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Unsettling Immigration Laws: Settler Colonialism and the U.S. Immigration Legal System

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UNSETTLING IMMIGRATION LAWS: SETTLER COLONIALISM AND THE U.S. IMMIGRATION LEGAL SYSTEM

*Monika Batra Kashyap**

ABSTRACT

This Article flows from the premise that the United States is a present-day settler colonial society whose laws and policies function to support an ongoing structure of invasion called “settler colonialism,” which operates through the processes of Indigenous elimination and the subordination of racialized outsiders. At a time when U.S. immigration laws continue to be used to oppress, exclude, subordinate, racialize, and dehumanize, this Article seeks to broaden the understanding of the U.S. immigration system using a settler colonialism lens. The Article analyzes contemporary U.S. immigration laws and policies such as the National Security Entry-Exit Registration System (NSEERS) and Trump’s immigration policies within a settler colonialism framework in order to locate the U.S. immigration system at the heart of settler colonialism’s ongoing project of elimination and subordination. The Article showcases solidarity movements between Indigenous and immigrant communities that protest the enduring structures of settler colonialism and engender transformative visions that defy the boundaries of the U.S. immigration legal system. Finally, the Article

* Visiting Assistant Professor at Seattle University School of Law, Ronald A. Peterson Law Clinic. J.D., University of California Berkeley School of Law, 2001. I acknowledge that this Article was written on unceded, occupied, and seized Coast Salish territories of the Dkhw’Duw’Absh People, whose historical relationships with the land continue to this day. As a non-Indigenous immigrant of color, I understand my complicity in, and responsibility to challenge, settler colonialism, and I support struggles for Indigenous self-determination. I wish to thank Amna Akbar, Dean Spade, and Thalia González for tremendously helpful feedback on earlier drafts; Brittney Adams and Alex Askerov for excellent research assistance; and the editors at *Fordham Urban Law Journal* for their thoughtful editing. This Article is informed by my experiences as an immigration attorney in New York City in the immediate aftermath of 9/11.

offers pedagogies that disrupt traditional immigration law pedagogy and that are designed to increase awareness of settler colonialism in the immigration law classroom.

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INTRODUCTION

The United States sits on invaded Indigenous¹ lands. European settler colonizers invaded Indigenous lands with the intent to permanently settle and form new ethnic and religious sovereign

1. I use the term “Indigenous” throughout this Article, while recognizing that the term is a problematic settler colonial construct that collectivizes distinct populations who have distinct experiences under imperialism. See LINDA TUHIWAI SMITH, *DECOLONIZING METHODOLOGIES: RESEARCH AND INDIGENOUS PEOPLES* 6–7 (1999). I capitalize “Indigenous” as a sign of respect and to extend the same treatment as other identity-based descriptors such as English, French, and Spanish.

communities on the newly acquired land.² These settler colonizers have continued to occupy invaded Indigenous lands by establishing an ongoing complex social structure of invasion called “settler colonialism.”³ This structure of invasion functions through the ongoing processes of Indigenous elimination and subordination of racialized outsiders⁴ — as well as through the creation and enforcement of laws that maintain the ongoing invasion.⁵ U.S. settler colonialism’s invasion may have started in the past, but it is a continuing structure of elimination and subordination that is happening now.⁶

On February 15, 2019, Trump declared a national emergency in order to secure funding for a border wall to confront the “national security crisis” created by what he calls an “invasion” of immigrants at the southern U.S.-Mexico border.⁷ The border wall is part of Executive Order 13767, Trump’s “Border Wall” executive order,⁸ which not only calls for the immediate construction of a costly physical wall along the U.S.-Mexico border, but also institutes new immigration policies that criminalize and dehumanize immigrants. For example, the order increases immigrant detentions, expands immigrant detention capacity, increases the power of state and local

2. Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RES. 388, 388 (2006) (making the seminal point that “settler colonizers come to stay”); see also JÜRGEN OSTERHAMMEL, COLONIALISM: A THEORETICAL OVERVIEW 11, 15 (2005) (distinguishing settler colonialism from “classic colonialism” or “franchise colonialism” where the aim is to take advantage of resources that will benefit the *metropole*, or mother country, and where the colonists do not intend to settle permanently).

3. Wolfe, *supra* note 2, at 390 (referring to settler colonialism as a complex social structure and that continues through time, rather than an event of the past).

4. I use the term “racialized outsider” throughout this Article to describe people of color who are not indigenous to the territories within the settler colonial boundaries of the United States.

5. See *infra* Part I (setting forth the foundational processes of U.S. settler colonialism).

6. LORENZO VERACINI, THE SETTLER COLONIAL PRESENT 9 (2015) (“[S]ettler colonialism forever proclaims its passing, but it never goes away.”).

7. Peter Baker, *Trump Declares a National Emergency and Provokes a Constitutional Clash*, N.Y. TIMES (Feb. 15, 2019), <https://www.nytimes.com/2019/02/15/us/politics/national-emergency-trump.html> [https://perma.cc/L877-2UMP] (quoting Trump as remarking, “We’re going to confront the national security crisis on our southern border, and we’re going to do it one way or the other . . . It’s an invasion . . . We have an invasion of drugs and criminals coming into our country.”).

8. Exec. Order No. 13,767, 82 Fed. Reg. 8,793 (Jan. 15, 2017) [hereinafter Border Wall Executive Order]. The official title of the executive order is: “Border Security and Immigration Enforcement Improvements,” but is commonly referred to as the “Border Wall” executive order.

enforcement of immigration laws, limits humanitarian protection to asylum seekers, increases criminal prosecutions at the border, and drastically increases expedited deportations.⁹

It will cost over 8 billion dollars to build the wall Trump hopes will stop the “invasion” of immigrants at the U.S.-Mexico border¹⁰ – the very border that was created when the United States invaded, occupied, and annexed half of Mexico’s territory.¹¹ Indeed, almost all of Texas, New Mexico, Arizona, California, Nevada, and Utah, as well as portions of Colorado, Kansas, and Oklahoma, were part of Mexico until the Mexican-American War (1846–1848).¹²

The 2,000-mile border created by U.S. invasion and conquest of northern Mexico not only represents a manifestation of the “geographical violence of imperialism,”¹³ but also bisects Tohono O’odham Nation lands which stretch across southern Arizona and northern Mexico.¹⁴ Specifically, sixty-two miles of the U.S.-Mexico border run through Tohono O’odham Nation lands.¹⁵ Members of the

9. See *id.* at Sec. 2; see also GREG CHEN & ROYCE MURRAY, AM. IMMIGRATION LAWYERS ASSOC., SUMMARY AND ANALYSIS OF EXECUTIVE ORDER “BORDER SECURITY AND IMMIGRATION ENFORCEMENT IMPROVEMENTS” (Jan. 25, 2017), <https://www.aila.org/infonet/analysis-trump-executive-order-on-border-security> [<https://perma.cc/SQH6-BDLJ>] (discussing the new immigration policies instituted in the order, including those that would expand detentions and increase deportations).

10. Damian Paletta et al., *Trump Declares National Emergency on Southern Border in Bid to Build Wall*, WASH. POST (Feb. 15, 2019), https://www.washingtonpost.com/politics/trumps-border-emergency-the-president-plans-a-10-am-announcement-in-the-rose-garden/2019/02/15/f0310e62-3110-11e9-86ab-5d02109aeb01_story.html?utm_term=.83db11d6e0bd [<https://perma.cc/VMG9-9MGV>] (“White House officials plan to use \$8 billion to build new fencing that they believe will block or discourage a wide range of immigrants.”); see also *infra* Section I.C. (discussing similar immigration policies designed to respond to perceived “national security threats”).

11. See Gerald P. López, *Don’t We Like Them Illegal?*, 45 U.C. DAVIS L. REV. 1711, 1737 (2012) (“In the 1846–1848 War, the U.S. crushed Mexico, took possession of the new Southwest . . . and established a new 2,000-plus mile boundary between itself and its defeated southern neighbor.”).

12. See SAMUEL P. HUNTINGTON, WHO ARE WE? THE CHALLENGES TO AMERICA’S NATIONAL IDENTITY 229 (2005).

13. Edward Said, *Yeats and Decolonization*, in NATIONALISM, COLONIALISM, AND LITERATURE 77 (1990) (noting that borders are part of the “geographical violence of imperialism”).

14. In 1853, the ancestral lands of the Tohono O’odham Nation were divided between the United States and Mexico via the Gadsden Purchase. See Gadsden Treaty, U.S.-Mex., art. I, Dec. 30, 1853, 10 Stat. 1031.

15. See 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/F37SC4DU>].

Tohono O’odham Nation live on both sides of the U.S.-Mexico border and have traveled throughout their lands to visit family, as well as to participate in cultural and religious ceremonies and traditions.¹⁶ By blocking the ability of Tohono O’odham Nation members to travel throughout their ancestral lands, Trump’s proposed border wall is an affront to Indigenous sovereignty and a threat to the future existence of Tohono O’odham Nation members: it closes off vital traditional passages and ancestral connections.¹⁷

Just weeks after Trump issued his “Border Wall” executive order, the Tohono O’odham Nation Legislative Council passed a resolution in opposition to Trump’s border wall.¹⁸ The resolution states that a continuous wall would further divide Tohono O’odham Nation’s historic lands and communities; prevent tribal members from making traditional crossings for ceremonial and religious purposes; deny tribal members access to traditional cemeteries for burying family members; prevent wildlife from conducting essential migrations; harm endangered species of wildlife that are sacred to the Tohono O’odham Nation; destroy culturally significant plants; militarize the lands on the Tohono O’odham Nation’s southern boundary; and destroy tribal sacred sites and human remains.¹⁹ Tohono O’odham Nation activists and leaders have joined the Council’s opposition to Trump’s border wall.²⁰

16. Richard Osburn, *Problems and Solutions Regarding Indigenous Peoples Split by International Borders*, 24 AM. INDIAN L. REV. 471, 479–80 (2000) (noting that Tohono O’odham Nation members freely interacted with their Mexican members until increased border enforcement in the 1980s, which forced members to travel 120 miles in order to cross the border at the closest legal border crossing point).

17. Santos, *supra* note 14 (“A wall would not just split the tribe’s traditional lands in the United States and Mexico, members say. It would threaten an ancestral connection that has endured even as barriers, gates, cameras, and Border Patrol agents have become a part of the landscape.”); see also Dianna M. Nanez, *A Border Tribe, and the Wall that Will Divide It*, USA TODAY (2017), <https://www.usatoday.com/story/tohono-oodham-nation-arizona-tribe/582487001/> [<https://perma.cc/997M-8LF4>] (“Tohono O’odham people believe their connections to their ancestors keep their people’s future alive.”).

