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George A. Martinez

Southern Methodist University, gmartine@mail.smu.edu

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IMMIGRATION: DEPORTATION AND THE PSEUDO-SCIENCE OF UNASSIMILABLE PEOPLES

George A. Martínez*

I. INTRODUCTION

AMERICA is in the midst of an immigration crisis. Immigrants are now seen as a threat to Anglo-American culture.¹ Military-like efforts are now being made to seal off the United States-Mexico border, resulting in thousands of deaths.² In response to proposals to enact harsh immigration laws, immigrants took to the streets in cities across America in an effort to assert their civil rights.³ If the pressing immigration issues of the day are to be resolved, then scholars must participate in the discourse in order to help solve and illuminate the various complex issues. This symposium issue seeks to contribute to that effort.

In his classic work of social and political philosophy, Karl Popper argued that in order to progress from a “closed society” which is oppressed by “magical forces” to an “open society” which “sets free the critical powers of man,” then social policy must be guided and informed by “the critical and rational methods of science.”⁴ In this Essay, I seek to critically examine an important aspect of immigration policy. Recent events,

* Professor of Law, Dedman School of Law at Southern Methodist University; B.A. 1976, Arizona State University; M.A. (Philosophy) 1979, The University of Michigan; J.D. 1985, Harvard Law School. I would like to thank Louis A. Martínez, Ph.D., for helpful discussion of the topics in this paper. I would like to thank Dean John B. Attanasio for providing financial and other support for this symposium on immigration. Thanks also to the SMU Law Review and its Editor-in-Chief Leah Bhimani for their excellent work on this symposium.

1. See, e.g., PATRICK J. BUCHANAN, *STATE OF EMERGENCY: THE THIRD WORLD INVASION AND CONQUEST OF AMERICA* 133–37 (Thomas Dunne Books 2006); SAMUEL P. HUNTINGTON, *WHO ARE WE? THE CHALLENGES TO AMERICA’S NATIONAL IDENTITY* 59–80 (Simon & Schuster 2004).

2. See TIMOTHY J. DUNN, *THE MILITARIZATION OF THE U.S.-MEXICO BORDER, 1978-1992: LOW INTENSITY CONFLICT DOCTRINE COMES HOME* (Victor J. Querra ed. 1996); Karl Eschbach et al., *Causes and Trends in Migrant Deaths Along the U.S./Mexico Border, 1985-1998* (Univ. of Houston Ctr. for Immigr. Res. Working Paper No 01-4, 2001).

3. See N.C. Aizenman, *Immigration Debate Wakes a ‘Sleeping Latino Giant’*, WASH. POST, Apr. 6, 2006, at A01; Teresa Watanabe & Hector Becerra, *500,000 Pack Streets to Protest Immigration Bills*, L.A. TIMES, Mar. 26, 2006, at A1. For analysis of the immigrant rights marches, see Kevin R. Johnson & Bill Ong Hing, *The Immigrant Rights Marches of 2006 and the Prospects for a New Civil Rights Movement*, 42 HARV. C.R.-C.L. L. REV. 99 (2007).

4. KARL R. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* 1 (5th ed. 1966).

including scholarly analysis and political action, raise the question of whether it is appropriate to direct deportation efforts primarily at Mexican and other Latino immigrants on the ground that such peoples are unassimilable.

In Part II, I describe how perceptions of Latino unassimilability appear to have led to deportation efforts being directed against Mexicans and Latinos. In Part III, I argue that this apparent deportation program should be rejected to the extent that it is based on the idea that Mexicans and Latinos are unassimilable peoples. In Part IV, I introduce the symposium papers.

II. THE BIG PICTURE: MEXICAN/LATINO IMMIGRANTS AND DEPORTATION

The issues are complicated, and an effort must be made to see how the pieces of the puzzle fit together to create a larger picture. In this regard, contending that the federal government has failed to adequately protect our country's borders, state and local governments are taking actions that significantly impact immigration.⁵ State and local governments are enacting laws or ordinances or are working closely with federal authorities to enforce immigration laws.⁶

Consider some examples. In September 2006, the City of Irving, Texas, began using the federal government's Criminal Alien Program ("CAP").⁷ Under the CAP, cities communicate with federal officials, who interview people who have been arrested by the local police and place immigration detainers on those suspected of being illegal immigrants.⁸ Since September 2006, the Irving program has turned over more than 1700 people to the Federal Immigration and Customs Enforcement ("ICE") for deportation.⁹ The Irving program has been very controversial, and it has generated large protests.¹⁰ The Mexican Consul, Enrique Hubbard Urrea, has urged Mexican immigrants to stay away from the City of Irving and has accused the Irving police of improperly targeting Latinos.¹¹

5. See Anthony Faiola, *Conflicting Laws Create Patchwork Immigration Policy*, WASH. POST, Oct. 15, 2007, at A01 ("As the Bush administration and Congress sit gridlocked on an immigration overhaul, states are jumping into the debate as never before.").

6. See Faiola, *supra* note 5. For an argument in favor of local police power in the immigration contest, see Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALBANY L. REV. 179, 234 (2005) ("If the rule of law is ever to be restored in immigration, state and local arrest authority will be a crucial component of the restoration.").

