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Indefinite Detention, Colonialism and Settler Prerogative in the United States

Abstract

The primacy accorded individual civil and political rights is often touted as one of the United States' greatest achievements. However, mass incarcerations of indefinite duration have occurred consistently throughout U.S. history and have primarily targeted people of color. The dominant narrative insists that the United States is a political democracy and portrays each instance of indefinite detention in exceptionalist terms. This essay argues that the historical patterns of indefinite detention are better explained by recognizing the United States as a settler colonial state whose claimed prerogative to expand its territorial reach and contain/control populations over which it exercises jurisdiction inevitably results in the involuntary inclusion and concomitant exclusion of peoples of color.

Keywords

Colonialism, carceral state, inclusive exclusion, immigration detention, indefinite detention, internment, mass incarceration, plenary power, settler colonialism, slavery.

Indefinite Detention, Colonialism and Settler Prerogative in the United States

[I]ndefinite detention is a national trope, sourced in the violence of colonialism.

-Penny Pether

(Pether, 2012: 2550)

The United States has long engaged in officially sanctioned incarceration outside the rule of law, leaving people(s) indefinitely imprisoned without the benefit of due process or other protections articulated in its Constitution and in international human rights law. Such indefinite detentions are generally characterized as “exceptional” measures necessary to protect the public from imminent threats to the national security (Van Bergen and Valentine, 2006: 452)¹, and oft-discussed examples² include the internment of almost 120,000 Japanese Americans during World War II, and the detention of some 800 people at the US naval base at Guantánamo Bay beginning in 2002. Such incarcerations conform to Giorgio Agamben’s characterization of the concentration camp as a place in which sovereign power operates directly upon “bare life,” unmediated by law, and through which the “state of exception begins to become the rule” (Agamben, 1998: 168-69).

Portraying these indefinite detentions as exceptional implies the existence of a norm in which the rule of law prevails. This, in turn, encourages those contesting particular instances of indefinite detention to frame their efforts in terms of bringing the exception into the realm of the “normal.” Thus, for example, in the wake of the attacks of September 11, 2001, many civil libertarians in the United States urged that those suspected of terrorist activity be processed through the criminal justice system rather than detained at Guantánamo (Alien Enemies Act, 2012: § 21). If, however, large-scale indefinite detentions are routinely utilized by the state to maintain the status quo they can only be understood and, therefore, effectively challenged, as structurally embedded rather than exceptional practices.

In the United States, indefinite detentions may be exceptional in the sense that the formalities of legal process have been abandoned, but they are not aberrational. Adam Klein and Benjamin Wittes observe:

Preventive detention is not prohibited by U.S. law or especially frowned upon in tradition or practice. The circumstances in which it arises are not isolated exceptions to a strong rule against it; rather, they are relatively frequent. The federal government and all 50 states together possess a wide range of statutory preventive detention regimes that are frequently used, many of which provoke little social or legal controversy (Klein and Witte, 2011: 86-87).

We cannot identify a point in United States history where “the state of exception begins to become the rule”; it has always been the rule. Mass internments were integral to the establishment of the state and have been consistently utilized to maintain its hegemony, domestically and globally. They constitute a condition of colonialism, as Penny Pether observed, regularly and predictably used to facilitate settler appropriation of land and natural resources, to ensure a readily available and easily disposable labor force and to exercise a claimed sovereign prerogative to maintain social “order.”³

This order, in turn, represents a status quo in which racial hierarchy is deeply, structurally embedded. Angloamerican settlers, like their European colonial counterparts, have consistently invoked their “civilizing mission” to justify the colonization of peoples of color; a “grand project,” to quote Antony Anghie, “that has justified colonialism as a means of redeeming the backward, aberrant, violent, oppressed, undeveloped people of the non-European world by incorporating them into the universal civilization of Europe” (Anghie, 2005: 3; Osterhammel, 2005: 17). On-going colonial subjugation, however, requires the colonized to be perpetually constructed as Other (Osterhammel, 2005: 108; Lorenzo Veracini, 2010: 22). The result is a “dynamic of difference” that perpetually “creat[es] a gap between two cultures . . . and seek[s] to bridge the gap by developing techniques to normalize the aberrant society” (Anghie, 2005: 4). While “normalize” generally connotes assimilation, in a colonial context it encompasses whatever is required to render life “normal” for the colonizers. Incarceration unconstrained by otherwise applicable law is one such technique that has been utilized regularly toward that end in the United States as well as in other colonial contexts.⁴

In considering the genealogy of indefinite detentions in the United States, this essay begins with a few examples of the internments, generally undertaken during times of war, that are commonly considered paradigmatic examples of the exceptional use of what are, in effect, concentration camps. To support my thesis that such incarcerations are not, in fact, aberrational I then provide illustrations from three broad dimensions of US history. The first is the mass internment of Indigenous peoples who survived the initial colonial invasion. The second considers slavery as a form of collective and racialized indefinite detention, one that has evolved into a carceral state that, in significant respects, is indistinguishable from Agamben's "camp" (Agamben, 1998: 20; Foucault, 1995). The third dimension is the indefinite detention of immigrants. Each of these broad dimensions of indefinite detention are utilized by the settler class as part of its perceived prerogative to appropriate Indigenous lands and resources, render those lands profitable, control who may or may not enter or remain within the borders of "their" state.

In analyzing the Australian high court's decision in *Mabo v. Queensland (No. 2)* (1992), Penny Pether noted that while her discussion of the related case law might appear "to herald a linear history rather than genealogy in the Foucauldian sense," she was, in fact, seeking "the singularity of certain recurrent constituting stories" in the "accumulated evidence of the 'invasions, struggles, plundering, disguises, ploys'" pervading the legal discourse (Pether, 1998: 139-140 n.3). Similarly, the examples below are not proffered as a linear history of American internments, but rather as illustrative of "certain recurrent constituting stories" about indefinite detentions. They demonstrate that the United States has consistently utilized its power to imprison large sectors of the population under its jurisdiction without regard for the rule of law. While some instances may appropriately be deemed exceptional, the exclusion of peoples from otherwise applicable rights regimes through large-scale incarceration is integrally related to the establishment and maintenance of the American settler state. This, in turn, means that if such detentions are to be effectively challenged, they must be understood as a form of exclusion originating in and inseparable from the forced inclusions of colonial appropriation and exploitation.

“National security” internments

The term “indefinite detention” generally brings to mind the extrajudicial internments of people deemed threats to the national security under conditions that replicate those Agamben describe as characteristic of the “camp.” The extent of these detentions and the conditions under which people are held vary depending upon the people(s) interned, the national political climate and the United States need to maintain its image as the paragon of liberty and democracy (Klein and Witte, 2001: 88). They are not, however, subject to the rule of law and, as most recently illustrated by the United States’ on-going detention of men and boys at its Guantánamo Bay Naval Base, the detainees may not only be reduced to bare life but also tortured, physically and psychologically, to the point that they prefer death (Pugliese, 2015).

The United States’ government has consistently asserted a prerogative to detain persons considered politically subversive, without charge or trial, particularly during times of war. Even before US independence, Thomas Jefferson helped draft Virginia laws which allowed the government to remove citizens beyond “military zones” and “to restrain all persons who refused to take the oath of loyalty to the American cause or who were merely suspected of disaffection” (Levy, 1989: 31-32). The Alien Enemies Act, first passed in 1798, still allows for the president to arrest, detain and remove civilians who are subjects or citizens of countries that the US is at war with, or that pose a threat of invasion or attack, without any individualized determination that they pose a danger to the US (Alien Enemies Act, 2012: § 21). This authority was used by President James Madison to detain British citizens during the War of 1812, Germans during World War I, and German, Italian and Japanese “enemy aliens” during World War II (Klein and Witte, 2011: 102-06).

President Thomas Jefferson attempted unsuccessfully to suspend the writ of habeas corpus in 1807, (Klein and Witte, 2011: 116-17) and President Abraham Lincoln did so during the Civil War, ordering the arrest and indefinite detention of those—including dissident newspaper editors and state legislators—he considered threats to public safety (Sandburg, 1954: 246-47; Speer, 1997: 37). While many, including Supreme Court Chief Justice Roger Taney, believed Lincoln’s actions to be unconstitutional in 1863 Congress

retroactively approved them (Klein and Wittes, 2011: 118-120). Tens of thousands of civilians in northern and border states were interned and many more banished without any specific showing of disloyalty; in one Missouri county, for example, by late 1863 only 600 people remained out of a population of 10,000 (Brownlie, 1958: 126, 163). Congress subsequently authorized suspension of the writ in 1871 to allow President Ulysses Grant to suppress the Ku Klux Klan in the Reconstruction South, in 1902 to facilitate the colonial conquest of the Philippines, and in 1900 to preclude threats to the annexation of Hawai'i (Klein and Wittes, 2011: 120-22).

