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Decolonizing Indigenous Migration

Angela R. Riley*& Kristen A. Carpenter**

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INTRODUCTION

Human migration is one of today's most fraught social and legal phenomena. Across the world, migrants and refugees are fleeing poverty, war, famine, and oppression, and seeking a safer, better life. Current trends in migration correspond to global events—climate change, deteriorating relations between world powers, technological interventions in democracy, and income inequality, among others—creating shifts felt at home and abroad. Some scholars and commentators locate these migrations in the "failures of formal decolonization," wherein decolonized peoples "remain largely subordinated" economically and politically in the current world order.[1] In such cases, as Tendayi Achiume has argued with respect to countries in Africa and Europe, individuals are now migrating to the home country of the former colonizer, seeking their share of the peace and prosperity that Europeans built through colonial extractions.[2]

In the Americas, too, migration is a serious issue, especially at the Southern border where many describe a "crisis."[3] Approximately one million migrants arrived at the U.S.-Mexico border from October 2018 to September 2019 alone.[4]

1. E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1520 (2019).
2. *Id.* at 1549–50.
3. *See, e.g.*, Rick Jervis et. al., *One Deadly Week Reveals Where the Border Crisis Begins—and Where it Ends,* USA TODAY (Oct. 1, 2019, 12:21 PM), https://www.usatoday.com/in-depth/news/2019/09/23/immigration-crisis-migrants-us-mexico-border/2022670001/ [https://perma.cc/PH26-L4PJ] (stating that humanitarian aid groups, Border Patrol, immigration courts, and local governments are overwhelmed and that the "immigration system [is] on the brink of collapse").
4. *Southwest Border Migration FY 2020*, U.S. CUSTOMS AND BORDER PROTECTION (Apr. 9, 2020), https://www.cbp.gov/newsroom/stats/sw-border-migration# [https://perma.cc/CF7E-SRP4]; Geneva Sands, *Nearly 1 Million Migrants Apprehended or Deemed Inadmissible Along US-Mexico Border in Fiscal Year 2019, CBP Says*, CNN (Oct. 8, 2019, 2:09

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The history preceding this situation in the United States contrasts in some ways to the imperial-style colonization of Africa by European powers.[5] The United States exists by virtue of "settler colonialism," a structure that seeks to displace, divide, and destroy Indigenous Peoples in order to acquire their land.[6] As described in Patrick Wolfe's influential formulation, settlers and their governments "eliminate[]" Indigenous Peoples and "replace" them with their own societies.[7] These deeply ingrained historical patterns show no signs of subsidence.[8] Indeed, the lines that settlers drew to mark their claims to Indigenous lands are often the very same borders the United States now uses to block global migrants from entry.[9] Thus, it is the frame of settler-colonialism, with its particular impacts on Indigenous Peoples, that we wish to explore in today's migration and border experiences.

At the U.S.-Mexico border, for example, a significant number of the individuals now being detained are people of Indigenous origin, including Kekchi, Mam, Achi, Ixil, Awakatek, Jakaltek, and Qanjobal. They hail from communities in Guatemala, Venezuela, and Honduras, among others.[10] Some are

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PM), https://www.cnn.com/2019/10/08/politics/migrants-apprehended-us-mexico-border-fiscal-year-2019/index.html [https://perma.cc/CF9B-7MHL].

5. *See* Achiume, *supra* note 1, at 1518 ("Colonial-era imperial interconnection politically and economically subordinated Third World peoples for the purposes of shoring up the prosperous, collective self-determination of First World nations."). We recognize that the vast experience of colonization in Africa over multiple regions, polities, and time periods cannot be characterized by one framework and that there were examples of settler colonialism, such as by the Dutch in South Africa, as well.

6. The seminal article on settler colonialism, which has launched a wave of subsequent scholarship, is Patrick Wolfe, *Settler Colonialism and The Elimination of the Native*, 8 J. GENOCIDE RES. 387 (2006).

7. Wolfe, *supra* note 6, at 388–89.

8. *See generally id.*

9. *See* CRISTINA LEZA, DIVIDED PEOPLES: POLICY, ACTIVISM, AND INDIGENOUS IDENTITIES ON THE U.S.-MEXICO BORDER 168–69 (2019); *see also* THE BORDER AND ITS BODIES: THE EMBODIMENT OF RISK ALONG THE U.S.-MÉXICO LINE 12, 16–17 (Thomas E. Sheridan and Randall H. Macguire eds., 2019); Eileen M. Luna-Firebaugh, *The Border Crossed Us: Border Crossing Issues of the Indigenous Peoples of the Americas*, 17 WICAZO SA REV. 159, 160–62 (2002).

10. *See* Rachel Nolan, *A Translation Crisis at the Border*, NEW YORKER (Dec. 30, 2019) https://www.newyorker.com/magazine/2020/01/06/a-translation-crisis-at-the-border [https://perma.cc/CTN4-3T9M] ("In the past year, two hundred and fifty thousand Guatemalan migrants have been apprehended at the U.S.-Mexico border. At least half of them are Mayans, and many speak little or no Spanish. According to the Department of Justice, Mam was the ninth most common language used in immigration courts last year, more common than French. Three Guatemalan Mayan languages made the top twenty-five: Mam, K'iche', and Q'anjob'al."); U.S. IMM. AND CUSTOMS ENF'T, LANGUAGE ACCESS PLAN 19 (2015), https://www.ice.gov/sites/default/files/documents/Document/2015/LanguageAccessPlan.pdf [https://perma.cc/A6GP-DSF2]; Tristan Ahtone, *Indigenous Immigrants Face Unique Challenges at the Border*, HIGH COUNTRY NEWS (June 21, 2018), https://www.hcn.org/articles/tribal-affairs-indigenous-immigrants-face-unique-challenges-at-the-border [https://perma.cc/AY59-2A94]; Dan Restrapo, Trevor Sutton & Joel Martinez, *Getting Migration in the Americas Right: A National Interest-Driven Approach*, CTR. FOR AM. PROGRESS (June 24, 2019, 2:12 PM), https://www.americanprogress.org/issues/security/reports/2019/06/24/471322/getting-migration-americas-right/ [https://perma.cc/3GT6-VDWK].

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Tohono O'Odham or Yaqui tribal members delayed or detained despite their U.S. citizenship, apparently because they are assumed to be "Mexican."[11] For all these Indigenous Peoples, their Indigenous status raises particular and often overlooked human rights concerns. Indigenous Peoples may be leaving their homelands precisely because their rights as Indigenous Peoples—for example, the right to occupy land collectively and without forcible removal—have been violated.[12] At border crossings, however, Indigenous migrants are usually treated as any other migrants, often without regard for their identity or experience as Indigenous Peoples.[13] This problem is exacerbated by practices of defining migrant identity in terms of countries of origin, without reference to Indigenous status.[14]

Yet Indigenous identity matters a great deal in migration. A recent *New Yorker* article, for example, contends that there is a "translation crisis at the border," noting that, while many migrants only speak Indigenous languages,

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11. Sara Daly, Comment, *Bordering on Discrimination: Effects of Immigration Policies/Legislation on Indigenous Peoples in the United States and Mexico*, 38 AM. INDIAN L. REV. 157, 157–59 (2013); AMNESTY INT'L, IN HOSTILE TERRAIN: HUMAN RIGHTS VIOLATIONS IN IMMIGRATION ENFORCEMENT IN THE U.S. SOUTHWEST 28–31 (2012), https://www.amnestyusa.org/files/ai_inhostileterrain_final031412.pdf [https://perma.cc/2CVV-UD6V]; *see also* Randall H. McGuire & Ruth M. Van Dyke, *Crossing la Línea: Bodily Encounters with the U.S.-México Border in Ambos Nogales, in* THE BORDER AND ITS BODIES: THE EMBODIMENT OF RISK ALONG THE U.S.-MÉXICO LINE 41, 51 (2019) ("Inspection increases proportionally for those with darker skin or shabbier dress, or for those speaking nonstandard dialects of Spanish or indigenous languages.").

12. *See* G.A. Res. 61/295, annex, United Nations Declaration on the Rights of Indigenous Peoples, at arts. 10 (Sept. 13, 2007) [hereinafter United Nations Declaration on the Rights of Indigenous Peoples]; *see, e.g.*, Jeff Abbott & Sandra Cuffe, *Palm Oil Industry Expansion Spurs Guatemala Indigenous Migration*, AL JAZEERA (Feb. 6, 2019), https://www.aljazeera.com/news/2019/01/palm-oil-industry-expansion-spurs-guatemala-indigenous-migration-190122160154738.html [https://perma.cc/9H77-NF5D] (describing how conflicts over land are causing Indigenous emigration from Guatemala).

13. *See* INDIGENOUS MEXICAN MIGRANTS IN THE UNITED STATES 180–81 (Jonathan Fox & Gaspar Rivera-Salgado eds., 2004); *but see* Associated Press, *Indigenous Immigrants Counted for First Time*, NBC NEWS (Jan. 4, 2010), http://www.nbcnews.com/id/34694076/ns/us_news-life/t/indigenous-immigrants-counted-first-time/#.XxcFCC2z1p8 [https://perma.cc/RZZ9-4NRY] (describing the inclusion of Indigenous categories in the 2010 census). We acknowledge, as the AP article does, that calls for attention to Indigenous identity in migration may raise sensitive issues of privacy, including immigration status.

14. Ahtone, *supra* note 10 (stating that "Indigenous legal frameworks, international standards and human rights can be ignored by federal agencies" due to the system of defining migrants by nationality); *see also* Jennifer Medina, *Anyone Speak K'iche' or Mam? Immigration Courts Overwhelmed by Indigenous Languages*, N.Y. TIMES (Mar. 19, 2019), https://www.nytimes.com/2019/03/19/us/translators-border-wall-immigration.html [https://perma.cc/9KKY-4WZW] ("It's possible for migrants to not encounter a single person who speaks their language on their path through the immigration system, making it all but impossible to give officials information."); Tom Jawetz & Scott Schuchart, *Language Access Has Life-or-Death Consequences for Migrants*, CTR. FOR AM. PROGRESS (Feb. 20, 2019, 9:05 AM), https://www.americanprogress.org/issues/immigration/reports/2019/02/20/466144/language-access-life-death-consequences-migrants/ [https://perma.cc/3T9F-CKXA] (indicating that "indigenous-language speakers reported receiving medical care in Border Patrol custody at just two-thirds the rate of other detainees . . . ").

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interpretation is often available only between Spanish and English.[15]As detailed more specifically below, Indigenous migrants often receive insufficient interpretation services in events ranging from detention to deportation. In fact, there have been numerous claims that Indigenous children died in U.S. custody precisely because they and their parents could not be understood in these situations.[16]

As Leti Volpp has written, Indigenous Peoples have been virtually absent from immigration law.[17] Yet, Indigenous Peoples' identities often shape their experiences with migration and border control in ways that have received scarce attention from legal advocates and decision-makers alike. In many cases, for example, Indigenous migrants flee their home countries due to extreme discrimination, national promotion of extractive industry on Indigenous lands,[18] or even genocidal acts, all of which are tied to their Indigenous status.[19] Climate change policy in the United States and other countries overlooks that many Indigenous Peoples are now migrating because their territories have become environmentally uninhabitable.[20] Meanwhile, state diplomacy about migration issues, especially between the United States and Mexico, has largely ignored Indigenous Peoples' issues.

Indigenous Peoples' migration is linked to the U.S. history of colonization in at least two respects. First, the very creation of the United States as a nation

15. Nolan, *supra* note 10.

16. *See* Amanda Covarrubias, *Guatemalan Girl Likely Died of 'Sepsis Shock' After Crossing Border, Hospital Officials Said*, NBC NEWS (Dec. 17, 2018, 12:26 AM), https://www.nbcnews.com/news/us-news/guatemalan-girl-died-sepsis-shock-hospital-officials-said-n948666 [https://perma.cc/88SL-C5CT] (reporting on the death of Jakelin Caal Maquin while in U.S. custody); *CBP Statement on Death in Custody: 7-year-old Guatemalan in El Paso, TX*, U.S. CUSTOMS AND BORDER PROTECTION (Dec. 14, 2018), https://www.cbp.gov/newsroom/speeches-and-statements/cbp-statement-death-custody-7-year-old-guatemalan-el-paso-tx [https://perma.cc/B79P-N8F8] (providing the U.S. government's account of the events); Nick Miroff, *Hours Before Her Collapse in U.S. Custody, a Dying Migrant Child's Condition Went Unnoticed*, WASH. POST (Dec. 18, 2018, 7:38 PM), https://www.washingtonpost.com/world/national-security/hours-before-her-collapse-in-us-custody-a-dying-migrant-childs-condition-went-unnoticed/2018/12/14/1c454d18-ffb8-11e8-862a-b6a6f3ce8199_story.html [https://perma.cc/Y93K-MAN8] (indicating that the child and father did not speak or read English and spoke only rudimentary Spanish).

17. Leti Volpp, *The Indigenous as Alien*, 5 U.C. IRVINE L. REV. 289, 293 (2015).

18. Dom Phillips, *Brazil: Fears for Isolated Amazon Tribes as Fires Erupt on Protected Reserves*, GUARDIAN (Aug. 29, 2019, 1:55 PM), https://www.theguardian.com/environment/2019/aug/29/brazil-amazon-wildfires-indigenous-reserves-remote-areas [https://perma.cc/4H4S-26VP].

19. Stephanie Leutert, *Why Are So Many Migrants Leaving Guatemala? A Crisis in the Coffee Industry Is One Reason*, TIME (July 27, 2018, 9:54 AM), https://time.com/5346110/guatemala-coffee-escape-migration/ [https://perma.cc/7NCQ-J864] ("A long and violent history of discrimination against the local indigenous communities—culminating in genocide during the country's 36-year civil war from 1960 to 1996—still creates the foundation that pushes many to leave.").

20. *See* Michelle Bachelet, UN High Commissioner for Human Rights, Opening Statement for Global Update at the 42nd Session of the Human Rights Council (Sept. 9, 2019), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24956&LangID=E [https://perma.cc/M4M4-AE7U] (noting that Indigenous Peoples "are increasingly being driven off their lands by environmental destruction").

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that excluded 'others' occurred through the near (but not total) elimination of Indigenous Peoples' own modes of government, territory, and kinship,[21] and the displacement of Indigenous Peoples themselves.[22] Whereas 150 years ago when Indigenous Peoples from the south headed north for trade, they might have been entering the traditional territories of the Tewa or Yaqui peoples,[23] now they and

21. *See* Volpp, *supra* note 17, at 298. For important examples of Indigenous Peoples who maintained both their identities and patterns of migration against severe challenges from the 1700s–1990s (and beyond), thereby resisting U.S. hegemony over borders, see generally BRENDAN W. RENSINK, NATIVE BUT FOREIGN: INDIGENOUS IMMIGRANTS AND REFUGEES IN THE NORTH AMERICAN BORDERLANDS (2018) (recounting Indigenous migration patterns among the Yaqui in the South and Chippewa and Cree in the North that continued, albeit disrupted, before, during, and after the creation of the United States).

22. *See* T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP 190 (2002) (noting that the process of colonization required "exclusion" and that it was necessary to "remove [Indigenous Peoples] or 'civilize' them")*; see also* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 141 (2002) (describing how the United States used a theory of territorial sovereignty in order to exercise federal power over Indians, which the United States saw as necessary to be a sovereign itself); Will Kymlicka, *Liberal Multiculturalism as a Political Theory of State-Minority Relations*, 46 POL. THEORY 81, 84 (2018) (criticizing how a nation-state's rule over Indigenous Peoples is rooted in unjust colonization); Aziz Rana, *Settler Wars and the National Security State*, 4 SETTLER COLONIAL STUD., 171*,* 172 (2014) (discussing how the doctrine of discovery embraced by European settlers included the understanding that "native peoples did not possess legally recognizable sovereignty, akin to European states, over their own territory"); Aziz Rana, *Colonialism and Constitutional Memory*, 5 U.C. IRVINE L. REV. 263, 264, 269 (2015) (describing how the United States is unlike some other former colonies in that it has never shed its colonial settler past to achieve meaningful Indigenous sovereignty whereas independence in other former colonies was coupled with a transfer of power to historically subordinated groups); Joanne Barker, *The Human Genome Diversity Project*, 18 CULTURAL STUD. 571, 594 (2004) (noting how Indigenous Peoples seek recognition as peoples because it is often the first line of defense against "histories of colonialism and racism that continue to undermine and negate the means and abilities of indigenous peoples to exercise their rights to sovereignty and self-determination"); Audra Simpson, *Under the Sign of Sovereignty: Certainty, Ambivalence, and Law in Native North America and Indigenous Australia*, 25 WICAZO SA REV. 107, 107–08 (2010) (reviewing KEVIN BRUYNEEL, THE THIRD SPACE OF SOVEREIGNTY: THE POSTCOLONIAL POLITICS OF U.S.-INDIGENOUS RELATIONS (2007); DEBORAH A. ROSEN, AMERICAN INDIANS AND STATE LAW: SOVEREIGNTY, RACE, AND CITIZENSHIP, 1790–1880 (2007); SOVEREIGN SUBJECTS: INDIGENOUS SOVEREIGNTY MATTERS (AILEEN MORETON-ROBINSON ED., 2007)) (describing how the limited autonomy today in Indian country is a result of historical settlement efforts that aimed to displace and assimilate existing Indigenous governmental and philosophical systems); MISHUANA GOEMAN, MARK MY WORDS: NATIVE WOMEN MAPPING OUR NATIONS 30 (2013) (arguing that "imposing colonial geographies must be understood as *yet another method to eliminate or eradicate or absorb that which is Native*"); Patrick Wolfe*,* supra note 6, at 389 (discussing how many settler societies needed to practically eliminate natives in order to establish their own society within that territory); Achiume, *supra* note 1, at 1536–37 (describing how non-Europeans during colonial expansion were deemed to lack legal sovereignty and thus were politically occupied by European settlers, resulting in a subordination of their sovereignty); Circe Sturm, *Reflections on the Anthropology of Sovereignty and Settler Colonialism: Lessons from Native North America*, 32 CULTURAL ANTHROPOLOGY 340, 342 (2017) (discussing Wolfe's argument that settler colonialism sees the ongoing existence of Indigenous Peoples as a threat to the social order and that they must be displaced).

23. For discussion of early Indigenous trade routes, including those apparently linking the Nuahua (of present-day Mexico) with the Zuni (of present-day United States), see Carroll L. Riley, *The Road to Hawikuh: Trade and Trade Routes to Cibola-Zuni During Late Prehistoric and Early Historic Times*, 41 KIVA 137 (1975).

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others are entering "the United States," a dominant polity committed to policing its boundaries and regulating its citizenship.

While many Indigenous communities survived this history of settler colonialism, the imposition of national borders across their territories has been severely disruptive. In several instances, the United States' regulation of its international borders divides and militarizes Indigenous spaces and peoples, as in the case of the Tohono O'Odham Nation in the south, and the Haudenosaunee Confederacy in the north.[24] As the *New York Times* recently reported, blasting operations for the development of President Donald Trump's border wall in southern Arizona are unearthing graves at Monument Hill, a cemetery for Apache warriors, and also disrupting Quitobaquito Springs, a pilgrimage site.[25] These and other activities threaten the religious freedom and human rights of the Indigenous Peoples whose territories are now on the frontlines of international border conflicts.

Moreover, as scholars in this area have long pointed out, U.S. intervention has been and remains a driving force in setting conditions that have motivated migration from Central and South America.[26] We take note of arguments that U.S. involvement in the countries of Guatemala, El Salvador, and Honduras, in particular, has destabilized those countries, making them more vulnerable to corruption and violence.[27] However strong this link, it is evident that the United

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24. *See* Todd Miller, *How Border Patrol Occupied the Tohono O'odham Nation*, IN THESE TIMES (June 12, 2019), https://inthesetimes.com/article/21903/us-mexico-border-surveillance-tohono-oodham-nation-border-patrol [https://perma.cc/99KD-A93A]; Molly Gibs & Rebecca Lan, *Unwelcome at Home: Borders Challenge Haudenosaunee Identity, Sovereignty*, NEWS HOUSE (May 30, 2019), https://www.thenewshouse.com/borderlines/international-borders-challenge-haudenosaunee-identity-sovereignty-akwesasne-mohawk-reservation/ [https://perma.cc/J4Q4-HTVH].

25. Christine Hauser, *Blasting in Construction of Border Wall Is Affecting Tribal Areas*, N.Y. TIMES (Feb. 11, 2020) https://www.nytimes.com/2020/02/11/us/trump-border-wall-arizona-native-americans.html [https://perma.cc/DDA9-JMPH]; *see also Native Burial Sites Blown Up for US Border Wall*, BBC NEWS (Feb. 10, 2020) https://www.bbc.com/news/world-us-canada-51449739 [https://perma.cc/YNF2-C3WC].

26. *See* Deirdre Shesgreen, *How US Foreign Policy in Central America May Have Fueled the Migrant Crisis*, USA TODAY (Dec. 21, 2018, 6:00 AM), usatoday.com/story/news/world/2018/12/21/has-united-states-foreign-policy-central-america-fueled-migrant-crisis-donald-trump/2338489002/ [https://perma.cc/J65B-KKEA] (quoting one scholar who stated that "the 800-pound gorilla that's missing from the table is what [the United States has] been doing there that brings them here, that drives them here").

27. *See id.* (describing the history of US intervention in Guatemala, El Salvador and Honduras, which has left Central American governments "weak and fragile," which empowers cartels, corruption and violence "that drives residents to flee"); *see also* Leisy J. Abrego, *Central American Refugees Reveal the Crisis of the State*, *in* THE OXFORD HANDBOOK OF MIGRATION CRISES 213, 213 (Cecilia Menjívar, Marie Ruiz & Immanuel Ness eds., 2018) (concluding that "[t]he true 'crisis' is rooted in historical and contemporary US intervention in Central America that, along with elite accomplices in the region, ensures widespread poverty, insecurity, and human rights abuses"); *Noam Chomsky: Migrants Are Fleeing Horrors Created by the U.S. in Latin America*, HAARETZ (Nov. 26, 2018, 6:51 PM), https://www.haaretz.com/us-news/noam-chomsky-migrants-are-fleeing-horrors-created-by-the-u-s-1.6695006 [https://perma.cc/CLC5-GY2V] (quoting Noam Chomsky, who concluded that people are fleeing the "misery and horrors" in Latin America for which the United States is responsible for creating via its intervention in those countries); Sarah Sklaw, *American Policy Is Responsible for the Migrant*

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States, in its exercise of sovereignty, polices national borders in ways that often exclude those seeking refuge. Both historically and presently, this has had uniquely deleterious impacts on Indigenous Peoples, including some of the children who died in U.S. custody after their parents fled countries that have violated Indigenous rights for decades.[28]

In this Article, we situate Indigenous Peoples at the center of an examination of U.S. immigration law and policy, seeking to bring Indigenous rights scholars and immigration scholars into closer conversation.[29] Although border formation has served to define U.S. territory for all people— marking in a concrete way who is "in" and who is "out"— this resonates uniquely for Indigenous Peoples. In our view, the ongoing legacy of settler colonialism renders invisible— and heightens—the experiences of Indigenous Peoples as migrants. As S. James Anaya has shown, Indigenous Peoples have both individual and collective rights to self-determination and territory as a matter of international law.[30] Yet Indigenous Peoples experience myriad violations of

Caravan, WASH. POST (Oct. 29, 2018, 3:00 AM), https://www.washingtonpost.com/outlook/2018/10/29/american-policy-is-responsible-migrant-caravan/ [https://perma.cc/K2ZY-D7FR] (discussing how the United States sought to promote its own economic interests in Latin America with "anti-communism, unregulated foreign markets and . . . drug control," which ultimately "exacerbated the poverty, despair and violence such policies were supposed to alleviate," all of which are key push factors); Stephen Kinzer, *Who's Responsible for the Border Crisis? The United States*, BOS. GLOBE (June 20, 2019, 4:46 PM) https://www.bostonglobe.acom/ideas/2019/06/20/who-responsible-for-border-crisis-the-united-states/K0qVm5AVf6SOaZGK1KwheO/story.html [https://perma.cc/9NAQ-RWED] (stating that U.S. interference in Guatemala in 1954 and Honduras in 2009 both overthrew incumbent governments, thereby subjecting the countries to "waves of repression and violence" and that "refugees at our border are fleeing horrific conditions that are in part the long-term results of American interventions in their homelands"); Amelia Cheatham, *Central America's Turbulent Northern Triangle*, COUNCIL ON FOREIGN RELS. (Oct. 1, 2019), https://www.cfr.org/backgrounder/central-americas-turbulent-northern-triangle [https://perma.cc/M5MK-L2Q9] (assessing why many are migrating from the region and noting that "[d]ecades of civil war and political instability planted the seeds for the complex criminal ecosystem that plagues the region today" and relaying that "[c]ritics say that U.S. interventions during the Cold War–including support for a coup in Guatemala, brutal government forces in El Salvador, and right-wing rebels based in Honduras known as the Contras–helped destabilize the region"); Skylar Baker-Jordan, *The US's Actions in Central America Are to Blame for the Migrant Caravan Leaving Honduras – Trump Has to Let Them in*, INDEPENDENT (Oct. 23, 2018), https://www.independent.co.uk/voices/trump-migrant-caravan-where-mexico-honduras-guatemala-central-america-a8597741.html [https://perma.cc/JW8K-V37U] (similarly stating that "[t]he United States has some responsibility for what is happening" and exploring how US intervention in Guatemala, El Salvador, and Honduras played a role in destabilizing the region).

28. *See Deaths of Indigenous Children at Border Amplifies the Need for Policy Change,* INDIAN L. RES. CTR., https://indianlaw.org/story/indigenous-children-border-deaths-amplifies-need-policy-change [https://perma.cc/U4J7-ULU8].

29. Legal scholars have been writing in this space for some time. *See, e.g.*, Volpp, *supra* note 17; Laura Gomez, *Off-White in an Age of White Supremacy: Mexican Elites and the Rights of Indians and Blacks in Nineteenth-Century New Mexico*, 25 CHICANO-LATINO L. REV. 9 (2005) (discussing the history of rights for Mexican people in relation to their "off-white" and Indigenous statuses over time, including in relation to migration).

30. S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 3–4 (2d ed. 2004) (articulating a legal framework for Indigenous Peoples as special subjects of concern, with individual and collective rights, including self-determination and equality, as a matter of international law).

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these rights, through discrimination and oppression that threatens their ability to survive in their home countries. And then, when Indigenous Peoples leave their home countries, their rights are often violated again in the process of migration and when crossing state borders.

Certain laws and policies should militate against these dynamics. The historic Jay Treaty and Treaty of Guadeloupe Hidalgo recognize certain rights to land and migration following the establishment of U.S. borders with Canada and Mexico, respectively.[31] More contemporarily, the UN Declaration on the Rights of Indigenous Peoples of 2007 (the UN Declaration) recognizes Indigenous Peoples' rights to self-determination, property, equality, and cross-border access, and the Global Compact on Migration of 2018[32] (Global Compact) calls for global cooperation to advance a human rights approach to safe and orderly migration around the world.[33] While these legal instruments contain the seeds of reform, settler colonial realities continue to harm Indigenous Peoples in international migration.

In our view, decolonizing Indigenous migration first requires conceptualizing and advancing a paradigm in which Indigenous practices and lifeways inform and reform migration in the settler state. This inquiry must begin by acknowledging and respecting Indigenous worldviews, which are rooted in Indigenous Peoples' deep connection to the natural world. As we have argued in previous work, Indigenous Peoples are significantly impacting and shaping human rights, drawing on Indigenous cosmologies and values to advance collective rights to self-determination, culture, traditional homelands, and others.[34] Indigenous Peoples' relationships with land and traditional landscapes

31. *See* Treaty of Peace, Friendship, Limits, and Settlement, Feb. 2, 1848, 9 Stat. 922 [hereinafter Treaty of Guadalupe Hidalgo]; Treaty of Amity, Commerce and Navigation, Between His Britannic Majesty and the United States of America, by their President, with the Advice and Consent of Their Senate (The Jay Treaty), Nov. 19, 1794, U.S.-Eng., 8 Stat. 116, U.N.T.S. No. 105. As Volpp points out, the development of international borders has 'settled' the question of the identity of Indigenous Peoples within the United States at the point of the ratification of the U.S. Constitution, even if actual citizenship was not solidified for almost 100 years. *See* Volpp, *supra* note 17, at 300. As a result, U.S. born American Indians, for example, have differentiated status in contemporary American life from their foreign-born Indigenous relatives. *See id.* Though this Article does not deal with the border regulation and migration issues of Indigenous Peoples elsewhere in the world, we acknowledge that similar phenomena are seen with Indigenous Peoples of Northern Europe, Russia, Asia, Africa, and other regions.

32. Global Compact For Safe, Orderly And Regular Migration, GLOBAL COMPACT FOR MIGRATION (2018), https://www.un.org/pga/72/wp-content/uploads/sites/51/2018/07/migration.pdf [https://perma.cc/U6Y8-J3MA] (mentioning Indigenous Peoples in Objective 7, para. 23(b)).

33. United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 12.

34. This work draws from the work of legal scholars who have debated how to "decolonize" federal Indian law. *See, e.g.*, Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 121 (1993); Silvia Rivera Cusicanqui, *Ch'ixinakax utxiwa: A Reflection on the Practices and Discourses of Decolonization*, 111 S. ATL. Q. 95, 100 (2012) ("There can be no discourse of decolonization, no theory of decolonization, without a decolonizing practice."). And this piece builds on our own theories of utilizing international human rights frames, in conjunction with Indigenous rights, to achieve "decolonization" in this space. Kristen

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often predate, by hundreds or thousands of years, the contemporary formation of states.[35] The establishment of state borders has disrupted religious practices, familial relationships, subsistence rights, and other Indigenous practices and rights.

At the same time, the unique rights of Indigenous Peoples within a decolonization frame raise difficult questions about how Indigenous Peoples express those rights following relocation and displacement. As societies are increasingly mobile, are concepts of individual identity and collective self-determination also mobile, such that they adhere to Indigenous Peoples when they cross borders? Moreover, whose obligation is it to effectuate such rights? Can the situation of Indigenous Peoples as migrants be meaningfully addressed through legal regimes of asylum and refugee law, or do they necessarily implicate international diplomacy and norms of state-Indigenous relations? These and other questions are left largely untouched by contemporary law and policy on migration.

In this Article, we argue that accounting for the experience of Indigenous Peoples in the creation and regulation of borders is critical to advancing a human rights approach to migration and to addressing the legacies of conquest and colonization that undergird nation-state territorial sovereignty. By focusing on the unique situation of Indigenous Peoples, this Article pushes migration law, both in theory and practice, to consider more fully its colonial origins and impacts, and to incorporate a broader concept of individual and collective human rights in law and policy.

