

Dreams and Nightmares. The Legal Legacy that Authorized Civil Detention Centers in the US

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Abstract A study of the juridical and legislative creation of the United States immigration framework premised on a concept of the nation-state as protective of the white-male of property, with a case-study of its enactment through the policies of the Trump Administration. The essay concludes with a consideration of alternative governance structures to protect the political rights of citizens/non-citizens of a political state.

Keywords Refugee. Asylum. Political rights. Human rights. Nation. Nation-State.

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1 Introduction

[T]he exemplary moment of sovereignty is the act of deportation. (Hannah Arendt)

The photographs and stories have gone viral, sparking outrage over an inhumane immigration system operating in the United States.

South and Central American refugees, packed in cages, covered in sheets made of metallic foil.

Migrant children lying on concrete floors or looking out from behind iron-mesh enclosures asking for their parents.

The Justice Department insisting it is not required to provide soap, toothbrushes, or adequate bedding to children in immigration custody.

A mural of President Trump plastered to the wall of an immigration detention center that reads, “[s]ometimes losing a battle you find a new way to win the war”.

These moments make up pieces in the mosaic of American immigration. Collectively, they tell a story that enables a particular cultural narrative on the current meaning of the United States. They tell the story of a sovereign entity born from a bygone era, beset with structural racism, and at battle with its sense of self. A national identity established by the state and its borders and historically premised on whiteness that embedded in its political, legal, and judicial discourses the non-citizen as ‘alien’, an alien who is excluded first through denial of rights then through deportation from the body of the nation. In the context of immigration, this exclusion of rights means ignoring the U.S. Constitutions’ Eighth Amendment and diminishing due process protections of the Fifth and Fourteenth Amendment. It makes for an ill-conceived immigration system. It creates humanitarian crises.

The non-citizen as “alien”¹ is a linguistically deviant device that dominates the immigration process (Cunningham-Parmeter 2011). It establishes a rhetorical framework around immigration that dehumanizes the migrant, refugee, or asylum seeker to distract from the constitutional crisis produced once found in the United States. Culturally, the word ‘alien’ is grounded in “the Latin words *alienus* and *alius*, which mean ‘of or belonging to another person or place’, ‘hostile’, ‘strange’, and ‘other’” (Cunningham-Parmeter 2011, 1570; Skeat 1968). Thus,

¹ See 8 U.S.C. § 1101(a)(3): “[t]he term alien means any person not a citizen or national of the United States”.

when the law speaks of aliens, it speaks of “dangerous others who are marked by their strangeness” (Cunningham-Parmeter 2011, 1570). The United States Congress created the ‘alien’ to diminish the non-citizen.² Courts, then, took the term ‘alien’ and twisted it into something nonhuman. Non-Citizen aliens have been described like hunted and caught animals, “who succumb to the lure” (*Michigan Department of State Police v. Sitz*, 1990). Aliens have been described as inanimate objects, “imported into this country” (*United States v. Brignoni-Ponce*, 1975). Aliens have been described like extraterrestrial body snatchers, who undertake a “silent invasion” (*United States v. Ortiz*, 1975).

We will argue that the ‘alien’ has not so much invaded our land but has been produced by a governmental state that imagines itself the protector of the ‘nation-state’. That linkage of governmental state/nation-state enables an understanding of the current political moment in the United States. Through this conceptual framework, we can articulate that, while popular to image the Trump Administration’s immigration policy as an aberrant exception in United States jurisprudence, the inhumane treatment of non-citizens took root in the nation’s imagination more than a century ago. It is the result of a carefully crafted body of legislative law and judicial interpretation founded in a logic that interlinks coloniality, nationality, and self-sovereignty; a system premised on whiteness as the subject of law and the non-white peoples as the ‘other’, the outsider to be denied entry and equal access to legal protections. In this way, the ‘stateless’ individual, the ‘non-citizen’, the ‘refugee’, the ‘alien’, are all bricks in a border wall written into the system. To create a political context that provides such individuals with rights and legal recourse, we will argue means breaking down fundamental connections between the state and nationalism; it means imagining a different legislative framework. It is to dream of a state moving beyond nationalism, beyond the current nightmare.

To draw out the contours of the current immigration system, this article begins by tracing the story of Liliana Velásquez, whose memoir *Dreams and Nightmares* (Velásquez 2016), traces her journey from Guatemala to the United States. While personally harrowing, Liliana represents her story as a triumph of how a “model” and “humane” refugee process might produce future citizens. Within her narrative, children pulled away from parents, placed in cages for months, seems an aberration. This article, however, seeks to demonstrate the common legal framework that produces these more common than not moments. In doing so, it exposes the fundamental linkage of the state with white nationalism, denying any current or previous state actor a claim of innocence or ignorance with regard to the current humanitarian crisis. Here, the article draws upon critical race theory within

² 8 U.S.C. § 1101(a)(3).

the United States to, ultimately, critique the Westphalian nation-state system. The article concludes by positing ‘critical regionalism’ as an alternative framework to the racially homogenous nation from which the state might govern, a framework informed by a vernacular sense of political agency. The overarching hope is to begin a conversation on how to secure fundamental human rights of all individuals.

