El Castigo and El Perdón:
TRACING MORALITY IN IMMIGRATION LAW AND HISTORY

By

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ABSTRACT

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There is a misconception that once an undocumented immigrant marries a US citizen his or her legal status is automatic – simple and quick. The reality is different. In the current immigration system, an undocumented migrant must first show evidence of "extreme hardship," before receiving *el perdón*, the waiver of inadmissibility for unlawful entry that permits migrants avoid *el castigo*, the punishment that bans undocumented migrants from the US for three to ten years. Ironically, for unlawful entrants, their families must first be separated in order to stay together, a concept that is contrary to family reunification policies of immigration law. This paper examines how the waiver of inadmissibility for unlawful entry is mired with historical and legal contradictions that impact the moral, social, political and cultural spaces of both the undocumented immigrant and his or her legal status family members. My goal is to broaden an understanding of the history of two accompanying legal sections of the law, *el castigo and el perdón*, the contradictory

motivations that have structured a discretionary legal framework and immigration policies as it exists today, and the moral understanding underpinning the two aspects of the waiver - the punishing and forgiving of a human being.

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INTRODUCTION

In 2008, José left the United States (US) to attend his consular interview to receive an immigrant visa in Ciudad Juarez, Mexico, leaving his wife Maria and two young children in the United States. As a Mexican citizen, the law required him to return to Mexico to attend an interview with the US consulate. Maria, a US citizen, had initiated José's immigration process in 2006 to legalize the status of her husband who had entered the United States undocumented. At his consular interview, José received the results, a blue sheet, indicating that he could not receive an immigrant visa to enter the United States because he first needed to present a waiver of inadmissibility for unlawful entry (the waiver) for having been in the United States unlawfully since 1998. José qualified for the waiver because he was married to a US citizen. However, after waiting in Mexico for nine months, an immigration adjudicator denied the waiver. The denial indicated that the evidence Maria, his US-born wife, presented did not demonstrate any "extreme" emotional, financial, health and other extraneous "hardships" while she was separated from her husband. As a result, José remained in Mexico while Maria lived in the United States, becoming a single parent and the principal financial supporter of her household, including their two US-born children ages seven and five.[1]

[1] Maria Ortiz, personal interview by author, 2015. Note: The names of the affected immigrants have been changed to protect their identities.

Immigration subjected Maria and José to a law passed in 1996 by Congress that neither of them understood. They were only aware that upon leaving the United States for Ciudad Juarez for his Consular Interview, José was bound to "*El Castigo*" (the punishment) and that only upon receiving "*El Perdón*" (the pardon or the waiver) would he be able to return to the United States. Everyone in their community had spoken of the mysterious *castigo* and *perdón.* However, no one could explain sufficiently to them why these two words co-existed together, nor could anyone explain to them the legal or the moral implications of the *castigo* and the *perdón*. What they understood was that: 1) José had crossed the border and entered the United States *indocumentado* (without documents); 2) he had stayed in the US with no lawful status, and accordingly, José *fué castigado* (was punished); and 3) now he had to be *perdonado* (pardoned). Morally, they understood that a *castigo* required a *perdón*; that an error required correction, and that a sin required forgiveness. It took five years to solve José's case and for José to return from Mexico to join his family in the United States.

There is a misconception that once an alien marries a US citizen, his or her conversion to legal status is automatic or that it is quick and straightforward. The reality is quite the contrary, most particularly for those who have entered the US without documents and have remained in the US unlawfully. The path to legalization for this group is mired with unforeseen consequences often outside their control. The people most affected by these multiple unknowns, a history of punitive

immigration laws, and a rigorous administrative system, are the millions of Mexicans who entered the United States by crossing the border without inspection or documents. The US-Mexico border has had a long historical policy of openness and ambiguity, where the borders have slowly solidified, and the doors have almost completely closed during the twentieth and twenty-first century. Consequently, because of the extreme opacity of the immigration system, migrants neither understand when these changes occurred nor do they question why. Instead, they accept a difficult destiny that has been constructed for them. José and Maria were caught in this historical and legal maelstrom, laced with moral undertones and subject to the whims of officials and the political atmosphere of the nation.

José and Maria are two of the thousands who illustrate the complexity, the ambiguity, the contradiction, and the moral construction of immigration law. For five years José was separated from his wife and family. For five years, he believed that he needed to live his *castigo* as his wife struggled to prove his worthiness for a pardon by submitting multiple applications of *el perdón*. While one side of the law permitted José to become legal after marrying a US citizen, the other part, how he entered the United States, blocked his full entry into the nation. As José toiled for more than ten years while he was in the US to give his family economic and social stability, he would have to abandon them for up to ten years until he was approved for a waiver to gain admission in accordance to the strictures of the law. This ten-year penalty, instituted in 1996, was the punishment for having entered the country

illegally. Maria was a married woman and had a devoted husband willing to support their family; however, she was forced to live the life of a single parent for several years. She had to prove to the state that she was experiencing extreme economic and social hardships so that her husband could merit a waiver and a visa to be allowed to re-enter the US and reunite with his family. What is paradoxical is that a nation that had prided itself as a land of immigrants, as a cradle of opportunity and as a model democracy of justice, has chosen first to tear people apart to give them equal rights to legal status and citizenship. Undocumented Mexican immigrants have been particularly berated and the moral dilemma of the US has singularly dismantled their families while castigating illegal entries.[2]

When José appeared at his consulate interview in Ciudad Juarez, an immigration official carefully scrutinized him against the immigration law violations passed in 1996, but more specifically against the section 9b violations.[3] The 9b violations stated that if a person entered the United States without documents or visa and remained in the United States for more than 180 days, but less than 365 days, the undocumented immigrant was inadmissible to re-enter the US for three years. Additionally, if his stay was for more than 365 days, the undocumented immigrant

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[2] Unlike non-immigrant visa over-stayers, those who have entered the country illegally by walking through the border are the ones who require the waiver of inadmissibility for unlawful entry. Because of the contiguous border with Mexico, Mexican nationals and some Central Americans are typically the ones who require this particular waiver.

[3] Section I-212(a)(9)(B(ii): Section of the Nationality Act (INA) states: (i) In general, any alien (other than an alien lawfully admitted for permanent residence) who (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

was inadmissible to re-enter the US for ten years. These were called the three- and ten-year bars, and the undocumented immigrant would be banned for three or ten years, respectively, for having entered the US unlawfully before acquiring an immigrant visa.[4] This three- and ten-year ban is known as *el castigo*. Being married to a US Citizen, José had an opportunity to request *el perdón* (a waiver) for his inadmissibility for having entered the US unlawfully.[5] Maria, José's US-citizen spouse, had to present a convincing "waiver" package for his unlawful presence, proving that not granting José an immigrant visa would result in "extreme hardship" to Maria. After three submissions of evidence and proofs, and after five years of separation, José's waiver of inadmissibility for unlawful entry, a discretionary benefit, was finally approved. José was finally granted an immigrant visa to be admitted into the United States and attained a permanent legal resident status.

The discretionary nature of immigration benefits, such as the waiver of inadmissibility for unlawful entry, leaves beneficiaries on a road that is equally ambiguous and bereft of certainty. In the current immigration system, the waiver of inadmissibility for unlawful entry, *el perdón*, is necessary for legalization specifically of those who have entered the United States without permission. Upon

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[4] Section I-212(a)(9)(B(i) and Section I-212(a)(9)(B(i) are also called 9b1 and 9b2 bars to admissibility.
[5] IV (immigrant visa) applicants who are subject to 9B are eligible for 212(d)(3)(A) waivers. https://fam.state.gov/fam/09FAM/09FAM030504.html. IV applicants are eligible to apply for waivers under 212(a)(9)(B)(v), if they are the spouse, son, or daughter of an American Citizen or a Permanent Legal Resident. Under the standard set by the statute, INS (Immigration and Naturalization Service) may not grant an IV (Immigrant Visa) waiver of 9B unless the applicant establishes that refusal of admission would result in "extreme hardship" to the American Citizen or Legal Permanent Resident relative.

an illegal entry, the journey to becoming a legal permanent resident for a non-citizen is complicated and enmeshed with social and economic consequences for their immediate families. The non-citizen must first acquire permission. This permission, in the form of the waiver, is based on an administrative and discretionary process that reviews factors evincing "extreme hardship" to a close family member who is either a US citizen or a legal permanent resident. However, extreme hardship does not have a clear definition, nor do the officials have specific or clear guidelines to determine when the family member is indeed suffering "extremely" or "beyond normal circumstances." However, despite the ambiguous nature of "extreme hardship," once a state official has decided that the evidence of suffering and the remedies required to ameliorate the suffering prove extreme, the waiver is, then, approved and the undocumented immigrant's inadmissibility for having entered the United States without inspection and staying for a period longer than 180 or 365 days is waived.[6] Basically, the officer reviewing the case must be thoroughly convinced that the US citizen or legal permanent resident will suffer extreme hardship and must believe that separation for ten years from the immigrant spouse or relocation of these families back to their country of origin, also for ten years, harm them above and beyond normal circumstances.

[6] Mixed status is a description of families in the United States who have a legal permanent or US Citizen parent and an immigrant parent, and may have children who are both immigrants or US Citizens; Ruth Gomberg-Muñoz, "The Punishment/ El Castigo: Undocumented Latinos and US Immigration Processing," *Journal of Ethnic and Migration Studies*, 2015, Vol. 41. No.14, 2240.

The waiver of inadmissibility for unlawful entry is a particular section of immigration law beset by incertitude and contradictions that impact the social, political, and cultural spaces of both unlawful immigrants and their legal status-holding family members. Those who attain legal status can access benefits from the various government institutions with the security to protect their families. These securities are not available to the undocumented population. Meanwhile, there exists an illegal population in the United States, a caste group that has been historically marginalized by specific laws created in the past century not only to reject them but also to subject them to a cultural and governing moral code that is both confusing and complicated. Upon entering the United States, an undocumented immigrant is enveloped in a social and moral matrix created to both, obstruct and accept, punish and forgive, criminalize and waive wrongdoings so that they can be accepted or rejected as members of the United States of America. This paradoxical incongruity leaves many mixed-status families, like Maria and José, devoid of certainty and clarity. Maria who was born in the US, and José who immigrated into the US, albeit undocumented, had accepted a destiny within a very complex and convoluted system. After José and Maria got married, they thought that "fixing" José's legal status would be simple. However, neither understood the complex social, cultural, political, and legal matrix that controlled their lives. They did not understand that the undercurrent foundation to this legal grid was a discretionary process within a moral code in-the-making that was intentionally unclear and difficult to navigate.

Although José's case took five years to resolve, it ended favorably. While there were impediments, hardships, and deviations, José received a pardon and the opportunity to become a member of the US system as a legal permanent resident.

The challenges for an undocumented immigrant to become a legal permanent resident of the United States have been embroiled in a history rife with exclusionary and restrictionist policies towards undocumented immigrants going back one hundred and fifty years.[7] Through a close examination of the history of exclusion, the study of the discretionary process, the understanding of the moral implication of its application, and the construction of the waiver of inadmissibility for unlawful entry, this paper will explicate the contradictions in immigration history and immigration law. More succinctly, it will demonstrate the ambivalent and convoluted application of immigration policies through its treatment of undocumented immigrants entering and establishing themselves as members of the US nation. The waiver of inadmissibility for unlawful entry imposed in 1996 and known today as *el castigo* and *el perdón* is an example of the discretionary and moral dilemma within a contentious and conflicting relationship between the state and unlawful entrants.

Very little historical literature has been written on the specific 9b section of the I-212 immigration law and the waiver of inadmissibility for unlawful entry;

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[7] Ruth Gomberg-Muñoz, "The Juarez Wives Club: Gendered Citizenship and US Immigration Law," *American Ethnologist*, Volume 43. No. , May 2016, 342; Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern* America (Princeton, NJ: Princeton University, 2004), 9.

therefore, this is an opportunity to write the historical implications that this law has had on undocumented migrants, along with the contradictory motivations that have structured the legal framework and immigration policies that exist today. It is also an occasion to fill in a significant gap in our knowledge. The current information on the waiver of inadmissibility for unlawful entry is more technical and exists primarily in adjudication manuals, legal journals or specially commissioned reports. These reports aim to provide information for advocates and immigration law practitioners in non-profits and legal firms on how to understand and create successful waivers. They also deliver information on how to differentiate and understand the difference between other types of inadmissibilities. The few scholarly papers written on the waiver of inadmissibility for unlawful entry have been socio-ethnographic perspectives studying the obstacles and impact on immigrant families. While I have used and have referenced data from these existing sources, the goal of this paper is to analyze and study two accompanying sections of the law, the 9b violation, the punishment, and the waiver, *el castigo,* and *el perdón*, so based on the history of US immigration law and policies, I explain how 9b and its corresponding waiver concurrently punishes and forgives a human being. Accordingly, this study asks the questions: How can the United States of America, founded on moral grounds and being a nation that has in the past embraced moral leadership of the world, require such harsh punishment of undocumented immigrants and divide its families before it can forgive? How can this forgiveness be enmeshed

in a mechanism of discretion so extraordinarily dependent on the political ethos of the time? Without a clear and predicable process, undocumented migrants seeking to obtain legal status have often been buffeted by the prevailing winds of politics where a waiver may be easily approved or may become impossible to receive.

The waiver of inadmissibility for unlawful entry as a mechanism for legalization was institutionalized on September 30, 1996, when Congress passed the Illegal Immigrant Reform and Immigrant Responsibility Act (IIRIRA). IIRIRA established bars on the entries and reentries of undocumented immigrants.[8] The group most affected by IIRIRA and the bars of entry and reentry were Mexican immigrants like José. These migrants, as others before them, were pushed by the lack of opportunities in Mexico and pulled by employment opportunities in the US in the twentieth century. Although Mexican migrants were not excluded at first, the patterns established by the Chinese exclusion which controlled the number, race, ethnicity, and class of immigrants allowed into the US blocked their eligibility to full inclusion and American citizenship.[9] In Chapter 1, I briefly trace the exclusionary history of the United States in the last one hundred and fifty years beginning with the Chinese Exclusion Act of 1882 followed by other immigration policies and laws restricting the entry of immigrants. In particular, this section traces the exclusionary policies through a period when the United States began to determine who could and

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[8] Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

[9] Erika Lee, *At America's Gates: Chinese Immigration during the Exclusion Era*, *1882-1943* (Chapel Hill: University of North Carolina Press, 2003), 9.

could not be included in the nation; the undocumented Mexican immigrant was included only as a laborer but was purposefully excluded as a member of the state. The National Origins Act, the bracero programs, and the Immigration and Nationality Act of 1965 are a few examples of the immigration policies and programs implemented by the US government that affected many Mexicans in their decision to migrate. Consequently, the immigration of the Mexican population was one of open admission when it was convenient to have workers in the US, and of deportations when it was not. Belonging and assimilating was difficult for the Mexican population. The criteria of who could be part of the American ethno-racial mix depended on who was "white" and who passed the morality test to become a citizen. Additionally, there were other conditions that many Mexican migrants also had to confront: passing literacy tests, being free from disease and disability, not becoming a public charge, and being free from association with radical politics to name a few. Administratively, immigration officials controlled citizenship and acceptance based on their discretion of who could or could not belong in the US.

The communities of the undocumented and Mexican immigrant changed and became even more disrupted beginning in the 1990s. The 1990s was a period when the focus of the US was in controlling and deterring illegal immigration. From 1965 to 1996 the pendulum of immigration had switched from accepting immigrants to one of restricting them. Thus, in Chapter 2, I explain, from a historical perspective. the politics and sentiments of the nation that resulted in the harsh and punitive

amendments to immigration laws in the legislation of the 1996 statute, IIRIRA, and the creation of the two hydra monster, *el castigo,* and *el perdón*.[10] The means for immigrants to enter the US legally, in particular for Mexican migrants, was curtailed by immigration policies and significant legislative actions passed by Congress in 1965, 1986 and 1990.[11] The Immigration and Nationality Act of 1965 established a cap on the admission of immigrants from the Western Hemisphere, thereby limiting the entries of Mexicans for the first time and problematically requiring that the US accept only 20,000 entrants, a fraction of the hundreds of thousands that historical records showed had entered to work in the past.[12] The 1986 Act activated additional restrictions but at the same time gave amnesty to approximately three million undocumented immigrants, mostly Mexicans. These newly minted legal residents wanted to unite with their families, and the backlog for family visas spiraled and halted legal migration for years. The Immigration Act of 1990 limited the admission of work visas and low-wage immigrants decreasing the legal migration of low-skilled workers and encouraging illegal entries of unskilled immigrants in the subsequent decades.[13] All three statutes wanted to control illegal immigration, but

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[10] IIRIRA: Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

[11] Heidy Sarabia, "Perpetual Illegality: Results of Border Enforcement and Policies for Mexican Undocumented Migrants in the United States," *The Society for the Psychological Study of Social Issues,* (2011), 51. IIRIRA: Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009(1996).

[12] Ngai, *Impossible Subjects*, 26.

[13] Muzzafar Chishti and Stephen Yale-Loehr, "*The Immigration Act of 1990: Unfinished Business a Quarter-Century Later*," (Washington DC: Migration Policy Institute, 2016), 1, 10.

the demand for labor in the US overshadowed outdated immigration policies creating a large wave of undocumented entries. The politics of the nation that resulted in the amendments to the immigration laws and the legislation of IIRIRA in 1996 became even more punitive as the US political arena grappled with illegal immigration. Public attitudes towards immigration during this period were conflicted. On the one hand, the nation wanted to punish illegal entry and control the invasion of immigrants; on the other, they wanted a nation that could still hold moral leadership in the world. I argue that these national moral sensitivities eventually gave birth to the 9b rule and the waiver of inadmissibility for unlawful entry, *el castigo* and *el perdón*, thus transforming the process of immigration for the subsequent decades particularly for the Mexican community.

The final approval of Jose's waiver of inadmissibility depended on a discretionary process established as part of the immigration system. Therefore, in the first section of Chapter 3, I address the topic of discretion as an immigration mechanism to control the entry and exit of immigrants. An adjudicator has the power of discretion: to accept or deny, and to include or exclude the undocumented migrant. In effect, an immigration officer has the authority to dispense benefits or obstruct them based on their examination of the undocumented entrant's case and their interpretation of the intentions of the 1996 statute.[14] Part of the discretionary process includes judging if an applicant deserves membership in a community. In

[14] *Arizona et al v United States*. 567 U.S. 387 S. Ct. 2492 (2012)

practical terms, during an applicant's immigration process, the determination of belonging may well be a function of the adjudicator's set of beliefs, political inclinations, and moral justifications. Thus, the methodology of the use of discretion has been historically applied both punitively and benevolently to punish and to forgive, again, without clarity or certainty.

While discretionary relief is the hope of many undocumented entrants such as José, the increasing criminalization of the undocumented immigrant has served to justify their moral exclusion from their communities. For this reason, Chapter 3 focuses on the moral implications of discretionary practices in the criminalization of the undocumented immigrant. In exercising the power of discretion an immigration adjudicator is entrenched unwittingly in a convoluted punitive matrix of laws that make an undocumented migrant a criminal before he or she has a chance to prove his or her worth and gain acceptance into an American community. Since the Immigration Act of 1924, Congress established a mechanism to deter illegal immigration designed first to punish violators and, then, forgive.[15] So, while a reconciliation process is in place institutionally, the undocumented immigrant must first admit his or her criminal status to receive the pardon that accompanies his or her crime. In this section of chapter 3, I argue that the state sees this dilemma as its moral obligation to forgive after first instituting punishment. The undocumented entrant accepts this moral process to become a member of the US community.

[15] Ngai, *Impossible Subjects*, 60.

Hence, this section attempts to answer the questions: Why must the United States first punish then forgive? Why does the immigrant community accept this stringent moral procedure to become members of the US community? Notably, this segment will also trace the history of the criminalization of undocumented migrants, their punishment, and the pardon that accompanies some of these crimes. Moreover, it will briefly touch on the history of the reconciliatory process ingrained in the US and its effect on the communities of undocumented migrants, particularly on their families.

As in the story of Jose and Maria, while immigration law portends family unification as a basic foundational practice of US immigration policy, the cases of many undocumented immigrants present contradictory statements as practiced by ruling institutions that proclaim to guide and care for them such as the state and the Church. This section of chapter 3 speaks to the moral contradictions of family reunifications and accentuates the moral dilemma of these contradictions to families who, if they obey the Church, lose their only opportunity to obtain legal status; however, if the families obey the state, they are marginalized morally from their community. Their moral conundrum is based on their illegal entry.

The predicament of how to control and make undocumented immigrants accountable for their illegal entries worsens when they have to navigate through a highly complex and punitive administrative process to legalize their status. The waiver of inadmissibility for unlawful entry, as designed by the 1996 IIRIRA statute,

creates a difficult administrative challenge faced by undocumented immigrants. The journey to achieve reconciliation and remedy their illegal presence, for many undocumented immigrants, becomes burdensome, inconsistent, and uncertain. As such, in this section of chapter 3, I discuss the arbitrary and unpredictable nature of discretion and how the waiver has been processed and adjudicated through an incongruous and variable legal system. Accordingly, because the waiver of inadmissibility for unlawful entry has now become a systemic practice, this section demonstrates the effect of how the waiver has been applied for the last twenty years within a system ensnared with contradictions in the legal system, confusion in the administrative processes, and guesswork in practitioners' offices.

The conflict of administering punishment, conferring forgiveness, and allowing sympathetic discretion confirms the moral dilemma of the United States as a nation in embracing the undocumented into its existing community. In the conclusion section, I argue that despite the harsh conditions that the undocumented immigrant has experienced in the last one hundred and fifty years, there have been exceptions. These benefits that exist through pilot programs, codicils, changes in rules, amendments to the statutes, and political executive discretions have been syncopations in immigration policies that have resulted in more humane treatment of undocumented migrants. As an example, the special provisions of the 245(i) law has helped many undocumented immigrants as it was the only legislation that allowed the adjustment of status without triggering the three- and ten-year bars which is the

reason why millions of undocumented immigrants require a waiver of inadmissibility for unlawful entry. The “V” visas were also exceptional family reunification programs that allowed many to attain work permits while they waited for twenty to twenty-five years for an immigrant visa. The Nicaraguan Adjustment and Central American Relief Act (NACARA) and Violence Against Women Act of 1994 (VAWA), which allowed self-petitions and special humane considerations, was another special exception that eliminated the much harsher violations requiring ten-year punishments.. There were other benefits that, again, were exceptions to an immigration history mired with punitive treatment for those who simply did not fit the American profile.

The harsh restrictions against the undocumented immigrants continue to remain. The waiver of inadmissibility for unlawful entry is the specter and the prime example of the harshness, the seeming contradictions, and the ambivalence that governing bodies impose over an immigrant class. This journey of contradictions is best articulated in IIRIRA highlighted in the 1990s through a small section of the statute, the 9b section of the law and its accompanying cohort, the waiver of inadmissibility for unlawful entry. Accordingly, this paper attempts to delineate the history of this contradiction by relying on secondary sources to confirm immigration history and policies of the last one hundred and fifty years. In addition, it analyzes evidence and perspectives from legal cases studying and referencing court records, reviewing papers written by legal scholars and legal historians, reviewing thesis

papers from other universities, and referencing articles presented in scholarly magazines. This paper also utilizes personal interviews with affected undocumented immigrants whom I have personally interviewed and have followed their journey from an undocumented status to legal permanent residency and to US citizenship. Individuals whose names, I have purposely left as pseudonyms to protect their identities.

CHAPTER 1

POLICIES AND PRACTICES OF MEXICAN INCLUSION AND EXCLUSION IN IMMIGRATION HISTORY

On September 30, 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).[16] IIRIRA established bars on the entries and reentries of undocumented immigrants hoping that amendments to the 1952 Immigration Act would be the solution to the presence of undocumented migrants in the United States. The group most affected by IIRIRA and the bars to reentry were Mexican immigrants. These immigrants as others before them were pushed from their homeland by the need to work and pulled by opportunities found in the United States. However, their entry into the United States was not always welcomed or easy. Crossing the border became not only a challenge but also an opportunity and a rite of passage for impoverished Mexican nationals. Though legislation such as IIRIRA has targeted Mexican immigration, these approaches to restriction and exclusion are part of a larger history going back to the Chinese Exclusion era of the1880s.[17] Hence, this chapter argues that the exclusionary history of the United States, beginning with the Chinese Exclusion Act of 1882, established the precedents of an exclusionary immigration policy that formulated its treatment of undocumented

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[16] Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

[17] Erika Lee, *At America's Gates: Chinese Immigration during the Exclusion Era*, *1882-1943* (Chapel Hill: University of North Carolina Press, 2003), 6.

immigrants through the twentieth century into the present. More specifically, immigration policies towards the Mexican immigrant population reflected the ambivalent behavior of the United States to include or exclude them, elucidating the assumptions that ultimately created the waiver of inadmissibility for unlawful entry. The waiver of inadmissibility for unlawful entry, a creation of IIRIRA and technically a mechanism for inclusion is, in fact, one of the final deterrents to the undocumented Mexican immigrant. The Mexican immigrant's access to citizenship was stymied through strict codes requiring good moral character. The waiver requires strict moral and citizenship standards that are difficult if sometimes impossible to attain. Consequently, I argue that the waiver of inadmissibility for unlawful entry, which impacts the undocumented Mexican immigrant, is specifically punitive, and echoes a nation who is determined to identify who can and cannot be included as members of the United States of America.

Although the Chinese were victims of one of the harshest immigration policies that lasted from the 1870s through the 1940s, the Mexican exclusion was subtler, longer, gradual, and one that continues to reverberate today. As such, Mexican immigration policies in the last one hundred years reflect a history of a nation focused on the inclusion of undocumented Mexican immigrants primarily as laborers while purposefully excluding them from full membership of the United States. For many years, Mexicans were not subjected to quotas or outright immigration policies of exclusion; however, their presence caused derision and

disparagement from some quarters. Mexicans were seen, similar to the Chinese, as inassimilable, racially inferior, and as a social problem.[18] Consequently, to satisfy nativist fears and concerns, US agribusiness enterprises believed that instead of excluding them, they could control and limit Mexican immigration. These attitudes towards the Mexican population was best expressed by Congressman John C. Box who in 1926 co-sponsored a bill to specifically limit Mexican immigration, stating infamously that, "…the continuance of a desirable character of citizenship is the fundamental purpose of our immigration laws. Incidental to this is the upholding of American standards of wages and living and the maintenance of order; all of these purposes will be violated by increasing the Mexican population of the country."[19] Congressman Box denounced the Mexicans for competing with Americans by offering themselves as cheap labor, disparaged their character as not fitting to become Americans, and articulated the fears of a "nativist" nation who believed that Mexicans were a threat to American society.[20] Congressman Box articulated that the Mexican immigrant's presence in the United States was tenuous and designed to be only temporary. Though Congressman Box's legislation never became law, the rhetoric was clearly damaging reflecting the spirit of the times that the Mexican immigrant did not fit the profile of the desirable US citizen.

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[18] Kelly Lytle Hernández, *Migra! A History of the US Border Patrol* (Berkeley: University of California Press, 2010), 28-29.
[19] Lytle Hernández, *Migra!,* 28-29.
[20] Lytle Hernández, 28-29.

The United States from its inception as a nation had a specific profile of whom it wanted to include and whom it wanted to exclude. According to Alexander Aleinikoff and contrary to conventional knowledge, the United States was not a nation of immigrants but a nation-state specifically designed in ethno-racial terms as Anglo-Saxon.[21] The entry of the Chinese ruffled the ideas of "purity" and the new national identity of the late 1800s. Therefore, in 1875, the first national immigration law was enacted to control the involuntary immigration of Chinese contract labor based on moral and undesirable characteristics. Known as the Page Act, this law specifically targeted Chinese immigrants. The Chinese had entered the United States during the California Gold Rush and had provided the cheap labor to build the transcontinental railroads, to extract material from new found mines in the West, and to work in the agricultural fields of California.[22] Their presence in the West created fear, resentment, and panic particularly as most of them were male laborers. As a result, Chinese coolies, convicts, and Chinese women believed to be prostitutes were restricted from entering the US.[23] Concerned that Chinese women were a moral and social threat, politicians pointed to the lack of virtue residing in the character of these women, whom they deemed not fit to become citizens. They were, according to Representative Higby from California, "the most undesirable population of people,

[21] T. Alexander Aleinikoff, *Semblances of Sovereignty: The Constitution, the State, and American Citizenship* (Cambridge MA: Harvard University Press, 2002), 6.
[22] Lee, *At America's Gates,* 26; Mae M. Ngai, *Impossible Subjects: Illegal Alien and the Making of Modern America* (Princeton NJ: Princeton University Press, 2004), 58-59.
[23] Aristide R. Zolberg, *A Nation by Design: Immigration Policy in the Fashioning of America* (Cambridge, MA: Harvard University Press, 2006), 188.

who spread disease and moral death among our white population" Accordingly, because of their "character," Higby believed that these Chinese women could never become US citizens.[24] What was not stated was the fear that this race would quickly reproduce and overtake an Anglo-Saxon nation. It was obvious that prohibiting the immigration of the Chinese, at this period of time, was based primarily on race and "moral character." The use of moral grounds gave the public the justification to negate community and citizenship status to the Chinese.[25] The use of moral grounds would also eventually be the cornerstone to negate citizenship and participation to other immigrant groups in the US. While many other points of exclusions, such as race, have eventually been removed from consideration in entering the US or being part of the nation, morality or having good moral character continues to remain part of the calculus for admitting or excluding immigrants into the United States.

US nativist sentiment in 1875 induced Congress to legislate the first federal restrictions of entry banning persons convicted of "crimes involving moral turpitude," the Paige Act, and culminated in the first exclusion and expulsion of the Chinese throughout the country with the signing of the Chinese Exclusion Act of 1882 into law.[26] However, the "Exclusion" law did not deter the Chinese from continuing to immigrate. Effectively, the Chinese Exclusion Act created the specter of the illegal immigrant as the Chinese began to enter the US surreptitiously through

[24] Daniel Kanstroom, *Deportation Nation: Outsiders in American History*, (Cambridge, MA: Harvard University Press, 2007), 103.
[25] Kanstroom, *Deportation Nation,* 102.
[26] Kanstroom, 110.

