

Immigration Legislation's Panoptic Gaze  
Through A Legal, Theoretical and Empirical Lens

by

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## ABSTRACT

From its founding, the United States has always claimed to be a nation of immigrants, yet in the past century the issue of immigration has become an even more contentious political issue surrounded by heated rhetoric filled with passion, but devoid of information. This thesis hopes to interrupt this rhetoric with a thorough analysis of immigration politics in Arizona through a legal lens, a theoretical lens and an empirical lens. While this thesis by no means looks at all facets of immigration politics, it informs in a manner that adds depth by providing information on the history behind, and legal arguments surrounding, the most contentious piece of immigration legislation in the United States at the moment. It then provides a theoretical analysis of how immigration legislation has created carceral networks and a panoptic gaze in Arizona specifically. It ends with a recommendation for further empirical research to partner with both the legal and theoretical frameworks.

This thesis concludes that, fortified with over a century of case law, the plenary power doctrine is unwavering, and it makes federal immigration legislation an overly powerful tool in our political system from which the courts can offer little if any protection. Congress walks a fine line between preempting immigration regulation and devolving immigration regulation. SB 1070 and the 287(g) program are two contested areas of immigration regulation, which both exhibit and alter the power relationships of immigration politics in Arizona.

Additionally, the application of the theories of Michel Foucault illuminates the power relationships at play in Arizona – from the power relationships among nation states in the broader political arena of geopolitics and colonialism to the face-to-face power relationship between a police officer and a stopped/detained/arrested person in a Foucauldian carceral network.

This thesis ends with a call for empirical research that would yield an opportunity to analyze these relationships. This thesis discusses the importance of empirical study. It situates the study within the genre of surveillance studies and its theorists. It analyzes similar studies, and identifies the variables the most illuminating for this analysis. This thesis is written in the hope that a researcher will pick up where this thesis has left off.

## DEDICATION

I dedicate this thesis to my loving and supportive family, especially...

To my Mother for her academic guidance from the very beginning of this program;

To my Father for nurturing my critical thinking and challenging me to always look at the bigger picture;

To my Papa Nick, for giving me an intense passion for matters of Social Justice and Human Rights;

To my Sister, Miescha, for fueling my passion to study immigration legislation in particular;

To my Sister, Malerie, for inspiring me through her own completion of a Masters Degree in a subject that she is passionate about;

To my Husband and Best Friend, Amir, for believing in me and encouraging me.

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## Chapter 1:

### INTRODUCTION

From its founding, the United States has always claimed to be a nation of immigrants, yet in the past century the issue of immigration has become an even more contentious political issue. Unfortunately, it seems the intense passion on either side of any immigration issue often leads to heated rhetoric. This rhetoric does not inform but rather intensifies entrenched positions. This entrenchment leads to greater inflammatory rhetoric even less based upon factual reasoned debate, and the cycle continues in a downward spiral. This downward spiral seems to find its center and acceleration in Arizona – often called the ground-zero of immigration politics.<sup>1</sup> This thesis hopes to interrupt this spiral for those who will read it, with a thorough analysis of immigration politics in Arizona through a legal lens, a theoretical lens and an empirical lens.

Through the legal lens, this thesis looks at immigration politics in the United States in general and in Arizona more specifically through legislation. It will analyze how legislation came to be such a powerful tool in immigration politics through tracing the creation and fortification of the plenary power doctrine. It will then demonstrate how the United States Congress has further control over immigration through preemption of state and local legislation. This thesis will then specifically look at how Arizona legislation has figured in this federalism tug-of-war, with a deeper look at the infamous SB 1070. Moreover,

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<sup>1</sup> Dennis Wagner and Emily Bazar, “Arizona has become ‘ground zero’ of immigration fight,”

while federal legislation is prohibited in devolving its plenary power onto the states in the creation of state immigration legislation, the federal government has found a way to devolve power to the states in immigration law enforcement through 287(g), which will be discussed further below.

With all of this discussion on various powers in immigration politics, a theoretical lens can help clarify some of the broader power relationships. Michel Foucault's theoretical work on power can help to trace how Arizona's immigration politics came to be. This thesis will look at geopolitics and colonialism, governmentality, power in general, resistance to power, biopower, discipline, the prison, the Panopticon and the carceral network as they apply to Arizona.

Both the legal and theoretical frameworks for analyzing immigration politics in Arizona can be combined in future empirical research. Empirically, researchers might be able to test the effect of immigration legislation on the creation of Foucauldian power relationships, specifically the panoptic-gaze and carceral network. This thesis discusses the importance of empirical study, it will situate the study within the genre of surveillance studies and its theorists, and offer the suggested variables that would be most illuminating in this analysis.

While this thesis by no means looks at all facets of immigration politics, it will hopefully inform in a manner that adds depth by providing information on: (1) the history behind, and legal arguments surrounding, the most contentious piece of immigration legislation in the United States at the moment, (2) a theoretical analysis of how immigration legislation has created carceral networks



and a panoptic gaze (3) a possible way to look at both the legal and theoretical frameworks empirically.

Chapter 2:

## LEGAL: IMMIGRATION LEGISLATION AND ENFORCEMENT

### History

This section seeks to historicize the present climate in the United States generally and Arizona and New Mexico specifically with regard to immigration. However, in a paper that so heavily relies on Foucauldian theories, it is important to state how and why this history will be different from the Foucault's methods of historicizing: archeology and genealogy. A succinct description of these methods is as follows:

The archeological side involved isolating various order of discourse which laid down the conditions for articulating thoughts and ideas, propositions and statements through which people made sense of their historical time. The genealogical side had more to do with non-discursive mechanisms of power which shaped the way people saw the world and acted within it. So, the various discourses that make up a school curriculum (mathematical, scientific, literary) express the archaeological approach. But the organisation of the space of the school, the way in which classrooms are designed in such a way that the teacher is empowered... has more to do with the genealogical side.<sup>2</sup>

In this manner, "Foucault suggests that we should, rather, try to analyse the complexity and indeed the confusing nature of past events."<sup>3</sup> However, there is a multiplicity of factors throughout the period spanning from 1492 until the present, which have coalesced to this point, and it is not the objective of this thesis to summarize them. Moreover, the passing of immigration legislation in Arizona can by no means be reduced to the efforts of the lone Russell Pearce, who

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<sup>2</sup> Geoff Danaher, *Understanding Foucault* (Thousand Oaks: SAGE Publications, 2000), 98.

<sup>3</sup> Sara Mills, *Michel Foucault*, Routledge Critical Thinkers: Essential Guides for Literary Studies (New York: Routledge, 2003), 51.

authored the infamous SB 1070. It took the entire legislature to come to a majority opinion. Those opinions were quite possibly rendered due to a myriad of factors including: some bartering for exchange votes, a constituency that blames undocumented workers for the high unemployment rate in the state, the recession, which actually caused the high unemployment rate, and (in the case of Russell Pearce) the death of his son at the hand of an undocumented immigrant.<sup>4</sup> While no single locus can claim responsibility, once the immeasurable loci have converged in a manner that allows immigration legislation to come to pass – no matter what those factors are – immigration legislation as a symptom of those forces becomes a symbol of those forces, which can be tracked throughout history.

Nonetheless, Foucault's methods were not simply a quirky preference; his methods of historicizing were a critique upon tradition history. Therefore, it is also important here to alleviate the concerns regarding going about writing history in a modern fashion. The modern form of writing history came about in conjunction with the exponential expansion of European colonization.<sup>5</sup>

This is one of the principal criticisms ... Foucault sees it as playing an instrumental role in the colonizing process itself and is therefore unable to provide a perspective that offers a useful critique of colonization. Partly, for Foucault, this is because conventional history writing regards history in terms of a single and steady progress unfolding over time. This progressive view of history ... tends to see the world gradually evolving into some ideal state, or utopian society. From this perspective, rather than being considered as an act of violent aggression by the colonizing force,

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<sup>4</sup> Ted Robbins, "The Man Behind Arizona's Toughest Immigrant Laws," *Morning Edition*, March 12, 2008, <http://www.npr.org/templates/story/story.php?storyId=88125098&ps=rs>.

<sup>5</sup> Danaher, *Understanding Foucault*, 99.

colonialism is regarded as an aspect of the evolutionary development of history into higher forms of society.<sup>6</sup>

Regardless of the fact that this section does not historicize in a Foucauldian manner of archeology or genealogy, the history presented in this paper is not done without this cautionary wisdom from Foucault in mind. This history does focus upon the colonizing power's history of law creation. Nevertheless, it is not put forth to be interpreted as a social Darwinian, logical or inevitable progression of society "into some ideal state, or utopian society"<sup>7</sup> that ignores the "violent aggression by the colonizing force"<sup>8</sup>. It is rather to document the use of legislation as a "violent aggression by the colonizing force"<sup>9</sup>.

Admittedly, this section does depart with Foucault on more than the presentation of history as neither archaeological nor genealogical. Foucault asserted that history cannot be synthesized into a coherent whole by identifying patterns among events. The following historical account contradicts this view explicitly. Immigration legislation has followed a pattern throughout time, whether this pattern is case law building upon precedence or the ebb and flow of immigration legislation with the economy.<sup>10</sup> Moreover, strict adherence to Foucauldian methods of writing would criticize the position of the author as a historian within the public institution of the university as "the protocols and procedures of the institution... will shape how the history will be written."<sup>11</sup> This

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<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid., 100.

<sup>11</sup> Ibid., 101.

is not disputed. This thesis does not offer a complete picture of the social, cultural, economic, psychological and anthropological factors that brought about today's situation under scrutiny, nor does it aim to do so. This section is merely contextualizing the immigration legislation of today, among its predecessors and attempting to show why and how immigration legislation is so powerful and more immune to the checks and balances that limit the power of other legislation.

Lastly, Foucault posits an additional concern regarding the colonialism involved in traditional historicizing: "Like colonialism it divides people in to subjects and objects, active and passive, the colonizing people who make history and develop knowledges, and the colonized people who are made the object of such history and knowledge."<sup>12</sup> Again, this section is not aiming to show immigration legislation as a way to show what the subjects actively did to colonize the passive objects of history. This is merely to document the paper trail of immigration legislation and how immigration legislation became so powerful, without any implication that this is an exhaustive exposé on how these pieces of legislation came about. With this in mind, let us now embark upon this particular history.