18. TOHONO O’ODHAM LEGIS. COUNCIL, *Border Security and Immigration Enforcement on the Tohono O’odham Nation*, Res. No. 17-053, at 3 (Feb. 7, 2017), <http://www.tonation-nsn.gov/wp-content/uploads/2017/02/17-053-Border-Security-and-Immigration-Enforcement-on-the-Tohono-Oodham-Nation.pdf> [<https://perma.cc/6LV3-XLMN>].

19. *Id.*

20. See, e.g., Sam Levin, “*Over My Dead Body*”: Tribe Aims to Block Trump’s Border Wall on Arizona Land, GUARDIAN (Jan. 26, 2017), <https://www.theguardian.com/us-news/2017/jan/26/donald-trump-border-wall-tohono-oodham-arizona-tribe> [<https://perma.cc/AC3W-T98L>].

In addition to the Tohono O’odham Nation, over twenty-four Indigenous communities who live along the U.S.-Mexico border will be impacted by a physical border wall.²¹ Trump’s Border Wall executive order not only flagrantly disregards — and threatens the continued existence of — Indigenous communities, but also criminalizes and dehumanizes all immigrants who are seeking entry at the southern border.²² Trump’s Border Wall executive order brings into laser-focus the enduring processes of U.S. settler colonialism and exposes the United States as a present-day settler colonial society — a society whose laws and policies continually support the ongoing processes of Indigenous elimination and the subordination of racialized outsiders.

At a time when U.S. immigration laws and policies continue to be used to oppress, exclude, subordinate, racialize, and dehumanize, this Article seeks to broaden the understanding of the U.S. immigration system using a settler colonialism lens.²³ The Article proceeds as follows. Part I begins by explaining the foundational and enduring

21. Ellen Wulforth, *American Indians Fear U.S.-Mexico Border Will Destroy Ancient Culture*, THOMPSON REUTERS (June 12, 2018), <https://uk.reuters.com/article/usa-border-indians/feature-american-indians-fear-us-mexico-border-wall-will-destroy-ancient-culture-idUKL1N1RP1DR> [<https://perma.cc/V9NA-T4PL>] (noting that “more than two dozen Indigenous tribes — designated by U.S. law as sovereign nations governing themselves — live along the U.S.-Mexico border, with some vowing to fight the wall to defend tribal culture”); see also NAT. CONGRESS OF AM. INDIANS, *Border Security and Immigration Enforcement on Tribal Lands*, Res. No. ECWS-17-002 (Feb. 13–16, 2017), <http://www.tonation-nsn.gov/wp-content/uploads/2017/02/ECWS-17-002-final.pdf> [<https://perma.cc/25UB-LDWK>] (noting that a “continuous, physical wall on the southern border” would impact many tribal communities who have citizens on both sides of border).

22. See *supra* notes 8 and 9.

23. Scholars across multiple disciplines in the United States have turned towards using a settler colonialism framework in their analyses to broaden understandings of systems of subordination. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW* (2010) (using a settler colonialism framework to analyze the contemporary system of incarceration in the United States.); KELLY LYTTLE HERNÁNDEZ, *CITY OF INMATES: CONQUEST, REBELLION, AND THE RISE OF HUMAN CAGING IN LOS ANGELES, 1771–1965* (2017) (using a settler colonialism framework to understand the contemporary system of mass incarceration in Los Angeles); Natsu Taylor Saito, *Tales of Color and Colonialism: Racial Realism and Settler Colonial Theory*, 10 FLA. A&M U. L. REV. 1 (2014) (using a settler colonialism framework to explain the structural dynamics of racism in the United States); Evelyn Nanako Glenn, *Settler Colonialism as Structure: A Framework for Comparative Studies of U.S. Race and Gender Formation*, 1 SOC. RACE & ETHNICITY 52, 56–57 (2015) (using a settler colonialism framework to adequately understand race and gender formation in the United States); Bryan McKinley Jones Brayboy, *Toward a Tribal Critical Race Theory in Education*, 37 URB. REV. 425, 433 (2005) (using a colonialism framework to expose the inadequacies of the U.S. education system).

processes of settler colonialism and situating the U.S. immigration system within those mechanisms. Part II locates the U.S. immigration legal system at the heart of the settler colonialism project by providing a settler colonialism-framed analysis of the National Security Entry-Exit Registration System (NSEERS) and Trump's immigration policies. Part III showcases solidarity movements between Indigenous and immigrant communities and acts of resistance to engender transformative visions and solutions that ignore the boundaries of the U.S. immigration legal system. Finally, Part IV sets forth pedagogies that disrupt traditional immigration law pedagogy by increasing awareness of settler colonialism in the immigration law classroom.

I. THE FOUNDATIONAL PROCESSES OF U.S. SETTLER COLONIALISM

The United States represents “the most sweeping, most violent, and most significant example of settler colonialism” in the world.²⁴ U.S. settler colonialism's ongoing structure of invasion operates through three separate yet interconnected mechanisms: Indigenous elimination, the subordination of people of color, and the creation and enforcement of laws designed to maintain the processes elimination and subordination.

A. Indigenous Elimination

Indigenous elimination is foundational to U.S. settler colonialism.²⁵ Elimination refers to the liquidation of Indigenous people through a variety of methods including: genocide,²⁶ enslavement,²⁷ forced

24. WALTER HIXSON, *AMERICAN SETTLER COLONIALISM: A HISTORY* 1 (2013). Other settler colonial societies include Canada, Australia, New Zealand, and South Africa.

25. Wolfe, *supra* note 2, at 388, 393 (describing settler colonialism as a project that “destroys in order to replace” and discussing in great detail the settler colonial imperative to eliminate Indigenous peoples); *see also* J.K. Kauanui & P. Wolfe, *Settler Colonialism Then and Now: A Conversation Between J. Kēhaulani Kauanui and Patrick Wolfe*, 2 *POLITICA & SOCIETÀ* 235, 248 (2012) (noting that it is “precisely this drive to elimination” that is foundational to the definition of settler colonialism).

26. *See generally* HIXSON, *supra* note 24 (documenting the continuous history of settler colonial ethnic cleansing in the United States, including genocidal campaigns carried out by official settler military forces and unauthorized settler vigilantes); Ann Picard, *Death by Boarding School: “The Last Acceptable Racism” and the United States’ Genocide of Native Americans*, 49 *GONZ. L. REV.* 137, 174 (2013–2014) (examining the role played by the residential boarding schools in the genocide of Indigenous communities in the United States, and noting that Indigenous children died of diseases, from injuries that went untreated, from trying to escape, and from corporal punishment that resulted in their deaths).

removal,²⁸ confinement to reservations,²⁹ and intricate biological and cultural assimilation programs that strip Indigenous people of their culture and replace it with settler culture.³⁰ The forced removal of Indigenous children from their families to government-funded residential boarding schools provides a quintessential example of a settler colonial cultural assimilation program of elimination – a program that was proudly designed by a U.S. settler colonialist to “kill the Indian and save the man.”³¹ In his poignantly titled book, *Education for Extinction*, David Wallace Adams remarks, “the white man had concluded that the only way to save Indians was to destroy them, [and] that the last great Indian war should be waged against children.”³²

In 1879, settler colonialist Richard Henry Pratt established the first government-funded residential boarding school in order to assimilate Indigenous children.³³ Indigenous parents who refused to allow their children to attend the boarding schools were either subdued by police while their children were taken from them,³⁴ or else imprisoned.³⁵

27. For a discussion of the enslavement of Indigenous peoples in the United States, see ALMON WHEELER LAUBER, *INDIAN SLAVERY IN COLONIAL TIMES WITHIN THE PRESENT LIMITS OF THE UNITED STATES* 48–117 (1913) (discussing the enslavement of Indigenous peoples in the United States by the French, Spanish, and British); *Introduction: Indian Slavery in Historical Context* to *INDIAN SLAVERY IN COLONIAL AMERICA* 1, 26 (Alan Gallav ed., 2009) (describing the broad geographical scope of Indigenous slavery in early America).

28. Glenn, *supra* note 23, at 58 (discussing the Indian Removal Act (IRA) of 1830 and the forced removals of the Cherokee, Chickasaw, Choctaw, Creek, and Seminole in the United States).

29. See JANET A. McDONALD, *THE DISPOSSESSION OF THE AMERICAN INDIAN, 1887–1934* (1991) (discussing the allotment program under the Dawes Act of 1887 in the United States).

30. Glenn, *supra* note 23, at 57 (noting that assimilation can be biological, through officially encouraged intermarriage to “dilute” Indigenous blood; or cultural, through stripping Indigenous people of their culture); see also Leti Volpp, *The Indigenous as Alien*, 5 U.C. IRVINE L. REV. 289, 292 (2015) (discussing U.S. governmental assimilation policies such as the regulation of marriage, kinship, and sexuality); Wolfe, *supra* note 2, at 388 (noting that elimination also refers to child abduction, religious conversion, and resocialization in missions or boarding schools).

31. See Richard H. Pratt, *The Advantages of Mingling Indians with Whites*, in *AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE “FRIENDS OF THE INDIAN,” 1880–1900* 260–71 (1973).

32. DAVID WALLACE ADAMS, *EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE, 1875–1928* 337 (1995).

33. MARGARET C. SZASZ, *EDUCATION AND THE AMERICAN INDIAN: THE ROAD TO SELF-DETERMINATION, 1928–1973* 9–10 (1974).

34. ADAMS, *supra* note 32, at 216 (describing a federal agent’s description of his use of force to take American-Indian children from their parents); WARD

Once in these schools, Indigenous children were literally stripped of their culture — stripped of their clothes, hair, names, language, spiritual practices — and often subjected to dismal housing conditions, poor food quality, forced labor, physical and sexual abuse, sexual exploitation, starvation, and incarceration.³⁶

The detrimental psychological, social, and cultural impacts of these boarding schools on Indigenous families and communities continue into the present.³⁷ The trauma of shame, fear, anger, loss of language, loss of culture, loss of connection with family, loss of identity — compounded by the trauma of abuse and exploitation — has led to enduring and devastating impacts on subsequent Indigenous generations, resulting in higher rates of substance abuse, domestic violence, and incarceration.³⁸ The ongoing impact of the residential boarding school program on Indigenous communities underscores settler colonialism's ongoing process of Indigenous elimination. In fact, some government-funded residential boarding schools continue to operate in the United States today.³⁹

CHURCHILL, *KILL THE INDIAN, SAVE THE MAN* 17 (2004) (discussing numerous incidents of parental resistance to the forced removal of their children).

35. BRENDA J. CHILD, *BOARDING SCHOOL SEASONS: AMERICAN INDIAN FAMILIES, 1900–1940* 13 (1998) (discussing an incident in which Indigenous parents who refused to send their children to government school were imprisoned on Alcatraz Island).