Canada and Mexico.[27] The Chinese situation was further exacerbated when they were deemed undesirable and unassimilable by some, and their presence was vigorously attacked. The press helped intensify these views during the early 1900s when it depicted undocumented Chinese as "sneaky," "shrewd," "alien," and "inferior," emphasizing their strange customs and hairstyles as a cultural anomaly "that [was] both sexually and racially ambiguous and threatening." Moreover, because Chinese subjected themselves to inhuman conditions to enter the United States, the Chinese were viewed as racially inferior.[28] The depiction and characterization of the Chinese during this period justified, in the American mind, the exclusion of this group on moral grounds. As such, their exclusion persisted from the 1880s through the 1940s.

During this period in the history of the US, however, not everyone agreed with the exclusion of the Chinese as it reflected negatively on the moral character of the nation. Voices like that of Senator Joseph Hawley of Connecticut critiqued the Chinese Exclusion Act of 1882 predicting that one hundred years later America would note the unjustified reasons to exclude these men and women.[29] However, one hundred years later, in the 1990s, other mechanisms such as the waiver of inadmissibility for unlawful entry were set in place to create arguments for the

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[27] Lee, *At America's Gates*, 166.
[28] Lee, 166-167.
[29] Kanstroom, *Deportation Nation,* 110.

exclusion of similar alien men and women, namely the undocumented Mexican immigrant who had also entered "sneakily and surreptitiously."

The exclusion of other groups continued after the 1880s. Instead of deterring immigration for undocumented immigrants, exclusion and restrictive policies created illegal entries and an undocumented population that was later construed as a criminal and an immoral specter in the US. The Chinese Exclusion Act provided the framework to racialize and exclude other groups and refashioned the restriction of undesirable and unassimilable aliens.[30] Thus, federal laws created immigration policies that controlled, regulated, and blocked the entry of inferior and threatening immigrants.[31] Subsequently, the Immigration Act of 1891 barred other groups from entering and purposefully drew distinctions between immigrants arriving into the US focusing on the economically disadvantaged, those likely to become public charges, convicts, felons, and those with contagious diseases;[32] In addition, from 1903 to 1907, new exclusionary revisions included anarchists, epileptics and the mentally infirm.[33] These limitations became even more fixed as the United States began to establish its identity as a nation of restricted immigrants that considered: class, gender, race, and qualifications for citizenship based on moral turpitude. Officials

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[30] Lee, *At America's Gates*, 30-31.
[31] Lee, 39.
[32] Patrick Ettinger, *Imaginary Lines: Border Enforcement and the Origins of Undocumented Immigration*, (Austin, TX: University of Texas Press, 2009), 12-1930, 11; Eithne Luibhéid, *Entry Denied: Controlling Sexuality at the Border*, (Minneapolis, MN: University of Minnesota Press, 2002), 9.
[33] Luibhéid, *Entry Denied*, 9.

then made decisions about whom to admit and whom to exclude.[34] Yet, the thirst for workers collided with this new ideology of "citizenship," and the fear of strange, unassimilable, or the wrong kind of newcomers cemented more restrictions.[35] The list of exclusions and restrictions from the late 1800s to the early 1900s used in prohibiting undesirable immigrants from entering, initiated during this period, would eventually be used in later decades to deter Mexicans from entering and deporting them afterwards if they did enter.[36]

The exclusion of Chinese migrants at the end of the nineteenth century also created a gap and opened the opportunity for other groups to replace the cheap labor the US needed to continue to grow. The Mexican population responded by migrating north. The transition of the United States to an imperial state at the turn of the twentieth century gave way to a new economic order along the border between the US and Mexico. Concurrently, the emergence of large-scale agriculture and modern methods to distribute produce in the American Southwest also created the need for labor. The Mexican population initially had free access to cross the border as long as their purpose was to work either in agriculture or other "US economic need" but not settle.[37] Between 1900 and 1930, approximately 1.4 million Mexicans migrated into the United States. Their immigration was purposefully "neglected" because they

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[34] Luibhéid, xxii.

[35] Hiroshi Motomura, *Immigration Outside the Law* (Oxford: Oxford University Press, 2014), 17-18.

[36] Joseph Nevins, *Operation Gatekeeper: The Rise of the "Illegal Alien" and the Making of the U.S.-Mexico Boundary*, (Routledge, New York, 2002), 111.

[37] Aviva Chomsky, *Undocumented: How Immigration Became Illegal,* (Boston MA: Bacon Press, 2014), 42-43;

were considered "birds of passage." Their stay in the US was temporary, provided they returned to Mexico after the agricultural season.[38] Consequently, Mexicans were not inspected until the early decades of the 1900s when economic and political developments along the US-Mexico border escalated the entry of both legal and illegal entries of Mexican nationals into the US, and when it became convenient for the agricultural elite not to have them in their territories.[39] In effect, the expansive capitalist dynamics of the US along the US-Mexico border created an ethnic inclusion and exclusion through the exploitation of Mexican labor and resources creating the pull that brought the Mexican population abroad.[40]

The demand for laborers by the US economy coupled with the need to work by Mexican nationals created the dynamic rhythm and movement of people along the borderlands. The US-Mexico border had been, for generations, a contact borderland zone of meetings, mixing, travel, and struggles.[41] The population of the borderlands was a mix of people made up mostly of Indians, Spaniards, mestizos, Mexicans, and Americans. The migrant community, however, who had historically crossed the borderlands were the "lower class Mexicans," an oppressed economic group who were in most cases mobile and in search of work. These mobile communities lived and existed in a fluid borderland before the discovery of mines, the staking of

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[38] Lee, *At America's Gates*, 171.
[39] Ettinger, *Imaginary Lines*, 123.
[40] Francis G. Couvares ed; Interpretations of American history, Immigration: American Assimilation or Transnational Race-making, 128.
[41] Ngai, *Impossible Subjects,* xxiii.

ranches, the founding of border towns, the building of railroads, and the existence of national borders.[42] Within this space, Americans occupied a position of privilege on both sides of the border throughout the late 1800s and early 1900s when the United States converted the borderlands into an industrialized state. North Americans became the key players and power brokers of the new developing economies, and "the borderlanders became [the] 'ethnic' – minorities," the laborers who were transported from one country to the next. Thus, while the Mexican elite and their American counterparts reaped economic rewards, the working-class Mexicans earned lower wages, were slowly displaced from their homes, and moved in and out of the US looking for work; confirming the natural pull of the US for these laborers and establishing a pattern of entry and re-entry of the Mexican national into the US.[43]

From the onset, Mexicans who migrated from different sections of Mexico and came to the borderlands as laborers experienced an unstable situation placing them in exploitable circumstances. The Mexican state did little to curb the violations against its own citizens. Instead, the Mexican state supported the powerful landowners and capitalists who by the end of the nineteenth century had dispossessed millions of Indians and mestizos of their lands.[44] At the end of the

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[42] Samuel Truett, *Fugitive Landscapes: The Forgotten History of the U.S-Mexico Borderlands, (*New York: New York University Press, 2006), 21.
[43] Rachel St. John, *Line in the Sand: A History of the Western US-Mexico Border* (Princeton, NJ: Princeton University Press, 2011), 72.
[44] Deborah Cohen, *Braceros: Migrant Citizens and Transnational subjects in the Postwar United States and Mexico* (Chapel Hill: University of North Carolina Press, 2011) 3. 36.; Gloria Anzaldua, "The Homeland, Aztlan/El otro Mexico," 32.

century, the modernization programs of the Porfiriato aggravated the exodus and movement of both mestizo and indigenous Mexicans. Porfirio Diaz, as the new president of Mexico, implemented a program of modernization from 1876 -1911 on the belief that modernizing Mexico would bring economic success similar to the capitalist economies experienced by the United States and Argentina. He believed that by attracting European immigration, he could mitigate the backwardness of the indigenous and rural mestizos of Mexico. Diaz's campaign for "order and progress" backfired and, instead, converted millions of Mexican *campesinos* from debt peonage to wage laborers thereby inducing an exodus from their lands and homes driving them into the northern areas for work.[45]

The Mexican revolution and other state policies also pushed workers out of their homes while US investments and labor needs continued to uproot Mexican peasants and created the process of Mexican out-migration initiating a migrant pool that traveled to the north for cash.[46] By further delineating an international border and destabilizing the northern Mexican communities, Mexican *campesinos* became marginalized not only by their own state but also by the United States.[47]

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[45] Lytle Hernández, *Migra!* 25.
[46] Chomsky, *Undocumented*, 52. Although the Mexican Revolution was initiated by middle class Mexicans, in the borderlands the movement was popularized by the economic disparities initiated by the government of Porfirio Diaz. Rachel St. John, in her book, *Line in the Sand*, claims that since the beginning of the Mexican Revolution, people of all nationalities, rich and poor crossed the border.
[47] David G. Gutierrez, "*Migration, Emergent Ethnicity, and the "Third Space": The Shifting Politics of Nationalism in Greater Mexico*," the Journal of American History, (sept 1991), 485.

Consequently, the Mexican immigrant laborer became a commodity responding to the economic needs of governmental powerbrokers and immigration policies.

The ambivalent attitude of the US towards Mexicans entering the US at the turn of the century was not solely economic but was retrospectively also designed to socially and morally block their entry. According to historian Mae Ngai, driven by nativist crusaders of the 1920s, Congress and the federal courts created and crafted an ambiance of "political and legal policies imagining 'deserving' and 'undeserving' illegal aliens and 'just and unjust deportations.'" These deportations and numerical restriction policies became more common after the passage of the 1924 National Origins Act.[48] The law established a quota system for countries and regions limiting the number of immigrants allowed to enter the United States each year. The Act defined the "desirability" of the population for admission into the United States limiting certain groups while Europeans received 96% of the total available slots.[49] The National Origins Act established a preferred "white" American race of European descent. Mexicans were legally defined as "white" albeit mixed and impure, but they were not considered racially equal to Euro-Americans.[50] More importantly during this time, though Mexicans were not technically excluded from citizenship, and therefore "naturalization," they were considered inassimilable and racially

[48] Ngai, *Impossible Subjects,* 38, 57; Kanstroom, *Deportation Nation*, 157.
[49] Ngai, *Impossible Subjects,* 17, Lytle Hernández, *Migra!* 9-10.
[50] Ngai, 50.

inferior.[51] The National Origins Act more specifically defined the “moral implications” attached to those who could or could not become part of the US, those who could or could not “naturalize,” individuals who were “socially inferior, culturally alien and politically suspect” emphasizing the desirable characteristics for US citizenship.[52] Mexican immigrants were allowed to naturalize since 1848 because they were “white enough despite not being truly white.” In the middle of the 19th century, it was possible to be Mexican and white.[53] However, in the twentieth century, the Mexican nationality became racialized as nonwhite; the Mexicans were workers, segregated, deportable, and potential public chargers.[54] The Mexican immigrant carried certain characteristics that perpetuated their inequality and discrimination: a different class, and a different complexion.[55] Their integration into the US was a social problem, and as such, citizenship was begrudgingly given to the Mexican immigrant.

The 1924 Act did not restrict Mexican immigration, but it brought to light the issues of undesirable ethnic immigrants. The debate in subsequent years focused on the racial and social problems that Mexican immigrants brought to the Southwest. Labor organizers, xenophobes, and eugenicists who objected to Mexican immigration thought that their immigration jeopardized the core objective of the

[51] Lytle Hernández, *Migra!* 28.
[52] Lytle Hernández, 28-29.
[53] Motomura, *Immigration Outside the Law*, 97-98.
[54] Chomsky, *Undocumented*, 182-183.
[55] Lytle Hernández, 10.

National Origins Act.[56] Essentially, the 1924 Act gave the US a new ethnic and racial map with a state surveillance machine to determine who could enter its borders.[57] The state surveillance machine was the border patrol. In her book, *Entry Denied*, Eithne Luibheid argued that immigration control is a means to construct the nation and the peoples in specific ways literally.[58] Luibheid referred to the patriarchal heterosexual order that the state imagined itself to be affirming that anyone else who did not fit this moral order was a threat requiring discipline.[59] Similarly, Mae Ngai argued that restriction also marked a new thinking in the nation's immigration policy and the new American idea and practice on citizenship, race and the nation–state.[60] Inassimilability was the factor most often used to define citizenship and acceptance into membership.[61] Hence, the 1924 Act established numerical limits and a global racial and national hierarchy that favored certain groups of immigrants and excluded others.[62] European and Anglo-Saxon characteristics were still paramount to membership while the Mexican and "other" immigrants threatened the ethno-racial design of the United States population resulting in placing better control along the borders.

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[56] Lytle Hernández, *Migra!* 27, 28.
[57] Lytle Hernández, 3.
[58] Luibhéid, *Entry Denied*, xviii.
[59] Luibhéid, xix.
[60] Ngai, *Impossible Subjects,* 3.
[61] Ngai, 50.
[62] Ngai, 3.

While there were ideological and moral restrictions placed in defining who could be part of America and who could not, the government also instituted a bureaucratic machine to control border entry and border jurisdiction. In 1917 the Supreme Court gave Congress absolute authority over "foreign relations and national sovereignty" and the power over aliens to give license and permission on who could remain in the United States.[63] Congress, and not the courts, had jurisdiction over immigrants. Congress, as a political machine, would mark the sentiment of the population for or against immigration in the immediate years and would also define the unfettered anti-immigration attitude of the US public in the subsequent decades. Congress, not the courts or the constitution, would establish who was allowed to enter and not enter – making "entry" a political gesture based on the tempo of the nation at any particular time.[64]

Furthering restrictions occurred not only at the borders but also at sending countries, as the 1924 Immigration Act gave American Consuls abroad, through the State Department, the task of distributing visas and keeping tabs of the quota system - in effect establishing the requirement of passports and visas (permission to enter) for admission into the US. The passport was the identifiable feature for nation-states to distinguish citizens from non-citizens, and it became an important feature to attain

[63] Ngai, *Impossible Subjects,* 18.

[64] T. Alexander Aleinikoff, *Semblances of Sovereignity: The Constitution, the State, and American Citizenship*, (Cambridge, MA: Harvard University Press, 2002), 153.

an immigrant visa.[65] The visa process that had been initially installed during World War I was inadequate, and restrictionists wanted a complete overhaul of this process. Upon entry, an immigrant was "presumed admissible unless [an] immigration inspector established the contrary."[66] However, with the new overhaul of the Department of State, the burden of proof switched to the immigrant "prior to embarkation."[67] Hence, the Department of State designed a complex apparatus overseas to specifically address the administrative procedures that the restrictive legislation required: police checks, medical inspections, financial responsibilities, and political interviews.[68] Accordingly, the Department of State, through its embassies abroad, had total jurisdiction of all immigrants coming in from other countries as well as immigrants who had already entered and were still living inside the United States. Immigrants who found themselves in the US would have to go back to their country to be administratively processed to re-enter the US. The State Department, as a political entity, had complete control to implement the restrictions of immigration laws passed in the 1920s, but more importantly, they had the legitimate control of [the] movement [of immigrants].[69] The consular process within the department of state became the bureaucratic procedure for vetting who could and could not be admitted into the US abroad and within the United States.

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[65] Ngai, *Impossible Subjects,* 19; John Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State* (Cambridge UK: Cambridge University Press, 2000), 120-122.
[66] Zolberg, *A Nation by Design*, 244.
[67] Zolberg, 244.
[68] Torpey, *The Invention of the Passport*, 120.
[69] Torpey, 120.

The border patrol, on the other hand, became the physical manifestation of control and restriction along the US-Mexico border. Created by the Immigration Act of 1924, Congress established for the first time an enforcement mechanism to deter illegal entries and deport any person who entered illegally without inspection.[70] Notwithstanding, the act exempted Mexico from numerical quotas. Foreign policy interest and agricultural labor needs protected Mexicans.[71] However, restrictionists believed that the unlimited immigration through the 1920s and the unrestricted immigration of the 1924 policy had made America "different." Thus, to stop illegal and uncontrolled immigration, in 1929 Congress authorized the criminalization of unauthorized entry.[72] Criminal provisions in immigration laws were another way for the government to reassert its sovereignty to control non-citizens in everyday enforcement practices. It was a license to use coercive force against people who had not caused harm to others.[73] It was also a way to deconstruct them from their communities morally. The era of harsh punishment, the criminalization of immigrants, and minimal constitutional protections had begun.

The harsh immigration policies implemented against undocumented immigrants failed to coincide with practical economic needs. As World War I ended, the US emerged as a superpower with the economic prowess to lead the

[70] Ngai, *Impossible Subjects,* 60.
[71] Ngai, 50.
[72] Ngai, 60.
[73] Alverti Ana, "Making People Criminal: The Role of Criminal Law in Immigration Enforcement,*" Sage Publication Journal – Theoretical Criminology* (University of Oxford, 2012) 419, 429.

world. As a result, the US appealed to workers nationally and internationally.[74] Despite inspections and order patrol restrictions, the Mexican border remained open attracting Mexican immigration. However, the 1930s and the Great Depression created high rates of unemployment and hostilities against Mexican workers.[75] Over 400,000 Mexicans, legal and illegal, were repatriated, some against their will. Mexicans once again became disposable. According to historian Benjamin Herber Johnson, Mexicans along the border were entirely expendable to the Mexican state, and to their Anglo neighbors they were irrelevant.[76] Nevertheless, the seeming commoditization of Mexican migrants did not change their human need to look for opportunities and settle for the moral obligation of states to treat them as human beings.

World War II once again created demand for Mexican workers and the US government contracted with the Mexican government granting Mexican farm workers contracts under the bracero program.[77] Mexican migrants entered the United States during the 1940s and the 1950s through the bracero programs providing the cheap and exploitable labor demanded from the farming industry.[78] The programs stimulated the entry of Mexicans both legally and illegally in response

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[74] Luibhéid, *Entry Denied*, 18.
[75] Ettinger, *Imaginary Lines*, 168.
[76] Benjamin Heber Johnson, *Revolution in Texas: How a Forgotten Rebellion and Its Bloody Suppression Turned Mexicans into Americans* (New Haven: Yale University Press, 2003), 209.
[77] Ettinger, 168.
[78] Luibhéid, *Entry Denied*, 20.

to massive labor demands.[79] Their presence resulted not only in the resurgence of anti-immigrant public sentiment mirroring the ideologies of the 1920s, but it also created a migration network of families that entered the US extending beyond the 1960s.[80] As a result, the newly minted restrictionists in the decades following World War II had enough grievances against Mexican immigration not only because it contributed to illegal immigration but also because that it was believed Mexicans lowered the wages of domestic workers.[81]

The bracero programs continued but were substantially reduced in the 1960s. Mexicans persisted in entering the US legally and illegally as the demand for labor surged. Amidst a cultural and social redesign in the US, the Immigration Act of 1965 repealed the system of national origins, opened immigration worldwide, and imposed quotas on the Western Hemisphere for the first time. The 1965 Act also increased enforcement at the US-Mexico border and severely limited immigration from Mexico, the Caribbean, and Latin America.[82] Restricting the entry of the Western Hemisphere to 120,000 immigrants was a reduction and unrealistic quota that further led to the illegal entry of Mexicans and Latin Americans in later decades. Noting that only 20,000 immigrants per year could be admitted from Mexico was ludicrous when between 1942 and 1964, 4.5 million contracts had been offered and

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[79] Ettinger, *Imaginary Lines*, 169.
[80] Zolberg, *A Nation by Design*, 321; Luibheid, 20
[81] Zolberg, 309, 320.
[82] Ngai, *Impossible Subjects,* 260-261, 263; Luibhéid, 24.

hundreds of thousands had entered the US to work as braceros, and in the early 1960s, 35,000 had been accepted for residency status.[83]

The reforms of 1965 ignored the physical relationship between contiguous countries, and the borderland relationship of Mexico and the US where economic, political and cultural bonds were strong and exchanges of goods and migration of peoples were normal.[84] The migration patterns and migration networks established during the bracero programs had become self-perpetuating: a migration industry had emerged along the border and migrants were able to come illegally with ease; employers continued to depend on cheap labor, and the stagnation of the Mexican economy pushed more migrants into the US.[85] Moreover, the Immigration and Nationality Act of 1965 eliminated the national origins quota system, which was widely viewed as discriminatory. It also gave priority to immigrants with relatives living permanently in the United States. The law distinguished between immediate relatives of US citizens, who were admitted without numerical restriction, and other relatives of US citizens as well as immediate and other relatives of legal permanent residents who faced numerical caps.[86] Immediate relatives typically meant a spouse and unmarried minor children younger than twenty-one years old. Families who had children older than twenty-one years old were forced to separate bringing only part of the family legally to the United States, and the others being forced to enter either

[83] Ngai, 261.
[84] Ngai, *Impossible Subjects,* 256.
[85] Motomura, *Immigration Outside the Law*, 45.
[86] US Family Based Immigration Policy; Congressional Research Service, February 9, 2018; 2, 10.

illegally or wait for their turn to enter several years later. So, though the 1965 Act was intended to remove the racially discriminatory language from immigration laws, the law was in effect restrictive because it extended quotas to the Western Hemisphere countries, thus narrowing the possibilities of legal migration from these countries. Paradoxically, then, the 1965 Act expanded illegal immigration specifically from Mexico because the quotas did not match the demand for labor in the US nor responded adequately to family reunification needs of migrating Mexicans.[87] The new preference system, in effect, made it impossible for Mexicans who did not belong to one of the preference categories to immigrate legally to the US. Consequently, unauthorized migrations from Mexico increased in the sixties and seventies.[88] Restrictions and control imposed on the migrants crossing the border became a permanent condition creating eventually millions of unlawful entrants in the twentieth century.[89]

The Mexican laborer from the onset was seen as a transnational product that was courted by US growers and other businesses even though they were seen as objects of derision.[90] Despite the literacy test, segregation of class, and other excludable categories, the Mexican population was still allowed to come in and out of the United States with no quota restrictions prior to 1965 in deference to US

[87] Ngai, 227.
[88] Walter LaFeber, *Inevitable Revolutions: The United States in Central America,* 2nd edition (New York: W.W. Norton & Company, 1993), 362.
[89] Chomsky, *Undocumented*, 138. Ruth Gomberg-Muñoz, "The Juarez Wives Club: Gendered Citizenship and US Immigration Law," *American Ethnologist,* Vol. 43. No. 2, 2016), 340.
[90] Cohen, *Braceros*, 3.

Southwestern agricultural labor interest. The Mexican belonged to a migratory agricultural proletariat external to the politics of the United States nation-state but intertwined with its economic needs.[91] Consequently, migration requirements changed in direct response to the employment demands of the United States.[92] When the US needed labor, they lobbied to bring in Mexicans exempting them from immigration restrictions; when they no longer needed them, they relied on deportation procedures or on the discretion of consular officers in describing a population "likely to become a public charge."[93] Mexicans were disposable. Restrictions and control imposed on the migrants crossing the border became a permanent condition creating eventually millions of unlawful entrants in the twentieth century.[94]

During the 1980s and 1990s, Americans had a distinctive attitude towards illegal immigration, a bipolar perspective. Critics worried that the nation had lost control of its borders, and that an undesirable population invaded the country. At the same time, manufacturing, construction, agricultural, and service industries enjoyed the low wage service of undocumented laborers. Correspondingly, the illegal population in the 1980s grew from 2 to 8 million.[95] After eight-plus years of contentious debating, Congress passed the Immigration Reform and Control Act of

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[91] Ngai, *Impossible Subjects,* 13.
[92] Chomsky, *Undocumented*, 53.
[93] Chomsky, 53.
[94] Chomsky, 138. Gomberg-Muñoz, "The Juarez Wives Club", 340.
[95] Ngai, *Impossible Subjects,* 265-266.

1986 (IRCA).[96] IRCA was envisioned originally as a law that would end most of the problems of illegal immigration and enable the US to regain control of its borders finally.[97] As a deterrent, IRCA attempted to regulate illegal immigration by enforcing border security, establishing a verification system for employers, and imposing sanctions on employers who hired undocumented immigrants.[98] The contrary happened. Illegal immigration continued to rise and many undocumented immigrants remained without legal status. However, a key component of IRCA was the legalization of approximately three million undocumented immigrants, the majority of whom were Mexican nationals, 85 percent of them being undocumented border crossers.[99] IRCA eventually allowed the Mexican immigrant to settle and create communities shifting their family's center of gravity from Mexico to the United States. Five years after IRCA, Mexicans also surpassed other groups in filing for and becoming naturalized citizens.[100]

Undocumented immigrants remained in the United States and continued to take risks of entry and reentries subjecting themselves to a new era of criminal penalties; entering the US was a criminal misdemeanor and re-entry a felony. As a result, what IRCA also accomplished was broadening the use of criminal penalties and enforcement tactics. The unresolved border problems energized the focus on

[96] Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986)
[97] Kanstroom, *Deportation Nation,* 226.
[98] Bryn Siegel, "The Political Discourse of Amnesty Policy," *Akron Law Review*, 2009, 297-298.
[99] Zolberg, *A Nation by Design*, 371- 372.
[100] Zolberg, 372-373.

deporting aliens by increasing immigration violations and identifying serious offenses. A relentless crackdown on “criminal aliens,” particularly of persons convicted of aggravated felonies ensued. An aggravated felony conviction was often defined as lacking “good moral character.” A conviction of this offense eliminated all types of discretionary relief from deportation and naturalization.[101] IRCA became a paradox to President Reagan’s statement upon signing the bill, “Future generations of Americans will be thankful for our efforts to humanely regain control of our borders and thereby preserve the value of one of the most sacred possessions of our people: American citizenship.” President Reagan and Congress’s intent was to create that careful balance of border control and reprieve to illegal entries.[102] IRCA failed to control illegal entry. In the end, the government could not control the biggest pull factor, employer behavior, and the Mexican migrant continued to enter. Correspondingly, millions of Mexican migrants received legal permanent residency between 1988 and 1992 encouraging and continuing both legal and illegal migration.

Illegal immigration continued to be the issue at hand for Congress and for the United States. Economic policies, stable communities, and a sophisticated network of illegal movement contributed once again to the pull and push factors that brought undocumented entrants into the US. In the 1990s, NAFTA required Mexico to abandon the protectionist agricultural policies that gave subsistence farmers a reason

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[101] Kanstroom, *Deportation Nation,* 228.

[102] The Daily Signal, October 8, 2017. “What Trump Could Learn from The Reagan Administration Amnesty.”

to stay in their lands.[103] NAFTA was a three-country agreement between Canada, Mexico, and the United States and went into effect in January of 1994. NAFTA eliminated most tariffs on products traded between the three countries, creating a free trade bloc, yet resulted in disastrous effects on ordinary citizens. NAFTA also facilitated the movement of goods and humans through the border and into different parts of the US.[104] As a result, the US felt invaded by immigrants in the 1990s, and restrictionists came forward passing or attempting to pass laws against immigrants leaving their mark at the state and federal levels. Furthering this immigration dilemma, 1992 brought Republicans and Democrats together at the White House and Congress with a stronger agenda - to control illegal immigration and speed deportation.[105] This dilemma became the background that eventually brought the IIRIRA legislation into place. However, this time the control in immigration could only be achieved through extreme criminal provisions to eliminate the growth of an unwanted population.

Immigration laws and reforms through the 1990s continued to harden the borders differentiating the citizen from the alien.[106] To add to the alien's chagrin, immigration reforms and laws separated him more from an American society that was designed to be mostly Anglo-Saxon. Gunnar Myrdal best summarized this

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[103] NAFTA: Public Law 103-182 (Act of 12/8/93) https://www.uscis.gov/tools/glossary/north-american-free-trade-agreement-nafta.

[104] Zolberg, *A Nation by Design*, 382-384.

[105] Zolberg, 410-411.

[106] Ngai, *Impossible Subjects,* 229.

tension when he said that "An interesting extension of the American dilemma can be found in the field of immigration legislation […] most Americans must experience a sense of moral embarrassment when asked to justify our present immigration laws in light of the democratic concept of 'equal rights and justice for all."[107] The American ideals and dreams did not apply to the millions of Mexican immigrants who were restricted from entering yet continued to come. The statutes of 1996 became the harshest immigration policies focused primarily on the exclusion of the undocumented Mexican immigrants. Their journey to become members of American society would be difficult if not nearly impossible. They would undergo a strict moral test to first become a legal permanent resident, then, a citizen. These tests and processes would be reflected in the undocumented immigrant's application and approval of his or her waiver of inadmissibility for unlawful entry. Upon entry, the undocumented immigrant is not aware that his or her presence sparks one hundred and fifty years of historical tension and ambivalence.

Migration is a natural phenomenon and will continue: wanted or unwanted. The imbalance of power and the asymmetrical political and economic relationships among nations and anachronistic immigration policies that counter capitalism and globalization have made migration inevitable.[108] It is important to note that racial distinction and moral standing became the defining characterization of becoming a member of the American nation for the last one hundred years. The melting pot

[107] Ngai, 228.
[108] Ngai, *Impossible Subjects,* 270.

narrative and affirmation of cultural pluralism has been a direct contrast to the more exclusionary American image at home and abroad that existed during this period, and modern historians have been correcting the linear concept of immigration long held of first, settlement and, then, inclusion into the United States as a migration myth created and imagined.[109] Historians have raised questions about the immigration assimilation narrative, and the myth of Ellis Island as it impedes the real story of ethnic and racial inequality of the United States.[110] The concept of *E Pluribus Unum*, of the "we" was already well defined by the 1900s.[111] The definition was neither plurality nor equal co-existence with others. According to Marilyn Baseler, the preferred American immigrant was "the propertied, industrious, [and] committed republican rather than the wretched refuse from Europe's or any land's teeming shore.[112] Mexicans did not come ashore, but it was the country that sent paupers and workers whose labor was needed temporarily to continue building America.