In this endeavor, this Article addresses dual issues working in parallel: the division of Indigenous territories by national borders and the mass migration of Indigenous Peoples from across the Americas to the United States. We do so specifically to acknowledge and highlight Indigenous Peoples' worldviews with respect to the land, which do not end at the American, Canadian, or Mexican borders. Additionally, we note that migration at the Southern border of the United States involves Indigenous Peoples from all over the Americas, as reflected in calls for "hemispheric" solutions to global migration issues, which transcend borders.[36]

Additionally, we acknowledge that a focus on the situation of Indigenous migrants could support various normative positions about migration more broadly, including calls for more or less formality in migration law and border

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A. Carpenter & Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 CALIF. L. REV. 173, 204 (2014).

35. *See* Carpenter & Riley, *supra* note 34, at 202 (noting that Indian nations "long predate[s] European contact" and that Indigenous "peoplehood is tied up in and defined by the lands from which they originated"); Cusicanqui, *supra* note 34, at 95–96 (arguing that Indigenous people bring ancient perspectives to contemporary experiences).

36. *See* SHANNON SPEED, INCARCERATED STORIES: INDIGENOUS WOMEN MIGRANTS AND VIOLENCE IN THE SETTLER-CAPITALIST STATE 12–13 (2019) (calling for a hemispheric approach to issues of Indigenous Peoples and migration).

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control, territorial sovereignty versus individual rights, and so on. Yet, advocating a particular position with regard to larger immigration and border control reform is beyond the scope of our project. Rather, our primary goal in this work is to bring to light the erasure of Indigenous Peoples and their issues in migration law and policy debates, and also within a whole range of prescriptive approaches, where they have typically been ignored. And, ultimately, we seek a paradigm shift in the migration and borders context. By advancing a decolonizing framework, we hope to illuminate the ways in which lands and peoples are linked in a common destiny of relationship, rather than separated by current lines on the land.[37] In our view, approaching migration issues through the lens of human rights as informed by Indigenous experience will help to foster more resilient relationships among peoples and with the land itself.

The Article proceeds as follows: Part I provides a snapshot of Indigenous migration with regard to North America, beginning with Indigenous worldviews and traditional tribal relationships to lands and territories. It then describes how those relationships have been disrupted by colonization, providing a legal history of border setting and immigration up to the mid-1950s. Part II examines the current situation at U.S. borders and elaborates on the doctrinal framework regarding migration, as expressed in Indigenous, national, and international law. Part III provides observations on lessons learned from examining migration through the lens of Indigenous experience, suggesting first and foremost a paradigm shift with respect to how we view the land and its people. It also offers some solutions, both conceptual and practical, for moving U.S. migration law and policy toward an Indigenous-informed human rights framework. The Article concludes with reflections on the practical and theoretical importance of incorporating Indigenous Peoples' experiences into migration law and policy.

37. Because our focus is on Indigenous Peoples and migration, we do not go as far as other scholars in reconceptualizing U.S. approaches to its immigration law and policy as a general matter. For example, Hiroshi Motomura in a series of works critiquing distinctions between authorized and unauthorized immigration into the United States, and between the situation of adults and children as migrants, suggests instead a framework that would reflect immigrants' eventual integration into U.S. society. *See, e.g.*, HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES (2006). Professor Motomura also discusses equitable principles that justify affording membership to immigrants. *See* HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW (2014). The situation of Indigenous Peoples in the Americas, including the need to remedy past harms caused by land dispossession and ongoing collective rights to self-governance and territory, might suggest interesting variations on the concepts of integration and equity for future discussion. We also note for additional consideration Professor Motomura's argument that liberal democracies should strive for "ethical borders" that guarantee "equality and dignity on the inside," and, considering models in Europe, operate in a more open, and less coercive, manner. *See* Hiroshi Motomura. *The New Migration Law: Migrants, Refugees, and Citizens in an Anxious Age*, 105 CORNELL L. REV. 457, 472–74 (2020).

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I.
FROM TURTLE ISLAND TO CITIZENSHIP: A SNAPSHOT OF INDIGENOUS LAND AND THE SETTLER STATE

Legal analysis often disregards the fact that the arrival and expansion of the Europeans displaced Indigenous Peoples' own laws, customs, and traditions with respect to territory and movement.[38] For example, international borders divide the traditional territories of dozens of tribes in the United States. In the North, this includes the Wabanaki and Haudenosaunee Confederacies, as well as the Ojibwe, Odawa, Lakota, Salish, Colville, Haida, Tlingit, and Tsimshian.[39] In the South, the international border divided the traditional lands of the Yaqui, O'Odham, Cocopah, Kumeyaay, Pai, Apache, and Kickapoo.[40] Today, not all "cross-border" people are similarly situated. Several of these peoples—the Akwesasne Mohawk and Tohono O'Odham, for example—actually have an international border running through their reservations.[41] Some, such as Yaqui and Cree, reside close to the border, with reservations in the United States and villages or reserves in Mexico and Canada, but these are no longer contiguous territories.[42] Still others, such as the Kickapoo, have federally recognized lands in Oklahoma, Kansas, and Texas— some of which is rather far from the border—but nonetheless have such well-established migration routes that they are recognized as bi-national with unique statutory rights to cross back and forth.[43] Considering Indigenous migration hemispherically necessitates the inclusion of Indigenous Peoples coming from the countries identified as contributing to the current crisis at the U.S. border, such as the Maya of Guatemala, Miskitos and Garifunas of Honduras, and the Yanomamu and Waoro from Venezuela.[44]

What accounts for the absence of legal analysis considering Indigenous Peoples' own laws and customs regarding migration and territory? Historically, Europeans categorized Indigenous Peoples as "lawless,"[45] and such conceptions

38. *See, e.g.*, KEVIN R. JOHNSON, RAQUEL ALDANA, BILL ONG HING, LETICIA M. SAUCEDO & ENID TRUCIOS HAYNES., UNDERSTANDING IMMIGRATION LAW 44 (3d. ed. 2019) (acknowledging the presence of Indigenous peoples at the onset of European 'immigration' to what is now the United States and Canada without considering Indigenous peoples' own laws or customs with respect to immigration, borders, belonging, and territory).

39. Sharon O'Brien, *The Medicine Line: A Border Dividing Tribal Sovereignty, Economies and Families*, 53 FORDHAM L. REV. 315, 315–16 (1984).

40. Christina Leza, *What Is the US.-Mexico Border to Indigenous Peoples Who Have Lived There?*, NATION OF CHANGE (July 8, 2020), https://www.nationofchange.org/2020/07/08/what-is-the-us-mexico-border-to-indigenous-peoples-who-have-lived-there/ [https://perma.cc/5FXP-DZRP].

41. Luna-Firebaugh, *supra* note 9, at 165–66.

42. *See id.* at 167; Brenden Rensink, *Ignored and Deported, Cree 'Refugees' Echo the Crises of Today*, WORLD (Jan. 31, 2019), https://www.pri.org/stories/2019-01-31/ignored-and-deported-cree-refugees-echo-crises-today [https://perma.cc/385C-2PHD].

43. Texas Band of Kickapoo Act, Pub. L. No. 97-429, 96 Stat. 2269, § 2(a) (1983).

44. For an overview of Indigenous peoples in Latin America, see generally HECTOR DÍAZ POLANCO, INDIGENOUS PEOPLES IN LATIN AMERICA: THE QUEST FOR SELF-DETERMINATION (Lucia Rayas trans., 1997).

45. *See generally* Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405 (1997) (discussing how Congress wrongheadedly

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have affected modern thinking in all realms of law and policy.[46] Moreover, the territorial boundaries of the United States appear indelibly imprinted on both maps and in policy as if they could defy time and circumstance.[47] In recent years, however, it has become less possible to ignore Indigenous Peoples in the scholarship around borders and migration, past and present.[48] Indigenous legal studies scholars have laid the groundwork for centering Indigenous Peoples' customs and traditions in legal analysis.[49] At the same time, scholars in critical legal geography have challenged the determinacy of bounded spaces as privileging power dynamics over lived realities and social justice norms.[50]

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extended state jurisdiction over Indian country to combat tribal "lawlessness," only to actually exacerbate problems of inadequate law enforcement on reservations).

46. *See* Jeffrey R. Dudas, *Law at the American Frontier*, 29 LAW & SOC. INQUIRY 859**,** 873 (2004) ("[I]n situations of internal colonialism indigenous peoples were . . . regularly imagined as lawless and/or ruled by custom and appetite. But because of the differences in historical situation, the colonizing state did not deem it necessary to construct the elaborate system of customary law that developed in many other colonial societies. This omission, however, did little to suppress the widespread belief that indigenous peoples needed civilizing if humanity was to achieve its rightful, progressive end.").

47. *See* Rebecca Tsosie, *The Politics of Inclusion: Indigenous Peoples and U.S. Citizenship*, 63 UCLA L. REV. 1692, 1695 (2016) ("The political boundary between the United States and Mexico is not always visible, particularly when one stands upon the rocky, cactus-strewn soil of the Sonoran Desert. Nevertheless, it is a tangible boundary and one that is heavily policed by the military and law enforcement units that secure the border."); Volpp, *supra* note 17, at 780 ("Immigration scholarship generally presumes not only that borders are spatially fixed, but also that they are fixed over time; states seem to have always existed within their current territorial borders."); *but see* Ron Dungan, *A Moving Border and the History of a Difficult Boundary*, USA TODAY, https://www.usatoday.com/border-wall/story/us-mexico-border-history/510833001/ [https://perma.cc/2BDU-5LTB] ("European nations staked claims on paper while tribes claimed the ground itself, but the border remained a work in progress, an imaginary line, until troops clashed and treaties settled the question.").

48. *See, e.g.*, Karla Mari McKanders, *The Unspoken Voices of Indigenous Women in Immigration Raids*, 14 J. GENDER RACE & JUST. 1 (2010) (centering Indigenous women in the immigration crisis, noting how they are particularly vulnerable in immigration).

49. *See, e.g.*, JUSTIN RICHLAND & SARAH DEER, INTRODUCTION TO TRIBAL LEGAL STUDIES (3d ed. 2015) (focusing on law developed by and for Indian Nations and Native people in the United States); MATTHEW L.M. FLETCHER, AMERICAN INDIAN TRIBAL LAW 1–22 (2011) (describing North American Indigenous law during the 18th and 19th centuries, including Anishinaabek law on with respect to territory, passage, and membership); RAYMOND DARREL AUSTIN, NAVAJO COURTS AND NAVAJO COMMON LAW: A TRADITION OF TRIBAL SELF-GOVERNANCE (2009) (exploring the use of tribal values, customs and norms in solving contemporary legal problems that face the Navajo Nation).

50. For some of the foundational readings in critical legal geography, see, for example, NICHOLAS K. BLOMLEY, LAW, SPACE, AND THE GEOGRAPHIES OF POWER (1994); Keith Aoki, *Space Invaders: Critical Geography "Third World" in International Law and Critical Race Theory*, 45 VILL. L. REV. 913 (2000); DAVID DELANEY, THE SPATIAL, THE LEGAL, AND THE PRAGMATICS OF WORLD-MAKING: NOMOSPHERIC INVESTIGATIONS (2010) (discussing the convergence of socio-legal and critical geographic scholarship as a theoretical framework for critical legal geograph**y**); THE LEGAL GEOGRAPHIES READER: LAW, POWER, AND SPACE (Nicholas Blomley, David Delaney & Richard T. Ford eds., 2001). For examples of critical geography in the Indigenous rights context, see, for example, Joel Wainwright & Joe Bryan, *Cartography, Territory, Property: Postcolonial Reflections on Indigenous Counter-Mapping in Nicaragua and Belize,* 16 CULTURAL GEOGRAPHIES 153, 162–63 (2009) (reflecting on the opportunities and challenges associated with a cartographic legal approach to Indigenous rights claims); Joe Bryan, *Walking the Line: Participatory Mapping, Indigenous Rights, and Neoliberalism,* 42 GEOFORUM 40, 40 (2011) (arguing that mapping could be used to show "how Indigenous political understandings of space are shaped relationally by multiple and overlapping forms

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With these theoretical frames as points of inspiration, we reflect in this Section on Indigenous Peoples' own traditions regarding borders and migration, and their disruption by settler colonialism.[51] We seek to demonstrate that the current borders of the United States were neither inevitable nor drawn on a blank map. As we describe later in the Article, Indigenous traditions remain deeply embedded in both tribal peoples and the landscape in ways that may inform responses to the current circumstances, even amidst U.S. hegemony in the region.[52] Part I.A begins with an explanation of Indigenous Peoples' traditional relationships to land and territory. Part I.B provides a brief history of "discovery," conquest, and colonization. Finally, Part I.C explains the establishment of U.S. borders and introduces migration policy.

A. Relationship of People to Land

Indigenous Peoples across the Americas have long referred to the continent of North America as "Turtle Island," Native peoples' place of origin.[53] The relationship of Indigenous Peoples to land is recounted both by Indigenous Peoples themselves through thousands of years of oral histories that capture both the physical and metaphysical worlds, and, more recently, by scholars who have studied and recorded the intensely symbiotic relationship of Indigenous Peoples to the earth.[54] Though sometimes challenged as essentializing complicated

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of territory and authority"); Jacquelyn Amour Jampolsky, *Property, Sovereignty and Governable Spaces*, 34 LAW & INEQ. 87, 92 (2016) (advocating for attention to "governable spaces" that may transcend reservation boundaries in federal Indian law cases).

51. For the seminal writings on settler-colonialism, see Wolfe, supra note 6. As applied in Indigenous border and migration contexts, see, for example, MARIA JOSEFINA SALDAÑA-PORTILLO, INDIAN GIVEN: RACIAL GEOGRAPHIES ACROSS MEXICO AND THE UNITED STATES 7 (2016) ("Spanish and British colonialism in North America were space-making endeavors . . . that . . . created space through the careful placing (and displacing) of indigenous subjects in landscape."); *see* SPEED, *supra* note 36, at 20 (building Mexico City on top of Tenochtitlan was "clearly *settler* replacement of the Native, as the geography itself was fundamentally transformed to reflect the (ostensible) permanence of settler occupation").

52. *See* JOHN BORROWS, RECOVERING CANADA: THE RESURGENCE OF INDIGENOUS LAW, at xii (2002) (arguing that "the power of Aboriginal law can still be discerned despite the pervasiveness of imported law"); RAYMOND D. AUSTIN, NAVAJO COURTS AND NAVAJO COMMON LAW: A TRADITION OF TRIBAL SELF-GOVERNANCE, at xvii (2009) (describing "a unique side to tribal court jurisprudence in the United States . . . [that] involves retrieving ancient tribal values, customs, and norms and using them to solve contemporary legal issues . . . ").

53. *See* DUANE CHAMPAGNE, NOTES FROM THE CENTER OF TURTLE ISLAND, at viii (2010) (describing that Chippewa creation stories indicate that "Turtle Island is the name given to the land"). *See also* ENCYCLOPEDIA OF THE HAUDENOSAUNEE (IROQUOIS CONFEDERACY) 318–19 (Bruce Elliott Johansen & Barbara Alice Mann eds., 2000) (referencing the Iroquois reference to the North American continent as "Turtle Island").

54. *See* Kristen A. Carpenter & Angela R. Riley, *Privatizing the Reservation?*, 71 STAN. L. REV. 791, 807–09 (2019) (describing how tribal cultures are centered upon the natural world); *see also* Angela R. Riley & Kristen A. Carpenter, *Owning* Red: *A Theory of Indian (Cultural) Appropriation*, 94 TEX. L. REV. 859, 865 (2016) (explaining that "because tribal cultures are inextricably linked to lands and other natural features, virtually all components of cultural life–material and intangible–link back to place"); S. James Anaya & Robert A. Williams, Jr., *The Protection of Indigenous Peoples' Rights Over Lands and Natural Resources Under the Inter-American Human Rights System*,

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realities, the unique interdependence of Indigenous Peoples with the land is, in our experience, such a core feature of indigeneity that it must be taken into account when constructing a decolonization rubric regarding border policing and migration.[55]

Many Indigenous creation stories tell how Indigenous Peoples emerged—often from the spirit world—to arrive in their aboriginal territories and sites of creation. In the Kiowa creation story, for example, the Kiowas came into the world, one by one, through a hole in a cottonwood log, which their Creator sent them through.[56] For the Haudenosaunee, the Great Spirit invited his daughter, Sky Woman, to come to the Lower World as the first human, where she had the first human twins, one good, one evil.[57] For the Navajo or Dine, Changing Woman is the first woman from the spirit world to inhabit human form. She lived on the San Francisco Peaks and gave birth to twins who are ancestors of today's Navajo people.[58] With hundreds of Indigenous tribes in the United States alone,[59] there is a wide range of origin stories, though most all of them involve the supernatural or a Creator that oversees or inspires the creation narrative, and which placed the tribe into their sacred territory.

Across the globe, Indigenous territory is inexorably connected to law and religion, governance and kinship, setting the basis for the exercise of Indigenous lifeways. Many of these structures existed long before contact with Europeans. Consider, for example, the Haudenosaunee *Kaianerehkowa* or "Great Law of Peace" (Great Law), which scholars date back a thousand years. The Great Law is thought to have emerged to address conflict among the Mohawk, Onondaga, Oneida, Cayuga, and Seneca, offering a model of peace:[60]

> Roots have spread out from the Tree of the Great Peace, one to the north, one to the east, one to the south and one to the west. The name of these roots is The Great White Roots and their nature is Peace and Strength. If any man or nation outside the Five Nations shall obey the laws of the Great Peace and make known their disposition to the Lords of the

14 HARV. HUM. RTS. J. 33, 49 (similarly recounting that land and natural resources are not simply economic commodities but are "crucial to [Indigenous communities'] existence, continuity, and culture"); Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022, 1028, 1061 (discussing how Indigenous Peoples have embraced a custodial obligation towards land and resources based on internal community values and further discussing how "well known and oft-repeated" the close relationship between Indigenous Peoples and land is); Rebecca Tsosie, *Land, Culture, and Community: Reflections on Native Sovereignty and Property in America*, 34 IND. L. REV. 1291, 1302 (2001) (stating that "[t]here is a dynamic and on-going relationship between Native peoples and the land" and that "the land carries a critical significance to indigenous peoples").

55. *See generally* Carpenter et al., *supra* note 54.

56. MILDRED P. MAYHALL, THE KIOWAS 6 (1962).

57. *The Haudenosaunee Creation Story*, ONEIDA, https://www.oneidaindiannation.com/the-haudenosaunee-creation-story/ [https://perma.cc/M6QZ-ASV6].

58. Kristen A. Carpenter, *Real Property and Peoplehood*, 27 STAN. ENV'T L.J. 313, 353 (2008).

59. Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 84 Fed. Reg. 1200-01 (Feb. 1, 2019).

60. *See* DAVID E. WILKINS, DOCUMENTS OF NATIVE AMERICAN POLITICAL DEVELOPMENT: 1500S TO 1933, at 14–15 (2009).

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> Confederacy, they may trace the Roots to the Tree and if their minds are clean and they are obedient and promise to obey the wishes of the Confederate Council, they shall be welcomed to take shelter beneath the Tree of the Long Leaves.[61]

In this regard, Haudenosaunee law created a "civic, not an ethnic society," in which neighboring peoples could co-exist peacefully with one another and immigrants to the confederacy could find safety.[62]

As with the Haudenosaunee's Great Law of Peace, the natural world and other markers of space helped to form and define Indigenous cultures. In the Southwest, for example, the traditional Navajo homeland contains six sacred mountains: Sisnaajini, Tsoodził, Dook'o'ooslííd, Dibé Nitsaa, Dził Na'oodiłii, Dził Ch'ool'í'í.[63] And while such spaces came to embody particular tribe's Indigenous homelands, they were often negotiated and even shared among peoples. In the Northeast, as William Cronon pointed out, land use rights were evident and well-regulated: Indigenous Peoples' land tenure often reflected non-exclusive relationships among people and facilitated a "usufruct" system in which a tribe might have one area for their homeland, but share with others a common territory for hunting.[64] Marge Bruchac explains that the Abenaki and other northeast tribes regulated these rights and relationships through gatherings, agreements, rituals, and ceremonies.[65]

In some instances, migration itself may comprise an aspect of Indigenous identity. The Anishinabe, for example, emphasize their migration as part of their creation story. According to oral tradition, the Anishinabe were told by the Creator to move west until they found "the place where the food grows on water," which is how they ended up in the Great Lakes region today with a

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61. THE CONSTITUTION OF THE IROQUOIS NATIONS: THE GREAT BINDING LAW, GAYANASHAGOWA, art. II.

62. KAYANESENH PAUL WILLIAMS, KAYANERENKÓ:WA: THE GREAT LAW OF PEACE 3 (2018).

63. *See* NAVAJO NATION CODE ANN. tit. 1, § 205(B) (2017).

64. WILLIAM CRONON, CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND 62–67 (2003).

65. Marge Bruchac, *Native Land Use and Settlements in the Northeastern Woodlands*, RAID ON DEERFIELD: THE MANY STORIES OF 1704 http://1704.deerfield.history.museum/popups/background.do?shortName=expNLand [https://perma.cc/V7VH-T6QQ] (*"*Long-standing inter-tribal agreements, flexible alliances, and a strong sense of personal and tribal responsibility and honor, governed which families and tribes inhabited particular parts of a homeland, how and when resources were harvested, how Nations would cooperate, and where people could seek refuge or alliance in times of war."). In some cases, the United States eventually became involved in these inter-tribal issues about territory and influence. Peter Erlinder, Minnesota v. Mille Lacs Band of Chippewa*: 19th Century U.S. Treaty-Guaranteed Usufructuary Property Rights, the Foundation for 21st Century Indigenous Sovereignty*, 33 LAW & INEQ. 143, 158 (2015). ("The Dakota and Anishinabe applied their own methods of inter-tribal regulation [to their historic land use disputes], but the 1825 treaty formalized these aboriginal claims into sovereign treaty-guaranteed domains—the Anishinabe in northern Minnesota and the Dakota to the south—with disputes to be resolved with the assistance of the United States, a signatory to the Treaty . . . .").

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culture that is integrally tied to wild rice.[66] Similarly, with the arrival of the horse, so too emerged the increasingly migratory buffalo hunting culture of the tribes of the northern and southern Plains, such as the Kiowa, Comanche, and Apache,[67] recorded in "winter counts," or records of events and places inscribed on animal hides.[68] For these tribes, movement across the Plains, as demanded by weather, game, and ceremonies, was an integral part of their tribal lifeways.[69]

B. "Discovery," Conquest, and Colonization

When Europeans came with their guns and trade goods, fences and maps, to make their mark on the land, they were not writing on a blank slate.[70] To the contrary, in the earliest stages of European arrival in the North America, individuals were often incorporated into and regulated by Indigenous norms governing land and kinship, territory and community.[71] Famously, French individuals traded and married into Indigenous fur trapping tribes such as the Ojibwe, while the Dutch entered into a Treaty with the Haudenosaunee recognizing mutual respect among, and separation of, their polities.[72]

With church and government sanctioned exploration and settlement, however, came European laws setting boundaries and dominion over the people and lands within them. By confirming the right of the Spanish to Indigenous lands via Papal Bull in 1493, the Catholic Church legitimated certain rights

66. Rachel Durkee Walker & Jill Doerfler, *Wild Rice: The Minnesota Legislature, a Distinctive Crop, GMOs, and Ojibwe Perspectives*, 32 HAMLINE L. REV. 499, 509 (2009); *see also* EDWARD BENTON-BANAI, THE MISHOMIS BOOK: THE VOICE OF THE OJIBWAY 101–02 (1988).

67. *See* COLIN G. CALLOWAY, ONE VAST WINTER COUNT: THE NATIVE AMERICAN WEST BEFORE LEWIS AND CLARK 268–77 (2003); MAYHALL, *supra* note 56, at 3–9 (describing the movement of these tribes in and around the southwest, what is now Texas and Oklahoma, and up through the Plains to the Yellowstone region, where they made contact with other tribes, such as the Crow).

68. *See* CALLOWAY, *supra* note 67, at 1, 5; *see also* Christina E. Burke, Russell Thornton & Dakota Goodhouse, *Winter by Winter*, *in* THE YEAR THE STARS FELL: LAKOTA WINTER COUNTS AT THE SMITHSONIAN 70, 155–57 (Candace S. Greene & Russell Thornton eds., 2007).

69. *See* CALLOWAY, *supra* note 67, at 268–76 (2003); MAYHALL, *supra* note 56, at 39.

70. *See generally* ROBERT A. WILLIAMS, JR., LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW & PEACE, 1600-1800 (1997) (describing Indigenous diplomatic traditions of the 17th and 18th centuries).

71. *See* Edward Cavanaugh, *Possession and Dispossession in Corporate New France, 1600-1663: Debunking a "Juridical History" and Revisiting Terra Nullius*, 32 LAW & HIST. REV. 97, 113–14 (2015) ("In 1600, Pierre de Chauvin de Tonnetuit undertook to plant fifty settlers at Tadoussac, a trading site on the Saguenay River. The sixteen settlers he actually planted there endured a terrible winter and were forced to 'take refuge' with the local Montagnais community. It appears that no transactions for land were made by this unfortunate party, because it seems that the five who survived the winter returned to France when their fleet returned to Paris—with two Montagnais diplomats—in the autumn of 1601. . . . In May of [1603], Champlain met with Montagnais chief Anadabijou, and approximately 100 followers of Montagnais, Algonquin, and Etchemin backgrounds, where a 'tabagie' took place" amounting to a peace treaty); *see also* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 593 (1823) ("The person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws.").

72. Robert A. Williams, Jr., *Sovereignty, Racism, Human Rights: Indian Self-Determination and the Postmodern World Legal System*, 2 REV. CONST. STUD. 146, 200–01 (1995) (analyzing the Gus-Wen-Tah or Two Row Wampum between the Dutch and Haudenosaunee).

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emanating from European discoveries.[73] As later articulated and expanded, this "Doctrine of Discovery" allocated among the various European powers the right to claim Indigenous lands.[74] The first to reach and occupy a territory whose inhabitants were not already subjects of a European government had the right to acquire such title by purchase or conquest.[75] Thus began a process by which Indigenous lands were claimed and divided into European colonies with borders previously unknown to their occupants.

To the extent that the Doctrine of Discovery was meant to quell conflict associated with the European conquest of the "New World," it did not succeed. Conflicts ensued between settlers and Indians, the French and English, as well as among colonies.[76] Quite frequently, the English in particular, attempted to resolve disputes by creating new lines and boundaries on the land, displacing Indians and regulating their movement in favor of settlers' interests.[77] In other instances, Puritans created "Praying Towns" as geographic places apart from either tribal or colonial settlements in which to convert Indians to Christianity.[78] During the height of King Philip's War, a calamitous conflict among New England colonists and Indian tribes, the Massachusetts General Court of 1676 enacted a law forbidding Indians from entering into the city limits of Boston (a law that was only repealed in 2004).[79] In the 1700s, the colonies of New France and British America waged the Seven Years War for control over the Eastern Seaboard and the right to expand their territories within it.[80] Throughout this period, colonizers used formal mechanisms, such as law, and informal ones, such as Native peoples' lack of immunity to deadly disease, to remove Native people from desired land and take it for themselves.[81]

As settlements gained permanence, Europeans employed colonial authority to assert jurisdiction over Indian lands.[82] Colonial governors in Virginia, the

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73. *See* ROBERT A. WILLIAMS JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 78, 83 (1990).

74. *See Johnson*, 21 U.S. at 573. For analysis of the sources of European law Justice Marshall used to substantiate the Doctrine of Discovery, see generally Lindsay G. Robertson, *John Marshall as Colonial Historian: Reconsidering the Origins of the Discovery Doctrine*, 13 J.L. & POL. 759 (1997). For additional writings on the Doctrine of Discovery, see, e.g., ROBERT J. MILLER, NATIVE AMERICA, DISCOVERED AND CONQUERED: THOMAS JEFFERSON, LEWIS & CLARK, AND MANIFEST DESTINY (2006).

75. *See Johnson*, 21 U.S. at 573.

76. *See* JENNY HALE PULSIPHER, SUBJECTS UNTO THE SAME KING: INDIANS, ENGLISH, AND THE CONTEST FOR AUTHORITY IN COLONIAL NEW ENGLAND 3–5 (2005).

77. *See* STUART BANNER, HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER 53–54 (2005).

78. *See* Neal Salisbury, *Red Puritans: The "Praying Indians" of Massachusetts Bay and John Eliot*, 31 WM. & MARY Q. 27, 32 (1974).

79. *See* Katie Zezima, *Banned in Boston: American Indians, but only for 329 Years*, N.Y. TIMES, Nov. 25, 2004, at A28 (discussing the Indian Imprisonment Act of 1675).

80. *See generally* WILLIAM M. FOWLER, JR., EMPIRES AT WAR: THE FRENCH AND INDIAN WAR AND THE STRUGGLE FOR NORTH AMERICA, 1754–1763 (2004).

81. *See* K-Sue Park, *Self-Deportation Nation*, 132 HARV. L. REV. 1878, 1889–92 (2019).

82. *See* Katherine A. Hermes, *Jurisdiction in the Colonial Northeast: Algonquian, English and French Governance*, 43 AM. J. LEGAL HIST. 52, 68–69 (1999) (arguing that the English asserted a form

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Carolinas, Georgia, and Tennessee signed treaties with the headmen and chiefs of the Cherokee Nation—sometimes concluded after violent incursions into Cherokee territory—diminishing the right of Cherokee people to occupy and enter what had been their own towns and hunting lands.[83] After finally defeating the French (and their Indian allies), Great Britain issued the Royal Proclamation of 1763, forbidding settlers from entering the Indian lands west of the Appalachians.[84] The Proclamation ostensibly protected Indians from land speculation and invasion by individual settlers; but at the same time, it subjected Indians in this territory to the sovereignty of Great Britain, as well as an influx of White traders, while diminishing Indigenous Peoples' own formal power over trade, migration, and other activities in the region.[85]

C. Domesticating Borders and Burgeoning Migration Policy

For the newly formed United States, sovereign dominion over territory and human movement in North America was a central feature of "Manifest Destiny," or the quest to spread national influence over the continent.[86] At the conclusion of the Revolutionary War, the Treaty of Paris of 1783 set the initial borders of the United States, which would be extended in various directions in coming decades.[87] In 1787, the U.S. Constitution asserted federal authority over trade with the Indians and immigration by foreigners.[88] While this "authority" over

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of territorial jurisdiction that increasingly subsumed Algonquians' own territorial and personal jurisdiction in the northeast from 1675–1763).

83. *See* CHARLES C. ROYCE, THE CHEROKEE NATION OF INDIANS 16–24 (1975).

84. *See* COLIN G. CALLOWAY, THE SCRATCH OF A PEN: 1763 AND THE TRANSFORMATION OF NORTH AMERICA 97–98 (2006).

85. *See id*. at 107–10.

86. *See* Robert J. Miller, *American Indians, the Doctrine of Discovery, and Manifest Destiny*, 11 WYO. L. REV. 329, 332 (2011) ("Manifest Destiny is generally defined by three aspects, and all three reflect the rhetoric of an American continental empire. First, the belief the United States has some unique moral virtues other countries do not possess. Second, the idea the United States has a mission to redeem the world by spreading republican government and the American way of life around the globe. And, third, that the United States has a divinely ordained destiny to accomplish these tasks."); *see also* LAURA E. GÓMEZ, MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE 3–4 (2007) (referring to "manifest destinies" as "a cluster of ideas that relied on racism" to justify war against Mexico and "the competing destinies of many groups" that made the Mexican American race).

