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Dignity Takings in Leviathanic Immigration Proceedings

Christopher Mendez

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NOTE

DIGNITY TAKINGS IN LEVIATHANIC IMMIGRATION PROCEEDINGS¹

CHRISTOPHER MENDEZ*

ABSTRACT

Current immigration law in the United States is rife with racially motivated biases necessitating immediate correction. Among the many problems with current law, constitutional rights are withheld from a large populace. This article reflects upon the history of immigration law in the United States, noting key decisions which have formed the status

1. © The Estate of Christopher Mendez 2019

* J.D. candidate, at the University of La Verne College of Law, expected May 2020. I would like to thank John Acevedo for his input. I would also like to thank Max Mendez for his comments. All errors remain mine alone. *Editor's note:* Christopher Mendez passed away prior to the publication of this article. *Note of Placido Gomez, Associate Dean for Academic Affairs and Professor of Law, University of La Verne College of Law:* Christopher Mendez was my student, my friend, my teacher. He died in a car accident visiting his mother who was hospitalized in Mexico. He left a wife and daughter. Christopher's death shocked the University of La Verne community; we are still in shock. Christopher was close to his classmates. Brad Baldwin wrote: "From the moment I met Christopher Mendez, I knew he was a passionate individual He took his studies very seriously Immigration Law spoke to him on a personal level. He would tell me stories about his relatives who had fled their home country due to extreme violence He was a special friend." David Gonzalez: "Christopher Mendez was a pugilist. He was someone who wanted to challenge the status quo in the legal community. He did not believe in conforming. He was committed to serving the underrepresented." I served on the Scholar Advisory Board and as Scholar Faculty for several years in the early 2000s. I am honored and proud to be part of the Scholar story; I commend you for the work you continue: giving voice to underrepresented peoples. The faculty and students of La Verne College of Law want to thank the writers and editors of *The Scholar* for honoring us with this publication.

quo. This article also proposes remedies such as the cessation of infringement by government agents on the property rights that affected immigrants have on their own bodies and a modern-day amnesty reflective of the Immigration Reform and Control Act of 1986. This article also introduces Bernadette Atuahene's concept of dignity takings to immigrant rights and proposes that reform proposals include dignity restorations for the "invisible" immigrant community and their affected families.

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INTRODUCTION

*I'm a man of substance, of flesh and bone, fiber and liquid—
and I might even be said to possess a mind. I am invisible,
understand, simply because people refuse to see me.*

—Ralph Ellison, *Invisible Man*²

Like the nameless narrator of Ralph Ellison's *Invisible Man*, a substantial segment of the American population—immigrants—works, studies, starts businesses, and pays taxes, all while being relegated to the shadows of society. Although somewhat historically inaccurate, the Court of Star Chamber is now a vivid synonym for “secrecy, severity, and the wresting of justice.”³ In fact, the United States Supreme Court in 1990, cited the abuses and gross miscarriage of justice in Star Chamber, as a lead motivating factor for the individual protections against self-incrimination, perjury, and contempt granted by the Fifth and Fourteenth Amendments of the Constitution of the United States.⁴ Historically, the privilege was intended to prevent the use of legal coercion to extract a sworn communication of facts from the accused which would incriminate him.⁵ Such was the process of the ecclesiastical courts and the Star Chamber—the inquisitorial method of putting the accused upon his oath and compelling him to answer questions designed to uncover uncharged offenses, without evidence from another source.⁶

These methods now represent the antithesis of acceptable norms within a democratic society, yet they remain palpable in U.S. immigration court

2. RALPH ELLISON, *INVISIBLE MAN* 3 (Vintage Books 2d ed. 1995) (1947).

3. Edward P. Cheyney, *The Court of Star Chamber*, 49 AM. HIST. REV. 727, 728 (1913); see also George Jarvis Thompson, *Development of the Anglo-American Judicial System*, 17 CORNELL L. REV. 203, 235-41 (1932) (stating the Star Chamber of England denied criminal defendants counsel, the right to present witnesses, and featured judges employing violent personal abuse in the course of the trial, restrained only by the inability to inflict penalty of life or limb).

4. *Pennsylvania v. Muniz*, 496 U.S. 582, 595-98 (1990).

5. See *Malloy v. Hogan*, 378 U.S. 1, 8 (1964) (“The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence.”).

6. *Pennsylvania v. Muniz*, 496 U.S. 582, 596 (1990).

proceedings.⁷ In this paper I focus primarily on demonstrating that the history of U.S. immigration legislation and jurisprudence is fueled by racial hatred and usurpatory greed (ostensibly shielded by Congress's Plenary Power). I argue it is devoid of legitimate government purpose as applied to Mexican Americans, thus representing a decades-long "dignity taking" in need of urgent restoration. Bernadette Atuahene created the concept of "dignity taking," defined as "when a state directly or indirectly destroys or confiscates property rights from owners or occupiers whom it deems to be sub persons without paying just compensation and without a legitimate public purpose."⁸ John Felipe Acevedo applied this definition "when police take a person's body through physical abuse or extra-judicial murder."⁹ In immigration, it would apply to negligent indifference to the care and needs of detainees, voluntary and involuntary deaths while in government custody, and wrongful prolonged imprisonment.

U.S. immigration policy systematically dehumanizes immigrants by using them like disposable assets obedient to economic supply and demand. Too often "immigrants [] are made scapegoats for political, economic, and social frustrations."¹⁰ As Secretary of State, Alexander Hamilton recognized that "immigration to the United States must be encouraged in order to increase the size of the work force and mitigate the 'dearness of labor.'"¹¹ Andrew Carnegie further elucidated the

7. See *Demore v. Hyung Joon Kim*, 538 U.S. 510, 522 (2003) ("[T]his Court has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens[.]").

8. BERNADETTE ATUAHENE, *WE WANT WHAT'S OURS* 21 (2014) [hereinafter ATUAHENE, *WE WANT WHAT'S OURS*]; Bernadette Atuahene, *Takings as a Sociolegal Concept: An Interdisciplinary Examination of Involuntary Property Loss*, 12 ANN. REV. L. & SOC. SCI. 171, 178 (2016) [hereinafter Atuahene, *Takings*] (expanding further, "there must be involuntary property loss as well as evidence of intentional or unintentional dehumanization or infantilization of dispossessed or displaced individuals or groups[.]" defining "dehumanization" as "the failure to recognize an individual's or group's humanity[.]" and defining "infantilization" as "the restriction of an individual's or group's autonomy based on the failure to recognize and respect their full capacity to reason").

9. John Felipe Acevedo, *Restoring Community Dignity Following Police Misconduct*, 59 HOW. L. J. 621, 628-29 (2016).

10. Kevin R. Johnson, *Fear of an "Alien Nation": Race, Immigration, and Immigrants*, 7 STAN. L. & POL'Y REV. 111, 112 (1996).

11. Alexander Hamilton, *Report on the Subject of Manufacturers*, NAT'L ARCHIVES (Dec. 5, 1791), <https://founders.archives.gov/?q=Ancestor%3AAARHN-01-10-02-0001&s=1511311111&r=7> [<https://perma.cc/4P7X-5C8E>].

economic opportunity of immigration as “the golden stream which flows into the country each year.”¹² Indeed in the 1950s, leaders recognized the “demand for migratory workers is thus twofold: To be ready to go to work when needed; to be gone when not needed.”¹³ The main variable that changed since Hamilton’s call to Congress in 1791 is the country of origin of the immigrant labor supply.

Despite consistent acknowledgements of the economic benefits, racist politicians make U.S. immigration decisions and, thus, consistently create unjust laws with a racist impact and purpose.¹⁴ In 1848, Senator John Calhoun advocated for the “free white race” while opposing immigration.¹⁵ The 1920s immigration bills were strongly influenced by Harry Laughlin, a leading eugenicist.¹⁶ In the 1990s, it was fear of asylum-seeking immigrants, following the 1993 World Trade Center bombing, that prompted sweeping change.¹⁷ President Bill Clinton signed two major immigration laws in 1996 and created the quintessential quagmire oppressing immigrants in modern-day America.¹⁸ The

12. ANDREW CARNEGIE, *TRIUMPHANT DEMOCRACY, OR FIFTY YEARS’ MARCH OF THE REPUBLIC* 143 (Kennikat Press 1971) (1886).

13. KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S.* 21 (1992).

14. President Donald Trump’s former Attorney General, Jeff Sessions, had a long history of attempting to curb not only illegal immigration, but legal immigration as well, in addition to overt instances of racism that had blocked his attempts to seek higher office before being appointed to the department that administers the quasi-judicial immigration courts. See Amber Phillips, *10 Things to Know About Sen. Jeff Sessions*, WASH. POST (Jan. 10, 2017), www.washingtonpost.com/news/the-fix/wp/2016/11/18/10-things-to-know-about-sen-jeff-session-s-donald-trumps-pick-for-attorney-general/?utm_term=.18ea26a3be7f [https://perma.cc/SQG8-FE4J] (“His former colleagues testified Sessions used the n-word and joked about the Ku Klux Klan, saying he thought they were ‘okay, until he learned that they smoked marijuana.’”).

15. APPENDIX TO CONG. GLOBE, 30th Cong., 1st Sess. 51 (1848) (Statement of Sen. John C. Calhoun).

16. JASON L. RILEY, *LET THEM IN: THE CASE FOR OPEN BORDERS* 25-27 (2008).

17. See 104 CONG. REC. S4461 (daily ed. May 1, 1996) (statement of Sen. Simpson) (stating that immigrants who had nothing to lose were coming into the country and claiming asylum then never show up to subsequent immigration proceedings); Frank Sharry, *Backlash, Big Stakes, and Bad Laws*, 9 DREXEL L. REV. 269, 274 (2016) (describing national hysteria over asylum-seekers following a *60 Minutes* interview that stated that anyone could enter the country by simply stating they wanted asylum).

18. Sharry, *supra* note 17, at 274 (discussing how after the September 11 terrorist attack, the Bush administration used the 1996 legislation to “target immigrants in the aftermath of the attacks—including the interrogation, detention, and deportation of Muslim, Arab, and South Asian immigrants and the ‘special registration’ program . . .”).

Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)¹⁹ required “mandatory detention of non-citizens convicted of a wide range of offenses, including, minor drug offenses,” and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)²⁰ “further expanded the list of offenses for which mandatory detention was required.”²¹ In essence, the combination of these two bills capriciously and arbitrarily legalized the mass, prolonged mandatory incarceration of immigrants.

The next section describes a succinct history of the White supremacy ideology that has influenced racially discriminatory and unconstitutional action against immigrants. Part IB introduces a brief narrative of the persistent use of racial discrimination toward immigrants in congressional legislation and campaign rhetoric, and its brutal impact on the Latino community. Part II then makes the case for dignity takings having been perpetrated against Mexican immigrants as a result of the deprivation of constitutional rights in extra-judicial proceedings, and the subsequent illicit deprivation of property that followed the removal of millions of immigrants.

I. LEGAL HISTORY OF MALLEABLE RACISM SUBJUGATING IMMIGRANTS

The legal history of the United States immigration system incorporates influences from violent, racist, and deceptive practices, presumably motivated by greed and a need for supremacy. The “hue and cry”²² method of reporting crime reappeared in immigration contexts to ensure

19. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996).

20. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

21. *Analysis of Immigration Detention Policies*, ACLU, <https://www.aclu.org/other/analysis-immigration-detention-policies> [<https://perma.cc/DW47-EYNW>] (explaining that the IIRIRA broadened the detention requirement of non-citizens to incorporate a wider range of offenses under the AEDPA).