36. Sarah Deer, *Relocation Revisited Sex Trafficking of Native Women in the United States*, 36 WM. MITCHELL L. REV. 621, 665–69 (2010) (describing the abusive and violent treatment of Indigenous children in U.S. residential boarding schools); see also BARBARA PERRY, *SILENT VICTIMS: HATE CRIMES AGAINST NATIVE AMERICANS* 31–33 (2008); Andrea A. Curcio, *Civil Claims for Uncivilized Acts: Filing Suit Against the Government for American Indian Boarding School Abuses*, 4 HASTINGS RACE & POVERTY L.J. 45, 78–79 (2006).

37. See Ann Murray Haag, *The Indian Boarding School Era and Its Continuing Impact on Tribal Families and the Provision of Government Services*, 43 TULSA L. REV. 149, 155–60 (2007) (discussing the enduring intergenerational impacts of separating Indigenous children from their families through the residential boarding school program).

38. *Id.*; see generally TRUTH AND RECONCILIATION COMMISSION OF CANADA, *HONOURING THE TRUTH. RECONCILING FOR THE FUTURE: SUMMARY OF THE FINAL REPORT OF THE TRUTH AND RECONCILIATION COMMISSION OF CANADA* (2015), http://publications.gc.ca/collections/collection_2015/trc/IR4-7-2015-eng.pdf [<https://perma.cc/G276-2F7Z>] (describing the intergenerational impacts of the residential boarding schools on Aboriginal communities in Canada). The report highlights the enduring impacts of the residential schooling program on child welfare, health, education, and on Aboriginal language and culture. *Id.*

39. Daniella Zalcmán, *Signs of Your Identity: Forced Assimilation Education for Indigenous Youth*, PULITZER CTR. (July 16, 2017), <https://pulitzercenter.org/project/western-canada-first-nations-residential-schools-identity> [<https://perma.cc/AYA3-UVWP>] (noting that as of 2016, the U.S.

B. Subordination of Racialized Outsiders

In addition to Indigenous elimination, settler colonialism depends on the subordination of racialized outsiders in order to extract value from the invaded and expropriated Indigenous lands, secure its colonial foothold, and fuel its expansion.⁴⁰ Subordination refers to a variety of methods and practices such as enslavement, exploitation, exclusion, criminalization, manipulation, and elimination.⁴¹ The transatlantic African slave trade, in which Africans were captured, stolen, and torn from their lands and culture and forced to extract profits for settlers from stolen Indigenous land, provides a quintessential example of this foundational process of settler colonialism.⁴² As Maile Arvin, Eve Tuck, and Angie Morrill point out, settler colonialism's two processes of illegal land seizure and slavery "produced the wealth upon which the U.S. nation's world power is founded."⁴³

In addition to its dependence on the African slave trade, U.S. settler colonialism also depends on the exploitation of other racialized workforces including colonial subjects, coerced or subordinated

government still operates fifty-nine Indian Boarding Schools). *See also* Charla Bear, *American Indian School a Far Cry from the Past*, NAT'L PUB. RADIO (May 13, 2008), <https://www.npr.org/templates/story/story.php?storyId=17645287> [<https://perma.cc/U4H3-ZC73>] (noting that "remnants still exist of the boarding-school system the federal government set up for Indian children in the late 1800s"). This article describes a government funded boarding school in California that houses "at-risk" youth from over eighty-five tribes across the country. *Id.* Some students come voluntarily as a way "do better," but others are mandated to attend by judges as an alternative to jail. *Id.* The article quotes one student: "We're always confined in a fence We really can't live high-school life like regular teenagers would. We can't just go shop at the mall whenever we want for how long we want. We can't go eat at a restaurant with our friends whenever we feel like we want. Staff always has to be around us." *Id.*

40. *See* Saito, *supra* note 23, at 44–64 (discussing the ways in which the United States has used – and continues to use – "strategies of colonization" not only with Indigenous peoples, but also with other people of color in the United States).

41. *Id.*; *see also* Glenn, *supra* note 23, at 62 (noting that settler colonialism's response to racialized immigrants continues to swing between the poles of elimination and coercive exploitation).

42. For a discussion of the African slave trade as part of U.S. settler colonialism, *see* HOWARD ZINN, *A PEOPLE'S HISTORY OF THE UNITED STATES: 1492–PRESENT* 25–26 (2003); *see also* Saito, *supra* note 23, at 40 (noting the significant role of the African slave trade and the institution of chattel slavery played in providing the agricultural and industrial base for settler consolidation and expansion); *see also* Glenn, *supra* note 23, at 61 (noting that because settlers could not amass a large enough Indigenous slave workforce, they turned to African slave labor to generate profits).

43. Maile Arvin et al., *Decolonizing Feminism: Challenging Connections Between Settler Colonialism and Heteropatriarchy*, 25 FEMINIST FORMATIONS 8, 12 (2013).

laborers, and refugees fleeing U.S.-generated and supported wars.⁴⁴ These workforces are manipulated according to the rise and fall of labor demands, the ever-changing political climate, or the variant moods and personalities of settler governments.⁴⁵ For example, in the 1840s, the United States recruited Chinese men to fill pivotal labor needs in railroad construction, domestic work, and laundry industries.⁴⁶ Then, after a period of economic recession, Congress passed the 1882 Chinese Exclusion Act, which restricted new immigration from China.⁴⁷ Similarly, in the 1940s, the United States recruited close to 5 million Mexicans to work in agricultural and railroad industries through the Bracero Program.⁴⁸ Then, after a period of economic recession, the United States deported over one million Mexicans through a program officially named “Operation Wetback.”⁴⁹

While the United States continues to depend on racialized workforces, U.S. institutions trend toward excluding them, deporting them, hiding them, criminalizing them, or “otherwise revoking the right of racialized outsiders to be within the invaded territory.”⁵⁰ The modern system of mass incarceration provides a poignant example of settler colonialism’s ongoing process of subordinating racialized outsiders. In her book, *City of Inmates*, Kelly Lytle Hernández argues that the contemporary system of mass incarceration in the United States supports settler colonialism by “purging, removing, caging, containing, erasing, disappearing, and eliminating targeted

44. Eve Tuck & K. Wayne Yang, *Decolonization Is Not a Metaphor*, 1 DECOLONIZATION EDUC. & SOC’Y J. 1, 7 (2012); see also John Enriquez Andres, *The Raiding of the Pearl: The Effects of Trade Liberalization on Philippine Labor Migration, and the Filipino Migrant Worker’s Experience*, 10 RUTGERS RACE & L. REV. 523, 530–31 (2009) (describing the pressure to migrate resulting from poverty in the Philippines); Juan R. Torruella, *Ruling America’s Colonies: The Insular Cases*, 32 YALE L. & POL’Y REV. 57, 82–87 (2013) (discussing the connection between colonization, economic exploitation and migration in Puerto Rico); David Bacon, *ILLEGAL PEOPLE: HOW GLOBALIZATION CREATES MIGRATION AND CRIMINALIZES IMMIGRANTS* 60 (2008); David Bacon, *THE RIGHT TO STAY HOME: HOW US POLICY DRIVES MEXICAN MIGRATION* 10–11 (2013).

45. See generally López, *supra* note 11 (discussing the targeted recruitment of cheap labor from China in the mid-1800s, which was followed by the 1882 Chinese Exclusion Act, and the recruitment of cheap labor from Mexico in the mid-1900s, which was followed by “Operation Wetback”).

46. *Id.* at 1744–51 (discussing the “whipsawing” of the Chinese by the United States).

47. *Id.* at 1747.

48. *Id.* at 1766–73 (discussing the Bracero Program and “Operation Wetback”).

49. *Id.* at 1770–71.

50. HERNÁNDEZ, *supra* note 23, at 8.

populations from land, life and society in the United States.”⁵¹ This modern U.S. system of mass incarceration, which overwhelmingly impacts racialized outsiders in jails, prisons, and immigrant detention centers, underscores the durability of settler colonialism.⁵²

C. Establishment and Enforcement of Laws

Finally, U.S. settler colonialism requires the creation of a system of laws and regulations to maintain its processes of Indigenous elimination and the subordination of racialized outsiders.⁵³ Settlers establish laws not only to support the processes of settler colonialism, but also to control and protect their illegally acquired lands from “unruly” outsiders.⁵⁴ The set of laws and policies specifically designed to monitor, control, and protect invaded and expropriated Indigenous lands from “unruly” outsiders constitute the U.S. immigration legal system. These immigration laws are reinforced and sustained by military and economic power, allowing for complete colonial control of the expropriated lands.⁵⁵

Given the settler colonial origins of the U.S. immigration legal system, it comes as no surprise that this system relentlessly relies upon “national security” justifications to explain the removals of “unruly” racialized outsiders.⁵⁶ These justifications are consistently sustained and supported by the highest “courts of the conqueror.”⁵⁷

51. *Id.* at 1.

52. LORENZO VERACINI, SETTLER COLONIALISM: A THEORETICAL OVERVIEW 16-17 (2010) (describing settler colonialism as “an inherently dynamic circumstance” in which Indigenous peoples and racialized outsiders “progressively disappear in a variety of ways,” including extermination, expulsion, incarceration, and assimilation).

53. Saito, *supra* note 23, at 26–27 (noting that settler colonialism requires formation of independent structures of governance and social control such as laws).

54. Kauanui & Wolfe, *supra* note 25, at 241 (noting that colonizers needed a system of laws and regulations in order to protect settler society from getting “out of order” by incoming “unruly” immigrants).

55. Saito, *supra* note 23, at 26–27 (noting that settler colonialism requires the maintenance of military and economic power in order to enforce the established laws); see also *Border Wall Executive Order*, *supra* note 8, at Sec. 4 (calling for the immediate construction of a border wall in order to “achieve complete operational control of the southern border”).

56. See generally Jennifer M. Chacon, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827 (2007) (discussing the origins and consequences of the blurred boundaries between immigration control and national security); see also Shoba Sivaprasad Wadhia, *Is Immigration Law National Security Law?*, 66 EMORY L.J. 669 (2007) [hereinafter Wadhia, *Is Immigration Law National Security Law?*].

