

December 2020

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### Recommended Citation

Saby Ghoshray, *Is There a Human-Rights Dimension to Immigration? Seeking Clarity through the Prism of Morality and Human Survival*, 84 *Denv. U. L. Rev.* 1151 (2007).

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IS THERE A HUMAN-RIGHTS DIMENSION TO  
IMMIGRATION?  
SEEKING CLARITY THROUGH THE PRISM OF MORALITY  
AND HUMAN SURVIVAL

SABY GHOSHRAY<sup>†</sup>

*She sat with him for a day, searching for water, never straying too far away for fear she could get lost. On Sunday, her little boy died . . .*

*[Edith] Rodriguez had staggered and zigzagged in her dehydrated state. At one point, it took a half hour to track just 100 feet of her journey. Six hours later, they found the boy's body under a mesquite tree. His mother had neatly placed his shoes to his side and carefully folded his arms across his chest. Authorities held Rodriguez for three days while they contemplated charging her with child endangerment. She was finally released with no charges and returned to Mexico.<sup>1</sup>*

INTRODUCTION

Three-year-old David and his mother represent the human saga in the immigration issue. Immigration has become one of the most contentious issues of our time. People migrate for various reasons, ranging from searching for a better economy, to fleeing persecution, to seeking asylum. But, one of the most overpowering reasons why humans migrate is to save their families from a life of poverty and deprivation. People migrate to a land that is more prosperous than the land in which they were born. Unfortunately, the current immigration debate in the United States has been more politicized than ever before, the reasons for

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1. Claudine LoMonaco, *U.S. – Mexico Border: The Season of Death*, FRONTLINE, June 27, 2006, [http://www.pbs.org/frontlineworld/blog/2006/06/usmexico\\_border\\_1.html](http://www.pbs.org/frontlineworld/blog/2006/06/usmexico_border_1.html)

In May of 2006, 3-year-old David Rodriguez Reyes died of heat exposure in the Arizona desert. Along with his mom, Edith Rodriguez Reyes they were fleeing their poverty stricken home of Cancun, Mexico. They set out on foot, following the guidance of a coyote they had paid to lead them to the U.S. border. Along the way, the unimaginable happened, but it happens all the time. Lack of water, the heat, and the arduous journey takes a toll on the human body and death ensues, in this case, for little David, too young to care about the politics and fiery immigration debate.

which I have discussed elsewhere.<sup>2</sup> While the media personalities bombard the airwaves with their anti-immigration rhetoric,<sup>3</sup> the politicians cash in on these sentiments,<sup>4</sup> sidestepping the human issues—two areas I want to focus on in this review. Studies have attempted to show whether immigration is better or worse for the prevailing economy.<sup>5</sup> Research has also been conducted to understand what impact economy has on the prevailing employment and how immigration has affected the welfare of

2. See Saby Ghoshray, *Race, Symmetry and False Consciousness: Piercing the Veil of America's Anti-Immigration Policy*, 15 TEMP. POL. & CIV. RTS. L. REV. (forthcoming).

3. *CNN Immigration Problem: Is Dobbs the Exception-or the Rule?*, FAIRNESS AND ACCURACY IN REPORTING (FAIR), Apr. 24, 2006, <http://www.fair.org/index.php?page=2867>. In this context, I refer to the current phenomenon in which the politicians and media personalities routinely exaggerate the severity of an impending disaster or threat. Politicians and media personalities are in positions of influence and have the ability to shape public opinion. Driven by their personal agenda, they routinely project a false sense of future calamity. Whether print, radio, or television, the media has been notorious in lambasting immigrants and making a case for the harm they cause in society. For example, CNN anchor Lou Dobbs has been an outspoken voice on the immigration topic, such that on his show "Lou Dobbs Tonight" in a segment entitled "Broken Borders," he routinely spells out the dangers of not patrolling on the Southern U.S. borders:

Dobbs' tone on immigration is consistently alarmist; he warns his viewers (3/31/06) of Mexican immigrants who see themselves as an "army of invaders" intent upon re-annexing parts of the Southwestern U.S. to Mexico, announces (11/19/03) that "illegal alien smugglers and drug traffickers are on the verge of ruining some of our national treasures," and declares (4/14/05) that "the invasion of illegal aliens is threatening the health of many Americans" through "deadly imports" of diseases like leprosy and malaria.

Lou Dobbs is not alone. His fellow CNN colleague, Jack Cafferty, as well as radio-com television host, Glenn Beck, have made on-air negatively-slanted comments about immigrants. *Id.* An article by the Southern Poverty Law Center notes:

A new study of media coverage shows that a large number of daily newspapers wildly exaggerated the number of volunteers who actually took part in the Minuteman Project, a vigilante "citizens border patrol" operation that took place in southeastern Arizona over the month of April 2005.

Southern Poverty Law Center, *Anti-Immigration Movement Newspapers Inflated Minuteman Numbers*, Summer 2006, <http://www.splcenter.org/intel/intelreport/article.jsp?aid=635>.

4. If one doubts that policy makers have anti-immigration agendas in the ordinances and zoning codes, here are just two samples of such policies. Hazleton, Pennsylvania, passed the *Illegal Immigration Relief Act*. American Civil Liberties Union, *Coalition Gains Immediate Halt to Un-Constitutional Ordinance in Hazleton, PA*, Sept. 1, 2006, <http://www.aclu.org/immigrants/discrim/26644prs20060901.html>. The name of the Act has a tone of concern for the illegal immigrant. However, the Act does not provide relief; rather it mandates that all city documents be printed only in English, and landlords that rent to undocumented workers be fined \$1,000. *Id.* Furthermore, in Virginia, officials came up with a clever way to discriminate against immigrants that tend to live in joint family structures. Using city planning rules, the City announced the "anti-crowding law" which defined the number of people in a home that deemed overcrowding in one dwelling. See Stephanie McCrummen, *Anti-Crowding Law Repealed: Latinos Were Focus of Manassas Ban on Extended Families in Homes*, WASH. POST, Jan. 12, 2006, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/11/AR2006011102532.html>. The city also defined what make-up of individuals in a relationship creates a family that could reside together. *Id.* This ordinance for example, not only deems the number occupants considered breaking city zoning code, but it also fines any non-immediate family members. *Id.* To ensure the enforcement of the code, the city provided a toll free hotline so Virginia residents could call and anonymously report overcrowding in their neighborhoods. *Id.*

5. Howard F. Chang, *Immigration Restrictions as Employment Discrimination*, 78 CHI.-KENT L. REV. 291, 296-97 (2003); Rachel M. Friedberg & Jennifer Hunt, *The Impact of Immigrants on Host Country Wages, Employment and Growth*, 9 J. OF ECON. PERSP. 23, 23 (1995); Julian L. Simon, *Public Expenditures on Immigrants to the United States, Past and Present*, 22 POPULATION & DEV. REV. 99, 99 (1996); Scott Thurm, *Asian Immigrants Are Reshaping Silicon Valley*, WALL ST. J., June 24, 1999.

the native-born citizens.<sup>6</sup> The current immigration debate in the United States also centers on the protection of its borders, arising out of the security concerns and terrorism-related fears.<sup>7</sup> I suggest in this review that the current debate or the existing literature surrounding immigration is missing the human-rights factor.

While the immigration debate gets mired in the political quagmire of Euro-centric policy debate,<sup>8</sup> and stays within the narrow trajectory centered on economic preservation of the native-born Americans,<sup>9</sup> I want to introduce the hitherto uncovered dimension of human rights into this immigration debate. This new perspective of immigration centers on asking the profound question: Is there a human right to immigration? What moral obligations does the target country or the destination point have? The issue of the human right to migrate is indeed complex, and, in my view, it resides within an implicit understanding of inherent dignity of humanity. This recognition of human dignity comes from a viewpoint that understands immigrants not as threats, but part and parcel of a mosaic of color, rhythms, and dreams that define the United States of America. I embark on a step-by-step analysis in this Article to arrive at my conclusion. Therefore, I ask a series of questions. Analyzing these questions will help develop a framework to understand the broad issue of immigration's human-rights dimension.

As I begin looking at immigration from a broader human-rights perspective, I am interested to discover if there is a fundamental-right analysis which could help our cause. I want to consider whether there is doctrinal support that asserts a fundamental right to immigration. To that effect, this analysis will evolve in multiple divergent threads. They are divergent, yet when they are considered together, these threads help develop a more transparent immigration-rights analysis. I will focus on the scope and dimension of human rights in immigration and consider whether a moral obligation exists for the target country based on some doctrinal and philosophical foundation. Furthermore, my inquiry in this Article seeks to establish whether there is a property-right element that could bring in more transparency within this complex immigration issue. I want to consider whether property rights can capture the political vicissitudes and partisan argumentation that we see happening in our immigration debate. Additionally, is there a special application of property right that could be legitimately applied to understand the immigration right?

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6. Friedberg & Hunt, *supra* note 5, at 23.

7. See generally MUZAFFAR A. CHISHTI ET AL., *MIGRATION POL'Y INST., AMERICA'S CHALLENGE: DOMESTIC SECURITY, CIVIL LIBERTIES, AND NATIONAL UNITY AFTER SEPTEMBER 11* 7 (2003).

8. For a discussion of the Euro-centric viewpoint of immigration, see Ghoshray, *supra* note 2.

9. For a discussion of economic preservation, see Ghoshray, *supra* note 2.

In this Article, Part I delves into a two-prong human-rights analysis based on developing an economic rationale for liberal immigration policy in the first segment, followed by an exploration of the politicization process that subsumes the human-rights dimension. In Part II, I examine whether other competing views of immigration based on property rights or moral discourse make sense within the present context, especially whether these arguments can necessarily advance a human-rights agenda. Part III seeks to place this human-rights discourse on a firmer foothold, as it attempts to explore the interplay amongst fundamental rights, natural rights, and human rights. Finally, I conclude by further discussing whether a human right to immigration exists, and whether that right is achievable within the present construct.