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[109] Ngai, xxii.
[110] Couvares, Francis G. ed; Interpretations of American history, Immigration: American Assimilation or Transnational Race-Making, 127.
[111] Aleinikoff, *Semblances of Sovereignty*, 3.
[112] Marilyn C. Baseler, Asylum for Mankind: America 1607 – 1800*, (Ithaca, NY: Cornell University Press, 1998), 16.*

CHAPTER 2

THE CREATION OF THE TWO-HEADED HYDRA: FROM 1965 TO 1996 – THE ORIGINS OF *EL CASTIGO* AND EL *PERDÓN*

On April 27, 2016, Representative Raul Grijalva introduced a bill in Congress proposing that immigration policies of the United States reduce removal and detention, restore due process for immigrants and repeal the unnecessary barriers to legal immigration.[113] The bill specifically focused on the three- and ten-year bar resulting from the Illegal Immigration Reform and Immigrant Responsibility Act passed in congress in 1996 (IIRIRA).[114] IIRIRA "created the three and ten-year, and permanent bars, which prohibit[ed] immigrants who have a valid family sponsor from obtaining lawful permanent resident status." By expanding the range of convictions and limiting legal immigration, IIRIRA established additional barriers that restricted the ability of eligible immigrants in obtaining lawful immigration status.[115] Consequently, for the last twenty-five years, those barriers, or bars of inadmissibility for having entered illegally, have stringently held back the undocumented immigrants. The intention of the bill presented by Grijalva in

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[113] H.Res. 708, 114th Congress, 2nd Session (April 27, 2016).

[114] I-212b bars: If an (undocumented) alien accrues unlawful presence in the United States, leaves the United States after accruing the unlawful presence, and then seeks admission during the period specified in (either 3 years or 10 years after the departure, depending on the duration of the accrued unlawful presence), he or she may be inadmissible pursuant to section 212(a)(9)(B)(i) (Three-year and Ten-year bars).

[115] H.Res. 708, 114th Congress, 2nd Session (April 27, 2016).

Congress was to repeal the unnecessary barriers to legal immigration, acknowledging that "immigrants and their families in the United States have inherent dignity and are deserving of human rights."[116] The bill, however, did not pass. The rejection of the bill in 2016 was symbolic of the fact that the sentiments in Congress a quarter of a century later had not changed. The United States had not yet resolved the issues of legal and illegal immigration, and the bars of entry remained the most punitive actions and penalties to legal migration. The spirited fight the three- and ten-year bar provoked in congress in 1995 continued in 2016, enmeshed in ambivalence, contradictions and fear.

The three- and ten-year bar, also known as 9b or *el castigo*, and its accomplice, the waiver of inadmissibility for unlawful entry or *el perdón*, exists today because the means for immigrants to enter the US legally, in particular for the Mexican migrant, was curtailed by immigration policies and major legislative actions passed by Congress in 1965, 1986 and 1990.[117] The 1965 Act capped legal migration from Mexico to the US, ignoring the pre-existing migratory patterns between the United States and Mexico. The 1986 Act enacted more restrictions but at the same time gave amnesty to approximately three million undocumented immigrants, mostly Mexicans. The Immigration Act of 1990 continued with additional criminal

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[116] H.Res. 708, 114th Congress, 2nd Session (April 27, 2016).

[117] Heidy Sarabia, "*Perpetual Illegality: Results of Border Enforcement and Policies for Mexican Undocumented Migrants in the United States,*" The Society for the Psychological Study of Social Issues, (2011), 51. IIRIRA: Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

restrictions and limited the admission of low-wage migrants, thereby decreasing the legal migration of low-skilled workers and encouraging illegal entries of the unskilled migrants in the subsequent decades.[118] All three statutes wanted to control illegal immigration, but the pull and push factors of labor and employment overshadowed outdated immigration policies, creating a large wave of undocumented entries in the decades of the 1970s, 1980s and 1990s.

From 1965 to 1996, the pendulum of immigration switched: from accepting immigrants to one of restricting them; from giving them rights and dignity to criminalizing them; from implementing a liberal ideology to fashioning a more restrictive agenda; and from having a more inclusive society to one of exclusion based on panic and fear. The switch in immigration policies from 1965 to 1996 occurred not only because there were economic and security concerns but also from ideological responses that surfaced with the sudden rise of both legal and illegal immigration. Implemented in 1996, *el castigo* and *el perdón* were administrative mechanisms required from undocumented migrants who wanted to legalize their status yet at the same time specifically designed to deter both the legal and illegal entries that continued to menace the US. As such, this chapter traces the creation of the two headed monster – the 9b statute (*el castigo*) and its accomplice, the waiver of inadmissibility for unlawful entry (*el perdón*) – by analyzing the historical trends and the ideological oscillation that gave rise to illegal immigration and the angst that

[118] Mussafar Chisti and Stephen Yale-Loehr, "The Immigration Act of 1990: Unfinished Business a Quarter-Century Later," *Migration Policy Institute Issue-Brief*; July 2016, 1, 10.

accompanied it. In particular, this chapter reviews the national dynamics leading to IIRIRA and incites discussion to the questions: What agitated the pendulum to move the nation from a liberal immigration policy to a more restrictionist program in thirty years? Why did the US want to stop legal migration from the largest sending country – Mexico? What were the key mechanisms that the US established to stop both legal and illegal immigration? What were the driving factors historically from 1965 through 1990 that led to the passing of the harshest immigration policies and amendments of 1996 in IIRIRA?

According to sociologist Albert Massey, immigration was not a salient issue in 1965. On the contrary, immigration was a back-burner topic for most Americans in the 1960s when America was more focused on civil rights, the war in Vietnam, the sexual revolution, and other societal urban issues.[119] In the 1960s, the United States also enjoyed a robust economy, so the language of immigration was neutral and uncommitted.[120] Additionally, scholar Herbert Dittgen describes the 1960s as a period when both the Republican and Democratic platforms urged that more immigrants be admitted on an equitable basis. The Republicans called for doubling the number of immigrants and an overhaul of the 1924 National Origins quota system, while the Democrats supported ending the quota system, clamoring that it

[119] Douglas S. Massey and Karen A. Pren, "Unintended Consequences of U.S. Immigration Policy: Explaining the Post-1965 Surge from Latin America," *Pop Devl Rev*, 2012, 2.
[120] Monica Dolores Bozquez, "Fear and Discipline in a Permanent State of Exception: Mexicans, their families, and U.S. immigrant processing in Ciudad Juarez," Master of Science in Community and Regional Planning, University of Texas, Texas, 2011, 38.

neither supported democracy nor the universal rights of humanity, specifically that it was "inconsistent with our belief in the rights of man."[121] Idealism and aspirations were the motivators of legislators in the 1960s as Congress sought to enact liberal reforms and introduce greater openness into the immigration system. When President Lyndon B. Johnson signed the Immigration and the Nationality Act of 1965, he expressed the liberal ideology of the day, denouncing the restrictive quotas of racial theories.[122] The racial theories and restrictions from the past were for a moment forgotten; the 1882 Exclusion Act became prehistory, the nativist sentiments of the 1920s were placed behind the door, and the 1924 Origins Act was repealed. For the time being, democratic immigration was welcomed from all nations, and the number of immigrants increased.

Paradoxically, the expectation was to have a more even distribution of immigrants entering the US, yet immigrants from Latin America dominated ingress to the United States in the subsequent decades. In fact, from the 1960s through the 1970s immigration from Latin America had been steadily growing, especially from Mexico.[123] The Immigration and Nationality Act of 1965 established a cap on the

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[121] Herbert Dittgen, "The American Debate about Immigration in the 1990s: A new Nationalism after the end of the Cold War," *Stanford, Electronic Humanities Review*. https://web.stanford.edu/group/SHR/5-2/dittgen.html.
The National Origins Act – also known as The Immigration Act of 1924 limited the number of immigrants allowed entry into the United States through a national origins quota. The quota provided immigration visas to two percent of the total number of people of each nationality in the United States as of the 1890 national census. It completely excluded immigrants from Asia.
[122] Dittgen, "The American Debate about Immigration in the 1990s."
[123] Massey and Pren, "Unintended Consequences of U.S. Immigration Policy," 4, 9.

admission of immigrants from the Western Hemisphere, thereby limiting the entries of Mexicans for the first time and illogically requiring that the US accept only 20,000 Mexican migrants per year, a fraction of the half a million Mexican immigrants that historical records showed had entered annually to work in the past.[124] Also, between 1965 and 1967 the bracero program, a work program that had been implemented from 1942 through 1964, was phased out.[125] The immigration policies and caps did not align with the history of labor recruitment in the hemisphere; the high level of circular migration that had previously existed; the strong connection to the dynamics of labor supply and demand; the role of family networks in sustaining and expanding migration; the motivations of migrants; or the structural transformations that occurred in sending and receiving communities as a result of mass migration.[126] The cap ignored the patterns, traditions and rhythms that had been established by Mexico and the US through existing migrant communities, US-Mexico work programs and employers who were used to the circular immigration patterns of cheap labor.[127]

The subsequent growth of Mexican entries confirmed this established arrangement with existing US-Mexico communities and US-Mexico employment

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[124] Ngai, Mae M., *Impossible Subjects: Illegal Aliens and The Making of Modern America*, (Princeton, New Jersey: Princeton University Press, 2004), 26. Massey/Pren, Unintended Consequences of U.S. Immigration Policy, 3.

[125] The Bracero Program was a series of laws and diplomatic agreements, initiated on August 4, 1942, when the United States signed the Mexican Farm Labor Agreement with Mexico.

[126] Massey and Pren, "Unintended Consequences of U.S. Immigration Policy," *9.*

[127] Aviva Chomsky, *Undocumented: How Immigration Became Illegal,* (Boston MA: Bacon Press, 2014), 52.

opportunities. As a result, the immigration demographics began to change in the 1970s as immigration from Europe decreased and immigration from Mexico increased.[128] Massey further argues that illegal migration increased after 1965 because the temporary labor program had ended and the number of permanent resident visas had been capped, leaving no legal way to accommodate the long established flows.[129] Consequently, illegal immigration increased from 1965 through the 1970s into the 190s as enforcement increased topping circular migration. The increase in illegal migration affected the dynamics of policy responses in the years that followed as it enabled political activists and bureaucratic entrepreneurs to frame Latino immigration as a threat to the nation.[130] Fear ensued and immigration became a crisis. Immigrants had invaded and they needed to be controlled. The Mexican migrant became the "illegal alien." The Immigration Reform and Control Act of 1986 (IRCA) attempted to correct the uncontrolled flow of immigrants from the contiguous south while managing agricultural and labor needs of the agricultural business community. IRCA seemed to acknowledge the contradictions that the 1965 Act had created. In its place, IRCA established an institutional framework that codified Mexicans as "illegals" by broadening the use of criminal penalties and enforcement tactics related to their entry, concentrating on a combination of

[128] Dittgen, "The American Debate about Immigration in the 1990s."
[129] Massey and Pren, "Unintended Consequences of U.S. Immigration Policy," 3.
[130] Massey and Pren, "Unintended Consequences of U.S. Immigration Policy," 4.

employer sanctions, law enforcement and a one-time amnesty program.[131] All the same, IRCA's focus was reinforcement and control of the borders and the strict enforcement of immigration laws.[132] IRCA attempted to address the imminent narrative of the Latino threat, but in retrospect, IRCA failed.

IRCA effectuated an era of immigration crisis, marking the shift from civil sanctions to criminal sanctions for violators of immigration law.[133] According to sociologist Judith Ann Warner, since the 1970s the media along with the federal government and politicians had used criminal statistics and enumeration data to construct undocumented immigration as a social and criminal problem. The passage of IRCA did not reduce undocumented entrance, and anti-immigrant public reaction peaked with the passage in California of Proposition 187 in 1994, creating the "illegal" alien as a dangerous and criminal alien. Concurrently, Mexican immigrants and the US-Mexico border were typically targeted as the major source of the social problem in America and statistics of criminal deportations were presented to support this idea.[134] To exacerbate the situation of the undocumented, in 1988 the Anti-Drug Abuse Act created the "aggravated felons" legal classification, which made immigrants convicted of murder, drug or firearms trafficking subject to deportation

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[131] Chomsky, *Undocumented*, 60.

[132] IRCA: The Immigration Reform and Control Act, Pub. L. 99–603, 100 Stat. 3445, enacted November 6, 1986, also known as the Simpson–Mazzoli Act or the Reagan Amnesty, signed into law by Ronald Reagan on November 6, 1986.

[133] Bosquez, "Fear and Discipline in a Permanent State of Exception," 38.

[134] Judith Ann Warner, "The Social Construction of the Criminal Alien in Immigration Law, Enforcement Practice and Statistical Enumeration: Consequences for Immigrant Stereotyping," *Journal of Social and Ecological Boundaries*, Winter 2005-2006 (1.2) 56-80. 61

after serving their time. Additionally, an Institutional Removal Program (IRP) that expeditiously deported criminal aliens from prison without detention hold was implemented. A combination of these programs and the newly instituted legislative laws to identify criminal aliens engulfed the 1980s.[135] Fear and the illegal crisis cemented the enforcement and criminalization efforts.

The most significant role of IRCA was controlling the border and placing advanced enforcement methods against those who would enter in the future or those who could not legalize. However, IRCA also had as its key components three additional major sections: 1) the legalization of approximately 2.5 to 3 million undocumented immigrants living in the United States; 2) an employer program that allowed undocumented workers in the agricultural sector to apply for legalization; and 3) the provision of additional workers should a shortage of farm labor develop.[136] Yet what is remembered the most amongst pro- and anti-immigration groups today is that IRCA provided amnesty for millions of the undocumented. Congress had granted over three million aliens permanent residency status through the amnesty act of 1986 (IRCA). What is overlooked is that IRCA also advanced the registry date from June 28, 1940 to January 1, 1972, where it stands today. Registry also allowed long-term unauthorized residents who entered the country prior to the cutoff date and who meet specific requirements to become legal permanent residents.

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[135] Warner, "The Social Construction of the Criminal Alien in Immigration Law," 62.
[136] Aristide R. Zolberg, *A Nation by Design: Immigration Policy in the Fashioning of America* (Cambridge, MA: Harvard University Press, 2006), 52.

More than 72,000 persons have legalized under this program since 1987.[137] Registry was an immigration provision that provided a mechanism for certain unauthorized aliens in the United States to acquire lawful permanent resident status. Registry is granted by the Attorney General who has the discretionary authority to grant residency to an applicant who can prove that he or she has a record of lawful admission and has maintained continuous residence, in this case, since before 1972. The registry provision originated in 1906 which charged the Bureau of Immigration and Naturalization with providing at US immigration stations "books of record," where the commissioners of immigration "shall cause a registry to be made in the case of each alien arriving in the United States [...] with the name, age, occupation [...] date of arrival of said alien." The 1929 Act extended this concept of registering new arrivals to permit the registry of "any alien not ineligible to citizenship in whose case there is no record of admission for permanent residence."[138] So, even though there were stringent restrictions on the undocumented migrant, IRCA also facilitated an updated version to the Registry as a method for legalization. However, as in 1929, most Mexican migrants were not aware of this specific opportunity.

The legalization of approximately three million undocumented persons – the amnesty program and the advancement of the registry – did very little to control the

[137] Kamasaki, Charles; Timmons, Susan; Tudi, Courtney; Immigration Reform and Administrative Relief for 2014 and Beyond: A Report on Behalf of the Committee for Immigration Reform Implementation (CIRI), Human Resources Working Group; 2015 by the Center for Migration Studies of New York. All rights reserved; JMHS Volume 3 Number 3 (2015): 283-305; p. 287.
[138] CRS Report for Congress; Immigration: Registry as Means of Obtaining; Lawful Permanent Residence ; Updated August 22, 2001.

flow of unlawful entrants, and the ramifications of all these programs were felt both positively and negatively in the subsequent decades. Truly, IRCA left an impression of hope in the minds of migrants for another amnesty, promoted confusion among policymakers and the public alike, and concurrently encouraged both the legal and illegal inflow of the Mexican population.[139] Once the migrant legalized his or her status, these new residents wanted to unite with their families.[140] Suddenly, their focal point changed from Mexico to the U.S., or, in many cases, to both. The legal permanent resident (LPR) could now bring his family legally into the United States, but the preference category imposed by the 1986 Act would only allow a spouse and minor children to enter legally.[141] Therefore, the LPR could either bring the remainder of the family, the older and married children illegally, or live transnationally in two countries, traveling back and forth. In the conclusion chapter and throughout this research paper, I cite several examples of the ramifications to older children when they enter illegally, never enter at all, or the twenty plus years they have to wait for legalization. The amnesty solution was imperfect at best and a policy failure at worst. Although the focus was to unite families, the 1986 amnesty

[139] Monica Dolores Bosquez, "Fear and Discipline in a Permanent State of Exception: Mexicans, their families, and U.S. immigrant processing in Ciudad Juarez," (Master's Thesis, University of Texas Austin, 2011), 39.
[140] Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986).
[141] Preference categories apply to family members who are not immediate relatives. The visas allotted for these categories are subject to annual numerical limits. https://www.uscis.gov/greencard/family-preference

divided and separated many families with unintended illegal immigration consequences.

To deter illegal entries and stop employment of the undocumented, the 1996 employer sanctions were imposed, but they were weak, fraught with widespread fraud and very difficult to monitor or implement. Control of employer and undocumented employees required an overhaul of American business practices and a bureaucratic machine that the government could not create to enforce nor comply with the 1996 laws.[142] Despite all the efforts to control the undocumented, the IRCA program proved to incite more illegal entries, as the undocumented population increased significantly in the following decades.[143]

While IRCA did not control the flow of the undocumented population, Mexico eventually became the largest source of both legal and illegal entries during the 1990s. The economic factors that pulled migrants to the US were magnets that existing immigration systems could not address. Obtaining a visa in Mexico was difficult, particularly for those who needed to work to survive. It was easier to walk across the border than to meet the demanding conditions at the consular offices. To obtain a work visa, an immigrant had to be vetted by future employers who often had a history of abusing workers.[144] Worse yet, to obtain a visitor visa, the future non-

[142] Zolberg, *A Nation by Design*, 373.
[143] Sarabia, "*Perpetual Illegality*, 51 - 52.
[144] Torrie Hester, *Deportation: The Origins of U.S. Policy*, (Philadelphia, Pennsylvania: University of Pennsylvania Press. 2017) 164-165. Putnam Lara, The Company They Kept: Migrants and The Politics

immigrant had to prove that he or she had strong ties to her country of birth: assets; employment; education; and finally bank accounts or enough resources to finance their trips. Therefore, poor migrants with intentions to work in the US often could not even obtain temporary or visitor's visas to effect entry. The conditions to enter legally were extremely difficult for those who had been displaced from their lands for generations, were discriminated against for centuries, and were barely subsisting. The Mexican migrant was lured to find work anywhere, and a system to cross the border along the US-Mexico border already existed since the era of the Chinese Exclusion Act of 1882.[145] Their only recourse was to enter surreptitiously through the borders illegally. In fact, it was often easier to pay a coyote and cross the river than to meet the strict visa requirements. Consequently, the undocumented population in the United States grew from three million in 1982 to six million in 1990.[146]

Responding to the uncontrolled flow of immigrants and creating an immigration selection system that would meet the future needs of the country, Congress enacted the Immigration Act of 1990 (IMMACT) both as an initial reform to the Immigration and Nationality Act of 1965 and in response to IRCA.[147] IMMACT created a bipartisan group, the Commission on Immigration Reform,

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of Gender in Caribbean Costa Rica 1870 – 1960 (Chapel Hill North Carolina: The University of North Carolina Press, 2002), 8-9.

[145] Chinese and other excludable groups established the existing networks to cross the US and Mexico border.

[146] Massey and Pren, "Unintended Consequences of U.S. Immigration Policy," 9.

[147] Mussafar, Yale-Loehr, "The Immigration Act of 1990," 1.

known also as "the Commission" or the Jordan Commission, to study the prevailing issues of immigration, both legal and illegal. The Commission was composed of nine members: two chosen by Republican leaders and two by Democratic leaders from the House of Representatives; two by the Democratic leaders and two by the Republican leaders from the Senate; and the Chair chosen by the President of the United States. The Jordan Commission contracted eighteen original research papers, held thirteen consultations and fifteen roundtables with government and non-government experts and scholars, held eight public hearings across the country, and conducted seven site visits. [148] The Commission was not the only congressional study, but it was one of several concurrent studies, task forces and immigration committees inside and outside of Congress charged to address the concerns many had on immigration issues. The immigration issues in the 1990s were becoming more complex, convoluted and contradictory. It was obvious that the 1965 and 1986 Acts did not resolve the problem but instead complicated them. As a result, the immigration issues in the 1990s became a collusion of ineffective statutes and public fear, affecting primarily the Undocumented Mexican population.

The 1990s was an unprecedented era where anti-immigrant sentiments of the public began to garner strength based on both material and ideological issues. In the early part of 1993, an economic recession cast a shadow on America aggravating the

[148] Vernon M. Briggs, Jr., "The Report of the Commission on Immigration Reform: (i.e., the Jordan Commission). A Beacon for Real Immigration Reform," Cornell University ILR school, ILR Collection January, 2009, 4.

sentiments towards immigrants.[149] The invasion of Mexicans became real as their numbers and presence also surged. Massey presents data indicating that in 1980 there were approximately 1.13 million undocumented Mexicans living in the United States, and by 1990 the population had grown to 2.04 million. Legal immigration from Latin America also grew despite the 1965 imposition of caps and quotas. With a country quota of 20,000 visas per year beginning in 1976, the expected number of entries of Mexican legal immigration rose to 621,000 in the 1970s, reached 1 million in the 1980s, and peaked at 2.8 million in the 1990s. These unprecedented numbers of both legal and illegal migration resulted in part by the entry of spouses and minor children who were numerically limited but were given a high position in the "preference system" of visa allocations. Additionally, legal residents took advantage of naturalization, as it afforded many benefits to leverage chain migration. These benefits were used by new citizens to expand the use of the preference categories and bring in additional relatives from 1992 through 1994 when under IRCA legal residents could apply for citizenships. [150]

The invasion of both legal and illegal immigrants was exacerbated by fear and security concerns that changed public attitudes towards immigrants. A series of visible and politically charged terrorist attacks began in 1993 and brought safety and security concerns to the highest priority. The 1993 attack on the World Trade Center

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[149] Joseph Nevins, *Operation Gatekeeper: The Rise of the "Illegal Alien" and the Making of U.S.-Mexico Boundary* (New York, Routledge, 2002), 88.
[150] Massey and Pren, "Unintended Consequences of U.S. Immigration Policy," 10-11.

and the 1995 bombing of the Murrah Federal Building in Oklahoma City, as well as other terrorist events against US installations, drove the public to support border enforcement but more dramatically to increase the number of arrests, detentions and deportations within the United States. Before 1996, internal enforcement activities had not played a very significant role in immigration enforcement; afterward, these activities rose to levels not seen since the deportation campaigns of the Great Depression. The conflation of the war on terrorism with the deportation of immigrants changed the attitude and the sentiments of the US public and Congress.[151]

With the "War on Terror" in the background and the seeming invasion of immigrants in the foreground, the Commission proposed immigration policy changes that needed to align with US national interests: that detention and removal be the first and foremost priority; that admission priorities be redefined; that the present legal admission system be shifted away from the extended family toward the nuclear family; that admission move away from the unskilled and toward the higher-skilled immigrant; and that a "modest reduction in the level of immigration" be made to "about 550,000 per year." Following these recommendations, the commission emphasized eliminating the existing family-based admission categories for adult unmarried sons and daughters of US citizens and for adult brothers and sisters of US

[151] Massey and Pren, "Unintended Consequences of U.S. Immigration Policy," 10-11.

citizens. The Commission also recommended "the elimination of the admission category of unskilled workers."[152]

To carry forward the new immigration ideology of the 1990s, President Clinton chose Barbara Jordan to chair the Commission. Jordan was a Democrat who openly challenged President Clint in Zoe Baird's nomination for Attorney General of the United States, urging that Baird be disqualified for knowingly hiring an undocumented woman to care for her son and for failing to pay the social security and unemployment taxes of an undocumented worker.[153] President Clinton, correspondingly, withdrew the nomination. Jordan articulated the anti-immigrant echoes of Congress, the public and the Presidency in 1993, which was the desire to "speed the deportation of the large number of illegal aliens in the country."[154] After the Baird fiasco, President Clinton needed to restore his credibility with both Congress and the public, and Jordan became the symbol to achieve credibility and the new moral compass for the nation.

The 1990s became a period when the presidency and the nation needed credibility as well as a new image redefining the nation's moral principle but more critically a revised political standard. As such, Jordan was the ideal candidate of the

[152] Carlos Ortiz Miranda, *United States Commission on Immigration Reform: The Interim and Final Reports*, Santa Clara Law Review, 38, (1998), 3; [Commission (1997), p. XVII]; Briggs, The Report of the Commission on Immigration Reform, 3-4.
[153] Kammer, Jerry, *Remembering Barbara Jordan and Her Immigration Legacy*, Center for Immigration Studies (2016). https://cis.org/Report/Remembering-Barbara-Jordan-and-Her-Immigration-Legacy
[154] Zolberg, *A Nation by Design*, 410-411.

period: she was a Democrat; had been active in the civil rights movement; was the first woman elected to Congress from Texas; and was the first Southern black female ever elected to the House. Notably, Jordan had soared into the national spotlight on July 25, 1974 with a speech that established her as a moral and political force and defender of the constitution and the rule of law. At that time, Jordan was a freshman member of Congress serving on the House Judiciary Committee which was considering articles of impeachment against President Richard Nixon on crimes connected with the Watergate scandal. Jordan had adamantly stated that even the President was not above the rule of law.[155] So, it made sense that Jordan be the personality to lead the Commission and to set the moral bearings that the nation believed it needed during the 1990s. It is with the leadership of this personality and the context of the political times that Jordan appeared and became the model of those who set the immigration tone for what was to impact a large group of people who lived outside the law in the subsequent decades. Jordan and her Commission asserted the need to stop illegal immigration in 1994, believing that American patience had been exhausted "toward those attempting to overwhelm the will of the American people by acts that ignore, manipulate, or circumvent our immigration laws." Jordan firmly believed that unless the country did a better job to curb both legal and illegal immigration, "we [risked] irreparably undermining our commitment

[155] Mary Beth Rogers, *Barbara Jordan: American Hero* (New York, Bantam Books, 1998), xi.

to legal migration."[156] The Jordan commission presented two preliminary reports to Congress, one in 1994 and another in 1995, and a final one in 1997.[157]

In the preamble of the first interim report, the Commission focused on restoring credibility, hailing this key national issue as a serious problem. More succinctly, Jordan stated that "credibility in immigration policy [could] be summed up in one sentence: those who should get in, get in; those who should be kept out, are kept out; and those who should not be here will be required to leave."[158] The message of the commission was clear. The Commission was willing to propose extreme measures to attain "credibility." In her congressional testimony of 1995 Jordan contended that the "the top priorities for detention and removal, of course, [were] criminal aliens. But for the system to be credible, people actually [had] to be deported at the end of the process."[159] It was under this premise that the Commission worked under Jordan's leadership.

According to Jordan, the focus of the Commission was "immigration" and the "commitment of law." Yet, the Commission had a huge challenge attempting to balance the ideology of having long recognized that immigrants are entitled to the

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[156] https://cis.org/Report/Remembering-Barbara-Jordan-and-Her-Immigration-Legacy
[157] Ortiz, "United States Commission on Immigration Reform," 646.
[158] U.S. Immigration Policy: Restoring Credibility, A Report to Congress, U.S. Commission on Immigration Reform, (1994) 3. Ortiz, *United States Commission on Immigration Reform*, 646.
[159] Testimony before House of Representatives, Committee on the Judiciary, Subcommittee on Immigration and Claims February 24, 1995. https://cis.org/Report/Remembering-Barbara-Jordan-and-Her-Immigration-Legacy

full protection of our constitution and laws while at the same time maintaining that the United States also had the sovereign right to impose appropriate obligations on immigrants.[160] The question of who was an immigrant, who was an American and who could be an American was a difficult balancing act for the Commission. Immigrants in the past century had been regarded as Americans-in-waiting, while in the 1990s immigrants had become and were viewed as the antithesis of Americanization.[161] In fact, Mae Ngai has argued that illegal alienage was not a fixed condition but rather a fluid and changing state, and that under certain conditions, the immigrant could attain legal status and eventually become an American citizen.[162] Citizenship and Americanization became one of the most critical topics of the Commission, but one that befuddled the study. Jordan noted in an article in *The New York Times*, that "Americanization [had] earned a bad reputation when it was stolen by racists and xenophobes in the 1920s. But it is our word, and we are taking it back."[163]

The Americanization ideal, according to Jordan, was the cultivation of a shared commitment to the American values of liberty, democracy and equal opportunity. Jordan saw Americanization as a process of integration, a unifying process by which immigrants become part of the American community.

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[160] Carlos Ortiz Miranda, "United States Commission on Immigration Reform: The Interim and Final Reports," *Santa Clara Law Review*, Vol 38, No.3 (1998), 662-663.
[161] Motomura, *Immigration Outside the Law*, x.
[162] Mae M. Ngai, *Impossible Subjects: Illegal Alien and the Making of Modern America* (Princeton NJ: Princeton University Press, 2004), 6.
[163] The New York Times, "The Americanization Ideal," Barbara Jordan, Sept 11, 1995, 15.

Jordan believed that we could remain united as a nation of immigrants as long as everyone acknowledged that the United States was founded on the rule of law. She refuted claims that opposition to illegal immigration and support for the reduction of legal immigration were anti-immigrant positions.[164] The paradox of Jordan's words were that most immigrants, and in particular undocumented immigrants, were segregated, that often they did not share equal opportunities or legal rights in the US, and that immigration law typically did not follow the rule of law, but rather it had been practiced discretionarily for the immediate last decades. Although Jordan came from a civil rights background, her views and ideology had diametrically switched. Jordan reflected and echoed the discordant sentiments of the public and of Congress in the 1990s. Jordan and her Commission's position were not much different from the restrictionists of the 1920s. In fact, it was the anti-immigrants of the 1990s who were now the racists and xenophobes, only now they were known as "respectable restrictionists," nationalists and anti-immigrants.[165] When the Jordan Commission report was finally released in 1997, columnist Stephen Chapman from the *St. Louis Post-Dispatch* mentioned that the report sided with the "exclusionists" and mirrored the sentiments of Congress during the 1920s.[166]

Jordan's commitment to the "rule of law" made her impervious to understanding the natural phenomenon of illegal migration to meet the pull factors of

[164] Nayla Rush, "Recalling 'The Americanization Ideal': The Legacy of Barbara Jordan," http://fairus.org/issue/societal-impact/recalling-americanization-ideal-legacy-barbara-jordan
[165] Zolberg, *A Nation by Design*, 386.
[166] Zolberg, 411.

