

IMMIGRATION LAW AND THE PRODUCTION OF “CRISIS”

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INTRODUCTION

As long as there has been immigration law, immigration has been in “crisis.”¹ When states and localities controlled immigration—before the national government took over after the Civil War—the “crisis” was the influx of poor Irish immigrants, like President Joe Biden’s ancestors.² When those Irish, fleeing famine, arrived in Boston harbor after their long Atlantic journey in tiny coffin ships—and after forty days of quarantine—they looked terrible: hungry, dirty, weak, and desperately poor.³ On top of it all, they were Catholic.⁴ Between their desperate

1. I place crisis in quotation marks here and elsewhere in the paper to emphasize its constructed nature. Where I argue that a claimed “crisis” is an actual crisis, I leave the marks off. See Douglas S. Massey & Karen A. Pren, *Unintended Consequences of US Immigration Policy: Explaining the Post-1965 Surge from Latin America*, 38 *POPULATION & DEV. REV.* 1, 2, 8–9, 24 (highlighting the paradoxical nature of American immigration policy, in that it has largely responded to “prevailing economic circumstances and political ideologies” rather than “explicitly to shifts in immigration”); Andrew M. Baxter & Alex Nowrasteh, *A Brief History of U.S. Immigration Policy from the Colonial Period to the Present Day*, CATO INST. (Aug. 3, 2021), <https://www.cato.org/policy-analysis/brief-history-us-immigration-policy-colonial-period-present-day> (summarizing the “radical swings in immigration policy” from the colonial period up to today).

2. See generally HIDETAKA HIROTA, *EXPELLING THE POOR: ATLANTIC SEABOARD STATES AND THE NINETEENTH-CENTURY ORIGINS OF AMERICAN IMMIGRATION POLICY* 41–42, 48, 50, 53–60, 63, 66, 68–69 (Oxford Univ. Press 2017) (discussing the extensive development of state and local immigration policy in response to nineteenth-century Irish immigration and subsequent anti-Irish nativism among Americans); see Ronan McGreevy, *From the Famine Ship to the White House—Joe Biden’s Irish Ancestry*, THE IRISH TIMES (Apr. 8, 2023), <https://www.irishtimes.com/ireland/2023/04/08/from-the-famine-ship-to-the-white-house-joe-bidens-irish-ancestry/>.

3. HIROTA, *supra* note 2 at 36 (“The perceived and actual destitution of [Irish] migrants appalled Americans. Irish migrants in reality included those who could support themselves, but their level of self-sufficiency mattered little when they first arrived. Their visual appearance [as destitute . . . triggered] . . . a practice of restricting the landing of foreigners who seemed likely to become public charges in America. Under this arrangement, the admission of migrants depended less on their realistic ability to support themselves than on the way they *appeared* to inspecting officers.”)(emphasis added); see also Mark Holan, *Ireland’s Famine Children “Born at Sea”*, 49 *PROLOGUE*, Winter 2017–18, <https://www.archives.gov/publications/prologue/2017/winter/irish-births>.

4. See HIROTA, *supra* note 2 at 41–42 (“[T]he . . . influx of the famine-stricken Catholic Irish in the 1840s [] infuriated Protestant Anglo Americans, provoking an anti-Catholic and anti-Irish nativist movement. Many native-born Americans regarded the Irish as culturally inferior and felt that their Catholic faith was incompatible with republican principles. . . . [N]ativists called for banning the landing of destitute immigrants and deporting those already in the nation back to Europe.”).

appearance and purported fealty to the Pope in Rome, Boston Brahmins declared a "crisis" and started deporting people summarily.⁵ The Irish were not "sending their best," the Bostonians thought, much like former President Trump said of refugees from Central and South America.⁶

Then there was the "crisis" that birthed national immigration law as we know it. In the late nineteenth century, Chinese immigrants landed on the West Coast.⁷ These migrants were invited and worked legally under labor contracts, which provoked a new, more head-scratching "crisis." The Chinese "worked too hard;"⁸ they did "terrible," destabilizing things like subsisting on cheaper meat than red-blooded, white American men.⁹ They did not usually have families to support—their ways and manners struck everyone who mattered in politics as unchangeably odd.¹⁰ The "crisis" got so bad in the eyes of the "white ethnics,"¹¹

5. *Id.*

6. *See id.*; Michelle Ye Hee Lee, *Donald Trump's false comments connecting Mexican immigrants and crime*, WASH. POST (July 8, 2015), <https://www.washingtonpost.com/news/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime/> (quoting Donald J. Trump: "When Mexico sends its people, they're not sending their best. They're not sending you. They're not sending you. They're sending people that have lots of problems, and they're bringing those problems with us. They're bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people.").

7. *See* BETH LEW-WILLIAMS, *THE CHINESE MUST GO: VIOLENCE, EXCLUSION AND THE MAKING OF THE ALIEN IN AMERICA*, 3 (Harvard Univ. Press, 1st ed. 2018).