7. Patrick McGee, *Amid Uproar, Fewer Are Being Detained in Irving*, FT. WORTH-STAR TELEGRAM, Oct. 24, 2007, at B6.

8. Brandon Formby, *Irving Hispanics on Edge*, DALLAS MORNING NEWS, Oct. 7, 2007, at 1B.

9. McGee, *supra* note 7.

10. Brandon Formby, *Hundreds Protest Increase in Deportations*, DALLAS MORNING NEWS, Sept. 27, 2007, at 9B.

11. Jeffrey Weiss, *Mexican Consul Defends Irving Deportation Warning*, DALLAS MORNING NEWS, Oct. 6, 2007.

Similarly, the State of Oklahoma has recently enacted some of the toughest immigration laws in the country.¹² The Oklahoma law makes it a crime to harbor or transport illegal immigrants and to hire undocumented workers.¹³ This law too has generated a great deal of controversy and Latinos say that the law amounts to “ethnic cleansing.”¹⁴ Since June 2007, the Tulsa police have turned over more than 500 people to ICE for detention and deportation.¹⁵ In addition, since the law was enacted, “Latinos have been leaving [Oklahoma] by the thousands.”¹⁶

Likewise, another Dallas, Texas suburb, Farmer’s Branch, has attracted national and international attention for its recent crackdown on immigrants.¹⁷ The town’s City Council enacted an ordinance which would impose fines on landlords who rent apartments to undocumented persons and would authorize local police officers to examine the immigration status of anyone arrested by police.¹⁸ Latinos also protested this action and the Mexican-American Legal Defense Fund has brought a lawsuit seeking to block implementation of the ordinance.¹⁹

Because of this effort to enforce the immigration laws in the American southwest and elsewhere, record numbers of persons are now being deported from the United States.²⁰ In fiscal year 2007, the government has deported more than 260,000 persons.²¹ In fiscal year 2006, the ICE stated that it had set a record for removals by deporting “nearly 195,000 illegal aliens from the country. . . .”²² Those deported are primarily from Mexico and other Latin American countries.²³

12. Oklahoma Taxpayer & Citizen Protection Act of 2007, 2007 Okla. Sess. Law Serv. Ch. 112 (H.B. 1804) (West).

13. *Id.*; see also Kevin Canfield, *Deputies Unfazed by New Law*, TULSA WORLD, Nov. 13, 2007, at A1.

14. Ismael Estrada & Keith Oppenheim, *Oklahoma Targets Illegal Immigrants with Tough New Law*, CNN, Nov. 5, 2007, <http://www.cnn.com/2007/us/11/02/oklahoma.immigration/>.

15. Canfield, *supra* note 13.

16. Estrada & Oppenheim, *supra* note 14.

17. See David Osborne, *Texas Town Passes New Laws to Deter Migrants*, THE INDEPENDENT, Nov. 15, 2006, at 24; *Texas City OKs Anti-Immigration Measures*, USA TODAY, Nov. 14, 2006.

18. Farmers Branch, Tex., Ordinance 2892 (Nov. 13, 2006), available at <http://www.clearinghouse.wvstl.edu/chDocs/public/IM-Tx-0001-0002.pdf>; Osborne, *supra* note 17, at 24.

19. *Villas at Parkside Partners v. City of Farmers Branch*, No. 3:06-CV-02371 (N.D. Tex. filed Dec. 22, 2006). In June 2007, the court enjoined Farmers Branch from enforcing the ordinance. 496 F. Supp. 2d 757, 760–61 (N.D. Tex. 2007). Joshua Pantesco, *Rights Groups Sue Dallas Suburb over Anti-Illegal Immigration Law*, JURIST, Dec. 26, 2006, <http://www.jurist.law.pitt.edu/paperchase/2006/12/rights-goups-suc-dallas-suburb-over.php>; Stephanie Sandoval, *FB Moves Against Illegal Immigrants*, DALLAS MORNING NEWS, Nov. 14, 2006.

20. Anna Gorman, *Rise in Detainees Straining System: To Cope, Immigration Officials are Speeding Up Deportations, Moving More People Between Facilities and Using More Private Jails*, L.A. TIMES, Nov. 5, 2007, at B1.

21. *Id.*

22. U.S. Immigr. & Customs Enforcement, Fact Sheets: Executive Summary ICE Accomplishments in Fiscal Year 2006, <http://www.ice.gov/pi/news/factsheets/2006accomplishments.htm>.

23. U.S. DEP’T OF JUSTICE, FY 2005 STATISTICAL YEARBOOK, at E1 (Feb. 2006).

The events in Texas and Oklahoma—which involve a close working relationship between the local police and federal authorities—also provide us with an excellent example of the criminalization of immigration law. The criminal law enforcement system is being used to regulate non-citizens.²⁴ As Bill Hing explains, those who pursue the American dream—those who come to this country to work—are now treated as criminals.²⁵

