The Immigrant as Criminal: Punishing Dreamers

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INTRODUCTION

Being a boat person is a crime. The crime begins with the acute desire on the part of the person to enter the United States, under even the most harrowing circumstances, in order to better herself or the lot of her family. They pay “snakeheads” to secret them in. 1 We punish people for this crime. We capture them, imprison them, hold them without bail in many cases; we relocate them to places inaccessible to volunteer attorneys, charge them with a misdemeanor, exclude and deport them. 2

Being a good brother or sister is a crime. This crime begins in the darkness along the border, when you help your younger sibling jump the line, to reunite with family members, or simply to seek a better life. We capture this good brother or sister, imprison the person, and prosecute for smuggling—an “aggravated felony.” 3 We deport these good siblings. If they return, we prosecute them again and sentence them up to twenty years. 4

Indeed, dreaming is a crime. This crime begins with images of a bountiful America swirling in the minds of young workers from abroad. The attraction of America is strong. The picture is one of social and eco-
nomic payoff for an honest day's work. The portrait is one of opportunity for oneself and one's family. The "crime" occurs once the dream is manifested by crossing the border without documents. We capture these dreamers. We incarcerate them. We charge them with a misdemeanor and remove (deport) them. We charge them with a felony if they return.

The justification for criminalizing these behaviors is based on a notion of preserving our borders, our sovereignty, and our scarce resources. It is based on our fear of being overrun, of job loss, of wage depression, and of unassimilability.

These are not new crimes, nor are the justifications. Asians have heard these explanations in the past: in the 1800s Asian immigrants were denied the right to naturalize and were reduced to second-class status in the criminal justice system; in 1875 the Page Law was enacted to exclude Chinese prostitutes but was enforced in a manner to exclude most Chinese women; in 1882 Chinese laborers were excluded; in 1907 Japan agreed to limit the number of Japanese laborers who could emigrate; in 1917 the Asiatic Barred Zone was created; in 1924 all Japanese were barred; and in 1934 Filipinos became excludable aliens. Latinos have heard these justifications as well: in 1850 the Foreign Miners' Tax was passed to discourage Latin American miners from the gold fields of California; in 1954 during "Operation Wetback" over a million Mexican workers were rounded up and deported; in 1977 the number of actual visas for Mexicans was slashed and immigration from all of Latin America was made more difficult, placing greater pressure on the border; in 1986 employer sanctions were enacted making undocumented workers even more subordinate and subject to exploitation; and in 1997 when the INS boasted of in-

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9. See, e.g., People v. Hall, 4 Cal. 399 (1854) (California Supreme Court upholding statute preventing Chinese from testifying against white Americans).
18. See Silva v. Bell, 605 F.2d 978 (7th Cir. 1979).
creased deportation statistics comprised mostly of Latin-born immigrants.20

PROBLEMATIZE, DEMONIZE, DEHUMANIZE, THEN CRIMINALIZE

The process of criminalizing the immigrant and her dreams is multi-stepped. First the immigrant is labeled a problem through demonization, then she is dehumanized, until at last her actions or conditions are criminalized.

Identifying immigrants as a problem through demonization involves familiar allegations: they take jobs, they cost a lot, they commit crimes, they don’t speak English, they damage the environment, they don’t share our values, and they are different. This problematization-demonization process is implemented by the likes of Patrick Buchanan, Pete Wilson, Peter Brimelow, and the Federation of American Immigration Reform. They attack with seat-of-the-pants economics. They attack with hysterical statements. They find a ready audience in members of the public (some gullible, others who themselves are malevolent) who look around, see people of color with accents working, and facilely conclude that the immigrants must be taking jobs that Americans would otherwise be holding. This brand of xenophobia is recycled from the worst nativist periods of the nation’s history—periods that decent people look back upon with shame.

After hysteria is heightened, the demonization process continues by asking the public if immigration is a problem. Thus, modern day polls and surveys claim to reveal that eighty percent of respondents think that current immigration is bad for the country if asked specifically about immigration.21 But when general polls ask respondents to name serious societal problems, immigration is either ranked low or not mentioned.22 The surveys that suggest that immigration is a problem to respondents are reminiscent of what happened in 1879 in California. A specific measure was placed on the state ballot to determine public sentiment towards Chinese immigration: 900 favored the Chinese, while 150,000 were opposed.23 A few years later, twenty-five anti-Chinese petitions were presented in Congress by a number of civic groups, like the Methodist Church and the New

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22. See, e.g., Michael Cabanatuan, County’s Rosy View: Poll Finds Traffic, Crime Top Concerns in Contra Costa, but Most are Optimistic, S.F. CHRON., Aug. 11, 1997, at A11; Bob Kemper, Property Taxes Still a Concern, Poll Finds Most Homeowners Say They Don’t Feel Benefits of Cap Law, CHI. TRIB., Aug. 3, 1997, at 1; Kevin Duchschere, Pessimism Drops in St. Paul; Most are Happy with City, STAR TRIB., Aug. 24, 1997, at 1A.