**The Plenary Power Doctrine – How Immigration Law became so powerful  
that the Constitution cannot touch it:**

The United States is known as a melting pot, a nation of immigrants, which the Statue of Liberty welcomes with the famous words, "Give me your

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<sup>12</sup> Ibid., 103.

tired, your poor, your huddled masses yearning to breathe free”.<sup>13</sup> However, neither the word immigration, nor any variation of it appears in the constitution. Nevertheless, there is today an extensive body of immigration law, and it is largely exempt from judicial review via the plenary power doctrine.

The word plenary comes from the Latin *plenus*, meaning full. In United States legal jargon, it means the full or complete authority by a particular branch (or branches) over a particular area of law, with little if any judicial review. Therefore, the plenary power doctrine is a doctrine upheld by the Supreme Court when holding a case to be non-justiciable on the basis that the legislative or executive branch has complete authority over the particular matter. It is important to note, that among scholars in the legal field, the plenary power doctrine is most often discussed and written about in terms of its applicability to immigration law. This is, of course, the manner with which the plenary power doctrine is discussed in this thesis, as well.

There are some often-referenced justifications for this doctrine that will surface in the cases to follow. The political question doctrine is perhaps among the most prominent justifications. The political question doctrine holds that the court will not rule on cases involving policy questions, which would be better dealt with by elected officials, who must reckon with a constituent body.<sup>14</sup> To do otherwise is sometimes referred to as legislating from the bench. Moreover, the political question doctrine acknowledges that the court should defer to the

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<sup>13</sup> “Statue of Liberty - The Statue of Liberty-Ellis Island Foundation”, n.d., [http://www.statueofliberty.org/default\\_sol.htm](http://www.statueofliberty.org/default_sol.htm).

<sup>14</sup> Jon Feere, *Plenary Power: Should Judges Control U.S. Immigration Policy?*, Backgrounders and Reports (Center for Immigration Studies, February 2009), <http://www.cis.org/plenarypower>.

judgment of the legislative and executive branch, because the court does not know the political ramifications of policy decisions. This goes hand in hand with the idea that especially where international relations are concerned (as it is in immigration law), the political branches of government should have full discretion, as only the political branches truly know the impact of those decisions on our relations with other nations.<sup>15</sup>

Also in line with the abovementioned reasons, is uniformity. The constitution does demand that there must be a uniform rule of naturalization. This has been read to be partially due to not wanting to jeopardize our foreign relations by allowing states to make individual and potentially troublesome immigration regulations.<sup>16</sup>

The reasoning behind relying on the plenary power doctrine will come into greater relief as the next section progresses from one case to the next. This section seeks to illuminate the history behind Congress' authority over matters of immigration, and trace some of the case law that demonstrates the Federal Courts' unwillingness to interfere in Congress' plenary power over immigration.

Although the plenary power has been bolstered and fortified through a century of case law, there are substantial broad arguments against this power within the legal community, and the Supreme Court itself is creating chinks in the plenary power doctrine that might allow for some corrosion in the near future and full deterioration in the distant. For now Immigration Law remains not merely a

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<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

symptom of the social, cultural, economic, psychological and anthropological factors that brought it into being, but also a powerful tool to be wielded with little constraint from the judicial branch.

### **The History of Congressional Involvement**

In Article 1 Section 8 of the United States Constitution, Congress' powers are defined. Among these powers lies the responsibility "To establish an uniform Rule of Naturalization."<sup>17</sup> The word immigration is actually not included in the document. However, this clause has been interpreted to give Congress authority over immigration issues. This was not a particularly contentious issue in the first one hundred years as a nation, because the United States had extremely porous borders in an attempt to populate the countryside and provide sufficient labor. This was beneficial during the construction of the railroad, yet upon completion Congress passed the first immigration law designed to exclude a particular race: the 1882 Chinese Exclusion Act.<sup>18</sup>

The turn of the century saw many attempts from a xenophobic legislative branch to bar immigration further. President Cleveland, President Taft, and President Woodrow Wilson vetoed attempts at literacy requirements, but Congress eventually overrode the Presidential veto.<sup>19</sup> In 1921 Congress instituted a provisional measure establishing national quotas, and in 1924 national quotas,

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<sup>17</sup> U.S. Const. art. I, § 8, cl. 4.

<sup>18</sup> T. Alexander Aleinikoff, David A. Martin, and Hiroshi Motomura, *Immigration and Citizenship Process and Policy*, 6th ed. (Thomson West, 2008), 164.

<sup>19</sup> *Ibid.*, 167.



as well as exclusions of particular nationalities, were codified in the National Origins Act.<sup>20</sup>

After World War II a shift toward greater tolerance began, but it was slowed and tempered by Cold War tensions of the 1950s. Nevertheless, exclusion of the Chinese was no longer quite as unconditional. The War Brides Act opened immigration to alien spouses, and the United States accepted refugees from various war torn countries.

As a matter of simplification, in 1952 United States immigration laws were consolidated into the Immigration and Nationality Act (INA). The 1965 amendments to the INA abolished the previous origins formula in favor of identical numerical caps for every country in the Eastern Hemisphere, which was then twice amended to establish a global cap of 290,000 immigrants per year.<sup>21</sup>

Legislation in the 1980s and through to present day have seen another shift, this time toward controlling “illegal entry” or undocumented immigration.<sup>22</sup> In 1981, President Reagan said, “Our nation is a nation of immigrants. More than any other country, our strength comes from our own immigrant heritage and our capacity to welcome those from other lands. No free and prosperous nation can by itself accommodate all those who seek a better life or flee persecution. We must share this responsibility with other countries.”<sup>23</sup> With that, President Reagan set up a task force, which came to the following recommendations: greater control of

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<sup>20</sup> Ibid., 170.

<sup>21</sup> Ibid., 176.

<sup>22</sup> Ibid., 179.

<sup>23</sup> Paul Spickard, *Almost All Aliens: Immigration, Race, and Colonialism in American History and Identity*, 1st ed. (Routledge, 2007), 392.

the immigration process, expedited removal, employer sanctions, and an immigration policy that reflects the “special relationship with... Canada and Mexico”. It also included the acknowledgements that, “We must also recognize that both the United States and Mexico have historically benefited from Mexicans obtaining employment in the United States,” and “Illegal immigrants in considerable numbers have become productive members of our work force. Those who have established equities in the United States should be recognized and accorded legal status.”<sup>24</sup> Author Paul Spickard explains the contradictory timing of this welcoming non-hostile viewpoint put forth by President Reagan and the shift in immigration legislation,

Regan’s statement did not reflect hostility to immigrants. It eloquently affirmed the primacy of constitutional protections...friendship and cooperation with Mexico...the contributions of Mexicans and of unauthorized migrants to American society... Yet... this did represent the beginnings of a dramatic policy change...toward ever-increasing restrictions on immigration, especially from Mexico, that would mount... In the end, there would be an assault on immigrants in general and Mexicans in particular. Many of those constitutional protections... and the special friendly relationship with Mexico would be obliterated.<sup>25</sup>

It began with the 1986 Immigration Reform Control Act (IRCA), which attempted to end the employment of undocumented immigrants and enforce employer sanctions, while offering amnesty and a path to citizenship to undocumented immigrants who entered the country before 1982. However, it soon escalated into much more discriminatory legislation with the Personal

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<sup>24</sup> Michael C. LeMay and Elliott Robert Barkan, *US immigration and naturalization laws and issues* (Greenwood Publishing Group, 1999), 276-277.

<sup>25</sup> Spickard, *Almost All Aliens*, 393.

Responsibility and Work Opportunity Act and the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA). Personal Responsibility and Work Opportunity Act made it so that “illegal immigrants could not apply for or receive federally sponsored loans, contracts, business licenses, retirement, welfare, health, disability, food assistance or unemployment benefits... and denied some benefits even to legal immigrants... until they became citizens.”<sup>26</sup>

The IIRIRA went much further. It fortified the border by adding 5,000 (and thereby doubling) Border Patrol agents, and additionally “provided for a new corps of agents to investigate and prosecute immigrant smugglers.”<sup>27</sup> The IIRIRA included the strengthening of previous employer sanctions, building of a fence, the creation of a national immigrant identification card, and the collaboration between the INS and state governments in “‘investigating, arresting, detaining and transporting illegal immigrants’ – to make the local police an arm of *la migra*.”<sup>28</sup> The IIRIRA “denied legal status to anyone who was in the United States without papers... barred people who had been deported from re-entering for up to ten years...streamlined procedures by which people could be deported... denying... the right to a hearing or access to the court system, and limited judicial review.”<sup>29</sup>

The terrorist attack of September 11, 2001 then further pushed this pendulum swing toward exclusion and border control with the: the USA PATRIOT Act, the Enhanced Border Security and Visa Entry Reform Act, and

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<sup>26</sup> Ibid., 394.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid., 395.

<sup>29</sup> Ibid.

the REAL ID Act.<sup>30</sup> The USA PATRIOT Act "...gave [the] U.S. Attorney General... virtually unlimited authority to investigate, detain, and deport whomever they liked...it also allowed the Justice Department to trample on the constitutional rights of U.S. citizens and, especially, of immigrants... It attempted to deny [non-citizens]... rights to free speech, political association, due process, and privacy..."<sup>31</sup>

The Enhanced Border Security and Visa Entry Reform Act directs the Attorney General to hire more INS investigators and inspectors (200 over the number authorized by the USA PATRIOT Act). Per an amendment to the IIRIRA, it also directs the Attorney General to create an electronic verification and monitoring system for foreign students. It demands that law enforcement and intelligence entities share alien information with INS and Department of State, and sets forth an information sharing plan. It mandates that the Secretary of State share the electronic visa file of every issued alien visa before the alien enters the United States. Lastly, it charges the President with studying the feasibility of a North American National Security Program.<sup>32</sup>

The REAL ID Act allows immigration judges or the government to require an asylum applicant to submit evidence, thereby increasing the applicant's burden of proof substantially. The Act also makes obtaining a driver's license that is also a federal ID (and only two states currently have driver's license that are not

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<sup>30</sup> Aleinikoff, Martin, and Motomura, *Immigration and Citizenship Process and Policy*, 180-181.

<sup>31</sup> Spickard, *Almost All Aliens*, 457.