Why the crackdown on immigration at this time in history? Why are we seeing record numbers of deportations? In my view, in large part, the explanation is found in the popular fear that immigrants constitute a major threat to our national identity. For instance, Harvard University Professor Samuel P. Huntington gives voice to this concern.²⁶ He argues that America's core culture is Anglo-Protestant and that this is the essence of American identity.²⁷ According to Huntington, people become Americans by assimilating to this Anglo-Protestant culture.²⁸ Immigration of Latinos—especially Mexicans—poses a threat to Anglo-American culture.²⁹ Because Mexican immigrants have allegedly failed to assimilate into American culture, our country could eventually turn “into a country of two languages, two cultures, and two peoples.”³⁰ The Hispanization of America thus poses a threat to the “cultural and . . . political integrity of the United States.”³¹ He urges that immigration from Mexico be halted or greatly reduced.³²

Huntington has important allies. For example, Patrick Buchanan shares Huntington's concerns about Mexican immigration.³³ Because Mexicans fail to assimilate, he advocates “an immediate moratorium on

24. See generally Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827 (2007); Nora V. Demleitner, *Immigration Threats and Rewards: Effective Law Enforcement Tools in the “War” on Terrorism?*, 51 EMORY L.J. 1059 (2002); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007); Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 GEO. MASON L. REV. 669 (1997); Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81 (2005) [hereinafter Miller, *Blurring the Boundaries*]; Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611 (2003) [hereinafter Miller, *Citizenship & Severity*]; Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

25. See Bill Ong Hing, *The Immigrant As Criminal: Punishing Dreamers*, 9 HASTINGS WOMEN'S L.J. 79 (1998).

26. HUNTINGTON, *supra* note 1.

27. *Id.* at 59–80.

28. *Id.* at 61.

29. *Id.* at 221.

30. *Id.* at 256.

31. *Id.* at 243; see also Cristina M. Rodriguez, *Language and Participation*, 94 CAL. L. REV. 687, 690 (2006) (“According to Huntington, America now faces the possibility of its own unraveling, brought on by the failure of an unprecedented number of recent immigrants, mostly from Latin America, to assimilate linguistically and culturally into an English speaking mainstream.”).

32. HUNTINGTON, *supra* note 1, at 243.

33. BUCHANAN, *supra* note 1, at 136–37.

immigration,” and the deportation and repatriation of Mexicans.³⁴ According to Buchanan, this is necessary if we are to preserve our nation.³⁵ He suggests that once immigration is resumed, we should only allow people to immigrate into our country who have a proven track record of assimilation into our culture.³⁶

These perceptions of Latinos and their associated deportation policy proposals are apparently now forming the basis for action in places like Texas.³⁷ Deportation is the implementation of “a policy selecting those allowed to become and remain residents of the United States. . . .”³⁸ In particular, we seem to be witnessing the deportation and repatriation of Mexican and other Latino immigrants. Significantly, one of the leaders of the immigration crackdown effort in Irving, Texas, Jean Towell, expressly argues that the Irving police practices are necessary to preserve American culture.³⁹ Similarly, one resident of Farmer’s Branch, Texas, and representative of a group known as “United Farmer’s Branch” explained the new ordinance directed against undocumented persons by stating: “They’re afraid that Farmer’s Branch is becoming Hispanic.”⁴⁰

In effect, many decisionmakers appear to have decided that Mexican immigrants are unassimilable.⁴¹ Since Mexican immigrants are presumably unassimilable, the push toward deportation and repatriation intensifies. As stated, for the most part, deportation efforts are aimed at Mexicans and other Latinos.⁴² In this regard, a new survey shows that a majority of Latinos in the United States, including American citizens, are concerned that they or someone they know may be deported.⁴³ When seen in the light of history, these concerns of even American citizens may not be far-fetched. During the Great Depression, approximately one million persons of Mexican origin were forcibly removed from the United States.⁴⁴ Half of these persons were American citizens.⁴⁵ During “Operation Wetback” in 1954, hundreds of thousands of persons of Mexican

34. *Id.* at 250, 254, 268–69.

35. *Id.* at 133–37.

36. *Id.* at 251–52.

37. See Legomsky, *supra* note 24, at 500 (“[Immigration] [p]olicymakers presumably act on the basis of both their own perceptions of reality and their perceptions of other people’s perceptions.”).

38. EDWARD P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY, 1798-1965, at 443 (1981).

39. Dianne Solís, *Taking on a Cause: Dallas Woman Leads the Charge Against Illegal Influx That She Says Threatens “American Culture”*, DALLAS MORNING NEWS, Nov. 25, 2007.

40. *Texas City OKs Anti-Immigration Measures*, *supra* note 17; Osborne, *supra* note 17.

41. See Miller, *Citizenship & Severity*, *supra* note 24, at 655 (“the immigration system has progressively abandoned the objective of assimilation, assumed the indigestibility of recent immigrants”).

42. Daniel Kanstroom, *Post-Deportation Human Rights Law: Aspiration, Oxymoron, or Necessity?*, 3 STAN. J. CIV. RTS. & CIV. LIBERTIES 195, 210–11 (2007).

43. *Latinos Express Concerns*, DALLAS MORNING NEWS, Dec. 14, 2007, at 1A, 24A.

44. See Kevin R. Johnson, *The Forgotten “Repatriation” of Persons of Mexican Ancestry and Lessons for the “War on Terror”*, 26 PACE L. REV. 1, 5 (2005).

