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Abstract

Professor Failing's article begins with stories of the Chinese Exclusion period and modern Arizona border immigration. Tracing Emmanuel Levinas' argument about violence and totalization of the vulnerable Other as it is manifested in discriminatory legislation in these periods, she argues for a return to the Face-to-Face in deciding immigration requests for admission to the U.S. through a rubric of equitable guided discretion.

Keywords

Immigration, Department of Homeland Security, Chin Shee, Levinas

Disciplines

Immigration Law

RECOVERING THE FACE-TO-FACE IN AMERICAN IMMIGRATION LAW

MARIE A. FAILINGER*

I. PROLOGUE

It is 1908. Yee Won mourns his father's death. Yee Won, in his own words a Chinese-born "capitalist and property owner,"¹ is at home in San Francisco and at home in China. But Yee Won needs a wife. Perhaps because of anti-miscegenation laws or perhaps because he wants to honor his father's wishes, Yee Won returns to China a few years later for a wife, on his way out of the United States securing a certificate from the U.S. immigration service permitting him to be re-admitted upon his return.² In 1917, three years after he has returned to American shores, he comes to the ship landing to collect his wife, Chin Shee, his 4-year-old daughter, Yee Tuk Oy, and his three-year-old son, Yee Yuk Hing, who have journeyed to

* Professor of Law, Hamline University School of Law. My thanks to Prof. Desmond Mander-son, McGill University, who invited me to present a different version of this paper at the Levinas and Law Centennial Conference, and to my research assistants Taneeza Islam and Scott Michael, and to Barbara Kallusky of the Hamline Law Library.

¹ *Yee Won v. White*, 258 F. 792, 794 (9th Cir. 1919).

² *See id.* at 793-94; *see also* Hrishikesh Kathkeyan & Gabriel J. Chin, *Preserving Racial Identity: Population Patterns and the Application of Anti-Miscegenation Statutes to Asian Americans, 1910-1950*, 9 *ASIAN L. J.* 1, 14-15, 17 (2002) (noting that before 1910, twenty-eight states had anti-miscegenation statutes, seven of which expressly applied to people of Asian descent). The language used in anti-miscegenation laws differed from state to state: statutes in Arizona, California, Mississippi, and Utah referred to "Mongolians," Nevada and Oregon to "Chinese," and Montana to "Chinese and Japanese." *See id.* at 15 & n.55 (early nineteenth-century statutes in Arizona, California, Mississippi and Utah); *id.* at 15 & n.56 (Nevada and Oregon); *id.* at 15 & n.57 (Montana). In 1913, Wyoming adopted such a statute, as did South Dakota in 1919. *See id.* at 17 & nn.64-67 (discussing the Wyoming and South Dakota statutes). For insight into how these laws and other circumstances affected Asian women, see Connie Young Yu, *The World of Our Grandmothers*, in *MAKING WAVES: AN ANTHOLOGY OF WRITINGS BY AND ABOUT ASIAN AMERICAN WOMEN* 33, 37 (Asian Women United of Cal. ed., 1989) (noting the large disparity between the numbers of Chinese men and women—in 1890, there were 103,620 Chinese men and only 3,868 Chinese women in the U.S.).

be with him. But wife, daughter and son are barred from the United States—they are aliens, Chinese.³

It is 2006. A No More Deaths volunteer waiting at the Homeland Security building in Nogales, Arizona, proceeds toward a bus carrying border-crossers who have been in the desert as many as six days, providing them with water and some burritos.⁴ The volunteer notes that “[t]he children’s clothes reek of urine and there is [sic] dirt smudges on their faces. They are disturbingly quiet and still for the bundles of energy normally characterizing the ages of [one-and-a-half, three, and five] years”⁵ A face catches the volunteer’s eye:

A young girl, twelve years old [and] named Isabel, sits with her head between her knees. She has been vomiting and from the touch of my palm seems to have a fever. Her younger siblings and mother sit beside her, with the other young families nearby. I ask some of the mothers if they drank the dirty water from cow tanks in the desert, infamous for parasites, bacteria, even Giarrdia; indeed they have. The youngest ones, in diapers, have diarrhea as well.⁶

Isabel is just one among many faces. Sergio lies in a desert wash, walking from Mexico to find work in order to support his family.⁷ When he is rescued by Samaritans, a group of volunteers with training in humanitarian aid protocol, he is “horribly lost, emotionally distressed, and very ill from dehydration, vomiting, and pneumonia exacerbated by the monsoon rains.”⁸ On July 14, 2005, volunteer patrols of No More Deaths assisted 101 migrants crossing the border; yet, only four days later, at least seven migrants died along the Mexican border.⁹ On that fateful day, Cesario Dominguez comes from Zacatecas to search for the body of his daughter, Lucrecia, who had left weeks earlier with her 7-year-old daughter and 15-year-old son to make the “illegal journey” to “El Norte” in an attempt to reunite with the children’s father in Texas.¹⁰ Given her body’s decay, Cesario can identify Lucrecia only by the rings on her fingers, and takes her

³ See *Yee Won*, 258 F. at 794.

⁴ See No More Deaths – No Más Muertes, *The Revolution Will Have Paletas!!*, http://nomoredeaths.org/index.php?option=com_content&task=view&id=35&Itemid=56 (last visited May 11, 2007).

⁵ *Id.*

⁶ *Id.*

⁷ NO MORE DEATHS – NO MÁS MUERTES, 2005 YEAR END REPORT (2005), <http://nomasmuertes.org/EndofSummerReport2005.html>.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

home in a death box.¹¹ People become numbers—78 deaths in July and 279 deaths in 2005 along the Arizona-Mexico border, and at least 700 deaths along the entire U.S.-Mexico border in 1999 and 2000.¹²

Marie Miramontes is making garments in a hot, sweaty factory for a company named Mr. Pleat.¹³ Suddenly, the building where she is working is surrounded by Immigration and Naturalization Service agents, stern and armed. Some of the agents begin to move through the factory, harshly interrogating her co-workers.¹⁴ She sees some pull out their immigration papers and show them to the agents. Others, after a few questions, are handcuffed and led away.¹⁵ Yet another, at her sewing machine, is suddenly tapped on the shoulder and asked, “Where are your papers?”¹⁶ Seeing the agent’s badge, Marie is torn.¹⁷ Though she is a “legal” worker, who knows what they will do with the information that she works here? And yet, if she does not identify herself, she fears that she will be led away in handcuffs like so many of her co-workers. “I am afraid,” she says, “because ‘if I leave and they think I don’t have no papers [they might] shoot me or something. They see me leaving and they think I’m guilty.’”¹⁸ As another replies, “Yes, yes, I have my papers,” Marie decides to prove her identity—free to go, but at the same time ceding her freedom.¹⁹

The response of the law to these Faces Standing Over us is to not look.²⁰ The Department of Homeland Security does not look into the Faces of Marie, Isabel, Sergio or Cesario. The Supreme Court does not look at

¹¹ *Id.*

¹² *Id.* (providing the numbers for the Arizona section of the border alone); Pia M. Orrenius, Fed. Reserve Bank of Dallas, *Illegal Immigration and Enforcement Along the Southwest Border*, in *THE BORDER ECONOMY* 30, 33-34 (2001), available at http://dallasfed.org/research/border/tbe_issue.pdf (noting that the number of border crossing deaths rose from single digits before 1995 to an estimated 388 in 2000 alone because of the border enforcement strategy of eliminating undocumented worker-traffic from city centers, which resulted in such traffic moving to more sparsely populated areas with dangerous climates); see also *The Immigration Debate: More Hearings, No Compromise*, TUCSON CITIZEN (Ariz.), June 21, 2006, at 2A (noting that from January 1 to June 21 of 2006, there had been 101 deaths, 334 rescues, and 316,460 apprehensions along the Tucson sector of the U.S.-Mexican border).

¹³ See *Immigration & Naturalization Serv. v. Delgado*, 466 U.S. 210, 212 & n.1 (1984).

¹⁴ See, e.g., *id.* at 212-13 (providing a vivid description of an INS factory raid).

¹⁵ See *id.* at 230 (Brennan, J., concurring in part and dissenting in part).

¹⁶ *Id.* at 231.

¹⁷ See *id.* (stating that “it is clear from the testimony that respondents felt constrained to answer the questions posed by the INS agents, even though they did not wish to do so”).

¹⁸ *Id.* at 237.

¹⁹ *Id.*

²⁰ See generally EMMANUEL LEVINAS, *TOTALITY AND INFINITY: AN ESSAY ON EXTERIORITY* (Alphonso Lingis trans., Duquesne Univ. Press, 1969) [hereinafter LEVINAS, *TOTALITY AND INFINITY*] (discussing exteriority and the Face).

these Faces. Instead, the Court interposes language to absolve itself from recognizing the infinity, the epiphany, generated by the Other's Face.²¹ In the words of the Court, the INS agents who surround Marie's workplace with guns are "mere[ly] questioning" her, not "seiz[ing]" her under the Fourth Amendment, and thereby claim that her Fourth Amendment rights were not violated;²² thus, she has no Face the Court can see. Indeed, what the Justices choose to see, in absolving themselves of the task of looking into the Faces of Isabel, Sergio and Cesario, is the "formidable law enforcement problems" caused by the "flow of illegal entrants from Mexico" through "surreptitious entries" and the need to interdict them.²³

Nor does the Supreme Court look into the Faces of Yee Tuk Oy, Yee Yuk Hing and Chin Shee in 1921, when Yee Won appeals to the Justices to reunite his family.²⁴ Instead, the Supreme Court concentrates its gaze on legal sentences, clothed in the majestic indifference of the law that masks the brute force of the sovereign power. One sentence masquerades as words of peace; it quotes the Treaty of 1894, entered into with China and continued by statute past its own expiration.²⁵ In the violently objective language of the law, it provides that "the coming . . . of Chinese laborers to the United States shall be absolutely prohibited," but this provision "shall not apply to the return to the United States of any registered Chinese laborer who has a lawful wife, child, or parent in the United States, or property therein of the value of one thousand dollars, or debts of like amount due him and pending settlement."²⁶

The logic is careful and seemingly irrefutable. Yee Won, a registered Chinese laborer, has a certificate; he was permitted to return. So too can those who have made themselves respectably American, who have risen above the laborer class by accumulating significant property, or who have immediate family members currently in the United States—the law permits them entry.²⁷ However, Chin Shee, Yee Tuk Oy and Yee Yuk Hing cannot

²¹ See *id.* at 194-97. Levinas states that "[t]he Other remains infinitely transcendent, infinitely foreign; his face in which his epiphany is produced and which appeals to me breaks with the world that can be common to us . . ." *Id.* at 194.

²² See *Immigration & Naturalization Serv. v. Delgado*, 466 U.S. 210, 216 (1984).

²³ *United States v. Martinez-Fuerte*, 428 U.S. 543, 552 (1976).

²⁴ See *Yee Won v. White*, 256 U.S. 399 (1921) (denying Yee Won's habeas corpus petition for his wife and children).

²⁵ See *id.* at 401.

²⁶ *Id.* (citing Treaty of 1894, U.S.-P.R.C., Mar. 17, 1894, 28 Stat. 1210).

²⁷ See *id.* at 400-01; see also Valerie Natale, *Angel Island: "Guardian of the Western Gate,"* PROLOGUE: Q. NAT'L ARCHIVES & RECS. ADMIN., Summer 1998, at 125, 128-29 (noting exemptions for "[t]eachers, consular officials, tourists, merchants, and the wives and children of exempt individuals"). Valerie Natale also notes that in 1888 Congress banned Chinese immigrants already present in the United States from leaving the country and re-entering; in 1892, Chinese laborers were required to get

crawl their way through the interstices of that treaty language. The lawful wife and children of a Chinese laborer are not “in the United States”; nor are they the wife and children of a merchant, who could bring his wife and children into the United States through the statutory exception to the ban. Nor does the family of a Chinese laborer have property or debts due them “of the value of one thousand dollars.” Catch 22.

Chin Shee, Yee Tuk Oy, and Yee Yuk Hing are, of course, in the United States even though they are not “in the United States” in the reality that the law sees. They are likely held at the ironically named Angel Island immigration center in San Francisco.²⁸ A Chinese woman named Hing Tong, who some years earlier has also been refused entry into the United States, paints a vivid picture of what her successor might have experienced.²⁹ She is first stopped as a sixteen-year-old Chinese bride, confined at Angel Island until authorities can determine if she fits into some admissible alien category.³⁰ She becomes so angry with her confinement that when her husband brings her a box of *dim sum*, she throws it out the window, saying, “I would have jumped in the ocean if they decided to deport me.”³¹ Admitted to the United States, Hing Tong birthed and raised seven children in San Francisco, surviving the San Francisco earthquake.³² She returns with her husband to China so that their children can get a non-segregated education the land of the free does not offer.³³ When she tries to return to the United States after her husband’s death, she is barred from her new homeland and interned at Angel Island, then she is ordered deported, separated from her children, because of an (easily curable) infectious disease.³⁴

Conditions for Chin Shee, Hing Tong and the other women imprisoned at Angel Island were poor. The Reverend Ira Condit once described how “merchants, laborers, are all alike penned up like a flock of sheep, in a wharf-shed, for many days, and often weeks, at their own expense, and are

certificates of residence to prove their legal status or face arrest and deportation. See Natale, *supra*, at 129.

²⁸ See Natale, *supra* note 27, at 128.

²⁹ See Yu, *supra* note 2, at 36.

³⁰ See *id.*

³¹ *Id.*

³² *Id.* at 38-39.

³³ See *id.*

³⁴ *Id.* at 39. For a chillingly similar description of the fearful experience of modern-day refugees who are interdicted when they flee to Australian shores, see Joseph Pugliese, *The Incommensurability of Law to Justice: Refugees and Australia's Temporary Protection Visa*, 16 LAW & LITERATURE 285 (2004).

denied all communications with their own people.”³⁵ Food provided to inmates was barely edible and the quarters were dismal and overcrowded.³⁶ Indeed, in these wooden fire traps, where inmates were largely kept inside to prevent escape, women hanged themselves in shower stalls to avoid continued imprisonment or deportation to the uncertain fate that awaited them in China.³⁷ The poignant poetry that these immigrant women carved on the walls of “The Shed,” where they were kept, is a testament to their understanding that the law refused to see their Faces, to see what is plain to see in their suffering.³⁸

Though we do not know the fate of Chin Shee and her children from 1917 to 1921, when Yee Won’s appeals are exhausted,³⁹ or whether Yee Tuk Oy and Yee Yuk Hing grow up knowing only the world of the death-seeking prison-like barracks, we do know that the Supreme Court ultimately decides whether it will look. The Court declares that Yee Tuk Oy and Yee Yuk Hing are *persona non grata*, “fully unacceptable or unwelcome” in the United States.⁴⁰ We do know that, once again in the twenty-first century, their story is being re-told in dusty jails in Tucson and Yuma, by human beings speaking a different language but seeking the same life.

* * *

These are the Faces of U.S. immigration; and yet the philosopher Emmanuel Levinas tells us that the law has lost touch with reality.⁴¹ Lawyers, taking their cue from modern philosophy, have accepted as the key narrative about the nature of existence that we are inexorably driven by our nature “to think of other individuals either as extensions of the self, or as alien objects to be manipulated for the advantage of the individual or social

³⁵ Richard P. Cole & Gabriel J. Chin, *Emerging from the Margins of Historical Consciousness: Chinese Immigrants and the History of American Law*, 17 LAW & HIST. REV. 325, 330 (1999).

³⁶ See Angel Island Immigration Station Found., Immigration Station History, <http://www.aiisf.org/history> (last visited on Apr. 12, 2007); Natale, *supra* note 27, at 131 (noting that seventy to one hundred women slept and lived in a single room with bunk beds stacked three high and two across, and quoting one immigration official who stated, “[I]f a private individual had such an establishment, he would be arrested by the local health authorities”).

³⁷ See Yu, *supra* note 2, at 40; Immigration Station History, *supra* note 36; see also Galvan v. Press, 347 U.S. 522, 530 (1954) (noting that “deportation may . . . deprive a man ‘of all that makes life worth living’” (quoting Ng Fung Ho v. White, 259 U.S. 276, 284 (1922)), and also noting that “deportation is a drastic measure and at times the equivalent of banishment or exile” (quoting Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948))).

³⁸ See Natale, *supra* note 27, at 131-32.

³⁹ In 1921, Yee Won’s habeas corpus petition for Chin Shee and the children was denied by the Supreme Court. See Yee Won v. White, 256 U.S. 399 (1921).

⁴⁰ Answers.com, *Persona Non Grata*, <http://www.answers.com/topic/persona-non-grata> (last visited May 10, 2007); cf. BLACK’S LAW DICTIONARY 1180 (8th ed. 2004).

