Shifting Paradigms of Membership:
Addressing the Neoliberal "Crimmigration" Crisis

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Abstract

Since the Chinese Exclusion cases of the late nineteenth century, the Supreme Court of the United States has upheld the federal government's plenary power over immigration matters, allowing for the suppression of immigrants' constitutional rights at the federal level. Despite the 14th Amendment of the U.S. Constitution promising equal protection for all – including noncitizens – plenary power has consistently denied immigrants personhood at the federal level. In this instance, and numerous that followed, the shifted membership standard was based on perceived national security interests and pseudo-scientific racism finding that certain classes of immigrants were inherently inferior and would not assimilate. Yet in 1996, a suite of Congressional laws further expanded this plenary power to the states, granting local governments authority over immigrant personhood as well. In assessing this rapid "partial devolution"[1] of power, I argue that dual, complementary forces since 1996 – the criminalization of immigration law and the neoliberal "transnationalization of labor"[2] – are critical to understanding the alarming shift toward immigrant non-personhood and exploitability.

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[1] Monica Varsanyi, "Rescaling the 'Alien,' Rescaling Personhood: Neoliberalism, Immigration, and the State," *Annals of the Association of American Geographers* 98 no. 4 (2008): 878.
[2] Saskia Sassen, *Globalization and Its Discontents* (New York: New Press, 1998): *xxx*.

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I. Case Study: The Raid in Postville, Iowa

At around 10:00 a.m. on May 12, 2008, U.S. Immigration and Customs Enforcement (ICE) executed a raid at Agriprocessors, "the nation's largest kosher slaughterhouse and meat packing plant"[3] in Postville, Iowa. Preparation for the raid had begun in December of the previous year, at a time when the Department of Justice viewed Postville as "a pilot operation to be replicated elsewhere, with kinks ironed out" only after "fast-tracking" the raid.[4] The legal impetus for the raid rested on one primary justification: 76 percent of the meat-packing plant's workforce was undocumented – and these individuals were to be criminally charged with "aggravated identity theft" and "Social Security fraud."[5] As explained by Erik Camayd-Freixas, a federal interpreter at the raid, "ICE [was also] under enormous pressure to turn out statistical figures that might justify a fair utilization of its capabilities, resources, and ballooning budget" – and thus, agents "beef [would] up their numbers" by focusing on undocumented workers who did not, in reality, pose any threat to the national security of the United States. This was the case in Postville, as undocumented immigrants at a meatpacking plant in rural Iowa were not threatening nor did they constitute any facet of domestic terrorism. Yet this did not factor into ICE's decision to fast-track the raid, and as a result, some 390 of the plant's undocumented immigrant workers were arrested by nearly 900 ICE agents[6] – leading to the raid's enthusiastic description by agency officials as "the largest single-site operation of its kind in American history."[7]

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[3] Camayd-Freixas, cited in Oboler, 160.
[4] Ibid, 170-1.
[5] Ibid, 160.
[6] Ibid, 160.
[7] Ibid, 159.

"A line was crossed at Postville," recalled Erik Camayd-Freixas[8] in his statements at a U.S. District Court Hearing on the raid in July of 2008.[9] Because "disasters, criminality, and terrorism do not provide enough daily business to maintain the readiness and muscle tone of [ICE],"[10] the federal government actively targeted foreign residents for minor labor-related crimes. Perhaps more remarkably, the Department of Justice ignored numerous precautions, regulations, and customs that would normally protect the victims' civil rights – rights enshrined in the United States Constitution for all residents regardless of citizenship via the fifth and fourteenth amendments.

This was most evident in the purposefully hasty manner in which the Department of Justice planned the raid. For example, government officials had leased the National Cattle Congress (NCC) – "a 60-acre cattle fairground" – under the guise of "Homeland Security training."[11] Despite its lack of federal certification, the fairground was transformed into "a sort of concentration camp or detention center"[12] and a makeshift courtroom, with its large size indicating that ICE expected the prosecution efforts to be simultaneously large-scale and fast-paced. Yet this was especially problematic in action, as massive groups of undocumented immigrants waited in the fairground for a rushed legal process. Hearings, in which workers were

[8] The "line" identified by Camayd-Freixas seems to be that the treatment of immigrants as nonpersons had become visibly inhumane for him, as immigrant residents were criminalized and targeted en masse. His account, while excellent for narrative purposes of reconstructing what happened at Postville, purposefully ignores the decades of federal mistreatment of foreigners prior to Postville. Further, he uses words such as "illegal" and "alien" (and not "undocumented") to assert that the workers were justly targeted and deported – even if he believes the means of doing so to be horribly executed.
[9] Camayd-Freixas, cited in Oboler, 174.
[10] Ibid, 170.
[11] Ibid, 159.
[12] Ibid, 159.

"driven single-file in groups of 10, shackled at the wrists, waist and ankles,"[13] literally resembled a meat-packing "assembly line." The raid stagers actually "circumvented habeas corpus by doubling the court's business hours"[14] in order to finish the arraignment of all 390 workers by the end of the week. "Court appointed attorneys represented 17 defendants on average," and the Department of Justice prepared scripts for the lawyers to follow in order to accelerate the pace of the meetings.[15] Workers were given only two legal options: first, to accept a Plea Agreement and five months in jail and a subsequent deportation without a hearing; or second, to plead not guilty and face indefinite imprisonment and later deportation under the Patriot Act. These criminal charges implied that all of the undocumented immigrants had criminal "intent" and "knowingly" committed identity theft, which was clearly untrue – especially considering the fact that Social Security numbers do not exist in Guatemala or other Latin American nations from which these individuals had immigrated. Similarly, Agriprocessors' various labor law violations – including the employment of children under age 18 to operate heavy machinery and wage theft – were placed behind the workers' trials in terms of legal importance. Responsibility for the 737 social security "no match" employees[16] was placed entirely on the undocumented workers and not on Agriprocessors as a corporation, despite the company committing the investigated fraud. Lastly, the Department of Justice hired only Spanish translators for Agriprocessors' workers, despite the workers often speaking languages indigenous to Latin America[17] and not Spanish; this further emphasized the government's carelessness in providing any legal assistance to the victims of the raid. These undocumented workers were quite literally lost in translation with their respective

[13] Camayd-Freixas, cited in Oboler, 164.
[14] Ibid, 163-4.
[15] Ibid, 164.
[16] Ibid, 169.
[17] Ibid, 160.

lawyers – a problem that was essentially untreatable because of the rushed "due process" period at the National Cattle Congress.

Interestingly, this undemocratic neglect for civil rights also led to ICE's blatant disregard for human rights, or those upheld by the United Nations (U.N.) through documents such as the Universal Declaration of Human Rights. First, Agriprocessors workers were not properly screened for refugees and those fleeing violence in their home country. Defined by the U.N. as "a person a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership in a particular social group,"[18] refugees should have been identified and not placed into the so-called "assembly line" of workers as they eventually were. As a member nation of the U.N. vocally embracing human rights, the United States government blatantly failed to identify potential persons who fit this definition. This represents a clear and illegal use of power by ICE, whose 900 agents not only attempted to exceed their authority as immigration enforcers to become legislators – but also superseded international regulations in place for safeguarding victims of abuse and terror in their home countries. Similarly, a sizeable portion of the 390 immigrant workers apprehended were victims of sexual assault, emotional abuse, and violated child labor laws. These factors, which were apparently already subject to scrutiny via "an ongoing state investigation […] designed to improve conditions"[19] should have been grounds for U nonimmigrant eligibility (also known as qualification for the U visa) – which grants temporary residence to "victims of crimes who have suffered substantial mental or physical abuse due to [the] crime."[20] Yet again, the government agency's rash implementation of raid

[18] "What is a refugee?" The U.N. Refugee Agency webpage (unrefugees.org), 2017.
[19] Camayd-Freixas, cited in Oboler, 171.
[20] "Victims of Criminal Activity: U Nonimmigrant Status," U.S. Citizenship and Immigration Services webpage (uscis.org), 07/28/2016.

procedures left these victims mostly unaccounted for – a serious legal error that disproportionately hurt workers' chances at safely seeking asylum. Thus, it is clear that ICE disregarded the human rights of undocumented workers at Agriprocessors by ignoring the safety of individual immigrant workers and instead rushing the raid to increase the agency's numbers.