45. *Id.* at 4.

descent, including citizens and non-citizens, were deported to Mexico.⁴⁶

There is a certain amount of irony in these claims that Mexicans do not assimilate. The dominant society at one time rigorously enforced a racial caste system that sealed off and segregated Mexican-Americans from white society.⁴⁷ With apparently no appreciation of this history, dominant society now complains that Mexicans fail to assimilate into Anglo-American society.

Recent work by theorists on the criminalization of immigration law explains the dynamics at work in contemporary immigration policy.⁴⁸ In the context of criminal law, the so-called “new penology” features tough prison sentences and mass incarceration.⁴⁹ The goal of the new penology is to manage criminals instead of rehabilitate them into society.⁵⁰ Similarly, the goal of immigration policy is now to manage immigrants of color who are assumed to be unassimilable instead of incorporate them into society.⁵¹ Importantly, there has been “a rather complete convergence between the criminal justice and deportation systems.”⁵²

At the same time, immigration scholars have recognized that important aspects of immigration law have failed to incorporate criminal law norms.⁵³ In particular, standard criminal law sanctions or punishments exist on a continuum and are designed to fit the seriousness of the crime. In contrast, immigration law imposes a single sanction—deportation—regardless of whether the infraction at issue is serious or not.⁵⁴ As a result, “removal of long term residents from the United States for crimes of questionable seriousness is now commonplace.”⁵⁵ Conventional immi-

46. See JUAN RAMON GARCÍA, *OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954*, at 228 (1980).

47. See DAVID MONTEJANO, *ANGLOS AND MEXICANS IN THE MAKING OF TEXAS, 1836-1986*, at 160 (1987) (“The modern order framed Mexican-Anglo relations in stark ‘Jim Crow’ segregation. Separate quarters for Mexican and Anglo were to be found in the farm towns. Specific rules defined the proper place of Mexicans and regulated interracial contact.”); George A. Martínez, *Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience: 1930-1980*, 27 U.C. DAVIS L. REV. 555, 561-64 (1994) (describing segregation of Mexican-Americans in public schools and public accommodations).

48. See Miller, *Citizenship & Severity*, *supra* note 24, at 616-17.

49. Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 450-451 (1992).

50. *Id.*

51. See Miller, *Citizenship & Severity*, *supra* note 24, at 655 (“[T]he immigration system has progressively abandoned the objective of assimilation, assumed the indigestibility of recent immigrants . . . and focused increasingly upon the task of managing inassimilable and therefore presumptively unknowable, unruly and dangerous immigrants.”).

52. Daniel Kanstroom, *Deportation, Social Control and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889, 1891 (2000).

53. See Legomsky, *supra* note 24, at 472; Juliet P. Stumpf, *Penalizing Immigrants*, 18 FED. SENT’G REP. 264 (2006).

54. Stumpf, *supra* note 53, at 264.

55. *Id.* See also Legomsky, *supra* note 24, at 524 (“The relentless expansions of the list of crimes that render even long-term lawfully admitted permanent residents deportable. coupled with the narrowing of the grounds on which compassionate discretionary relief can be dispensed in deserving cases . . . mean the most trivial misstep can result in devastating loss with no possibility of discretionary relief.”).

gration scholars seem puzzled as to why there are no graduated penalties in the immigration context and propose, quite sensibly, that there should be a range of sanctions.⁵⁶ Despite this, immigration law has resisted the construction of a spectrum of penalties and has retained using removal from the United States, or deportation, as the sole sanction. Any confusion or puzzlement of the immigration scholars appears to arise from a failure to comprehend the larger picture. If the goal of the immigration system were to incorporate undocumented persons into society, then one would expect to see graduated sanctions in the immigration context. This would allow immigrants a chance to escape deportation and remain in the country. The goal of the immigration system, however, now seems to be to remove presumptively unassimilable persons who allegedly constitute a threat to American identity. Given this apparent goal, one would expect that a range of sanctions would not be incorporated into immigration law because that would make it more difficult to remove supposedly unassimilable persons who would undermine American culture.

Historically, other racial minorities have been excluded from America or denied the right to become Americans on the ground that they allegedly failed to assimilate into the core American culture. After the American Civil War, Congress enacted the Chinese Exclusion Act, which in effect halted immigration from China.⁵⁷ In upholding the Act, the Supreme Court held that if Congress “considers the presence of foreigners of a different race in the country, who will not assimilate with us, to be dangerous to its peace and security . . . [Congress’s] determination is conclusive upon the judiciary.”⁵⁸

III. THE PSUEDO-SCIENCE OF UNASSIMILABLE PEOPLES

To the extent that this apparent deportation program is based on the theory that Mexicans and Latinos constitute unassimilable peoples, it should be rejected because: (1) it is based on a standard that would reintroduce *de facto* whiteness as a requirement for American citizenship; (2) it is contrary to moral and political principles of multiculturalism; and (3) it is based on a psuedo-scientific theory of unassimilable peoples.

I have argued elsewhere that to demand that we should only allow persons who assimilate into dominant American culture to become citizens is objectionable because it would reestablish *de facto* the old and now infamous requirement—which prevailed from 1790 to 1952—that only white persons could become citizens of the United States.⁵⁹ It would re-estab-

56. See Stumpf, *supra* note 53, at 265–67.

57. Chinese Exclusion Act of May 6, 1882, ch. 126, 22 Stat. 58 (1882). For more on the history of Chinese immigrants, see RONALD TAKAKI, *A HISTORY OF ASIAN AMERICANS: STRANGERS FROM A DIFFERENT SHORE* (1989).