⁴¹ See *infra* notes 42-44 and accompanying text.

self.”⁴² The law, like any other intellectual discipline, approaches this “reality” with a question, an abstraction breathtakingly separated from what it has just described: what should we do about this reality, what should we do with being? Levinas has our number: he sees that in verbally separating reality from obligation, in separating ontology from ethics, we are expressing our skepticism about the reality of ethics itself.⁴³ In proclaiming as his first order of inquiry that “everyone will readily agree that it is of the highest importance to know whether we are not duped by morality,”⁴⁴ he exposes the law’s reluctance to admit its deep doubt that from “the natural history of human beings in the blood and tears of wars between individuals, nations, and classes; . . . the closed-in-upon self; . . . [comes t]he emergence, in the life lived by the human being . . . of the devoting-of-oneself-to-the-other.”⁴⁵

Levinas tells us that we are duped, not by morality, but by modern ontology, by putting our faith in being: he argues that reality is, in fact, the Face of Isabel, and all of these faces, standing over us in Their Need.⁴⁶ This is “our original experience of the other person,” her “com[ing] before [us] in a face to face encounter,” not as alter ego, nor as an “object to be subsumed under one of [our] categories and given a place in [our] world.”⁴⁷ Rather, our relation to the Faces of Isabel and Marie and Sergio and Yee Tuk Oyn and Yee Yuk Hing is

the relation to the absolutely weak—to what is absolutely exposed, what is bare and destitute . . . and consequently with what is alone and can undergo the supreme isolation we call death—and there is, consequently, in the Face of the Other always the death of the Other and thus, in some way, an incitement to murder, the temptation to go to the extreme, to completely neglect the other—and at the same time (and this is the paradoxical thing) the Face is also the “Thou Shalt not Kill.” A Thou-Shalt-not-Kill that can also be explicated much further: it is the fact that I cannot let the other die alone, it is like a calling out to me.⁴⁸

Levinas tries to warn us of what will happen when we dupe ourselves into believing that the relationship with the other is chosen and thus only an artifact of our lives, rather than a fact of existence, permitting us to “total-

⁴² John Wild, *Introduction* to LEVINAS, TOTALITY AND INFINITY, *supra* note 20, at 11, 12.

⁴³ See LEVINAS, TOTALITY AND INFINITY, *supra* note 20, at 21.

⁴⁴ *Id.*

⁴⁵ EMMANUEL LEVINAS, ENTRE NOUS: ON THINKING-OF-THE-OTHER at xii (Michael B. Smith and Barbara Harshav trans., Columbia University Press 1998) [hereinafter LEVINAS, ENTRE NOUS].

⁴⁶ See generally LEVINAS, TOTALITY AND INFINITY, *supra* note 20.

⁴⁷ Wild, *supra* note 42, at 12-13.

⁴⁸ LEVINAS, ENTRE NOUS, *supra* note 45, at 104.

ize” the other.⁴⁹ He tells us what will happen, what indeed has happened, in United States immigration law if we do not accept the reality—the reality!—that we are “recalled to a responsibility never contracted, inscribed in the face of an Other.”⁵⁰ First, I retell an old story in Part II: the ways in which the U.S. immigration law embodies Levinas’s prophecy about how the law, a product of our own denial, refuses the Face of the Other. That story pairs the haunting experience of early twentieth-century Chinese immigrants with our surreally similar contemporary controversy over illegal immigration on the Mexican border roughly one century later. Part III traces the ways in which the law, through the language of property and other conceits, effects the erasure of the Other. The warning to those who have ears to hear is ominous: Levinas reminds us that “to know or to be conscious is to have time to avoid and forestall the instant of inhumanity.”⁵¹ Finally, in Part IV I will suggest that, perhaps, law is not inexorably murdering, that a re-birth of immigration law can live out the reality of the face-to-face in the demand of the Other to come in, under the rubric of equity and its modern apparition: guided discretion.

II. NARRATIVE: AMERICAN IMMIGRATION LAW AND THE PUSHING AWAY OF THE PROXIMATE OTHER

Levinas argues that we are confronted and conflicted by the paradox of desire:

The other metaphysically desired is not “other” like the bread I eat, the land in which I dwell, the landscape I contemplate I can “feed” on these realities and to a very great extent satisfy myself, as though I had simply been lacking them. Their *alterity* is thereby reabsorbed into my own identity as a thinker or a possessor. . . .

[Rather, t]he metaphysical desire . . . is desire for a land not of our birth, for a land foreign to every nature, which has not been our fatherland and to which we shall never betake ourselves. The metaphysical desire does not rest upon any prior kinship. It is a desire that cannot be satisfied.⁵²

And yet, faced by this desire—we premeditate a murder: first, by erasure—the assimilation of the other, then by direct violence against him, then by reduction of the other to a face (discrimination), and then by banishment from our sight. The law’s word to the Other is property.

⁴⁹ See generally *id.*

⁵⁰ *Id.* at 58.

⁵¹ LEVINAS, TOTALITY AND INFINITY, *supra* note 20, at 35.

⁵² *Id.* at 33.

DESIRE

From the outset, history records the desire of immigrant for the New World, that “land not of our birth” and “foreign to every nature,” and the reciprocal desire of the New World for these Absolutely Other immigrants. We covet the workers that tend lawns and children, work in factories that have become too hard for natives, smooth the hotel beds in which we lie, and pick the vegetables we insist on buying cheaply.⁵³ A century earlier, we embraced their forbears who cleaned natives’ fish, picked their vegetables, washed their laundry, mined the coal that kept them warm, and laid down the tracks that kept them mobile.⁵⁴

On the other side, the immigrant’s desire for that land absolutely foreign, the “Gold Mountain”⁵⁵ he or she believes will be freedom, is similarly unquenchable. Seven hundred fifteen Chinese men and women arrive right after gold is discovered in 1849; by 1870 there are 63,000 Chinese in America,⁵⁶ and by 1880, when the Exclusion Act is passed, there are 105,000 Chinese immigrants.⁵⁷ El Norte calls, and Mexican immigration explodes in the late 1960s.⁵⁸ Early twentieth-century immigration has been eclipsed by the twenty-first, with 28.4 million immigrants living in the United States in 2000, the most ever recorded.⁵⁹ Among them, perhaps 8 to 12 million are resident “illegally,” i.e., without the permission of the United

⁵³ See, e.g., Lucinda Dillon Kinkad, *Undocumented: Emotions Run High, but Utah Tacitly Approves of Illegals*, DESERET MORNING NEWS (Utah), Oct. 9, 2005, § Wire, at A1.

⁵⁴ Paula C. Johnson, *The Social Construction of Identity in Criminal Cases: Cinema Verité and the Pedagogy of Vincent Chin*, 1 MICH. J. RACE & L. 347, 362-63 (1996) (noting that in the 1860s two-thirds of all Chinese in the United States were independent prospectors or workers in the California mines; however, they were ultimately driven toward railroad work by discrimination, violence, and diminishing mining profits).

⁵⁵ Yu, *supra* note 2, at 34 (noting that California was described as *Gum San*, or Gold Mountain).

⁵⁶ Johnson, *supra* note 54, at 362 (noting that nineteenth century Chinese immigrants were fleeing the chaos of the British Opium Wars and peasant rebellions, others uprooted from land by property disputes, and still others fleeing poverty and starvation).

⁵⁷ Cole & Chin, *supra* note 35, at 326.

⁵⁸ See Orrenius, *supra* note 12, at 31 (noting that migration rates from Mexico doubled between 1965 and 1995 and that border patrol apprehension of illegal immigrants increased from “21,000 in 1960 to more than 1.5 million in 1999, with steep increases in the 1970s”).

⁵⁹ See Steven A. Camarota, Ctr. for Immigration Studies, *Immigrants in the United States—2000: A Snapshot of America’s Foreign-Born Population 1* (2001), available at <http://www.cis.org/articles/2001/back101.html> (“Even at the peak of the great wave of early 20th century immigration, the number of immigrants living in the United States was less than half what it is today (13.5 million in 1910).”). For a discussion of new migration patterns of the Mexican Diaspora, in which immigrants move across the U.S.-Mexico borders throughout their lifetime and develop “transnational identities,” see Kevin R. Johnson, *The End of “Civil Rights” as We Know It?: Immigration and Civil Rights in the New Millennium*, 49 UCLA L. REV. 1481, 1494-95 (2002) [hereinafter Johnson, *The End of Civil Rights*].

States government, either as surreptitious entrants at national borders or as visa overstays.⁶⁰

This desire of the immigrant for the absolutely other country is unabated in the face of death, both metaphorical and real: early twentieth-century immigrants do not simply risk their lives being smuggled across the border, they also disappear into invisibility in West Coast Chinatowns.⁶¹ Today, Central American immigrants risk their lives in the forbidding desert, walking for days, suffering exposure, only to disappear into railroad cars or vans that will haul them into cities and towns where they will have no official identity.⁶²

Yet, defying the ethical relation that is reality, our society feeds on those who desire it like bread; it feeds and becomes sated. In the nineteenth and early twentieth centuries, as jobs become less plentiful, the hunger for workers engendered by the Gold Rush and its expansions grows fiercer, and Westerners rise up against the horde of “invaders,” demanding the closure of the port of San Francisco to “Mongolians.”⁶³ In the twenty-first century, we see the same tension between the U.S. economy’s hunger for workers, and then its satisfaction. The 1942 Bracero Program, permitting guest workers to cross American borders to serve American needs for cheap labor,⁶⁴ is preceded by the “repatriation” plan of the Great Depression and followed in 1953 by Operation Wetback in 1953 which clamps down on illegal immigration, and its abrupt end in 1964 simply heralds a new era of illegal immigration.⁶⁵ The free flow of Mexican labor guaranteed by the early nineteenth-century statutes is replaced by a quota on Western Hemisphere immigrants in 1965—ironically, at the very time that

⁶⁰ See Eunice Moscoso, *Immigration Could Be the Hot Election Issue in 2008*, SEATTLE POST-INTELLIGENCER, June 2, 2005, http://seattlepi.nwsource.com/national/226708_immig02.html.

⁶¹ See SEPARATE LIVES, BROKEN DREAMS (KPIX television broadcast 1993); see also Ctr. for Asian American Media, *Separate Lives, Broken Dreams*, <http://www.asianamericanmedia.org/separatelivesbrokendreams/synopsys.html> (last visited May 10, 2007).

⁶² For narratives of such immigrant crossings, see Bob Moser, *Samaritans in the Desert*, NATION, May 26, 2003, at 13; NationalGeographic.com, *Photographer Recounts Crossing U.S. Border with Mexican Illegal Immigrants*, http://news.nationalgeographic.com/news/2003/01/0123_030123_border.html (last visited May 10, 2007).

⁶³ See Cole & Chin, *supra* note 35, at 362; *Oyama v. California*, 332 U.S. 633, 653 (1948) (Murphy, J., concurring) (noting the “[c]harges of espionage, unassimilateness, clannishness and corruption of young children” leveled against the Japanese, as “Mongolian invaders”).

⁶⁴ Orrenius, *supra* note 12, at 31.

⁶⁵ Kevin R. Johnson, *Open Borders?*, 51 UCLA L. REV. 193, 230-31 (2003) [hereinafter Johnson, *Open Borders*] (suggesting that the U.S. owes Mexican immigrants a moral obligation because present-day Mexican migration is fueled by the extensive family and social ties the guest workers established during the Bracero Program).

the United States finally rejected the explicitly race-based restrictions on immigration that had affected immigrants from Southern Europe, Africa, and Asia.⁶⁶ And today, these impossibly small immigration quotas that give birth to waves of illegal immigration⁶⁷ are intermingled with American fears that al-Qaeda operatives or drug smugglers will sneak across the borders.⁶⁸ And so the National Guard goes to patrol the Mexican border, militarizing the region as if Arizona is the target of Palestinian missiles or suicide bombers; and Congress considers putting up a wall.⁶⁹

FEAR OF THE HEIGHT OF THE OTHER

Levinas warns that we do not simply use up or consume the other, like a piece of bread or a plot of land.⁷⁰ Rather, the other disturbs our security: “[t]he way of the I against the ‘other’ of the world consists in *sojourning*, in *identifying oneself* by existing here at *home with oneself*. . . . Everything is here, everything, belongs to me”⁷¹ Because the “face resists posses-

⁶⁶ For a discussion of the 1965 Immigration Act in this context, see Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273, 297-98 (1996).

⁶⁷ See Gordon H. Hanson, *Illegal Migration from Mexico to the United States* (Nat’l Bureau of Econ. Research, Working Paper No. W12141, 2006), available at <http://ssrn.com/abstract=896214>. Hanson notes that the Immigration Act of 1990 set a cap of 675,000 admissions per year, of which 480,000 are family reunification, 140,000 go to preferred employees, and 55,000 go to diversity immigrants, in addition to non-quota family members who can emigrate. *Id.* at 2 n.5. Hanson suggests that the transition from illegal to legal resident status is common, with 54% of Mexican nationals who obtained a green card in 1996 having entered illegally at an earlier time, and 90% of those entering legally between 1992 and 2004 qualifying under family reunification provisions. *Id.* at 8. The process may take as long as two years for family members, and more than 5 years for those subject to quotas. *Id.* at 8 & n.13.

⁶⁸ See, e.g., Michelle Malkin, *Dismissing the Dangers of Illegal Immigration*, INSIGHT ON THE NEWS, Sept. 2, 2002, at 46 (providing examples of al-Qaeda terrorists who entered as illegal immigrants or overstayed visas); Peter Hecht, *Terror Talk on Southern Border: GOP-Led Hearing Links Illegal Immigration, Dire Risk Scenarios*, SACRAMENTO BEE, July 6, 2006, at A1 (quoting Congressman Ed Royce as saying, “[d]rug cartels, smuggling rings and gangs operating on both the Mexico and U.S. sides are increasingly well-equipped and more brazen than ever Some border areas can be accurately described as war zones.”); see also Heather MacDonald, *Why East Coast Elites Should Shut Up About Immigration*, <http://michellemalkin.com/immigration/2006/07/03/01:26.pm> (July 3, 2006, 01:26 PM) (claiming that few establishment elites have talked to California jail wardens, hospital executives and school leaders to determine the impact of illegal immigrants on their communities) (last visited May 10, 2007).

⁶⁹ See Deborah Tate, *U.S. Senate Votes to Deny Citizenship to Illegal Immigrants with Criminal Record* (Voice of America radio broadcast May 17, 2006) (audio file and transcript available at <http://www.voanews.com/english/archive/2006-05/2006-05-17-voa64.cfm>) (describing the proposed 6000 National Guard troops to be deployed on the border and planned 600 kilometers of fencing along the Mexican border, and also quoting Senator Jeff Sessions as commenting that “[g]ood fences make good neighbors”).

⁷⁰ See LEVINAS, TOTALITY AND INFINITY, *supra* note 20.

⁷¹ *Id.* at 37.

sion, resists my powers,"⁷² the radical difference of the other becomes subversiveness in the immigration story, an exaggeration of the real dangers that lurk among the immigrants from human smugglers, drug smugglers, gang members. We could begin at the beginning, with the Alien and Sedition Acts of 1798, which gave the president the power to "deport any non-citizen whom he deemed a threat to the national security. Deported aliens had no recourse to the courts nor any right to a writ of habeas corpus,"⁷³ and thus no opportunity for a face-to-face with any public official who might recognize that this difference invites as much as it threatens.⁷⁴ Its companion legislation, the Enemy Alien Act, has brutally outlived its origins by more than 200 years, with the imprimatur of the United States Supreme Court.⁷⁵ The Act

authorizes the President during a declared war to detain, expel, or otherwise restrict the freedom of any citizen 14 years or older of the country with which we are at war. It requires no proceeding to determine whether the individual is in fact suspicious, disloyal, or dangerous; the act creates an irrebuttable presumption that an enemy alien is dangerous.⁷⁶

In the nineteenth and early twentieth century, the dangers of the other are foremost upon the mind of the Court as it rejects challenges to the federal government's exclusion of Chinese immigrants.⁷⁷ The Supreme Court writes that "[i]f [Congress] considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, . . . its determination is conclusive upon the judiciary."⁷⁸

⁷² *Id.* at 197.

⁷³ David Cole, *Enemy Aliens*, 54 STAN L. REV. 953, 989 (2002). The Alien Act's more famous twin, the Sedition Act, made it a crime to criticize federal officials and was wielded as a sword of suppression against the Other party, until it expired just two years later, and President Jefferson pardoned those convicted under it. *See id.* at 989-90. The history of the Sedition Act has often been cited by the Court in support of freedom of speech, usually without reference to its historical roots in distrust of foreigners. *See id.*

⁷⁴ *See id.*

⁷⁵ *See id.*

⁷⁶ *Id.* at 990 (noting that, unlike the Sedition Act, the "Enemy Alien Act" has not been repealed to this day and has been enforced from time to time during war). The Supreme Court upheld the application of the Act in 1948, after the war, and it was used to detain and question thousands of Japanese, Germans, and Italians. *Id.*

⁷⁷ *See, e.g., Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

⁷⁸ *Id.* at 630; *see also* Cole & Chin, *supra* note 35, at 358; Kevin R. Johnson & Bill Ong Hing, *National Identity in a Multicultural Nation: The Challenge of Immigration Law and Immigrants*, 103 MICH. L. REV. 1347, 1370-73 (2005) (reviewing SAMUEL P. HUNTINGTON, WHO ARE WE? (2004) and discussing the history of federal exclusion policies directed at Asians beginning with the Chinese Exclusion Act of 1882).

In our own time, those who speak Spanish similarly are treated as conspirators against our society. One blogger writes,

Illegal aliens manipulate America's welfare opportunities like an art form. They've bankrupted dozens of hospitals out of existence. Illegal alien felons cram our prisons while having wreaked havoc on our citizens. Illegals inundate our school systems while destroying our language and culture. Pregnant mothers with anchor babies pour across our borders by the tens of thousands annually.⁷⁹

He adds that “[o]ur English language suffers displacement while newcomers carry anti-American sentiment to extreme levels.”⁸⁰ Although the paranoia is slightly toned down in official statements that equate illegal immigration with terrorism,⁸¹ the Court accepts such characterizations with little protest.⁸²

Because the call of the Other is too strong, because the Other is in fact too high above us and because we cannot admit the Height of his Need,⁸³ we are required to re-imagine his Height as destructive. Thus, the fear of popular uprising plays large in the imagination of the state. The Alien and Sedition Acts of 1798 are passed in reaction to fears that mobs might take over newly formed American institutions the way they had taken over French institutions.⁸⁴ A century later, the “anti-Oriental virus” mutates: “trade unionists, who fear[] economic competition, and . . . politicians, who [seek] union support,” combine to pass laws “for the purpose of discouraging the immigrants and dramatizing the native dissatisfaction.”⁸⁵ In this third century of United States immigration, this fear is replaced by something just as deeply angry and afraid: “patriot” websites describe sinister plots by Mexicans against the national security, including one which claims that Mexican American leaders in the United States

[swear] allegiance . . . to foreigners of their ethnic group, not to the United States. They seek political power and realize the way to get it is

⁷⁹ Frosty Wooldridge, *Review: 'In Mortal Danger—America,'* RENSE.COM, May 24, 2006, <http://www.rense.com/general71/review.htm> (reviewing TOM TANCREDO, *IN MORTAL DANGER: THE BATTLE FOR AMERICA'S BORDER AND SECURITY* (2006)).