22. *Hue and Cry*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“1. The public uproar that, at common law, a citizen was expected to initiate after discovering a crime . . . All were obliged to pursue the criminal when the hue and cry was raised. Neglect of these duties entailed an amercement of the individual, the township or the hundred. The sheriffs and the constables were under special obligations, as conservatores pacis, to fulfil these duties.”). See also Mary Lee Grant, *U.S. Militia Groups Head to Border, Stirred by Trump’s Call To Arms*, WASH. POST (Nov. 3, 2018), https://www.washingtonpost.com/world/national-security/us-militia-groups-head-to-border-stirred-by-trumps-call-to-arms/2018/11/03/ff96826c-decf-11e8-b3f0-62607289efee_story.html?noredirect=on [<https://perma.cc/C6HV-8ETY>] (describing groups of citizens arming themselves to patrol the border with Mexico looking for “illegals”).

Hobbesian (rather than Lockean) principles condemned non-Whites to live outside society in a state of “continual fear, and danger of violent death: and the life of man, solitary, poor, nasty, brutish and short.”²³ As renown historian Howard Zinn notes: “[t]here is not a country in world history in which racism has been more important, for so long a time, as the United States.”²⁴ Immigration policies and the motivations behind them are best understood and disentangled when placed against the sinister backdrop of U.S. racial history. Aristide Zolberg sums up the beginnings of our nation succinctly:

Long before what is conventionally regarded as the beginning of national immigration policy, the Americans undertook to violently eliminate most of the original dwellers, imported a mass of African [enslaved] workers whom they excluded from the nation altogether, actively recruited Europeans they considered suitable for settlement, intervened in the international area to secure freedom of exit on their behalf, elaborated devices to deter those judged undesirable, and even attempted to engineer the self-removal of liberated slaves, deemed inherently unqualified for membership.²⁵

Thus, when analyzing early American history from a bird’s eye perspective, early “ruling” practices appear to resemble those of *The Walking Dead*’s bloody-thirsty, hate-mongering antagonist, Negan, and his “sanctuary” settlement.²⁶ Much like the doctrinal fantasies of Divine Right and Manifest Destiny, Negan rules supreme, offering protection and safety in exchange for revenue from his settlement’s residents. However, those who oppose, resist, or stand in his way face dire consequences: a brutal death at the hands of the ruler, or exile—i.e. death

23. THOMAS HOBBS, *Of the Natural Condition of Mankind as Concerning their Felicity and Misery*, in LEVIATHAN 107 (Oskar Piest, ed., Bob-Merrill Co., Inc. 1958) (1651).

24. HOWARD ZINN, *A PEOPLE’S HISTORY OF THE UNITED STATES: 1492–PRESENT* 23 (20th ed. 1999).

25. ARISTIDE R. ZOLBERG, *Themes and Perspectives*, in *A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA* 1-2 (2008).

26. See generally *The Walking Dead: Last Day on Earth* (AMC television broadcast Apr. 3, 2016) (debuting Negan’s character as a ruthless and powerful leader); *The Walking Dead: Service* (AMC television broadcast Nov. 13, 2016) (showing a visit by Negan to a settlement in which the leader of that group inevitably decides they cannot resist their property being taken and succumbs to Negan’s demands); *The Walking Dead: Bury Me Here* (AMC television broadcast Mar. 12, 2017) (highlighting a failed attempt to spark an uprising by the settlements ultimately resulting only in additional deaths).

at the hands of blood-thirsty walkers. When Adolf Hitler looked back at American history, he “admired the U.S. actions toward Native Americans, and in a 1928 speech praised Americans for having ‘gunned down the millions of Redskins to a few hundred thousand, and now keep[ing] the modest remnant under observation in a cage.’”²⁷

A. *The Six Immigration Eras*

Michael C. LeMay devoted intensive time and resources in the field of immigration. He identified several waves matching the historical, economic, and political climate of American society as the driving forces of immigration policy since 1820 to the present.²⁸ Federal statutes and legislative history expressly document the racist motivations of congressional edicts—most notably in the enactment of the Chinese Exclusion Act of 1882.²⁹ “Congress passed the exclusion act to placate worker demands and assuage prevalent concerns about maintaining white ‘racial purity.’”³⁰ These notions of repulsiveness toward non-Whites have influenced U.S. immigration laws that deprived immigrants of their rights, and in particular, of their dignity.

1. *Open Door Era: Eugenics’ Purity Heavy Influence on Policy*

In 1790, the nascent United States Congress passed its first law regulating naturalization.³¹ Naturalization simply required two years of residency and an oath or affirmation to uphold the Constitution.³² Just five years later, a free White person could apply for citizenship after renunciation of all former allegiances, titles, and a five-year residency.³³ Since then, subsequent laws affecting immigration to the United States have restricted the entry of newcomers primarily on the basis of race. To

27. JAMES Q. WHITMAN, *HITLER’S AMERICAN MODEL* 9-10 (2017).

28. MICHAEL C. LEMAY, *U.S. IMMIGRATION POLICY, ETHNICITY, AND RELIGION IN AMERICAN HISTORY* (2018) [hereinafter LEMAY, *U.S. IMMIGRATION POLICY, ETHNICITY, AND RELIGION*].

29. Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (1882) (repealed 1943).

30. ERIC FORNER & JOHN A. GARRATY, *THE READER’S COMPANION TO AMERICAN HISTORY* 189 (1991).

31. Act to Establish a Uniform Rule of Naturalization, 1st Leg., 2d Sess., ch. 3, § 1, 1790 (repealed 1795).

32. *Id.*

33. Act to Establish a Uniform Rule of Naturalization; and to Repeal the Act Heretofore Passed on that Subject (a), 3d Leg., 2d Sess., ch. 20, § 1, 1795 (repealed 1802).

wit, legislators have “always been concerned with the racial makeup of the nation[, and the] national preoccupation with the maintenance of a ‘White country’ is reflected in immigration law.”³⁴ Yet these restrictive laws encompassed numerous removal and repatriation efforts and strategies, unfairly and discriminatorily applied solely to protect American society from the fear of being “overrun[.]” and “contaminated.”³⁵ These removal strategies have unjustly deprived immigrants with long-established roots to the United States of due process and other protections afforded to all persons within the United States and which are staple to democratic societies.³⁶

From 1820 through 1880, the “Open-Door” era welcomed mostly Germans, Irish and Scandinavian immigrants.³⁷ The Gold Rush that began in California and the enactment of the Alien Contract Labor Law of 1864 attracted Chinese immigrants to the United States.³⁸ When gold began to diminish, Chinese immigrants began contributing to agriculture, mining, and the construction of the Transcontinental Railroad.³⁹ This

34. Tanya Kateri Hernandez, *Construction of Race and Class Buffers in the Structure of Immigration Controls and Laws*, 76 OR. L. REV. 731, 731-32 (1997).

35. Cf. 4 CONG. REC. 3098, 3099-3100 (1876) (statement of Sen. Mitchell)

The effect of Chinese immigration upon the Pacific coast is to degrade the industry of the country, to subordinate the labor of the honest, hardworking, free American citizen to that of the dishonest, servile legions of a rice-eating and heathen race . . . to debauch and defile our youth; to corrupt the channels of trade; to set upon the face of our beautiful cities the degrading seal, the disgusting impress of Asiatic life and manners; in a word, to contaminate and blast our civilization with the degrading tendencies of a people . . . whose history, customs, habits, modes of life, and aspirations have for ages, and must of necessity continue to be for centuries yet to come, surrounded in the shades and consequent darkness of heathenism.

83 CONG. REC. 1517, 1518 (1953) (statement of Sen. McCarran) (stating former Sen. Pat McCarran’s contention that the United States is the last flickering light of humanity in Western Civilization that will be extinguished if overrun, perverted, contaminated or destroyed).

36. See, e.g., THOMAS CURRAN, XENOPHOBIA AND IMMIGRATION 1820-1930, at 21-31 (1975) (describing the different organizations that formed with the goal of restricting immigration and denying foreign-born people the ability to nationalize in the United States to maintain power and control).

37. MICHAEL C. LEMAY, FROM OPEN DOOR TO DUTCH DOOR 21 (1987) [hereinafter LEMAY, DUTCH DOOR].

38. An Act to Encourage Immigration, ch. 246, 13 Stat. 385, 386 (1864) (encouraging immigration to the United States by setting up prepaid passages in exchange for labor in order to supply companies with workers).

39. William Wei, *The Chinese American Experience: An Introduction*, HARPWEEK, <http://immigrants.harpweek.com/ChineseAmericans/1Introduction/BillWeiIntro.htm> [<https://perma.cc/WY9A-W2AQ>].

migration was largely encouraged by the most significant immigration law of this era—the enactment by Congress of the Alien Contract Labor Law of 1864, which also came to be adequately known as the 1864 Act to Encourage Immigration, signed by President Lincoln on July 4, 1864.⁴⁰ The Act allowed employers to pay for the passage of an immigrant and then receive repayment in the form of up to a year's worth of wages earned by their labor.⁴¹ The Act impliedly authorized the indentured servitude of immigrants as valid contracts entered into by them and their future employer paying for their passage fare while simultaneously stating it discouraged indentured servitude and slavery.⁴² The terms of the contract heavily favored the employer and required recording the contract as a lien against any property the immigrant later acquired.⁴³ This broad authority presumably operated under the Commerce Clause of the United States Constitution as a precursor to the *Lochner* era that upheld the freedom of contract as a basic right, and as such *laissez faire* practice reigned supreme at the turn of the nineteenth century without much regard to workers' rights.⁴⁴

During most of this era, what is now the American Southwest was owned by Mexico, and did not come under the control of the United States government until the signing of the Treaty of Guadalupe Hidalgo.⁴⁵ Until then, the region had been occupied by Mexicans and Native Americans, as Mexico had won its independence from Spain in 1821.⁴⁶ In 1848, then-Senator of South Carolina, John C. Calhoun, one of many who stood against the annexation of California, declared the following in his speech to the Senate:

40. An Act to Encourage Immigration, ch. 246, 13 Stat. 385 (1864).

41. *Id.*

42. Compare *id.* at 285 (“[Labor contracts] shall be held to be valid in law, and may be enforced in the courts of the United States, or of the several states and territories”); with *id.* at 386 (“[B]ut nothing herein contained shall be deemed to authorize any contract contravening the Constitution of the United States, or creating in any way the relation of slavery or servitude.”). The Thirteenth Amendment abolishing slavery, including indentured servitude had passed the Senate by a vote of 38 to 6. CONG. GLOBE, 38th Cong., 1st Sess. 1490 (1864). However, verification of ratification did not occur until December of 1865. No. 52, 13 Stat. 774 (1865).

43. An Act to Encourage Immigration, ch. 246, 13 Stat. 385, 386 (1864).

44. For a more detailed discussion on the *Lochner* era, which is beyond the scope of this paper, see ERWIN CHERMERINSKI, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 622 (Aspen/Wolters-Kluwer 4th ed. 2011).

