *Migration as Reparations*, NACLA (May 24, 2016), <https://nacla.org/blog/2016/05/24/migration-reparations> [<https://perma.cc/H38Y-K5ML>]. See generally E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509 (2019).

81. IMMERWAHR, *supra* note 17, at 8–13.

acknowledge—“[t]o avoid hiding critical information in a fog of detail, the map must offer a selective, incomplete view of reality”⁸²—but Immerwahr’s quarrel with the logo map is that it bears almost no resemblance to the country’s legal borders. Most maps of the United States now include Hawai’i and Alaska, floating in the peripheries and seldom drawn to scale, but they almost never include Puerto Rico, though it is home to 3.5 million citizens. Nor do they include the United States’s other inhabited territories—American Samoa, Guam, the US Virgin Islands, and the Northern Mariana Islands—or the hundreds of uninhabited (or depopulated) islands that the United States has annexed over the past half century.⁸³ Immerwahr argues that, in fact, it is almost impossible to visualize the current contours of the American empire, in his words, a “[p]ointillist [e]mpire,” now encompassing roughly a thousand military bases across the globe.⁸⁴ The problem with the logo map, in his account, is that it allows Americans to imagine themselves an ordinary nation while disavowing the nation’s colonial history and imperial dimensions.

There are other ways in which the conventional map obscures the settler imperial character of the United States. First, the logo map, bordered by oceans east and west, tends to naturalize the United States’s current dimensions, rendering its continental sweep as inevitable as the land mass stretching “from sea to shining sea.” Of course, there is nothing natural or inevitable about the United States’s coastal borders. Instead, they represent the culmination of long contested processes of territorial expansion, indigenous displacement, racial enslavement, and white settlement.⁸⁵ In the first half of the nineteenth century, the United States doubled, then tripled in size, purchasing vast territories from France, annexing the Republic of Texas, and seizing half of Mexico. Indigenous peoples, among the other hundreds of thousands crossed by the border—European settlers, free and enslaved Africans, Mexicans and mestizos—were seldom consulted by the empires that traded their lands. By the second half of the nineteenth century, the United States no longer recognized tribal sovereignty at all, asserting instead unilateral sovereign power—“plenary power”—over indigenous peoples and

82. MARK MONMONIER, *HOW TO LIE WITH MAPS* 1 (3d ed. 2018).

83. See Tom C.W. Lin, *Americans, Almost and Forgotten*, 107 CALIF. L. REV. 1249 (2019). The Chagossians, for instance, were forced from their native island in the Indian Ocean after possession was transferred from the United Kingdom to the United States in 1965, as one form of empire fell into decline and another rose into ascendance. The island, now called Diego Garcia, is the site of a US military base. See generally DAVID VINE, *ISLAND OF SHAME: THE SECRET HISTORY OF THE U.S. MILITARY BASE ON DIEGO GARCIA* (2009).

84. IMMERWAHR, *supra* note 17, at 213; see David Vine, *Where in the World Is the U.S. Military?*, POLITICO (July/Aug. 2015), <https://www.politico.com/magazine/story/2015/06/us-military-bases-around-the-world-119321> [<https://perma.cc/JA6W-V9WP>].

85. See generally FRYMER, *supra* note 6.

lands. As I and others have argued, the plenary power doctrine, a doctrine with its origins in colonial conquest, achieved its current sweeping articulation in the late-nineteenth century—a paradoxical high moment of both imperial expansion and exclusionary nationalism—and through the experience of accelerated Indian removal, overseas expansion, and Asian exclusion.⁸⁶

If, within the national imaginary, the west coast has come to represent the boundlessness of settler ambition—manifest destiny—the southern border represents its racial limit. The United States’s imperial aspirations, legal historians have observed, have been consistently constrained only by its attachment to white supremacy.⁸⁷ After declaring independence from Britain, settler colonists assumed that their own “empire of liberty” would eventually span the southern hemisphere to include the Caribbean islands and stretch as far south as Rio de Janiero.⁸⁸ At the end of the Mexican-American War in 1848, for instance, when Congress was faced with the opportunity to acquire large swaths of Mexico, it resolved to take as much land as possible with as few people as possible, reluctant to incorporate into the national body a mass of racialized others. Abraham Lincoln, at the time a Representative from Illinois, recommended that the United States should take “the unsettled half” of Mexico, into which the United States could “introduce an American population.” Of the populated half, he worried “we could derive little benefit from it,” adding “it was not proposed to kill the Mexican population to drive them out, to confiscate their lands and property, or to make them slaves.”⁸⁹

Just as the image of the bordered nation tends to naturalize a violently constructed nation-space, it also tends to naturalize a brutally engineered identity between people and place throughout North America. In the eighteenth century, a French imperialist observed matter-of-factly that “[e]mpire is the art of putting men in their place.”⁹⁰ For centuries, European imperialism oversaw the mass transfer of millions—free as well as forced migrants—always for the benefit of empire states and their settler counterparts. European imperialism set the world in motion, but within Europe and its settler counterparts today, immigration

86. Sherally Munshi, “*The Courts of the Conqueror*”: *Constitutionalism, Colonialism, and the Time of Redemption*, in *LAW’S INFAMY* (Austin Sarat et al. eds.) (forthcoming 2021); Sherally Munshi, *Manners of Exclusion: From the Asiatic Barred Zone to the Muslim Ban*, in *DEEPENING DIVIDES*, *supra* note 53; Sherally Munshi, *Race, Geography, and Mobility*, 30 *GEO. IMMIGR. L.J.* 245 (2016); *see also* ALEINIKOFF, *supra* note 6, at 11–38; KANSTROOM, *supra* note 6, at 64–67; Saito, *supra* note 6.

87. *See* FRYMER, *supra* note 6, at 11–17; IMMERWAHR, *supra* note 17, at 80–82.

88. FRYMER, *supra* note 6, at 1, 173–74.

89. *Id.* at 196.

90. ALEJANDRO COLÁS, *EMPIRE* 7 (2007) (quoting Charles Maurice de Talleyrand).

debates seem to conjure a far more static image of the world, structured around the imagined identity between people and place implied by the word “nation”—derived from the Latin *natio*, meaning “birth” or “origin.” Contemporary immigration debates seem to take for granted, as Akhil Gupta and James Ferguson have written, an image of the world as it appears on the world map, an “inherently fragmented space, divided by different colors into diverse national societies, each ‘rooted’ in its proper place.”⁹¹

The solidity of the US inkblot on the world map also gives the impression of a fixed identity between a territory and its inhabitants. This imagined identity suppresses not only the considerable heterogeneity among those living in the United States, but also the multiplicity of migrations—again, free and forced—that have brought different peoples into involuntary relation and proximity.

In much of postcolonial Asia and Africa, the nation state form is recognized to be an ill-fitting imposition, reflecting the monoculturalist preoccupations of imperial Europe rather than the varied experience or political longings of those it colonized.⁹² In the United States, the imagined identity between people and place is further complicated by the country’s settler past and present. Unlike former colonies in Asia, Africa, and South America, the United States has never been decolonized. It remains a settler colony. Its declaration of national independence ended one form of imperial relation, but inaugurated another. No longer constrained by the limits imposed by the British government, settler expansion would continue with new intensity, relying as before on the exploitation of enslaved Africans and the expropriation of Indian lands. Within this landscape of racial diversity, Natsu Taylor Saito shrewdly observes, “[w]hiteness has been constructed and defended as a rigidly exclusive category precisely because it is not a descriptor of national origin but a marker of entitlement to colonial power, privilege and property.”⁹³

Critical histories of immigration law tend to focus our attention on the role that racialized exclusion—the racial bar and ethnic quotas—have played in preserving white nationalism since the late nineteenth century, often overlooking the role the practices of racial *inclusion*—recruitment and incorporation—have played in shaping both racial geography and national identity. Through the nineteenth century, European immigrants were encouraged to participate in the

91. Akhil Gupta & James Ferguson, *Beyond “Culture”: Space, Identity, and the Politics of Difference*, 7 CULTURAL ANTHROPOLOGY 6, 6 (1992).

92. See generally FRANTZ FANON, *THE WRETCHED OF THE EARTH* (Constance Farrington, trans., Présence Africaine 1961) (1963); RABINDRANATH TAGORE, *NATIONALISM* (1917).

93. Natsu Taylor Saito, *Race and Decolonization: Whiteness as Property in the American Settler Colonial Project*, 31 HARV. J. ON RACIAL & ETHNIC JUST. 31, 62 (2015).

project of colonial settlement by federal, state, and local governments, which offered a variety of material and ideological inducements to new Americans.⁹⁴ These settlers were lured across oceans and a vast continent with promises of cheap land, voting rights, and citizenship. By contrast, their Asian counterparts were recruited (or conned) to labor but denied the same privileges of political membership. They were denied the right to own land and were frustrated in their attempts to establish families.⁹⁵ Immigration laws effectively barred the entry of “Oriental” women, and antimiscegenation laws criminalized intimacy between Asian men and white women.⁹⁶ These laws were intended not only to limit migration but also to prevent those already here from making their home in the United States and producing a generation of Asian American birthright citizens.

Recent proposals to end birthright citizenship or to deny birthright citizenship to the children of unauthorized immigrants recall these earlier attempts to deny the children of Asian immigrants the same privilege.⁹⁷ Though birthright citizenship has long been cherished and defended as a measure of the United States’s commitment to universal equality, the institution has been shaped by the experience and imperatives of settler colonialism. President Trump claimed that the United States is “the only country in the world” that extends automatic citizenship to children born on its soil.⁹⁸ In fact, more than thirty countries follow the same rule. Almost all of these are in the western hemisphere, where settler governments adopted generous laws to attract and quickly incorporate new immigrants and to displace indigenous populations.⁹⁹

94. See RANA, *supra* note 6, at 13.

95. See generally Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641 (2005); Rose Cuison Villazor, *Rediscovering Oyama v. California: At the Intersection of Property, Race, and Citizenship*, 87 WASH. U. L. REV. 979 (2010).