⁸⁰ *Id.*

⁸¹ See Hecht, *supra* note 58, at A1 (discussing Representative Ed Royce's delineation of threats to the United States and Representative Brad Sherman's critique of the Subcommittee on International Terrorism and Nonproliferation: “the subcommittee's bid to equate terrorism to illegal immigration from Mexico was a tool to hype the criminal sanctions the House immigration bill seeks to impose on people illegally crossing the border in search of work”).

⁸² See, e.g., *United States v. Brignoni-Ponce*, 422 U.S. 873, 878-80 (1975) (discussing the public interest in detaining illegal immigrants).

⁸³ See generally LEVINAS, *TOTALITY AND INFINITY*, *supra* note 20.

⁸⁴ See Cole, *supra* note 73, at 989.

⁸⁵ *Oyama v. California*, 332 U.S. 633, 651-52 (1948) (Murphy, J., concurring).

to flood America with legal and illegal immigrants from their ethnic “tribe.” Simply by demographics, they will dilute the vote of American citizens and replace our American culture. “The Third World” is at your doorstep and anxious to present you with the bill as they jump on “the entitlement bandwagon.”⁸⁶

Even well-known and respectable scholars and public figures recite their nightmares as if they are proven facts. Professor Samuel Huntington drew criticism after he expressed “fear over the possible ‘reconquista’ (re-conquest) of the Southwest and the territory ceded by Mexico to the United States,” and relied on an uncited source warning that the southwestern United States “may join with northern Mexico to form a new nation by 2080.”⁸⁷ Historian Arthur Schlesinger claims that “[a] cult of ethnicity has arisen both among non-Anglo whites and among nonwhite minorities to denounce the idea of a melting pot . . . , and to protect, promote, and perpetuate separate ethnic and racial communities.”⁸⁸ Still another scholar, Peter Brimelow, worries that massive immigration will “wreck” the assimilation of Mexicans already here.⁸⁹ The Mexican trudging across the desert with his backpack seems too pitiful to justify such fears, so he must be made into a terrorist, an invader that justifies summoning Minutemen⁹⁰ or the National Guard.⁹¹

The height of the Other that frightens us most, as we live securely at home with ourselves, is the height of the Other’s Need. The very threat of the Other is that it demands to impose itself “precisely by appealing to me with its destitution and nudity—its hunger—without my being able to be deaf to that appeal.”⁹² In the case of immigration law, this demand is quite literal: it is a demand of the hungry and the destitute and the naked for that

⁸⁶ The American Resistance, Agendas of MEChA, La Raza, MALDEF, and Southwest Voter Registration Projects, http://www.theamericanresistance.com/race_industry/true_agenda_audio.html (last visited May 11, 2007) (presenting various audio clips of prominent public figures allegedly making “Pro-Mexico, Anti-America” statements).

⁸⁷ See Johnson & Hing, *supra* note 78, at 1364-65 (criticizing Professor Huntington’s depiction of Mexican immigration as one-sided and characterizing his fears of “reconquista” as a “red herring”).

⁸⁸ Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. ILL. L. REV. 525, 538 (quoting ARTHUR M. SCHLESINGER, JR., *THE DISUNITING OF AMERICA* 15 (1992)) [hereinafter Johnson, *Race Matters*].

⁸⁹ *Id.* (citing PETER BRIMELOW, *ALIEN NATION: COMMON SENSE ABOUT AMERICA’S IMMIGRATION DISASTER* 271-74 (1995)).

⁹⁰ See, e.g., Annie Schleicher, PBS, *NewsHour Extra: Civilian Militia Patrol U.S.-Mexico Border*, Apr. 6, 2005, http://www.pbs.org/newshour/extra/features/jan-june05/minuteman_4-06.pdf (describing the Minuteman Project, a 200-plus member volunteer group patrolling 23 miles of the Arizona-Mexico border, some armed with guns or knives, who report illegal immigrants to the border patrol).

⁹¹ See *supra* note 69 and accompanying text.

⁹² See LEVINAS, *TOTALITY AND INFINITY*, *supra* note 20, at 200.

material justice that constitutes equality. But Levinas predicts how we will respond.⁹³ The first Others to be officially excluded (with the Chinese) in the Public Charge Law,⁹⁴ are those who appeal to us in their need: “any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge.”⁹⁵ That statute is followed by similar statutes in 1893, barring many, including “paupers”;⁹⁶ in 1903, barring “professional beggars” and deporting anyone who became a public charge within two years after immigrating;⁹⁷ in 1907, excluding people with physical or mental defects that hindered their prospects for gainful employment;⁹⁸ in 1917, extending to five years the 1903 statute’s “public charge” test,⁹⁹ and in 1952, solidifying these restrictions.¹⁰⁰

The push to exclude the One who stands over us in his Need has been continued into our own century by federal law. In 1986, for example, the Immigration Reform and Control Act of 1986 limited the granting of lawful residency to undocumented aliens who show that they do not use federal assistance programs.¹⁰¹ A decade later, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996¹⁰² prevented undocumented workers from getting federal welfare assistance, legal services, and help from most federal and state assistance programs through Temporary

⁹³ See *id.*

⁹⁴ Public Charge Law of 1882, ch. 376, 22 Stat. 214 (1882).

⁹⁵ Louis Anthes, *The Island of Duty: The Practice of Immigration Law on Ellis Island*, 24 N.Y.U. REV. L. & SOC. CHANGE 563, 571 (1998). The “public charge” exclusion is not recent, either; rather, it follows years of sporadic state efforts to exclude the poor from state borders. See Gerald L. Neumann, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1833-35 (1993) (noting that before Congress started to regulate immigration, individual states had regulated migration, aiming to exclude convicts, the poor, and other undesirables); see also Cole & Chin, *supra* note 35, at 328.

⁹⁶ Act of Mar. 3, 1893, ch. 206, 27 Stat. 569 (repealed 1952).

⁹⁷ Act of Mar. 3, 1903, ch. 1012, 32 Stat. 1213 (repealed 1907).

⁹⁸ Act of Feb. 20, 1907, ch. 1134, 34 Stat. 898 (repealed 1917).

⁹⁹ Immigration Act of 1917, ch. 29, § 19, 39 Stat. 874 (repealed 1952).

¹⁰⁰ McCarran-Walter Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (current version in scattered sections of 8 U.S.C.); see also Richard A. Boswell, *Restrictions on Non-Citizens’ Access to Public Benefits: Flawed Premise, Unnecessary Response*, 42 UCLA L. REV. 1475, 1481 (1995) (discussing these Acts).

¹⁰¹ Immigration Reform and Control Act (IRCA) of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (current version in scattered sections of 8 U.S.C.); see also Boswell, *supra* note 100, at 1481-82 (noting that the Act “restricted the opportunity to become lawful residents to undocumented persons able to show that they would not need federal assistance. It also precluded many who received legal status from participation in public benefit programs in the future.”). Boswell notes that the Act was amended to eliminate the requirement that the government prove institutionalization, and now provides that a deportation can “occur where the person has become a public charge within five years after entry from causes not affirmatively shown to have arisen since entry.” *Id.*

¹⁰² Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (current version in scattered sections of 8 U.S.C. and 18 U.S.C.).

Assistance to Needy Families (TANF).¹⁰³ In the current and fierce debate about whether providing a path to citizenship for undocumented workers in the U.S. and a guest worker program would cost money,¹⁰⁴ legislation eerily similar to the Public Charge Law has been proposed. The Hagel-Martinez proposal,¹⁰⁵ for example, would require residency of as many as sixteen to eighteen years before a currently illegal immigrant would be eligible for federal public assistance such as Medicaid benefits: a special conditional status for those who have lived in the U.S. as illegal for five or more years, then six to eight more years of conditional status, then a five-year wait as a “qualified” immigrant to be eligible for public benefits.¹⁰⁶

ASSIMILATION AND ERASURE OF THE FACE

Levinas argues that in our desperation to possess, to dominate, we will define freedom as the imperialism of the self, the domination of the comfortable over the need of the other.¹⁰⁷ In immigration, we can begin to control our own terror of difference by absorbing Others within our national identity, at least those who are willing to become, and are capable of becoming, like those whom we perceive to be “the Same.”¹⁰⁸

Yee Won understands that he must be absorbed if he is to survive, and so he claims on his official documents that he is a “capitalist and property owner.”¹⁰⁹ He understands that to be an American, to be assimilated, requires melding into the community of American property owners, for the crucial legal distinction between those who are admitted and those who are barred is the distinction between laborers and merchants.¹¹⁰ The Exclusion Law bars Chinese laborers, while Chinese merchants—those who are engaged in buying and selling merchandise at a fixed place of business and

¹⁰³ See, e.g., Joan Friedland & Tanya Broder, *Immigrant Benefits and Documentation Issues*, 1390 PLI/CORP 187, 198-200 (2003) (describing exclusion from public benefits).

¹⁰⁴ Compare Robert Rector, *Amnesty and Continued Low Skill Immigration Will Substantially Raise Welfare Costs and Poverty*, HERITAGE FOUND. BACKGROUNDER, May 16, 2006, at 1-2 (arguing that the cost of immigration that provides amnesty to 9 to 10 million illegal immigrants would be about \$16 billion per year, or potentially \$30 billion with family reunification), with JONATHAN BLAZER, NAT'L IMMIGRATION LAW CTR., IMMIGRATION REFORM AND ACCESS TO PUBLIC BENEFITS: THE RETURN OF AN UNEASY COUPLING 1 (2006), http://www.nilc.org/immlawpolicy/CIR/cirandbenefits_2006-5-15.pdf (noting that public benefits expenditures would be offset from the increased taxes that legalized immigrants with higher earnings would pay).

¹⁰⁵ Comprehensive Immigration Reform Act of 2006, S. 2611 & S. 2612, 109th Cong. (2006).

¹⁰⁶ See BLAZER, *supra* note 104, at 2.

¹⁰⁷ LEVINAS, TOTALITY AND INFINITY, *supra* note 20, at 87-88.

¹⁰⁸ See *id.*

¹⁰⁹ Yee Won v. White, 258 F. 792, 794 (9th Cir. 1919).

¹¹⁰ See *id.*

who do not engage in any manual labor—may come and go of their own accord.¹¹¹ The term “Chinese laborer” is, as expected, redundant: to define “laboring,” the statute enumerates every form of work that, in the imagination of the white and powerful, a “Chinaman” can be expected to be doing in the United States: “skilled and unskilled manual laborers, including Chinese employed in mining, fishing, huckstering, peddling, laundrymen, or those engaged in taking, drying, or otherwise preserving shell or other fish for home consumption or exportation.”¹¹²

So understanding, from his past brush with exclusion, that he cannot be such a “Chinaman” any longer if he wants to come back to all that he has, Yee Won testifies in the immigration application for his wife and children that he is “a property owner and a capitalist,” and in support shows the immigration officers “bank books, certificates of stock, and other documents showing that he was a person of means.”¹¹³ Yee Wong states that he exports fruit from San Francisco to New South Wales, is affiliated with an Australian importer, has a place of business, and has made \$20,000 per year.¹¹⁴

Even this attempt by Yee Won to accept his erasure as a person is not enough for the law. Summoning the evidence of an anonymous informant and a questionable photo identification, the government decides that he is, in fact, a Chinese laundryman, a laborer, and not exempt.¹¹⁵ Stripped of his mercantile status, he comes within the “no laborers” language, and the Court reaffirms its earlier holding in *United States v. Mrs. Gue Lim*: Chinese merchants may bring their wives and minor children into the United States so long as they can prove to the satisfaction of the immigration authorities that they are indeed merchants; however, laborers may not.¹¹⁶

Other Chinese immigrants go to still further lengths to erase themselves: seizing the opportunity of the destruction of birth and citizenship records in the San Francisco earthquake, many claim that they are American citizens and that their birth records have been destroyed.¹¹⁷ In subsequent years, immigrating Chinese men pay huge sums—\$1400 in gold to make one man’s nephew “a son of a native”—to a thriving network of

¹¹¹ *Id.* at 795-96 (citing the Act of November 3, 1893, ch. 14, 28 Stat. 7 (1893), which defined “merchant” and “laborer”).

¹¹² *Id.* at 795.

¹¹³ *Id.* at 794.

¹¹⁴ *Id.*

¹¹⁵ *See id.* at 796.

¹¹⁶ *See id.* at 796-98 (citing *United States v. Mrs. Gue Lim*, 176 U.S. 459 (1900), which held that wives and children of Chinese merchants were permitted to enter without certificates).

¹¹⁷ *See Natale, supra* note 27, at 129.

document forgers.¹¹⁸ The forgers provide “paper children” and “paper parents” with false testimonies and letters testifying to their status, identification papers with the photos switched, suggesting that they are the children of American citizens or aliens who are exempted from the laborer ban.¹¹⁹ Some forgers help immigrants establish fictitious businesses with fictitious account books that permit immigrants to claim that they are merchants, and thus exempt from the laborer ban.¹²⁰ One partnership book from a fictitious San Francisco firm notes:

The purpose of this firm is to bring profit to ourselves with the benefit to others. It benefits others because it provides headquarters for our relatives. . . . Any person who should use the firm’s name to enable boys to come to the United States as his sons must pay the firm Fifty Dollars (\$50) for each boy.¹²¹

It is now 2007, but the erasure continues. In their desperate push to comply with the demand that they be effaced, immigrants once again turn to document forgers to make themselves acceptable.¹²² The Philadelphia Inquirer notes:

Forgers [largely controlled by the Castorena family cartel] are making tens of millions, and possibly billions, of dollars selling counterfeit Social Security cards, driver’s licenses, immigrant registration cards, and other papers to illegal immigrants.

...

Only trained experts can distinguish [the cartel’s] fake identity documents from real ones, and the Castorena family organization has spread to at least 50 cities in 33 states.

At a sentencing hearing for one family member in December, [a federal judge] said that the group’s criminal reach was “simply breathtaking” and struck “at the heart of the sovereignty of the United States of America.”¹²³

And the government demands not only that the Face be erased, but its voice as well. The President of the United States, showcasing the administration’s concern for verification of immigration status in a factory visit, calls for the erasure of Isabel, Marie, and their fellow Mexicans:

¹¹⁸ See *id.* at 129-30.

¹¹⁹ See *id.* at 129-31.

¹²⁰ See *id.*

¹²¹ *Id.* at 129 (quoting a Chinese partnership book captured by customs inspectors).

¹²² See, e.g., Dave Montgomery, *Illegal Immigration Drives Demand for Forged Documents*, PHILA. INQUIRER, May 21, 2006, at A2.

¹²³ *Id.*

We need to make sure we help people assimilate. I met four people here who assimilated into our country. They speak English; they understand the history of our country; they love the American flag as much as I love the American flag. That's one of the great things about America, we help newcomers assimilate. Here's [sic] four folks that are living the American Dream, and I think it helps renew our soul and our spirit to help people assimilate.¹²⁴

By Executive Order, President Bush convenes a Task Force on New Americans to “help legal immigrants embrace the common core of American civic culture, learn our common language, and fully become Americans,” with its first task being to “provide direction to executive departments and agencies (agencies) concerning the integration into American society of America’s legal immigrants, particularly through instruction in English, civics, and history.”¹²⁵ Simultaneously, Congressional legislation demands the assimilation of Spanish-speaking immigrants; Congress succumbs to “patriotic” furor against the strangeness of the Other by introducing legislation to make English, already the language of the twenty-first century world empire, the official language of the United States.¹²⁶ Thus, the supreme democratic authority attempts to override many state and federal efforts to welcome and accommodate non-English-speaking immigrants.¹²⁷ Members of Congress polish their rhetorical support of those “natives” who create a specter of chaos out of the recitation of the Pledge

¹²⁴ Press Release, The White House, President Bush Discusses Immigration in Alexandria Virginia (July 5, 2006), available at <http://www.whitehouse.gov/news/releases/2006/07/20060705.html> (transcribing President Bush’s remarks).

¹²⁵ Exec. Order No. 13,404, 71 Fed. Reg. 33,593 (June 7, 2006); cf. Chin, *supra* note 66, at 342-43 (examining the legislative history of the Immigration and Nationality Act of 1965 and discussing the “assimilation assumption” shared by the legislators). In the words of Congressman Saltonstall, which capture both the expectation that immigrants would contribute to a dynamic and diverse culture and the assumption of assimilation, “The homogeneity of American life has been enhanced by the efforts of many groups of heterogeneous people.” Chin, *supra* note 66, at 343.

¹²⁶ The Inhofe Amendment “would make English the national language and provide that ‘[u]nless otherwise authorized . . . , no person has a right, entitlement, or claim to have the Government of the United States . . . communicate, perform, or provide services, or provide materials in any language other than English.’” *English as the Official Language: Hearing Before the Subcomm. on Educ. Reform of the H. Comm. on Educ. and the Workforce*, 109th Cong. 25 (2006) (statement of John Trasviña, Interim President and Gen. Counsel, MALDEF) [hereinafter *Trasviña Statement*]; see also Rama Lakshmi, *House Panel Examines the Future of English*, WASHINGTONPOST.COM, Jul. 27, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/07/26/AR2006072601375.html> (noting Representative Raule Grijalva’s protest of “the ‘insidious’ part of the committee hearings that strengthened ‘racially tinged myths and false stereotype that immigrants don’t want to learn,’” and his view that “[t]he move to make English the official language can only be viewed as an extremist document and counterproductive”).