45. Treaty of Guadalupe Hidalgo, July 4, 1848, U.S.-Mexico, 9 Stat. 929 (1848).

46. ZINN, *supra* note 24, at 149-56.

We have acquired many of the neighboring tribes of Indians, but we have never thought of holding them in subjection, or of incorporating them into our Union Nor have we ever incorporated into the Union any but the Caucasian race. To incorporate Mexico, would be the first departure of the kind; for more than half its population are pure Indians, and by far the larger portion of residue mixed blood. I protest against the incorporation of such a people. Ours is the Government of the white man. The great misfortune of what was formerly Spanish America, is to be traced to the fatal error of placing the colored race on an equality with the white.⁴⁷

Calhoun's inflammatory remarks were motivated by fear, but they also served to monopolize control and power by Whites in American politics.⁴⁸ I confirm with further examples that this attitude continues its prevalence in American politics, subjugating Peoples of Color and maintaining purist White hegemony in power. Also during this period were Jim Crow laws in the South, anti-miscegenation legislation, and the denial of the constitutional protections afforded to Whites for free Blacks and Indians.⁴⁹ Further, during this era, non-Whites were deprived of access to land and property—a textbook dignity taking⁵⁰—since being White was a prerequisite to purchase land.⁵¹

2. *Door-Ajar Era: The Chinese Exclusion Acts (1880-1920)*

LeMay calls the period between 1880 and 1920 the “Door-Ajar Era.”⁵² The Recession of the 1870s led to “new calls for restrictionism.”⁵³ This era saw Italian, Greek, and Jewish immigrants arrive from South-Central

47. APPENDIX TO CONG. GLOBE, 30th Cong., 1st Sess. 51 (1848) (Statement of Sen. John C. Calhoun).

48. NEIL FOLEY, *THE WHITE SCOURGE: MEXICANS, BLACKS, AND POOR WHITES IN TEXAS COTTON CULTURE* 22 (1997).

49. *Id.*

50. Atauhene, *Takings supra* note 8, at 178.

51. Eleanor Marie Lawrence Brown, *On Black South Africans, Black Americans, and Black West Indians: Some Thoughts on We Want What's Ours*, 114 MICH. L. REV. 1037, 1046 (2016) (“[T]he government offered mortgage subsidies to facilitate the purchase of homes by middle-class Americans. For myriad reasons, including securing the support of southern senators, the government drafted rules that ensured blacks did not qualify for mortgage subsidies. This rendered such programs essentially whites only, excluding racial minority groups like Hispanics[.]”); *see also* FOLEY, *supra* note 48, at 19 (“[W]hiteness was thus inscribed in Texas law as the quintessential property for both citizenship rights and landownership.”).

52. LEMAY, *DUTCH DOOR, supra* note 37.

53. *Id.* at 36.

and Eastern European nations who were not considered ethnically “White.”⁵⁴ It was also when “[t]he Yellow Peril first became a major issue in the United States . . . when white working-class laborers, fearful of losing their jobs” spread hurtful and racist imagery against Chinese immigrants.⁵⁵ A decade prior, in dire need of labor and “anxious to open up trade with China, the United States entered into the Burlingame Treaty, a provision of which touted the ‘inherent and inalienable right of man to change his home and allegiance, and . . . the mutual advantage of free migration.’”⁵⁶ However, as the economy took a hit in 1873, and the transcontinental railroad having been completed, the government sought to dispose of these Chinese immigrants.⁵⁷ Shortly after the Supreme Court declared Congress had exclusive occupation of the field of immigration,⁵⁸ it implemented race-based laws with discriminatory impact, effect, and purpose.

On May 6, 1882, Congress passed the Chinese Exclusion Act of 1882,⁵⁹ the first law to bar immigration on the basis of race.⁶⁰ This statute suspended the right of Chinese laborers to enter the country for a ten-year period.⁶¹ The bluntly racist law also prohibited any “State court, or court of the United States” from “admit[ting] Chinese to citizenship.”⁶² The 1882 law allowed Chinese laborers already residing

54. LEMAY, DUTCH DOOR, *supra* note 37, at 38. See ANDREW HACKER, TWO NATIONS: BLACK & WHITE, SEPARATE, HOSTILE, UNEQUAL 4-5 (1992) (stating that “idea of ‘race’ is primeval”; while “America is inherently a ‘white’ country”, “there is no consensus when it comes to defining ‘race’ and the Irish, Jews and Hindus have each “been called a race in their own right.”); see also Leonard M. Baynes, *Who is Black Enough for YOU?*, 2 MICH. J. RACE & L. 205, 213 (1997) (arguing the concept of “Black” is a social construct defined by White society).

55. Tim Yang, *The Malleable Yet Undying Nature of the Yellow Peril*, DARTMOUTH, <http://www.dartmouth.edu/~hist32/History/S22%20-The%20Malleable%20Yet%20Undying%20Nature%20of%20the%20Yellow%20Peril.htm> [https://perma.cc/YFB5-ZCK6].

56. Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases*, 10 ASIAN AM. L.J. 13, 14 (2003) (citing Burlingame Treaty, July 28, 1868, U.S.-P.R.C., 16 Stat. 739, 740, T.S. No. 48).

57. *Id.*

58. *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875) (“The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States.”).

59. Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (1882) (repealed 1943).

60. Julian Lim, *Immigration, Asylum, and Citizenship: A More Holistic Approach*, 101 CALIF. L. REV. 1013, 1026-27 (2013).

61. Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58, 59 (1882) (repealed 1943).

62. *Id.* at 61.

in the United States the opportunity to obtain certificates of return, allowing them to return if they left the country for a time.⁶³ However, in 1888 Congress banned the practice and declared all previously issued certificates void.⁶⁴ The Supreme Court upheld the laws in *The Chinese Exclusion Case*.⁶⁵ Chae Chan Ping had been granted legal presence in the United States for over twelve years, and in 1887 he obtained the proper certificate to leave for China with the right to return to his home in the United States.⁶⁶ When he returned, only a few days after the 1888 act passed, he was denied entry because “his right to enter the land had been abrogated.”⁶⁷ The Court based part of its decision on national security and protection grounds, stating “[i]t matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or from vast hordes of its people crowding in upon us.”⁶⁸

But it was the Geary Act of 1892,⁶⁹ that was the fiercest exclusionary statute against the Chinese. This Act renewed all exclusion legislation in force, extended it for another ten-year-period, and required Chinese and those of Chinese descent to obtain a certificate of legal residency or potentially face deportation.⁷⁰ At the time, “organized labor fought hard against these laws.”⁷¹ In *Fong Yue Ting v. United States*, three Chinese workers with the legal right to reside in the United States challenged the Geary Act’s residency certificate requirement.⁷² The Geary Act required that Chinese residents without a certificate of residency to rebut the presumption of deportability by proof from “at least on credible *white*

63. *Id.* at 59.

64. An act a supplement to an act entitled “An act to execute certain treaty stipulations relating to Chinese”, ch. 1064, 25 Stat. 504 (1888).

65. *The Chinese Exclusion Case*, 130 U.S. 581 (1889).

66. *Id.* at 581-82.

67. *Id.* at 582.

68. *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889); *see also Saito, supra* note 56, at 15 (“Justice Field held that Congress has the power to regulate immigration, . . . [and] added that the courts would not intervene because the power emanated from the government’s prerogatives over national security, territorial sovereignty, and self-preservation.”).

69. An Act to Prohibit the Coming of Chinese Persons into the United States (Geary Act), ch. 60, 27 Stat. 25 (1892).

70. *Id.*

71. LEMAY, *DUTCH DOOR, supra* note 37, at 54.

72. *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

witness” of residency.⁷³ None of them could meet that new requirement so their deportation orders were valid.⁷⁴ In essence, Justice Gray “extended Congress’ plenary power from the exclusion of those first arriving to the deportation of permanent residents.”⁷⁵ By citing to its plenary power, the Court granted Congress absolute impunity in matters of immigration, compounding the difficulties racially discriminated immigrants have asserting constitutional protections, and the negative incidental effects on the rights and lives of long-term immigrants of the United States.⁷⁶ The Court further held that deportation was not a punishment for a crime and so did not necessitate constitutional protections.⁷⁷ These rulings, in effect, have allowed lawmakers to place immigration law “beyond the reach of the judiciary and to remove from all aliens as much of the protections of the Constitution as possible.”⁷⁸

During this period, “Chinese laborers were not targeted for deportation because they committed murder, rape, or other violent acts. Rather, the sole reason these aliens were being deported was because they failed to fill out the proper forms required by Congress.”⁷⁹ Using these draconian laws, the Attorney General detained a person of Chinese descent, Wong Kim Ark, for deportation despite his being born in the United States.⁸⁰ The Supreme Court held Wong Kim Ark had the constitutional status of birthright U.S. citizenship.⁸¹ Despite this, he continued to be subjected to gruesome inquisition-style interrogations and was forced to

73. *Id.* at 729 (citing An Act to prohibit the coming of Chinese persons into the United States (Geary Act), ch. 60, 27 Stat. 25 (1892)) (emphasis added).

74. *Id.* at 731-32.

75. Saito, *supra* note 56, at 16.

76. *See generally* Saito, *supra* note 56, at 17-20 (discussing how the plenary power is used in modern immigration law to discriminate against groups like Cubans, Haitians, Muslims, and Arabs).

77. *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) (“The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend.”); *see also* VANESSA BEASLEY, WHO BELONGS IN AMERICA? 104 (2006).

78. BEASLEY, *supra* note 77.

79. Gregory L. Ryan, *Distinguishing Fong Yue Ting*, 28 ST. MARY’S L.J. 989, 1007 (1997) (citing *Fong Yue Ting v. United States*, 149 U.S. 698, 731 (1893)).

80. *United States v. Kim Wong Ark*, 169 U.S. 649 (1898).

81. *Id.*

“laboriously fill out routine paperwork” after returning to the United States from trips abroad.⁸² Thus, “[i]n what must have felt like an enormous insult, Wong still had to fill out the government’s form 430, ‘Application of *Alleged* American Citizen of the Chinese Race for Preinvestigation of Status,’ even though his status as a citizen had been affirmed by the highest court in the land.”⁸³ Like Wong Kim Ark, even San Francisco-born famed martial arts actor, Bruce Lee, was subjected to the insulting and oppressive INS form 430.⁸⁴

Completing the trifecta of the Chinese Exclusion Cases is *Wong Wing v. United States*, which reaffirmed that “deportation is not a punishment.”⁸⁵ The *Wong Wing* Supreme Court decision granted a blank check to the Attorney General and the immigration courts, giving birth to the Leviathan monster of immigration law—an extra-judicial system—which went on to deprive generations of immigrants of constitutional protections for over 100 years, defying the country’s history of inclusivity and enfranchisement of women, Blacks, and other marginalized groups. This represents a wide-reaching move taking essential rights away from a populace when the country’s history had long been towards inclusivity of all groups to partake in the “all men are created equal” ideas that the country was founded upon.⁸⁶ No longer did immigration courts have to grapple with constitutional claims of due process, or search and seizure—an inquisitorial, summary approach sufficed in all-matters related to immigration.⁸⁷ In essence, this era’s congressional acts, and the Supreme

82. ERIKA LEE & JUDY YUNG, *ANGEL ISLAND: IMMIGRANT GATEWAY TO AMERICA* 84 (2010).

83. *Id.* at 83-84, 84 n. 29. File 12017/1686 (Wong Kim Ark), Return Certificate Application Case Files, NARA, PR. *Id.* at 89-109.

84. *Id.* Exhibit A, File 12017/53752 Lee, Bruce (Lee Jun Fon), Return Certificate Application Case Files, NARA, PR.

85. *See* *Wing Wong v. United States*, 163 U.S. 228 (1896) (reiterating that deportation was not a punishment for a crime and thus did not require constitutional protections, but recognizing that sentencing someone to hard labor for allegedly being in the country illegally did require constitutional protection).

86. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

87. *See* *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) (“He has not, therefore, been deprived of life, liberty or property, without due process of law; and the provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, have no application.”); *see also* *Wing Wong v. United States*, 163 U.S. 228 (1896).

Court decisions were “unapologetically racists . . . unmatched in their pitilessness.”⁸⁸

3. *Pet-Door Era and Ethnic Cleansing (1920-1950)*

The Eugenics Movement at the beginning of the twentieth century “influenced popular thinking” regarding immigration restriction.⁸⁹ Neil Foley, in *The White Scourge*, traced racism to eugenicists who “worried” about the “survival of the unfit,” and felt threatened that the “‘Nordic’ race was in danger of being overwhelmed . . . by the ‘rising tide’ of dark people in the world.”⁹⁰ By the 1920s, the political climate toward immigration had morphed into one of “effective restrictionism” in what LeMay terms the “Pet-Door Era” when policies would essentially close the door to all but a favored few.⁹¹ Policies during this time were influenced by the Red Scare in the summer of 1919, “reflecting a xenophobic fear of Bolshevik radicalism, setting the state for a new era of immigration policy.”⁹² People are fickle, and that’s a well-known cliché. Yet, when analyzing the frequency of senators’ use of the tactic of making wild representations about a new group of immigrants, its effectiveness is remarkable. “The xenophobic efforts to enforce restrictionism drastically limited immigration, and effectively overturned a century-old policy of an open door to immigration” in exchange for “a series of laws (in 1921, 1924, and 1929) basing immigration on quotas of national origin.”⁹³ To wit, Harry Laughlin, a leading eugenicist of this era, “pushed for a federal sterilization law . . . [and] provided extensive testimony to Congress in support of the Immigration Act of 1924,” one of these national origin quota laws.⁹⁴ He argued that, based on his

88. James Whitman, *Why the Nazis Love America*, TIME MAG. (March 21, 2017), <http://time.com/4703586/nazis-america-race-law/> [<https://perma.cc/94MU-32EH>].