96. See Abrams, *supra* note 95, at 662, 695.

97. See, e.g., Birthright Citizenship Act of 2019, H.R. 140, 116th Cong. (2019); *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

98. Amanda Erickson, *Trump Says No Other Country Has Birthright Citizenship. He’s Wrong*, WASH. POST (Oct. 30, 2018, 9:18 AM), <https://www.washingtonpost.com/world/2018/10/30/trump-says-no-other-country-has-birthright-citizenship-hes-wrong> [https://perma.cc/LNX5-M6U3].

99. The United Kingdom, Ireland, Australia, New Zealand, and the Dominican Republic only recently abandoned their practice of granting of birthright citizenship, and for the same reasons given by restrictionists in the United States: to deny citizenship to the children of unauthorized migrants and to discourage further unauthorized migration. Yasmeen Serhan & Uri Friedman, *America Isn’t the ‘Only Country’ With Birthright Citizenship*, ATLANTIC (Oct. 31, 2018), <https://www.theatlantic.com/international/archive/2018/10/birthright-citizenship-other-countries-trump/574453> [https://perma.cc/CW8B-R5Q9]; see also Imogen Tyler, *Designed to Fail: A Biopolitics of British Citizenship*, 14 CITIZENSHIP STUD. 61, 68–69 (2010).

Through birthright citizenship, the settler nation naturalizes its relationship to conquered lands, while allowing it to reproduce itself in perpetuity.¹⁰⁰ In the United States, the privileges of citizenship and naturalization have been generously extended to “free white” settlers, but those same privileges were long withheld from racialized others, forced or recruited to labor in the United States.¹⁰¹ Black Americans were granted citizenship after the end of the Civil War. A decade later, Congress amended the Naturalization Act to extend citizenship to “free white people” and to persons of “African nativity and . . . descent,” with the express purpose of excluding “Asiatics” from citizenship.¹⁰² At other moments in US history, the status of American citizens descended from Chinese, Japanese, Mexican, and other foreign-born parents has been cast into doubt.¹⁰³ For indigenous Americans, birthright citizenship remains a dubious “gift,” an imposed status conditioned on the disavowal of indigenous difference.¹⁰⁴

The supposed universality of birthright citizenship is further qualified and complicated by more recent histories of US expansion. Constitutionally guaranteed birthright citizenship is not the rule in the United States’s overseas territories, which, unlike the United States, are primarily inhabited by nonwhite indigenous peoples. The inhabitants of American Samoa and Swains Island are considered nationals rather than citizens; birthright citizenship in Puerto Rico is protected by statute rather than the Constitution—Congress may revoke it at any time.¹⁰⁵

While histories of immigration law tend to focus on acts of legislative exclusion, they tend to overlook acts of *forced* expulsion. Periodic campaigns to remove racialized others have also played an important role in maintaining the

100. See Siobhan B. Somerville, *Notes Toward a Queer History of Naturalization*, 57 AM. Q. 659, 660, 663 (2005).

101. See Naturalization Act of 1790, ch. 3, 1 Stat. 103.

102. See Naturalization Act of 1870, ch. 254, 16 Stat. 254, 256. The Naturalization Act of 1790, which restricted citizenship to “free white people,” was amended after the passage of the Fourteenth Amendment to extend citizenship to persons of “African nativity and . . . descent.” Rather than strike the language in the original Act restricting citizenship to “free white people,” the Court chose to preserve those words at add “aliens of African nativity and . . . persons of African descent” for the express purpose of excluding “Asiatics” from citizenship. See *United States v. Bhagat Singh Thind*, 261 U.S. 204, 207, 214 (1923).

103. See, e.g., Gómez, *supra* note 6; IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 35–55 (1996); Sherally Munshi, “You Will See My Family Became So American”: *Race, Citizenship, and the Visual Archive* 63 AM. J. COMPAR. L. 655 (2015); Rachel E. Rosenbloom, *Policing the Borders of Birthright Citizenship: Some Thoughts on the New (and Old) Restrictionism*, 51 WASHBURN L.J. 311 (2012).

104. AMY L. BRANDZEL, *AGAINST CITIZENSHIP* 14–15, 75 (2016).

105. See Puerto Rican Federal Relations (Jones) Act, ch. 145, § 5, 39 Stat. 951, 953 (1917); John Vlahoplus, *Other Lands and Other Skies: Birthright Citizenship and Self-Government in Unincorporated Territories*, 27 WM. & MARY BILL RTS. J. 401, 401 (2018).

United States's racial character. It is no coincidence that the euphemism now used to refer to the deportation of immigrants—"removal"—is the same euphemism once used to refer to the expulsion of indigenous peoples (just as it is no accident that the word "rendition" was once used to refer to the capture and return of fugitive slaves).¹⁰⁶ In the United States, the history of removal is one that repeats itself, not only as a strategy for eliminating indigenous peoples—from the continent as well as overseas territories—but also other racialized newcomers and arrivants.¹⁰⁷

Before the abolition of slavery, even otherwise respectable abolitionists proposed to remove Black Americans to African colonies, a preferable alternative to incorporating Black Americans as free and equal citizens.¹⁰⁸ After emancipation, Black Americans were forced to flee the daily humiliation and terror of life in the South, often to find themselves consigned to zones of immiseration in the North.¹⁰⁹ Well into the early twentieth century, Black communities thriving in cities like East St. Louis, Illinois and Tulsa, Oklahoma, were the targets of violent pogroms.¹¹⁰

Racialized immigrants have also been subject to periodic purge. The passage of the Chinese Exclusion Act in 1882, rather than placating exclusionists, unleashed a wave of violence across cities in the Pacific Northwest. Between 1885 and 1888, organized mobs in nearly forty cities descended on Chinese communities, forcing individuals from their homes, robbing them of their possessions, and setting fire to their businesses. Far from spontaneous outbursts, the attacks were planned and coordinated. A successful campaign to drive the Chinese community out of Tacoma, Washington was referred to as the "Tacoma Method" and held up as an example to other cities intent on "driv[ing] out" unwelcome foreigners.¹¹¹ A few decades later, immigrants from India were subject

106. *E.g.*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009.

107. Jodi Byrd uses the term "arrivants" to refer to "those people forced into the Americas through the violence of European and Anglo-American colonialism and imperialism around the globe." JODI A. BYRD, *THE TRANSIT OF EMPIRE: INDIGENOUS CRITIQUES OF COLONIALISM*, at xix (2011). She also observes that the United States has a way of "mak[ing] 'Indian[s]'" out of, or removing, anyone who stands in the way of its interests. *Id.* at xx.

108. See ALEJANDRO DE LA FUENTE & ARIELA J. GROSS, *BECOMING FREE, BECOMING BLACK: RACE, FREEDOM, AND LAW IN CUBA, VIRGINIA, AND LOUISIANA* 132–77 (2020).

109. See generally ISABEL WILKERSON, *THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA'S GREAT MIGRATION* (2010).

110. See generally CHARLES L. LUMPKINS, *AMERICAN POGROM: THE EAST ST. LOUIS RACE RIOT AND BLACK POLITICS* (2008).

111. JEAN PFAELZER, *DRIVEN OUT: THE FORGOTTEN WAR AGAINST CHINESE AMERICANS* 253 (2008); see also BETH LEW-WILLIAMS, *THE CHINESE MUST GO: VIOLENCE, EXCLUSION, AND THE MAKING OF THE ALIEN IN AMERICA* 115, 124–25 (2018).

to similar treatment. After a notorious episode in Bellingham, Washington, as one local newspaper reported, the community of a few hundred Indians had been successfully “wiped off the map.”¹¹² Japanese internment during World War II, survivors recall, was as much about removing and confining Japanese immigrants—portrayed as “invaders” and “colonizers” threatening to displace white Americans—as it was about confiscating their land and property, frustrating any return to their homes or imagining a future in the United States.¹¹³

B. The Post/Colonial Border

Colonial borders never merely represent an existing divide. Instead, as Achille Mbembe suggests, colonial borders produce the difference that they govern, “writing on the ground a new set of social and spatial relations.”¹¹⁴ The US–Mexico border, as it was drawn and redrawn, did not merely mark an existing division between national territories or people. Instead, the border played a critical role in dividing national territories and distinctly racialized national communities, yielding, as María Josefina Saldaña-Portillo put it, “the United States as nonindigenous space atop Mexico as indigenous space.”¹¹⁵ Beyond linguistic and cultural differences, the essentialized difference maintained by the southern border, particularly within the American imaginary, is the difference between white and nonwhite, civilized and barbarian, settler and Indian.

After the Mexican-American War, a war of conquest, the United States seized the northern third of Mexico. Even in the “unsettled half” of Mexico, as Lincoln anticipated, American conceptions of national identity would clash violently with the existing racial heterogeneity that defined northern Mexico, a borderland that had become home to especially diverse multiracial and multiethnic communities.¹¹⁶ While the United States largely conceived of itself as a white nation, by the mid-nineteenth century, the Mexican government had begun to promote a very different sort of racial ideology, *mestizaje*, a postcolonial

112. Sherally Munshi, *Race, Geography, and Mobility*, 30 GEO. IMMIGR. L.J. 245, 262 (2016) (citing *Bellingham Sees the Last of the Hindus*, REVELLE & MORNING AM., Sept. 7, 1907, at 1).

113. Kerry Abrams, *Peaceful Penetration: Proxy Marriage, Same-Sex Marriage, and Recognition*, 2011 MICH. ST. L. REV. 141, 154, 167, 169; see V.S. MCCLATCHY, JAPANESE IMMIGRATION AND COLONIZATION, S. DOC. NO. 67-55, at 14 (1921); *Order 9066*, APM REPORTS (July 2018), <https://www.apmreports.org/order-9066> [<https://perma.cc/G4U4-AR9C>].