2 The Dreams of the “Good Refugee”

Liliana could have ended up in a cage. Instead, she received a green card. Liliana Velásquez left her home in Villaflor, Guatemala, alone, at the age of 14, to escape the mental and physical abuse occurring within her family. She sought refuge in the United States. That same year, in 2012, there were 10,146 unaccompanied children making a similar journey. In 2013, the number of unaccompanied minors doubled to 20,715.³ This surge in children seeking status in the United States relates to the ongoing economic and political crises that mark modern Central and South America. Crises which often result from neo-liberal policies enacted by global corporate entities that are endorsed by both Democratic and Republican legislators in the United States (Harvey 2005; Mignolo 2013). Exploiting the Americas for the benefit the United States has always been a bipartisan effort.

Liliana’s individual journey, then, must be understood within a context where global forces both motivated her journey, then, reframed her identity as an ‘unaccompanied minor’ and ‘alien’. These classifications are deeply intertwined with the cultural conscious of the United States. The language is deliberate and describes a political motivation. A political motivation to ‘blame the victim’ for needing to seek status in the United States over the turmoil in their own country and without regard for the catalyst. Donald Trump’s 2015 presidential campaign captured the political moment: “When Mexico sends its people, they’re not sending their best [...] They’re sending people that have lots of problems, and they’re bringing those problems with us. They’re bringing drugs. They’re bringing crime. They’re rapists. And some, I assume, are good people.”⁴

³ According to Factcheck.org, a project of the Anneberg Public Policy Center, “[t]he surge in unaccompanied children from Central America is largely due to increased violent crime in the ‘northern triangle’ (Guatemala, Honduras, and El Salvador). A July 3 report by the nonpartisan Congressional Research Service says 48 percent of apprehended children ‘said they had experienced serious harm or had been threatened by organized criminal groups or state actors, and more than 20 percent had been subject to domestic abuse’. Honduras has the highest murder rate in the world” (Shapiro 2014). Also see the June 2018 Council on Foreign Relations report, “Central America’s Violent Northern Triangle” (Labrador, Renwick 2018).

⁴ “Here’s Donald Trump’s Presidential Announcement Speech”, *Time*, 16 June 2015. URL <https://time.com/3923128/donald-trump-announcement-speech> (2019-07-28).

Luckily, Liliana was understood as one of the “good people” by those involved in the immigration system at that time.

As noted in her memoir, Liliana begins her journey by trying to escape family abuse by herself. She then joins up with a small cadre of individuals attempting to reach the United States. Both collectively and individually, these people are robbed at gunpoint, exploited by corrupt police/army officers, and consistently threatened with sexual abuse. Finally, Liliana crosses over into the United States and is immediately captured by federal agents, who she describes as dressed like soldiers; ‘soldiers’ who handcuff her and force her to march for an hour to reach the Border Control car, before taking her to an immigration detention center in Tucson, Arizona. There, she witnesses, “children, mothers, men, women – some sleeping on floors some sitting up, some covered in plastic to protect them from the rain” (Velásquez, 2016, 130). She faces the chilling reality of “so many people who were going to be deported to their country” (103).

Importantly, these experiences occur during the Obama Administration. Of course, it should also be noted that the Obama Administration established an in-country refugee/parole program, Central American Minors, as part of the United States’ Refugee Admissions Program:

The Central American Minors (CAM) Refugee/Parole Program aims to provide a “safe, legal, and orderly alternative to the dangerous journey” that many unaccompanied children have taken to the United States. It allows certain parents who are lawfully present in the United States to request refugee resettlement for their children who are still residing in their countries of origin. Children who are found to be ineligible for refugee status but are at risk of harm can be considered for parole, which allows individuals to be lawfully present in the United States temporarily. (Meyer et al. 2016, 9)

It also attempted to support economic growth within such countries through economic aid, linked to enhanced border and security requirements. While seemingly more humane than the Trump Administration – who ended the domestic abuse allowance that ultimately authorizes Liliana’s ability to remain –, both Administration’s premise their work on ‘securing the border’, a framework which will be discussed further below. Thus, the evils of immigration under the Trump Administration are not simply aberrations. They are just the latest symptoms of the same old ill-conceived immigration system.

Unlike the children who remained in the cages of Tucson, Liliana continues deeper into the heartland of the United States immigration system. As her journey progresses, she begins to fashion a narrative where the system’s ability to work rests not so much in legal avenues; but instead, on the individual humanity of those directly involved in

her case. For instance, Lilian is transported to Phoenix, a trip she describes as being marked by kindly immigration officers who provide her with an influx of snacks. In Phoenix, she faces placement in a new form of immigration detention. A program known as the House of Dreams. Inside the House of Dreams, she finds caring individuals who assuage her fears and provide her medical treatment. She even gains access to a lawyer, despite that fact that she has no constitutional right to counsel. Her lawyer then spends months working to have Liliana reunited with her brothers in North Carolina. When that fails, she finds placement in a foster family from Philadelphia. Up to this point, each moment of the process seems designed to create a safe and caring environment for Liliana. She experiences a system that appears to act in her best interest.