York Union League Corps, and from many states, including Alabama, Ohio, West Virginia, and Wisconsin. In the demonization process, "[t]he California legislature declared a legal holiday to facilitate anti-Chinese public rallies that attracted thousands of demonstrators."24

Demonization is an ugly thing. It attacks a person’s sense of worth, of self, of identity. It deflates. Long before the demonization reaches the technical exclusion/criminalization stage, the social and emotional exclusion of the targeted individuals commences. Historically, long after the repeal of any exclusionist law, the psychic exclusion endures in the minds of the affected communities.

Even in the face of a robust economy, the modern problematization-demonization process has been wildly successful. Restrictionist strategies have worked, as their proponents have been allowed to define the issues, largely in their own terms of alleged economic and fiscal impact. Pro-immigrant sentiment and immigrant rights groups have been silenced in the media. Driven by the public’s thirst for understanding complicated subjects in the simplest of terms, the media accepts the gut-instinct style of economic claims that blame immigrants for job loss and wage depression. Nuanced findings are not good material for headlines. Driven by the political system's reward to the candidates who offer the most stinging sound-bites, politicians point fingers at the disenfranchised, voiceless alien to grab the attention of voters. The media and politicians serve as convenient and effective conduits for the demonizers of aliens. The effectiveness of the demonizers is striking, since even in not-so-robust economic times, the pro-immigrant economic position is quite defensible.

Aggregate empirical studies support the conclusion that immigrants are a boon to the economy.25 Certainly variance occurs in labor market analyses of different jobs in different parts of the country. Yet considered in total, the evidence reveals that immigrants create more jobs than they take, and what little wage depression occurs is visited upon Latino immigrant groups.26 States that have a larger population of immigrants have lower unemployment rates.27 In fact, the increased presence of undocumented workers also energizes the economy and creates new jobs for native workers.28 These findings are counterintuitive for those who base their conclusions on sightings of immigrant workers presumed to be holding jobs that U.S. citizens deserve. Moreover, immigrants (undocumented as well as

24. Id.
27. See id. at 53-54.
A maldistribution of these contributions between local, state, and federal governments might occur. However, blaming immigrants for this maldistribution is out of line; when the numbers are totaled, it is apparent that society comes out ahead financially when it comes to immigrants.

As the level of demonization through anti-immigrant rhetoric has reached new heights, hot talk radio hosts, conservative columnists, and politicians—Democrats and Republicans alike—chime in. Many of these neo-nativists claim that things are different; that times have changed from even just a few years ago. Much of the rhetoric strikes a chord with many well-meaning, but misguided, members of the public who have sensed a lack of control over a variety of issues that affect their lives and who are looking for simple answers. Others—the more racist in our midst—derive a sense of validation from shock jock antics. Of course Asians and Latinos have heard these chants in the past. Once again, “playing the immigration card” has become the fashion. Once again, further subordination of the subordinated is in vogue. Scapegoating is in.

Once demonized, the immigrant can be dehumanized. Dehumanization commodifies the immigrants. The immigrant-as-commodity is not precious. Rather, the immigrants-as-commodities are likened to “hazardous waste dumps.” Although the Supreme Court has ruled that dangerous and hazardous materials are “commerce” subject to Commerce Clause scrutiny, the immigrant-toxic-waste-dump-commodity has little constitutional protection in this dehumanized state. Dehumanization thus silences the immigrants. Dehumanization allows the public to ignore their faces. Dehumanization allows the powers-that-be to categorize the immigrant at will, allowing them to ignore the idealism, the goals, the aspirations, the dreams of the immigrant, the images of the Statue of Liberty. In short, it allows them to ignore what is in the mind of the immigrant.