57. My reference to the term “courts of conqueror” is taken from *Johnson v. McIntosh*, the seminal U.S. Supreme Court case in which the Court ruled that

For example, the passage of the 1882 Chinese Exclusion Act which was based on the perceived threat of an “invasion” of Chinese immigrants,⁵⁸ was upheld by the Supreme Court on national security grounds.⁵⁹ Similarly, in the case of Fred T. Korematsu,⁶⁰ the Supreme Court upheld the policy of Japanese internment because “military authorities feared an invasion” and “felt constrained to take proper security measures.”⁶¹

Today, the U.S. settler colonial state continues to use national security justifications to fuel its racist and exclusionary policies — policies that are upheld by settler colonialism’s highest courts. For example, in *Rajah v. Mukasey*,⁶² the court upheld the post-9/11 NSEERS program,⁶³ holding that there was a “rational national security basis” for the program.⁶⁴ Similarly, in *Trump v. Hawaii*,⁶⁵ the Supreme Court upheld the Muslim Ban because the policy “has a legitimate grounding in national security concerns.”⁶⁶ Finally, Trump issued an executive order and further declared a “national emergency” in order to address what he calls a “national security crisis at the southern border.”⁶⁷ While litigation has been mounted against Trump for his “national emergency” proclamation, Trump is

Indigenous peoples can have no absolute title over property, and instead that title goes to the discovering conqueror. 21 U.S. 543, 588 (1823) (“Conquest gives a title which the Courts of the conqueror cannot deny.”).

58. 13 CONG. REC. 1482 (1882) (statement of Sen. Miller) (referring to a “Chinese invasion” that was a “stealthy, strategic, but peaceful invasion as destructive in its results and more potent for evil than an invasion by an army with banners”).

59. *See* *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889) (finding that “the presence of foreigners of a different race in this country, who will not assimilate” are dangerous and pose a threat to its peace and security).

60. *Korematsu v. United States*, 323 U.S. 214 (1944).

61. *Id.* at 223.

62. *Rajah v. Mukasey*, 544 F.3d 427 (2d Cir. 2008).

63. NSEERS required men from twenty-five Muslim-majority countries to report to an immigration office for a review of their immigration status. *See infra* notes 71–84 and accompanying text (describing the NSEERS program in greater detail).

64. *Mukasey*, 544 F.3d at 438.

65. *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (holding that the “Government has set forth a sufficient national security justification to survive rational basis review”).

66. *Id.* at 2421.

67. Baker. *supra* note 7 (quoting Trump as asserting that “[w]e’re going to confront the national security crisis on our southern border, and we’re going to do it one way or the other”); *see also* Border Wall Executive Order, *supra* note 8, at 8793 (“Border security is critically important to the national security of the United States.”); *see also* Proclamation No. 9844, 89 Fed. Reg. 4,949 (Feb. 15, 2019) (“The current situation at the southern border presents a border security and humanitarian crisis that threatens core national security interests and constitutes a national emergency.”).

likely to prevail at the Supreme Court using a national security justification.⁶⁸

In short, settler colonialism relies on its systems of laws and policies to support the ongoing violence of Indigenous elimination and subordination of racialized outsiders. The U.S. immigration legal system, specifically, is an engine of settler colonialism that is given the military and economic power to control invaded and expropriated Indigenous lands by continuously engaging in the criminalization, removal, and exclusion of racialized outsiders.

II. CONTEMPORARY IMMIGRATION LAWS THROUGH A SETTLER COLONIALISM LENS

This Part of the Article provides a settler colonialism-framed analysis of three contemporary U.S. immigration laws and policies by underscoring their role in upholding the foundational processes of the settler colonialism. These analyses expose the U.S. immigration system's role in carrying out the ongoing processes of Indigenous elimination and subordination of racialized outsiders.

A. NSEERS

NSEERS⁶⁹ was created in the immediate aftermath of 9/11 as part of a counterterrorism program designed to respond to potential national security threats.⁷⁰ NSEERS required men from twenty-five

68. Aziz Huq, *Has the Supreme Court Already Decided the Wall Case?*, POLITICO (Feb. 19, 2019), <https://www.politico.com/magazine/story/2019/02/19/trump-national-emergency-border-wall-225164> [<https://perma.cc/7GAQ-NEPJ>] (“[T]he Supreme Court’s [Muslim Ban] opinion from last year can be applied point for point to the statutory and constitutional arguments against the wall emergency proclamation. The expected result is that the president prevails.”).

69. See Press Release, U.S. Dep’t of Justice, Attorney General Ashcroft Announces Implementation of the First Phase of the National Security Entry-Exit Registration System (Aug. 12, 2002), https://www.justice.gov/archive/opa/pr/2002/August/02_ag_466.htm [<https://perma.cc/K6FK-TPNN>].

70. See Attorney General Prepared Remarks on NSEERS (June 2, 2002), <https://www.justice.gov/archive/ag/speeches/2002/060502agpreparedremarks.htm> [<https://perma.cc/Z94D-PMXP>] (quoting Attorney General Ashcroft as remarking that, “[NSEERS] will expand substantially America’s scrutiny of those foreign visitors who may pose a national security concern and enter our country. And it will provide a vital line of defense in the war against terrorism.”); see also PENN STATE LAW IMMIGRANTS’ RIGHTS CLINIC AND RIGHTS WORKING GROUP, *THE NSEERS EFFECT: A DECADE OF RACIAL PROFILING, FEAR, AND SECRECY* (2012), https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1005&context=irc_pubs [<https://perma.cc/5Q7L-H49U>] [hereinafter NSEERS EFFECT].

Muslim-majority countries to register at immigration offices for fingerprinting, photographs, invasive interrogations, and review of their immigration status.⁷¹ The government derived statutory authority to implement NSEERS through Section 110 of the U.S. Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) of 1996, Section 414 of the USA PATRIOT Act, and Section 263 of the Immigration and Nationality Act (INA).⁷² Failure to comply with NSEERS could result in the initiation of criminal proceedings and potential imprisonment.⁷³

NSEERS represents a discriminatory profiling policy that allowed the U.S. immigration system to systematically target Muslim men based on the false assumption that Muslims have a greater propensity for committing terrorism-related crimes.⁷⁴ The program had drastic social and economic consequences on Muslim families, not only tearing families apart, but also leaving many families homeless without their primary source of income.⁷⁵ NSEERS offers a poignant example of an immigration policy created under a national security justification that was never tested and was ultimately found to be flawed.⁷⁶ While the program did not result in a single known terrorism-related conviction, it did result in the deportation of nearly 14,000 Muslim men.⁷⁷ For over a decade, numerous advocacy organizations, politicians, and bar associations spoke out against

71. *See generally* Attorney General Ashcroft Announces Implementation. *supra* note 69. *See also* 8 C.F.R. 264.1; 67 FR 52,584 (Aug. 12, 2002) (to be codified at 8 C.F.R. pts. 214 & 264); NSEERS EFFECT, *supra* note 70, at 4 (highlighting the requirements of the National Security Entry—Exit Registration System (“NSEERS”) and requiring certain nationals or citizens of Afghanistan, Algeria, Bahrain, Eritrea, Iran, Iraq, Lebanon, Libya, Morocco, North Korea, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, Yemen, Bangladesh, Egypt, Indonesia, Jordan, and Kuwait to appear at an Immigration and Naturalization Service office to register under NSEERS and provide additional information); 8 C.F.R. § 264.1(b), (g). The following NSEERS notices were also issued in the Federal Register: 67 Fed. Reg. 67,766-01 (Nov. 6, 2002); 67 Fed. Reg. 70,526 (Nov. 22, 2002); 67 Fed. Reg. 77,64201 (Dec. 18, 2002); 68 Fed. Reg. 2,363-03 (Feb. 24, 2003).

72. NSEERS EFFECT, *supra* note 70, at 14.

73. *Id.* at 16.

74. *Id.* at 4.

75. *Id.* at 24.

76. Shoba Sivaprasad Wadhia, *National Security, Immigration, and the Muslim Bans*, 75 WASH. & LEE L. REV. 1475, 1477 (2018) [hereinafter Wadhia, *National Security*].

77. NSEERS EFFECT, *supra* note 70, at 26 (citing ICE Fact Sheet, which states that, as a result of registering under NSEERS, “13,799 men were placed into removal proceedings and 2,870 were detained”).

NSEERS and called for its termination.⁷⁸ However, NSEERS was not officially dismantled until December 22, 2016, just days before Trump took office.⁷⁹

When viewed through a settler colonialism lens, the NSEERS program is an extension of settler-established laws designed to control and protect illegally acquired settler-colonial lands from “unruly” outsiders: Muslim men. Moreover, NSEERS is a reiteration of the registration requirements mandated during the years of the Chinese Exclusion Act which required all Chinese residents to register or else face deportation,⁸⁰ and the enforced registration requirements forced upon Iranian students in the United States during the “Iranian Hostage Crisis.”⁸¹ NSEERS also reincarnates the discriminatory and humiliating system of roundup and detention used to support Japanese internment.⁸² NSEERS supports U.S. settler colonialism’s

78. *Id.* at 4.

79. See Shoba Sivaprasad Wadhia, *Understanding the Final Rule Ending NSEERS*, YALE J. ON REG.: NOTICE & COMMENT (Dec. 23, 2016), <http://yalejreg.com/nc/understanding-the-final-rule-ending-nseers-bv-shoba-sivaprasad-wadhia/> [<https://perma.cc/Z6T6-NDT7>]; Shoba Sivaprasad Wadhia, *On this Day: The End of NSEERS*, MEDIUM NEWS (Dec. 22, 2016), <https://medium.com/@shobawadhia/on-this-day-the-end-of-nseers-2959935e6c66> [<https://perma.cc/5BP6-3RXL>] [hereinafter Wadhia, *On this Day*]; see also J. David Goodman & Ron Nixon, *Obama to Dismantle Visitor Registry Before Trump Can Revive It*, N.Y. TIMES (Dec. 22, 2016), <https://www.nytimes.com/2016/12/22/nvregion/obama-to-dismantle-visitor-registry-before-trump-can-revive-it.html> [<https://perma.cc/7MKV-3KEY>].

80. See Margaret Hu, *Crimmigration-Counterterrorism*, 2017 WIS. L. REV. 955, 966–74 (2017) (discussing the registration requirements of the Geary Act which arose as a method to track, inspect, and deport Chinese laborers present in the United States); see also Jorge Encinas, *There’s a Long, Ignominious Trail of Bans, Registries and Forced Relocation*, NAT’L PUB. RADIO (Feb. 2, 2017) [<https://perma.cc/G4B9-OFEB>] (discussing the Geary Act which extended the provisions of the 1882 Chinese Exclusion Act and added registry as one of the conditions); Hon. Paul Brickner & Megan Hanson, *The American Dreamers: Racial Prejudices and Discrimination as Seen Through the History of American Immigration Law*, 26 T. JEFFERSON L. REV. 203, 235 (2004) (describing NSEERS as a “flashback to the registration requirements mandated during the years of the Chinese Exclusion Act”).

81. See generally Jimmy Carter, *Iranians in the United States* White House Statement on a Court Decision Upholding the President’s Authority to Investigate Student Visas (Dec. 27, 1979), <https://www.presidency.ucsb.edu/documents/iranians-the-united-states-white-house-statement-court-decision-upholding-the-presidents> [<https://perma.cc/Q2T2-HL3W>] (commending the appeals court ruling upholding the constitutionality of Carter’s executive order which required Iranian students to register with an immigration office and provide proof of valid immigration status).

