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RACE, GENDER, AND NATION IN AN AGE OF SHIFTING BORDERS: THE UNSTABLE PRISMS OF MOTHERHOOD AND MASCULINITY

Catherine Powell*

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INTRODUCTION

The contributions that critical race theory scholars have made to the literature on nation, borders, and sovereignty have become even more salient in the Age of Trump. However, what remains undertheorized is how *gender* intersects with race in the legal construction of nation and borders.¹ In particular, this Article analyzes two common tropes in the current immigration debate—the “welfare cheat” and the “criminal”—to demonstrate how these narratives shape legal constructs of nationhood and borders as both raced and gendered.² As part of

1. This Article draws inspiration from the work of Kimberlé Crenshaw and others, whose pioneering work on intersectionality informs my work. See, e.g., Kimberlé W. Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989); Kimberlé W. Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

For foundational scholarship on intersectionality in the context of immigrant in particular, see, e.g., Leti Volpp, *Talking Culture: Gender, Race, Nation, and the Politics of Multiculturalism*, 96 COLUM. L. REV. 1573 (1995) (critiquing the use of the “cultural” defenses to justify violence against immigrant women); Leti Volpp, *Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181 (2001) (critiquing Susan Moller Okin’s claim that immigrant communities are often less feminist-oriented); Kerry Abrams, *Polygamy, Prostitution, and the Federal Immigration Law*, 105 COLUM. L. REV. 641–716 (2005) (discussing how the nation’s first restrictive federal immigration statute targeted Chinese women immigrating to the United States); Rupaleem Bhuyan et al., *Regulating Spousal Migration Through Canada’s Multiple Border Strategy: The Gendered and Racial Effects of Structurally Embedded Borders*, 40 LAW & POL’Y 346 (2018) (examining how the regulation and discourse concerning marriage “fraud” in Canada continues to racialize immigrants in exclusionary ways, disproportionately impacting women). See also Laura Ho, Catherine Powell, and Leti Volpp, *(Dis)Assembling Rights of Women Workers Along the Global Assembly Line: Human Rights and the Garment Industry*, 31 HARV. C.R.-C.L. REV. 383, 384, n.5 (1996) (discussing how race and ethnicity have been used to limit the rights of certain categories of workers in predominantly female sectors).

While scholarship on the intersection of race and gender in the *current* immigration context is sparse, one scholar who has engaged this nexus in the context of Trump—though quite distinct from the focus of this Article is Leti Volpp. Building on her earlier work on how gender and race infuse immigration law and policy debates to pathologize immigrant culture, in her more recent work, Volpp brilliantly interrogates how the focus on “honor killings” in the Trump travel ban executive orders mainly serves to exoticize immigrant women from the excluded countries. Leti Volpp, *Protecting the Nation from “Honor Killings”: The Construction of a Problem*, 34 CONST. COMMENT. 101, 136–37 (2019) (critiquing the focus on “honor killings” in the Trump travel ban as a “cynical deployment of feminist concerns as a proxy for xenophobic exclusion[.]” where “[t]he project of ‘saving women’ is knitted into Islamophobia in the United States, with the literal barring of Muslims bodies from entering the United States in the name of purportedly protecting Muslim women from violence.”).

2. By adding gender explicitly into the equation for *men* (as well as women) of color, this Article builds on a conversation I hosted with Muneer Ahmad. In that conversation, Ahmad spoke about the use of *racialized* tropes in the immigration debate. See Catherine Powell & Abigail Van Buren, *Litigating the Family Separation Policy: A Conversation with Muneer Ahmad*, COUNCIL ON FOREIGN RELATIONS, WOMEN AROUND THE WORLD (NOV.

UCLA Law’s symposium on *Critical Perspectives on Race and Human Rights: Transnational Reimaginings*, this Article seeks to address a gap in the literature, not only by examining what gender adds to today’s legal debate over immigration, but also how gendered racial constructs of citizenship impact the legal rights of women *and* men, particularly through the unstable prisms of motherhood and masculinity. Based on tropes that are both raced and gendered—and specifically through the lenses of motherhood and masculinity—Trump promotes restrictive immigration policies, in effect, shifting U.S. borders inward and outward.³ My analysis here builds upon and creatively expands the “shifting border” framework developed by Ayelet Shachar, who has called our attention to the colossal governmental authority gained by the ability to “shift” the location of the border—as a matter of law.⁴

On the one hand, Trump has mobilized stereotypes based on race and gender to “shift” borders *inward*, expanding “constitution-free” zones within U.S. borders.⁵ As discussed more fully in Part II, the President accomplishes this by characterizing Latinas in particular as irresponsible mothers who bring their children to the United States or give birth to “anchor babies” in the country as a way to take advantage of the American welfare state.⁶ By painting immigrant mothers in this way and separating children from their parents, Trump has sought to undermine longstanding legal standards that protect families who have crossed the border. By placing these families *outside* the law’s protection, as if they had not crossed the border, Trump shifts the border inward.⁷

5, 2018), <https://www.cfr.org/blog/litigating-family-separation-policy-conversation-muneer-ahmad> [<https://perma.cc/8UVR-W59S>] (blog summarizing Council on Foreign Relations roundtable conversation, led by Catherine Powell and Muneer Ahmad). By adding a gendered framing of men of color into the analysis, this Article also builds on my collaborative work with Camille Gear Rich on women of color. Catherine Powell and Camille Gear Rich, *The New “Welfare Queen”: Donald Meet Ronald, Ronald Meet Donald*, JUST SECURITY (Oct. 23, 2018), <https://www.justsecurity.org/61164/welfare-queen-donald-meet-ronald-ronald-meet-donald> [<https://perma.cc/Q9JD-JCGL>]. See also Camille Gear Rich, *Reclaiming the Welfare Queen: Feminist and Critical Race Theory Alternatives to Existing Anti-Poverty Discourse*, 25 S. CAL. INTERDISC. J. 257 (2016).

3. I am borrowing the notion of border shifting from Ayelet Shachar and Ran Hirschl. See Ayelet Shachar, *Bordering Migration, Migrating Borders*, 37 BERKELEY J. INT’L L. 93 (2019); Ran Hirschl & Ayelet Shachar, *Spatial Statism*, 17 INT’L J. OF CONS. L. 383 (2019).

4. Shachar, *Bordering Migration, Migrating Borders*, *supra* note 3.

5. For discussion and other examples of countries shifting borders inward (and creating “constitution-free” zones) see *id.* at 97, 104–108; Hirschl & Shachar, *Spatial Statism*, *supra* note 3, at 395–98.

6. Powell and Rich, *supra* note 2.

7. As discussed further, *infra*, in Subpart II.B, immigrant children in the United

Simultaneously, Trump “shifts” U.S. borders *outward* by stopping asylum seekers even before they arrive.⁸ In order to do so, the President uses tropes of Latino and Muslim masculinity in ways that are both raced and gendered—deploying images of “bad hombres”⁹ and “unknown Middle Eastern men”¹⁰—whom Trump unfairly stereotypes as threats, whether as criminals, gang members, rapists, or terrorists poised to spill over the Southern Border.¹¹ While commentators rightly note the racist assumptions underlying these stereotypes, few note the gendered dimensions of these tropes. For example, Trump’s invocation of rape as a gendered trope is no accident. He has cleverly manipulated stereotypes about the sexuality of Latin men as a means of dogwhistling to the anxieties of whites, given the long history of weaponizing these biased stereotypes, associating men of color with alleged crimes of sexual violence against white women in particular (from slavery to Emmett Till to the “Central Park Five” jogger case and beyond). After pitching the border wall as necessary to keep dangerous criminals and drugs from crossing over from Mexico, yet failing to secure congressional approval to sufficiently fund the wall,¹² Trump has been forced to

States have certain protections by virtue of the *Flores* Settlement Agreement, a court settlement that has been in place for over two decades and that sets limits on the length of time and conditions under which children can be incarcerated in immigration detention, regardless of whether they come accompanied or unaccompanied by an adult to the United States. See *The Flores Settlement and Family Incarceration: A Brief History and Next Steps*, HUMAN RTS. FIRST (Oct. 30, 2018), <https://www.humanrightsfirst.org/resource/flores-settlement-and-family-incarceration-brief-history-and-next-steps> [<https://perma.cc/DWH7-YNJH>].

8. For other examples of countries shifting borders outwards, see Shachar, *Bordering Migration, Migrating Borders*, *supra* note 3, at 96–97, 108–15; Hirschl & Shachar, *Spatial Statism*, *supra* note 3, at 398–404.

9. Lizzy Gurdus, *Trump: ‘We Have Some Bad Hombres and We’re Going to Get Them Out’*, CNBC (Oct. 19, 2016), <https://www.cnbc.com/2016/10/19/trump-we-have-some-bad-hombres-and-were-going-to-get-them-out.html> [<https://perma.cc/HN9L-T4M7>] (quoting Trump in the third and final presidential debate with Democratic candidate, Hillary Clinton).

10. Sam Wolfson, *Are Donald Trump’s Claims About the Caravan of 7,000 Migrants Accurate?*, THE GUARDIAN (Oct. 24, 2018), <https://www.theguardian.com/us-news/2018/oct/22/fact-check-trumps-claims-migrant-caravan> [<https://perma.cc/L9AY-T2XM>].

11. For further discussion, see *infra* the discussion in Subparts III.A–B.

12. When Congress only approved a fraction of the money Trump sought, and following a lengthy government shutdown based on the impasse over border wall funding, the President declared a national emergency along the Mexican border as a basis for unilaterally spending billions more for “unforeseen military requirements.” Adam Liptak, *Supreme Court Lets Trump Proceed on Border Wall*, N.Y. TIMES (July 26, 2019), <https://www.nytimes.com/2019/07/26/us/politics/supreme-court-border-wall-trump.html> [<https://perma.cc/FF3D-JAP7>]. Note that at the time of writing this Article, the legality of the President’s decision to unilaterally fund the wall is playing out in the courts, with the Supreme Court having stayed a lower court injunction against the Trump administration, handing the President

settle for a variety of other tactics to stop individuals before they even arrive at a U.S. border (as discussed more fully in Part III).

Even as new border walls continue to be erected, as Ayelet Shachar notes, “a new and striking phenomenon—the *shifting border*—has emerged.”¹³ As Shachar explains, “[t]he border itself has become a moving barrier, an unmoored legal construct” whereby “the fixed black lines we see in our world atlases do not always coincide with those comprehended in—indeed, created by—the words of law.”¹⁴ As discussed in Part I, *infra*, the notion of the border as a legal construct is not new. But, using the framework of the “shifting border” provides a helpful spotlight on “the surge of state-controlled *invisible* borders—borders that rely on sophisticated legal techniques to detach migration control functions from a fixed territorial location[.]”¹⁵

By applying an analysis to the crossroads of gender and race in the Age of Trump, this Article provides new insights for understanding mechanisms underlying the border as a legal construct—even as Trump manipulates gender and race as socially constructed borders. By providing a new way of comprehending the work of raced and gendered narratives in shifting borders, this Article uncovers how Trump’s uses of these tropes are not only deeply offensive, but also materially devastating for those seeking entry into the United States.¹⁶

Trump’s policies are the latest iteration of oft-used tropes—which characterize female (and male) immigrants of color as undesirable—and yet, the gendered dimensions of Trump’s policies are not well-understood. In tracing the migration of race/gender tropes from African American exclusion to Latino and Muslim immigrant exclusion, this

a temporary victory. *Trump v. Sierra Club*, 588 U.S. (2019), https://www.supremecourt.gov/opinions/18pdf/19a60_o75p.pdf [<https://perma.cc/MPL5-WRXG>].