Indeed, it is only in Philadelphia, when placed in a North Philadelphia home, where she encounters direct mistreatment - the foster family refuses to share food with her, forces her to provide childcare, and limits her movement outside of the home. Lilian is saved from this situation when her social worker - who had previously recommended not creating an issue about her living conditions - breaks with standard practice and ensures access to La Puerta Abierta, a center which provides mental health services for non-citizens. Here Liliana meets Layla, a psychologist at the center, who takes up a special form of advocacy. Layla successfully petitions the court to allow Liliana to join her family. Through her commitment to hard work, to never giving up (as expressed in her memoir), Lilian is able to secure a green card, finish high school, and enroll in college. She now travels across Philadelphia and the United States, sharing her story with grade school and college classes. Considered within her self-defined history, Liliana's nightmare has turned into the American Dream.

3 The Dreamwork of Nation-States

We start with pictures and stories for several reasons: first, nations and nation-states are built upon their origin stories, stories which make clear who founded a country and, thus, who are rightful citizens. These stories are, as they say, "written by the winners of history". Where such stories start, what events are included or omitted, what is emphasized, and who are cast as heroes, all act to undergird the status quo. These stories, when left unexamined, authorize the mistreatment and even torture of those portrayed as the outsider or intruder by the nation-state. Consider the power of the story just told - a story which ended with a refugee using her experience to gain access to college, to speaking engagements. Liliana's story exists within the narrative of the "good refugee" within the current public discourse of the United States. For as noted at the outset, Lil-

iana describes a journey through a Central America replete with abusive family member, rapists, bad cops. Indeed, it is through the exceptional few, such as a kind coyote, that the cultural/political geography is established. In the United States, by contrast, Liliana describes a terrain full of kind committed individuals, with the notable exception of the foster family who acts as proof of 'the general rule'.

Essentially, through Liliana, we learn, the refugee/immigration system 'works' for those dedicated to working hard, not giving up, and believing in traditional notions of family, home, and education. By the end of her memoir, she has transformed the image of those left caged in Tucson. What once represented images of abuse, punishment, or torture, now represent an acknowledgement, even if reluctant, that some individuals need to be deemed inadmissible, detained, and deported back to their country of origin, perhaps even back into the violence they (like Liliana) sought to escape. That is, there is a need for a border, a 'wall', that can protect current inhabitants from countries that do send "their worst". Thus, the narrative of the nation-state (and its relationship to the state) is important for how it reframes the chaotic and diffuse reality of existing bodies spread across a multiple terrains into a set of concept-metaphors that create a stable identity, a habitus called 'citizen' who is then granted the benefit of particular unalienable rights

And the dream work of the United States, the desire which informs the citizen habitus, as with all states, is to create a homogeneous nation. As Judith Butler writes, reflecting on the work of Hannah Arendt:

Arendt argues that the nation-state, as a form, that is, as a state formation, is bound up, as if structurally, with the recurrent expulsion of national minorities. In other words, the nation-state assumes that the nation expresses a certain national identity, is founded through the concerted consensus of a nation, and that a certain correspondence exists between that state and the nation. The nation, in this view, is singular and homogeneous, or, at least, it becomes so in order to comply with the requirements of the state. (Butler, Spivak 2011, 30-1)

Historically this exclusion from the United States' nation-state has been enacted upon Indigenous populations already present in North America and African populations brought to this continent, both of whom are seen as illegitimate inhabitants. In a post-Civil Rights Era, there is a popular narrative that such legal/political exclusions have been removed; whiteness decentered. That equality under the law now exists. Critical race theory, however, has been audacious in its critique of the very foundations of the United States' legal system, to its commitment or lack thereof, for the equal protections of all of

its citizens. Focusing primarily on how the legal system impacts descendants of formerly enslaved African communities, the work of critical race theory scholars meticulously articulates how the most basic assumptions and tenets of the United States' legal and legislative systems assume the legitimate subject of these structures continue to be white. That, in fact, the popular frameworks of 'whiteness' are constructed in part through the power of legal discourses to invest/disinvest humanity in particular populations.

Recently the paradigms of critical race theory have been extended to articulate the racially exclusionary immigration laws, which also are understood as reinforcing the subordination of domestic minority groups. In equal parts, it recognizes that the Trump Administration shares fair blame for the egregious and inhumane treatment of non-citizens; but also, the Trump Administration is not the first to enact racially exclusive immigration policy nor attempt to justify human rights abuse (Johnson 2002). For the overarching concern about these abuses does not start or stop with the Trump Administration. The concern centers on the legal and legislative rulings that long ago created a rhetorical comparison to conflate two concepts into one legal identity that defined all non-citizens, be they: refugees, asylum seekers, migrants, or criminals, as the same 'alien' entity not worthy of protection. Those dehumanizing associations are deeply engrained into the cultural conscious of the United States and do more to distort notions of justice in the immigration system than any one administration.