### I. IS THERE A HUMAN-RIGHTS ELEMENT TO IMMIGRATION?

Consider balancing on a shoddy raft in the hopes of landing on the Florida shores, or following the arduous footsteps of a coyote across the blazing, drought-ridden desert in search of the Arizona border. These are not made-up fables. These are some of the tortuous obstacles individuals confront when they decide to migrate to the United States. Whether we are pro- or anti-immigration, we can agree it is complex in its multidimensional impacts and fraught with severe emotional undercurrents. To some, like the landless Mexican farmer, the U.S. spirit beckons with extended hands to the tired and weak to come and find rest. Migrating to the United States promises hope and opportunities to break the cycle of poverty and persecution. However, these open-hand promises do not come without resounding cries amongst scores of U.S. citizens that view immigration as the abrogation of socio-cultural symmetry and a threat to the majority's economic preservation. The majority's need for self-preservation is expressed in resistance and has a disappointing xenophobic tone in the demand to end immigration, which is further compounded by the misunderstanding about the economic impact of immigration. While literature is replete with economic issues surrounding immigration, the interplay of race, symmetry, and economy has not been studied thoroughly. While the importance of the economic effects of immigration cannot be ignored, the faces of humanity—the Mexican farmer, the Cuban tailor, and the Nigerian teacher—cannot be ignored either. The human factor makes it incumbent that we consider the interplay of issues surrounding immigration. I intend to discuss several of these important issues in this article.

The public opinion and dividing lines on U.S. immigration, whether legal or illegal is obvious.<sup>10</sup> Print media, television media, and even ra-

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10. The immigration debate has been brewing almost since the first immigrants arrived. Since the turn of the millennium, America has experienced the highest immigration rates to date, resulting in polarized viewpoints on whether immigration hinders or benefits America's economy. For a favorable view, see Stephen Moore, *Social Scientists' Views on Immigrants and U.S. Immigration*

dio media are quick to blame immigrants for terrorism,<sup>11</sup> crime rate hike,<sup>12</sup> socio-cultural change,<sup>13</sup> and draining the public welfare system,<sup>14</sup> just to name a few.

Native-born Americans have not always lent a welcoming hand to new immigrants,<sup>15</sup> and the feeling of resentment towards immigration has reached a new peak.<sup>16</sup> The extreme feelings of anti-immigration have been fueled by the domestic concerns about terrorism and the economy.<sup>17</sup> The anti-immigrant feeling as a result of a heightened fear of terrorism is a more recent phenomenon. Consider the terrorism factor. Since 9/11 U.S. citizens are bombarded with elevated security alerts, stricter body searches at public events, and are being persuaded about the need to build a fence along the Mexican-U.S. border. Consider the economy factor. The threat of losing jobs and lowering the hourly wage has been the rallying cry on the issue of losing economic advantage. The increase in unemployment among U.S.-born citizens,<sup>18</sup> and downward pressure on wages at all levels<sup>19</sup> have been blamed on immigrants.

Existing economic literature and empirical economic studies suggest that the public cries about losing economic advantage to immigration is without merit. Yet, the perception persists that illegal aliens or foreigners are taking all the jobs from native citizens,<sup>20</sup> and that these same immigrants are overburdening the welfare system.<sup>21</sup> These perceptions have grown in intensity as numerous vested interest groups politicize the immigration issue.<sup>22</sup> Also, the many news-media channels rely on the immigration debate to boost their ratings by constantly propagating an alarmist viewpoint among viewers.<sup>23</sup> The issue of immigration acts as fodder for those wanting to dramatize and abuse this emotionally-riddled issue for their vested gain. Respected research on the labor mar-

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*Policy: A Postscript*, 487 ANNALS AM. ACAD. POL. & SOC. SCI. 213, 213 (1986). For a contrary viewpoint, see George J. Borjas, *Assimilation and Changes in Cohort Quality Revisited: What Happened to Immigrant Earnings in the 1980s?*, 13 J. OF LAB. ECON., 201, 201-02, (1995).

11. See generally MICHAEL WELCH, *DETAINED: IMMIGRATION LAWS AND THE EXPANDING I.N.S. JAIL COMPLEX* 5-6 (2003).

12. See Donald R. Taft, *Does Immigration Increase Crime?*, 12 SOC. FORCES 69, 69-70 (1933).

13. See R. Stephen Warner, *Immigrants and the Faith They Bring*, RELIGION-ONLINE.ORG. <http://www.religion-online.org/showarticle.asp?title=2946> (last visited Apr. 4, 2007).

14. Bill Ong Hing, *Don't Give Me Your Tired, Your Poor: Conflicted Immigrant Stories and Welfare Reform*, 33 HARV. C.R.-C.L. L. REV. 159, 160-61 (1998).

15. See Charles J. Ogletree, Jr., Conference Paper, *America's Schizophrenic Immigration Policy: Race, Class, and Reason*, 41 B.C. L. REV. 755, 758-59 (2000).

16. *Id.* at 767-70.

17. See generally CHISHTI ET AL., *supra* note 7.

18. See Friedberg & Hunt, *supra* note 5, at 23.

19. *Id.*

20. See *id.*

21. See Simon, *supra* note 5, at 99.

22. See, e.g., FAIR, *supra* note 3; Southern Poverty Law Center, *supra* note 3.

23. See Southern Poverty Law Center, *supra* note 3.

ket impact of immigration, however, supports the fact that immigrants do not displace native workers.<sup>24</sup>

Studies have established that immigration has a positive impact on the economy as immigration always produces net economic gain to the residents of destination countries, especially in the advanced economies.<sup>25</sup> In addition, neo-classical economic theory purports that even with the increase of the number of immigrants there is no observable role in reducing wages,<sup>26</sup> or increasing unemployment.<sup>27</sup> The anti-immigrant lobby fails to recognize these economic facts. They also ignore that immigrants' impact on the economy by increasing the demand of labor and goods with their own consumption,<sup>28</sup> which runs conversely to the myth of immigrants only taxing and burdening the system.<sup>29</sup> Research on the economic impact from immigration does not indicate a negative impact.<sup>30</sup> Rather, immigration appears to benefit the American economy and population as a whole. Against this backdrop of positive economic impact, why then, is the anti-immigration debate predominantly based on a negative economic perspective? Let us explore this further.

The concepts of equality, freedom, and opportunity for all humans of this earth form the very essence of a human-rights discourse of immigration, which was also the original premise based on which America was founded. Within this original premise lies the expanded conception of a view that this land will provide refuge to the persecuted and will become ultimately a harbor to those who have been victimized in their land of origin. Emma Lazarus captured this humanistic yearning beautifully in the poem *Colossus*.<sup>31</sup>

Give me your tired, your poor,  
Your huddled masses yearning to breathe free,  
The wretched refuse of your teeming shore . . . , the homeless, . . . to  
me . . .<sup>32</sup>

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24. See Chang, *supra* note 5, at 304-08.

25. *Id.* at 305, 308, 311-12.

26. Immigrants, whether legal or not, are often feared as a threat to the rule of law and the degradation of the economic stability of the country. Because of these fears, immigrants are easy political scapegoats for the ills of society. However, in reality the flow of unskilled labor is not only needed but will improve the overall economy. See generally NIGEL HARRIS, *THE NEW UNTOUCHABLES: IMMIGRATION AND THE NEW WORLD WORKER* (1995).

27. *Id.*

28. See Simon, *supra* note 5; Thurm, *supra* note 5.

29. See Simon, *supra* note 5.

30. See generally Friedberg & Hunt, *supra* note 5.

31. Emma Lazarus, *The New Colossus*, in *THE POEMS OF EMMA LAZARUS*, (1889), available at <http://factmonster.com/ipka/A0874962.html>. *The New Colossus* poem was written by Jewish American poet, Emma Lazarus, in an effort to raise money for the pedestal that the Statue of Liberty would rest on. Her famous poem was etched on that very pedestal. The meaning of the poem captured the heartstrings of the millions who immigrated to the United States. The complete poem and more information on the origins of the poem and the Statue of Liberty are available at <http://www.factmonster.com/ipka/A0874962.html>.

32. *Id.*

This openness in welcoming strangers, the immigrants, has been eroded in numerous ways, by the nativist sentiments, of their own fears of survival and by fears of losing the American way. The humanistic discourse behind immigration in America has lost its original premise. Almost two centuries later, in a world rapidly becoming smaller due to globalization, America is being seen less as that land of abode and refuge that originally beckoned the persecuted humanity. The pertinent question that comes before us is: What is the genesis of the current anti-immigration rhetoric encircling the media,<sup>33</sup> the policy makers,<sup>34</sup> and the legislation?<sup>35</sup> In this present discourse, I do not want to delve into the reasoning behind this anti-immigration backlash, an area I have covered elsewhere.<sup>36</sup>

I have shown that the anti-immigrant vibe of today comes from the contemporary nativist movement built on the hidden agenda of Eurocentric,<sup>37</sup> self-preservation, a long-tenured guiding principle that nurtured the development of the American civilization.<sup>38</sup> America was initially built on a fairly open immigration policy, where European immigrants were welcomed and encouraged to settle. However, the history of immigration also recorded early nativist backlash against these early immigrants. Various exclusionary and restrictive immigration measures also

33. See sources cited *supra* note 3.

34. See sources cited *supra* note 4.

35. See H.R. 4437, 109th Cong. (2005). In December of 2005, the House of Representatives passed H.R.4437, Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005. *Id.* Review of this Act finds an anti-immigration tone. Enforcement of this Act would classify any individual not in current legal status as a criminal. *Id.* at Sec. 203. This Act would eliminate the 'day in court' approach the U.S. society has long valued. It eliminates due process and it eliminates judicial review. There would be no judge to appeal to. The overwhelming majority of individuals that would be harmed by H.R. 4437 are the relatively innocent immigrants that for a myriad of harmless reasons fall out of legal status. To gain better insight into the details of this Act, visit <http://www.govtrack.us/congress/bill.xpd?bill=h109-4437>.