13. Ayelet Shachar, *After the Berlin Wall: Shifting, Not Disappearing, Border 1* (unpublished Dec. 2018 draft paper on file with the author) [hereinafter Shachar, *Shifting, Not Disappearing, Border*].

14. *Id.* at 96. Elsewhere, Shachar notes, “This is so even as politicians frequently revert to images of a fixed legal spatiality when it comes to the rhetoric surrounding the exercise of sovereign authority, as in Donald Trump’s election promise to build an “impenetrable, physical, tall, powerful, beautiful . . . border wall.” *Id.* at 1, n.3.

15. Hirsch & Shachar, *Spatial Statism*, *supra* note 3, at 395.

16. See Adam Serwer, *The Cruelty is the Point*, *THE ATLANTIC* (Oct. 3, 2018), <https://www.theatlantic.com/ideas/archive/2018/10/the-cruelty-is-the-point/572104> [<https://perma.cc/TU9Z-FVWJ>] (noting “the Trump era is such a whirlwind of cruelty, that is can be hard to keep track”). There is an intimate connection between Trump’s “ritual rhetorical flagging of targets before his supporters” (often with mocking laughter concerning his glee toward exercising sheer power and sovereignty over the vulnerable) and the actual real world consequences of his policies, which restrict the life chances of the vulnerable (often fleeing violence and poverty). *Id.*

Article draws on what Jennifer Chacón refers to as “liminal legalities,” which “enable governmental actors to reassert and maintain control over populations identified as risky in ways that do not trigger the rights-protective schemes.”¹⁷ Shifting borders permit the government to create and take advantage of these liminal legalities. Trump’s racial tropes, which turn on narratives of worthiness and “law and order,” entrench this liminal legal status.¹⁸ This Article extends the notion of liminal legalities to the ways that gender intersects with race.

In so doing, this Article builds on the work of other scholars who have analyzed earlier uses of gender and race in restricting immigration and limiting the ability of certain categories of immigrant women to give birth in the United States. For example, as Kerry Abrams illustrates, the nation’s first restrictive federal immigration statute, the Page Law of 1875, targeted Chinese women immigrating to the United States and prevented the birth of their children in the country, thereby curbing the growth of a new generation of Chinese Americans.¹⁹

By examining how race and gender are woven together to produce this marginalized, liminal status in law—in the shadow of shifting borders—this Article seeks to address oversights in the literature. First, I demonstrate how an intersectional perspective can be a useful way of explaining the marginal status of both women and men of color in the current immigration context.²⁰ Here, I seek to provide a window into the recuperative project Trump is engaged in to “restore” the nation—and law—to the status quo ex ante of white male hegemony (“Mak[ing] America Great Again”). Second, by illustrating how these intersectional race/gender tropes have migrated from African Americans to Latinx and Muslim immigrants, the Article supports linkages for a politics that is at once feminist and transracial—bolstering the possibility for

17. Jennifer M. Chacón, *Producing Liminal Legalities*, 92 *DENV. U. L. REV.* 709, 709 (2015).

18. Christopher Lasch, *Sanctuary Cities and Dog Whistle Politics*, 42 *NEW ENG. J. CRIM. & CIV. CONFINEMENT* 159, 163 (2016) (tracing the “law and order” discourse back to President Richard Nixon); Powell & Van Buren, *supra* note 2 (discussing Ahmad’s examination of “worthiness”).

19. Abrams, *Polygamy, Prostitution, and the Federal Immigration Law*, *supra* note 1. While it is useful to consider how gender and race tropes may have migrated from the context of Asian immigrants to the current context involving Latinos, it is beyond the scope of this Article.

20. For important exploration of the role of gender and masculinity for men in other contexts, *cf.* *BLACK MEN ON RACE, GENDER, AND SEXUALITY: A CRITICAL READER* (Devon Carbado ed., 1999); *POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT* (Angela J. Davis ed., 2017).

solidarity across difference to build a more inclusive vision of nationhood and governance.

While neither Latinx nor Muslim identity are racial statuses *per se*, this Article explores Trump's deployment of these identities as "raced." Critical race scholars have noted how Latinx and Muslim identities (and identities of other immigrants of color) have been racialized to the extent social construction of these identities operates along similar lines as racial hierarchies of dominance and subordination.²¹ As discussed in further detail, *infra* (in Part III), Muslims have often been unfairly profiled based on race: identified as "terrorists" based on perceptions of physical markers of "Muslim-looking" identity (as opposed to actual religious affiliation), which has led to Sikhs, Hindus, and other non-Muslim men being suspected of terrorism.²² Further, as Chacón notes, Latinos who are noncitizens and citizens alike are profiled—including in the context of immigration enforcement—and can be "policed more heavily because they bear the visible markers of race or ethnicity that correlate to other forms of liminal legal status."²³

In order to create space for alternative national stories, it is necessary to destabilize illiberal constructions of nationhood and borders. As Jill Lepore points out, "A nation born in contradiction will forever fight over the meaning of its history."²⁴ Without coherent national stories, tribal and illiberal forces have sought to coopt what it means to be America. A thorough deconstruction of how race and gender enable law to construct new borders in ways that restrict rights and devastate lives is valuable to clear the way for transformative law reform.

Part I examines how even as the nationstate is in decline, other forms of power and regulation are on the rise. Trump has learned to manipulate the fluidity of borders as legal constructs to recast and reinforce a notion of nationhood based on a bygone era of white nationalism and patriarchy. Even if he does not get his border wall, he has learned how to secure his anti-immigrant agenda through legal, if not physical,

21. See, e.g., Chacón, *supra* note 17; Muneer I. Ahmad, *The Muslim as Terrorist*, Immigration Law Professors Conference, Drexel Kline School of Law (2018); Devon Carbadó, *Racial Naturalization*, 57 AM. Q. 633, 637 (2005), reprinted in LEGAL BORDERLANDS: LAW AND THE CONSTRUCTION OF AMERICAN BORDERS (Mary L. Dudziak & Leti Volpp eds., 2006).

22. See also Muneer Ahmad, *Homeland Insecurities: Racial Violence the Day After September 11*, 72 SOCIAL TEXT 101 (2002).

23. Chacón, *supra* note 17, at 753. See also Jennifer M. Chacón, *Citizenship Matters: Conceptualizing Belongings in an Era of Fragile Inclusions*, 52 U.C. DAVIS L. REV. 1, 64 (2018) ("[F]ormal citizenship does not protect people from discriminatory policing.").

24. Jill Lepore, *A New Americanism: Why a Nation Needs a National Story*, FOREIGN AFFAIRS, <https://www.foreignaffairs.com/articles/united-states/2019-02-05/new-americanism-nationalism-jill-lepore> [<https://perma.cc/W7ZW-R5UA>] (last updated Feb. 26, 2019).

barriers—using both race and gender to shift legal scripts. Part II turns to ways that Trump has used the “welfare fraudster” narrative to gain support for shifting borders “inward.” Part III analyzes Trump’s use of the tropes of “the criminal” and, relatedly, “the terrorist” to shift borders “outward.” The conclusion ends with thoughts on the possibilities for solidarity across race and gender boundaries to counter the ways border shifting is being used to deny rights.

I. NATIONHOOD, BORDERS, AND FLUIDITY

As Mary L. Dudziak and Leti Volpp note, beyond being territorial boundaries,²⁵ “[b]orders are constructed in law, not only through formal legal controls on entry and exit but also through the construction of rights of citizenship and noncitizenship, and the regulation or legitimation of American power in other parts of the world.”²⁶ More broadly, critical race, third world, feminist, and critical race feminist scholars have examined the notion of borders and nationhood not as inherent, but as socially constructed exercises of power.²⁷

This more nuanced perspective is important. While globalization led commentators to observe that the traditional nationstate and borders were in decline,²⁸ since 9/11, “the legal distinction between member and stranger is, if anything, back with renewed vengeance[.]”²⁹

25. LEGAL BORDERLANDS: LAW AND THE CONSTRUCTION OF AMERICAN BORDERS (Mary L. Dudziak & Leti Volpp eds., 2006).

26. *Id.* at 2.

27. For examples of critiques of sovereignty, nationhood, borders, and citizenship in critical race scholarship *see, e.g.*, E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509 (2019); ANTHONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (Cambridge Univ. Press 2005); Ariela J. Gross & Chantal Thomas, *The New Abolitionism, and the Memory of Slavery*, 35 L. & HIST. REV. 99 (2017). For an example of critical feminist scholarship criticizing sovereignty and nationhood, *see, e.g.*, Hillary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613, 644 (1991) (deconstructing the public/private dichotomy in international law, which views international law as a system of states). For an example of critical race feminist scholarship criticizing sovereignty and nationhood, *see, e.g.*, Vasuki Nesiha, *Decolonial CIL: TWAIL, Feminism, and an Insurgent Jurisprudence*, 112 AM. J. INT'L L. UNBOUND 313 (2018) (symposium on B.S. Chimni, *Customary International Law: A Third World Perspective*, 112 AM. J. INT'L L. 1 (2018)).

28. For an early observation of the decline of the nationstate, *see, e.g.*, Francis Fukuyama, *The End of History?*, 16 NAT'L INT. 3 (1989). The modern notion of the nationstate emerged from the Treaty of Westphalia, which ended religious wars by establishing secular rule over defined territory. As I have discussed elsewhere, many scholars have speculated that sovereignty is undergoing a significant rethinking in both constitutional law and international law. *See* Catherine Powell, *We the People: These United Divided States*, 40 CARDOZO L. REV. 2685, 2692–93 (2019).

29. Hirschl & Shachar, *Spatial Statism*, *supra* note 3, at 394 (citing Catherine Dauvergne, *Citizenship with a Vengeance*, 8 THEORETICAL INQUIRIES L. 498 (2007)).

At the same time, aspects of regulation—including immigration regulation—are becoming “*de-territorialized*.”³⁰ Far from undermining national power, this “freeing up sovereignty from a rigid and static ‘Westphalian’ understanding of fixed territoriality is a power transformation.”³¹ In fact, “relaxing the relationship between law and territoriality, and blurring the distinction between ‘inside’ and ‘outside,’ opens up a whole new purview for exercising power in the name of securing the integrity of the home territory and vigilantly protecting its membership boundaries.”³² From this perspective, we can view borders as “crucial sites from which the nation-state is narrated and constituted.”³³

This Article provides a detailed case study, with a particular focus on Trump’s use of race and gender to reinforce not only the physical border, but to construct “bureaucratic walls.”³⁴ Even as federal courts have enjoined various Trump immigration policies, “Trump officials bounce back by debuting new measures to diversify their enforcement efforts and put up new bureaucratic obstacles at the border even as others are knocked down.”³⁵ By running for president on a nativist “America First” platform to “Make America Great Again,”³⁶ Donald Trump ran an explicitly anti-immigrant campaign. Borrowing the notion of “shifting borders,”³⁷ we can see how Trump has used race and gender tropes to bolster legal claims that move the border inward in certain instances and outward in others. The following case studies demonstrate how Trump has sought to shift borders *inward*, by limiting legal protection for immigrants through his family separation policy, based on characterizing Latina women as irresponsible “welfare mothers.” Simultaneously, Trump has characterized men of color arriving at

30. Shachar, *Bordering Migration, Migrating Borders*, *supra* note 3, at 101.

31. Shachar, *Shifting, Not Disappearing, Border*, *supra* note 13, at 5.

32. Shachar, *Bordering Migration, Migrating Borders*, *supra* note 3, at 103.

33. Anthea Vogl, *Over the Borderline: A Critical Inquiry into the Geography of Territorial Excision and the Securitisation of the Australian Border*, 38 U. NEW S. WALES L.J. 114, 117 (2015).