Indeed, the notion of punishing employers for knowingly hiring undocumented workers (with the resulting punishment of prosecuting or at least removing the workers themselves) is representative of the demoniza-
tion-dehumanization process applied to immigrants. At the end of World War II, initial efforts to completely demonize and dehumanize the immigrant worker by imposing employer sanctions failed. In the mid-1970s, a plan known as the Rodino proposal, to make hiring of undocumented workers illegal, was constantly debated. Finally, the dehumanization effort was accomplished as part of the Immigration Reform and Control Act of 1986.

Refugees have also been subjected to the demonization-dehumanization process. Until 1980, the United States had a proud history (albeit with a few embarrassing footnotes) as a recipient of refugees. As early as 1783, President George Washington proclaimed, “[t]he bosom of America is open to receive not only the opulent and respectable stranger, but the oppressed and persecuted of all nations and religions.” For almost two hundred years, significant numbers of refugees were welcomed into the United States. The 1948 Displaced Persons Act enabled 400,000 refugees and displaced persons (mostly from Europe) to enter into the United States. The 1953 Refugee Relief Act admitted another 200,000 refugees. Thousands of refugees entered from mainland China after the 1949 communist takeover, and more than 145,000 Cubans sought refuge after Fidel Castro’s 1959 coup. Finally, using special authority, the Attorney General permitted over 400,000 refugees from Southeast Asia to enter by 1980 after the U.S. military withdrawal from Vietnam in April 1975.

Dissatisfaction with ad hoc admissions provided the impetus for reform that ultimately led to the passage of the 1980 Refugee Act. Policy makers were uncomfortable with the Attorney General’s considerable unstructured power to hastily admit tens of thousands of refugees who were unwanted in many parts of the country. Thus, under the new law, limits were imposed on the annual slots available to refugees irrespective of real humanitarian needs. Under the new law, the human side of refugees could be suppressed.

32. A proposal to impose criminal penalties for the employment of undocumented workers as part of the 1952 overhaul of the immigration laws was soundly defeated. See López, supra note 17, at 669.
33. See Hing, supra note 26, at 23.
34. See generally Hing, supra note 19.
37. See Hing, supra note 35, at 123.
38. By the mid-1960’s more than 3,000 Cubans were admitted each month. IMMIGRATION AND NATURALIZATION SERVICE, 1966 ANNUAL REPORT (1967). By 1976, 145,000 Cubans were paroled into the United States. See Silva v. Bell, 605 F.2d 978 (7th Cir. 1979).
Since the fall of Saigon (Ho Chi Minh City) in 1975, thousands of Vietnamese refugees have attempted to flee by boat to places such as Hong Kong.\(^ {42} \) Originally, many of them were processed and allowed to enter countries such as the United States. Eventually, however, refugees became less welcomed and fewer were admitted. As more and more were being kept at holding facilities, it was ultimately decided to send most back to Vietnam.\(^ {43} \) Can we forget the images of refugees who were dragged into airplanes for deportation by Hong Kong/British authorities? Apparently so. A case of boat people dehumanized.

Once dehumanized and rendered voiceless, the immigrant’s actions, status, and dreams may be criminalized. The process is completed: problematize, demonize, dehumanize, then criminalize. Congress’ authority to criminalize and exclude in the immigration area is vast. Indeed, as an enumerated power expressed in Article 1, Section 8, of the Constitution, this power has been labeled “plenary,”\(^ {44} \) just as we have come to label Congress’ power over interstate commerce.\(^ {45} \) And just as the Supreme Court has allowed Congress to legislate under the pretext of the Commerce Clause to implement its moral judgments (e.g., wage and hour laws, civil rights protections), Congress has been permitted to legislate and criminalize the behavior of immigrants based on social and moral judgments.\(^ {46} \)

So we decided long ago, as a matter of public policy, to punish those who attempt to cross our borders without proper documents. These individuals—the relatives, the adventurers, the aggressive, the creative, and the industrious—are criminalized. We punish them for being boat people. For seeking freedom. For seeking political freedom. For seeking economic freedom. For seeking political options. For seeking economic options. For wanting a better life for themselves and their children. For being a good sibling. Simply, for dreaming. The decision to criminalize applies to those whose travels across the southern border have been cultural rituals for generations—across a border into territory that for generations was part of Mexico. The decision applies, regardless of the hardships or conditions endured in the journey to the Golden Mountain. The decision applies, regardless of the aspirations of the person.