<sup>32</sup> F. James Rep Sensenbrenner, "H.R.3525 - Enhanced Border Security and Visa Entry Reform Act of 2002," Bill originating in the House, December 19, 2001, <http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR03525:@@D&summ2=m&>.

also federal IDs) impossible for undocumented immigrants, because they must be able to prove legal status and submit a social security number. Moreover, the REAL ID Act directs the Attorney general to fortify the border with “additional physical barriers and roads (including the removal of obstacles to detection of illegal entrants)”<sup>33</sup> and allocates funds to do so. More interestingly, the REAL ID Act allows Secretary of Homeland Security to waive any laws that hinder this said fortification, and restricts the court review of these waivers to the district courts.

This brief history is meant to demonstrate the federal legislative branch’s establishment of their role in immigration law and the pendulum of immigration legislation from strict exclusion of all Chinese, to greater inclusion in the wake of WWII, and the swing back toward greater exclusion and control. These acts have not gone uncontested. However, the judicial branch of the federal government has developed a body of case law making Congress’ authority over immigration matters practically immune from the judicial review established in *Marbury v. Madison*.

### **Setting the Scene for the Chinese Exclusion Case**

As abovementioned, the United States originally had extremely porous borders. Not only were the borders open, the United States actively recruited immigrants. Pamphlets, flyers and posters were sent to Europe glorifying the United States, and the United States signed and ratified the Burlingame Treaty with China in 1868. The most commonly referred to passage in which

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<sup>33</sup> F. James Rep Sensenbrenner, “H.R.418 - REAL ID Act of 2005,” Bill originating in the House, January 26, 2005, <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR00418:@@D&summ2=m&>.

summarizes the spirit of the treaty acknowledging, "... 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."<sup>34</sup>

Accordingly, Chinese immigrants set sail for the United States. The Chinese immigrants sought a better life and higher wages, while the U.S. sought railroad labor. The completion of the railroad and an economic downturn in California saw a surge of racial hostility – codified in the 1882 Chinese Exclusion Act. The Act instituted a ten-year moratorium on Chinese immigration and stated, "the coming of Chinese laborers to this country endangers the good order of certain localities."<sup>35</sup> Chinese who had already immigrated to the United States were exempt in that they were allowed to come and go between China and the United States by procuring a certificate before leaving to show immigration inspectors upon their return (per an Act passed in 1884).<sup>36</sup>

There were of course many gray areas regarding a person's legality of entry. This ambiguity led federal judges to often err on the side of the Chinese immigrant.<sup>37</sup> So much so, that Congress passed subsequent laws culminating

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<sup>34</sup> Burlingame Treaty, July 28, 1868, U.S.-P.R.C., 16 Stat. 739, T.S. No. 48.

<sup>35</sup> F. James Rep Sensenbrenner, "H.R.418 - REAL ID Act of 2005," Bill originating in the House, January 26, 2005, <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR00418:@@D&summ2=m&>.

<sup>36</sup> *Chinese Exclusion Act*, 1882.

<sup>37</sup> Hiroshi Motomura, *Americans in Waiting: The Lost Story of Immigration and Citizenship in the United States* (Oxford University Press, USA, 2006), 15-17, 25-26.

with the 1888 Scott Act on which the famous Chinese Exclusion Case is based:  
Chae Chan Ping v. United States.<sup>38</sup>

### **The Beginning of the End of Judicial Review: Chae Chan Ping v. United States**

Chae Chan Ping entered the United States in 1875. Twelve years later he left to visit China with the intention of returning. Per the restrictions in the acts of the 1880s, Chae Chan Ping diligently obtained a certificate from the United States government. Procuring this certificate was necessary to prove that Chae Chan Ping was exempt from the 1882 Chinese Exclusion Act, because it showed that he had been present in the United States before its passage, and could move freely between China and the United States. Unfortunately, between leaving the country in 1887 and returning in 1888 the Scott Act was passed, making Chinese immigration prohibited even with a certificate.<sup>39</sup> Chae Chan Ping alleged the 1888 law conflicted with the United States' obligations under the Burlingame Treaty and his due process rights under the Fifth Amendment.<sup>40</sup>

The Supreme Court ruled against Chae Chan Ping. In the majority opinion, Justice Field recognized that the Scott Act contradicted the Burlingame Treaty. He simultaneously stated that treaty was not to be considered supreme over a legislative act of Congress. The two are of equal weight. Therefore, just as when Congress passes new laws when an old law is no longer adequate, Congress should have the power to pass an act that goes against the previously accepted

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<sup>38</sup> Ibid., 26.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

treaty. More importantly, the courts must recognize the latter law as "...the last expression of the sovereign will..." As such, it trumps.<sup>41</sup>

Justice Field then points to the question of whether or not Congress has the power to pass an act that excludes non-citizens. The constitution vests authority in Congress to draft and pass laws, which protect our independence and security as a nation: "...declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce... and admit subjects of other nations to citizenship."<sup>42</sup>

The Supreme Court states that this is a non-negotiable power inherent in being a sovereign nation, "If it could not exclude aliens it would be to that extent subject to the control of another power."<sup>43</sup> Additionally, it is necessary, "To preserve its independence... against foreign aggression... whether from the foreign nation... or from vast hordes of its people crowding in upon us."<sup>44</sup> For these reasons and the fact that immigration affects the relationship between nations, immigration regulation is found to be a national issue to be left to the federal government.

Up until the end of Supreme Court Justice Field's opinion, the jurisdiction of the nation in general and legislative and executive branch specifically over issues regarding exclusion and immigration has been affirmed, but the role of the courts is not discussed. Thus it seems as though the court is only saying that

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<sup>41</sup> N. T Saito, "Enduring Effect of the Chinese Exclusion Cases: The Plenary Power Justification for On-Going Abuses of Human Rights, The," *Asian LJ* 10 (2003): 15.

<sup>42</sup> *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

<sup>43</sup> *Ibid.*, 130:605.

<sup>44</sup> *Ibid.*, 130:604.



Congress and the President have power over immigration issues, but not yet plenary power. This changes with this quote given toward the end of the decision:

Whether a proper consideration by our government of its previous law, or a proper respect for the nation whose subjects are affected by its action, ought to have qualified its inhibition and made it applicable only to persons departing from the country after the passage of the act, are *not questions for judicial determination*. If there be any just ground of complaint on the part of China, it must be made to the political department of our government, which is *alone* competent to act upon the subject, (emphasis added).<sup>45</sup>

This quote initiates the precedence of the political branches of government having plenary power over immigration issues. The Supreme Court waives its right to review immigration law against the constitution against which other laws must be pitted to show legitimacy. This case does not go unused, or get overturned. Instead, it is used throughout our history and expanded upon with each case to create an ever-expanding potential black hole of rights.

### **Harisiades v. Shaughnessy: Xenophobia, Anti-Semitism and Anti-Catholicism, Oh My!**

Mr. Justice Jackson wrote the opinion for the court. In this case, the Appellants argue against the constitutionality of the Alien Registration Act of 1940 (18 *U.S.C.* § 2385). Appellants argue that because they have been admitted for permanent residence, they should have the same constitutional protections as citizens. Appellants also argue that the justification for deportation must be reasonably related to the protection of the United States.

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<sup>45</sup> *Ibid.*, 130:606.

In regards to the first argument, the Supreme Court brings to light that the Appellants do not have the same burdens as a citizen, and therefore are not (and have never been) afforded legal protection equal to that of citizens. The Court also states that, because the Appellants have citizenship elsewhere, they are protected by that government and international law. Moreover, according to international law a sovereign state retains the right to expel aliens.

In regards to the second argument, the Supreme Court conceded that the Alien Registration Act of 1940 might be a more severe embodiment of the United States' right to expel. However, it also acknowledged that Congress has greater information on these matters, and has both expanded and fortified this act since its passage. It is important here to quote Mr. Justice Jackson, because the Supreme Court refers to this section verbatim in various other cases.

It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.<sup>46</sup>

Mr. Justice Frankfurter takes this notion a step further in his concurring opinion stating, "But whether immigration laws have been crude and cruel, whether they may have reflected xenophobia in general or anti-Semitism or anti-Catholicism, the responsibility belongs to Congress."<sup>47</sup>

This is a compelling case, because it resurrects the argument used in the Chinese Exclusion Case, defends it, and strengthens it by adding more

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<sup>46</sup> *Ibid.*, 130:609.

<sup>47</sup> *Harisiades v. Shaughnessy*, 342 U.S. 580, 588 (S. Ct. 1952).

justification. Writing that it is “largely immune from judicial inquiry or interference” opens the floodgates. It might have been assumed that if there were serious constitutional violations the courts might not be able to turn a blind eye, but the court even goes so far as to say that even if the immigration laws enacted by Congress are full of egregious violations including xenophobia in general or anti-Semitism or anti-Catholicism which would not be tolerated in other contexts, the judicial branch should not step in. This is a foreshadowing of various discriminatory policies enacted by Congress and upheld by the Supreme Court in the following cases.

**Mathews v. Diaz – Flexibility > Constitutionality**

Appellants Diaz, Clara and Espinosa filed a class action suit in the District Court alleging that the Social Security Act (42 U.S.C. § 1395o) was unconstitutional, based upon discriminatory qualifications for enrollment which prohibit aliens from enrolling unless they have both attained permanent residence status and have completed five years of residence in the United States. The District Court held that it was unconstitutional, because it created subclasses among aliens saying, “...the danger of unjustifiable discrimination against aliens... is so great, in view of their complete lack of representation in the political process, that this... should be tested under the same pledge of equal protection as a state statute.”<sup>48</sup>

Mr. Justice Stevens wrote the opinion of a unanimous Supreme Court, which held that neither liberty nor property had been deprived without due

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<sup>48</sup> *Ibid.*, 342:597.

process of law. While the Supreme Court did acknowledge that all aliens are entitled to the constitutional protection provided by the Fifth and Fourteenth Amendments in securing due process, the Court did not believe that this could be expanded to imply that all aliens should be classified in the same groups for the purposes of granting particular privileges associated with being a member of the United States, such as Social Security. The following sentence within this reasoning is extensively quoted, “In the exercise of its broad power over naturalization and immigration, *Congress regularly makes rules that would be unacceptable if applied to citizens,*”<sup>49</sup> (emphasis added).