114. Mbembe, *supra* note 61, at 25; see also ANDERSON, *supra* note 56, at 172–73.

115. MARÍA JOSEFINA SALDAÑA-PORTILLO, INDIAN GIVEN: RACIAL GEOGRAPHIES ACROSS MEXICO AND THE UNITED STATES 3–6 (2016).

116. FRYMER, *supra* note 6, at 196.

national unity rooted in practices of racial admixture and assimilation.¹¹⁷ The racial diversity that had come to define northern Mexico at the time of annexation was both a reflection of Mexico's national ideology and the result of land policies intended to promote settlement along its northern frontier.

Long before Mexico declared its independence from Spain, its northern territory, though sparsely populated, had been home to diverse Indian communities, including Tohono O'odham, Yaqui, Mayo, Pima, and Opata.¹¹⁸ In the early nineteenth century, as the new Mexican government and the United States sought to establish supremacy in the region, they were forced to contend with the powerful raiding tribes, the Apache and Comanche, which exercised considerable control over the region.¹¹⁹ The tribes themselves had turned to raiding Spanish settlements in northern Mexico as part of a larger strategy for survival in the wake of removal from the northern plains.¹²⁰

Soon after it declared its independence, the Mexican government enacted a law to encourage migration and settlement to the northern frontier to serve as a buffer against raiding Indians. The settlement law drew a diverse population of newcomers, including Indians who had been displaced from parts of Florida and Texas as well as African Americans who had escaped southern slavery. These new settlers were lured by promises of land, freedom, and membership within a national community that they recognized to be more inclusive of racial and ethnic difference than that of the United States.¹²¹

After the war, the United States promised that Mexicans living in the annexed territory would be allowed to enjoy the rights and privileges of

117. While the inclusionary ideology of *mestizaje* embraced by the Mexican government extended freedoms and opportunities to indigenous, mestizo, and *afromestizo* peoples that were unavailable in the United States, *mestizaje* was and is not without its own failings. Critics have argued that colonial hierarchies of race and caste were often preserved even within a formal discourse of antiracism and hybridity. Jared Sexton has argued that dreams of transcending racial difference through amalgamation are often dreams of eliminating any trace of indigenous or Black difference. Writing specifically of José Vasconcelos's vision of *la raza cósmica*, Sexton writes that its "eugenicist impulses and implications are unavoidable," rendering the nationalist utopia of *mestizaje* not so unlike "the 'ethnic absolutism' of Anglo-Saxon white supremacy." JARED SEXTON, *AMALGAMATION SCHEMES: ANTIBLACKNESS AND THE CRITIQUE OF MULTIRACIALISM* 201 (2008) (footnote omitted). Saldaña-Portillo emphasizes the way in which *mestizaje* roots indigenizes the postcolonial nation by incorporating the figure of the Indian, on the one hand, while deracinating indigenous peoples through assimilationist policies, on the other. SALDAÑA-PORTILLO, *supra* note 115, at 26–27.

118. ST. JOHN, *supra* note 17, at 45.

119. See generally BRIAN DELAY, *WAR OF A THOUSAND DESERTS: INDIAN RAIDS AND THE U.S.–MEXICAN WAR* (2008); PEKKA HÄMÄLÄINEN, *THE COMANCHE EMPIRE* (2008).

120. See generally Brian DeLay, *Independent Indians and the U.S.–Mexican War*, 112 AM. HIST. REV. 35 (2007).

121. See SALDAÑA-PORTILLO, *supra* note 115, at 26–27, 115–16.

citizenship—though citizenship at the time was restricted to “free white person[s].”¹²² According to the terms of the Treaty of Guadalupe Hidalgo, Mexicans in the annexed territory could choose to stay or “to remove” to Mexico, to retain their Mexican citizenship or become Americans. Either way, their property rights would be “inviolably respected.”¹²³ In practice, however, citizenship and property rights were enjoyed only by an elite white minority. The diverse majority living in the region who, until then, had enjoyed a certain equality within Mexican society, was less easily absorbed into the US national body.¹²⁴

In Laura Gómez’s analysis, by formally extending citizenship to annexed Mexicans, the Treaty of Guadalupe Hidalgo had effectively rendered annexed Mexicans “legally white.” In the eyes of average white Americans, however, they would remain “socially non-white.”¹²⁵ After annexation, mestizos and *afromestizos* living in the annexed territories were routinely adjudged racially ineligible for citizenship; *afromestizos* suddenly found themselves governed by a repressive Black code; Indians were categorically denied citizenship and lost control of lands promised to them by the Spanish Crown and recognized by Mexico.¹²⁶ Long after the United States formally annexed roughly two-thirds of Mexico’s territory, poor, nonwhite communities on both sides of the border were cheated or frightened out of their lands by armed vigilantes, agricultural businesses, and often even neighbors.¹²⁷ Gloria Anzaldúa recalls that “[g]ringos in the US Southwest consider the inhabitants of the borderlands transgressors, aliens—whether they possess documents or not, whether they’re Chicanos, Indians or Blacks.”¹²⁸ Those who did not belong were violated with impunity, “raped, maimed, strangled, gassed, shot.”¹²⁹

Anticipating that Mexicans living in the annexed territories would be consigned to second-class citizenship, Mexican treaty negotiators sought assurances that annexed territories would be quickly “incorporated into the Union

122. Act of Apr. 14, 1802, ch. 28, 2 Stat. 153 (repealed 1940).

123. Treaty of Peace, Friendship, Limits, and Settlement, Mex.–U.S., art. VIII, Feb. 2, 1848, 9 Stat. 922 [hereinafter Treaty of Guadalupe Hidalgo].

124. GÓMEZ, *supra* note 6, at 62.

125. *Id.* at 87. Mestizos living in the annexed territories were then forced to make an uneasy choice between retaining their mixed-race identity and losing the privileges of US citizenship, on the one hand, or disavowing their mixed-race heritage to claim the privileges of US citizenship, on the other. *See id.* at 44–45.

126. SALDAÑA-PORTILLO, *supra* note 115, at 140–41; *see also* Morrison v. California, 291 U.S. 82, 95 n.5 (1934) (“Indians not born in the United States . . . are ineligible for citizenship Whether persons of [Mexican] . . . descent may be naturalized in the United States is still an unsettled question.”); GÓMEZ, *supra* note 6, at 83–87, 103.

127. GLORIA ANZALDÚA, BORDERLANDS/LA FRONTERA: THE NEW MESTIZA 29 (4th ed. 2012).

128. *Id.* at 25.

129. *Id.*

of the United States.”¹³⁰ California, with its vast territory, relatively few Mexicans and Indians, and many recent white settlers, was granted statehood almost immediately after the war. But incorporation of the remaining territory, with its diverse population, would remain stalled for decades.¹³¹ Secretary of State James Buchanan justified the differential treatment in distinctly colonial terms, conflating racial identity with qualification for self-government.¹³² California would be governed by peoples “of our own kindred . . . and educated for self-government under our own institutions.”¹³³

But the Territory of New Mexico, as Senator Henry Clay later explained, with its “variety of races . . . pure and mixed,” rendered the state “not now, [nor] for a long time to come . . . prepared for State government.”¹³⁴ The Territory was gradually carved into separate states and incorporated as they gained white majorities—Colorado in 1876, Utah in 1896—but the remaining New Mexico Territory was suspended in what Kevin Bruyneel has referred to as a colonial “third space.” Like earlier Indian territories and eventual overseas territories, the New Mexico Territory was designated an ambivalent third status, neither in nor out, neither domestic nor dependent.¹³⁵ It was not until 1912, after a flood of white settlers doubled the population, that New Mexico and Arizona were granted full statehood—last among the contiguous forty-eight.¹³⁶

The international boundary line that now divides the United States from Mexico thus obscures another set of international relations—between indigenous nations and settler colonial nations.¹³⁷ Saldaña-Portillo demonstrates that over the

130. Treaty of Guadalupe Hidalgo, *supra* note 123, art. IX. Laura Gómez notes that the original draft of the treaty provided that the annexed territory would be incorporated as one or more states “as soon as possible.” GÓMEZ, *supra* note 6, at 44. The US Senate voted to revise the language to assure that states would be incorporated “at the proper time (to be judged of by the Congress of the United States).” *Id.* (emphasis omitted).

131. GÓMEZ, *supra* note 6, at 47.

132. *See id.* at 43; *see also* Mark S. Weiner, *Teutonic Constitutionalism: The Role of Ethno-Juridical Discourse in the Spanish-American War*, in *FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION* 48 (Christina Duffy Burnett & Burke Marshall eds., 2001).

133. FRYMER, *supra* note 6, at 200.

134. *Id.*

135. KEVIN BRUYNEEL, *THE THIRD SPACE OF SOVEREIGNTY* 3–21 (2007); *see also* *Downes v. Bidwell*, 182 U.S. 244 (1901) (plurality opinion) (describing Puerto Rico’s status within the United States); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (referring to Indian tribes as “domestic dependent[s]”).

136. *See* FRYMER, *supra* note 6, at 204–05; *New Mexico and Arizona Statehood Anniversary (1912–2012)*, NAT’L ARCHIVES, <https://www.archives.gov/legislative/features/nm-az-statehood> [<https://perma.cc/WXH3-EP76>] (last visited Aug. 17, 2016).