Pangs of fear reverberated throughout the nation immediately after the events at Postville. To this day, the human rights abuses remain outstanding violations of U.N. policy within the international community, but equally as worthy of discussion is the fact that the United States federal government never held itself accountable for ICE's infringement upon the Agriprocessors workers' civil rights. In theory, the Postville raid breached the foreign residents' fifth and fourteenth amendments, which hold that "no person shall […] be deprived of life, liberty, or property, without due process of law […]"[21] and that no state shall "deny to any person within its jurisdiction the equal protection of the laws,"[22] respectively. These two amendments do not specify citizenship as a prerequisite for due process and equal protection, and therefore, all persons – including foreign residents on U.S. soil – *should* have them protected at the state level under the Constitution. Yet the *persons* targeted and harassed by ICE agents were essentially treated as *nonpersons* without any civil rights or protections. Not only did ICE commit these actions, but the federal government and its various arms of immigration enforcers technically has the legal ability to suppress Constitutionally-protected rights for foreigners, regardless of their long term ties to the United States. How did the U.S. Constitution fail so many people? Perhaps more importantly, how could this happen in a nation that prides itself as being a nation of immigrants?

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[21] U.S. Const. amend. V.
[22] U.S. Const. amend. XIV.

II. Introduction

Immigration in the United States has never been just a game of insiders and outsiders. Much of the modern political discourse surrounding immigration involves what Boston College law professor Daniel Kanstroom refers to as "extended border control,"[23] or the enforcement of who can legally enter and stay in the United States just after an immigrant's entrance through the country's borders. Enforcement of "extended border control" is generally related to correcting and enforcing conditions of the admission process, and the current preoccupation with it is evident in nearly all facets of American politics with regards to immigration today. For example, Donald Trump's formal announcement ceremony for his presidential candidacy on June 16, 2015 attempted to highlight the urgent need for increased militarization of the U.S.-Mexico border. Despite Trump speaking controversially about numerous issues – including terrorism, the national debt, and foreign affairs – no topic warranted as much attention as immigration and his proposed thousand-mile border fence[24] between the U.S. and Mexico. Trump spoke bluntly:

> When Mexico sends its people, they're not sending their best. They're not sending you. They're not sending you. They're sending people that have lots of problems, and they're bringing those problems with us. They're bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people. [..] Because we have no protection and we have no competence, we don't know what's happening. And it's got to stop and it's got to stop fast.[25]

However ineloquent the comments, this Trumpian rhetoric attempted to corroborate calls for increased "extended border control" in multiple ways. Foremost, the language is strategic

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[23] Daniel Kanstroom, *Deportation Nation: Outsiders in American History* (Cambridge: Harvard University Press, 2007) 5.
[24] "Donald Trump's Mexico Wall: Who is Going to Pay for It?" (BBC News, February 06, 2017).
[25] "Full Text: Donald Trump Announces a Presidential Bid" (The Washington Post, June 16, 2015).

because the implementation of both the border fence and subsequent "post entry social control" depended on some form of antagonism from Mexico, however nonexistent. Politically, the notion that Mexico as a single entity was sending individuals across national borders placed the Mexican government in diametric opposition to the national security of the United States, which in itself might validate the need for Trump's so-called "protection" via increased border control. In reality, this was and remains a purely politicized representation of immigration patterns – it ignores numerous economic and sociopolitical factors that actually do influence migratory bridges throughout North America. Yet because Trump targeted immigrants based on national origin, he transcended hatred and bigotry and actively *racialized* the Mexican people. This racialization, especially apparent in Trump's aside that perhaps "some" Mexicans are "good" people, overgeneralizes the identities of all Mexicans. It connects modern economic language of immigrants as job "thieves" with past language of racial inferiority – all in order to satisfy the political end of militarized border control. This further established the false interconnectedness of the Mexican people and the criminalization of their labor, allowing Trump to scapegoat them for trampling upon America's apparently "great" past.

In the context of the Postville Raid of 2008, though, "extended border control" is not necessarily to blame for the federal government's seemingly "extraconstitutional" use of power to regulate immigration. Rather, foreign residents already inside the U.S. have been regularly treated inhumanely as *nonpersons* by the federal government for over a century, as government actors carefully distinguish citizens from noncitizens by regulating foreign residents within – not just at – U.S. borders. In contrast to "extended border control," Kanstroom refers to this phenomenon as "post entry social control,"[26] whereby nation-states continually threaten and

[26] Kanstroom, 5.

enforce the deportation of foreign residents already situated within the United States. Such authority rests on the assumption that nation-states hold sovereign power to control their territory and distinguish citizens from noncitizens. Basically, by nature of their existence, independent countries are entitled to grant privileges to whomever they would like within their borders. In the context of a membership spectrum of residents with varying degrees of rights, these individuals are the "members" of the country. In contrast, independent countries may also *not* grant certain privileges and rights to individuals within their borders – establishing a second, less privileged class of foreign residents whom the federal government categorizes as substandard to citizens. According to Kanstroom, this "post entry social control" derives from "eternal probation" (or "eternal guest") models of immigration in which even "long-term lawful permanent residents […] are harbored subject to the whim of the government and may be deported for any reason."[27] After arriving and residing in the country for some period of time, foreign residents become nonpersons who are deemed inferior on the basis of alienage or noncitizen status – sometimes, as Trump's language did toward Mexican residents – through their racialization by the federal government. They are subject to inferior treatment – and worsening standards of membership by government actors. Therefore, the federal government of an independent country has and uses this inherent sovereign power to exclude foreign residents from the privileges that citizens hold. In the context of the United States, these denied privileges are largely civil rights from the Constitution, although the Postville Raid of 2008 and various other historical examples demonstrate that the abandonment of civil rights can even lead to negligence in respecting human rights.

[27] Kanstroom, 6.

The United States federal government, despite its status as a democracy, enforces post-entry social control through the plenary power doctrine, a legal tenet first referenced in the immigration context by the Supreme Court in the late nineteenth century. The infamous doctrine places all immigration matters in the hands of the federal government without any review by judicial actors like the Supreme Court. Therefore, without a judicial body serving as a system of checks and balances, the federal government (consisting of the executive and legislative branches) has free reign in treating foreign residents as nonpersons. Such a blatant disregard for civil rights in the United States is seemingly paradoxical, as the 14th Amendment of the United States Constitution equal protection clause ensures for all – including noncitizens within the nation's borders. Yet plenary power has allowed federal actors to evade the equal protection clause for over a century, allowing numerous presidential administrations to wrongly dehumanize lawful residents as nonpersons on a variety of legal bases. The controversial nature of federal mistreatment of any foreigners has brought multiple high profile cases to the Supreme Court, and, despite the lack of judicial review in these instances, the legal language used in each case's holding is critical toward understanding how and why such a disregard for foreigners' human rights can continue. In order to illustrate the dynamics and consequences of "post entry social control" and to further argue that plenary power ensures the increased exploitability of foreign residents as nonpersons, I chronicle six notable legal cases involving federal plenary power – and one historical example – in the following section entitled "Plenary Power in Immigration."

In 1996, though, this federal preemption over resident immigrants shifted drastically. Prior to this decade, "state and local governments were held by the courts to a 'personhood'

standard" – meaning they were "required to treat 'immigrants as people'"[28] unlike the federal government. This follows the logic of post-entry social control, as states are not sovereign governments and must follow the Equal Protection Clause of fourteenth amendment; therefore, states could not treat resident foreigners as nonpersons. Yet Monica Varsanyi, Professor of Political Science at John Jay College of Criminal Justice, explains that multiple policy changes passed in the 1990s related to anti-terrorism and welfare massively changed this notion of post-entry social control. Historically connecting "immigrants" to "criminals," the U.S. Congress passed legislation that created a "partial devolution"[29] of power to state and local governments as a response to terrorist attacks like the 1995 Oklahoma City bombing. As a result of these policies, state and local governments received newfound power "to discriminate on the basis of alienage or noncitizen status" – just as the federal government could through plenary power. This devolution of power was partial, "challeng[ing] rather strict jurisdictional lines in place over a century"[30] and contradicting the federal government's sovereign power over its people. These contradictions remain today, and states such as Arizona have attempted to exceed federal preemptions in cases of immigration but are struck down because of federal preemption. The partial devolution of power in the 1990s has resulted in the further suppression of foreign residents' membership rights. These individuals are no longer considered persons at the state and local levels; rather, foreigners are considered vulnerable nonpersons.

I argue that two fundamental factors of this shifting membership are contributing to the suppression of foreign residents' rights in the United States. First, policies from this era have allowed for the merging of the criminal and immigration legal fields, resulting in what Lewis &

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[28] Varsanyi, 884.
[29] Ibid, 878.
[30] Ibid, 878.

Clark Law School Professor Juliet Stumpf calls *crimmigration*. This association has blurred the line between immigrant and criminal so strongly that "immigration law is now often used in lieu of criminal law to detain or deport those alleged to be involved" in crimes – especially those related to terrorism.[31] Second, the rise in neoliberal economic practices since the 1980s – practices that privileged the free market over workers' rights – has made foreign residents extremely vulnerable to labor exploitation, which establishes them not just as nonpersons but as "neoliberal subjects"[32] with fewer rights. In essence, the free market promoted by the government relies on expendable labor, yet this labor force of immigrants is heavily criminalized. Therefore, both the criminalization of immigrants and their increased exploitability are interrelated forms of post-entry social control – together causing the deterioration of foreigners' rights within the United States at an alarming rate.