36. See Ghoshray, *supra* note 2, at 3-4.

37. See *id.* at 7-8, 29-30. Here, I provide a brief review of the original immigrants that founded the United States. For brevity, I focus only on the immigrants that came across the oceans to colonize America and not those Native Indians already present on the American soil. The first immigrants to America were virtually all from Europe. The colonial period of the seventeenth century witnessed immigrants from England that rapidly settled in Virginia and New England. The colonization process was solidified in Jamestown, Virginia, the famous first settlement in North America. The influx of immigrants grew and became more widespread as thousands of religious Pilgrims established the Plymouth Colony in Massachusetts. The values of those first Pilgrims increasingly influenced the developing colonies. These Pilgrims were the original Anglo-Saxon immigrants who were white, spoke English, and practiced the Protestant religion. The Anglo-Saxon immigrant traits and characteristics created the founding bedrock culture of the United States of America and their impact is still apparent in the twenty-first society.

38. See Seth Kaller, Inc., Thomas Jefferson Signed Naturalization Act: Establishes Law for Citizenship, available at [http://www.sethkaller.net/catalogs/turning\\_points\\_dd/11232\\_dd.php](http://www.sethkaller.net/catalogs/turning_points_dd/11232_dd.php) (last visited Apr. 24, 2007). The path to U.S. citizenship was much easier for a white immigrant than those non-whites. The genesis of restricting immigrants' citizenship based on color and ethnicity has its origins in the Naturalization Act of 1790, which held that any "white person" would be granted U.S. citizenship. Further, empirical evidence is abundant which details the profiles of the initial immigrants and established that they were nearly exclusively white Anglo-Saxon individuals. For more information on this topic, review the information available at <http://www.spartacus.schoolnet.co.uk/USAimmigration.htm> (last visited Apr. 24, 2007).



made it challenging for non-European immigrants or East-European immigrants to prosper and proliferate amongst a predominantly Anglo-conformist environment, as I have shown in my earlier research.<sup>39</sup>

The impact of these enforcement mechanisms in shaping the lives of the immigrants can hardly illuminate the constant tension between the human rights of the immigrants and the combination of economic, xenophobic, racist reasons that prompt countries to develop exclusionary immigration practices. While the poet Emma Lazarus celebrated America's welcoming of "the poor" and the "huddled masses" into its shores, the real history of America's exclusionary immigration policies perhaps is better understood through the eyes of American-born Fred Korematsu<sup>40</sup> who endured the ignominy of the Japanese Internment Act<sup>41</sup> and the legacy of *Korematsu v. United States*.<sup>42</sup>

Exploring the archives of the recorded history of America, we are painfully constrained to find that the focus of immigration restriction of the nineteenth century centered on the stated objective to keep the "poor" and the "huddled masses" out of America's shores using the public-charge criteria and personal-wealth factor.<sup>43</sup> Beginning with the 1882 Chinese Exclusion Act,<sup>44</sup> the exclusionary immigration enforcement con-

39. See Ghoshray, *supra* note 2, at 8, 33-34.

40. See Eric Yamamoto & May Lee, *Excerpts from a Brief Biography: Fred Korematsu*, AABA NEWSLETTER (Asian American Bar Association of the Greater Bay Area, San Francisco, Cal.), May 2004, at 1, 4, available at [www.aaba-bay.com/aaba/docs/aaba-0504.pdf](http://www.aaba-bay.com/aaba/docs/aaba-0504.pdf).

41. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942). Against the backdrop of World War II, President Roosevelt authorized the internment of tens of thousands of American citizens of Japanese ancestry. See *Korematsu v. United States*, 323 U.S. 214, 216-17 (1944). President Roosevelt signed Executive Order 9066 on February 19, 1942, and banned any citizen from the coastal area along Washington to California and also southern Arizona. See *id.* The order authorized forcibly relocating individual citizens to less than desirable relocation camps controlled by the military. See *id.* at 220-21. The vast majority of the individuals who were held captive were of Japanese ancestry and suffered grievous violations of their civil liberties. The war-time measures were sweeping in scope and uprooted whole communities. There is no doubt that Order 9066 was intended for Japanese citizens as well as residents. I offer a snapshot of the instructions published in the San Francisco News on April 2, 1942. The instructions read:

INSTRUCTIONS TO ALL PERSONS OF JAPANESE ANCESTRY

Living in the Following Area:

All that portion of the City and County of San Francisco, lying generally west of the of the north-south line established by Junipero Serra Boulevard, Worchester Avenue, and Nineteenth Avenue, and lying generally north of the east-west line established by California Street, to the intersection of Market Street, and thence on Market Street to San Francisco Bay. All Japanese persons, both alien and non-alien, will be evacuated from the above designated area by 12:00 o'clock noon Tuesday, April 7, 1942. No Japanese person will be permitted to enter or leave the above described area after 8:00 a.m., Thursday, April 2, 1942....

Virtual Museum of the City of San Francisco, Internment of San Francisco Japanese (Apr. 1, 1942), <http://www.sfmuseum.org/hist9/evacorder.html>.

42. 323 U.S. 214 (1944).

43. See Maxine S. Seller, *Historical Perspectives on American Immigration Policy: Case Studies and Current Implications*, 45 LAW & CONTEMP. PROBS. (U.S. IMMIGRATION POLICY) 137, 153-54 (1982).

44. See THE READER'S COMPANION TO AMERICAN HISTORY 167 (Eric Foner & John A. Garraty eds., Houghton Mifflin Company 1991). The Exclusionary Act was not the only form of anti-immigration attacks on Chinese immigrants. In an 1854 case, the California Supreme Court in

tinued unabated until the 1924 National Origins Quota System.<sup>45</sup> Implicit within these legislations was race-based discrimination designed to stymie the rise of immigration from southern and eastern European countries, which made it increasingly difficult for nordic and northern Europeans to retain their racial majority.<sup>46</sup> In addition, the National Quota System did not have any provision for immigrants from Asian and African countries at all.<sup>47</sup> This racially-asymmetric balance was captured by Harvard Professor, Charles Ogletree Jr., who noted that although the origins-based quota system gave way to the more liberalized immigration policy under the Immigration and National Act Amendments of 1965,<sup>48</sup> the discriminatory effect remained. According to Professor Ogletree, “implicit and explicit racial biases still pervade all four major avenues of legal immigration: family-sponsored, employment-based, diversity and refugee. The family-sponsored and employment-based immigration rules appear to be facially neutral, but per-country ceilings and racial biases in determining eligibility have resulted in fewer immigration visas for people of color.”<sup>49</sup> These exclusionary policies were at odds with the United Nations Declaration of Human Rights which categorically states:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.<sup>50</sup>

Race-based discrimination in processing immigrants’ entry to the United States has been a constant theme within a broader U.S. immigra-

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*People v. Hall* ruled that the testimony of a Chinese man who witnessed a murder by a white man was inadmissible because the Chinese were:

[A] race of people who[se] nature has [been] marked as inferior, and who are incapable of progress or intellectual development beyond a certain point, as their history has shown; differing in language, opinions, color, and physical conformation; between whom and [our own] nature has placed an impassable difference [and as such had no right] to swear away the life of a citizen [or] participate with us in administering the affairs of our Government.

See *People v. Hall*, 4 Cal. 399, 405 (Cal. 1854).

45. See *Seller*, *supra* note 43, at 148.

46. See *id.* at 148, 151-52.

47. See Immigration Act of 1924, ch. 190, § 11(b), (d), 43 Stat. 153, 159 (1924) (defining calculation of quotas but omitting “descendants of slave immigrants” and persons “ineligible to citizenship” from the population for purposes of calculation); Mae M. Ngai, *The Architecture of Race in American Immigration Law: A Re-Examination of the Immigration Act of 1924*, 86 J. OF AM. HIST. 67, 72 (1999); *Seller*, *supra* note 43, at 148.

48. See Immigration and Nationality Act Amendments of 1965, sec. 2, § 202(a), Pub. L. No. 89-236, 79 Stat. 911 (1965) (instituting per-country ceilings); see *Ogletree*, *supra* note 15, at 761.

49. *Ogletree*, *supra* note 15, at 761.

50. G.A. Res. 217 A (III), art. 2 (Dec. 10, 1948), available at <http://www.un.org/Overview/rights.html>.

tion policy.<sup>51</sup> In sharp contrast to the human-rights ideals of the United Nations Charters, race-based selective enforcement of immigrants has been the predominant norm, as seen in countless illegal raids against legal residents and harassing them for legal documents,<sup>52</sup> selective race-based confiscation of immigrants at checkpoints,<sup>53</sup> unwarranted entry into resident homes<sup>54</sup> in direct violation of the Fourth Amendment's illegal search and seizure provisions,<sup>55</sup> and discriminatory enforcement of the identification requirement of ethnic minorities.<sup>56</sup> Not only do these practices of arbitrary and selective enforcement of federal immigration laws create questions regarding civil rights protection deficiencies, but they begin to develop a total annihilation of a human-rights framework within the American immigration system. While human-rights standards could provide a tool to manage the tension discussed earlier, U.S. policies of race-based profiling have not only been restricted to law-enforcement officers in charge of federal immigration laws, but they have also developed into a predominant pattern among the consular officials as documented in *Olsen v. Albright*.<sup>57</sup> Clear consular instructions further corroborate the explicit racial overtones of an existing policy, as it categorically states: "Filipinos and Nigerians have high fraud rates, and their applications should be viewed with extreme suspicion, while British and Japanese citizens rarely overstay, and generally require less scrutiny."<sup>58</sup>

These systematic violations of human rights and routine denials of the legal rights of immigrants compel us to engage in an inquiry that begins with the profound question we asked earlier: Is there a human-rights dimension to immigration? Where does the human-rights element reside within a broader discourse on immigration? How does it come into play in a broader immigration discourse? I will first attempt to un-

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51. See Ogletree, *supra* note 15, at 761-62.