137. As indigenous scholars remind us, notwithstanding the United States’s assertion of sovereignty over Indian tribes, all “Indian affairs” remain matters of international relations.

course of the nineteenth century, as the United States and Mexico recast themselves as postcolonial nations, each adopted divergent constructions of national identity—the United States “broadly exclusionary” and Mexico “broadly incorporative.”¹³⁸ But neither construction, she insists, can claim independence from the indigenous worlds they displaced. The United States’s exclusionary national form has been entirely shaped by indigenous dispossession and displacement. Mexico’s incorporative national form, *mestizaje*, relies on the appropriation of indigenous claims to territorial belonging, as well as the erasure of indigenous difference through assimilation and miscegenation.

Saldaña-Portillo calls our attention to an often-overlooked provision of the Treaty of Guadalupe Hidalgo to demonstrate that, despite the differences between their national cultures, the United States and Mexico seemed to share the view that establishing the nation state system within the western hemisphere was contingent on the elimination of “savage” Indians.¹³⁹ Within the more accommodating racial imaginary of Mexican nationalism, Indians were generally considered assimilable. But “savage” Indians, unruly and insubordinate, were distinguished from those who could be saved or civilized and, as such, represented the limits of national inclusion and assimilation.¹⁴⁰

In the Treaty of Guadalupe Hidalgo, the United States promised Mexico that it would defend both countries against the threat posed by “savage” Indians. Acknowledging that the savage tribes which had long raided settlements in northern Mexico would now “occup[y]” territory within the United States’s borders—“savages” were thus reduced to “occupants” of the land rather than citizens or subjects—the United States pledged to prevent and punish the tribes’ “incursions within the territory of Mexico” and to punish “in the same way, and with equal diligence and energy, as if the same incursions were mediated or committed within its own territory, against its own citizens.”¹⁴¹ What is particularly striking about the provision, Saldaña-Portillo notes, is its articulation of an equality and “solemn” bond between the United States and Mexico—until then, warring enemies—forged in their common defense against those savage tribes who refused to submit to the sovereignty of nation states.¹⁴² But, in the name of defending the emerging nation state system from savage uprising, the Treaty

138. SALDAÑA-PORTILLO, *supra* note 115, at 138.

139. *Id.* at 137–38.

140. *Id.*

141. Treaty of Guadalupe Hidalgo, *supra* note 123, art. XI.

142. *Id.*

provision would also allow the United States to extend its power, unilaterally, beyond its own borders and into Mexico.¹⁴³

C. The Border Is Not a Line

The United States has never been contained by its own borders. In a recent history tracing the movement of the frontier, Greg Grandin reminds us that the American Revolution was a war fought, among other reasons, to resist the imposition of a boundary—specifically, the Proclamation Line of 1763, drawn by the King of England to prevent settlers from further invading indigenous lands.¹⁴⁴ Immerwahr reminds us that the logo map, outlining the contiguous forty-eight states, represents the territorial limits of the country as they were for only three years. It was only three years after the Gadsden Purchase was ratified, filling out the logo map and dividing the Tohono O’odham tribe, that the United States began to annex small islands across the Caribbean and Pacific, entering a new phase of overseas imperialism.¹⁴⁵

Territorial occupation is only one form of imperialism. Since the late nineteenth century, the United States has been identified with various forms of neo-imperialism, marked by the unilateral assertion of economic and military power throughout the world.¹⁴⁶ But the southern border, materially and symbolically, is particularly bound up with the United States’s imperial relation to its neighbors in Latin America. The border is not a line, Ann Stoler reminds us, but a regime of “managed mobilities, mobilizing and immobilizing populations, dislocating and relocating peoples according to a set of changing rules and hierarchies.”¹⁴⁷ Laws governing migration from Mexico for the past century have been largely governed by the whims of the United States economy, rendering immigrants vulnerable to periodic cycles of absorption and expulsion.¹⁴⁸ Migration itself has been compelled not only by labor demands in the United States but also by mass displacements caused by US policies, including the

143. *Id.*

144. GRANDIN, *supra* note 17, at 17–21.

145. IMMERWAHR, *supra* note 17, at 47.

146. See generally DAVID HARVEY, *THE NEW IMPERIALISM* (2003); Alyosha Goldstein, *Toward a Genealogy of the U.S. Colonial Present*, in FORMATIONS OF UNITED STATES COLONIALISM 1 (Alyosha Goldstein ed., 2014); Paul A. Kramer, *The Geopolitics of Mobility: Immigration Policy and American Global Power in the Long Twentieth Century*, 123 AM. HIST. REV. 393 (2018).

147. Stoler, *supra* note 1, at 52; Ann Laura Stoler, *Interior Frontiers*, POL. CONCEPTS, <https://www.politicalconcepts.org/interior-frontiers-ann-laura-stoler> [https://perma.cc/XHR9-4S5D].

148. See, e.g., FRANCISCO E. BALDERRAMA & RAYMOND RODRÍGUEZ, *DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S*, at 99–109 (rev. ed. 2006).

imposition of free trade agreements, introduction of foreign aid, and geopolitical organization of the war on drugs.¹⁴⁹ Harsha Walia offers the enormously useful term “border imperialism” to refer to the ways in which the United States’s assertion of economic and military power stimulates and provokes the very migrations it seeks to prevent—particularly within the hemispheric context.¹⁵⁰

In his 2012 documentary *Harvest of Empire*, based on a book with the same title, Juan Gonzalez traces major migrations from the Caribbean and Central America—Puerto Rico, Cuba, Dominican Republic, El Salvador, Mexico, Guatemala, Nicaragua—to a continuous history of US economic policy and military intervention.¹⁵¹ In some instances, he traces the roots of migration to a history of formal occupation or domination, as from Puerto Rico and Cuba. Others—the mass exodus of women and children from El Salvador, the migration of indigenous Guatemalans, for instance—he traces to decades of informal and covert US intervention in Central America. Gonzalez’s documentary becomes almost tedious as it plods through atrocities in one country after another—though the bloody particulars vary from country to country, the expansion of US power remains constant. Over the course of the film, the grid of nation states that organizes the film begins to give way to another picture: one of a centuries-long hemispheric invasion.

III. WAYWARD MOVEMENTS

Waywardness: the avid longing for a world not ruled by master, man
or the police. The errant path taken by the leaderless swarm in search
of a place better than here.

The social poesis that sustains the dispossessed. . . .
[T]he unregulated movement of drifting and wandering . . .

149. See generally PETER ANDREAS, BORDER GAMES: POLICING THE U.S.–MEXICO DIVIDE (2d ed. 2009); DOUGLAS S. MASSEY, JORGE DURAND & NOLAN J. MALONE, BEYOND SMOKE AND MIRRORS: MEXICAN IMMIGRATION IN AN ERA OF ECONOMIC INTEGRATION (2003); RONALD L. MIZE & ALICIA C.S. SWORDS, CONSUMING MEXICAN LABOR: FROM THE BRACERO PROGRAM TO NAFTA (2011).

150. Walia writes that “border imperialism” consists of:
[F]our overlapping and concurrent structurings: first, the mass displacement of impoverished and colonized communities resulting from asymmetrical relations of global power, and the simultaneous securitization of the border against those migrants whom capitalism and empire have displaced; second, the criminalization of migration . . . third, the entrenchment of a racialized hierarchy of citizenship by arbitrating who legitimately constitutes the nation-state; and fourth, the state-mediated exploitation of migrant labor. . . .

WALIA, *supra* note 79, at 4.

151. HARVEST OF EMPIRE: THE UNTOLD STORY OF LATINOS IN AMERICA (Onyx Films 2012).

ambulatory possibility, interminable migrations . . .
 the everyday struggle to live free. The attempt to elude capture by
 never settling. . . . Waywardness is a practice of possibility at a time
 when all roads, except the ones created by *smashing out*, are
 foreclosed.¹⁵²

—Saidiya Hartman

In *The Undercommons*, social theorists Stefano Harney and Fred Moten imagine what they call a politics of “the surround,” a politics and form of collective life defined not by its opposition to but its independence from colonial conquest.¹⁵³ They open their discussion with a classic Hollywood image, one of the settler defending his encampment against the Indians who surround him. Hollywood, they write, had an “upside down” way of representing settler colonialism, “inverting . . . the role of aggressor so that colonialism is made to look like self-defense.”¹⁵⁴ The image itself, Harney and Moten point out, is not a false image: The settlers are, as a matter of fact, surrounded by natives. The image represents a certain truth. What is false, or unreal, is the settler’s understanding or construction of his relationship to the natives who surround him. It is the settler who threatens the native—not the other way around. It is the settler, rather than the native, who introduces danger to the scene, who invades. And it is his own act of invasion that occasions his terror, which he then uses to justify the catastrophic violence that he inflicts on others in the name of self-defense.

The goal of the surround, as Harney and Moten suggest, is not to oppose or even to resist the settler’s position—to oppose the settler’s position is to affirm it. Instead, the goal is to withdraw from the settler paradigm, to desert, to “destitute,” and to “delink[]” from the colonial episteme, and, in turn, to recover and reaffirm ways of being that have been devalued and disavowed by the settler.¹⁵⁵ In that sense, the politics of the surround might be described not as anticolonial but *ante-colonial*. It is characterized by its own existence—prior to and outside of the settlers’

152. SAIDIYA HARTMAN, WAYWARD LIVES, BEAUTIFUL EXPERIMENTS 227–28 (2019).

153. STEFANO HARNEY & FRED MOTEN, THE UNDERCOMMONS: FUGITIVE PLANNING & BLACK STUDY 17 (2013).

154. *Id.* (quoting Michael Parenti); see also ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 292 (2004).