During World War I, Congress passed the Espionage and Sedition Acts, which prohibited virtually all criticism of the government (Espionage Act, 1917; Sedition Act, 1918; Unger, 1976: 41-42; Chang, 2002: 23). More than a thousand people were convicted under these laws, and despite the fact that no one was convicted of espionage, more than one hundred individuals were sentenced to prison terms of ten years or more (Goldstein, 2001: 113; Linfield, 1990: 33-67). In 1919 Attorney General A. Mitchell Palmer conducted raids in thirty-three cities, arresting and holding 10,000 people, both citizens and noncitizens, as "criminal anarchists" (Churchill and Vander Wall, 2002: 20-23; Unger, 1976: 43-44). During World War II, the US government engaged in the wholesale incarceration of approximately 120,000 persons of Japanese descent, on the grounds it was impossible to distinguish the "loyal" from the "disloyal" (*Korematsu v. United States*, 323 U.S. 214: 219). Because two-thirds of those interned were US citizens, the program was authorized not by the Alien Enemies Act but by executive order (Executive Order No. 9066 (1942)). Forced to abandon their homes, farms and businesses, and to store or sell their possessions on a few days' notice, men and women, children and old people, were shipped off to ten concentration camps—euphemistically designated "relocation centers"—in remote interior locations, where most were held for the duration of the war (Drinnon, 1987: 62; Weglyn, 1976).⁵

In 1947, as the United States moved into the Cold War, President Harry S. Truman authorized the Justice Department to investigate the "infiltration of disloyal persons" within the government and to create a list of "subversive" organizations (Weglyn, 1976: 32). The

Internal Security Act of 1950 required all members of “Communist-front” organizations to register with the government and authorized a proposal, not rescinded until 1971, to establish “emergency detention centers” for incarcerating those so registered, without trial, any time the president chose to declare an “internal security emergency” (Churchill and Vander Wall, 2002: 33; Zinn, 1980: 423-24; Matsuda, 1998: 9). Following the attacks of September 11, 2001, Congress passed the Authorization for Use of Military Force (AUMF), giving the executive broad authority to detain persons suspected of engaging in or supporting terrorism. In the following months, the Department of Justice detained several thousand Muslim or Arab immigrants, as well as those perceived to be of Middle Eastern origin, holding them indefinitely without charge, refusing to release information about who was being held, and often preventing the detainees from contacting their families, friends or lawyers (Chang, 2002: 67-86). Since then almost 800 men and boys have been captured overseas and imprisoned at the Guantánamo Bay Naval base, where many still remain, and an unknown number of persons have been detained and tortured at an undisclosed number of “black sites” around the world (Pether, 2012: 2562).

Fifteen years after the “war on terror” was declared, the US government’s power to detain people without legal or judicial safeguards continues unabated. The National Defense Authorization Act for 2012, signed into law by President Barack Obama, allows the indefinite military detention of those suspected of involvement in terrorist activity, without temporal or geographic limitations, and in terms that appear to apply to all persons, regardless of citizenship (National Defense Authorization Act for 2012 (2011): § 1021). The US government thus maintains large-scale, indefinite incarceration as an extrajudicial option for responding to threats to the national security—internal or external, real or imagined.

Despite the predictability of such internments, they continue to be characterized as exceptional in the master narrative. It appears that most Americans prefer to believe that such measures are legitimate responses to actual or anticipated military threats, that peacetime is the norm to which the country will shortly return, and that, when it does, the rule of law will again prevail. Underlying these beliefs is a presumption that arbitrary detention can be

readily distinguished from the state's "normal" practices. For the reasons discussed in the following sections, I believe that the indefinite detention of large sectors of the population under US jurisdiction has been and continues to be essential to the maintenance of American settler colonial rule.

Territorial control: American Indian internments

As theorists of settler colonialism emphasize, the "founding fathers" of the United States were colonizers who came to *stay*, not simply to profit and return home (Wolfe, 1999: 2). These Angloamerican settlers brought with them a presumption of sovereign prerogative, an unshakeable belief in their right to establish a state over which they exercised absolute control (Veracini, 2010: 3, 53-54). This required a territorial foundation and that, in turn, meant that ensuring the "disappearance" of the Indigenous peoples of the land for, as Deborah Bird Rose aptly puts it, they "got in the way just by staying home" (Rose, 1991: 46). It is well documented that the "settlement" of North America involved the decimation of Indigenous nations through military massacres, privatized violence incentivized by scalp bounties and sensationalized disinformation, and the often-deliberate spreading of lethal diseases (Churchill, 1997; Stannard, 1992). But the significance of the systemic imprisonment of American Indians to the appropriation of the continent is often overlooked, as is the fact that the precedents established in the "Indian Wars" continue to be relied upon by the US government in its so-called War on Terror (Yoo, 2003: 7; Fletcher and Vicaire, 2011).⁶

Although the British and, subsequently, the United States had entered into numerous treaties with Indigenous nations, thereby acknowledging American Indian sovereignty in the process of legitimating colonial land claims, by the 1830s the US Supreme court was proclaiming that American Indian nations would no longer be recognized as either independent or fully sovereign. As Chief Justice John Marshall announced in *Cherokee Nation v. Georgia*, "[t]hey may, more correctly, perhaps, be denominated domestic dependent nations," nations that "occupy a territory to which we assert a title independent of their will" (*Cherokee Nation v. Georgia*, 30 U.S. 1831: 17). This characterization of Indigenous peoples as internal colonies laid the groundwork for the federal government's subsequent assertion of

absolute—“plenary”—power over Indian affairs (Churchill, 2002: 673-79; Newton, 1984). In other words, the unilateral extension of US jurisdiction to encompass—i.e., forcibly include—Native peoples simultaneously resulted in their exclusion from all otherwise applicable legal protections.

It also laid the groundwork for the forced removal of the so-called Five Civilized Tribes (the Cherokee, Choctaw, Chickasaw, Creek, and Seminole nations) and some thirty smaller peoples from their homelands, and their relocation to reservations west of the Mississippi River (Foreman, 1953; Jahoda, 1975). The nature of the process has been masked by the pervasive use of relatively benign terms like “relocation,” “removal” and “reservations,” but the reality was Indigenous peoples across the continent were reduced to the conditions of bare life Agamben describes as characterizing the concentration camp, a setting in “which human being could be so completely deprived of their rights and prerogatives that no act committed against them could appear any longer as a crime” (Agamben, 1998: 171).

For the Indian nations of the Southeast, “removal” meant families taken at gunpoint from their homes (which were often then ransacked and burned), imprisoned in stockades, and then force-marched some 1,200 miles across the country in mid-winter, with a resulting death rate of some fifty percent (Thornton, 1984: 293).⁷ These conditions were inflicted on civilians, by the US military, during a period in which no hostilities were occurring. The survivors who made it to “Indian country” in Oklahoma were then assigned to “agencies,” i.e., reservations. “Reserved lands” sounds relatively benign but, as the following examples illustrate, the reservations to which some 400 American Indian nations were eventually consigned were, in fact, prison camps (Harring, 1994: 204-206).

In 1862, in the aftermath of what is known as Little Crow’s War in Minnesota, almost all of the Santee Sioux were interned at Fort Snelling, where conditions were so miserable that one-quarter of the population died within several months. In addition to the threat of military pursuit, escape was deterred by a \$200 scalp bounty proclaimed on all Santees found outside the fort (Brown, 1970: 60, 63-64; Schultz, 1992: 279-283). In 1863, following the

army's Kit Carson "campaign," the Navajos were first imprisoned at Fort Defiance, Arizona, and then force-marched some 300 miles to the Bosque Redondo near Fort Sumner, New Mexico, where they were held for four years. Lodged in crude shelters (sometimes literally holes in the ground), provided grossly inadequate rations and wracked by disease, half of the detainees perished before they were moved to another reservation in 1868 (Bailey, 1988; Bailey 1998; Thompson, 1982). Thus trapped on inhospitable lands with inadequate food or shelter, survival seemed unlikely, prompting many interned peoples to try to escape. But they were prisoners, allowed to leave their assigned agencies only with the permission of the military or a federal Indian agent (Frederickson, 1981: 242-43).