52. See Mexican American Legal Defense and Education Fund, Civil Rights Concerns within the Department of Homeland Security (Feb. 25, 2003), [http://www.maldef.org/news/latest/dhs\\_rights.cfm](http://www.maldef.org/news/latest/dhs_rights.cfm).

53. See *id.*

54. *Id.*

55. See *id.* (describing warrantless searches).

56. *Id.*

57. 990 F. Supp. 31, 33-34 (D.D.C. 1997); see also *Olsen v. Christopher*, 962 F. Supp. 5 (D.D.C. 1997) (emphasizing a concern that the State Department may be promoting racial profiling in the adjudication of nonimmigrant visa applications). In *Olsen v. Albright*, a Brazilian consular officer contested his termination for refusal to abide by a race-based visa eligibility policy. 990 F. Supp. at 32-33. The lawsuit uncovered startling facts regarding established policy guidelines for the overseas visa application process, which the Court held was in violation of federal anti-discrimination law. *Id.* at 37-39. These policies include (i) general descriptions such as "looks poor," or "looks rough," and (ii) specific races such as, Arab, Chinese and Koreans categorized for additional scrutiny for suspicion of major fraud. *Id.* at 33-34. The court held that, "the consulate's visa policies stand in direct opposition to the progress this country has made in eliminating discrimination in the context of immigration law." *Id.* at 39.

58. *Albright*, 990 F. Supp. at 34 (internal quotes omitted).

derstand the human-rights viewpoint for economic and human welfare concepts, and then examine the global-justice viewpoint.

#### *A. Economic Viewpoint of Human Rights in Immigration*

From the days of yore, human migration has centered on economic grounds, as humanity's primal instinct for survival has caused artificial, geographical barriers to crumble under the willingness of human desire. From a purely economic point of view, the drive for immigration comes from the multitude of factors which include persisting poverty,<sup>59</sup> growing unemployment,<sup>60</sup> loss of an agrarian way of life,<sup>61</sup> and loss of income as a result of global trading realignment.<sup>62</sup> Under no circumstances do these constitute an exhaustive list of factors that drive people to the unforgiving desert highway along the U.S.-Mexican border in search of a better life; or that drives a desperate mother and children to stack themselves like sardines into the back of a truck with no ventilation which ultimately becomes the tomb of many of its occupants. This drive is not so difficult to comprehend when you consider that increasing globalization of labor may have brought efficiencies and economies of scale from a corporate point of view, but from the human point of view, it has caused a severe and disproportionate distribution of resources.<sup>63</sup> This has resulted in significant inequity among the masses of this world, and I would argue that we must recognize the issue of immigration from this broader human-rights dimension.

What then, is the economic viewpoint of the human-rights dimension of immigration? Does that mean, whenever there is shortage of food, or loss of avenues for income in any parts of the world, that the

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59. *Why do People Migrate?*, BBC.CO.UK, <http://www.bbc.co.uk/print/schools/gcsebitsize/geography/population/migrationrev3.shtml> (last visited Apr. 13, 2007). At the very core of migration are two concepts called the push and pull factors. *Id.* The push factors influence people in their migration decisions. *Id.* First consider the push factors which are issues like political fears, natural disasters and poor living conditions. *Id.* Persons migrate away from push factors. The second core concept is the pull factors. *Id.* The pull factors are issues like better housing and education, chances of a job and good medical care. *Id.* Persons migrate toward pull factors. *Id.* Because of the overall wealth, high standard of living and high quality of life compared to other nations, people of the world have migrated to the United States for many decades.

60. *Id.*

61. *See id.*

62. *See* Mark Weisbrot, *Globalization on the Ropes*, Z MAGAZINE, <http://www.zmag.org/globropes.htm> (last visited Apr. 13, 2007).

63. *See id.* In his article, Weisbrot notes:

Critics of corporate globalization have focussed [sic] primarily on its most glaring injustices, its environmental destruction, its erosion of national sovereignty-- and with good reason. The Fund and the Bank are bleeding Africa dry, exacting debt payments from the poorest countries in the world that are ten times as large (relative to income) as the Allies considered conscionable to take from Germany after World War II. Their relentless promotion of resource-intensive exports has hastened the destruction of the world's forests. And of course there is nothing good that comes from allowing the secret tribunals of the WTO to substitute their judgement [sic] for that of elected representatives on matters of public health and safety.

*Id.*

onus is on the United States to open its borders so people from all over can come in and work? After all, the Universal Declaration of Human Rights states unequivocally: "Everyone has the right to work, to free choice of employment, to just and favourable [sic] conditions of work and to protection against unemployment."<sup>64</sup> The issue before us is to identify, therefore, if the problem in other parts of the world necessarily becomes a human-rights obligation to the United States as it pertains to opening its border for more immigration. Clearly the growing crisis of global economic security is one of the drivers of the immigration crisis. This crisis is deepened when a sovereign state becomes engaged in a negotiation between two diverging variables, such as, the individual human right,<sup>65</sup> and the economic interest of the target state.<sup>66</sup> As I have shown earlier, the economic impact of immigration in the United States has been well-researched and, therefore, must not influence any discussion centering on purely human-rights issues. While I examine the tension between a sovereign state's stronger controlling impulse with globalization's weakening impact on its territorial integrity, I see shades of humanistic jurisprudence posing challenges toward the restrictive covenant in immigration.<sup>67</sup> This regulation of immigration, I would argue, cannot be divorced from the analysis of a global-justice viewpoint.<sup>68</sup>

History has shown repeatedly that humanity's drive for survival is the most primal of all instincts. Faced with the dire consequences of survival, an individual from a poorer country will find a way to arrive at the shores of a richer nation. While the sovereignty of a nation state dictates imposing territorial control to stem the flow of immigration, the human right to survive presents a unique challenge of not relaxing the border in order to save lives. Especially in an era of globalization, how

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64. See Universal Declaration of Human Rights, G.A. Res. 217A, at art. 23, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 10, 1948), available at <http://www.un.org/Overview/rights.html>.

65. See generally *id.* ("[T]he equal and alienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.").

66. Here, I refer to the fact that economic interest of the destination country has been the focus of much debate as the specter of immigration looms large. Despite the popular sentiments alluding to the adverse economic impact of immigration, no study has been able to establish a causal link between excessive immigration and economic crisis in the advanced economies.

67. By restrictive covenants I refer to the current bent in legislation and within the administration that proposes a stricter immigration control and border tightening. See, e.g., Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, *supra* note 35.

68. In my view, global justice must incorporate concern and efforts toward ensuring equality and justice for all. As Weisbrot notes: "There is nothing natural or inevitable about an economic order that restricts half of the earth's six billion people to an income of less than two dollars a day." Weisbrot, *supra* note 62. To understand some of the issues and concepts discussed within the global justice viewpoint consider that global justice is an issue in political philosophy arising from the concern that "we do not live in a just world." Wikipedia, Global Justice, [http://en.wikipedia.org/wiki/Global\\_justice](http://en.wikipedia.org/wiki/Global_justice) (last visited Apr. 13, 2007). Many people are extremely poor, while others are extremely rich. Many live under tyrannical regimes. Many are vulnerable to violence, disease, and starvation. Many die prematurely. How should we understand and respond to these facts? What do the inhabitants of the world owe one another? What institutions and what ethical standards should we recognize and apply throughout the world?

can a nation close its border and enjoy the fruits of economic prosperity when people could be dying of hunger on the other side of its border? I would argue, therefore, that the issue of immigration goes beyond a human-rights discourse, as it also intersects within the moral fiber of the destination country. Any nation faced with similar issues of “huddled masses” lining up across its borders, waiting to be fed and rescued, confronts much more than economic choices. This is a moral discourse that the economically-advanced nation cannot ignore. In my view, the issue of border protection and immigration control is ultimately dependent on the resolution of the tension between the enforcement challenges and the dual challenges emanating from human rights and moral obligations. In the end, however, this sovereignty issue of stronger control is inconsistent with the global-justice view on various grounds, as I shall discuss below.

Firstly, from a property rights point of view, as I shall show in the next section, the restrictive covenant and the exclusionary fundamental of immigration<sup>69</sup> is not in tune with the current immigration practice. Secondly, I will explain in Part II, how this human-rights element is deeply embedded within the moral-rights obligations that the United States has inherited because of its hegemonic practices and its existing relationships with various parts of the world. Thirdly, as I shall illustrate in Part III, immigration discourse cannot be divorced from a broader human-rights discourse. This is a point of view that is implicit within a global-justice viewpoint, a dimension of our analysis that is not infected with the nativist view looking through the prism of narrow Euro-centrism and partisan politics of the immigration debate.<sup>70</sup>

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69. The political climate after 9/11 has increased the restrictions for immigrants, especially for those who violate immigration law, regardless if the violation is minor or not. Often due process is overlooked for these individuals. Current immigration policy would increase the restrictions by returning many immigrants to their countries of origin. These exclusionary and restrictive measures are often borne out of fearful feelings since 9/11.