155. Walter D. Mignolo, *Delinking: The Rhetoric of Modernity, the Logic of Coloniality and the Grammar of De-Coloniality*, 21 CULTURAL STUD. 449, 453 (2007); Jack Halberstam, *Strategy of Wildness*, CRITIQUE & PRAXIS 13/13 (Feb. 25, 2019), <http://blogs.law.columbia.edu/praxis1313/jack-halberstam-strategy-of-wildness> [<https://perma.cc/99CC-YB4B>]; see Corey Snelgrove, Rita Kaur Dhamoon & Jeff Corntassel, *Unsettling Settler Colonialism: The Discourse and Politics of Settlers, and Solidarity With Indigenous Nations*, 3 DECOLONIZATION: INDIGENITY, EDUC. & SOC’Y, 1, 2, 17–25 (2014).

encampment. “We’re already here, moving. We’ve been around. We’re more than politics, more than settled, more than democratic.”¹⁵⁶ This “*life* that surrounds” the encampment represents not a nostalgic return to innocence, but an already available alternative to the enclosure, violence, and regulatory imperatives of a paranoid empire, a government that has outrun its own mythologies and can no longer sustain itself, materially or ethically.¹⁵⁷ The surrounding natives present no actual threat of violence, but their presence is intolerable, nonetheless, because it disrupts the settler’s claim to innocence, universality, and original and exclusive sovereignty. Moreover, their presence exposes the limits of an existing framework of politics, as if to announce, “[w]e surround democracy’s false image in order to unsettle it.”¹⁵⁸

In the days leading up to the 2018 midterm elections, President Trump sought to drum up support for conservative candidates by promising to defend the nation against an immigrant “invasion.”¹⁵⁹ As a caravan of migrants, most of them Guatemalans and Hondurans seeking asylum, made its way up the continent, the President sent 5000 armed guards to the southern border and threatened that they might be ordered to shoot.¹⁶⁰ He referred to the caravan—which included women, children, and people in wheelchairs—as an “onslaught,” suggesting that it harbored “criminals,” “unknown Middle Easterners,” (terrorists, presumably) and “diseases.” On one occasion, he said, “These aren’t people. These are animals.”¹⁶¹ Political leaders had relatively little to say in response, apparently

156. HARNEY & MOTEN, *supra* note 153, at 19.

157. *Id.* at 17 (emphasis added). Critics have characterized migration as “acts of desertion from the regimes of subordination and subjection that migrants objectively repudiate through their mobility projects.” Nicholas De Genova, Glenda Garelli & Martina Tazzioli, *Autonomy of Asylum? The Autonomy of Migration Undoing the Refugee Crisis Script*, 117 S. ATL. Q. 239, 242 (2018) (emphasis omitted). Walter Dignolo describes the “de-colonial” not as a reversal of what he calls colonial modernity, but an “option[],” an always already available “delinking” from the institutional and epistemic forms of colonial modernity that continue to govern our present. Dignolo, *supra* note 155, at 497–98.

158. HARNEY & MOTEN, *supra* note 153, at 19.

159. Tanvi Misra, *On Weaponizing Migration*, CITYLAB (Nov. 2, 2018), <https://www.citylab.com/equity/2018/11/weaponizing-migration-caravan-trump-immigration/574012> [<https://perma.cc/UF6E-EKH4>].

160. *Id.*; see also *Trump: US Troops Will Consider Rocks Thrown at Them at Border as ‘Firearms,’* GUARDIAN (Nov. 1, 2018, 7:33 PM), <https://www.theguardian.com/us-news/video/2018/nov/01/trump-us-troops-will-consider-rocks-thrown-at-them-at-border-as-firearms-video> [<https://perma.cc/S2PX-9LEN>] (last visited Sept. 6, 2020).

161. See *Donald Trump and the “Onslaught” From Central America*, ECONOMIST (Oct. 27, 2018), <https://www.economist.com/the-americas/2018/10/27/donald-trump-and-the-onslaught-from-central-america> [<https://perma.cc/T32N-A8TK>]; Todd J. Gillman, *Trump Insists in State of the Union That Dangerous ‘Onslaught’ of Migrants Justifies Border Wall*, DALL. MORNING NEWS (Feb. 6, 2019, 10:50 PM), <https://www.dallasnews.com/news/politics/2019/02/05/trump-will-press-border-wall-state-union-no-emergency-declaration-yet>

heeding the advice of strategists who convinced Democratic candidates that they had nothing to gain by challenging his characterization of events or his assertion of state power.¹⁶²

But the arrival of the caravan, like any other encounter, confronts us with an ethical challenge. Emmanuel Levinas famously seized upon the physical, face-to-face encounter as a foundational scene of ethics.¹⁶³ The physical encounter with another confronts us with our mutual vulnerability—each is exposed to the threat of violence from the Other—and in turn, our inescapable relation and responsibility to one another. Postcolonial critics have cast doubt on Levinas's model, arguing that the scene of supposed mutuality staged in his face-to-face encounter tends to efface the real inequality that has historically conditioned the philosopher's encounter with the Other.¹⁶⁴ But at the very least, the physical presence of the Other has the potential to disrupt phantasmic constructions of the Other—as terrorist, invader, or other faceless abstraction.

In this vein, Guillermo Torres has urged white Americans to “[g]ive these migrants/immigrants a lingering look. A respectful look. See the face of Native

[<https://perma.cc/CFC8-K9NN>]; Josh Hafner, *On Politics Today: Trump Calls Undocumented People 'Animals,' Rhetoric With a Dark Past*, USA TODAY (May 16, 2018, 11:04 PM), <https://www.usatoday.com/story/news/politics/onpolitics/2018/05/16/trump-calls-undocumented-immigrants-animals-echoing/617762002> [<https://perma.cc/YMX3-W35G>]; *Identity Politics Are Stronger on the Right Than the Left*, ECONOMIST (Nov. 1, 2018), <https://www.economist.com/united-states/2018/11/01/identity-politics-are-stronger-on-the-right-than-the-left> [<https://perma.cc/3SND-A4MS>]; Bryan Mealer, *Call It a Miracle: How Strangers Got Two Caravan Families Across the Border*, GUARDIAN (Dec. 22, 2018, 4:00 AM), <https://www.theguardian.com/us-news/2018/dec/22/migrant-caravan-families-asylum-honduras-california> [<https://perma.cc/7SU9-95HH>]; Misra, *supra* note 159; Maegan Vazquez, *Trump Admits 'There's No Proof' of His 'Unknown Middle Easterners' Caravan Claim*, CNN (Oct. 23, 2018, 5:36 PM), <https://www.cnn.com/2018/10/23/politics/donald-trump-proof-unknown-middle-easterners-migrant-caravan/index.html> [<https://perma.cc/M6Z2-7NDA>].

162. See Roberto Suro, Opinion, *Democrats Are AWOL on Immigration. They Need to Speak Up*, WASH. POST (Nov. 1, 2018, 12:37 PM), https://www.washingtonpost.com/opinions/democrats-are-awol-on-immigration-they-need-to-speak-up/2018/11/01/8c35210c-dd3f-11e8-b3f0-62607289efee_story.html?utm_term=.43ead9b92335 [<https://perma.cc/5LQN-FEBC>]; see also Editorial, Opinion, *Common Sense on the Caravan*, N.Y. TIMES (Nov. 2, 2018), <https://www.nytimes.com/2018/11/02/opinion/caravan-border-trump-migrant.html> [<https://perma.cc/VSG7-TXJD>]; Lindsay M. Harris, *Seeking Asylum Isn't a Crime. Why Do Trump and Sessions Act Like It Is?*, WASH. POST (June 29, 2018, 7:06 AM), https://www.washingtonpost.com/outlook/seeking-asylum-isnt-a-crime-why-do-trump-and-sessions-act-like-it-is/2018/06/29/dc4cf136-7a7c-11e8-93cc-6d3beccdd7a3_story.html?utm_term=.b576cbe3798d [<https://perma.cc/L6RW-DYAM>].

163. EMMANUEL LÉVINAS, TOTALITY AND INFINITY: AN ESSAY ON EXTERIORITY (Alphonso Lingis, trans., Kluwer Acad. Publishers, 1991) (1969); see also ITAMAR MANN, HUMANITY AT SEA: MARITIME MIGRATION AND THE FOUNDATIONS OF INTERNATIONAL LAW (2016), at 12 & n.52.

164. See Simone Drichel, *Face to Face With the Other Other: Levinas Versus the Postcolonial*, 7 LEVINAS STUD. 21 (2013); Shu-mei Shih & Françoise Lionnet, *Introduction to THE CREOLIZATION OF THEORY* 1, 14 (Françoise Lionnet & Shu-mei Shih eds., 2011).

America.”¹⁶⁵ He suggests that white Americans who boast of their Indian ancestry, real or imagined, ought to welcome these migrants, as they would welcome their distant relatives. “Indian bloodlines do not stop at the present-day US–Mexico border,” he reminds us, and “there is little difference between a Navajo or Aztec, or Mayan and Opòn . . . Inka or Cherokee.”¹⁶⁶ These migrants, Torres wants us to recognize, “are not the comfortable, rich European settlers with fair skin and blue and green eyes, the ones who have raped Mexico and Latin America for riches and resources.”¹⁶⁷ They are overwhelmingly indigenous peoples whose ancestors lived on this continent before it was divided and have been resisting the ravages of colonial capitalism for five hundred years.