US labor. The immigration dilemma was based on the US thirst for cheap labor. The Jordan Reports continued to give priority to future economic considerations of the US, immigration based on education and skill-set. The Immigration Act of 1990 had already limited the admission of low-wage occupations to 10,000 per year, and by 1997, Congress further reduced this number to 5,000 per year. Decreasing the legal migration of low-skilled workers encouraged illegal entries in the late 1990s and in the subsequent decades.[167] Consequently, rigid application of the rule of law to control illegal entries was a misconception and a misrepresentation to set immigration policy. Furthermore, immigration laws had for decades been practiced at the discretion of the executive and congressional branches and reflected the political climate rather than the forceful application of the rule of law. In later years, Jordan's tough-minded stance on immigration made her the target of criticism from many liberal activists who saw the undocumented immigrant as a vulnerable group in need of protection instead of vindictive imputations.[168] Jordan and her Commission, unfortunately, reflected the contentious perception of the public at large in the 1990s, which eventually culminated in the changes of the harsher statutes in IIRIRA.

Prior to the passing of IIRIRA, the US Commission on Immigration Reform published two reports: *Restoring Credibility* in 1994 and *Setting Priorities* in 1995. Both reports were the documents that impacted the draconian amendments to the

[167] Mussafar; Yale-Loehr, "The Immigration Act of 1990," 10.
[168] https://cis.org/Report/Remembering-Barbara-Jordan-and-Her-Immigration-Legacy

immigration statutes of IIRIRA. The first, *Restoring Credibility*, addressed unlawful immigration and focused on immigration enforcement and control.[169] As mentioned earlier, credibility was crucial to the members of the Commission, particularly those who were aware of what was happening along the US-Mexico border towns of San Diego and El Paso. The Commission clearly supported the activities of Operation Hold the Line in El Paso and believed that similar activities be implemented throughout other border areas such as San Diego.[170] The Commission believed that success depended on the prevention of unlawful entry, called interdiction, rather than apprehension after unlawful entry.[171] Credibility also meant that unauthorized migrants who gained entry faced an effective procedure for their apprehension and removal from the country. Furthermore, the Commission agreed with the "frustration" over the nation's inability to "control" illegal immigration and the need to "manage" legal migration.[172] Therefore, in *Restoring Credibility*, the Commission recommended orderly management and control which IIRIRA later translated into expedited removals and summary exclusions for those who attempted to enter with fraudulent or improper documents. The Commission also recommended enforcement at worksites by verifying work authorization and implementing

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[169] Carlos Ortiz Miranda, "United States Commission on Immigration Reform: The Interim and Final Reports," *Santa Clara Law Review,* Volume 38, No 3 1998, 648.
[170] U.S. Commission on Immigration Reform, 1994 Report to Congress, U.S. Immigration Policy: Restoring Credibility (1994).
[171] Ortiz Miranda, United States Commission on Immigration Reform, 652.
[172] Restoring Credibility. U.S. Commission on Immigration Reform, 1994 Report to Congress, U.S. Immigration Policy: Restoring Credibility (1994).

employer sanctions to turn off employment magnets. To secure non-discriminatory work verification the commission recommended a computerized registry through the Social Security Administration and the Immigration and Naturalization Service.[173] Although employer registration was a controversial topic, the study, nevertheless, recommended registering undocumented entrants despite the fact that certain members of the Commission believed this act posed threats to civil liberties and blatantly went against their stated goals. Regardless of the controversies, a weakened version of "registry" entered the rhetoric of IIRIRA.[174]

The Commission's key enforcement strategy, however, was the removal and detention of undocumented aliens and it became its top priority and the harshest recommendation it addressed. Specifically, the Commission recommended that "criminal aliens" receive final orders of deportation before they were released from incarceration, that repatriation to Mexico or other countries be accomplished in the interior of that country as opposed to the border, and that bilateral treaties to transfer criminal aliens to serve their sentences in home countries be used.[175] The Commission articulated not only the tension and contentiousness of immigration issues but also exposed the rhetoric and feelings of the 1990s. These pressures were resolved, albeit stringently and in a punitive fashion, in the IIRIRA immigration statute passed by Congress and signed by President Clinton in 1996.

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[173] Ortiz Miranda, "United States Commission on Immigration Reform," 654-655.
[174] Ortiz Miranda, 655-656.
[175] Ortiz Miranda, 661.

The second report, *Setting Priorities*, re-structured the definition of family only to include the nuclear family. More importantly, the report emphasized that immigrants who enter the US should do so primarily to serve the national interest, albeit the economic national interest.[176] As a result, the new definition of family prioritized the entry of certain family categories and de-prioritized others; for example, the Act no longer gave immediate visas to siblings or older children, thus limiting entry into the United States.[177] The Commission gave various reasons for eliminating other family-based categories. The underlying premise was that immigrants should be chosen on the basis of their economic skills and their contribution to the US economy.[178] *Setting Priorities* lacked an understanding of the implications and of their recommendations to those who were not aware of what the laws were but more specifically for those who were already here. Since the Commission also recommended eliminating public benefits to undocumented migrants except for emergency purposes, the undocumented population who needed medical attention or who had a family member needing medical attention were either forced to have none in the US, pay an astronomical amount or cross the border to get medical assistance in Mexico.

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[176] U.S. Commission on Immigration Reform, 1994 Report To Congress, U.S. Immigration Policy: Restoring Credibility (1994).

[177] U.S. Commission on Immigration Reform, 1995 Legal Immigration Report To Congress, Legal Immigration: Setting Priorities (1995)

[178] Ortiz Miranda, "United States Commission on Immigration Reform," 652.

Another dilemma involved families who had entered legally but could not bring an older child due to the visa restrictions of older children. The process of attaining resident visas often took five to seven years due to administrative delays. During this waiting period, children of legal entrants aged out, forcing them to enter another category where their entry was delayed for another twenty plus years. These children, in turn, entered unlawfully to unite with their families, but if caught at the border they were deported or labeled criminals for entering illegally, thereby posing difficult conditions for them to enter legally at a later date. Administrative delays in the immigration system broke families while the immigrant communities had to recreate and support an illegal system to stay together. The practical and complex lives of transnational immigrants and residents were not taken into account in the halcyon conference rooms where the Commission and Congress vetted the ideal scenarios to protect and regulate borders.

The public debates in Congress, in Commission reports and in studies were about protecting America and its pre-set identity from the uncontrolled invasion of immigrants. A brief review of one of the 3,000-plus papers from the studies presented to the Commission in 1997, *Impact of Federal Welfare Reform on Immigrants*, prepared by the Lewin Group, listed key interviewees and sources. The interviewees were third party contacts to immigrants: professors, directors, senators,

representatives, commissioners, program directors, staffers and others.[179] In the thirteen pages none of the interviewees included actual immigrants, undocumented or otherwise. Additionally, the site visits and roundtable sessions requested by the Commission were concentrated in major cities: Washington D.C., El Paso, Los Angeles, Houston, and Miami, yet none in the actual homes or the actual schools of immigrants affected by the studies. Furthermore, in an example of an announcement for roundtable participants in Austin, Texas by the Commission on January 18, 1995, the Commission requested that the discussion include commissioners, researchers, officials, representatives of local organizations, and other experts. The first roundtable examined the economic and labor impacts of immigration on Texas, with a focus on the Austin-San Antonio area, and the second roundtable focused on the effects of immigration on social and community relations in central Texas.[180] Once again, the roundtable discussions did not include immigrants but third-party speakers and representatives. Additionally, the Congressional hearings chaired by Senator Alan Simpson along with Senator Ted Kennedy in 1995, which proposed to reduce overall immigration and control illegal immigration and to take into consideration the Jordan Commission's recommendations, opened the hearings to senators, representatives, members of the Commission, staff, and legal counsels, yet not, again, to actual affected migrants. The hearing leadership did state that the largest

[179] US Commission on Immigration Reform: March 7, 1998

[180] COMMISSION ON IMMIGRATION REFORM: Central Texas Roundtables; Federal Register / Vol. 60, No. 9 / Friday, January 13, 1995.

interest group was the American people and those representing them.[181] Consequently, the tone and public discussions centered on the political positioning of individual senators in their home state, invoking the invasion and fear of immigrants, the burden to taxpayers or "jobs taken away from Americans."[182] The discussion in Congress never focused on the question of human rights but rather whether immigrants placed a burden on the social and economic system of the US. The liberal principles of the 1960s had ended, and the debate centered on the mounting concern of the public costs of illegal immigration. Social and economic issues became the chorus of Congress even though the predictions of the economic, political and social consequences on the United States would be contradicted in practice.

The historical framework of accepting immigrants at the turn of the twenty-first century became more centered on the social, cultural and moral reflection of the ideal American and on their economic contribution rather than on family unity or moral leadership in the world. The Commission reports were a good study of the historical departure from family reunification to economic considerations, border management and enforcement.[183] And even though not all of their recommendations made it as part of the 1996 IIRIRA Act, the Commission reflected the sentiment of

[181] REFORM OF LEGAL IMMIGRATION Hearing before the Subcommittee of the Judiciary United States Senate one hundred fourth Congress first session on Legal immigration reform proposals; e 13, 1995; Serial No. J-104-45
[182] Dittgen, "The American Debate about Immigration in the 1990s."
[183] Ortiz Miranda, "United States Commission on Immigration Reform," 685.

Congress and the majority of the population: to control illegal immigration and punish those who broke the law. Consequently, the population crossing the borders between the United States and Mexico were caught in a historical conundrum of sometimes being allowed to cross legally and work, while at other times they were restricted or altogether prohibited. Their poverty, race and economic circumstance restricted them while the possibility of work and opportunity lured them daily, urging them to cross and face the consequences. After 1996, crossing the borders illegally had criminal and dire consequences. But these criminal penalties had historical antecedents of exclusion. It was specifically the amendments to the statutes that specified, for example, that any "alien, other than an alien lawfully admitted to permanent residence, who has been unlawfully present in the United States for one year or more, and who again seeks admission within ten years of the date of such alien's departure or removal from the United States, is inadmissible."[184] These became the bars to admission that were implemented in the IIRIRA statute. Congress, representing a contentious population with strong grievances against the immigrant community, took its privilege of protecting the nation from the 1917 Act to impose this unique series of words to keep its borders "safe." Seeking admission meant that, according to the 1924 Act, the alien had to return to his country of origin to finish his consular processing, thereupon triggering a violation to the immigration statute known as 9b and subjecting himself or herself to the three- or ten-year bar,

[184] Section 212(a)(9)(B)(i) and212(a)(9)(B)(ii).

also known as the "punishment" or *el castigo* in Latino communities.[185] In the same breath, Congress also allowed these individuals to obtain a waiver for their inadmissibility for unlawful entry, or *el perdón*, should these individuals have a qualifying relative who is a US citizen or legal permanent resident. The seeming benevolence of the United States as a nation gave the inadmissible alien an opportunity to be pardoned, provided he or she could prove that he or she was a person morally acceptable into this nation.

The transformation of immigration laws in IIRIRA impacted the lives not only of a generation of undocumented entrants but also of the nation as a whole. It took over fifteen years to clarify the meaning of these laws through internal memos, court cases and various legal forms and paperwork in governmental interpretations. Therefore, after briefly analyzing the reports of the Commission one can discern how undocumented migrants and American citizens with ties to undocumented migrants were caught in a non-negotiable middle ground.

The 1996 Illegal Immigration and Responsibility Act signed by President Clinton was an anti-immigrant statute and bequeathed the immigrant's perpetual illegality.[186] IIRIRA criminalized border crossers, established new grounds for inadmissibility, created more measures to criminalize aliens, set a new platform for

[185] Under Section 212(a)(9)(B)(i) and212(a)(9)(B)(ii) of the Act, an alien is inadmissible if the alien has accrued a specified period of unlawful presence, leaves the United States after accruing the unlawful presence, and then seeks admission during the period specified in (either 3 years or 10 years after the departure, depending on the duration of the accrued unlawful presence).
[186] Sarabia, "Perpetual Illegality," 53.

denying admissions to migrants, and excluded judicial reviews from certain removal procedures. IIRIRA also created the need for the waiver of inadmissibility for unlawful entry and created a complicated and complex immigration process for an immigrant to legalize his or her status. Prior to IIRIRA, waivers of inadmissibility existed to remedy criminal activities of immigrants and non-immigrants, but after IIRIRA, a waiver was needed for the simple act of "entry." The politics and ideology of the nation that gave birth to the amendments to immigration laws and the legislation of IIRIRA in 1996 were punitive. The sentiments of the United States during this period were conflicting. On the one hand, the nation wanted to punish illegal entry and control the invasion of immigrants; on the other hand, they wanted a nation that could still hold moral leadership in the world. From 1992 to 1995, the percentage of Americans who wanted to reduce immigration rose from fifty-four percent to sixty-five percent.[187] In thirty years, the pendulum had completely switched; from an open immigration system to blocking legal and illegal immigration. These national moral sensitivities eventually gave birth to a section of the harshest statute of IIRIRA – the 9b, the punishment – and its accompanying cohort – the waiver of inadmissibility for unlawful entry – also known as *el castigo* and *el perdón*, thus transforming the immigration system of legalization specifically for the Mexican community and thus creating a two-headed monster to contend with in the future.

[187] Zolberg, *A Nation by Design*, 386.

CHAPTER 3

DISCRETION AND CRIMINALITY: THE MORAL STRUCTURES OF CONTROLLING IMMIGRATION ENTRIES

In 1929, the United States passed laws that criminalized unlawful entry, and in 1996 changes to these laws were accompanied by severe punishments. Accordingly, when the IIRIRA law went into effect on April 1, 1997, Mexican migrants who had been in the country before that date were immediately embroiled in a series of bureaucratic and legislative challenges.[188] These challenges, however, were not new. Since the 1920s, Congress had attempted to control unlawful entries, creating legal frameworks that both granted discretionary relief and expedited deportation for undocumented migrants who entered to work in the US. As a result, the history of the Mexican migrant community and of their opportunity to remain in the US has been one of discretionary tolerance. Upon entry, unauthorized migrants accepted an invitation to work in the US, and through this "acquiescence" and "discretion" these unlawful entrants established a civil contract to live, to be included and to be given claim to be part of their American communities. While their presence was merely tolerated, their labor was welcomed.[189] Thus, discretion has been the methodology that the US government has used to reconcile having a flexible workforce while managing the unlawful entrant's illegal presence or

[188] IIRIRA: Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996).
[189] Hiroshi Motomura, *Immigration Outside the Law* (Oxford: Oxford University Press, 2014), 14, 21.

acceptance into his or her American community. The use of discretion became an informal mechanism to manage immigration control of the Mexican migrant, but more critically to justify morally accepting or excluding illegal entrants into American society. To further confuse the issue, immigration laws have assigned a stigma of immorality to unlawful entry and unlawful presence, which, in turn, has diminished an unauthorized migrant's inclusion into American society.[190] The moral opprobrium derives from the crime they committed upon illegal entry.

The stigma of immorality has been further perpetuated through legal frameworks that have been placed to control people and manage their "criminal" behavior.[191] In the US, immigration policies and laws have been designed to manage the entry, exit and "acceptance" of undocumented immigrants. Consequently, undocumented immigrants have had to navigate through legal and moral structures of right and wrong; societal systems wherein if they do right, they are accepted; if they do wrong, they are exiled. Correspondingly, among the immigrant community, the words "el castigo" and "el perdón" – the punishment and the pardon, or forgiveness – are inseparable. *El castigo* and *el perdón* is the dialectic that entrenches undocumented entrants into the moral spaces of society and institutions, particularly when upon entering a country without permission an undocumented migrant has committed a violation that requires a pardon from a government or other

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[190] Motomura, *Immigration Outside the Law*, 21.
[191] Stephanos Bibas, "Forgiveness in Criminal Procedure," *Ohio State Journal of Criminal Law*, Vol 4:329), 331-332.

ruling institutions and forgiveness from themselves and their communities. The journey of undocumented migrants encapsulates the dilemma of admissibility and inadmissibility for "unlawful entry" – of how inadmissibility for having entered illegally became a violation and later a crime, a violation that needed to be forgiven and a crime that needed to be pardoned. The quandary of the undocumented migrant and the state is best exemplified in the "waiver of inadmissibility for unlawful entry," e*l castigo* and *el perdón*, which has become the symbolic phoenix of the undocumented entrant.

El castigo and *el perdón* is the dialectical response to the questions of : Why must the United States first punish undocumented migrants, then, forgive? Why do undocumented migrants accept this stringent moral and discretionary procedure of punishment and forgiveness to become members of US communities? In answering these questions, I argue that the United States recognizes the conundrum of illegal entries and the subsequent legalization of undocumented entrants as a moral obligation to forgive after first instituting punishment; the undocumented entrant, in turn, accepts a moral and discretionary process established by the state to become a member of a US community. When an undocumented immigrant enters the US the immigrant and the state are morally, socially and politically connected. To manage this relationship, the state has established a systemic use of discretion, has converted certain violations into crimes against the immigrant, has set up punitive administrative challenges, and has put in place confusing reconciliatory processes.

Thus, in Chapter Three, I will address how discretion is an immigration mechanism used to control the entry and exits of the undocumented migrants, benevolently when it was convenient for the state, and punitively through the use of deportations, when it was economically and politically unfavorable for migrants to be in the United States. Chapter Three also traces how the progressive criminalization of undocumented immigrants justified their moral exclusion from their communities as deportations became more common and discretionary reliefs were infrequent and increasingly rare. Although family unification was the foundation of US immigration policy, this chapter addresses the moral contradictions faced by many undocumented immigrants with ruling institutions when they tried to live in their communities as family members. The dilemma of controlling immigrants, however, has been further exacerbated when undocumented immigrants have had to navigate through a highly complex and punitive administrative process to legalize status. Finally, this chapter will explain the current reconciliatory process that has been institutionalized in the US – the waiver of inadmissibility for unlawful entry – and its effect on the communities of the undocumented within a legal structure ensnared with contradictions, an administration process embroiled in confusion, and legal practices entangled in guesswork. Interpreting the labyrinth of statutes, laws, memoranda and court decisions has been a Sisyphean feat for historians, legal scholars, practitioners, applicants, and government decision-makers.

Favorable discretionary relief is the hope of every undocumented entrant in America to remedy their illegal entry and presence. Yet, the use of discretion and the administrative process which entangles them confirms the tension between the rule of law and the administrative practices in effect for the last century, becoming a national moral dilemma of a nation attempting to protect its borders from those deemed undesirable and from those not eligible to become members of the United States of America.

3.1 Discretion: An immigration mechanism to control the entry and exit of Undocumented Immigrants

Most immigrants entering the US are unaware that their acceptance into American society has been through a selective, dynamic and "discretionary process," responding to the political and economic pressures of the time.[192] Unaware of this process, immigrants have entered the US in search of work and opportunities, some legally and others not. Accordingly, the decision of granting immigration benefits or denials, particularly in the last one hundred and fifty years, has been through a discretionary process rather than the rule of law. This wide discretion was located in the authority invested in the executive branch of the federal government through the plenary powers doctrine, which held that the executive branch had vast discretionary power in certain areas of policy, including immigration. Truly, the power of

[192] Aristide R. Zolberg, *A Nation by Design: Immigration Policy in the Fashioning of America* (Cambridge, MA: Harvard University Press, 2006), 15.

discretion has been an ambiguous component of immigration law. Legal historian Hiroshi Motomura argues that a strict following of the letter of the law would have created a large removable population that administratively would have been impossible to remove.[193] Consequently, discretion, and often discriminatory and selective discretion, has replaced the predictability and uniformity associated with the rule of law.[194] In effect, an official, an officer or an immigration judge ultimately decides if the undocumented migrant can have legal status or not, if they can stay or not. The official or adjudicator who approves or rejects a request of admission via a waiver or other documentation for an unlawful entrant is in essence determining if this person has earned membership in the United States. The fact remains that during the immigration process of the undocumented alien, the determination of "belonging to the US" as discretionarily employed by a government official is ultimately a function of the officer's set of beliefs, political inclinations and moral justifications. The undocumented entrant who has a chance to attain legal status and is able to attain legal permanent residency is at the mercy of the opinion of an immigration officer. Hence, the use of discretion could be applied both punitively and benevolently to punish or to forgive, often without clarity or certainty. While discretionary process became common-place after the 1996 statute with the implementation of the waiver of inadmissibility for unlawful entry, discretionary decisions were part of the immigration process to control entries and exits in the

[193] *Arizona et al v. United States*, 11-182, Supreme Court of the United States, 2012.
[194] Motomura, *Immigration Outside the Law*, 14.

early 1900s. In effect, in the late 1920s, officers at the border who operated independently applied the use of discretion in their day to day operations as a way of enforcing immigration laws.[195]

Contact with border patrol, federal officials or directly with the local and state police became more common for undocumented migrants as stricter policies from 1903 through 1996 made illegal entries a criminal act and created a growing group of criminals, mostly of Mexican immigrants.[196] The laws passed in 1917, 1924 and 1929 became progressively draconian and targeted Undocumented Mexican migrants along the 2,000 mile Mexican border, penalizing entry into the US as a crime. The Wickersham Deportation Report described how the use of discretion, both punitively and benevolently, was used in day to day operations by officers in the borderlands in the 1930s. The Wickersham Reports was a multi-topic study commissioned by President Hoover and published in 1931, directed primarily at studying the 1917 immigration and prohibition laws. Of particular importance was the volume dealing with the violation of immigration and deportation laws where investigator Reuben Oppenheimer cited that the methods utilized by many border officials violated American ideals of due process.[197] The reports specifically

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[195] Kelly Lytle Hernández, *Migra! A History of the US Border Patrol* (Berkeley: University of California Press, 2010), 39-43.
196 Motomura*, Immigration Outside the Law*, 50; Wickersham Commission (UAS National Commission on Law Observance and Enforcement). *Report on the Enforcement of the Deportation Laws of the United States*, Vol 5 (Washington DC: US Government Printing Office, 1931), 32.
[197] Cristina Salinas, *Managed Migrations: Growers, Farmworkers and Border enforcement in the Twentieth Century*, (Austin: University of Texas Press, 2018), 89.

addressed the use of a non-uniform and discriminatory application of discretion that gave individual officers the power to be agent, detective, prosecutor, and judge.[198] Concomitantly, the power granted to the officers via an administrative process to simplify detection and expediently deport ineligible entrants was mostly bereft of civil rights safeguards and gave limited rights to undocumented migrants.[199] In its harshest application, according to the reports, discretion had been applied unjustly, separating families and detaching people from their communities. The actions taken by these border officials, accordingly, ran contrary to the dignity and humane objectives of the US and violated many rights of the undocumented.

The lack of the proper use of discretion was a key issue within the reports. In fact, when the *Wickersham Report on the Deportation of Aliens* was presented in 1931, George Wickersham, chair of the Wickersham Report investigation, requested that limited discretion be granted for people who had entered and violated US laws "when the judgement was just and necessary." The separation of families, according to Wickersham, was often too severe, recommending that the families' hardships be taken into consideration and stating that the "rigid requirement of the current statutes needed to be more consistent with the dignity of a great and humane nation."[200] The reports were concerned that US officials who administered the nation's immigration laws held too much power, leading them to harshly treat immigrants under their care.

[198] Wickersham Commission, *Report on Deportation Laws*, 5.
[199] Wickersham Commission, 7.
[200] Wickersham Commission, 7.

The reports also mentioned that fair and just treatment of any person, even those who were not citizens of the United States, should be protected by the US constitution and be given relief and justice. Henry Anderson, a member of the same commission, expressed disappointment that the report indicted immigration officials yet at the same time concurred and supported the aspiration that future studies would yield better recommendations of how to prevent and control illegal entries with a system that gave more humane deportations.[201] Kenneth Mackintosh, yet another member, mirrored similar sentiments and added that the law itself was rigid and did not give enough discretion to families when adhering to the letter of the law.[202]

Wickersham, Mackintosh and Anderson reflected the concern of the ambivalent and uncontrolled activities of US officials with unlawful entrants since the passing of the 1917 Act, but more critically since the 1924 and 1929 Acts had criminalized crossings with no documentation and had established more regulations to deport undocumented entrants.[203] The Wickersham Reports cited several studies where inspectors interviewed suspects without explanation of their rights, for example: that during the interrogation process their information should be voluntary; or that the alien had the option of "registering" his or her legal status should they

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[201] Wickersham Commission, *Report on Deportation Laws*, 5, 9.

[202] Wickersham Commission, 12.

[203] In brief, the 1917 Act required that immigrants be able to read and write in their native language. It also introduced pre-inspection and more-rigorous medical examinations. It also restricted the immigration of 'undesirables' from other countries, i.e.: imbeciles, epileptics, alcoholics, poor, criminals, beggars, and others. The 1924 Act limited the number of immigrants allowed entry into the United States through a national origins quota. The law also required that all arriving non-citizens to present a visa when applying for admission to the United States.

qualify; or that inspectors accused the alien suspect of lying; or that they had entered the country for immoral purposes.[204] In the early stages of using discretion, the Wickersham Reports identified the inconsistencies of punishing and forgiving and of attempting to carry out immigration laws humanely and justly.

More important than achieving justice in immigration matters, however, were the demands for ensuring domestic security and achieving an ideal US population, conceived in racial, class and gendered terms. To achieve these ends, the border had to be protected from entries of undesirable characters and unlawful entrants. It was presumed that officers at the border were simply doing their duty of protection. The question instead became: who exactly were they protecting? It was not until the end of the nineteenth century and the beginning of the twentieth that the US began to identify the type of people it wanted to block, although it had already defined from the beginning the type of nation it wanted to become.[205] Therefore, to physically deter illegal crossings from the unassimilable or undesirables, Congress officially established the Border Patrol on May 24, 1924. Congress sought to enforce the provisions of the Immigration Act of 1917 to prevent unlawful entries into the United States.[206] By 1924, the plethora of people who "should not" enter overwhelmed individual border patrol officials. In response, the Act of February 27,

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[204] Wickersham Commission, *Report on Deportation Laws*, 99-100.

[205] Zolberg, 4-5; Erika Lee. *At America's Gates: Chinese Immigration during the Exclusion Era, 1882-1943*, (Chapel Hill: University of North Carolina Press, 2016), 7; Daniel Kanstroom, *Deportation Nation: Outsiders in American History*, (Cambridge, MA: Harvard University Press, 2007), 21.

[206] Kelly Lytle Hernández, *Migra! A History of the US Border Patrol* (Berkeley: University of California Press, 2010), 26.

1925 and the *Lew Moy* case decision gave Border Patrol officers broad authority to interrogate, detain and arrest any person engaged in illegal entry or those found in violation of US immigration laws.[207] The *Lew Moy v. the United States* case extended the Border Patrol's reach into the interior of the United States. The case gave broad warrant-less powers to Border Patrol officials to interrogate, detain and arrest immigrants on the notion of "reason to belief" of anyone who was engaged in illegal entry, with the only exception to the alien's immediate property. An unethical official, for example, could simply take this power and violate the rights of anyone he or she believed was an illegal entrant.[208]

In its enthusiastic role of protecting the borders, the Border Patrol followed certain behavioral patterns against the migrants that the US wanted to exclude. Historian Kelly Lytle-Hernández explains that these Border Patrol officers were average working-class men, mainly "white," who used law enforcement to earn a living but who also earnestly opposed unrestricted Mexican immigration into the United States.[209] For them, their role as border guards defined their manhood, confirmed their whiteness, stated their authority, redefined their class, increased their respect and belonging, and accentuated their brotherhood in the borderlands.[210] They held authority over both the agricultural businessmen and immigrants alike, and they had, in most cases, little supervision with no formal training in exercising their role

[207] Lytle Hernández, *Migra!* 35.
[208] Lytle Hernández, 35.
[209] Lytle Hernández, 40-41.
[210] Lytle Hernández, 41.

along the 2,000-mile border between the US and Mexico. These officials experimented with ways to enforce immigration laws according to their own designs. Some of these techniques included patrolling the backcountry trail and conducting traffic stops along major highways with officers questioning anyone they believed were Mexican aliens, essentially profiling;[211] anyone who looked Mexican was guilty until proven innocent. There was no uniform policy of how the Border Patrol could enforce immigrations laws along the border. Instead, they followed questionable practices that accentuated their racism, social stigmas and selective immigration enforcement.[212] At this early time of their formation, the Border Patrol lacked guidelines and a moral compass to regulate thousands of immigrants who came under their jurisdiction. The Wickersham Deportation Report underscored and highlighted these weaknesses.

In the 1930s, the Wickersham Deportation Reports identified issues that were to remain with immigration administrative procedures for the next century: forcible separation of families, voluntary and involuntary departures and punitive actions against undocumented migrants.[213] The underlying message and the sometimes unjustified decisions presented in the reports were the systemic use of punitive discretion. Discretion was often used punitively to deny undocumented migrants access to the full protection of the judicial system. The reports concluded, in favor

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[211] Lytle Hernández, *Migra!* 41, 50.
[212] Lytle Hernández, 46 - 50.
[213] Wickersham Commission, *Report on Deportation Laws*, 8-9.

of the undocumented migrant, that consideration of the extreme hardships of the families and discretionary relaxation be granted to those who were in the process of deportation, as many had already made strong attachments to the US.[214] Effectively, the reports stated the injustices and often inhumane treatment of the undocumented and foreign alien, yet, it did very little to change immigration statutes or the discretionary process for the benefit of the mistreated migrant.[215] Though the reports were timely and prescient, they remained archived in the halls of congressional libraries while Congress continued to pass laws that expeditiously removed undocumented migrants and streamlined administrative processes with little regard to the family values and attachments that these migrants had already made in their communities. The reports revealed the injustices of a system while concurrently justifying the use of discretion to remove aliens. According to the reports, a removal order was an administrative process and could be discretionarily decided, whereas a criminal action necessitated a judicial procedure. The dilemma and contradiction persisted of when to label the alien a criminal or a civil violator. The designation was tied to whether the migrant received a fair or an unfair system of justice. Even though decades later various entries became criminal actions, discretion continued to be the mechanism to deter or accept aliens.[216] Accordingly, the use of discretion has continued to be part of the US immigration system in its most benign use as

[214] Wickersham Commission, *Report on Deportation Laws*, 7.
[215] Frances Fisher Kane, "The Challenges to the Wickersham report," *Journal of Criminal Law and Criminology*, Volume 23, Issue 4 November-December (Winter 1932), 575, 613.
[216] Wickersham Commission, 12.

discretionary relief and in its worst application as immediate deportation for the undocumented "criminal" entrant. In later years, US immigration laws began to criminalize the undocumented migrant, and consequently, discretionary relief began to get harder to obtain.