While this is objectively true that Congress has unquestionably greater authority over aliens in admitting, naturalizing and deporting. This case could have been a chance to end Congressional authority there. The Supreme Court could have ruled that it is only appropriate for Congress to set rules for admission, status, naturalization and deportation because there must be some sort of regulation particular to the actual immigration process. However, people should otherwise be treated equally under the fifth and fourteenth amendment. Instead, the Supreme Court took the fact that Congress is able to treat non-citizens differently than they treat citizens in that non-citizens are subject to an immigration process, to mean that Congress is able to treat non-citizens differently than they treat citizens in greater areas of law and regulation.

Additionally, the Supreme Court held not just that citizens and non-citizens can be treated differently, but also that non-citizens can be treated

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<sup>49</sup> *Mathews v. Diaz*, 426 U.S. 67, 73 (S. Ct. 1976).

differently from each other by dividing them into various subclasses and apportioning various levels of participation in the benefits of the United States to said subclasses. The Supreme Court reasons that this “statutory classification does not deprive them of liberty or property without due process of law.”<sup>50</sup> Of even greater interest in this case is the Supreme Court’s laissez-faire approach, and the reasoning behind it. The court decides that because immigration laws and policies are often influenced by and influential upon international politics, must be dealt with in the political branches only.

... the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government. Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary. This very case illustrates the need for *flexibility* in policy choices *rather than the rigidity often characteristic of constitutional adjudication...*(emphasis added)<sup>51</sup>

In this way the Supreme Court established a precedence of narrow review, if any, of decisions made by the legislative and/or executive branch in the area of immigration and naturalization. It exempts immigration law from needing to withstand constitutional scrutiny applied to all other laws made by Congress. In essence, the Supreme Court gives up the precedence of judicial review established in *Marbury v. Madison*.

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<sup>50</sup> Ibid., 426:79.

<sup>51</sup> Ibid., 426:84.

It is worth noting, that in this case, the distinction amongst aliens is based upon the relationship of those aliens to the United States, i.e. duration of stay in the United States and status within the United States. Forming subclasses of non-citizens based upon the relationship to the United States may make logical sense, and seem in line with the aforementioned idea of allowing Congress to only discriminate amongst non-citizens in regard to the immigration process. Unfortunately, this is not the extent of Congressional discretion on creating subclasses amongst non-citizens. The next case takes the precedent established in this case and expands upon it to not only be discrimination based upon relationship and status with the United States, but rather is discrimination amongst aliens based upon gender.

**Fiallo v. Bell – Insert the word Immigration and delete protection from Gender Discrimination**

In the case of Fiallo v. Bell the appellants argue against the constitutionality of the Immigration and Nationality Act of 1952. The Act includes a segment designed to aid in the reunification of families by easing the immigration process for those who are children or parents of United States lawful permanent residents or citizens. There are particular stipulations for the determination of whether or not a child or parent qualifies for this. The child may be legitimate, legitimated, a stepchild, an adopted child, or an illegitimate child, if the child seeks preferential immigration status through a natural mother. For a child of a natural father, all of the aforementioned relationships may qualify with the exception of one – an illegitimate child.

While the appellants acknowledge that the immigration context necessitates narrow judicial review, the appellants wish for the Supreme Court to look at the treatment of the citizen and resident alien that is attempting to be reunited with family, not the immigrant seeking to be with family in the United States. In this manner the appellants argue that regardless of the immigration context, the courts should always protect the rights of citizens.

To this the Supreme Court by virtue of the opinion Mr. Justice Powell delivered reiterates the stance taken in *Mathews v. Diaz* stating, "... it is important to underscore the limited scope of judicial inquiry into immigration legislation... 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens...largely immune from judicial control."<sup>52</sup> Furthermore, the court quotes *Mathews v. Diaz* writing, "Congress regularly makes rules that would be unacceptable if applied to citizens."<sup>53</sup> In regard to the Appellants claim that this case is about the rights of citizens, the Supreme Court simply deems that Congress has the authority to admit or exclude various classes of aliens.

Moreover, the Appellants claim that this case is unique in that it has at its core discrimination both based upon sex and upon illegitimacy. The Supreme Court states that this issue has been previously and similarly resolved and that there is no reason to revisit. The Court cites its opinion in *Kleindienst v. Mandel*

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<sup>52</sup> *Ibid.*, 426:81.

<sup>53</sup> *Fiallo v. Bell*, 430 U.S. 787, 792 (S. Ct. 1977).

stating that, if the Executive has a “facially legitimate and bona fide reason”<sup>54</sup> the courts will not delve into it further as to the Executive’s discretion in matters under its jurisdiction. This case thereby, now allows not only subclasses among immigrants with regard to their relationship to the United States, but also with regard to gender.

**Narenji v. Civiletti – Discrimination based on Nationality is acceptable, if being used as an International political pawn.**

Acting upon direction given by President Carter, on November 13, 1979 Attorney General Benjamin Civiletti issued regulation 8 C.F.R. § 214.5. This was a response to the hostage crisis, which took place at the U.S. Embassy in Tehran, Iran. The regulation required natives or citizens of Iran who were both nonimmigrant aliens and post-secondary school students to report to the Immigration and Naturalization Service to provide resident information and proof of nonimmigrant status maintenance.

The Appellants argue against the constitutionality of the regulation stating that the Attorney General was not authorized to issue the regulation, nor did the International hostage crisis in Iran create an authority to do so. Most importantly, the Appellants charged that the creation of a subclass of aliens on the basis of nationality blatantly infringes upon the Equal Protection Clause of the United States Constitution.

The District Court disagreed with the former assertion. It stated that the Attorney General is endowed by Congress via the Immigration and Nationality

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<sup>54</sup> Ibid.



Act to administer and enforce the Act, and thereby may issue regulations to this end. The Attorney General must also prescribe the conditions of an alien's residence, and is therefore allowed to check in to make sure that said conditions have not been violated. On the contrary, the District Court agreed with the latter allegation that this "check in" could not be performed with distinctions based upon nationality and thus found the regulation to be unconstitutional.

The Court of Appeals did not agree with this second ruling. It ruled that the Legislative and Executive branch have full authority to make distinctions as they deem necessary in matters of immigration, even if the distinction is based upon the immutable characteristic of nationality. The Court stipulated only that the distinctions not be "wholly irrational"<sup>55</sup> and this regulation was deemed rational due to the political context of the time. The Attorney General assured the court that this was a matter of foreign policy and national security, as such the President has direct authority over such matters and may delegate responsibility to the Attorney General as he deems necessary. The Court of Appeals bases this standard of rationalism upon the abovementioned Supreme Court cases of *Mathews v. Diaz* and *Fiallo v. Bell*, and the entirety of the quote provided in the above-summarized case of *Harisiades v. Shaughnessy* is cited.

**INS v. St. Cyr – No Habeas, and No Suspension Clause Necessary.**

In the case of *INS v. St. Cyr* the appellant is a citizen of Haiti and a Legal Permanent Resident of the United States. He was made deportable by a plea bargain in 1996 that included an admission of selling a controlled substance.

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<sup>55</sup> *Ibid.*, 430:794.

Upon striking this bargain, St. Cyr knew that there would be an opportunity to receive a waiver of deportation from the Attorney General. Shortly thereafter, Anti-Terrorism and Effective Death Penalty Act (AEDPA) of 1996 went into effect, as did the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996. St. Cyr was now no longer eligible to seek a waiver, because the Attorney general interpreted the statutes to mean that he no longer had that authority.<sup>56</sup>

St. Cyr contested the Attorney General's interpretation by way of a writ of habeas corpus. Herein lies the problem: the Immigration and Naturalization Service (INS) argues that AEDPA and IIRIRA denied courts the jurisdiction by which to decide a case brought via habeas corpus. This is the issue with which the Supreme Court wrestles. It does not come to a unanimous decision. Supreme Court Justice Stevens delivered the opinion.

Stevens asserts that the INS must prove that it is not overwhelmingly assumed that the federal courts would naturally have judicial review and that Congress had a clear and explicit intent to bar courts from habeas jurisdiction in passing AEDPA and IIRIRA. The court does set the bar reasonably high stating, "Implications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction..."<sup>57</sup> Additionally, there must be no plausible alternative interpretation. Stevens even goes so far as to say that there must be some form of review ("...a serious Suspension Clause issue would be presented if... the 1996

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<sup>56</sup> *Narenji v. Civiletti*, 617 F.2d 745, 746 (D.C. Ct. App. 1979).

<sup>57</sup> *Immigration and Naturalization Service v. St. Cyr*, 533 U.S. 289, 293 (S. Ct. 2001).

statutes have withdrawn that power... and provided no adequate substitute for its exercise.”<sup>58</sup> and that aliens should not be presumed to have less access to habeas corpus given the longstanding history of aliens’ full access to it.

Therefore, the court held “...the absence of such a forum, coupled with the lack of a clear ... congressional intent to preclude judicial consideration on habeas... strongly counsels against adopting a construction that would raise serious constitutional questions. Accordingly, we conclude that habeas jurisdiction under § 2241 was not repealed by AEDPA and IIRIRA.”<sup>59</sup>

Although this may appear at first glance to be a holding suggesting that the Supreme Court is retaining their grasp upon habeas corpus and taking back a bit of the plenary power granted Congress, it is actually quite the opposite. The court is actually implying in this decision that it is absolutely within the power of Congress to strip the courts of judicial review of Habeas Corpus, and that this would not cause a constitutional question of violating the Suspension Clause, which allows for the suspension of Habeas Corpus in specific situations only. This could be accomplished by providing review in another forum.

Furthermore, even the dissenting opinion provided by Supreme Court Justice Scalia with whom the Chief Justice, Justice Thomas, and Justice O’Connor join does not disagree with the conclusion that Congress can take away Judicial Review of Habeas Corpus. In fact, it takes this concept a step further to say that in this instance these particular judges believe that the statutes in question

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<sup>58</sup> Ibid., 533:299.

<sup>59</sup> Ibid., 533:305.

were explicit enough to conclude that Congress did strip the courts of judicial review.