82. See Tv S. Wahab Twibell, *The Road to Internment: Special Registration and Other Human Rights Violations of Arabs and Muslims in the United States*, 26 VT. L. REV. 407, 415–17 (2005) (discussing the connections between NSEERS and Japanese internment.); see also Carlos Morales, *War Victim Fears Repeat*, CHI. TRIB. (Apr. 9, 2003), <https://www.chicagotribune.com/news/ct-xpm-2003-04-09-0304090103->

foundational mechanism of subordinating racialized outsiders – through criminalization and mass deportation – in order to protect invaded lands from the perceived danger of Muslim men.

B. Trump’s 2017 Muslim Bans⁸³

A few weeks after taking office in January 2017 and just one month after NSEERS was formally ended,⁸⁴ Trump issued the first in his series of Muslim Bans which restricted entry of all nationals from seven Muslim-majority countries.⁸⁵ The Muslim Bans, like NSEERS, continue the U.S. government’s practice of creating discriminatory, racialized, inhumane, and humiliating immigration policies under a dubious national security justification.⁸⁶ The Muslim Bans were decried as immigration policies rooted in hatred, xenophobia, and blatant bigotry.⁸⁷ Each version of the ban was challenged in federal courts around the country,⁸⁸ and numerous community leaders,

storv.html [https://perma.cc/XRH8-ADT] (quoting Fred Korematsu as remarking that “[t]here are Arab-Americans today who are going through what Japanese Americans experienced years ago, and we can’t let that happen again”).

83. For support of my use of the term “Muslim Ban,” see Wadhia, *National Security*, *supra* note 76, at 1483 (utilizing the term “Muslim bans” because the restrictions imposed in all three versions of the Muslim Bans directly impact or block the admission of nationals from countries with majority Muslim populations or refugees).

84. Though NSEERS was discontinued in 2011, the regulatory structure remained on the books until December 22, 2016, when it was officially dismantled. See Wadhia, *On this Day*, *supra* note 79.

85. See Wadhia, *National Security*, *supra* note 76, at 1483–88. Wadhia provides a comprehensive explanation of the three iterations of Trump’s Muslim Bans: 1) Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) (restricting entry to the United States of nationals from Iran, Iraq, Libya, Sudan, Somalia, Yemen and Syria); 2) Exec. Order No. 13,870, 82 Fed. Reg. 13,209 (Mar. 6, 2017) (restricting entry to the United States of nationals from Iran, Libya, Sudan, Somalia, Yemen, and Syria); and 3) Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017) (blocking entry to the United States of nationals from Iran, Libya, Chad, North Korea, Syria, Somalia, Venezuela, and Yemen).

86. See, e.g., Hu, *supra* note 80, at 995 (noting that like both the Chinese Exclusion Act and the orders related to Japanese internment, the Muslim Ban orders were based on rationales relating to national security).

87. *CAPAC Members on One Year Anniversary of Trump’s Muslim and Refugee Travel Ban*, CONG. ASIAN PAC. AM. CAUCUS (Jan. 26, 2018), <https://capac-chu.house.gov/press-release/capac-members-one-year-anniversary-trump%E2%80%99s-muslim-and-refugee-travel-ban> [https://perma.cc/5VF4-27TL] (quoting Congresswoman Judy Chu, Chair of the Congressional Asian Pacific American Caucus).

88. Wadhia, *Is Immigration Law National Security Law?*, *supra* note 56, at 1488 (noting that legal challenges to the Muslim Bans came from a variety of litigants that

college and university presidents, and media outlets spoke out vehemently against the bans.⁸⁹

When viewed through a settler colonialism lens, the Muslim Bans are recurring versions of settler-established laws designed to control and protect illegally acquired settler-colonial lands from “unruly” outsiders: Muslims. Moreover, the Muslim Bans perpetuate the subordination of racialized outsiders that was accomplished by the Chinese Exclusion Act,⁹⁰ and the policy of Japanese internment.⁹¹ Furthermore, Trump’s 2017 Muslim Bans are an extension of the perhaps less-familiar 1522 Muslim Ban against Muslim slaves:

The transatlantic African slave trade brought the first Muslims to the Americas.⁹² The first recorded slave revolt occurred in 1522 and was led by Muslim slaves.⁹³ As a result, Spanish and English settlers feared that enslaved Africans would be more susceptible to revolt if

included mosques, individual family members, states, and refugee resettlement organizations).

89. *Id.* at 1502.

90. See generally Michael Kagan, *Is the Chinese Exclusion Case Still Good Law? (The President Is Trying to Find Out)*, 1 NEV. L.J. F. 80, 84 (2017) (“If ever a case existed to breathe new life into the Chinese Exclusion Case, it is the sprawling litigation over Trump’s executive orders.”); see also Garrett Epps, *The Ghost of Chae Chin Ping*, ATLANTIC (Jan. 20, 2018), <https://www.theatlantic.com/politics/archive/2018/01/ghost-haunting-immigration/551015/> [<https://perma.cc/Y6DL-V3PU>].

91. See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392, 2448 (2018) (Sotomayor, J., dissenting) (“By blindly accepting the Government’s misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security, the Court redeploys the same dangerous logic underlying *Korematsu* and merely replaces one ‘gravely wrong’ decision with another.”); see also Brief for Karen Korematsu et al. as Amici Curiae Supporting Respondents, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (No. 17-965), 2018 WL 1586445.

92. See Khaled A. Beydoun, *Antebellum Islam*, 58 HOWARD L.J. 141, 150 (2014) (noting that America’s first Muslims were slaves who were “violently poached” and held captive on slave ships set for the *New World before there was a United States of America*); Hishaam D. Aidi & Manning Marable, *Introduction: The Early Muslim Presence and its Significance*, to BLACK ROUTES TO ISLAM 1, 1 (Manning Marable & Hishaam D. Aidi eds., 2009) (“A little known fact that continues to inspire incredulity is that America’s first Muslims arrived chained in the hulls of slave ships.”); see also TIMOTHY MARR, *THE CULTURAL ROOTS OF AMERICAN ISLAMICISM* 135 (2005) (“[T]he only Muslims inside the United States were subjugated African slaves.”).

93. See SYLVIANE A. DIOUF, *SERVANTS OF ALLAH: AFRICAN MUSLIMS ENSLAVED IN THE AMERICAS* 145 (2013) (describing the “[f]irst slave revolt [in the history of] the Americas” in 1522 led by Wolof and Fulani Muslims); see also LESLIE K. BEST, *THE AFRO-LATINO: A HISTORICAL JOURNEY* 11 (2010).

they were Muslim,⁹⁴ and further feared that they might entice Indigenous slaves to revolt as well.⁹⁵ Thus, a “Muslim Ban” was erected to exclude “slaves suspected of Islamic leanings,”⁹⁶ which was followed by the issuance of three subsequent decrees banning the importation of Muslim slaves.⁹⁷

Trump’s Muslim Bans – like the Muslim Bans of the mid-1500s – support U.S. settler colonialism’s foundational mechanism of subordinating racialized outsiders through dehumanization, criminalization, and exclusion, in order to protect invaded lands from the perceived danger of Muslims.

C. Trump’s Immigrant Family Separation Policy

On April 23, 2018, the Trump administration officially enacted an immigrant “family separation policy” intended to drastically reduce the number of U.S. border crossings.⁹⁸ The policy required the criminal prosecution of all immigrant parents with children – including those seeking asylum – for crossing the border anywhere other than at a designated port of entry.⁹⁹ Because such criminal prosecution requires the removal of children from their parents’ custody, the policy resulted in thousands of families being separated into different detention centers.¹⁰⁰ The separate detention of babies

94. See Naeem Ali, *Muslim Revolts in the Americas*, FORGOTTEN ISLAMIC HISTORY (Feb. 13, 2014), <http://www.forgottenislamichistory.com/2014/02/the-african-muslim-slave-revolts-trans.html> [https://perma.cc/DK6E-DTYN].

95. *Id.*

96. Andrew Lawler, *Muslims Were Banned from the Americas as Early as the 16th Century*, SMITHSONIAN MAG. (2017), <https://www.smithsonianmag.com/history/muslims-were-banned-americas-early-16th-century-180962059/> [https://perma.cc/54SP-VR7S]; see also TOBY GREEN, *INQUISITION: THE REIGN OF FEAR 186–91* (2007) (discussing the effect of “the decree” that banned Muslim slaves); see also Ali, *supra* note 94 (“In 1526, after the first slave revolt, the Spanish crown issued the first cedula (royal decree) outlawing the importation of African Muslims.”).

97. Ali, *supra* note 94 (noting that subsequent decrees banning Muslim slaves were issued in 1531, 1543, and 1550).

98. See U.S. DEP’T OF HOMELAND SECURITY, MEMORANDUM ON INCREASING PROSECUTIONS OF IMMIGRATION VIOLATIONS (Apr. 23, 2018), <https://www.documentcloud.org/documents/4936568-FOIA-9-23-Family-Separation-Memo.html> [https://perma.cc/HS69-KY2D].

99. See *id.* The DHS policy stated that all adults crossing the border without authorization should be referred for prosecution “including those presenting with a family unit.” *Id.*

100. See Brian Naylor, *DHS: Nearly 2,000 Children Separated from Adults at Border in 6 Weeks*, NAT’L PUB. RADIO (June 16, 2018), <https://www.npr.org/2018/06/16/620451012/dhs-nearly-2-000-children-separated-from-adults-at-border-in-six-weeks> [https://perma.cc/H2RG-FNFZ].

and infants under the age of three resulted in devastating psychological trauma.¹⁰¹ The policy instigated a fervent explosion of legal challenges¹⁰² as well as domestic and international condemnation.¹⁰³

When viewed through a settler colonialism lens, Trump's family separation policy echoes the process of Indigenous elimination in which Indigenous children were forcibly separated from their families and sent to government-funded residential schools. The U.S. residential boarding school program not only subjected Indigenous children to harsh and often abusive conditions, but also prevented normal family bonding and deprived Indigenous children of parental contact – resulting in the destabilization of Indigenous families and devastating intergenerational impacts.¹⁰⁴

(noting that the U.S. Department of Homeland Security reported the separation of 1,995 minors from April 19 to the end of May 2018); *see also Family Separation: By the Numbers*, ACLU, <https://www.aclu.org/issues/immigrants-rights/immigrants-rights-and-detention/family-separation> [<https://perma.cc/LPB9-9FJZ>] (noting that as of October 15, 2018, 2,654 children were initially determined to have been separated from their parents).