Here, the concept of 'statelessness' can be an important lever of analysis. Critical race theory deconstructs 'statelessness' as a racially informed concept. It is a powerful explanatory legal concept used by lawyers and critical theorists alike. 'Statelessness' means, "a person who is not considered as a national by any State under the operation of its law;" it is "a person who is not only homeless but productionless" (UN 1954 Article 1). Provided that in the United States the concept of the 'nation', itself, is premised on 'whiteness', then what rights remain to empower or protect those crossing without documentation from Central or South America, from non-European heritage nations? Through a consideration of the 'stateless' individual, we can ask what is the governmental paradigm which requires just and humane treatment of these individuals?

Critical race theory invokes the strategy of the 'counter-story' as a way to begin to argue for a different form of governance. In this regard, critical race theory shares a concern with decoloniality, which, in response to coloniality's imposition of the white male of property as the subject of rights, rights infused with global capitalist values, attempts to learn from indigenous forms of knowledge/communal structures. (The very values which, as discussed above, produced the political/economic crises driving immigration in Central America). For conceptual schools, counter-stories call into question the

legitimacy of now existing legal/political prejudices. Indeed, Delgado, one of the first critical race theory theorists, highlights how language helps shape human perception. With words, humans comprehend meaning in the world that surrounds them. He writes: “Stories, parables, chronicles, and narratives are powerful means for destroying mindset – the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place” (Delgado 1989, 3).

Our first rendering of Liliana’s memoir was to read it within her own terms as a successful story of a child who crossed borders and cultures to gain certain citizenship rights (a green card). As just discussed, this story rested upon a larger governance structure premised on a coloniality that premised ‘white male’ subjectivity as both the subject of rights and national identity. Returning to Liliana, now framed as ‘stateless’ within the workings of a historically determined juridical-political system, we want to articulate the system in which such habitus of citizenship rights are offered or denied. And in doing so, we hope to ultimately provide a space to frame a counter-narrative to the legitimacy of the nation-state as ‘protector of human rights’.

4 The Nightmare of the Refugee in the Nation-State

By the time Donald Trump took office, Liliana already had lived in the United States for four years. During this time, the immediate crisis of rising rates of unaccompanied minors crossing the border lessened. From 2014 to 2016, the numbers dropped from 51,000 to 18,500 (Kandel 2017). This drop correlates with an approximately twenty-year trend. To be certain, in 2000, the monthly average of unaccompanied minors crossing the border equaled 71,000 to 220,000. Yet by 2018, those numbers had dropped to between 20,000 to 40,000. In that time, the reasons for crossing into the United States also changed: what started as primarily economic reasons increasingly turned into reasons concerning political hardship. Despite the numbers, there is an exigency to continuing to produce the stateless as a means to reaffirm the legitimacy of the nation-state proper. There will be so long as the nation-state remains. For, as Judith Butler argues, “[t]he state derives its legitimacy from the nation, which means that those inhabitants who do not qualify for ‘national belonging’ are regarded as ‘illegitimate’ inhabitants” (Butler, Spivak 2011, 30-1). All “subsequent status that confers statelessness on any number of people becomes the means by which they are at once discursively constituted within a field of power and juridically deprived” (2011, 31). Thus, despite the numbers, there is an exigency to continuing to produce the stateless as a means to reaffirm the legitimacy of the nation-state proper. This need is particularly urgent today at a time when 1) the

free circulation of global capitalism has called the sovereignty of the nation-state into question; 2) the failed neo-liberal projects in the Global South has caused new massive global migrations; and 3) all of this has ignited the fear of disenfranchisement in those workers displaced in the Global North.

Undoubtedly, the Trump Administration has taken to this task with great vigor. Intentionally implementing policies and arguing agendas designed to incentivize would-be refugees and migrants to stay in their home countries. These tactics include, but are certainly not limited to, the utilization of facial recognition software to sweep civilian databases, the militarization of ICE (United States Immigration and Customs Enforcement), coordination with local law enforcement, pretextual traffic stops, and increased reliance on criminal statute. Consequently, approximately 39,000 people are now being held in immigration detention centers. Around 2,000 are children. Many of these children are being separated from their parents through the utilization of 8 U.S.C. § 1325, which makes it a federal crime to improperly enter the United States.⁵ Use of this statute means the initiation of criminal proceedings. That process all but guarantees the separation of families. For the person charged with violating 8 U.S.C. § 1325 will be transferred from ICE custody into the custody of the United States Marshal Service (USMS) to stand trial. Whereas ICE custody takes place at immigration detention centers, USMS custody typically takes place at regional jails. This process can take years to complete. In the meantime, the children are left in immigration detention centers, where, as noted above, they live in tents or cages without simple necessities for health, hygiene, and safety.⁶ In these conditions, people die. Indeed, under the Trump Administration at least three minors have died while being held in immigration detention centers. As a result, Sanctuary Cities (which refuse to support ICE activities) as well as consistent protest have emerged across the United States.