58. *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889).

59. See George A. Martínez, *Immigration and the Meaning of United States Citizenship: Whiteness and Assimilation*, 46 WASHBURN L.J. 335, 336 (2007). For more on the whiteness requirement for citizenship, see IAN F. HANEY-LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996).

lish the white person requirement because under the racial prerequisite cases which interpreted the criterion of whiteness, one established one's whiteness by showing that one's group could assimilate into dominant American society.⁶⁰ Such a requirement is inconsistent with our modern sensibilities about race. Thus, one should reject the current deportation program to the extent that it is based on an assimilationist/whiteness standard.

The assimilationist/deportation program should also be rejected because it is inconsistent with the dominant political philosophy of our time—multiculturalism.⁶¹ According to multiculturalism, all cultures are of equal value.⁶² When one attempts to force another to assimilate into a homogenous culture, that violates the principle that all cultures are deserving of equal respect.⁶³ Thus, one should reject the current deportation program to the extent that it is based on the idea that Mexicans and others are unassimilable peoples.

Even if it were appropriate to consider assimilation, the facts show that persons of Mexican origin assimilate. Latino immigrants learn to read and speak English.⁶⁴ One recent study by the Pew Hispanic Center shows that approximately 90% of adult Latinos who were born in this country speak fluent English.⁶⁵ Mexican-Americans have served with great distinction in the United States military.⁶⁶ Indeed, leading Mexican-American organizations—for example, the League of United Latin American Citizens (“LULAC”)—have advocated assimilation, English language acquisition, American patriotism, and status as white⁶⁷ Ameri-

60. See Martínez, *supra* note 59, at 339–42.

61. NATHAN GLAZER, *WE ARE ALL MULTICULTURALISTS NOW* (1998).

62. See CHARLES TAYLOR, *The Politics of Recognition*, in *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* 25, 27 (Amy Gutmann, ed. 1994) (“Democracy has ushered in a politics of equal recognition, which has taken various forms over the years, and has now returned in the form of demands for the equal status of cultures. . .”).

63. *Id.* at 38.

64. LINDA CHAVEZ, *OUT OF THE BARRIO: TOWARD A NEW POLITICS OF HISPANIC ASSIMILATION* 37 (1991); Linda Chavez, *Tequila Sunrise: The Slow But Steady Progress of Hispanic Immigrants*, *POL’Y REV.*, Spring 1989, at 64, 64–67; Frank Sharry, *Why Immigrants Are Good for America*, *ORLANDO SENTINEL*, Sept. 22, 1991, at G1.

65. N.C. Aizenmann, *Most U.S.-Born Latinos Speak Fluent English*, *WASH. POST*, Nov. 30, at A14.

66. See Gilbert Paul Carrasco, *Latinos in the United States: Invitation and Exile*, in *THE LATINO CONDITION* 77, 81 (Richard Delgado & Jean Stefancic eds., 1998) (“The bravery of Latino troops was recognized in the many medals awarded to Mexican-Americans, including the Congressional Medal of Honor (the United States’ highest honor). . .”).

67. The legal system has determined Mexican-Americans to be white as a matter of law. See George A. Martínez, *The Legal Construction of Race: Mexican-Americans and Whiteness*, 2 *HARV. LATINO L. REV.* 321, 323–29 (1997). For additional work on Mexican-Americans and whiteness, see LAURA E. GOMEZ, *MANIFEST DESTINIES: THE MAKING OF THE MEXICAN-AMERICAN RACE* 3 (2007); Ariela J. Gross, “*The Caucasian Cloak*”: *Mexican-Americans and the Politics of Whiteness in the Twentieth-Century Southwest*, 95 *GEO. L.J.* 337 (2007); Thomas A. Guglielmo, *Fighting for Caucasian Rights: Mexicans, Mexican-Americans, and the Transnational Struggle for Civil Rights in World War II Texas*, 92 *J. OF AM. HIST.* 1212, 1212–37 (2006); Steven H. Wilson, *Brown Over “Other White”: Mexican-Americans’ Legal Arguments and Litigation Strategy in School Desegregation Lawsuits*, 21 *L. & HIST. REV.* 145, 147–48, 152–53 (2003).

cans.⁶⁸ This is consistent with social science literature which “finds that Hispanics are in fact well ‘assimilated’ with most Latinos holding or sharing the same core values and attitudinal predispositions associated with democracy as other Americans.”⁶⁹

These facts, which contradict the narrative of Mexican unassimilability, seem to be irrelevant to the debate.⁷⁰ They do not cause the theorists to withdraw their claims of Mexican unassimilability. What are we to make of this? A leading philosopher of science, Karl Popper, tells us that “the criterion of the scientific status of a theory is its falsifiability, or refutability, or testability.”⁷¹ “A theory which cannot be refuted by any conceivable event is non-scientific.”⁷² Since it would appear that nothing can count against these claims of Mexican unassimilability, these theories should be seen as nothing more than pseudo-science.