34. *Trump Builds a Bureaucratic Wall to Keep out Migrants*, THE ECONOMIST (July 20, 2019), <https://www.economist.com/the-americas/2019/07/20/trump-builds-a-bureaucratic-wall-to-keep-out-migrants> [<https://perma.cc/DS62-7NRK>].

35. Nick Miroff, *Trump Officials Tighten Asylum Rules, Enlist Foreign Nations to Deter Migration*, WASH. POST (July 31, 2019, 8:42 AM), https://www.washingtonpost.com/immigration/to-deter-migrants-trump-administration-builds-elaborate-scaffolding-at-the-border-and-on-the-books/2019/07/31/6ce7eb2e-b2e9-11e9-951e-de024209545d_story.html?noredirect=on&utm_term=.01332739ce40&wpisrc=nl_most&wpm=1 [<https://perma.cc/QE43-84JP>].

36. Kelly J. Baker, *Make America White Again?*, THE ATLANTIC (Mar. 12, 2016), <https://www.theatlantic.com/politics/archive/2016/03/donald-trump-kkk/473190> [<https://perma.cc/U4X3-Q3XU>].

37. Hirschl & Shachar, *Spatial Statism*, *supra* note 3.

the Southern Border as criminals, gang members, rapists, and terrorists, as a way of shifting the borders *outward*, by stopping asylum seekers even before they cross into the United States.

II. THE “WELFARE CHEAT” NARRATIVE: USING THE RACE AND GENDER OF LATINA MOTHERS TO SHIFT BORDERS INWARD

This Part of the Article turns to ways that Trump deploys stereotypes at the intersection of race and gender to enlist the “welfare fraudster” trope as a vehicle to gain support to shift borders inward (undermining legal protections for immigrants within U.S. borders).³⁸ In Subpart II.A, I analyze the gendered and racially loaded ways in which Trump constructs Latina immigrants as irresponsible mothers—or what Camille Gear Rich and I have called “the new ‘welfare queen.’”³⁹ Subpart II.B then explores how Trump has used the welfare queen trope to shift the border inward through his family separation policy.

38. Beyond these tropes, Trump has framed the immigration debate in racial terms in other ways as well, which—while beyond the scope of this Article—include statements such as reportedly referring to African countries and Haiti as “shithole” countries and indicating, by contrast, a preference for visitors from Norway. “*Sh*thole Countries*” Respond to Trump’s Rhetoric, CBS NEWS (Jan. 12, 2018, 10:29 AM), <https://www.cbsnews.com/news/donald-trump-shithole-countries-response-from-haiti-africa-el-salvador> [perma.cc/YX5T-4D2V]. Additionally, the President recently tweeted that four members of the House of Representatives—all women of color—should “go back” to their home countries “and help fix the totally broken and crime infested places from which they came.” Donald J. Trump (@realDonaldTrump), TWITTER (July 14, 2019, 5:27 AM), <https://twitter.com/realDonaldTrump/status/1150381395078000643> [perma.cc/72WL-AJW2]. Only one of the four women—Minnesota Representative Ilhan Omar—was born abroad (in Somalia). In any event, all four women are American citizens. Julie Hirschfeld Davis, *House Condemns Trump’s Attack on Four Congresswomen as Racist*, N.Y. TIMES (July 16, 2019), <https://www.nytimes.com/2019/07/16/us/politics/trump-tweet-house-vote.html> [https://perma.cc/EMZ2-2CCL]. According to the U.S. Equal Employment Opportunity Commission, “examples of potentially unlawful conduct include insults, taunting, or ethnic epithets, such as making fun of a person’s foreign accent or comments like ‘Go back to where you came from,’ whether made by supervisors or co-workers[.]” Sanjana Karanth, *Federal Law Says “Go Back to Where You Came From” Counts as Discrimination*, HUFFPOST (July 17, 2019), https://www.huffpost.com/entry/federal-law-go-back-came-from-discrimination_n_5d2e815de4b085eda5a390c-c?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuaHVmZnBvc3QuY29tL2F1dGhvcic9zYW5qYW5hLWthcmFudGg_Z3VjY291bnRlcj0x&guce_referrer_sig=AQAAAGWs-dJTyl_PXVmR5dxbKiQHxYzPFRvCuu4e-hC24JONjIr1QNxjCA6q7wS19xgQWWvzH-kXDAY5dOPb2fDbfj__raS-Smk5utPvxunmmYxiMERxvp1JJ3CBzBZR09oDv8SdUCH-f6oM2cxkzjM2u7SQ81c_Mcs3OWhFa6Wy_G9I0cT [perma.cc/RH78-ZGSW]. See also U.S. EQUAL EMP. OPPORTUNITY COMM’N, IMMIGRANTS’ EMPLOYMENT RIGHTS UNDER FEDERAL ANTI-DISCRIMINATION LAWS, <https://www.eeoc.gov/eeoc/publications/immigrants-facts.cfm> [perma.cc/C7B5-RA48] (last visited Nov. 22, 2019).

39. Powell & Rich, *supra* note 2. This Part of the Article draws on that piece.

As Rich notes in her own earlier work, on a broader level, the “welfare queen” has a megatropé type of status.⁴⁰ She is able to colonize nearly any space and pathologize any figure that makes a claim for support or relief from the state in any form. Corporate bailout regimes create corporate welfare queens. Family farm owners are welfare queens. The unemployed run the risk of being labeled welfare queens, too. In a sense, this megatropé transcends left/right boundaries, and both sides now use the trope to cast people outside of the sphere of the deserving and the belonging—and outside of the boundaries of citizen and nation.⁴¹

A. The New Welfare Queen

While largely criticized for its racially coded nature, Trump’s policy of separating immigrant parents from their children opened a new avenue in his efforts to demonize immigrants using not only raced, but gendered tropes as well. As Rich and I have demonstrated, with his family separation policy,⁴² Trump has mixed sexist stereotypes into his efforts to restrict immigration. Going beyond stoking racial anxiety, Trump has tapped into the anxiety that ostensibly fertile brown mothers⁴³ are a drain on the welfare state. In sum, we concluded that Trump “has updated the ‘welfare queen’ trope that President Ronald Reagan used to disparage black women in the 1980s.”⁴⁴

Reagan told *the apocryphal story of Linda Taylor*, whom he described as a welfare fraudster who “used 80 names, 30 addresses, 15 telephone numbers to collect food stamps, Social Security, veterans’ benefits for four nonexistent deceased veteran husbands, as well as welfare, [whose] tax-free cash income alone has been running \$150,000 a year[.]”⁴⁵ While in the popular imagination, the “welfare queen” was thoroughly raced as a black woman, Linda Taylor’s racial identity was actually not entirely clear, and at least some official records *reflect* that she was, in fact, white (an ambiguity highlighting how racial constructs can be manipulated to achieve various personal and political goals).⁴⁶

40. Rich, *Reclaiming the Welfare Queen*, *supra* note 2, at 268–69.

41. *Id.* I am grateful to Professor Rich for conversations on this and acknowledge her work for the “welfare queen” framing, from which these ideas are drawn. See, e.g., *id.*

42. I discuss the family separation policy in greater detail in Part II.B, *infra*.

43. As discussed, *infra*, the image of black and brown women having many children became especially prominent during Ronald Reagan’s presidency.

44. Powell & Rich, *supra* note 2.

45. Josh Levin, *The Welfare Queen*, SLATE (Dec. 18, 2013), http://www.slate.com/articles/news_and_politics/history/2013/12/linda_taylor_welfare_queen_ronald_reagan_made_her_a_notorious_american_villain.html [perma.cc/2J9V-Y47V].

46. Gene Demby, *The Truth Behind the Lies of the Original “Welfare Queen”*, NPR (Dec. 13, 2013), <https://www.npr.org/sections/codeswitch/2013/12/20/255819681/>

Based on the Reagan-era stereotype, a common misconception is that “irresponsible” black women have an excessive number of children in order to extract steady welfare checks from the government. In effect, Trump tells us that “irresponsible” brown immigrant mothers play a similar game to gain a fast-track to U.S. citizenship. According to Trump, these women essentially smuggle their children to the Southern Border in an effort to jump the queue for citizenship. As discussed in Subpart II.B, legal protections safeguard immigrant children from lengthy immigration detention, and in the past, parents have been released from detention along with their children. From Trump’s view, however, “‘fairness’ demands that these would-be welfare cheats be separated from their children and duly prosecuted,⁴⁷ in effect, to punish these “irresponsible” mothers for smuggling their children into the United States.⁴⁸ Ideally, the entire family would be deported, rather than offer the family an unfair leg up along the path to U.S. citizenship. Yet the Trump administration cannot deport families once they have crossed the border without overstepping immigration legal requirements, which Trump has criticized as time-consuming and for allowing immigrants to melt into the U.S. population if the parents and children cannot be detained while awaiting the deportation determination.⁴⁹

As Rich and I discuss, similarities abound between the Reagan-era pathologizing of so called “welfare mothers” and immigrant mothers in the Trump narrative. On the campaign trail, Trump complained that Mexican women are strategically giving birth to “*anchor babies*” in the

the-truth-behind-the-lies-of-the-original-welfare-queen [perma.cc/RZZ8-BGKL].

47. Powell & Rich, *supra* note 2.

48. Trump’s view that Latina immigrant women are “irresponsible” is clearly demonstrated by his comments about Latina women coming to the United States to have “anchor babies,” to facilitate “chain migration,” or to “smuggle” their children into the United States (discussed *infra*). For a discussion of “anchor babies,” see *infra* note 50 and accompanying text. For a discussion of “chain migration,” see *infra*, notes 51–52 and accompanying text. For a discussion of immigrant parents “smuggling” children, see *infra* note 69 and accompanying text. Although Trump criticizes parents who flee violence (whether government-sponsored, gang-related, or domestic in nature) and come to the United States as seeking to game the system, such behavior may also be characterized as highly responsible and highly motivated parenting behavior. After all, what parent would not do whatever they could to protect their child from a life of violence and poverty?

49. Trump has repeatedly criticized what he calls the “‘catch and release’ of families from Central America and elsewhere,” and the administration would rather not release immigrant parents and children “while they waited for their cases to be heard.” Michael D. Shear & Zolan Kanno-Youngs, *Migrant Families Would Face Indefinite Detention Under New Trump Rule*, N.Y. TIMES (Aug. 22, 2019), https://www.nytimes.com/2019/08/21/us/politics/flores-migrant-family-detention.html?emc=edit_na_20190821&ref=cta&nl=breaking-news?campaign_id=60&instance_id=0&segment_id=16348&user_id=758db07a98a5a67a90badbc4501e9653®i_id=17436275ing-news [perma.cc/7UYG-F4BK].