¹²⁷ See, e.g., *Trasviña Statement*, *supra* note 126, at 25-26 (describing ELL and ESL classes for non-English-speaking students and Executive Order 13,166, which mandates access to federal benefits for persons with limited English proficiency).

of Allegiance in Spanish.¹²⁸ Thus, they feed the growing resentment of “citizen groups” who equate contribution to this society with assimilation, who suggest that speaking any language but English is traitorous. A web journalist cites Congressman Tom Tancredo’s book, *In Mortal Danger: The Battle for America’s Border and Security*¹²⁹:

“For years I have witnessed a difference [in] the kinds of people coming into the United States,” Tancredo said. “Too many immigrants continue to be loyal to their native countries. They desire to maintain their own language, customs and culture. Yet, they seek to exploit the success of America while giving back as little in return as possible.”¹³⁰

And so, both official and non-official public leaders substantiate a long American tradition of pressuring Spanish-speaking immigrants to “anglicize their Spanish surnames, to claim a ‘Spanish’ ancestry, and to discard the Spanish language.”¹³¹

INFECTION, VIOLENCE, DISCRIMINATION

The trajectories that native backlash movements against immigrants take in the early twentieth and twenty-first centuries are eerily similar. When erasure—the demand for assimilation, for the Other to be taken into the Same—is unsuccessful, the Other is described as an infection to be eradicated, first with violence, then by discrimination.¹³²

In the first scene, the people blame immigrants for contaminating their empire, for bringing a deadly virus into their midst. Historians record these outbursts against immigrants as an infection. One of the first claims against the Chinese in support of the Exclusion Act is that among the hordes of immigrants to the United States are an overwhelming number of Chinese prostitutes.¹³³ (Those who make this charge seem to neglect the irony that, while claiming that Chinese female prostitutes are a moral virus,

¹²⁸ See, e.g., H.R. Res. 793, 109th Cong. § 2 (2006) (“[T]he House of Representatives affirms that statements or songs that symbolize the unity of the Nation, including the National Anthem, the Oath of Allegiance sworn by new United States citizens, and the Pledge of Allegiance to the Flag of the United States, should be recited or sung in English, the common language of the United States.”).

¹²⁹ See *infra* note 79.

¹³⁰ Wooldridge, *supra* note 79.

¹³¹ See Johnson, *Race Matters*, *supra* note 88, at 539.

¹³² See generally LEVINAS, *TOTALITY AND INFINITY*, *supra* note 20.

¹³³ See Yu, *supra* note 2, at 35. Yu notes that the general public at that time perceived Chinese women as slaves and largely prostitutes who were corrupting the morals of young white boys. “The Chinese race is debauched,” claimed one lawyer arguing for the passage of the Chinese Exclusion Law: “They bring no decent women with them.” This stigma on the Chinese immigrant woman remained for many decades, causing unnecessary hardship for countless wives, daughters, and slave girls.

the government has prohibited Chinese laborers either from marrying white women or from bringing their wives to this country,¹³⁴ thus leaving thousands of men to hunt for the relatively few Chinese women born in the United States.) Indeed, in the national fear of the Other, all single women emigrating become ““automatic suspects”” for prostitution or ““likely to become a public charge”” and are thus excluded.”¹³⁵ While the 1875 Page Law¹³⁶ and others like it severely restrict the immigration of Chinese women, anti-Chinese propaganda depicts Chinese immigrants as willing prostitutes, declaring that the word “Chinawoman” is “synonymous with what is most disgusting and vile.”¹³⁷

Charges of physical and moral disease that follow Chinese immigrants begin to meld into each other.¹³⁸ Keith Aoki describes how William Randolph Hearst’s newspapers portrayed California’s Chinatowns as dens of “[o]pium smoking, gambling, prostitution, rats, and honeycombs of secret underground tunnels . . . [;] in short, a serious and imminent moral and physical threat to public health and welfare.”¹³⁹ The Chinese had pathological culinary habits ascribed to them: “The people are not nice in what they eat. Dead puppydogs are publicly sold in the streets for food. Rats and mice are frequently eaten.”¹⁴⁰ Given the commonly-held notion at the time that the Chinese ate rats, an advertisement for rat poison called “Rough on Rats” depicted a Chinese man eating a live rat.¹⁴¹ “Nineteenth-century Chinatowns (and the Chinese living in them) were viewed as pathological breeding grounds for diseases such as leprosy, cholera, and the bubonic plague.”¹⁴²

Indeed, it is not simply the private press that portrays the Chinese in this manner. Officials echo these nativist sentiments. Daina Chiu traces how charges of physical and moral contagion that followed Chinese enclaves overlap.¹⁴³ The San Francisco Board of Supervisors declares in

¹³⁴ See Kathkeyan & Chin, *supra* note 2, at 15; Cole & Chin, *supra* note 35, at 362 (noting the combined impact of immigration and anti-miscegenation policies on the lives of individuals).

¹³⁵ Cole & Chin, *supra* note 35, at 362; see also Keith Aoki, “Foreign-Ness” & Asian American Identities: *Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes*, 4 ASIAN PAC. AM. L.J. 1, 30-31 (1996).

¹³⁶ Page Law, 18 Stat. 477, § 5 (1875).

¹³⁷ Aoki, *supra* note 135, at 31.

¹³⁸ *Id.* at 30-31 (citing Daina C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation and Guilty Liberalism*, 83 CAL. L. REV. 1053, 1076 (1994)); see also Chiu, *supra*, at 1076.

¹³⁹ Aoki, *supra* note 135, at 29.

¹⁴⁰ *Id.* (citing JACOBUS TEN BROEK ET AL., PREJUDICE, WAR, AND THE CONSTITUTION 20 (3d ed. 1968)).

¹⁴¹ *Id.* at 29-30.

¹⁴² *Id.* at 30.

¹⁴³ See Chiu, *supra* note 138, at 1076.

1870 that the “Chinese were considered ‘moral leper[s]’ whose habits encouraged disease wherever they resided” and declares in 1885 that San Francisco Chinatown is a “moral cancer on the city. . . . A Mongolian vampire sapping [San Francisco’s] vitals.”¹⁴⁴ In 1852 California Governor John Bigler claims “that the Chinese were a moral evil, that as coolies they were little more than slaves, that they degraded white labor and were inherently incapable of playing the role of citizens.”¹⁴⁵

Similarly, in the twenty-first century, the first claims spoken against illegal immigrants are claims about contagion. On one website, an apparently well-known doctor warns:

[I]f we catch and detain a sick Illegal Alien,¹⁴⁶ who after examination by physicians in a detention center proves to have a serious disease, we keep him! Foolish compassion makes us fear that his home country has neither adequate resources nor modern wonder drugs. So we release sick Illegal Aliens to the American streets, to infect others if their diseases are contagious, or we place them in our Medicaid program where we pay for their expensive treatments.

. . .

Horrendous diseases that long ago America had conquered are resurging. Horrific diseases common in Third World poverty and medical ignorance suddenly are appearing in American emergency rooms and medical offices. Along with the visible invasion of Illegal Aliens across our borders is an invisible invasion of deadly diseases.¹⁴⁷

Illegal aliens from Mexico and other countries are accused of spreading tuberculosis, Ebola, Leprosy, HIV and bird flu, and even of poisoning Americans with toxics.¹⁴⁸ Aoki notes one scholar’s view:

¹⁴⁴ *Id.* at 30-31 (alteration in original) (quoting Chiu, *supra* note 138, at 1076 and quoting Charles J. McClain & Laurene W. McClain, *The Chinese Contribution to the Development of American Law*, in SUCHENG CHAN, *ENTRY DENIED* 18 (1991)).

¹⁴⁵ Cole, *supra* note 73, at 991 (quoting JACOBUS TEN BROEK ET AL., *PREJUDICE, WAR, AND THE CONSTITUTION* 18 (1st ed. 1954)). Cole further notes that the California state legislature published “An Address to the People of the United States on the Evils of Chinese Immigration” in 1876, which foreshadowed the enactment of the federal Chinese Exclusion laws beginning in 1882. *Id.*

¹⁴⁶ For more on the debate about how to properly refer to undocumented immigrants, see Kinkead, *supra* note 53 (noting that members of the anti-immigration movement call immigrants “illegal aliens,” while the Immigration and Customs Enforcement agents call them “undocumented immigrants”). Recognizing that there are differing views on people who cross the border without authorization, this article uses the labels interchangeably.

¹⁴⁷ See Madeleine Cosman, *Hospital to the World Welcomes Illegals & Contagious Diseases*, NEWSWITHVIEWS.COM, Apr. 25, 2005, <http://newswithviews.com/Cosman/madeleine3.htm>.

¹⁴⁸ See *id.* (“Just one infected person who could walk through the Golden Door of our Hospital to the World could be a suicide bomber with incendiaries in his arteries, veins, or capillaries.”); Illegal Immigration vs Americans for Legal Immigration PAC: Diseases Biohazards Illegal Immigration, http://www.alipac.us/modules.php?name=News&new_topic=36 (last visited May 11, 2007) (posting a

The . . . stubbornly recurring stereotypical trope applied to Asian immigrants deploys representations of them as different sorts of natural disasters: floods, tidal waves, inhuman swarms, and plagues. Such “natural disaster” imagery rhetorically positioned immigrants as extraordinary and exceedingly dangerous exceptions to the “natural” order, “disasters” whose effects had to be remedied with equally drastic defensive counter-measures.¹⁴⁹

Only a few today understand, with Levinasian irony, the ultimate meaning of the immigrant’s viral threat: “In some profound way, this transformation is subversive, freeing America from its black/white dialectic. Ultimately, what we mestizos bring to the [United States] is a sense of impurity. After all, we are a people who violate borders. That is our gift.”¹⁵⁰

As hysteria builds, claims that immigrants are a moral and literal infection within our midst are followed by direct attempts to kill the infection, by violence and threats of violence against immigrants in both centuries.¹⁵¹ Cole and Chin note how historians record that “almost from the moment they arrived in California, and almost wherever they went, Chinese immigrants encountered hostility and persecution. . . . They, as well as other foreign miners, became the targets of personal violence, including ‘crimes of arson, assault, robbery, burglary, kidnapping, and murder.’”¹⁵²

As in many situations of mass hysteria, violence is directed against the individual scapegoat: there are “frequent lynchings, stonings, and beatings

collection of “warnings” regarding illegal immigration, including claims that 1) bar customers were poisoned by a non-English-speaking bartender; 2) U.S. counties on the Mexican border have the highest rates of disease; and 3) illegal aliens bring new strains of infections diseases); Anti-Defamation League, *Extremists Declare ‘Open Season’ on Immigrants: Hispanics Target of Incitement and Violence*, May 23, 2006,

http://www.adl.org/main_Extremism/immigration_extremists.htm?Multi_page_sections=sHeading_3 [hereinafter Anti-Defamation League]. Oregon National Socialist leader Jim Ramm wrote that “the browner invasion is much like a cancerous tumor that should of [sic] been removed. But instead, it was allowed to grow and infect other organs . . . [A]s this brown disease rages out of control the white patient faces racial death.” Anti-Defamation League, *supra*. Similarly, Kevin Strom, leader of the neo-Nazi National Vanguard, claims, “These Mestizo invaders are so different from us that by mixing with them or being dispossessed by them we will cease to live, we will cease to be ourselves or have a place to exist to support the lives of our future generations. And that is the *crucial* reason why this invasion must be stopped.” *Id.*

¹⁴⁹ Aoki, *supra* note 135, at 31 (citing Sumi K. Cho, *Immigrants as Pollution* (Jan. 19, 1995) (unpublished manuscript)).

¹⁵⁰ Richard Rodriguez, *The Return of the Native: The Past Meets the Future in Mestizo America*, *NEW PERSP. Q.*, Summer 2006, at 21, 22; *see also* Pugliese, *supra* note 34, at 286-87 (analyzing claims of contagion in the current Australian refugee crisis).

¹⁵¹ *See* Cole & Chin, *supra* note 35, at 326.

¹⁵² *Id.*

of Chinese immigrants” in mid-nineteenth century California.¹⁵³ Extortion and violence, even by government officials, becomes common: numerous accounts tell of tax collectors resorting to violence and extortion to collect fees from immigrant Asian miners.¹⁵⁴ In our own time, calls for violence against undocumented aliens abound. Hate crimes against Mexicans are on the rise.¹⁵⁵ So-called “hate-talk-show” host Phil Valentine, surrounded by Tennessee legislators, recently suggested to a crowd of 1000 in Franklin, Tennessee, that one way to solve the immigration problem is to pick up a gun and shoot undocumented immigrants.¹⁵⁶ The Anti-Defamation League website documents the following calls for violence against Central American immigrants:

Alabaman Larry Darby, a Holocaust denier and candidate for Alabama attorney general, recently stated in a May 3 interview on Alabama Public Television that he wanted National Guard troops on the border with orders to “shoot to kill, absolutely . . . we are at war, we are being invaded by a foreign country, we are at war.”

. . . .

One member of an Aryan Nations faction, “Pastor” Jay Faber of Pennsylvania, claimed on April 10 on the Aryan Nations Internet forum that “I already know they will not throw one of these stumpy little brown beasts out of here, so for the amount of guats [Guatemalans] in my area, I have at least 10 rounds of ammunition for each of them.”

Aryan Nations faction leader August Kreis in October 2005 claimed on his Web site that “this infestation of cockroaches need deportation or extermination!” If legal means of “stopping this rising tide” were not enough, “then these brown squat monsters should begin to turn up dead all across Amerika [sic] . . . [.] We now have another game animal to add to our list of available targets for our favorite pastime, hunting, and we’ll declare permanent OPEN SEASON on these dirty wetbacks! From what I have heard through the grapevine the Skinheads and Klans across the country are more than prepared for this type of action. I say let’s play by state and see which state can claim the most kills and let the jewsmedia whores keep score!”¹⁵⁷

With physical violence failing to quell the resistance of the Other, the Self resorts to its next tactic: reversing the priority of Height that the other has over us, to allow us to look down upon the other.¹⁵⁸ As Roger

¹⁵³ Cole, *supra* note 73, at 991.

¹⁵⁴ See Cole & Chin, *supra* note 35, at 326.

¹⁵⁵ See Johnson, *The End of Civil Rights*, *supra* note 59, at 1496.

¹⁵⁶ See Bob Moser, *White Heat*, NATION, Aug. 28/Sept. 4, 2006, at 11, 12-14.

¹⁵⁷ Anti-Defamation League, *supra* note 148.

¹⁵⁸ See generally LEVINAS, TOTALITY AND INFINITY, *supra* note 20.

Burggraave suggests, one way to accomplish this is by taking the Face literally, by reducing the Other to appearance, to skin color, to features of eyes and nose.¹⁵⁹ Thus, Congress's first official pronouncement on the right to become a citizen by naturalization in 1790 restricts that right to "free white persons,"¹⁶⁰ which begins the use of racial criteria for admission and which is not fully lifted until 1965.¹⁶¹

The literalization of the face demands cooperation from its victims. The features of the Chinese and the way they speak set them apart; the skin of Mexicans and the way they speak set them apart. Rather than defying the attempt to be set apart, much racism causes immigrants to disappear, first into their own communities, and then even from their own Faces.¹⁶² Hing Tong, who bore and raised seven children, whose feet have been bound to stumps in her native China, tries to put heavy weights upon her feet so that people do not stare at her as she hobbles about the streets of San Francisco.¹⁶³ Mexican-Americans prize those of their national origin with fair skin and hair, disparage or ignore those with dark brown skin and eyes.¹⁶⁴

To disparage the race of another is to subjugate,¹⁶⁵ to reduce the immense Height of the other to something less than human. Chinese men, women and children are reduced to animals: they are compared to swarms of "insidious ants," which if left unchecked will destroy American civilization.¹⁶⁶ Mexican and Chinese human beings are compared to locusts, cockroaches, and beasts—as similes, not just metaphors.¹⁶⁷ Or, they are reduced by circumstances to persons less than free, less than independent participants in American economic life, just as merchants are "reduced" to laborers by the Chinese Exclusion Act unless they can show their wares and bills

¹⁵⁹ See Roger Burggraave, *Violence and the Vulnerable Face of the Other: The Vision of Emmanuel Levinas on Moral Evil and Our Responsibility*, 30 J. SOC. PHIL. 29, 30-31 (1999).

¹⁶⁰ Naturalization Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103 (repealed by Act of Jan. 29, 1795, ch. 20, 1 Stat. 414).

¹⁶¹ Johnson, *supra* note 54, at 361-62 (noting that Asians were the only group of non-white immigrants who were totally excluded from immigrating, starting with the Chinese in 1882 and adding other Asian groups, until the restriction was lifted in 1965). In the language of the law, Asian immigrants were "aliens ineligible for citizenship." *Id.*

¹⁶² See generally LEVINAS, *TOTALITY AND INFINITY*, *supra* note 20.

¹⁶³ Yu, *supra* note 2, at 38.

¹⁶⁴ See, e.g., Ana M. Novoa, *Lessons from La Morenita del Tepeyac*, 20 J.L. & RELIGION 267, 286-88 (2004-05).

¹⁶⁵ See Burggraave, *supra* note 159, at 37.

¹⁶⁶ Cole & Chin, *supra* note 35, at 339.