8. *Id.* at 6 ("Assumed to be permanently loyal to China, the Chinese appeared racially incapable of becoming American. While white citizens worried that Native Americans and African Americans would contaminate the nation, they feared the Chinese might conquer it. One anti-Chinese leader in Tacoma[,] [Washington] for example openly worried that if "millions of industrious hard-working sons and daughters of Confucius" were "given an equal chance with our people," they "would outdo them in the struggle for life and gain possession of the Pacific coast of America.").

9. *Id.* at 32 ("The Chinese . . . demonstrated an uncanny ability to survive without consumption . . . according to prevailing stereotypes, [Chinese migrants] did not eat red meat, buy books or nice clothes, engage in leisure, or provide for women and children.").

10. *Id.* at 33 ("[W]hereas most Americans assumed that European migrants would permanently settle in America, learn its ways, and become its citizens, they believed Chinese migrants could never be folded into the nation. Not only did the Chinese heathen worship idolatrous gods, eat rats, and tell lies under oath, but white Americans feared that these pagan beliefs, uncivilized ways, and immoral conduct could never be reformed.").

11. *Id.* at 33–34 ("Whereas East Coast Americans portrayed Irish and Eastern Europeans as probationary members of the white race, West Coast settlers saw more

threatened by the Chinese presence, that these whites drove the Chinese out of their local communities on the West Coast;¹² and they lynched some of them too.¹³ These mob-led community expulsions in the American West often had the explicit or tacit support of local, state, and even national authorities.¹⁴

To stop the "crisis" of the Chinese and the local reaction to them, Congress rewarded the vigilantes, barring Chinese nationals from immigrating because of their race and barring those already here from naturalizing because of their race.¹⁵ The Supreme Court signed off on the whole matter, saying that the Constitution did nothing to prohibit a blanket race-based prohibition on immigrant entry despite the adoption of the Reconstruction Amendments to the Constitution, which might have easily been interpreted to forbid race-based exclusions.¹⁶

potential for assimilation in European migrants. . . By rallying around the anti-Chinese cause in the U.S. West, white ethnics could downplay their own cultural diversity and seize a rare opportunity for racial upward mobility.").

12. *Id.* at 1 ("Three hundred Chinese migrants trudged down the center of the street . . . they were led, followed, and surrounded by dozens of white men armed with clubs, pistols, and rifles . . . One of the Chinese, Tak Nam, tried to protest, but later he remembered the mob answering in a single voice: 'All the Chinese, you must go. Everyone.' The date was November 3, 1885, and the place was Tacoma, Washington territory . . . In 1885 and 1886, at least 168 communities across the U.S. West drove out their Chinese residents.").

13. LEW-WILLIAMS, *supra* note 7, at 4 (describing lynchings of Chinese migrants as rare but depicting a lynching of a Chinese migrant in a photograph from 1887).

14. *Id.* at 54-55 ("Local authorities, immersed in local politics and operating on a local scale, showed singular investment in ending Chinese migration . . . local officers . . . developed a homegrown system of identifying, apprehending, and deporting Chinese migrants without trial. These local arms of the federal government . . . sought to close the border [to Chinese] by blurring the distinction between public and private enforcement.").

15. *Id.* at 7 ("Though the vigilantes set their sights on ridding themselves of Chinese neighbors, the expulsions were not simply local means directed toward local ends. Anti-Chinese violence . . . was a form of political action . . . what could be termed 'violent racial politics.' By directing racial violence against local targets, vigilantes asserted a national political agenda.").

16. *See* *Chae Chan Ping v. United States*, 130 U.S. 581, 595-96 (1889). (upholding the Chinese Exclusion Act as a constitutional exercise of Congress's plenary authority over immigration on a blatantly racist basis: "In December, 1878, the convention which framed the present Constitution of California, being in session, took this subject up and memorialized Congress upon it, setting forth in substance that the presence of Chinese laborers had a baneful effect upon the material interests of the state, and upon public morals; that their immigration was in numbers approaching the character of an Oriental invasion, and was a menace to our civilization; that the discontent from this cause was not

This episode birthed modern, consolidated national control of immigration law—the basic structure that we live with today.¹⁷

The next "crisis" was in the 1910s to 1920s.¹⁸ Now the trouble was so-called "white ethnics" and Jews.¹⁹ These were largely the same "white ethnics"—Poles, Slavs, Italians, Greeks—that were earlier rewarded for driving the Chinese out of California.²⁰ The nub of the difficulty was said to be that these "white ethnics" and Jews just were not very bright.²¹ "Definitive" studies from prominent researchers at prestigious universities purported to show that the Italians, Greeks, and Jews intrinsically had low IQs.²² There was nothing to be done, and it was just the way God

confined to any political party, or to any class or nationality, but was well nigh universal; that they retained the habits and customs of their own country, and in fact constituted a Chinese settlement within the state, without any interest in our country or its institutions, and praying Congress to take measures to prevent their further immigration.").