87. *See* ADAM BURNS, AMERICAN IMPERIALISM: THE TERRITORIAL EXPANSION OF THE UNITED STATES, 1783-2013 8, 10–11 (2017).

88. In Indian law, one source of the government's plenary power is the Commerce Clause. *See* U.S. CONST. art. I, § 8, cl. 3 ("Congress shall have power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ."). However, it also seems to have an independent basis in federal Indian common law. United States v. Kagama, 118 U.S. 375, 383–84 (1886) ("These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States, dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power."). *But see* Cleveland, *supra* note 22, at 9–10 (analyzing sovereign authority over "Indians, aliens, and territories" as a matter of extra-

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Indians and aliens has been critiqued for its exceptional and absolutist formulations, it has also been accepted as emblematic of the United States itself.[89] As the Supreme Court has stated: "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."[90] The same could be said of congressional authority in Indian law, which has been used to justify treaty abrogation, property deprivations, and other exceptions to the rule of law.[91] In both immigration and Indian law, congressional acts have been held nonjusticiable, even though in the case of federal Indian law, this plenary authority is tempered by the trust obligation the United States owes to Indian tribes.[92]

Unlike states, Indian tribes were not parties to the Constitution, nor did they consent to its power over them.[93] Nevertheless, both Indian law and immigration law became increasingly "domesticated" in U.S. law.[94] Beginning in 1790, a series of federal statutes, known as the Trade and Intercourse Acts, further centralized the acquisition of Indian lands and trade with Indian tribes in the

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constitutional sources). Regarding immigration, see U.S. CONST. art. I, § 8, cl. 4 ("Congress shall have power . . . [t]o establish a uniform Rule of Naturalization . . . .").

89. For articles advancing these critiques and noting continued judicial adherence to the doctrine, see, for example, Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 10 (1998) ("[T]reating the immigration cases as race cases offers a new critique of the plenary power doctrine in all of its applications. While the Court has shown little inclination to abandon the plenary power doctrine, underscoring the racial origins of the doctrine ought to give the Court pause."); Natsu Saito Taylor, *Asserting Plenary Power over the Other: Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs to Incorporate International Law*, 20 YALE L. & POL'Y REV. 427, 431–32 (2002) (noting both critiques of, and adherence to, plenary power doctrines).

90. Mathews v. Diaz, 426 U.S. 67, 79–80 (1976).

91. S*ee* Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903) (noting congressional "[p]lenary authority over the tribal relations of the Indians" as justification for the decision to treat as nonjusticiable Congress's abrogation of a treaty right). In other cases, it was suggested that there was some space for judicial oversight on Constitutional grounds. *See, e.g.*, Del. Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 83–89 (1977) (examining whether Congress's exercise of its plenary power was reasonably related to its trust responsibility owed to tribes). These and other issues are the subject of extensive scholarly analysis, much of which is summarized in Michalyn Steele, *Plenary Power, Political Questions, and Sovereignty in Indian Affairs*, 63 UCLA L. REV. 666 (2016). Congressional power in Indian affairs is also limited by the clear statement rule such that Congress must legislate expressly to curtail Indian rights reserved pursuant to treaty or otherwise. Washington v. Wash. State Comm. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 690 (1979) ("Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights . . . .").

92. JOHNSON ET AL., *supra* note 38, at vi ("The fundamental question of the role of the judiciary in reviewing the constitutionality of immigration laws remains in dispute. The Supreme Court has never overruled its foundational decisions upholding immigration laws that were racially discriminatory."). For a full account of the trust responsibility, see generally Mary Christina Wood, *"Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, UTAH L. REV. 1471 (1994).

93. Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799, 800–01 (2007) (explaining that American Indian tribes are the only governmental body within the United States that is not subject to the Bill of Rights and further explaining tribes' "extra-constitutional status").

94. *See generally* Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 36–38, 52–53 (1996) (describing the process through which the Supreme Court, in particular, created a federal common law through a series of decisions setting the metes and bounds of tribal sovereignty and jurisdiction).

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federal government and in 1793 and 1796 defined the boundaries of Indian country, prohibiting settlers from entry.[95] As Stuart Banner has noted, increased encroachment by settlers itself had a coercive effect, in some cases motivating tribes to agree to cessions of land through treaties "as a means of obtaining some recompense for a state of affairs they had great trouble preventing."[96] And, as reflected by the Act of 1786 and subsequent acts, tribal reservation borders could be modified time and again by treaty to meet the needs of the expanding colonizing population.[97] For example, in the Treaty of Holston of 1791, the United States and Cherokee Nation agreed to additional Cherokee land cessions and set new boundaries of the Cherokee Nation.[98] While the Cherokees agreed to refrain from diplomatic relations with foreign nations, the Treaty also reaffirmed Cherokee authority over certain aspects of entry and immigration into the Cherokee Nation by non-Indians.[99] In this regard, while the Cherokee Nation ceded more of its land via the Treaty of Holston, it reserved other powers including some of its rights to invite non-Indians into—and exclude them from—its territory, as well as to exercise jurisdiction over them.[100]

As the United States was acquiring territory from both Indians and European governments, its borders extended, and so too did legal issues over movement and trade involving Indigenous Peoples. In the Northeast, for example, the Wabanaki Confederacy was comprised of the Micmac, Maliseet, Penobscot, and Passamaquoddy Indian Tribes, who traditionally traveled and traded freely in the region from what is today the western boundary of the State of Maine to Nova Scotia, Canada.[101] After the Revolutionary War, "the international boundary between the newly formed United States and the remaining British possessions in Canada . . . ran through the middle of the territory occupied by the four tribes of the Wabanaki Confederacy."[102] It was apparently "in response to anxiety and confusion among the tribes as to their status with respect to the International Boundary,"[103] that in 1794 the United States and Great Britain adopted the Jay Treaty, which provided in relevant part:

> It is agreed that it shall at all times be free to his Majesty's subjects, and to the citizens of the United States, and also to the Indians dwelling on either side of the said boundary line, freely to pass and repass by land

95. *See* CONFERENCE OF WESTERN ATTORNEYS GENERAL, AMERICAN INDIAN LAW DESKBOOK 30–35 (2019 update) (describing each of the Trade and Intercourse Acts from 1789 to 1887).

96. BANNER, *supra* note 77, at 54.

97. *See* CONFERENCE OF WESTERN ATTORNEYS GENERAL, *supra* note 95.

98. *See, e.g.*, Treaty with the Cherokee, arts. 3–10, July 2, 1791, 7 Stat. 39.

99. *Id.* Among other things, the treaty provided that any non-Indian who settled among the Cherokees would be subject to Cherokee law, U.S. citizens were granted passage along the Tennessee River and roads within the reserved lands of the Cherokee, and U.S. citizens had to obtain a federal license to hunt on Cherokee lands. *Id.* The Treaty contained certain criminal jurisdiction provisions for Indians, non-Indians, and others who might "take refuge" in the Cherokee Nation. *Id.*

100. *Id.*

101. Akins v. Saxbe, 380 F. Supp. 1210, 1213 (D. Maine 1974).

102. *Id.*

103. *Id.*

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> or inland navigation, into the respective territories and countries of the two parties, on the continent of America (the country within the limits of the Hudson's bay Company only excepted) and to navigate all the lakes, rivers and waters thereof, freely to carry on trade and commerce with each other. . . .
>
> No duty of entry shall ever be levied by either party on peltries brought by land, or inland navigation into the said territories respectively, nor shall the Indians passing or repassing with their own proper goods and effects of whatever nature, pay for the same any import or duty whatever. But goods in bales, or other large packages, unusual among Indians, shall not be considered as goods belonging bona fide to Indians.[104]

In the 1800s, the balance of power continued to shift in favor of the United States, and tribes ceded great swaths of land in treaties.[105] These "coerced and patently unfair Indian land cession agreements,"[106] resulted in the loss of millions of acres of land.[107] Even so, westward expansion demanded even more Indian land. In the 1830s, the United States passed a series of Removal Acts, during which the Indians in the East and the Upper Midwest were literally "removed" to the Indian Territory, now the state of Oklahoma, and confined to reservations.[108] To effectuate removal, the United States government subjected Indians to forced, militarized marches, including the Trail of Tears, the Trail of Death, and the Long Walk, among others.[109]

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104. The Jay Treaty, *supra* note 31, at art III.

105. *See* VINE DELORIA, JR., BEHIND THE TRAIL OF BROKEN TREATIES: AN INDIAN DECLARATION OF INDEPENDENCE 110 (1974) (noting diminishing power of tribes in treaty negotiations after 1800); *see also* THE ENCYCLOPEDIA OF NATIVE AMERICAN LEGAL TRADITION 331–32 (Bruce Elliot Johansen ed., 1998) (noting that in the 1800s the United States entered into treaties with tribes that it intended to break).

106. Raymond Cross, *Sovereign Bargains, Indian Takings, and the Preservation of Indian Country in the Twenty-First Century,* 40 ARIZ. L. REV. 425, 427 (1998) ("Indian treaty making in the mid-to-late nineteenth century became the diplomatic 'cover' for coerced and patently unfair Indian land cession agreements. Millions of acres of Indian lands were taken by the federal government in outright congressional defiance of the Indian consent provisions of many treaties.").

107. *See* JOSEPH WILLIAM SINGER, PROPERTY § 15.3.1 (5th ed. 2017).

108. *See* Park, *supra* note 81, at 1900–02.

109. *See* R. DAVID EDMUNDS, THE POTAWATOMIS: KEEPERS OF THE FIRE 265–71 (1978) (recounting the removal of the Potawatomi, an event that has come to be known as the Trail of Death); LYNN R. BAILEY, THE LONG WALK: A HISTORY OF THE NAVAJO WARS, 1846-68 (1970). *See generally* RENNARD STRICKLAND, THE INDIANS IN OKLAHOMA (1980) (discussing the process by which the tribes of the southeastern United States were removed to the Indian Territory). Despite removal, however, many tribes were able to hold on to their tribal customs and traditions, as well as their lands. *See* McGirt v. Oklahoma, 140 S. Ct. 2452, 2459 (2020) ("On the far end of the trail of tears was a promise."); *see also* Jonodev O. Chaudhuri, *Our Muscogee People Suffered for Generations in Hope of a Better Tomorrow. It's Finally Here*, WASH. POST (July 14, 2020, 3:29 PM), https://www.washingtonpost.com/opinions/our-muscogee-people-suffered-for-generations-in-the-hope-of-a-better-tomorrow-its-finally-here/2020/07/14/3caf0638-c60a-11ea-8ffe-372be8d82298_story.html [https://perma.cc/84ZP-SLYV] (describing how the Muscogee Creek were able to rekindle their sacred fires in their new lands); Charles T. Jones, *Dancing with God Cherokee Stomp Embraces Ancient Culture*, OKLAHOMAN (June 27, 1999), https://oklahoman.com/article/2658619/dancing-with-god-cherokee-stomp-embraces-ancient-culture

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Contemporaneously in the South, the Indigenous Peoples were contending with the Spanish, whose presence and influence were disruptive and oppressive to the Aztec, Yaqui, Apache, Comanche, and others.[110] Mexico gained independence from Spain in 1821.[111] The Mexican American war began in 1846 and concluded with the Treaty of Guadalupe Hidalgo, officially titled the Treaty of Peace, Friendship, Limits and Settlement between the United States of America and the Mexican Republic of 1848.[112] It set the Rio Grande as a boundary for Texas, and gave the United States ownership of California and a large area comprising much of New Mexico, Arizona, Nevada, Utah, and Colorado.[113] Mexicans in those annexed areas had the choice of relocating within Mexico's new boundaries or receiving American citizenship with full civil rights.[114] In 1853, the U.S.-acquired land in southern Arizona and New Mexico via the Gadsden Purchase, which also extended the Southern border of the United States in those areas.[115]

But the establishment of the Southern border did not fully clarify federal power over its inhabitants. The United States was concerned about the exercise of congressional authority over the Pueblos, who occupied certain lands acquired from Mexico.[116] In order to assert authority over them pursuant to the Indian Commerce Clause, it was necessary for the United States to define the Pueblos as "Indian."[117] Initially, the Supreme Court determined that Pueblos were not Indians, at least for some legal purposes, because they appeared to be sedentary, industrious, and respectful of the law.[118] After New Mexico achieved statehood,

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[https://perma.cc/H3Q5-VUPW] (describing the preservation of Cherokee traditions). For a description of ceremonial ways of the Euchee and other tribes removed to Oklahoma, see Gregory H. Bigler, *Traditional Jurisprudence and Protection of Our Society: A Jurisgenerative Tail*, 43 AM. INDIAN L. REV. 1, 8–11 (2018).

110. For sources focusing on Indigenous Peoples and the conquest of Mexico, see generally IDA ALTMAN, CONTESTING CONQUEST INDIGENOUS PERSPECTIVES ON THE SPANISH OCCUPATION OF NUEVA GALICIA, 1524–1545 (2017); Felix S. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 GEO L.J. 1 (1942) (explaining the relationship between Spain and Indians in present-day Mexico, as well as between Spanish law and federal Indian law).

111. THE OXFORD HISTORY OF MEXICO 149 (Michael C. Meyer & William H. Beezley eds., 2000).

112. Treaty of Guadelupe Hidalgo, *supra* note 31; WILLIAM M. MALLOY, TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS, AND AGREEMENTS BETWEEN THE UNITED STATES OF AMERICA AND OTHER POWERS (1910); *see also* SALDAÑA-PORTILLO, *supra* note 51, at 108–09.

113. Treaty of Guadalupe Hidalgo, *supra* note 31, at art. 5.

114. *Id.* at art. 8.

115. Gadsden Purchase Treaty, Dec. 30, 1853, U.S.-Mex., 10 Stat. 1031 (Dec. 30, 1853). *See also* Christine A. Klein, *Treaties of Conquest: Property Rights, Indian Treaties, and the Treaty of Guadalupe Hidalgo*, 26 N.M. L. REV. 201, 208 n.49 (1996) (describing issues of boundary and property that were left open by the 1848 Treaty of Guadalupe Hidalgo and resolved by the 1853 Gadsden Treaty).

116. *See* United States v. Lucero, 1 N.M. 422, 440 (1869) (affirming that the Treaty of Guadalupe Hidalgo granted the United States sovereignty over those living on the acquired land); *see also* United States v. Mares, 88 P. 1128 (N.M. 1907) (holding that the Pueblos in the acquired land were citizens not subject to federal sovereignty).

117. *See Lucero*, 1 N.M. at 457.

118. United States v. Joseph, 94 U.S. 614, 617 (1876).

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however, the Supreme Court revisited this determination in the case of *United States v. Sandoval*.[119] There, drawing on old stereotypes and tropes about Indians—namely, that they were "primitive," "influenced by superstition and fetichism," and were "a simple, uninformed, and inferior people"—the Court concluded the Pueblos must be Indians after all.[120] As Gerald Torres has noted, the Court used "law office anthropology" to designate the Pueblos as racially "Indian," thus confirming federal power over them as a people.[121]

During this period, the United States asserted its plenary authority in Indian affairs by establishing and managing Indian reservations. In many instances, reservation conditions were dire. Often, Indians were unable to find enough game to survive on reservations, and government officials increasingly began to impose reprisals for leaving reservation boundaries in search of food.[122] At the same time, the United States famously broke its promises to protect Indians from White settlement on their lands, thereby extending the dominion of Whites and the state itself,[123] with deleterious consequences for the survival of Indian tribes.[124] In 1887, Congress enacted the General Allotment Act authorizing the executive branch to negotiate agreements with tribes, dividing tribal lands in severalty among individuals, granting certain Indians citizenship, and transferring "surplus" lands to whites.[125] While several tribes vehemently pushed back against allotment, arguing that the allotment agreements violated treaties and constituted illegal takings under the Fifth Amendment, the Supreme Court held in the infamous case of *Lone Wolf v. Hitchcock* that the tribes' claims were nonjusticiable pursuant to Congress' plenary power over Indians.[126]

In various ways, congressional assertion of plenary authority over Indian Affairs proceeded in parallel with plenary authority in immigration, with some unique intersections. The Chinese Exclusion Act of 1888,[127] which barred

119. 231 U.S. 28 (1913); *see also* Klein, *supra* note 115, at 214–15.

120. *Sandoval*, 231 U.S. at 39.

121. Gerald Torres, *American Blood: Who is Counting and for What?*, 58 ST. LOUIS UNIV. L.J. 1017, 1034 (2014).

122. Angela Riley, *The Apex of Congress's Plenary Power over Indian Affairs: The Story of Lone* Wolf v. Hitchcock, *in* INDIAN LAW STORIES 196–97 (Carole Goldberg, Kevin K. Washburn & Philip P. Frickey eds., 2010).

123. *See* United States v. Sioux Nation of Indians, 448 U.S. 371, 376–84 (1980).

124. *See* Cross, *supra* note 106, at 428 ("Indian peoples' survival as distinct cultural and economic entities has been jeopardized by this rapid and massive shrinkage of their land base.").

125. Carpenter & Riley, *supra* note 54, at 815 (discussing the process of allotment by which "surplus" Indian lands were opened to Whites, resulting in massive land dispossession).

126. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). But the Supreme Court later backed off such a robust and limitless version of congressional plenary power over tribes in *United States v. Sioux Nation*, 448 U.S. 371, 376–84 (1980), finding that the taking of the Black Hills by the United States constituted a constitutional taking under the Fifth Amendment to the Constitution.

127. *See* Act of Oct. 1, 1888, ch. 1064 § 1, 25 Stat. 504 ("[F]rom and after the passage of this act, it shall be unlawful for any [C]hinese laborer who shall at any time heretofore have been, or who may now or hereafter be, a resident within the United States, and who shall have departed, or shall depart, therefrom, and shall not have returned before the passage of this act, to return to, or remain in, the United States.").

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Chinese laborers from re-entering the United States, was upheld on grounds of congressional competency and power in immigration matters, similar to those asserted in Indian Affairs.[128] Subsequent U.S. policy continued to define immigration standards, but uniquely affected the international movement of Indigenous Peoples. The Immigration Act of 1917 set limits on immigration by Asians and other groups of "aliens."[129] This Act expressly excluded "Indians not taxed" from the definition of "aliens."[130] However, the Immigration and Nationality Act of 1924, advancing a restrictionist approach to southern and eastern European migration,[131] expanded the emerging use of national origin classifications to determine the right to immigrate to the United States.[132] The 1924 Act changed the law with respect to Canadian-born Indigenous individuals who were now defined as "aliens" and denied free crossing at the northern border of the United States.[133] Indigenous Peoples from Canada challenged the 1924 Act as a violation of Jay Treaty rights. In *United States. v. Daibo*, the Eastern District of Pennsylvania addressed "the question of whether the Indians are included among the members of the alien nations whose admission to our country is controlled and regulated by the existing immigration laws."[134] The answer, according to the court, was no: "From the Indian viewpoint, he crosses no boundary line. . . . This does not mean that the United States could not exclude him, but it does mean that the United States . . . will not be taken to have denied this right, unless the clear intention so to do appears."[135] The Jay Treaty right of free passage survived the Act of 1924, though cases about the extent of trade and customs rights persist to this day.[136]

Motivated in significant part by the large numbers of American Indians that served in World War I, Congress passed the Indian Citizenship Act in 1924,[137] which granted birthright citizenship to Indians in the United States, though it did not make them state citizens.[138] States used this as a basis to deny Indians voting

128. Chae Chang Ping v. United States, 130 U.S. 581, 609 (1889).

129. Immigration Act of February 5, 1917, ch. 29, 39 Stat. 874 (codified as amended at 8 U.S.C. § 156 (2018) (repealed 1952).

130. *Id.*

131. *See* JOHNSON ET AL., *supra* note 38, at 63–64 (describing the 1924 legislation that "based the quota for each nationality on the number of foreign-born persons of their national origin in the United States in 1890—prior to the major wave of southern and eastern Europeans").

132. Immigration Act of 1924, ch. 190, § 11, 43 Stat. 153, § 11 (repealed 1952).

133. *Id.*

134. *See* United States *ex rel.* Diabo v. McCandless, 18 F.2d 282, 283 (E.D. Pa. 1927).

135. *Id.*

136. *See* Greg Boos, Greg McLawsen & Heather Fathali, *Canadian Indians, Inuit, Métis, And Métis: An Exploration of the Unparalleled Rights Enjoyed by American Indians Born in Canada to Freely Access the United States*, 4 SEATTLE J. ENV'T L. 343, 377–79 (2014) (arguing, based on a review of case law, that U.S. courts do not honor the duty-free commerce provisions of the Jay Treaty to the same extent as free passage provisions).

137. See Angela R. Riley, *Indians and Guns*, 100 GEO. L.J. 1675, 1703 (2012).

138. Act of June 2, 1924, ch. 233, 43 Stat. 253. *See also* Bethany R. Berger, *Birthright Citizenship on Trial:* Elk v. Wilkins *and* United States v. Wong Kim Ark, 37 CARDOZO L. REV. 1185, 1241–43 (2016).

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rights well into the 1950s.[139] It was not until the Nationality Act of 1940 that all persons born on U.S. soil (with limited exceptions, such as the children of foreign diplomats) were deemed citizens.[140]

As U.S. citizens, American Indians at least formally enjoyed full rights to vote, own property, and move freely on and off reservations throughout the country.[141] The nation-state was truly settled now, even if in practice American Indians, like other people of color, continued to experience discrimination.[142] As of 1924, American Indians were now "in" (a state that had conquered them)—and other Indigenous relatives were decidedly "out" (because their homelands now fell in Canada, Mexico, or even further afield).[143] Perhaps unsurprisingly, not all American Indians sought or even welcomed citizenship.[144] While many Indigenous people became "patriotic" Americans,[145] others rejected citizenship altogether.[146]

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From the point of contact through contemporary law regarding borders and migration, the United States acted as an aggressive settler colonial power. While justifying many of its actions through the Doctrine of Discovery, the continent

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139. *See* DANIEL MCCOOL, SUSAN M. OLSON & JENNIFER L. ROBINSON, NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE 9, 11 (2007).

140. *See* Pub. L. No. 853, 76th Cong., 3d Sess. (effective Jan. 13, 1941).

141. In reality, of course, discrimination against American Indians continues. *See, e.g.*, *Developments in the Law – Indian Law: Chapter Four: Securing Indian Voting Rights*, 129 HARV. L. REV. 1731 (2016) (recounting instances wherein Native people have recently been denied their right to vote).

142. *See* NATSU TAYLOR SAITO, SETTLER COLONIALISM, RACE, AND THE LAW 4 (2020) ("To some extent all peoples of color within the United States have been subjected to what philosopher Georgio Agamben calls 'inclusive exclusion,' the transformation of those who have been coercively included in American society into excluded and subjugated Others.") (citation omitted).

143. *See* Volpp, *supra* note 17, at 293 (Though they "have been considered citizen and alien." they have also been understood as "neither citizen nor alien"); *see also* SPEED, *supra* note 36, at 12 (Indigenous Peoples from Mexico lack status as federally recognized tribes).

144. *See, e.g.*, Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship upon Indigenous Peoples,* 15 HARV. BLACKLETTER L.J. 107 (1999) (critiquing U.S. citizenship in the Indigenous Peoples' context).

145. *See generally* THOMAS GRILLOT, FIRST AMERICANS: U.S. PATRIOTISM IN INDIAN COUNTRY AFTER WORLD WAR I (2018).

146. David Wilkins, *An Inquiry into Indigenous Political Participation: Implications for Tribal Sovereignty*, 9 KAN. J.L. & PUB. POL'Y 732, 735–36 (2000) (quoting a 1998 speech by Chief Irving Powless, Jr. of the Onondaga Nation rejecting citizenship). After questioning the validity of the 1924 General Indian Citizenship Act, Powless stated:

> [T]he Haudenosaunee [also known as the Iroquois Confederacy] have never accepted this law. We do not consider ourselves as citizens of the United States. This law is a violation of the treaties that we signed that prove that we are sovereign. Because we are a sovereign people the United States can not make us citizens of their nation against our will . . . . I have never voted in any election of the United States nor do I intend to vote in any coming elections. Most of our people have never voted in your elections. A few have, but there are not that many who have moved in that direction.

Id. To this day many Haudenosaunee people travel internationally on their own passport rather than one issued by the United States. *See* Gibs & Lan, *supra* note 24.

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of North America was not, in fact, discovered by Europeans. Thus, the process of demarcating, defining, and controlling the lands and peoples that would become the United States occurred by subordination and subjugation. In the next Section, we turn to the present-day circumstances, briefly describing contemporary immigration law as it applies to and involves Indigenous Peoples and providing a snapshot of U.S. borders today.

II.
TURNING TO THE CONTEMPORARY: THE PROBLEMS OF MIGRATION AND BORDER LAW FOR INDIGENOUS PEOPLES

As immigration scholars have suggested, immigration law assumes "narratives of modernity."[147] Viewed from this narrative, the history of the nation-state and the presence of Indigenous Peoples—past, present, and future—are often ignored in contemporary immigration debates. But Indigenous Peoples across the hemisphere have played a critical role in immigration, though too often as the recipients of border regulation or as pawns in global political struggles. Of course, "[i]mmigration law assumes that people cross borders. But it is also the case that borders cross people – and peoples."[148] In this Section, Part II.A begins by briefly discussing the history of U.S. immigration law and explaining how it shaped migration, immigration, and border regulation in a pre-9/11 world. Part II.B shifts to post-9/11 regulation and enforcement to provide a snapshot of border migration as it exists in contemporary America.

A. Modern Immigration Law and Border Regulation

The current centerpiece of U.S. immigration law is the Immigration and Nationality Act (also known as the McCarran-Walter Act) of 1952 (1952 Act).[149] The Act maintained limitations on immigration by Asians and more broadly set immigration quotas that would replicate the demographics of the United States to reflect its European majority.[150] More specifically, by setting national quotas at a rate of one-sixth of one percent of each nationality's population in the United States in 1920, the United States ensured that 85 percent of the 154,277 visas available annually were allotted to individuals of northern and western European lineage.[151] Scholars have noted that these policies "were designed to maintain a 'white nation.'"[152] The 1952 Act also set forth a system of preferences in which individuals with certain skills received preferential immigration treatment, a

147. Volpp, *supra* note 17, at 296.

148. *Id.*

149. Act of June 27, 1952, ch. 477, 66 Stat. 163 (codified as amended at 8. U.S.C. § 1401(a)–(b)); *see also* JOHNSON ET AL., *supra* note 38, at 65.

150. *See* Gabriel J. Chin*, The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273, 279–82 (1996).

151. *See id.* at 279–80.

152. *See* Rose Cuison Villazor & Kevin R. Johnson, *The Trump Administration and the War on Immigration Diversity*, 54 WAKE FOREST L. REV. 575, 578 (2019).

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policy still in use today.[153] During this period, thousands of Mexicans, including Indigenous Peoples, worked in the United States as agricultural guest workers under the so-called "Bracero program," which continued in place until 1964, when it was terminated.[154]

The Immigration and Nationality Act of 1952 reflected Cold War concerns of the period, including a prohibition on entry by anarchists and communists.[155] But the United States was also engaging in Cold War-related political acts south of the border that aided in constructing today's immigration demographics. For example, in 1954, former Guatemalan president Jacobo Árbenz appeared to be an ally to Guatemala's Indigenous population—at least to the extent that he promised to allocate property to them.[156] However, the United States viewed Árbenz as a communist threat and used its power to overthrow him and put in place a government it supported.[157] And so began a decades-long war between the Guatemalan government—backed by the United States—and Indigenous Peoples, with land rights at the very heart of the conflict.[158]

The violence stemming therefrom, fueled by the United States,[159] led Indigenous Peoples to flee.[160] While Peace Accords were finally reached in 1996,[161] they did not end the problems for Guatemala's Indigenous Peoples who were left with slim options for habitable land.[162] The Indigenous community of La Trinidad, for example, was re-settled near an active volcano, threatening the

153. *See* JOHNSON ET AL., *supra* note 38, at 64–67.

154. *See* Villazor & Johnson, *supra* note 152, at 584. For the experience of Indigenous Mexican workers in Bracero program, see MIREYA LOZA, DEFIANT BRACEROS: HOW MIGRANT WORKERS FOUGHT FOR RACIAL, SEXUAL, AND POLITICAL FREEDOM, 9, 23–60 (2016) (discussing Mexican governmental policy in favor of assimilating Indigenous workers, issues of language and culture among Indigenous braceros, and hierarchies among "mestizo" and "indio" workers, including Mixtec, Zapotec, Purhépecha, and Mayas).

155. *See* JOHNSON ET AL., *supra* note 38, at 64–67.

156. *See* Kevin Sieff, *Under the Volcano*, WASH. POST (Nov. 27, 2019), https://www.washingtonpost.com/world/2019/11/27/after-volcano-indigenous-guatemalans-search-safer-ground-guatemala-or-united-states/?arc404=true [https://perma.cc/QP8A-B4S5].

157. *See id.*

158. *See id.*

159. *See id.* (describing how the United States intervened again in 1980 to provide support to Guatemalan soldiers who resisted Indigenous groups, killing between 50,000-100,000 Indigenous civilians during the war).

160. Emily Yates-Doerr, *Why Are so Many Guatemalans Migrating to the U.S.?*, SAPIENS (Oct. 25, 2018), https://www.sapiens.org/culture/guatemala-migrants-united-states/ [https://perma.cc/3KKA-6KC4].

161. *See* Susanne Jonas, *Democratization Through Peace: The Difficult Case of Guatemala*, 42 J. INTERAMERICAN STUD. & WORLD AFFS. 9, 13–15 (2000); *but see* Maria Martin, *Killings of Guatemala's Indigenous Activists Raise Specter of Human Rights Crisis*, NPR (Jan. 22, 2019, 6:45 PM), https://www.npr.org/2019/01/22/685505116/killings-of-guatemalas-Indigenous-activists-raise-specter-of-human-rights-crisis [https://perma.cc/3SC4-DHKE] ("Now the mostly Maya organizations and many human rights groups worry that the violence is making a comeback: In just the last year, 26 members of mostly Indigenous *campesino* organizations have been killed.").

162. *See* Seiff, *supra* note 156 (discussing how, despite the UN and United States contributing money for Indigenous Peoples to select plots of land to live on, the options for such land were either infertile or near volcanoes).