¹⁶⁷ See Anti-Defamation League, *supra* note 148; Aoki, *supra* note 135, at 32-33 (noting the pervasive use of insect and swarm imagery to dehumanize the Chinese in the minds of the public—whereas "we" are distinct individuals, "they" all look alike and are individually undifferentiated like insects—which feeds paranoia and racism).

of lading.¹⁶⁸ Chinese immigrants, for example, are portrayed “as coolies, virtual slave laborers who were taking away jobs from American workers and bread from the mouths of American women and children.”¹⁶⁹

For all but the hard-bitten racist, however, it is difficult looking down at the face of the Other all of the time. And the Face inexorably resists being pushed down from its Height. Unsuccessful at turning our face away from the Other as she presses for recognition, unsuccessful at pushing the Other’s Need below us, we exclude the Other from our midst. And law provides the legitimacy for that exclusion.

III. PROPERTY AND PROCEDURE AS THE LAW’S ERASURE OF THE OTHER

In support of our society’s refusal to be in the vicinity of the neighbor, the law practices the first words of property: I exclude.¹⁷⁰ First, the law segregates the Other into Chinatowns and barrios;¹⁷¹ unsatisfied, the law forces the Other out altogether.¹⁷² Property is the language that legitimizes pushing the Other out of our proximate space to that place where we cannot any longer see her. The way in which the American law of property tells immigrants they are excluded is a complex story, somewhat different for each stream of immigrants, but bears a little retelling only to remind us how a government of laws participates in the human refusal to behold the Other in her proximity and demand upon us. This story shows how the law of property gains its legitimacy by reliance on legal familiarities: the values of objectivity, equality, efficiency. And, the story of property is shored up with other legal conceits: the tall tales that justice can be achieved by dividing time into past and present (the prospectivity of legislation), that there is a difference in kind between what we should do as moral persons and what the law can demand of us, and that the violence of regulation is not the same as private violence. The threat of the Other is reduced either by spreading the Other out, like a pancake, as an abstraction, or government by abstraction.

In the story of property, legal discrimination is the first word the law speaks to the Other.¹⁷³ Some of these legal pronouncements are subtle,

¹⁶⁸ See discussion *supra* Part I.

¹⁶⁹ See Cole & Chin, *supra* note 35, at 342.

¹⁷⁰ See generally JESSE DUKEMINIER ET AL., PROPERTY ch. 1 (6th ed. 2006).

¹⁷¹ See discussion *supra* Part II.

¹⁷² See *supra* notes 94-106 and accompanying text.

¹⁷³ See *infra* notes 175-76 and accompanying text.

written in the first language of the law, fairness and objectivity.¹⁷⁴ First, new arrivals to New York are taxed for the privilege of landing.¹⁷⁵ It is hard to complain about taxes that are seemingly applied to all who fit the category. Then immigrant Chinese miners are saddled with licensing fees and taxes for the privilege of making a living that their American-born counterparts are not required to pay.¹⁷⁶

More visibly, the new immigrants later encounter segregation in community life. Aoki notes how Chinese stereotyping leads to disadvantaging laws in employment, education and housing.¹⁷⁷ Immigrants are pushed into Chinatowns by onerous work taxes and mob violence, and then are segregated there by law.¹⁷⁸ Urban Chinese are segregated from whites in their own dominant industries, such as laundries.¹⁷⁹ Chinese railroad workers are required to stay in separate living quarters,¹⁸⁰ and Chinese urban dwellers are punished for violating space regulations in apartments.¹⁸¹ Chinese children are segregated in public schools.¹⁸² Ultimately, Cole and Chin note, by the end of the nineteenth century, “Chinese immigrants became the object of what some historians have called ‘the driving out.’ They suffered from escalating violence and discriminatory laws that be-

¹⁷⁴ See *id.*

¹⁷⁵ See Gabriel Chin, *Regulating Race: Asian Exclusion and the Administrative State*, 37 HARV. C.R.-C.L. L. REV. 1, 12 (2002) [hereinafter Chin, *Regulating Race*] (quoting Mayor of New York v. Miln, 36 U.S. 102, 141 (1837)). Chin notes that the Supreme Court in *Miln* suggested that states could regulate immigration under their police power:

New York, from her particular situation, is perhaps more than any city in the Union, exposed to the evil of thousands of foreign emigrants arriving there, and the consequent danger of her citizens being subjected to a heavy charge in the maintenance of those who are poor. It is the duty of the state to protect its citizens from this evil . . .

Id.

¹⁷⁶ See Cole & Chin, *supra* note 35, at 326; Aoki, *supra* note 135, at 25.

¹⁷⁷ See Aoki, *supra* note 135, at 20.

¹⁷⁸ *Id.* at 20 n.84 (noting a San Francisco Board of Supervisors resolution in 1890 making it “unlawful for any Chinese person to locate, reside or carry on a business anywhere in San Francisco except . . . in an area set aside for slaughterhouses, tallow factories, hog factories and other businesses thought to be prejudicial to the public health or comfort”).

¹⁷⁹ *Id.* at 30 n.127 (noting the most infamous example: the discriminatory enforcement of so-called safety legislation that applied only to Chinatown’s laundries in an attempt to drive the Chinese out of the business).

¹⁸⁰ Johnson, *supra* note 54, at 363 (“However, unlike White ethnic immigrants such as Italians, Poles, and Irish, the Chinese were a politically proscribed labor force. Consigned to the permanent foreigner status of migrant workers, they were located in a racially segmented labor market.”).

¹⁸¹ See Aoki, *supra* note 135, at 30 n.127 (discussing an ordinance prohibiting the rental of apartments under 500 cubic feet of air per person, and criminalizing a tenant’s living or sleeping in such rooms; violation of this ordinance was punishable by cutting off Chinese men’s hair queues, which the authorities took to be symbols of loyalty to the Chinese emperor).

¹⁸² *Id.* at 20 n.85 (citing *Gong Lum v. Rice*, 275 U.S. 85 (1927), which applied the “separate but equal” doctrine in *Plessy v. Ferguson*, 163 U.S. 537 (1896), to segregation of Chinese schoolchildren).

came a defining characteristic of their experience in America.”¹⁸³ Most insidiously, they further note, the law’s oppression far exceeds that of the crowd’s private violence against Chinese immigrants, which “ebbed and flowed,” while local law steadily and insistently increased its imprisoning strictures upon these immigrants.¹⁸⁴

The contemporary period holds out little more hope that the Face of the immigrant will be welcomed in a moment of ethics. De facto, if not de jure, arriving Mexicans are pushed into barrios by the inflections of superiority, the blank stares of indifference, or the gestures of hostility they encounter when they try to move about as free people in the white world. Their neighborhoods become virtual cages marked not by iron bars but by language—English heard on one corner and Spanish across the street, marking out the borders of belonging, one street to the next. Even if the law does not technically confine them, it abets those who would seek to confine them by its indifference to curbing private violence and oppression. In response to being pushed into the distance by hostility and condescension, the Other understandably seeks shelter with those who look alike, huddling against the shaming that follows them in stores or restaurants or real estate visits into white neighborhoods.

The drive to marginalize and to separate the Other is felt in modern times by American state and federal laws stripping undocumented aliens of the opportunity to receive benefits for basic needs. The 1996 federal immigration law’s bar of family subsistence benefits under the TANF program,¹⁸⁵ the federal law’s most basic family subsistence program, has not been the last word on this stripping away of undocumented immigrants’ security. The Wall Street Journal reports that, this year alone, “more than 500 pieces of immigration-related legislation have been introduced in state legislatures, and 57 of them have been enacted in 27 states, according to the National Conference of State Legislatures.”¹⁸⁶

Similarly, the law inverts the Height of the Other by infantilizing her, by rejecting her agency and her competence, including her competence to

¹⁸³ Cole & Chin, *supra* note 35, at 327.

¹⁸⁴ *Id.*

¹⁸⁵ See, e.g., Friedland & Broder, *supra* note 103, at 198-200 (noting the limitations in TANF aid). Friedland and Broder note that only qualified immigrants, including lawful permanent residents with green cards, refugees and asylees, Cuban or Haitian entrants into the U.S., persons granted parole for at least a year, and some abused immigrants with their children or parents, were permitted to receive TANF benefits under this law. *Id.* Undocumented immigrants and many lawfully present persons were not permitted. *Id.*

¹⁸⁶ Miriam Jordan, *States and Towns Attempt to Draw the Line on Illegal Immigration*, WALL ST. J., July 14, 2006, at A1 (noting bills in Georgia and Colorado restricting public benefits and employment rights for illegal immigrants).

be a witness to the truth. Just as newly freed African-Americans were kept in a form of citizenship-servitude by being precluded from exercising basic civic duties such as serving as jurors in trials,¹⁸⁷ so too does California's law bar the Chinese from testifying against white people.¹⁸⁸ Indeed, California law also makes Chinese immigrants incompetent to testify to the status of other immigrants, requiring that Chinese immigrants prove that their presence is legal by presenting the testimony of "one white witness."¹⁸⁹ Similarly, in 1920, the Congressional decision to require a literacy test for immigrants implies not only that their language makes them incompetent citizens, but also serves the Congressional design to keep out non-English speakers.¹⁹⁰ In today's America, undocumented immigrants may be rendered incompetent witnesses or denied legal recovery by demands for discovery of their immigration status.¹⁹¹

But we may be especially astonished at how sincerely and literally the legal theme of property sounds to distance the Other in the law defining who can be our neighbor, occupying the land and the dwelling next door.¹⁹² In both the late nineteenth and late twentieth centuries, residential segregation of immigrants becomes authoritatively sanctioned by seemingly neutral laws.¹⁹³ Although restrictions on alien ownership of land date back to the American founding, originally they are spotty, judge-made common law decisions.¹⁹⁴ Due to Western states' anxiety over immigrants, however, such restrictions become statutory and conclusive in the 1880s and 1890s, this period coinciding with the end of Asian immigration.¹⁹⁵ California's constitutional amendment of 1894 cannot be clearer in its exclusion of the Other as neighbor: "Foreigners of the white race, or of African

¹⁸⁷ See *Strauder v. West Virginia*, 100 U.S. 303 (1879).

¹⁸⁸ See *Cole & Chin*, *supra* note 35, at 327 (describing the decision of the California Supreme Court in *People v. Hall*, 4 Cal. 399 (1854)).

¹⁸⁹ See *Cole*, *supra* note 73, at 991; *Aoki*, *supra* note 135, at 30 n.128.

¹⁹⁰ See *Cole*, *supra* note 73, at 991.

¹⁹¹ See, e.g., Monica Guizar, *Virginia Court Denies Defendant's Inquiry Into Worker's Immigration Status in State Workers' Compensation Claim*, IMMIGRANTS' RTS. UPDATE, March 23, 2006, available at <http://www.nilc.org/immsemplymnt/emprihts/emprihts096.htm> (discussing a Virginia case in which the defendant employer attempted to get his employee to drop a workers' compensation claim by filing for discovery on the worker's immigration status).

¹⁹² See, e.g., *Aoki*, *supra* note 135, at 20 n.86 (describing laws prohibiting the ownership of land by aliens in Washington, California and Oregon).

¹⁹³ See *id.* at 31 n.127 (discussing San Francisco misdemeanor ordinance prohibiting rental or occupancy of rooms without a sufficient amount of airspace per person).

¹⁹⁴ See Polly J. Price, *Alien Land Restrictions in the American Common Law: Exploring the Relative Autonomy Paradigm*, 43 AM. J. LEGAL HIST. 152, 156 (1999) (noting that these common law decisions tended to exclude aliens only from fee simple holdings, not the vast majority of other real property rights).

¹⁹⁵ See *id.* at 166-74 (discussing the statutory curtailment of aliens' property rights by the states).

descent, eligible to become citizens of the United States . . . , shall have the same rights in respect to . . . real property, other than real estate, as native-born citizens”¹⁹⁶ Private restrictive covenants, enforceable until the Supreme Court’s 1948 decision, gain support from statutory prohibitions against race-commingling in residential neighborhoods.¹⁹⁷

The word of property spoken against the immigrant Other is not, however, a historical relic. Today, half of all American states retain some form of restriction on, or exclusion of, aliens from property rights.¹⁹⁸ More ominously, California—the chief site of both Chinese and now Mexican expulsion—at the end of the twentieth century has passed Proposition 187, which amends the California constitution to severely limit the property rights of legal and illegal aliens in California, declaring that the people of California “had suffered . . . economic hardship caused by the presence of illegal aliens in th[e] state.”¹⁹⁹ And the Social Security Administration, in absorbing over \$57.8 billion in Social Security taxes paid by undocumented workers who will never collect Social Security absent Congressional legislation, has essentially taken property via its “earnings suspense file.”²⁰⁰ Ironically, Aoki notes, the Other, the immigrant, literally contained by property law, is then, like the Chinese, accused of refusing to assimilate.²⁰¹

¹⁹⁶ *Id.* at 173 (quoting Calif. Const. 1879, Art. I, § 17, amendment adopted November 6, 1894); see also *Oyama v. California*, 332 U.S. 633 (1948).

¹⁹⁷ See Keith Aoki, *Direct Democracy, Racial Group Agency, Local Government Law, and Residential Racial Segregation: Some Reflections on Radical and Plural Democracy*, 33 CAL. W. L. REV. 185, 198-99 (1997) (describing the demise of official tools of segregation, including the invalidation of restrictive covenants by *Shelley v. Kraemer*, 344 U.S. 1 (1948), and the unofficial social phenomena continuing segregation de facto).

¹⁹⁸ See Price, *supra* note 194, at 152 (noting that some of these statutes affect only non-resident aliens, some completely restrict aliens from holding land, and some impose other burdens).

¹⁹⁹ *Id.* at 207 (alteration in original) (quoting *League of United Latin American Citizens v. Wilson*, 131 F.3d 1297, 1300 (9th Cir. 1997)).

²⁰⁰ See Eduardo Porter, *Illegal Immigrants Are Bolstering Social Security with Billions*, N.Y. TIMES, Apr. 5, 2005, at A1; *Is the Federal Government Doing All It Can to Stem the Tide of Illegal Immigration?: Hearing Before the Subcomm. on Regulatory Affairs of the H. Comm. on Government Reform*, 109th Cong. (2006) (statement of Martin H. Gerry, Deputy Comm’r, Office of Disability & Income Sec. Programs), available at http://www.ssa.gov/legislation/testimony_07250.html.

²⁰¹ See, e.g., Aoki, *supra* note 135, at 32 (describing the “viciously circular” blame-the-victim dynamic of first excluding the Chinese from U.S. citizenship under the blatantly xenophobic immigration policies and then portraying them as disloyal and subversive because they were not U.S. citizens). For more on this, see also Bina Kalola, *Immigration Laws and the Immigrant Woman: 1885-1924*, 11 GEO. IMMIGR. L.J. 553, 580 (1997), who notes:

Congress reported that the new immigrants from Southern and Eastern Europe, unlike those from western Europe, came from poor regions with backward races and customs, and as a result, these immigrants did not have the capacity to assimilate like the western Europeans[.] . . . ‘have very low standards of living, possess filthy habits, and are of an ignorance which passes belief.’

Id. (citation omitted) (quoting in part ANNUAL REPORT OF THE COMM’R OF IMMIGRATION FOR THE PORT OF N.Y., 62d Cong., § 2, at 14 (1911)).

The final word of property by which the One pushes back the proximate Other is similarly literal: it defines who can be a co-habitant of the same geography, by excluding the Other from our polity and our territory.²⁰² Exclusion from any hope of citizenship is first: the naturalization provision that limits citizenship to “free white persons” after 1790 is broadened in 1870, in the wake of the great Civil War, to permit citizenship for Africans but not Asians.²⁰³ Indeed, Chin notes that the proposal to extend citizenship to Asians was resoundingly defeated in 1870; and when the limitation was inadvertently dropped from the statutory revisions of 1874, Congress acted within a month to restore it, so firm was their desire to prevent Asians from obtaining American citizenship.²⁰⁴

The next act pushing away the proximate Other is even more extreme: physical exclusion from the United States. By 1882, Congress has excluded the Chinese by law, except for certain well-propertied classes, and for the first time made it legally possible for persons to be deported as punishment for entering the country in violation of the Chinese Exclusion Act.²⁰⁵ This temporary exclusion is not lifted until 1965.²⁰⁶ Again, we find a chilling parallel in the current situation: in 2006, Congressional conservatives have successfully urged the Senate to permanently bar citizenship for illegal aliens convicted of either one felony or three misdemeanors, with few exceptions.²⁰⁷ The apparently reasonable objective of that law—to eliminate dangerous persons such as rapists and forgers from our midst²⁰⁸—neglects to clarify what offenses might subject undocumented workers to deportation, from drunk driving to picking up a prostitute to possession of marijuana.²⁰⁹

²⁰² See generally LEVINAS, TOTALITY AND INFINITY, *supra* note 20; DUKEMINIER ET AL., *supra* note 170.

²⁰³ See Chin, *Regulating Race*, *supra* note 175, at 11.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ See Chin, *supra* note 66, at 297-98.

²⁰⁷ See, e.g., Tate, *supra* note 69 (describing the 99 to 0 vote in favor of blocking illegal aliens convicted of these crimes from becoming legal residents or aliens).

²⁰⁸ See, e.g., Bruce Lambert, *Illegal Immigrants Readied for Deportation*, N.Y. TIMES, March 30, 2005, at B5 (describing deportation of forty-one Latin American, Caribbean and South Asian illegal immigrants, many of whom were convicted of rape and other sex crimes); Tim McGlone, *Judge Gives Immigrant 7 Years, Deportation*, VIRGINIAN-PILOT, Jan. 20, 2006, at B2 (describing deportation of illegal immigrant convicted of manslaughter and drunken driving).