17. See MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA*, (Princeton Univ. Press, 2004).

18. *Immigrants in the Progressive Era*, LIBR. CONG., <https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/progressive-era-to-new-era-1900-1929/immigrants-in-progressive-era/> (last visited Sept. 21, 2023); PEW RSCH. CRT., *MODERN IMMIGRATION WAVE BRINGS 59 MILLION TO U.S., DRIVING POPULATION GROWTH & CHANGE THROUGH 2065: VIEWS OF IMMIGRATION'S IMPACT ON U.S. SOCIETY MIXED 18–20* (2015).

19. See John R. Logan & WeiWei Zhang, *White Ethnic Residential Segregation in Historical Perspective: US Cities in 1880*, 41 SOC. SCI. RSCH. 1292 (2012) (noting that "second wave" immigrants arrived in the United States from 1890–1920); see also Fredo Arias-King, *Politics By Other Means: The "Why" of Immigration to the United States*, CTR. FOR IMMIGR. STUD. 1, 6 (Dec. 2003), <https://cis.org/sites/cis.org/files/articles/2003/back1703.pdf> (indicating that "second wave" immigrants, such as Italians, Jews, Poles, and Irish, were considered "white ethnics").

20. See generally Arias-King, *supra* note 19; see also LEW-WILLIAMS, *supra* note 7, at 21, 34, 40 (2018) (indicating that "white ethnics" were rewarded with "a rare opportunity for upward racial mobility" by "rallying behind the anti-Chinese cause in the U.S. West," including California).

21. See Andrew S. Winston, *Scientific Racism and North American Psychology*, OXFORD RSCH. ENCYCS. 1, 3, 6 (May 29, 2020), <https://doi.org/10.1093/acrefore/9780190236557.013.516> (discussing the scientific racism that purported to show the inferior intelligence of non-Nordic white immigrants and the role of intelligence tests in legitimating the restriction of immigration of those same groups in the 1920s Quota Acts).

22. See *id.*; see also Kimball Young, *Intelligence Tests of Certain Immigrant Groups*, 15 THE SCI. MONTHLY 417, 422 (Nov. 1922).

made them, the academics claimed.²³ At stake in these “scientific” claims about immigrants’ mental capacity was nothing less than the “fitness” of the nation as a whole, or so urged the social Darwinists’ ascendent during this period.²⁴ Nativists, with the backing of scientific authority, urged that if we kept admitting members of these ethnic groups “proven” to be dim bulbs, then our population would become progressively less bright.²⁵ Perhaps we could tolerate a handful of them, but there were just so many of them coming in—it had to stop.²⁶ And so it did.²⁷ Congress passed the Quota Acts which allocated visas based on the national origins of the population at the founding.²⁸ The idea was that we could make “America Great Again” if we just increased

23. See generally Winston, *supra* note 21, at 6 (noting that IQ studies claimed to link “feeble-mindedness” with hereditary traits rather than immigrant culture or educational opportunities).

24. See *id.* at 15, 16 (highlighting that some believed there were “racial differences in crime and intelligence” that impacted the “biological basis for nationalism and ethnocentrism”).

25. *Id.* at 5–7, 13.

26. *Id.* at 6–7 (Brigham further asserted “that the intelligence of American immigrants was declining due to both great influx of inferior races and poorer representatives of those races. Interbreeding would produce a lowering of the higher race, as predicted by Madison Grant. Immigration needed to be both ‘restrictive and highly selective’ . . . Brigham’s work was well known to Congressman Albert Johnson, the author of the 1924 Act, a close friend of Madison Grant and president of the Eugenics Research Association in 1923. The testimony that helped secure passage of the Act came primarily from eugenicist Harry Laughlin, who, during several presentations to the House Immigration Committee, presented extensive data on diseases, degenerative conditions, and the physical and mental inferiority of recent immigrants. As described by Gelb, Allen, Futterman, and Mehler (1986), Laughlin presented six pages of testimony on the hereditary mental ability of immigrants as revealed through the army tests. An exhibit on the inheritance of mental, moral, and physical traits from the Second International Congress of Eugenics was displayed in the Capital Building for three years. Terman (1924) declared that, through mental testing, psychology ‘has become the beacon light of the eugenics movement’ and ‘is appealed to by congressmen in the reshaping of national policy on immigration.’”).

27. MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 21–22 (Princeton Univ. Press 2004) (describing how national origins quotas were designed to increase numbers of immigrants from “native stock” European countries in the founding eras and decrease immigration of Southern and Eastern Europeans and Jews).