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existence of the community and leading many to migrate to the United States.[163] La Trinidad's history has commonalities to many other Indigenous communities where Indigenous Peoples often suffer human rights abuses and experience some of the lowest living standards in Latin America.[164] And these same peoples comprise the core of Guatemala's increased representation at the U.S.-Mexico border.[165]

The Civil Rights Era in the United States ushered in significant changes in immigration law and policy. Notably, Congress finally eliminated the use of race and national origin in immigration law, at least as a formal matter, in the 1965 Immigration Act (1965 Act), which stated that, "no person shall . . . be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence."[166] The 1965 Act provided that 170,000 visas would be available per year and that 75 percent of them would be allocated for family members.[167] In this regard, the 1965 Act reset the operative principle for immigration from "national origin" to "family ties," a principle that was formally race and ethnicity neutral and is now criticized by some in the current political discourse as "chain migration."[168]

The 1965 Immigration Act also created challenging circumstances for (often Indigenous) Mexican workers. Given the repeal of the Bracero program, the 1965 Act imposed a quota of 120,000 on Western Hemisphere immigration, which was previously not limited numerically.[169] For the first time, Mexican workers were severely limited in their ability to enter the United States to work legally. Yet demand for guest workers persisted, and thus workers from Mexico continued to enter the country, but often without authorization.[170]

Rose Villazor and Kevin Johnson have argued that, "[d]espite the shortcomings of the 1965 Immigration Act, it nevertheless diversified the

163. *See id.*

164. *See* Danielle DeLuca, *Human Rights Violations in Guatemala: Hearing Indigenous Voices*, CULTURAL SURVIVAL Q. MAG., June 2012, https://www.culturalsurvival.org/publications/cultural-survival-quarterly/human-rights-violations-guatemala-hearing-indigenous [https://perma.cc/FE62-TPW4].

165. *See* Seiff, *supra* note 156.

166. 8 U.S.C. § 1152 (2018); *See also* Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 7 Stat. 911 (codified as amended in scattered provisions of 8 U.S.C.).

167. Immigration and Nationality Act of 1965 § 201 (codified at 8 U.S.C. 1151 (2018)).

168. *See, e.g.*, *Remarks by President Trump Before Marine One Departure*, WHITE HOUSE (Oct. 13, 2018, 3:52 PM), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-marine-one-departure-16/ [https://perma.cc/SRQ9-UR9N] ("Chain migration is not a good thing. Chain migration is bad.").

169. *See* Villazor & Johnson, *supra* note 152, at 584.

170. *See id.*; *see also* Kevin Sieff & Annie Gowen, *With Fewer Undocumented Workers to Hire, U.S. Farmers Are Fueling a Surge in the Number of Legal Guest Workers*, WASH. POST (Feb. 21, 2019, 10:24 AM), https://www.washingtonpost.com/world/the_americas/with-fewer-undocumented-workers-to-hire-us-farmers-are-fueling-a-surge-in-the-number-of-legal-guest-workers/2019/02/21/2b066876-1e5f-11e9-a759-2b8541bbbe20_story.html [https://perma.cc/2G7A-6E2E] (Since 2016, the number of U.S. agricultural visas has grown from 165,000 to 242,000, a record high . . . . Amid an intractable debate over immigration and border security, America's labor force is quietly being transformed, as many employers see no choice but to shift from illegal to legal labor.").

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immigration stream."[171] Between 1965 and 2015, the foreign-born population rose from 9.6 to 45 million and "about 60% of the current immigrant population [came] from countries populated by people of color, including Mexico, India, the Philippines, and China."[172] Modern immigration has had an impact on the U.S. population overall such that in "1965, 84% of the U.S. population was white, and Latinx persons accounted for 4% and Asians less than 1% of the population. By 2015, the white population decreased to 62% of the total population, and Latinx and Asian populations increased to 18% and 6%, respectively."[173] As we describe below, many of the "Latinx" immigrants in this increasing group are Indigenous in origin even if they are not necessarily identified that way by authorities.

Acting on global pressure to address the situation of refugees, Congress passed the Refugee Act of 1980, providing rights and a pathway to citizenship upon a showing of a well-founded fear of persecution in an asylum-seekers' home country.[174] As we discuss in more detail below, the Refugee Act has had a mixed legacy in cases regarding Indigenous Peoples leaving their home countries because of discrimination, or other rights violations, based on their Indigenous status.

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). The statute provides that "the Attorney General *may not remove* an alien to a country if the Attorney General decides that the

171. Villazor & Johnson, *supra* note 152, at 584

172. *See id*. at 585.

173. *See id*. (citation omitted).

174. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified at 8 U.S.C. § 1521 (2018)). The 1980 Refugee Act largely reflects the principle of non-refoulement under which individuals may not be forced to return to countries where they face violence and persecution, which has long been accepted as customary international law. THE MOVEMENT OF PERSONS ACROSS BORDERS 123 (Louis B. Sohn & Thomas Buergenthal eds., 1992) ("The general prohibition against a State's return of a refugee to a country where his or her life would be threatened . . . has become a rule of customary international law."). This principle is also expressed in the 1967 United Nations Protocol Relating to the Status of Refugees (Protocol), *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (1967), to which the United States is a party. The United States is not a party to the 1951 United Nations Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6577, 189 U.N.T.S. 150. While the U.S. 1980 Refugee Act is thought to reflect international legal principles, administration of the Act has been criticized as departing from international standards. *See, e.g.*, Natasha Arnpriester, *Trumping Asylum, Criminal Prosecutions for "Illegal" Entry and Re-Entry Violate the Rights of Asylum Seekers*, 45 HASTINGS CONST. L.Q. 3, 5–6 (2017) (criticizing the rules under which individuals must be in the United States to file for asylum but may be criminally prosecuted for the act of entering the United States). In late 2019, President Trump announced a new "Remain in Mexico" program, under which asylum seekers must stay in Mexico while their cases are processed. There are myriad problems with this program ranging from increased violence to difficulty in accessing lawyers. *See* Jason Kao & Denise Lu, *How Trump's Policies Are Leaving Thousands of Asylum Seekers Waiting in Mexico,* N.Y. TIMES (Aug. 18, 2019), https://www.nytimes.com/interactive/2019/08/18/us/mexico-immigration-asylum.html [https://perma.cc/84AZ-GDZ2]; Maria Sacchetti, *U.S. Asylum Officers Say Trump's 'Remain in Mexico' Policy Is Threatening Migrants' Lives, Ask Federal Court to End it*, WASH. POST (June 27, 2019, 7:58 AM), https://www.washingtonpost.com/immigration/u-s-asylum-officers-say-trumps-remain-in-mexico-policy-is-threatening-migrants-lives-ask-federal-court-to-end-it/2019/06/26/863e9e9e-9852-11e9-8d0a-5edd7e2025b1_story.html [https://perma.cc/Y6G4-YTCB].

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alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion."[175] This is referred to as the "withholding of removal" section.[176] In addition, IIRIRA also revised the asylum provisions in the Immigration and Nationality Act, changing the language to provide that "[a]ny alien who is physically present in the United States or who arrives in the United States . . . , irrespective of such alien's status, *may* apply for asylum . . . ,"[177] then leaving it within the discretion of the Attorney General whether that asylum petition will be granted.[178] As courts have noted, "withholding of removal" and "asylum" proceedings are not identical, and the distinction between them "is subtle but important."[179] In general, there is a higher burden on the applicant to establish eligibility for "withholding of removal" than to establish eligibility for asylum.[180] But grants of asylum, which are discretionary, carry important rights, such as the ability to bring one's family members to the United States if they, too, face danger.[181]

Many Indigenous migrants are now seeking asylum based, at least in part, on persecution they face in their home country by virtue of being Indigenous. And, while a refugee's Indigenous status is plainly relevant in some asylum proceedings, courts have taken inconsistent stances on the matter. In *Damaize-Job v. I.N.S*, for example, the Ninth Circuit overturned a Board of Immigration Appeal's (BIA) denial of an application by a Miskito Indian for withholding of deportation and asylum.[182] The Ninth Circuit reasoned that, just like in other cases with similar evidence of threatened violence, petitioner Damaize's status as a Miskito Indian subjected him to a clear probability of violence by the Sandinista government in Nicaragua.[183] By contrast, in cases such as *Yanes-Estevez v. U.S. Attorney General.*, the court determined that "any discrimination [against Indigenous people] that might exist today does not rise to the level of persecution."[184] And, in *Mendoza v. Attorney General of the U.S.*, the Third Circuit denied a petition to review the BIA's affirmance of an immigration judge's finding that an asylum applicant "had not met his burden of proof to

175. 8 U.S.C. § 1231(b)(3)(A) (2018) (emphasis added).
176. 8 C.F.R. § 1208.16 (2020).
177. 8 U.S.C. § 1158(a)(1) (2018) (emphasis added).
178. *Id.* § 1158(b).
179. Garcia v. Sessions, 856 F.3d 27, 30 (1st Cir. 2017). There has been significant criticism for the way in which the INA and IIRIRA interact. Namely, the construction of the two statutes means the Attorney General has no discretion to deny withholding of removal if the "alien" "can show a 'clear probability' of persecution" if deported. *Id.* at 31. By contrast, "aliens 'who can . . . show [only] a well-founded fear of persecution' . . . merely 'are *eligible* for the discretionary relief of asylum.'" *Id*. The "clear-probability" standard is "more demanding" than the "well-founded fear" test for asylum, and "distinct types of benefits" attach to the two remedies. *Id.* at 32.
180. *Id.* at 31–32.
181. *See id.*
182. 787 F.2d 1332, 1335 (9th Cir. 1986)
183. *Id.* at 1335–36.
184. 389 F. App'x 974, 979 (11th Cir. 2010).

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show a vulnerability to persecution on account of his indigenous ethnicity . . . ."[185]

Beyond the question of whether indigeneity should be a factor in granting asylum are the additional barriers that Indigenous refugees face in obtaining asylum once at the U.S. border, including the lack of access to counsel and the inability to have proceedings interpreted into their Indigenous languages. In *Garcia v. Sessions,* for example, the First Circuit considered the denial of an Indigenous Guatemalan man's asylum petition.[186] Victor Garcia had previously entered the United States, but, unable to fully understand Spanish or English, he did not apply for asylum and was ordered removed.[187] When he subsequently re-entered the United States, any chance for asylum was barred because of his prior removal order. Thus, he was limited to seeking the much more restrictive withholding of removal order,[188] even though the immigration judge found that Garcia would face a more-likely-than-not probability of persecution in Guatemala on account of his being Indigenous.[189]

As *The New Yorker's* "Translation Crisis at the Border" piece demonstrates, Garcia's case is not unique. Many migrants speak neither English nor Spanish, and most are never afforded an opportunity to have asylum or deportation hearings interpreted into their Indigenous languages.[190] Thus, while Indigenous status does seem to have made a difference in at least some asylum proceedings, it is evident that indigeneity—particularly with regard to translation and interpretation to and from Indigenous languages—acts as a formidable obstacle to many Indigenous migrants in securing asylum in the United States.

In sum, changes in U.S. immigration policy over the last half century have opened certain doors and scaled back explicit racial restrictions on migration, but the changes have failed to create a system that meaningfully reckons with the presence and movements of Indigenous Peoples. In the next Section, we examine how the post-9/11 world has entrenched and exacerbated these failings.

B. Borders and Immigration in a Post-9/11 America

Indigenous people report that before 9/11, the US-Mexico border, at least within the Tohono O'Odham reservation, was relatively fluid. Tohono O'Odham people went back and forth, largely free to conduct family and cultural matters, and rarely encountering law enforcement.[191] But after 9/11, federal policy and

185. 482 F. App'x 734, 736–37 (3d Cir. 2012).

186. *Garcia*, 856 F.3d at 42–43.

187. *Id.* at 33.

188. *Id.* at 32–34.

189. *See id.* Judge Stahl wrote a vigorous dissent, noting that "if Garcia had access to an attorney, the benefit of legal proceedings in a language he understood, or even just an interpreter [for K'iche] . . . he could have then applied for asylum . . . ." *Id.* at 48 (Stahl, J., dissenting).

190. *See* Nolan, *supra* note 10.

191. *See, e.g.*, Tay Wiles, *A Closed Border Gate Has Cut off Three Tohono O'odham Villages from Their Closest Food Supply*, PAC. STANDARD MAG. (Feb. 7, 2019), https://psmag.com/social-

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practice changed dramatically. Congress passed the USA Patriot Act of 2001,[192] Homeland Security Act of 2002,[193] and Enhanced Border Security and Visa Entry Reform Act of 2002[194] to tighten U.S. borders, expand deportation, and increase surveillance and information sharing about potential threats to the United States. Since these Acts, border gates have been closed and individuals crossing without permission detained.[195] In 2003, investigative and enforcement elements of the U.S. Customs Service and Immigration and Naturalization Service merged to create U.S. Immigration and Customs Enforcement (ICE), which now has over 20,000 law enforcement and support personnel.[196]

The Obama Administration left a mixed legacy on immigration and border issues.[197] While President Barack Obama deported certain categories of immigrants in high numbers, in 2012 he also announced the "Deferred Action on Childhood Arrival" (DACA). Under this law, individuals brought to the United States as young children may be relieved from removal and entrance into removal proceedings, provided they meet several restrictive criteria.[198]

The election of Donald Trump in 2016 changed the discourse, law, and policy regarding immigration in the United States. In direct opposition to Obama-era policy, President Trump campaigned on a promise to repeal DACA, though the Supreme Court stalled those efforts in June 2020.[199] President Trump also called for—and is still calling for—the construction of a "wall" between the United States and Mexico.[200] And the Trump administration's policy of detaining

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justice/a-closed-border-gate-has-cut-off-three-tohono-oodham-villages [https://perma.cc/929F-83DM] (discussing pre-9/11 passage on the reservation and the closing of the San Miguel gate).

192. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of U.S.C.).

193. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified in scattered titles of U.S.C.).

194. Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173 (codified in scattered sections of 8 U.S.C.).

195. MARC R. ROSENBLUM, US IMMIGRATION POLICY SINCE 9/11: UNDERSTANDING THE STALEMATE OVER COMPREHENSIVE IMMIGRATION REFORM 4–6 (2011) https://www.migrationpolicy.org/sites/default/files/publications/RMSG-post-9-11policy.pdf [https://perma.cc/6PV2-QZXH].

196. *Who We Are,* U.S. CUSTOMS AND IMM. ENF'T, https://www.ice.gov/about [https://perma.cc/8CPQ-9EYC].

197. *See* JOHNSON ET AL., *supra* note 38, at 84–97 (describing immigration and border policy during the Obama administration).

198. *See* Memorandum from Janet Napolitano, Sec'y, Dep't Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., et al. 1–3 (June 15, 2012); *see also* Ming H. Chen, *Beyond Legality: The Legitimacy of Executive Action in Immigration Law,* 66 SYRACUSE L. REV. 87, 91 (2016).

199. Dep't of Homeland Sec. v. Regents of the Univ. of California, 140 S. Ct. 1891 (2020).

200. *Remarks by President Trump and President Niinistö of Finland in Joint Press Conference*, WHITE HOUSE (Aug. 28, 2017) https://www.whitehouse.gov/briefings-statements/remarks-president-trump-president-niinisto-finland-joint-press-conference/ [https://perma.cc/J5AH-MKQW] ("Mexico will pay for the wall. It may be through a reimbursement. We need the wall very badly."). For a broader view of the utility of walls in the history of human civilization, see Darcy Eveleigh, *What History Teaches Us About Walls*, N.Y. TIMES (May 27, 2016),

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migrants and "family separation" has exacerbated the suffering of migrants on the Southern border for the last several years.

Yet, as portions of the partially constructed wall are literally blowing over by the wind, U.S. borders with Mexico and Canada appear simultaneously indelible and inchoate.[201] Indeed, the removal and disruption of Indigenous Peoples and spaces across North America has left a "geography . . . fundamentally transformed to reflect the (ostensible) permanence of settler occupation."[202] While the territorial boundaries of the United States are fixed in treaties[203] and guarded by armed officers,[204] they are crossed every day by thousands of individuals with and without permission.[205]

But beneath the wall, real or imagined, there remains an Indigenous landscape.[206] Before the lines were drawn, Indigenous people emerged from this earth and moved with its rhythms. Before, during, and after conquest, Indigenous people are still here trying to protect lands and rivers,[207] food sources, and

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https://www.nytimes.com/2016/05/28/upshot/what-history-teaches-us-about-walls.html [https://perma.cc/DCV6-PRD5] ("The history of walls — to keep people out or in — is also the history of people managing to get around, over and under them. Some come tumbling down.").

201. *See* Adrianna Rodriguez, *Gusty Winds Blew over a Part of President Trump's Border Wall with Mexico in California*, USA TODAY (Jan. 30, 2020, 10:21 AM), https://www.usatoday.com/story/news/nation/2020/01/30/trumps-border-wall-falls-over-high-winds-california-mexico/4618372002/ [https://perma.cc/P6FZ-LSD4].

202. *See* SPEED, *supra* note 36, at 20.

203. *See supra* Part I.

204. *See* U.S. CUSTOMS & BORDER PROTECTION, USE OF FORCE POLICY, GUIDELINES AND PROCEDURES HANDBOOK 8 (2014), https://www.cbp.gov/sites/default/files/documents/UseofForcePolicyHandbook.pdf [https://perma.cc/N9FQ-KFVE]. For criticisms, see, for example, Steve D. Shadowen, *U.S. Border Patrol's Policy of Extrajudicial Killing,* 28 BERKELEY LA RAZA L.J. 1, 1–2 (2018) ("From 2005 through March 2014, United States Border Patrol (Border Patrol) agents killed at least forty-four people along the nation's southern border. Many of the victims were undocumented Mexican nationals who were shot by agents for allegedly throwing rocks at them. These deaths resulted from a Border Patrol policy and practice—purportedly ended in March 2014—that allowed field agents to use lethal force against rock-throwers regardless of whether the agent was in imminent danger of death or serious injury. This article shows that the United States policy violated the international jus cogens norm against extrajudicial killing—a norm so fundamental to international order that every nation is bound by it regardless of the nation's consent.") (citations omitted).

205. For the United States' statistics on southwestern border apprehensions, see, for example, *Southwest Border Migration FY2020*, U.S. CUSTOMS & BORDER PROT., (2020) https://www.cbp.gov/newsroom/stats/sw-border-migration [https://perma.cc/NRX2-RQNW].

206. *See, e.g.*, ABC NEWS, *Stunning Landscape of Tribal Nation on US-Mexico Border Hides a Darker Reality*, YOUTUBE (May 17, 2019), https://www.youtube.com/watch?v=8At5rA6o2Rs [https://perma.cc/E2PJ-FT84] (video of Tohono O'Odham Nation). Several community mapping projects reveal the persistence of Indigenous landscapes. *See, e.g.*, MAC CHAPIN & BILL THRELKELD, INDIGENOUS LANDSCAPES: A STUDY IN ETHNOCARTOGRAPHY (2001) (with examples from Honduras, Panama, Bolivia, Cameroon, and Suriname).

207. *See*, *e.g.*, Ellen Wulfhorst, *American Indians Fear US-Mexico Border Wall Will Destroy Ancient Culture*, REUTERS (June 12, 2018. 6:07 PM), https://www.reuters.com/article/us-usa-border-indians/american-indians-fear-u-s-mexico-border-wall-will-destroy-ancient-culture-idUSKBN1J903W [https://perma.cc/UX5Z-M3NM].

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families[208] in and around border lands. In one powerful report, the Ysleta del Sur Pueblo leaders explained these connections as follows:

> To the Ysleta del Sur Pueblo Indians, the water of the Rio Grande that divides the United States and Mexico sanctifies religious rites and purifies their hunts. Indian communities living miles away use the river to send messages to fellow tribes downstream, tribal chief Jose Sierra told the Thomson Reuters Foundation. "They go to the river and talk to the river, and the river sends it down," said Sierra, a barrel-chested man with long, graying hair and thick turquoise bracelets at his wrists. "They put messages in the river that come to us through the water." But now tribal leaders fear a proposed border wall as envisioned by U.S. President Donald Trump will sever access to the river, spoiling traditions and ruining ancient culture.[209]

The remainder of this Section describes how contemporary law and policy embodies the dual phenomena of (1) Indigenous Peoples divided by settler-state borders and (2) Indigenous Peoples' cross-border migration.

1. Peoples Divided

The Indigenous conception of peoplehood, territory, and sovereignty is vastly different than the one imposed by the Westphalian view of the nation-state. Here, we highlight two Indian nations that have had their territory and people divided by the U.S.-Mexico border: the Yaqui (Yoeme) and the Tohono O'Odham.

Indigenous Peoples have a right to cross the U.S.-Mexico border in order to access traditional lands.[210] For many Indigenous Peoples, the U.S.-Mexico border is just an imaginary line.[211] Yet the presence of that imaginary line and the United States' management of it has restricted Indigenous rights to access traditional lands.[212] Indeed, Indigenous Peoples have been subjected to discrimination and abuse by border patrol agents.[213] One tribe that is particularly impacted by the border is the Yaqui Nation, whose members live in Sonora, Mexico, Arizona, California, and southwestern Texas and thus frequently seek

208. *See* Cristina Leza, *How a Border Wall Would Separate Indigenous Communities*, PAC. STANDARD MAG. (Mar. 19, 2019), https://psmag.com/social-justice/a-border-wall-would-separate-indigenous-communities [https://perma.cc/NBH3-TQNH] (noting that "three Tohono O'odham villages in Sonora, Mexico, have been cut off from their nearest food supply, which was in the U.S." and thousands of other Indigenous people who are members of US tribes, living in Mexico, fear that construction of wall would make it difficult or impossible to travel to the United States "to participate in cultural events, visit religious sites, attend burials, go to school, or visit family").

209. Wulfhorst, *supra* note 207.

210. *See* AMNESTY INT'L, *supra* note 11, at 27.

211. *See* Christina Leza, *For Native Americans, US-Mexico Border Is an 'Imaginary Line*,*'* CONVERSATION (Mar. 19, 2019, 6:44 AM), https://theconversation.com/for-native-americans-us-mexico-border-is-an-imaginary-line-111043 [https://perma.cc/U28Q-VLUB].

212. *See* AMNESTY INT'L, *supra* note 11, at 28.

213. *See id.* at 27–28.

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to cross the border.[214] Members of the Yaqui Nation have recounted several incidents in which U.S. Customs and Border Protection (CBP) agents harassed them in their attempts to cross the border.[215]

U.S. policy has also had a profound impact on the Tohono O'Odham Nation, which is situated directly on the U.S.-Mexico border.[216] The increased border control presence within the reservation includes a fence on the border, a CBP Forward Operating Base, and hundreds of CBP and other federal agents.[217] President Trump's proposed border wall could also run directly through the Tohono O'Odham Nation.[218]

But the presence of CBP officers on Tohono O'Odham Nation lands has only increased the difficulty of international border-crossing for tribal citizens, even including efforts within the United States to cross off tribal lands. For example, if Tohono O'Odham citizens want to leave their land to travel into Tucson or any other neighboring area, they have to pass through a CBP checkpoint; this requirement subjects them to potentially frequent and hostile searches.[219] One member noted that she has to go through these checkpoints regularly for routine activities like grocery shopping, and that she is pulled over for a secondary check every time.[220]

Moreover, members may have the validity of their Tribal ID cards randomly called into question when trying to cross into Mexico or the United States. When this happens, interactions with CBP agents may evolve into more serious detainment, deportation, or separation of family members.[221] And the physical barrier of a border manifested by a fence or wall impedes the ability of Tohono O'Odham citizens to visit cross-border relatives and to continue cultural and spiritual practices that traverse the border.[222] Indeed, there are currently only three gates in the barrier between the Tohono O'Odham Nation and Mexico, and

214. *See id.* at 28.

215. *See id.* at 28–29 (describing how Yaqui Tribal members are "repeatedly harassed by Border Patrol agents" and citing instances where an agent refused to allow a Yaqui family, the parents of which were U.S. citizens, to cross because the child did not look like the parents and instances of CBP agents invading and confiscating cultural items).

216. *See id.* at 29–30.

217. *See id.* at 30.

218. *See* Laurel Morales, *Border Wall Would Cut Across Land Sacred to Native Tribe*, NPR (Feb. 23, 2017, 4:35 AM), https://www.npr.org/2017/02/23/516477313/border-wall-would-cut-across-land-sacred-to-native-tribe [https://perma.cc/JCJ5-W57A].

219. *See* AMNESTY INT'L, *supra* note 11, at 31.

220. *See id.*

221. *See id.* at 30.

222. *See id.* at 32; *see also* John Burnett, *Border Wall Rising in Arizona, Raises Concerns Among Conservationists, Native Tribes*, NPR (Oct. 13, 2019, 7:00 AM), https://www.npr.org/2019/10/13/769444262/border-wall-rising-in-arizona-raises-concerns-among-conservationists-native-trib [https://perma.cc/6ULG-W3PL] (stating that there is currently no funding for a wall on the Arizona Tohono O'Odham lands but members are fearful CBP might change its mind and, if it does so, it would increase the difficulty for members to participate in tribal and family gatherings).

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CBP heavily monitors all three, oftentimes with a heavy hand.[223] Such division has caused members to feel detached from their relatives on the other side of the border.[224] Additionally, preparation for Trump's border wall is encroaching on surrounding areas, posing a threat to significant historical and cultural sites.[225] This is occurring despite statements by UN mandate holders calling on the United States, among other countries, to fulfill their commitments under Article 36 of the UN Declaration and ensure that Indigenous Peoples divided by borders continue to maintain their communities without interference.[226] However, as one Tohono O'Odham citizen, Ofelia Rivas, stated, "When the wind blows, will they ask it for documents? When the water flows, will they ask it for documents? What about the animals? What about the plants? It is not in harmony with how we live our lives."[227]

2. Peoples in Migration

Under recent administrations, immigration policy has shifted to greater militarization and an explosion of the criminalization of immigration (also known as "crimmigration") on the Southern border.[228] Individuals who cross the border are often treated as "illegal" based on their unauthorized entry, even if

223. *See* AMNESTY INT'L, *supra* note 11, at 30–31.

224. *See* Leza, *supra* note 211.

225. *See* Rafael Carranza, *Tohono O'odham Historic Sites at Risk as Border Wall Construction Advances in Arizona*, AZ CENTRAL (Jan. 20, 2020, 9:44 PM), https://www.azcentral.com/story/news/local/pinal/2020/01/21/tohono-oodham-historic-sites-risk-over-border-wall-construction/4527025002/ [https://perma.cc/YP24-PP9Y].

226. *See* AMNESTY INT'L, *supra* note 11, at 32.

227. *Id.* at 29.

228. *See* Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006) (coining the term "crimmigration," arguing how a membership theory explains the convergence of immigration and criminal law, and explaining why that convergence is troubling); *see also* César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1458 (exploring why the creation of crimmigration, which represents a shift from framing noncitizens as 'Americans in waiting' to criminal deviants and security risks, came about); Valsamis Mitsilegas, *The Changing Landscape of the Criminalisation of Migration in Europe: The Protective Function of European Union Law,* in SOCIAL CONTROL AND JUSTICE: CRIMMIGRATION IN THE AGE OF FEAR 87 (Maria João Guia et al. eds., 2013) (discussing the growing use of criminalization in immigration in Europe and the role that the European Union plays in limiting such use of criminal law); Christopher N. Lasch, *"Crimmigration" and the Right to Counsel at the Border Between Civil and Criminal Proceedings*, 99 IOWA L. REV. 2131 (2014) (discussing the future implications of the Supreme Court's decision in *Padilla v. Kentucky*, 559 U.S. 356 (2010), in which the Court found a Sixth Amendment right to effective counsel about immigration consequences of a criminal conviction and thus recognized the blurring line between criminal law and immigration law); Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281 (2010) (discussing the influence that the prosecution of immigration has on the criminal system); Jennifer Lee Koh, *Crimmigration and the Void for Vagueness Doctrine,* 2016 WIS. L. REV. 1127 (arguing that the void for vagueness doctrine should be applied to statutory provisions that implicate both immigration and criminal law); César Cuauhtémoc García Hernández, *Deconstructing Crimmigration*, 52 U.C. DAVIS L. REV. 197 (2018) (arguing for a disentanglement of criminal law and immigration law); Ingrid V. Eagly, *Local Immigration Prosecution: A Study of Arizona Before SB 1070*, 58 UCLA L. REV. 1749 (2011); Ingrid V. Eagly, *The Movement to Decriminalize Border Crossing*, 61 B.C. L. REV. 1967 (2020); Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135 (2009).

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they plan to apply for asylum.[229] These individuals are then detained in federal incarceration facilities.[230] The Trump administration has sought to deter and punish migrants by making detention more onerous; examples include imposing a widely critiqued policy of family separation in 2018 and fostering prison conditions of extreme hot and cold and providing inadequate sleep and washing facilities.[231] Many of these recent practices have had particularly grievous impacts on Indigenous Peoples at the Southern border, especially those who do not speak English or Spanish and have been denied interpretation services.[232] In some instances, Indigenous children have died, and families have become permanently separated as a result.[233]

In the past, the United States' Southern border was crossed primarily by single men from Mexico, but as of May 2019, Central American families and unaccompanied children predominated border crossings.[234] Central American migrants made up the majority of the nearly 144,000 migrants that sought to cross the U.S.-Mexico border in that month, which was the highest monthly total recorded in thirteen years.[235] May was the peak month for migration in 2019,[236] a year in which Customs and Border Patrol agents apprehended more migrants

229. *See* Amnesty Int'l, USA: 'You Don't Have Any Rights Here': Illegal Pushbacks, Arbitrary Detention & Ill-Treatment of Asylum-Seekers in the United States 11–13 (2018), https://www.amnesty.org/download/Documents/AMR5191012018ENGLISH.PDF [https://perma.cc/2PAJ-GMTZ].

230. *See* Conrad Wilson, *Hundreds of Immigrant Detainees Held in Federal Prisons*, NPR (Aug. 23, 2018, 7:38 AM), https://www.npr.org/2018/08/23/641165251/legal-battles-began-when-migrants-were-sent-to-federal-prisons [https://perma.cc/4UGE-M5UN].

231. Ray Sanchez, Sheena Jones, Dave Alsup & Keith Allen, *The Chill of Detention: Migrants Describe Their Experiences in US Custody*, CNN (July 9, 2018, 2:43 PM), https://www.cnn.com/2018/07/07/us/separated-families-detention-conditions/index.html [https://perma.cc/5EC6-HBE5] ("Adults and children are held in prison-like conditions, with unsanitary bathrooms, lockdowns and solitary confinement."); Miriam Jordan, *Family Separation May Have Hit Thousands More Migrant Children Than Reported*, N.Y. TIMES (Jan. 17, 2019), https://www.nytimes.com/2019/01/17/us/family-separation-trump-administration-migrants.html [https://perma.cc/76AD-K77F] ("The federal government has reported that nearly 3,000 children were forcibly separated from their parents under last year's 'zero tolerance' immigration policy, under which nearly all adults entering the country illegally were prosecuted, and any children accompanying them were put into shelters or foster care.").

232. *See* Ahtone, *supra* note 10; *see also* Medina, *supra* note 14; Jawetz & Schuchart, *supra* note 14 (explaining the impacts of language barriers on interactions between Indigenous migrants and immigration officials).

233. *See* Katherine Hamilton, *Five Indigenous Children Have Died at Border Patrol Since December 2018*, CULTURAL SURVIVAL (July 8, 2019), https://www.culturalsurvival.org/news/five-indigenous-children-have-died-border-patrol-december-2018 [https://perma.cc/F9WK-43K6].