Most often these fears translate into a growing selective restrictionism in border control—including pervasive visa requirements, carrier sanctions, sniffer dogs, retinal and other biometric scanning, detention of irregular migrants, stringent pre-departure checks at airports, and computerized data storage and analysis on an unprecedented scale. Guards on the border between the United States and Mexico are now equipped with infra-red night-vision goggles. This is an extraordinary display of military measures not used against any other section of the domestic population.

Jacqueline Bhabha, *Reforming Immigration Policy: Start by Protecting Rights, Not Borders*, BOSTON REVIEW (Summer 2005), available at <http://bostonreview.net/BR30.3/bhabha.html> (discussing the “ineffectual” efforts to solve the problem of migration).

70. See Jeanne A. Butterfield, *Immigration Matters: Politics Trumped Substance in Debate*, PACIFIC NEWS SERVICE, Apr. 12, 2006, [http://news.pacificnews.org/news/view\\_article.html?article\\_id=c5721a3d9f938468698399a9d4d71b2d?](http://news.pacificnews.org/news/view_article.html?article_id=c5721a3d9f938468698399a9d4d71b2d?)

The U.S. House of Representatives passed a very harsh and punitive immigration bill—the Sensenbrenner Bill—last December. That bill would criminalize and make felons of every single undocumented person in the United States, whether they crossed the border illegally or came on a valid student visa and dropped a class and fell out of status. It would also criminalize every single priest, lawyer and community service provider who aided an undocumented immigrant in any way. These two provisions have sparked out-

Let us try to understand how the issues of unemployment, poverty, loss of agriculture, and trading patterns impact the human-rights dimension of immigration. If we look at the immigration pattern, especially when it comes to analyzing the immigration that is based on economic necessity, we must take a detailed look at the countries from where people are trying to immigrate. Beyond the geographical categorization, these countries form several broad categories. The first category contains the countries, in which economic resources are asymmetrically allocated.<sup>71</sup> These are predominantly countries, which are ruled by autocratic dictators<sup>72</sup> or oligopolies.<sup>73</sup> I would assert that the United States is responsible, in a significant way, for allowing these regimes to continue to thrive and survive politically, despite plundering the wealth of these countries, thereby perpetuating an uneven distribution system. This framework leaves countless millions of hapless humanity under persistent poverty with no hope for resurrection. Take an example of some Latin American countries where, between the 1950s and the 1980s, the United States has been largely responsible for promoting either a civil war,<sup>74</sup> or supporting the regime for fear of spreading communism,<sup>75</sup> while giving scant respect to humanity's need for equalization of resources. Therefore, having been at least implicitly responsible in impacting these countries' poor economic conditions, the responsibility and obligation lie with the United States to allow reasonable immigration to its countries.

The next set of countries I want to examine are those where significant world-trade-related pacts have been entered into and resulted in severe degradation to the traditional way of life.<sup>76</sup> Particular segments of the population in those countries find themselves under sustained and growing unemployment. I would argue that the United States bears responsibility for providing equitable rehabilitative measures in economic parity for these people. The North American Free Trade Agreement's (NAFTA's) impact on the agriculture sections of Mexico would bear

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rage around the country, as millions march in the streets to say "We are not criminals" and as major religious and community organizations say "humanitarian assistance is not a crime."

*Id.*

71. See generally Sajal Lahiri & Yoshiyasu Ono, *Asymmetric Oligopoly, International Trade, and Welfare: A Synthesis*, 65 J. OF ECONOMICS 291 (1997).

72. See Ariel David Adesnik, *Engaging Autocratic Allies to Promote Democracy*, THE WASHINGTON QUARTERLY, Spring 2006, at 7.

73. See Taft, *supra* note 12, at 71.

74. See generally Mark Rosenfelder, *U.S. Interventions in Latin America*, METAVERSE, <http://www.zompist.com/latam.html> (last visited Apr. 7, 2007) (cataloguing U.S. interventions in Latin America starting in the 1840s).

75. *Id.*

76. For a general discussion on trade policies and pacts, see Paul Krugman, *Is Bilateralism Bad*, in INTERNATIONAL TRADE AND TRADE POLICY (Cambridge: MIT Press 1991); Paul Krugman, Symposium, *The Move Toward Free Trade Zones* (1991), available at <http://www.kansascityfed.org/publicat/Sympos/1991/S91krugm.pdf>.

testimony to this.<sup>77</sup> Evidence has been uncovered that across the southern and southwestern lands of Mexico, NAFTA's impact has been severely felt as the farmers can no longer compete with the subsidies that are given to the farmers in the United States and the rich heritage of agriculture mechanisms to which U.S. farmers are privy. Therefore, in terms of both the quality of production and the quantity of production, Mexican farmers are falling behind, and resorting to the abandonment of their crops and farm lands.<sup>78</sup> These landless farmers, are the very immigrants that put their fate in coyotes and cross the border the borders into America in search of a better life.

Let us examine why NAFTA was created. Though equality and equity was the premise for creating NAFTA, it was designed to dominate the North American agricultural sector and to give an upper hand to the American farmers. While this agenda was successful, it had an adverse impact on the farmers in Mexico, who cannot compete with their U.S. counterparts. A simple example makes this point abundantly clear. The Mexican farmers are lucky to have 5-7 acres of land to work, whereas their American and Canadian counterparts enjoy the blessings of 250 acres on average.<sup>79</sup> This simple fact alone issues a death sentence to the Mexican farmer. Should we now close the border and let these people die of starvation and malnutrition? Herein rests the human-rights dimension, hitherto missing from today's scholarly debate.

#### *B. Politicization of the Immigration Issue: Submersing the Human-Rights Dimension*

In the previous section, I examined how various economic factors impacted the human desire to migrate in search of economic stability, and I have shown in unmistakable terms that there exists a profound human-rights dimension that cannot be denied within our current immigration discourse. Now, I want to examine how this human-rights element could get subsumed within a more powerful impulse, and what we must do to protect the human-rights discourse. In my view, immigration is complex in its multidimensional impacts and fraught with severe emotional undercurrents. Its invocation conjures up two diametrically-

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77. The North American Free Trade Agreement (NAFTA) is a treaty between Canada, Mexico, and the United States and was signed in January of 1994. North American Free Trade Agreement, U.S.-Canada-Mexico, art. 32, Jan. 1, 1994, 32 I.L.M. 289 (1993). NAFTA eliminated a large number of tariffs on goods shipped between the three countries. *Id.* Designed to be an economic benefit to the three nations, research has uncovered evidence that NAFTA has been a disaster to many in Mexico who cannot compete with the American market. See Katie Jo Keppinger, *NAFTA Harms Mexican Farmers and Biodiversity*, 10 GLOBAL PESTICIDE CAMPAIGNER 3 (2000), available at [http://www.panna.org/resources/gpc/gpc\\_200012.10.3.08.dv.html](http://www.panna.org/resources/gpc/gpc_200012.10.3.08.dv.html) (discussing the harmful effects of NAFTA).

78. See Keppinger, *supra* note 77; see also Pav Jordan, *Mexican Farmers See Death Sentence in NAFTA*, REUTERS, Dec. 28, 2002, available at <http://www.commondreams.org/headlines02/1228-07.htm> (discussing the objections of Mexican Farmers to NAFTA).

79. See Jordan, *supra* note 78 (discussing the difference in average farm size among American and Mexican farms).



contrasting imageries: To the alien immigrant, migration comes as a beacon of hope where human aspiration takes a fanciful flight away from persecution and poverty. To the native population, it is a harbinger of the abrogation of socio-cultural symmetry and a threat to the majority's economic preservation. Therefore, political polarization on the issue of immigration takes place within a broader conflict in cultural, political, and economic aspirations of various stakeholders.

By carefully viewing immigration as a privilege, as opposed to a right, the Euro-centric political entities have been immensely successful in advancing the rationale of discretionary implementation. I would argue, whenever there is discretionary scope, exclusionary elements exist, which I have examined in detail in the previous section. How does this happen? In my view, the exclusionary bias of immigration is borne out of both a misguided perception of the economic impact of immigration and a fearful fight for self-preservation.<sup>80</sup> While literature is replete with economic issues surrounding immigration,<sup>81</sup> the interplay of race, symmetry, and the economy has not been studied thoroughly.<sup>82</sup> Economic impacts shape policy, but when countless lives are at stake, it is paramount that we take the blinders off from our collective consciousness and take an introspective look at the human-rights issues surrounding immigration. As history dictates, by eliminating the moral and human-rights dimension from immigration, the anti-immigration lobby is able to place the issue of privilege in a direct collision course with the issue of human rights.<sup>83</sup>

Why must we establish whether immigration is a privilege or a right? Because where the privilege becomes a matter of discretion and rights become a matter of absolute entitlement, abuses do arise. When it is a privilege, the administrative enforcement becomes far more aggressive as it no longer requires satisfying the human-rights dimension, as has been witnessed in the obvious U.S. policy changes since 9/11. As the government responded with vengeance, hundreds of thousands of legal resident non-citizens became subject to the full fury of the U.S. Justice Department. By focusing suspicion on groups of individuals, based on religion or national origin alone,<sup>84</sup> the USA Patriot Act<sup>85</sup> unleashed its expanded power to invade people's privacy and imprisoned them without due process. For example, the Patriot Act allows law enforcement agencies to search a person's dwelling or workplace with a search warrant when the occupant is away, take photographs and physi-

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80. See Ghoshray, *supra* note 2.