This case further bolsters Congress' power to dictate to the courts what they can and cannot review, which is the issue at the heart of Congress' plenary power over Immigration Law. As has been shown in the previous cases assisting in the creation of this doctrine, the Supreme Court has held that immigration is "largely immune from judicial control," yet this is expanding the potential void of judicial control to encompass something as fundamental as Habeas Corpus.

This potential void came to fruition shortly thereafter. Congress passed the REAL ID Act, which was explicit about denying courts judicial review of removal orders, and mentioning 28 U.S.C. § 2241 explicitly. As for the second part of the Supreme Court's standard that Habeas Corpus must have another venue in which it can be reviewed, Congress empowered the Appellate Courts to do so. In this manner, the Supreme Court offered more power to Congress, and Congress gladly took it.

**Constitutional Concerns: Unconstitutional, but with the Supreme Court Stamp of Approval.**

Perhaps the strongest and most frequent argument made against the plenary power doctrine is something that the Supreme Court itself would quite possibly agree with: it goes against the United States constitution. This statement might appear brazen at first, as is the accusation that the Supreme Court would concede. There is evidence.

The Supreme Court acknowledges that expelling and excluding foreigners cannot be found among the enumerated powers. Instead the Supreme Court and other proponents assert that it is an inherent power derived from simply being a sovereign nation with a line of demarcation between this nation and the next, over which nouns of all types may only cross legally with the express permission of the nation state.

It could be argued that the Supreme Court does not see the plenary power as being against the constitution, but rather as exempt from the rules with which the constitution constricts all other laws made in the United States.<sup>60</sup> The above quoted excerpt from *Mathews v. Diaz* demonstrates this line of thought perfectly: “This... illustrates the need for flexibility in policy choices rather than the rigidity often characteristic of constitutional adjudication.”<sup>61</sup> This bold statement by the court does little to assuage the argument that there should be constitutional adjudication on all laws, not simply a majority.

Additionally, there is no leap to be made in regards to whether or not aliens are supposed to be granted constitutional protection. As far back as the Judiciary Act of 1789, aliens were afforded protection in the courts. As far back as 1886 in *Yick Wo v. Hopkins* aliens were deemed to be protected by the Fourteenth Amendment in the reading of “person”.<sup>62</sup> The Fifth Amendment is also repeatedly cited as being violated by the plenary power doctrine through the

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<sup>60</sup> *Ibid.*, 533:314.

<sup>61</sup> *Mathews v. Diaz*, 426:81.

<sup>62</sup> Olafson, “Concept of Limited Sovereignty and the Immigration Law Plenary Power Doctrine, The,” 441.

reading of the words “No Person” at its start.<sup>63</sup> It is only in the arena of immigration law, wherein the rights afforded some persons evaporate.<sup>64</sup>

Supreme Court Justice Douglas summarized the constitutional argument against the plenary power doctrine in his dissenting opinion of *Harisiades v. Shaughnessy* writing, “The immigration power... flows from sovereignty... The power of deportation is therefore an implied one. The right to life and liberty is an express one. Why this implied power should be given priority over the express guaranty of the Fifth Amendment has never been satisfactorily answered.”<sup>65</sup>

Conversely, there is an argument not necessarily against the use of the plenary power doctrine, but rather against the existence of the plenary power doctrine and any conflict with the constitution. While it must be taken into consideration, it by no means makes the invocation of the plenary power doctrine by the Supreme Court any less troubling.

This line of thought challenging the existence of a plenary power doctrine is best explained by Gabriel J. Chin in his article, “Is there a Plenary Power Doctrine?” In this article he does acknowledge, “The Court’s record in this context consists of a string of cases, over a century long, upholding with depressing regularity statutes discriminating on the basis of race, sexual orientation, political activity, and sex and birth out-of-wedlock.”<sup>66</sup> However, he

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<sup>63</sup> Olafson, “Concept of Limited Sovereignty and the Immigration Law Plenary Power Doctrine, The,” 441.

<sup>64</sup> *Ibid.*, 440.

<sup>65</sup> *Harisiades v. Shaughnessy*, 342:599.

<sup>66</sup> Gabriel J Chin, “Is There a Plenary Power Doctrine - A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law,” *Georgetown Immigration Law Journal* 14 (2000 1999): 257,

adds to this that at the time these court cases were decided, similar discrimination was upheld domestically against citizens. Thus, these decision did not conflict with the constitutional protections read into constitutional law at the time.

Chin points to the fact that "...the year *Chae Chan Ping* was decided, state and federal courts upheld racial segregation in schools, miscegenation laws, exclusion of witnesses on the basis of race, and laws granting benefits to whites but not to blacks."<sup>67</sup> During the time of *Harisiades*, Communism was deemed to be advocating overthrowing the government, and therefore the restriction of some of its members' free speech rights was deemed constitutional. Therefore *Harisiades*' communist sympathies probably would have still assured a similar outcome in the case.<sup>68</sup>

Chin also illuminates for the *Fiallo* case that unwed fathers who happened to be citizens were also discriminated against.<sup>69</sup> However, Chin acknowledges that the precedent of *Fiallo* is still troubling because, "Exclusion, deportation and naturalization restrictions based on religion, sexual orientation and race are gone, and those based on Communist Party membership much diluted. Oddly, however, discrimination based on sex and birth out-of-wedlock remains a substantial part of the INA,"<sup>70</sup> and "the domestic and immigration paternity cases do seem inconsistent with the sex discrimination cases of recent years."<sup>71</sup>

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<http://heinonline.org/HOL/Page?handle=hein.journals/geoimlj14&id=267&div=&collection=journals>.

<sup>67</sup> Ibid., 260.

<sup>68</sup> Ibid., 265.

<sup>69</sup> Ibid., 272-273.

<sup>70</sup> Ibid., 272.

<sup>71</sup> Ibid., 278.

With regard to *Mathews v. Diaz*, the author reasons that the case would not have been decided otherwise, if held to constitutional scrutiny, because “Few public benefit programs are available to all without regard to some eligibility criteria like age, assets, income, family relationship, or health, so the domestic cases in this line typically uphold limiting benefits to some class or classes.”<sup>72</sup>

With this background knowledge of the time period in which these cases were decided, Chin states, “Typically, the Court has upheld discriminatory immigration laws during periods when domestic discrimination against citizens was permitted on the same basis. Therefore, typically the discrimination was consistent with domestic constitutional law. By the time the Court’s jurisprudence became suspicious of the classification at home, Congress had often changed the discriminatory practice, preempting a judicial test under an interpretation of the Constitution which might be more favorable to the immigrant.”<sup>73</sup> Thus, while these distinctions might have been deemed constitutional at the time had they been subjected to constitutional scrutiny, the harrowing fact of the matter is that these decisions have not yet been overturned and can be relied upon as precedent.

This brings us to Chin’s overarching question. Chin does not argue that the plenary power doctrine was mistakenly applied by scholars to the area of Immigration Law, but rather poses the question of: Why has the Supreme Court said that they are following a plenary power doctrine in these cases, when it seems that these cases would have been decided no differently in their day, if the

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<sup>72</sup> Ibid., 279.

<sup>73</sup> Ibid., 278.



appellants had been citizens? “If most of the immigration cases could have been decided the same way without any special constitutional rule, the Supreme Court’s continuing insistence that there is a plenary power doctrine becomes mysterious.”<sup>74</sup>

Chin offers two explanations.

One possible explanation is that although the Court often says that Congress has plenary power over immigration, it often says that Congress has plenary power over everything that it does...It may be that the plenary power doctrine is merely a restatement of the familiar principle that federal courts cannot invalidate acts of Congress simply because they believe them to be unwise, but only if the acts are unconstitutional.<sup>75</sup>

Another possible explanation is that the Court may want to leave itself room in the event that it does face a statute or executive decision genuinely based on foreign policy or national security grounds. It may unnecessarily emphasize the limited nature of its review to make it clear that it has leeway in the difficult cases.<sup>76</sup>

However, even if this scholar is right, this thesis maintains that the Supreme Court’s continued reliance on the plenary power doctrine as the reasoning behind these discriminatory decisions is still worrisome. It opens the door for greater discrimination among aliens than among citizens. It is much the same the executive of any government declaring a state of emergency. It is terrifying because of the power that can be freely wielded.

Put another way, Chin states, “If the plenary power doctrine is largely dicta, it is harmful dicta. There is value in accurately expressing the controlling principles of law...If our immigration law is not a kind of “laboratory of

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<sup>74</sup> Ibid., 281.

<sup>75</sup> Ibid., 281-282.

<sup>76</sup> Ibid., 282.

autocracy” but is instead simply a part of our constitutional law, the Court should so say.”<sup>77</sup>

### **The International Scene: Human Rights Take Center Stage While State Sovereignty Plays a Supporting Role.**

After World War II, the international community came to the consensus that perhaps the sovereign balance of power that had ruled international relations since the 1648 Treaty of Westphalia, was insufficient. A shift was made toward balancing state sovereignty with individual human rights with the Universal Declaration on Human Rights, which was then codified into two treaties: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR).

Since then various legal fora have come into being that may hold the United States accountable on some level for human rights abuses, or the lack of rights afforded non-citizens in the United States. Some include: the ICCPR Human Rights Committee, the Inter-American Commission, the Inter-American Court, the International Court of Justice, the United Nations General Assembly, United Nations Human Rights Council, the Secretary general and High Commissioner for Human Rights, and Universal Jurisdiction.

Each of these fora have a variety of pros and cons, as well as level of efficacy in actually being able to affect change in the nation state in question. However, the mere existence of this variety of fora, and the fact that the United States along with a resounding majority of the rest of the world (or region in the

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<sup>77</sup> Ibid., 287.

instance of the Inter-American Commission/Court) can be judged in these fora, is a testament the world's intolerance of sovereignty trumping individual human rights without question.

The Supreme Court has claimed that Congress' plenary power is derived not from the constitution, but rather from the concept of sovereignty. Yet today's concept of sovereignty (especially when individual human rights are in question) resembles very little of the concept of sovereignty in 1889 when the Supreme Court decided the Chinese Exclusion Case, and the international scene is wrought with examples of various countries' sovereignty being infringed upon, because of alleged human rights violations.<sup>78</sup> In this way, without even acknowledging specific violations of specific treaties (of which countless have been alleged in the United States) it is argued that Congress' plenary power over immigration law, is at the very least, outdated, and perhaps even in conflict with modern international law.