²⁰⁹ The current law permits deportation for broad categories of criminal offenses including “crimes of moral turpitude,” which include theft, receipt of stolen property, fraud, alien smuggling, trafficking in drugs and firearms, and many others. See TRAC IMMIGRATION, AGGRAVATED FELONIES AND DEPORTATION, <http://trac.syr.edu/immigration/reports/155> (last visited May 11, 2007) (stating that immigrants have been deported for shoplifting and petty larceny, such as stealing a bottle of Tylenol or a pack of cigarettes); see also S. Thompson, *Becoming a U.S. Citizen: Crimes You Can't Commit*,

The trajectory of the exclusion of the Chinese follows a familiar Levinasian prediction. It traces how the Self apprehends reality by totalizing, by trying to reduce the immense Otherness of the Other to a comprehensible and controllable form, to situate truth in an impersonal reason instead of in the Face.²¹⁰ In the move to create property rules to push the proximate Other beyond our line of sight, racial exclusion play-acts justice in the guise of reform. And the lines it speaks in this play are the values of the law: standardization, regularization, thematization, abstraction. We see instantiated the equality of exclusion, the reduction of freedom to “the reflection of a universal order which maintains itself and justifies itself all by itself.”²¹¹

The statutory exclusion of categories of aliens from the United States between 1875 and 1917²¹² begins with the reduction of complex human beings to a single simplistic feature characterizing their existence, one that ostensibly makes them dangerous to the nation.²¹³ No longer complex human beings, the excluded are only and wholly convicts, prostitutes, illiterates, contagious.²¹⁴ In its broad definition, particularly of illiteracy and contagion, this categorization has momentous consequences, barring both immigrants and their families from traversing the waters between Angel Island or Ellis Island and the mainland shore.²¹⁵ Reducing Others to these categories requires them to retrace the long and arduous journey on which they have embarked from another world, many to a life that has literally disappeared in their home countries.²¹⁶ Next, paupers are barred from en-

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http://www.associatedcontent.com/article/62251/becoming_a_us_citizen_crimes_you_cant.html (last visited May 11, 2007) (listing prostitution, drunk driving and selling pornography as examples of “crimes of moral turpitude”).

²¹⁰ See LEVINAS, *TOTALITY AND INFINITY*, *supra* note 20, at 87.

²¹¹ *Id.*

²¹² See Kathrin S. Mautino, *Entry: What Mama Never Told You About Being There*, 31 SAN DIEGO L. REV. 911, 913-14 (1994) (noting that until 1875, there were no entry requirements for aliens coming to the United States; the entry of an alien was not an issue because there were no grounds for exclusion).

²¹³ See *infra* notes 215-17 and accompanying text.

²¹⁴ See *supra* note 201.

²¹⁵ See Natale, *supra* note 27, at 128 (noting that 75-80% of Chinese arrivals were admitted after some form of detention ranging from a few days to two years, while having little contact with those on the mainland). For more on this, see also Yu, *supra* note 2, at 41, who describes the deportation of an immigrant solely because of a curable ailment, and Kalola, *supra* note 201, at 580, who notes:

The most controversial debates in 1903 and 1907 surrounded the proposal to enact a literacy test which would keep out a large number of unskilled laborers. Those favoring the test knew that almost one-third of southern and eastern European males were illiterate; therefore the test would successfully bar those they wished to keep out.

²¹⁶ See, e.g., Yu, *supra* note 2, at 35-36 (discussing her grandmother’s experience as a bride waiting sixteen years for her husband to attain merchant status and bring her to the United States, while she was also forbidden to visit her mother because she now belonged to her husband’s family).

try; and indeed, someone who later is reduced by the law from a human being to “a public charge” can be deported, even if his status has resulted from unforeseen misfortune not contemplated when he stepped onto American shores.²¹⁷

The word of ethics is inverted into a word of exclusion. In terms of the key psychological justification for property rights—that we be able to be secure in our persons and place in the world²¹⁸—it is hard to imagine a more destructive experience than being seized by the federal government when one has come upon desperate times and returned by ship to a foreign shore that may no longer be home in anything but name. Similarly, in this story of exclusion, immigrant women become the property and prerogative of their husbands: “attached” to male citizens or resident aliens, they can be permitted an exemption from some of these rules barring their entry only at the request of their husbands.²¹⁹ These exclusionary bars are treated as obviously fair, as if the immigrants themselves could surely understand the need for—indeed, the desert inherent in—their own exclusion.

Finally, we see the ultimate moment of thematic abstraction—the quota system, imposing numerical country-by-country limits on those who want to come to the United States beginning in 1921, which is made permanent in 1924.²²⁰ Now, the absolutely Infinite Other is reduced to tiniest abstraction, becoming a number in a mass of numbers; hidden beneath the numerical categories—race.²²¹ The standard becomes ingeniously diffuse: the rules admit more from those countries that have previously supplied larger numbers of previous immigrants, fewer from those countries that have supplied fewer immigrants.²²² In a day in which race is a multitude of categories rather than simply a few, those from more recently immigrating

²¹⁷ See *supra* notes 94-99 and accompanying text.

²¹⁸ See generally DUKEMINIER ET AL., *supra* note 170.

²¹⁹ See Janet M. Calvo, *Spouse-Based Immigration Laws: The Legacies of Coverture*, 28 SAN DIEGO L. REV. 593, 601 (1991) (noting that as of 1903, alien wives of citizen husbands could be admitted even if they had a contagious disease, so long as it was curable or not dangerous, and, as of 1917, even if the wife could not read).

²²⁰ *Id.* at 602-03 (noting that the 1924 national quota system incorporated the assumption of coverture, allowing wives to enter under the quota of their husbands' nationality if their own quota was full, while preventing husbands from using their wives' quotas); Chin, *supra* note 66, at 279 (noting that there was a 150,000 person quota for immigrants in 1920). Congress rejected a proposal to treat Americans' alien husbands and wives similarly in 1948, agreeing only to grandfather in as non-quota immigrants those husbands who had married American women by January 1, 1948. Calvo, *supra* note 219, at 602-03.

²²¹ See *infra* notes 222-23 and accompanying text.

²²² See Chin, *supra* note 66, at 279-80 (noting that based on the quotas established in 1924, under which nations were awarded quotas of one-sixth of one percent of the number of U.S. citizens who traced their ancestry to that country in 1920, very few slots were allotted southern and eastern Europeans).

(and less desirable) “races,” i.e., those with skin darker than the northern and western Europeans, must squeeze into quotas of no more than one hundred per country.²²³

The social movement to define aliens as a disease is reflected in frantically mounting abstractions in the law. Congress selects a bogeyman class from a sort of Bermuda Triangle, first the “Asiatic Barred Zone,” then the “Asiatic Triangle,” a geography that includes China by previous law, Japan by a “Gentleman’s Agreement,” and other countries such as Vietnam and the Philippines, a vortex of danger that represents the threat of the Absolutely Other.²²⁴ This law is so intent on ensuring that the Other is not proximate to us that it defines immigration status for Asians not by their actual nationality, but the nationality of their ancestors.²²⁵ Thus, a Brazilian citizen of Chinese or Japanese ancestry is not permitted to emigrate freely as a Brazilian, but is subject to the immigration laws applied to China or Japan. Some, such as the Chinese, still desiring their freedom, queue up on waiting lists that place them in the United States more than 350 years after they get on the list.²²⁶ Meanwhile, countries that have overpopulated American shores are allotted quotas that go begging for want of interested immigrants.²²⁷

The focus on the seemingly objective qualification—which pretends to ethics—continues to drive the pursuit to exclude the Chinese, which as a group is thematized, objectified, legally erased and ultimately banned.²²⁸

This litany is repeated with the Japanese.²²⁹ As with the Chinese, the exclusion policies first target Japanese civil rights—the right to own property and work in industries—in the period leading up to World War II.²³⁰ They too are denied the right to become citizens, because they are

²²³ See *id.* at 279-80, 291-92, 302; see also Johnson, *The End of Civil Rights*, *supra* note 59, at 1486-89 (discussing how race-based exclusion laws reinforced racial inferiority notions in the United States).

²²⁴ See Calvo, *supra* note 219, at 601 (noting that even the exclusion of those from the Asiatic zone had exceptions for government officials, professional people and missionaries, along with their wives); Chin, *supra* note 66, at 281-82 (noting that after 1924, the quota for Asian immigrants was zero).

²²⁵ See Chin, *supra* note 66, at 281.

²²⁶ See *id.* at 283, 286, 325 (noting that there was a special quota of 105 persons of Chinese ancestry who were citizens of other countries; for instance, ethnic Chinese born in Hong Kong who were British subjects, and discussing the “backlogs” created).

²²⁷ See *id.* at 279-80.

²²⁸ See *supra* note 220-23 and accompanying text.

²²⁹ See Cole, *supra* note 73, at 992.

²³⁰ See *id.*

Wholly Other, not able to be absorbed in the same: they are “considered unassimilable, a breed apart, and an inferior race.”²³¹

The language of the law represents such quotas as fair and just: the queue rewards early comers, the hundred-person quota pretends an egalitarian approach to the unwanted.²³² The quota system dissimulates in the values of the law, seemingly impersonal, seemingly objective. Language reduces the other to a cipher under the blanket of disinterestedness. And the triumph of the law is stunningly captured in the words of the early twentieth-century Commissioner of Immigration who “boasted that virtually all immigrants now ‘looked’ like Americans.”²³³

The specter of racial categories continues today in the contours of U.S. immigration policy. Not until 1965 were racially-based quotas ostensibly eliminated,²³⁴ though the rationale stems more from the law’s disinterestedness than from recognition of the call of alterity, more from the rubric of civil rights than the absolute demand of the Other’s Need. Even in this expansive attempt to reduce the racialization of U.S. immigration policy, Congress retained restrictions on the destitute, the diseased, the mentally and physically disabled, and the convicted, throwing a small bone to political refugees in 1980.²³⁵ This “liberal innovation” is perhaps the by-product of public shame over the Japanese internment in World War II,²³⁶ a shame that echoes Levinas’s description of the consciousness of one’s own injustice that accompanies the welcoming of the Others who have outburst the history of their confinement.²³⁷ Asian Americans have not only outburst their confinement through their success—according to American

²³¹ *Id.*; see also Chin, *supra* note 66, at 281-82 (discussing the Immigration Act of 1924, which tied immigration to eligibility for naturalization, thus preventing most Asian immigration after 1924—Asian immigrants were ineligible for citizenship under the Chinese Exclusion Act of 1882 and the “Asiatic Barred Zone”).

²³² See *supra* notes 223-25 and accompanying text.

²³³ Cole, *supra* note 73, at 991.

²³⁴ See generally Chin, *supra* note 66.

²³⁵ See Davalene Cooper, Note, *Promised Land or Land of Broken Promises? Political Asylum in the United States*, 76 KY. L.J. 923, 925-928 (1988) (noting that “[t]he purpose of the Refugee Act of 1980 was to fulfill obligations under international law by making domestic law consistent with the United Nations Protocol Relating to the Status of Refugees,” but prior to that, admission of refugees into the United States was highly political, and refugee statutes had targeted refugees coming from communist countries (citation omitted)).

²³⁶ See Frank H. Wu, *Profiling in the Wake of September 11: The Precedent of the Japanese American Internment*, CRIM. JUST., Summer 2002, at 52, 56 (noting the change in the national view of the internment, including President Gerald Ford’s rescission of President Roosevelt’s executive order in 1976 and a commission finding that the internment had been motivated by “wartime hysteria, racial prejudice and failure of political leadership”).

²³⁷ See LEVINAS, *TOTALITY AND INFINITY*, *supra* note 20, at 86.

standards, inverting every claim about their subject state²³⁸—but they have outdone their captors in standing before the Other who would imprison them with a neighborly word.²³⁹

And yet, even in that seeming moment of justice in the 1965, the Need of the Other is eclipsed by the desire to contain, by the desire to enumerate, categorize, abstract the Other. In the debate where national quotas are erased for some, others are reduced to numbers for the first time: immigrants from the Western Hemisphere are for the first time placed under quotas because of the now-familiar litany that they will overwhelm the United States in their numbers.²⁴⁰

That story reaches its climax in the border crisis facing the U.S. today. The story of U.S. immigration law, of Chin Shee and her children, their faces pressed against the window-bars of their internment barracks, is once again unfolding in the Arizona desert.²⁴¹ There, each and every Other, one by one, has suffered: this one by starving to death, that one freezing into a numb and endless sleep, this one parched into submission and that one poisoned by the water he drinks, this one thrashing in the unbearable pain of a snake's venomous attack, that one a fragile ball of silence after a rapist's brutality.²⁴² This one, who has turned over her life savings to a "coyote" or been stopped by the Border Patrol after she believes she has made it to safety, that one who speaks back to his employer only to find himself on a Homeland Security bus bound for Mexico.²⁴³

In the United States Congress, even today, elected officials are demanding that the United States "toughen" its policy and practice of immigrant exclusion, not simply deporting those immigrants who have braved

²³⁸ See, e.g., *Becoming American: The Chinese Experience* (PBS television broadcast Mar. 25, 2003); see also PBS.org, *Becoming American: The Chinese Experience* (Program Description), http://www.pbs.org/becomingamerican/ap_prog3.html (discussing the "enormous success on the part of Chinese Americans, and their growing impact on the U.S. culture and economy" as well as their "label as a 'Model Minority'").

²³⁹ See *id.*; LEVINAS, TOTALITY AND INFINITY, *supra* note 20.

²⁴⁰ See Chin, *supra* note 66, at 297-98, 327-28. Chin discusses the limitation of 120,000 visas to persons of the Western Hemisphere for the first time in 1965, without per-country limitations or preferences, and the legislators' view that the quota would protect against the emigration of "about half a million Chinese living in the Western hemisphere, many of whom would like to come into this country if they could, but who are prohibited now from doing so because of the triangle provision." *Id.* (quoting 111 CONG. REC. 21,774 (1965)).

²⁴¹ See discussion *supra* Part I.

²⁴² See, e.g., *id.*

²⁴³ See, e.g., *id.*; Minn. Dep't of Human Rights, *Case 2: A Mexican Hotel Worker Fears Deportation*, RIGHTS STUFF, May-July 2004, http://www.humanrights.state.mn.us/rsonline4/or_case2.html (describing experiences of illegal immigrant workers in Minnesota threatened with deportation to forestall complaints about their conditions).

this desert of suffering, but imprisoning those who provide food, shelter, water and medical care to immigrants who survive the border.²⁴⁴ Conservative Congressional leaders have called for criminal sanctions against anyone who provides any help to an alien without legal authorization, whether a humanitarian assister or a criminal “coyote.”²⁴⁵ The language is broad enough to trap the saint as well as the sinner, covering transportation, concealment, “harboring” or “shielding from detection,” or “encouraging or inducing” someone to come into the United States.²⁴⁶ Already, under existing statutes, the government has arrested Good Samaritans from the humanitarian group No More Deaths, who leave food and water in the Arizona desert for crossing immigrants or drive the desperately ill ones to a place where they can receive medical aid.²⁴⁷

Law enters as a promise of symmetry into the murky dilemma of justice, where I am faced not only with the Face of the Other, but the Face of still more Others, the situation of many demanding that their need be faced, the situation that creates the very problem of justice.²⁴⁸ Levinas at

²⁴⁴ See, e.g., Roger Mahony, Op-Ed, *Called by God to Help*, N.Y. TIMES, Mar. 22, 2006, at A25; see also 8 U.S.C. § 1324(a)(1)(A) (2000). Section 1324 of Title VIII punishes, inter alia,

[a]ny person who—

(i) knowing that a person is an alien, brings to or attempts to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner, regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States.

8 U.S.C. § 1324(a)(1)(A) (2000). Furthermore, under this statute, a person commits a crime if he or she

(ii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law;

(iii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation; [or]

(iv) encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law.

Id. The statute also punishes any conspiracy to commit any of the preceding acts, or aiding and abetting such acts, and apparently defendants do not even have to possess traditional “accessory” mens rea. See *United States v. Guerra-García*, 336 F.3d 19, 25-26 (1st Cir. 2003) (permitting the use of circumstantial evidence to infer reckless mens rea about the alienage of a transported immigrant).

²⁴⁵ See 8 U.S.C. § 1324(a)(1)(A) (2000).

²⁴⁶ See *id.*

²⁴⁷ See *No More Deaths – No Más Muertes, Charges Dismissed Against Tucson Humanitarians*;

Judge Calls Prosecution Unfair, http://nomoredeaths.org/index.php?option=com_content&task=view&id=37&Itemid=31 (last visited May 12, 2007).

²⁴⁸ See EMMANUEL LEVINAS, *OTHERWISE THAN BEING OR BEYOND ESSENCE* 191 n.2 (Alphonso Lingis trans., Martinus Nijhoff Publishers 2d ed. 1981) (1978) [hereinafter LEVINAS, *OTHERWISE THAN BEING*]; Louis E. Wolcher, *The Tragic Foundations of Human Rights*, 24 WIS. INT’L L.J. 523, 543 (2006).

tempts to respond to the problem of justice—the competition of many Others with their profound demands upon us—with a paradox, acknowledging both that we are called to an unlimited responsibility for all others, and that we can limit the responsibility to the Other, to acknowledge concern for the self.²⁴⁹

American law, by contrast, responds to this seemingly insoluble demand for justice by many others through a series of legal fictions offering comfort against the reality that these Others are all standing Over us in their Need.²⁵⁰ Among these fictions are 1) the conceit that a morality can be founded on the difference between retroactive and prospective legislation, 2) the divorce of minimalist justice from the ethics of the face, and 3) the lie that there is a difference in kind between private violence and the violence of regulation.²⁵¹

The law is full of temporal demarcations that permit us to tell a first lie of justice; its language is the language of prospectivity and retrospectivity. A man's killing a fetus by kicking its mother's womb is a punishable crime after the legislature has declared it to be, but not before, because retrospective application of the law is a violation of due process.²⁵² An immigrant is entitled to Social Security benefits after the moment he is sworn in as a citizen, but not until then; it does not matter that the work he continues to do is precisely the same.²⁵³ In the legal fiction that time has borders, Chinese laborers who had reached the American shores before the law of Chinese exclusion can probably stay in the United States, but families of people like Yee Won are imprisoned and ultimately deported.²⁵⁴ And, indeed, the greatest immigration lie of all: if a pregnant Mexican woman manages to push her body over an invisible line at the California or Arizona borders just in time, her child will be an American, deserving of all this nation offers, but if she falls in the desert even a foot short, that same child is at the mercy of the American people.²⁵⁵ Isabel's mother is a criminal because she comes to the United States too soon: had she put herself on

²⁴⁹ See EMMANUEL LEVINAS, BASIC PHILOSOPHICAL WRITINGS 93-94 (Adriaan T. Peperzak et al. eds., 1996).