101. *See* Garance Burke & Martha Mendoza, *At Least 3 “Tender Age” Shelters Set Up for Child Migrants*, AP NEWS (June 20, 2018), <https://apnews.com/dc0c9a5134d14862ba7c7ad9a811160e> [<https://perma.cc/A8WY-N69A>] (describing the separate detention of infants as a result of Trump's family separation policy); Alan Gomez, *Democrats Grill Trump Administration Officials Over Family Separation Policy on the Border*, AP NEWS (Feb. 7, 2019), <https://apnews.com/dc0c9a5134d14862ba7c7ad9a811160e> [<https://perma.cc/SQE9-D4KV>] (“Separating children from their parents poses significant risks of traumatic psychological injury to the child. The consequences of separation for many children will be lifelong.”).

102. *See, e.g.*, Matt Zapposky, *17 States and D.C. Sue Over Trump's Family Separation Policy*, WASH. POST (June 26, 2018), https://www.washingtonpost.com/world/national-security/17-states-and-dc-sue-over-trumps-family-separation-policy/2018/06/26/b32d2a6c-7975-11e8-80be-6d32e182a3bc_story.html?utm_term=.fd898eb048ee [<https://perma.cc/NSJ6-JTDH>]; *7-Year-Old Daughter Separated from Mother for Nearly Four Months*, ACLU NEWS (Feb. 26, 2018), <https://www.aclu.org/news/aclu-challenges-trump-administration-practice-forcibly-separating-asylum-seeking-parents-and> [<https://perma.cc/J7VR-C5WT>] (describing the ACLU lawsuit against Trump's family separation policy filed in federal district court in San Diego).

103. *See* Alex Ward, *How the World Is Reacting to Trump's Family Separation Policy*, VOX (June 20, 2018), <https://www.vox.com/world/2018/6/20/17483738/trump-family-separation-border-trudeau-may-reaction> [<https://perma.cc/U758-35LS>] (documenting international condemnation of the policy from the United Kingdom, Canada, the United Nations, and the Pope).

104. *See* Rebecca Tsosie, *Indigenous Women and International Human Rights Law: The Challenges of Colonialism, Cultural Survival, and Self-Determination*, 15 UCLA J. INT'L L. & FOREIGN AFF. 187, 206–07 (2010) (noting the intergenerational devastating impact of U.S. government-funded boarding schools which destabilized Indigenous families); *see also supra* notes 31–39 and accompanying text (discussing

Moreover, Trump's family separation policy mirrors the forced separation of families that was part of the African slave trade.¹⁰⁵ The system of chattel slavery included the constant threat and actual separation of children from their families.¹⁰⁶ Trump's family separation policy is a continuation of policies repeatedly used by the settler colonial state to exert absolute control over all aspects of the lives of the colonized.¹⁰⁷ Trump's family separation policy exposes the persistence of the processes of settler colonialism such as elimination through family separation. Although Trump was forced to "reverse" his policy on June 20, 2018,¹⁰⁸ several immigrant families have yet to be reunited and the practice of immigrant family separation continues today.¹⁰⁹

Acknowledging the settler colonial roots of contemporary immigration laws such as NSEERS, the Muslim Bans, and Trump's family separation policy provides a broader frame for understanding how the law maintains structural dynamics of racism and perpetuates subordination.¹¹⁰ This broadened frame helps explain why legal challenges to both NSEERS and the Muslim Bans on statutory and constitutional grounds have proven unsuccessful.¹¹¹ As a result,

the forced removal of Indigenous children from their parents through government-funded residential boarding schools in the United States).

105. See STEVEN MINT. HUCK'S RAFT: A HISTORY OF AMERICAN CHILDHOOD 95–98 (2004) (discussing instances of permanent family separation as a result of slavery in the United States).

106. See Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 YALE J.L. & FEMINISM 207, 220 (1992) (noting that the sale of slaves away from their families was often used as punishment, and that upon the death of a slaveholder, children of slaves were distributed among the heirs of the master).

107. See, e.g., *id.* at 219 ("Thus, the system of American slavery is best understood as the absolute control by white slaveholders over all aspects of the lives of their slaves.").

108. See generally Exec. Order No. 13,841, 83 Fed. Reg. 29,435 (June 20, 2018), <https://www.whitehouse.gov/presidential-actions/affording-congress-opportunity-address-family-separation/> [<https://perma.cc/YW4V-JD4Y>].

109. See Gomez, *supra* note 101 (noting that "several government officials testified that the family separation practice continues, and that the administration has made it difficult to understand why").

110. See, e.g., Amna Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 405 (2018) (demonstrating that analyzing laws within the larger historical arc of settler colonialism facilitates a "broader frame for understanding how law, the market, and the state co-produce intersectional structural inequality").

111. For NSEERS litigation, see *Rajah v. Mukasey*, 544 F.3d 427, 435 (2d Cir. 2008) (upholding NSEERS based on numerous sections of the INA and finding no equal protection violations); *Malik v. Gonzales*, 213 F. App'x 173 (4th Cir. 2007) (finding that NSEERS raised no equal protection or due process violations); *Zerrei v.*

recognizing U.S. immigration laws as constructs of settler colonialism reveals the need for transformative solutions and strategies of resistance that reject these constructs. The next Part of this Article presents examples of solidarity movements between Indigenous and immigrant communities and acts of resistance that engender such transformative solutions and strategies.

III. INDIGENOUS/IMMIGRANT SOLIDARITY AND RESISTANCE

A settler colonialism framework requires acknowledging the enduring violence of settler colonial conquest – the violence of elimination, subordination, racialization, criminalization, and exploitation. It is all the more crucial to emphasize anti-colonial resistance and the voices of resilience, protest, and rebellion that come from the margins.¹¹² This Part of the Article highlights examples of Indigenous and immigrant solidarity movements and acts of resistance in the settler colonial societies of Australia, Canada, and the United States. These collective acts of resistance can inspire transformative visions and solutions that defy the boundaries of the immigration legal system – such as freedom of movement, building solidarity, providing sanctuary, and affirming Indigenous sovereignty, self-determination, and decolonization.¹¹³

A. Aboriginal Passport Ceremony Movement (Australia)

The Australian Aboriginal Passport Ceremony movement brings together and forges alliances between immigrant and Indigenous

Gonzales, 471 F.3d 342, 347–48 (2d Cir. 2006) (rejecting argument that NSEERS raises due process violations); *Zafar v. U.S. Att’y Gen.*, 461 F.3d 1357, 1367 (11th Cir. 2006) (finding that NSEERS raised no equal protection or due process violations); *Sewani v. Gonzales*, 162 F. App’x 285, 286–87 (5th Cir. 2006) (finding that NSEERS raised no equal protection or due process violations); *Shaybob v. U.S. Att’y Gen.*, 189 F. App’x 127, 130 (3d Cir. 2006); *Ali v. Gonzalez*, 440 F.3d 678, 681 n.4 (5th Cir. 2006) (finding that NSEERS raised no equal protection or due process violations). For a comprehensive database detailing the overwhelming amount of litigation related to the Muslim Bans, including *Trump v. Hawaii*, see *Litigation Documents & Resources Related to Trump Executive Order on Immigration*, LAWFARE (last updated Dec. 23, 2018), <https://www.lawfareblog.com/litigation-documents-resources-related-travel-ban> [<https://perma.cc/M9ER-BQVH>].

112. See, e.g., HIXSON, *supra* note 24, at 13 (discussing the need for scholars to avoid writing narratives in which Indigenous peoples function purely as victims of the man’s white aggression and to instead incorporate Indigenous agency and anticolonial resistance into a broader narrative).

113. Akbar, *supra* note 110, at 479 (2018) (arguing that by studying the critiques offered by radical social movements, law scholarship can be expanded, and a bolder project of transformation forwarded).

rights struggles.¹¹⁴ Aboriginal Passports are issued by the self-declared Aboriginal Provisional Government (APG), which was founded in 1990 on the principle that Aborigines are a sovereign people.¹¹⁵ Even though the Australian government refuses to officially recognize the Aboriginal Passport, Indigenous people have been able to use the Passports to re-enter Australia for nearly thirty years.¹¹⁶ Moreover, the Aboriginal Passports have been used to enter several other countries, including Libya, Switzerland, and Norway.¹¹⁷

The Aboriginal Passport Ceremony movement was initiated in 2012 when President of Australia's Indigenous Social Justice Association, Ray Jackson, tried to issue Aboriginal Passports to two Tamil asylum seekers who had been detained for three years in a Sydney detention center.¹¹⁸ At a press conference outside the detention center, Jackson called on Australians to send letters and petitions to the Prime Minister to release the detainees.¹¹⁹ Jackson stated: "We stand alongside our brothers and sisters and they should be immediately be released from the trauma of detention."¹²⁰ Jackson was ultimately denied access to the detention center and was unable to issue the detainees Passports, but this act of solidarity and resistance sparked a movement of Indigenous/immigrant solidarity.¹²¹

114. Aboriginal Passports are issued by the Aboriginal Provisional Government (APG), which was founded in 1990 on the principle that Aborigines are a sovereign people. See *Passports*, ABORIGINAL PROVISIONAL GOVERNMENT, <https://apnews.com/dc0c9a5134d14862ba7c7ad9a811160e> [https://perma.cc/6SF7-CZ6G] [hereinafter ABORIGINAL PROVISIONAL GOVERNMENT].

115. The APG "enacts" Aboriginal sovereignty through issuing Aboriginal passports and Aboriginal birth certificates. *Id.*

116. Joshua Robertson, *Tolerance of Travelers with Aboriginal Passports Amounts to Recognition, Says Activist*, GUARDIAN (Apr. 20, 2015, 4:19 PM), <https://www.theguardian.com/australia-news/2015/apr/20/tolerance-of-travellers-with-aboriginal-passports-amounts-to-recognition-says-activist> [https://perma.cc/PH3Y-NGWT] (stating that "[t]he [Australian] Department of Customs and Border Protection does not recognize Aboriginal passports as valid travel documents, but Indigenous people have used them to re-enter Australia for about three decades").

117. See ABORIGINAL PROVISIONAL GOVERNMENT, *supra* note 114 (noting that the Aboriginal passport has been used to enter several countries including Libya (1988), Switzerland (1990), Norway (1990), Haudenosaunee Confederacy (2014), and the Solomon Islands (2015)).

118. Gerry Georgatos, *Aboriginal Passports Issued to Two Asylum Seekers Incarcerated at Villawood*, INDYMEDIA AUSTL. (May 14, 2012, 11:35 AM), <http://indymedia.org.au/2012/05/14/aboriginal-passports-issued-to-two-asylum-seekers-incarcerated-at-villawood.html> [https://perma.cc/Y8AD-9FE5].