81. *Id.*

82. *Id.*

83. *Id.*

84. AMERICAN CIVIL LIBERTIES UNION, SANCTIONED BIAS: RACIAL PROFILING SINCE 9/11 (Feb. 2004), available at <http://www.aclu.org/FilesPDFs/racial%20profiling%20report.pdf>.

85. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act), Pub. L. No. 107-56, 115 Stat. 272 (2001).

cal property, including communications equipment, and not inform the owner or occupant until later.<sup>86</sup> Such intrusiveness of basic freedom comes from the provisions within the Patriot Act which approve the delayed notice to occupants after the search has already been conducted.<sup>87</sup> What most Americans do not recognize as implicit within these new policies and practices, is that within them there resides an absolute abrogation of human-rights ideals that has been the heartbeat of American democracy.

Most Americans also do not consider that the government's no-holds-barred strategy of interjecting criminalization within immigration has not only taken away the basic freedom of thousands of American citizens and non-citizen residents,<sup>88</sup> it has also destroyed numerous families along the way.<sup>89</sup> The contentious issue, therefore, is translated into a determination of whether immigration is an absolute entitlement or a matter of discretion. While scholars may argue that there is no right to immigration as such, migrant workers are entitled to the rights enshrined in the major international treaties.<sup>90</sup> Some of these rights, such as the right to freedom from discrimination, family reunification, freedom from arbitrary arrest, detention and expulsion, and the right to equal justice, work, and health, can go beyond the discretionary measures as they take on particular significance within the immigration context.

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86. *Id.* § 213.

87. *Id.*

88. See AMERICAN CIVIL LIBERTIES UNION, *supra* note 84.

89. ACLU Legal Director Steven R. Shapiro stated that the "ACLU is part of a broad-based coalition that filed a amicus brief calling on the Supreme Court to assure that the Guantánamo detainees have access to the courts to challenge the legality of their detention." Further:

More than 600 people from 44 countries are being held indefinitely by the United States at Guantánamo with no charges filed against them and no access to lawyers or to their families. Most have been held for 18 months or longer. The government has refused to treat them as prisoners of war, and has refused to say when (if ever) they will be returned home. As a result, they have languished in a legal limbo that international law does not contemplate and that American constitutional law does not permit. Indeed, the government has claimed that it can continue to hold even those detainees who may eventually be tried and acquitted by military commissions.

Steven R. Shapiro, Constitution at the Crossroads: Landmark Post- 9/11 Cases Before Supreme Court Will Test America's Values of Fairness and Justice for All, Apr. 12, 2004, <https://www.aclu.org/scotus/2003/17465prs20040412.html>; see also Christopher Drew & Judith Miller, *Though Not Linked to Terrorism, Many Detainees Cannot Go Home*, N.Y. TIMES, Feb. 18, 2002, at A1.

90. Although international law recognizes the right of States to control entry to their territories, it is essential to provide migrants with information about their rights, and with independent, accessible, free or affordable legal advice without indefinite and arbitrary detention. If people's human rights are to be respected, it has to be made real and effective, rather than merely theoretical and illusory. As such, all States are bound by international and national law from distributing inhuman or degrading treatment to migrants or asylum seekers. For example, The European Commission of Human Rights held that the prohibition against torture and inhumane or degrading treatment or punishment contained in Article 3 of the European Convention on Human Rights prohibits systematic racial discrimination in immigration control against a particular racial group in certain circumstances. *East African Asians v. United Kingdom*, App. Nos. 4403/70-4419/70, 3 EUR. H.R. REP. 76, 86 (1973).

Understanding the human-rights dimension of immigration requires recognizing the human faces of immigration, which becomes extremely difficult in the present environment. This is difficult because, against a strong sentiment of national security, the discriminatory value assigned to the lives and the rights of immigrants are justified by the compelling national-interest argument.<sup>91</sup> While the human-rights element is subsumed within this strong sentiment of national security and self-preservation, the immigration policy of today is being hijacked by both Euro-centric and hegemonic discourse. By constraining the immigration policy with the enforcement mechanism, the anti-immigration lobby has been largely successful in taking the human elements out of the present debate.

Within this construct, therefore, the issue of immigration becomes more of a privilege rather than a right enshrined within a broader discourse of fundamental, human rights. Clearly, the human-rights dimension is not explicitly visible within our current immigration debate, as it is not transparent within our existing jurisprudence. I shall now embark on exploring whether compelling arguments exist as I continue to trace the contours of a human-rights dimension to immigration, looking through the multiple prisms of property rights and moral obligations in the next section.

## II. EXAMINING THE IMMIGRATION DEBATE THROUGH THE DUAL RATIONALITY OF PROPERTY RIGHTS AND MORAL OBLIGATIONS

The immigration debate of today can be seen as the fulcrum that is rigorously trying to balance the stronger sovereign impulse of regulating inflow of outsiders with the weaker humanistic impulse of global justice. Within this global-justice viewpoint resides a number of competing theories, each of which, in its own way, attempts to influence the immigration debate. These include property-rights doctrine and moral-obligation viewpoint. Having established a broader human-rights framework, I want to dissect each one of these doctrines to examine how they measure up against the human-rights discourse of immigration. My objective here is to develop a narrower focus to identify some other dimensions of immigration that could strengthen the human-rights dimension.

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91. Linda Greenhouse, *Supreme Court Roundup: Justices Allow Policy of Silence on 9/11 Detainees*, N.Y. TIMES, Jan. 13, 2004, at A1 (“[T]he plaintiffs said that, ‘times of crisis and fear demand vigilance from citizens and their courts to assure that the countermeasures adopted by the executive are consistent with our fundamental values and constitutional principles.’ The brief said the court should grant review ‘to ensure that even after Sept. 11, the judiciary will continue to fulfill its constitutional and statutory obligation to provide meaningful review of the exercise of executive power.’”); see *Ctr. for Nat’l Sec. Studies v. U.S. Dep’t of Justice*, 331 F.3d 918, 927-28 (D.C. Cir. 2003).

### A. Property-Rights Doctrine of Immigration

This global-justice dimension can be seen through an expanded scope of a common property concept.<sup>92</sup> So, where does this property-rights viewpoint come from? Scholars have proposed a liberal immigration policy based on the original ownership viewpoints.<sup>93</sup> The original ownership theory contends that, in the beginning, the uninhabited earth was owned by no one in particular, or rather, jointly owned by all of the inhabitants of the earth. Based on this, could any particular race or ethnic group stake a specific, definitive claim against a particular swath of land? What this doctrine is perhaps advancing is a more expansive view of an open-border concept in which a sovereign State's right to control its border could be challenged against the rights of all individuals to immigrate.

In my view, collective-ownership doctrine<sup>94</sup> is in conflict with the moral claims based on the first occupant's rights.<sup>95</sup> If everyone submits his or her claim for a collective ownership of earth, the problem expands into an unsolvable chaotic mess, where every single competing claim has to be determined against billions of similar claims. This is an untenable proposition and, as such, could not support a broader human-rights dimension of immigration on a number of grounds. First, the collective-ownership doctrine cannot be applied judiciously in a present-day scenario as this will require abolishing the existing geographical boundaries of nation states and will make the concept of sovereignty a mutable concept. Second, this will give rise to an immigration quandary that goes far beyond a fundamental human-rights viewpoint. Could the Kantian view of communal possession of earth's surface<sup>96</sup> be helpful in advancing a more amenable premise in support of an expansive neo-liberal immigration policy?

The Kantian view of communal possession proposes that when earth was created or discovered, the land did not belong to anyone in particular.<sup>97</sup> If we focus our attention on the United States, we find that

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92. Common property can be defined as a construct that is similar to the physical commons, which is conceptually similar to the wiki (creative) commons. Compare BLACK'S LAW DICTIONARY 1253 (8th ed. 2004) (defining common property), with Wikipedia, Wiki, <http://en.wikipedia.org/wiki/Wiki> (last visited Apr. 3, 2007) (defining "wiki"). By definition, it conveys the meaning of a property that cannot be owned by individual entities by virtue of their very nature. This includes physical spaces, such as, air, water, wildlife, functioning ecosystems, etc. See Michael Blake, *Is There a Human Right to Free Movement? Immigration and Original Ownership of the Earth 2* (Harvard Univ. John F. Kennedy School of Gov't, Paper No. RWP06-012, 2006), available at <http://ssrn.com/abstract=902383>.

93. See, e.g., Blake, *supra* note 92.

94. *Id.*

95. *Id.*

96. See generally IMMANUEL KANT, METAPHYSICS OF MORALS sections 6, 13 (1797), reprinted in PRACTICAL PHILOSOPHY (Mary J. Gregor ed., trans., 1996); IMMANUEL KANT, PERPETUAL PEACE (Liberal Arts Press, Inc. 1957) (1795).

97. See sources cited *supra* note 96.

the land belonged to the Native Indians or the indigenous populations of the United States. The systematic destruction of the socio-cultural fabric of the Native American Indians has been well-documented in the annals of American history,<sup>98</sup> an area I have discussed elsewhere.<sup>99</sup> Without going into the details about how America was conquered, I would simply assert that the European settlers were the first occupants that attempted to bring in their form of civilization to the original inhabitants of America. Through illegal means of historical betrayal, Europeans have managed to conquer the original inhabitants.<sup>100</sup> Does that give them the absolute right to this communal property, this land, this piece of earth we know as America today? Philosophers, historians, and moral theologians will differ in their opinion. I will argue here that, from the surface, this Kantian view does not lead us to a fundamental right to immigration. However, it opens up possibilities under various scenarios which could very well support the relative rights of mobility or differential rights to safety. In addition, the communal rights alluded to here could eventually lead to rights to obtain refuge or the right to work. In the end, however, the doctrine of property right is not a robust right that can be enforced upon the sovereign States, and in my mind, is not consistent with supporting broader fundamentals of a humanistic jurisprudence of immigration.