United States, claiming that immigrant women from Mexico “move over here [to the United States] for a couple of days [and] they have the baby.”⁵⁰

Since becoming president, Trump has continued to use Reagan’s “welfare queen” trope, for example, in invoking “the problem” of “chain migration,” a phrase Trump uses to explain and criticize the process through which, supposedly, one immigrant can rapidly bring in “24 family members[.]”⁵¹ In fact, it usually takes years—and even decades—to bring a relative from abroad to the United States. In critiquing “chain migration,” Trump takes a page from Reagan’s playbook, with the claims that women are essentially rigging the system by getting a foot in the door and then bringing in multiple relatives. However, apparently Trump’s *own in-laws*—Melania Trump’s parents—became citizens through so-called chain migration.⁵²

Like Reagan, Trump uses the raced and gendered welfare trope to justify particular legal maneuvers and to appeal to and mobilize his base. Conveniently ignoring the fact that *unauthorized immigration from Mexico has dropped* since the 2007–2009 recession,⁵³ Trump refers to immigrants coming across the Southern Border as “*an infestation*,”⁵⁴ akin to the way black residents moving into predominantly white neighborhoods and schools have been perceived. For example, when black students integrated predominantly white schools in countless neighborhoods across the country, white parents and students countered with

50. Reena Flores, *Donald Trump: “Anchor Babies” Aren’t American citizens*, CBS NEWS (Aug. 19, 2015), <https://www.cbsnews.com/news/donald-trump-anchor-babies-arent-american-citizens> [perma.cc/4NGK-7ZA3]. See also Carly Haden Foster, *Anchor Babies and Welfare Queens: An Essay on Political Rhetoric, Gendered Racism, and Marginalization*, 5 WOMEN, GENDER, AND FAMILIES OF COLOR 50 (2017). While children over the age of 21 with citizenship can sponsor their parents through the immigration and naturalization process, the INA does not grant citizenship to those mothers who give birth to children in the United States while remaining in the United States unlawfully. See Immigration and Nationality Act, §§ 202, 212, 301, 8 U.S.C. §§ 1151 (b), 1192, 1401 (2018).

51. Nick Gillespie, *Lies About Chain Migration Are Donald Trump’s “Welfare Queen,” A Tale to Comfort the Base*, REASON (May 24, 2018), <https://reason.com/blog/2018/05/24/lies-about-chain-migration-are-donald-tr> [perma.cc/F44A-A3PX] (quoting Trump as calling “chain migration” a “disaster”).

52. Annie Correal & Emily Cochrane, *Melania Trump’s Parents Become U.S. Citizens, Using “Chain Migration” Trump Hates*, N.Y. TIMES (Aug. 9, 2018), <https://www.nytimes.com/2018/08/09/nyregion/melania-trumps-parents-become-us-citizens.html> [perma.cc/MYT7-RHSU].

53. Jie Zong et al., *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POL’Y INST. (Feb. 8, 2018), <https://wwwmigrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states-7> [perma.cc/C9Z9-MFK7].

54. Donald J. Trump (@realDonaldTrump), TWITTER (July 3, 2018, 3:49am), <https://twitter.com/realDonaldTrump/status/1014098721460686849> [perma.cc/9KFG-9XXA].

similarly strong hostility, spearheading an often-violent campaign of massive resistance.

The connection between Reagan's old welfare queen motif and Trump's new one is underscored by the Trump administration's rule to limit welfare benefits to even legal immigrants. The rule (which is going into effect as this Article goes to press) punishes legal immigrants for accepting Medicaid, food stamps, public housing, and other government benefits to which they are entitled—making it harder for these immigrants to apply for green cards and visas, based on the assumption that they are more likely to become “public charges.”⁵⁵ However, studies illustrate that immigrants are net-contributors of taxes. *The average immigrant pays up to \$259,000 more in taxes than she receives in government support.*⁵⁶

55. Ted Hesson, *Emails Show Stephen Miller Pressed Hard to Limit Green Cards*, POLITICO (Aug. 2, 2019), <https://www.politico.com/story/2019/08/02/stephen-miller-green-card-immigration-1630406> [perma.cc/GXR5-SPNR] (discussing new rule to allow Department of Homeland Security “to bar *legal* immigrants from obtaining green cards if they receive certain government benefits”) (emphasis added). At the time this Article went to press, the rule is going into effect, shortly after the U.S. Supreme Court stayed a nationwide injunction on the rule. Chantal Da Silva, *What the Trump Administration's New 'Public Charge' Rule Means for Immigrants*, Newsweek (Feb. 23, 2020), <https://www.newsweek.com/what-trump-administrations-new-public-charge-rule-will-mean-immigrants-u-s-1488630> [https://perma.cc/JSJ2-F6M8]; Susannah Luthi, *Supreme Court Allows Trump to Enforce 'Public Charge' Immigration Rule*, Politico (Jan. 27, 2020), <https://www.politico.com/news/2020/01/27/supreme-court-enforce-trump-immigration-rule-106520> [https://perma.cc/E3UX-6RSB]. See also *Dept of Homeland Security v. New York*, 589 U.S. __ (Jan. 27, 2020) (on application for stay); *Wolf v. Cook County Illinois*, 589 U.S. __ (Feb. 21, 2020) (same). The new rule—which is based on a provision of the Immigration and Nationality Act that renders inadmissible any noncitizen who “is likely at any time to become a public charge[.]” 8 U.S.C. § 1182(a)(4)(A)—essentially expands the category of noncitizens considered likely to become a public charge. *Wolf v. Cook County Illinois*, 589 U.S. __ p. 2 (slip op.) (J. Sotomayer, dissenting) (providing background on the rule change).

In fact, historically, immigration in the United States has been restricted by fears stoked by the “public charge” trope—whether in the context of the Chinese exclusion or efforts to limit non-Western European immigration to the United States in the nineteenth and twentieth centuries. See Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, *supra* note 1, at 676–77 (2005) (discussing federal and state laws aimed at “public charges” in the context of Chinese immigration to the West Coast); Julia G. Young, *Making America 1920 Again? Nativism and U.S. Immigration, Past and Present*, 5 J. ON MIGRATION & HUM. SEC. 217 (2017) (discussing the public charge trope and immigration from Southern and Eastern Europe in the twentieth century). See also *Yamataya v. Fisher*, 189 U.S. 86, 97 (1903) (upholding the amendments to the Immigration Act of 1882 which allowed for the exclusion of “paupers or persons likely to become a public charge”).

Even as it regards *citizens*, President Trump recently signed an executive order extending the welfare-to-work requirements of the 1990s by mandating that any recipient of food assistance, Medicaid, and low-income housing subsidies must join the work force or face the losing their benefits. Glenn Thrush, *Trump Signs Order to Require Recipients of Federal Aid Program to Work*, N.Y. TIMES (Apr. 10, 2018), <https://www.nytimes.com/2018/04/10/us/trump-work-requirements-assistance-programs.html> [perma.cc/RUZ9-S3C6].

56. Max Ehrenfreund, *Trump Touts Study That Says Immigrants Could Actually Save*

As Muneer Ahmad has pointed out, immigrants are caught in a “double bind.”⁵⁷ They are trapped between stereotypes: called lazy welfare cheats, while simultaneously accused of “taking our jobs.”⁵⁸ Citing the piece Rich and I coauthored, Ahmad explains that the “welfare queen” was such a successful trope in the Reagan years, that we could “sent her packing” with welfare reform under Bill Clinton. But now, Trump needs the “welfare queen” stereotype to do more work—both for immigrants and citizens alike.

B. Shifting the Border Inward: A New Way of Understanding the Family Separation Policy

By using these unfair stereotypes based on gender and race, Trump has sought to shift borders inward, undermining protections for families *within* the United States. In particular, the family separation policy exploits the legal fiction that distinguishes immigrants physically present from those legally present in the United States.⁵⁹ With this legal maneuver, being physically present in the United States is not the same as “being here.”⁶⁰ U.S. immigration law effectively creates a legal fiction distinguishing “admission” from “entry” such that an individual can be physically present in the country, but without authorization to be lawfully admitted. Where an individual has not been lawfully admitted, her status is that which it would have been had she been stopped at the border. Thus, the key criteria is not whether an individual has crossed the physical frontier of a territory, but whether she “has crossed [] through the law’s gates of admission, which, as the authorizing legislation proclaims, are *not* territorially fixed but rather designated by the executive branch of government.”⁶¹

Taxpayer Dollars, WASH. POST. (Mar. 1, 2017, 2:17pm) https://www.washingtonpost.com/news/wonk/wp/2017/03/01/trump-touts-study-that-says-immigrants-could-actually-save-taxpayer-dollars/?noredirect=on&utm_term=.f9c362f7653c [perma.cc/M98V-A3MB].

57. See Powell & Van Buren, *supra* note 2.

58. *Id.* (hyperlinking to *Trump: Immigrants are ‘Taking Your Jobs’*, WASH. POST (Mar. 6, 2014), https://www.washingtonpost.com/video/politics/trump-immigrants-are-taking-your-jobs/2014/03/06/6998bb82-a576-11e3-b865-38b254d92063_video.html?utm_term=.09ccd08a62d6 [perma.cc/BCV4-KFWU]).

59. As Shachar notes, “the shifting border distinguishes between physical entry into the country (which does not count for immigration purposes) and *lawful admission* through a recognized port-of-entry (which makes one’s presence in the territory permissible, and therefore visible, in the eyes of the regulatory state).” Shachar, *Bordering Migration, Migrating Borders*, *supra* note 3, at 107.

60. See generally Linda Bosniak, *Being Here: Ethical Territoriality and the Rights of Immigrants* 8 THEORETICAL INQUIRIES L. 389–410 (2007).