89. FOLEY, *supra* note 48, at 5 (defining the Eugenics Movement as “advance[ing] the theory that behavior and racial traits were genetically determined and therefore inherited”).

90. *Id.*

91. LEMAY, *DUTCH DOOR*, *supra* note 37, at 73.

92. MICHAEL C. LEMAY, U.S. IMMIGRATION 3 (2004) [hereinafter LEMAY, U.S. IMMIGRATION].

93. *Id.*

94. RILEY, *supra* note 16, at 26. See Immigration Act of 1924, ch. 190, 43 Stat. 153 (1924) (amended 1952). Interestingly, the Act concludes at Section 32, Savings Clause, which anticipates the rebuking of any section as unconstitutional and reserves the validity of the rest of the act as unaffected by any potential sections deemed unconstitutional. Also, Section(2)(f), creates a tremendous discretionary judgment to immigration officers to deem individuals “inadmissible” (to

research, “an ‘excessive’ number of immigrants coming from the Southern and Eastern Europe were mentally deficient and thus ‘unfit.’”⁹⁵ Because of the irresponsible fashion in which these racist laws were passed, and the calculated damaging effect of the reports, redressing these wrongs and preventing future transgressions should be observed, in line with constitutional protections. “These laws stemmed the flood of immigration (from about 25 million during the forty years of the door-ajar era) to a comparative trickle (just over 6 million during the forty-five years of the pet door era).”⁹⁶

a. Mexican Repatriation

The Department of Labor concluded in 1920 that; a) Mexican immigrants were not competing with Americans for jobs, and b) that “the agricultural industry of the Southwest could not continue to expand without access to Mexican labor.”⁹⁷ Yet, through the denigrative rhetoric that is boilerplate of congressmen throughout history, by the end of the decade, “approximately one million persons—U.S. citizens as well as noncitizens—of Mexican ancestry” were used as scapegoats during the Great Depression of 1929 and deported to Mexico.⁹⁸ It is believed that 60 percent of those deported were U.S. citizens by birth.⁹⁹ Made invisible before today’s public eye, the “‘Mexican repatriation’ efforts of 1929 to 1936 are a shameful and profoundly illustrative chapter in American history, yet they *remain largely unknown*—despite their broad

the U.S.), if the officer “knows or has reason to believe” that the immigrant is inadmissible to the United States under immigration laws, a standard still used to determine several forms of inadmissibility today. Immigration Act of 1924, ch. 190, 43 Stat. 153, 154 (1924) (amended 1952); 8 U.S.C. § 1182(a); INA 212(a).

95. RILEY, *supra* note 16, at 27. Riley notes that “Laughlin eventually became the House of Representative’s chief eugenics advisor” where his legislation he drafted, while not becoming law, provided the model for Nazi Germany’s compulsory sterilization of 1933. *Id.*

96. LEMAY, U.S. IMMIGRATION, *supra* note 92.

97. FOLEY, *supra* note 48, at 46.

98. Kevin R. Johnson, *The Forgotten “Repatriation” of Persons of Mexican Ancestry and Lessons for the “War on Terror”*, 26 PACE L. REV. 1, 1-2 (2005) [hereinafter Johnson, *The Forgotten*].

99. See FRANCISCO E. BALDERRAMA & RAYMOND RODRIGUEZ, *DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S*, at 330 (1995) (describing the flagrant disregard for human rights when many children born in the United States would have to leave with their families who were summarily deported accounting for as many as 60 percent of those expelled being U.S. citizens).

and devastating impact.”¹⁰⁰ To put it in perspective, it is approximated that one-third of all Mexicans in the United States were deported between 1931 and 1934.¹⁰¹ This historic mass deportation carried out from 1929 through 1936 has become known as Mexican repatriation.¹⁰² The forced movement against Mexicans was based on race rather than citizenship, and “meets modern standards for ‘ethnic cleansing,’”¹⁰³ and matches President Trump’s advocated plan of action in present time.¹⁰⁴

b. Bracero Program

The bombing of Pearl Harbor by the Japanese on December 7, 1941 forced the United States into World War II.¹⁰⁵ This, in turn, led to the “virtually overnight” creation of the Bracero Program which “Congress quietly authorized . . . in 1943.”¹⁰⁶ Although “vegetable and cotton growers in California, Texas, and Arizona, sounded the alarm of impending labor shortages . . . Texas employers were excluded from eligibility for braceros, as Mexican negotiators cited a history of discrimination and abuse of Mexican workers in that state.”¹⁰⁷ To bar one of the three states in dire need of labor signifies a deep level of persistent and intolerable abuses by Texas toward Mexican immigrants. “Yet, “[f]rom 1942 through 1952, a total of 818,545 braceros were imported from Mexico [while at the same time] the INS apprehended

100. Alex Wagner, *America’s Forgotten History of Illegal Deportations*, ATLANTIC (Mar. 6, 2017), <https://www.theatlantic.com/politics/archive/2017/03/americas-brutal-forgotten-history-of-illegal-deportations/517971/> [<https://perma.cc/PK96-YL7E>] (emphasis added).

101. VICKI L. RUIZ, *FROM OUT OF THE SHADOWS* 29 (1998).

102. See generally BALDERRAMA & RODRIGUEZ, *supra* note 99 (outlining the trials and tribulations of the people who were deported and the destruction of the communities they were taken from).

103. Johnson, *The Forgotten*, *supra* note 98, at 6. See *Ethnic Cleansing*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“The elimination of a particular people from an area or country because of their racial or national identity; specif[ically], the officially sanctioned forcible and systematic diminution or elimination of targeted ethnic minorities from a geographic area.”).

104. See Wagner, *supra* note 100 (comparing the announcement by the Trump Administration “aimed at ‘protecting U.S. jobs’” while also tightly controlling who is able to enter the workforce and his contrast rhetoric claiming to remove criminals preying on innocent citizens with the Hoover Administration’s actions and rhetoric during this era).

105. CALAVITA, *supra* note 13, at 19.

106. *Id.* AT 18-19. The Bracero Program, negotiated by U.S. and Mexican officials, allowed the entry of temporary Mexican agriculture workers to address labor shortages. *Id.*

107. *Id.* at 19.

over two million undocumented workers, the vast majority of whom were Mexican.”¹⁰⁸

4. *Dutch-Door Era: Subtle Purity in Legislation (1950s-1980)*

The Dutch-Door Era, covering the 1950s through the 1980s, opened strong against Mexicans with Operation Wetback, and the prevailing disparaging discourse by senators wrangled with the surging Civil Rights Movement. President Truman’s civil rights message to Congress on February 2, 1948 urged “Congress to remove the remaining racial or nationality barriers which stand in the way of citizenship for some residents of [the United States].”¹⁰⁹ Truman reiterated this call when he vetoed the Immigration and Naturalization Act of 1952, recognizing it was based on “fantastic” notions of protection from Eastern European immigrants that had “fallen under the communist yoke” during the second Red Scare.¹¹⁰ Senator Pat McCarran, urged Congress to protect “this nation” from being “overrun, perverted, contaminated or destroyed” by its “deadly enemies” comprised of waves of immigrants who refuse to integrate to the American way of life.¹¹¹ President Truman denounced the bill as “a mass of legislation which would perpetuate injustices of long standing against many other nations of the world, and intensify the repressive and inhumane aspects of our immigration procedures.”¹¹² While President Truman’s June 25, 1952 veto was ultimately overridden by Congress, it is a historical golden nugget that exposed the arbitrary and gross injustices of the immigration law based on Eurocentric misconceptions about immigrants from non-White places of origin by a ruling class of megalomaniac White men in politics at the time.¹¹³

In 1954, President Truman’s successor, President Dwight D. Eisenhower, implemented Operation Wetback—a concerted law

108. *Id.* at 32. Furthermore, during this time there was a spike in illegal immigration, in part due to enforcement policies since “Border Patrol was notoriously reluctant to apprehend and deport illegal farm workers during the harvest season or at other times of peak labor demand.” *Id.*

109. Special Message to the Congress on Civil Rights, 20 PUB. PAPERS 125 (Feb. 2, 1948).

110. Veto of Bill to Revise the Laws Relating to Immigration, Naturalization, and Nationality, 182 PUB. PAPERS 443 (June 25, 1952).

111. 83 CONG. REC. 1517 (1953) (statement of Sen. McCarran).

112. Veto of Bill to Revise the Laws Relating to Immigration, Naturalization, and Nationality, 182 PUB. PAPERS 441 (June 25, 1952).

113. An Act to Revise the Laws Relating to Immigration, Naturalization, and Nationality, ch. 477, 66 Stat. 163 (1952).

enforcement effort—that enlisted the use of the military to deport more than one million Mexicans and even American citizens into deep southern Mexico; oftentimes resorting to violent tactics and leaving immigrants stranded without resources in cruel and brutal conditions.¹¹⁴

To counteract the racist and exclusionary treatment of Mexicans in U.S. society, a victory was secured in the Supreme Court case *Hernandez v. Texas* which held that people of Mexican ancestry could not be systematically excluded from juries.¹¹⁵ In addition, President John F. Kennedy's platform and election on November 8, 1960 “opened the way to a frontal attack on the quota system itself” amidst the Civil Rights Movement.¹¹⁶ This led the way for the Immigration and Nationality Act of 1965, and opened the doors to family categories and skilled laborers instead of primarily favoring Northern Europeans like the pre-1965 quota system.¹¹⁷ “Adding to the momentum for change, the civil rights movement pushed the nation and its leadership to seriously question and reevaluate the racial bias of many of the nation's laws. Immigration law was no exception.”¹¹⁸

Until then, Mexico and other countries from the Western Hemisphere had been excluded from the quotas. Once the visas were exhausted, those unable to enter legally crossed the US-Mexico border causing a surge in unauthorized migration. This new quota restriction on immigrants from Mexico was the beginning of a monstrosity of immigration policy to the United States by Mexicans, and the quota system never looked back. Because of this sudden influx, this was a time when multiple lawsuits legally challenged the constitutionality of immigrations arrests, deportation raids, and detentions.¹¹⁹

In the 1970s, the country began to face a recession and attacks on immigration were renewed.¹²⁰ The Immigration and Naturalization

114. See CALAVITA, *supra* note 13, at 53 (stating that despite Congress questioning immigration officials about the alleged abuse, Congress generally lauded the effort as effective and even increased the agency's budget).

115. *Hernandez v. Texas*, 347 U.S. 475 (1954).

116. LEMAY, U.S. IMMIGRATION, *supra* note 92.

117. Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911, 911 (1965) (“The immigration pool and the quotas of quota areas shall terminate June 30, 1968.”); MICHAEL C. LEMAY, *ILLEGAL IMMIGRATION* 8 (2007) [hereinafter LEMAY, *ILLEGAL IMMIGRATION*].