Unfortunately, the intricacies of this immigrant membership degradation are not easily treatable. In lieu of traditional calls for policy change, I argue for a philosophical reassessment of global duties in order to properly stabilize and reinstate the personhood of all. This requires a shift in mindset from rights-based systems of morality to a duties-centric model. As explained by Yale University Professor of Law Samuel Moyn, "even the most generous attempts to protect the political and socioeconomic rights of individuals leave some duties of individuals to their own states and all humanity out of account."[33] If nations cannot guarantee the fulfillment of rights preserved in their respective supreme legal documents, then their existence in-action will continue to be disputed. Understanding the world's moral history of duties, or obligations, can

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[31] Juliet Stumpf, "The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power," *American University Law Review* vol. 56, issue 4 (2006): 385.
[32] Varsanyi, 882.
[33] Samuel Moyn, "Rights vs. Duties" (*Boston Review*, May 16, 2016).

help to create a more proactive and collective response toward even the world's most pervasive systems of rightlessness.

III. Plenary Power in Immigration

"In the exercise of broad power over immigration, Congress regularly makes rules that would be unacceptable if applied to citizens. This Court has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens."

—Chief Justice William H. Rehnquist, *Mathews v. Diaz, 426 U.S. 67* (1976)

In determining membership and personhood status, the Supreme Court's upholding of the federal government's plenary power over matters of immigration is arguably the most consequential legal doctrine in terms of immigrant rights. The doctrine grants the President and Congress control over immigration with minimal judicial review[34] from the Supreme Court, and it asserts "inherent sovereign powers" whereby "exclusion of noncitizens [is] a fundamental right of a sovereign government"[35] in the nation-state. Antithetical to the 14th Amendment of the U.S. Constitution, plenary power allows the federal government to enforce post-entry social control via discriminatory measures toward foreign residents that would normally be unconstitutional in a non-immigration context, as "federal courts have repeatedly allowed Congress to use immigration laws to exclude and deport noncitizens deemed unwanted."[36] The meaning of "unwanted" has varied with historical context, from biases based on alienage to racially-biased police stops for immigration purposes. Despite this clear disregard for human rights, plenary

[34] Kanstroom, 114.
[35] Varsanyi, 884.
[36] César Cuauhtémoc García Hernández, "Plenary Powers Doctrine" in Katherine R. Arnold, ed. *Anti-Immigration in the United States: A Historical Encyclopedia*, 393.

power has never been provided for in the U.S. Constitution – and it has yet to be overturned by the Supreme Court. In order to fully understand the critical relationship between the plenary power doctrine and membership, it is important to analyze case law and its implications on personhood in the United States.

The plenary power doctrine was first invoked by the Supreme Court in immigration law through the now infamous "Chinese Exclusion Case" of 1882. Years before, in 1868, the United States and China signed the Burlingame Treaty, which authorized open immigration for citizens from both nations: it affirmed "the inherent and inalienable right of a man to change his home and allegiance, and also the mutual advantage of free migration and emigration of their citizens and subjects […] for purposes of curiosity, of trade, or as permanent residents."[37] Chinese immigrants had already established deep ties to the United States prior to this treaty's authorization, though – Chinese immigrants "were recruited to construct the transcontinental railroad and to labor on farms and in factories" throughout the country long before. As residents, Chinese immigrants were largely viewed as a "racial buffer" between whites and African Americans – although they were still viewed as a "servile" race "prone to submissiveness."[38] After the abolition of slavery, though, Chinese immigrants were especially vulnerable to the constant threat of white violence and racism, as racist whites viewed Chinese workers as threatening to their economic status as "free white workers."[39] This irrational fear over "coolie labor," along with the subsequent economic depression, fueled the racist violence of white residents. Whites racialized Chinese residents, maintaining the racist belief that, because "the

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[37] See: Burlingame Treaty, U.S.-China, July 28, 1866, 16 Stat. 739, 740.
[38] Tamara K. Nopper, "Chinese Exclusion Act" in Katherine R. Arnold, ed. *Anti-Immigration in the United States: A Historical Encyclopedia*, 107.
[39] Ibid, 107.

Chinese were servile," they were "willing to work for less pay because of a lower standard of living."[40] Chinese women were racially derided as prostitutes, a "distinct threat"[41] to the American way – while Chinese immigrants in general were lambasted for a lack of morals and an inability to "Americanize" like European residents.[42] Essentially, long-term residents were made foreigners as a product of American racism. Still, there had long been a Chinese presence in the United States, and the Burlingame Treaty overtly stated the right to a permanent residence once an immigrant entered the United States.

Yet amidst increasing anti-Chinese racism, the American government produced two policy measures that restricted borders: first, the Chinese Exclusion Act of 1882 excluded entry for prostitutes and criminal convicts – in itself a measure that "could have been race- and nationality-neutral but for the presumption that Chinese women were prostitutes."[43] Policy measures such as this managed to simultaneously validate and preserve the deeply racist Orientalism perpetuated by white Americans.[44] Second, in 1884, Congress altogether suspended the immigration of Chinese workers into the United States, forcing those who already resided in the country to obtain certificates for reentry if and when they were to leave the country. For the large Chinese community that had long resided in the United States, this was an incredibly

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[40] Nopper, cited in Arnold, 107.
[41] Kanstroom, 102.
[42] Ibid, 121.
[43] Natsu Taylor Saito, *From Chinese Exclusion to Guantánamo Bay: Plenary Power and the Prerogative State* (Colorado: University Press), 17.
[44] The Chinese Exclusion Act was the first legislation "to explicitly exclude a specific ethnic group." This is noteworthy for a variety of reasons; Chinese women were morally excluded as prostitutes and Chinese men were eugenically excluded for being both racially inferior and economically threatening, despite the United States having an altogether solid relationship with China. Thus, such antagonism toward long-term Chinese residents was formed entirely on the basis of racism and economic fears, not political conflict. See: Nopper in Katherine R. Arnold, ed. *Anti-Immigration in the United States: A Historical Encyclopedia*, 105-6.

restrictive measure that invalidated their lived experiences by making them into foreigners in their own home.

Thus, the certificate of reentry quickly did become a point of contention for Chinese residents – it challenged the right of Chinese residents to move freely beyond the United States, adding stipulations to their existence within American borders. While the certificate system was essentially the result of border control, it produced major ramifications for Chinese residents that signaled post-entry social control. The story of San Francisco resident of twelve years Chae Chan Ping, in particular, epitomized these unequal and discriminatory implications. In 1882 (the same year as the passing of the first Chinese Exclusion Act), Ping obtained a certificate and visited his family in China, anticipating successful reentry because his travel did not negate his ties to the United States. However, upon Ping's return in 1888, the federal government expanded the Chinese Exclusion Act by further restricting Chinese immigration. The Act now denied entry to all Chinese immigrants regardless of certificate status. Because the law was applied retroactively, Ping – with all the correct paperwork in hand – was left excluded, stuck on a boat without entry to his home. Aside from the obvious injustice in denying entry to a long-term resident, the Act's retroactive passage was unconstitutional because it violated the personhood of foreign residents like Ping. Likewise, Ping himself argued that this shift in policy was unconstitutional because it violated both the Burlingame Treaty and due process laws.[45] The government retroactively shifting the membership rights of foreign residents signified that the government was not respecting the legal rights owed to those persons, and thus, was not respecting rule of law. Ping had long been a legal resident of the country prior to the sudden flux in border security, but he was now treated as a foreigner who had never resided within the

[45] Saito, 17.

nation. The resulting case, ***Chae Chan Ping v. United States (1889)***, reached the Supreme Court in March of 1889. Despite Ping's legal team presenting "nearly every conceivable argument for his return,"[46] the Court dissented by denying him the right to reenter the country. The Justices articulated that foreign individuals were "nonpersons" at the federal level through three key points:[47] first, the federal government has "inherent sovereign powers" in determining its own membership and "exclusion of noncitizens was a fundamental right of any sovereign" nation-state; second, the Court considered immigration "a legislated and political issue," officially removing judicial review from the process; and third, the Court denied state and local governments any power in this process, establishing the federal government – not the states – as the sole decision maker in evaluating personhood.