61. Shachar, *Bordering Migration, Migrating Borders*, *supra* note 3, at 108 (citing 8 U.S.C. § 1182(a)(6)(A)(i)).

Taking advantage of this distinction—and the fact that the border is effectively shifted inward for immigrants who are out of status—the Trump administration threatened to prosecute “irresponsible” immigrant mothers who bring their children over the Southern Border. However, immigrant children in the United States have certain protections by virtue of the *Flores* Settlement Agreement, a court settlement that has been in place for over two decades.⁶² The *Flores* Settlement sets limits on the length of time and conditions under which children can be incarcerated in immigration detention, regardless of whether they come accompanied or unaccompanied by an adult to the United States.⁶³ This settlement grew out of a 1985 class action lawsuit filed on behalf of detained immigrant children, challenging the former Immigration Naturalization Service (INS), based on procedures concerning the detention, treatment, and release of children.⁶⁴ After several years of litigation, the parties agreed upon on a 1997 settlement, including three basic requirements imposed on immigration authorities:

Releasing children without delay to, preferably, parents or, alternatively, other adult relatives (or licensed programs willing to take custody)

If suitable placement is not available, the government must place children in the “least restrictive” setting suitable for the age and any special needs of the children

Implement safeguards concerning the care and treatment of children in immigrant detention[.]⁶⁵

While President Barack Obama’s administration incarcerated thousands of families for over a year starting in 2015, two court orders required the government to scale back the practice, applying the *Flores* Settlement protections—beyond unaccompanied minors—to children accompanied by their parents.⁶⁶

The Trump administration has gone further, not only opposing the expansion of protections for immigrant children, but also diluting preexisting protections established in the *Flores* Settlement. In April 2018, then-Attorney General Jeff Sessions announced a new “zero-tolerance policy,” calling for “the criminal prosecution of all migrants who cross between ports of entry, including individuals seeking U.S. refugee protection and parents traveling with children.”⁶⁷ Even before this

62. For background, see, e.g., *A Brief History*, HUMAN RTS. FIRST, *supra* note 7.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Zero Tolerance Cruelty: Separating Families at our Southern Border*, HUMAN RTS.

new approach was formally announced, the Trump administration had begun to separate families. Children were classified as unaccompanied and sent to shelters without their parents and without a clear system in place for parents to track and eventually reunite with their children.⁶⁸

The Trump administration's goal was reportedly to deter mothers from bringing their children into the United States, equating these mothers with criminal smugglers.⁶⁹ Jeff Sessions warned, "If you smuggle illegal aliens across our border, then we will prosecute you. If you are smuggling a child, then we will prosecute you and that child will be separated from you as required by law."⁷⁰ On June 15, 2018, the DHS reported 1995 children were separated between April and May of 2018. The government later revealed that thousands more children had been separated than had previously been disclosed and acknowledged that the government had not effectively tracked to whom children had been released.⁷¹

Following significant criticism, on June 20, 2018, President Trump signed *Executive Order 13841*, restricting family separations.⁷² However, this Executive Order concurrently instructed the Justice Department to overturn the *Flores Agreement*.⁷³ *The President emphasized that the government was "keeping families together . . . [but the policy] continues to be a zero tolerance policy."*⁷⁴ That same month, a federal court in San Diego ordered the administration to reunify all separated families.⁷⁵ However, according to court documents recently filed, the

FIRST (June 1, 2018), <https://www.humanrightsfirst.org/resource/zero-tolerance-cruelty-separating-families-our-southern-border> [<https://perma.cc/8FV3-TTY7>].

68. Lisa Riordan Seville & Hannah Rappleye, *Trump Admin Ran 'Pilot Program' for Separating Migrant Families in 2017*, NBC NEWS (June 29, 2018, 1:30 AM), <https://www.nbcnews.com/storyline/immigration-border-crisis/trump-admin-ran-pilot-program-separating-migrant-families-2017-n887616> [<https://perma.cc/EMW3-8Y4E>].

69. Joshua Barajas, *How Trump's Family Separation Policy Became What it is Today*, PBS (June 14, 2018, 12:14 PM), <https://www.pbs.org/newshour/nation/how-trumps-family-separation-policy-has-become-what-it-is-today> [<https://perma.cc/26QY-6T3D>].

70. *Id.*

71. *Separated Children Placed in Office of Refugee Resettlement Care*, U.S. DEP'T OF HEALTH AND HUMAN SERVS., OFFICE OF THE INSPECTOR GENERAL, (2019), <https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf> [<https://perma.cc/3BLB-RZCJ>].

72. Exec. Order No. 13,841, 83 Fed. Reg. 29,435 (June 20, 2018), <https://www.whitehouse.gov/presidential-actions/affording-congress-opportunity-address-family-separation> [<https://perma.cc/R8JJ-RX2L>].

73. *Id.*

74. Meg Wagner, Veronica Rocha, Brian Ries, & Amanda Wills, *What's Happening at the U.S. Border*, CNN (June 22, 2018), https://edition.cnn.com/politics/live-news/immigration-border-children-separation/h_736e0a322bf643474f887e8077d1454b [<https://perma.cc/TLJ2-PN3X>].

75. Miriam Jordan, *No More Family Separations, Except These 900*, N.Y. TIMES (July 30, 2019), https://www.nytimes.com/2019/07/30/us/migrant-family-separations.html?campaign_id=60&instance_id=0&segment_id=15693&user_id=758db07a98a5a67a90badb-

Justice Department concedes that immigration authorities have removed at least 900 immigrant children from their families—in the year since the Trump administration officially ended the family separation policy—ostensibly for reasons as relatively trivial as a parent failing to change a diaper or traffic infraction, such as driving without a license.⁷⁶

By using race and gender tropes to dehumanize Latina mothers and their children, Trump laid the groundwork for the separation and detention of immigrant families who cross the Southern Border. While the family separation policy has formally ended (if not completely ended in practice), as this Article goes to press, the Trump administration has proposed a new rule to allow the indefinite detention of both parents and children—a move that would presumably require approval by the federal court in the *Flores* litigation, and that would reverse the *Flores* protections for children.⁷⁷ Today, it is hard to imagine similar treatment of immigrants from Europe.⁷⁸

III. THE “CRIMINAL” AND THE “TERRORIST” NARRATIVE: USING THE MASCULINITY AND “RACE” OF LATINO AND MUSLIM MEN TO SHIFT BORDERS OUTWARD

This Part of the Article examines ways that Trump deploys stereotypes at the intersection of race and gender to enlist the tropes of the “criminal” and the “terrorist” as a way of gaining support to shift borders outwards by stopping asylum-seekers and immigrants before they arrive at a U.S. territorial border. By painting Latino men as “criminals” and Muslim men as “terrorists,” Trump constructs images of masculinity that are both raced and gendered.

In Subpart III.A, I summarize accounts of ways Trump uses the trope of the “criminal” in referring to Latinos. Subpart III.B examines accounts of how Trump uses the trope of the “terrorist” in referring to

c4501e9653®i_id=17436275ing-news [https://perma.cc/T4HN-C5ZE].

76. *Id.* See also *Looking at Lasting Effects of Trump's Family Separation Policy at the Southern Border*, NPR, All Things Considered (Jan. 1, 2020), <https://www.npr.org/2020/01/01/792916538/looking-at-lasting-effects-of-trumps-family-separation-policy-at-the-southern-bo> [https://perma.cc/GKP4-EB6Q] (reporting “Although the Trump administration ended its policy of separating families at the border a year and a half ago—June of 2018—those separations continue. More than 1,100 migrant families have been separated since then [] according to the American Civil Liberties Union.”).

77. See Shear & Kanno-Youngs, *supra* note 49.

78. Note, however, that in an earlier period, white immigrants from particular countries were discriminated against. See generally NELL IRVIN PAINTER, *THE HISTORY OF WHITE PEOPLE* (2010) (discussing exclusion, stereotyping, and discrimination against Irish, Italians, Polish, and other white ethnic immigrant groups in ways that are reminiscent of today's exclusion, stereotyping, and discrimination against Latinos and Muslims).

Muslims. In summarizing prevailing accounts in these two Subparts—that focus on race—I add an analysis of how gender intersects with these racial tropes. The role of gender in stereotyping *men* as “dangerous” is largely missing from existing accounts. Subpart III.C examines how these race and gender tropes have helped Trump gain support to shift borders even further southward—in other words, outward—as a legal construct.

A. The Trope of Latino Men as “Criminals”

In this Subpart, I add a gender analysis into accounts of racial tropes Trump has used in characterizing Latino men. This builds off of the insights provided by such scholars as Chris Lasch, who discusses how Trump has used racial tropes to associate Latino immigrants with crime, including through the use of “dogwhistle politics,” the practice of embedding coded racial appeals in a political message in order to promote policies of continued racial subordination.⁷⁹ In particular, Lasch examines how dogwhistle politics framed the political and cultural narrative surrounding the death of Kathryn Steinle, a woman killed in San Francisco by an undocumented immigrant, Juan Francisco Lopez-Sanchez. Because Mr. Lopez-Sanchez had an extensive criminal record and was an undocumented immigrant who had been previously deported five times, his arrest ignited a fierce national debate over whether so-called “sanctuary cities” protected criminals. Lasch illustrates how the Trump administration and Fox News sought to use the Steinle murder to link sanctuary cities, such as San Francisco, with crime.⁸⁰

Calling Mr. Lopez-Sanchez a “Latino Willie Horton,” Lasch draws the comparison between Mr. Lopez-Sanchez and Willie Horton, an African American man infamously referred to in a George H.W. Bush 1988 presidential campaign ad attacking his opponent, then-Massachusetts Governor, Michael Dukakis, and stoking racial fears.⁸¹ Having previ-

79. Lasch, *supra* note 18, at 162 (quoting Ian Haney López, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* (2014)). As Leti Volpp explains, “A ‘dog whistle’ refers to coded signals that only certain constituencies understand (dogs can hear whistles at frequencies that humans cannot).” Volpp, *Protecting the Nation*, *supra* note 1, at 104, n. 18 (citing Ian Haney López, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* (2014)).

80. Lasch, *supra* note 18, at 165–72.

81. *Id.* at 180 (citing Paul Waldman, *The New Willie Horton?*, *WASH. POST* (July 8, 2015), <https://www.washingtonpost.com/blogs/plum-line/wp/2015/07/08/the-new-willie-horton> [perma.cc/P32D-Z9T3]). See also Peter Baker, *Bush Made Willie Horton an Issue in 1988, and the Racial Scars are Still Fresh*, *N.Y. TIMES* (Dec. 3, 2018), <https://www.nytimes.com/2018/12/03/us/politics/bush-willie-horton.html> [https://perma.cc/YH3G-887G].

ously been convicted of murder, Mr. Horton stabbed a man and raped his fiancée in a home invasion during a furlough from prison—a furlough policy that the Bush campaign ad implied represented Governor Dukakis’s approach to being “soft” on crime. Taking a page from this playbook, when he ran for president, Trump pointed to Lopez-Sanchez’s role in the Steinle murder as a basis for his claim that “we must secure our border immediately” and that “[n]obody else has the guts to even talk about it.”⁸² Lopez-Sanchez claimed the killing was an accident (that his gun misfired) and was ultimately found “not guilty” for murder.⁸³ Similar to black men, Latino men are also often unfairly associated with violent crime—and are feared—not only on the basis of stereotypes that link race and crime, but also based on stereotypes and societal expectations concerning masculinity, power, and violence. Masculinity can intersect with racialized assumptions in particularly toxic ways for men of color.⁸⁴

Throughout his run for the presidency, Trump stereotyped Mexican men in particular as criminals and gang members, using these racist tropes to appeal to his white working-class base and to gain support for his anti-immigration platform. Trump notoriously described Mexican immigrants as rapists and drug dealers, saying, “They’re bringing drugs. They’re bringing crime. They’re rapists.”⁸⁵

Trump’s reference to rape is hardly accidental. There is a long history of associating men of color with crimes of sexual violence against white women. This trope is both raced and gendered, as it constructs both white women as victim-survivors and men of color as, “predators.” The power of this trope dates at least as far back as Emmett Till and stereotypes of African American men and boys as sexually aggressive predators.⁸⁶ Against this backdrop, Trump implicitly stokes fears

82. Theodore Schleifer, *Trump: San Francisco Killing Shows Perils of Illegal Immigration*, CNN (July 8, 2015), <https://www.cnn.com/2015/07/03/politics/trump-san-francisco-killing> [https://perma.cc/2LXA-MNX2].

83. *Undocumented Immigrant Found not Guilty of Murdering Woman in San Francisco*, Fox 8 (Nov. 30, 2017), <https://fox8.com/news/undocumented-immigrant-found-not-guilty-of-murdering-woman-in-san-francisco> [https://perma.cc/6VPR-86XL].

84. Cf. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 20–57 (rev. ed. 2012) (discussing mass incarceration—largely of African American men).