The military was frequently deployed to track down and capture or kill those attempting to escape. In 1877 the Northern Cheyennes were relocated from their traditional Montana territory and imprisoned on the Cheyenne-Arapaho reservation in Oklahoma. As malaria, dysentery, and other illnesses spread rapidly among them, in the fall of 1878, some 300 Cheyennes fled in a desperate attempt to go home (Berthrong, 1976: 27-47; Sandoz, 1964: 27-31). Some 15,000 troops pursued the small group of escapees and incarcerated them at Camp Robinson, Nebraska, where they were denied food and firewood in the dead of winter in an attempt to coerce them to returning to Oklahoma. In January 1879, the Cheyennes tried once more to escape but they were quickly tracked down, and about half of them, children included, were killed (Sandoz, 1964: 245-90; Andrist, 1964: 321-29).

Likewise, the infamous Wounded Knee massacre of 1890 was perpetrated by troops pursuing Minneconjou Lakotas whose sole "offense" was to have fled their assigned agency during a period of starvation and severe repression, to seek refuge among their Oglala relatives at the Pine Ridge Agency, about 150 miles away (Hyde, 1937; Hyde, 1961; Andrist, 1964: 350-2; Brown, 1970: 401-2; McGregor, 1940).

The message was clear: American Indians had no alternative but to stay in their assigned locations, under whatever conditions the government cared to impose. The explicit purpose of the policy was to "clear" the land for White settlers and, by 1890, when the federal government declared the "frontier" to be closed, those Indigenous peoples who had survived

what David Stannard terms the “American holocaust” were confined to less than 3% of their original landbase (Stannard, 1992; Churchill, 2003: 12). As in all colonial ventures, the dynamic of difference had been employed to render them less than human—to construct them quite literally as bare life—as reflected in the fact that it was 1879 before the Ponca leader Standing Bear became the first American Indian legally recognized as a “person” capable of suing for habeas corpus (Dando-Collins, 2004).

Another thirty years passed before an American court ruled in 1909 that Indigenous people could not be classified—or treated—as “prisoners of war” merely because they were Indians, a practice that persisted even after that time and has never been renounced by the government (Harring, 1994: 198-203). The most egregious example is that of the Chiricahua Apaches. Harsh conditions at the San Carlos reservation had precipitated the escape and protracted military resistance mounted by Geronimo’s band during the 1870s and 1880s. In retaliation, after Geronimo’s surrender in 1886, the government shipped the entire Chiricahua population—children, elders, women, and even those men who had fought *for* the U.S. against their “renegade” relatives—to military prisons in Florida and then Alabama. During their first eight years of incarceration, some 40% of the imprisoned Chiricahuas died, and it was not until the winter of 1913-14 that the survivors were finally transferred to the Kiowa-Comanche reservation in Oklahoma (Lieder and Page, 1997: 28-38; Roberts, 1984).

The purpose of incarcerating the Chiricahua Apaches for an entire generation was to ensure that their spirit was broken, to assimilate them to the “American” way of life, with all that implies. Oversight of this project was entrusted to an army captain, Richard Henry Pratt, the Chiricahuas’ warden at the military prison in Florida. This, in turn, qualified Pratt to inaugurate the American Indian “boarding school” system whose aim, as he stated in 1895, was to “kill the Indian, save the man” in each student (Churchill, 2004: 13-14). These schools represent a massive program of indefinite detention. They operated for the better part of a century and, for generations children were forcibly removed from their families, often by the military. Parents who resisted were imprisoned. The children were very literally held captive, often for 10 years or longer, sexually abused, and tortured (Churchill, 2004). But sadism was

not the purpose of their incarceration, as sadistic as their captors may have been. The purpose of the schools was to eliminate all vestiges of Indigenous culture in these children, to strip them of their identity and replace it with the settlers' vision of what compliant people of color should look and act like.

In 1946 the US government established an Indian Claims Commission (ICC) in attempt to distinguish its record of territorial acquisition from that of the Germans it was then prosecuting at Nuremberg (Churchill, 2003: 125-52). The following year, the Chiricahuas filed a claim for damages accruing from the expropriation of their lands and from their lengthy imprisonment in Florida and Alabama. In 1971, the ICC finally awarded them token payment for their lost lands but not for their imprisonment (*Fort Sill Apache Tribe v. United States*, 26 Ind. Cl. Comm. 281 (1971)). On appeal the Court of Claims held that while "the Apache Tribe did not prosper from the injuries suffered by its constituent members" during their 27 years of imprisonment, these were claims over which the Commission had no jurisdiction. By refusing to review this decision, the Supreme Court effectively legitimated the settler state's prerogative to intern entire peoples in order to consolidate control over its claimed land base (Lieder and Page, 1997: 222).

This prerogative has been exercised on numerous occasions, both within the claimed boundaries of the United States and in its colonial and imperial ventures across the globe. The Japanese American internment provides one internal example. While it was justified on the grounds of "military necessity" (*Korematsu v. United States*, 323 US 214: 233), upon closer examination it becomes evident that the removal of persons of Japanese descent from the West Coast, and their indefinite incarceration, was largely motivated by White settler resistance to their very presence. Despite reports from all relevant intelligence agencies that Japanese Americans posed no security threat, President Franklin D. Roosevelt ceded to pressure brought by organizations of prominent landowners and businessmen including, notably, the future Supreme Court Chief Justice Earl Warren (U.S. Congress, Commission on Wartime Relocation and Internment of Civilians (CWRIC), 1982: 54-55).⁸ One such group was the Native Sons of the Golden West, explicitly dedicated to preserving California "as it

has always been and as God himself intended it shall always be—the White Man’s Paradise” (Barnhart, and Matson, 1970: 32-57; Daniels, 1968: 85-7). As the California Joint Immigration Committee (formerly known as the Asiatic Exclusion League) stated bluntly in early February 1942, “This is our time to get things done that we have been trying to get done for a quarter of a century” (tenBroek, Barnhart, and Matson, 1970: 79).

California, of course, had not “always been . . . the White Man’s Paradise.” White settler claims had been realized only by the mass extermination of Indian nations (Churchill, 1997; Stannard, 1992) and the utilization and subsequent removal of Asian, particularly Chinese, and Mexican labor (Saito, 2003: 14-16; Johnson, 2004: 661-667). The Japanese American “evacuation” and “relocation” was entirely consistent with this history. Indian reservations served as “prototypes” for the camps in which Japanese Americans were interned (Drinnon, 1987: xxiv, 265) and Poston, one of the ten major Japanese American concentration camps, was actually located on the Colorado River Indian reservation in Arizona and administered by John Collier, the Commissioner of Indian Affairs (Byrd, 2011: 185).

Poston’s history illustrated the integral—and distinctly colonial—relationship between the American Indian and Japanese American internments. In 1940 Collier had proposed to “colonize 10,000 American Indians to the [Colorado River] reservation” (Byrd, 2011: 185), and Japanese American prisoners were utilized to develop the irrigation system Collier believed would allow the reservation to be self-sustaining. As Jodi Byrd observes,

By naming the relocation centers and internment camps “colonies” within their internal documents, the United States revealed the deeper logics of removals and reservations, and Collier, who saw in Poston an opportunity to develop a social experiment that might innovate future management strategies within the Office of Indian Affairs, had already laid the groundwork so that Hopi and Navajo families might join those relocation colonies after the war ended to continue the work started by the Japanese American internees (Byrd, 2011: 187).

American Indian internments would continue until the mid-1950s, when the government decided that its interests were better served by “terminating” its relationship with them,

abruptly pushing them off the reservations and dispersing them in cities (Orfield, 1966; Fixico, 1986). This attempt to once again remove Indigenous peoples from their land base became the responsibility of Dillon S. Myer, the new Commissioner of the Bureau of Indian Affairs (BIA). Myer, instructively, had been the Director of the War Relocation Authority (WRA), the agency responsible for managing the Japanese American internment. According to Richard Drinnon,

An accident of chronology has masked the underlying meaning of Myer's termination policy. Had he been commissioner of the BIA *before* he became director of the WRA, then the continuities stretching from the reservations to the camps could hardly have been missed and the fundamental sameness of his treatment of Native Americans and Japanese Americans would have elicited close analysis long ago (Drinnon, 1987: 265).

The extension of this prerogative-to-intern to American imperial ventures is beyond the scope of this essay, but it bears noting that the concentration camp model developed for "pacifying" American Indian nations has been utilized by the United States not only to intern domestic peoples, but in its overseas wars as well. From 1898 to 1903 the US fought a brutal war to bring the Philippines under colonial rule and, as Filipino resistance mounted, the US Secretary of War instructed the Army to employ the "methods which have proved successful in our Indian campaigns in the West" (Linn, 2000: 23). All Filipinos were viewed as "hostiles" and those who were not killed were to be forcibly removed to internment camps (Churchill, 2003: 315-18; Miller, 1982: 196-218; Drinnon, 1997: 287-88). As Stuart Creighton Miller notes,

The entire population outside the major cities in Batangas [a province of Luzon] was herded into concentration camps, which were bordered by what [Brig. Gen. J. Franklin] Bell called "dead lines." Everything outside the camps was systematically destroyed—humans, crops, food stores, domestic animals, houses, and boats (Miller, 1982: 208).