Once the undocumented entrant was apprehended, the alien remained in an incomprehensible maze. The Wickersham Deportation Reports understood that deportation was an inevitable reality of control. The reports recognized that deportation affected family members – wives, husbands and children. Even though deportation served as the controlling structure against the alien, the government dispensed some discretionary relief to those who they judged as deserving to stay. Alien registration and voluntary departure were examples of the few, if any, discretionary relief available to undocumented entrants during the 1920s and 1930s. The Act of March 2, 1929 gave the Department of Labor authority to give undocumented entrants an opportunity to register. This certificate of registration was similar to a lawful admission into the US.[217] The undocumented migrant could register, provided that he or she had entered prior to 1921, had resided continuously in the US, was a person of good moral character, and had no previous deportations issued. The 1929 Act provided a semi-amnesty opportunity to those who could take advantage of, afford it and wanted to remain in the US. However, according to scholar and historian Mae Ngai, few knew about the registry, understood it or could

[217] Wickersham Commission, *Report on Deportation Laws*, 36.

even afford the fee, and even though many Mexicans could have taken advantage of the registry, they were unaware of its existence. The registry favored European and Canadians, as they made up eighty percent of the recipients.[218] Furthermore, the registry was initially designed for those wanting to become naturalized and needed relief for not having a record of their admission.[219]

Another example of discretionary relief was voluntary departure. Voluntary departure, a softer interpretation of deportation, was offered to aliens who chose to voluntarily depart with no future repercussion should they, in the future, want to reapply for admission or return as a beneficiary of an immediate relative.[220] The undocumented entrant who departed conceded removability but did not have a bar to seek admission in the future. Notwithstanding, failure to depart on or before the date the judge prescribed would have resulted in a fine and a ten-year bar from other types of relief from deportation. The relief ignored that many of these aliens, particularly the Undocumented Mexican migrants, had already formed families in the United States and that they already belonged to communities. Although the voluntary departure relief seemed humane, their forced physical departure was a harsh reality for many of them. These historical silver linings of relief seemed to be in tune with the humane nation that the United States wanted to become, yet any type of

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[218] Mae M. Ngai, *Impossible Subjects: Illegal Alien and the Making of Modern America* (Princeton NJ: Princeton University Press, 2004), 82.
[219] USCIS, "Registry Files, March 2, 1929 – March 31, 1944. https://www.uscis.gov/history-and-genealogy/genealogy/registry-files-march-2-1929-march-31-1944
[220] Wickersham Commission, *Report on Deportation Laws*, 34, 37.

deportation, voluntary or involuntary carried negative social and cultural repercussions that the US seemed to ignore – separation of families and separation from communities that had already been established for years.

Deportation was and is the punishment for violations to immigration law. Deportation was the harshest stigma to someone indicating that he or she did not belonging to this nation. However, if a person showed good moral character, the deportation process could be halted with some provision of relief. These relief systems were often given in the form of discretionary waivers. Nevertheless, not everyone was aware of how these waivers could be presented in court or how they could be administratively processed. As a result, many undocumented immigrants were left to the mercy of administrative officials and immigration judges. More broadly, deportation cases for Mexicans had a double standard, as the government looked at these cases through racial and political lenses, determining who should or who could be included as members of US communities. In her work, Natalia Molina has deconstructed the moral category of the deserving citizen, those who have been deemed worthy of citizenship and have become members of the US community, more specifically who could be pardoned from the punishment of deportation. Responding to the continuous debate of the Mexican "anchor baby," Molina argues that since 1924, American-born babies of unauthorized immigrants were not seen as US citizens, and that the stigma of not belonging had already been

institutionalized.[221] The stigma of illegality, non-whiteness and non-inclusivity was inherited through their parents and governed their deportation status. In effect, mechanisms had been put in place for years to enforce excluding Mexicans from attaining an American identity.[222] Mexicans were seen as racially inferior and as a social burden to society as US citizens; they were criminal, diseased and unassimilable.[223]

Even in the 1930s in a political climate that wanted restrictive immigration laws, some legislators were concerned with the negative effects of deportation on immigrant families in the US, yet that concern was not extended to Mexican immigrants. The Kerr Bill (H.R. 8163), proposed in 1935, would have assisted the many Mexicans bereft of the benefits they could not access. The proposed bill assisted immigrants of "good moral character" with no criminal offenses from being separated from their families, provided that the undocumented immigrant proved hardship, that deportation would have serious consequences for their family, or that their presence was in the best interest of the nation.[224] Although the bill did not pass, the discussion of who could or could not be a member of the US defined that the real intent of the Kerr Bill was to protect European immigrants and not Mexicans.[225] The

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[221] Natalia Molina, "Deportable Citizens: The Decoupling of Race and Citizenship in the Construction of the 'Anchor Baby'" in *Deportation in the Americas*, eds. Kenyon Zimmer and Cristina Salinas (College Station, TX: Texas A&M University Press, 2018), 167.
[222] Molina, "Deportable Citizens," 168.
[223] Molina, 169.
[224] Molina, 173.
[225] Molina, 176.

nation needed to "reckon" with the many mixed-citizenship families and how they could fit in the nation, but in the 1930s the nation had already determined its exclusive national design.[226] Similar to the Registry Act of 1929, there was a predisposed assumption of who could and who could not belong to the US nation. Fairness and justice were granted to America's conception of whiteness and its definition of what it believed was inclusion.[227] No Mexicans or Asians were ever presented in the Kerr Bill hearings. Instead, Russians and European white immigrants were given publicity and sympathy through the media and the public hearings[228] Similar to the Registry Act of 1929, the government wanted to do the right thing, but their moral actions, policies and distribution of justice was imbued through racial lenses. The Undocumented Mexican migrant continued to find barriers to inclusivity and belonging. During the same decade that Congress was debating the Kerr Bill, local and state officials throughout the Southwest and Midwest had executed a large program of repatriating Mexican immigrants back to Mexico, often through means of coercion and intimidation.[229]

[226] Molina, "Deportable Citizens,"174.
[227] Molina, 176-177.
[228] Molina, 176-178.
[229] Francisco E. Balderrama and Raymond Rodriguez, *Decade of Betrayal: Mexican Repatriation in the 1930s*. Albuquerque: University of New Mexico Press, 1995.

3.2 Criminalization of Undocumented Immigrants

Deportation was not the only punishment the immigrant alien feared. If apprehended, the migrant could also be tried as a criminal and punished. Even if the alien remained in the US, the undocumented migrant was assumed to be a criminal first. In the late 1920s, the Department of Labor had jurisdiction of immigrants, and subsequently, the Secretary of Labor had the sole authority to apprehend aliens and deport them.[230] Prior to deportation, if an alien had committed a crime, he or she could be tried, sentenced and imprisoned. Although the alien had a right to judicial review, the Supreme Court held, at that time, that deportation proceedings were not criminal in nature, and even if the alien was entitled to due process, he or she could not invoke certain constitutional safeguards applicable to criminal proceedings.[231] In fact, the Supreme Court added that due process law could be conducted by an administrative body, provided that the hearings were just and fair.[232] Yet the question of fairness, justice and moral correctness was again in the hands of the Department of Labor who mandated that the procedure be simplified via an administrative process to avoid delays and to quickly determine who could or could not enter.[233] As a result, an alien's claim to constitutional protection was adversely determined by a non-judicial administrative process, and in the absence of a judicial procedure these aliens often did not have the protection of *habeas corpus* nor of

[230] Wickersham Commission, *Report on Deportation Laws*, 39.
[231] Wickersham Commission, 44.
[232] Wickersham Commission, 44.
[233] Wickersham Commission, 4-5.

competent counsel.[234] Accordingly, the alien's experience with the US justice system sowed the seed of injustice for the alien.

Consequently, deportations and accusations of other inadmissibilities became part of the practice of criminal violations in immigration law. Criminal law and immigration law became intertwined and, in most cases, limited the opportunities of the undocumented. Legal scholar and law professor, César Cuauhtémoc García Hernández has written extensively on "crimmigration," a new legal term that has conjoined immigration and criminal law and has been implemented in the court systems increasingly for the past three decades. Today, dozens of crimes have resulted in the forcible removal of aliens from the United States. Although criminality and immigration have been inseparable since the 1920s, since 2010 all criminal defense attorneys have been obligated to advise their immigrant clients, legal or not, of the immigration consequences of conviction. The official designation of criminal charges against immigrants began to be vigorously enforced in the mid-1980s with the arrival of migrants pegged as public-safety risks: Mariel Cubans, Haitians and Central Americans, many belonging to indigenous communities and fleeing the civil wars, seeking safety in the United States only to be treated as delinquents and criminals. The shifting migration trends represented danger for the US, and Congress responded with the Immigration Act of 1990, which expanded the

[234] Wickersham Commission, *Report on Deportation Laws*, 4-5. Note: Immigration and Naturalization Services (INS) were at one time under the jurisdiction of the Department of Labor (1903), then the Justice Department (1940), and in 2003, it came under the Department of Homeland Security.

number and type of crimes defined as aggravated felonies, and later with the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, the IIRIRA which created the legal infrastructure for "crimmigration." Three decades later, the halls of the federal government's imprisonment apparatus has been filled by people who have violated the two most commonly immigration crimes – unauthorized entry and unauthorized reentry.[235]

As different types of illegal entries have been criminalized, the barriers for undocumented immigrants to enter the US have increased, making it harder for them to legalize their status. The waiver of inadmissibility for unlawful entry is an example of the anticipated pardon that immigration grants to immigration "lawbreakers," but more specifically to those who have entered the US once and who have only committed the crime of "illegal entry." Therefore, fast-forwarding to the present day, when an undocumented immigrant living in the United States has an opportunity to legalize through marriage or via an existing petition, admission into the US required that the applicant, if unlawful entrant, return to his or her country of origin to receive an immigrant visa.[236] When an applicant attended his or her consular processing, he or she knew that his or her application for admission would be denied and their re-entry prohibited for three or ten years for committing the

[235] César Cuauhtémoc Garcia Hernandez, "Deconstructing Crimmigration," University of California, Davis, Vol 52:197-253, 2018; https://lawreview.law.ucdavis.edu/issues/52/1/Symposium/52-1_Garcia_Hernandez.pdf
[236] The 1924 law also required that all arriving non-citizens to present a visa when applying for admission to the United States. https://www.uscis.gov/uscis-tags/unassigned/visa-files-july-1-1924-march-31-1944

crime of entry without inspection, unless they had an approved "waiver of inadmissibility for unlawful entry" – the pardon. If their waiver was not approved previously, they become eligible to apply for a waiver.[237] While this benefit is a grand reprieve from the federal government, the entry or the entries into the US for many undocumented migrants is much more convoluted and complex.

In addition to the unlawful entry inadmissibility bar, an undocumented entrant also faces fifty four-plus grounds of inadmissibility that a consular official could apply towards the entrant prior to admission: grounds of inadmissibility related to health, criminal actions, economic status, or many others.[238] Unbeknownst to the applicant, some of these grounds have waivers available, and others do not. The most common waiver for the unlawful entrant is the "waiver for inadmissibility for unlawful entry," or the waiver (*el perdón*) for the illegal entry to remove the three- or ten-year bar (*el castigo*). This is *el perdón* and *el castigo*, or 'the punishment" that is renowned in the Mexican immigrant communities.[239]

When an applicant files this waiver, the applicant, or unlawful entrant, is viewed as someone who has broken the law, a criminal or offender that has inflicted

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[237] The 3-year and 10-year bars are also called the bars of inadmissibility.

[238] §212(a). Also 8USC 1182: Inadmissible aliens. http://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title8-section1182&num=0&edition=prelim. Section 212 [8 U.S.C. 1182] - General Classes Of Aliens Ineligible To Receive Visas And Ineligible For Admission; Waivers Of Inadmissibility.

[239] Gomberg-Muñoz, Ruth, "The Punishment/El Castigo: Undocumented Latinos and US Immigration Processing," *Journal and Migration Studies*, 2015, Vol 41, No.14, 2236.

both tangible and intangible harm upon a victim.[240] The applicant, then, should make the necessary restitution. The victim, in this case, is the federal government and the US community that the unlawful entrant inhabits. Stephanos Bibas argues that forgiveness in a criminal procedure takes into account the tangible harms that created a debt for which the offender needs to make restitution; the intangible harms may include an insulting and degrading message that the victim is inferior and that the wrongdoer can do as he or she pleases if not punished. Although we are speaking of a community, the criminal action recognizes that the insult and degradation are moral injuries, creating a moral debt that the wrongdoer owes the victim.[241] In broader community terms, the offender flouted the community's laws and sowed fear and resentment, communicating disrespect for the community and creating a moral debt to the community. Forgiveness involves overcoming one's resentment of an offender for having inflicted an injury. Forgiveness, then, requires that the victim acknowledges his or her moral debt and repairs his or her relationship with the offender. By expressing remorse and apologizing, an offender acknowledges the harm he or she has done. Moreover, a wrongdoer's remorse and apology opens the door to the community's voluntary forgiveness, which fosters reconciliation as well as individual and social healing.[242] Accordingly, the very

[240] Bibas, "Forgiveness in Criminal Procedure," 331-332.
[241] Bibas, 331-332.
[242] Bibas, 332.

action of punishment, impunity and the pardon becomes a moral responsibility to the community and to the government, the state.

For undocumented migrants who have been criminalized as illegal aliens, though the question of who was injured in the crime was unclear, the same logic about crime was overlaid onto the acts of unauthorized migration. Major immigration laws and immigration policies have cast the Mexican migrant as "illegal," reifying their "illegality" by criminalizing them.[243] According to scholar Aviva Chomsky, the undocumented migrant lived internally, exiled in his community. While he or she was physically present, the undocumented migrant had no legal status, no legal paperwork, no permission to vote, and neither authorization to work or to receive health or public benefits. He or she had no proof that they were part of his or her respective society.[244] Consequently, for the Hispanic community, a *castigo*, or punishment, accentuated not only their inferiority as a foreign national entering a land of opportunity – the preferred society – but also their civic exclusion. The *castigo* also emphasized their need for reconciliation in whatever form this preferred society deemed necessary. For centuries, ideas about mobility, institutionalized racism and inferiority placed the Mexican immigrant as racially inferior, whose position was highlighted through an illegal entry whereupon entering

[243] Heidy Sarabia, "Perpetual Illegality: results of Border Enforcement and Policies for Mexican Undocumented Migrants in the United States," *Analysis of Social Issues and Public Policy*, Vol. 12, No. 1, 2012, 51.
[244] Aviva Chomsky, *Undocumented: How Immigration Became Illegal*, (Boston, MA: Beacon Press, 2014), 17.

the land of opportunity, the land of riches and paradise, these sinful and immoral members had caused an injury that needed a *perdón*.[245] The waiver of inadmissibility for unlawful entry is the *perdón* to the three- and ten-year bar (*el castigo*) that an undocumented immigrant triggers in the process of seeking their legal status.[246] For the Hispanic community, in particular, *el castigo* seemed to be a normative association with a crime they had committed – entering the US with no documentation. Not surprisingly, then, achieving *el perdón* required the foreign national to undergo a transformation, manifested as the waiver package, *el perdón*, that each undocumented applicant has to submit, as well as the visa process each must undergo prior to entering the US. The waiver package consists of: submission of testimonials, specifically, evidence that proves "extreme hardship" to a US citizen or a legal permanent resident spouse or parent; proof of good moral character; proof of a strong work ethic; strong connection to family and community in the US; studies of why separation from the alien in the US or why the relocation of the US citizen or legal permanent spouse would cause an incredible hardship. The proofs and evidence is subjective to an unfamiliar government official who ultimately uses discretion to judge the aforementioned and undefined "extreme hardship." The undocumented migrant and his or her family invest time and money to prove the

[245] Chomsky, *Undocumented*, 30;
[246] IIRIRA and the waiver of inadmissibility. In 2013, I-212 (9)(b)(ii) changes via a memorandum - if a US citizen spouse….and in 2016 if the spouse is a legal permanent resident. https://slate.com/news-and-politics/2000/12/what-s-the-difference-between-a-pardon-and-a-commutation.html

migrant's worthiness and his or her deep remorse with no guarantee of the results. Nevertheless, this is the apology that eventually opens the doors for the undocumented immigrant to reconcile with his or her community and to achieve social healing.[247] This is the paradigm of the US: a state demanding adherence to its immigration laws, harshly punishing an illegal entrant and then placing a structure of pardoning him or her via an administrative process – the waiver of inadmissibility for having entered the US unlawfully.

3.3 Moral Contradictions of Family Reunification:

Because of the considerations of family unification, the waiver of inadmissibility for unlawful entry is most often available to spouses of US citizens and legal permanent residents. However, not all family members can take advantage of this waiver. For example, there is no waiver of unlawful entry between siblings or between a child and a parent. Also, it was not until July 1, 2013 that immigration policies finally allowed visa petitions to be filed on behalf of a same-sex spouse in the same manner as those filed on behalf of an opposite-sex spouse. The application of justice even within the immigration system has been selective, harsh and restrictive, and most often dictated by legislative judgements that took neither family nor changing communities into consideration.[248] To institutionalize this application,

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[247] Bibas, "Forgiveness in Criminal Procedure," 332.
[248] Bill Ong Hing, *Deporting Our Souls: Values, Morality, and Immigration Policy* (Cambridge, MA: Cambridge University Press, 2006), 105-107.

the family preference category was established in 1965, preserving the immigration policy that promoted family reunification but with new hierarchies and caveats. Immigration policy since the 1920s had incorporated family relationship as a basis for admitting immigrants. The promotion of family reunification found in current law originated with the passage of the 1952 Act, which first established a hierarchy of family-based preferences that continues to govern contemporary US immigration policy, including the prioritization of spouses and minor children over other relatives, as well as relatives of US citizens over those of legal permanent residents.[249] After the passing of IRCA in 1986, the kinship system was strongly attacked, as critics wanted to eliminate the sibling immigration category. Senator Alan Simpson of Wyoming stated that brothers and sisters were insignificant relatives in US culture. Demographer Charles Keely, the Mexican American Legal Defense and Education Fund, the United Latin American Citizens, and others decried Senator Simpson and the select commission's report against siblings, testifying that "we have enriched our nation with the close ties of nuclear families and brothers and sisters, and posturing this relationship as nepotism was simply political and did not reflect the moral values of this nation."[250] In fact, legal scholar Bill Ong Hing has argued that "the reunification of families serves the national interest not only through the humaneness of the policy itself but also through the promotion of the public

[249] U.S. Library of Congress, Congressional Research Service, *US Family-Based Immigration Policy*, prepared for members and committees of Congress,R43145 (2018), 2.
[250] Hing, *Deporting Our Souls*, 120-121.

order and wellbeing of the nation. Psychologically and socially, the reunion of family members with their close relatives promotes the health and welfare of the United States."[251]

Despite the narrowing definitions allowing for legal channels for families to unite, migrants have sought to unite with their family members in the United States and have had to negotiate their status as "illegal" and unauthorized members of a community within the United States. Oftentimes, that negotiation has required migrants to traverse the multiple moral systems that make judgments on their status, especially within the church and the state. Consider an undocumented immigrant's opportunity to live in an American community and reach some level of reconciliation but has been entrapped in a larger dilemma of two clashing juxtaposed moral institutions – the church and the state. The story of Agustin and Alejandro are examples of undocumented immigrants who have navigated through the legal and moral spaces of both institutions, as well as a history of over one hundred years of exclusionary immigration laws, to become legal and quasi-legal members in their community. Agustin, a thirty-nine-year-old undocumented person, had entered the United States in 1998. His father had originally petitioned for him to enter the US legally in 1993, but while waiting for his petition to be approved, Augustin "aged out." Agustin had turned twenty-one years old, and as a result, Agustin's paperwork remained pending with the new immigrant classification of "adult child" (F2B)

[251] U.S. Congress, *United States Immigration Policy and National Interest, Final Report of the Select Committee on Immigration and Refugee Policy* (1981), 112; Hing, *Deporting Our Souls*, 139.

rather than that of "minor child."[252] Agustin would now have to wait twenty to twenty-five years before processing his residency legal papers. Agustin was subjected to the 1965 preference category immigration change, and as an older child, his family unity was no longer "critical." Only the minor children could now enter the US when the time arrived to receive immigrant visas. Still, he was part of his family. So, while all his family moved to the United States, instead of waiting in Mexico, he entered the US unlawfully. After twenty-one years of living in an undocumented status, Agustin finally had the opportunity to obtain his residency papers, his social security card and, hopefully, a better job. Through that time, Agustin had remained a single man. His F2B immigration classification status did not allow him to be married.

When it was time for him to adjust his legal status in 2013, the July 2013 Visa Bulletin specifically stated that there was a visa available for an F2B "unmarried" son of a legal permanent resident who had a priority date of November 1, 1993 or before.[253] Agustin's petition was dated September 1, 1993, prior to

[252] Aging out and F2B: Agustin's father filed a petition for him in 1993 while Agustin was 19 years old. Under immigration law, a legal permanent resident can only petition his spouse, children under 21, and his single children. The spouse and children under 21 years of age can get a visa once the petition has been approved provided the child is still under 21 years of age (F2A status). Those children who have aged out (turned 21 years of age while the petition was pending prior to approval) must then be re-classified as F2b – adult child. The waiting period or this line can vary from 10 year to 30 years. The Mexico waiting line was typically 20-25 years waiting period before they could obtain a visa.

[253] The Visa Bulletin allows a prospective immigrant to check his or her place in the immigrant visa queue. The Visa Bulletin provides the most recent date for when a visa number is available for the different categories and countries for family-sponsored, employment-based and diversity (lottery) visas. https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin.html; All categories of

November 1993. His time had finally arrived. His elder brother Alejandro had a similar petition, but because Alejandro chose to get married while his case was pending, he could no longer adjust his legal status. Alejandro lost his opportunity because he chose to marry the mother of his children and live a life rooted in traditional family values.[254] Agustin was also brought up in a traditional Catholic upbringing, but for the past seventeen years, he had lived in a relationship without getting married, having three children ages three to thirteen years old. His thirteen-year-old daughter asked him several times why he had not married Aurelia, her mother, questioning her father's faith and his commitment to his family. Agustin would answer her: "*Esto es el sacrificio que tengo que hacer para arreglar mis papeles y quedarme aqui*" (this is the sacrifice I must make to obtain my legal papers and remain in the United States). It was very difficult to explain to friends, his children and other relatives why he could not get married; otherwise, he, too, would have canceled his only chance to adjust his legal status. "*¿Que puedo decir a mis hijos*? *Que puedo responder a mi hija*? *solamente pido que me entiendan*. *¿Como puedo ayudarles a ellos para que tengan también un futuro en este pais*?" (What can

family preference immigrant visas are issued in the chronological order in which the petitions were filed until the numerical limit for the category is reached. The filing **date** of a petition becomes the applicant's priority **date.** https://travel.state.gov/content/travel/en/search.html?search_input=priority+date&data-sia=false&data-con=false&search_btn=

[254] Agustin Flora, interview by author via telephone, Dallas, TX June 29, 2013.

I tell my children? How do I respond to my daughter? How can I help them to have a better future in this country?)[255]

Agustin had decided to live "in sin," unmarried and undocumented, waiting to process his legal status while Alejandro, on the other hand, abandoned his only chance to obtain legal status, choosing, instead, to get married and to live what he considered a moral life. Alejandro accepted his destiny, *el castigo,* while continuing to live in a limbo "legal status," whereas Agustin decided that he will be *perdonado* because his decision was for the greater good of his family. Both Alejandro and Agustin found themselves in a moral dilemma, a moral quandary most undocumented experience in their journey to obtain legal status. Both lived within two structures of authority infused with morality, yet in this case contradicting each other. The Reverend Jesus Montes, pastor of Santa Maria Catholic Church in Dallas, Texas whose members are primarily Mexican Hispanics and are undocumented, has said that many parishioners have asked him how they can marry in the eyes of God, but not "really" marry:

> This question is very difficult. In Mexico, you can marry in the Catholic Church and not be married by civil law. Here, the Catholic Diocese does not allow Catholic couples to marry in the church unless they also sign a marriage license. I am aware that many of my parishioners are just living together. This is not healthy for the families, for their faith, nor for their spiritual growth. I must encourage them as a priest to abandon their legal petition and follow the precepts of the Church.[256]

[255] Agustin Flora, interview by author via telephone, Dallas, TX, June, 2013.
[256] Rvd. Jesus Montes, interview by author, Dallas, TX, July, 2013.

Father Monte's recommendation of living a moral life according to the teachings of the Catholic Church have sometimes forced families to return to Mexico voluntarily, where work is scarce, unemployment rampant and lives tenuous. Others, like Alejandro, will remain in the US, exiled from his community and existing in a legal void.

Agustin and Alejandro are examples of an undocumented population who have found themselves in a "middle space" morally, socially, spiritually, emotionally, and legally. They are constantly negotiating living and working in a community that may or may not accept them socially, in a Church that reprimands them for attempting to attain legal status and live immorally "in sin," and in a state whose rules contradict their moral standards. Migrants like Agustin must grapple with an emotional state of continual mental stress of having to choose right from wrong. Their legal status has brought into question what is good from bad, what is moral from immoral. Entering the United States without permission has a moral implication reflected not only in the interpretation of immigration laws of the United States but also in the interpretation of the lives of many undocumented immigrants. Agustin broke the law and entered illegally because the law was unfair and Agustin could not accept being apart from his family. Agustin did not get married and instead lived in sin because he would lose the only chance he had to be accepted and legal in his community.

Agustin, as many others like him, did not live in a traditional married family. He and his partner were *juntado*, living "in sin" together, while they dreamt of their daughters and sons someday getting married. Both the laws from the Church and State were unjust and went against Agustin's traditions and customs. Therefore, Agustin broke both laws. Today's society and specifically the spaces in the US inhabited by immigrants in concert with other institutions of authority have created conflict and have complicated the lives of undocumented immigrants. Agustin and Alejandro were caught in a legal and moral quandary. While Agustin was able to subsume his conjugal status to his legal opportunity, Alejandro's conscience gave in to the rules of the Church, giving up his only opportunity to legalize his status. Alejandro chose to follow tradition and religious custom that eventually precluded him from ever joining the group, his community of legal residents in the United States, effectually excluding himself and living in internal exile.[257] Agustin, on the other hand, decided to negotiate his morality within a framework of new rules, new traditions, new conflicts, and new customs to fit his basic need to work, have a better life and eventually participate in the group. One chose the state, the other chose the Church. Both initially entered undocumented because the state could not understand their need of family and community. The fact is that while Alejandro lived a moral and religious life in his conscience and internal world, he was subjected to moral judgements by his external society as an undocumented law breaker. Alejandro did

[257] Chomsky, *Undocumented*, 17.

not resolve his moral issues. He had complicated them as he lived in a complicated moral web because of his illegal status in the US. The moral system viewed from people of authority, in this case the Church and State, seemed black and white, yet the rules and policies created and practiced by immigration authorities with respect to the undocumented entrant contradicted this framework.

Agustin did not require the submission of the "legal" *perdón* to adjust his status. As such, he did not need to prove his worth because his 1993 petition allowed him to simply adjust his legal status due to an immigration law passed in 1994 and amended in 2000 giving undocumented immigrants an opportunity to pay a penalty fee provided that they had a petition prior to April 30, 2001. Agustin did not have to leave the US and, therefore, did not trigger the violation that most do when they return to Mexico to receive their visas. Others, however, who enter the US undocumented and were not able to adjust their legal status in the US were required to provide proof of living a moral life and a "non-criminal" status by submitting the waiver of inadmissibility for unlawful entry. Like Agustin, many undocumented migrants have had to negotiate an interpretation of morality within a matrix of institutional requirements. Law and morality, in the case of Agustin and Alejandro, had contradicted each other. Alejandro took *el castigo* and Agustin lived with his own interpretation of being *perdonado*. Alejandro and Agustin's illegal entry forced them to make difficult choices in negotiating the moral repercussions of their criminality.

3.4 Development of the Punitive Immigration Administrative Challenges Post 1996

The act of unlawful entry is considered both a criminal and a civil action. The confusion of when these activities morph from one state into the next has been an administrative challenge resolved, in some cases, through legal battles or time tested interpretations of statutes. The "illegal immigrant" classification and, in particular, the ethnographic and racialized assumptions superimposed by immigration restrictions have bound criminality and inadmissibility together impacting many Mexican immigrants.[258] A point often overlooked is that the demarcation and assumption of "illegal aliens" and "criminal aliens" followed by criminal prosecutions for immigration violations had been more common for the Latino community.[259] Thus, criminal prosecutions and sentencing for unlawful entry and re-entry has been concentrated primarily along the 2,000 mile US - Mexico border where the border patrol has historically established immigration enforcement. The Southwestern border is disproportionally associated with "illegal entrants" and "criminality" focusing on Latin American entrants whose federal prosecutions rose from twenty-three percent in 1992 to forty-eight percent in 2012.[260]

For this reason, in 2013, when the "provisional waiver" for unlawful entry was first instituted, more than sixty percent of the waivers were not approved for

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[258] Ruth Gomberg-Muñoz, "The Punishment/El Castigo: Undocumented Latinos and US Immigration Processing," *Journal of Ethnic and Migration Studies*, (Vol 41, No 15, 2015), 2237.
[259] Gomberg-Muñoz, "The Punishment/El Castigo," 2237.
[260] Gomberg-Muñoz, 2249.

what immigration adjudicators "believed" were possible criminal actions committed by applicants.[261] Denials often stated "reason to believe." The reasons could be based on the best assumptions of the adjudicator upon a careful review of the undocumented immigrant's case. The provisional waiver was a program instituted in 2013 by the government granting certain immigrant visa applicants who were immediate relatives (spouses, children, and parents) of US citizens to apply for provisional unlawful presence waivers before leaving the United States for their consular interview.[262] Before 2013, families were often separated for several years while applicants waited for these waivers to be approved. While the provisional waiver helped maintain families together, early data of provisional unlawful waivers suggested that the provisional waiver program had done little to change the criminalization of undocumented applicants in the last eighty years since the publication of the Wickersham Reports. The widened net cast by 'reason to believe' conferred the suspicion of criminality on more applicants and fortified the distinction

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[261] Susan Schreiber and Charles Wheeler, *Update from the NBC on Provisional Waivers*, 2013. Since March 4, 2013, certain immigrant visa applicants who are immediate relatives (spouses, children and parents) of US citizens or legal permanent residents can apply for provisional unlawful presence waivers before they leave the United States for their consular interview provided that they are statutorily eligible for an immigrant visa and a waiver of inadmissibility for unlawful presence in the United States.
According to USCIS, the rationale for developing the "reason to believe" standard, where the adjudicators made a very quick assessment based on the name check and biometrics results as to whether the applicant might be inadmissible on another ground. Under this standard, adjudicators were instructed to deny all applications involving a criminal conviction, regardless of what the conviction was for, when it occurred, or whether it fell within a recognized exception to inadmissibility, like a petty offense.