28. See *id.*

immigration from that original *Northern* European stock: English, Scotch, German, Scandinavian.²⁹

As European sources of labor declined in the wake of migration restrictions from Europe, the industry became more dependent on African American labor from the South, as well as labor from Mexico.³⁰ The movement of Mexican nationals remained technically unrestricted, even after the passage of the Quota Acts. U.S. industry and agriculture wanted Mexican labor, but society racialized Mexicans negatively, as they had the Chinese, leading to socially and legally subordinate treatment.³¹ Most shamefully, long-resident Mexican workers—including many U.S. Citizens—were deported en masse when their labor was no longer needed.³² Whatever the predations and prejudices meted out to European immigrants, Europeans, including Jews, who were present on American soil were largely treated by the government as Americans in training—or, “Americans in waiting” as one prominent scholar puts it.³³ Mexican immigrants and citizens never enjoyed this dispensation.³⁴

By now I hope I have painted the picture adequately: the country Americans cherish today is not made up solely or even predominantly of White Anglo-Saxon Protestants of the “old

29. *Id.* at 21–22, 27.

30. See ARISTIDE R. ZOLBERG, *NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA* 241 (2006).

31. *Id.* (providing examples of how Mexicans were poorly viewed and treated in society as a result of assumptions about their lifestyle).

32. See NGAI, *supra* note 27, at 70, 72, 74 (“ . . . local authorities throughout the Southwest and Midwest repatriated over 400,000 Mexicans during the early 1930s . . . Thus the county welfare bureaus organized and sent trainloads of Mexicans to the border, where the Mexican government received them. An estimated 60 percent were children or American citizens by native birth; a contemporary observed that the “vast majority” spoke English and that many had been in the United States for at least ten years . . . Nearly 20 percent of the Mexican population in the United States returned to Mexico during the early years of the Depression. The repatriation of Mexicans was a racial expulsion program exceeded in scale only by the Native American Indian removals of the nineteenth century.”).

33. See generally HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP* (2007) (using the phrase “Americans in waiting” consistently to refer to immigrants waiting for naturalization).

34. See LEW-WILLIAMS, *supra* note 7, at 33 (“Mexicans . . . continued to be treated as racially ambiguous.”).

American stock.” Instead, today, our population, our power,³⁵ and glory is a motley crew of yesterday’s “riff-raff” that was excluded, lynched, driven out, and made disposable—a process that sadly continues.³⁶ Yet the arrival of these people back then and today—from less favored European countries, Asia, and Latin America—was always met with cries of “crisis.”³⁷ Was immigration ever a real crisis? Why did it seem like a crisis at the time?

My answer is that immigration is rarely an actual, long-term, or even medium-term, material “crisis”—an actual real threat to the values of this country, our way of life, or our economy. I want to suggest that immigration law itself creates the specter of a “crisis” that haunts immigration politics, not the other way around: the immigration “crisis” is *immigration law itself*. Restrictive immigration policies are what drive human movement into forms, tableaux, and pictures that look like a menace.

Consider some scenes of our current immigration “crisis” in the U.S. and Europe. At the Global North’s border with the Global South, an unprecedented mobilization of resources and capital has been deployed to keep out migrants.³⁸

The “crisis,” as Europe paints it, is the people who decide to pay smugglers to take them on unsafe boats to Spain, Italy, Greece, and other points of Europe—accessible through the Mediterranean to the African Continent.³⁹ The journey is

35. See Max Posch et al., *Surname Diversity, Social Ties and Innovation*, (manuscript at 22) (Aug. 3, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4531209 (finding that surname diversity, a proxy for immigration, increases both the quantity and quality of innovation. The results support the view that social interactions between diverse minds are key drivers of innovation.”).

36. In Texas, for example, Operation Lone Star is engaging in a zero tolerance policy by prosecuting undocumented migrants and refugees throughout Texas at cost of approximately 1.5 billion dollars per year. See generally Emily Hernandez, *What is Operation Lone Star? Gov. Greg Abbot’s controversial border mission, explained.*, TEX. TRIB. (Mar. 30, 2022, 5:00 AM), <https://www.texastribune.org/2022/03/30/operation-lone-star-texas-explained/>.

37. See NGAI, *supra* note 27, at 19–20 (explaining how a crisis atmosphere surrounded discussion as immigration increased in the 1920s).

38. *Rising Border Encounters in 2021: An Overview and Analysis*, AM. IMMIGR. COUNCIL, 4–5, 14 (Mar. 2022), https://www.americanimmigrationcouncil.org/sites/default/files/research/rising_border_encounters_in_2021.pdf.

39. *Europe’s Refugee Crisis: An Agenda for Action*, HUM. RTS. WATCH (Nov. 16, 2015), <https://www.hrw.org/report/2015/11/16/europes-refugee-crisis/agenda-action>.

dangerous, and the risk of death is high.⁴⁰ The Missing Migrant Project counts 28,013 people who likely died en route from the Mediterranean to Europe.⁴¹ Sit with those statistics and the persistence of the rafts and the dreams that they carry: the consistent and sustained nature of the embarkation to Europe has been happening in large numbers for at least two decades.⁴² Over that period Europe has been saturated with the imagery of these crossings—the overcrowded boats, rafts, and barges teeming with negatively racialized black, poor, bodies: these are the images that constitute the “crisis.”⁴³ But do these pictures and the movement that they depict, evince a “crisis” different than the “crises” I described in the past—the “crises” of the Irish, the Italians, the Jews, and the Chinese?