For Bell, this was a reasonable policy, “since all natives were treacherous, [and] it was therefore impossible to recognize ‘the actively good from the actively bad’” (Miller, 1982: 208). In early 1901, the 51,000 inhabitants of Marinduque Island were ordered into concentration camps, and later that year all 266,000 residents of Samar Island “were ordered to present themselves to detention camps in several of the larger coastal towns. Those who did not . . . would be shot” (Schirmer and Shalom, 1999: 15-17). As major US newspaper headlines informed the citizenry, Lt. Gen. Arthur MacArthur, commander of US forces in the Pacific, had adopted the “Kitchener Plan,” an easily recognized reference to the British tactics of extermination and “reconcentration” being used against the Boers in South Africa (Miller, 1982: 163-64).

In turn, the *reconcentrado* policy used in the Philippines to “facilitate counter-insurgency operations” (Schirmer and Shalom, 1999: xiv, 15, 299) was replicated by the Americans in Vietnam. By 1963, a reported 8.7 million peasants in the Republic of Vietnam (South Vietnam) had been forcibly concentrated in “strategic hamlets” where, according to the *Pentagon Papers*, “it was difficult to differentiate between *security for* the rural populace and *control of* that populace, since many of the actions to achieve one were almost identical to the acts to realize the other” (Shafer, 1988: 267). After US ground troops were introduced in 1965 the process was accelerated, with millions more driven from US-declared “free fire zones” in the countryside and “reconcentrated” by what was termed “forced draft urbanization” (Sheehan, 1988: 106-107, 540-542; Chomsky and Herman, 1979: 65-66). Since then, similar tactics have been and continue to be used by US-backed regimes in Central America to drive Indigenous peoples off their lands resulting, among other things, in large-scale migrations to the United States (Taylor and Steinberg, 2011: 254-57).

Enslaved and incarcerated labor

As Euroamerican colonizers successfully employed strategies of elimination and containment to occupy Indigenous lands, they recognized that they would need a large and subordinated labor force to render the appropriated—and depopulated—territory profitable (Wolfe, 1999: 1-2). Initially, much of this labor came from enslaved persons, primarily of African descent.

After “emancipation,” criminalization supplanted chattel slavery as a means of maintaining an imprisoned labor force. In turn, as labor needs shifted and Afrodescendant peoples came to be seen as a “surplus” population, mass incarceration has served as a means of controlling and conceptually disappearing large sectors of the population.

Slave labor camps

By the early 1700s some 30,000 to 50,000 American Indians had been enslaved by the British in North America, (Ablavsky, 2011: 1466; Mann, 2006: 41) but the colonizers soon turned to the African slave trade already well established in the Caribbean (Davidson, 1980: 67-76). By 1808, when American settlers declared the slave trade to be illegal, an estimated 388,000 persons had been brought directly to the United States, with another 60,000 to 70,000 coming through the Caribbean (Gates, 2014). By 1860, there were some 4 million enslaved persons of African descent in the United States, accounting for almost 40 percent of the population of the slaveholding states, and nearly 13 percent of the total population (Sublette and Sublette, 2016).

The transformation of this (now internally) colonized and entirely involuntary workforce into a source of immense wealth required the forcible inclusion of persons of African descent within settler-claimed space, transformed into sufficiently compliant workers, and simultaneously excluded, physically and conceptually, from settler society. To accomplish these purposes the settler class, with the full backing of the state’s legal system and police powers, utilized all-encompassing strategies of subjugation (Higginbotham, Jr., 1996: 68-73; Finkelman, 1968: 21; Baptist, 2014).⁹ These strategies relied upon the foundational construction of Africans and Afrodescendants as a colonially-derived “resource” to be appropriated and exploited; in other words, as property rather than human beings (Harris, 1993: 1720). This meant that they could be bought or sold; raped, tortured, or abused at will; bred like animals; pledged as collateral; deeded and inherited (Crusto, 2005: 68-69; Bridgewater, 2005: 115-121).

This involuntary labor force could only be maintained by physical containment and control. While individual slave “owners” are often portrayed as individually responsible for

capturing escaped slaves, the containment of the enslaved population was widely recognized as a broader imperative of settler colonial society. The U.S. Constitution itself required “person[s] held to service or labour in one state, under the laws thereof, escaping into another”— i.e., fugitive slaves—to “be delivered up on claim of the party to whom such service of labour may be due” (U.S. Constitution, article 4, section 2, clause 3). Congress passed legislation implementing this requirement in 1793, and strengthened it with the Fugitive Slave Act of 1850 that, among other things, penalized those who interfered with the capture of escaped slaves and provided special federal commissioners to adjudicate rendition proceedings (Act of February 12, 1793; Act of September 18, 1850). State laws imposed similar obligations on all individuals to apprehend and return escaped slaves, and state militias and local law enforcement authorities were utilized to perform this function (Websdale, 2001). Just as American Indians could not leave their assigned reservations without the permission of federal agents, enslaved Africans and their descendants could not travel from their assigned plantations (or other locations) without the written permission of those who purported to own them. As with Indians, those who escaped were hunted down and tortured or killed (Conroy, 2006: 151-57). For example, a 1705 Virginia statute provided that slaves not possessing the required passes could be apprehended by “any person,” meaning any White person, and lashed by the local constable. For those deemed runaways, it was “lawful for any [White] person or persons . . . to kill and destroy such slaves by such ways and means as he, she, or they shall think fit,” and the owners of slaves so killed were to be reimbursed from the public treasury (Higginbotham, 1996: 56-57).

The most intense utilization of enslaved labor occurred on southern plantations, sites of indefinite—indeed, indefinitely hereditary—detention. Terror and violence were routinely utilized to extract ever-increasing productivity with no constraints beyond the desire of an “owner” to protect his “investment” (Pether, 2012: 2554-55; Baptist 2014: 113, 127).¹⁰ These were classic examples of Agamben’s camps, in which “no act committed against [an enslaved person] could appear any longer as a crime” (Agamben, 1998: 171). As explained by Georgia Supreme Court, if the common law were interpreted to “protect[] the life of the slave, why not

his liberty? [A]nd if it protects his liberty, then it breaks down, at once, the *status* of the slave” (*Neal v. Farmer*, 9 Ga 579). “To assure docility and compliance,” A. Leon Higginbotham summarized, “the slave had to understand . . . that resistance was futile, and that any attempt to regain control over his life would be met with severe punishment and possibly death” (Higginbotham, 1996: 50).

Resistance, of course, was not futile and played a significant role in the outcome of the Civil War and the formal abolishing of slavery, as WEB Du Bois explained in his *Black Reconstruction* (Du Bois, 1983: 55-83). Nonetheless, the mass and indefinite detention of Black Americans continued apace. The constitutional amendments of the Reconstruction era conferred—or imposed, depending on one’s perspective—US citizenship on people of African descent and purported to guarantee them due process and equal protection under law (Touré, 2006: 446).¹¹ This did not change the underlying opinion of much of the White population and its most powerful leaders, that, as Supreme Court Justice Roger Taney had stated in his infamous 1856 *Dred Scott* opinion, *all* those of the “African race,” whether enslaved or not, were “beings of an inferior order . . . so far inferior, that they had no rights which the white man was bound to respect” (*Scott v. Sandford*. 60 U.S. 393: 407).

Convict Labor

The Thirteenth Amendment to the US Constitution, ratified in 1866, prohibited slavery and involuntary servitude “*except as a punishment for crime*” (US Const. amend XIII, 1866) and, following “emancipation,” criminalization provided the settler class with a ready supply of involuntary labor. Laws governing the enslaved were quickly replaced with “Black codes,” which often limited African Americans to agricultural and domestic employment and criminalized idleness, vagrancy and “disrespect” of White people (Litwak, 1980: 367-70).¹² The penalty was almost invariably some form of unpaid labor and, as stated bluntly by the Virginia Supreme Court in 1871, convicted persons became “the slaves of the State” (*Ruffin v. Commonwealth*, 62 Va. 790: 796).