234. *See* Catherine E. Shoichet & Geneva Sands, *What's Behind the Spike in Immigrants at the Border*, CNN (June 7, 2019, 2:17 PM), https://www.cnn.com/2019/06/07/politics/reasons-behind-immigration-spike-at-the-border/index.html [https://perma.cc/U4WK-FJ26].

235. Priscilla Alvarez, *32% Increase in Migrants Encountered or Arrested at the Southern Border in May*, CNN (June 5, 2019, 5:49 PM), https://www.cnn.com/2019/06/05/politics/southern-border-migrants/index.html [https://perma.cc/T5WG-H7GL].

236. John Gramlich & Luis Noe-Bustamante, *What's Happening at the U.S.-Mexico Border in 5 Charts*, PEW RES. CTR. (Nov. 1, 2019), https://www.pewresearch.org/fact-tank/2019/11/01/whats-happening-at-the-u-s-mexico-border-in-5-charts/ [https://perma.cc/G47V-JDFC].

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than in any year since 2007.[237] Data from 2019 shows a number of changes in migration trends. For example, whereas in 2000 only 2 percent of those apprehended were non-Mexicans, in 2019 approximately 80 percent of those apprehended were non-Mexicans (including more Guatemalans and Hondurans than Mexicans).[238] This data reflects a general trend of an increase in Northern Triangle migrants since 2014.[239]

Key drivers of migration from Central America include poverty, organized crime, climate disasters, and unstable political systems.[240] Notably, Central American migrants often experience a combination of these so-called "push factors,"[241] which the United States has played a role in manufacturing. Some have suggested that the current focus on treatment of migrants at the border disregards why they arrived at the border in the first place.[242] The simple fact is the United States has long intervened in the politics and economics of countries in Central America, often contributing to conditions of violence and political instability[243] that ultimately impel people to leave their homes.[244]

237. *Id.*

238. *Id.*

239. *See Push or Pull Factors: What Drives Central American Migrants to the U.S.?*, NAT'L IMMIG. F. (July 23, 2019), https://immigrationforum.org/article/push-or-pull-factors-what-drives-central-american-migrants-to-the-u-s/ [https://perma.cc/9RUP-X3ZK] [hereinafter *Push or Pull Factors*].

240. *See* Shoichet & Sands, *supra* note 234 (explaining that policy experts and officials generally agree that the uptick is due to a 'confluence of events' including harsh conditions in Central America); *Push or Pull Factors*, *supra* note 239 (noting that "experts generally agree that the recent increase in UACs and families migrating from the Northern Triangle is attributable to immediate threats of violence, corruption and environmental degradation in these countries . . . "); Chantal Da Silva, *Why Do Migrants Keep Coming to the U.S. Border, Despite Donald Trump's Hardline Policies?*, NEWSWEEK (July 12, 2019, 3:00 AM), https://www.newsweek.com/why-migrants-us-border-trump-push-pull-factors-1447784 [https://perma.cc/LC78-5Q94]. Oliver Milman, Emily Holden & David Agren, *The Unseen Driver Behind the Migrant Caravan: Climate Change*, GUARDIAN (Oct. 20, 2018), https://www.theguardian.com/world/2018/oct/30/migrant-caravan-causes-climate-change-central-america [https://perma.cc/55XC-VS4B] ("Pausing for a rest as the first of three recent migrant caravans passed through the Mexican town of Huixtla last week, Jesús Canan described how he used to sow maize and beans on a hectare of land near the ancient Copán ruins in western Honduras. An Indigenous Ch'orti' Maya, Canan abandoned his lands this year after repeated crop failures – which he attributed to drought and changing weather patterns. 'It didn't rain this year. Last year it didn't rain,' he said softly. 'My maize field didn't produce a thing. With my expenses, everything we invested, we didn't have any earnings. There was no harvest.'"). *See generally* CLIMATE CHANGE AND INDIGENOUS PEOPLES: THE SEARCH FOR LEGAL REMEDIES (Randall S. Abate & Elizabeth Ann Kronk Warner eds., 2013).

241. *See Push or Pull Factors*, supra note 239 (explaining how gang violence in the Northern Triangle countries feed off of the vulnerability that immense poverty creates and further discussing how climate disasters cause food insecurity, which increases the motivation to leave the country on top of already existing fears of gang violence).

242. *See* Shesgreen, *supra* note 26.

243. *See id.* (quoting Stephanie Leutert, director of the Mexico Security Initiative at the University of Texas-Austin, who notes that the United States' role is one factor of many but that "'[o]f course, yes, the U.S.'s direct intervention and U.S. policies have absolutely destabilized' Guatemala, El Salvador and other Central American countries, creating long-term problems in the region . . . ").

244. *See id.*; *see also* Abrego, *supra* note 27; *Noam Chomsky: Migrants Are Fleeing Horrors Created by the U.S. in Latin America*, *supra* note 27; Sklaw, *supra* note 27; Kinzer, *supra* note 27; Cheatham, *supra* note 27; Baker-Jordan, *supra* note 27.

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Unsurprisingly, lower levels of violence and poverty operate as key "pull factors" that drive Central American migrants to the United States.[245]

Guatemala is not the only Central American country that continues to be impacted by U.S. interventions, past and present. El Salvador, for example, is plagued by violence and is fourth on the list in terms of national origin representation at the U.S. border.[246] Some scholars have posited that some of the violence in El Salvador derives from the role that the United States played in the country's civil war in the 1980s, in which it weaponized "rightwing death squads" aimed at combating communism.[247] This was not the first time the United States, concerned about communism, interfered with democracy in El Salvador. In the 1960s, President Dwight D. Eisenhower withheld recognition of free elections but only months later recognized and legitimatized a rightwing coup.[248] The subsequent civil war depleted the Salvadoran economy and left it in an unstable and militarized condition, which it still suffers from today.[249] More recently, the United States has compounded the economic problems in El Salvador by forcing free trade conditions that are not always favorable to Salvadorans and their businesses.[250]

Similarly, the United States has been deeply involved in the affairs of Honduras, one of the most violent countries in the world and the second-highest source of migrants at the U.S. border today.[251] In the 1980s the Reagan administration sent troops to Honduras to train Contra rebels in a war against Nicaragua, arguably equipping the militarization that now engulfs the country.[252] Nearly thirty years later, the United States was implicated in the military ouster of Honduran President Manuel Zelaya in 2009.[253] The ouster sparked protests as Honduras spiraled into the militarized and violent country that many are fleeing today.[254] Finally, the United States continues to push free trade, which has been connected to rural migration, on the Honduran political economy.[255]

Within the increasing Central American migrant population are Indigenous Peoples from communities which previously had experienced little migration.[256]

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245. *See Push or Pull Factors*, *supra* note 239 (discussing that, in addition to family reunification and better educational opportunities, low levels of poverty and low levels of violence are forces that pull migrants to the United States despite the long, dangerous, and uncertain path it entails).

246. *See* Gramlich & Noe-Bustamante, *supra* note 236.

247. Julian Borger, *Fleeing a Hell the US Helped Create: Why Central Americans Journey North*, GUARDIAN (Dec. 19, 2018, 3:00 AM), https://www.theguardian.com/us-news/2018/dec/19/central-america-migrants-us-foreign-policy [https://perma.cc/W48Y-77WE].

248. *See* Mark Tseng-Putterman, *A Century of U.S. Intervention Created the Immigration Crisis*, MEDIUM (June 20, 2018), https://medium.com/s/story/timeline-us-intervention-central-america-a9bea9ebc148 [https://perma.cc/L9XJ-URM6].

249. *See* Borger, *supra* note 247.

250. *See* Tseng-Putterman, *supra* note 248.

251. *See* Borger, *supra* note 247; Gramlich & Noe-Bustamante, *supra* note 236.

252. *See* Tseng-Putterman, *supra* note 248.

253. *See id.*

254. *See id.*

255. *See id.*

256. *See* Shoichet & Sands, *supra* note 234.

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As some of the poorest and most vulnerable residents of Central American countries, Indigenous Peoples are particularly impacted by many of the push factors mentioned above.[257] Indigenous Peoples, for example, are uniquely and acutely impacted by poverty, lack of enforceable property rights, the destruction of land due to climate change, extractive industry,[258] and governmental interference.[259] Such conditions have led to famine and extreme economic instability.[260] Given these patterns, it is unsurprising that so many migrants arriving at the U.S. border from Guatemala and other Central American countries are Indigenous, with virtually no place to go if they are turned away.[261]

Although there has been less direct evidence of Indigenous migration from South America, there are indicators that climate change, discrimination, destruction of Indigenous habitats, and even genocidal acts are pushing Indigenous Peoples out of their homelands in places like the Amazon basin.

257. *See* Andrew R. Arthur, *Looking for Push Factors in Central America*, CTR. FOR IMMIGR. STUD., (Oct. 18, 2018), https://cis.org/Arthur/Looking-Push-Factors-Central-America [https://perma.cc/EB3C-KUBF] (describing how poverty as well as "[m]alnutrition, a lack of access to education, and a lack of protection for [I]ndigenous peoples from the predation of the gangs and drug traffickers" and exploitation of resources are all push factors for Indigenous populations in Central America); *see also* Daniel Gonzalez, *A Dangerous Red Flower Is Driving Record Numbers of Migrants to Flee Guatemala*, USA TODAY (Sep. 26, 2019), https://www.usatoday.com/in-depth/news/nation/2019/09/23/immigration-issues-migrants-mexico-central-america-caravans-smuggling/2026039001/ [https://perma.cc/7H3Z-5FTD] (discussing how Mexican drug cartels took advantage of the poor socioeconomic status of Indigenous farmers in Guatemala by persuading them to grow a plant used to make heroin, which further exposed the farmers to poverty after the Guatemalan government eradicated their fields; and discussing how the Indigenous Mayan population in Guatemala is hurt economically due to climate change).

258. Jeff Abbott & Sandra Cuffe, *Palm Oil Industry Expansion Spurs Guatemala Indigenous Migration*, AL JAZEERA (Feb. 6, 2019), https://www.aljazeera.com/news/2019/01/palm-oil-industry-expansion-spurs-guatemala-indigenous-migration-190122160154738.html [https://perma.cc/9H77-NF5D].

259. *See* Gonzalez, *supra* note 257 (stating that "Indigenous communities are most affected by poverty, with 79% living in poverty, on less than $5.50 a day, and 40% living in extreme poverty, on less than $1.90 a day"); *see also* Adolfo Flores, *Here's Why a Record Number of Families Are Actually Showing Up at the Border*, BUZZFEED NEWS (May 8, 2019, 11:42 PM), https://www.buzzfeednews.com/article/adolfoflores/border-record-families-asylum-central-america-cbp [https://perma.cc/YJD3-PP2E] (relaying a report from Edwin Castellanos, dean of the Research Institute at Guatemala's Valle University and expert on climate change in Central America, finding that "indigenous people are the most affected by unpredictable rainfall and rising temperatures"); Laura Velasco Ortiz & Dolores París Pombo, *Indigenous Migration in Mexico and Central America: Interethnic Relations and Identity Transformations*, 41 LATIN AM. PERSPS. 5, 6 (Margot Olavarria trans., 2014) (explaining that Indigenous communities are severely impacted by poverty); Jen Kirby, *How to Address the Causes of the Migration Crisis, According to Experts*, VOX (July 17, 2019, 4:00 PM), https://www.vox.com/2019/7/17/18760188/migration-crisis-central-america-foreign-policy-2020-election [https://perma.cc/6HXZ-9F8V] (explaining how poverty and climate change drive migration of Indigenous populations).

260. Caley Pigliucci, *The Forgotten Migrants of Central America*, INTER PRESS SERV. (June 12, 2019), http://www.ipsnews.net/2019/06/forgotten-migrants-central-america/ [https://perma.cc/WX56-PTGK]; *see also* Shoichet & Sands, *supra* note 234 (explaining that "increasingly devastating drought in parts of Guatemala and Honduras" are impacting farmers and fueling migration and that in some regions of Guatemala "indigenous communities where people rarely migrated before . . . are seeing a dramatic change").

261. *See* Pigliucci, *supra* note 260; Soichet & Sands, *supra* note 234.

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When global attention turned to the massive fires in the Amazon in September 2019, the media highlighted environmental impacts,[262] but only a few reported on the 131 Indigenous communities in flames.[263]

Indigenous Peoples in the Amazon are extremely vulnerable to devastation, death, and even genocide. To facilitate extractive industry and agriculture in the Amazon, Brazilian President Jair Bolsonaro has called for a rollback of Indigenous Peoples' territorial rights, leaving them vulnerable to loggers and farmers.[264] Burning of the Amazon's rainforest literally destroyed Indigenous Peoples' homes, medicines, and food sources, depriving them of virtually all sources of sustenance.[265] The fires, fueled by the government's exploitative policies, left many Indigenous Peoples feeling threatened or forced to flee in pursuit of better conditions.[266]

Beyond the fires, extractive industry and development in the region has led, quite literally, to the murder of Indigenous Peoples living in the rainforest.[267]

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262. *See, e.g.*, Sarah Gibbens, *The Amazon Is Burning at Record Rates–and Deforestation is to Blame*, NAT'L GEOGRAPHIC (Aug. 21, 2019), https://www.nationalgeographic.com/environment/2019/08/wildfires-in-amazon-caused-by-deforestation/ [https://perma.cc/S7ZQ-SM22] (noting the dual effect of the fires of releasing carbon and destroying carbon-absorbing vegetation); Susan Scutti, *Here's What We Know About the Fires in the Amazon Rainforest*, CNN (Aug. 24, 2019, 4:37 PM), https://www.cnn.com/2019/08/23/americas/amazon-wildfires-411/index.html [https://perma.cc/55C7-3TEX] (describing how destruction of the Amazon may cause it to become a net source of carbon dioxide); Max Fisher, *'It's Really Close': How the Amazon Rainforest Could Self-Destruct*; N.Y. TIMES (Aug. 30, 2019), https://www.nytimes.com/2019/08/30/world/americas/amazon-rainforest-fires-climate.html; [https://perma.cc/AYJ2-TRDK] (noting scientists' concerns that the Amazon rainforest is on the brink of being completely destroyed); Julia Rosen, *The Amazon Rainforest is on Fire. Climate Scientists Fear a Tipping Point Is Near*, L.A. TIMES (Aug. 26, 2019, 6 AM), https://www.latimes.com/environment/story/2019-08-25/amazon-rainforest-fires-climate [https://perma.cc/45R4-ZZKT] (describing how deforestation may transform the Amazon into a dry grassland); Mahita Gajanan, *Environmentalists Have Been Warning About Amazon Fires for Decades. The Stakes Are Now Higher than Ever*, TIME (Aug. 23, 2019), https://time.com/5659658/amazon-rainforest-fire-history/ [https://perma.cc/VRR6-FM2V] (discussing the impacts of the fires on the environment and Indigenous communities).

263. *See* Dom Phillips, *Brazil: Fears for Isolated Amazon Tribes as Fires Erupt on Protected Reserves*, GUARDIAN (Aug. 29, 2019, 1:55 PM), https://www.theguardian.com/environment/2019/aug/29/brazil-amazon-wildfires-indigenous-reserves-remote-areas. [https://perma.cc/4H4S-26VP] ("[L]and grabbers [target] indigenous reserves because they are often remote, well-conserved and unprotected."); Richard Pérez-Peña & Matina Stevis-Gridneff, *Brazil's Rainforest Fires Prompt Alarm and Anger in Europe*, N.Y. TIMES (Aug. 23, 2019), https://www.nytimes.com/2019/08/23/world/americas/amazon-fires-brazil.html [https://perma.cc/EP69-P25V] (mentioning threats to Indigenous communities).

264. *See* Phillips, *supra* note 263.

265. Fabio Teixeira, *Indigenous Tribes Fear Hard Year Ahead After Amazon Fires*, REUTERS (Sept. 4, 2019, 3:53 PM), https://www.reuters.com/article/us-brazil-amazon-indigenous/indigenous-tribes-fear-hard-year-ahead-after-amazon-fires-idUSKCN1VP32L [https://perma.cc/XB7P-8MSE].

266. *See* Phillips, *supra* note 263 (noting that the failure of President Bolsonaro to protect Indigenous lands has contributed to migration of Indigenous communities out of the Amazon).

267. Manuela Andreoni & Letícia Casado, *'Guardian' of the Amazon Killed in Brazil by Illegal Loggers*, N.Y. TIMES (Nov. 4, 2019), https://www.nytimes.com/2019/11/04/world/americas/brazil-indigenous-amazon.html [https://perma.cc/J255-3KN9] (discussing the killing of Paulo Paulino

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Despite pleas by the Guajajara Indigenous Group to the government for protection from loggers and miners, Paulo Paulino Guajajara was murdered by a group of five loggers who were working illegally on Indigenous land.[268] Guajajara's murder came within months of the murder of a leader of the Wajapi Indigenous community by a group of illegal miners.[269] Indigenous groups strongly connected the violence directly to the Brazilian government's policies of degradation of environmental and Indigenous protections.[270] The government's express support for extractive industry and development, along with its stated hostility for Indigenous groups and their rights to culture and habitat, are creating the perfect storm for migration out of the Amazon and into new territories, with devastating consequences for the people and the environment.

As the number of migrants at the U.S. border has increased, they have been met with hostility from the Trump administration, which has enacted several initiatives designed to disincentivize migrants from crossing the border.[271] For example, the Attorney General in 2018 issued a decision restricting claims of asylum eligibility based on domestic violence[272] and issued a similar order in 2019 to discourage asylum claims predicated on family-based groupings.[273]

Guajajara, an Indigenous leader who had worked to protect an Indigenous reserve in the Amazon and noting that his killing was just one in a string of murders of Indigenous leaders by miners and loggers).

268. *Id.*

269. *Id.*

270. *See id.* (describing a "searing statement lamenting Mr. Guajajara's death" in which "the association of Brazilian Indigenous peoples" said these killings were a "direct reflection of [the government's] hate speech" and that the Bolsonaro administration had "'Indigenous blood' on its hands"); *see also* Ernesto Londoño, *Miners Kill Indigenous Leader in Brazil During Invasion of Protected Land*, N. Y. TIMES (July 27, 2019), https://www.nytimes.com/2019/07/27/world/americas/brazil-miners-amapa.html. [https://perma.cc/587E-J3RA] (noting that Indigenous leaders pleaded with the federal government for protection against violence from miners).

271. *See* Abigail Hauslohner, *Mexico Has Replaced Central America as Largest Source of Migrants Taken into Custody at the Border*, WASH. POST (Nov. 14, 2019, 1:13 PM), https://www.washingtonpost.com/immigration/mexico-has-replaced-central-america-as-largest-source-of-migrants-taken-into-custody-at-the-border/2019/11/14/1b5e78dc-06f8-11ea-ac12-3325d49eacaa_story.html [https://perma.cc/6CQQ-3TCH] (discussing the "Remain in Mexico" policy, increased barriers to seeking asylum, and cooperation from the Mexican military as Trump administration policies that were designed to deter migration).

272. *In re* A-B-, 27 I. & N. Dec. 316 (A.G. 2018). Theresa Lawson explains that many women are subject to domestic violence in their home countries. *See* Theresa Lawson, Note, *Sending Countries and the Rights of Women Migrant Workers: The Case of Guatemala*, 18 HARV. HUM. RTS. J. 225, 234–36 (2005) (discussing why Guatemalan women choose to migrate to the United States). Recent documented cases of Indigenous women seeking asylum in the United States locate their fear of persecution and torture in their home countries to their dual status as being both Indigenous and being women. *See, e.g.*, R-S-C v. Sessions, 869 F.3d 1176, 1180 (10th Cir. 2017) (discussing the rape, beating, and torture of an Indigenous woman in Guatemala both because she was Indigenous and because she was female); Antonio v. Barr, 959 F.3d 778, 797 (6th Cir. 2020) (finding "that violence toward Mayan Indigenous women is pervasive throughout Guatemala and is not limited to one particular region").

273. *In re* L-E-A-, 27 I. & N. Dec. 581 (A.G. 2019).

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The Trump administration has also issued two "asylum bans"—the first barring asylum claims from those who were not cleared or inspected at the US-Mexico border,[274] and the second barring asylum claims from those who passed through other countries without seeking asylum in those countries before seeking asylum in the United States.[275] Additionally, the U.S. government issued the "Migrant Protection Protocols," a policy that has returned nearly 50,000 asylum seekers back to Mexico to wait for their day in immigration court.[276] In doing so, many of the migrants have been sent into dangerous border cities and back into some of the very conditions they sought to escape.[277]

As this Section has demonstrated, many of the world's most vulnerable people face particular challenges and obstacles associated with their Indigenous status, including pressure to migrate. But Indigenous people have individual and collective human rights, which, when acknowledged, may provide a roadmap for the decolonization of migration law and policy. It is in that spirit that Part III proposes paradigms and prescriptions for change.

III.
PARADIGMS & PRESCRIPTIONS

This Article has argued that the ongoing legacy of settler colonialism facilitates an approach to migration law that harms Indigenous Peoples. In this Section, we seek to offer some solutions, both conceptual and practical, toward decolonizing Indigenous migration.

First, we suggest examining Indigenous Peoples' experiences with migration through the lens of human rights. This approach draws from our previous work, in which we have argued that Indigenous Peoples are actively shaping human rights, successfully introducing Indigenous cosmologies and lifeways to legal discourse, and advocating for the protection of collective rights, including self-determination, land, and identity, among others.[278] As reflected in the UN Declaration human rights instruments and institutions now have the potential to protect both individuals and peoples against potential abuses by the state. In part by empowering Indigenous Peoples' own laws, customs, and traditions, the UN Declaration and the movement to implement it are advancing a decolonizing agenda by challenging and reforming legal regimes that have traditionally oppressed Indigenous Peoples.[279] These insights are deeply important in the migration context, in which Indigenous Peoples' concerns have

274. *Presidential Proclamation Addressing Mass Migration Through the Southern Border of the United States*, WHITE HOUSE (Nov. 9, 2018), https://www.whitehouse.gov/presidential-actions/presidential-proclamation-addressing-mass-migration-southern-border-united-states/ [https://perma.cc/9WSR-M76Y].

275. Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829-01 (July 16, 2019).

276. Hauslohner, *supra* note 271.

277. *See id.* (reporting that many Central American asylum seekers staying in border cities "have been vulnerable to homelessness, kidnappings and other violence from drug cartels and criminals").

278. *See* Carpenter & Riley, *supra* note 34.

279. *See id.* at 220–33

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often been rendered invisible by legal and policy frameworks that privilege the interests of states, not only over individuals, but also over Indigenous Peoples.

Grounded in an Indigenous Peoples' human rights paradigm, we next turn to practical suggestions. We argue that the UN Declaration, along with the Global Compact and other human rights instruments, can inspire solutions to the many problems of Indigenous migration in the settler state. As discussed above, the problems of Indigenous migration range from the discrimination and violence that push Indigenous Peoples from their home countries to the invisibility of Indigenous languages, cultures, and identities that deprive migrants of fair treatment once they reach the border. To address these and other problems, we set forth prescriptions in the categories of international/regional, domestic, and Indigenous law and policy.

Our conceptual and prescriptive interventions center the humanity and worldviews of Indigenous Peoples, whose experiences have often been ignored in law and policy debates regarding migration. And while we do not take on the task of more broadly reforming global migration policy, we posit that some of the prescriptions offered here could resonate with broader debates around borders, citizenship, identity, and territory.[280] Fundamentally, we seek a paradigm shift in the migration and borders context to bring to light that all lands and peoples are potentially linked in a common destiny of relationship, rather than separated by lines on the land.[281]

A. Decolonizing Paradigms: The Human Rights of Indigenous Peoples

Among U.S. academics, there is already a great deal of theoretical and practical legal work aspiring to advance equality and justice in immigration law.[282] This includes scholarship sounding in constitutional and civil rights law, informed by critical race theory.[283] For example, scholars have argued that the civil rights protections of the Constitution should apply to all "people" in the United States, not only citizens;[284] exposed ways in which the treatment of

280. *See* JOHNSON ET AL., *supra* note 38, at 669–700 (discussing potential trends in the future of immigration law). *See* Eagly, *The Movement to Decriminalize Border Crossing*, *supra* note 228, at 1968 (examining an increasing resistance to "mass border criminalization").

281. For scholarship that takes a broader approach to reconceptualizing immigration law and policy, see MOTOMURA, AMERICANS IN WAITING *supra* note 37; MOTOMURA, IMMIGRATION OUTSIDE THE LAW (2014) *supra* note 37; Motomura. *The New Migration Law*, *supra* note 37.

282. *See, e.g.*, MOTOMURA, AMERICANS IN WAITING, *supra* note 37, at 13 (recommending that lawful immigrants should receive the benefits of American citizenship for the period before they are granted citizenship); Jennifer M. Chacon, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 614 (2012) (arguing that federal, state, and local efforts at enforcement of immigration policy have contributed to the overcriminalization of immigration).

283. *See, e.g.*, Eagly, *Prosecuting Immigration*, supra note 228; GÓMEZ, MANIFEST DESTINIES, supra note 86.

284. *See, e.g.*, David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. JEFFERSON L. REV. 367, 388 (2003) ("While not identically situated in all respects, foreign nationals should enjoy the same constitutional protections for fundamental rights and liberties as United States citizens. The areas of permissible differentiation - admission, expulsion, voting, and

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immigrants belies national commitments to equality and non-discrimination;[285] and suggested modes of belonging and attachment as alternatives or paths to formal citizenship, with attendant rights along the way.[286]

Yet, in our view, the experiences of Indigenous Peoples vis-à-vis the settler state have received insufficient attention within the predominant immigration frame. For many Indigenous Peoples and scholars, addressing these issues implicates a process of "decolonization."[287] As Indigenous Peoples have asserted in other contexts, decolonization does not necessarily implicate the overthrow of the state,[288] but it does require accountability, unwinding, and healing. Dakota elder Harley Eagle has stated, for example:

> I feel it is vital to tell . . . my own perception of how we as Native People work at decolonization. That process involves how we must find that safe and appropriate way of viewing our own personal life's journey and that of our Peoples and how they fit into the history of colonization. We must see how our current existence is influenced by the overall dastardly plans of colonization . . . . We must begin to look at the colonizing

running for federal elective office - are much narrower than the areas of presumptive equality - due process, freedom of expression, association, and religion, privacy, and the rights of the criminally accused."); *see also* Demore v. Kim, 538 U.S. 510, 543 (2003) (Souter, J., concurring in part and dissenting in part) ("Aliens 'residing in the United States for a shorter or longer time, are entitled, so long as they are permitted by the government of the United States to remain in the country, to the safeguards of the Constitution, and to the protection of the laws, in regard to their rights of person and of property, and to their civil and criminal responsibility.'") (quoting Fong Yue Ting v. United States, 149 U.S. 698, 724 (1893)).

285. *See* Chin, *supra* note 89.

286. *See generally* MING HSU CHEN, PURSUING CITIZENSHIP IN THE ENFORCEMENT ERA (2020) (assessing immigrants' attempts to integrate at a time when U.S. policy is focused on enforcement and exclusion).

287. For sources sharing Indigenous Peoples' perspectives on decolonization in other contexts, see, for example, Robert B. Porter, *A Proposal to the Hanodaganyas to Decolonize Federal Indian Control Law*, 31 U. MICH. J.L. REFORM 899, 903–04 (1998); Robert B. Porter, *Building a New Longhouse: The Case for Government Reform Within the Six Nations of the Haudenosaunee*, 46 BUFF. L. REV. 805, 934 (1998) (advocating decolonization of Native nations and noting that "[d]ecolonization is not simply the process of attempting to reverse the colonization process," but instead "seeks to revitalize an Indigenous society by consciously rejecting the course of development imposed by the colonizing society and to otherwise restore the natural and independent development process of that particular Indigenous people"); Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 220–26 (1986) (offering a more nuanced description of European colonialism than is often portrayed and arguing that "[t]o dismiss hastily the importance of legal discourse in the history of European colonialism would ignore the true role of legal ideology and its 'immunizing power,' not only in the nascent imperialist consciousness of the Discovery era, but in the more mature form of that consciousness as it is experienced today") (citation omitted); *see also* GOEMAN, *supra* note 22, at 32–39 (observing that "liberal discourses " have "recognized past wrongs . . . all of which are conceived of as an unfortunate *national* past even though colonization is ongoing"); Daniel Heath Justice, *"Go Away, Water!": Kinship Criticism and the Decolonization Imperative*, *in* REASONING TOGETHER: THE NATIVE CRITICS COLLECTIVE 147 (Craig S. Womack et al. eds., 2008) (discussing Native American Studies literature on decolonization).

288. *See* Robert T. Coulter, *The Law of Self-Determination and the United Nations Declaration on the Rights of Indigenous Peoples*, 15 UCLA J. INT'L L. & FOREIGN AFF. 1, 19 (2010) (explaining that Indigenous Peoples' self-determination is not generally construed to connote a right to secession).

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> process through the lens of our cultural teachings and values, which also hold keys to our healing journey.[289]

As we have argued in other works, the paradigm of human rights as informed by Indigenous practice has the potential to advance the decolonizing process in law and policy.[290] In the following Sections, we advance some thoughts on decolonizing Indigenous migration accordingly.

1. Human Rights Instruments: The Global Compact, the UN Declaration on the Rights of Indigenous Peoples, and Others

A human rights framework for immigration stands in opposition to the idea that state sovereignty outweighs all other concerns, including migrants' interests in life and dignity. This Section will discuss the tenets of a human rights paradigm on migration in the context of Indigenous migration.

All human beings share the need for protections against state violence, tyranny, and abuse of power. This is just as true at state borders as anywhere else. Indeed, as one scholar has argued, "the general admission of aliens should not be regarded as an untrammeled discretionary power within the exclusive domestic jurisdiction of states."[291] The United States has often rejected this principle on grounds of nationalism and national security.[292] But the United States remains a participant in key instruments such as the Convention Against Torture,[293] which protects individuals (even immigrants and non-citizens) from torture in detention, and the UN Protocol Relating to the Status of Refugees,[294]

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289. Harley Eagle, *Hearing the Hard Stuff*, *in* JUSTICE AS HEALING: INDIGENOUS WAYS 54, 54–55 (Wanda D. McCaslin ed., 2005).

290. *See generally* Carpenter & Riley, *Jurisgenerative Moment*, *supra* note 34 (analyzing the intersection of indigenous rights and international human rights discourse as generating new conceptions and practices of human rights).

291. James A. R. Nafziger, *The General Admission of Aliens Under International Law*, 77 AM. J. INT'L L. 804, 805 (1983).