119. *Id.*

120. *Id.*

121. *More Than 200 Migrants to Receive Aboriginal Passports*, AUSTL. GREEN LEFT WEEKLY (Aug. 6, 2012), <https://www.greenleft.org.au/content/more-200->

After learning about Jackson's attempt to issue Aboriginal Passports to the Tamil asylum seekers, Sydney-based immigrant rights activist Rihab Charida approached Jackson to obtain an Aboriginal Passport as an expression of solidarity with Aboriginal sovereignty.¹²² Charida and Jackson developed the idea of the Passport Ceremony and were soon inundated with requests to attend the "Welcome to Aboriginal Land Passport Ceremony," at which over 200 immigrants received Aboriginal Passports after signing a pledge recognizing the sovereignty of Aboriginal and Torres Strait Islander peoples.¹²³ For Jackson, the Ceremony reinforced Aboriginal sovereignty and self-determination while welcoming immigrants into Aboriginal lands.¹²⁴ For Charida, the Ceremony presented a chance for immigrants to protest Australia's legitimacy as the sovereign power of the land.¹²⁵

The Aboriginal Passport Ceremony movement has continued to spread in Australia and builds solidarity between immigrants and Aboriginal Torres Strait Islander peoples. In 2016, at an event in Melbourne entitled *Sovereignty and Sanctuary*, Aboriginal Passports were presented in solidarity with the plight of refugee arrivals to Australia and were accepted in solidarity with the ongoing struggle for Indigenous self-determination.¹²⁶ The Aboriginal Passport Ceremony protests the ongoing structures of settler colonialism in Australia and rejects its systems of laws by asserting Aboriginal sovereignty, building solidarity, and providing sanctuary.

migrants-receive-aboriginal-passports [https://perma.cc/FAE8-KPE2] (noting that the Passport Ceremony movement was inspired by the issuing of the passports to two Tamil asylum seekers detained indefinitely in Sydney and is the beginning of an important alliance between immigrants and Aboriginal and Torres Strait Islander peoples).

122. *Id.* (quoting Charida as remarking, "[W]e are the beneficiaries of a great injustice inflicted on the injustices aimed solely at the Aboriginal and Torres Strait Islander peoples. Having learned the true history of this land and to witness the unabated land theft and violence directed at the Aboriginal and Torres Strait Islander peoples, we feel compelled to do and say something.").

123. *Id.*

124. *Id.*

125. *Id.*

126. Press Release, Sovereignty + Sanctuary: A First Nations/Refugee Solidarity Event, RISE (July 13, 2016), <http://riserefugee.org/media-release-sovereignty-sanctuary-a-first-nations-refugee-solidarity-event-13072016/> [https://perma.cc/L7CC-4XEQ].

B. Canada: No One Is Illegal Indigenous/Immigrant Solidarity Movement

Initiated in 2001 in Montreal, No One is Illegal (NOII) is an extended network of immigrant rights groups rooted in anti-colonial, anti-capitalist, ecological justice, Indigenous self-determination, anti-occupation, and anti-oppressive communities.¹²⁷ The ultimate vision of NOII is to build a movement “based on dismantling settler colonialism through the affirmation of Indigenous self-determination and the welcoming of immigrants to live in respectful relationship to existing communities and the land.”¹²⁸ NOII groups have formed all across Canada including in Calgary, Halifax, Kingston, Toronto, Ottawa, Winnipeg, Nova Scotia, Vancouver, Victoria, and Quebec City.¹²⁹

NOII prioritizes building alliances between immigrant and Indigenous struggles and deems imperative the need for immigrants to “tak[e] up [their] end of the responsibility to dismantle settler colonialism . . .”¹³⁰ For example, the NOII-Toronto platform includes the following statement:

We must understand our own role and responsibility in the genocide, displacement and theft of land of indigenous people in the Americas. The clear links between colonization and migration highlights the need for our work to be intricately linked in solidarity with the struggles of Indigenous nations in the Americas (and particularly those on land we occupy) for sovereignty, land, and freedom.¹³¹

NOII groups across Canada engage in active support of Indigenous self-determination and the struggle for decolonization.¹³² Indigenous solidarity work is integral to the political work of each of the NOII

127. HARSHA WALIA, UNDOING BORDER IMPERIALISM 98 (2013) (setting forth an in-depth “cartography” of the No One is Illegal (NOII) social movement).

128. *Id.* at 138.

129. *Id.* at 98.

130. *Id.* at 101.

131. *Indigenous Solidarity*, NO ONE IS ILLEGAL TORONTO, <http://toronto.nooneisillegal.org/taxonomy/term/6> [<https://perma.cc/C4J7-36L2>]; see also *Indigenous Support*, NO ONE IS ILLEGAL VANCOUVER, <https://noii-van.resist.ca/indigenous-support/> [<https://perma.cc/E5X9-V59U>] (“A fundamental organizing principle for *No One is Illegal* is to build alliances in solidarity with indigenous communities in struggle as we fight against racism, colonization, and global systems of apartheid.”).

132. WALIA, *supra* note 127, at 133–35 (noting that over the years, NOII groups have supported Indigenous land protection struggles in numerous Indigenous communities).

chapters throughout Canada. For example, NOII-Vancouver “has been supporting Secwepemc Nation against tourism, mining, and real estate development on Secwepemc lands” with pickets and court appearances, as well as fundraising to support community land reclamation and language revitalization efforts.¹³³ NOII groups “have also prioritized support for urban struggles including housing for Indigenous peoples, and justice for missing and murdered Indigenous women.”¹³⁴ The NOII vision offers a solution to dismantling settler colonialism by forging alliances between Indigenous and immigrant struggles, affirming Indigenous self-determination and sovereignty, and supporting Indigenous struggles for decolonization.

C. United States: Indigenous Resistance to Trump’s Family Separation Policy

In response to Trump’s 2018 immigrant family separation policy,¹³⁵ many Indigenous community leaders, activists, and journalists remarked on the striking similarity between the policy of separating immigrant families at the border and that of forcibly removing Indigenous children from their families and sending them to government-funded boarding schools.¹³⁶ For example, Jefferson Keel, President of the National Congress of American Indians released the following official statement in response to the policy:

The forced separation of immigrant children from their families is simply immoral and harkens back to a dark period for many Native American families. For decades, the U.S. government stole Native children from their parents and forced them into boarding schools hundreds and sometimes thousands of miles away. Our communities know too well the intergenerational psychological trauma that will flow from the actions that the United States is taking today. Congress and the President should take heed of such abhorrent mistakes from the past and actually live the moral values this country proclaims to embody by immediately ending this policy and

133. *Id.* at 132.

134. *Id.* at 133.

135. *See supra* Section II.C. (describing Trump’s family separation policy in greater detail).

136. Cecily Hilleary, *Many Native Americans, Citing History, Angry Over Trump Immigration Policy*, VOA NEWS (June 20, 2018, 1:40 PM), <https://www.voanews.com/a/native-americans-citing-historic-experience-angry-over-trump-immigration-policy/4443698.html> [https://perma.cc/868F-X4A8] (noting that Trump’s family separation immigration policy has “triggered outcry from many Native Americans who find parallels in their own history with the U.S. government”).

reuniting the affected children with their parents. Families belong together.¹³⁷

Similarly, Levi Rickert, member of the Prairie Band Potawatomi Nation and publisher and editor of Native News Online, made the following statement:

The Trump administration's policy of separating children from their parents is not a novel idea. It is not a new thing exercised by the federal government. The separating of children from parents is familiar to American Indians because it happened in our families—often Hopefully, enough people will convince the Trump administration that separating children from parents did not work during the Indian boarding school policy days and it will not work now and should not be part of their policy.¹³⁸

Vi Waln, a member of the Sicangu Lakota Nation and a nationally published journalist wrote: “Many Indigenous people are praying for the children to be reunited with their families and for the United States to do the right thing. But we know from experience that this might not happen.”¹³⁹ These statements build solidarity between Indigenous and immigrant struggles and are an act of resistance to settler colonialism, exposing the systematic elimination of Indigenous people and subordination of racialized outsiders.

These voices of solidarity and resistance from Australia, Canada, and the United States are rooted in critiques that protest the enduring structures of settler colonialism. Listening to these voices can help formulate strategies and solutions that not only target the immigration system, but also take aim at the broader systems of oppression rooted in settler colonialism.¹⁴⁰

137. Press Release, Jefferson Keel, President, Nat'l Cong. of Am. Indians, Official Statement on the Forced Separation of Immigrant Families (June 19, 2018), <http://www.ncai.org/news/articles/2018/06/19/official-statement-of-ncai-president-jefferson-keel-on-the-forced-separation-of-immigrant-families> [<https://perma.cc/N235-EC74>]. Jefferson Keel is also Lieutenant Governor of the Chickasaw Nation.

138. Levi Rickert, Opinion, *Trump Administration's Policy of Separating Children Is Reminiscent of Indian Boarding Schools*, NATIVE NEWS ONLINE (June 15, 2018), <https://nativenewsonline.net/opinion/trump-administrations-policy-of-separating-children-is-reminiscent-of-indian-boarding-schools/> [<https://perma.cc/AY92-SVRH>]; Hilleary, *supra* note 136 (showcasing the following internet memes shared by Indigenous youth on social media in response to Trump's immigrant family separation policy: “Illegal Immigration is Not a New Problem. Native Americans Used to Call it White People”; “No One is Illegal on Stolen Land”; and “The Most Dangerous Immigrants Arrived in 1492”).

139. Hilleary, *supra* note 136 (quoting Vi Waln).

140. See Jennifer M. Chacón, *Unsettling History*, 131 HARV. L. REV. 1078, 1123 (2018) (reviewing KELLY LYTTLE HERNÁNDEZ, CITY OF INMATES: CONQUEST,

IV. UNSETTLING PEDAGOGIES

This Part of the Article offers two pedagogical tools that are designed to “unsettle” traditional immigration law pedagogy by increasing awareness of settler colonialism in the immigration law classroom.¹⁴¹ As a result of this increased awareness, students will not only be better equipped to analyze immigration laws through a lens of settler colonialism, but they will also be more inspired to engage in and support solidarity movements that protest the structures of settler colonialism. The tools offered in this Part disrupt traditional immigration law pedagogy by forcing students to recognize settler colonialism and acknowledge the preexistence of Indigenous peoples.

A. Indigenous Land Acknowledgement

Immigration Law Class #1 Exercise:

Upon whose land do you reside?

Which Indigenous communities/nation(s) specifically?

Create your own Indigenous land acknowledgement statement.

An Indigenous land acknowledgment involves making a statement recognizing the traditional territories of the Indigenous peoples who have lived on the land before the arrival of settlers.¹⁴² Indigenous land acknowledgements can be transformative “sites of potential disruption” that force non-Indigenous students to confront their own complicities within settler colonialism and their resultant

REBELLION, AND THE RISE OF HUMAN CAGING IN LOS ANGELES, 1771–1965 (2017)) (noting how a settler colonialism framework exposes the need for solutions that target a broader “system of oppression rooted in the ideologies of a settler-colonial past and present”).