Throughout, those residing in the United States have learned two important lessons about its immigration system.

First, it is a system of dehumanization, confinement, aggressive policing, punishment, and deportation. It is a system of contradictions and competing rhetoric where non-citizens found in the United States are subjected to torturous psychological, emotional, and phys-

5 See 8 U.S.C.A. § 1325: “[a]ny alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offense, be fined under Title 18 or imprisoned not more than 6 months, or both, and, for a subsequent commission of any such offense, be fined under Title 18, or imprisoned not more than 2 years, or both”.

6 For example, the Trump Administration defines soap and toothpaste as non-necessities.

ical abuse while detained pending deportation proceedings. Similar to what happened to Liliana along her journal, pistols may be held to the heads of refugees. Cement floors may act as their beds. Death may come to them before deportation does.

Second, no matter the severity of the treatment, it likely will not be found to violate the legal standards of punishment or deprivation under the United States Constitution. These individuals will not be accorded the constitutional safeguards relating to cruel and unusual punishment or the deprivation of life and liberty. It looks like punishment. It feels like deprivation. It may well be torture. But it is *overwhelmingly* likely to be determined constitutional.

While the Trump Administration has made their “tough on immigrants” stance a central tenet of policy, Trump did not invent this system. It is allowed within the fabric of the legal system and supported by the legislative intent of immigration policies. In part, the ability to treat non-citizens with such cruelty is due to the fact that for more than a century the United States has defined the deportation process, including detention, as a *civil process* exercised by the power of Congress.⁷ This Congressional power is rooted within notions of white supremacy, xenophobia, and the Supreme Court’s 1893 decision in *Fong Yue Ting*. There, the Court upheld a provision in the Chinese Exclusion Act of 1892, which required a Chinese person, “claiming the privilege of remaining in the United States, to prove the fact of his residence here at the time of the passage of the act by at least one credible *white witness*” (*Fong Yue Ting v. United States*, 1893; emphasis added). Here, we see the resonance of white-vouching for immigrants echoed in Layla’s endorsement of Liliana.

Within this racist framework, the Supreme Court accepted the maximum that this nation had an absolute and unqualified right, a “power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and *upon such conditions as it may see fit to prescribe*” (*Fong You Ting v United States*, 1893). That power falls to Congress. It is “recognized that the determination of a selective and exclusionary immigration policy was for the Congress and not for the Judiciary” (*Harisiades v. Shaughnessy*, 1952). There it has remained. No matter how crude, cruel, xenophobic, and racist, the responsibility of immigration laws reside in Congress, even when “such determination may be deemed to offend American traditions and may, as has been the case, jeopardize peace” (*Harisiades v. Shaughnessy*, 1952). Witness the cruelty of a system that would create conditions where

⁷ *Hinds v. Lynch*, 790 F.3d 259, 264 (1st Cir. 2015) (citing *Fong Yue Ting v. United States*, 149 U.S. 698, 730, 13 S.Ct. 1016, 37 L.Ed. 905 (1893); *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491, 119 S.Ct. 936, 142 L.Ed.2d 940 (1999).

a father and daughter die on a riverbank attempting to cross into the United States from El Salvador to escape violence.

Although Congress repealed the Chinese Exclusion Act in 1943, from the time of Fong Yue Ting, the absolute power of Congress to exercise “deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure” (*Harisiades v. Shaughnessy*, 1952). As an original proposal, this doctrine is highly debatable in light of the close association that exists between criminal convictions and deportation (*Harisiades v. Shaughnessy*, 1952). Nevertheless, the United States Supreme Court has considered the matter closed for many years. To be certain, in 1913, the Court held it thoroughly established “that Congress has power to order the deportation of aliens whose presence in the country it deems hurtful. The determination by facts that might constitute a crime under local law is not a conviction of crime, nor is the deportation a punishment; it is simply a refusal by the government to harbor persons whom it does not want” (*Bugajewitz v. Adams*, 1913). While it may be the case that alignment of local penal law with the policy of Congress is a jurisprudential coincidence, it is far from coincidence that both are accomplished under the logic of state-building which employs the exclusion of individuals based upon race/ethnicity as part of its creation of the modern nation-state.

What is neither coincidence nor accident, however, is the inhumane treatment of non-citizen migrants in the United States, which has arisen in the wake of Fong Yue Ting and its progeny. For the century-old legal fiction that makes deportation a civil matter also makes the Eighth Amendment’s prohibition against cruel and unusual punishment inapplicable to the detention of people pending deportation hearings because, again, “deportation is not a punishment for crime” (*Ingraham v. Wright*, 1977). Deportation is civil, *albeit in name only*, and there is no Eighth Amendment concept of punishment in a civil proceeding: “Excessive bail shall not be required, nor excessive fines imposed, nor *cruel or unusual punishment inflicted*” (emphasis added).