\(^{42}\) See C.K. Lau, Closing the Door on Refuge: The Vietnamese Problem has Troubled Hong Kong for More than 20 Years and There is Still No Easy Solution in Sight, SOUTH CHINA MORNING POST, Aug. 17, 1997, at 9.


\(^{45}\) See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 4.1 (5th ed. 1995).

\(^{46}\) Congress’ authority to legislate in the immigration area has long been held to be plenary. See, e.g., The Chinese Exclusion Case, 130 U.S. 581 (1889) (upholding the authority to exclude on the basis of race and ethnicity); Fiallo, 430 U.S. 787 (upholding immigration law provisions that discriminated on the basis of gender as well as illegitimacy).
Why do we make them criminals? Why do we punish them? Why do we criminalize? Governor Wilson has explained: "We can no longer allow compassion to overrule reason." So we punish. We have that power. We are a sovereign nation. The Court has upheld that power. We feel compelled to exercise that power. We must protect our borders. We must protect our people. We must protect our economy. We punish dreamers. After all, we cannot take everyone in, can we?

The process of problematizing, demonizing, dehumanizing, and criminalizing renders punishment of aliens a part of the American psyche. We have come to accept the punishment and exclusion of people from other lands. We accept this concept even today, in a period when we are beginning to recognize the inter-dependency of national economies, work forces, and environmental practices.

THE RECRUITMENT OF IMMIGRANTS AND THE ALLURE OF AMERICA

That immigrant's dream about the United States is attributable to much more than the romanticized visions of America that are broadcast throughout the world via films, television, and its international political involvement. Of course the picture of America as a free and open society is a strong attraction. Yet for some, the dreaming and traveling to the United States for freedom and even for work is a continuation of patterns set in motion long ago.

For example, early Chinese workers were at first officially welcomed. The simultaneous opening of both China and the American West, along with the discovery of gold in the late 1840s, led to a growing demand for, and a ready supply of Chinese labor. Chinese were actively recruited to fill needs in railroad construction, laundries, and domestic service. In 1852, the governor of California recommended a system of land grants to induce the immigration and settlement of Chinese. A decade later, a select committee of the California legislature advocated continued support of Chinese immigration. It reported that the 50,000 Chinese in the state paid almost $14 million annually in taxes, licenses, duties, freights, and other charges, that their cheap labor would be of great value in developing the new industries of the state, and that trade with China should be fostered.

Drawing praise for their industry, abilities, and for their willingness to accept lower wages, Chinese were considered almost indispensable.
1857 at the Oregon constitutional convention, a nativist amendment to exclude Chinese failed principally because they made "good washers, good cooks, and good servants."\textsuperscript{53} Chinese immigrants were regarded as less demanding and more dependable than other laborers.\textsuperscript{54} After the Civil War some Southern plantation owners seriously considered replacing their former slaves with Chinese labor.\textsuperscript{55} By 1868, the United States entered into the Burlingame Treaty with China, convincing China to allow more Chinese to travel to the United States and to open up avenues for international trade.\textsuperscript{56}

Even the skeptical had their reasons for coming to see the usefulness of the Chinese. The Central Pacific Railroad, doubtful about Chinese ability to handle heavy construction but frustrated over the dependability of the native work force, decided nonetheless to hire them. They were available, placer mining was giving out, and they could be purchased for two-thirds the price of white workers.\textsuperscript{57} Eventually it was widely acknowledged that without the Chinese, it would have been impossible to complete the western portion of the transcontinental railroad in the time required by Congress. By 1882 about 300,000 Chinese had entered and worked on the West Coast.\textsuperscript{58}

Other Asians followed. Like the initial wave of Chinese immigrants, Japanese laborers were at first warmly received by employers. These young and healthy men were needed to perform the strenuous work on Hawaiian sugar plantations.\textsuperscript{59} Japanese were also recruited in California after Chinese exclusion.\textsuperscript{60} Filipinos became a convenient source of cheap labor after Japanese immigration was restricted in 1908.\textsuperscript{61} Just as the Chinese exclusion law had encouraged employers to look to Japan, so the limitations on Japanese immigrants led to an intense recruitment, especially by the Hawaiian Sugar Planters' Association, of Filipino laborers because of their open travel status as noncitizen nationals.\textsuperscript{62} Growers thought Filipinos (like Mexicans on the mainland) were well-suited to "stoop" labor and were not as aggressive as Japanese or as enterprising as Chinese. They were praised as especially hardworking, submissive and