#### **R.I.P. Plenary Power 1888 – 2001?**

Given these constitutional and international considerations, as well as the plethora of opponents of the plenary power doctrine among legal theorists/professionals, it is no surprise that some have been calling for its demise for quite a long time now. While demise might not be in sight, the plenary power

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<sup>78</sup> Olafson, "Concept of Limited Sovereignty and the Immigration Law Plenary Power Doctrine, The," 438.

doctrine might be faltering. Peter J. Spiro writes about this in his article entitled, “Explaining the End of Plenary Power.”<sup>79</sup>

Spiro notes that the decline in the deference to plenary power is not simply to be viewed as part of an overall trend in increasing constitutional or judicial supremacy, as neither is on the rise.<sup>80</sup> Instead, Spiro hypothesizes that this shift is a reaction to the international context. This is of great interest, because it was international concerns in political decision-making from which the plenary power first burgeoned; it would be quite interesting, if it were to also lead to the plenary power’s ultimate downfall. Spiro lists more international dynamics to be taken into consideration than mentioned above.

Spiro cites the fact that international politics are not nearly as volatile as they were in the late 1800s or even in the late 1900s during the Cold War. With this volatility, there were good reasons to be nervous about any involvement of the judicial branch in foreign policy matters.<sup>81</sup> Now, not only is there greater stability on the world stage, there is also an acceptance of domestic courts on the international stage. Domestic courts have appeared on the international stage through extradition, universal jurisdiction, truth commissions, and in the United States – the Alien Tort Statute.<sup>82</sup> Spiro does acknowledge that September 11, 2001 might affect this trend. However, it is not clear how.

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<sup>79</sup> Olafson, “Concept of Limited Sovereignty and the Immigration Law Plenary Power Doctrine, The,” 438.

<sup>80</sup> P. J Spiro, “Explaining the End of Plenary Power,” *Geo. Immigr. LJ* 16 (2001): 339.

<sup>81</sup> *Ibid.*, 340.

<sup>82</sup> *Ibid.*, 341.

While these factors may explain a shift away from reliance on the plenary power doctrine, Spiro argues that this shift is already taking place, and is exemplified in the Supreme Court cases: *Nguyen v. INS* and *Zadvydas v. Davis*.<sup>83</sup> *Nguyen* is a case regarding requirements for citizenship of children born out of wedlock to fathers as opposed to mothers outside of the United States. The Supreme Court could have simply upheld the decision made in *Fiallo v. Bell* explained above, wherein the plenary power doctrine was invoked quoting *Mathews v. Diaz* writing, “Congress regularly makes rules that would be unacceptable if applied to citizens.”<sup>84</sup> Instead, the Supreme Court chose to utilize “...the standard equal protection analysis for gender-based classifications, without any alteration... to account for the immigration context.”<sup>85</sup> In this way, *Nguyen* opens up the plenary power doctrine to vulnerability, while *Zadvydas v. Davis* makes a direct strike.

*Zadvydas v. Davis* deals specifically with detention. Upon having received a final order of removal, an alien may be held in custody (per the INA) for up to 90 days, during which time the Government is to secure said removal. If the alien has not been removed by the end of those 90 days, the INA stipulates that they may be detained longer or released with particular supervision if the alien is: “...inadmissible...removable [as a result of violations of status requirements or entry conditions, violations of criminal law...security... foreign policy...

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<sup>83</sup> *Ibid.*

<sup>84</sup> *Fiallo v. Bell*, 430:792.

<sup>85</sup> Spiro, “Explaining the End of Plenary Power,” 342.

determined by the Attorney General to be a risk to the community or unlikely to comply with... removal...”<sup>86</sup>

The length of detention post-90-days could be read to be based solely upon the discretion of the Attorney General. The Supreme Court challenges that this reading of the statute places the constitutionality of the Act in jeopardy.<sup>87</sup> Therefore, the Supreme Court holds that the Act must be read to avoid such a constitutional conflict. So, they read in that the post-removal-period must only be for the amount of time that is “reasonably necessary to bring about that alien’s removal from the United States. It does not permit indefinite detention.”<sup>88</sup>

Justice Breyer also delves into how another reading of the Act to permit indefinite detention would be clearly at odds with the Fifth Amendment, seeing as the alien’s liberty has been taken away without the due process of a criminal proceeding, because it would have been a civil proceeding.<sup>89</sup> Moreover, the Supreme Court asserts that the constitution certainly does apply in this instance, because the aliens have been admitted into the United States; this is not an exclusion case.<sup>90</sup>

The Government brings up the plenary power doctrine specifically, and states that the judicial branch “must defer to executive and legislative branch

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<sup>86</sup> Spiro, “Explaining the End of Plenary Power,” 342.

<sup>87</sup> *Immigration and Nationality Act of 1952*, 1994.

<sup>88</sup> *Zadvydas v. Davis*, 121 S. Ct. 2491, 2498 (S. Ct. 2001).

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*, 121:2498-2499.

decisionmaking [*sic*]”.<sup>91</sup> To this Justice Breyer responds, “But that power is *subject to important constitutional limitations*,”<sup>92</sup> (emphasis added).

In this way, the Supreme Court has not only refused to simply grant Congress plenary power over matters of Immigration Law. It goes further to place a piece of Immigration Law under constitutional scrutiny in several ways: 1) reading in a reasonable standard, so as to avoid a constitutional problem with detention, 2) applying the Act to the Fifth Amendment and showing how it would be in conflict with it due to the civil proceeding, 3) discussing the border issue of when the constitution goes into effect protecting aliens – and deeming it to have gone into effect for aliens admitted into the country. Then the Supreme Court again takes this even another step further when prodded by the Government to address the plenary power doctrine head-on. The Supreme Court explicitly says, “that power is subject to important constitutional limitations,”<sup>93</sup> which certainly knocks down the plenary power doctrine a few pegs from where it stood twenty-five years prior in *Mathews v. Diaz*, wherein the Supreme Court touted, “flexibility in policy choices rather than the rigidity often characteristic of constitutional adjudication.”<sup>94</sup>

Of course, knocking it down a peg is not the equivalent of assured destruction. In fact, the Supreme Court leaves room to give unconditional deference to Congress in this decision saying, “Despite this constitutional problem, if ‘Congress has made its intent... clear, ‘we must give effect to that

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<sup>91</sup> *Ibid.*, 121:2500.

<sup>92</sup> *Ibid.*, 121:2501.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Mathews v. Diaz*, 426:81.

intent’”<sup>95</sup> Moreover, Spiro points out that although the Supreme Court did acknowledge that the executive branch’s primacy in foreign policy matters, “require courts to listen with care when the Government’s foreign policy judgments... are at issue, and to grant the Government appropriate leeway...”<sup>96</sup>, that requirement is a “far cry from the stance... of nonjusticiability [*sic*].”<sup>97</sup>

### **Summary: The Rise, the Teetering, the Fall?**

From the beginning of the United States as a Federation the constitutional clause including the word “naturalization” has been interpreted to confer enumerated power over immigration law to Congress. This went unquestioned as the United States allowed immigrants to stream through porous borders. It was not until there was an attempt to stem this tide with the Chinese Exclusion Act of 1882 that the Supreme Court added that this power over immigration law was inherent in being a sovereign nation, and as such necessitated the ability to act politically with other countries and without interference from the judicial branch.

Case law then fortified and bolstered this position. In *Harisiades v. Shaughnessy* did so by introducing a chilling and oft quoted phrase justifying plenary power over immigration law by saying, “Such matters are so exclusively entrusted to the political branches... largely immune from judicial inquiry or interference.”<sup>98</sup> *Mathews v. Diaz* contributes the Supreme Court’s determination that political decisions “need... flexibility... rather than the rigidity ... of

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<sup>95</sup> *Zadvydas v. Davis*, 121:2503.

<sup>96</sup> *Zadvydas v. Davis*, 121:2503.

<sup>97</sup> Spiro, “Explaining the End of Plenary Power,” 344.

<sup>98</sup> *Harisiades v. Shaughnessy*, 342:588.



constitutional adjudication,”<sup>99</sup> taking another step back from any involvement in Immigration Law. While *Mathews v. Diaz* did create subclasses among aliens, these subclasses were based upon the relationship between the alien and the United States (length of residence and permanent residency status), *Fiallo v. Bell* continued to allow for the creation of subclasses among aliens – this time allowing for discrimination based on gender. This quote drawn from *Mathews* and inserted into the justifying rationale of *Fiallo* echoes throughout later court cases on plenary power, “Congress regularly makes rules that would be unacceptable if applied to citizens.”<sup>100</sup> *Narenji v. Civiletti* makes gender interchangeable with nationality to create subclasses of aliens. Lastly, *INS v. St. Cyr* implicitly grants Congress the power to strip aliens of Habeas Corpus without abiding by the prerequisites in the Suspension Clause.

Just when it seems as though the plenary power can grab no greater hold over Immigration Law, that power begins to slip from grasp. Some argue that there is simply no longer a way to justify the constitutionality of immigration law exceptionalism. Some argue that this plenary power no longer protects us from international conflict, but rather might actually create international conflict, or at least be in conflict with modern day international politics. Lastly, Peter J. Spiro offers two additional cases to look at from the very same year as *INS v. St. Cyr*, which might signal the decline of the plenary power doctrine. At the very least, the Supreme Court shows that it is willing to apply the constitutional rigidity to

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<sup>99</sup> *Mathews v. Diaz*, 426:81.

<sup>100</sup> *Mathews v. Diaz*, 426:81.

matters falling under Immigration Law, and a reluctance to lean on the easy justification of the plenary power doctrine. It does seem that, “It may be a bit premature to enter a tombstone date on plenary power, but the grave has been dug.”<sup>101</sup>

### **A Continuance of Congress’ Power: Federal Preemption**

Not only does the United States legislative branch enjoy plenary power over another federal branch with regard to immigration regulation, it also has authority over state legislative branches. This is in part due to the creation of the plenary power doctrine. The combination of the Supreme Court’s affirmation throughout our nation’s history of Congress’ exclusive authority over immigration regulation, and the Supremacy Clause of the United States Constitution creates preemption.