85. *Donald Trump Transcript: ‘Our Country Needs a Truly Great Leader,’ WALL STREET J.: WASH. WIRE* (June 16, 2015, 11:29 AM), <https://blogs.wsj.com/washwire/2015/06/16/donald-trump-transcript-our-country-needs-a-truly-great-leader> [https://perma.cc/96U9-TX2M]; *Transcript: Donald Trump Presidential Campaign Announcement, C-SPAN*, (June 16, 2015), <https://www.c-span.org/video/?326473-1/donald-trump-presidential-campaign-announcement> [https://perma.cc/WA32-2P59].

86. The fourteen-year-old Emmett Till was notoriously lynched, after being accused

of violence against women. During a speech condemning the possible entry across the Southern Border of a “caravan” of asylum-seekers from Central America, Trump claimed that “women want security,” riffing on a nexus of concerns American women ostensibly have regarding physical security, economic security, and national security.⁸⁷

Further, with his focus on MS-13—a gang in the United States largely comprised of men from Central America—Trump has linked male violence and criminality to immigration.⁸⁸ In its efforts to eliminate both domestic violence and gang violence as grounds of asylum,⁸⁹ the Trump administration is loosely *conflating* immigrants who are *fleeing* gang and domestic violence in Central America with the MS-13 gang members who are *perpetrating* violence in the United States. In so doing, Trump conflated *survivors* and *perpetrators* of violence. This rhetorical sleight of hand is aimed at equating all immigrants from Latin America with criminals.

Similarly, Trump has repeatedly applied this trope of male violence to Central American men, whom he describes as “animals” and gang members who come to the United States to terrorize wholesome American neighborhoods.⁹⁰ These stereotypes of men of color as dangerous sexual

of flirting with a white woman. DeNeen L. Brown, *Emmett Till's Mother Opened his Casket and Sparked the Civil Rights Movement*, WASH. POST (July 12, 2018, 12:44 PM), https://www.washingtonpost.com/news/retropolis/wp/2018/07/12/emmett-tills-mother-opened-his-casket-and-sparked-the-civil-rights-movement/?utm_term=.705e1e7a7f7a [https://perma.cc/9MVP-KJYU].

87. Tim Harris, *Trump on Border Wall: Barbed Wire Used Properly Can Be a Beautiful Sight*, REALCLEAR POLITICS (Nov. 5, 2018), https://www.realclearpolitics.com/video/2018/11/05/trump_on_border_wall_barbed_wire_used_properly_can_be_a_beautiful_sight.html [perma.cc/8YGW-RMP9].

88. Donald J. Trump (@realDonaldTrump), TWITTER (June 19, 2018, 6:52 AM), <https://twitter.com/realDonaldTrump/status/1009071403918864385> [https://perma.cc/YAF6-Q8V4].

89. Catherine Powell & Maiya Moncino, *States are Challenging New Policy That Denies Asylum to Survivors of Domestic Violence*, JUST SECURITY (Oct. 16, 2018), <https://www.justsecurity.org/61082/states-challenging-policy-denies-asylum-victims-domestic-violence> [https://perma.cc/YH7R-RAAT]; Caroline Bettinger-López & Rachel Vogelstein, *Sessions' Draconian Asylum Decision*, FOREIGN AFFAIRS (June 15, 2018), <https://www.foreignaffairs.com/articles/united-states/2018-06-15/sessions-draconian-asylum-decision?cid=soc-tw> [https://perma.cc/XKK8-MW4Q]; Azam Ahmed, *Women are Fleeing Death at Home. The U.S. Wants to Keep Them Out*, N.Y. TIMES (Aug. 18, 2019), https://www.nytimes.com/2019/08/18/world/americas/guatemala-violence-women-asylum.html?nl=todaysheadlines&emc=edit_th_190819?campaign_id=2&instance_id=11592&segment_id=16279&user_id=758db07a98a5a67a90badbc4501e9653®i_id=174362750819 [https://perma.cc/GWL5-5LGH].

90. Julie Hirschfeld Davis & Niraj Chokshi, *Trump Defends 'Animals' Remark, Saying It Referred to MS-13 Gang Members*, N.Y. TIMES (May 17, 2018), <https://www.nytimes.com/2018/05/17/us/trump-animals-ms-13-gangs.html> [https://perma.cc/FRP3-7P8V].

Note also Trump's disregard for the rights of the Latinx community, in that he

predators or as “animals” turn on both race *and* gender, as they characterize these men as aggressive, hypermasculine, and even subhuman.

The trope of immigrant men as criminal was at the heart of Trump’s presidential campaign and has carried over to his presidential promise to build a wall on the Southern Border.⁹¹ In his second State of the Union address—following a government shutdown over funds for border wall construction—Trump pitched the wall as necessary to keep dangerous criminals and drugs from spilling over the Southern Border.⁹² Trump prominently introduced guests in the audience whose family member had been killed by immigrants.⁹³ While immigrants, like nonimmigrants, occasionally do commit crimes, immigrants are statistically *less* likely to commit crimes than their nonimmigrant counterparts.⁹⁴ It was thus particularly disingenuous for Trump to make it

granted a presidential pardon to Sheriff Joe Arpaio. Arpaio had been convicted for contempt of court, for repeatedly and knowingly disobeying a federal judge’s orders to cease policing tactics against Latinos that the judge ruled amount to systemic racial profiling. Arpaio claimed he was not targeting Latinos, but merely cracking-down on undocumented immigration. Merrit Kennedy, *In Racial Profiling Lawsuit, Ariz. Judge Rules Sheriff Arpaio In Contempt of Court*, NPR (May 14, 2016, 11:22 AM), <https://www.npr.org/sections/thetwo-way/2016/05/14/478050934/in-racial-profiling-lawsuit-ariz-judge-rules-sheriff-arpaio-in-contempt-of-court> [<https://perma.cc/MUU5-BWFQ>]; Colin Dwyer, *Ex-Sheriff Joe Arpaio Convicted of Criminal Contempt*, NPR (July 31, 2017, 4:08 PM), <https://www.npr.org/sections/thetwo-way/2017/07/31/540629884/ex-sheriff-joe-arpaio-convicted-of-criminal-contempt> [<https://perma.cc/RCX3-34E3>].

91. As discussed above, while running for president, Trump stereotyped Mexican men as criminals and gang members, notoriously describing Mexican immigrants as rapists and drug dealers. See note 81 and accompanying text. Since becoming president, Trump has grounded calls for the southern border wall on similar stereotypes—associating Mexican immigrants with criminals and gang members. See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (April 23, 2017, 11:42 AM), https://twitter.com/realDonaldTrump/status/856171332521820165?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E856171332521820165&ref_url=https%3A%2F%2Fwww.washingtonpost.com%2Fnews%2Fthe-fix%2Fwp%2F2017%2F04%2F24%2F4-reasons-trumps-border-wall-is-already-going-south-on-him%2F [<https://perma.cc/D69Y-K57Z>] (claiming, “The Democrats don’t want money from budget going to border wall despite the fact that it will stop drugs and very bad MS 13 gang members.”).

92. President Donald J. Trump, State of the Union Address (Feb. 6, 2019) (stating that “[t]ens of thousands of innocent Americans are killed by lethal drugs that cross our [southern] border and flood into our cities” and referring to immigrants who commit crimes in the United States).

93. *Id.* (introducing Debra Bissell, a woman whose parents were burglarized and shot to death “by an illegal alien”).

94. See, e.g., Michelangelo Landgrave & Alex Nowrasteh, *Incarcerated Immigrants in 2016: Their Numbers, Demographics, and Countries of Origin*, CATO INSTITUTE (June 4, 2018) <https://www.cato.org/publications/immigration-research-policy-brief/their-numbers-demographics-countries-origin> [<https://perma.cc/8A92-Z9XL>] (“The data show that all immigrants—legal and illegal—are less likely to be incarcerated than native-born Americans relative to their shares of the population.”); Tanvi Misra, *For the Last Time, Here’s the Real Link Between Immigration and Crime*, CITYLAB (Feb. 6, 2019) <https://www.citylab>.

appear as though immigration caused heightened crime rates. There is no evidence to support this, as the Cato Institute’s research demonstrates.⁹⁵ However, Trump’s repeated association between immigrants and crime (and gangs) is an unmistakable dogwhistle.⁹⁶

B. THE TROPE OF “THE MUSLIM” AND “THE TERRORIST”⁹⁷

In this Subpart, I add a gender analysis into accounts of racial tropes Trump has used in characterizing Muslim men, who have been unfairly associated with terrorism because of the ways their Muslim identity intersects with a perception of male violence. I focus on two instantiations of Trump’s use of gendered and raced constructs of Muslim men as dangerous in support of immigration restrictions: (1) the travel ban, and (2) the unsubstantiated claim that “unknown Middle Easterners” were mixing in with the “Migrant Caravan” marching north toward the U.S.–Mexico border in 2018.⁹⁸ I then conclude with

com/equity/2019/02/crime-immigration-city-migrants-refugees-state-of-the-union/582001 [https://perma.cc/NKK9-5KB6] (reviewing available data and concluding immigrants—both documented and undocumented—are less likely to engage in criminal behavior than native-born Americans).

95. See Christopher Ingraham, *Two Charts Demolish the Notion that Immigrants Here Illegally Commit More Crime*, WASH. POST (June 19, 2018), <https://www.washingtonpost.com/news/wonk/wp/2018/06/19/two-charts-demolish-the-notion-that-immigrants-here-illegally-commit-more-crime> [https://perma.cc/6G8B-YUUA] (providing data from the Cato Institute indicating that both legal immigrants and undocumented immigrants are much less likely to commit a crime than native-born residents and criticizing President Trump’s policies). See also Laura McGann & Stavros Agorakis, *The Desperate Demagogue*, VOX (Nov. 2, 2018, 2:10 PM), <https://www.vox.com/policy-and-politics/2018/11/2/18051420/trump-closing-argument-ugly-immigration-speech> [https://perma.cc/2877-FRGC] (noting the dangers of President Trump’s rhetoric with regards to immigration).

96. Another regulatory response—based on Trump’s association of immigration and crime—is the President’s support for merging the two through the crim-immigration regulatory framework. See, e.g., Annie Lai & Christopher N. Lasch, *Crimmigration Resistance and the Case of Sanctuary City Defunding*, 57 SANTA CLARA L. REV. 539, 546 (2018) (discussing the emergence of the crim-immigration framework within the evolution of sanctuary policies that have arisen, in some instances, to counter this framework). Because crim-immigration seeks to enlist the criminal law enforcement regime to support deportations, we might view it as another instantiation of how borders are shifted inward. While I have explored the crim-immigration regime elsewhere, it is beyond the scope of the current Article, as I would need to think more carefully of the role of race and gender in that regime. For my work on crim-immigration within the context of the sanctuary cities debate, see Powell, *supra* note 28. For a superb historical perspective on the rise of crim-immigration, see Christopher N. Lasch et al., *Understanding Sanctuary Cities*, 59 B. C. L. REV. 1703 (2018) (discussing the need to counter the ways the current era of mass incarceration is being used to facilitate a new era of mass deportation).

97. I am grateful to Muneer Ahmad, for the work he has done on how Muslims are unfairly associated with terrorism. For discussion of Ahmad’s work, see *infra* note 103.