\textsuperscript{53} Mary Coolidge, Chinese Immigration 21 (1909).
\textsuperscript{54} See Hing, supra note 35, at 20.
\textsuperscript{56} See Hing, supra note 35, at 22.
\textsuperscript{57} See id. at 20.
\textsuperscript{59} See Hing, supra note 35, at 27.
\textsuperscript{60} See id.
\textsuperscript{62} See Kitano & Daniels, supra note 61, at 79.
reliable—praise that ironically rooted itself in well-entrenched racist sentiment. Despite the arduousness of the work in the sugar and pineapple industries, the steady pay lured many Filipino laborers (most of whom came from the Ilocos region and other economically underdeveloped areas of the Philippines populated by poor peasants and farm workers) who could not earn comparable wages in their home country.

Consider also Mexicans. What is now California, Texas, New Mexico, Arizona, and parts of Colorado, became part of Mexico when it declared independence from Spain in 1821. But less than thirty years later under the Treaty of Guadalupe Hildalgo, these areas were ceded to the United States at the end of the Mexican-American War. Mexicans living in this region were given the option of becoming United States citizens or relocating to the Mexican side of the new border; most remained. For many years, Mexicans and Americans paid little attention to the new international border, traveling back and forth at will, continuing to regard areas along the border as unitary economic regions.

In the 1880s, U.S. labor needs in mining, agriculture, and the railroads surged, in part because of the exclusion of Chinese laborers. In order to fill these needs, U.S. employment recruiters traveled to Mexico to promote migration by offering the lure of employment. As with the aggressive recruitment of Chinese labor during the gold rush era, most recruitment programs directed at Mexicans were sponsored by states as well as by particular industries. These recruitment efforts resulted in the initiation of widespread, long-distance Mexican migration.

Reliance on Mexican workers continued into the new century. Soon after the turn of the century, the entry of Japanese workers was restricted and the recruitment of Mexican workers to fill the void heightened. The Mexican Revolution of 1910 spurred further migration from Mexico, and during World War I, more were recruited to fill resulting labor shortages. Perhaps most telling was the special treatment afforded to Mexican work-

63. See B. Lasker, FILIPINO MIGRATION TO THE CONTINENTAL UNITED STATES AND HAWAII 25-27 (1931); P. Smith, The Social Demography of Filipino Migration Abroad, INT'L MIGRATION REV. 10 n.3 (1976) 307.
66. See López, supra note 17, at 642.
67. See id. at 643.
68. See id. at 647-50.
70. See López, supra note 17, at 644-650.
71. See id. at 651-53.
72. See id. at 656.
ers under the 1917 Immigration Act. Among other things, the law created an Asiatic Barred Zone, a literacy requirement, and a head tax. Under the law, the latter two were waived for Mexicans, and special employment categories designed for Mexicans in temporary jobs and agriculture were created under the so-called "ninth proviso."73

In spite of a post-World War recession, officially-authorized recruitment of Mexican workers did not cease. For example, from 1919 to 1921, the Arizona Cotton Growers' Association spent $425,000 recruiting and transporting Mexican workers, while immigration law exceptions for temporary Mexican labor continued.74 Although employer recruitment of Filipinos increased in the 1920s out of concern that quotas on Mexicans might be imposed (by 1930, 300,000 Filipinos worked in California), the federal cooperation with local employers resulted in over 500,000 Mexican workers admitted during the decade.75 Opposition by organized labor was not strong as long as most of the employment involved low-wages and poor work conditions in agriculture and other unpopular fields.76

The era of national origins quota legislation that culminated in severe restrictions on southern and eastern Europeans, as well as permanent exclusion of Japanese, illustrates a different attitude towards Mexico. The State Department opposed extensions of quota limitations on Mexico as a breach of necessary good will towards our important trading partner. Although the literacy test and head tax would be imposed, total flexibility for the admission of temporary Mexican labor was retained.77

After the stock-market crash of 1929, hundreds of thousands of residents of Mexican descent (citizens, legal immigrants, and undocumented alike) were removed, but as World War II approached the economy strengthened and the demand for cheap labor returned.78 By 1942, a treaty with Mexico was reached leading to the Bracero Program, under which thousands of workers were admitted with government permission.79 Another such agreement was reached in 1951, extending the program until its demise in 1965.80

Throughout this period, the recruitment and use of Mexican workers established an atmosphere of official countenance of undocumented migration. As one commentator has concluded:

74. See López, supra note 17, at 658.
75. See L. Grebler, Mexican Immigration to the United States: The Record and Its Implications, 26 (UCLA Graduate School of Business Administration, Mexican-American Study Project Advance Report No. 2, Jan. 1966).
76. See López, supra note 17, at 658-61.
77. See id. at 662-63.
78. See id. at 663-64.
It is entirely implausible to regard the United States’ role in illegal entry as unintentional, naive, or innocent. Policy makers in the United States must have been aware that recruitment activities designed to promote the Bracero Program would encourage poor Mexicans to believe the United States was a land of opportunity, thereby encouraging those who could not be admitted legally to enter illegally. The relative attractiveness of illegal entry was increased by the failure to enforce the promises that had been made in connection with the adoption of the Bracero Program. Policy makers in the United States relied on the tradition of migration to help win new recruits for their “qualitatively” controlled program. They must have been aware from past experience that the first wave of braceros would be followed by increasing numbers, documented and undocumented. Evidence indicates that policy makers knew particular regions in Mexico were primed for news of work opportunities, for the Bracero Program focused its recruitment in the same areas that had been the focus of earlier promotional efforts.81

These circumstances were officially continued until 1986, when for the first time the federal government passed legislation making the employment of undocumented workers illegal. Yet the employer sanctions law was packaged with amnesty provisions (legalization) for persons who had lived in the country for five straight years or who had simply worked in agriculture for at least ninety days.82

With some exceptions for certain seasonal work, recruitment of massive numbers of low-wage workers to the United States is not officially condoned today. However, the allure of the country continues in the media and in our nation’s constant involvement in humanitarian and political interventional efforts throughout the world. The Statue of Liberty remains emblematic of its inscription and message to the rest of the world:

Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore.
Send these, the homeless, tempest-tost to me.
I lift my lamp beside the golden door!83

Its inscription is not part of our immigration laws, much less part of the Constitution. Its message has been graffitied over, time and again by restrictionist taggers in the demonization process. Yet, its message remains a

81. López, supra note 17, at 668.
82. See generally Hing, supra note 19, at 418.
83. HING, supra note 26, at 31.
signal of hope—a virtual invitation—throughout the world, as long as the Statue stands.

THE SET UP

Given the history of recruitment and continuing allure of the United States, the restrictions in the immigration selection system of the immigration laws provide the framework for criminalization for demonized immigrants who are technically unqualified to enter.

The current numerical limitation system, while not explicitly racist, operates in a manner that severely restricts immigration from Mexico and the high-visa-demand countries of Asia. After Asian racial exclusion laws were repealed in the late 1940s and early 1950s, the doors certainly were not flung open. Quotas for China and Japan, for example, were set at 100; total immigration from the so-called “Asia-Pacific Triangle” was limited to 2,000. Immediately after the Philippine Independence Act of 1934, the Filipino quota was fifty. Certainly the 1965 amendments were a welcome change, but the new law was clearly not a panacea. President John F. Kennedy had originally proposed a first-come, first-serve system. If implemented, the system would have facilitated the entrance of even more Asian immigrants than under the actual system enacted. Instead, a preference quota system of approximately 20,000 visas for each country was established, with only 200 visas available for territories such as Hong Kong.

Between 1965 and 1976, while the rest of the world enjoyed an expansion of numerical limitations and a definite preference system, Mexico and the Western Hemisphere were suddenly faced with numerical limitations for the first time. While a first-come, first-serve system for the Western Hemisphere sounded fair, applicants had to meet strict labor certification requirements. Of course, waivers of the labor certification requirement were available to certain applicants, such as parents of U.S. citizen children. As one might expect, given the new numerical limitations, by 1976 the procedure resulted in a severe backlog of approximately three years and a waiting list with nearly 300,000 names.

In 1977, Congress imposed the preference system on Mexico and the Western Hemisphere along with a 20,000 visa per country numerical limitation. Thus, Mexico’s annual visa usage rate was virtually sliced in half overnight, and thousands were left stranded on the old system’s waiting