The Trump administration adopted its zero-tolerance policy in April 2018. Within a year seven children died in US custody.¹⁶⁸ If we were to give them a respectful look, we would recognize that all but one of them were indigenous—not simply Guatemalan, as is often reported. At least five of the children were Maya.¹⁶⁹ Greg Grandin has suggested that “if you wanted to do a history of 20th century displacement caused by political repression, caused by the expansion of capitalism, caused by extractive capitalism, caused by one after another failed Washington policy, you could do no better than to look at the history of the Q’uechi’ Maya.”¹⁷⁰

Mayan interests have never fully aligned with or been represented by the settler national government. “We are the majority in Guatemala,” Juanita Cabrera Lopez explains, “[Y]et we are the most abandoned and neglected by the state.”¹⁷¹ Cabrera Lopez, Executive Director of the International Mayan League and advocate for indigenous migrants, insists that when we remember the children

165. Guillermo Torres, Opinion, *If You Respect Native American Culture Then Help Actual Native Americans Trying to Cross Our Border*, DALL. MORNING NEWS (Jan. 12, 2018, 5:00 PM), <https://www.dallasnews.com/opinion/commentary/2018/01/12/if-you-respect-native-american-culture-then-help-actual-native-americans-trying-to-cross-our-border> [https://perma.cc/84V6-4BFG]; see also James Giago Davies, *Hispanic Immigrants Are Mostly Indians*, NATIVE SUN NEWS TODAY (July 10, 2019), <https://www.nativesunnews.today/articles/hispanic-immigrants-are-mostly-indians> [https://perma.cc/WYL8-B3V7].

166. Torres, *supra* note 165.

167. *Id.*

168. See Nicole Acevedo, *Why Are Migrant Children Dying in U.S. Custody?*, NBC NEWS (May 29, 2019, 1:44 PM), <https://www.nbcnews.com/news/latino/why-are-migrant-children-dying-u-s-custody-n1010316> [https://perma.cc/5EH6-RB5R].

169. International Mayan League/USA, *Statement by Juanita Cabrera Lopez at the Faith Vigil for Children Dying at the Border*, FACEBOOK (May 23, 2019), <https://www.facebook.com/mayanleague/posts/statement-by-juanita-cabrera-lopez-maya-mam-nation-executive-director-of-the-int/2178302498904637> [https://perma.cc/R3EM-SEY7].

170. Greg Grandin, *How U.S. Policies Punished Central Americans, Long Before Jakelin Caal Mauín’s Death*, DEMOCRACY NOW! (Dec. 19, 2018), https://www.democracynow.org/2018/12/19/greg_grandin_how_us_policies_punished, [https://perma.cc/WUK3-3PQX].

171. International Mayan League/USA, *supra* note 169.

whose lives were “stolen,” we not only say their names but recognize their indigenous nations: Claudia Patricia Gómez González, Maya Mam, twenty years old, from San Juan Ostuncalco, Quetzaltenango, died May 23, 2018; Jakelin Caal Maquín, Maya Q’eqchi’, seven years old, from San Antonio Secortez, of Raxruhá in Alta Verapaz, died December 7, 2018; Felipe Gómez Alonzo, Maya Chuj, eight years old, from Nentón, Huehuentenango, died December 24, 2018; Juan de León Gutiérrez, Maya Ch’orti’, sixteen years old, from Caserio Tizamarte in the village El Tesoro, Camotán, Chiquimula, died April 30, 2019; Wilmer Josué Ramírez Vásquez, whose indigenous nation has not yet been identified, two years old, from Chiquimula, of Ch’orti’ Maya territory, died May 14, 2019; Carlos Gregorio Hernández Vásquez, Maya Achi, sixteen years old, from San Jose el Rodeo, Cubulco Baja Verapaz, died May 20, 2019.¹⁷²

The caravan was not an invasion but a part of a broader movement for survival, undertaken not exclusively but overwhelmingly by indigenous Americans who have been uprooted, most recently, by genocide, land dispossession, and environmental disruption—forms of violence in which the United States has had a direct hand.¹⁷³ Since 2018, the number of children and families fleeing Guatemala for the US border has doubled; in the first half of 2019, US authorities apprehended more children from Guatemala than from Honduras and El Salvador combined.¹⁷⁴ Most of these children came from the western highlands of Guatemala, where indigenous communities have struggled to hold on to their land for more than a century.¹⁷⁵

Since Guatemala, Honduras, and El Salvador gained their independence from Spain in 1821, American entrepreneurs have taken advantage of political and economic insecurity in the region to secure their own interests, often with direct support from the US government. It was only a few years later that the United States, with its articulation of the Monroe Doctrine, claimed supreme authority over the western hemisphere.

Jakelin Caal Maquín was born in Alta Verapaz, where Maya Q’eqchi’ have struggled to remain since the arrival of Spanish settlers.¹⁷⁶ Since the mid-

172. *Id.*

173. *Id.*

174. See Jonathan Blitzer, *How Climate Change Is Fueling the U.S. Border Crisis*, NEW YORKER (Apr. 3, 2019), <https://www.newyorker.com/news/dispatch/how-climate-change-is-fuelling-the-us-border-crisis> [<https://perma.cc/DT6W-DCC4>]; see also Rachel Nolan, *A Translation Crisis at the Border*, NEW YORKER (Dec. 30, 2019), <https://www.newyorker.com/magazine/2020/01/06/a-translation-crisis-at-the-border> [<https://perma.cc/C97R-U6YR>].

175. See Blitzer, *supra* note 174.

176. See Greg Grandin & Elizabeth Oglesby, *Who Killed Jakelin Caal Maquín at the US Border?*, NATION (Dec. 17, 2018), <https://www.thenation.com/article/archive/guatemala-refugee-crisis-jakelin-caal-maquin> [<https://perma.cc/LG8L-MELH>].

nineteenth century, Maya Q'eqchi' have been displaced by waves of land speculators, *ladino* coffee planters, and German and American entrepreneurs.¹⁷⁷ Q'eqchi' who resisted were routinely killed or exiled.¹⁷⁸ Local governments sided with the owners of the emerging plantation economy, facilitating the judicial and extrajudicial transfer of land from peasants to planters while establishing bureaucratic and punitive regimes designed to ensure planters a cheap and captive supply of peasant laborers. In 1888, ninety-seven Alta Verapaz Maya farmers owned farms comparable in size to plantations; by 1949, none did.¹⁷⁹

The Q'eqchi', alongside other indigenous communities that had been resisting exploitation and repression, stood to benefit from ambitious land reform projects initiated by President Jacobo Árbenz in 1952. But within two years, the democratically-elected president was ousted by a military coup orchestrated by the CIA. The United Fruit Company, whose vast interests in Guatemala would have been affected by the proposed land reform, lobbied Congress to intervene. Rebellion followed, then further repression. Greg Grandin and Elizabeth Oglesby observe that the conflict took a dark turn after 1965, with the arrival of US security advisor John P. Longan. Longan, who had earned a reputation for violence as an agent of the US Border Patrol, came to Guatemala to train an elite death squad. Within three months, it had kidnapped, tortured, and assassinated at least thirty people, unleashing a terrifying brutality in the region.¹⁸⁰

The litany of offenses committed by the United States in Guatemala—and throughout Central America—is by now familiar, but it is worth emphasizing that what the United States often refers to as a civil war was primarily a US-backed war against indigenous peoples resisting dispossession, exploitation, and political repression. Grandin, a historian of the war, writes that rural villagers “fought to establish land rights, end forced labor, and assure the ability simply to survive.”¹⁸¹ Before the end of the conflict, the US-backed military in Guatemala had murdered an estimated 200,000 people.¹⁸² During the most brutal final years of the conflict, over 100,000 Mayas were killed with unfathomable cruelty. A 1996 peace agreement brought an end to the extreme violence but did nothing to redistribute lands, as had been promised, or to prevent further indigenous dispossession.

177. See GREG GRANDIN, *THE LAST COLONIAL MASSACRE: LATIN AMERICA IN THE COLD WAR* 24, 140 (updated ed. 2011).

178. Grandin & Oglesby, *supra* note 176.

179. See GRANDIN, *supra* note 177, at 26.

180. Greg Grandin & Elizabeth Oglesby, *Washington Trained Guatemala's Killers for Decades*, NATION (Jan. 25, 2019), <https://www.thenation.com/article/archive/border-patrol-guatemala-dictatorship> [<https://perma.cc/PT2F-DY46>].

181. GRANDIN, *supra* note 177, at 139.

182. *Id.* at 74.

Instead, at the advice of the United States and international development groups, the Guatemalan government opened large swaths of the country to foreign investments in mining and damming projects, the production of African palm oil, and hardwood timbering—forms of extractive capitalism that further threaten indigenous survival.¹⁸³

Indigenous communities, in turn, have resisted their imposition. In Huehuetenango, where Felipe Gómez Alonzo lived, local people resisted the building of the Northern Transversal Highway, a project initiated before the war to open northern Guatemala to resource extraction. Local people resisted the project, not because they oppose the building of roads, as Grandin and Oglesby explain, “but because the Israeli company contracted to build it threatened to cut down . . . a protected forest next to the community’s only supply of fresh drinking water.”¹⁸⁴ A few miles away, indigenous activists have been imprisoned and murdered for defending lands against extractive capitalism. In 2018, Guatemala experienced the sharpest rise yet in the number of environmental activists murdered, making it the deadliest country for environmental activists per capita.¹⁸⁵ Most of those killed were leaders of the Campesino Development Committee (CODECA), an indigenous-led social movement advocating for land redistribution, energy nationalization, and a plurinational state.¹⁸⁶ Within a day of the worst killings, Felipe and his father concluded their two thousand mile journey to the United States border to request asylum. He died in US custody six days later.¹⁸⁷

The arrival of the migrant unsettles the very mapping of reality on which our border regime is premised, challenging the colonial divisions that have distanced the United States from those affected by its interventions. The role of the advocate, those of us who find ourselves on this side of the border, within the settler encampment, is to remap and rename the crisis. It is also to recognize and receive the migrant Other, not just as an equal, but as a fully realized political subject, one who carries in her movement the capacity to renew our democratic vision and to

183. See Grandin & Oglesby, *supra* note 176; John Vidal, *How Guatemala Is Sliding Into Chaos in the Fight for Land and Water*, GUARDIAN (Aug. 19, 2018, 4:00 AM), <https://www.theguardian.com/world/2018/aug/19/guatemala-fight-for-land-water-defenders-lmining-logging-eviction> [https://perma.cc/6BBS-4B24].