Rather than building prisons, southern states inaugurated convict lease systems that resulted in predominantly Black prisoners being “leased” to private individuals including, in

some cases, their former slave masters (Bennett, 1962: 273). The selling of rights to the labor of prisoners enriched both the public coffers and politically powerful individuals, and for some eight decades after the Civil War convict labor undergirded the South's agricultural economy as well as its industrialization. The costs of leasing were low enough that there was little incentive to provide adequate food, clothing, or medical care, for more convicts could easily be obtained (Lichtenstein, 1996; Mancini, 1996; Oshinsky, 1996). Those who leased convicts were permitted to chain, whip, and torture the prisoners, and to kill those who attempted to flee (Blackmon, 2008: 54-57).¹³ The convict labor system—which also affected, among others, Mexican and Chinese workers in the West (Takaki, 1987: 82)¹⁴—thus replicated the conditions of slavery and, while the prisoners may have been sentenced to a fixed term of years, the arbitrariness with which they were convicted, and the fact that most would not survive their sentences rendered their detentions arbitrary and effectively indefinite (Colvin, 1997: 247-48).

Convict leasing continued into the late 1920s and 1930s, and prison labor continues to be a source of significant profit (Pether, 2012: 2555-56). Federal prisoners make a wide range of products for the military and as well as the “free” market, and at least 37 states contract prison labor to mega-corporations like IBM, Microsoft and Honeywell, as well as smaller enterprises such as JC Penney and Victoria's Secret. While some states pay minimum wage, the federal government pays inmates \$.23 to \$1.15 per hour and, overall, prisoners are reportedly paid about 40 cents/hour (Cummings, 2012: 421-22). With the rise of private prisons, prisoners themselves are increasingly regarded as commodities rather than persons, just as they were under the convict lease system (Hallett, 2006; Levin, 2014). Nonetheless, in assessing imprisonment as a form of indefinite detention, it appears that the perceived need for social control eclipses profitability as a motivating force. This, in turn, means that people residing in marginalized communities of color are tethered to the carceral state by the pervasive and perpetual threat of imminent incarceration.

Prisons as Concentration Camps

As the US transitioned from an economy based primarily on manufacturing to one

dependent upon finance, technology, and the provision of services, income inequality has grown dramatically and Black Americans are increasingly perceived as a surplus population. Unlike the Chinese or Mexican workers deemed redundant in the late nineteenth and early twentieth centuries, they cannot be deported en masse and, instead, are increasingly being warehoused in prisons. As Pether observed,

mass incarceration of black men makes them invisible to most of us. It thus puts out of sight and mind phenomena of post-bellum U.S. life including the fact that since the great migration . . . there has never been an adequate supply of jobs in the ‘white economy’ for black men that would enable them to sustain a family (Pether, 2012: 2558).

Illustrating this point, Bruce Western notes that in 2000 the jobless rate for young Black men who had not completed high school was a stunning 49% by conventional measures, and 65% if one includes prison and jail inmates. “Only by counting the penal population do we see that fully two out of three young black male dropouts were not working at the height of the 1990s economic expansion,” he observes, adding that of these unemployed young men, “nearly half were in prison or jail” (Western, 2006: 91).

Agamben argues that the concentration camp as a “zone of indistinction between nature and right” must be distinguished from the prison because “while prison law only constitutes a particular sphere of penal law and is not outside the normal order, the juridical constellation that guides the camp is . . . martial law and the state of siege” and, therefore, the camp embodies a “space of exemption” rather than “a simple space of confinement” (Agamben, 1998: 20). For the vast majority of US inmates, however, the prison is anything but “a simple space of confinement” under terms dictated by law. While the judiciary occasionally intervenes to limit some of the excesses inflicted upon imprisoned persons, by and large the reasons for incarceration are arbitrary, the terms frequently indefinite, and the conditions such that prisoners, for the most part, have been reduced to bare life. As a result, it may not be functioning “outside the normal order,” but that is only because a state of siege has been normalized with respect to those who remain internally colonized.

The absence of due process and equal protection under law permeates all aspects of the criminal justice system. Police officers can stop, question, and frisk individuals without probable cause, effectively requiring “African Americans [and other people of color] to affirmatively justify the legality of their presence on the streets” (Conroy, 2006: 163). To provide just one example, in an eight-block Brooklyn, New York neighborhood the police conducted 52,000 “stop, question, and frisks” over a four-year period, resulting in “an indiscriminate barrage of degrading detentions” that one legal scholar analogizes to the counterinsurgency strategy known as “cordon and search” (Fabricant, 2011: 384). Such tactics lead to disparate rates of arrests and convictions that, in turn, result in longer prison sentences. According to the American Civil Liberties Union, in federal courts, Black men receive sentences nearly 20 percent longer than White men convicted of similar crimes and in some states the disparities are more dramatic.

The proliferation of “two-strike” and “three-strike” laws across the country led to a surge of life sentences for petty crimes (McCullough, 2002). In Georgia, where prosecutors can recommend life imprisonment for a second drug offense, more than 98 percent of the prisoners serving life sentences under this provision are Black (American Civil Liberties Union, 2016). Nationally, as of 2013, there were about 160,000 prisoners with life sentences—nearly half are Black and more than 10,000 were juveniles at the time of the crime. Almost 50,000 prisoners with life sentences, including one in four juveniles, have no possibility of parole (Nellis, 2013). “What distinguishes the American criminal justice system and brands it as distinctively harsh by comparison with the civilized and even uncivilized, world is [not the death penalty but] the frequency with which it banishes its own citizens to cages for the duration of their lives and with no pretense of offering a legal mechanism for freedom” (Lerner, 2013: 1103).

Until the 1970s, most US jurisdictions allowed judges almost unfettered discretion in sentencing, resulting in the widespread imposition of indeterminate sentences and concomitant disparities in the actual time served for similar offenses, and many states still retain this option (Subramanian and Delaney, 2014: 6-11). In a classic example, in 1961

George Jackson, still a teenager, was convicted of a \$70 robbery and given a sentence of one year-to-life in the California prison system. Ten years later Jackson, who had since become a political activist and author, was assassinated by prison guards (Zohrabi, 2012: 167-190).

Almost a half-century later, California prison officials exercise a prerogative to administratively classify prisoners as “prison gang” members and to be indeterminately sentenced to solitary confinement in the state’s “secure housing units” (SHUs). As of 2016, inmates are still being “validated” as gang members and consigned to SHUs for possessing George Jackson’s writings or materials pertaining to Black August commemorations honoring Jackson and other political prisoners (Zohrabi, 2012: 176-186).

Finally, it bears noting that the conditions of confinement faced by most American prisoners are often indistinguishable from those of the concentration camps, i.e., “the very paradigm of political space at the point at which politics becomes biopolitics and *homo sacer* is virtually confused with the citizen” (Agamben 1998: 171). This is clearly true of incarceration in solitary confinement—often benignly termed “administrative segregation”—which “has been transmuted from an occasional tool of discipline into a widespread form of preventive detention” (Dayan, 2011). Every day, some 86,000 people in the United States are imprisoned in isolation (Cole, 2016). As Angela Allen-Bell observes,

there is no real indicator as to who a likely candidate for isolation is and there is no consistency with respect to how long one might remain in an isolation unit. Prisoners have been put in isolation for having in their cells ink pens with metal in the tip, possessing tobacco, talking back to officers, . . . serving as jailhouse lawyers, . . . having charisma and leadership traits, serving as prison activists or whistleblowers, having militant and/or radical political beliefs, . . . and refusing to get out of the shower quickly enough (Allen-Bell, 2012: 772-73).

The conditions of isolation units regularly include confinement for 22 to 24 hours per day with virtually no contact with other human beings; grossly inadequate medical care; “[p]hysical torture such as hog-tying, restraint chairs, forced cell extraction”; “[c]hemical torture, such as stun grenades and stun guns”; and “‘no-touch torture,’ such as sensory

deprivation, permanent bright lighting, extreme temperatures, and forced insomnia” (American Friends Service Committee, 2016). In 2011 the United Nations Special Rapporteur on torture noted that because of the extreme harm inflicted by solitary confinement, it should be banned in almost all cases and there should be an absolute prohibition on isolation in excess of 15 days (*UN News Centre*, 2011). Yet the US has held—and continues to hold—prisoners in isolation not simply for years but for decades (Allen-Bell, 2012: 780). In one of the most extreme cases, political prisoner Albert Woodfox was released from the notorious Angola prison, a former slave plantation in Louisiana, in 2016 after more than 43 years of solitary confinement (Cole, 2016).