Popper offers examples of pseudo-scientific theories: astrology, the Marxist theory of history, and psychoanalytic theory.⁷³ For example, Marxists would never accept any evidence as counting as a refutation of their theory of history.⁷⁴ As a result, they undermined their “claim to scientific status.”⁷⁵ Similarly, with respect to psychoanalytic theory, there

68. See DAVID G. GUTÉRREZ, WALLS AND MIRRORS: MEXICAN AMERICANS, MEXICAN IMMIGRANTS AND THE POLITICS OF ETHNICITY 93 (1995) (“Individuals associated with groups such as LULAC based both their political strategies and their programs on the fundamental assumption that Mexican Americans and Mexican immigrants should attempt to adjust and adapt to American society by emulating, and ultimately conforming to, American social, cultural, and political mores.”); Carlos K. Blanton, *George I. Sanchez, Ideology and Whiteness in the Making of the Mexican-American Civil Rights Movement, 1930-1960*, 72 J. OF S. HIST. 571, 57–72.

69. Luis R. Fraga et al., *Su Casa Es Nuestra Casa: Latino Politics Research and the Development of American Political Science*, 100 AM. POL. SCI. REV. 515, 519 (2006).

70. See Kevin R. Johnson & Bill Ong Hing, *National Identity in a Multicultural Nation: The Challenge of Immigration Law & Immigrants*, 103 MICH. L. REV. 1347, 1352 (2005) (reviewing SAMUEL P. HUNTINGTON, WHO ARE WE? THE CHALLENGES TO AMERICA’S NATIONAL IDENTITY (2004)) (observing that “Huntington suffers from a myopia, seeing only the aspects of history and evidence that support his case”); Charles R. Venator Santiago, *Huntington’s White Patriotism and Latino Nationalist Narratives*, at 7 (Univ. of Conn. Dep’t of Pol. Sci. & Puerto Rican & Latino Studies Inst. 2007) (unpublished manuscript, on file with author) (observing that Huntington does not engage the data showing Latino assimilation).

71. Karl Popper, *Science: Conjectures and Refutations*, in INTRODUCTORY READINGS IN THE PHILOSOPHY OF SCIENCE 19, 23 (E.D. Klemke, Robert Hollinger & A. David Kline eds., 1980) (emphasis omitted). See also A.J. Ayer, *Editor’s Introduction*, in LOGICAL POSITIVISM 3, 13–14 (A. J. Ayer ed., Free Press 1959) (“Karl Popper suggested in his *Logik der Forschung* that what should be required of a factual statement was just that it be capable in theory of being falsified.”). In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Supreme Court relied on Popper’s theory of falsifiability to distinguish science from other endeavors. 509 U.S. 579, 593 (1993).

72. Popper, *supra* note 71, at 22.

73. *Id.* at 23.

74. *Id.* at 23. See also Stephen Thornton, *Karl Popper*, in THE STANFORD ENCYC. OF PHIL. (Edward Zalta ed., 2005), available at <http://www.plato.stanford.edu/entries/popper> (“[W]hen [Marxist] predictions were not in fact borne out, the theory was saved from falsification by the addition of *ad hoc* hypotheses which made it compatible with the facts.”).

75. Popper, *supra* note 71, at 23.

"was no conceivable human behavior which could contradict them."⁷⁶ Thus, psychoanalytic theory is also revealed as pseudo-science.⁷⁷ Popper views such pseudo-scientific theories as mythology—something like stories in Greek mythology.⁷⁸

Popper applies his ideas to social philosophy.⁷⁹ Just as we should reject theories that are falsified in scientific research, we should reject social policies that cannot withstand critical scrutiny.⁸⁰ The theory of the unassimilability of Mexicans and Latinos cannot withstand critical inquiry. It would seem that no facts can count against it. As a result, it should be seen as little more than mythology and rejected.⁸¹

The highly questionable nature of these theories of unassimilability may be clearly seen when we consider the history of various peoples who have been wrongly declared unassimilable. For example, in rejecting a challenge to the Chinese Exclusion laws, the Supreme Court declared the unassimilability of Chinese immigrants:

The differences of race added greatly to the difficulties of the situation. . . . [T]hey remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country. It seemed impossible for them to assimilate with our people, or to make any change in their habits or modes of living. As they grew in numbers each year the people of the coast saw . . . great danger that . . . that portion of our country would be overrun by them, unless prompt action was taken to restrict their immigration.⁸²

In the infamous case of *Korametsu v. United States*, the Supreme Court concluded that it was permissible to place Japanese immigrants and Japanese-Americans in internment camps, in part because it found such per-

76. *Id.* See also Thornton, *supra* note 74 ("Psychoanalytic theories by their nature are insufficiently precise to have negative implications, and so are immunised from experiential falsification.").

77. Popper, *supra* note 71, at 23–24.

78. *Id.*; see also Thomas S. Ulen, *Economics as a Science: Robert Nelson's Economics as Religion*, 56 *CASE W. RES. L. REV.* 649, 656 (2006) ("Science does not present us with a body of settled conclusions but with a means of knowing about the world – a means that stands in stark contrast to divination of animal entrails, prayer, assertion, tradition, revelation, authority, and the like.").