Ultimately, the court's ruling in *Chae Chan Ping v. United States (1889)* – particularly those three considerations – changed the political landscape with regards to foreign residents in the United States. The Supreme Court not only removed its own jurisdiction over immigrant residents, but it established the federal government's extraconstitutional plenary power to define and remove an immigrant's membership while within the country's borders. All immigration cases from then on would be decided under the assumption that the federal government's authority was not under the scrutiny of the Court, allowing for the implementation of discriminatory policies based on racist sentiment, national security interests, unwanted ideological interference, and more. The 14th Amendment – which ensured equal protection for noncitizens – was now suspended at the federal level. Thus, these residents were forced to remain in a legal limbo whereby the U.S. Constitution afforded them legal rights but the federal

[46] Kanstroom, 113.
[47] Varsanyi, 884.

government denied such rights in action – aside from a weak notion of due process. In the case of Ping, this denial of personhood happened even without a logically-stated reason, as pure racism – not U.S.-China relations – compelled the federal government to strip Ping of his membership.

Four years later in ***Fong Yue Ting v. United States*** **(1893)**, the Court debated another Chinese exclusion case in which "a Chinese laborer deported […] because of his inability to find [a] 'credible white witness' required by law."[48] The blatantly racist concept of forcing Chinese immigrants to require a white witness to testify on their behalf, again, substantiated the racist American portrayal of Chinese residents as "servile," immoral, and untrustworthy. Similarly, the federal government's neglect for Ting's rights under the 14th Amendment only deepened the unconstitutional pattern toward nonpersonhood. Unprecedented in this case, though, was the use of deportation and detention against a litigant in a *civil* matter. Ting was a resident of the United States and, unlike Ping, was literally situated within the country at the time his residency became disputed. Any legal matters were civil pursuits, not matters of immigration – and criminal sanctions such as deportation and detention were not applicable. Yet the Court ultimately took such matters of categorization into its own hands, deciding to view the case as an immigration issue and arguing that sanctions such as detention were technically not punishment. This ceded their view of Ting as a resident – and Ting as an immigrant was deported for good under the assumption that there was no deprivation of liberty in forms of punishment like detention. Yet again, the long-term residency of a Chinese individual in the United States did not factor into the government intrusion of his membership. And, unlike in *Chae Chan Ping v. United States (1889)* when the federal government removed membership for a resident temporarily outside of the

[48] Kanstroom, 7.

country, *Fong Yue Ting v. United States* (1893) demonstrated the apparent ability of the federal government to proactively deport resident foreigners still in the country. Federal plenary power was allowing the executive and legislative branches to pursue post-entry social control efforts via the racialization of the Chinese people in increasingly insidious and repressive ways. And, in a devastating blow to immigrant personhood, the Supreme Court had upheld the government's apparent "duty" in protecting members from racially inferior foreigners – a clear and horrendous form of eugenics.

A third case in the story of Chinese exclusion in the United States – ***United States v. Ju Toy* (1905)** – worsened the legal exclusion of Chinese Americans by infringing upon citizenship rights of Chinese-Americans. The son of Chinese immigrants, Toy was an American citizen because of his birth in the United States – a precedent established just seven years earlier through *United States v. Wong Kim Ark* (1898). Toy had visited China and, like Chae Chan Ping over a decade earlier, expected successful reentry to his home country – this time because of the assumption that citizens of foreign parentage were nonetheless citizens with inalienable rights. Despite not being an immigrant, Toy was denied entry purely because of his Chinese ancestry. In response, he petitioned for habeas corpus, as his citizenship indicated that his deportation required a trial. In the resulting legal case, *United States v. Ju Toy* (1905), the Supreme Court assumed that "the Fifth Amendment applied to a citizen denied entry" while also stating that "due process did not require a jury trial."[49] As a result, the Supreme Court held that denying entry – even for an American citizen – did not infringe upon due process. This was because Toy became a nonperson, a foreigner in his own country, and he was deported to China. In his dissent in the case, Justice David J. Brewer stated that the decision was "appalling" – and that the

[49] Kanstroom, 129.

Supreme Court had just deprived an American citizen his Constitutional rights "simply because he belong[ed] to an obnoxious race."[50] Toy had been horribly racialized by the Supreme Court, including Brewer in his dissent. Toy's status as a Chinese-American reentering the country was somehow solid rationale for his deportation, demonstrating just how nonsensically the federal government could achieve its goals of post-entry social control.

There are numerous lessons to be learned from Chinese exclusion in the latter half of the nineteenth century. Through the deportation of Chae Chan Ping, the Supreme Court first established a disregard for the Constitutional protections of foreigners in the United States. Ping's long-term residency had no influence on the Court as they unconstitutionally enacted retroactive legislation that prevented his reentry. Then, the Supreme Court allowed the proactive deportation of resident Fong Yue Ting, despite Ting's residency making the legal case a civil, not immigration, matter. From the legal precedents established at the time, deporting Ting should have never been a possibility, yet the Court actively decided to view the case in an immigration context – illustrating the cunning ways in which the Court can defer to the federal government on matters of immigration in order to privilege post-entry social control. And, arguably most fascinating, the Supreme Court paradoxically stated that denying entry for individuals did not constitute a violation of due process – even for an American citizen such as Ju Toy. These three instances of Chinese exclusion illustrate the horrific ways in which the federal government of the United States utilized existing racism against Chinese individuals to forcibly exclude them for purposes of post-entry social control. It is also important to note that, because an immigrant's presence in the United States is a civil matter, none of these individuals could be illegal in a

[50] Kanstroom, 129.

criminal sense – as the term "illegal" inaccurately yet purposefully criminalizes their rightful presence in the States.

In the decades following the Chinese exclusion cases, this eugenic basis for the exclusion of foreigners as nonpersons was applied to various other groups, including Japanese residents. The Dillingham Commission, created in Congress in 1907 to analyze immigration policy, facilitated this race-based exclusion by "instantiat[ing] a uniquely American idea of an 'Asian' racial category" and publishing a summary report connecting this new racialized category to criminal endeavors.[51] This influenced future eugenic quotas and policies, as well as the continued racialization of Japanese individuals in the United States – many of whom were long-term residents like the Chinese. Thus, it is important to note that anti-Japanese racism was already rampant prior to the Second World War and **Japanese Internment**. This instance of unchecked federal power was only possible because of federal plenary power over immigration, and it was further fueled by the attack on Pearl Harbor on December 7, 1941 – which unified Americans in favor of outright exclusion for Japanese-Americans. Just two months after the attack, President Franklin Delano Roosevelt's signing of Executive Order (EO) 9066 displaced all persons of Japanese heritage from western states and made their rights "subject to military edict" in the name of national security.[52] Thousands of American citizens of Japanese ancestry were forcibly displaced from their homes at the stroke of a pen – an action that was only possible because of the plenary power doctrine. The rights of Japanese residents, though existing in name, were visibly and forcibly trampled upon. Several citizens of Japanese descent were given the chance to challenge EO 9066 in the courts[53] and granted due process, yet the Supreme Court

[51] Kanstroom, 133.
[52] Saito, 54.
[53] Ibid, 62.

purposefully and consistently avoided a decision on the constitutionality of the internment. Extra-constitutionality such as this asserted that Japanese-Americans lacked "the right to have rights"[54] within their own legal residence. Thus, the federal government exceeded previous exploitation of Japanese residents and suspended their rights as persons – using wartime rhetoric and the horrific racism espoused by the American public to justify this exclusion. This was unique in comparison to Chinese exclusion because the federal government made noncitizens of Japanese residents under the guise of national security; while Chinese exclusion had virtually no connection to U.S.-China relations at the time, the federal government attempted to justify Japanese Internment on the basis that Japanese residents were inferior because of their patronage to Japan. However, this post-entry social control was logically the result of decades of racism toward and exploitation of Japanese residents — not just retaliation for Pearl Harbor. Furthermore, the eugenic basis for EO 9066 elucidated the notion even that documented *citizens* of non-European ancestry were susceptible to erratic standards of membership. While the case of citizen Ju Toy involved suspension of his membership for reentry, Japanese-American internment affected thousands of American citizens *within* the country who were still displaced as nonpersons for purposes of post-entry social control.

The federal government's post-entry social control evolved following World War II, although its methods of attempting to justify the inherently unjust exclusion of resident foreigners remained paradoxical – even to the point of being Orwellian. The case of ***Shaughnessy v. United States ex rel Mezei (1953)*** debated the constitutionality of a resident's detention at Ellis Island, despite his long-term ties and the lack of an explicit reason for detention. The man, Ignatz Mezei, had lived in the United States for 25 years as cabinet maker –

[54] Hannah Arendt, *The Origins of Totalitarianism* (New York, Harcourt Books, 1994).