292. *See* JOHNSON ET AL., *supra* note 38, at 49 ("It is often assumed that nations have unfettered sovereign power to maintain closed borders. The United States Supreme Court's approach to American immigration law has often been consistent with this premise. However, international law has increasingly restricted the sovereign powers of nation-states to limit migration into their territories."). One salient and recent example of this rejection is the United States' withdrawal from negotiations of the Global Compact on Migration. *See* Patrick Wintour, *Donald Trump Pulls US Out of UN Global Compact on Migration*, GUARDIAN (Dec., 3 2017, 10:03 AM), https://www.theguardian.com/world/2017/d109raguadonald-trump-pulls-us-out-of-un-global-compact-on-migration [https://perma.cc/5C4P-6JAG] (quoting then-U.S. ambassador to the United Nations Nikki Haley as saying: "We will decide how best to control our borders and who will be allowed to enter our country. The global approach in the New York declaration is simply not compatible with US sovereignty").

293. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

294. Res. 1186 (XLI), Protocol Relating to the Status of Refugees, Nov. 18, 1966 (ESCOR), https://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolStatusOfRefugees.aspx [https://perma.cc/AC5G-9SVD]; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267. Many, however, including even some U.S. asylum officers, believe the "Remain in Mexico" policy, for example, violates asylum and refugee law, both domestic and international, including the Protocol Relating to the Status of Refugees. *See* Sacchetti, *supra* note 174.

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which prohibits the return of individuals to countries where they have a well-founded fear of persecution. At a minimum, U.S. actions with respect to border security and the treatment of immigrants and refugees should be consistent with these standards.[295]

Within the sphere of human rights, there are long-standing international treaties and protocols regarding immigrant and refugee rights.[296] And there are recent developments in this realm as well. For example, in 2018, 152 countries voted in favor of a resolution to endorse the Global Compact.[297] The Global Compact is notable for laying out the world's first-ever global cooperative framework to deal with migration.[298] Recognizing that "no State can address migration alone," the Global Compact speaks to the lack of human rights protections extended to migrants under current legal regimes.[299] While affirming respect for state sovereignty, the Global Compact also articulates collective commitments, including using data to inform policies, minimizing the drivers of migration, providing accurate information, ensuring proof of legal identity, and enhancing the availability of legal pathways for migration.[300] To ensure progress on migration policy, the Global Compact creates an International Migration Review Forum, scheduled to take place every fourth session of the General Assembly, starting in 2022.[301]

The Global Compact potentially represents a sea change in migration and border issues in that it considers the 258 million people on the move, comprising 3.4 percent of the world's population, as a common concern.[302] To reduce the vulnerability of certain classes of migrants, including Indigenous Peoples, the Global Compact calls on countries to develop policies and partnerships to provide these migrants with assistance and human rights protections "at all stages of migration."[303] Unfortunately, aside from acknowledging Indigenous Peoples

295. *See* Arnpriester, *supra* note 174, at 5–7.

296. *See, e.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 293.

297. G.A. Res. 73/195 (Dec. 19, 2018). Although the Compact "reaffirms the sovereign right of States to determine their national migration policy" it sets out 23 objectives for safe, orderly, and regular migration, including data collection, coordinating border management, reserving migration detention as a last resort measure, providing migrants with basic services, and eliminating discrimination in public discourse to help "shape perceptions of migration." *Id.* ¶¶ 15(c), 16. Each objective includes a list of actions that represent relevant policies and best practices. The Compact was adopted by the UN General Assembly through a resolution with 152 votes in favor, 5 against (Czech Republic, Hungary, Israel, Poland, United States), and 12 abstentions. *See* Press Release, General Assembly Endorses First-Ever Compact on Migration, Urging Cooperation Among Member States in Protecting Migrants, U.N. Press Release GA/12113 (Dec. 19, 2018), https://www.un.org/press/en/2018/ga12113.doc.htm [https://perma.cc/X8PH-LQ2S].

298. Press Release, *supra* note 297.

299. G.A. Res. 73/195, *supra* note 297.

300. Press Release, *supra* note 298.

301. *Id.*

302. *See* Press Release, *supra* note 298.

303. G.A. Res. 73/195, *supra* note 297.

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as a vulnerable group, the Global Compact does not elaborate further on the situation of Indigenous Peoples in migration contexts.

But human rights with regard to Indigenous Peoples actually demand more: recognition of the individual and collective rights of Indigenous Peoples as such, many of which are codified in the UN Declaration. The UN Declaration was adopted in 2007, with favorable votes by 144 members of the UN General Assembly.[304] The United States, along with Canada, New Zealand, and Australia, all ultimately expressed support for the UN Declaration following initial opposition.[305] The UN Declaration seeks to protect Indigenous Peoples in light of their vulnerability and unique circumstances as special subjects of concern under human rights frameworks. S. James Anaya, former UN Special Rapporteur on the Rights of Indigenous Peoples, has explained that the UN Declaration represents "a convergence of common understanding about the rights of indigenous peoples."[306] Among other things, the UN Declaration recognizes the individual and collective rights of Indigenous Peoples to self-determination, property, culture, and equality. In these and other realms, the UN Declaration sets forth minimum standards for the treatment of Indigenous Peoples by states[307] and also provides other treaty bodies with specific context for applying their respective instruments, such as the International Covenant on Civil and Political Rights and International Convention to End All Forms of Racial Discrimination.[308] Moreover, there is an entire infrastructure at the United Nations dedicated to helping states, Indigenous Peoples, industry, and UN

304. United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 12; *see also United Nations Declaration on the Rights of Indigenous Peoples*, U.N. DEP'T OF ECON. & SOC. AFFS.: INDIGENOUS PEOPLES, https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html [https://perma.cc/36HJ-4ANB] ("The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted by the General Assembly on Thursday, 13 September 2007, by a majority of 144 states in favour, 4 votes against (Australia, Canada, New Zealand and the United States) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine).").

305. *Id.*

306. Special Rapporteur on the Rights of Indigenous Peoples, *The Situation of Indigenous Peoples in the United States of America*, ¶¶ 82–83, U.N. Doc. A/HRC/21/47/Add. 1 (Aug. 30, 2012).

307. *See, e.g.*, Mayagna (Sumo) Awas Tingni Community. v. Nicaragua, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001) (applying the Declaration to assess Maya property rights under Belize's constitution).

308. *See, e.g.*, U.N. Hum. Rts, Comm., Communication No. 2668/2015, Sanila-Aikio v. Finland, UN Doc. CCPR/C/124/D/2668/2015 (Nov. 1, 2018); U.N. Hum. Rts. Comm., Communication No. 2950/2017, Käkkäläjärvi v. Finland, UN Doc. CCPR/C/124/D/2950/2017 (Nov. 2, 2018) (views adopted by the committee under Article 5 (4) of the Optional Protocol) (extensively citing the Declaration in support of findings that by extending the pool of eligible votes for elections of the Sami Parliament, Finland improperly interfered with the Sami peoples' rights to political participation and to minority rights under Articles 25 and 27 of the International Covenant on Civil and Political Rights). For a summary of these cases, see *UN Human Rights Experts Find Finland Violated Sámi Political Rights to Sámi Parliament Representation*, U.N. HUM. RTS. OFF. HIGH COMM'R (Feb. 4, 2019), https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24137&LangID=E [https://perma.cc/2KT3-CJSR].

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agencies realize the aims of the UN Declaration through practical measures and law reform in countries around the world.[309]

A recent study of the UN Expert Mechanism on the Rights of Indigenous Peoples (EMRIP Migration Study) explains the applicability of the UN Declaration to the situation of Indigenous Peoples in the context of borders, migration, and displacement.[310] This study calls for states and international agencies to address the situation of Indigenous Peoples as migrants, including the human rights violations that may be driving Indigenous Peoples from their homes and ancestral territories, and the problems experienced by Indigenous Peoples during migration across borders, both domestically and internationally.[311]

The EMRIP Migration Study notes that contemporary measures around migration and borders should first and foremost be informed by Article 7 of the UN Declaration, providing that "indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person" and "indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group."[312]

Critically, Article 36 of the UN Declaration further recognizes that Indigenous Peoples have the right to cross international borders purporting to divide their territories, in order to maintain "contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders" and that states have an affirmative duty "in consultation and cooperation with indigenous peoples" to "take effective measures to facilitate the exercise and ensure the implementation of this right."[313] Finally, the EMRIP Migration Study affirms that Indigenous Peoples do not cease to be Indigenous when they cross

309. For a description of UN mechanisms and procedures focused on Indigenous Peoples, see INT'L WORK GRP. FOR INDIGENOUS AFFS., THE INDIGENOUS WORLD 2019 582–88, 613–71 (David N. Berger ed., 2019), https://www.iwgia.org/en/documents-and-publications/documents/4-the-indigenous-world-2019/file.html [https://perma.cc/J4P5-KJA5]. The Expert Mechanism on the Rights of Indigenous Peoples, a subsidiary body of the Human Rights Council, is mandated to assist states and Indigenous Peoples in realizing the aims of the UN Declaration. *Expert Mechanism on the Rights of Indigenous Peoples*, U.N. HUM. RTS. OFF. HIGH COMM'R, https://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/EMRIPIndex.aspx [https://perma.cc/7P6K-TVMQ].

310. U.N. Hum. Rts. Comm., Expert Mechanism on the Rights of Indigenous Peoples, Study and Advice on Indigenous Peoples' Rights in the Context of Borders, Migration, and Displacement, U.N. Doc A/HRC/EMRIP/2019/2/Rev.1 (Sept. 18, 2019), https://undocs.org/en/A/HRC/EMRIP/2019/2/Rev.1 [https://perma.cc/4SYW-UHDG] [hereinafter *EMRIP Study on Migration*].

311. *Id.*

312. *Id.* at ¶ 8.

313. United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 12, at art. 36 ¶¶ 1–2.

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borders.[314] Indigenous Peoples enjoy rights to life, health, security, family, language, identity, and culture, even while they are migrating.[315]

2. Human Rights Practice: Indigenous Laws, Customs, and Traditions

Tribal lifeways have ancient origins that far predate the history of settler colonialism.[316] In previous Sections of this Article—and in our prior work—we have articulated what the law can learn from Indigenous cosmologies, which are rooted in relationships between people and the natural world.[317] We have also described the ways in which Indigenous Peoples' own laws, customs, and traditions are already shaping human rights law.[318] This Section carries that analysis forward by examining how a human rights approach informed by Indigenous experience can help to shift the migration paradigm—and eventually change migration law and policy altogether.

Indigenous practices encourage us to reconsider the current moment in migration as an opportunity not to build a wall but to *hear* the messages that Indigenous Peoples have long been sending through the rivers of this hemisphere. To *see* the Indigenous Peoples living and moving on both sides of borders that demarcate hierarchies of the settler state project. Indeed, the Indigenous dynamics of the migration situation are not actually hidden, but rather occurring in plain sight.[319] It is Indigenous Peoples who are walking for miles from places where they have been denied land rights,[320] dying in detention when they cannot be understood in Indigenous languages,[321] having cultural

314. *EMRIP Study on Migration,* supra note 310 at annex ¶¶ 5–6 .

315. *Id.* at ¶ 13.

316. *See generally* PETER KULCHYSKI, ABORIGINAL RIGHTS ARE NOT HUMAN RIGHTS: IN DEFENCE OF INDIGENOUS STRUGGLES (2013) (claiming that "aboriginal rights" derive from material practices rather than the abstract ideals that shape "human rights").

317. *See, e.g.*, Carpenter & Riley, *Indigenous Peoples and the Jurisgenerative Moment*, *supra* note 34; Riley & Carpenter, *Owning Red*, *supra* note 54, at 869–71; Carpenter et al., *In Defense of Property*, *supra* note 54, at 1064–69; Carpenter & Riley, *Privatizing the Reservation?*, *supra* note 54, at 846–47.

318. *See* Carpenter & Riley, *supra* note 34, at 173–80, 206–11.

319. *See* Carlos Yescas, *Hidden in Plain Sight: Indigenous Migrants, Their Movements, and Their Challenges*, MIGRATION POL'Y. INST. (Mar. 31, 2010), https://www.migrationpolicy.org/article/hidden-plain-sight-indigenous-migrants-their-movements-and-their-challenges [https://perma.cc/YNH2-4QX6] ("Within the migration studies field, indigenous people have often not been considered separately from others born in the same country (e.g., Zapotecs from Mexico are simply 'Mexicans' in the United States despite language and cultural differences). In most cases, those communities were accounted for within peasants' internal migration to cities, and city governments did not recognize their cultural differences until the indigenous peoples' movement became visible on the international stage.").

320. *States Must Act Now to Protect Indigenous Peoples During Migration*, U.N. HUM. RTS. OFF. HIGH COMM'R (Aug. 7, 2018), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23429&LangID=E [https://perma.cc/J7KS-NQ8H].

321. *See* Covarrubias *supra* note 16 (recounting the story of the Indigenous language-speaking seven-year-old, Jacquelin Caal Maquin, who did not obtain timely medical care, at least in part because of language issues, and died in U.S. custody); *see also* Garcia v. Sessions, 856 F.3d 27, 33 (1st Cir. 2017) (noting that Garcia "who speaks no English and only minimal Spanish" had previously been

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items seized and destroyed by border officials,[322] and becoming stranded in Mexico after travelling from the United States for ceremonial reasons[323]—or being denied entry to the United States to access Indian Health Services,[324] and being harassed (and possibly killed) by U.S. border patrol on their own reservations in the United States.[325]

U.S. immigration law enforcement is often oppressive to Indigenous Peoples and others regardless of whether they are citizens of the United States or Mexico or another state in the region. Perhaps this should not come as a surprise. The settler state was born of violence, taking Indigenous lands, criminalizing Indigenous laws and religions, displacing Indigenous people, limiting mobility, and infecting Indigenous kinship with nation-state politics. To the extent Indigenous Peoples have survived, it is through their own resilience and lifeways. The global community is coming to understand that these Indigenous practices provide far-reaching lessons, which may offer keys to climate change adaptation,[326] development of medicinal knowledge to combat disease,[327] and modalities for peace and diplomacy among peoples, [328] among other issues.

By embracing these Indigenous realities, we can begin to envision legal reforms and policy objectives that have the potential to foster justice and equality

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deported to Guatemala without requesting asylum or withholding of removal "apparently because of the language barriers he faced . . . ").

322. *See* LEZA, *supra* note 9, at 109–10 (describing incidents in which Lipan Apache had sacred items, a drum and an eagle feather, "manhandled" by border officials in Texas, and Yaquis had a sacred deer head, known to be a living being, destroyed by a border official in Arizona).

323. *See, e.g.*, Miller, *supra* note 24 (relaying that "after a trip to Mexico to retrieve some ceremonial items, Tohono O'odham member Joaquin Estevan's tribal ID card was rejected by U.S. Border Patrol agents, leaving him stranded").

324. *See* Peter Heidepriem, Note, *The Tohono O'odham Nation and the United States-Mexico Border*, 4 AM. IND. L. J. 107, 111–13 (2015) (describing that Tohono O'Odham individuals who are born in Mexico but meet tribal citizenship requirements are eligible for benefits, including "healthcare, education, housing subsidies, and work training programs," that are available to federally recognized tribes but that it is "next to impossible" to get these services because of the situation at the U.S.-Mexico border).

325. *See* Miller, *supra* note 24 ("Pulling people out of their vehicles is one in a long list of abuses alleged against the Border Patrol agents on the Tohono O'odham Nation, including tailing cars, pepper spraying people and hitting them with batons. Closer to the border, people have complained about agents entering their homes without a warrant. In March 2014, a Border Patrol agent shot and injured two Tohono O'odham men after their truck sideswiped his vehicle. (The driver said he was swerving to avoid a bush and misjudged; Border Patrol charged him with assault with a deadly weapon.) In 2002, a Border Patrol agent ran over and killed a Tohono O'odham teenager."). These and other incidents are described with more sympathy to the Border Patrol in Heidepriem, *supra* note 324, at 116–20.

326. *See* Alexis Wright, *Want to Stop Australia's Fires? Listen to Aboriginal People*, N.Y. TIMES (Jan. 15, 2020), https://www.nytimes.com/2020/01/15/opinion/australia-fires-aboriginal-people.html [https://perma.cc/GN5T-3XHR] (describing how Australian aboriginal people controlled fires for millennia before settlers took over land).

327. *See* Graham Dutfield, *Why Traditional Knowledge Is Important in Drug Discovery*, 2 FUTURE MED. CHEM., 1405, 1405–09 (2010).

328. *See, e.g.*, INT'L YEAR OF INDIGENOUS LANGUAGES, https://en.iyil2019.org/ [https://perma.cc/37JA-AXHE] ("Indigenous languages matter for social, economic and political development, peaceful coexistence and reconciliation in our societies.").

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and decolonize migration and borders. It isn't too late to imagine this future. The United States hasn't succeeded in dividing and conquering Indigenous Peoples; indeed, it only closed the last gate between Tohono O'Odham in the United States and Mexico in 2016, and President Trump's wall is far from complete.[329] The gate can be reopened, and the wall can be stopped. American law on borders and migration has been dynamic from the beginning, adapting to the changing interests of the colonial project. The current focus on national security and economic protectionism may not be the final word on a U.S.-based approach to immigration and borders and, in any event, these interests are not completely immune from other concerns reflected in law, policy, and morality.

Beyond assisting in the formulation of new migration policies, surfacing Indigenous Peoples' presence and concerns allows us to rethink a number of assumptions about migrants. First, Indigenous Peoples are often, though certainly not always, reluctant migrants because of the very deep cultural connections between them and their lands.[330] When they do decide to leave their homelands, Indigenous Peoples may be migrating away from a state because it has failed to respect Indigenous Peoples' rights to land and nondiscrimination at home, such as Guatemala's failure to recognize Indigenous property rights sufficiently despite the terms of the country's nearly thirty-year-old Peace Accords.[331] In many cases, these circumstances call for both redress in home countries, where Indigenous rights should be better protected, and recognition in

329. For reporting on the gate closure and its impacts for Tohono O'Odham people, see Wiles, *supra* note 191; *see also* 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/2QFT-H5GS] (describing the significance of the San Miguel Gate, the last of five or six gates through which Tohono O'Odham could cross relatively informally from the United States into Mexico and back).

330. *See* Ana María Oyarce, Fabiana del Popolo & Jorge Martínez Pizarro *International Migration and Indigenous Peoples in Latin America: The Need for a Multinational Approach in Migration Policies*, 3 REVISTA LATINOAMERICANA DE POBLACIÓN, Dec. 2009, at 143, 150 (describing "[t]he lesser magnitude of international Indigenous migration" as "related to two main phenomena: first, indigenous peoples' unbreakable ties to their lands, which function as an anchor (although survival needs may force them to migrate elsewhere) and, second, the structural disadvantage facing indigenous peoples who adopt the uncertain and costly strategy of international migration"). Yet, to put it in colloquial terms, not all Indigenous Peoples want to stay home. For one study presenting a complicated view of Indigenous migration and mobility, see generally CECILIE VINDAL ØDEGAARD, MOBILITY, MARKETS AND INDIGENOUS SOCIALITIES: CONTEMPORARY MIGRATION IN THE PERUVIAN ANDES (2010) (describing multiple aspects of Andean people's movement to urban areas, including motivations of progress and social mobility, and many dimensions of those experiences in the realms of culture, cosmology, and the market).

331. Julie Davis and Luis Mogollon, *Dissonant Voices: Understanding Guatemala's Failure to Amend its Constitution to Recognize Indigenous Law*, 25 U.C. DAVIS J. INT'L L. & POL'Y 69, 71 (2018) ("Guatemala is a country with a near-majority indigenous population and a robust presence of indigenous law in various departments that are heavily indigenous. Nonetheless, despite promises dating from the signing of the Peace Accords in 1996, Guatemala's Constitution does not formally recognize indigenous law, although several articles of the Constitution recognize indigenous people.") (footnotes omitted).

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U.S. asylum processes, when persecution makes it unsafe for Indigenous migrants to return to their countries of origin.[332]

Second, Indigenous Peoples are deeply concerned with keeping the reservations and other lands they have retained as their own safe havens from violence and conflict.[333] It is perhaps for this reason, as well as political pressure, that the cross-border Tohono O'Odham have joined in U.S. federal law enforcement and national security efforts.[334] The tribal government wishes to be a good partner with the United States and even has a special tracking program within Immigration and Customs Enforcement known as the "Shadow Wolves."[335] But many O'Odham have also made clear that they object to a wall and resist militarization of their reservation.[336] They seek to find collaborative solutions with the United States and Mexico that allow their members to move across their territory and enjoy their culture, while also protecting the physical environment and diminishing violence on the reservation.[337] While these partnerships between the national and Indigenous governments represent pragmatic approaches to border issues, they are also fraught with complexities that all too often leave Indigenous Peoples vulnerable to state power.

Third, Indigenous Peoples do not cease to be Indigenous when they leave their home communities or even their home countries.[338] On a practical level, as the cases show, Indigenous Peoples carry their languages and cultures with

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332. We are reminded of Professor Motomura's point that liberal democracies should strive for "ethical borders" which guarantee the well-being of citizens, as well as justice and equality. *See* Motomura, *The New Migration Law*, *supra* note 37, at 471–72 (internal quotations omitted). In our view, these values as applied in the Indigenous Peoples' context should mean that all states protect Indigenous Peoples' rights at home and are mindful of the denial of Indigenous Peoples' rights when assessing claims for immigration rights.

333. *See* Santos, *supra* note 329 ("Tohono O'odham leaders acknowledged that they were straddling a bona fide national security concern. The tribe reluctantly complied when the federal government moved to replace an old barbed-wire fence with sturdier barriers that were designed to stop vehicles ferrying drugs from Mexico. It ceded five acres so the Border Patrol could build a base with dormitories for its agents and space to temporarily detain migrants. It has worked with the Border Patrol; hardly a day goes by without a resident or tribal police officer calling in a smuggler spotted going by or a migrant in distress, said Mr. Saunders, the director of public safety.").

334. *See* Chelsey Lugar, *How the U.S.-Mexico Border Has Split the Tohono O'Odham*, HIGH COUNTRY NEWS (Mar. 19, 2018), https://www.hcn.org/issues/50.5/tribal-affairs-how-the-u-s-mexico-border-has-split-the-tohono-oodham [https://perma.cc/A6QZ-PXXG] (describing viewpoints among tribal members and experiences with federal presence on the reservation).

335. *ICE Shadow Wolves*, U.S. IMMIGR. & CUSTOMS ENF'T (June 1, 2007), https://www.ice.gov/factsheets/shadow-wolves [https://perma.cc/7HBB-SABY].

336. *See* Morales, *supra* note 218 (quoting Verlon Jose, vice chairman of the Tohono O'Odham Nation, as saying, "Over my dead body will we build a wall").

337. *See* AMNESTY INT'L, *supra* note 11, at 22, 73 (noting that the Tohono O'Odham nation is concerned about the increase of crime on the reservation that occurs through migrant smuggling and advancing a proposal that tribal governments and U.S. officials work together to protect the border and respect Indigenous culture).

338. *States Must Act Now to Protect Indigenous Peoples During Migration*, *supra* note 320 (*"*[A]ll Indigenous peoples, whether they migrate or remain, have rights under international instruments, including the UN Declaration on the Rights of Indigenous Peoples.").

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them.[339] Even more fundamentally, Indigenous peoplehood is inherent in the group and not dependent on state recognition.[340] As a result, attributes of Indigenous Peoples' identities are indelible aspects of Indigenous humanity. Moreover, under the approach of the Global Compact, responsibility for human rights in migration is shared globally.[341] Thus, it is incumbent on all states alone and working together to ensure protection of Indigenous Peoples' rights to life and identity in home countries, while crossing borders, and in places where they seek refuge.[342]

Similarly, as Shannon Speed and others have said, the situations in Canada, the United States, Mexico, and other countries can be viewed "hemispherically" rather than through national lenses alone.[343] Speed notes that anthropologists have long known what lawyers and policy-makers need to know now: that Indigenous Peoples remain Indigenous—whether as Nahua or Maya—even when they leave their communities.[344] Even if U.S. law labels someone as a "Mexican national" or "Guatemalan national," that person carries with them rights, languages, cultures, and other aspects of Indigenous identity that matter.[345] Accordingly, while Indigenous Peoples may not call for the abolition of borders altogether, Indigenous perspectives can still change the way we understand and make policy about migration.[346]

In many instances where the United States treats migrants as "foreigners," Indigenous Peoples instead see "relatives," whether close or distant, who share common values with respect to the land. Given Indigenous Peoples' origins and staying power in this landscape, it is possible this perspective could offer more sustainability and permanence[347] than the current zigs zags of federal policy,

339. *See generally* Giovanni Batz, *Maya Cultural Resistance in Los Angeles: The Recovery of Identity and Culture Among Maya Youth*, 41 LATIN AM. PERSPECTIVES, May 2014, at 194 (discussing Mayan children's cultural affirmation of their heritage).

340. *See* Carpenter, *Real Property and Peoplehood*, *supra* note 58, at 350–51 ("Tom Holm postulates four attributes of [Indigenous] peoplehood that have ensured the survival of Indian tribes during periods of conquest, colonization, and forced assimilation. These comprise: (1) maintaining language, (2) understanding place, (3) keeping particular religious ceremonies alive, and (4) perpetuating a sacred history. . . . In the final analysis, all of these attempts to define Indian peoplehood may be truly academic, because 'indigenous peoples have insisted on the right to define themselves.'"); Carpenter, Katyal & Riley, *supra* note 54, at 1046–65 (articulating a theory of Indigenous peoplehood).

341. Global Compact for Safe, Orderly and Regular Migration, *supra* note 32, ¶¶ 8–9.

342. *See EMRIP Study on Migration*, *supra* note 310, at ¶ 8, annex 11.

343. *See* SPEED, *supra* note 36, at 12–13.

344. *See id.* at 13.

345. *See id.* at 12–13.

346. Josué López, *CRT and Immigration: Settler Colonialism, Foreign Indigeneity, and the Education of Racial Perception*, 19 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 134, 134 (2011) ("When Indigeneity is centered, an examination of immigration policies is made more complex due to the relationship between the State's power over regulating the movement of people across its borders and a legacy of settler colonialism that recognizes the State exists on stolen lands.").

347. *See generally* David H. Getches, *A Philosophy of Permanence: The Indians' Legacy for the West*, J. WEST, July 1990, 54 (describing the "philosophy of permanence" which characterizes the relationship of tribes to their aboriginal lands).

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which seem like a rather frantic outgrowth of the colonial scramble to claim territory and exclude others from it.[348]

As we stated at the outset of the Article, Indigenous Peoples' ties to land have been matched by their movements—trade routes and diplomacy stretching across miles, peoples, languages, and cultures.[349] In these respects, some Indigenous Peoples have always been what we would now call either plurinational or transnational.[350] To state it more broadly, Indigenous practices, protocols, and norms maintained over hundreds or thousands of years can disrupt the logic of colonial borders and inform contemporary law reform.[351]

B. Legal and Policy Prescriptions

In this Section we suggest law and policy prescriptions informed by human rights instruments, including the UN Declaration and Global Compact, and especially by Indigenous Peoples' own laws, customs, and traditions regarding migration.

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348. *See, e.g.*, Michael D. Shear, Miriam Jordan & Manny Fernandez, *The U.S. Immigration System May Have Reached a Breaking Point*, N.Y. TIMES (Apr. 10, 2019), https://www.nytimes.com/2019/04/10/us/immigration-border-mexico.html [https://perma.cc/F44N-6BSQ] ("[T]he administration has tried a series of strategies: prosecuting everyone who crosses illegally, taking their children from them, tightening asylum standards, slowing down the number of people allowed to apply for asylum each day, forcing asylum applicants to remain in Mexico while they wait for court dates. In some cases, this approach has proved too cruel for the American public to tolerate and has run up against the protections enshrined in the Constitution, which the courts have decided protect migrants as well as citizens. Some of the president's agenda has been blocked by Congress or the courts. None of it has fixed the problem.").

349. *See, e.g.*, *Indigenous Trade Networks Thrived Long Before the Arrival of Europeans*, INDIGENOUS CORP. TRAINING (July 5, 2017), https://www.ictinc.ca/blog/indigenous-trade-networks-thrived-long-before-the-arrival-of-europeans [https://perma.cc/7WHJ-YVBW].

350. *See* Isabella M. Radhuber, *Indigenous Struggles for a Plurinational State: An Analysis of Indigenous Rights and Competences in Bolivia,* 11 J. LATIN AM. GEOGRAPHY 167, 169 (2012) (describing how "Indigenous-peasant" groups in Bolivia developed a plurinational state project, which is now inscribed in the 2009 Constitution of Bolivia, to strengthen their self-determination). *See generally* Roger Merino, *Reimagining the Nation-State: Indigenous Peoples and the Making of Plurinationalism in Latin America*, 31 LEIDEN J. INT'L L. 773 (2018) (discussing the challenges of nationalism, multi-level governance, and cultural diversity in the context of plurinational approaches to Indigenous Peoples rights vis-à-vis natural resource extraction in Ecuador and Bolivia); *see, e.g.*, Sid Hill, *My Six Nation Haudenosaunee Passport is not a 'Fantasy Document*,*'* GUARDIAN (Oct. 20, 2015, 10:15 AM), https://www.theguardian.com/commentisfree/2015/oct/30/my-six-nation-haudenosaunee-passport-not-fantasy-document-indigenous-nations [https://perma.cc/A6YC-Q2EV] (describing how many Haudenosaunee individuals travel on their own Haudenosaunee passports, rather than those of the United States or Canada).

351. *See generally* AUDRA SIMPSON, MOHAWK INTERRUPTUS: POLITICAL LIFE ACROSS THE BORDERS OF SETTLER STATES (2014) (analyzing Mohawk Kahnawà:ke sovereignty); JODI A. BYRD, THE TRANSIT OF EMPIRE: INDIGENOUS CRITIQUES OF COLONIALISM 206 (2011) ("America becomes obsessed with borders and its frontiers, with origins and legitimacy—its schizophrenic nature might then be said to ventriloquize the perspectives of previously denied 'citizens' such as Yamashita's Manzanar through reenactments and dispersals of the foundational logic of borders and frontiers, indigeneity and foreignness.").

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1. International and Regional Prescriptions

a. Diplomacy

Both the Global Compact on Migration and the EMRIP Migration Study call for cooperative interstate approaches to migration issues.[352] Agreements between states are achieved through diplomacy of various kinds.[353] For example, in 2018, the United States reached a diplomatic agreement with Mexico in which the latter pledged to stop migrants before they reach the Mexico-U.S. border.[354] The United States also made agreements with Guatemala, El Salvador, and Honduras requiring migrants on their way to the United States to apply for protections in those countries first.[355] If they do not comply, migrants face the threat of being sent back to their countries of origin.[356]

Diplomatic relations among the United States and Latin American states are often fraught, including in the examples above. Yet multilateral and bilateral negotiations between the United States and other countries are not going away any time soon. For these reasons, we call for more attention to Indigenous Peoples' issues in multilateral and bilateral diplomacy regarding immigration in the Americas.