[262] Provisional Waiver Program: https://www.uscis.gov/family/family-us-citizens/provisional-unlawful-presence-waivers

between 'criminal' and 'non-criminal' applicants.[263] Instead of clarifying criminal and non-criminal activities by undocumented immigrants, the provisional waiver program and the "reason to believe" in effect caused more administrative confusion.

The case of *Arizona* v. *the United States* in April of 2012 attempted to clarify the criminality and non-criminality of unlawful entrants by defining who, how, and why each actor (violator of immigration law) was considered a criminal and was responsible to criminal penalties. In 1996, a section of the IIRIRA law imposed criminal and civil penalties on employers who employed unauthorized employees, yet another section immediately after imposed only civil penalties on undocumented migrants who sought and engaged in unauthorized employment.[264] The Supreme Court later explained this contradiction in 2012 where it stated that when IRCA was passed in 1986, the statute had an expressed preemption provision barring states from imposing penalties on employers who hired undocumented workers. The preemption clause, though, was silent about whether additional penalties could be imposed against employees.[265] This meant that the Supreme Court relied on the legislative studies of IRCA which emphasized that Congress made a deliberate choice not to impose criminal penalties on aliens who seek or engage in, unauthorized employment. IRCA took into consideration that these aliens were, in most cases, already experiencing employer exploitation because of their unlawful

[263] Gomberg-Muñoz, "The Punishment/El Castigo," 2249.
[264] *Arizona et al v United States*, 567 U.S., 11-182 (2012).
[265] *Arizona et al v United States*, 567 U.S., 11-182 (2012).

and removable status. IRCA's framework took serious considerations that making criminals of the undocumented who engaged in unauthorized work would be inconsistent with federal policy and objectives. The Supreme Court, then, interpreted that "the correct instruction to draw from the text, structure, and history of IRCA was that Congress decided it would be inappropriate to impose criminal penalties on unauthorized employees."[266] However, not all aliens were free from criminal impositions. There were still exceptions and penalties imposed on undocumented migrants who accepted unlawful employment by fraud, perjury, or other statutory violations, and, as a consequence, could not be eligible to have their status adjusted to that of a lawful permanent resident.[267] The Supreme Court sided and took consideration of undocumented migrants and removed criminal employment sanctions.

In effect, *Arizona* v. *the United States* concluded that as a general rule, it was not a crime for a removable alien to remain in the United States or, for that matter, work in the US and for employers to hire undocumented entrants. An important point made by this case was that "Policies pertaining to the entry of aliens and their right to remain here are [. . .] entrusted exclusively to Congress."[268] When and if

[266] *Arizona et al v United States*, 567 U.S., 11-182 (2012).
[267] IRCA: Public Law 99-603 (Act of 11/6/86), was passed in order to control and deter illegal immigration to the United States. Its major provisions stipulate legalization of undocumented aliens who had been continuously unlawfully present since 1982, legalization of certain agricultural workers, sanctions for employers who knowingly hire undocumented workers, and increased enforcement at US borders; *Arizona et al v United States*, 567 U.S., 11-182 (2012)
[268] *Truax v. Raich*, 239 U. S. 33 (1915).

arresting an undocumented entrant, the provisions must be "implemented in a manner consistent with federal law regulating immigration, protecting the civil rights of all persons, and respecting the privileges and immunities of United States citizens."[269] Congress protected the undocumented immigrant from state imposed laws pre-empted by federal laws. Accordingly, Congress also reiterated that unlawful entry and unlawful reentry into the country were federal offenses. Once in the US, aliens would be required to register with the federal government and would need to carry proof of status on their person.[270] Failure to do so is a federal misdemeanor.[271] Their entry was a crime; their presence was not. Failure to carry proof of status was also a crime. The lives of the undocumented continued to be enmeshed in criminal and civil actions with no established clarity how to manage them administratively or discretionarily.

The Supreme Court ruling of 2012 embraced and took into consideration immediate human concerns of the undocumented entrant and the need for family reunification balancing positive and negative reasons for an undocumented entrant to remain in the US which was either stated or inherent in the statute.[272] As such, the exercise of a "just" and "humane" use of discretion was based on studying "sufficient obstacles (in) judgment, [being well] informed by examining the federal

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[269] *Arizona et al v United States*, 567 U.S., 11-182 (2012)
[270] Title 8 U. S. C §§1301 describes aliens who are seeking entry and §§1306 requires that aliens required to be fingerprinted and willfully fails to register are guilty of a misdemeanor. Arizona et al v United States, 9.
[271] *Arizona et al v United States*, 567 U.S., 11-182 (2012)
[272] *Arizona et al v United States*, 567 U.S., 11-182 (2012)

statute as a whole, and identifying its purpose and intended effects."[273] The examination of all these factors was possible through waivers. Thus, waivers became an inherent part of the administrative immigration process, and under immigration statutes, waivers have been available to provide for the unification of families and avoid the hardship of separation. Still, the waivers are discretionarily granted and continue to be challenged through an official's interpretation of statutes.

One essential critical component of a discretionary waiver is membership in the community. Belonging, however, is and could be a flexible state. To attain discretionary relief, an undocumented migrant must prove that he or she is a critical component of a community, have good moral character, and be worthy of consideration.[274] In this regard, Mae Ngai probes the question of illegal alienage as not being a fixed condition but rather a contingent and unstable position whereby under certain conditions, an undocumented migrant can adjust status, attain legal residency, and eventually become a US citizen.[275] Correspondingly, legal scholar Linda Bosniak confirms the flexible condition of the undocumented in the US and addresses the issue of substantive citizenship as a civic virtue and as a group social identity. The very nature of being present in the US has made undocumented migrants members of their communities who have established strong permanent

[273] *Arizona et al v United States*, 567 U.S., 11-182 (2012)
[274] Wickersham Commission, *Report on Deportation Laws.*
[275] Mae M. Ngai, *Impossible Subjects: Illegal Alien and the Making of Modern America* (Princeton NJ: Princeton University Press, 2004), 6.

roots in this country.[276] Many noncitizens participate in their community without possessing the formal status of "citizen."[277] The official/adjudicator who approves or rejects a waiver for an unlawful entrant determines if this person has earned membership or can be considered a member of the community of the United States and requests proof of this membership. Notwithstanding, during the actual evaluation of an applicant's case, the applicant is subjected through a process of criminality, reconciliation, and finally, status of membership. Precisely because of these conditions, the waiver of inadmissibility for unlawful entry and its discretionary practice for unlawful entrants is a severe rite of passage, a severe series of administrative challenges put into effect with the IIRIRA statute of 1996.

The amendments to the existing immigration laws of the 1996 IIRIRA statute conjointly narrowed discretionary relief as a mechanism of administering immigration law and enforcement.[278] More specifically, in 1996, Congress implemented changes that were designed primarily to reduce the opportunities for criminal aliens to obtain administrative relief and to facilitate their removal from the United States by restricting and streamlining their deportation.[279] The effect of these altered laws took a heavy toll on a large undocumented population whose future had already been marked by inconsistency and unpredictability. Since 1917, Congress

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[276] Wickersham Commission, *Report on Deportation Laws*, 26.
[277] Chhunny Chhean and Chia-Chi Li, "In Brief: Linda Bosniak's The Citizen and the Alien," 14 *Asian Am. L.J.* (2007), 245-246. https://scholarship.law.berkeley.edu/aalj/vol14/iss1/9/
[278] Motomura, *Immigration Outside the Law*, 26; Doris Meissner memo - Nov 17, 2000.
[279] *INS v St. Cyr*, 533 U.S. 289 (2001). H.R. Rep. No. 1086, 87th Cong., 1st Sess. 23 (1961).

had attempted to balance an alien's opportunities for judicial discretion and immediate deportation, and from 1961 through 1996, Congress continued to revisit the need to streamline deportability since it believed that aliens resorted to continual appeals to delay their deportation.[280] Since Congress' fundamental purpose was to abbreviate deportation procedures, the 1996 statute re-casted a comprehensive new immigration framework creating new forms of discretionary reliefs with stricter eligibility terms.[281] These changes were specifically designed to reduce opportunities to "criminal aliens" therein preventing them from obtaining relief from deportation and facilitating their removal from the US. Nonetheless, the expansion of "criminal" designations accelerated the bureaucratic challenges undocumented immigrants continued to encounter. Additionally, the stricter framework and eligibility requirements of 1996 did not alter the inconsistency and unpredictability of discretionary relief; instead, it brought more confusion.

3.5 Confusion of the Reconciliatory Process: The Waiver of Inadmissibility of Unlawful Presence

On September 30, 1996, Congress executed IIRIRA into law; Congress rendered that the amendments and new provisions would take effect on April 1, 1997. In the same 1996 legislation, Congress also introduced the harsh and punitive

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[280] *INS v St. Cyr*, 533 U.S. 289 (2001). In 1961 Congress' leading issue was that aliens had resorted "to repeated judicial reviews and appeals for the sole purpose of delaying their justified expulsion from this country."
[281] *INS v St. Cyr*, 533 U.S. 289 (2001).

sections known as 9b1 (the three-year bar), 9b2 (the ten-year bar), and 9c1 (the permanent bar).[282] These bars were punishments of varying lengths depending on how long the migrant had been in the country after first crossing the border (9b), or how often he had crossed the border (9c). The 9b statute became 9b1 and 9b2. The 9b1 section described undocumented entrants who were ready to receive immigration benefits, immigrant visas, or an adjustment status to become a legal permanent resident finally. If that person was unlawfully present in the United States for more than 180 days but less than 365 days and, then, departed the US, that person would not be allowed to return to the US for three years. Similarly, 9b2 described that when an undocumented entrant was ready to receive an immigration benefit, an immigrant visa, or an adjustment status to finally become a legal permanent resident, if that person was unlawfully present in the United States for more than 365 days and, then, left the US, that person would be barred from returning to the US for ten years. The remedy to these bars was the "waiver of inadmissibility for unlawful presence." This particular waiver of inadmissibility pardoned the undocumented migrant for entering unlawfully and staying for more than 180 days, but less than 365 days. He or she thus avoided the three year bar, or for staying in the US for more than 365 days, again avoiding the ten year bar, provided that the undocumented migrant had a spouse or a parent who would undergo extreme hardship, and provided that the undocumented migrant qualified for this waiver. The other harsher

[282] INA §§ 212(a)(9)(B) [9b] and 212(a)(9)(c) [9c].

accompanying statute, 9c1 (9c), however, stated that if a person had been removed from the United States and came back or attempted to come back without being admitted, that person would not be allowed to receive an immigrant visa. He or she would also not qualify to adjust his or her status until he or she returned to his or her country and remained there for ten years. The 9c bar further stated that if the undocumented migrant had stayed in the US for more than 365 days, left the US, and entered unlawfully without being admitted, that person would not be qualified to receive an immigrant visa for ten years until he or she returned to his or her country and stayed there for ten years. There is no waiver of inadmissibility for 9c, and because of the lack of a waiver, this condition is called the "permanent bar."[283] The word "permanent bar" is a misnomer as it is not permanent, and it only applies for ten years. See figure 3.1 to understand the difference between 9b and 9c.

Practitioners and advocates realized that the 9b1, 9b2, and the 9c1 bars exclusively affected most of the undocumented migrants who entered the US from Mexico. The 9b and the 9c bars took effect on April 1, 1997, and undocumented migrants from Mexico often had entries both before and after April 1, 1997 with some entering once and others entering multiple times. The 9b and 9c bars were unrealistic to the undocumented migrant from Mexico. The 9c bar specifically was the most stringent as there was no waiver available. The bars ignored the migratory

[283] Jonathan Montag Law Offices: https://www.montaglaw.com/2012/01/16/striving-to-decipher-ina-%C2%A7-212a9/

patterns that had been established for decades by laborers and employers alike as well as migrant communities. The bars ignored the need to unite families transnationally from two contiguous states. The bars assumed that undocumented migrants had no families and had no reason to return to their home countries in case of illnesses, death of a family member, or any other extrinsic circumstance. Once undocumented immigrants crossed, they needed to remain in the US until they found an immigration relief to adjust their legal status, and only if they found an immigration relief. The rules were contrary to the idea of family reunification in immigration law.

Nevertheless, clarifying and interpreting the 1996 statute specifically regarding the 9b and 9c bars would not be easy. Following an immigration history that became more punitive every ten to twenty years, the ambiguities, interpretations, and intentions of the law would be sorted out through legal interpretations and memoranda by various governmental bodies. Twelve years after the law was implemented, in 2008, the Board of Immigration Appeals held in *Matter of Rodarte-Roman* that 9b applied to unlawful presence accruing only after April 1, 1997.[284]

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[284] 23 I&N Dec. 905 (BIA 2006). The BIA has been given nationwide jurisdiction to hear appeals from certain decisions rendered by immigration judges and by district directors of the Department of Homeland Security (DHS) in a wide variety of proceedings in which the Government of the United States is one party and the other party is an alien, a citizen, or a business firm. BIA decisions are binding on all DHS officers and immigration judges unless modified or overruled by the Attorney General or a federal court. Most BIA decisions are subject to judicial review in the federal courts. The majority of appeals reaching the BIA involve orders of removal and applications for relief from removal. Other cases before the BIA include the exclusion of aliens applying for admission to the United States, petitions to classify the status of alien relatives for the issuance of preference

Matter of Rodarte-Roman explicitly cited that Congress intended to single out recidivist immigration violators making it more difficult for them to be admitted to the US after departing the United States on the effective date of April 1, 1997 and accumulating over a year of unlawful presence in the US.[285] For example, Raul Rodarte entered the United States before 1997, stayed for three years, and went back to Mexico. Rodarte re-entered the US, had an opportunity to marry a US citizen, and proceeded to adjust his legal status. Rodarte's entry and re-entry was precisely the recidivist activity that the 1996 law wanted to impede. Recidivists were undocumented migrants that crossed the border multiple times and were believed to ignore sovereignty boundaries across nations. Rodarte had entered the US multiple times. Consequently, when he applied to adjust his status for legal permanent residency, the immigration judge ruled that Rodarte was a recidivist who had violated the 9c bar; hence, refusing to grant him legal status, and immediately placing him in deportation proceedings.[286]

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immigrant visas, fines imposed upon carriers for the violation of immigration laws, and motions for reopening and reconsideration of decisions previously rendered.
The BIA is directed to exercise its independent judgment in hearing appeals for the Attorney General. BIA decisions designated for publication are printed in bound volumes entitled *Administrative Decisions Under Immigration and Nationality Laws of the United States*

[285] Matter of Briones: 24 I&N Dec. 355 (BIA 2007).

[285] Cristina Salinas, *Managed Migrations: Growers, Farmworkers, and Border Enforcement in the Twentieth Century*, (Austin, TX: University of Texas Press, 2018), …

[285] Matter of *Briones*: 24 I&N Dec. 355 (BIA 2007).

[286] Adjustment of status is the process to apply for lawful permanent resident status (also known as applying for a Green Card) when an applicant who has unlawful status is present in the United States. This means that the applicant may apply and become a resident without having to return to his or her home country to complete visa processing.

According to the adjudicator and the immigration judge, Rodarte had multiple unlawful entries, and as a recidivist, the judge and adjudicator refused to adjust Rodarte's status to become a permanent legal resident (an immigration benefit that he could, discretionarily, acquire through his American wife), but instead Rodarte was placed in deportation proceedings. The judge and adjudicator believed that Rodarte had violated immigration laws, namely 9c, and was subsequently inadmissible. However, Rodarte's entries and exits occurred prior to 1997, and more explicitly, his last exit was in May of 1997. In this case, the 1996 IIRIRA immigration statute favored him as he had entered in 1993, left in May of 1997, and came back on August of 1997. When Rodarte appealed his case to the Board of Immigration Appeals (the BIA), their interpretation of the 9b and the 9c immigration statute indicated that Rodarte had only accumulated one month of unlawful time before he had exited the US. According to the statute, accumulating more than one year of unlawful presence triggered 9c1. Rodarte had not accumulated more than 365 days of unlawful presence but rather, at most, 90 days. In the analysis of *Matter of Rodarte*, the BIA clearly stated that sections 9b and 9c "could be viewed as ambiguous and [that it was] incumbent upon them [BIA] to resolve the ambiguity [of the law] and adopt a reasonable construction of Congress's [intent] and language." [287] Clearly the 1996 law was not precise, and the complexity of its application took several years, several cases, and contradictory interpretations by an adjudicator;

[287] Matter of *Rodarte*: 23 I&N Dec. 905 (BIA 2006).

Rodarte later appealed to an immigration judge, and finally to the Board of Immigration Appeals.[288] This is the complexity and confusion that attorney and legal scholar Montag alluded to when he wrote in 2012 that most legal practitioners and undocumented migrants could not understand the meaning of the statute.[289] This is also the complex nature of immigration enforcement that legal scholars often cite that have created exceptions and loopholes where officials operate within multiple administrative channels and exercise extraordinary discretionary power.

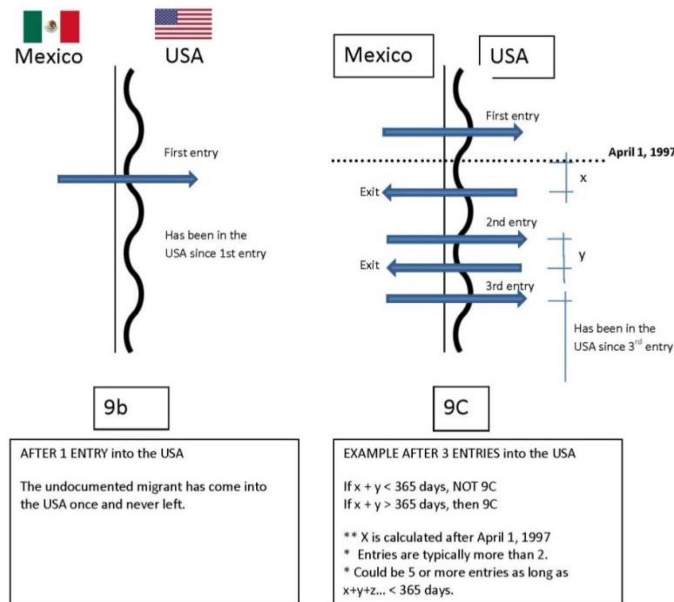

Figure 3.1: Understanding the difference between *9b and 9c Immigration Violations*
Violators of 9b require the Waiver of Inadmissibility for Unlawful Entry. 9C violators do not have a waiver available
(Figure created by author)

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[288] Jonathan Montag Law Office: https://www.montaglaw.com/2012/01/16/striving-to-decipher-ina-%C2%A7-212a9/
[289] Jonathan Montag Law Offices: https://www.montaglaw.com/2012/01/16/striving-to-decipher-ina-%C2%A7-212a9/

The 1996 law, in effect, became more punitive because it wanted to punish recidivists who had an opportunity to fix their status at a later date. In the case of *Matter of Rodarte*, his entries and the timing of his recidivist activity clarified the statute, halted his deportation, and granted an immigration benefit to Mr. Rodarte, but in the case of Carillo de Palacios, her recidivism, entries, exits, and deportation sealed her fate for deportation under 9c.

Carrillo de Palacios I and Carrillo de Palacios II were cases ruled by immigration courts following each other and with contradicting decisions. These two cases dealt with the same unlawful entrant and countered the general understanding of the 9b and 9c statute. Ms. Maria Matilde Carrillo de Palacios, a Mexican national, was unlawfully present in the United States from 1981 to 1983. She was deported in 1984. She came back to the United States without being legally admitted twice in 1992 and in September 1997. In 2003, she submitted her paperwork to adjust her status.[290] Sometime between 2003 and 2005, she was denied adjustment of status and placed in removal proceedings. However, an immigration judge granted her legal status on November 8, 2007 concluding that any bars to adjusting her status were remedied by another statute known as 245(i), initially passed in 1994 and amended in 2000.[291] The 245(i) law gave opportunities to aliens

[290] *Maria Matilde Carrillo De Palacios v. Eric H. Holder Jr.*, No. 09–72059, (9th Circuit 2011).
[291] 245(i): The Legal Immigration Family Equity (LIFE) Act and LIFE Act Amendments of 2000 (Pub. L. 106-553 and -554) enables certain individuals who are present in the United States who would not normally qualify to apply for adjustment of status in the United States to obtain a green card (permanent residence) regardless of: The manner they entered the United States; working in the

who were willing to pay a penalty fee of $1000 to adjust their legal status in the US even though they had entered the US with no documentation or visas, provided they had petitions approved prior to April 30, 2001. Congress amended and extended the law in 1998 and again in 2000. With the 245(i) benefit, undocumented migrants do not trigger the bars of inadmissibility because they can adjust their legal status in the US. In the case of Carrillo de Palacios, The BIA held that 245(i) did not eliminate the reason for her inadmissibility, violation of the 9c bar. On June 3, 2009, the BIA reversed the immigration judge's decision determining that Ms. Carrillo de Palacios was inadmissible for having been unlawfully present in the United States for more than one year, from 1981 to 1983, departing, and then coming back without being legally admitted, and for also having been deported and then coming back without asking permission to enter. Ms. Carrillo de Palacios had two immigration issues: unlawful presence for more than one year and deportation. The BIA held that since Ms. Carrillo de Palacios did not ask for special permission to come back, she did not qualify for the exception to 9c. Therefore, she was ordered removed.[292]

Ms. Carrillo de Palacios appealed. On June 21, 2011, the Ninth Circuit Court concluded that Ms. Carrillo de Palacios had accrued unlawful presence from 1981 to

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United States without authorization; or failing to continuously maintain lawful status since entry. To qualify for this provision, the applicant must be the beneficiary of a labor certification application or an immigrant visa petition from an employer or a family member filed on or before April 30, 2001. In most cases, the applicant must pay an additional $1,000 fee and complete a supplemental application to Register Permanent Residence or Adjust Status.

1983, and when she returned without permission in September of 1997, after the Apri1 1, 1997 implementation of the 1996 statute, Ms. Palacios triggered the 9c bar. This particular conclusion was contrary to the conclusion earlier in *matter of Rodarte* by the BIA which did not count unlawful entry before April 1, 1997. In June of 2011, the Ninth Circuit Court believed that unlawful entries before April 1, 1997 could be counted. However, on December 1, 2011, The Ninth Circuit withdrew their opinion and issued a denial to *Carrillo de Palacios II* concluding that Ms. Carrillo de Palacios was deported in 1984, and when she came back in September of 1997, without first requesting permission, she triggered the 9c bar. The 9c bar was triggered because of the deportation, not because she was unlawfully present in the US from 1981 through 1983. The court stated that before Ms. Carrillo de Palacios returned to the US after being deported, she should have stayed away ten years and should have requested a special waiver giving her permission to re-enter. Most importantly, yet contradictory, according to the BIA decision, *Carrillo de Palacios II* had also concluded that unlawful presence at any time and then reentry after April 1, 1997, created the 9c bar. To make matters worse and further confuse the interpretation of the 9b and 9c sections, on May 6, 2009, USCIS published an internal memo outlining and directing immigration officials on how to determine the 9c bar statute:[293]

[293] USCIS, Memorandum, May 6, 2009.

…the alien's unlawful presence is counted in the aggregate, i.e. the total amount of unlawful presence is determined by counting together all periods of time during which an alien was unlawfully present in the United States on or after April 1, 1997. Therefore, if an alien accrues a total of more than one (1) year of unlawful presence time whether accrued in a single stay or multiple stays, departs the United States, and subsequently reenters or attempts to enter without admission, he or she is subject to the permanent bar (9c).

This memo contradicted the unpublished BIA decision of *Carillo de Palacios II* regarding the method of counting unlawful time.[294] Nonetheless, this is the memo that most adjudicators at the consulate offices have been using to determine whether an applicant could receive an immigrant visa, their residency status, and final admission to the US.

Henceforth, in 2011 after the BIA Board of Immigration Appeals, the Administrative Appeals Office (AAO), the United States Citizenship and Immigration Services (USCIS), and the Ninth Circuit Court had an opportunity to interpret the 1996 statute regarding 9b and 9c, the final definition of the 9b and 9c bars were still not completely cleared.[295] Under those circumstances, after reviewing dozens of cases from the BIA and immigration courts, reading unpublished AAO decisions, and perusing through multiple memoranda that updated and corrected the

[294] USCIS, Memorandum, May 6, 2009.
[295] Jonathan Montag law offices: https://www.montaglaw.com/2012/01/16/striving-to-decipher-ina-%C2%A7-212a9/. Matter of Rodarte: 23 I&N Dec. 905 (BIA 2006.

adjudicator's field manuals, practitioners like Jonathan Montag have concluded that fifteen years after IIRIRA and the passing of the 1996 statute, ambiguity and contradiction continued to prevail.[296] Thereupon, it was not surprising that scholars, practitioners, and applicants have been confused for the last twenty years waiting for some clarity. For that matter, simply interpreting the less complicated 9b statute and filing inadmissible waivers should have been a less troubling pathway for undocumented migrants to attain legal status. The collusion of these two parts of the immigration system, 9b and 9c, has remained a quandary specifically for those attempting to help the immigration community. Even more so for those officials who have the power of discretion to make final decisions and grant legal status to undocumented migrants. The 1996 statute, in effect, became more punitive not only because it attempted to punish recidivists who had an opportunity to fix their status at a later date, but the actual application of the law became exceedingly more confusing and more complex. Additionally, the statute introduced other excludable immigration violations of which only twelve had waivers and exceptions. The waiver of inadmissibility for unlawful entry is the most common waiver for the most common violation, the 9b bar.

In 2011, Laurel Scott, an immigration attorney and legal scholar who has practiced immigration law for several years, and has been a frequent lecturer at the

[296] Jonathan Montag law offices: https://www.montaglaw.com/2012/01/16/striving-to-decipher-ina-%C2%A7-212a9/

American Immigration Lawyers Association conferences, stated that in 2003, filing a waiver of inadmissibility for unlawful entry to remedy the 9b violation was a dangerous proposition for the undocumented migrant. In fact, many attorneys felt that it was unethical to send their clients abroad to receive their immigrant visas.[297] For this reason, many undocumented migrants remained undocumented even though they had an American spouse or a legal permanent resident spouse, and had an opportunity to legalize their status. By 2011, the general consensus among attorneys was that processing the waiver had become safer even though a minority still believed that sending their clients abroad would be exposing them to the three- or ten-year bar, thus, separating their families. According to Scott, the dramatic shift from 2003 to 2011 was on understanding the risks that her clients faced upon leaving the US when facing consulate officials. In most cases, attorneys had the duty to determine if the client faced other grounds of inadmissibility (from a possible fifty-four- plus) such as multiple entries, crimes of moral turpitude, criminal actions, misrepresentation, false claim to US citizenship, likely to become a public charge, or a medical threat. These grounds of inadmissibility were but a few of the many inadmissible categories that an undocumented migrant still faced at their consular interview in addition to unlawful presence. Scott wanted to make sure that her

[297] Laurel Scott, "The Real Risks of Filing an I-601 Application for Waiver of Grounds of Inadmissibility at the Consulate Abroad," (2011).

clients understood the risks they were taking.[298] However, the *Carillo de Palacios I and II*, and *Matter of Rodarte* cases explained that the risks and complexity applicants experienced derived more from the interpretation of the 1996 statute by the various departments of the government ruling immigration administrative processes rather than from understanding the case of the applicant or of explaining or educating the applicant. Furthermore, upon assessment of the client or applicant, the hidden danger of waiver cases (cases that only need the waiver of inadmissibility for unlawful entry approved), according to Laurel Scott was fighting "against the 'Doctrine of Consular Non-reviewability,' which gave the consular officer nearly unlimited power to kill your case with the flimsiest of accusations and little or no evidence. This [was] catastrophic for the case and [was] usually the end of the road." In the end, the consular official had the ultimate discretion to ask, assume, accuse, forgive, and grant admissibility.[299] In 1930, George Wickersham and Reuben Oppenheimer also used similar words to describe the administrative power of agents who enforced detection of entry and ordered deportation of these undocumented migrants. "An agent could be all of the above: a detective, a prosecutor, and a judge."[300] Eighty-five years later immigration attorneys and undocumented immigrants who wanted to legalize their status were still confronting the overwhelming authority that administrative officials had in these matters.

[298] Laurel Scott, "The Real Risks of Filing an I-601 Application for Waiver of Grounds of Inadmissibility at the Consulate Abroad," (2011).
[299] Laurel Scott – blog - posted May 19, 2009.
[300] Wickersham Commission, *Report on Deportation Laws*, 5.