98. See Wolfson, *supra*, note 10. See also Powell & Van Buren, *supra* note 2 (noting Ahmad’s discussion of Trump’s unsubstantiated claims of “unknown Middle Easterners”

a discussion of unfair racial profiling of Muslim men as being raced and gendered.

First, on the travel ban, Trump insinuated during his presidential campaign that visitors from predominantly Muslim countries are dangerous, pledging “a total and complete shutdown of Muslims entering the United States until our country’s representatives can figure out what the hell is going on.”⁹⁹ As discussed further in Subpart III.C, within days of taking office, Trump issued the first in a series of executive orders imposing a travel suspension for visitors exclusively from a handful of predominantly Muslim countries (which has now become a de facto indefinite ban)—in ways that were both over- and underinclusive of actual security threats.¹⁰⁰

A second way Trump has constructed Muslim men as raced and gendered is by baselessly claiming that “unknown Middle Easterners” were marching toward the U.S.–Mexico border in 2018 as part of the “Migrant Caravan” from Central and South America.¹⁰¹ In fact, after

mixing in with the “Migrant Caravan”).

99. Jenna Johnson, *Trump Calls for ‘Total and Complete Shutdown of Muslims Entering the United States’*, WASH. POST (Dec. 7, 2015, 7:43 PM), <https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states> [https://perma.cc/2JDV-LLHV]; Jessica Taylor, *Trump Calls for ‘Total and Complete Shutdown of Muslims Entering’ U.S.*, NPR (Dec. 7, 2015, 5:49 PM), <https://www.npr.org/2015/12/07/458836388/trump-calls-for-total-and-complete-shutdown-of-muslims-entering-u-s> [https://perma.cc/ZVS9-295B]. Once Trump took office and imposed the travel ban on several predominantly Muslim countries, Trump’s lawyer-advisor, Rudolph Giuliani, conceded that the intent behind the ban was to implement the “Muslim ban” upon which Trump had campaigned. See Rebecca Savransky, *Giuliani: Trump Asked Me How to do a Muslim Ban ‘Legally’*, THE HILL (Jan. 29, 2017, 8:48 AM), <https://thehill.com/homenews/administration/316726-giuliani-trump-asked-me-how-to-do-a-muslim-ban-legally> [perma.cc/7JBD-Z67Z].

100. See, e.g., Peter Margulies, *The Travel Ban Decision, Administrative Law, and Judicial Method: Taking Statutory Context Seriously*, 33 GEO. IMMIGR. L.J. 159, 180 (2019) (arguing that “[w]ith respect to the persons that the order covers, EO-3 is both over- and under-inclusive”); Pratheepan Gulasekaram, *An Annotated Guide to Donald Trump’s Revised Travel Ban*, THE GUARDIAN (Mar. 7, 2017), <https://www.theguardian.com/us-news/ng-interactive/2017/mar/07/trump-travel-ban-new-annotated-guide> [https://perma.cc/EAG4-LHSD] (discussing the “charge that the ban is both over-inclusive (it certainly bans many who are not national security concerns) and under-inclusive (it excludes entire countries which may be producing more people than the listed countries who are interested in harming US”).

101. Wolfson, *supra* note 10 (noting Trump’s efforts to make the caravan an issue in the lead-up to the 2018 midterm elections).

Of course, not all terrorists are men—and vice versa. However, masculinity plays a role in terrorist recruitment. See Catherine Powell & Rebecca Turkington, *Gender, Masculinities, and Counterterrorism*, COUNCIL ON FOREIGN RELATIONS, WOMEN AROUND THE WORLD (Jan. 23, 2019), <https://www.cfr.org/blog/gender-masculinities-and-counterterrorism> [https://perma.cc/9ZQV-XCXA] (summarizing highlights from a Council on Foreign Relations roundtable conversation, led by Catherine Powell and Fionnuala Ní Aoláin). As the UN Special Rapporteur on the Promotion and Protection of Human Rights While

making the claim, “Trump himself acknowledged that he had no evidence for the claim.”¹⁰² Muneer Ahmad explores ways in which “the Muslim” is conflated with “the terrorist”—in this and other contexts—and by which Muslim identity is racialized.¹⁰³ Patterns of profiling of Muslims reveal that Muslims are racialized, in that those identified as terrorists are perceived as such based on perceptions of physical markers of “Muslim-looking” identity (as opposed to actual religious affiliation).¹⁰⁴ Trump’s efforts to equate “the Muslim” with “the terrorist,” including in his vague reference to “unknown Middle Easterners,” is a form of fear-mongering that builds on stereotypes of Muslim men as dangerous.

Both of these examples—Trump’s travel ban and groundless claims about “unknown Middle Easterners” crossing the Southern Border—draw on a legacy of unfair racial profiling of Muslim men, which is raced and gendered. The unfair and discriminatory profiling of Middle Eastern men at airports in the aftermath of the September 11 terror attacks is well-documented, and mirrors the manner in which African Americans (especially black men) have been discriminatorily profiled.¹⁰⁵ As experts have noted, such racial profiling is a flawed law enforcement methodology, posing serious constitutional over- and underinclusivity challenges both inside and outside the context of immigration¹⁰⁶ (similar to the problems posed by the travel ban). Not only were Muslim men unfairly detained, actual terrorists who did not fit that description were not adequately monitored.¹⁰⁷ By focusing on Muslims

Countering Terrorism, Fionnuala Ní Aoláin, has observed, hegemonic masculinities play a role in producing and sustaining violence by terrorists and—I might add—by the state (given the underrepresentation of women in most national governments as well as in many national militaries, among other factors). *Id.*

102. Wolfson, *supra* note 10.

103. See, e.g., Muneer I. Ahmad, *Resisting Guantánamo: Rights at the Brink of Dehumanization*, 103 NW. L. REV. 1683 (2009); Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CALIF. L. REV. 1259 (2004); Ahmad, *supra* note 22. For Ahmad’s analysis of the role of Trump in eliding “the Muslim” and “the terrorist,” see Powell & Van Buren, *supra* note 2.

104. Ahmad, *supra* note 22.

105. See, e.g., David A. Harris, *Driving While Black and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544 (1997).

106. *Id.*; Stefano Bonino, *How Discrimination Against Muslims at Airports Actually Hurts the Fight Against Terrorism*, WASH. POST (Aug. 26, 2016, 5:41 AM), https://www.washingtonpost.com/news/monkey-cage/wp/2016/08/26/how-discrimination-against-muslims-at-airports-actually-hurts-the-fight-against-terrorism/?utm_term=.9a7f8f5f6018 [perma.cc/SJ4K-YUCZ].

107. Once terrorists realized that law enforcement was focused on Muslim men, in certain circumstances, western women—who are often presumed innocent—were recruited to be terrorists. See Katrin Bennhold, *Jihad and Girl Power: How ISIS Lured 3 London Girls*, N.Y. TIMES (Aug. 17, 2015), <https://www.nytimes.com/2015/08/18/world/europe/jihad-and-girl-power-how-isis-lured-3-london-teenagers.html?module=inline> [perma.cc/

through the travel ban and the “unknown Middle Easterners” rhetoric, Trump replicates this misplaced focus on race and gender.

Between the travel ban and comments on “unknown Middle Easterners,” the President inappropriately characterizes Muslim men as terroristic and dangerous. He need not even specifically focus on the gender of these mysterious “unknown Middle Easterners,” as it is understood that he is dogwhistling both the race and maleness of these “unknown” (and in reality, nonexistent) individuals.

Just as Trump’s focus on Latino men as criminals is analogous to the ways in which black men are stereotyped as criminals, aggressors, and sexual predators, so too did his references to the need for a “Muslim ban” and to “unknown Middle Easterners” invoke images of young, male, dangerous, Muslim terrorists. This trope appeals to cultural, racial, and gendered anxieties, based on memories of the September 11 attackers, who were all Muslim, Middle Eastern men, triggering years of profiling and detention of men who fit a similar profile.¹⁰⁸

C. Shifting the Border Outward (and Southward) for Asylum Seekers

By using unfair stereotypes—based on gender and race—concerning Latino and Muslim men, Trump has sought to shift borders outwards (and southward). As Shachar points out in her work on shifting borders, destination countries have occasionally developed methods to stop immigrants and refugees from arriving before they reach a territory.¹⁰⁹ The Trump administration has done so through two sets of policies I discuss in this Subpart: (1) rolling back protections for refugees (largely targeting those fleeing violence and poverty in Central America), and (2) the travel ban (targeting Muslim countries), as touched on briefly above.

With regard to rolling back protections for refugees, Trump has manufactured a crisis at the U.S.–Mexico border as a basis for shifting borders outwards. These strategies have included relocating initial asylum screening to Mexico, thereby forcing asylum-seekers to remain in Mexico while their legal claims for refuge in the United States proceed.¹¹⁰ Specifically pointing to the “danger” posed by “criminals” as

FT5R-P7B5] (noting that while “women are a strategic asset for the Islamic State, they are hardly ever considered in most aspects of Western counterterrorism”). Terrorist recruiters have recognized the gendered and raced assumptions of law enforcement, and recruited women precisely because of the relative invisibility of women terrorists to antiterrorism officials. *Id.*

108. See Ahmad, *supra* note 22.

109. Shachar, *Bordering Migration, Migrating Borders*, *supra* note 3, at 108–15.

110. U.S. DEP’T OF HOMELAND SEC., MEMORANDUM: POLICY GUIDANCE FOR

well as “misguided court decisions and outdated laws that have made it easier for illegal aliens to enter and remain in the United States,” former DHS Secretary Kirstjen Nielsen announced a pilot project to block asylum-seekers from entering the United States from Mexico.¹¹¹ More recently, the Trump administration has announced a requirement that refugees initially seek asylum in the first “safe third country” they cross on their journey to the United States.¹¹² Based largely on a raced and gendered narrative of ostensible Latino criminality, Trump’s “Remain in Mexico” and “safe third country” policies effectively shift borders outward (and southward).

IMPLEMENTATION OF THE MIGRANT PROTECTION PROTOCOLS (2019); see Elliot Spagat and Cedar Attanasio, *Tariff Deal Gives Momentum to ‘Remain in Mexico’ Policy*, ASSOCIATED PRESS (June 11, 2019), <https://apnews.com/e836471bc7f14eaba90fd09aa83b6cb8> [perma.cc/9KXZ-6MU8] (explaining the Remain-in-Mexico policy); Michael D. Shear and Maggie Haberman, *Mexico Agreed to Take Border Actions Months Before Trump Announced Tariff Deal*, N.Y. TIMES (June 8, 2019), <https://www.nytimes.com/2019/06/08/us/politics/trump-mexico-deal-tariffs.html> [perma.cc/PER7-JKYT], noting that:

Mr. Trump’s decision to use trade as a bludgeon against Mexico [to accelerate expansion of the Remain-in-Mexico policy] was driven in part by his obsession with stopping what he falsely calls an invasion of the country and in part by a desire to satisfy his core supporters, many of who have grown angry at his inability to build his promised border wall.

Id.