Preemption is the displacement of state law by federal law. In *De Canas v. Bica*, the Supreme Court laid out a three-part test against which State law must be weighed in deciding whether or not it is preempted by federal law. If the law fails any of the three tests it is preempted. This three part test deems that a state or local law is preempted: if the piece of legislation is attempting to regulate immigration, if Congress intended to occupy the field in a manner that excludes state or local involvement, or if the state/local law conflicts with federal law.

### **Regulation of Immigration:**

Regulation of immigration is prohibited for much the same reason that the judiciary branch was hesitant to become involved in review of immigration

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<sup>101</sup> Spiro, “Explaining the End of Plenary Power,” 339.

legislation in the 1800s. It is a sensitive and possibility volatile foreign policy issue. At best, it would be chaotic to have fifty different immigration regulation policies affecting our foreign policy and relationships with foreign nations.

Regulation of immigration is “a determination of who should or should not be admitted into the country and the conditions under which a legal entrant may remain.”<sup>102</sup> At first glance, this definition might seem to simply mean that state and local governments cannot bar admission, set quotas or change the terms of visas (conditions under which a legal entrant may remain). However, the courts have interpreted this definition to be quite far-reaching.

Merely classifying immigrants upon arrival to the United States was deemed unconstitutional because it “concern[s] the admission of citizens and subjects of foreign nations.”<sup>103</sup> The infamous California Proposition 187 was found unconstitutional, because it regulated immigration by, “creating a comprehensive scheme to detect and report the presence and effect the removal” of undocumented immigrants.<sup>104</sup> Moreover, immigration legislation aimed at denying undocumented immigrants the ability to rent or lease from landlords has been deemed preempted, because it regulates immigration by affecting the “conditions under which a legal entrant may remain”<sup>105</sup> by denying some the ability to lease or rent shelter.

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<sup>102</sup> Spiro, “Explaining the End of Plenary Power,” 339.

<sup>103</sup> *DeCanas v. Bica*, 424 U.S. 351 (United States Supreme Court 1976).

<sup>104</sup> *Chy Lung v. Freeman*, 92 U.S. 275 (United States Supreme Court 1876).

<sup>105</sup> *LULAC v. Wilson*, 908 F. Supp. 769 (Central District of California 1995).

### **Field Occupation:**

With regard to field preemption, really any law that attempts to legislate on any facet of immigration touched upon in the Immigration and Nationality Act (INA) is preempted, and the INA is a fairly thorough document. However, typically where the INA has been found lacking and a state or local legislature has been able to pass a non-preempted piece of legislation, Congress has subsequently passed legislation to cement its occupation of that previously empty field of immigration legislation. (Much like the abovementioned case of *INS v. St. Cyr*, when the Supreme Court ruled that Congress had not intended to strip the courts of judicial review of Habeas Corpus and Congress subsequently passed the REAL ID Act, in order to explicitly show their intention to bar the courts of judicial review of Habeas Corpus.) This occurred with employer sanctions, as these pieces of state and local legislation were not preempted, until Congress passed the Immigration Reform and Control Act.<sup>106</sup>

Additionally, “Where an ordinance creates a separate scheme of reporting and investigating violations of immigration law or would create a separate system for determining immigration status, the ordinance would be preempted because the state or locality would be operating in a field occupied by Congress.”<sup>107</sup> This is important to note, because this is where many pieces of legislation run afoul of Congressional authority – by claiming to “enforce” “existing” federal legislation albeit with new “schemes”.

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<sup>106</sup> *Villas at Parkside Partners v. City of Farmers Branch* (Northern District Court Texas 2007).

<sup>107</sup> *LULAC v. Wilson*, 908:.

## **Conflict Preemption**

“A state or local statute is conflict-preempted if it (1) burdens or conflicts “in any manner with any federal laws or treaties” or (2) stands ‘as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,’”<sup>108</sup> or “conflicts with federal law making compliance with both state and federal law impossible.”<sup>109</sup>

Circling back to the last quote of the field preemption section, creating a separate enforcement scheme for investigation, auditing, reporting, or determining immigration status would also invalidate a law under conflict preemption as it would conflict and interfere with the enforcement mechanisms put in place by the United States Congress.<sup>110</sup> A prime example is California’s Prop 187. In *LULAC v. Wilson*, the Supreme Court held that the “classification, notification and cooperation/reporting provisions delegate to state agents tasks which federal law delegates exclusively to federal agents.”

## **Devolution**

Although federal preemption and the plenary power doctrine seem to allow Congress to wield power over immigration law however it deems necessary, Congress is limited in its ability to devolve power onto the states to pass immigration law. As evidenced by the preemption doctrine, states must complete the *De Canas* obstacle course to pass legislation that is not preempted by Congressional authority. However, there is another hurdle to passing

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<sup>108</sup> Guízar, “Facts about federal preemption.”

<sup>109</sup> *LULAC v. Wilson*, 908:.

<sup>110</sup> Guízar, “Facts about federal preemption.”

immigration legislation at the state level: *Graham v. Richardson* and *Aliessa v. Novello*.

### **Graham v. Richardson**

As was previously mentioned, *Yick Wo* set the precedence for non-citizens to be included in the reading of the word “persons” in the Equal Protection Clause of the Fourteenth Amendment. Nevertheless, there was a loophole through which state legislation could discriminate to protect a “special public interest”, whether that be common property or resources. This special interest doctrine was upheld unchanged in numerous cases until *Takahashi v. Fish & Game Comm’n*. In this particular case, a California statute was deemed unconstitutional for two reasons. First, it could not fall under the special public interest doctrine, because California cannot claim ownership or trusteeship of all fish in its coastal waters. Second, and more importantly, the statute did not simply bar noncitizens generally; it barred those ineligible to citizenship, thus targeting Japanese aliens specifically. Targeting a specific race/nationality was deemed to be an “invidious discrimination”. *Takahashi* put important limits (“the power of a state to apply its law exclusively to its alien inhabitants as a class is confined within narrow limits”<sup>111</sup>) upon the special public interest doctrine that would come to bear upon the decision of *Graham v. Richardson*.

In *Graham v. Richardson* statutes in Arizona and in Pennsylvania attempted to bar persons living in those states of welfare benefits based upon citizenship requirements and (for Arizona) length of residence (fifteen years).

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<sup>111</sup> Guízar, “Facts about federal preemption.”

Arizona and Pennsylvania attempted to invoke the special public interest doctrine due to the limited resources for welfare benefits. However, the court looked to *Takahashi* and found that California's statute did not protect such a special public interest as would justify the discrimination against non-citizens. Importantly, this introduced the idea that the special interest had to outweigh the detriment to non-citizens.

Furthermore, the court in *Graham* overturned the New York court's opinion in *People v. Crane* (upheld in the Supreme Court Case of *Crane v. New York*) which read, "Whatever is a privilege, rather than a right, may be made dependent upon citizenship,"<sup>112</sup> and instead stating, "... this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'"<sup>113</sup> Additionally, the Supreme Court found that "There can be no 'special public interest' in tax revenues to which aliens have contributed on an equal basis with the residents of the State."<sup>114</sup> Lastly, the court (without citing *De Canas* as it was decided five years later) found that the Arizona and Pennsylvania laws were preempted.

In this manner, while historically the federal government has been permitted through the plenary power to discriminate against non-citizens; this case says that states may not discriminate against non-citizens by significantly closing the special public interest doctrine loophole and by claiming that immigration laws can be preempted by federal law (which will, of course, be

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<sup>112</sup> *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (S. Ct. 1948).

<sup>113</sup> *People v. Crane*, 108 N.E. 427 (New York 1915).

<sup>114</sup> *Graham v. Richardson*, 403 U.S. 365 (S. Ct. 1971).

expanded upon in *De Canas v. Bica*). However, the question remains: “What if the federal government authorizes the states to discriminate based upon citizenship status through federal legislation?”, or put another way, “Can the federal government devolve some of their legislative plenary power immune from judicial review onto the states?” This brings us to *Aliessa v. Novello*.

### **Aliessa v. Novello**

The main question facing the New York State Supreme Court was: “whether a state’s discriminatory policies against lawful immigrants are countenanced under the Equal Protection Clause of the United States Constitution when they are specifically authorized by the Congress.”<sup>115</sup> While the New York Supreme Court ruled that “regrettably” they are, the New York Court of Appeals ruled, “states may not discriminate against lawful immigrants on the basis of alienage without violating the equal protection guarantees of the federal Constitution, notwithstanding congressional authorization to do so.”<sup>116</sup>

As with *Graham v. Richardson*, this case centered upon welfare benefits. It all began with the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), which “restricts immigrant’s eligibility for certain federally funded public assistance benefits, such as Supplemental Security Income, Food Stamps, Temporary Assistance to Needy Families, and Medicaid.”<sup>117</sup> Title IV specifically of PRWORA discontinued coverage for many immigrants who had previously qualified for Medicaid, some entirely and some only until they have

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<sup>115</sup> Ibid.

<sup>116</sup> E. M.E Yacknin, “Aliessa and Equal Protection for Immigrants,” *NYU Ann. Surv. Am. L.* 58 (2001): 391-392.

<sup>117</sup> Ibid., 392.



resided in the United States for five years. Title IV also explicitly allows states to extend that ineligibility period beyond five years. Moreover, Title IV allows states to deny *state*-funded Medicaid to qualified aliens who are not eligible for *federally* funded Medicaid.<sup>118</sup>

New York took the bait and passed the Welfare Reform Act of 1997. Under this law, immigrants who had suddenly found themselves ineligible for federally funded Medicaid coverage were now barred from state-funded Medicaid coverage as well – per Title IV of PRWORA.

The class action suit contesting the Welfare Reform Act of 1997 sought to show that the state legislation violated the Equal Protection Clause of the Constitution. In 2001, the New York Court of Appeals agreed with the plaintiffs. The Court of Appeals reasoned that although Congress has extreme latitude (as evidenced in the aforementioned cases developing and fortifying the plenary power doctrine) to discriminate against lawful immigrants in manners that would be unacceptable if applied to citizens, and does not violate the equal protection principles, so long as there is a “rational basis” for doing so, the Constitution “does not afford similar judicial deference to state-created policies and practices that discriminate against lawful immigrants.”<sup>119</sup> In fact, the court applies strict scrutiny to state legislation thought to be in violation of the Fourteenth Amendment. Moreover, as in *Graham*, the Court did not allow for the special public interest doctrine and acknowledged that lawful resident aliens “contribute

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<sup>118</sup> *Ibid.*, 395.