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352. Global Compact for Safe, Orderly and Regular Migration, *supra* note 32, at ¶¶ 8–9; *EMRIP Study on Migration*, *supra* note 310, at annex ¶¶ 22–24 ("States should recognize that migration across borders is a regional and a global issue and should be addressed at those levels, including by engagement by regional groups such as the Association of Southeast Asian Nations, or regional human rights commissions, as well as through the process of review provided for in the Global Compact, taking into account international law and the UN Declaration. States are encouraged to enter into bilateral and regional agreements, including in situations of cross-border conflict or where international borders have been closed, to address cross-border issues, such as indigenous identity cards (recognized by States across borders). States affected by cross-border migration are encouraged to remind one another that departure from their obligations under the UN Declaration and other international human rights instruments contributes to migration. Affected States should also engage and work together to find diplomatic solutions to protect indigenous rights domestically and in the migration context.").

353. In the classic formulation, diplomacy occurs between states. *See* THE OXFORD HANDBOOK OF MODERN DIPLOMACY 1–10 (Andrew E. Cooper, Jorge Heine & Ramesh Thakur eds., 2013). Yet, along with civil society, international institutions, NGOs, and others, *see id.* at 10–27, Indigenous Peoples are coming to have a greater role in diplomatic processes. *See* Kristen Carpenter & Alexey Tsykarev, *Indigenous Peoples and Diplomacy on the World Stage*, AJIL Unbound (forthcoming Feb. 2021).

354. *U.S.-Mexico Joint Declaration Media Note*, U.S. DEP'T OF STATE (June 7, 2019), https://www.state.gov/u-s-mexico-joint-declaration/ [https://perma.cc/SCP9-FQUJ]. For the terms of the agreement with Mexico, see Joint Declaration on Migration, U.S.-Mex., June 7, 2019, T.I.A.S. No. 607.

355. *See* Peniel Ibe, *The Dangers of Trump's "Safe Third Country" Agreements in Central America*, AM. FRIENDS SERV. COMM. (July 28, 2020), https://www.afsc.org/blogs/news-and-commentary/dangers-trumps-safe-third-country-agreements-central-america [https://perma.cc/398V-RQF7] (describing critiques that these agreements violate the non-refoulement principle of international refugee and asylum law).

356. *See* Nicole Narea, *Trump's Agreements in Central America Are Dismantling the Asylum System As We Know It*, VOX (Nov. 20, 2019, 3:08 PM), https://www.vox.com/2019/9/26/20870768/trump-agreement-honduras-guatemala-el-salvador-explained [https://perma.cc/Y6RE-E9PQ].

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> The 2018 agreement between the United States and Mexico states:
>
> [B]oth countries recognize the strong links between promoting development and economic growth in southern Mexico and the success of promoting prosperity, good governance and security in Central America. The United States and Mexico welcome the Comprehensive Development Plan launched by the Government of Mexico in concert with the Governments of El Salvador, Guatemala and Honduras to promote these goals. The United States and Mexico will lead in working with regional and international partners to build a more prosperous and secure Central America to address the underlying causes of migration, so that citizens of the region can build better lives for themselves and their families at home.[357]

The agreement thus lays the ground for regional cooperation in the migration context.

The agreement, however, makes no specific mention of Indigenous Peoples. This is a problematic omission because of how significantly questions of migration and the ability to stay at home safely affect Indigenous Peoples. In Guatemala, for example, the population is multicultural, wherein most people have Indigenous ancestry and at least 50 percent of the population belongs to Indigenous groups including the Maya, Xinca, and Garífuna.[358] As explained above, Guatemala's failure to address Indigenous land rights has created insecurity and been cited as a factor causing Indigenous people to flee the country.[359] While Honduras lacks an official census, estimates suggest 7–20 percent of the population is Indigenous.[360] Indigenous Peoples in Honduras are quite vulnerable in part because national law does not afford sufficient protections for them or their lands, leaving them exposed to violence and dispossession.[361] In Venezuela, the economic collapse of the country and political repression has dominated assessments of human rights and emigration.[362] Yet reports suggest that Indigenous Peoples are leaving the country because of hunger and other issues particular to their vulnerable

357. *U.S.-Mexico Joint Declaration Media Note*, *supra* note 354.

358. Special Rapporteur, *Rep. on the Situation of Human Rights and Fundamental Freedoms of Indigenous People: Mission to Guatemala*, annex. ¶ 10, U.N. Doc. E/CN.4/2003/90/Add.2 (Feb. 24, 2003) (ESCOR, Comm'n on Human Rights) [hereinafter *Guatemala Report*].

359. *Id.* at ¶¶ 22–28; *see also* Speed, *supra* note 36, at 28–44 (tracing Indigenous women's migration from across Central America and Mexico, in significant part, to domestic violence and lack of land rights).

360. Special Rapporteur on the Rights of Indigenous Peoples, *Rep. on the Situation of Indigenous Peoples in Honduras*, ¶¶ 4, 79, U.N. Doc. A/HRC/33/42/Add.2 (July 21, 2016) (Human Rts. Council).

361. *Id.* at Note by the Secretariat (describing human rights abuses against Indigenous Peoples in Honduras and stating that "the situation of the indigenous peoples of Honduras is critical, since their rights over their lands, territories and natural resources are not protected, they face acts of violence when claiming their rights, in a general context of violence and impunity, and they lack access to justice. In addition, they suffer from inequality, poverty and a lack of basic social services, such as education and health").

362. *See, e.g.*, Human Rts. Council, U.N. High Comm'r for Hum. Rts., *Report on the Situation of Human Rights in the Bolivarian Republic of Venezuela*, A/HRC/41/18 (July 5, 2019).

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status.[363] In short, to the extent there is a migration problem coming from these countries, it is, in significant respects, a problem experienced by Indigenous Peoples. Diplomacy efforts that ignore that reality are poorly suited to speak to the scope of the current migration moment.

Indigenous land rights could similarly be addressed through diplomatic channels. By most accounts, Indigenous Peoples largely want to stay in their home communities, but they are being pushed out by the lack of land rights, in particular, as well as the ramifications of climate change which are making it difficult to survive on subsistence agriculture.[364] Though insecurity in land rights is not solely an Indigenous issue, the process through which states often recognize land rights, namely through government-issued titles, often works to the disadvantage of Indigenous Peoples, who hold their land pursuant to customary land tenure.[365]

Indigenous communities suffer additionally because, without secure rights, it is difficult to deal with issues like village governance, the environment, and cultural survival.[366] Advocates argued that the father of Jakelin Caal Maquin—an Indigenous girl who died in U.S. custody—decided to leave Guatemala in part because of the lack of Indigenous land rights and employment opportunities in Guatemala.[367] Moreover, scholars have argued that the tenuous situation of

363. Flavia Faria & Nadia Williamson, *Hunger, Despair Drive Indigenous Groups to Leave Venezuela*, UNHCR: THE UN REFUGEE AGENCY (Aug. 7, 2018), https://www.unhcr.org/en-us/news/stories/2018/8/5b6055e14/hunger-despair-drive-indigenous-groups-leave-venezuela.html [https://perma.cc/CS66-TPDJ] (discussing the scarcity of resources and illness outbreaks that push the Warao and Wayúu people of Venezuela to leave their lands).

364. *See* Speed, *supra* note 36, at 28–44 (tracing indigenous women's migration from across Central America and Mexico, in significant part, to domestic violence and lack of land rights); Milman, *supra* note 240 (identifying climate change as a primary driver of migration of indigenous communities leaving Guatemala).

365. *See generally* Anaya & Williams, *supra* note 54 (arguing that customary international law should affirm Indigenous People's rights over lands and natural resources).

366. *See generally* COMMUNITIES SURVIVING MIGRATION: VILLAGE GOVERNANCE, ENVIRONMENT, AND CULTURAL SURVIVAL IN INDIGENOUS MEXICO (James P. Robson, Dan Klooster & Jorge Hernández-Díaz eds., 2019) (explaining how out-migration weakens rural communities' capacity for natural resource management).

367. *Deaths of Indigenous Children at Border Amplifies the Need for Policy Change, supra* note 28 ("It's been reported that Jackelin's father, a subsistence farmer with a plot of land too small to support a family, went to the United States in search of work. He took Jackelin with him—perhaps because he had heard that his chances of staying in the United States were better if he arrived with a child. For the Maya and other indigenous peoples in Guatemala, land rights are not only a foothold on opportunity, their lands and resources are fundamental to their physical and cultural survival. But decades of U.S. policy supporting repressive Guatemalan regimes helped spark a 36-year civil war that resulted in the displacement and slaughter of hundreds of thousands Maya and other indigenous peoples. It has been 28 years since the signing of the Guatemala Peace Accords, which promised to return land to the indigenous peoples from whom it was stolen centuries earlier. But indigenous peoples are still struggling for their land rights. Today, lands remain concentrated in the hands of a few. For example, just five companies own all the palm oil plantations in the country—including those north of San Antonio de Cortez, where Jackelin's father is reported to have sought employment. These plantations occupy an area of land equal to that used by more than 60,000 subsistence farmers. The Maya people are the majority population in Guatemala, consisting of 22 different indigenous nations; but the political and social landscape of the country is governed by a minority, a de facto apartheid in the Americas.").

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Indigenous women survivors of domestic violence is made all the more precarious by their inability to secure their own land rights in countries including Guatemala.[368]

But international Indigenous rights law mandates that states recognize Indigenous Peoples' land rights. For example, International Labour Organization Convention No. 169, among other international instruments, seeks to do so, and most relevant instruments are binding in many Latin American countries.[369] Moreover, an entire body of jurisprudence has emerged from the Inter-American Commission and Inter-American Court on Human Rights, recognizing property rights in traditional land tenure pursuant to the American Convention on the Rights and Duties of Man. Subsequent decisions call on states to recognize Indigenous property rights as a matter of regional treaties and national constitutions, such as in Belize, Nicaragua, and others.[370] It is perhaps unsurprising that Indigenous Peoples' efforts to secure basic human rights starts with asserting an ownership interest in their lands. Though Western ownership models may be a poor fit with Indigenous lifeways, the recognition of Indigenous property rights may stand as a necessary condition to the protection of other basic rights for Indigenous Peoples.[371]

While the United States has failed its own Indigenous Peoples in many ways, including in the realm of property rights, the United States does recognize Indigenous ownership and jurisdiction over lands to a significant extent.[372] Therefore, one way for the United States to engage in diplomacy that supports Indigenous Peoples who wish to stay in their home countries is to advocate for Indigenous land rights. The United States could, for example, encourage Mexico, Guatemala, Honduras, Venezuela, and other countries, to recognize Indigenous land rights as a matter of their own national laws. U.S. leaders could emphasize the obligations of other states to meet international standards, such as the UN Declaration, and to support their engagement with international and regional processes to effectuate such rights.

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368. *See* Speed, *supra* note 36, at 45–67.

369. C169 Indigenous and Tribal Peoples in Independent Convention, arts. 13–19 (June 27, 1989) http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169 [https://perma.cc/TJ5S-8MGU] (International Labour Organisation Convention); *see also* Special Rapporteur on the Rights of Indigenous Peoples, *supra* note 306 (noting that most Latin American states have ratified Convention No. 169).

370. *See, e.g.*, Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 (2001), http://www1.umn.edu/humanrts/iachr/AwasTingnicase.html [https://perma.cc/97XF-Z4HH]; Cal v. Att'y Gen. (Claims No. 171 and 172 of 2007) (Oct. 18, 2007) (Belize).

371. *See* Carpenter, Katyal & Riley, *In Defense of Property*, *supra* note 54, at 1027–29.

372. *See, e.g.,* Carpenter & Riley, *Privatizing the Reservation?*, *supra* note 54, at 807–25 (describing the system of American Indian land tenure in the United States); McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) (affirming that the reservation of the Muscogee Creek Nation had never been disestablished by Congress).

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Human rights diplomacy requires that nation-states work in conjunction with Indigenous Peoples to secure such rights, rather than unilaterally imposing those frameworks on Indigenous groups. In fact, the UN Declaration itself protects against undue influence by states by requiring that measures impacting Indigenous Peoples be undertaken with their full participation, consultation, and free, prior, and informed consent.[373] In some states, including Belize, the government has recognized Indigenous Peoples' land rights and is in a process, albeit fraught with challenges, of demarcating them.[374] Additionally, Indigenous Peoples have rights of redress and restitution regarding lands that have been taken without free, prior, and informed consent.[375] But as UN Experts have suggested, many states do not fully recognize these rights.[376] Given that the United States, like other states in the region, is on record supporting the UN Declaration and as participating in UN Indigenous Peoples' mechanisms and Inter-American Systems, implementation is feasible. Using diplomatic channels to encourage national governments in the Western Hemisphere to address long-overdue Indigenous rights at home, the United States may be able to systemically address Indigenous Peoples' migration from Central America.

b. OAS Hearings and Studies

The United States is a charter member of the Organization of American States (OAS) and instrumentalities of the OAS, including the Inter-American Commission and Court on Human Rights, which use both the UN Declaration and the American Declaration.[377] Regardless of whether the United States is willing to take a leadership role on Indigenous migration issues, the OAS could consider conducting thematic hearings on Indigenous Peoples' migration in the region. Advocates, in particular, should consider making a request of the Inter-American Commission to conduct these hearings.[378] The American Declaration calls for special attention to the rights of Indigenous migrant workers, the right to assemble at sacred sites, and the right to access resources on Indigenous territories that have been crossed by international borders.[379] The OAS has

373. United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 12, at arts. 10, 26, 32.

374. *See* Maya Leaders Alliance, *Maya Villages Sue Government of Belize for Failing to Protect Indigenous Lands*, CULTURAL SURVIVAL (Apr. 13, 2016), https://www.culturalsurvival.org/news/maya-villages-sue-government-belize-failing-protect-indigenous-lands [https://perma.cc/GWB6-ZBYR] ("The government also committed to meeting with the Maya to develop a mechanism and schedule for officially demarcating and registering Maya lands.").

375. United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 12, at art. 28.

376. *See Guatemala Report*, *supra* note 358 and accompanying text (describing UN Special Rapporteur's reports on Guatemala, Honduras, and other countries).

377. Organization of American States, American Declaration on the Rights of Indigenous Peoples, AG/RES2888 (XLVI-O/16), June 15, 2016.

378. *See* Press Release, Org. of Am. States, IACHR is Accepting Requests for Hearings for its 175th Period of Sessions (Dec. 12, 2019), http://www.oas.org/en/iachr/media_center/PReleases/2019/322.asp [https://perma.cc/53KH-2HGP].

379. *See* Org. of Am. States, *supra* note 377, at arts. XVI(3), XXV, XXVII(3)(c)(vi).

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already considered issues around migration in the region, and it has been highly attentive to the problems of migrant workers and other vulnerable groups.[380]

Study by the OAS and contributions by member states and Indigenous Peoples in particular could help to provide more information on the origins, circumstances, and political and legal situations that are causing Indigenous Peoples to leave their countries, while also elaborating on their needs in legal processes during migration (for example, by identifying the languages they speak).[381] This would all be consistent with taking a shared approach to making migration safer and more orderly around the world.

c. U.S.-Canada Border Crossing

A persistent problem for Indigenous migration across the U.S.-Canada border is Canada's failure to recognize Jay Treaty rights, which, if properly adhered to, would provide for the free passage of Indians between the United States and Canada.[382] Yet passage is very difficult in practice.[383] Accordingly, we embrace the recommendations of scholars that would have the Canadian government recognize a right of free passage grounded in the Jay Treaty as a possible solution that could ease U.S.-Canada border crossing.[384] More specifically, this could remove the issue from the courts and instead develop a bilateral understanding between the U.S and Canadian governments that formally solidifies their cooperation in advancing the cross-border rights of Indigenous Peoples, a commitment that each country has already recognized.[385]

Beyond Canada's lack of reciprocity in this regard, the United States' recognition of Jay Treaty rights is not without its problems. For example, asserting the right to cross the U.S.-Canada border freely depends on proof of "50 per centum of blood of the American Indian race."[386] Yet, procedures for proving eligibility have developed informally and thus it is not always clear how a Canadian-born American Indian is to assert their rights.[387] Compounding the

380. *See* Sarah Paoletti, *Pursuit of a Rights-Based Approach to Migration: Recent Developments at the UN and the Inter-American System*, 14 Hum. Rts. Brief at 14, 15–16 (2007); *see, e.g.*, Press Release, Org. of Am. States, Joint Statement for the Development of a Regional Response to the Massive Arrival of Venezuelans to the Americas of the Inter-American Commission on Human Rights, and Committees, Organs and Special Procedures of the United Nations (Sept. 5, 2008), https://www.oas.org/en/iachr/media_center/PReleases/2018/197.asp [https://perma.cc/RCA3-M44J].

381. For information about OAS processes concerning Indigenous rights, see *Indigenous Peoples*, OAS, http://www.oas.org/en/topics/indigenous_peoples.asp [https://perma.cc/XC32-CEKF]; *see also* Megan Mooney, Note, *How the Organization of American States Took the Lead: The Development of Indigenous Peoples' Rights in the Americas*, 31 AM. INDIAN L. REV. 553 (2007).

382. *See* Greg Boos et al., *supra* note 136.

383. *See id.* at 354–59 (explaining various Canadian court cases about the lack of reciprocal rights to enter Canada).

384. *See id.* at 371.

385. *See* Nicole Terese Capton Marques, *Divided We Stand: The Haudenosaunee, Their Passport and Legal Implications of Their Recognition in Canada and the United States*, 13 SAN DIEGO INT'L L.J. 383, 419–20 (2011).

386. INA § 289, 8 U.S.C. § 1359 (2018).

387. *See* Boos, McLawsen & Fathali, *supra* note 136, at 385.

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problem is lack of awareness of Jay Treaty rights on the part of CBP agents.[388] In an effort to streamline this process and do away with unnecessary complications, some scholars recommend the creation of a "Jay Treaty Card" that, upon recognition, will validate all rights the holder is entitled to under the Jay Treaty.[389] We agree that this card could likewise help solve the issue created by the Western Hemisphere Travel Initiative, which in its current form restricts the right of free passage by requiring *all* U.S. and Canadian travelers to present a passport or other document denoting identity and citizenship.[390]

Additionally, while the United States honors its obligations under the Jay Treaty to provide unrestricted travel across the border for certain Canadian-born American Indians, it has not concomitantly recognized its obligation to provide for unrestricted *trade* across the border.[391] This means that Indigenous communities are subject to the same cross-border trade restrictions as any other U.S. citizen, some of which restrict tribal culture and religion.[392] Accordingly, we support the calls of scholars who advocate for increased recognition of Jay Treaty rights through more collaboration with Indigenous communities when enacting laws that impact tribal culture and religion and additional opportunities for government-to-government consultations, between Indigenous and national parties, on migration matters.[393]

Another issue that disproportionately impacts Indigenous Peoples at the northern border is human trafficking.[394] Traditionally, human trafficking has been regarded as a "threat[] to the homeland," thereby implicating borders and framing the issue as one aimed at keeping traffickers out rather than protecting victims.[395] To combat these adverse impacts, advocates recommend reformation of border controls that focus on victim identification techniques rather than the current focus on border policing.[396]

388. *See id.* at 386.
389. *See id.* at 395.
390. *See id.* at 395–97.
391. *See id.* at 378.
392. *See id.* at 379. For a thoughtful analysis of how Indigenous Peoples historically and contemporarily think about trade, particularly in the design and negotiation of primary documents that establish Indigenous rights, see *Wash. State Dep't of Licensing v. Cougar Den*, 139 S. Ct. 1000 (2019) (Gorsuch, J., concurring) (asserting that the Yakama Indians would have expected their treaty to preserve their free access to trade and commerce).
393. *See* Boos et al., *supra* note 136, at 381, 397. The U.S. Department of Homeland Security did recently establish the Tribal Desk within The Office of Intergovernmental Affairs, although scholars have expressed concern about its efficacy. *See id.* at 397.
394. *See* Mike Perry, *"The Tip of The Iceberg": Human Trafficking, Borders and the Canada-U.S. North*, 42 CAN.-U.S. L.J. 204, 206, 211, 218 (2018).
395. *See id.* at 217.
396. *See id.* at 224–26.

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2. Domestic (U.S.) Law Recommendations

a. Entering the United States: Statutory Rights, Enhanced Tribal ID Cards, and Training for Border Agents

Many Indigenous Peoples cross the northern and Southern borders regularly for purposes of employment, culture, or family. There are several federal laws that address these situations. As we described above, the Jay Treaty permits passage by Canadian Indigenous Peoples for various purposes. With respect to the Southern border, an example often held out as functional and respectful of Indigenous rights is the federal Texas Band of Kickapoo Act (Kickapoo Act).[397] In 1983, Congress determined that some of the Kickapoo, having been forced to move to Texas and Mexico, could not prove U.S. citizenship or eligibility for federal Indian services.[398] To address the situation, Congress granted federal recognition to the band, with rights to pass and repass the border, authorized the Secretary of the Interior to take land into trust on their behalf, and urged cooperation between the United States and Mexico to address the "tricultural" existence of the Kickapoo.[399] While the Kickapoo Act is particular to the situation of the Kickapoo people, it suggests a legislative model for recognizing Indigenous land, passage, and membership rights in ways that effectively transcend the border.

At the federal regulatory level, one promising solution is the issuance of Enhanced Tribal Cards. Historically, standard tribal identification cards were sufficient to allow U.S. tribal members to freely cross the U.S. border. However, post-9/11 security reforms[400] that took effect in 2009 created strict requirements for identification, making standard tribal IDs no longer sufficient.[401] Recognizing the need for near-border tribes to travel for religious, cultural, and other tribal purposes, U.S. tribes and U.S. Customs and Border Protection began entering into agreements to allow for Enhanced Tribal Cards (ETCs).[402] ETCs

397. Texas Band of Kickapoo Act, Pub. L. No. 97-429, 96 Stat. 2269 (1983).

398. *Id.*

399. *Id.*

400. *See Western Hemisphere Travel Initiative*, U.S. CUSTOMS & BORDER PROTECTION (2018), https://www.cbp.gov/travel/us-citizens/western-hemisphere-travel-initiative# [https://perma.cc/DYC5-NDUN] (explaining identification requirements as governed by the Western Hemisphere Travel Initiative, a joint plan issued by the U.S. Department of State and U.S. Customs and Border Patrol pursuant to the Intelligence Reform and Terrorism Prevention Act of 2004).

401. *Homeland Security: NCAI Announces the Availability of Disaster Relief Microgrants*, NAT'L CONG. OF AM. INDIANS, http://www.ncai.org/policy-issues/tribal-governance/homeland-security [https://perma.cc/LNF9-LJKM].

402. *See, e.g.*, Press Release, U.S Dep't. of Homeland Sec., Department of Homeland Security and the Pascua Yaqui Tribe Announce a Historic Enhanced Tribal Card (July 30, 2010), https://www.dhs.gov/news/2010/07/30/department-homeland-security-and-pascua-yaqui-tribe-announce-historic-enhanced, [https://perma.cc/4584-WDFQ]; Press Release, U.S. Dep't of Homeland Sec., Department of Homeland Security and the Tohono O'odham Nation Announce Agreement to Develop Enhanced Tribal Card (Nov. 3, 2009), https://www.dhs.gov/news/2009/11/03/department-homeland-security-and-tohono-oodham-nation-announce-agreement-develop [https://perma.cc/P4YU-75WT].

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are documents that recognize both tribal membership and U.S. citizenship and include document security features and are electronically verifiable.[403] Under these agreements, tribes remain in control of issuing ETCs and determining tribal enrollment, and no data such as genealogy or blood quantum is shared with the U.S. government.[404] Five tribes, including the Pascua Yaqui, Tohono O'Odham, Kootenai, Seneca Nation, Hydaburg Cooperative Association of Alaskans, and Pokagon Band of Potawatomi Indians, have approved ETC programs.[405] The United States is working with at least seventeen tribes to develop more ETC programs.[406] Although ETCs allow tribal members to freely travel and return to the United States as they did before, there is considerable cost to issuing and replacing ETCs that is borne by the tribes; still, ETCs are cheaper and easier for tribal members to acquire than a U.S. passport.[407]

These examples are effective in many regards but also have significant drawbacks. Each is limited to "federally recognized" Indian tribes,[408] potentially excluding others with Indigenous identity and posing similar practical challenges.[409] In this regard, these approaches to the problems of border-crossing

403. For more information about the technology and security of ETCS, see for example, Alianza Indígena sin Fronteras & Christina Leza, Handbook on Indigenous Peoples' Border Crossing Rights Between the United States and Mexico (2019) https://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/Call/IndigenousAllianceWithoutBorders.pdf [https://perma.cc/V2TC-8F8U].

404. *See Up Close: Meet Marisela Nuñez – Pascua Yaqui Tribe of Arizona: Enhanced Tribal ID Card Program and Tribal Enrollment Director*, INDIAN GAMING MAG., July 2017, at 39 http://www.indiangaming.com/istore/Jul17_Nunez.pdf [https://perma.cc/D3TD-JQW9].

405. Western Hemisphere Travel Initiative: Designation of an Approved Native American Tribal Card Issued by the Pokagon Band of Potawatomi Indians as an Acceptable Document To Denote Identity and Citizenship for Entry in the United States at Land and Sea Ports of Entry, 82 Fed. Reg. 42,351 (Sept. 7, 2017); Press Release, U.S. Dep't of Homeland Sec., Department of Homeland Security and the Tohono O'odham Nation Announce Agreement to Develop Enhanced Tribal Card, *supra* note 402.

406. LEZA, *supra* note 9, at 107.

407. *See Up Close: Meet Marisela Nuñez*, *supra* note 404, at 38.

408. *See generally* Kirsten Matoy Carlson, *Making Strategic Choices: How and Why Indian Groups Advocated for Federal Recognition from 1977 to 2012,* 51 LAW & SOC'Y REV. 930 (2017) (explaining how Indian groups sought federal recognition to reaffirm their own self-governance).

409. *See* Western Hemisphere Travel Initiative: Designation of an Approved Native American Tribal Card Issued by the Confederated Tribes of the Colville Reservation As an Acceptable Document to Denote Identity and Citizenship for Entry in the United States at Land and Sea Ports of Entry, 85 Fed. Reg. 31,796, 31,797 (May 27, 2020) (approving the tribal card issued by the Confederated Tribes of the Colville Reservation and explaining that the tribal card program is open to "federally recognized Native American tribes" who comply with "requirements for developing and issuing WHTI-compliant Native American tribal cards, including a testing and auditing process to ensure that the cards are produced and issued in accordance with the terms of the agreements"). And for an example, see M. John Fayhee, *A New Apache Homeland in New Mexico?*, HIGH COUNTRY NEWS (Oct. 14, 2013), https://www.hcn.org/issues/45.17/an-okie-apache-fights-his-kin-to-build-a-casino-and-bring-his-people-home [https://perma.cc/CX52-EN7Z] (describing efforts of Apache descendants in New Mexico to reconstitute tribal kinship and economic development over one hundred years after the U.S. government captured Geronimo and other Apache and installed them as prisoners of war in Oklahoma, where federally recognized Apache tribes exist today). For an account of a non-federally recognized tribe residing at the border, see Aaron Miguel Cantú, *Down in the Valley: How Trump's Border Wall Perpetuates the Legacy of Colonialism on the Rio Grande*, INTERCEPT (Mar. 31, 2019, 6:00 AM),

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issues necessitate working with the authority of the settler state, at least to some extent.

Even where there are legal measures in place to facilitate orderly migration by Indigenous Peoples with special status, customs and border officials may not always have sufficient knowledge or sensitivity to implement these rights. In dozens of examples, Indigenous Peoples have had ceremonial items inspected, damaged, or seized, in violation of both domestic and international standards.[410] In addition to immigration rules and regulations, border officials should be trained on rights held by Indigenous Peoples. American Indians have rights, for example, under the American Indian Religious Freedom Act and other statutes to possess and use items that might otherwise be prohibited under customs, trafficking, and drug enforcement laws.[411] Indigenous individuals also have the right to possess cultural items under the UN Declaration.[412] One obvious solution for these problems is to train customs and border officials in federal Indian law as well as Indigenous cultural norms.[413]

b. Detention, Separation, and Initial Hearings: Language Rights

Like many migrants, Indigenous Peoples often arrive in the United States sick, exhausted, dehydrated, impoverished, and traumatized by the events that drove them away from their home countries, in addition to the oftentimes devastating journey itself, which all too often includes abuse by those who have promised to help them cross the border.[414] Upon arrival, as recent news events have evidenced, they are all too often detained in conditions—unsanitary,

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https://theintercept.com/2019/03/31/border-wall-rio-grande-valley/ [https://perma.cc/4YB5-VMJV] (describing opposition of the Carrizo/Comecrudo tribe to construction of a border wall in what they claim as their territory).

410. *See, e.g.*, *History & Culture*, TOHONO O'ODHAM NATION, http://www.tonation-nsn.gov/history-culture/ [https://perma.cc/LM3T-Q7JP] ("On countless occasions, the U.S. Border Patrol has detained and deported members of the Tohono O'odham Nation who were simply traveling through their own traditional lands, practicing migratory traditions essential to their religion, economy and culture. Similarly, on many occasions U.S. Customs have prevented Tohono O'odham from transporting raw materials and goods essential for their spirituality, economy and traditional culture. Border officials are also reported to have confiscated cultural and religious items, such as feathers of common birds, pine leaves or sweet grass.").

411. *See Kristen A. Carpenter, Limiting Principles and Empowering Practices in American Indian Religious Freedoms*, 45 CONN. L. REV. 387, 399–400 (2012).

412. United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 12, at arts. 11, 31.

413. For one helpful model, note that in 2017, Canada announced measures to address some Canada-United States border-crossing issues for First Nations, including the recruitment of more Indigenous border officers and enhanced training on Indigenous cultures for Border Services Agency staff. FRED CARON, REPORT ON FIRST NATION BORDER CROSSING ISSUES, at pt. C(4) (2017), https://www.aadnc-aandc.gc.ca/eng/1506622719017/1506622893512 [https://perma.cc/K5CE-VGLN].

414. *See* SPEED, *supra* note 36, at 45–67 (recounting narratives of struggle experienced in the migration from Central America to the United States).

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overcrowded, and cold (or hot)—that may constitute human rights violations.[415] Compounding the problems for Indigenous Peoples are language barriers. Many Indigenous Peoples fleeing from rural areas of their home countries are fluent only in their Native languages without sufficient Spanish or English skills to communicate to border agents or other interpreters. [416] There is ample evidence, however, that adequate interpretation services simply do not exist for those who speak Indigenous languages.[417]

Without adequate interpretation, Indigenous detainees may not fully understand the terms of their detention or incarceration, which may lead to the deprivation of basic human rights. When asked about their health situation, for example, Indigenous speakers of Maya languages have been asked to complete forms in English, potentially leading to devastating consequences.[418] Due process rights include a right to government-provided interpreters or language services during removal proceedings.[419] Moreover, compliance with the 1964 Civil Rights Act, which prohibits discrimination on the basis of national origin in all programs receiving federal money, requires the government to provide "meaningful access to programs and activities for people with limited English proficiency . . . ."[420]

Accordingly, the Department of Homeland Security (DHS) has set forth internal policy stating that if Customs & Border Protection agents "ever have a language or communication issue, they are required to find another Agent who speaks the language or to utilize contract interpreters."[421] Yet many anecdotal examples suggest that DHS policy has not fully realized its stated policy on interpretation. Language barriers may contribute to the separation of parents and

415. *UN Rights Chief 'Appalled' by US Border Detention Conditions, Says Holding Migrant Children May Violate International Law,* UN NEWS (July 8, 2019), https://news.un.org/en/story/2019/07/1041991 [https://perma.cc/NWZ4-JD4K].