"he [had] married an American citizen and, during World War II, sold war bonds and served as an air-raid warden."[55] Thus, he had a clear legal status in the country and familial ties to his wife and children. Mezei traveled to Romania for 19 months to visit his dying mother, yet upon returning to Ellis Island, the Attorney General ordered Mezei to permanent exclusion without a hearing on the basis of "information of a confidential nature, the disclosure of which would be prejudicial to the public interest."[56] The federal government ignored Mezei's previous 25 years of residency, instead treating him as a threatening immigrant attempting to enter the nation for the first time. Such a lack of an explicit basis for detaining a lawful resident was not only unprecedented but dystopian – Mezei was prevented access to his home and family because of apparent "secret" evidence against his character. Therefore, the federal government was actively criminalizing a resident simply for traveling to Romania and attempting to return – despite the fact that he never committed a crime. The concept of "secret evidence" is especially ridiculous in a legal context because, as was the case with Mezei, there is literally no evidence to contest for the purpose of winning the case – hence, someone like Mezei was automatically resigned to a losing case and detention. Mezei then spent nearly two years in detention at Ellis Island on the basis of this "secret" evidence that, to this day, has never been revealed by the federal government. During this lengthy detention, Mezei attempted to leave the United States, but he was continually declined entry to France, Britain, Hungary, and a dozen Latin American nations.[57] As a result, Mezei was essentially undeportable. The Supreme Court held that "if a lawful resident noncitizen is temporarily absent from the United States, the right to due process

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[55] Charles D. Weisselberg, "Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei," *University of Pennsylvania Law Review* vol. 143, no. 4 (1995) 964.
[56] *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953).
[57] Weisselberg, 965.

may still exist" in some cases, while also maintaining that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[58] The story of Ignatz Mezei represents clear violations of an established resident's rights via the use of unconstitutional secret evidence and deprivation of Mezei's liberty; his due process rights were clearly violated. Yet, most importantly, Mezei's detention established entry fiction as a valid basis for post-entry social control – as the man was criminalized by the federal government for no explicitly stated reason. The Supreme Court only corroborated the existence of entry fiction by not acknowledging an infringement upon Mezei's due process rights.

Prior to 1996, the plenary power doctrine was a distinctive feature of solely the federal government; state and local discriminatory policies were preempted by federal policies, a detail that was continually reaffirmed in Supreme Court cases such as ***Mathews v. Diaz* (1976)**. This particular case involved legal residents of Florida who argued that their state's "five-year residence requirement for federal welfare program eligibility was unconstitutional,"[59] resulting in the case's dismissal by the Supreme Court because of federal preemption. *Mathews v. Diaz* (1976) illustrated that "states may discriminate against legal residents if this discrimination is uniformly authorized by the federal government." Thus, federal preemption meant that states were only allowed to exercise negative power toward immigrants if this authority was in line with federal standards – and a clear line existed in that states' discrimination measures could not supersede federal discrimination. Just as it was "inappropriate" for the Supreme Court to scrutinize immigration policy under the Constitution, "it was inappropriate for state governments to become involved in the development of immigration and naturalization policy."[60] Despite the

[58] Crista Khong, "Shaughnessy v. United States ex rel. Mezei" (Cornell University Law School).
[59] Varsanyi, 886.
[60] Ibid, 886.

requirement that states must treat immigrants as persons via the recognition of Constitutional rights, the broader context of rightlessness and vulnerability under the federal government was something that would never be applied to citizens. This double standard was explicitly acknowledged by Chief Justice William H. Rehnquist in *Mathews v. Diaz* (1976), with Rehnquist stating that Congress regularly makes rules that would be "unacceptable" if applied to citizens. Thus, judicial actors are knowledgeable of their complicity in the removal of immigrant personhood, as the Supreme Court's justices have acknowledged the unrestricted power of the federal government while simultaneously not exerting an effort to curb its unconstitutional actions. Several years later in ***Plyler v. Doe*** **(1982)**, the Supreme Court again illustrated the clear power divide between the federal and state governments prior to 1996. The Court "defended the rights of undocumented children against a discriminatory Texas statute that aimed to deny public school enrollment to undocumented children."[61] Because of the children's undocumented status, the state of Texas attempted to label them as not being "persons within the jurisdiction" of Texas – to which the Court asserted that states, unlike the federal government, must uphold the Constitution and its protections for foreign residents. Therefore, in the purview of the state government, all its residents were persons protected by the Equal Protection Clause.[62]

The legal reality that the Supreme Court – the highest federal court in the United States – decided that immigration issues were beyond its purview is in itself paradoxical. Yet in both theory and practice, the federal government's usage of its plenary power has been equally unique because of the intricacies, contradictions, and ironies involved. Plenary power has allowed the President and Congress to remove the personhood of foreign residents of the United States with

[61] Varsanyi, 887.
[62] Ibid, 887.

varying forms of justification depending on political and economic context. Chinese and Japanese residents were forcibly excluded based on eugenics, eastern European immigrants were vulnerable to preemptive deportation proceedings based on unfounded communism, and – gradually until the 1990s – states were pushing back against federal preemption over such discrimination. While these historical examples of exclusion may have been morally corrupt, their existence was legal and authorized because of the Supreme Court's lack of review over their lawfulness and compatibility with the Constitution.

In 1996, though, the dual system of federal authority and state scrutiny to federal preemption drastically changed. Multiple policies – chiefly the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) – produced what Monica Varsanyi calls a "partial devolution"[63] of power to state and local governments whereby these lower tiers of governments may treat foreign residents as nonpersons in the contexts of terrorism and welfare. This localized power was not absolute, meaning federal preemption in matters of immigrant personhood still existed, but it created opportunities for the further degradation of foreigners' rights in the United States. This has become evident through the intertwined factors of "crimmigration" and the neoliberal labor force.

IV. The Rise of Crimmigration

The merging of criminal and immigration law, or *crimmigration*, is a fairly recent phenomenon, as courts have traditionally correlated immigration law with foreign policy instead of the domestic criminal justice system.[64] Prior to this change, criminal law largely emphasized a

[63] Varsanyi, 878.
[64] Stumpf, 379.

focus on "traditional conduct associated with criminality—offenses against property and people," while immigration law was a subset of civil law that presided over whether one was authorized in the country. Such proceedings were processed through the civil immigration court system, and individuals were not entitled to appointed counsel because of federal plenary power over foreign residents' stay in the country.[65] The only intersection between the two fields was the denial of entry for immigrants with a criminal history, but that pertained to entry and was not a form of post-entry social control. Still, deportation was not allowed as a form of punishment based on the Supreme Court's holding in *Wong Wing v. United States* (1896).

Certain similarities exist between the two fields – particularly, the notion that both "regulate the relationship between the state and the individual."[66] This contrasts with most other areas of law that resolve "conflicts and [regulate] the relationships of individuals and businesses,"[67] as criminal and immigration law determine whether individuals are included or excluded from society. Inherently, through enforcement of criminal law, the federal government draws a dividing line between criminals and the innocent in a society – while immigration law allows the government to differentiate between immigrants and citizens. Thus, both "establish […] lesser levels of" membership in the American society – similar to how plenary power has historically made this membership subject to volatility. For immigrant residents, this degraded membership "abandon[s] framing noncitizens as contributing members of society on the path to full political membership as citizens,"[68] those who UCLA Professor of Law Hiroshi Motomura

[65] César Cuahtémoc García Hernández, "Creating Crimmigration," *BYU Law Review* issue 6 art. 4 (2013): 1457.
[66] Stumpf, 380.
[67] Ibid, 379-80.
[68] Hernández, 1458.

refers to as "Americans in waiting."[69] Thus, with the advent of crimmigration, foreign residents on American soil have been reimagined as criminals and national security concerns rather than legal residents on the proper path to citizenship. This ideological shift is clearly identifiable in the American lexicon when referring to immigrants – the words "illegal" and "alien" are overwhelmingly common, despite immigration being a civil matter – meaning that an immigrant's presence in the United States literally cannot be "illegal" in the criminal sense without the converging of immigration and criminal law.