Finally, the doctrine of common usage of land or common usage of property starts with the premise of all things as equal and every person as a co-owner. Then the issue becomes more complex as we are confronted with a litany of questions as follows: Who are the first occupants and what differential rights must be bestowed upon them? Who are the intermediate occupants and what relative rights must be accorded to them? Who are the final occupants? What criteria must we employ to chart the course of future immigration?

### *B. Moral Dimension of Immigration Rights*

Is there a moral argument to the debate surrounding immigration? Earlier, I argued that economic realities of survival make practical justifications for migration to an economically-advanced country. The primal instinct of a parent to feed and clothe their children is obvious to all.

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98. See generally JOHN ALEXANDER WILLIAMS, WEST VIRGINIA: A HISTORY FOR BEGINNERS (Topper Sherwood ed., Charleston, W.Va: Appalachian Editions 1993); see also General William T. Sherman, *The Useless Indians: An Assessment by General William T. Sherman*, available at <http://www.pbs.org/wnet/historyofus/web08/features/source/docs/C01.pdf>; see also *United States v. Sandoval*, 231 U.S. 28 (1913). The Court's opinion sends an obvious message of a superior vs. subordinate race and sends a message of dehumanization to the Native Indians. The opinion reads in part: "The people of the Pueblos, although sedentary rather than nomadic in their inclinations, and disposed to peace and industry, are nevertheless Indians in race, customs, and domestic government. Always living in separate and isolated communities, adhering to primitive modes of life, largely influenced by superstition and fetichism [sic], and chiefly governed according to the crude customs inherited from their ancestors, they are essentially a simple, uninformed, and inferior people." *Id.* at 39.

99. See Ghoshray, *supra* note 2.

100. I have discussed this in great detail elsewhere. See Ghoshray, *supra* note 2.

President George W. Bush captured this humanistic yearning during one of his election campaigns: "Family values don't stop at the Rio Grande River. . . . If you're a mother and dad, and you got kids to feed, and you're making 50 cents and you see someone in Iowa making \$50, and you care about those kids, you're coming."<sup>101</sup> The issue I want to explore in detail in this section is, under what circumstances does America as a country inherit moral responsibility to develop a broader, liberal immigration policy? Or, does America need to adhere to a morality-laced argument surrounding immigration? I would suggest that three specific lines of argument exist, that together make a compelling moral case for developing an inclusive immigration policy.

First, the United States, by virtue of its economic dominance in the world, has been somewhat responsible in shaping a world economy that is impacted by uneven distribution of wealth in various parts of the world. Therefore, it is morally obligated to provide economic parity to these people. Second, I would argue, that the United States has a checkered history of colonization, where it has either been in the forefront of colonization or has supported countries that have colonized others. This process of colonization is still continuing by means of economic colonization of rest of the world. Therefore, the United States has inherited the moral obligation to provide a semblance of economic parity to those people it has colonized in the past or where it is still in the process of colonization in some form. The most efficient way to impart economic parity, I would argue, could come by means of extending the economic fruits of immigration to its shores. Third, I argue that because of America's dominance in the world-trade market, it has been the intellectual leader to implement different treaties like NAFTA, and the World Trade Organization ("WTO") movements. Economic reverses confronted by other countries as a result of economic treaties that have historically benefited the United States should require at least a moral obligation on the part of the United States to open its doors for a more liberalized immigration policy.

The examples above provide ample basis to assert that the United States has a moral obligation to develop an expansive immigration policy that is more inclusive than exclusive. Clearly, this moral obligation emanates from economic rationales. Let us revisit one scenario here. As discussed earlier, NAFTA resulted in the destruction of agrarian infrastructure in some places in Mexico,<sup>102</sup> so much that thousands of people were left with no alternative for their financial future.<sup>103</sup> Do these people have legitimate rights to immigration to the United States, as they have

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101. *GOP's Bush Calls for Increasing Legal Immigration Levels*, MIDDLE AMERICAN NEWS, Feb. 2000, available at <http://www.americanpatrol.com/REFERENCE/FamilyValuesDontStop-BUSH.html>.

102. See Jordan, *supra* note 78.

103. *Id.*

been directly affected by the aggressive U.S. fiscal policy? Or, stated differently, does the United States have a moral obligation to provide economic sustenance to those affected by NAFTA? Suppose we agree that because of America's undue influence, situations were created in other countries that have a derogatory impact on their citizens. How could we measure the true economic impact and how that impact could be used to develop an immigration policy? The question becomes more complex when we have to identify eligible candidates for immigration. This is a complex set of issues that must be considered.

The objective of this paper is not at this point to develop a comprehensive immigration policy. Rather, I want to influence the traditional thought process by going beyond the conventional dimension by which immigration analysis has been done so far. Taking into consideration this moral-obligation aspect of immigration would allow the policymakers to incorporate other policy directives. In what other areas might we see that the United States has such moral obligations? From a colonialism dimension, my view is that the United States has been the forefront of colonialism that took place in 1700s. The colonialism was initiated with the implicit premise of advancing the American agenda abroad, with the unstated objective of extracting resources from other regions of the world, by means of world domination. I would argue that sustained periods of colonization have caused these countries to fall behind in their process of evolution towards becoming independent and self-sufficient. For example, American civilization is over 200 years old, whereas the countries that have achieved independence within the last 100 years are technically behind by a century. What obligation does the United States have to incorporate a liberal immigration policy when it comes to individuals from these countries? Past colonization makes it incumbent on the United States to develop a more liberal immigration policy, specifically as it relates to citizens from the countries that had been colonized previously. However, the recent restrictive bent in U.S. immigration policy is not in conformity with this liberal viewpoint of immigration. It is therefore incumbent on the United States to capture these past deeds as the administration restructures its immigration policy.

### III. CONTINUOUS SPECTRUM BETWEEN HUMAN RIGHTS AND FUNDAMENTAL RIGHTS

In this section, I will argue that the concept of the right to immigration as a human right emanates from an expanded conception of an individual right enshrined in the constitutional jurisprudence of the developed countries. In this way, the concept of immigration as a human right goes to the very core of fundamental rights bestowed upon humanity. In my view, this second thread of rights to migration as a human right is based on the fundamental-right doctrine developed contemporaneously both in common and civil-law jurisprudence. Earlier, I suggested that the right to migration as a human right comes from a broader interpreta-

tion of the right to the highest attainable status for an individual. The question, then, is whether there is a fundamental right to migration, and what is the test we can employ to determine if this is indeed a fundamental human right?

First and foremost, let us begin with the concept of rights, and how they are created. Most countries' constitutions contain a set of rights, just like the U.S. Constitution has certain enumerated rights. On the surface, it seems that the government should support certain rights, but not all of them may be necessarily protected by the Constitution. A strictly originalist point of view would support the constitutional interpretation that we must only protect those rights which are actually located in the Constitution, and support legislation to protect other rights.<sup>104</sup> A more dynamic constitutional interpretation,<sup>105</sup> however, would suggest a different conclusion where rights could emanate from various sociological, doctrinal, and environmental developments. There should be certain rights that could be created as a result of the evolution of human understanding. For example, as our understanding of the limitation of natural resources matures, and as our ability to gauge the adverse impact of environmental degradation on the sustainability of our human civilization grows, primacy ought to be given to certain rights. These rights could include the right to pollution-free air, or right to flowing water, or right to choose protection of environment over excessive water commodification. There should be binding legal instruments that could protect these rights from the corrosive impact of any governmental regulation, corpo-

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104. I have detailed the various shades and hues of originalist interpretation of the constitution elsewhere. See Saby Ghoshray, *To Understand Foreign Court Citation: Dissecting Originalism, Dynamism, Romanticism, and Consequentialism*, 69 ALB. L. REV. 709, 712-13 (2006).

105. Here we are confronted with the issue of strict constructionist vs. dynamic constitutional interpretation. Dynamic constitutional interpretation argues for the need to expand the meaning of constitutional clauses as a result of changing values and complex sociological dimensions. I will argue in this Article, that the changing realities based on the evolving nature of our understanding of human existence makes it incumbent upon all of us to extricate ourselves from the frozen, static-in-time version of the Constitution to embrace a more dynamic Constitution. By referring to a dynamic Constitution, attention is drawn to the process by which the Constitution adapts to the changing conditions in the society, we are confronted with its dynamic aspect. In most parlances, the dynamic Constitution and the living Constitution are terms used synonymously. See generally RICHARD H. FALLON, JR., *THE DYNAMIC CONSTITUTION: AN INTRODUCTION TO AMERICAN CONSTITUTIONAL LAW* 1-2, 12-13, 269 (2004). The term "living" is used to denote that the Constitution is still evolving in consonance with the evolving needs of the society, rather than possessing a fixed in time, definitive meaning. See *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958). The concept of a living Constitution is noted by the Court in *Trop v. Dulles*, "[T]he words of the [Eight] Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* The concept further gained currency in a 1987 lecture of Justice Thurgood Marshall titled, *The Bicentennial Speech*, where he argued that the Constitution must be interpreted in light of the moral, political and cultural climate of the age of interpretation. See Thurgood Marshall, Assoc. Justice, U.S., Remarks at the Annual Seminar of the San Francisco Patent and Trademark Law Association: *The Bicentennial Speech* (May 6, 1987), available at [http://www.thurgoodmarshall.com/speeches/constitutional\\_speech.htm](http://www.thurgoodmarshall.com/speeches/constitutional_speech.htm); see also Ruth Bader Ginsburg, Assoc. Justice, U.S., Remarks to the American Society of International Law: *A Decent Respect for the Opinions of [Human] Kind: The Value of a Comparative Perspective in Constitutional Adjudication* (Apr. 1, 2005), available at <http://www.asil.org/events/AM05/ginsburg050401.html>; Ghoshray, *supra* note 104, at 709-43.



rate privatization, or any combination of the two. These rights strictly belong to human persons or natural entities as they predominantly emerge from humanity's interaction with nature. These rights do not accrue to a legally-created entity, such as a corporation. Implicit in this expanded conception of rights, I will argue, resides the guarantee that there are some rights so fundamental that can never be regulated by either the government or the legislature. Therefore, no majority, no matter how large, could violate the rights of individuals. These are indeed the fundamental rights that could emanate either via humanistic jurisprudence or from natural-rights doctrine.