118. LEMAY, U.S. IMMIGRATION, *supra* note 92.

119. PARTISIA MACÍAS-ROJAS, *FROM DEPORTATION TO PRISON* 49-52 (2016).

120. LEMAY, U.S. IMMIGRATION, *supra* note 92, at 12.

Service began particularly targeting those of Mexican descent.¹²¹ However, officials found “settled U.S. residents unafraid to assert their constitutional rights.”¹²² This led to procedural protections being upheld and respected by the border patrol officers during this era.¹²³ The 1980s were a time when “[c]riminal deportations were difficult to execute because among those with convictions, many were long-term residents.”¹²⁴ This is a stark contrast to the modern era’s plucking of criminal immigrants from their long-term ties to the United States and simple deportations back to their country of origin, after paying the price—by serving their time in mandatory detention centers, earning private prison companies like Corrections Corporation of American (CAA) and The Geo Group huge bucks at the expense of taxpayers, and at the misery of immigrants’ blood, sweat, and liberty.

5. *Revolving Door Era (1985-2001)*

When the “Revolving Door Era” began, the tug-of-war between hate-mongering rhetoric and pro-immigrant legislation was at its most fervent immigration cycle to date. Senator Edward Kennedy argued for fundamental change in immigration law, successfully.¹²⁵ Kennedy’s work in immigration expanded from his commitment to civil rights and firm belief that America is a nation of immigrants (particularly Irish immigrants).¹²⁶ And while his initial most significant work in immigration starts with “the 1965 overhaul that ended a system of national quotas,” the Revolving-Door Era includes Kennedy’s Refugee Act of 1980. The Refugee Act of 1980 created systematic regulations for refugees and asylum seekers, redefined “refugee” to include more than just those from communist and Middle Eastern countries, and increased the number of people who could seek refugee status from three million to fifteen million.¹²⁷ Then, in 1986 Congress passed the Immigration

121. MACÍAS-ROJAS, *supra* note 119, at 50.

122. *Id.* at 51.

123. *Id.* at 53.

124. *Id.*

125. LEMAY, *ILLEGAL IMMIGRATION*, *supra* note 117, at 343.

126. Kelly Finchman, *Undocumented Irish Lose Champion with Kennedy Death*, ABC NEWS (Aug. 26, 2009), <https://abcnews.go.com/Politics/TedKennedy/kennedy-fought-illegal-irish-immigrants/story?id=8419782> [<https://perma.cc/F3NN-NCWB>].

127. LEMAY, *U.S. IMMIGRATION*, *supra* note 92, at 6.

Reform and Control Act (IRCA)¹²⁸ which led to the legalization of more than three million applicants, but also increased the size and budget for border control and resulted in more discrimination against “foreign-looking or -sounding people.”¹²⁹ These U.S. laws are the most favorable laws toward Mexican immigrants passed in over thirty years. Since then, the immigrant community has worked, continued to pay taxes, contribute to society, and pay into the social security fund without receiving any legal benefits for its contributions. Arguably this is so because, even amidst what has been one of the most beneficial periods for Mexican immigration, the incendiary and discriminatory attitude exposed by Foley’s *The White Scourge*,¹³⁰ persists against Latinos and immigrants in modern day America twenty years after its publication. For example, Kevin R. Johnson exposes the blatant use of race to deprive minorities of due process protections against unreasonable search and seizures in two Supreme Court cases.¹³¹

First, a 1996 ruling, *Whren v. United States*,¹³² which authorized traffic stops for driving while Brown (or on the basis of race) which “in effect authorizes racial profiling in run-of-the-mill traffic stops.”¹³³ This ruling is particularly frustrating and infuriating, because it opens up the door for arbitrary and capricious harassment by law enforcement on People of Color.¹³⁴ In essence, by authorizing the use of race to stop and possibly remove a noncitizen, it deprives People of Color of the constitutional protections and creates one more layer of subjugation through the law on minorities—yet another offensive dignity taking on non-White immigrants.

Even more upsetting is the situation for immigrants, who in the random police stop scenario, are pulled over by law enforcement officials without probable cause. Almost twenty years prior to *Whren*, the Court decided

128. Immigration Reform and Control Act of 1986, Pub.L. 99-603, 100 Stat. 3359 (1986).

129. LEMAY, U.S. IMMIGRATION, *supra* note 92, at 17-18.

130. FOLEY, *supra* note 48.

131. Kevin R. Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 CASE W. RES. L. REV. 993, 1005 (2016) [hereinafter Johnson, *Doubling Down*].

132. *Whren v. United States*, 517 U.S. 806 (1996).

133. Johnson, *Doubling Down*, *supra* note 131.

134. *Id.* at 1006 (“Indeed, the decision in *Whren* serves to create strong, if not almost irresistible, incentives for police officers to manufacture reasons other than race to justify a stop—even if race in fact was the true reason for the stop.”).

United States v. Brignoni-Ponce.¹³⁵ On the evening of March 11, 1973, the San Clemente immigration checkpoint was closed because of inclement weather, but two officers were observing northbound traffic from a patrol.¹³⁶ After observing one vehicle in particular, the officers decided to pursue and stop the vehicle, “saying later that their only reason for doing so was that its three occupants appeared to be of Mexican descent.”¹³⁷ Upon questioning the occupants about their citizenship they “learned that the passengers were aliens who had entered the country illegally.”¹³⁸ The *Brignoni-Ponce* opinion decided that “an immigration stop based on ‘Mexican appearance,’ . . . is permissible so long as combined with other factors.”¹³⁹ This insensitive opinion created a powerful legal avenue for unfairness and subjugation of minorities by government authorities based on skin color.

Those accorded with upholding and interpreting laws must be fair, impartial, willing, and ready to observe and respect constitutional protections to all persons, irrespective of race. The Justices of the Supreme Court took an oath to uphold the Constitution, and the flagrant constitutional violations against established immigrants are no less despicable than a rigged prizefight with a predetermined winner by the invisible man within the venue yet outside the prescribed rules. In sports however, the unfairness leaves a bad taste in our mouths, but we shake it off as entertainment and promoters justify it as part of the drama in entertaining. In law, and at the upper echelons of justice such as the Supreme Court, these lapses of judgment, or blatantly unfair decisions without observing the equal protection and due process protections of minorities, create the danger of robbing our nation of the democratic values of freedom and liberty for all, which make the United States a role model leader of nations.

The 1990s saw the “U.S. immigrant population [grow] rapidly,” with states such as North Carolina, Georgia, Nevada, Arizona, and Utah

135. *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

136. *Id.* at 873-74.

137. *Id.* at 874.

138. *Id.*

139. *Id.* at 875; Johnson, *Doubling Down supra*, note 131, at 1008. *See Brignoni-Ponce*, 422 U.S. at 885 (listing a larger number of reasons officers could use to pull over someone allegedly suspected of unauthorized presence, including “the characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut.”)

experiencing a dramatic growth in their immigrant populations.¹⁴⁰

One of the era's major legislations leading to this growth was the Immigration Act of 1990.¹⁴¹ The bill fixed what were seen as failures of IRCA, tipping the ratio of immigration preferences towards families rather than individuals.¹⁴² According to a study published by UC Davis, "Mexico received the major benefit" of the 1990 bill; and in 1995, it "alone had 51,502 (relative to the predicted 3,740)" family-based applications for spouses and children under 21 years of age of legal permanent residents.¹⁴³ Yet, the denial of constitutional rights to Mexican immigrants persisted, as evidenced by a U.S. Supreme Court decision on February 28, 1990. In *United States v. Verdugo-Urquidez*, the Court affirmed that "[t]he Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores."¹⁴⁴

The Revolving Door Era, culminates with the passage and implementation by Congress of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).¹⁴⁵ The law greatly expanded the grounds for which aliens could be removed based on criminal convictions, including the addition of petty theft, DUI's, and minor drug charges.¹⁴⁶ "By restructuring the deportation and detention process, . . . and collapsing exclusion and deportation into one removal category [were] way[s] to narrow the ways in which immigrants could contest deportation."¹⁴⁷ The minimal procedural due process

140. RANDOLPH CAPPS ET AL., URBAN INSTITUTE, THE DISPERSAL OF IMMIGRANTS IN THE 1990S (2002), <https://www.urban.org/sites/default/files/publication/60621/410589-The-Dispersal-of-Immigrants-in-the-s.PDF> [<https://perma.cc/A9H2-SFEP>] (noting that growth rates were "especially high across a wide band of states in the Southeast, Midwest, and Rocky Mountain regions).

141. See Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990) (amending the Immigration and Nationality Act to change the level and preference system of admission of immigrants to the United States and to provide for administration naturalization).

142. LEMAY, U.S. IMMIGRATION, *supra* note 92, at 19.

143. Michael Greenwood & Fred Ziel, *The Impact of the Immigration Act of 1990 on U.S. Immigration*, MIGRATION DIALOGUE, <https://migration.ucdavis.edu/mn/cir/greenwood/combined.htm> [<https://perma.cc/BR9L-TEDW>].

144. *United States v. Verdugo-Urdiquez*, 494 U.S. 259, 271 (1990) (quoting *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring)).

145. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub.L. 104-208, 110 Stat. 3009-546 (1996).

146. MACÍAS-ROJAS, *supra* note 119, at 61. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub.L. 104-208, 110 Stat. 3009-546, at 3009-627 (1996).

147. MACÍAS-ROJAS, *supra* note 119, at 61.

immigrants enjoyed in the post-civil rights, Dutch-Door era were swiftly eradicated by IIRIRA, which imposed “mandatory detention” and instituted “retroactive deportations and applied to unauthorized and legal permanent residents.”¹⁴⁸ This, in essence, created a ghost parallel legal system that ran counter to the United States Constitution and continues to maintain immigrants “outside society.”¹⁴⁹ This then, allowed for the swift removal of immigrants by categorizing them as criminal aliens, yet depriving them of constitutional protections by claiming that immigration proceedings were “purely civil” in nature, making draconian retroactive applications of the law constitutionally permissible.¹⁵⁰ Thereafter, detained immigrants were removed from the country even when they had been granted legal presence—another blatant deprivation of rights and of their liberty. As Acevedo affirms, “[W]hen a person becomes or is treated like a criminal, she has been dehumanized by being put into a category of not being a full citizen.”¹⁵¹ Thus, dignity takings are rampant against immigrants, even from the irrational denial of their eligibility to come before the law despite proven commitment and loyalty to this nation in their efforts, ties, and productivity.¹⁵²

148. *Id.*

149. HOBBS, *supra* note 23, at 189. This institutionalized regime, thus, indefinitely sentences immigrants to a life outside society in which they, in essence live in perpetual fear, are deprived equality, and retain second-class citizenship, live in poverty, and some even face death at the hands of officers or the Sonoran Desert.

150. Margaret W. Wong, *Challenges to Mandatory Detention Under U.S. Immigration Law*, FED. LAW. 58, 59 (Sept. 2010), http://www.fedbar.org/Resources_1/Federal-Lawyer-Magazine/2010/The-Federal-Lawyer-September-2010/Features/Challenges-to-Mandatory-Detention-Under-US-Immigration-Law.aspx?FT=.pdf [<https://perma.cc/646M-9AZG>].