141. See generally Volpp, *supra* note 30 (delivering a forceful critique of the way immigration law is taught in the United States by condemning it for erasing the preexistence Indigenous peoples and for failing to recognize settler colonialism). See also Amna Akbar et al., *No. 7: Immigration Law*, GUERRILLA GUIDES TO LAW TEACHING (Sept. 5, 2017), <https://guerrillaguides.wordpress.com/2017/09/05/no-7-immigration-law/> [<https://perma.cc/SPC2-3UNE>] (acknowledging that traditional immigration law courses “tend to either follow a traditional chronological series of constitutional cases or take a practical approach to training students on immigration agency procedures”). The authors encourage immigration law professors to conceptualize immigration law and policy as a “tool used to reinforce white supremacy.” *Id.*

142. See Ramna Shahzad, *What Is the Significance of Acknowledging the Indigenous Land We Stand On?*, CBC NEWS (July 15, 2017), <https://www.cbc.ca/news/canada/toronto/territorial-acknowledgements-indigenous-1.4175136> [<https://perma.cc/3LYD-PDDT>].

responsibilities on Indigenous lands.¹⁴³ Beginning an immigration law related course with an Indigenous land acknowledgement exercise not only helps students acknowledge settler colonialism and its ongoing process of Indigenous elimination, but it also lays the foundation for an understanding of the U.S. immigration legal system as an instrument of hypocrisy and irony – as a system that indignantly assumes the power and prerogative to control seized, stolen, and expropriated Indigenous lands. Numerous step-by-step land acknowledgement guides with necessary maps and pronunciation aides have emerged to facilitate the practice of land acknowledgement.¹⁴⁴ Students can use these guides to create their own acknowledgement statements.

However, it is important for students to realize that while land acknowledgements expose settler colonialism's ongoing policies of Indigenous elimination – without accompanying decolonial action, land acknowledgements are stripped of their disruptive power.¹⁴⁵ For example, when used by an educational institution, land acknowledgements should include a statement of commitment to targeting Indigenous students for scholarships and recruitment, to work with researchers to benefit Indigenous communities, and to

143. See Chelsea Vowel, *Beyond Territorial Acknowledgements*, *APIHTAWIKOSISÂN* (Sept. 23, 2016), <https://apihtawikosisan.com/2016/09/beyond-territorial-acknowledgments/> [<https://perma.cc/6VEM-RCK7>]; see also Justin Wiebe & K. Ho, *An Introduction to Settler Colonialism at UBC: Part Three*, TALON (Oct. 13, 2014), <http://thetalon.ca/an-introduction-to-settler-colonialism-at-ubc-part-three/> [<https://perma.cc/8SU9-VXA8>] (arguing that Indigenous land acknowledgements force non-Indigenous students to discuss their relationship to the land and how they are implicated in settler colonialism: “If more non-Indigenous professors were to make territory acknowledgments, students who were previously unaware of settler colonialism could start gaining a better understanding of its complexities.”).

144. See, e.g., Ayendri Ishani Perera, *Activism Skills: Land and Territory Acknowledgement*, AMNESTY INTERNATIONAL CANADA: ACTIVISM GUIDE (Sept. 1, 2017), <https://www.amnesty.ca/blog/activism-skills-land-and-territory-acknowledgement> [<https://perma.cc/8SU9-VXA8>]; see also U.S. DEP'T OF ARTS & CULTURE, *HONOR NATIVE LAND: A GUIDE AND CALL TO ACKNOWLEDGEMENT* (2017), https://drive.google.com/file/d/0B_CAyH4WUfQXTXo3MjZHRC00ajg/view [perma.cc/4C4W-4U37]; *FAQ – Indigenous Land Acknowledgement, GIRL GUIDES (2018)*, https://www.girlguides.ca/web/Documents/MZ/Land_Acknowledgement_FAQs.pdf [<https://perma.cc/5YSH-259Q>].

145. See, e.g., Maija Kappler, *Reconciliation More Than Land Acknowledgements, Indigenous Groups Say*, CBC NEWS (Jan. 14, 2017), <https://www.cbc.ca/news/canada/manitoba/reconciliation-more-than-land-acknowledgements-indigenous-groups-say-1.3936171> [<https://perma.cc/NML8-UB5N>] (“Indigenous leaders stress that the more powerful the institution that makes the statement, the more important it is for it to be accompanied by concrete actions or it appears more as an empty gesture than a sign of respect.”).

focus on Indigenous language revitalization efforts.¹⁴⁶ Therefore, a land acknowledgement exercise should be presented to students as a mere “first step” to be followed by a necessary “second step,” which requires beginning the ongoing and continual process of learning about settler colonialism, building relationships with Indigenous communities, and aligning oneself with Indigenous struggles for self-determination and decolonialization.¹⁴⁷

B. Modifications to the “Personal Immigration History” Exercise

Many immigration law professors in the United States ask students to engage in some variation of a “personal immigration history” exercise. In general, this exercise asks law students to describe their personal immigration history by explaining why, when, and under what circumstances their families decided to or were forced to migrate to the United States; and to report about what legal restrictions, if any, their families faced at the time of immigration. I offer two modifications that disrupt the traditional way in which the “personal immigration history” exercise is employed in order to prevent the exercise from eclipsing settler colonialism and failing to acknowledge the pre-existence of Indigenous peoples.

The first modification helps avoid the assumptions that all law students are non-Indigenous. This modification involves including a threshold question that asks: “Are you or your family Indigenous to this land?” followed by a set of specific questions that relate to the Indigenous experience of colonialization such as: “What was the territory that was stolen from your family?”; “If you or your family migrated from the land that was stolen from your family, why, when, and under what circumstances did you or your family migrate?”; “Did anyone in your family attend a residential boarding school?”; “How did the experience of attending a residential boarding school impact you or your family?”

The second modification involves reframing the exercise as a “personal settler colonialism history” in order to require all students

146. Patty Winsaw, *Are Indigenous Acknowledgements a Step Forward or an Empty Gesture*, STAR (Dec. 27, 2017), <https://www.thestar.com/news/insight/2017/12/27/are-indigenous-acknowledgements-a-step-forward-or-an-empty-gesture.html> [https://perma.cc/N9GH-44NN] (interviewing the Director of the Centre for Indigenous Governance at the Ryerson University in Toronto).

147. See Jaydene Lavallie et al., *Know the Land Territories Campaign*, LAURIER STUDENTS’ PUB. INT. RES. GROUP, <http://www.lspirg.org/knowtheland> [https://perma.cc/LY2F-Q8N2].

to describe their relationship to settler colonialism. This modification involves a specific set of questions which include: “Are you a descendant of the original European settlers and/or a racialized outsider?”;¹⁴⁸ “Are you a descendant of ‘virtuous immigrants’¹⁴⁹ and/or ‘undesirable immigrants?’”;¹⁵⁰ “Did you or your ancestors arrive as part of the settler colonialism project as slaves, colonial subjects, refugees fleeing the United States generated and supported wars, economic refugees, or coerced/subordinated laborers?”¹⁵¹

Without either of these modifications, the traditional “personal immigration history” exercise risks reinforcing the notion that “we are all immigrants” and that the United States is therefore a “nation of immigrants.” By allowing for the conclusion that the United States is made up exclusively of “immigrants” who arrived from *somewhere else*, the traditional version of the exercise denies the reality of Indigenous peoples who have always lived on these lands.¹⁵² Moreover, by supporting an oversimplified notion of “immigrant” that includes *everyone*, the traditional exercise transforms settlers into immigrants and ignores the violence of subordination and slavery, conquest, and elimination.¹⁵³

A modified version of the traditional “personal immigration history” exercise and an Indigenous land acknowledgment exercise can play an important role in helping students acknowledge settler colonialism and the pre-existence of Indigenous peoples. As a result, these “unsettling pedagogies” lay the foundation for analyzing immigration laws through a settler colonialism lens. Moreover, by

148. See *supra* note 4 (explaining use of the term “racialized outsiders” to refer to people of color who are not indigenous to the lands that currently comprise the United States).

149. See Glenn, *supra* note 23, at 62 (describing “virtuous” migrants as typically European immigrants who were selected for gradual inclusion into the settler colonial state).

150. *Id.* at 60–67 (describing “undesirable” migrants as typically racialized immigrants who were considered morally and irredeemably degraded, such as Mexican and Chinese immigrants).

151. See Tuck & Yang, *supra* note 44 and accompanying text.

152. See Volpp, *supra* note 30, at 289–91.

153. Tuck & Yang, *supra* note 44, at 6–7 (“Settlers are not immigrants. Immigrants are beholden to the Indigenous laws and epistemologies of the lands they migrate to. Settlers become the law, supplanting Indigenous laws and epistemologies. Therefore, settler nations are not immigrant nations.”); see also Roxanne Dunbar-Ortiz, *Stop Saying This Is a Nation of Immigrants!*, COLOURS OF RESISTANCE, <http://www.coloursofresistance.org/334/stop-saying-this-is-a-nation-of-immigrants-2/> [<https://perma.cc/J6WF-TSB3>] (“Are ‘immigrants’ the appropriate designation for the original European settlers? . . . No . . . So, let’s stop saying ‘this is a nation of immigrants.’”).

inviting students interested in immigration law to confront their own complicities and resultant responsibilities on Indigenous lands, these pedagogies can inspire engagement in movements that forge links between the struggles for immigrant rights and Indigenous self-determination.

CONCLUSION

The harms of settler colonialism continue today. The laws created by settler colonialism were designed to protect its ongoing invasion. Whether through the 2017 Muslim Ban, or the 1522 Muslim Slave Ban; whether through Trump's immigrant family separation policy or the U.S. government-funded residential boarding school program; whether through NSEERS or the Chinese Exclusion Act and Japanese Internment Order; whether through the border that divided the Tohono O'odham Nation's lands in 1853 or Trump's border wall that threatens to fortify that border today — the U.S. immigration legal system consistently supports U.S. settler colonialism's ongoing structures of invasion.

Analyzing U.S. immigration laws and polices within a settler colonialism framework exposes the U.S. immigration system as integral to the real invasion that threatens us — not the "invasion" of immigrants at the southern border — but the invasion of settler colonialism's ongoing processes of Indigenous elimination and subordination of racialized outsiders. Understanding the U.S. immigration legal system as an instrument of settler colonialism not only reveals underlying racism, violence, hypocrisy, irony, and xenophobia — but can also mobilize movements of solidarity and acts of resistance that combat the foundational structures of settler colonialism.