184. Grandin & Oglesby, *supra* note 180.

185. GLOB. WITNESS, ENEMIES OF THE STATE? HOW GOVERNMENTS AND BUSINESS SILENCE LAND AND ENVIRONMENTAL DEFENDERS 23 (2019); Sandra Cuffe, *Land, Environmental Activist Killings Surge in Guatemala*, AL JAZEERA (July 29, 2019), <https://www.aljazeera.com/news/2019/07/land-environmental-activist-killings-surge-guatemala-report-190729202602098.html> [https://perma.cc/K3VA-HNML].

186. See Cuffe, *supra* note 185; Vidal, *supra* note 183.

187. See Grandin & Oglesby, *supra* note 180.

redefine the conditions of our shared existence. Immigration restrictionists, not surprisingly, recognize the political subjectivity of border crossers only in terms of criminality; their unauthorized movement renders them “illegal.”

But those who favor a more open border policy also participate in the epistemic erasure of migrant agency. Economistic approaches to relaxing border restrictions regard migrants as inert objects, moved by the push and pull of invisible hands, and value them as units of human capital.¹⁸⁸ Humanitarian approaches more readily identify the innocent child, the caged body, the muted corpse as the object of sympathy and human rights, but not the freedom seeker.¹⁸⁹ Liberal arguments sounding in the language of fundamental rights tend to reinscribe not just the universalist pretensions of political liberalism, but also its individualist assumptions, the very constructions of self-sovereignty that underwrite colonial capitalism.

The migrant caravan, a political movement with plainly performative dimensions, resists this conventional effacing. In her writing about the mass protests that have transformed the political landscape in recent years, Judith Butler observes that mass demonstrations have the power to call into question the character of our democratic orders.¹⁹⁰ As embodied actions, mass demonstrations call out the inadequacy of democratic discourse and deliberation, the language and arena within which political battles are thought to be fairly waged. As collective actions, mass demonstrations call into question the representativeness of our democratic institutions, confronting them with an alternative expression of popular will and the prospect for real self-determination. In this sense, the arrival of the migrant caravan challenges American democracy by confronting it with its constitutive exclusion, calling into question how the American people defines itself. Jacques Rancière has described democratic practice as precisely this—as “the inscription of the part of those who have no part.”¹⁹¹ The Q’eqchi’ farmer may never hold the status of citizen, she may be denied fundamental rights and formal recognition, but with her arrival, she challenges these circumscriptions to insist that she is a part of our political community all the same. She is someone in relation.

188. See, e.g., BRYAN KAPLAN & ZACH WEINERSMITH, OPEN BORDERS: THE SCIENCE AND ETHICS OF IMMIGRATION 27–54 (2019).

189. For critiques of humanitarian discourse, see generally DIDIER FASSIN, HUMANITARIAN REASON (Rachel Gomme trans., 2012); MIRIAM TICKTIN, CASUALTIES OF CARE: IMMIGRATION AND THE POLITICS OF HUMANITARIANISM IN FRANCE (2011).

190. JUDITH BUTLER, NOTES TOWARD A PERFORMATIVE THEORY OF ASSEMBLY 2 (2015).

191. JACQUES RANCIÈRE, DISSENSUS: ON POLITICS AND AESTHETICS 66 (Steven Corcoran, ed. and trans.) (2010).

The movement began on October 12, 2018, the 526th anniversary of Christopher Columbus's arrival in the Americas, when roughly a thousand men, women, and children convened at the bus terminal of San Pedro Sula, Honduras, one of the most violent cities in the world, in one of the poorest countries on the continent.¹⁹² Because they refused to live under the threat of gang violence, Roberto Saviano called the migrant caravan "the biggest anti-mafia march the world has ever seen."¹⁹³ Recognizing that border controls allow the state to regulate and maintain wage differentials—often consigning migrants to labor for US employers and consumers for lower wages and with fewer protections—Massimiliano Tomba affirms the unauthorized movement of migrant laborers as a form of insurgency.¹⁹⁴ Unauthorized labor migration, he recognizes as a form of "workers' resistance to control and . . . of self determination of the wage against capital."¹⁹⁵

The caravan, like unauthorized migration generally, in this view, represents not just a flight from repression but a movement against it, a refusal to be confined by borders, especially when those borders consign people to conditions of violence and poverty that render life unlivable. By traveling together, the migrants of the caravan shielded one another from rape and robbery, while avoiding coyotes' profiting from others' displacement by charging thousands of dollars, and to whom the migrants might otherwise become perilously indebted for life.¹⁹⁶ Engaged in collective acts of waymaking, the migrants of the caravan rehearsed forms of citizenship not reducible to legal status or entitlement.¹⁹⁷

While the caravan presented itself as both public performance and concerted action, individuals who make the journey in stealth and solitude are also part of a

192. Roberto Saviano, *The Migrant Caravan: Made in USA*, N.Y. REV. (Mar. 7, 2019), <https://www.nybooks.com/articles/2019/03/07/migrant-caravan-made-in-usa> [https://perma.cc/DWT2-NRZ8]; see also Kate Linthicum, *Homicides Have Fallen Dramatically in Honduras. So Why Are People Still Fleeing?*, L.A. TIMES (Dec. 14, 2018, 3:00 AM), <https://www.latimes.com/world/mexico-americas/la-fg-honduras-violence-20181214-story.html> [https://perma.cc/NUJ9-ENU8].

193. Saviano, *supra* note 192. Saviano, an Italian journalist, is best known for endangering his own life by exposing the inner workings of the Camorra, an organized crime syndicate which has long terrorized the people of Naples.

194. Masimiliano Tomba, *Differentials of Surplus-Value in the Contemporary Forms of Exploitation*, 12 THE COMMONER 23, 25, 35 (2007).

195. *Id.* at 35.

196. *Id.*

197. See, e.g., John Doering-White, *Evidencing Violence and Care Along the Central American Trail Through Mexico*, 92 SOC. SERV. REV. 432 (2018); Jesús A. Rodríguez, *How the Migrant Caravan Built Its Own Democracy*, POLITICO MAG. (Dec. 12 2018), <https://www.politico.com/magazine/story/2018/12/12/migrant-caravan-tijuana-border-government-222856> [https://perma.cc/BMJ8-6JZB].

larger political movement. In *Wayward Lives, Beautiful Experiments*, Saidiya Hartman gathers the scattered movements of Black women and girls who participated in the Great Migration of the early twentieth century into what she identifies as a political collectivity.¹⁹⁸ Like “illegal” immigrants, Black women and girls engaged in practices of freedom appear in legal records only as criminals, delinquents, “wayward” subjects of regulation and reform.¹⁹⁹ The incorrigible women who appear in the official record only as threats to the social order, Hartman recuperates as revolutionary subjects.²⁰⁰ To recognize such movements as revolutionary movements is not to romanticize the migration of those forced to flee their homes—to be clear, the recognition of an ante-colonial freedom of movement necessarily includes the freedom to stay. Instead, it is to affirm the political subjectivity of those who resist regulation and enclosure and to reclaim a shared capacity to imagine our way beyond the enclosures of the present.

An indigenous uprising that is also a transnational movement, the caravan gestures toward a political community that extends beyond the nation state. It is, at once, an act of rebellion—an autonomous movement, made independently and in open defiance of nation state bordering practices—and an insistence on relationality. By walking together, the migrants of the caravan close the imagined social and ethical distance among peoples heightened by national borders. The unreal character of the world map begins to give way to a submerged political economy and the possibility of alternative forms of coexistence.

CONCLUSION

When lawmakers and philosophers ask, *who should be allowed to cross borders, under what circumstances, on what moral ground*, they often leave unexamined the historical formation of the border itself. National borders are taken for granted as the backdrop against which normative debates unfold. Political philosophers present very different arguments for maintaining or loosening border restrictions, but the colonial processes that have given rise to national borders seldom enter the frame of normative debate.²⁰¹ In this Article, I

198. HARTMAN, *supra* note 152.

199. *Id.* at 227–28.

200. Similarly, Nicholas De Genova compares the “incorrigibility” of unauthorized migrants, who are undocumented and unafraid—shameless in claiming their right to remain—to queer activists’ affirmation of both presence and belonging, as announced, for instance, in the rallying cry, “we’re here, we’re queer, get used to it!” Nicholas De Genova, *The Incorrigible Subject: Mobilizing a Critical Geography of (Latin) America Through the Autonomy of Migration*, 16 J. LATIN AM. GEOGRAPHY 17, 26 (2017).

201. See, e.g., JOSEPH H. CARENS, *THE ETHICS OF IMMIGRATION* (2013); MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (1983); Arash Abizadeh, *Democractic*

have sought to bring the border itself into the frame of normative consideration by exploring not only the colonial dimension of national borders, but also the ways in which national borders themselves circumscribe and constrain the liberal imaginary. Unsettling the framework within which we conventionally address questions of migration is essential to expanding the political imaginary. If unilateralism is the defining feature of both imperialism and immigration restriction, then our task is to advance an alternative ethic of relationality, reciprocity, and interdependence.

For more than a decade, the political imaginary has been largely constrained by the terms of comprehensive immigration reform, proposed legislation that has largely consisted of three facets: increased border and interior enforcement (to satisfy restrictionists), regularization of “deserving” immigrants (represented by Dreamers and DACA recipients), and “rationalization” of future streams of migration, which has largely meant restricting flows of family-based migration to create more opportunities for high-skilled workers, the so-called best and the brightest.²⁰²

By acceding to this consensus approach to immigration reform, liberals leave dominant settler nationalist frames unchallenged. They leave unchallenged, for instance, a national security frame, which has long been used to justify all sorts of illiberal policies, including explicitly discriminatory immigration policies since the late nineteenth century. And they leave unchallenged a framework of economic nationalism, which advances the short-term interests of the United States, often by exploiting value from other peoples and places, taking advantage of the material asymmetries it produces. The one point of general agreement between conservatives and liberals—the adoption of a merit-based system which favors the selection of high-skilled workers over family members and lottery winners—reflects the triumph of neoliberal rationality which extends the possessive individualism of colonial capitalism into every area of life, undermining alternative bases from which we might build alternative futures—a respect for human life, or commitment to collective survival, for instance.