151. Acevedo, *supra* note 9, at 631.

152. See Lawrence Cisneros, *Earning Civil Rights: Why the Constitutional Right to Appointed Counsel Should be Extended to Immigration Proceedings*, 28 HARV. J. HISP. POL’Y 8, 13 (2016) (arguing that the work immigrants do, the taxes they pay, the stimulus they generally provide to the American economy are reasons enough to state they have earned civil rights protections). As it pertains to “the ability for non-citizens or non-members of a society to earn entry into the social contract or explicit societal recognition through indirect means—an implicit understanding, forming a new contract through action and work rather than formal acknowledgment from the members’ government and formal institutions (like business entities) in granting one such rights.” *Id.* Cisneros goes on to conclude that “more precisely, where the undocumented, may begin to accrue rights and privileges through work earned in the explicit acknowledgment of such service through monetary compensation which directly benefited the member’s businesses and government.” *Id.* I would add that, combined with the doctrine of laches, in that the government failed to promptly remove the immigrants within one year of their entrance despite knowing of their unlawful presence, waived the illegality of the “original sin” and so long

6. *Storm-Door Era: Iron-Fisted Scourge through Criminalization (2001-2016)*

Lastly, the “Storm-Door Era” was set off by a hue and cry against terrorism following the terrorist attacks that destroyed the New York World Trade Center on September 11, 2001.¹⁵³ The transition during this era, from operating on the outskirts of a civil legal system toward a criminal legal system for processing immigrants, was reminiscent of “the earliest moments of racially restrictive immigration laws—the Chinese Exclusion Acts of 1882, 1892, and 1902, the 1921 Quota Act, the 1924 Immigration Act—criminal prosecutions, criminal deportations, and mandatory detentions were not prevalent in immigration enforcement.”¹⁵⁴

a. Mandatory Detention

The Mandatory Detention is codified at INA § 236(c).¹⁵⁵ In effect, “[t]he United States runs a massive immigrant detention system, pursuant to several statutory schemes” granting broad enforcement discretion to the Department of Homeland Security.¹⁵⁶ This detention robs immigrants of constitutional protections since deportation matters are civil in nature, as was myopically affirmed by the Supreme Court in *INS v. Lopez-Mendoza*.¹⁵⁷ Immigration proceedings further treat detained individuals as “sub-persons,” and are at best extra-judicial proceedings. On any given day, an observer will find these proceedings to be surreal and so far outside American constitutional jurisprudence that it shocks the conscience of an upholder of American values. This unconscionable

as they have been honorable members of their community, have committed no crimes, and have paid taxes consistently, then they have “earned” their right to apply for a path to citizenship.

153. See LEMAY, U.S. IMMIGRATION POLICY, ETHNICITY, AND RELIGION, *supra* note 28, at 26 (lasting from 2001-2016, the Storm Door Era aimed at establishing “Fortress America” through the passage of stringent legislation designed to “harden” and “strengthen” the U.S. borders, with laws like the USA Patriot Act and the Homeland Security Act).

154. MACÍAS-ROJAS, *supra* note 119, at 42.

155. 8 U.S.C. § 1226(c); INA § 236(c) (mandating detention for a number of crimes which would make someone either inadmissible or deportable, including an undefined “crime of moral turpitude”).

156. Prerna Lal, *Legal and Extra-Legal Challenges to Immigrant Detention*, 24 ASIAN AM. L.J. 131, 135 (2017).

157. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984).

treatment of an integral segment of American society, outside constitutional protections, constitutes a dignity taking.¹⁵⁸

The United States' history of dignity takings through over-punishment spans from the slaughtering of the Native Americans, Black slavery, the Mexican Repatriations, and through then-Presidential candidate Donald Trump's slandering of Mexican immigrants and U.S. citizens of Mexican ancestry as "rapists" and "people with lots of problems, bringing drugs . . . bringing crime . . ." ¹⁵⁹ while fervently advocating for the re-institution of Eisenhower's 'Operation Wetback.'¹⁶⁰ Eerily, former Maricopa County (AZ) sheriff, Joe Arpaio, referred to Tent City, a local Phoenix immigration detention center, as a "concentration camp."¹⁶¹ Arpaio is "well known in part for forcing his inmates to wear pink underwear and sleep outdoors in his Tent City Jail."¹⁶² This mistreatment of a particular race is reminiscent of the pre-WW2 era,

158. See John Felipe Acevedo, *Dignity Takings in the Criminal Law of Seventeenth-Century England and the Massachusetts Bay Colony*, 92 CHI. KENT L. REV. 743 (2017) ("A society's ideological agenda drives the way convicts are viewed, demonized, or pitied. The dehumanization of criminals may not be as obvious as white colonial leaders calling Africans 'savages,' but it can still lead to a skewing of punishments to being overly severe, and in fact dehumanizing, especially as all offenders get associated with the most severe ones."). In the spirit of Acevedo's expanded definition to instances where the state over-punished the defendant's body, I argue that prolonged detentions in immigration constitute "over-punishment," separate and aside from recklessly allowing detainees to die or become seriously ill while in custody. I further argue that reaping thirty years of benefits and productivity without an opportunity for conferring legal status benefits, or worse, spitting them back to their country of origin, is cruel and unusual and constitutes a dignity taking.

159. See Katie Reilly, *Here Are All the Times Donald Trump Insulted Mexico*, TIME (Aug. 31, 2016), <http://time.com/4473972/donald-trump-mexico-meeting-insult/> [<https://perma.cc/L4SR-9WJJ>] (reporting on every instance Donald Trump publicly insulted Mexican immigrants and people of Mexican ancestry in the year leading up to the 2016 election).

160. Yanan Wang, *Donald Trump's 'Humane' 1950s Model for Deportation, 'Operation Wetback' was Anything But*, WASH. POST (Nov. 11, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/09/30/donald-trumps-humane-1950s-model-for-deportation-operation-wetback-was-anything-but/?utm_term=.06daf836b18b [<https://perma.cc/U6ZP-ATW4>] (describing President Trump's approval of the 1955 'Operation Wetback,' which was an intense and controversial effort implemented to encourage Mexican immigrants to leave the country on their own out of fear).

161. See Valeria Fernández, *Arizona's 'Concentration Camp': Why Was Tent City Kept Open for 24 Years?*, GUARDIAN (Aug. 21, 2017, 2:15 PM), <https://www.theguardian.com/cities/2017/aug/21/arizona-phoenix-concentration-camp-tent-city-jail-joe-arpaio-immigration> [<https://perma.cc/L4SR-9WJJ>] (According to the Guardian, when they asked Arpaio about the comment, he brushed it off as a joke but added: "But even if it was a concentration camp, what difference does it make? I still survived. I still kept getting re-elected.").

162. *Id.*

when in 1934, Hitler “ordered the creation of the People’s Court (*Volksgerichtshof*) [as] part of a system of terror, condemning tens of thousands of people as “Volk Vermin.”¹⁶³

Similarly, the “mandatory detention” statute leads to immigrants prolonged detention and subsequent deportation, without regard to the disruption to family units. The U.S. Supreme Court has interpreted the Fourteenth Amendment to recognize a right to family integrity.¹⁶⁴ Therefore, by detaining and/or deporting a relative of a United States citizen (causing severe financial, emotional, educational, and parenting strains to “family life”), that U.S. citizen’s constitutional rights are infringed upon, which include derivative claims by his family.¹⁶⁵ Thus, the systematic implementation of mandatory detention and its related laws in this regard are tantamount to dignity takings against the immigrant population. Alison Parker, co-director of the U.S. program of Human Rights Watch, briefly chronicled the frustration by attorneys in trying to find their immigrant clients, or that of trying to find a relative once they are in immigration custody.¹⁶⁶

163. *The Reichstag Fire*, U.S. HOLOCAUST MEMORIAL MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/the-reichstag-fire> [<https://perma.cc/XS3X-Y7BA>].

164. See Kevin B. Frankel, *The Fourteenth Amendment Due Process Right to Family Integrity Applied to Custody Cases Involving Extended Family Members*, 40 COLUM. J.L. & SOC. PROBS. 301, 309-321 (2007). Frankel identifies the three leading Supreme Court cases recognizing a due process right to family integrity under the Constitution: *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (recognizing the constitutional protection of the sanctity of the family extended to family choice arbitrary boundary of the nuclear family); *Santosky v. Kramer*, 455 U.S. 745 (1982) (requiring a higher standard of proof in cases that involve termination of the parent-child relationship); and *Troxel v. Granville*, 530 U.S. 57 (2000) (upholding the fundamental family rights and interests in the upbringing of a child without government interference). Here, my argument is twofold: first, “family life” includes the family lifestyle the parent and child have constructed within the United States and become accustomed to, and secondly, it follows that the substantive due process protecting the sanctity of family integrity flows from parent to child, as well as reciprocally from child to parent, the child as the bearer of the constitutional rights to be upheld.

165. See Tanya Golash-Boza, *Punishment Beyond the Deportee: The Collateral Consequences of Deportation*, 63 AM. BEHAVIORAL SCIEN. 1331 (2019) (stating that the effects of deportations on families such as increased emotional difficulties and depression in children who witness their parent’s arrest, older children becoming sole providers for their younger siblings, and the creation of financial crises).

166. See Alison Parker, *Lost in Detention*, MARSHALL PROJECT (Mar. 4, 2015, 10:23 AM), <https://www.themarshallproject.org/2015/03/04/lost-in-detention> [<https://perma.cc/JW6V-9L7P>] (describing how those detained in ICE custody are often lost in the immigration system: if they can afford an attorney, they are often denied access, their information is often incorrect in the system making locating them difficult, telephone access is prohibitively expensive, and they can be continually relocated to different facilities without notification to family members).

The Wall Street Journal recently reported a new record of 45,000 immigrants “detained,” which shattered the bed quota requirement by the U.S. government.¹⁶⁷ This begs the question: How is this happening? i.e. How is the quota requirement being met, thus generating a guaranteed around \$1 billion in annual revenues for private prisons?¹⁶⁸ The clear answer is that those entrusted to govern, are using the law as Leviathan tentacles to raid and “arrest immigrants in mass record numbers” in order to maximize the profits of corporations running these private prisons.”¹⁶⁹ It becomes evident that the government seeks to remove immigrants from the country only after reaping massive profits.

Thus, the United States appears to have taken a concept of domination of the “inferior races” through business and economics and implemented it freely. Through the implementation of dubious practices and greasing the politicians and lobbyists, we are witnessing an example of Congress taking life, liberty, and property from integrated members of the American fiber without due process.¹⁷⁰ Profits arise from their coerced labor, i.e., working for a dollar a day in order to raise funds to call their

167. Devlin Barrett, *Record Immigrant Numbers Force Homeland Security to Search for New Jail Space*, WALL STREET J. (Oct. 21, 2016); <https://www.wsj.com/articles/record-immigrant-numbers-force-homeland-security-to-search-for-new-jail-space-1477042202> [<https://perma.cc/F2BG-HX6P>].

168. See Yuki Noguchi, *Under Siege and Largely Secret: Businesses That Serve Immigration Detention*, NPR (June 30, 2019, 10:23 AM), <https://www.npr.org/2019/06/30/736940431/under-siege-and-largely-secret-businesses-that-serve-immigration-detention> [<https://perma.cc/T8BK-L7YY>] (stating that around 71% of migrants were detained in for-profit prisons and that GEO Group and CoreCivic, the two largest jailers, generated a total combined revenue of \$4.1 billion in 2018 with detention contracts making up about one quarter of the amount); see also Robert Stribley, *What is the 'Immigration Industrial Complex'?*, HUFFINGTON POST (June 29, 2017), https://www.huffingtonpost.com/entry/what-is-the-immigration-industrial-complex_us_5953b8cae4b0c85b96c65e2c [<https://perma.cc/Z58B-CEUF>] (estimating the amount it cost to house one immigrant awaiting deportation under ICE’s custody for an average of thirty-one days at \$5,633, averaging out to total cost to taxpayers for the entire detained immigrant population of \$2 billion per year).

169. Mark Karlin, *Massive Deaths in Border Desert Caused by US Immigration Policy*, BUZZFLASH (Feb. 3, 2015, 6:58 AM), <http://buzzflash.com/commentary/massive-deaths-in-border-desert-caused-by-us-migration-policy> [<https://perma.cc/YTH3-B75U>] (statement of Robert Neustadt).