It is well-documented that prolonged and indefinite incarceration in isolation units subjects human beings to a regime in which they are reduced bare life, devoid of any meaningfully protected rights. But this is also true more generally for US prisoners who are routinely warehoused in overcrowded facilities; denied access to decent food, adequate medical care, or educational materials; and left at the mercy of guards who are all too often sadistically brutal. Theoretically, prison conditions are subject to the “cruel and unusual” limitations of the Eighth Amendment to the US Constitution, but this is a standard that originated in the law of slavery and in many respects “cannot be said to have evolved significantly over time” (Reinert, 2016: 859).¹⁵ As Alexander Reinert notes, “prisoners are protected from use of force inflicted for sadistic and malicious purposes, just as slaves once were in theory,” but in reality they have no legal recourse for dehumanizing treatment such as being doused with urine and feces by correction officers, punched in the genitals and shoved into cement by prison staff, slapped several times for no reason, sprayed in the face with pepper spray or tear gas long after any disturbance has arisen, or forced to stand naked for eight to ten hours in a two-and-a-half-foot square cage (Reinert, 2016: 858-59).

At an individual level, the result is that “[p]rison rules and regulations, the day-to-day operation of the institution confront the inmate with an image of himself that is grotesque and absurd,” and any “prisoner who refuses to internalize this image, who insists upon seeing

other versions of himself, is in constant danger” (Willens, 1987: 49).

The congruity between concentration camps and American prisons is succinctly highlighted by Penny Pether’s brief sketch of Charles Graner, the US Army reservist and “apparent architect of prisoner abuse at Abu Ghraib,” the US prison in Iraq notorious for torture, sexual abuse, and murder by the guards (Pether, 2012: 2559). She notes that Graner began his career during the Iran-Iraq war at a prison camp “where Iraqis were starved to the point of madness” and then became a guard at a maximum security prison in his home state of Pennsylvania (Pether, 2012: 2560). At the latter facility, where the majority of inmates were Black and more than 90% of the guards were White, Graner was among guards accused of beating and sexually assaulting prisoners, spitting in their food, and “shower[ing] them with racial epithets” (Pether, 2012: 2561). From this experience he moved on to Abu Ghraib, where, by his own admission, he beat, humiliated, and terrorized “ghost detainees” (Reid, 2005).

For these and many other reasons, incarceration in the United States is aptly described as another variant of arbitrary and indefinite detention, and it is one that affects huge sectors of the population. Racial or ethnic minorities constitute over 60% of the U.S. prison population. African Americans, constituting about 13% of the overall population, comprise almost 40% of those imprisoned; (Sentencing Project, 2013; Sentencing Project, 2016) American Indian men are imprisoned at four times the rate of White men, and American Indian women at six times the rate of their White counterparts (Lakota People’s Law Project, 2015: 6). Crime rates in the United States have not risen significantly since 1972, but since then its prison population has grown six-fold to over 2.2 million people, giving the US the dubious distinction of having the world’s largest prison population and highest rate of incarceration (Alexander, 2011: 8; Sentencing Project, 2016).

In addition to those who are incarcerated, some 4.7 million people in the United States are being monitored under conditions of probation or parole (Porter, 2016: 1). Purporting to eliminate indeterminate sentencing in the federal system, the 1984 Sentencing Reform Act prospectively eliminated federal parole, replacing it with a system of “supervised

release” that follows completion of a prison sentence. However, as Fiona Doherty explains, this “allows judges to return people to prison for violating the conditions of their supervised release, including conditions prohibiting behavior that is not criminal” and justifies re-incarceration as “additional punishment for the underlying crime,” thus rendering the amount of time to be spent in prison upon conviction of a wide range of federal crimes “structurally indeterminate” (Doherty, 2013: 960-61).

As summarized by Michelle Alexander, “The stark and sobering reality is that, for reasons largely unrelated to actual crime trends, the American penal system has emerged as a system of social control unparalleled in world history” (Alexander, 2011: 8). It is a system that largely serves to contain, control and effectively disappear a “surplus” population that is overwhelmingly poor and of color. As it serves those ends, its effects are not confined to those who are incarcerated or under court-ordered surveillance. Much as the plantations were sites of indefinite detention despite their lack of perimeter fencing, systems of containment and control symbiotically related to the criminal ‘justice’ system ensure that the majority of the residents of many contemporary communities of color are just as effectively and indefinitely confined.

These dynamics are illustrated in a 2013 shadow report filed by the Center for Constitutional Rights (CCR) with the U.N. Human Rights Committee and focusing on the New York City Police Department’s “stop and frisk” practices. According to the CCR, between 2004-2012 the police conducted over 4.4 million stops, 85% of which targeted primarily young Black or Latino men because, as stated by the police commissioner, “he wanted to instill fear in them, every time they leave their home” (Center for Constitutional Rights, 2013: 2-3). Children are growing up confined to their apartments, for those who live in targeted neighborhoods are vulnerable to being stopped, harassed, or arrested simply for *being* in the hallways, stairwells, or elevators of their apartment buildings, sitting outside, walking to school or the grocery store, riding the subway. As one resident put it, “we live in an occupied zone. . . It almost feels like you’re in an outside prison” (Center for Constitutional Rights, 2012:19). Poor people of color, now increasingly viewed as a drain on

social resources rather than an asset to be exploited, are—much like Indigenous peoples—getting in the way of the colonizers simply by staying home.

Immigrant Detention

The previous sections have briefly addressed ways in which the settlers who believe the United States to be “their” country have routinely imposed regimes of indefinite detention upon American Indians, Afrodescendants and other peoples of color in order to obtain Indigenous lands and to profit from the lands and peoples they have colonized. A discussion of such “routine” internments would be incomplete, however, without mention of the indefinite detention of peoples cast as unwelcome or disposable migrants, for “[n]o preventive detention regime in US law sees more use or affects as many people as does the immigration detention system” (Klein and Wittes, 2011: 141).

Thus far I have argued that indefinite detentions in the US have, in large measure, been a necessary concomitant to the settler colonists’ appropriation of Indigenous lands, their utilization of enslaved labor to “develop” and profit from those lands, and their desire to contain and control sectors of the population they perceive as superfluous to the wellbeing of “their” state. From this perspective, the exclusion of Indigenous and Afrodescendant peoples through various forms of incarceration is integrally related to their histories of having been involuntarily included in the course of American colonial expansion. Immigrants are generally understood to be voluntary migrants and, therefore, it might appear that their exclusion from the United States, either through internment or deportation, is unrelated to the forced inclusions that inevitably characterize colonial ventures.

In fact, however, immigration-based detentions can be seen as integrally related to American settler colonialism. An assumed right to control who may, must, or may not enter the territory, and who may or must leave it, is a foundational precept of the sovereign prerogative claimed by colonial founders of the state (Veracini, 2010: 16-17). As the Supreme Court candidly stated in its 1901 decision in *Downes v. Bidwell*, where it refused to constitutional protections to the residents of external colonies such as Puerto Rico, “[t]he power to acquire territory . . . implies not only the power to govern such territory, but to

prescribe upon what terms the United States will receive its inhabitants, and what their status shall be” (*Downes v. Bidwell*, 182 U.S. 244 (1901): 279). Despite the master narrative’s rhetorical insistence that this is a “nation of immigrants” (White House, Office of Communications, 2013)—a framing that serves primarily to erase Indigenous sovereignty—it has always been more accurately described, as it was by the so-called Native Sons of the Golden West, as “the White Man’s Paradise” (CWRIC, 1982: 364 n41). In attempting to create and maintain this “paradise,” immigration policies have played a critical role.

Mae Ngai has documented in detail how global migration is not simply “a unidirectional phenomenon, in which the hapless poor of the world clamor at the gates of . . . wealthier nations” and, more particularly, how American immigration history is “the product of specific economic, colonial, political, military, and/or ideological ties between the United States and other countries” (Ngai, 2004: 11, 10). Given the United States’ remarkably successful campaign to depict this as a “land of opportunity” for all, many undoubtedly came voluntarily, believing—accurately or not—in their ability to share in the benefits accrued by the largely Euroderivative settler class (Lockwood, 2013). Many others, however, have migrated under very different circumstances, from Chinese laborers literally kidnapped and forced to migrate (Redman, 2010: 2-5); to Filipinos, Puerto Ricans and Pacific Islanders driven from their homelands by U.S. colonial occupation and its economic consequences (Andres, 2009: 530-31; Torruella, 2012: 2-87; Román and Simmons, 2002: 488-519); to Central American refugees, themselves Indigenous peoples, forced off their lands by U.S.-backed military governments (Romig, 1985: 317-18) to those, like Mexican subsistence farmers, no longer able to feed their families as a result of global economic agreements (Belanger, 2006: 2-3, 13-16); to refugees generated by U.S. wars, from Southeast Asia to Iraq, Afghanistan, and Syria (Hedges, 2013).