Let’s break it down. When we call something a crisis, it implies a temporary state. There is a “pre-crisis”, a “crisis”, and a “post-crisis.” After all, Webster’s Dictionary defines “crisis” as a “state of affairs in which a decisive change is impending.”⁴⁴ One way of thinking about what is happening in the Mediterranean is to consider what would need to happen to shift us from “crisis” to “post-crisis,” or what would ease the “crisis.” To ask this question is also to ask: what end state do we seek? It’s clear that Europeans, or European leaders, want these embarkations by boat from Africa to Europe to stop.⁴⁵ Such an end state may be possible through the imposition of extraordinary force or

40. See *Migration Within the Mediterranean*, MISSING MIGRANTS PROJECT, <https://missingmigrants.iom.int/region/mediterranean> (last visited Sep. 10, 2023).

41. *Id.*

42. See *id.* (stating that the missing migrant project began tallying these deaths after 2014, but traces the increase in migration to the mid 1990s).

43. Manos Tsakiris, *Refugees in the Media: How the Most Commonly Used Images Make Viewers Dehumanize Them*, THE CONVERSATION (Nov. 19, 2021), <https://theconversation.com/refugees-in-the-media-how-the-most-commonly-used-images-make-viewers-dehumanise-them-171865>.

44. *Crisis*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/crisis> (last visited Sep. 10, 2023).

45. See, e.g., Elliot Davis Jr., *How Immigration is Roiling Governments Across Europe*, U.S. NEWS & WORLD REP. (Aug. 8, 2023), <https://www.usnews.com/news/best-countries/articles/2023-08-08/how-immigration-is-roiling-governments-across-europe> (stating that European officials have responded to increased immigration by attempting to discourage it entirely, as well as commenting on the rise of right-wing parties, which have anti-immigration attitudes as a major part of their platforms).

draconian penalties for entering Europe to seek asylum, or through armed European guards forcibly preventing embarkations in their countries of origin. But if the boats don't come under these conditions, is the "crisis" over?

From the European point of view, yes—yes it would be. The boats, and the bodies, and the bodies and the boats; they are a constant irritant because they force Europe to confront the contradiction and dissonance in the reality of "fortress Europe" with hard borders that drown people with the unreal, idealized way that Europeans view themselves as defenders of Human Rights—as free thinkers, the people of the enlightenment.⁴⁶ The dead bodies floating in the ocean expose the hollowness of that self-conception. When the boats stop and the bodies stop, the *crisis of identity*—the constantly exposed contradiction—stops for the Europeans.⁴⁷

Does such an end state stop the "crisis" from the perspective of the migrant? Almost certainly not. For the migrant, the "crisis" was never the Mediterranean. The sea was just the available means of relieving the migrant's actual crisis.⁴⁸ Barring an expansion of invited routes to migrate, the Mediterranean is the path to freedom or safety, or something better than what the migrant left behind. The "crisis" for Africans, Syrians, or anyone else seeking entry by boat is war, famine, and governments that do not deliver for their people.⁴⁹ Or, more generically, stunted horizons of opportunity. These horizons matter so much to people because we are not immortal. Every human gets just one shot to live their dreams.⁵⁰ Yet we are born in places with radically different opportunity structures.⁵¹ And then immigration and

46. Heidi Mogstad, *Why Doesn't Europe Grieve Deaths in the Mediterranean?*, AL JAZEERA (May 25, 2023), <https://www.aljazeera.com/opinions/2023/5/25/why-doesnt-europe-grieve-deaths-in-the-mediterranean>.

47. *Id.*

48. See MISSING MIGRANTS PROJECT, *supra* note 40.

49. See, e.g., Mogstad, *supra* note 46.

50. See JAQUELINE STEVENS, *STATES WITHOUT NATIONS: CITIZENSHIP FOR MORTALS* (Columbia Univ. Press, 2010) (discussing the implications of human mortality in politics and migration).

51. For example, one marker of the wide disparities in life chances is the difference between nations in mean years of schooling. The mean is fourteen years in the United States, nine years in Poland and Columbia, and a mere two years in Mali. *Life Chances*,

nationality law condemn about a billion people—against their will—to stay in places where they cannot realize their human potential, much less their dearest dreams.⁵²

Most American citizens today would have trouble imagining what it must be like to be born in a place where even the brightest, most talented child will have an infinitesimally small chance of exercising their talents to their limits.⁵³ Whatever America's or Europe's flaws—and they are many—children born in those places and a few other developed economies around the world get to play out their potential to a degree that is basically unfathomable in most of the world.⁵⁴ Where a person's choice to stay in or leave their country of birth can reasonably be called a choice, rather than forced migration, those who leave by choice do so out of ambition. They want a chance to make something of the one life they have, or, if not for them, then for their offspring. The Mediterranean is the means of getting that shot to make something of themselves and their children, or to secure access to the kinds and quality of basic goods like shelter, housing, food, safety, or electricity, that Europeans and Americans take for

OXFORDREFERENCE.COM, <https://www.oxfordreference.com/display/10.1093/oi/authority.20110803100104944> (last visited Sep. 23, 2023) (referencing disparities in education as a life chance indicator); *Average Years of Schooling*, WORLD ECONOMICS, <https://www.worlddeconomics.com/Indicator-Data/ESG/Social/Mean-Years-of-Schooling/> (last visited Sept. 10, 2023).