The origins of crimmigration law and its implications on American membership can be traced to shortly after the Civil Rights movement when overt racist discrimination toward people of color was outlawed. Such discriminatory behavior became facially neutral[70] in criminal justice rhetoric, meaning that while criminal legal pursuits are now semantically unprejudiced, they still can have a disparate demographic impact on people of color. Concurrent with this shift was the growth in scope of criminal grounds for which foreign residents are excludable since the 1980s. Using the Cold War framework that emphasized economic value over ideological or humanitarian considerations, the United States government drastically changed its perception of immigrants in the 1980s by maintaining an "awareness of immigrants' economic costs."[71] That is, poor classes of immigrants – both inside and outside the nation's borders – could be separated into three classes of usefulness: "those who increased the country's labor supply, those who improved the labor quality, and those who contributed to the country's capital base."[72] Those who did not fit into any of these categories could be deemed economic threats – and, as a result,

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[69] Hiroshi Motomura, *Americans in Waiting* (Oxford University Press, 2006).
[70] Hernández, 1459.
[71] Cheryl Shanks, *Immigration and Politics of American Sovereignty, 1890-1990* (Ann Arbor: University of Michigan Press, 2002): 197.
[72] Ibid, 202.

were scapegoated by key political actors as having caused the downfall of American hegemony in the global markets. Therefore, as arguments over whether to grant amnesty to undocumented immigrants persisted in the 1980s, conservative actors were quick to identify the repercussions. Republican Harold Daub summarized his concerns in these purely economic terms:

> Amnesty could damage the U.S. economy. The United States is moving toward a high-technology, computerized, robotized kind of economy and absorbing those large numbers of skilled workers from abroad would require the United States to develop a very different kind of economy.[73]

This rhetoric established immigrant residents as being economic objects with varying degrees of usefulness depending on their rightlessness – in itself foreshadowing the neoliberalization of the state that transformed the national economy in the 1980s.

The passing of the Immigration Reform and Control Act (IRCA) of 1986, though well-known for its amnesty provisions, was among the first and most prominent policies to criminalize immigration. It highlighted the economic threat of immigrants by containing language criminalizing certain acts involving immigration. For example, one section criminalized the act of knowingly hiring undocumented workers, while another "authorized up to five years imprisonment for bringing people into the United States clandestinely."[74] And, just four days after the Act's passing, the Immigration Marriage Fraud Amendments Act authorized a maximum of five years imprisonment for knowingly entering into marriage "for the purpose of evading any provision of immigration laws."[75] These actions criminalized the assistance of immigrants in economic terms, preventing unwanted additions to the labor force.

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[73] Shanks, 206.
[74] Hernández, 1471.
[75] Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, § 2(d), 100 Stat. 3537, 3542.

Congress continued the criminalization of immigrants through the Anti-Drug Abuse Act of 1988. At that time, only three crimes were considered aggravated felonies: murder, illicit trafficking in firearms, and drug trafficking.[76] Yet the 1988 Act "added the 'aggravated felony' into the immigration law lexicon and provided that a conviction for an aggravated felony would result in deportation." This expanded the range of crimes by which immigrants could be deported – and nearly every piece of subsequent legislation has added to this list. The Immigration Act of 1990 "defined an aggravated felony as any crime of violence for which the sentence was at least five years, regardless of how the statute under which the alien was actually convicted defined the crime"[77] – tremendously increasing the scope for an immigrant's criminality. Crimes previously of lower legal classes such as money laundering were now included in this definition. Because more crimes by immigrants became aggravated felonies, more immigrants were disproportionately targeted and arrested in the U.S. criminal justice system. Also in 1990, Congress removed a form of judicial review – judicial recommendation against deportation – which had allowed judges in the process to "prevent deportation on the basis of a particular conviction." As a result, deportation became easier to justify and use as punishment for the rising number of crimes committed by immigrants. Four years later, these criminal court judges "received the power to order deportation as part of the sentencing process,"[78] which widely disseminated criminal authority over immigrants. Immigration officials also began resembling criminal law enforcement agencies in this period, as Immigration and Naturalization Service (INS) employees were first authorized to carry firearms in 1990.[79]

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[76] Hernandez, 1468.
[77] Stumpf, 383.
[78] Hernández, 1469-70.
[79] Ibid, 1466.

Despite the many radical changes to the immigration law landscape in these years, no policy could compare to two consequential pieces of legislation that passed in 1996. In the aftermath of both the 1993 World Trade Center attack and the 1995 Oklahoma City bombing, government actors increasingly connected immigrants to terrorism and crime in the policy realm. First, the passing of the Antiterrorism and Effective Death Penalty Act (AEDPA) added numerous offenses to the aggravated felony definition, including gambling, transportation related to prostitution, human smuggling, certain passport fraud convictions, perjury, and failure to appear for a judicial proceeding.[80] Furthermore, the AEDPA "permitted the use of secret evidence in deportation cases" and eliminated previously available statutory protections of habeas corpus. "The result," stated Ernesto Verdeja, Professor at the University of Notre Dame, "was the elimination of judicial hearings for many detained aliens, effectively granting the INS both prosecutorial and judicial powers over aliens slated for deportation and permitting no avenue for contesting orders of removal."[81] Just months after the passing of the AEDPA, Congress also passed the Immigration Reform and Immigrant Responsibility Act (IIRIRA), which – again – added crimes including rape and sexual abuse of a minor[82] to the aggravated felony definition. More importantly, the IIRIRA "authorized the federal government to remove a person convicted of an aggravated felony and sentenced to at least five years imprisonment" even if the recipient country would threaten the person's life.[83]

The AEDPA and IIRIRA modified criminal law on a local level, as state troopers, county sheriffs, and city police authority police now had powers previously restricted to federal agents –

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[80] Hernández, 1469.
[81] Ernesto Verdeja, "Law, Terrorism, and the Plenary Power Doctrine: Limiting Alien Rights," *Constellations: An International Journal of Critical & Democratic Theory*. 9.1 (2002): 91.
[82] Hernández, 1457.
[83] Ibid, 1457.

such as the power to arrest previously deported noncitizen felons.[84] The IIRIRA established of the Memorandum of Understanding (MOU) process, whereby any local and state officials interested in enforcing immigration laws "can sign an agreement with the federal government" that requires training and legal guidelines for their newfound responsibilities.[85] This localization of power is arguably the most visible way that crimmigration has manifested itself in American culture. While this was not particularly noticeable at first, the terrorist attacks of 9/11 catalyzed strict enforcement and a massive expansion of antiterrorism measures. The U.S. Department of Homeland Security, created in response to the attacks, entered "civil immigration warrant information into national law enforcement databases accessible to state and local police,"[86] allowing local police to play a role in enforcing immigration matters. This was particularly remarkable in the greater context of criminalizing immigration, as any police officer in the nation could now enforce a matter of civil immigration as a crime.

Then, the passing of the USA Patriot Act of 2001 only expanded upon the foundation built by both the AEDPA and the IIRIRA in denying immigrant rights. The Patriot Act further expanded the definition of terrorism and made these changes legally retroactive, covering actions regardless of whether they were actually criminalized at the time. And, most controversially, the Patriot Act granted the U.S. Attorney General the power to classify a noncitizen as a terrorist – immediately forcing mandatory detention and criminal charges upon that person.[87] Such detention, if needed, could be indefinite – resulting in a "life" prison sentence at the hand of one person. This clearly jeopardized the future of foreign residents who were already susceptible to

[84] Varsanyi, 889.
[85] Ibid, 889.
[86] Stumpf, 385.
[87] Verdeja, 94.

an ever-changing membership standard, as their due process rights could be infringed upon by a lone political actor. The constitutionality of this was challenged in both *Zadvydas v. Davis* and *Ashcroft v. Ma* (2001), when the Supreme Court held that the AEDPA and IIRIRA "allowing for the indefinite detention of immigrants who could not be deported constituted a violation of habeas corpus rights and thus posed a 'serious constitutional problem.'"[88] Therefore, the Court ruled that the government cannot detain immigrants if their deportation was unlikely "in the foreseeable future" and that the due process clause applied to all persons on American soil, regardless of citizenship status. While such a ruling seems to limit the federal government's plenary power, this was not necessarily true. In these two cases, the foreign residents in question – Zadvydas and Ma – were tried as criminals, not terrorists, and the federal government has greater jurisdiction over matters of national security and terrorism. Thus, for Congress and the executive branch, "the due process protections affirmed in this case may not be relevant in instances involving domestic security."[89] Plenary power did not die and foreign residents had lost membership rights, but there appeared to be hope in curtailing the influence of plenary power.

Beginning with the Florida Department of Law Enforcement in 2002, the post-9/11 period produced a flurry of local and state-signed MOUs to enforce immigration law. Alabama, Arizona, eight counties, and multiple cities "also entered into 287(g) agreements with the DHS, and dozens of others […] expressed interest in" similar programs.[90] While these MOUs largely failed, the eagerness of so many states and municipalities to enforce immigration is noteworthy. No longer was jurisdiction over immigration preempted to the federal level; lower levels of government now might assert a duty in removing personhood of foreign residents as a means of

[88] Verdeja, 94.
[89] Ibid, 94.
[90] Varsanyi, 890.

protecting citizen "members" of society. Therefore, no longer was an immigrant's personhood guaranteed at a state and local government level – it was possible for these lower tiers of administration to exceed federal levels of discrimination. Meanwhile, the U.S. Immigration and Custom Enforcement (ICE) was established – becoming the national law enforcement agency tasked with investigating and removing undocumented immigrants. As a whole, ICE "is under enormous pressure to turn out statistical figures that might justify a fair utilization of its capabilities, resources, and ballooning budget" – and as a result, agents increase their numbers by focusing on undocumented workers who are not national security threats.[91] The agency is well-known for flashy, sensationalized raids – like the one in Postville in 2008 – in order to publicize their apparent "successes" in enforcement. In reality, though, ICE agents are the epitome of extra-constitutionality in terms of immigration. Within the immigration enforcement arm of DHS – today, the largest armed federal law enforcement body in the nation[92] – ICE agents are known to use harsh and manipulative tactics to find and arrest undocumented immigrants, and despite the immorality of such behavior, it is often legally permissible.