170. See Noguchi, *supra* note 168 (“According to the Center for Responsive Politics, which tracks political contributions, CoreCivic and GEO Group spent \$1.6 million and \$2.8 million, respectively, on political contributions and lobbying in 2018, overwhelmingly to Republican candidates.”).

families,¹⁷¹ and from their bodies through privatized prisons; meanwhile billing taxpayers for the costs.¹⁷² In essence, it seems like congressmen long for the profitable days of slavery, and have found a way to reap the benefits without raising eyebrows. Peter Linebaugh warned of this phenomenon in *The Magna Carta Manifesto*, i.e., how rights are set aside when greed gets involved.¹⁷³

Moreover, despite this system of revenue-generating detention, one of the most bizarre features of the U.S. extra-judicial immigration system is finding immigration judges in suffocating rooms about three times the size of a walk-in closet, deep inside a privately-owned high-security prison.¹⁷⁴ Built as dizzying, colossal labyrinths with suffocating iron doors and impenetrable walls, no window or ventilation in sight, rendering escape nearly impossible in the middle of the high-desert. A judge acts as her own court clerk and stenographer, personally swearing in defendants, and the only courtroom assistant is a seemingly low paid, apathetic employee acting as a bailiff. This room is one short hallway walk to the prisoner beds, and one thick wall of separation. It screams dungeon. It feels Star Chamber-like. Obviously they are built with efficiency in mind, yet that efficiency failed to account for due process, and perhaps the private contractors were given carte blanche by the government in that regard with their primary goal of keeping the prisons profitable, hence, occupied.¹⁷⁵

171. See Shannon Najmabadi, *Detained Migrant Parents Have To Pay To Call Their Family Members. Some Can't Afford To*, TEX. TRIB. (July 3, 2018, 2:00 PM), <https://www.texastribune.org/2018/07/03/separated-migrant-families-charged-phone-calls-ice/> [<https://perma.cc/UCC4-PSAC>] (“For detainees who earn \$1 to \$3 per day in exchange for participating in “voluntary work programs,” a 15-minute phone call could easily exceed a day’s paycheck.”).

172. See Stribley, *supra* note 168 (“In 2013, the Nation reported that immigration detention costs United States taxpayers about \$2 billion per year”).

173. PETER LINEBAUGH, *THE MAGNA CARTA MANIFESTO* 265 (2008). The Atlantic Charter for example: ““All natural resources should be declared public property and be developed under public ownership.”” [To which] Churchill later wrote that the Atlantic Charter was not ‘applicable to the coloured races in colonial empires.’” Citing PENNY VON ESCHEN, *RACE AGAINST EMPIRE* 25 (1997).

174. Observations by Christopher Mendez, Adelanto Detention Facility, in Adelanto, Ca. (2017).

175. See, e.g., KARA GOTSCH & VINAY BASTI, SENTENCING PROJECT, CAPITALIZING ON MASS INCARCERATION: U.S. GROWTH IN PRIVATE PRISONS 9-11 (2018), <https://www.sentencingproject.org/wp-content/uploads/2018/07/Capitalizing-on-Mass-Incarcerati-on.pdf> [<https://perma.cc/QTP6-ZLFG>] (showing that massive amounts of money are invested in

b. Sonoran Desert Border Deaths

By the turn of the millennium, there was sufficient information documenting the brutal effects of IIRIRA on immigrants attempting to cross through the Sonoran Desert.¹⁷⁶ As Robert Neustadt proclaims, “[t]his situation is a full-blown humanitarian catastrophe, and U.S. government border enforcement strategy is directly implicated in the dramatic increase in deaths.”¹⁷⁷ In fact, the Kino Border Initiative, a binational organization focused on promoting U.S.-Mexico border relations and immigration policies that affirm the dignity of migrants, reported that, “[s]ince 1998, more than 6,500 have died along the U.S.-Mexico border,” yet these numbers only account for known deaths in the vast desert.¹⁷⁸ With limited options, a mass exodus of immigrants from Latin America face death by slow starvation or substandard living conditions at the hands of increasing economic pressures. Now, with Donald Trump’s “remain in Mexico” policy, even with a strong basis for a claim of asylum, migrants risk their lives attempting to cross with no laws to protect them, or provide any relief.¹⁷⁹

S.B. 1070 was enacted by the State of Arizona in 2010 purportedly to “discourage and deter the unlawful entry and presence of aliens and economic activities by persons unlawfully present in the United States.”¹⁸⁰ However, as Ali Noorani states, this bill “was not just an attack on undocumented immigrants, it was a clear effort to halt the demographic and cultural change that was taking place in Arizona, not to mention America as a whole.”¹⁸¹ The bill’s intent was to “make attrition

continuing practices of mass incarceration to ensure profits for shareholders through lobbying and other efforts).

176. RAQUEL RUBIO-GOLDSMITH ET AL., *THE “FUNNEL EFFECT” & RECOVERED BODIES OF UNAUTHORIZED MIGRANTS PROCESSED BY THE PIMA COUNTY OFFICE OF THE MEDICAL EXAMINER, 1990-2005*, at 59-60 (2006).

177. Karlin, *supra* note 169 (closing traditional areas where people crossed caused a “funnel effect” pushing people into the desert and mountain terrain of Arizona and Texas).

178. *Id.*

179. *See Delivered to Danger: Illegal Remain in Mexico Policy Imperils Asylum Seekers’ Lives and Denies Due Process*, HUMAN RTS. FIRST (Aug. 2019), <https://www.humanrightsfirst.org/sites/default/files/Delivered-to-Danger-August-2019%20.pdf> [<https://perma.cc/MUL9-UAY9>] (discussing the crisis at the border as desperate asylum seekers are forced to wait in sometimes dangerous areas in Mexico for a chance to have their case heard and that desperate to reach the United States sooner, several have died crossing the border).

180. 2010 Ariz. Legis. Serv. Ch. 113 (S.B. 1070) (West 2010).

181. ALI NOORANI, *THERE GOES THE NEIGHBORHOOD* 42 (2017).

through enforcement” of immigration laws at the state level.¹⁸² Its provisions successfully negatively impacted the immigrant community by authorizing harassment, questioning, arrest, and criminalization of presence within the borders of Arizona; conditions eventually diluting economic opportunities for migrants within the state and discouraging them from staying or coming to Arizona.¹⁸³ These feelings occurred despite Federal Judge Susan Bolton’s granting of a preliminary injunction, enjoining Arizona and state officials from enforcing certain provisions in the summer of 2010.¹⁸⁴ When the case eventually came before the Supreme Court, it acknowledged Arizona’s claim that there is “an ‘epidemic of crime, safety risks, serious property damage, and environmental problems’ associated with the influx of illegal migration.”¹⁸⁵ To wit, the U.S. Supreme Court noted, “Warning signs are posted that read ‘DANGER—PUBLIC WARNING—TRAVEL NOT RECOMMENDED.’”¹⁸⁶ Yet, Congress has taken subjugation through language in law to keep immigrants “outside of society” one step further. Lawmakers have strayed from inclusive descriptors of immigrants to utilizing words like “alien” to insist that they remain outsiders. They may live and contribute to American society for extended periods of time, yet they are perpetually labeled as foreigners. Once dehumanization and reclassification are in full force fanning public sentiment, then at the highest echelon of American society these mass graves are devoid of nexus and easily dismissed as another nation’s problems.

c. Deferred Action for Childhood Arrivals (DACA)

We also saw the creation of DACA during this era. On December 18, 2010, Congress voted on a law that would have conferred legal status to millions of immigrant youth: The “Development, Relief and Education

182. 2010 Ariz. Legis. Serv. Ch. 113 (S.B. 1070) (West 2010).

183. See TOMAS LOPEZ, UNIV. ARIZ., LEFT BACK: THE IMPACT OF SB 1070 ON ARIZONA’S YOUTH, (Sept. 2011), https://law.arizona.edu/sites/default/files/Left_Back%20Report.pdf [<https://perma.cc/X9YM-FJPX>] (describing how the legislature was able to effect communities, especially the youth, with the passage of the bill which authorized harassing behavior by law enforcement including anxiety and distrust for public officials).

184. *United States v. Arizona*, 703 F. Supp 2d. 980 (D. Ariz. 2010), *aff’d*, 641 F.3d 339 (9th Cir. 2011), *aff’d and rev’d* 567 U.S. 387 (2012).

185. *Arizona v. United States*, 641 U.S. 339, 398 (2012).

186. *Id.*

for Alien Minors” Act, better known as the DREAM ACT.¹⁸⁷ While versions of the bill have been introduced since 2001, and continue to be introduced, that morning was the closest it has come to passage, falling just five Senate votes shy from being enacted into law.¹⁸⁸ In 2012, then Secretary of the Department of Homeland Security, Janet Napolitano, issued a memo to immigration officials directing them to defer enforcement actions against certain undocumented immigrants.¹⁸⁹ This program, which became known as the DACA program, protected “nearly 800,000 young immigrants brought to the United States as children from deportation.”¹⁹⁰ Even though DACA, and even the narrow defeat of the DREAM ACT, represented a short-lived move towards beginning some “dignity restoration” for undocumented workers in the United States, the election of President Trump quickly shifted the tide in the other direction.

B. Current State of Affairs: Trump Times

Since the Chinese Exclusion Cases of the 1880s, the courts have consistently relied on this precedent to quickly adjudicate cases in favor of the government and deny any detailed review of immigrants’ constitutional challenges. Immigrant rights made some progress almost a century later through the Civil Rights Movement, as well as the subsequent immigration amnesty twenty years later. Despite some regressions in policy, there were signs of progress toward the incorporation and legalization of the immigrant sector into American society, most notably, the young immigrants referred to as

187. H.R. 5241, 111th Cong. (2010); 12/18/2010 Cloture on the motion to agree to House amendment to Senate amendment not invoked in Senate by Yea-Nay Vote. 55 – 41.

188. AMERICAN IMMIGRATION COUNCIL, *The Dream Act, DACA, and Other Policies Designed to Protect Dreamers*, (Aug. 2019), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_dream_act_daca_and_other_policies_designed_to_protect_dreamers.pdf [https://perma.cc/6GRN-76ME].

189. See Memorandum from Janet Napolitano, Sec’y, Dep’t of Homeland Sec., to David Aguilar, Acting Comm’r, U.S. Customs and Border Prot., et al. 1 (June 15, 2012), <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [https://perma.cc/7M6D-8YVD]; Remarks on Immigration Reform and an Exchange With Reporters, 1 PUB. PAPERS 800 (June 15, 2012), <https://www.govinfo.gov/content/pkg/PPP-2012-book1/pdf/PPP-2012-book1-doc-pg800.pdf> [https://perma.cc/P8VQ-CVET] (detailing the need for action for certain undocumented immigrants and the inability of Congress to pass the DREAM ACT).

190. Tal Kopan, *Trump Ends DACA but Gives Congress Window to Save It*, CNN POLITICS (Sept. 5, 2017), <http://www.cnn.com/2017/09/05/politics/daca-trump-congress/index.html> [https://perma.cc/9EDW-42EK].

DREAMERS.¹⁹¹ However, Donald Trump publicly threatened Mexican immigrants from the date he “launched his campaign with a speech describing Mexicans as rapists.”¹⁹² Trump’s disparaging remarks were central to his presidential campaign and repeatedly slandered Mexicans as “[d]rug dealers, criminals, [and] rapists.”¹⁹³ Then, during the first year in office, on September 5, 2017, Trump rescinded DACA¹⁹⁴ and implemented aggressive deportation measures.¹⁹⁵ Coincidentally, the Trump Administration also renewed several lucrative contracts including GEO Corporation’s private prison government contracts, almost immediately upon taking office.¹⁹⁶ All the while President Trump derives power from his nativist agenda charging that “America needs to build a wall to stop immigrants . . . [and] has to be tough on ‘law and order,’ particularly against immigrant gangs and African American youth[.]”¹⁹⁷

191. See Chris Nichols, *Do Three-Quarters of Americans Support the DREAM Act? Nancy Pelosi Says So*, POLITIFACT (Sept. 19, 2017), <https://www.politifact.com/california/statements/2017/sep/19/nancy-pelosi/nancy-pelosi-claims-three-quarters-americans-suppo/> [<https://perma.cc/H4F9-EBTF>] (finding that polls have consistently found that the majority of Americans, including Republicans, support giving status or a pathway to citizenship for immigrants who arrived in the United States as children).