The discussion above points to certain rights, which are fundamental, yet may not have been properly enumerated within the Constitution because the historical development of civilization did not recognize them at the time of the Constitution's writing. These rights could very well not have been protected by the litany of international laws, developments, and treaties that form the broad spectrum of international law. For example, these rights may not have found explicit invocation in the development of The Hague or Geneva stream of laws, or other U.N. Declarations. On the other hand, these rights are so fundamental, that without them, the very existence of a human being becomes unconscionable. How could this happen?

Not all rights are automatically incorporated in the human-rights doctrine, nor do they become enshrined in the relevant constitution of the nation state. Along the journey of our civilization, historical developments take place which determine humanity's need for certain protection or expansion of certain liberties. Rights are created in such opportune moments of time, but when they are recognized is a different story. The legitimate question comes to the mind then, what is a true test, a test that can be employed to identify whether a right truly belongs to the category of human rights or fundamental rights? Allow me to bring to focus the "shock the conscience test."<sup>106</sup> By performing this test, we are able to determine whether an action or behavior falls outside the standards of civilized decency. Does the human right to migration require the creation of new enumerated rights, such that the fundamental nature of that right is so profound that denial of such right will pass the shock-the-conscience test of constitutional adjudication?

The basic premise of the shock-the-conscience test of certain rights resides in the premise that follows. Certain rights are so inherent, so

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106. See *Rochin v. California*, 342 U.S. 165, 169 (1952). The "shock the conscience" test was popularized after Justice Felix Frankfurter writing for the U.S. Supreme Court established the shock-the-conscience test, based on the Fourteenth Amendment's prohibition against states depriving any person of "life, liberty, or property without due process of law." *Id.* This test attempts to determine whether an action or behavior falls outside the standards of civilized decency. *Id.* The test, however, has its detractors that criticize permitting judges to assert their individual views on what constitutes shocking. See, e.g., *id.* at 175-76 (Black, J., concurring).

fundamental in the current conception of our human existence, that any abrogation of such right or explicit denial of it must be viewed as shocking the conscience. Not all rights are fundamental rights nor are they all human rights, as rights could be envisioned, rights could be structured, rights could even be derivative of existing rights. In order for them to qualify as analogous to basic fundamental human rights, the rights must pass the shock-the-conscience test. From this discussion, it is natural to see that the right to migration would be within the premise of a human right, but does not pass the shock-the-conscience test unless a gross and egregious violation of humanity is taking place. Simply invoking the economic rationale is not the way to cross the threshold for establishing a fundamental right to migration. Next, I examine whether there is a basis to identify migration as a human right that is derived from the natural-law conception of basic rights.<sup>107</sup>

Why natural law? The right to migration has to be seen through the prism of human existence, a broader meaning of human existence, and its interrelationship within the common property ownership doctrine discussed earlier. If fundamental economic rationales are so compelling that the very sustenance of humanity is at stake, we must exert extreme prudence in adjudicating our administrative decisions regarding immigration. This is also the essence of right creation with the fundamental relationship between earth and human as the humans try to control its own destiny. Therefore, the dual paradigm based on the basic premise of natural-law doctrine to establish the right to migration as human right and the economic reason for sustenance of humans brings us to a poignant issue. Which do we choose, the unbridled right to economic sufficiency and material comfort to the first occupants, or the basic necessities for all humans within a shared-resource paradigm? The final answer must come from the deeper meaning of life, the meaning enshrined in the perpetuation of natural tendencies of humanity. It is a very difficult paradigm. Primacy must be given to the possibility of a scenario where countless millions of individuals could be deprived of the basic necessity of life, as they cannot afford to sustain themselves. Are we bold enough to choose life over luxury?

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107. Generally, natural rights are viewed as the identical twin theory of universal human rights that are part and parcel inherent in humanity. See Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc A/810 (Dec. 10, 1948), available at <http://www.un.org/Overview/rights.html>. Often in discussions, the merit of natural rights is developed and viewed alongside human rights. *Id.* While there is no formally, globally accepted doctrine, natural rights are accepted by many that a natural right is a right that exists in a state of nature, like the right to life and liberty. *Id.* To me, the definition of a natural right is intrinsically linked to the very nature of us as human beings. However, the issue of natural rights becomes complicated by the governments we elect to help protect our rights, and also these rights can become competitive. In this Article, I refer to natural rights which are linked with human rights and that include the inherent right to life.

Right to migration as a human right is based on a conflict between a State's natural impulses to maximize the potential for those who reside within its border over the fundamental right of preserving basic necessity for all of humanity. How does natural law define this? These are the questions we must answer. My natural-law analysis would assert that, the compelling national interests of the more advanced, richer countries must not supersede the fundamental right to survival of people from other parts of the world. As neocolonialism rears its all-encroaching tentacles to grab every natural resource it finds in its wake, the more powerful countries owe it to the rest of the world to share in the bounty, the natural right and the human right doctrine should surface in order to protect that right of all humanity. Indeed, this right may not be enshrined within the established jurisprudence in the developing world, but must be recognized by the more advanced States within a broader humanistic viewpoint.

#### CONCLUSION

Despite living in a global village that is more interconnected today than ever before, humanity is scattered in isolated islands of a disjointed economic environment. Uneven distribution of wealth in today's world is so egregious that it begs the question of where is humanity as the civilization marches towards unprecedented technological advancement. On the other hand, politicized anxieties have taken a new dimension as the specter of economic deprivation within the domestic United States has become fodder for a vigorous anti-immigrant sentiment. Against such manipulated, exclusionary ideals and a manufactured crisis of confidence, I began this enquiry to understand if the immigration debate could be captured through the lense of a broader humanistic viewpoint. As the preponderance of evidence clearly indicates, popularized fear of economic deprivation resulting from immigration is largely unfounded, and a set of strong economic rationales exist that posit a more humanistic discourse on immigration. Could this humanistic discourse arise from a global-justice viewpoint, or could this be the genesis to uncover a human-rights dimension of immigration? This has been the objective of my review in this Article.

This enquiry centered around two substantive premises on which the human rights dimension of immigration has to be understood. In the first, I explored all the possible viewpoints that support a blanket human-rights claim to immigration. This enquiry is centered upon an explicit understanding of the possible economic drivers that directly develop a case for human rights to immigration. Queries I entertained are as follows: What is the dimension that would allow the collective consciousness of the Americans to rise beyond politicized distortion of economic realities of the native American and look beyond its shores to understand the economic calamities of others? Is this economic reality of others a sustainable doctrine based on which expansive immigration jurispru-

dence could be developed? Does this human-rights dimension have a moral center of gravity, and what are the driving forces behind such morality-laced argumentation?

In this Article, I have examined this morality-centric immigration discourse from three diverging perspectives. I have established that, the United States has a moral obligation not to engage in exclusionary immigration policymaking based on a number of tangible grounds. These obligations come from its colonial past, its economic dominance in the world, and its hegemonic economic policies. This moral obligation should also be understood from the other side, which beckons us to probe into humanity's eternal yearning for sustenance, for survival, and above all, for the continuation of its progeny. In this review, I have established that the jurisprudence of American immigration policy is riddled with arbitrary exclusion, racial profiling and unwarranted, unconstitutional race-specific enforcement against ethnic minorities, which is inconsistent with the moral obligation of the United States. Delving deeper into this phenomena, while disturbed by the racial overtones, I assert that the paradox of U.S. immigration policy can only be overcome via humanistic approach.

In the second thread of my inquiry, I examined whether property-rights doctrine is tenable to advance a humanistic viewpoint of immigration. Despite an expansive dissection, I find no reason to believe that a more fundamental property-rights view based on a collective-rights concept could establish inclusive immigration jurisprudence. My argument centered on the fact that collective-rights doctrine is in sharp contrast with the rights of first occupants is such structurally unstable as it can not explain the basic concepts of state sovereignty and national security. While a traditional property-rights analysis may not have a derivative claim towards rights to immigration, I do, however, propose that, the property rights doctrine can be efficiently invoked in establishing certain other rights that are more fundamental and may have a natural-rights basis than the rights to immigration.

In addition, I argue that the rights to immigration fall within a continuous spectrum between a fundamental right and human rights. This right may not emanate from the fundamental concept of natural rights, but it is well-enshrined within the corpus of rights in the human-rights jurisprudence. In the end, the issue is not whether we characterize this as a human right or not, rather it is in humanity's ability to act upon recognizing this right. That is where humanity's biggest challenge comes.

Finally, this review goes beyond the hackneyed analysis of the impact of immigration at a macro level. Instead, it penetrates a deeper construct and brings out the more sublime issues surrounding immigration. This is important from both legislation-development and policy-implementation points of view, which require further research. While the exploration continues, I can't but end on my belief in the inherent

dignity of humanity. That dignity, I hope, will allow us to recognize the full spectrum of a human-rights dimension of immigration, which sees every human as part of a vibrant human race, and not as an isolated, individual threat to the United States of America.