In many of these cases, governmental policies have facilitated the importation of labor when the otherwise available workforce was inadequate to settler territorial or economic expansion, and then excluded these workers during periods of economic downturn (López, 2012). In other instances, such as the influx of refugees generated by U.S. wars, the

diversification of the population seems less intentional; accepted, often grudgingly, as the collateral damage of the policies and actions perceived as necessary to achieve or maintain global hegemony (Scott, 2014).

Despite the wide range of motivations impelling migrations to the United States, certain commonalities, or patterns, can be seen in terms of the subordination of migrants, particularly migrants of color, in the interest of maintaining colonial relations and one of these is the government's consistent use of a virtually unfettered prerogative to detain immigrants. This section provides a few illustrative examples of this process.

During the mid-nineteenth century, Chinese workers were heavily—and often involuntarily—recruited to the US to serve as a readily contained and presumptively disposable pool of low-wage labor essential to the agricultural and industrial development of the West (Takaki, 1989: 79-88; Galenson, 1984: 15). Within a few decades, however, the Chinese were increasingly depicted as a “yellow peril” intent on displacing White workers and Congress responded to the mounting calls for exclusion by passing the first federal immigration laws since the prohibition of the slave trade. A series of Chinese Exclusion Acts was passed in the 1880s, prohibiting the entry of Chinese workers, precluding the reentry of Chinese residents who left the country, creating a presumption of illegal presence that could be rebutted only with a certificate of residence (“a kind of internal passport”) attested to by White witnesses (Daniels, 2004: 17-22). Equally egregiously, during the Depression of the 1930s, when their labor was no longer desired, about one-third of the population of Mexican origin—both citizen and non-citizen—was summarily rounded up and deported (Johnson, 2004: 661-667).

In the *Chinese Exclusion Cases*, the Supreme Court first articulated the plenary power doctrine referenced above with respect to the federal government's assertion of absolute authority, unconstrained by otherwise applicable constitutional protections, over American Indian nations and external colonies. Deferring to the political branches of government—i.e., Congress and the Executive—the Court authorized exclusion based solely upon race or national origin (*Chae Chan Ping v. United States*, 130 U.S. 581 (1889): 606) and refused to

characterize deportation as punishment (*Fong Yue Ting v. United States*, 149 U.S. 698 (1893): 730-34). Subsequently the Court exempted detention pending deportation from otherwise applicable constitutional constraints (*Rodriguez-Fernandez v. Wilkerson*, 654 F.2d (10th Cir. 1981): 1382, 1385). Since then, indefinite detention pending deportation or, more recently, adjudication of asylum claims, has been standard practice, limited only by Supreme Court rulings in 2001 and 2005 that in the absence of a “significant likelihood of removal” persons deemed deportable or inadmissible could not be held for more than six months without administrative review (*Zadvydas v. Davis*, 533 U.S. 678 (2001); *Clark v. Martinez*, 543 U.S. 371 (2005)).

During the Cold War these immigration powers were utilized to indefinitely detain non-citizens whom the government wished to deport, but had nowhere to go. Thus, for example, the Court allowed Ignatz Mezei, a permanent resident who had gone to Europe to visit his ailing mother, to be held indefinitely on Ellis Island, without a hearing, on the attorney general’s assertion that his reentry would be “prejudicial to the public interest” (*Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953): 208). During the 1980s these precedents were invoked to allow the indefinite detention of Mariel Cubans (Boswell, 1997: 702)¹⁶. The injustice inherent to such practices was articulated by the Tenth Circuit Court of Appeals in the *Rodriguez-Fernandez* case when it ordered the release of a Mariel Cuban who was excludable but had nowhere else to go:

The case law generally recognizes almost absolute power in Congress concerning immigration matters, holding that aliens in petitioner’s position cannot invoke the Constitution to avoid exclusion and that detention pending deportation is only a continuation of exclusion rather than “punishment” in the constitutional sense. . . . [Yet, in] the instant case the detention is imprisonment under conditions as severe as we apply to our worst criminals. It is prolonged; perhaps it is permanent (*Rodriguez-Fernandez v. Wilkerson*, 654 F.2d 1382 (10th Cir. 1981): 1385).

The Tenth Circuit’s view, however, did not prevail (*Jean v. Nelson*, 727 F. 2d 957 (11th Cir. 1984): 968), and it was twenty-five years before the Supreme Court ruled that the Marielitos

could not be held forever (*Clark v. Martinez*, 543 U.S. 371 (2005)). Until then, “any Mariel refugee who had not become an American citizen or legal resident could be detained indefinitely after completing a jail term for even the smallest crime” (Ojito, 2005).

In the meantime, the United States had indicted and detained or repatriated tens of thousands of Haitian asylum seekers, holding those detainees it found to have credible asylum claims at its naval base at Guantánamo Bay, Cuba (Paik, 2016: 91-99). Ultimately some 12,500 Haitians were interned at Guantánamo before the US began intercepting and forcibly returning Haitians found on the high seas and, eventually, invading Haiti in 1994 to restore “stability” to the region and avert “the threat of a mass exodus of refugees” (Paik, 2016: 99). Arguing that Guantánamo was not under US sovereign control, US officials repudiated any legal responsibility regarding the detainees’ basic human rights, setting the stage for its current use of the naval base (Paik, 2016: 95-96). The Haitians were held in overcrowded, unsanitary conditions that they were told could last for decades, forced to live “a life of animals, of beasts,” in the words of one detainee (Paik, 2016: 105).

In 1993, as migration from Central America increased largely as a result of the wars being waged by US-backed military governments in the region, the Supreme Court allowed the immigration service to detain over 1,000 unaccompanied children each year, often in adult facilities, rather than releasing them to noncustodial family members or guardians (*Reno v. Flores*, 507 U.S. 292 (1993)). Mandatory detention was imposed on asylum seekers and most deportable migrants in 1996 (Antiterrorism and Effective Death Penalty Act (1996); Illegal Immigration and Immigrant Responsibility Act (1996)), and in 2003 asylum and immigration control was transferred to the newly-formed Department of Homeland Security. Since 2009 the immigration authorities have consistently filled a congressionally-mandated quota of at least 34,000 beds for detainees (Torrey, 2015). During fiscal year 2014 the US held some 425,000 persons—more than twice the federal prison population—in immigration detention, primarily in private prisons or local jails. While most are held for a matter of weeks, many others remain incarcerated for years (Karaim, 2015). In 2001 the US government opened its first family detention center and in 2014, it dramatically expanded the use of family detention

with the stated purpose of deterring undocumented migration (Hatoum, 2015).¹⁷ This policy may change following a July 2016 ruling by the Ninth Circuit Court of Appeals that a 1997 settlement agreement prohibiting the detention of unaccompanied children applies to children accompanied by their parents—but not to the parents—but only as a result of political pressure, not legal constraint (*Flores v. Lynch*, (9th Cir., July 6, 2016)).

The 2001 USA PATRIOT Act included broad provisions for the indefinite detention of non-citizens, including permanent residents, reasonably believed to be involved in terrorism or subversion, subject only to the attorney general's review and renewal every six months (8 U.S.C. § 1226a(a)(1)-(7) (2001)). As Klein and Wittes note, however, this provision has never been used because “[t]he other immigration detention authorities are themselves so robust that it apparently has not been necessary” (Klein and Wittes, 2011: 143). In the *Rodriguez-Fernandez* case, the appellate court noted that “no principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment,” and argued that some constitutional constraints must apply, for “[s]urely Congress could not order the killing of Rodriguez-Fernandez and others in his status on the ground that Cuba would not take them back and this country does not want them” (*Rodriguez-Fernandez v. Wilkerson*, 654 F.2d 1382: 1388, 1387). It is not clear, however, that this is true. Thus, for example, the US government has justified the rendition of non-citizens from the US to Syria and other unknown locations, with the intent to subject them to intense interrogation and severe torture, by arguing that anyone presenting a foreign passport at a port of entry, even if only changing planes, can be considered to be “seeking admission” into the US, and that anyone deemed “inadmissible,” even wrongly or illegally, remains “outside” the US and, therefore, outside the protections of the Constitution (Bernstein, 2005).