192. See generally David Leonhardt & Ian Prasad Philbrick, Opinion, *Donald Trump’s Racism: The Definitive List*, N.Y. TIMES (Jan. 15, 2018), <https://www.nytimes.com/interactive/2018/01/15/opinion/leonhardt-trump-racist.html> [<https://perma.cc/J9UB-H8EY>] (listing racist remarks about various racial groups made by President Trump).

193. ‘Drug Dealers, Criminals, Rapists’: What Trump Thinks of Mexicans, BBC NEWS (Aug. 31, 2016), <http://www.bbc.com/news/av/world-us-canada-37230916/drug-dealers-criminals-rapists-what-trump-thinks-of-mexicans> [<https://perma.cc/PRN8-MVDL>].

194. *Id.*

195. Michael D. Shear & Ron Nixon, *New Trump Deportation Rules Allow Far More Expulsions*, N. Y. TIMES (Feb. 21, 2017), <https://www.nytimes.com/2017/02/21/us/politics/dhs-immigration-trump.html> [<https://perma.cc/ZXD8-HKMV>].

196. See Complaint for Declaratory and Injunctive Relief, Campaign Legal Center v. Federal Election Commission, No. 1:18-cv-00053-TSC (D.C. Jan. 10, 2018) (alleging that the private prison corporation GEO illegally made a contribution to a super-PAC supporting the election efforts of President Donald Trump after a directive by the Deputy Attorney General Sally Yates which would reduce the use of for-profit prisons because of their conditions; then after the election of President Donald Trump, his Attorney General Jeff Sessions awarded lucrative government contracts to GEO group).

197. Julian E. Zelizer, *America’s Mirror on the Wall*, ATLANTIC (Jan. 28, 2018), <https://www.theatlantic.com/politics/archive/2018/01/americas-mirror-on-the-wall/551165/> [<https://perma.cc/UL9K-X333>]; see Richard Delgado, *J’Accuse: An Essay on Animus*, 52 U.C. DAVIS L. REV. ONLINE 119 (2018) (utilizing a hypothetical conversation to outline the extremely destructive language President Trump has used through his Twitter account, at rallies, and

Congress is taking a very mellow approach to a symbolic March 5, 2018 deadline issued by President Trump to pass a DREAM Act.¹⁹⁸ Most recently on February 26, 2018, “[t]he Supreme Court . . . declined to enter the national controversy over ‘dreamers,’ turning down the Trump Administration’s request to immediately review lower court decisions that keep in place [DACA].”¹⁹⁹ Regrettably, talks regarding immigration reform are ineffective, and millions of long-term contributing immigrants remain dehumanized as ‘illegals’ living outside society to face the force of law.

II. DIGNITY DUE

Because of the abusive extra-judicial practices in the U.S. immigration system which deprive immigrants of due process combined with the U.S. economy’s inability to subsist without the immigrant community, keeping immigrants outside the law is without a legitimate purpose (even at the federal level), and is, merely, a ruse to take property and liberty from them with the ulterior motive of profiting the ‘immigrant industrial complex.’²⁰⁰ Under Atuahene’s dignity takings framework, the immigrant community, in particular the undocumented immigrant community, is owed dignity restoration in order to bring them within the

elsewhere, how it affects People of Color, and the general absurdity of it coming from a person in his position).

198. See @realDonaldTrump, TWITTER (Sept. 5, 2017, 7:38 PM), <https://twitter.com/realDonaldTrump/status/905228667336499200> [<https://perma.cc/UN4W-Y3AG>] (“Congress now has 6 months to legalize DACA (something the Obama Administration was unable to do). If they can’t, I will revisit this issue!”); @realDonaldTrump, TWITTER (Jan. 10, 2018, 8:11 AM), <https://twitter.com/realDonaldTrump/status/951094078661414912> [<https://perma.cc/Z4GG-6X8K>] (“It just shows everyone how broken and unfair our Court System is when the opposing side in a case (such as DACA) always runs to the 9th Circuit and almost always wins before being reversed by higher courts.”)

199. Robert Barnes, *Supreme Court Declines to Enter Controversy Over ‘Dreamers,’ Rejects Trump Administration’s Request to Review Lower Court Rulings*, WASH. POST (Feb. 26, 2018), https://www.washingtonpost.com/politics/courts_law/supreme-court-declines-trump-request-to-take-up-daca-controversy-now/2018/02/26/4fb2e528-132f-11e8-9570-29c9830535e5_story.html?hpid=hp_hp-top-table-main_dacano-942am%3Ahomepage%2Fstory&utm_term=.8928b5fe3a58 [<https://perma.cc/G3AD-QLQF>].

200. See Stribley, *supra* note 168 (explaining how immigrants are often used as a means of income production by providing inexpensive and disposable labor, profits for private prisons, massive campaign donations for officials by those who profit from the system, deportation’s ability to generate profits for the legal system and airlines, and contracts for border surveillance technology).

law and remedy the past and present racial injustices that resonate the injustices of indentured servitude. Atuahene adopts a definition of *dehumanization* as “the failure to recognize an individual or group’s humanness” and *infantalization* as “the restriction of an individual or group’s autonomy based on the failure to recognize and respect their full capacity to reason.”²⁰¹ Today, a vast ocean of long-term immigrants to the United States from Latin American countries have assimilated to abide by the laws of this country, contribute, produce, and pay taxes, and yet, they are “invisible” in the political conversation, thus effectively depriving them of dignity, rights, and an opportunity to be heard. In Atuahene’s words and visionary concept, “When an individual or community’s humanity is invisible, they are no longer regarded as humans having the mental acumen, soul, or agency necessary to enter into the social contract.”²⁰²

Yet, the best analogy in arguing for dignity restoration of immigrants, is drawn from Acevedo’s *Restoring Community Dignity Following Police Misconduct*,²⁰³ in which he argues that the “takings theory is equally applicable to police brutality against the bodies of individuals when such brutality arises from the kind of systemic discrimination evident in” police misconduct.²⁰⁴ The analogy is of parallel exactitude given the transgressions against a marginalized group at the hands of law enforcement. In applying the theory, the variables are simply substituted: the African American community deprived of dignity at the hands of local cops becomes undocumented immigrants at the hands of immigration law enforcement. Most recently, for instance, is Arizona’s the now-overturned S.B. 1070, former-Sheriff Arpaio’s wrongdoing, and the numerous atrocities that occurred behind closed doors at private detention centers. The transgressions and deprivations through a long history of systemic discrimination are well-documented for both groups—the difficulty for my argument is the limited known abuses against the bodies of undocumented immigrants while under custody

201. ATUAHENE, WE WANT WHAT’S OURS, *supra* note 8, at 31-32.

202. *Id.* at 31; *see also* Lawrence Brown, *supra* note 51, at 1039 (“This effect is especially pronounced when the confiscation of property is used to dehumanize and subjugate the citizens within—or remove them entirely from—the social contract.”).

203. Acevedo, *supra* note 9.

204. *Id.* at 625 (arguing that instances of police misconduct and violence like in the case of the Ferguson police department’s killing of the unarmed teenager, Michael Brown, which sparked nationwide protests is a form of community dignity takings).

given the secrecy, seclusion, and strict high-security within the abominable private prisons, although the fatal infringements are starting to be more publicized.²⁰⁵

CONCLUSION

The Utah Compact

The Mayflower Compact of 1620 was “a set of rules for self-governance established by the English settlers who traveled to the New World on the Mayflower” to deal with the lawlessness that awaited them.²⁰⁶ It served as inspiration for the Utah Compact, an effort to push for humane legislation integrating immigrants within the law.²⁰⁷ The Utah Compact contains five principles to guide Utah’s immigration discussion, centered around: 1) federal solutions, 2) law enforcement, 3) families, 4) economy, and 5) a free society.”²⁰⁸ It was drafted and strongly supported by “a dozen faith leaders, former governors, business leaders, and law-enforcement officials gathered in Salt Lake City,” with participants voicing opposition to Arizona’s S.B. 1070 and other “oppressive and Draconian legislation.”²⁰⁹ Moreover, the compact encourages local law enforcement resources to focus on criminal

205. *C.f.* Paloma Esquivel, ‘We Don’t Feel OK Here’: Detainee Deaths, Suicide Attempts and Hunger Strikes Plague California Immigration Facility, L.A. TIMES (Aug. 8, 2017, 5:00 AM), <http://www.latimes.com/local/lanow/la-me-ln-adelanto-detention-20170808-story.html> [<https://perma.cc/YCY4-J9FZ>] (exploring the conditions and distress that plague immigration detention facilities); Catherine E. Shoichet, *Surprise Inspections Find ‘Significant Issues’ in Treatment of ICE Detainees*, CNN POLITICS (Dec. 14, 2017, 8:27 PM), <http://www.cnn.com/2017/12/14/politics/immigrant-detainee-treatment-report/index.html> [<https://perma.cc/9HGL-3U9K>] (describing inappropriate language communicated to detainees by guards and misuse of disciplinary proceedings); Hannah Rappleye & Lisa Riordan Seville, *24 Migrants Have Died in ICE Custody During the Trump Administration*, NBC NEWS (June 9, 2019, 6:00 AM), <https://www.nbcnews.com/politics/immigration/24-immigrants-have-died-ice-custody-during-trump-administration-n1015291> [<https://perma.cc/A6GH-8GAP>] (“The Department of Homeland Security’s inspector general reiterated that fact in a report released this week that found ‘egregious violations’ at two detention centers it inspected, including nooses in detainee cells, inadequate medical care, rotten food and other conditions that endangered detainee health.”).

206. *See generally* *The Mayflower Compact*, HISTORY (Sept. 12, 2018), <http://www.history.com/topics/mayflower-compact> [<https://perma.cc/8FE4-MQ3F>]

207. NOORANI, *supra* note 181, at 51-52 (listing five principles of the Utah Compact to ensure a safe and reasonable approach to immigration and enforcement of immigration law)

208. *Id.* at 52.

209. *Id.* at 52.

activities and “not civil violations of federal code.”²¹⁰ This principle directly opposes what Arizona sought to accomplish, and it is a thumb on the nose to Supreme Court rulings finding that immigration detentions are of a civil nature, rather than criminal, thereby using the Justices’ own logic to keep local law enforcement away from preying on immigrants.

The present state of immigration is desperate for additional unity efforts similar to the Utah Compact which are crucial to pressuring Congress to feel the weight of the people. It is noteworthy that all talk of immigration reform stops at amnesty, it being treated as the Holy Grail of undocumented immigrants. Amnesty does little to restore dignity as years of lost opportunities, income, property, and for some, loss of liberty as a result of Congress’s failure to provide a just path towards legalization. I propose that future congressional bills on immigration reform include “dignity restorations” for these people including educational assistance, assistance with homeownership, and possible financial restitutions. An appeal for dignity restoration appears in the Utah Compact’s fifth principle, a “free society,” in which “immigrants are integrated into communities . . . [because] . . . [t]he way we treat immigrants will say more about us as a free society and less about our immigrant neighbors. Utah should always be a place that welcomes goodwill.”²¹¹

Likewise, until immigration reform gives visibility to the undocumented immigrants that reside in our country, dignity takings will continue to be a dark part of American history. Ellison ends his book stating, “[A]nd it is this which frightens me: Who knows but that, on the lower frequencies, I speak for you?”²¹² The protagonist, in shining light on his own story of invisibility, may actually be speaking to the reader, a person who is not considered invisible. Similarly, in advocating for the “invisible ones,” the undocumented immigrants, we may be truthfully advocating for our own “self-evident” rights as Americans. After all, when an entire subclass of citizens, live amongst us without constitutional protections, the “unalienable rights” of “life, liberty and the Pursuit of Happiness” have in fact been made alien.²¹³

210. *Id.* at 51 (Principle 2, Law Enforcement reads, “We respect the rule of law and support law enforcement’s professional judgment and discretion. Local law enforcement resources should focus on criminal activities, not civil violations of federal code.”).

211. *Id.* at 52.

212. ELLISON, *supra* note 2, at 581.

213. THE DECLARATION OF INDEPENDENCE (U.S. 1776).