416. *See* Jennifer Gieselman, Note, *An Invisible Wall: How Language Barriers Block Indigenous Latin American Asylum Seekers*, 27 TRANSNAT'L L. & CONTEMP. PROBS. 451, 469 (2018).

417. *See* Nolan, *supra* note 15.

418. *See* Jawetz & Schuchart, *supra* note 14 (linking lack of language access and interpretation to the inadequate medical treatment and deaths suffered by Indigenous migrants in Border Patrol custody).

419. Nazarova v. I.N.S., 171 F.3d 478, 484 (7th Cir. 1999) ("A non-English-speaking alien has a due process right to an interpreter at her deportation hearing because, absent an interpreter, a non-English speaker's ability to participate in the hearing and her due process right to a meaningful opportunity to be heard are essentially meaningless."); *see* Tal Kopan, *Trump Administration Ending In-person Interpreters at Immigrants' First Hearings*, S.F. CHRON. (July 3, 2019, 4:47 PM), https://www.sfchronicle.com/politics/article/Trump-administration-ending-in-person-14070403.php [https://perma.cc/TE73-BG8V] (discussing the potential due process implications of a 2019 Trump Administration policy that is replacing in-person interpreters with pre-recorded videos during initial immigration court hearings).

420. Jawetz & Shuchart, *supra* note 14; *see also* Lau v. Nichols, 414 U.S. 563 (1974) (finding that denial of English language or other competent instruction to students who did not speak English violated § 601 of the Civil Rights Act of 1964).

421. U.S. DEP'T OF HOMELAND SEC., MYTH VS. FACT: DHS ZERO-TOLERANCE POLICY (2018), https://www.dhs.gov/news/2018/06/18/myth-vs-fact-dhs-zero-tolerance-policy [https://perma.cc/Z8BL-ZPN2].

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children who cannot communicate their family status to officials.[422] Children who speak Spanish have often had to serve as interpreters for their family members, which infringes on privacy, compounds trauma, and may prevent effective assistance of legal counsel. These problems may be particularly acute when, for example, the migrants have been victims of sexual violence or other crimes such that they do not feel free to convey these events through their children.[423] When officials do attempt to obtain Indigenous languages interpreters, it can delay asylum hearings, thus extending incarceration.[424]

Noting shortfalls in government-offered language assistance, a 2000 Executive Order directed each Federal agency to "examine the services it provides and develop and implement a system by which L[imited] E[nglish] P[roficient] persons can meaningfully access those services consistent with, and without unduly burdening, the fundamental mission of the agency."[425] This resulted in the creation of the U.S. Department of Homeland Security's Language Access Plan,[426] including the U.S. Immigration and Custom

422. Scott Bixby, *Language Barriers Lead Border Patrol to Rip Children from Their Indigenous Parents*, DAILY BEAST (Aug. 17, 2018, 10:33 AM), https://www.thedailybeast.com/language-barriers-lead-ice-to-rip-children-from-their-indigenous-parents [https://perma.cc/5NWN-8RQ4]; *see also* U.S. DEP'T OF HOMELAND SEC., *supra* note 421 (explaining that adults and minors are separated at the U.S. border when Customs & Border Protection Agents (1) are unable to determine the familial relationship, (2) believe a child may be at risk with the parent or legal guardian, or (3) when the parent or legal guardian is referred for criminal prosecution.). EMRIP and human rights experts have recommended the immediate end to family separation on human rights grounds. *EMRIP Study on Migration*, *supra* note 310, at annex ¶ 18 ("States should establish a presumption against immigration detention, including ending the immigration detention of children and families and prohibiting the separation of children from their parents and caregivers. States should immediately identify and reunite children and families who are currently separated because of migration or law enforcement policies.") (footnote omitted). Ultimately, the Trump Administration did abandon the policy but has not fully reunited (or even located) children separated from their parents, and there are still many problems associated with the treatment of children and caregivers in detention. *See* Kevin Sieff, *They Were One of the First Families Separated at The Border. Two and a Half Years Later, They're Still Apart.*, WASH. POST (Feb. 17, 2020, 11:32 AM), https://www.washingtonpost.com/world/the_americas/they-were-one-of-the-first-families-separated-at-the-border-two-and-a-half-years-later-theyre-still-apart/2020/02/17/38594c98-4152-11ea-99c7-1dfd4241a2fe_story.html [https://perma.cc/9XQU-PKYU]; *see also* Madeleine Joung, *What Is Happening at Migrant Detention Centers? Here's What to Know*, TIME MAG. (July 12, 2019, 2:01 PM), https://time.com/5623148/migrant-detention-centers-conditions/ [https://perma.cc/WEF4-8S9C] (describing cold, crowded cells, a lack of basic hygiene supplies, and "outbreaks of flu, lice, chicken pox and scabies").

423. *See* Medina, *supra* note 14 ("Even migrants with lawyers are often forced to depend on their bilingual children for further help."); *cf.* Chris Hedges, *Translating America for Parents and Family; Children of Immigrants Assume Difficult Roles*, N.Y. TIMES (June 19, 2000), https://www.nytimes.com/2000/06/19/nyregion/translating-america-for-parents-family-children-immigrants-assume-difficult.html [https://perma.cc/MR6A-WT7S] (describing the burden imposed on bilingual children who have to interpret for their family members and confront topics such as illness, finances, and the law).

424. *See* Gieselman, *supra* note 416, at 469.

425. Exec. Order No. 13,166, 65 Fed. Reg. 50,121, 50,121 (Aug. 16, 2000).

426. U.S. DEP'T OF HOMELAND SEC., LANGUAGE ACCESS PLAN (2012), https://www.dhs.gov/sites/default/files/publications/crcl-dhs-language-access-plan.pdf [https://perma.cc/YCH2-SFU8].

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Enforcement's Handbook.[427] The Handbook states that, in detention centers, "[o]ral interpretation or assistance shall be provided to any detainee who speaks another language in which written material has not been translated or who is illiterate," at least regarding initial orientation.[428]

Yet these policies have not alleviated the deprivation of rights stemming from language issues. The interpretation issues surrounding Indigenous language speakers in family detention are serious and complex[429]:

> Even when indigenous language interpreters are available, some of them do not interpret into English. This complexity necessitates the use of two interpreters—such as one translating Ixil to Spanish and the second translating Spanish to English—further compounding the potential for inaccuracy and telephonic connectivity problems. Indeed, the DHS advisory committee characterized indigenous language speakers as some of the most vulnerable among the detained population.[430]

As a result, DHS "concluded that the barriers were so severe that ndigenous language-speaking families should generally be released, and if they remain detained, counsel should be appointed at the government's expense."[431]

In these examples, the United States is unable even to meet its own minimum legal standards for language interpretation. International human rights instruments arguably call for even a higher standard of language rights for Indigenous migrants.[432] The International Covenant on Civil and Political Rights provides that individuals have a right to understand legal proceedings in criminal matters and prohibits discrimination against minorities on the basis of language.[433] The UN Declaration clarifies that Indigenous Peoples have the right

427. U.S. IMMIGR. & CUSTOMS ENF'T, PERFORMANCE-BASED NATIONAL DETENTION STANDARDS 2011 (rev'd 2016), https://www.ice.gov/detention-standards/2011 [https://perma.cc/JS2W-8GJB].

428. *Id.* at 50.

429. Ingrid V. Eagly, Steven Shafer & Jana Whalley, *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 CALIF. L. REV. 785, 823–25 (2018).

430. *Id.* at 824 (footnotes omitted).

431. *Id.*

432. *See* Kristen A. Carpenter & Alexey Tsykarev, *(Indigenous) Language as a Human Right,* 24 UCLA J. INT'L L. FOREIGN AFFS. 49, 64–71 (2020).

433. *See* International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16) at art. 2 § 1 (Dec. 16, 1966) ("Each State Party . . . undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."). Additionally, Article 14 provides for language rights in criminal trials, stating that any person, "[i]n the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; . . . (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court." *Id.* at art. 14 § 3(a), (f). Article 24 extends the right of non-discrimination based on language to children. *Id.* at art. 24. Article 27 provides: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language." *Id.* at art. 27.

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to use, revitalize, and transmit their languages.[434] It further provides: "States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means."[435]

To ensure basic human rights to life, due process, family, privacy, and health—and also to avoid mistakes and disasters like denying available medical care to Indigenous children or accidentally separating them from parents—we recommend that the United States meet international standards on language rights and strive to ensure that migrants have interpretation services at all stages of interactions with U.S. officials in immigration, customs, and enforcement matters.[436] An emerging cadre of Indigenous people working as interpreters in immigration courts and scholarly work studying them suggests the potential for significant developments going forward.[437]

3. Indigenous (Tribal) Prescriptions

The UN Declaration recognizes the importance of Indigenous Peoples' worldviews and experiences,[438] and the Special Rapporteur on the Rights of Indigenous Peoples has recently issued a study that discusses the salience of Indigenous peoples' own institutions and laws globally.[439] Here we offer some suggestions about the existing and potential uses of Indigenous Peoples' self-

434. United Nations Declaration on the Rights of Indigenous Peoples, *supra* 12, at art. 13.

435. *Id.*

436. If the United States starts to gain information and track data about Indigenous migrants, it will be better equipped to provide interpretation in the necessary languages. *See* Medina, *supra* note 14 ("But getting interpreters to court is hardly a given: With so few of them in such high demand, they have to be arranged weeks or even months in advance. Judges are often forced to rely on interpreters by phone, making it difficult to hear and impossible to understand body language."); *cf.* Craig Locatis, Deborah Williamson, Carrie Gould-Kabler, Laurie Zone-Smith, Isabel Detzler, Jason Roberson, Richard Maisiak & Michael Ackerman, *Comparing In-Person, Video, and Telephonic Medical Interpretation*, 25 J. GEN. INTERNAL MED. 345, 349 (2010) (concluding that "when possible in-person interpretation services should be provided by trained interpreters" because in a medical interpretation context, a preference was shown for in-person interpretation). Additionally, there are programs, including a tool used by Department of Homeland Security—the "I Speak" documents—that can help at least with published documents. U.S. DEP'T. OF HOMELAND SEC., "I SPEAK" BOOKLETS AND POSTERS FOR DHS RECIPIENTS (2019), https://www.dhs.gov/sites/default/files/publications/Overview%20of%20I%20Speak%20Resources%20for%20Recipients.pdf [https://perma.cc/KE83-3TEY]. Technology may enable both pre-recorded information and real time interpretation of use to migrants.

437. For recent research on Maya language interpreters including their work in immigration courts, see Sonya Rao, Language Futures from Uprooted Pasts: Emergent Language Activism in the Mayan Diaspora of the United States 24–26 (2015) (Master's Thesis, UCLA), https://escholarship.org/content/qt3hj82094/qt3hj82094.pdf?t=nrzlmx [https://perma.cc/G9LX-XGYM].

438. United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 12, at arts. 9 (right to belong to an Indigenous community), 11 (redress for spiritual, religious, intellectual or cultural property), 26 (land rights), 27 (impartial tribunal for restitution of land rights), 33 (membership and identity), 34 (institutional structures).

439. G.A. Res. 33/12, Rights of Indigenous Peoples (July 17, 2019).

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governance to address, and especially to decolonize, contemporary migration and border law and policy.

We demonstrate that tribal governments can use their legislative, regulatory, and adjudicatory authority to bring tribal values into lawmaking regarding borders and migration.[440] Indeed, they are already doing so in a number of important ways.

a. Cross-Border Membership and Governance

Like national criteria, membership or citizenship in a tribal community can be nuanced and complex. We assert here that many Indigenous Peoples' decolonized approaches to membership—delineating it according to kinship, culture, and language rather than by reference to international borders, blood quantum, or other external criteria—presents a unique opportunity for Indigenous Peoples.[441] For example, the Tohono O'Odham Nation has recognized members on both sides of the U.S.-Mexico border ever since it was formally recognized in 1848 and 1853.[442] To this day, membership is a function of descent from historic census rolls, rather than by reference to U.S. or Mexican citizenship.[443] This system makes 2,000 O'Odham individuals who live on the Mexico side of the border members of the Nation.[444] This approach also reflects the norm of "belonging" that pervades human rights approaches to minority identity[445] and the right of Indigenous Peoples to determine their own membership and identity.[446] Whether they are U.S. or Mexican citizens, Tohono

440. *See id.* at ¶¶ 74–75 (calling for the recognition of Indigenous Peoples' autonomy or self-government even beyond the boundaries of Indigenous territories, as in "functional autonomy arrangements" that may be relevant "in the context of migration and urbanization," and recognizing instances of "intercultural dialogue" and institutions that can sustain such dialogue even in difficult circumstances).

441. For an exposition of tribal membership in the United States, see generally Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, 87 WASH. L. REV. 1041 (2012).

442. *About Enrollment*, TOHONO O'ODHAM NATION, http://www.tonation-nsn.gov/membership-services/enrollment-program/about-enrollment/ [https://perma.cc/856L-QVMM]; Eileen Luna-Firebaugh, *'At Hascu 'Am O 'I-oi? What Direction Should We Take?: The Desert People's Approach to the Militarization of the Border*, 19 WASH. U.J.L. & POL'Y 339, 339, 345–47 (2005).

443. *About Enrollment*, *supra* note 442.

444. *See* Simon Romero, *Tribal Nation Condemns 'Desecration' to Build Border Wall*, N.Y. TIMES (Mar. 2, 2020), https://www.nytimes.com/2020/02/26/us/border-wall-cactuses-arizona.html, [https://perma.cc/DC9R-56EJ].

445. *See* International Covenant on Civil and Political Rights, *supra* note 433, at art. 27 ("In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.").

446. United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 12, at art. 33 ("1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of Indigenous individuals to obtain citizenship of the States in which they live. 2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.").

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O'Odham people are entitled to federal health, education, and housing benefits by virtue of tribal enrollment.[447]

Indigenous Peoples' recognition of one another across borders is a powerful sign of Indigenous identity that transcends state-imposed boundaries and racial hierarchies between the United States, Mexico, and other countries. This is particularly poignant given the tendency for Indigenous Peoples themselves to internalize differences based on current national boundaries and citizenship.[448] Even while language, land, culture, and kinship unite them, some Indigenous people—whether Yaqui, O'Odham, or Apache—describe tension between them and their relatives on the other side of "the border."[449] Each side may doubt the Indigenous authenticity of the other or use racialized language to describe their own Indigenous relatives.[450] Yet, in some instances they are able to transcend these imposed and internationalized divisions.

One example concerns the Yaqui people, who have members both in Arizona (the Pascua Yaqui tribe) and in Sonora, Mexico (los Ocho Pueblos).[451] For almost twenty years, the Yaquis have been engaged in a quest to repatriate a sacred ceremonial item known as the "Maaso Kova" from Sweden (held at Sweden's Museums of Ethnography), taken from the Yaquis in 1934 when they were prisoners of the Mexican government.[452] Typically, under the UNESCO convention, requests for repatriation are made by the state from which the item was taken.[453] Refusing to be divided along national boundaries, the Yaquis formed a "Maaso Kova Committee" comprised of political and spiritual leaders, including the tribe and pueblos, from both sides of the border.[454] In a groundbreaking dialogue facilitated by the EMRIP, the Yaqui people and Swedish National Museums agreed in principle to initiate a process of repatriation involving not only the state parties but also their own Maaso Kova committee.[455]

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447. *See* LEZA, *supra* note 9, at 55–56.

448. *See* SALDAÑA-PORTILLO, *supra* note 51, at 15 (summarizing "hostilities and differences" among Indigenous Peoples in the United States and Mexico).

449. *See* LEZA, *supra* note 9, at 169–72.

450. *See id.*

451. *See Technical Advisory Note — Repatriation Request for the Yaqui Maaso Kova* (June 16, 2020), https://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/Session12/MaasoKova.pdf [https://perma.cc/AFD2-6YY8] (EMRIP); *see also* Nathaniel Flicker, *The Yaqui Tribe's Fight for Survival: A Story of Water Rights and Resistance*, MEDIUM (May 7, 2018), https://medium.com/dsoc3240-2018/the-yaqui-tribes-fight-for-survival-a-story-of-water-rights-and-resistance-2843e8737759 [https://perma.cc/6KNR-ZGJA] (discussing another cross-border issue facing the Yaquis: water rights).

452. *Id.*

453. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, arts. 7, 15 (Nov. 14, 1970), http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html [https://perma.cc/F3H6-Q5KR] (UNESCO).

454. *Technical Advisory Note, supra* note 451, at 3.

455. *Id.*

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Beyond international and domestic legal regimes, there is another opportunity to improve border crossing—through advocacy *within* communities. At the U.S.-Canadian border, for example, Gwich'in tribal members rarely avail themselves of their §289 border-crossing rights pursuant to the Jay Treaty because they are largely unaware of them.[456] Scholars recommend that the Gwich'in Council International (GCI) use its platform as representatives of Gwich'in communities to increase awareness of these rights amongst individuals and local communities and to lobby the Canadian government to recognize and implement its obligations under the Jay Treaty.[457] These recommendations may serve as a model for other Indigenous communities.

b. Tribal Jurisdiction

As stated above, tribes have both civil and criminal jurisdiction over their lands, albeit qualified by federal law.[458] Tribes can also administer law enforcement policy that differs from that of the settler-state with respect to migrants on their own lands.[459] In 2008 and 2009, dozens of bodies of migrants were recovered on the Tohono O'Odham reservation.[460] Varying viewpoints arose on the reservation about whether the tribe should provide water to migrants.[461] For some, this situation was considered a call for the United States to better protect Tohono O'Odham lands *from* migrants.[462] But some tribal members embraced the common humanity of migrants and considered it an obligation to take care of others who enter their land.[463]

Recognizing Indigenous Peoples' rights to self-determination and giving voice to Indigenous lifeways necessarily requires understanding that tribes are

456. *See* Boos et al., *supra* note 136, at 370.

457. *See id.* at 371–72.

458. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 520 (1832); Montana v. United States, 450 U.S. 544, 565 (1981).

459. *See* Evan Wyloge, *Native American Tribes Say They Won't Enforce Immigration Law*, ARIZ. CAPITOL TIMES (June 14, 2020), https://azcapitoltimes.com/news/2010/06/14/indian-tribes-oppose-new-immigration-law/ [https://perma.cc/X89F-4UPR].

460. *Tohono O'odham Man Can't Put Out Water for Migrants*, INDIANZ.COM (Sept. 3, 2008), https://www.indianz.com/News/2008/09/03/tohono_oodham_man_cant_put_out.asp. [https://perma.cc/BQ2Q-5BNW]; Chelsea Rae Ybanez, *Hundreds of Bodies Found Near the Border Remain Unidentified*, CRONKITE NEWS (Oct. 26, 2017), https://cronkitenews.azpbs.org/2017/10/26/hundreds-bodies-found-near-border-remain-unidentified/ [https://perma.cc/8URN-C3BT].

461. *See, e.g.*, *Tribe Divided Over Providing Water to Illegal Migrants Crossing Indian Land*, PBS NEWSHOUR (Sept. 16, 2008, 5:15 PM), https://www.pbs.org/newshour/arts/social_issues-july-dec08-waterstations_09-16 [https://perma.cc/K6G8-AU5B].

462. *See, e.g.*, Karrie A. Gurbacki, Note, *Migration of Responsibility: The Trust Doctrine and the Tohono O'odham Nation*, 6 MEX. L. REV. 273 (articulating an argument based on federal Indian law's trust responsibility for a federal obligation to protect reservation lands from migrants).

463. *See Tohono O'Odham Man Can't Put Out Water for Migrants*, *supra* note 460; Elizabeth Ellis, *The Border(s) Crossed Us Too: The Intersections of Native American and Immigrant Fights for Justice*, HEMISPHERIC INST. https://hemisphericinstitute.org/en/emisferica-14-1-expulsion/14-1-essays/the-border-s-crossed-us-too-the-intersections-of-native-american-and-immigrant-fights-for-justice-2.html [https://perma.cc/E8X5-A47R].

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not a monolith. Like all societies, cultures, and governments, members hold conflicting and competing viewpoints at times. And recognizing Indigenous Peoples' rights to self-determination necessarily means respecting that tribal governments can set their own policies on migration and citizenship, at least to a certain extent.[464]

Additionally, tribal governments can use their jurisdictional power to adjudicate claims arising on their reservation as a means of dealing with some of the conflict around borders and migration. A major issue in federal Indian law over the past decade has been the restoration of tribal criminal jurisdiction over domestic violence crimes, regardless of the race of the perpetrator.[465] We have described in this Article that Indigenous women are particularly vulnerable to domestic violence, and this is true throughout the Americas.[466] The phenomenon of violence against Indigenous women reflects the colonial domination by White men and internalization of misogyny by Indigenous men (both resulting in the "rapeability" of Indigenous women).[467] At the same time, the United States has, for decades, limited tribes' jurisdiction over domestic violence and other crimes.[468] In their push for the Tribal Law and Order Act, which increased tribes' sentencing authority, and the Reauthorization of the Violence Against Women Act,[469] which expanded the category of people subject to tribal criminal jurisdiction, Indigenous women cited the need for tribes to have prosecutorial and sentencing authority over perpetrators who are not enrolled members of federally recognized tribes, including Indigenous people who may not be U.S. citizens.[470] By taking these crimes seriously and prosecuting them on tribal lands under the new statutes, tribal governments are already helping to address the epidemic of violence against Indigenous women in ways that other governments have not.[471] Tribes could even go further and become convening institutions to

464. *See* Michelle Chen, *Defying US Borders, Native Americans Are Asserting Their Territorial Rights*, NATION (Feb. 22, 2019), https://www.thenation.com/article/archive/native-american-border-territory/ [https://perma.cc/CB42-AZ7W] ("Indigenous nations also determine their own policies on border crossings by migrants, pointedly asserting their independence from federal policies.").

465. 25 U.S.C. § 1304 et seq. (2018). *See* Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564, 1569–73 (2016). In a landmark decision, the U.S. Supreme Court ruled in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), that the treaty-guaranteed borders of the Muscogee Creek Nation had never been diminished by Congress, despite more than one hundred years of encroachment by the state of Oklahoma. The ruling is critical insofar as it upholds tribal treaty rights, but also for the implications it holds with regard to the exercise of tribal criminal jurisdiction in Indian country.

466. *See, e.g.*, INDIAN L. & ORDER COMM., A ROADMAP FOR MAKING NATIVE AMERICA SAFER: A REPORT TO THE PRESIDENT & CONGRESS OF THE UNITED STATES 151 (2015), https://www.aisc.ucla.edu/iloc/report/ [https://perma.cc/6DSK-Z3UM] ("American Indian and Alaska Native women experience the highest rates of sexual assault and domestic violence in the nation.").

467. Sarah Deer, *Criminal Justice in Indian Country*, 37 AM. IND. L. REV. 347, 382 (2013).

468. Riley, *supra* note 465, at 1568.

469. *Id.* at 1603.

470. *See* E. Band of Cherokee Indians v. Torres, 4 Cher. Rep. 9 (2005).

471. *See* Carpenter & Riley, *supra* note 34, at 226–33 (describing Eastern Band of Cherokee Nation's use of tribal governance measures, informed by tribal law and human rights, to address violence against women); Riley, *supra* note 465, at 1603–04.

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study the phenomenon of violence against Indigenous women in cross-border and migration situations.

c. Indigenous Community Mapping and Climate Mitigation

Finally, Indigenous Peoples are relying on their own laws, customs, and traditions to surface their relationships with peoples and lands across borders. One important set of developments concerns community mapping.[472] The Zuni Tribe, for example, has mapped its relations with land and people, natural features, and spiritual dimensions.[473] The community mapping project juxtaposes the Executive Order creating the Zuni Reservation with traditional conceptions of land including prayer, ceremony, emergence, and movement over multiple dimensions of space as well as kinship, sensory, and spiritual experience.[474] The Maya people of Belize have similarly used community mapping to inform land claims.[475] And a project called "Indigenous Borderlands and Border Rights" seeks to visualize through maps Indigenous conceptions of space and the impacts of the U.S.–Canada border on Indigenous Peoples.[476]

Relatedly, Indigenous Peoples are using scientific technologies together with mapping to empower local adaption to climate change.[477] To the extent that climate change does not observe national boundaries, and the United States is

472. Jeremie Gilbert & Ben Begbie-Clench, *"Mapping for Rights": Indigenous Peoples, Litigation and Legal Empowerment*, 11 ERASMUS L. REV. 6, 9 (2018) ("Mapping has moved from a traditionally high technology and specialised field to a much more accessible and participatory approach where communities themselves can play a role. There are many names for such mapping techniques—'participatory land use mapping', 'participatory resource mapping', 'community mapping' or 'ancestral domain delimitation'. All these refer to the idea of direct involvement of the communities concerned."). These projects are challenging and may serve to instantiate borders and state power rather than subvert them. *See, e.g.*, Wainwright & Bryan, *supra* note 50.

473. *See, e.g.*, Adam Loften & Emanuel Vaughan-Lee, *Counter Mapping*, EMERGENCE MAG., https://emergencemagazine.org/story/counter-mapping/ [https://perma.cc/R5HA-YRH7]; *see also* Mac Chapin, Zachary Lamb & Bill Threlkeld, *Mapping Indigenous Lands*, 34 ANN. REV. ANTHROPOLOGY 619, 619 (2005) (discussing "the genesis and evolution of indigenous mapping, the different methodologies and their objectives, the development of indigenous atlases and guidebooks for mapping indigenous lands, and the often uneasy mix of participatory community approaches with technology").

474. Loften & Vaughan-Lee, *supra* note 473.

475. *See, e.g.*, MAYA PEOPLE OF SOUTHERN BELIZE, MAYA ATLAS: THE STRUGGLE TO PRESERVE MAYA LAND IN SOUTHERN BELIZE (1997) (showing maps produced by Maya villages and communities related to land claims in Belize).

476. Guntram H. Herb, *Mission Statement*, INDIGENOUS BORDER LANDS & BORDER RTS., https://sites.middlebury.edu/borderrites/about/mission-statement/ [https://perma.cc/RRC8-YXUZ].

477. *See, e.g.*, Antonella Piccolella, *Participatory Mapping for Adaptation to Climate Change: The Case of Boe Boe, Solomon Islands*, 9 KNOWLEDGE MGMT. FOR DEV. J., (SPECIAL ISSUE) 24, 24–36 (2013); *see also* Rina Chandran, *Mapping Project Seeks to Secure 'Invisible' Indigenous Lands*, REUTERS (Sept. 12, 2019, 10:36 PM), https://www.reuters.com/article/us-asia-landrights-mapping/mapping-project-seeks-to-secure-invisible-indigenous-lands-idUSKCN1VY0DE [https://perma.cc/KC96-FEB6]; Katie Reytar & Peter Veit, *Five Maps Show How Important Indigenous Peoples and Local Communities Are to the Environmen*t, WORLD RESOURCES INSTITUTE (Dec. 20, 2017), https://www.wri.org/blog/2017/12/5-maps-show-how-important-indigenous-peoples-and-local-communities-are-environment [https://perma.cc/N5TX-SD3F].

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currently resisting international cooperation,[478] these efforts may be critical in addressing problems in the Americas.

In these efforts, Indigenous Peoples are transcending state boundaries, racialized geographies, and current migration politics.[479] Stated another way, Indigenous Peoples are decolonizing borders and migration toward healthy, just living in relationship with one another and all of creation.

CONCLUSION

In the Americas, relationships with the land and among peoples predate the imposition of borders between the United States and Mexico and between the United States and Canada. These relationships constitute ancient ways of life that persist, despite the trauma and struggle of European conquest and colonization. As a result, the ongoing imposition of borders and regulation of migration can harm the entire collective cosmology of the people, wherein life is deeply tied to land.[480] These injuries are political and economic, spiritual and cultural, and experienced on a deeply human level. As the Tohono O'Odham activist Ofelia Rivas has stated, "It's like somebody put a knife in your mother. The barrier will always be there and you can't pull it out."[481]

It may be true that the borders are not going anywhere, and that the hegemony of the settler state has harmed and changed Indigenous Peoples in ways that cannot be repaired.[482] But it is also true that settler-state approaches do not seem to be quelling the "migration crisis" and that Indigenous Peoples are suffering, often invisibly, in the process. Accordingly, it is important to consider different perspectives on the problem and alternative bodies of law to address it. Viewed through the lens of settler colonial theory, we can come to understand that the current expressions of border and migration policy by the United States tell only part of the story. Indigenous Peoples have a history of North America as their own homeland, until they were colonized, displaced, and divided by international borders. Today when the United States so strongly declares policy

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478. *See* Phillip A. Wallach, *Where Does U.S. Climate Policy Stand in 2019?*, BROOKINGS INST. (Mar. 22, 2019), https://www.brookings.edu/2019/03/22/where-does-u-s-climate-policy-stand-in-2019/ [https://perma.cc/8H8X-546U] (describing U.S. withdrawal from the Paris Climate Agreement).

479. *See* SALDAÑA-PORTILLO, *supra* note 51, at 15 (interrogating Indigenous negotiation and struggle with the space-making projects of their conquering national and colonial powers).

480. *See* LEZA, *supra* note 9, at 162.

481. *Id.*

482. As the late Principal Chief of the Cherokee Nation, Wilma Mankiller, once said in another context:

> What happened to us at the turn of the century with the loss of land, when our land was divided out in individual allotments, had a profound irreversible effect on our people . . . . When we stopped viewing land ownership in common and viewing ourselves in relation to owning the land in common, it profoundly altered our sense of community and our social structure. And that had a tremendous impact on our people and we can never go back.

Mishuana Goeman, *Land as Life: Unsettling the Logics of Containment*, *in* NATIVE STUDIES KEYWORDS 71, 78–79 (Stephanie Nohelani Teves, Andrea Smith & Michelle H. Raheja eds., 2015) (emphasis omitted).

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and actions as a matter of "national security," it obscures ongoing injuries to Indigenous Peoples that reflect this history. In many instances, the migrants trying to enter the United States at the Southern border are Indigenous Peoples, leaving states that fail to recognize their rights as such and then suffering in detention and asylum proceedings when their languages and other aspects of Indigenous identity are not recognized.

To the language and law of national security and state sovereignty, we suggest adding human rights as informed by Indigenous Peoples' own laws, customs, and traditions. Indigenous Peoples are currently experiencing human rights violations in the realms of right to life, land, identity, self-determination, language, culture, subsistence, and other collective human rights. As these issues are increasingly surfacing, we have suggested a number of prescriptions with the potential to decolonize borders and migration, especially through hemispheric cooperation and diplomatic solutions. Scholars, policy-makers, and advocates should listen to these voices so that the law on migration and borders, informed by Indigenous experiences, can help to reform and heal the system, the states, the people, and maybe even the land itself.

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