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86. See 8 U.S.C. § 1152(c) (1976).
87. See HING, supra note 26, at 25.
88. See CHARLES GORDON ET AL., IMMIGRATION LAW PROCEDURE § 1.4C (1993).
89. See HING, supra note 26, at 24.
Today's selection system simply does not have room for many relatives who do not have the support of multi-national corporations, professional backgrounds, or substantial funds for investment. For the same reasons, the system has no slot for anyone who simply has a dream or sense of adventure, irrespective of the person's drive, creativity, or ingenuity. The system results in very severe backlogs in certain family immigration categories—particularly for spouses, unmarried sons and daughters of lawful permanent residents and siblings of U.S. citizens. For some countries, such as the Philippines and Mexico, the waiting periods for some categories are ten to nineteen years! Given the severe backlogs and the continuing allure of the United States (not simply in terms of economic opportunities, but because relatives are already here due to the historical recruitment efforts), many would-be immigrants are left with little choice. Inevitably they explore other ways of entering the United States without waiting. By doing so, they fall into the jaws of the immigration laws that have been constructed in ways that punish them civilly and criminally for circumventing the proper immigration procedures.

The basic civil sanction of removal (deportation) applies to individuals who fall into the immigration trap of following their instincts to reunify with families or to seek economic opportunities. The categories of deportable aliens include the following persons: those who are in the United States in violation of the immigration laws (e.g., entry without inspection, false claim to citizenship), those nonimmigrants who overstay their visas or work without authorization, those who have helped others enter (smuggled) without inspection, and those who are parties to sham marriages. Additional civil penalties, including fines, can be imposed for forging or counterfeiting an immigration document, failing to depart pursuant to a removal order, entering without inspection, and entering into a sham marriage.

However, Congress has implemented criminal provisions that go far beyond the civil sanction of removal and monetary fines for many of these actions. For example, the following are criminalized (subject to impris-
onment and/or monetary fines): immigrant parents who falsify registration information about the family, any bringing in (smuggling), transporting or harboring (within the United States) of an undocumented alien, entry without inspection or through misrepresentation, the reentry of an alien (without permission) who previously has been removed or denied admission, and making a false claim of U.S. citizenship.

Thus, with an insufficient supply of immigrant visas to satisfy the demands for family reunification, and no supply for a simple working class dreamer, the action of traveling to the United States can easily result in criminal liability.

Over the years, I have had many clients whose stories of visa problems and backlogs have flirted with disaster. I recall two sisters from the Philippines. One sister had immigrated as a nurse and subsequently became a U.S. citizen. She became ill, and her sister from the Philippines entered on a tourist visa to care for her. After nursing the citizen sister back to health, the alien sister decided that she wanted to remain and be with her sister. Both were in their 50s, never married, and realized that the most precious thing that they had in life was each other’s love. They had heard from friends that the waiting period for siblings from the Philippines was several years, but they decided to apply on their own anyway, at least to get on the waiting list. To their surprise, just a few months later, the immigration officials sent them a notice with an immigrant visa application saying that the alien sister could apply for permanent residence. They thought, “How wonderful, our prayers have been answered.” They submitted the permanent resident application and about a year later were called in for an interview. At the interview, the examiner discovered that a mistake had been made and that the alien sister should not have been sent a permanent resident application. She was asked to depart from the United States. Under today’s law, the citizen sister could be criminally prosecuted for harboring an undocumented alien.

Many of my Mexican clients were granted amnesty (legalization) pursuant to the Immigration Reform and Control Act of 1986. But quite a few had spouses and children who did not meet the residency or agricultural work backgrounds to qualify for legalization on their own. Under existing law, these legalized aliens could be criminally liable for harboring, and some who helped their relatives cross the border surreptitiously could be

99. See 8 U.S.C. § 1324(a) (1996). Smuggling is considered an “aggravated felony,” the effect of which is to make relief from deportation almost impossible. See id.
prosecuted for smuggling.105

CLOSING

And so we continue to punish. We criminalize boat people. We criminalize dreamers. We punish those who are merely seeking a better life. We do this because we believe we cannot let everyone in. We do this because we believe that they are hurting us fiscally and economically. We do this because we think they are hurting us socially. However, we do this in the face of evidence that they are an economic benefit; and we do this knowing that the people behind much of the rhetoric (many of whom are simply racists) are in a demonization-problematization mode. Yes, many others jump on the band wagon of demonization. Even some former boat people and dreamers themselves chime in—the new ones “make us look bad.” This does not make the sentiment right. Except for those Native Americans among us, we can all trace our roots to dreamers and boat (or jet) people.

Even in the civil setting, these dreamers are treated as criminals. They are thrown in jails (we call them holding or detention facilities), deprived of their right to counsel and exercise.