What constitutional protections may remain exist in due process. For no one in the United States, no matter her origin, can be deprived of life, liberty, or property without due process of law. Whatever other rights denied by virtue of status, the Fifth Amendment and Fourteenth Amendment demand due process protections against deprivations of life or liberty at the hands of state or federal officials. The due process clause may not invalidate all inflictions of severe hardship faced by non-citizen migrants (*Harisiades v. Shaughnessy*, 1952). However, certain conditions or restrictions will implicate Fifth and Fourteenth Amendment concepts of punishment, which may trigger the recognition of constitutional protections and relief for those who suffered.

Still barring exceptional circumstances, the due process clause has little power to protect non-citizen refugees and migrants, who unlike Lilliana do not encounter the humane bureaucrat or find the concern cit-

izen advocate. Their constitutional protections remain limited by that absolute and unqualified but “overriding concern that the United States, as a sovereign, maintain its right to self-determination” (*Lynch v. Cananatta*, 1987). The due process clause has even less power to prevent the level of inhumane treatment required to bring a cognizable claim of “punishment” in civil proceeding.⁸ Acts of “gross physical abuse” or “malicious infliction of cruel treatment” may constitute punishment.⁹ However, these determinations must be made by finders of fact – a judge or a jury – in a civil trial, which is cost prohibitive and to which no right to free counsel attaches. Legal standards like these further distinguish Liliana’s story because she was provided access to legal advice while in custody. More often, such legal standards make for more legal fictions that further shield human rights violations from coming to light and being litigated in courts of law. There is a very thin constitutional protection against inhumane treatment for non-citizen migrants in the United States. The poorer the person the thinner the protection.

5 The False Dream of International Human Rights

A thicker line of protection potentially exists under international standards. The *United Nations’ Universal Declaration of Human Rights* includes “the equal and inalienable rights and fundamental freedoms of each human being” (U.N. General Assembly Resolution 1948). Its *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* recognizes “the equal and inalienable rights of all members of the human family” as “the foundation of freedom, justice and peace in the world” and derives those rights from “the inherent dignity of the human person” (U.N. 1984, Art. 16). In the same spirit, the *International Covenant on Civil and Political Rights* decrees, “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person” (U.N. 1966, Art. 10).

The Declaration, however, is premised on a Westphalian nation-state system put in after World War II. Under this system, the concept of justice is defined in terms of internal citizenship rights. As Nancy Fraser writes, “Subtending the lion’s share of social struggle in the postwar era, this view channeled claims for justice into the domestic political arenas of territorial states. The effect, notwithstanding lip-service to international human rights and to anti-imperialist solidarity, was to truncate the scope of justice, marginalizing, if not wholly obscuring, cross-border injustices” (Fraser 2013, 214). Thus,

⁸ See generally *Bell v. Wolfish*, 441 U.S. 520 (1979).

⁹ See *Medina v. O’Neill*, 838 F.2d 800, 801 (5th Cir. 1988).

while the United States is party to these international prohibitions against cruel, inhuman, or degrading treatment, its participation is subject to reservations and declarations. Those make it “bound by the cruel, inhuman, or degrading treatment prohibitions”, but “*only to the extent that those words mimic the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments*” (Budhrani 2012, 804; emphasis added). Consequently, the limited protections afforded to non-citizen migrants under the United States Constitution narrowly adheres to, if not violates, the norms established under international human rights law.

To make matters worse, the United States has declared these international prohibitions “non-self-executing”. This means that no private right to action exists in the United States to assert these international prohibitions against cruel, inhuman, or degrading treatment, absent express congressional legislation: “[w]hile treaties ‘may comprise international commitments [...] they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be self-executing and is ratified on these terms’” (Budhrani 2012, 804). No such legislation exists. On the contrary, history makes clear that Congress will control, detain, and exclude those it has deemed undesirable, however severe its consequences. The dream of the United Nations is no match for this American nightmare.

Here, it seems important to return to Liliana’s memoir, the narrative which establishes the very humanity which many of the United States border agents, bureaucrats, and advocates seem to recognize. It is important, that is, to realize this entire legal system is premised on taking away that very humanity from Liliana. Unlike the personal narrative of her memoir, this narrative focuses on her statelessness. In this narrative, the moment Liliana arrived in the United States, she stopped being a child. She started being an ‘alien’. She was caught, not as a child seeking refuge and reunification with her family, but, instead, as an alien unlawfully present in the United States.