The gratuitous cruelty of the Trump administration’s immigration policies has reanimated a certain humanitarian impulse among liberal Americans who were shocked by images of children separated from parents, locked in cages, or found face down at the water’s edge. While the circulation of similar images in Europe has conjured shared memories of displacement in the wake of world war

Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders, 36 POL. THEORY 37 (2008).

202. See, e.g., Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013).

and proud identification with postwar commitments to human rights and asylum, most Americans have little sense of obligation or responsibility—historical or otherwise—toward people crossing the United States’s borders. But in both contexts, the subject of rights who emerges from these images, the object of sympathy, is an abject body, sloughed of any cultural specificity or political history.²⁰³

Children seem to be favored objects of sympathy, not only because they can be characterized as innocent, thereby defying standard ascriptions of migrant criminality or wrongdoing, but because they can be denied any form of political agency or motivation. Children appear sympathetic not because they are engaged in what we might recognize as a political movement, an act of dissent, an insistence on survival, as I suggested in the previous Part, but precisely because their extreme vulnerability renders them almost perfectly apolitical. The implicit appeal these images make to the sympathetic viewer is that these parents and children deserve our care because they are just like us, they have families as we have families, their children scream as ours scream. Obscured by this sentimental appeal to an abstract common humanity is the role that our own immigration policies, among other state practices, play in differentiating among us, often with devastating consequences.

While the election of Donald Trump stunned many white Americans, others were far less surprised, recognizing his victory to be entirely continuous with forms of patriarchal white supremacy that remain foundational to the settler nation.²⁰⁴ Notwithstanding the fury they evoked, Trump’s immigration policies were not entirely unprecedented. As plenty of critics have observed, the Obama administration opened family detention centers and deported a staggering number of immigrants. But to suggest that the Trump administration’s policies were unexceptional is not to excuse, trivialize, or normalize their calculated meanness or catastrophic effects. Instead, it is to challenge ourselves to critically examine why those of us who were scandalized by the detention of families under the Trump administration were inured to those same practices when they were more quietly undertaken by his more graceful predecessor. To see the Trump administration’s immigration agenda as a radical departure from the recent past is to disavow the structures of racial democracy and settler nationalism that have long shaped US immigration law.

203. See TICKTIN, *supra* note 189, at 1–28.

204. See Jonathan Rosa & Yarimar Bonilla, *Deprovincializing Trump, Decolonizing Diversity, and Unsettling Anthropology*, 44 AM. ETHNOLOGIST 201, 201–02 (2017).

In this sense, the critical response to family separation and detention policies issued by indigenous activists and thinkers is instructive, offering an important corrective to Trump exceptionalism by resituating his administration's policies within a widened framework of settler nationalism. For instance, in July of 2019, after the government announced plans to open a child detention center at Fort Sill, a military base in Oklahoma, indigenous peoples led a protest to block access at the site.²⁰⁵ Recalling histories of indigenous confinement and displacement, one critic explained, "We, as Indigenous peoples, know the pain and generational trauma that comes from Fort Sill and camps just like it."²⁰⁶

Fort Sill was opened as a military base in 1869 to house US soldiers suppressing Indians resisting colonization.²⁰⁷ In 1894, it was used to imprison nearly 400 Apache men, women, and children, including the Apache leader, Geronimo, who died there in 1909.²⁰⁸ During World War II, the base was used to intern about 350 Japanese Americans. In July of 2019, survivors of internment joined in protesting the reopening of Fort Sill, invoking their own experience of suffering the legacies of forced removal and confinement. Satsuki Ina, a seventy-five-year-old scholar, filmmaker, and co-director of *Tsuru for Solidarity* stood in front of Ft. Sill holding an image of herself as a child in detention. She explained, "[w]e are here today to protest the repetition of history."²⁰⁹

Actions like these confront the settler nation with repressed histories of violence while shoring up common grievances across lines of difference. In 2017, for instance, indigenous leaders and undocumented immigrants convened a day-long meeting devoted to "cross-cultural remembrance and solidarity."²¹⁰ Indigenous leaders expressed solidarity with undocumented youth by recalling their own history of being denied access to citizenship and denied travel without documentation. Nicholas Courtney, Makah and Modoc Nations, recognized that the communities' shared experience is "tied within the same deep colonial roots of

205. *Indigenous Peoples Led Shutdown at Ft. Sill Immigration Detention Center*, INDIGENOUS ENV'T NETWORK, <https://www.ienearth.org/indigenous-peoples-led-shutdown-at-ft-sill-immigration-detention-center> [https://perma.cc/ZFU9-X4K2].

206. *Id.*

207. Gillian Brockell, *Geronimo and the Japanese Were Imprisoned There. Now Fort Sill Will Hold Migrant Children Again, Sparking Protests*, WASH. POST (June 23, 2019, 7:40 AM), <https://www.washingtonpost.com/history/2019/06/12/geronimo-japanese-were-imprisoned-there-now-fort-sill-will-hold-migrant-children-again> [https://perma.cc/G7ML-8QBJ].

208. *Id.*

209. *Id.* See also TSURU FOR SOLIDARITY, <https://tsuruforsolidarity.org> [https://perma.cc/4JMC-NEMJ] (last visited Apr. 16, 2021).

210. Isha Aran, *How Native Americans and Immigrants Are Coming Together to Define the Future of Resistance*, SPLINTER (Sept. 20, 2017, 2:32 PM), <https://splinternews.com/how-native-americans-and-immigrants-are-coming-together-1818586478> [https://perma.cc/9SSD-4K25].

‘get brown people out of sight, out of mind.’”²¹¹ Recognizing that the repetition of history and the reproduction of colonial structures has been sustained by national amnesia, organizers of the meeting identified memory work as both an essential corrective to national self-understanding and a critical resource for reimagining the terms of coexistence, a “collective beginning.”²¹²

Creating the conditions necessary for imagining our way beyond settler formations entails an unsettling of the inclusionary framework of liberal nationalism, constructions that tend to reinscribe the primacy of white settlers while minoritizing others. The activism of indigenous peoples protesting the Muslim ban is illustrative. After the president issued an executive order banning travel from several Muslim-majority countries, indigenous activists joined hundreds of others in protest, but they also used the occasion to reassert their priority and to challenge settler constructions of national belonging. At the Los Angeles airport, white Americans sang the national anthem and renditions of *This Land Is Your Land*—songs intended to appeal to a sense of patriotism and multicultural inclusivity—the Tongva, the original inhabitants of what is now Los Angeles, played drums as they performed a traditional welcome ceremony.²¹³ Nick Estes and Melanie Yazzie, indigenous activists and scholars, marched behind the Tongva, holding placards that read “No Ban on Stolen Land,” and “Refugees Welcome on Native Land,” at once inviting identification and solidarity among the nation’s outsiders and reasserting sovereignty over land and questions of migration.²¹⁴

These gestures are not uncomplicated. They are provocative, among other reasons, because they symbolically usurp the United States of its exclusive authority to determine, as Estes writes, “who belongs or who doesn’t to a settler

211. *Id.* (appearing in the video player at the bottom of this page, at 0:08–0:14).

212. Press Release, Nat’l Cong. of Am. Indians & Define Am., In Historic Meeting Native Nation and Immigrant Leaders Forge New Alliances (Sept. 18, 2017), http://www.ncai.org/news/091817_Press_Release_Native_Nation_and_Immigrant_Leaders_Forge_New_Alliances.pdf [https://perma.cc/UBN7-GUE5]. For recent essays exploring the relationship between colonialism and legal memory, see Seth Davis, *American Colonialism and Constitutional Redemption*, 105 CALIF. L. REV. 1751 (2017); Munshi, “*The Courts of the Conqueror*,” *supra* note 86; Aziz Rana, *Colonialism and Constitutional Memory*, 5 U.C. IRVINE L. REV. 263 (2015).

213. Nick Estes (@nick_w_estes), TWITTER (July 14, 2019, 12:53 PM), https://twitter.com/nick_w_estes/status/1150493541811965954 [https://perma.cc/QX4A-GLLS].

214. Elizabeth Ellis, *The Border(s) Crossed Us Too: The Intersections of Native American and Immigrant Fights for Justice*, HEMISPHERIC INST. (2018), <https://hemisphericinstitute.org/en/emisferica-14-1-expulsion/14-1-essays/the-border-s-crossed-us-too-the-intersections-of-native-american-and-immigrant-fights-for-justice-2.html> [https://perma.cc/6DX3-XFLA].

nation,” while rejecting the settler nation’s criteria for inclusion.²¹⁵ The authority to welcome is articulated not strictly in terms of temporal priority—who was here first—but in terms of a capacity to rehabilitate the conditions of our shared coexistence. Estes concluded his essay by describing a scene of welcome:

[T]he Tongva drummers surrounded a Muslim family, singing them an honor song. The singers welcomed them to their homelands. Tears streamed down a young girl’s face. She wore a hijab. Moments earlier she appeared frightened. Now at peace. This is what it means to go back to where you came from. Nothing about the complex human condition of shared grief, love, and solidarity is alien to that place of freedom. Call it home.”²¹⁶

215. Nick Estes, *Go Back to Where You Came From*, OPENSPACE (Nov. 4, 2019), <https://openspace.sfmoma.org/2019/11/go-back-to-where-you-came-from> [<https://perma.cc/H2M2-7FKX>].

216. *Id.*