The case of Celestino Salinas exemplifies the challenges of discretionary relief that undocumented migrants experience to attain the waiver of inadmissibility after illegal entries to the United States, and the minimal control he or she exerts on his or her discretionary relief. Celestino Salinas married a US citizen in July of 2012 and began to process his paperwork to become a legal permanent resident in 2015. In July 2016, Celestino received a letter from the United States Immigration Services (USCIS) giving him thirty days to respond to questions regarding the waiver of inadmissibility package he had submitted to attain a pardon.[301] The government wrote that Celestino had failed to show extreme hardship that his wife would endure due to separation or relocation. More specifically, they wrote, he had not proven that his departing the US and separating from his spouse for the next ten years would cause his spouse extreme hardship. Furthermore, the letter indicated that the issues he had presented about his wife relocating to Mexico, such as adjusting to life in a new country, cultural readjustment after living in the United States all her life, and having a lower quality or limited scope of education for her children was not sufficiently "extreme." These were rather normal conditions of separation and relocation. The letter reiterated that to be eligible for a provisional unlawful presence waiver he needed to submit additional evidence establishing that his qualifying relative (his spouse) would experience extreme hardship under either

[301] The USCIS office located in Phoenix, Arizona is the service center within the U.S. Department of Homeland Security that adjudicates and processes Waivers of Inadmissibility for unlawful entry.

separation or relocation or both scenarios.[302] Once he submitted the additional evidence, the government would, then, determine whether the hardships based on the designated scenarios rose to the level of "extreme" hardship under the "totality" of the circumstance. In other words, he had to prove extreme hardship inclusive of all extenuating circumstances.[303]

Celestino responded to the letter with basically the same information he had initially submitted his package. Concurrently, he sent his most recent and updated financial records: taxes, bank statements, check stubs, and most recent payment of bills, as he had already comprehensively submitted all proof and evidence he deemed necessary to prove the financial "extreme" hardship his wife would suffer upon his departure. Celestino was updating the financial argument of his waiver with his most recent information. Three days after the government received Celestino's response, his provisional waiver of inadmissibility for unlawful entry was approved. Celestino did not present any other "unique" evidence to reverse a decision from doubt to rejection or to transform his package for the final approval of his waiver. The official merely exercised his power of discretion to approve Celestino's waiver.

In exercising his or her power of discretion, the immigration adjudicator confirmed an immigration system marked deeply by discretion rather than by

[302] The waiver of inadmissibility of unlawful entry is typically applied and processed when the applicant has returned to his or her country of origin. The provisional waiver of inadmissibility for unlawful entry is applied and processed when the applicant still remains in the US.
[303] Salinas, Celestino, Request for Additional Evidence letter dated 2016.

"uniformity, consistency, or predictability."[304] The adjudicator perhaps just needed more time or just changed his or her mind. In 2016, information from USCIS revealed that approximately one hundred plus adjudicators were reviewing provisional waiver packages. When an official received a waiver package, he or she was typically charged to review, file an RFE if necessary, and grant or deny the waiver.[305]

Even though there is a Policy Manual, Volume 9, chapters 3, 5 and 7 specifying how extreme hardship should be determined, the fact is that discretion is the normative exercise by government agencies in federal law and the executive branches.[306] Discretion comes from the "inherent authority of any federal agency to make a broad range of choices" on how it administers and enforces any law.[307] Indeed, many practitioners and even scholars have stated that understanding immigration processes is more of an art form than the rule of law, and unpredictable and inconsistent discretion is part of the current policy of the US immigration law system.

Six months prior to his successful final submission, Celestino had sent his "provisional waiver of inadmissibility package" to USCIS consisting of 230 pages specifying how his wife, Ana, a US citizen would experience extreme hardship should he be separated from her and should he have to leave to Mexico for ten years,

[304] Motomura, *Immigration Outside the Law*, 41.
[305] CLINIC (Catholic Legal Immigration Network), March 2016 Conference.
[306] Motomura, *Immigration Outside the Law*, 42.
[307] Motomura, 17.

or if Ana and their two children would have to relocate to Mexico, again, for ten years until he was either approved for the provisional waiver of inadmissibility or fulfilled the ten-year bar exit to Mexico.[308] Celestino was trying to obtain e*l perdón* (the waiver) prior to triggering the ten-year bar of inadmissibility which would occur upon his departure for Ciudad Juarez, Mexico to obtain his immigrant visa.[309] Celestino was still living in the United States. Since 2013, undocumented migrants who had qualifying relatives who were US citizens, or since 2016, qualifying relatives who were legal permanent residents no longer had to leave the country to apply for the unlawful presence waiver of inadmissibility. The physical separation of the applicant and the relative petitioning or qualifying relative who would be affected were no longer required. Therefore, the extreme hardship for both separation and relocation was based on "imagined" scenarios. The extreme hardship Celestino described that his wife would suffer would not be occurring yet, and he

[308] Motomura, *Immigration Outside the Law*, 192.

[309] Provisonal Waiver of Inadmissibility: Foreign nationals who are not eligible to adjust their status in the United States must travel abroad and obtain an immigrant visa. Individuals who have accrued more than 180 days of unlawful presence while in the United States must obtain a waiver of inadmissibility to overcome the unlawful presence bars under section 212(a)(9)(B) of the Immigration and Nationality Act before they can return. Typically, these foreign nationals cannot apply for a waiver until after they have appeared for their immigrant visa interview abroad, and a Department of State (DOS) consular officer has determined that they are inadmissible to the United States. The provisional unlawful presence waiver process allows those individuals who are statutorily eligible for an immigrant visa (immediate relatives, family-sponsored or employment-based immigrants as well as Diversity Visa selectees who only need a waiver of inadmissibility for unlawful presence to apply for that waiver in the United States before they depart for their immigrant visa interview. This new process was developed to shorten the time that US citizens and lawful permanent resident family members are separated from their relatives while those relatives are obtaining immigrant visas to become lawful permanent residents of the United States (USCIS website).

was requesting that it not happen at all. Before 2013, the physical separation occurred between the undocumented immigrant and his or her spouse. Depending on how long it took for the waiver of inadmissibility for unlawful entry to be approved, this separation would last from two to three years or more. The "extreme hardships" were real, and the US citizen or legal permanent spouse experienced substantial suffering. In 2013, the provisional waiver was instituted ameliorating the condition of separation, yet maintaining the same evidentiary requirements to prove "extreme hardship."

Celestino's first package contained all the evidence possible to justify the extreme hardship that Ana would possibly suffer if Celestino had to go to Mexico and be separated from him or if Ana had to relocate to Mexico. Ana did not work outside of the home, as she had only attained a tenth-grade education. Ana and her two children depended on Celestino's earnings of $30,000 a year to subsist as a family of four. Ana's main argument was her financial hardship. Her original response actually contained a thorough study of three scenarios: her fragile status today with very little debt, her severe status in the US if Celestino left for Mexico and she was separated from him, reflecting a debt of $70,000 a year, and a third acute scenario portraying her relocation to Mexico, and accumulating a debt of $80,000 a year (See Table 3.1). Ana also submitted additional hardships that she would experience. Disruptions to her existing family, all of whom were US citizens, severing community ties in the US, the extra expenses she would incur educating her

children in Mexico, the exposure to an environment of crime in the state where she and Celestino were going to live, and the lack of health facilities in and around the hamlet they would inhabit. Ana had accompanied every submission with evidence from studies published by the various immigration departments and the Department of State, as well as independent studies and actual data gathered from Mexico and the US. Ana also submitted bank statements, pay stubs, income tax returns, and newspaper articles to back up her assertions.[310] Consequently, when Ana and Celestino read the letter requesting additional evidence, they did not know what else to submit. Hence, when Celestino responded he requested that the immigration official review the package once again, but in particular, individual sections and specific pages where he highlighted with the additional information and financial updates. Celestino was asking the adjudicator to review and use his or her "best judgement of discretion."[311]

[310] Author's review of copy of Celestino Salinas waiver package.
[311] Author interview with Celestino Salinas and his RFE response in 2017.

SCENARIO 1:
CURRENT FINANCIALS IN USA
(Celestino is in the USA) **Stable!!**

Monthly Income (NET)		
	Celestino in USA	3,200.0
	Ana	
	Total:	3,200.0
Monthly Expenses (Household size 7 in USA)		
	Apartment Rental	650.0
	Home expenses	100.0
	Phone	210.0
	Electric/gas/water/waste	350.0
	Cable	55.0
	Car Insur	190.0
	Medical and Dental	150.0
	Food/Groc & Restau	800.0
	Clothing/Washateria	200.0
	Transportation, etc	350.0
	Personal/miscellaneous	100.0
	Total:	3,155.0
Monthly Surplus		45.0

SCENARIO 2: Husband (Celestino) in MX
CONSEQUENCE OF SEPARATION
(Dallas, Texas, USA & Los Mendoza, Matehuala, SLP, MX)

Monthly Income			
	Ana - USA (NET)	1,200.0	
	Total:	1,200.0	(a)
Monthly Expenses (Household size 4 in USA)			
	Rent for Apartment	650.0	
	Home Expenses	100.0	
	Phone	350.0	(b)
	Electric/gas/water/waste	350.0	
	Cable	55.0	
	Car Insur	190.0	
	Medical	300.0	(c)
	Food/Groc & Restau	1,000.0	(d)
	Clothing/laundry/wash	300.0	(e)
	after school care	1,520.0	(f)
	Transportation, etc	400.0	(g)
	Credit card	350.0	(h)
	Personal/Miscellaneous	100.0	(i)
	Travel Expenses	1,580.0	(j)
	Total:	7,245.0	
Monthly deficit		(6,045.0)	

SCENARIO 3: Moving to Mexico
CONSEQUENCE OF RELOCATION
Los Mendoza, Matehuala, San Luis Potosi, Mexic

Monthly Income		
	Celestino (working 7 days a\	300.0
	Ana	100.0
	Total:	400.0
Monthly Expenses (Household size 4 in Mexico)		
	Storage Fees in USA	300.0
	Rent in Mexico	300.0
	New Home Expenses	250.0
	Phone -incl Long Distance	150.0
	Electric/gas/water	100.0
	Medical	500.0
	Food/Groc	800.0
	Transportation	400.0
	Bi-lingual/Private School	2,800.0
	Credit card	400.0
	Travel Expenses to US	950.0
	Total:	6,950.0
Monthly Deficit		(6,550.0)

Table 3.1: Comparative Financial Scenario Sample Arguing “Extreme” Financial Hardship
Scenario 1 states current financial status of applicant and family while in the United States
Scenario 2 describes financial changes due to separation of applicant. Applicant is in country of origin, Mexico.
Scenario 3 describes financial condition when applicant and family have relocated to Mexico.
(Author interview with Celestino and review of original “Waiver” package submission)

The adjudicator followed a process to discretionarily approve or deny a waiver of inadmissibility already established by an immigration adjudicator manual. According to the manual, an officer or an adjudicator must “first determine whether the applicant meets the legal eligibility requirements.” In the case of a provisional waiver, the officer/adjudicator would have ascertained first that Celestino had a case pending with the Department of State based on an approved petition, in this case, a family petition, and that his qualifying US citizen or legal permanent resident spouse would experience extreme hardship.[312] Once the applicant proved his

[312] Author interview with Celestino Salinas and his RFE response.

eligibility, then, the adjudicator would determine whether the waiver application should be granted as a matter of discretion.[313] However discretion is a balancing act. The decision makers, such as immigration judges, directors, BIA officials, consular officers, and/ or adjudicators, must balance the adverse factors. They must verify or support an alien's undesirability as a permanent resident in the US, along with the social and humane considerations presented on his or her behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the US.[314] In adjudicating a waiver request, the officer, therefore, ensures that the applicant meets all of the statutory requirements for the waiver, including the extreme hardship as well as entry into a US community. If the applicant is eligible, the officer, then, determines whether the applicant warrants a "favorable exercise of discretion." In each case, the officer analyzes each part separately.[315]

Also, in each case, the applicant has the burden of proof to demonstrate by a "preponderance" of the evidence that he or she satisfies the statutory requirements of the waiver, including extreme hardship. The applicant meets the preponderance of the evidence standard if the evidence shows that it is more likely than not that a denial of admission would result in "extreme hardship" to one or more qualifying

[313] www.uscis.gov/policymanual/HTML/PolicyManual-Volume7-PartA-Chapter9.html
[314] Matter of *Mendes-Morales*: 21 I&N Dec. 296 (BIA 1996)
[315] https://www.uscis.gov/policy-manual/volume-9-part-b-chapter-5.

relative. The hardship to the qualifying relative must rise above and beyond the common consequences of separation and economic loss.[316]

Natural consequences and suffering separation or relocation is reasonable according to the immigration manuals. To be approved, the adjudicator must assess that the hardships presented rise to the level of "extreme." In other words, the adjudicator must believe, judge, and discern that discretion is warranted based on "extreme" suffering. However, the definition of "extreme suffering" is never clearly outlined. The definition is hazy and obscure, fraught with legalese language. For example, chapter 7 of the policy manual states that a finding of extreme hardship permits but never compels a favorable exercise of discretion. If the officer finds the requisite extreme hardship, the officer must then determine whether the government should grant the waiver as a matter of discretion based on an assessment of the positive and negative factors relevant to the exercise of discretion. The relationship to US citizens or lawful permanent residents and a finding of extreme hardship to one or more of those family members are significant positive factors to consider. Furthermore, for purposes of exercising discretion, a finding of extreme hardship that is sufficient to warrant a favorable exercise of discretion to grant a waiver of the unlawful presence grounds of inadmissibility may not be sufficient to warrant a favorable exercise of discretion concerning crime, fraud or other related grounds

[316] https://www.uscis.gov/policy-manual/volume-9-part-b-chapter-5.

of inadmissibility. The conduct that triggers the applicant's inadmissibility, such as any criminal conviction is a significant negative factor that adjudicators could also consider.

The factors that the government considers in evaluating discretion for the waiver of inadmissibility for unlawful presence is not that different from factors used in evaluating discretion for criminal cases. Chapter 7 of the policy manual on discretion specifically references two critical cases in their instruction to officials on how they should exercise administrative discretion, *Matter of Marin* and *Matter of Mendes-Morales*.[317] The former dealing with fraud and the latter with sexual assault: both criminal cases. In both cases, positive and negative factors are balanced to see if the criminal aliens deserve to be granted benefits. Some issues that an immigration judge or adjudicator will consider are: the reasons why the applicant has been excluded, if he or she has had other immigration violations during his or her stay in the US, if he or she has had any criminal records and a history of any bad moral character, or any reason why he or she cannot become a member of a community.[318] In turn, the immigration judge, for that matter, an adjudicator, summarizes favorable considerations that may include: family ties in the United States, residence of long

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[317] Matter of *Marin*: 16 I&N Dec. 581, 584- 85 (BIA 1978). Matter of *Mendes- Morales*: 21 I&N Dec. 296 (BIA 1996)

[318] § 212(h) bars any non-citizen from waiver eligibility if the individual "[…] has previously been admitted to the United States as an alien lawfully admitted for permanent residence if…since the date of such admission the alien has been convicted of an aggravated felony[…]" Since Congress amended the statute to create this bar to eligibility in 1996, there has been a great deal of litigation interpreting this bar (Catholic Immigration Network Inc.: https://cliniclegal.org)

duration in this country, particularly where the alien began his residency at a young age, evidence of hardship to the alien and his family, if he is excluded and deported, a history of stable employment, the existence of property or business ties, evidence of value and service to the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good moral character, i.e. affidavits or letters from family, friends, and responsible community representatives.[319] Upon reviewing the record as a whole, the immigration judge is required to balance the equities and adverse matters to determine whether discretion should be favorable to the applicant. In turn, the applicant requesting relief must establish that he or she merits a positive exercise of discretion. Administrative discretion will depend in each case on the nature and circumstances of the ground of exclusion sought to be waived and on the presence of any additional negative factor. As the negative factors grow serious, the applicant must introduce additional favorable evidence to offset the adverse situation.[320]

In the above cases, *matter of Marin* and *matter of Mendes-Morales*, the issue for inadmissibility was over and beyond unlawful presence. The case of Mr. Marin, a Colombian, was involved in a felony crime where he was charged with the sale of cocaine. Mr. Marin entered a guilty plea in a New York State criminal court in March of 1976. At his deportation hearing, Mr. Marin requested discretionary relief from the judge to remain in the United States. However, the judge dismissed the

[319] www.uscis.gov/policymanual/HTML/PolicyManual- Volume7-PartA-Chapter7.html
[320] www.uscis.gov/policymanual/HTML/PolicyManual-Volume7-PartA-Chapter7.html

request based on the fact that Mr. Marin could not provide enough positive factors. Similarly, in the case of *Mendes-Morales*, Mr. Mendes-Morales was accused of first-degree sexual assault in 1994 and was punished to serve a two to three-year sentence. Upon his release, the judge denied his request to regain admissibility addressing the question of whether aliens with criminal records should be admitted to the United States and be allowed to reside in this country permanently.[321] These two cases, albeit, criminal in nature, are the examples that adjudicators study to balance positive and negative factors and judge whether an undocumented migrant could be granted the pardon by the power of discretion. Celestino's adjudicator would use these two cases as a guide and reference when adjudicating the waiver of inadmissibility for unlawful entry to give discretionary relief to Celestino. While Celestino's case would gleam next to these two cases, the fact remained that the adjudicator would consider the illegal entrant a criminal first, then, adjudicate discretion as it had historically been given to criminal immigrants. " '

When Celestino initially entered the US in search of work, the strict policies against illegal entries since 1917 through 2005 had made his illegal entry a criminal and deportable act.[322] Celestino had "systemically" been criminalized, and if his request for a pardon or his response to submitting more evidence had not been approved, Celestino would have been potentially deported and exiled from his

[321] Matter of *Mendes-Morales*: 21 I&N Dec. 296 (BIA 1996)
[322] Motomura, *Immigration Outside the Law*, 50; Wickersham Commission, *Report on Deportation Laws*, 32.

community.[323] Celestino, Agustin, and Alejandro were '"systemically" criminalize upon entering the United States. All three were undocumented immigrants, and all three navigated their designation as "criminal" and "immoral" aliens differently. Celestino had the option to obtain *el perdón* and followed the strictures of immigration laws and policy developed in the last twenty years. Agustin negotiated his social and legal structure and opposed his religious tradition to obtain legal status while Alejandro gave up his only chance and decided to live in exile with his traditional and religious conscience in place.

Conclusion

The use of discretion, in Celestino's case and the case of the many undocumented immigrants, confirms the moral dilemma, the tension between the rule of law and the actual administrative practices, but more ominously, the "political" nature of discretion. In effect, the United States recognizes the conundrum of illegal entries and subsequent legalization as a moral obligation to forgive after first instituting punishment. Celestino's future depended on the benevolent use of discretion and Celestino accepted the moral conduct expected of him following the discretionary process established by the state so that he could become a member of the US community.

While discretionary relief is the hope of every undocumented entrant in America, the increasing criminalization of the undocumented immigrant serves to

[323] Motomura, *Immigration Outside the Law*, 21; Chomsky, *Undocumented*, 12,15, 17.

justify his or her moral exclusion from their communities as deportations became common, and discretionary reliefs are infrequent and increasingly rare. In exercising the power of discretion an immigration adjudicator often unwittingly becomes entrenched in a system that historically had created a convoluted punitive matrix of laws that made an undocumented migrant a criminal before they had a chance to prove their worth and gain acceptance into an American community. The adjudicator, in turn, has the power to accept or deny, and to include or exclude based on proof of specific hardships to specific family members. However, the proof of "extreme hardship" is and has been ambivalent and unclear with no finite definition and left to the interpretation of manuals and officers who have followed policies and internal memorandums dictated by political policies. In the meantime, the undocumented migrant lives exiled from his family and his community waiting for the final approval which sometimes could take several submissions. While immigration law portends family unification as a basic foundational practice of US immigration policy, the cases of Agustin and Alejandro presented contradictory moral statements by their ruling institutions when either one tried to live in their community as a family member while attempting to reach community membership. Their institutions placed them in a situation where they were set up for failure unless they created a temporary moral holding space.

Finally, the dilemma of how to control and make undocumented immigrants accountable for their illegal entries is further exacerbated when they have to navigate

through a highly complex and punitive administrative process to legalize their status. The waiver of inadmissibility for unlawful entry as designed by the 1996 IIRIRA statute has become the most difficult administrative challenge faced by undocumented immigrants. As shown in Celestino's case study, the journey to achieve reconciliation and remedy their illegal presence became burdensome, fraught with inconsistencies, and surrounded by uncertainty. The use of discretion confirms the tension between the rule of law and administrative practices in effect for the last century becoming a national moral dilemma of a nation attempting to protect its borders from those deemed undesirable and not fitting to be members of the community.

Discretion and the political ideologies that govern it are inherently tied together constitutionally. According to historian Alexander Aleinikoff, constitutional reasoning in immigration law has been dominated by the plenary power doctrine which states that cases defining which aliens can be excluded or expelled is a fundamental attribute given to the government's executive departments which in turn are immune from judicial control.[324] The plenary power doctrine is an essential attribute of national sovereignty; as such, border control and the power of who can or cannot come into this country lies on the hands of the legislative and executive branches, thus making it, political. Consequently, the court has taken a position not to "undertake to pass upon [the] political question," deferring final

[324] T. Alexander Aleinikoff, *Semblances of Sovereignty: The Constitution, the State, and American Citizenship* (Cambridge MA: Harvard University Press, 2002), 153.

decisions to political government departments, such as the executive branches.[325] Aleinikoff suggests that this interpretation of judicial deference is out of step with more recent interpretations and constitutional developments in the last century, and indicates that the Justice Department and the Supreme Court should rethink this anachronistic model.[326] As Justice Stevens has also noted, "In exercise[ing] its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."[327] Also citing inequities that too often occurred in deportation cases, Justice Holmes had earlier opined the need for a federal judge to intervene in cases that did not obtain a fair and just opportunity.[328] Despite the regular deference, exercise, and acceptance of the plenary power doctrine in immigration decisions, the Supreme Court has had some dissenting voices that hopefully one day will break and change the "political aspect" of discretion and bring forth a more just and consistent system.

A country governed by fear creates crime and punishment in its laws and policies. The narrative of threats and invasion in the last one hundred years has corrupted the moral code of a nation that wanted to do the right thing; a nation that wanted to continue to be the moral leader of the world. In the last three decades, the drive to control undocumented migration and ethno-racial fears has defined the nation of the US differently. The criminalization of immigrants for entry and re-

[325] Aleinikoff, *Semblances of Sovereignty,* 154.
[326] Aleinikoff, 154.
[327] Aleinikoff, 154-160.
[328] Kanstroom, *Deportation Nation,* 128.

entry has exhibited disregard to family unity. The increased incarceration of the undocumented and the stretched definitions of criminal activities against immigrants has indicated that capitalist institutions, such as correctional entities like Corporation of America and the GEO Group and their lobbyist have become the moral directors of America.[329] Creating an illegal population and keeping them illegal by making their legal journey difficult and exiling them from the community is not the signature of a moral nation. While the undocumented entrant accepts a seemingly just process to become a member of the US community, the state has a responsibility, a moral obligation to forgive, accept, and be fair after instituting a more equitable type of punishment.

[329] Sarabia, "Perpetual Illegality," 63-64.

CONCLUSION

A NATION OF CONTRADICTIONS

> *"Someone said once that 'Law is what cements our society.' While this is true, the same society that gets its strength in the laws also need hope, compassion, and forgiveness to interpret such laws; a society without those values is merely a system without humanity. The cohesive bond that makes a society even stronger is family. Every human being deserves a family, and every family deserves to be together. This is a humble plea from a husband who loves his wife and a father who does not want to see his kids suffering because their mother has to leave the country."*[330]

The above paragraph is from a letter written by a US citizen who was trying to understand the immigration laws, the administrative process, and the moral compass that imbues a nation to make decisions about who can and cannot belong. In this case the US government would be making a decision whether or not to grant his wife *el perdón*, the waiver of inadmissibility for unlawful entry. At the time of this writing her fate hangs in the balance – she may or may not be granted an immigration visa.

The waiver of inadmissibility for unlawful entry is but one example of the seeming contradictions that affect the immigrant class in the US and, even though the policies of immigration have been historically harsh and punitive, the United

[330] Carlos Gonzalez, Letter to USCIS as part of his Waiver of inadmissibility for Unlawful Entry, September 2018.

States has had to balance this harshness with the moral obligation to protect families who enter the US seeking refuge and opportunity. These ambivalent decisions have confused the immigrant community, their families, and advocates for the undocumented immigrants. The ambivalence and contradictions are part of the moral dilemma that the United States as a nation has had to negotiate in the last one hundred years while it closes its doors and citizens of other nations continue to immigrate into its borders. As a result, the government has put in place opportunities for the immigrant community to adjust their legal status through pilot programs, codicils, rulings, amendments to statutes, and other administrative discretions. Through these actions, the government has sometimes been generous, exercising exceptions and giving immigrants opportunities to become members of this nation while uniting families, yet at other times, the government has purposefully placed barriers to make it difficult to enter the US or to process legal immigration entries into this nation. The ambivalence, contradictions and biased discretionary refutations have often been based on ideological and political differences of internal government policymakers and the current politics of a presidential administration.[331]

The focus of Congress and several presidential administrations in the last three decades was to control the continuous flow of illegal immigration that resulted from the well intentioned yet ill planned legislations of 1965, 1986, 1990 and, in

[331] U.S. Congress, Subcommittee on Immigration Citizenship, Refugees, Border Security and International Law, "Oversight Hearing on the Executive for Immigration Review," (Sept, 2008), by Stephen, Legomsky, 10.

particular, the 1996 IIRIRA. The Immigration and Nationality Act of 1965 capped admissions of immigrants from the Western Hemisphere, limiting the entries of Mexicans for the first time; the 1986 Act activated restrictions but gave amnesty to approximately three million undocumented immigrants, mostly Mexicans; the Immigration Act of 1990 limited the admission of low-wage immigrants decreasing the legal migration of low-skilled workers, and encouraging illegal entries of unskilled immigrants; the 1996 IIRIRA established bars on the entries and reentries of undocumented immigrants.[332] The last three statutes wanted to control illegal immigration, but the demand for labor in the US overshadowed outdated immigration policies creating a large wave of undocumented entries. Clearly, the US wanted to punish illegal entry and control the invasion of immigrants, yet national moral sensitivities institutionalized the 9b rule and the waiver of inadmissibility for unlawful entry (*el castigo* and *el perdón*), transforming the process of immigration mostly for the Mexican community through today.

Ironically, after Congress had granted three million aliens permanent residency status through the amnesty act of 1986 (IRCA), they realized that these recent legal residents wanted to unite with their families.[333] However, the inspection and admission requirements became a hardship to the family members of these new

[332] Ngai, Mae M., *Impossible Subjects: Illegal Aliens and The Making of Modern America*, (Princeton, New Jersey: Princeton University Press, 2004), 26; Muzzafar Chishti and Stephen Yale-Loehr, "*The Immigration Act of 1990: Unfinished Business a Quarter-Century Later*,"(Washington DC: Migration Policy Institute, 2016), 1, 10; Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996).
[333] Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986);

legal US residents.[334] Spouses and children of these legalized aliens had to apply for a visa at a consulate office abroad, placing financial difficulties on these aliens and creating administrative burdens and straining resources on the Department of State.[335] One of the solutions that Congress proposed to address this backlog was the creation of section 245(i), authorizing the Attorney General to grant adjustment of status with the payment of a penalty fee of $1,000. When Section 245(i) was first enacted in 1994 its purpose was to help certain unlawful entrants who had entered the US without inspection to legalize them within the US.[336] These applicants no longer had to leave the US as required by the 1924 Immigration Act. Initially, Congress enacted section 245(i) as a provisional and efficient method to adjudicate the consular petitions by the INS for three years but only to undocumented immigrants who had entered between October 1, 1994 and October 1, 1997. [337] However, the program proved successful, and in 1997 Congress extended section 245(i). Then, Congress placed a new requirement to petitions filed and approved before January 14, 1998. Later, section 245(i), expanded to also include visa petitions filed on or before April 30, 2001 with the LIFE Act amendments of

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[334] Section 201(a) of the Immigration Reform and Control Act of 1986, Pub L. No. 99-603, 10 tit. 3359, 3394 (codified at section 245A of the Act, 8 USC. §1225a)
[335] Matter of *Alonzo Briones*, Nov 29, 2007; 59 Fed. Reg. 51,092 (Oct 7, 1994) 1994 WL 543334
[336] Bryn Siegel, The Political Discourse in Amnesty in Immigration Policy, *Akron Law Review*, 2009, 301.
[337] INS is the legacy department of Homeland Security.

2000.[338] In 2000, Congress realized that after the harshness and major 1996 overhaul to immigration laws it should embrace section 245(i) as a necessary complement to the three- and the ten-year bars it had just finished passing in the IIRIRA legislation.[339] This was the only legislation that allowed adjustment of status for an undocumented immigrant in the US without triggering the three- and ten-year bars, which would eventually require a waiver of inadmissibility for unlawful entry from millions of undocumented immigrants.

As a result of the last changes to the 245(i) statute, undocumented entrants who had entered the United States prior to 2001, had a petition pending prior to April 30, 2001, had been physically present in the US on December 21, 2000, were admissible, and had a visa available could adjust their status and attain legal residency in the US without having to leave the country. If they had entered after April 1, 1997 and had stayed in the US for over one year, there would be no need for them to present the waiver of inadmissibility for unlawful entry, as they would never trigger 9b. In other words, any undocumented immigrant who met these requirements did not need *el perdón*; they could attain their residency status inside the US. To this day, this exception continues to exist, provided the undocumented immigrant meets specific requirements. The caveat to this exception, however, is that

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[338] Matter of *Alonzo Briones*; Departments of Commerce, Justice and Stat, the Judiciary and Related Appropriations Act, 1998, Pub L. No. 105-119, §111(a)-(b), 111 Stat. 2440, 2458 (enacted Nov. 26, 1997) ("1998 Appropriations Act"); LIFE Act amendment of 2000, Div. B, tit. XV, Pub. L. No 106-554, § 1502(a)(1), 114 Stat. 2763 (enacted Dec 21, 2000); (effective as if included in the enactment of the Legal Immigration Family Equity Act, tit. XI, Pub. L. No. 106-553, 114 Stat. 2762 (2000) ("LIFE Act").
[339] Bryn Siegel, "The political Discourse in Amnesty in Immigration Policy," 302.

a petition should have existed prior to April 30, 2001. Any petition after that date fell under the IIRIRA restrictions which triggered the three- and ten-year bars for unlawful entry. Nevertheless, section 245(i) benefited many undocumented migrants.

Immigration advocates and scholars have suggested that reenacting Section 245(i) permanently and eliminating the bars to reentry may be the most humane and most equitable action Congress could take without giving outright amnesty.[340] When IIRIRA implemented its harsh rulings against undocumented immigrants, it assumed that violators understood and knew the laws and therefore intentionally violated them; but this assumption has not been the case, and millions of undocumented immigrants, primarily Mexicans, continue to live in the shadows of US communities. However piecemeal these reforms were to deal with immediate immigration problems, the contradictions of immigration policy persisted; however, some undocumented immigrants have benefited from these programs and continue to do so only if they are aware and knowledgeable of these programs.