52. See Anita Pugliese & Julie Ray, *Nearly 900 Million Worldwide Wanted to Migrate in 2021*, GALLUP (Jan. 24, 2023), <https://news.gallup.com/poll/468218/nearly-900-million-worldwide-wanted-migrate-2021.aspx> (noting about 900 million people tell Gallup news that they would migrate if it were possible); see also David Leonhardt, *The Global Immigration Backlash*, N.Y. TIMES (July 11, 2023), <https://www.nytimes.com/2023/07/11/briefing/global-migration.html>.

53. See Michael B. Sauter et al., *Countries Where Children Have the Best Opportunities*, 24/7 WALLST (Apr. 16, 2014), <https://247wallst.com/special-report/2014/01/28/countries-where-children-have-the-best-opportunities>; See generally *The Opportunity Atlas*, U.S. Census Bureau, <https://www.opportunityatlas.org> (noting that this is not to deny, of course, that people born in the many U.S. zip codes of concentrated poverty and disadvantage experience a very similar set of limitations, if different in degree. The Opportunity Atlas, based on the work of economist Raj Chetty and his collaborators illustrates these U.S. disparities in granular detail).

54. See BRYAN CAPLAN & ZACH WEINERSMITH, *OPEN BORDERS: THE SCIENCE AND ETHICS OF IMMIGRATION* 32–38 (First Second 2019).

granted.⁵⁵ For the migrants who wish to move, stopping their movement is the crisis, not the boats. For migrants seeking entry, the crisis was always a lack of available visas and the stunted horizons of possibility in their home countries.⁵⁶ Setting foot in Europe was the thing that *relieved* the crisis from the migrant's point of view.

And what if that form of relief—more migration, more visas—was the “post-crisis”? What if Europe decided to welcome many more immigrants than it was previously willing to, and as a result the demand to migrate met the supply? The boats disappear because the movement happens in airports (or safer commercial boats) with the state's blessing. The concern of course is that admitting more migrants is a “crisis” all its own for the Europeans. The “crisis” of too many immigrants. Fears abound. They won't assimilate. They will end up like the Irish who landed destitute at Boston harbor, their progeny will become . . . President . . . ?

II. A CRISIS OF THE VISUAL?

Why does the way I am framing this problem sound so foreign? Why is this way of seeing the “crisis” of global migration not more common? I think it has something to do with the visual spectacle of these “crises;” the way we see them, or really, the way they are framed by immigration law and policy. When we see boats filled to the brim with humans; when we see migrants dead on the shores of European beaches, we have one or two different kinds of reactions. One reaction is that the deaths and bodies are unfortunate but inevitable. We *must* have immigration restrictions to the extent we have them; we cannot let everyone in; and we

55. See Alberto Alesina & Edward L. Glaeser, *Why are Welfare States in the US and Europe so Different? What do we Learn?*, 2 HORIZONS STRATÉGIQUES 51, 52 (2006) (noting the United States provides less than European nations when it comes to basic goods and welfare); See also David McHugh, *Pandemic Shows Contrast Between US, European Safety Nets*, PBS NEWS (May 10, 2020, 10:07 AM), <https://www.pbs.org/newshour/world/pandemic-shows-contrasts-between-us-european-safety-nets>.

56. See Amen Gashaw, *A Tale of Two Nomads: Racism and Migrant Labor in the Middle East*, HARV. INT'L REV. (Mar. 4, 2021), <https://hir.harvard.edu/a-tale-of-two-nomads/> (focusing on the disparities between skilled and unskilled migrant workers to highlight issues with worldwide immigration systems).

cannot *fix* the countries people are fleeing. So, dead bodies are the sad, but inevitable, cost of doing business. The other reaction that the boats and the bodies invite is to assign blame. "They" should stay where they are, in "their"⁵⁷ countries. France, Greece, Spain, or Italy—these places aren't "theirs," and they should know that and stay put and keep out. This reaction washes our hands of responsibility altogether. The slogan "we are here because you were there"⁵⁸ pointedly contests this reflexive nationalistic possessiveness by trying to illustrate the way that the Global North's colonial adventures and extractions paved the way for these migrations. But it is hard for populations to learn from history because the present and its frames—frames that the law itself creates by excluding people—take up so much mental and imaginative space. For the slogan "we are here because you were there" to cash out as state action, European states would need to make an effort at making the present filled with the horrors of history in school curricula and memorials. Only Germany has undertaken such an effort and perhaps that effort is why the mass admission of one million refugees from the Syrian war, controversial as it was, actually occurred.⁵⁹