²⁵⁰ See discussion *supra*.

²⁵¹ See discussion *infra* pp. 47-52.

²⁵² See, e.g., *Keeler v. Superior Court*, 470 P.2d 617, 626 (Cal. 1970) (holding that the term "human being" means a person who had been born alive and does not include an unborn fetus), *superseded by statute*, 1970 Cal. Stat. 2440, *as recognized in* *People v. Carlson*, 112 Cal. Rptr. 321, 324-25 (Ct. App. 1974).

²⁵³ See BLAZER, *supra* note 104.

²⁵⁴ See *Yee Won v. White*, 258 F. 792 (9th Cir. 1919) (upholding the exclusion of Yee Won's family); *Yee Won v. White*, 256 U.S. 399 (1921) (denying his habeas corpus petition).

²⁵⁵ See e.g., *United States v. Wonk Kim Ark*, 169 U.S. 649 (1898).

the immigration list reserved for citizens of Mexico and crossed into the United States when her time came²⁵⁶ (or, coincidentally, found a recruiter for one of the few thousand jobs legally available to Mexicans),²⁵⁷ she might not be a criminal, and those who helped her might not have risked criminal prosecution.²⁵⁸

Of course, to put oneself on an immigration list, as the United States demands, is to put oneself into a no-man's land of time and space that the distinction between retrospective and prospective does not recognize. On one hand, it is to plan to leave behind the community of those who have made up one's reality; on the other, it is to be not-yet in the community of those in one's future. Those like Chin Shee become "grass widows," doomed to live out their lives without the security and help of their husbands.²⁵⁹ It is as if legal immigrants are being asked to spend their time in purgatory before they are admitted to a better place, though without any clear explanation of what sins they have committed, other than being born a Mexican. Illegal immigrants, on the other hand, are simply in a land which is neither their home nor a place they visit; they can neither go back in time, nor forward.

The second legal lie is that the law reinforces its own fairness by describing justice as a minimalist rectitude, apart from perhaps preferable but clearly optional ethics. In this account, law's work is to respond to what is real, thereby ordering its own plausibility. As Levinas suggests, in this account, ethics or morality is seen a kind of duping: we acknowledge it, but not as anything that has much to do with reality as we know it.²⁶⁰ The Need of the Other, because it is optional to us, is pushed off to the fringes of the private world, locked in as "charity" bespeaking the extra effort of the saint and not a demand upon every living person. The law deals in facts, in reality: the economic cost of providing public benefits to immigrants, the social unrest that having more competition for jobs will create.²⁶¹ The inexorable pull of the Face becomes unhinged from the demand

²⁵⁶ See generally LAURENCE A. CANTER ET AL., U.S. IMMIGRATION MADE EASY (7th ed. 2000).

²⁵⁷ See Jeanne Batalova, Ph.D., *Spotlight on Legal Information to the United States*, MIGRATION POLICY INSTITUTE, Aug. 1, 2006, <http://www.migrationinformation.org/Feature/display.cfm?ID=414> (noting that employment-preference immigrants from all countries varied from 59,525 in 1991 and 246,878 in 2005, a figure which include 132,964 who were their spouses and children).

²⁵⁸ See *supra* notes 243-46 and accompanying text.

²⁵⁹ See Ctr. for Asian American Media, *supra* note 61.

²⁶⁰ See generally LEVINAS, OTHERWISE THAN BEING, *supra* note 248; LEVINAS, TOTALITY AND INFINITY, *supra* note 20.

²⁶¹ See, e.g., Johnson & Hing, *supra* note 78.

of the Other, creating debilitating guilt,²⁶² forging a sense of our powerlessness to respond to the other's Need, a shame that pushes us into paralysis. Perhaps Chin Shee and her children exercise no tug upon the conscience of Immigration Commissioner White;²⁶³ he is impervious to their faces. Or perhaps they do tug upon his conscience, but instead of responding to them in their Need, he turns his shame upon them as psychological violence—it becomes Chin Shee's fault that she is pleading for justice, and he is washed clean of responsibility.

In the third lie, the law recognizes the Face only as violent: the law tells us in the Chinese Exclusion Act and today's attempts to contain Mexicans behind a wall that our society is using the contained and ordered violence of the law in order to prevent uncontained, disordered violence.²⁶⁴ If we can put up the wall, we can prevent the overrunning of our landscape by the "coolie hordes," the "swarm of locusts";²⁶⁵ the Immigrant Other, the One more, and the Still One More. We can protect not only our own lives and those whom we have absorbed, our property, but the very relational grounds in which our lives are planted, our communities. Those Americans who live in fear of immigration today talk not only about threats to their own lives, but about a decimated future for their children and their children's children, indeed, the very civilization on which their hopes rest.²⁶⁶

In this third lie, that there is a difference in kind between private violence and the violence of regulation, the fear of the Stranger who will come by stealth across our borders is the fear that we will be tricked into offering succor to someone who denies his true identity.²⁶⁷ We are afraid that we will accept the criminal as one of us, provide him with food and shelter if

²⁶² See LEVINAS, *OTHERWISE THAN BEING*, *supra* note 248, at 114 (describing the shame of self as "identity gnawing away on itself"); see also LEVINAS, *TOTALITY AND INFINITY*, *supra* note 20, at 84 ("[M]easuring oneself against the perfection of infinity is . . . accomplished as shame, where freedom discovers itself murderous in its very exercise. . . . Shame does not have the structure of consciousness and clarity. It is oriented in the inverse direction; its subject is exterior to me.").

²⁶³ See discussion *supra* Part I.

²⁶⁴ See Cole & Chin, *supra* note 35; see also *supra* note 68 and accompanying text.

²⁶⁵ See Aoki, *supra* note 135, at 33 n.141. Aoki quotes a poem by Daniel O'Conner that exemplifies the anti-Chinese paranoia:

We will make a second China by your pleasant Western Seas;
 We will swarm like locusts that scoured the east of old;
 . . . we will do your women's labor at half a woman's rate . . . We'll monopolize and master
 every craft upon your shore,
 And we'll starve you out with fifty—aye, five hundred thousand more!

Id. (alteration in original).

²⁶⁶ See Michael Crowley, *Border War*, *NEW REPUBLIC*, Mar. 28–Apr. 4, 2005, at 12, available at <http://www.tnr.com/doc.mhtml?i=20050328&s=crowley032805> ("[Rep. Tom] Tancredo and his allies are demanding American troops at the Mexican border and severe restrictions on *legal* immigration—while warning of a looming threat to 'Western civilization' itself.").

²⁶⁷ See *supra* note 68 and accompanying text.

he has none, medical care if his employer will not, a state pension in his old age.²⁶⁸ Even worse, we claim that the Stranger who crosses the border illegally violates the norm of equality we parade before the world: it is unfair, Congress says, for those who have broken the law to “cut into the citizenship line,” while those who have respected our law queue up for years and still wait to be admitted.²⁶⁹ The illegal entrant has placed his desires and needs above the one who waits legally to come. This diatribe against the injustice of illegal immigration carefully fails to notice that our lawmakers who complain about immigrants “jumping the queue” have themselves demanded that everyone else in the world recognize their birth as birthright, the entitlement to the advantages of American citizenship simply by accident of their birth.

In this account, addressing the third legal fiction,²⁷⁰ law is the means by which we hold ourselves back from wreaking the violence upon the stealthy intruder, violence that we would otherwise have to mete out to protect ourselves against his Violence. In this account, there are only two options: violence (personal) and violence (law). The law cabins violence to a “practical” size, not so literal and complete. Chinese immigrants are segregated by law, not as the reinforcement of private violence against them, but to forestall it.²⁷¹ The wall on the Mexican border is an attempt to forestall the greater violence of starvation, bandits, and patriot patrols that officials fear may turn to armed resistance.²⁷² The law’s violence is just because it prevents murder—our own, the immigrant’s, our culture’s.

²⁶⁸ See *id.*

²⁶⁹ See Morton M. Kondracke, Opinion, *Pence-Hutchison Bill Creates Hope on Immigration*, ROLL CALL, July 27, 2006, reprinted in NAT’L IMMIGRATION FORUM, TODAY’S NEWS CLIPS: JULY 27, 2006, at 49, <http://www.immigrationforum.org/documents/newsclips/0706/dc072706.pdf>. Kondracke notes that while the “Bush White House, GOP moderates and most Democrats . . . insist on ‘comprehensive’ reform that gives qualified illegal immigrants a chance to legalize their status[, c]onservatives denounce this as ‘amnesty’ for lawbreakers.” *Id.* He further notes that the Pence-Hutchison Bill would require “illegal immigrant adults from Latin American countries [to] return home for a brief period, undergo background checks, obtain legal work visas at privately run ‘Ellis Island Centers’ [before being] eligible to return to the United States for up to six two-year employment periods.” *Id.* For more on this issue, see also Carolyn Lochhead, *The Immigration Debate: Feinstein Offers Plan to Legalize Immigrants*, S.F. CHRON., May 23, 2006, at A1 (discussing Senate “compromise” Hagel-Martinez Bill). Under the Hagel-Martinez “compromise,”

illegal immigrants living in the United States five years or more would be eligible for a path to earned citizenship. Those here two to five years, an estimated 2.8 million people, would have to leave the country before applying for a new guest worker visa. Those here less than two years, an estimated 2 million people, would be subject to immediate deportation.

Id.

²⁷⁰ See *supra* note 251 and accompanying text.

²⁷¹ See discussion *supra* Part I.

²⁷² See, e.g., Crowley, *supra* note 266 (“Unless we do something significant to control our borders, we’re going to have another event with someone waltzing across the borders. Then the blood of the people killed will be on this administration and this Congress.” (quoting Rep. Tancred)).

IV. IMPOSING A LESSER VIOLENCE WHILE STANDING FACE-TO-FACE

To concede that the chief dilemma for the self, confronted with the height of the One and the One More, is about which form of violence to employ seems not to give those who must choose—lawmakers, judges, bureaucrats who administer the law—many options. It is to invert everything Levinas has tried to teach.²⁷³ In the immigration field, such a concession seems to find peace in the abstraction and thematization of the Other that happens when a country admits immigrants based on criteria such as self-sufficiency, mental stability, physical health or the number they hold in the queue. It seems to re-describe reality as inversion of the Height that Levinas shows us. It seems to concede to the legal landscape of time that make some persons legal and others illegal immigrants, the distinctions between minimalist justice and aspirational ethics, between obligations to Intimates and to Strangers, between the ameliorated violence of law and the unbridled violence of the mob. To concede the necessity, if not the value, of comparison, of objectivity, of fairness in law seems to defeat the Levinasian project in any but the most narrow and immediate individual moment when I stand before a single Other.

The law is and must necessarily be about taking responsibility, however distorted its view about the One standing over us. If it is true that the Other may use his Height to oppress not just the self but the One More, then the law must account for that. It may not simply preach to the self about totalizing the Other or dissembling about Height. If it is even partly true that the law is the medicine enabling the self to limit his feverish physical violence against the Other, then to demand that the law be stripped away for ethics does no real service to the Other. And, while we should not like to admit it in a Levinasian discussion, there is the call of efficiency which is irreducible to bureaucratic indifference or god-playing. For if the command of the Other to heed his desperation is heard in all of its fullness, it is not simply the most proximate others who will be affected. Much like resource allocation in health care, where the decision to extend maximal care to the critically injured patient or the dying premature infant means that resources are not available to many chronically ill patients or the disabled infant babies,²⁷⁴ the decision of the law to ensure maximum due process, the full encounter with the Other, will necessarily affect all of those whose cases cannot be heard.

²⁷³ See discussion *supra* Parts I, II, III.

²⁷⁴ See generally, e.g., Albert R. Jonsen, Univ. of Wash. School of Medicine, Resource Allocation, <http://www.depts.washington.edu/bioethx/topics/resall.html> (last visited May 11, 2007).

Yet, immigration is not simply a zero-sum resource game. Unlike the allocation of medical resources, it is far from clear that the extension of immigration rights to some will necessarily require that many are turned away. This is particularly true if the policy of “open borders” is coupled with the education of immigrants about their realistic prospects in the “land of the free,” and if genuine efforts are made for global equity in the flow of capital and employment opportunities.²⁷⁵ The Gold Mountain is the desire for an inapproachable alterity, an alterity which real experience can never duplicate. And the Gold Mountain will not be home, even for many of those who come to the United States illegally for work; the revolving door of immigration attests to the fact that, whatever its economic allure, the United States of America is not the center of the universe for all.

Of course, political conservatives may be right that any “open borders” regime will be challenged by immigration demand that exceeds the capacity of even those most willing to behold the Need of the Other. However, since the United States has never in modern times opened its borders to even approach the documented demand for workers,²⁷⁶ as evidenced by the vast numbers of illegal immigrants who work in the U.S.,²⁷⁷ it is difficult to predict whether the feared “swarms” or “hordes”²⁷⁸ of immigrants are likely to come.

For those who must make law, the question of how law accounts for the need of the Other in this immigration dilemma is not neatly resolved, but there are alternatives beyond queues or abstractions like “illiterate” or “public charge” or “Asiatic triangle.”²⁷⁹ We are not left only with the options of being immobilized by the Other’s Need, turning away from the Other’s demands, or turning our anger at the Other’s demands outward through exclusionary and discriminatory scapegoating.

So long as we acknowledge that we must “start[] out from the Face, from the responsibility for the other,”²⁸⁰ the common law gives us some opening to be faithful to the reality that Levinas discloses to us. In the common law tradition, equity stands side by side with the seeming objectivity, clarity and consistency of the common law as a challenging partner, not its mere shadow. Equity tells us that the face-to-face is required: in equity, the King authorizes a real person, not immersed in the common law’s

²⁷⁵ See Johnson, *Open Borders*, *supra* note 65, at 201-202.

²⁷⁶ See generally *id.*

²⁷⁷ See Lochhead, *supra* note 269.

²⁷⁸ See *supra* note 265 and accompanying text.

²⁷⁹ See discussion *supra* Part III.

²⁸⁰ See LEVINAS, *ENTRE NOUS*, *supra* note 45, at 104.

rigidity and abstractions, to go face to face with the equity petitioner.²⁸¹ Indeed, it requires that the equity petitioner's pleas be judged by inverting the common law, by upending justice upon such indeterminate, non-abstract and unconfined concepts as laches, bad faith, fair dealing, for the sake of the Face pleading her cause to the King. To the chagrin of legal theorists everywhere,²⁸² these messy concepts continue to this very day to inform the practice of the common law courts; and they are grounded in the Demand of the Other for true justice.

To be sure, common law equity has given much ground—perhaps too much ground—to principled rule-making, even while it has exposed the pretensions of the common law generally to be able to exercise justice without looking at the Face of the Other. And, in modern times, with the merger of the equity and common law courts in the United States,²⁸³ we sometimes conceive of equity more as an occasional stand-in to common law²⁸⁴ rules rather than as a parallel system of Being Seen, invoked by those whose need remains unrecognized by the law.

But in re-imagining immigration law, we do not need to concede that equity is an extraordinary stand-in for extraordinary situations, such as in humanitarian parole for persecuted refugees. Modern American jurisprudence has given us the rubric of guided discretion—a compromise between the objectivity and clarity of rules and the acceptance of the face-to-face as necessary for justice—as an heuristic to challenge our willingness to totalize the other, as well as to challenge the call of the Face, its claim to equity. Most famously in modern American jurisprudence, the rubric of guided discretion has been employed as the constitutional requirement in death penalty cases.²⁸⁵ (Ironically, in these cases, it was developed to respond not to the law's rigidity but to the opposite concern: the prevalence of arbitrary

²⁸¹ See Kevin C. Kennedy, *Equitable Remedies and Principled Discretion: The Michigan Experience*, 74 U. DET. MERCY L. REV. 609, 611-12 (1997). Kennedy notes that, while equity originally was a system for purchasing writs to be decided by the common law courts, as those courts ossified, petitioners commonly asked the King's chancellor for relief, "invoking the king's arbitrary power to do good and dispense justice." *Id.* Although criticized as lawless, "[a]s a bishop of the church, the Chancellor often relied on appeals to conscience," and the Chancery was critical in the development of non-damages remedies such as contract reformation and injunctive relief. *Id.*

²⁸² See generally, e.g., Legal Theory Blog, http://solum.typepad.com/legaltheory/legal_theorists_philosophers_and_others/index.html (last visited May 11, 2007).

²⁸³ See Kennedy, *supra* note 281, at 610-12.

²⁸⁴ See *id.* at 613 (noting that equitable relief retains its position as extraordinary relief to be invoked rarely).