79. See POPPER, *supra* note 4, 1–5.

80. Thornton, *supra* note 74.

81. Interestingly, there appears to be a similar mythology at work which constructs immigrants as criminals. See Legomsky, *supra* note 24, at 500. Professor Stephen Legomsky has exhaustively reviewed the literature on immigration and crime and has found that "immigrants are more law-abiding than the native-born" and that there is an "absence of evidence that even undocumented immigrants are any more or less prone to crime than the native-born." *Id.* at 502.

82. *Chae Chan Ping v. United States*, 130 U.S. 581, 595 (1889). See also Charles J. McClain, Jr., *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850-1870*, 72 *CAL. L. REV.* 529, 532 (1984) ("The Chinese, so the argument goes, unlike all other immigrant groups, did not come to this country with a desire to settle and assimilate, but rather with the intention to make a quick fortune and return home. It was this feature of their immigration, according to this view, that was most responsible for the misfortunes that were visited upon them.").

sons unassimilable.⁸³ The *Korametsu* opinion heavily relied on the rationale of *Hirabayashi v. United States*, another case dealing with special treatment of persons with Japanese ancestry during World War II, decided a year earlier:

There is support for the view that social, economic and political conditions which have prevailed since the close of the last century, when the Japanese began to come to this country in substantial numbers, have intensified their solidarity and have in large measure prevented their assimilation as an integral part of the white population. In addition large numbers of children of Japanese parentage are sent to Japanese language schools outside the regular hours of public schools in the locality. Some of the schools are generally believed to be sources of nationalistic propaganda, cultivating allegiance to Japan.⁸⁴

Likewise, in *United States v. Thind*, the Supreme Court refused to allow an Indian immigrant to become an American citizen because it found Indians to be unassimilable:

It is a matter of familiar observation and knowledge that the physical group characteristics of the Hindus render them readily distinguishable from the various groups of persons in this country commonly recognized as white . . . [I]t cannot be doubted that the children born in this country of Hindu parents would retain indefinitely the clear evidence of their ancestry What we suggest is merely racial difference, and it is of such character and extent that the great body of our people instinctively recognize it and reject the thought of assimilation.⁸⁵

The pseudo-scientific nature of these theories of unassimilability is clear. At this point in American history, it is beyond argument that all of these peoples—persons of Japanese, Chinese, and Indian origin—are all extremely important and well-aculturated members of American society.

83. *Korametsu v. United States*, 323 U.S. 214, 219–24 (1944); *id.* at 237–38 (Murphy, J., dissenting).

84. *Hirabayashi v. United States*, 320 U.S. 81, 96–97 (1943); *see also Korametsu*, 323 U.S. at 216–219; *id.* at 237–38 (Murphy, J., dissenting). For more on the internment cases and their significance, see Sumi Cho, *Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown, and a Theory of Racial Redemption*, 40 B.C. L. REV. 73, 83–86 (1998); Gil Gott, *A Tale of New Precedents: Japanese American Internment as Foreign Affairs Law*, 40 B.C. L. REV. 179 (1998); Aya Gruber, *Raising the Red Flag: The Continued Relevance of the Japanese Internment in the Post-Hamdi World*, 54 U. KAN. L. REV. 307 (2006); Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the “Racing” of Arab Americans as “Terrorists”*, 8 ASIAN L.J. 1, 2–12 (2001); Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African-American Claims*, 40 B.C. L. REV. 477 (1998).

85. *United States v. Thind*, 261 U.S. 204, 215 (1923). For recent analysis of *Thind*, see Taunya Lovell Banks, *Both Edges of the Margin: Blacks and Asians in Mississippi Masala, Barriers to Coalition Building*, 5 ASIAN L.J. 7, 20–23 (1998); Bill Ong Hing, *Vigilante Racism: The De-Americanization of Immigrant America*, 7 MICH. J. RACE & L. 441, 451–454 (2002).

Given the extremely dubious nature of the various claims regarding the unassimilability of distinct peoples and the failure to accept facts as contradicting the current theory of the unassimilability of Mexicans and other Latinos, we should regard such a theory as pseudo-science—just a myth. To the extent that the current deportation program of Mexicans and other Latinos is based on pseudo-scientific theories regarding the alleged unassimilability of such peoples, it should be rejected. This is necessary if we are to achieve a truly open and rational society.

IV. THE SYMPOSIUM PAPERS

I turn now to consider the articles that appear in this symposium issue on immigration. In the foreword, Dean Kevin R. Johnson argues in favor of changing United States immigration laws so as to create “open borders” and eliminate “exaggerated border controls.”⁸⁶ He offers a number of reasons in support of this proposal, including that (1) it responds in an appropriate way to the global economy; (2) it would bring an end to the current harsh immigration enforcement regime, and (3) the current system of immigration laws is unrealistic and unenforceable.⁸⁷

In the first article, Professor Howard Chang observes that economic theory recognizes that free migration of labor is likely to produce economic gains for all countries.⁸⁸ Nevertheless, some economists support restrictions on immigration in order to shield native employees from immigrant competition.⁸⁹ Professor Chang argues that such worries about the effects of foreign competition on native workers do not justify protectionist immigration policy.⁹⁰ He contends that the tax system is able to provide an appropriate remedy for any concerns about native workers.⁹¹

In the next article, Professor Nathan Cortez considers the appropriate role for states and local government in the immigration context.⁹² In particular, he examines whether “otherwise permissible state and local laws avoid preemption simply by referring to or relying on federal immigration standards.”⁹³ He argues that relying on federal standards will not necessarily immunize state and local laws from preemption.⁹⁴

In the next article, Professors James Hollifield, Valerie Hunt, and Daniel Tichenor observe that industrial democracies like the United

86. Kevin R. Johnson, *Opening the Flood Gates: Why America Needs to Rethink Its Immigration Laws*, 61 SMU L. REV. 3, 4 (2008).