Another thought that probably bubbles up in people's minds when they think about bodies and boats is that these people on the move are invading—they are trespassing—they are taking advantage. The darkest thought people might have is: "let them drown." Indeed, Italy has criminalized rescue at sea, codifying this dark immoral thought.⁶⁰ In effect, this law seeks to impose a kind of death penalty for people trying to realize a harmless

57. See generally Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POL. 251, 261–62 (1987), <http://www.jstor.org/stable/1407506> (noting that while the assignment of nationality based on birth is a social, political and legal fact, the author places "their" in quotation marks to emphasize that the assignment of nationality by birth and the use of that nationality to exclude people from places that they wish to move to is morally arbitrary).

58. See IAN SANJAY PATEL, *WE'RE HERE BECAUSE YOU WERE THERE: IMMIGRATION AND THE END OF EMPIRE* 2 (2021).

59. Sekou Keita & Helen Dempster, *Five Years Later, One Million Refugees are Thriving in Germany*, CTR. GLOB. DEV. (Dec. 4, 2020), <https://www.cgdev.org/blog/five-years-later-one-million-refugees-are-thriving-germany>.

60. See, e.g., Giulia Tranchina, *Italy's Criminalization of Migrant Rescue: The Luventa Case*, HUM. RTS. WATCH (Dec. 13, 2022, 11:40 AM), <https://www.hrw.org/news/2022/12/13/italys-criminalisation-migrant-rescue-luventa-case>.

dream or who were fleeing for their lives. All these thoughts paint immigrants as wrongdoers, as threatening.

What legal logic flows from the impressions these visuals make on people? That immigration restriction and the low visa supply—the things that cause these sea migrations—are justified. Why? Well, just look at these sea migrations! We cannot let *those* people in, they are desperate and destitute and not like us! They are like the dirty exhausted Catholics that arrived from Ireland in the Boston harbor a century and a half ago. These images of the bodies and boats—manufactured by the radically limited amount of visas that Europe issues—are what drives the “logic” of this reaction.

III. DOMESTIC “CRISIS”

Let’s switch cameras to America. What is the nature of the “crisis” here today? Why are there these encampments on the Texas border?⁶¹ Why are there migrant caravans, why this sudden increase in movement during the Biden presidency?⁶² Again—the visuals are produced by the artificial scarcity of visas created by immigration law itself and the way immigration admissions were virtually cut off during the global pandemic.⁶³ If every asylum applicant was let in to seek asylum, if every economic migrant had a visa over the last few decades available to them, there would be no caravan, and there would be no visible “crisis.”⁶⁴ The visual of a caravan is a symptom of radical visa

61. See Mireya Villarreal, *Migrants Desperate to Live in US Endure Inhumane Conditions Near the Mexican Border: Reporter’s Notebook*, ABC NEWS (May 6, 2023, 6:44 AM), <https://abcnews.go.com/US/migrants-desperate-live-us-endure-inhumane-conditions-mexican/story?id=99108515>.

62. See Quinn Owen, *Migrant Crisis Explained: What’s Behind the Border Surge*, ABC NEWS (Sept. 23, 2023, 7:00 AM), <https://abcnews.go.com/Politics/migrant-crisis-explained-border-surge/story?id=103364219>.

63. See Jens Krogstad & Ana Gonzales-Barrera, *Key Facts About US Immigration Policies and Biden’s Proposed Changes*, PEW RSCH. CTR. (Jan. 11, 2022), <https://www.pewresearch.org/short-reads/2022/01/11/key-facts-about-u-s-immigration-policies-and-bidens-proposed-changes> (noting a thirty percent decrease in green card approvals from the third quarter of 2020 as compared to the same time in 2019).

64. See CAPLAN & WEINERSMITH, *supra* note 54, at 42, 45–46, 48 (expanding the idea that migration levels will not be frictionless but when policy defaults to admission rather than exclusion there is a realistic prospect that people will be able to move, act rationally,

supply restrictions left to fester over decades. More supply would meet demand over time. Our country would be more populated, perhaps, and the complexion of its denizens might shift, but it is a big diverse country already. Would we even notice the shift? But restriction itself makes us stand up and see immigration in a particular and unflattering form. It makes immigration look aggressive and transgressive, it makes humans with human potential and with a can-do spirit—with the *hutzpah* to move and take control of their destinies—appear desperate, unworthy, and untouchable. When immigration looks like migrant caravans and border encampments, we recoil at the humans who make up these movements and we are glad that we have these fences, and that Border Patrol, and these Immigration and Customs Enforcement officers to send those people away. Ironically, it is precisely these "solutions" that produce their seeming necessity.