Immediately upon arrest, she was subject to immigration detention. The Immigration and Nationality Act of 1952 establishes that “an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States (8 U.S.C. §1226(a)”. Her confinement in the program known as the House of Dreams was a form of immigration detention. Immigration detention is considered civil detention. Civil detention exists outside the Eighth Amendment’s prohibitions against cruel and unusual punishment. In the absence of the Eighth Amendment, civil detention comes with a decreased adherence to the standards that control constitutional conditions of confinement. During the four months she remained detained at the House of Dreams, it could have easily become the House of Nightmares. Liana was, in essence, an alien at the mercy of her captors.

Her story could have been the following:

**Declaration of J O A M , and
J A C A (An Infant)**

I, J O A M , declare under penalty of perjury that the following is true and correct to the best of my knowledge and recollection.

1. I came from Moncagua in San Miguel, El Salvador. My birthday is I am 16 years old. I lived in my grandfather's home with my 20-years-old fiancé, J A C A , my 20-year-old sister, L A A R , and our one-year-old daughter, J A C A . Our daughter's date of birth is
2. My fiancé, daughter, sister, and I had to leave El Salvador because our grandfather saw the gang kill our neighbor. They threatened to kill him and so we all had to leave. He is old so he went into hiding and we came to the United States because we have family here. My fiancé's uncle, D C M , lives in Virginia and wants to sponsor us. His telephone number is
3. My fiancé and I crossed with our baby into the United States at Port Juarez and had to cross the river by foot. It was very deep so I held our baby and my fiancé held onto me to keep us above the water. Two hours after we crossed, we met Border Patrol and they took us to a very cold house. We slept on mats on the floor and gave us aluminum blankets. They took away our baby's diapers, baby formula, and all of our belongings. Our clothes were still wet and we were very cold and so we got sick. My fiancé, our daughter, and I got sick from being so cold. We were there for about ten hours.
4. After that they took us to a place with a tent. There was also a structure with a roof, but no walls. They put us in a cell together. Until this point, our family was kept together, but here they came and took our daughter and me out of the cell and separated my fiancé from us. We were all very upset. Our baby was crying. I was crying. My fiancé was crying. We asked the guards why they were taking our family apart and they yelled at us. They were very ugly and mean to us. They yelled at him in front of everyone to sit down and stop asking questions. We have not seen him since.
5. They made us all sit in lines and all face the same way. If we tried to shift positions or turn around and look the other way, they would yell at us and tell us not to turn around. There were about 30 children there. They also were made to sit on the ground lined up and all face the same way. They made us do that for like five hours. Our one-year-old tried to stand up and take some steps and the guards told me to make my baby sit down and stay still. They got mad at me because I was having trouble making my baby, who is a toddler, sit still for so long. My back was hurting me from sitting there on the ground with my legs folded and my baby in my lap trying to hold her still.

Figure 1a-b Testimony by Joam and Jaca (an infant) from Moncagua in San Miguel

6. After that, they brought us here to Clint. It was about a 40-minute drive. We stay in a room with 45 other children. There are ten bunkbeds. We sleep two children per mattress so four children sleep in each bed. The other children sleep on thin mats on the concrete floor. The way the beds are assigned is that the child who leaves gives their bed to someone else. A girl left the facility and so she designated that bed for my daughter and me. Until then, my baby and I slept on a cement wall. There was no mat so my baby and I slept directly on the cement. We had two blankets (one each) and so I put one underneath us and the other one on top of us.
7. I have been in the U.S. for six days and I have never been offered a shower or been able to brush my teeth. There is no soap here and our clothes are dirty. They have never been washed. My daughter is sick and so am I.
8. In the morning, they give us Jello, oatmeal, and silver pouches of fruit punch. At lunch, they give us instant soup, another pouch of fruit punch, and a cookie. At dinner, they give us a bean burrito, Jello, and a silver pouch of fruit punch. There is nothing else in the burrito. No rice or cheese. They give my daughter formula, but otherwise we get no milk. We get no fruits or vegetables.
9. My baby asks for her dad all of the time. She frequently looks for him and wonders where her dad is. We both miss him very much and don't understand why they broke up our family.

I, **J O A M**, swear under penalty of perjury that the above declaration is true and complete to the best of my abilities. This declaration was provided in Spanish, a language in which I am fluent, and was read back to me in Spanish.

—

June 18, 2019

J O A M

And here, then, is the final rendering of Liliana's story. The successful conclusion of her dream should not blind us to the nightmares faced by others. Liliana might have suffered the fate of Hernández Vasquez and two other minors who died while in federal custody. She might have suffered the fate of Óscar Alberto Martínez Ramírez and his daughter, Angie Valeria, who died on a riverbank attempting to reach the United States. That is, her success is deeply enmeshed within a legal system premised on excluding, debasing, and abusing those most in need of political asylum.