111. Glenn Thrush, *U.S. to Begin Blocking Asylum Seekers From Entering Over Mexican Border*, N.Y. TIMES (Jan. 24, 2019), <https://www.nytimes.com/2019/01/24/us/politics/migrants-blocked-asylum-trump.html?module=inline> [perma.cc/X769-FY2Y] (noting that while “using the San Ysidro border crossing near San Diego as the first location to turn back immigrants applying for refugee status[,]” the Administration had indicated that the policy would gradually be expanded to border crossings with heavy foot-traffic in Texas, New Mexico and Arizona). The “Remain in Mexico” policy “is likely to intensify pressure on the Mexican authorities” and “will force the Mexican government to create a system for processing, housing and protecting the asylum-seekers who would now congregate on their side of the border.” *Id.* Additionally, the policy was “intended to dissuade immigrants, mostly from Central America, from making the long and dangerous journey through Mexico to the southwestern United States border.” *Id.*

112. 8 C.F.R. § 208 (2019). The new rule regarding “safe” third countries has been controversial, as many of the countries that the Trump administrations deems safe (such as Guatemala) are not considered safe by many refugee experts, and has been challenged in federal court. Caitlin Dickerson, *Federal Appeals Court Blocks Trumps’ ‘Remain in Mexico’ Policy*, (Feb. 28, 2020), https://www.nytimes.com/2020/02/28/us/migrants-court-remain-in-mexico-mpp-injunction.html?emc=edit_na_20200228&ref=cta&nl=breaking-news&campaign_id=60&instance_id=0&segment_id=21729&user_id=758db07a98a5a67a90badbc4501e9653®i_id=17436275 [https://perma.cc/KM9Y-6AVW]; Miriam Jordan and Zolan Kanno-Youngs, *Trump’s Latest Attempt to Bar Asylum Seekers is Blocked After a Day of Dueling Rulings*, N.Y. TIMES (July 24, 2019), <https://www.nytimes.com/2019/07/24/us/asylum-ruling-tro.html> [perma.cc/8ECH-9T5J]; see also Michael D. Shear et al., *After Tariff Threat, Trump Says Guatemala Has Agreed to New Asylum Rules*, N.Y. TIMES (July 26, 2019), <https://www.nytimes.com/2019/07/26/world/americas/trump-guatemala-asylum.html> [perma.cc/WGF7-BCH6].

With respect to the Muslim travel ban, as discussed above¹¹³ and revisited here, the ban serves both to advance the trope of Muslim men as terrorists and to shift the border outward. Trump issued three presidential “travel ban” orders—each of which was aimed at banning Muslim travelers before they even arrived at U.S. borders—thereby pushing the border outward, in effect, to the port of embarkation of any of the banned countries. The initial iteration of the travel ban was hastily issued, with minimal interagency consultation and no credible rationale beyond the blatantly discriminatory rationale upon which Trump had campaigned to ban Muslims from the United States before their arrival.¹¹⁴ A second version of the travel ban, issued several weeks later, also singled out predominantly Muslim countries, aimed at stopping travelers before their arrival at U.S. borders; however, this second iteration of the travel ban incorporated an extensive analysis of presumed national security bases for excluding visitors from each country.¹¹⁵ The third version of the travel ban—which added in a couple of *non*-Muslim countries (and withdrew three predominantly Muslim nations)—was issued in September 2017¹¹⁶ and was ultimately upheld by the Supreme Court, on the grounds that banning travelers from this group of countries was ostensibly based on national security,¹¹⁷ in con-

113. See *supra* notes 100–01.

114. See Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (2017). As discussed *supra* notes 100–01, once Trump took office and imposed the travel ban on several predominantly Muslim countries, Trump’s lawyer-advisor, Rudolph Guiliani, conceded that the intent behind the ban was to implement the “Muslim ban” that Trump had campaigned on. See discussion *supra* note 100. Upon realizing the illegality of banning Muslims *per se*, Trump sanitized the Muslim ban, referring to it as—and replacing it with subsequent iterations of—an ostensibly race-neutral “travel suspension.” See discussion *infra* notes 116–20 and accompanying text. This “travel suspension” *de facto* became an indefinite ban. Muzaffar Chishti & Jessica Bolter, *The Travel Ban at Two: Rocky Implementation Settles into Deeper Impacts*, MIGRATION POL’Y INST. (Jan. 31, 2019), <https://www.migrationpolicy.org/article/travel-ban-two-rocky-implementation-settles-deeper-impacts> [https://perma.cc/JDL4-LCRY] (discussing ‘Travel Ban Policies Currently in Effect’ and ‘Possible Future Developments’).

115. See Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (2017). While the second travel ban continued a ninety-day ban on travelers, it removed Iraq; exempted permanent residents and current visa holders; and dropped preferential status to persecuted religious minorities (a provision that had been largely perceived as favoring Christian minorities in predominant Muslim countries). See Glenn Thrush, *Trump’s New Travel Ban Blocks Migrants from Six Countries, Sparing Iraq*, N.Y. TIMES (Mar. 6, 2017), <https://www.nytimes.com/2017/03/06/us/politics/travel-ban-muslim-trump.html?module=inline> [perma.cc/WSA5-J99R]. Additionally, travel ban 2.0 reversed an indefinite ban on refugees from Syria, substituting it with a 120-day freeze, requiring review and renewal. *Id.*

116. Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017) (amending Executive Order 13780 and adding North Korea and Venezuela to the list of banned countries).

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

trast to the anti-Muslim animus that seemed to underlie the initial travel ban (which lower courts had enjoined).¹¹⁸

Once the Supreme Court addressed the merits of the third iteration of the travel ban, Chief Justice Roberts' opinion distinguished *President* Trump's more subtly-coded rhetoric from the more overtly anti-Muslim rhetoric of *Candidate* Trump during the 2016 presidential campaign.¹¹⁹ In so doing, Roberts rebuffed Justice Sonia Sotomayor's dissent, in which she had argued for an Establishment Clause analysis that would have required the Court's more rigorous heightened scrutiny in reviewing the travel ban.

One implication of the shifting border is that the Court is more likely to analyze the president's immigration policies—even ones initially motivated by discriminatory animus—within the framework of national security concerns regarding borders. Using this national security frame, Roberts triggered the lower, more deferential standard of rational basis review, in contrast to the higher standard of review that would have been triggered had the Court given credence to the First Amendment (Establishment Clause) argument. This analysis would have led to a more rights-protecting constitutional jurisprudence. All three iterations of the travel ban effectively shifted the border outwards, based on Trump's original policy goal to ban Muslims before they even arrive at U.S. borders.

CONCLUSION:

POSSIBILITIES FOR SOLIDARITY ACROSS RACE AND GENDER BOUNDARIES

This Article spotlights the role of gender in the current immigration and refugee debate to illuminate that Trump's restrictive policies are not only raced, but also gendered. I have explored how even as

118. *But see* Vahid Niayesh, *Trump's Travel Ban Really was a Muslim Ban*, WASH. POST (Sept 26, 2019), <https://www.washingtonpost.com/politics/2019/09/26/trumps-muslim-ban-really-was-muslim-ban-thats-what-data-suggest> [<https://perma.cc/4BYD-NZ39>] (summarizing data demonstrating “the number of immigrant visas issued to citizens of the[] Muslim-majority countries [included in the travel ban] dropped sharply”—from 1,419 in October 2017 to 69 in January 2018—while the non-Muslim majority countries covered by the ban (North Korea and Venezuela) “did not experience a drop in visas issued—contradicting any notion that the travel ban wasn't a ‘Muslim ban’ because it included two non-Muslim countries”). *See also* Joseph Landau, *Process Scrutiny: Motivational Inquiry and Constitutional Rights*, 119 COLUM. L. REV. 2147 (2019) (commenting that while most commentators have framed “the travel ban litigation through the President's repeated expressions of hostility against the Muslim faith,” the courts have focused on whether or not the administration followed constitutionally mandated process for issuing executive orders). For an overview of the three iterations of the travel ban—and legal challenges—see, e.g., Adam Liptak, *Supreme Court to Consider Challenge to Trump's Latest Travel Ban*, N.Y. TIMES (Jan. 19, 2018), https://www.nytimes.com/2018/01/19/us/politics/supreme-court-trump-travel-ban.html?emc=edit_na_20180119&nl=breaking-news&nid=17436275&ref=cta [perma.cc/4GBD-C7LR].

119. *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

traditional notions of the nationstate are being eroded, other forms of power and regulation are on the rise. Trump has learned to manipulate the fluidity of borders, shifting them alternatively inward and outward to opportunistically suit his needs, based on stereotypes of motherhood and masculinity that are raced and gendered. As Shachar notes, “The sheer reach and magnitude of the shifting border [calls for] revisiting the age-old question of how to tame menacing governmental authority.”¹²⁰

By examining how Trump has used the narratives of, on the one hand, the “welfare cheat” to shift borders inward and, on the other hand, “the criminal” (and, relatedly, “the terrorist”) to shift borders outward, this Article sheds new light on how the intersection of race and gender is being used to recreate borders not only in the physical sense, but legal constructs. Even as Trump cynically uses race and gender to shift legal scripts, resistance to these policies—by lawyers, activists, immigrants, and the media—has sparked solidarity across race and gender boundaries. For instance, African American groups have strongly criticized the anti-Latinx orientation of the family separation policy.¹²¹ Similarly, women’s rights activists have linked arms with immigrants’ rights lawyers to challenge family separation and Trump’s efforts to eliminate domestic violence as a grounds of asylum.¹²² If there is a silver lining in these restrictive policies, it is the crosscutting ways in which Trump’s reliance on both race and gender stereotypes has laid a foundation for feminist, crossracial solidarity that can counter the demonizing of immigrants and refugees, as well as the accompanying legal restrictions that have grave consequences for so many.¹²³

120. Shachar, *Bordering Migration, Migrating Borders*, *supra* note 3, at 133.

121. The tweeter feed of Sherrilyn Ifill, President of the NAACP Legal Defense and Educational Fund, reflects this strong crossracial solidarity. *See, e.g.*, Sherrilyn Ifill (@Sifill_LDF), TWITTER (July 27, 2019, 7:23 AM), https://twitter.com/Sifill_LDF/status/1155121552364572673 [perma.cc/FYA4-YNUJ] (regarding Mary Papenfuss, *Immigration Officials Snatch 9-Year-Old U.S. Citizen Heading to School, Hold Her for 2 Days*, HUFFINGTON POST (Mar. 24, 2019), https://www.huffpost.com/entry/julia-isabel-amparomedina-immigration-border_n_5c96aa60e4b0a6329e177fbb?fbclid=IwAR3VN5DUGf-CiOlXALxFvscS7Dg6z-h_bd_aPNyWa4hjRrknBea8DTd-yc [https://perma.cc/ECK3-HGRY]) (lamenting, “When is it enough?” in retweeting a story in Huffington Post concerning a child separated from her family, despite being a U.S. citizen, because she was overheard speaking Spanish and therefore assumed to be an unauthorized immigrant).

122. *See* Catherine Powell, *Bringing a Gender Lens to the Immigration Debate*, COUNCIL ON FOREIGN RELATIONS, WOMEN AROUND THE WORLD (June 24, 2019), <https://www.cfr.org/blog/bringing-gender-lens-immigration-debate> [perma.cc/7JA4-7EFN] (discussing collaborative work between the ACLU’s Immigrants’ Rights Project and Women’s Rights Project).

123. In this way, my conclusions echo the work of my colleagues, Jennifer Gordon & Robin Lenhardt, *Rethinking Work and Citizenship*, 55 UCLA L. REV. 1161, 1236 (2008) (highlighting important similarities and convergences in the paths to the workplace taken by African American and Latino immigrant workers and pointing to unique opportunities for increased solidarity between these groups).