Most assuredly the laws that have been established in response to the demonization and authorized by the dehumanization have been broken. But what kind of “criminal” have we defined by this process? What is the harm? Who or what is the victim? The nation? American workers? American society? The economy? Is it the nation’s sovereignty that is the victim because borders have been crossed?

Apparently movement is the crime. Wanting to work is the crime. Wanting to be with family again is the crime. Seeking a better life for your children is the crime. Moving across the border is the crime. Being an immigrant in an era of nativism is the crime.

The criminalization and punishment of dreamers and people with hope is a mistake our country has made in the past. In the 1930s, for example, the United States turned away thousands of Jews fleeing Nazi persecution, in large part because of the restrictionist, dehumanizing views then dominating immigration laws.106 Congress and United States consular officers consistently resisted Jewish efforts to emigrate and impeded any significant emergency relaxation of limitations on quotas.107 In the early 1980s, immigration officials implemented an efficiency plan in Miami by which Haitian asylum hearings were often limited to fifteen minutes, immigration judges were ordered to increase productivity and hear at least eighteen cases per day, and some attorneys were scheduled for hearings at the same

106. See Kitano & Daniels, supra note 61, at 13-14.
107. See Hing, supra note 35, at 124.
time for different clients in different parts of the city. The federal appeals court chastised officials for violating due process and ordered a new plan for the reprocessing of asylum claims. A similar suit concluded with the government agreeing to reevaluate potentially up to half a million Salvadoran and Guatemalan asylum cases from the 1980s, due to strong evidence of immigration officials' political bias and discrimination against these applicants. We have learned that the mistake of turning Jews away at the time of Nazi persecution was repeated again with Haitians, Guatemalans, and then El Salvadorans as the extent of political repression in those countries finally came to light.

Consider also the nation’s rush to imprison Chinese boat people of the 1990s arriving into New York and San Francisco harbors from Fujian Province. The powers-that-be rushed to adjudge these modern-day Chinese boat people as opportunists, with little more than aspirations for better economic futures. Instead of applauding their efforts, desire, and struggles, or giving them a parade, the nation threw them into detention facilities in parts of the country, isolated from willing pro bono lawyering assistance. The process of dehumanizing these dreamers was gruesome, especially for women held in a Bakersfield, California facility who attempted to rehumanize and regain their sense of self through a lengthy hunger strike. Did we really know enough about the situation in China to confidently turn away Chinese fleeing from Fujian Province as obvious economic migrants? Why were they so willing to endure hazardous and unsafe journeys? Was arresting and deporting those seeking freedom who have been subjected to reprehensible work environments in this country a response we will look back on with pride? What does it say that after years of imprisonment the government acknowledged that many of the detainees had legitimate asylum claims even under the most rigorous standards? Or will we dehumanize them once more and forget them again?

Yes, we have the power to exclude, to punish, and to criminalize boat people, good brothers and sisters, and dreamers. But even though we have

108. See Haitian Refugee Center v. Smith, 676 F.2d 1023, 1030-1031 (5th Cir. 1982).
109. See id. at 1039-41.
111. See Dunn, supra note 1. New York Times columnist A.M. Rosenthal argued that a parade was more appropriate:

Let them in, those heroes from China, those men and women who sought the beautiful land, let them out of detention as swiftly as possible and then treat them with the courtesy, dignity and respect their brave hearts merit—that is what America should do for its own soul’s sake . . . We can keep debating . . . Right now, I just think about how nice it would be—the parade for the Chinese off the Golden Venture.

this power, how, when, and on what basis should we exercise it? Given the constraints of the selection system, many immigrants—the dreamers, the adventurers, the brothers and sisters—choose other methods to enter, yes, to circumvent the immigration laws. So we punish those who circumvent, even though we have constructed an image that attracts and a history of officially-sanctioned movement that continues.

Are we really proud of this criminalization? Do the actions of the dreamers really call for imposing criminal sanctions, much less punishment like removal in civil proceedings?

Recognizing that the overzealous exercise of sovereign border powers results in a system that punishes people for moving, for dreaming, and for following historical patterns of recruitment, demands reflection. Even though the nation has the power to exclude and deport, that power must be implemented morally and ethically, with a real understanding that we are dealing with human beings. We should remain vigilant in our efforts to rehumanize these good brothers and sisters who have been demonized by misguided segments of our society. Once rehumanized, once we hear their voices and see their faces, they will become familiar. The accents may differ and their skin hue of a distinct shade, but they are truly the voices and faces of our own immigrant-dreamer ancestors.