IV. AN ALTERNATE REALITY

Now let's imagine an impossible counterfactual, a thought experiment.⁶⁵ Let's imagine that migrants from Africa, South America, Asia, and the Middle East had access to secret teleportation technology. The Starship Enterprise took pity on our unenlightened civilization and gave migrant groups access to

and plan to make their landing in a new country as seamless as possible); see also ILYA SOMIN, *FREE TO MOVE: FOOT VOTING, MIGRATION, AND POLITICAL FREEDOM* 19, 30 (Oxford Univ. Press 2020) (noting the exit of people from countries with bad governance may discipline those regimes and gradually improve them while also flattening the demand to move).

⁶⁵ Derrick Bell, *Racism: A Prophecy for the Year 2000*, 42 *RUTGERS L. REV.* 93 (1989-1990). This hypothetical is loosely inspired by famed critical race theorist Bell's article. In the article Bell invents the story of the "Space Traders, a force of highly advanced extraterrestrials lands on earth in the year 2000 and offers us a deal: give up all African-Americans in return for three gifts—enough gold to retire the national debt, a magic chemical that will cleanse America's polluted skies and waters, and a limitless source of safe energy to replace our dwindling reserves. The traders give us 17 days to think it over. National debate moves quickly to a foregone conclusion. Legislation is drafted ordering citizens to perform "special service for transportation" and is approved by a national referendum and the Supreme Court. On the appointed day, Blacks are made to line up. Heads bowed, they leave the United States just as their ancestors arrived 400 years ago, sacrificed on the altar of "white greed." Richard Delgado & Jean Stefancic, *Derrick Bell's Chronicle of the Space Traders: Would the U.S. Sacrifice People of Color if the Price were Right*, 62 *U. COLO. L. REV.* 321 (1991).

this advanced technology. This advanced technology holds all the demands to migrate in a hypothetical constant but makes the means of migration both impossible to stop and *invisible* to perceive. Migrants just appear in our society, like Captain Kirk on Vulcan, but they are smart enough to do it in places and with friendly helpers where they would not be seen or noticed by the larger society. Migrants could zoom invisibly from places of destitution to sanctuary spaces in Europe and the U.S. where they are slowly and carefully introduced and strategically scattered, to go undetected. The migrants with the teleporter are careful to teleport to safe spaces where they are welcomed by individuals, if not the society at large—a kind of perfectly invisible underground railroad. The migrants are smart. They spread themselves out, they have a queue system where only so many people move to Europe or the U.S. per day so they do not arrive at their new homes in packs or large groups. They spread their numbers out over time, over years, evenly, giving themselves plenty of time to integrate into their new societies, find housing, jobs, etc. The scheme works. Large numbers move, but they seem like regular immigrants, their impact is barely noticed. Without the spectacles, like those at the U.S. Southern Border, the average voter usually has no way of noticing migration. Particularly given how segregated communities are by race.

Finally, the scheme comes to light after five years undetected. The census shows an uptick of a significant number of people and a teleportation goes to the wrong place and is caught on tape. Citizens of the rich West are outraged. They ask for deportations and the finding and destruction of the teleporter. But they can't find the teleporter and people keep coming, secretly, quietly, blending in. The only way to rid Europe and the U.S. of these unlawful entrants by teleportation was to find where they were harbored, remove them, and deport them. So that's what we do—in the U.S. and Europe, we pull them from their houses, raid their places of employment, and rip parents from the arms of citizen children.

Pause and think about the feelings this picture of immigration paints. Does it make a difference in the way we assign blame? I want to suggest that the enforcement actions taken to rectify the wrongs of the invisible teleported migrants look and feel

dramatically more violent than the violence of closing the borders, shutting off the visa supply, and letting people drown in the Mediterranean or die in the desert. The picture in the interior looks active and violent, like the state is committing the violence towards people. The violence of the migrant caravan, or the boat landings—we don't as readily digest those circumstances as actions our countries do to others. With visible land and sea migration, it is the migrants who are made to appear as if they are threatening us. With deportation and raids, by contrast, we are disrupting a peaceful status quo. The immigrants look different because they are already "us": better fed, cleaner, and respectable. They work jobs that we don't want to do—deporting them makes less sense and feels like more of a waste of human potential. After all, we can see that they are contributing.

V. CONCLUSION

As silly as this hypothetical may seem, I think that it offers a way of seeing into the usually unseen way immigration law's production of "crisis" functions to reinforce the power and necessity of immigration restriction and punitive enforcement—even though it is that restriction itself that is the ultimate cause. As fanciful as the teleporter is, we have technology available to us that does in effect the same thing that the teleporter does—VISAS! More visas do much the same thing that the migrants achieved themselves with the teleporter. Properly done we can spread the impact of migrants, help them blend in, integrate, etc., we can do these things with the money we now spend on deportations and border enforcement. Maybe if we did that immigration wouldn't be such a "crisis."