6 Beyond Dreams and Nightmares

We began this essay with a series of images and stories initially framed through the words of Hannah Arendt: "[t]he exemplary moment of sovereignty is the act of deportation" (quoted in Butler, Spivak 2011, 102). In doing so, we hoped to demonstrate how the United States is enacting a crisis of its sovereignty. And as intimated in the essay, we see the roots of this crisis in the results of a neo-liberal economics that has created a global political and economic crisis. Which is to say that as a push for the open borders of global trade have been implemented, the resulting poverty (and consequent political oppression to maintain order/privilege) has produced as an equally global refugee/immigration crisis. In the context of the United States, the refugee/asylum seeking populations, in our opinion, then, are simply asking the perpetrator of their strife to recognize their responsibility.

What is occurring, however, is exactly the opposite. Clinging onto historic connections between the state and nation-state, we see a form of governance (legislative and juridical) which doubles down on a white-supremacist power structure, a structure that works to enact political borders which deny culpability and 'blame the victim' for their status. The rare 'good immigrant' might be allowed to enter, but only as an alibi for the exclusion of the unfit 'alien' invading the nation – an 'alien' for whom there is not political vehicle to claim restitution for harm or political refuge. Here we are reminded of Foucault's argument that the ultimate act of sovereignty was to punish the very body of its subject through torture or imprisonment. Here we note again the detention centers where daily adult and children refugee/asylum seekers have their dignity and humanity denied in the name of a 'national identity' in which they will not be allowed to participate.

For if the pressures of global capitalism has struck a mortal blow to the nation-state and we are now witnessing its demise, these images and story of refugees – both the dreams (Lilliana) and the nightmares (caged-children) – are pushing us to ask some hard questions

about our country, our waning nation-state, our government, and our definition of citizenship and to come up with some solutions on how to bring our rhetoric of 'equality for all' in line with this new global reality. Which is to say, this political destabilization requires us to consider alternative concepts of political/human rights which move beyond the limitations of nation-state structures – structures which as noted repeatedly above do not act in the interest of the dispossessed. We need an alternative model to the reactionary politics of the Trump Administration (as well as nascent and overt nationalist leaders in Europe and the Mena region).

In their long interview, published as a book *Who Sings the Nation-State?*, critical theorists Judith Butler and Gayatri Spivak (2011) investigate many of the themes of this article: the limits of the concept of the nation-state, its diminishment under global capitalism, the rise of nationalism, the legal dispossession of US immigrants to political agency, and the examination of some nascent geo-political formations that might take the place of the ailing concept of nation-state.

Spivak, in particular, suggests the concept of "critical regionalism" as a way to "go over and under nationalism, but keeps [sic] the abstract structures of something like a state. This allows for constitutional redress against the mere vigilance and data-basing of human rights, or public interest litigation in the interest of a public that cannot act for itself" (Butler, Spivak 2011, 94). That is, the state is something we need in order to address issues of "redistribution, welfare, and constitutionality" (90). Yet unlike the nation-state, premised on homogeneous concepts of the citizen, this type of critical regionalism-informed state formation would include heterogeneous publics and cultures, would include the sovereignty rights and democratic principles of self-determination and self-regulation to a variety of populations, and adhere to a "post-national understanding of what human rights might be" (2011, 106).

Of course, in the current moment of crisis, it is difficult to imagine what such a formation might entail. Yet in the struggle of Indigenous populations against the Dakota pipeline in the United States; Indonesian farmers against the global corporations who attempt to take their farmland; and Columbian women creating new forms of community in response to gang-led violence, we recognize the seeds of alternative concepts of political rights being enmeshed within restrictive nation-state concepts. These struggles of Indigenous populations are even more complicated when they transverse national borders, as is the case for the current refugees, Indigenous people of the Americas, who are now held captive in Detention Centers on the very land that only 200 years ago was part of a different nation; 500 year ago was populated by the Caddo and Apache nations. Through such examples, invoking these different historical geographically-located legacies, we can begin to see how expanded publics within a homo-

geneous 'nation' might gain political recognition for populations too often excluded from power within a geography whose history transcends that nation-state's particular history and borders. Decolonial struggles, perhaps, begin to offer us a multi-versality from which to articulate space of political agency and human rights for those too often defined as stateless, those seeking a right to dignity that should not be reliant on national boundaries.

Still, we recognize that the very idea of a new form of governance not predicated on the nation-state/nationalism may seem to be a far off 'solution' to the foundational causes of the detention centers at our border. And in the current moment, much of our energy must be placed in addressing the immediate rights of children in detention centers, adults being deported back to dangerous contexts, individuals suffering deprivation and death in their struggle to gain political agency. Yet as we make these arguments, we would argue, we must build the framework from which a future can be built. We must endlessly strive to articulate a future for which there is seemingly no model, but which in its utopian promises mobilizes individuals and collectives to build a governance which fulfils not only current needs but our future hopes. As Judith Butler tells us: "[t]he declaring does not make it so, but it is part of the discursive process of beginning something new; it is an inducement, an incantation, a solicitation" (Butler, Spivak 2011, 95). We must work in the present for increased rights, then, for those most oppressed, but also work to solicit and enact a future where such rights are always already accorded to every individual.

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