Concluding thoughts

Indefinite detention is often described—and contested—as a form of exclusion from society having spatial, biological, conceptual and legal dimensions. Denied the protections penal law purports to provide, detainees are forcibly confined, subjected to physical and mental torture, and rendered socially invisible. Exclusion, however, implies a border between

inside and outside; it can exist only in relation to inclusion. Similarly, exceptions arise only in relation to rules. Thus contextualized, Agamben defines the “relation of exception” as “the extreme form of relation by which something is included solely through its exclusion” (Agamben, 1998: 18). His characterization of “the exception [as] an *inclusive exclusion*” (Agamben, 1998: 21) provides a useful starting point for understanding indefinite detentions in settler colonial contexts, for colonization is a process of forcible inclusion that must be realized for there to be anyone or anything to exclude.¹⁸

To the extent the inclusion of peoples perpetually rendered “different” has been integral to US colonization and imperial expansion, the concomitant exclusions, or internments, must be seen as normative rather than exceptional. The United States would not have the land base that allows for its physical existence and its wealth without the forced removal of American Indians from their traditional lands and their militarily-enforced confinement to reservations, or boarding schools. The involuntary labor relied upon by the settlers to render these lands profitable cannot be divorced from the concentration camps of chattel slavery or their subsequent evolution into the world’s most largest prison system. The disposable labor force on which the settlers still depend has been constructed and controlled by mass internments and an immigration system that has long relied upon indefinite detention. Most recently, it appears that the arbitrary and dehumanizing incarceration of people who are, or are perceived to be, Arab, Muslim and/or of Middle Eastern origin is integral to the United States’ maintenance of global hegemony (Saito, 2001).

Most of the peoples of color interned by the United States have been in a position to be excluded by virtue of having first been involuntarily included in the American settler colonial project. As a result, the exclusion represented by the indefinite detentions to which they have been subjected cannot adequately be understood—much less redressed—without simultaneously addressing the underlying inclusions, i.e., the appropriation of lands, resources and human bodies in the interest of colonial expansion. More recent migrants and refugees may be perceived as voluntarily requesting inclusion, but in many instances their migrations can be seen as proximately caused by the United States’ exercise of its military and economic

power on a global scale. These and many other racialized detentions—each a conscious project of the settler state—are characterized by the twinned dimensions of inclusion and exclusion that reflect the internal logic of colonialism as well as its more practical aims.

To the extent the dynamic of exclusion cannot be separated, in theory or practice, from that of involuntary (i.e., colonial or imperial) inclusion, the resulting injustices are not exceptional but organic to the state's assertion of its sovereign prerogative (Wolfe, 1999: 204-210). This helps explain the consistency with which the United States has utilized indefinite detentions throughout its history, while also suggesting that such practices cannot be effectively prevented or redressed within a paradigm of law, constitutional or otherwise, that rests upon colonial foundations. Throughout American history the settler state has exercised its claimed prerogative to indefinitely detain individuals or entire peoples in what it claims to be the national interest. With equal consistency, this power has been ratified by the Supreme Court, often in the name of judicial deference to the plenary authority of the political branches of government.

In the seminal *Downes v. Bidwell* decision referenced above, Justice Henry Billings Brown acknowledged that such “an unrestrained possession of power” could lead to concerns about despotism. He assured, us, however, that we need not worry, for “[t]here are certain principles of natural justice inherent in the Anglo-Saxon character, which need no expression in constitutions or statutes to give them effect” (*Downes v. Bidwell*, 182 U.S. 244 (1901): 280). In support of this proposition, he quoted the following statement from Chief Justice John Marshall's opinion in *Johnson v. McIntosh*, the 1823 case that deemed American Indians incapable of owning their own lands:

The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest (*Downes v. Bidwell*, 182 U.S. 244 (1901): 281; quoting *Johnson v. McIntosh*, 21 U.S. 543 (1823): 589).

In 2016, the US government's power to indefinitely detain whomever it wishes, under whatever conditions it deems appropriate, still rests on this legal foundation. The ability to detain is constrained not by the rule of law but by "the objects of the [colonial] conquest" and conditions of detention are limited, in essence, only by the "principles of natural justice inherent in the Anglo-Saxon character." If we wish to effectively contest the conditions of exclusion embodied, quite literally, in indefinite detentions, we will also have to address and contest the underlying colonization that dictates the terms upon which those deemed Other have been and continue to be incorporated into, or subsumed by, the claimed jurisdiction of the United States.

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¹ They note that administrative detentions, also known as indefinite or preventive detentions, "are, by definition and practice, sought [by the executive] only during 'national emergencies'".

² Some 70,000 internees were U.S. citizens by birth in the territory; others were permanent residents precluded from citizenship by racial restrictions in U.S. naturalization law.

Korematsu v. United States, 323 U.S. 214, 242 (1944) (Murphy, J., dissenting) (noting the internment of 70,000 Americans citizens); *Ozawa v. United States* 260 U.S. 178 (1922) (precluding Japanese immigrants from naturalized citizenship). I use the term "Japanese American" to refer to both.

³ “Order” here refers both to the regulation of society in the interest of the status quo, as in the phrase “law and order,” and to the “ordering” of that society in a hierarchy rationalized, implicitly or explicitly, in terms of a Western, linear vision of “human progress.”

⁴ Agamben references the debate amongst historians over whether to attribute the origins of the concentration camp to the Spanish in Cuba in 1896 or the English in the Boer War of 1899-1902. Agamben, 1998: 166. For reasons described below, I place its origins much earlier.

⁵ Those implementing the internment were clear that these were concentration camps—a term not to be confused with extermination camps. Dillon S. Myer, director of the War Relocation Authority (WRA) and directly responsible for the camps, stated that the Moab, Utah facility was “nothing more than a concentration camp” (Drinnon, 1987: 62). Tom Clark, the Justice Department’s liaison to the WRA during the war, said upon his retirement from the Supreme Court in 1967, “We picked the [Japanese Americans] up and put them in concentration camps. That’s the truth of it” (Weglyn, 1976: 214). On November 21, 1944, President Roosevelt openly stated that American citizens of Japanese descent were being “kept locked up in concentration camps” (Weglyn, 1976: 217).

⁶ Yoo, 2003:7 cites an 1873 opinion by the attorney general on the treatment to be accorded “Modoc Indian Prisoners” to argue that interrogations of terror suspects remained outside the purview of civil law. Fletcher and Vicaire, 2011: 18-24 provide additional examples of governmental invocation of the “Indian Wars” to justify the conduct of the War on Terror.

⁷ Thornton, 1984: 293 states “The Choctaws are said to have lost 15 percent of their population, 6,000 out of 40,000; and the Chickasaw ... surely suffered severe losses as well. By contrast, the Creeks and Seminoles are said to have suffered about 50 percent mortality”.

⁸ Noting that the FBI, the Office of Naval Intelligence, the attorney general, and a State Department investigation had all concluded there was “no Japanese ‘problem’” on the West Coast prior to President Franklin Delano Roosevelt’s evacuation order of February 1942.

⁹ Without using the words “slave” or “slavery” the US Constitution provided that: (1) slaves would be counted as three-fifths of a person for purposes of taxation and representation; (2) the slave trade could not be banned before 1808; and (3) fugitive slaves had to be returned to their masters.

¹⁰ Noting the increasingly precise means of “calibrating time and torture” that led to a fourfold increase in the cotton harvested per person between 1800 and 1860.

¹¹ Describing the Fourteenth Amendment as “robbing [Afrodescendant peoples] of their right to national independence, repatriation to their Afrikan homeland, or emigration to new lands of their own choosing”.

¹² Noting that the Black codes had been passed so that “the condition of the slave race would . . . be almost as bad as it was before”).

¹³ Mortality rates soared as a result, reaching, for example, 45% in Alabama’s fourth year of convict leasing. On the less formal system of re-enslavement that continued in Alabama and the Justice Department’s only partially successful attempts to prosecute related “peonage” cases in 1903.

¹⁴ California, for example, imposed a “foreign miners tax” that generated between one quarter and one half of California’s state revenue between 1852 and 1870. Those who could not pay the tax were put to work building roads or otherwise providing free labor for the state.

¹⁵ Describing a practice of shackling inmates to a metal bar, outside in summer and winter, for up to seven hours.

¹⁶ Noting that Cuban prisoners were not accorded Eighth Amendment rights even while held in maximum security federal prisons because immigration detention was deemed civil, not criminal.

¹⁷ Preston, 2014, describes the opening of a 2,400 bed facility in Dilley, Texas, specifically intended for women and children.

¹⁸ Agamben’s work does not address colonial relations directly. Simone Bignall thus notes that “the position of indigenous peoples within the settler-state presents a ‘peculiar’ situation

of contested sovereignty, which calls for a revision—or an expanded interpretation—of Agamben’s core concepts” (Bignall, 2012: 264). I believe such revision or extension is also needed with respect to internally colonized peoples who, as a result of involuntary relocation, may not be indigenous to the lands on which they now reside. Work describing African Americans as well as American Indians has called them “peoples encapsulated within established states” (Richardson, et al., 1991: 542).