The merger between immigration and criminal law first conflated "undocumented immigrant" with criminal – and now it is seemingly synonymous with terrorist. Because of the AEDPA in 1996, secret evidence against undocumented citizens is acceptable in the courts, and the broadening definition of terrorist activity cannot be disputed or argued. Just months after the AEDPA, the IIRIRA continued limiting foreigners' rights – removing a system of checks and balances by allowing final deportation orders without review by court. The Patriot Act continued the degradation of immigrant membership, making the ever-expanding definition of terrorist

[91] Camayd-Freixas, cited in Oboler, 170-1.
[92] Stumpf, 388.

retroactive and granting the Attorney General massive power in determining membership status. The ruling in *Zadvydas v. David* and *Ashcroft v. Ma* stated the inherently unconstitutional nature of indefinite detention of immigrants who could not be deported and also defended due process as a right for all persons in the United States – a hopeful indicator that the plenary power doctrine could be limited in the near future. Yet loopholes exist, and the notion that these cases dealt with non-political matters signifies that plenary power still reigns supreme in the realm of national security and terrorism. Thus, immigrant membership continues to be deteriorated by American crimmigration – now by both federal and local governments.

V. Neoliberalization, Labor, and "Economic" Actors

"The very design of neoliberal principles is a direct attack on democracy."
—Noam Chomsky, "The High Cost of Neoliberalism"

The criminalization of immigration is not the only factor that is leading to increased exploitability and loss of rights for immigrant residents. Interrelated with this post-entry social control is the oppressive labor dynamic promoted by the neoliberalization of the state – a dynamic created from both government emphasis on free-market values and the rise of globalization since the 1980s. This decade proved to be a tumultuous era with regards to the rights of foreigners in the United States, as distrusting Americans – skeptical of the utility of the government amidst corruption scandals and economic stagflation – clung to the promise of economic prosperity under the guise of unbridled conservatism. Hand in hand with their loss of confidence in liberalism, Ronald Reagan was elected to the nation's highest office in an electoral landslide in 1980. The resulting "Reagan Revolution" signified an economic shift toward free-

market values, which included privatization and deregulation: tax cuts, tax incentivizing cities, increases in defense spending, and an emphasis on competitive business practice.

While Reagan's conservatism "celebrate[d] the virtues of individualism, competitiveness, and economic self-sufficiency," it also established the desire to "abolish or weaken social transfer programs while actively fostering the 'inclusion' of the poor and marginalized into the labor market, on the market's terms."[93] Thus, the implementation of "Reaganomics" also involved severe cuts to public spending, safety deregulations, the discouraging of unionization, the removal of workers' rights, wage decreases, and other measures that directly infringed upon workers' rights in the United States.[94] Such policies were especially detrimental to foreign residents – persons who were already subject to rightlessness and limited rights as nonpersons under the federal government. This secondary notion of incorporating "poor and marginalized" individuals into the free-market economy is important, as it catalyzed a "new politics of traditionally disadvantaged actors" in which the participation of traditionally disadvantaged groups in the economy and the "valoriz[ation] of corporate actors as participants" create a "politics of exclusion."[95] Essentially, the neoliberalization of the state has signified a shift away from government attempts at addressing poverty and inequality in marginalized groups – and toward the economic exploitation of "women, immigrants, and people of color, whose political sense of self and whose identities are not necessarily embedded in the 'nation' or in the 'national community.'"[96] This was provided for with the "casualization of labor," explained by sociologist

[93] Varsanyi, 881.
[94] Ibid, 879.
[95] Sassen, *xx*.
[96] Ibid, *xxi*.

Saskia Sassen as the decline of manufacturing and the expanded "supply of low-wage jobs" in the service sector.[97]

As a result of these policies, disadvantaged actors outside the realm of traditional Constitutional membership rights – including foreign residents – become "neoliberal subjects"[98] with even fewer rights. "Membership for neoliberal subjects," explains Monica Varsanyi, "reflects […] a particular neoliberalizing constellation of legal and political institutions and is substantively different than noncitizen membership of past eras."[99] It is a worsened status of membership "marked more than ever by the status of illegality" because of the rollback of rights for immigrant residents, the merged criminal and immigration legal fields, and the partial devolution of power since 1996. Essentially, these residents lack the Constitutional protections of personhood that would normally protect their residency in the United States – and the rise of crimmigration meant both the expansion in the range of crimes for which these residents can be deported and the elimination of "judicial oversight over deportation hearings."[100] Further, the partial devolution of power only increases the scope of vulnerability for the deportation of these foreign residents; prior to this delegation of power to local governments, the federal government constituted the sole "state" under which noncitizens were vulnerable. Today, because of the antiterrorism and welfare policies of the 1990s, "the 'state' is no longer only the federal government, but the states (and cities) of, for example, Arizona, Georgia, and North Carolina."[101] The details of this partial devolution are increasingly sophisticated, as "the messy and costly

[97] Sassen, 34.
[98] Varsanyi, 882.
[99] Ibid, 882.
[100] Ibid, 883.
[101] Ibid, 883.

details of servicing and policing expanding noncitizen populations"[102] have been relegated to state and local governments despite federal preemption not being completely overturned.

The neoliberalization of the state took place concurrently with the globalization of the national economic system – a system in which the United States was forging the way for distinct economic ties between nation-states in the global market. Free trade agreements (FTAs) passed through the 1990s – the most notable being the North American Free Trade Agreement (NAFTA) – established important migratory patterns through the United States, as well as "powerful push and pull factors"[103] involving the casualization of labor. This is because "the central military, political, and economic role played by the United States […] contributed both to the creation abroad of pools of potential emigrants and to the formation of linkages between industrialized and developing countries" that then serve as migratory "bridges" for immigrants.[104] This is an important aspect of the neoliberal crimmigration system, as it has produced what Varsanyi refers to as the "neoliberal paradox."[105] Essentially, economic policies from Reagan to Clinton produced a "tense […] compromise between competing interests—free market, neoliberal expansionists, on the one hand, and nationalistic, security-minded exclusionists on the other."[106] This is a clear paradox created and perpetuated by the federal government's neoliberalization because "barriers to the flow of capital [are] rapidly falling, at the same time as enhanced border enforcement and militarization increasingly [are suppressing] the

[102] Varsanyi, 879.
[103] Ibid, 878.
[104] Sassen, 34.
[105] Varsanyi, 879.
[106] Ibid, 879.

flow of labor and people."[107] American borders are open for the flow of capital but not for the free entry of human beings from nations with connected migratory bridges.

Thus, while it seems that the federal government of the United States merely misunderstands the intricacies of migration patterns since the advent of neoliberal policies in the 1980s, this is not the case. Government policies that privilege the free market also purposefully marginalize the working class and foreign residents, as the incorporation of disadvantaged actors in the national economy is needed for an efficiently neoliberal economy. Because the state "bears few costs and has few responsibilities or obligations" with regards to immigrants because of their nonperson status, the "production of neoliberal subjects and a nationally bounded, relatively free internal labor market, populated by disciplined, divided (along the lines of legal status), largely nonunion"[108] actors is a way for the federal government to exploit extremely vulnerable residents for the benefit of wealthy corporate and transnational actors. As a result, neoliberal government policies rely on expendable labor, yet this labor force of immigrants is heavily criminalized – on purpose. This, truly, is the worsening of membership for foreign residents. Whatever rights and semblances of personhood that still existed prior to the partial devolution of power in the 1990s had been usurped by their economic criminalization at the hand of the federal government.

[107] Varsanyi, 879.
[108] Ibid, 883.

VI. The Efficacy of Duties in the Nation-State

"*Human rights wither without a language of duties*."
—Samuel Moyn, "Rights vs. Duties"

There is no simple answer to the question of how to restore the legal personhood of foreign residents in the United States. The clearest response would be to end federal plenary power over matters of immigration, something that I do argue is a clear necessity for the sake of personhood for all residents in the country – citizen or not. Yet this does not appear to be a likely (or practical) solution to a century-long power issue. After all, the Supreme Court of the United States would have to actively reinstate judicial review for immigration matters, something that it repeatedly has not done since Chinese Exclusion. Thus, instead of discussing policy or doctrinal changes, there is a clear need for international actors to shift their philosophical mindset with regard to the rights of foreigners in the United States.