²⁸⁵ See Mary Sigler, *Contradiction, Coherence, and Guided Discretion in the Supreme Court's Capital Sentencing Jurisprudence*, 40 AM. CRIM. L. REV. 1151, 1162-63 (2003).

and race-based jury decisions imposing death on capital defendants.²⁸⁶ However, the story that it teaches—that the Face must be seen, and it can never be seen as simply a color or a feature—is true whether the decision-maker is a lay jury or a seasoned judge.) It is under the rubric of guided discretion that the Supreme Court has been most willing to look at the face of the Other who threatens: “on a matter as grave as the determination of whether a human life should be taken or spared, [it has declared] that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.”²⁸⁷

The rubric of guided discretion acknowledges that the demand of the Other upon us may sometimes be unjust, that he may have elevated himself above us by his acts.²⁸⁸ And yet, it insists, first and foremost, on the reality of the face-to-face. A critical flaw in the U.S. immigration scheme is that it accepts, indeed rewards, the treatment of the other as an abstraction, a less-than-human characteristic by offering only the guise of due process. That is, the immigration law gives immigrants a paper right to have their claims for statutory-based exceptions heard by an official, while making the substantive standards for admission so rigorous as to tie the hands of even the most compassionate and just hearing officer.²⁸⁹ The result of that contradiction in the law is predictable: faced with case after case in which they stand in the Height of the Other in Her Need, called to responsibility but powerless to answer that call because of narrow directives for admission, immigration hearing officers take out their fury not on the rules but on the Other.

The evidence from the sanctuary cases in the 1980s, in which Salvadoran and Nicaraguan refugees fleeing persecution appealed in vain not to be deported, is chilling in this regard.²⁹⁰ Barbara Bezdek documents the deception and coercion that immigration officials used in order to get fleeing refugees to waive their right to due process, separating families into

²⁸⁶ *Id.* Sigler points out that by requiring a capital jury’s decision to be guided by specific factors determined in the democratic process by the legislature (the “guided” part of “guided discretion”), the courts have attempted to create some consistency in punishment across races and geography, while asking juries to be at least minimally accountable for their decisions. *See id.*

²⁸⁷ *Id.* at 1162 (citing *Gregg v. Georgia*, 428 U.S. 153, 163-66 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

²⁸⁸ *See id.*

²⁸⁹ *See, e.g.,* Marc Seidenberg, Comment, *Withholding of Deportation: Burdening the Refugee in Contravention of International Standards*, 11 *BROOK. J. INT’L L.* 379, 380 (1985) (noting that the Supreme Court, after passage of the Refugee Act of 1980, reiterated that an asylum-seeker still had the burden of proof to establish “clear probability of persecution”).

²⁹⁰ *See* Barbara Bezdek, *Religious Outlaws: Narratives of Legality and the Politics of Citizen Interpretation*, 62 *TENN. L. REV.* 899 (1995).

geographically distant detention camps, tricking them into believing that their family members had agreed to be deported, getting them to sign English language waivers that they did not understand.²⁹¹ She also shows how immigration hearing officers became almost literally blind to the faces and deaf to the testimony of these refugees as they documented the horrors of their life between merciless guerillas and marauding government soldiers.²⁹²

The rubric of guided discretion is not a panacea for the government's refusal to take responsibility for the need of the Other and the One More. While guided discretion, as it has been practiced in death penalty and other cases,²⁹³ is worthy of more than I can give it here, I would be loathe to suggest that it is, indeed, the perfect exercise of wisdom and love for which Levinas calls.²⁹⁴ For one thing, the law as guided discretion concedes something more than it should to the fear of the Other who stands before the bar, while acknowledging its Fear of the one who sits in judgment. Guided discretion does not trust the story of the Face. In its fear of being conned, in its fear that the Need of the other will be too powerful, the rubric of guided discretion insists on written-down standards, cabining the discretion of the decision-maker, and regularized process for irregular human needs. Another worry is that while equity has properly been located in what is termed "the conscience," equity has not escaped the criticism that judges will improperly use their "too subjective" notions of conscience to grant more than justice gives, more than a satisfied nation wishes to offer. The continual pall of suspicion cast over equity-based decisions thus threatens that the adjudication of the face-to-face will devolve into yet another set of rules over time, as the history of equity suggests it might.²⁹⁵ And, the fate of those who have brought immigration cases in other times, such as those Bezdek documents, warns that eventually, no matter how much discretion they are given to respond to the Need of the Other, overloaded immigration officers may simply become too exhausted to really look at the faces before them.²⁹⁶

However, we can say that equity at least begins where Levinas insists we must begin: on the priority and the precedent reality of the face-to-

²⁹¹ See *id.* at 922.

²⁹² *Id.* at 940-41 (noting that only 2-3% of Central Americans' applications for refugee status were granted).

²⁹³ See *id.* at 922.

²⁹⁴ See LEVINAS, *ENTRE NOUS*, *supra* note 45, at 104.

²⁹⁵ See Kennedy, *supra* note 281.

²⁹⁶ See Bezdek, *supra* note 290.

face,²⁹⁷ because it is impossible for an immigration judge—or anyone—to actually exercise discretion without considering the plight of the Other. It insists, as Levinas insists,²⁹⁸ that we start with the encounter with the Other from which any legal decision must be made in order to claim not simply moral validity, but a grounding in the reality of our existence.

To the extent efficiency rises up to object to guided discretion as the chief rubric for considering immigration applications, we might counter first on efficiency grounds. The cost of securing the United States against illegal immigration is itself staggering: President Bush has requested \$1.948 billion in emergency funding to add border patrols and temporarily deploy the National Guard to the Mexican border in order to prevent illegal immigration, house detained immigrants and deport them back to their home countries.²⁹⁹ As much as \$3.7 billion would be required to build an enforceable border wall between the two countries.³⁰⁰ The Government Accountability Office conservatively estimates the cost of implementing new immigrant employee verification programs at \$11.7 billion annually, with much of this amount to be borne by private business.³⁰¹ Indeed, one team of economists estimates that the total cost of locating and deporting illegal immigrants in the United States would approach \$206 billion.³⁰² This sum is in addition to the amount that the government has already been spending on enforcement.³⁰³

²⁹⁷ See LEVINAS, *ENTRE NOUS*, *supra* note 45.

²⁹⁸ See *id.*

²⁹⁹ Press Release, The White House, Fact Sheet: President Requests Funds to Strengthen Border Security (May 18, 2006), available at <http://www.whitehouse.gov/news/releases/2006/05/20060518-6.html>.

³⁰⁰ Tyche Hendricks, *Border Security or Boondoggle? A plan for 700 Miles of Mexican Border Wall Heads for Senate—Its Future Is Not Assured*, S.F. CHRON., Feb. 26, 2006, at A1.

³⁰¹ U.S. GOV'T ACCOUNTABILITY OFFICE, IMMIGRATION ENFORCEMENT: WEAKNESSES HINDER EMPLOYMENT VERIFICATION AND WORKSITE ENFORCEMENT EFFORTS 29 (Report No. GAO-05-813, 2005), available at <http://www.gao.gov/new.items/d05813.pdf>.

³⁰² See RAJEEV GOYLE & DAVID A. JAEGER, CTR. FOR AMERICAN PROGRESS, DEPORTING THE UNDOCUMENTED: A COST ASSESSMENT 1 (2005), available at http://www.americanprogress.org/kf/deporting_the_undocumented.pdf. The authors give comparison figures to underscore the size of this expense, noting that it would:

- Exceed the *entire* budget of the Department of Homeland Security for FY 2006 (\$34.2 billion);
- Approach the *total* amount of money requested by the 33 federal agencies responsible for homeland security activities for FY 2006 (\$49.9 billion);
- *More than double* annual spending on border and transportation security (\$19.3 billion);
- Comprise *half* the annual cost of the Iraq War (\$74 billion); and
- *More than double* the annual cost of military operations in Afghanistan (\$16.8 billion).

Id. (citations omitted).

³⁰³ See Orrenius, *supra* note 12, at 30. Orrenius notes:

As illegal immigration has increased, so has border enforcement. Between 1978 and 1999, the U.S. Border Patrol quadrupled in size. The most rapid rise came between 1992 and 1999, when the number of agents more than doubled, from 3,651 to 7,982. Not only is the number

Indeed, there is evidence that the drive to contain the Other is costlier than the face-to-face itself. Scholars have remarked on what else could be done with the \$2.2 billion (the lower estimate) it would cost to build a fence: such a budget could fund 2500 new Border patrol officers to focus on true threats to the nation, or increase by fifteen-fold the U.S. Agency for International Development's budget for economic development in Mexico over the next five years, thus stemming the tide of illegal immigration.³⁰⁴

Or, I would suggest, that money could be employed with the directive that we have no choice but to look upon the face of the Other, the immigrant who seeks only to work in the United States. The cost of individual consideration of requests to enter the United States is not as unthinkable as it appears on first glance. As just one analogy, the Social Security Administration (SSA) processes approximately 2.6 million disability claims and over one million appeals hearings every year.³⁰⁵ Many of these cases involve determinations profoundly more complex than the decision to admit an alien into the United States.³⁰⁶ SSA administrators must peruse complex medical records and lengthy personal histories, make determinations about the impact of medical conditions on the ability to work, make highly technical judgments about whether a particular applicant is unable to do his former job, as well as any job in the national economy.³⁰⁷ Yet, SSA's total administrative budget for these disability claims and the vast number of retirement, death and other claims it handles each year is only somewhat more than \$9 billion annually.³⁰⁸ If each of the more than half-million illegal immigrants entering the United States every year were to request individualized consideration of their admission, the cost might well be a fraction of the money spent on border and transportation security. And, indeed,

of agents greater, but time spent patrolling the border grew from 1.9 million hours in 1985 to 8.6 million in 1999. And since 1970, as a percentage of the federal budget, enforcement funds have increased 338 percent.

Id.

³⁰⁴ Hendricks, *supra* note 300; see also Johnson, *Open Borders*, *supra* note 65, at 233-34.

³⁰⁵ See SOC. SEC. ADMIN., PERFORMANCE PLAN FOR FISCAL YEAR 2006, at 5, available at <http://www.ssa.gov/performance/2006/FY2006PerfPlan.pdf>.

³⁰⁶ See generally Social Security Online, Electronic Booklets: Disability Benefits, <http://www.ssa.gov/pubs/10029.html> (last visited May 11, 2007).

³⁰⁷ See *id.*

³⁰⁸ See SOC. SEC. ADMIN., THE FISCAL YEAR 2007 BUDGET 1 (2006), available at <http://www.ssa.gov/budget/2007bud.pdf> (noting request for total budget of \$626 billion, to be used to pay benefits to more than 54 million people every month, process more than 6.7 million claims for benefits, issue 18 million Social Security cards, process 265 million earnings items, handle 59 million phone calls, and issue 142 million social security records, and noting that SSA's proposed administrative budget alone is \$9.619 billion.); see also S. REP. NO. 101-241, at 11 (1990) (noting that the Congressional Budget Office estimated that administrative costs would be about \$50 per applicant in 1990 dollars to register Salvadoran and Nicaraguan refugees who were illegally present in the country).

many of these immigration decisions might well be pro forma, because an employer of record would be taking responsibility for contracted workers.³⁰⁹

The advent of computerized records and transnational criminal information-sharing³¹⁰ means that many concerns about dangerous immigrants, such as those who traffic in drugs and people or commit violent crimes, concerns that might legitimately have spurred previous generations to close our borders, can be ferreted out through international cooperation. Similarly, technology has made concerns that the face-to-face will demand an overwhelming share of resources much less plausible: one can imagine, for example, a video-conference interview in which a prospective applicant is located in his or her country of origin while a decision-maker in the United States pulls up vital factual information regarding the applicant on a nearby computer screen. With appropriate documentation and an effort to respond seriously to the demand of the Other to come into the United States, the economics of immigration admissions will necessarily change dramatically in our lifetimes. Of course, the face-to-face does not identify what “guides” immigration officers will use as they decide who, among the many faces pressed against the window, will come in and who will not. Proposals to limit admission to those who can prove that they have work waiting for them simply moves back further the challenge of the Public Charge Law,³¹¹ for it once again permits us to define the Other in terms of the self, by our own greed to keep the advantages of the nation for ourselves, and to use the Other to make our hotel beds, tend our vegetables, watch our children at prizes that suit us. Something more is required.

V. REPRISE

As I have suggested, to take the Levinasian argument seriously—to believe that reality is in the Face of the One Standing Over us in Her Need—is, in the first instance, to suggest a greater challenge than the immigration dilemma itself would imply. If Levinas tells us the truth about the human condition, can we dare to have law? For law seems to demand the denial of the face-to-face in the name of its own values, such as consistency, fairness, and thematization. And yet, if the conceit of the law to justice requires us to deny the Face, and thus to invite “the instant of inhumanity,” how can we proceed? Can we hope to survive in any but the most brutal sense if we take the Public Charge Law and its exclusion of the most

³⁰⁹ See *supra* notes 301-02 and accompanying text.

³¹⁰ See, e.g., Interpol Homepage, <http://www.interpol.int/> (last visited May 11, 2007).

³¹¹ See *supra* notes 94-100 and accompanying text.

vulnerable, the most in need of our national bounty and care, as our best example of immigration justice? Can we pretend to the lie that we are looking at the Faces in their Need if we admit only those who can increase the GDP by their hard labor, whose Social Security taxes go into a “suspense” file to cover our indebtedness as a nation?³¹²

Conversely, can we afford not to have law? To pretend out of existence the possibility of borders, of legal and illegal admission, of a legal definition of citizenship? And thus we encounter the paradoxical inquiry: is justice in our immigration policy a demand too stark? Is turning away from the Face to Face necessitated by the human condition?

Levinas would once again have us understand that we completely misunderstand the human condition. The call for an immigration policy demanding exclusion of those whom we see in most need—paupers, illiterates, the diseased, the insane most of all—suggests that when we see how high the demand of the Other and each Other coming behind him is over us, we can truly imagine the Face of the Other as only a threat to us.

Levinas calls us, rather, to encounter the Other and the Many More with hope: he knows that in the proximity and demand of the Face, we will discover who we truly are as persons responsible. He writes:

The face breaks the system. . . . I can neither fail nor vindicate him; he remains transcendent in expression. . . .

. . . The face that looks at me affirms me. But, face to face, I can no longer deny the other: it is only the noumenal glory of the other that makes the face to face situation possible.³¹³

Law interrupts that moment when we have the hope of recognizing ourselves as persons-for-the-other by substituting a false construction of reality as only violent to ourselves. Law becomes the border fence that we built between ourselves and the Other to keep the Other at bay, forsaking his Height and his Welcome. For the Other is as much welcoming as violent. We may wish for law that is at least sometimes a lesser-violence-than-murder, that attempts to be least-violent, because it gives the Other the opportunity to come near, to welcome Us with grace even when she knows that we are attempting to squelch her Demand upon us. To admit this Other, even in our terror that she may overwhelm us In Her Need, gives the Other the opportunity to practice tolerance and to forgive us for our failure to be for-the-other, as many Chinese Americans have done in their embrace

³¹² See *supra* note 200 and accompanying text.

³¹³ See LEVINAS, *ENTRE NOUS*, *supra* note 45, at 34.

of an American story in which they can participate,³¹⁴ as many Japanese Americans have done by accepting with dignity the modest reparations conferred upon them for the gross indignities during World War II.³¹⁵ Indeed, if we did not grant *The Other Standing Over Us* the opportunity to come into our midst, to practice hospitality in the face of our raised hand, it is difficult to explain why many modern-day Muslim Americans and Mexican Americans would exercise grace in the face of their own identification as diseases on the body politic.³¹⁶

Levinas writes:

The true problem for us Westerners is not so much to refuse violence as to question ourselves about a struggle against violence which, without blanching in non-resistance to evil, could avoid the institution of violence out of this very struggle. . . . One has to find for man another kinship than that which ties him to being, one that will perhaps enable us to conceive of this difference between me and the other, this inequality, in a sense absolutely opposed to oppression.³¹⁷

He argues that this kinship already exists: “Responsibility for the other, this way of answering without a prior commitment, is human fraternity itself, and it is prior to freedom. The face of the other in proximity, which is more than representation, is an unrepresentable trace, the way of the infinite.”³¹⁸ A first place to start is in our own history, and in the imagination of a country that would exclude the older “Chin Shee” or Isabel as a merely “contagious person,” the younger Chin Shee as merely the wife of a laborer, that would send Cesario home believing that the people of the United

³¹⁴ For an example of Chinese American pride in their contributions to America, see Celebrate Chinese Americans Great Contributions, <http://www.scanews.com/spot/2003/january/s645/caf/news.html> (last visited May 11, 2007) (collecting articles and postings in English and Chinese).

³¹⁵ See Wu, *supra* note 236, at 56 (describing Presidential apologies and 1988 congressional legislation that paid \$20,000 in reparations for each survivor of the internment camps); see also Frank H. Wu, *Neither Black Nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225, 236 n.53 (1995) (citing DENNIS M. OGAWA, FROM JAPS TO JAPANESE: THE EVOLUTION OF JAPANESE AMERICAN STEREOTYPES 28-35 (1971), for its “examples of post-War praise for Japanese Americans, especially their willingness to forgive the internment, and their attempts to overcome discrimination without relying on governmental relief”). Wu and others have criticized the “Model Minority” myth which has arisen from this account of Japanese American response to the internment. See *id.* at 236-47.

³¹⁶ See, e.g., Khurram Saeed, *Muslim-Americans Reach Out*, http://www.allied-media.com/Arab-American/muslims_reach_out.htm (last visited May 11, 2007) (discussing the efforts by Muslim Americans to educate their neighbors about Muslims and to help them understand their status as victims of 9/11 as well). For a discussion of treatment of Muslims as terrorists, see Johnson, *The End of Civil Rights*, *supra* note 59, at 1488.

³¹⁷ LEVINAS, OTHERWISE THAN BEING, *supra* note 248, at 177.

³¹⁸ *Id.* at 116.

States welcome him as he has welcomed them, rather than people who send his daughter home in a coffin and call it justice.

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