Paula Hernandez fell under this situation. Paula had a petition from her legal permanent resident father from 1996. Her father Guillermo was an amnesty recipient of the IRCA Act of 1986.[341]At the time her family was finally issued immigrant visas, Paula was not able to adjust her status with her mother or her siblings in 2004

[340] Siegel, "The political Discourse in Amnesty in Immigration Policy," 301.
[341] Interview by author with Paula Hernandez, 2018.

because she was already over 21 and had aged out.[342] As a result, she lived as an undocumented immigrant and waited until her 1996, F2b priority date took effect.[343] In 2015, her US-born daughter, Alicia, turned 21 years old. Alicia, as a US citizen, was able to petition her mother under the immediate relative preference category and together with the existing petition of 1996 helped her mother adjust in the US by paying the penalty fee of $1000.[344]The immigration system allowed and still continues to assist Alicia and other US-born children to help their parents finally achieve family re-unification, provided that their parents had a petition from a family member on or prior to April 1, 2001. Even though Paula was in the US, section 245(i) allowed her to legally unite with her family, presenting yet another contradiction. Undocumented immigrants may be physically present but legally separated.

Not every undocumented immigrant who has been in the US prior to April 1, 2001 has the opportunity to utilize section 245(i) to adjust his or her legal status in

[342] The Immigration and Nationality Act (INA) defines a child as a person who is both unmarried and under 21 years old. If someone applies for lawful permanent resident (LPR) status as a child but turns 21 before being approved for LPR status, that person can no longer be considered a child for immigration purposes. This situation is commonly referred to as “aging out” and often means that these applicants would have to file a new petition or application, wait even longer to get, or may no longer be eligible for a Green Card. (USCIS)

[343] US immigration law allows certain foreign nationals who are family members of US citizens and lawful permanent residents to become lawful permanent residents based on specific family relationships. Second preference (F2B) - unmarried sons and daughters, 21 years of age and older, of lawful permanent residents

[344] Immediate relative includes: spouse of a US citizen; unmarried child under 21 years of age of a US citizen; or the parent of a US citizen (if the US citizen is 21 years of age or older). Immigration law allows an immediate relative of a US citizen to become a lawful permanent resident based on your family relationship if you meet certain eligibility requirements.

the US. There are some unusual exceptions to this rule. This is yet another contradiction that happens to be beneficial. Carlos Gutierrez is an example of a different application of 245(i). Carlos entered the US from Mexico in March of 2014 with no documentation. Carlos' father Roberto had been residing in the US since the late 1990s, and on April 2001, Roberto's employer petitioned him.[345]Roberto's family was included in the petition, and they had an option to adjust their status in the US or abroad.[346] Roberto's family was in Mexico and remained there waiting for their legal paperwork to be completed. Roberto adjusted his status in 2005 and became a legal permanent resident. As is typical of many immigrants, Roberto was unaware that his family could enter the United States immediately after filing the correct and sometimes convoluted legal paperwork. Frustrated by the wait, Roberto's youngest son Carlos, nineteen years of age, entered the US without permission. For three years Carlos waited for his legal paperwork to be completed and worked as an undocumented person in the US. Typically, someone like Carlos would not have been able to attain legal status easily because he entered without inspection after April 1, 1997 and was subject to the three- and ten-year bar should he need to go back to Mexico to attain his immigrant visa and then his residency. Despite his illegal entry and undocumented presence, Carlos was able to adjust his

[345] Interview with Carlos and Roberto Gutierrez, June 2014 and January, 2017 by author.
[346] Follow to Join is an immigration benefit to legal permanent residents who were married and had children prior to becoming a legal permanent resident, and has received the immigration benefit through an employer or family petition.
https://www.immihelp.com/greencard/familybasedimmigration/following-to-join-benefits.html

status in 2017 through 245(i) in the US.[347] Although Carlos had not been physically present in the US on December 21, 2000, his father, Roberto was physically present in the US, thus Carlos met all the other requirements of 245(i). The unique exception of Carlos' physical presence is an anomaly once again written into the statutes to help unite families.

Neither Paula nor Carlos would have been able to adjust their status in the US if not for the special provisions within the 245(i) law. Both Paula and Carlos would have required the waiver of inadmissibility for unlawful entry because ordinarily they would have had to process their legal paperwork in the consular offices of their country of origin, Mexico. Having entered the US without documentation, they both would have triggered 9b had they returned to their country of origin to obtain the required immigrant visa, thus requiring a waiver of inadmissibility for unlawful entry and required to stay in Mexico for three or ten years.[348]Combinations of immigration benefits and special provisions have also helped other immigrants who were trying to unite their families but only if they were fully aware of these benefits. This was the case of the "V" visas.

The "V" nonimmigrant visas were another exception Congress granted to unite families, provided they had filed a petition for an unmarried child prior to

[347] USCIS, Department of Justice, Questions and Answers, March 23, 2001; https://www.uscis.gov/sites/default/files/files/pressrelease/Section245ProvisionLIFEAct_032301.pdf

[348] To review 9b violations, see figure 3.1 in chapter 3.

December 21, 2000.[349]The visa specifically helped older children who aged out. During this time period, legal permanent petitions were taking three to eight years to be approved, and children were aging out, allowing only parents and minor children to enter the US, separating families. Recognizing this hardship, "V" visas were granted to immigrant petitions filed on or before the enactment date of the LIFE Act of 2000. Once again, while Congress tried to stop the flow of illegal entries, it also recognized the need for unifying families. The "V" visas were temporary non-immigrant status benefits available to the spouses and minor children of lawful permanent residents who were waiting for more than three years for an immigrant visa. Persons who secured "V" status received employment authorization and were protected from removal.[350]

Attaining "V" visa status helped many "non-legal" migrants to become temporary and productive members of their society while they waited for their lengthy preference categories sometimes lasting for twenty-three years, to be processed. The "V" visas protected these migrants from removal while the encumbered, ponderous immigration system processed their claim to legal status. The case of Olga Carrillo is an example of someone who received the "V" visa and other benefits that helped her unite with her family and remain in the United States. Olga's father Ricardo Carrillo filed a petition for Olga in October of 1995. On

[349] https://www.uscis.gov/family/family-green-card-holders-permanent-residents/v-visa/v-nonimmigrant-visas

[350] USCIS.gov: US Department of Justice, Fact Sheet December 21, 2000, "Legal Immigration Family Equity Act"

November 6, 1995 the petition was approved.[351] Ricardo was a legal permanent resident, and due to the preference category, his family had to wait eight years to finally obtain immigrant visas.[352] In July of 2003, Ricardo's family finally finished processing their legal paperwork to enter the country.[353] Unfortunately, in 2003 Olga was already twenty-two years old, and she was no longer considered a child. She could not adjust her status to become a legal permanent resident with the rest of her family.[354] Her mother and two younger siblings received their residence cards, but Olga did not. However, because Olga's family had been waiting for an immigrant visa for eight years, and she had a petition prior to December 21, 2000, Olga was granted a "V" visa, and she was able to enter the US with her family. The nonimmigrant "V" visa also allowed Olga to obtain a work permit, a social security card and a state identification card to live a productive life until an immigrant visa was available for her. Olga had to renew her permit to work every two years, but she willingly renewed it because it gave her the required temporary legal status to be part

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[351] Interview by author with Olga Carrillo, 2012, 2016, 2017

[352] Section 203(a) of the INA prescribes preference classes for allotment of Family-sponsored immigrant visas. There are four categories: F1, F2A, F2B, F3 and F4. When Ricardo petitioned his family, he fell under the F2A preference category: spouses and minor children of Legal Permanent Residents

[353] Second Preference (F2A) categories are spouses of legal permanent residents, and unmarried children (under 21 years of age) of permanent residents. https://www.uscis.gov/greencard/family-preference

The Visa Bulletin allows applicants to check their place in the immigrant visa queue. The Visa Bulletin provides the most recent date for when a visa number is available for the different categories and countries for family-sponsored, employment-based and diversity (lottery) visas. https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin.html

[354] Interview with Olga Carrillo (2016) Olga was born on June 2, 1981.

of her family and her community. Since Olga was over twenty-one years of age, her preference category changed from F2a unmarried child, under 21 to F2b, over 21 daughter of a legal permanent resident. Olga knew to wait and not to get married until an immigrant visa was available to her.[355] Olga's situation was similar to Agustin's as presented in Chapter Three, and marriage would have annulled her chances to attain complete legal status. Olga, like Agustin, lived with the father of her two children without getting married.

On October 5, 2011, Olga's father passed away. After sixteen years of waiting, Olga's only hope to legalize her status in the US suddenly disappeared. A petition is typically revoked when the original petitioner passes away. However, Olga applied and requested that her petition be re-instated on humanitarian grounds and asked for a discretionary reaffirmation.[356] In July 2012 her petition was again approved and re-affirmed with her legal permanent resident mother Evelia as the substitute petitioner. In March 2017, after twenty-two years of waiting, Olga had a visa available for her F2b preference category. Olga could now adjust her status and become a legal permanent resident. Because Olga had a "V" visa that allowed her to

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[355] The F2a category includes spouses and unmarried children (under 21 years of age) of legal permanent residents. The F2b Second Preference category includes unmarried adult sons and daughters of legal permanent residents. https://www.uscis.gov/greencard/family-preference

[356] According to 8 C.F.R. §205.1(a)(3)(i)C), the approval of a Form I-130 is revoked upon the death of a Petitioner. A petition's approval can be reinstated based on (1) section 204(l) of the Immigration and Nationality Act, and/or (2) humanitarian grounds under 8 C.F.R. §205.1(a)(3)(i)(C)(2). Section 204(l) of the Act was created by Public Law 111-83 and allows certain beneficiaries to remain eligible for immigration benefits after a qualifying relative passes away. If the principal beneficiary was in the United States on the date of the petitioner's death and has remained in the US since the death, the petition approval may be reinstated.

get a work permit, Olga had been working for over ten years and had accumulated forty social security credits. Olga had religiously reported her taxes. Consequently, she did not need a legal status financial sponsor, another challenge for many undocumented immigrants seeking legal status. Olga filed her Affidavit of Support exemption paperwork along with proof of her social security earnings. Olga adjusted her status without the need of *el perdón*, the waiver of inadmissibility for unlawful entry, because she had entered with a "V" visa, qualified for 245(i) because she had come in prior to 2001, and was able to adjust her status in the US. Because of the many benefits she received, Olga had been a productive "citizen" this entire time.

The US government granted several immigration benefits to Olga in its attempt to unify her family, taking every humanitarian action possible under the law. Although Olga had to wait twenty-two years until she was able to finally receive her residency status, she did receive the "V" nonimmigrant visa allowing her to enter with her family, giving her an opportunity to work, get a social security card, report taxes, obtain a driver's license, open bank accounts, and buy a home. Furthermore, Olga received an exceptional benefit when her father passed away, a humanitarian reinstatement of her petition. Using humanitarian discretion, the government allowed Olga to maintain her pending petition and did not terminate it. Additionally, because Olga worked for ten years and had proof that she would not be a burden to

the state she qualified to adjust her legal status on her own financial merits without needing a financial co-sponsor.[357]

Olga's story, however, is an exception. Not everyone has been aware of the benefits available for family reunification offered in the late 1990s or in 2000, including the granting of the "V" nonimmigrant visas. Disappointed that one child was left behind, most families encouraged the "separated" child to enter in whatever way possible to join the family already living in the US. Additionally, not everyone was aware that a pending immigrant petition could be reinstated under humanitarian grounds if the original petitioner passed away. Olga happened to have shared her story and found organizations that guided her through a very complicated and convoluted immigration process that kept changing over the twenty-two years she waited for her immigrant visa. Most undocumented immigrants did not and do not have the luxury of continuous legal advice, let alone understand the changing immigration laws that have occurred between 1995 and 2015. Most undocumented immigrants did not have the financial means or the education to understand the complexity of the immigration statutes or the administrative processes required to legalize their status. Olga attained legal status, understanding that she could not get

[357] When an applicant files to become a legal permanent resident or immigrant visa under certain family-related provisions, the applicant must show that he or she has the financial means to live in the United States without needing welfare or financial benefits from the US government. The law requires that the sponsor or co-sponsor demonstrate that he or she is able to assist an applicant financially. The sponsor must show that he or she has an annual income of not less than 125 percent of the federal poverty level.

married even if she wanted to. She chose to follow the state rules and not her traditional national customs in fear of losing the only opportunity to remain in the US legally. Once most undocumented immigrants enter the US they understand not only that they are subjected to some level of punishment but also that they are subjected to a contradictory moral standard.

Most undocumented immigrants keep their moral dilemma internally while they negotiate with their legal conundrums externally. Most undocumented immigrants understand the meaning of *el castigo* and *el perdón*. The *castigo* is even more pronounced if the undocumented immigrant entered twice, particularly when on his or her first entry the undocumented immigrant had accumulated over a year of illegal time, triggering 9c.[358] The 9c rule has kept many undocumented immigrants from initiating or processing their legal status, in most cases remaining in limbo status for many years or for their entire lives.

Yet, despite the harshness of the 9c rule, which gives the undocumented immigrants a ten-year bar without a waiver, immigration placed exceptions to these sections of the statute in the form of the NACARA and HRIFA Acts, as well as the VAWA legislations.[359] In 1997 and 1998 Congress allowed certain Cubans, Central

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[358] 9C. See figure 3.1 on Chapter 3.

[359] Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, §202, 111 Stat 2193, 2193 (1997) ("NACARA"); Haitian Refugee Immigration Fairness Act of 1998, tit. IX, Pub. L. No. 105-277, §902, 112 Stat 2681-538, 2681-538 ("HRIFA")
The Violence Against Women Act of 1994 (VAWA) is a United States federal law, Title IV, sec. 40001-40703 of the Violent Crime Control and Law Enforcement Act, H.R. 3355) signed as Pub.L. 103–

Americans and Haitian undocumented entrants who were physically present in the US to adjust their status through the NACARA and HRIFA Acts. Their cases were even more exceptional because it nullified inadmissibility grounds related to the 9c unlawful presence and unlawful employment.[360] The 9c inadmissibility - entering unlawfully into the US, accumulating more than 365 days of unlawful presence, departing the US, and entering again - was an inadmissibility that had no waiver. It was an inadmissibility where the unlawful entrant was punished for ten years requiring the undocumented immigrant to return to his country for ten years before he or she could apply for an immigrant visa. The unlawful entrant was in essence a recidivist, and the 1996 IIRIRA specifically wanted to punish recidivists. But as the government began to implement the NACARA and HRIFA programs, Congress granted the Attorney General the discretionary authority to waive the 9c inadmissibility by amending the LIFE Act in December of 2000.[361]

Congress understood the impediments and obstacles of certain inadmissibility rules that IIRIRA had put in place such that certain undocumented entrants would not be allowed to adjust status unless a special discretion was granted through legislation. In effect, NACARA was the political response to the concern that specific individuals would be adversely affected and uprooted by the harsh changes

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322 by President Bill Clinton on September 13, 1994 (codified in part at 42 USC. sections 13701 through 14040).

[360] Matter of *Alonzo Briones.*

[361] Matter of *Alonzo Briones*; NACARA §202, 111 Stat at 2193-94, §902(a)(2), 112 Stat at 2681-538; 8 C.F.R. §§1245.13(c)(2), 1245.15()(3) (2007).

of the 1996 immigration laws as amended by IIRIRA.[362] Additionally, the uniqueness of this law was that it permitted individuals to adjust status even if they have been ordered excluded, deported, removed, or had failed to depart voluntarily after an order of voluntary departure. NACARA also benefitted the spouses, children and unmarried sons and daughters of qualifying aliens and permitted these individuals to adjust status so long as they met specific criteria.[363] NACARA was both an amnesty and a refugee program focused on certain Cuban, Soviet and Central American undocumented immigrants, but not Mexicans. Historically, Mexicans have not being considered refugees or asylees, nor are they aliens who are unable or unwilling to return to their country of origin or nationality because of persecution or a well-founded fear of persecution. Instead, Mexicans have been considered economic entrants and as such did not meet special provisions given to those who faced oppression or civil wars. Mexicans have a very low percentage of being admitted to the US as asylees and refugees.[364]

According to Senator Ted Kennedy as well as in congressional reports, the NACARA and the HRIFA legislation was an admission by the Senate that the IIRIRA immigration law treated many families unfairly and that something needed

[362] Lourdes A Rodriguez, Understanding The Nicaraguan Adjustment and Central American Relief Act, *ILSA journal of International and Comparative Law*, Vol 5:501), 502.
[363] Rodriguez, Understanding The Nicaraguan Adjustment and Central American Relief Act, 505.
[364] Migration Policy Institute, “Refugees and Asylees in the United States,” February 3, 2014. https://www.migrationpolicy.org/article/refugees-and-asylees-united-states

to be done to correct it.[365] Even within the NACARA and HRIFA programs inequities toward various nationalities were evident. The specific nationalities included in the Act ended up benefiting from this legislation to some degree.[366] From 1998 through 2014, approximately 250,000 people benefited from NACARA.[367] NACARA and HRIFA were excellent programs, albeit temporary, but notably, they did not include the Mexican population.

Similarly, in 1994, Congress also passed the Violence Against Women Act (VAWA) with bipartisan support. Once again, a key exception within this law was not accruing unlawful presence if the undocumented immigrant's presence in the US could be connected to sexual, physical and/or emotional violence.[368] VAWA applicants could apply to adjust their status regardless of having entered without inspection, worked without authorization or fallen out of lawful status since entering into the United States. The "domestic abuse green card," as noted by some, could be attained even if the undocumented immigrant was inadmissible under the 9c rule.[369] Susana Flores took advantage of this benefit when she became a VAWA recipient. Susana was the battered spouse of a US citizen. Susana entered the US in 2000, met and lived with Enrique, her eventual US citizen spouse, and had two children.

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[365] Rodriguez, "Understanding The Nicaraguan Adjustment and Central American Relief Act," 509.
[366] Rodriguez, 509.
[367] NACARA: https://en.wikipedia.org/wiki/Nicaraguan_Adjustment_and_Central_American_Relief_Act
[368] https://family.findlaw.com/domestic-violence/the-domestic-violence-green-card-immigrant-visa-petitions-for-vi.html
[369] https://www.nolo.com/legal-encyclopedia/green-card-under-the-violence-against-women-act-vawa-who-is-eligible.html. Immigration and Nationality Act or I.N.A. Sections 245(a) and 245(c)

Enrique drank heavily and in his fits of drunkenness abused Susana. According to her affidavit, her husband abused her financially, psychologically and sexually. Her husband finally threw Susana, an undocumented immigrant, and her children into the streets in December of 2006. Susana found a shelter and a non-profit organization to help her and filed for VAWA benefits. Despite the years of abuse, Susana had to show proof that she had good character and merited the benefit. In 2009, Susana was finally able to attain her permit to work and in 2016, she received her resident card.[370] Similar to the "V" nonimmigrant visa but with a shorter time-frame and with very unique benefits, a VAWA recipient like Susana did not need a person to legally file her paperwork; she was able to file her own petition on her own behalf to adjust her legal status. Also, there are no limits to the number of VAWA self-petitions that may be filed in any given year, unlike the preference categories which are limited or other immigration benefits that have finite numbers.[371]

The unique aspects of NACARA, HRIFA and VAWA were the nullification of the inadmissibility grounds related to the 9c unlawful presence and unlawful employment.[372] As mentioned earlier and in the prior chapters, the 9c inadmissibility, entering unlawfully into the US, accumulating more than 365 days of unlawful presence, departing the US, and entering again, was an inadmissibility that

[370] Interview with Susana Flores, 2016
[371] Section 201 of the Immigration and Nationality Act (INA) sets an annual minimum family-sponsored preference limit of 226,000. The US admitted 84,995 refugees in the fiscal year ending in September 2016.
[372] Matter of Alonzo Briones.

had no waiver and required that the unlawful entrant be punished for ten years in his country of origin before he or she could apply for an immigrant visa. Moreover, an undocumented migrant still faced other grounds of inadmissibility at their consular interview in addition to unlawful presence: multiple entries, crimes of moral turpitude, criminal actions, misrepresentation, false claim to US citizenship, assisting the entry of undocumented, likely to become a public charge, or becoming a medical threat. The "Doctrine of Consular Non-reviewability" and punishment was a specter for any undocumented who went to their home country to attain an immigrant visa.

IIRIRA's regulations were harshest on the Undocumented Mexican immigrants, and the fifty-four-plus violations redefined by IIRIRA affected the Mexican community inside and outside the US. The Doctrine of Consular Non-reviewability affected Luz Martinez during her consular interview in Mexico in 2017 for having brought her daughter into the US. Luz Martinez entered the United States in December of 2001 after being left alone in Mexico with her youngest daughter. Her five sons had followed their father Jesus, one by one entering the United States at various times to find work and a better life than the one they had in Ocampo, Guanajuato, Mexico. Jesus had been an agricultural worker and was the beneficiary of the 1986 amnesty program, receiving legal permanent status in 1990. But Jesus never learned to read or write and, consequently, never had the opportunity to bring his children or his wife legally into the United States. Each one of his children

entered surreptitiously across the border.[373] The paperwork required to bring his family required his ability to understand the evidence he needed to submit on his applications, and because of his limited literacy, he failed to complete them.

In 2002, the family was finally together in Dallas, Texas, albeit sans legal status. Jesus and Luz were in their middle sixties, and unless Luz gained legal status she could not travel or dream of ever going back to Mexico. However, on August 29, 2016, USCIS expanded the existing provisional waiver process to allow family members of legal permanent residents who were statutorily eligible for immigrant visas to apply for provisional waivers of the unlawful presence ground of inadmissibility.[374] Jesus was a legal permanent resident, and up until that time legal permanent residents did not qualify to submit a provisional waiver but instead a regular waiver which separated their families for two to four years or longer in two countries while they waited for the waiver to be approved. The expansion of the provisional waiver, according to USCIS, was built on the process established in 2013 to support family unity by reducing the time that eligible individuals were separated from their family members while they completed immigration processing abroad. This was true, as it often took two to five years to sometimes process a waiver of

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[373] Interview by author with Jesus Martinez, January, 2016 and February, 2017.

[374] US Citizenship and Immigration Services (USCIS) is the federal agency that oversees lawful immigration to the United States. Provisional Waiver Program: Since March 4, 2013, certain immigrant visa applicants who are immediate relatives (spouses, children and parents) of US citizens can apply for provisional unlawful presence waivers before they leave the United States for their consular interview. On August 29, 2016, the provisional unlawful presence waiver process was expanded to all individuals statutorily eligible for an immigrant visa (Legal Permanent Residents) and a waiver of inadmissibility for unlawful presence in the United States. USCIS website.

inadmissibility for unlawful entry abroad. Jesus and Luz had already been separated for decades while Jesus worked in the US and visited his family only twice a year prior to and during the time he became a legal permanent resident. The family opted to live in a household of mixed legal status until they were assured that their separation would be short.[375]

Upon receiving the news from USCIS in August of 2016, Jesus submitted the provisional waiver of Luz. The waiver was approved after Jesus presented that due to his heart condition, age and difficult life as an illiterate person he would experience "extreme hardship." In February of 2017, Luz attended her consular interview in Ciudad Juarez, Mexico but she did not return back to Dallas. At her interview, the consular official concluded that Luz had "knowingly induced, assisted, abetted or aided" another person "to enter or try to enter the United States" in violation of immigration law.[376] Luz was accused of having smuggled a person into the United States. When she was asked at her interview if she had come alone, she responded that she had brought her young daughter with her and had crossed the river with her daughter. According to immigration law, Luz had brought her daughter illegally – acting as a "coyote," - and had violated one of the 1996 IIRIRA violations, and would now be subjected to another punishment. At her time of entry, no one was left in Mexico to take care of her child so naturally Luz crossed with her

[375] https://www.uscis.gov/news/news-releases/uscis-allow-additional-applicants-provisional-waiver-process (Release Date: July 29, 2016)

[376] §212(a)(6)(E): an alien will be inadmissible even if an alien assists or causes close family members to enter the United States illegally and regardless of his or her motivation.

child.[377] Luz had to remain in Mexico until Jesus, once again, could prove extreme hardship. Ironically, the 2016 ruling to unite family members had divided Jesus' family once again. The life of an immigrant, particularly of Mexican immigrants who enter the US, is much more complex and more nuanced than the letter of the law that it portends to resolve while overseeing lawful immigration into the United States.[378] The result is a dichotomy dealing with the human element and the legal construct; border control and implication to families; a government changing policies versus family values. The good news to Jesus and his family was that there was a waiver for smuggling a person provided the violator had smuggled his or her child. The contradiction in this case is that families typically do not "smuggle" their own children. They bring their children as a process of migration. The definition of "smuggling" had suddenly expanded to contravene the definition of "family."

In the last one hundred years, immigration laws have become more constricted in its efforts to protect American borders. At the same time, special laws and amendments have provided waivers and humanitarian programs to unite families, to protect and assist individuals who have experienced disaster, oppression or other urgent circumstances even though some applications of these laws and policies have often countered ordinary definitions of family unity and re-unification. These issues have become a moral dilemma for a nation and for undocumented

[377] Interview by author with Jesus Martinez, January, 2016 and February, 2017.

[378] US Citizenship and Immigration Services (USCIS) is a component of the United States Department of Homeland Security (DHS).

immigrants. Luz could have easily stated that her daughter was not with her, that her daughter entered at a different time and with someone else. This statement could have given her an immigrant visa and would have allowed her to return back to the US and continue with her life. Instead, she told the truth, and she was punished for another two years in Mexico without seeing her family who were all now residing in the US. Knowing the changing immigration policies and laws, understanding the consequences of their own actions, and anticipating the next move of Congress or of forthcoming USCIS department memorandums are requisites for unlawful migrants to manage their lives in the US Most undocumented immigrants, or most US citizens any citizen for that matter do not have the sophistication nor the knowledge of the constant change of immigration policies and the laws.

Consequently, undocumented immigrants who have taken advantage of some legal protections are those who have been knowledgeable of these programs and have had the guidance of navigating through the very complex immigration system of the US. Hence, the US government has indeed offered and continues to offer many benefits to certain undocumented immigrants through the U-Visa, VAWA program, the PIP program, CSPA rulings, TPS extensions, DACA program, T visas for victims of human trafficking, SIJ Status for minors, asylum, and other humanitarian paroles that are beyond the scope of this study.[379] These benefits,

[379] U- Visas and T- Visas are temporary immigration benefit to foreign nationals who are victims of qualifying criminal activity, victims of human trafficking, domestic violence, and other serious crimes. Parole in Place (PIP) is a discretionary option for military embers, enlistees, their families.

however, have been discretionary and could end or become more restrictive any time depending on the political climate of the executive administration. As noted by legal scholar Motomura, discretion depends on the political and economic aspects of a nation that are often inconsistent, unpredictable and sometimes discriminatory.[380] For example, shortly after the Trump Administration assumed control of the White House in 2017, the US confirmed its policy of exclusion and contradictions by instilling a restrictionist culture in various federal agencies in charge of US immigration, forcing immigration advocates to seek relief through the judicial branch.[381] The new immigration policies of the Trump administration had been placed supposedly to attract the best and the brightest and make America great, an agenda that has been followed by suppressing legal immigration through the "rigorous enforcement" of the existing immigration laws. These enforcement methods have created uncertainty. Rigorous enforcement indicated that federal agencies were directed to delay, deny and challenge visa requests. In effect the restrictionist culture seeks to close the doors on legitimate immigration cases using "technicalities and broad deferential, non-reviewable authority," creating an

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CSPA provides a method for calculating a person's age to see if they meet the definition of a child for immigration purposes. This allows some people to remain classified as children beyond their 21st birthday. TPS is another government benefit given to nationals of a designated country due to conditions that temporarily prevent the country's nationals from returning safely. https://www.uscis.gov/greencard/eligibility-categories

[380] Motomura, *Immigration Outside the Law*, (New York: Oxford University Press, 2014), 22.

[381] Wolfsdorf, Beatus, Blanco, Barnett and Rosenthal, "An era of exclusion: Ongoing US Immigration Policy Changes Under the Trump Administration," (Rupert Wilson, editor; *WWL, Corporate Immigration* 2018: London, March 2018).

atmosphere of fear and uncertainty.[382] The forthcoming new immigration era will be marked by increased unpredictability and exclusion.

According to historian Mae Ngai, migration will continue, wanted or unwanted. The imbalance of power, the asymmetrical political and economic relationships among nations and the anachronistic immigration policies that counter capitalism globalization have made migration inevitable. Ngai credits Paul Empie with advocating a position of "secular morality" for the United States that asks policymakers to "resist the insistent pressure of groups of our citizens for a quick increase in their standard of living without regard to our relations to a world society." Empie, per Ngai, calls for a higher moral code that takes into consideration a more balance interest of people, culture and universal human rights.[383] Similarly, in his book, *Our Endangered Values, America's Moral Crisis*, former President Jimmy Carter cites that special interest groups and fundamentalists are becoming increasingly influential in religion and government, and as a consequence, they are changing "the nuances and subtleties of historic debate into black and white rigidities." Carter continues his observation of America by stating that these trends pose a threat to our nation's historic customs and moral commitments by creating a

[382] Wolfsdorf, Beatus, "An era of exclusion."
[383] Mae M Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America*, (Princeton, NJ: Princeton University Press, 2004), 253.

brand of rigidity, domination and exclusion.[384] The United States is in the midst of a suggestive dichotomy: how to deal with wealth vs. poverty; integration vs. segregation; punishment vs. forgiveness. As a nation, the United States has a moral obligation to punish violators, but as the quotation at the beginning of the conclusion chapter states, a country can also atone and forgive those same violators. The current definition of moral justice in the US is to both punish and forgive.

The waiver of inadmissibility for unlawful entry is an example of that justice, of the punishing and forgiving. History has shown that the government has put in place processes and systems in favor of those who they politically deem deserving to stay. While the US is a nation by design, they have designed a system of unequal access and entry. The waiver of inadmissibility for unlawful entry is a system. It is not an easy system; it is not a perfect system. In fact, the system is rife with discrimination and possible corruption. Instead of being humane and flexible it was designed as a system of discretion fraught with dangers, uncertainty and unpredictability. This is nonetheless the system of entry to join a community in the United States of America.

[384] Jimmy Carter, *Our Endangered Values, America's Moral Crisis*, (New York: Simon & Schuster, 2005), 3, 35.

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