The works of renowned twentieth century political theorist Hannah Arendt help to elucidate this argument. In her book *The Origins of Totalitarianism*, Arendt discusses the logic of how the Rights of Man – though "supposedly inalienable" – were unenforceable "even in countries whose Constitutions were based upon them."[109] Rightless individuals, or those nonmembers toward whom the state government had denied the protections and rights of members, would first lose their homes, then their government protections in a manner that "impl[ied not] just the loss of legal status in their own, but in all countries."[110] And thus, these persons become stateless – perhaps residents of a nation, but not members of the actual nation-state. This is the dilemma inherent in rights-based systems: "The calamity of the rightless is not

[109] Arendt, 372.
[110] Ibid, 373.

that they are deprived of life, liberty, and the pursuit of happiness, or of equality before the law and freedom of opinion-formulas which were designed to solve problems within given communities – but that they no longer belong to any community whatsoever."[111] When one loses their national identity, they also lose any semblance of community that could ensure the fulfillment of their rights under the government that refuses to acknowledge their personhood. This is because stateless actors have historically, and currently in the context of nonpersons in the United States, not held the "right to have rights."[112] Yet stateless actors *should* have the right to have rights – including "the a right to belong to some kind of organized community."[113] Members of a nation-state have historically only become aware of this intrinsic dilemma "when millions of people emerged who had lost and could not regain these rights because of the new global political situation."[114]

The failure of rights-based systems of morality requires a shift in mindset from assuming the inherent existence of rights fulfilled by government actors toward a duties-centric model of morality. Duties are the moral responsibilities that aim to collectively fulfill individual rights of persons – meaning that they consist in genuine respect for moral laws of society. Prior to the twentieth century, duties and obligations, "or responsibilities, as we are more apt to call them now — were the main commitment of religious ethics and thus the centerpiece of the history of ethical culture."[115] That is, there exists an entire history of duties in systems of religious ethics and morality. For example, Judaism, Christianity, and Islam all hold "that the substance of moral

[111] Arendt, 375.
[112] Ibid, 376.
[113] Ibid, 376.
[114] Ibid, 376.
[115] Moyn, "Rights vs. Duties."

teachings is some set of divinely decreed obligations,"[116] whether to a religious figure or to fellow humans. Philosophers like Immanuel Kant "expound[ed] a catalogue of duties"[117] when lecturing on practical ethics, and Cicero famously wrote *On Duties* to emphasize the importance of an obligations-based framework for morality. Later, numerous nineteenth-century liberals emphasized the value of duties for two significant reasons: first, their "historical and sociological frameworks" were developed so that "individual freedom [was] a collective achievement that depended on ongoing collective commitments and necessarily common action."[118] Second, protection of individual freedom was thought to breed a "destructive form of libertarianism" that would destroy all values other than individual freedom. This signifies an overarching value in collective – not individual – responsibility.

Each of these historical examples has prioritized the concept that maintaining a memory of the history of duties will shift individual notions of rights to collective ones, prompting individuals in society to collectively help others regardless of status – or membership in the nation-state. In contrast, rights-based systems of morality were born out of an "*escape* from the confinement of duty"[119] in which individual freedoms were of utmost importance. Basically, rights-based systems pertain to a freedom *from* following through with moral responsibilities, while duty-based systems offer the freedom *to* complete such responsibilities This reality, which became especially popular in the twentieth-century with the advent of various independence movements, is most visible through rights-based documents like the Bill of Rights in the United States Constitution or the Universal Declaration of Human Rights ratified by the United Nations.

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[116] Moyn, "Rights vs. Duties."
[117] Ibid.
[118] Ibid.
[119] Ibid.

While good-natured in theory, such documents cannot and do not protect stateless actors – just as Hannah Arendt explained so many years ago. Rather, the "omission of duties" in these documents has meant "grave consequences for rights protection itself."[120] In the context of neoliberal crimmigration and neoliberalization broadly, a philosophical return to the history of duties could "balance the transnational commercial freedoms that currently redound to the benefit of a few."[121] This is only possible if rich states –most notably the United States – acknowledge and follow their duties toward poorer states in a non-libertarian manner. For example, powerful states must not follow false duties arguing that "individuals are duty bound to cultivate personal virtue and take responsibility for their lives rather than depend selfishly on the 'nanny state' to minister to their needs."[122] This example is not a true duty-focused model of morality.

Thus, the livelihood of foreigners in the United States is still at risk of further suppression while the western system of human rights exists. The shifted paradigm of membership for these residents has repeatedly worsened since Chinese Exclusion in the late nineteenth century: from the advent of federal plenary power over immigration and subsequent legal cases of exclusion on the bases of eugenics and alienage, to the partial devolution of power to treat immigrants as nonpersons to states and local governments, to the neoliberalization of the state criminalizing labor sources for residents – the United States' reliance on rights only has proven detrimental for the personhood of the country's most vulnerable residents. And, under the moral framework of duties, the liberation of these "non-members" is intrinsically tied to that of "members." It is the duty of members, therefore, to fulfill their obligations and liberate the vulnerable.

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[120] Moyn, "Rights vs. Duties."
[121] Ibid.
[122] Ibid.

Works Cited

Arendt, Hannah, *The Origins of Totalitarianism* (New York, Harcourt Books, 1994).

Burlingame Treaty, U.S.-China, July 28, 1866, 16 Stat. 739, 740.

Camayd-Freixas, Erik, "Interpreting after the Largest ICE Raid in US History: A Personal Account" in Suzanne Oboler, ed. *Behind Bars: Latino/as and Prison in the United States*. (New York: Palgrave Macmillan, 2009).

Capehart, Jonathan, "Donald Trump's 'Mexican Rapists' Rhetoric Will Keep the Republican Party out of the White House" (*The Washington Post*, June 17, 2015).

"Donald Trump's Mexico Wall: Who is Going to Pay for It?" (*BBC News*, February 06, 2017).

Full Text: Donald Trump Announces a Presidential Bid" (*The Washington Post*, June 16, 2015).

Hernández, César Cuahtémoc García, "Creating Crimmigration," *BYU Law Review*, issue 6 art. 4 (2013).

Hernández, César Cuauhtémoc García, "Plenary Powers Doctrine" in Katherine R. Arnold, ed. *Anti-Immigration in the United States: A Historical Encyclopedia* (Greenwood, 2011).

Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, § 2(d), 100 Stat. 3537, 3542.

Kanstroom, Daniel, *Deportation Nation: Outsiders in American History* (Cambridge: Harvard University Press, 2007).

Katz, Josh, "2016 Election Forecast: Who Will Be President?" (*The New York Times*, July 19, 2016).

Khong, Crista, "Shaughnessy v. United States ex rel. Mezei" (Cornell University Law School).

Motomura, Hiroshi, *Americans in Waiting* (Oxford University Press, 2006).

Moyn, Samuel, "Rights vs. Duties" (*Boston Review*, May 16, 2016).

Nopper, Tamara K. “Chinese Exclusion Act” in Katherine R. Arnold, ed. *Anti-Immigration in the United States: A Historical Encyclopedia* (Greenwood, 2011).

Saito, Natsu Taylor, *From Chinese Exclusion to Guantánamo Bay: Plenary Power and the Prerogative State* (Colorado: University Press).

Sassen, Saskia, *Globalization and Its Discontents* (New York: New Press, 1998).

Shanks, Cheryl, *Immigration and Politics of American Sovereignty, 1890-1990* (Ann Arbor: University of Michigan Press, 2002).

Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953).

Stumpf, Juliet, “The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power,” *American University Law Review* vol. 56, issue 4 (2006).

Varsanyi, Monica “Rescaling the ‘Alien,’ Rescaling Personhood: Neoliberalism, Immigration, and the State,” *Annals of the Association of American Geographers* 98 no. 4 (2008).

Verdeja, Ernesto, “Law, Terrorism, and the Plenary Power Doctrine: Limiting Alien Rights,” *Constellations: An International Journal of Critical & Democratic Theory* 9.1 (2002).

“Victims of Criminal Activity: U Nonimmigrant Status,” *U.S. Citizenship and Immigration Services* (uscis.org), 07/28/2016.

Weisselberg, Charles D. “Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei,” *University of Pennsylvania Law Review* vol. 143, no. 4 (1995).

“What is a refugee?” *The U.N. Refugee Agency webpage* (unrefugees.org), 2017.

Williamson, Elizabeth, "Donald Trump's Shiny New Washington Hotel" (*The New York Times*: September 24, 2016).