87. *Id.* at 4.

88. Howard F. Chang, *Optimal Taxation, Working Women, and the Disadvantages of Immigration Restriction As a Policy to Improve Income Distribution* 61 SMU L. REV. 23, 24–25 (2008).

89. *Id.*

90. *Id.*

91. *Id.*

92. Nathan G. Cortez, *The Local Dilemma: Preemption and the Role of Federal Standards in State and Local Immigration Laws*, 61 SMU L. REV. 47 (2008).

93. *Id.* at 48.

94. *Id.*

States are caught in a “Liberal Paradox.”⁹⁵ In order to compete in the global economy, such countries must be open to migration.⁹⁶ At the same time, national security and political demands militate in favor of closing the borders.⁹⁷ They note that United States immigration policy was fairly liberal from about 1950 to 1990.⁹⁸ A more restrictive approach to immigration appeared in the 1990s.⁹⁹ Despite this, another expansive era of immigration has continued to the present day.¹⁰⁰ The authors argue that this expansion in immigration is the result of “both policy interventions and changing U.S. economic conditions.”¹⁰¹

In the next article, Professor Michael Olivas considers Professor Kris Kobach’s arguments that the Development Relief and Education for Alien Minors (“DREAM”) Act not be enacted and state DREAM Act counterparts be repealed.¹⁰² The proposed DREAM Acts would allow undocumented persons to receive in-state tuition at state universities.¹⁰³ Professor Olivas argues, as against Kobach, that states may legally provide tuition benefits to undocumented persons and that it is appropriate to do so.¹⁰⁴

In the final article, Professor Rose Villazor explores the meaning of “sanctuary” in the context of immigration enforcement.¹⁰⁵ She argues that sanctuary locations fail to offer real safety for immigrants.

In the first essay¹⁰⁶ Professor Karen Engle offers analysis of the Olivas and Hollifield, Hunt, and Tichenor papers.¹⁰⁷ In particular, she views them through a lens which considers “the extent to which political versus economic factors drive immigration.”¹⁰⁸

In the following essay, Professor Teresa Miller argues that neo-liberal economic policies have led to a criminalization of undocumented immigration.¹⁰⁹ She suggests that such economic policies have helped bring about the current uproar over immigration in the United States.

95. James F. Hollifield, Valerie F. Hunt & Daniel J. Tichenor, *The Liberal Paradox: Immigrants, Markets and Rights in the United States*, 61 SMU L. REV. 67 (2008).

96. *Id.* 94–98.

97. *Id.*

98. *Id.* at 77–78.

99. *Id.* at 87–89.

100. *Id.*

101. *Id.* at 70.

102. Michael A. Olivas, *Lawmakers Gone Wild? College Residency and the Response to Professor Kobach*, 61 SMU L. REV. 99 (2008).

103. The following are all proposed versions of the federal DREAM Act; S. 1291, 107th Cong. §§ 2, 3 (2001); S. 1545, 108th Cong. (2003); S. 2075, 109th Cong. (2005); H.R. 5131, 109th Cong. (2006); S. 2611, 109th Cong. §§ 621-632 (2006); H.R. 1275, 110th Cong. (2007); S. 774, 110th Cong. (2007); S. 1348, 110th Cong. §§ 621-632 (2007) (as amended by S. 1150 §§ 612-619).

104. Olivas, *supra* note 102, at 122–25.

105. Rose Cuison Villazor, *What Is a “Sanctuary”?*, 61 SMU L. REV. 133 (2008).

106. Karen Engle, *The Political Economy of State and Local Immigration Regulation: Comments on Olivas and Hollifield, Hunt & Tichenor*, 61 SMU L. REV. 159 (2008).

107. *Id.*

108. *Id.* at 156.

109. Teresa A. Miller, *A New Look at Neo-Liberal Economic Policies and the Criminalization of Undocumented Migration*, 61 SMU L. REV. 171 (2008).

In the book review, Professors Karen E. Bravo and María Pablón López review Professor Kevin Johnson's new book on immigration reform.¹¹⁰ They analyze Professor Johnson's claim that a less restrictive immigration system is consistent with our national security and is a better system than our current immigration regime.

V. CONCLUSION

This symposium on immigration law and policy is an effort to bring reason to bear on some of the most important issues of our time. The papers generated by the symposium shed light on many issues and will help shape the debate in the area of immigration.

110. Karen E. Bravo & María Pablón López, *Crisis Meets Reality: A Bold Proposal for Immigration Reform*, 61 SMU L. REV. 191 (2008) (reviewing KEVIN R. JOHNSON, *OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS* (2007)).

Articles