<sup>119</sup> *Ibid.*, 396.

to our economy, serve in the Armed Forces and pay taxes, including, of course, taxes that fund State Medicaid.”<sup>120</sup>

However, the counsel for New York argued that even though State legislation is typically not exempt from the strict scrutiny applied, it should be exempt in this case because the Congress used its position of immunity from judicial review of immigration law to explicitly authorize the State’s discriminatory legislation.

In the Court’s reasoning against the counsel for New York, Congress’ power to devolve power onto the states was severely limited. The court did so with a reading of the Naturalization Clause, which reads that Congress shall “establish [a] uniform Rule of Naturalization.” The word uniform figures prominently in this clause. Congress derives much of its plenary power and power of preemption from the idea that due to foreign policy considerations and federalism in general, there must be uniformity in immigration law immune from the tinkering of all fifty states and the swaying of the court, which could upset the volatile balance of foreign relations. In so doing, the Court did much more than simply strike down New York’s law. The Court limited Congress’ ability to allow States to create Immigration Legislation, by stating that the requirement for uniformity made Title IV impermissible.

As we approach the next question with regard to the web of power wielded in immigration law, it is important to keep the following in mind. While the plenary power doctrine is typically thought of in terms of judicial deference to

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<sup>120</sup> *Ibid.*, 401.

the legislative branch, it includes deference to the executive branch, as well. A quick look back at the case that began it all, *Chae Chan Ping*, confirms:

Whether a proper consideration by our government of its previous law, or a proper respect for the nation whose subjects are affected by its action, ought to have qualified its inhibition and made it applicable only to persons departing from the country after the passage of the act, are *not questions for judicial determination*. If there be any just ground of complaint on the part of China, it must be made to the political department of our government, which is *alone* competent to act upon the subject, (emphasis added).<sup>121</sup>

This begs the question: If the legislative branch of the federal government cannot devolve power onto states to pass immigration law, can the federal legislative branch devolve power onto states to enforce immigration law?

### **Devolution of Immigration Law Enforcement**

As concluded above, the United States Congress' hold on the plenary power with regard to judicial review of immigration legislation, while not quite as steadfast as it was prior to the few recent cases of the late 1990's, remains unequivocal. Moreover, the standard outlined in *De Canas v. Bica* has been shown to set the bar extremely high for state legislation to escape the shadow of federal legislation. Moreover, even if Congress legislates to allow States to create discriminatory legislation, it is impermissible. The plenary power is a double-edged sword, as it both empowers and restrains Congressional immigration legislation. Yet despite this sometimes-welcome sometimes-unwelcome iron grip of Congress over immigration law, power is slowly slipping into the hands of state and local law enforcement.

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<sup>121</sup> *Chae Chan Ping v. United States*, 130:609.

By setting a standard for which immigration legislation can be preempted *De Canas* implies that not all pieces of state legislation regarding immigration will be preempted. Interestingly, *Gonzales v. City of Peoria* the Ninth Circuit court ruled that a particular law out of Arizona was not preempted:

We assume that the civil provisions of the Act regulating authorized entry, length of stay, residence status, and deportation, constitute such a pervasive regulatory scheme, as would be consistent with the exclusive federal power over immigration. However, this case does not concern that broad scheme, but only a narrow and distinct element of it – the regulation of criminal immigration activity by aliens. The statutes relating to that element are few in number and relatively simple in their terms. They are not, and could not be, supported by a complex administrative structure. It therefore cannot be inferred that the federal government has occupied the field of criminal immigration enforcement.<sup>122</sup>

This difference between a criminal violation and civil violation is important to immigration law enforcement. The Department of Justice (DOJ) published an opinion seconding the views of the Ninth Circuit supporting the ability of the state to enforce criminal violations of the INA, yet it added that “state and local police lack recognized legal authority to stop and detain an alien solely on suspicion of civil deportability as opposed to a criminal violation of the immigration laws or other laws.”<sup>123</sup> The difference is as follows: under section 275 of the INA illegally entering the country is a criminal offence, whereas merely being illegally present in the country is a civil violation (such as overstaying a visa).

This opinion of the court and the DOJ was subsequently codified into law, thereby officially devolving the supreme power of Congress to state and local

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<sup>122</sup> *Chae Chan Ping v. United States*, 130:609.

<sup>123</sup> *Gonzales v. City of Peoria*, 722 F. 2d 468 (Court of Appeals, 9th Circuit 1983).

officials. As part of the Antiterrorism and Effective Death Penalty Act of 1996 § 1252c reads: “State and local law enforcement officials are authorized to arrest and detain an individual who – (1) is an alien illegally present in the United States; **AND** (2) has previously been convicted of a felony in the United States and deported or left the United States after such conviction.”<sup>124</sup> (emphasis added)

Legislation on bequeathing additional enforcement power to state and local officials did not stop there. A number of amendments to the INA during the 1990s passed in an attempt to increase cooperation between state and local police with the Immigration and Naturalization Service (INS). Moreover, some amendments even “prohibited ordinances restricting communications between local agencies and the INS.”<sup>125</sup>

For years this devolution of power was a one-way street, as state and local law enforcement agencies were not taking the bait. Most simply did not want further involvement in immigration law enforcement, because they believed their resources and manpower were already stretched too thin. Other departments had the foresight to acknowledge the detrimental effects it could potentially have upon relations between law enforcement and immigrant communities. It was not until September 11, 2001 that police forces began to contemplate their role in immigration law enforcement as being part of a broader antiterrorism effort.

After September 11, 2001, the DOJ under Attorney General John Ashcroft put forth an unpublished opinion stating:

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<sup>124</sup> G. K Venbrux, “Devolution or Evolution-The Increasing Role of the State in Immigration Law Enforcement,” *UCLA J. Int’l L. & Foreign Aff.* 11 (2006): 314.

<sup>125</sup> Venbrux, “Devolution or Evolution-The Increasing Role of the State in Immigration Law Enforcement,” 315.

...arresting aliens who have violated criminal provisions of Immigration and Nationality Act or civil provisions that rendered an alien deportable, *and* who are listed on the [National Crime Information Center Database (NCIC)] – is within the authority of the states. The Department of Justice has no plans to seek additional support from state and local law enforcement in enforcing our nation’s immigration laws, beyond our narrow *anti-terrorism mission*.<sup>126</sup> (emphasis added)

This was not only a break with the previous DOJ statement barring state and local law enforcement from enforcing violations of civil provisions within the INA (albeit with the added provision that the immigrant’s name must appear in the NCIC). This was also a complete break with the plenary power doctrine, as it rationalized state and local power, by saying this power was inherent to states’ sovereign entities.

Additionally, a previously ignored portion of the INA received much more attention § 287(g). Under 287(g) the Attorney General may enter into a written agreement with state and local police qualified to investigate, apprehend and detain non-citizens. These officers must have knowledge of federal immigration laws, and have received training in enforcing those laws. Moreover this enforcement is defined in the agreement, and is subject to federal oversight by the Attorney General. Lastly, it can be revoked.<sup>127</sup> In this manner, 287(g) acknowledges the federal plenary power over immigration law (with oversight and possible revocation), while inviting the help of state and local police.

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<sup>126</sup> Venbrux, “Devolution or Evolution-The Increasing Role of the State in Immigration Law Enforcement,” 315.

<sup>127</sup> *Ibid.*, 318.

Florida was the first to enter into a Memorandum of Understanding (MOU) through 287(g) with the Attorney general. The scope was quite modest, the federal oversight was heavy, it came with a twelve-month expiration date, and the efforts were specifically aimed at the narrow anti-terrorism mission.<sup>128</sup> Alabama's MOU was quite a bit more lenient. While there was still ICE training involved, supervision by ICE officers and a formal complaint program, Alabama's MOU expanded immigration enforcement outside of any anti-terrorism mission and had no expiration date.<sup>129</sup>

The legal validity of such a broad MOU is up for debate. It can be argued that 287(g) by no means meant to confer such overarching immigration enforcement power onto the state and local police agencies. First, the INA in general upholds the historical understanding of the plenary power doctrine, so it is not in congruence with the rest of the Act. Second, as above-mentioned, this provision has as its base an understanding of the plenary power doctrine as evidenced by the limits to state and local authority set for the creation of MOU's.<sup>130</sup> Secondly because of legal questions, and primarily because of the cost associated with MOU's few states have entered into them. Arizona happens to be one of them.

### **SB 1070**

On April 23, 2010, Arizona Governor Jan Brewer signed into law the Support Our Law Enforcement and Safe Neighborhoods Act commonly and

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<sup>128</sup> Ibid., 307-308.

<sup>129</sup> Ibid., 322.

<sup>130</sup> Ibid., 324.

heretofore referred to as SB 1070. It is arguably the broadest and strictest piece of state immigration legislation of its time, and also the most controversial. Some states have passed memorial pieces of legislation heralding Arizona's efforts and have even drafted similar pieces of legislation. Meanwhile, boycotts and protests against Arizona have erupted. It has even prompted discourse on an international level. The previous sections on the plenary power doctrine, preemption, and the power tug of war between the federal government and the state governments have provided a solid base on which to analyze this piece of legislation in light of each. This section will analyze the new crimes and new police power and responsibilities SB 1070 creates, as well as the constitutional issues arising with each.

**New Crimes.** SB 1070 creates the crime of "Willful failure to complete or carry an alien registration document". Stemming from and citing the Alien Registration Act of 1940, SB 1070 makes it a crime if a person does not "maintain authorization from the federal government to remain in the United States" (making it a crime to willfully fail or refuse to make an application under the Alien Registration Act) and requires that persons who have obtained a Certificate of Alien Registration (or receipt card) to carry it at all times.<sup>131</sup>

While this may sound daunting and burdensome, because it is inherently linked with certain federal statutes, failure to carry documents is in actuality difficult to violate. It is difficult to violate for the following reasons. If you are a legally admitted and legally residing person in the United States you do not need

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<sup>131</sup> Ibid., 325.



to carry any documents, because the Arizona Revised Statutes are aimed specifically at unauthorized persons. If you are a legally admitted, but unlawfully residing person in the United States, there is no need to carry any documents, because there is no statute requiring persons to carry expired or invalid documents (which the documents would be if you entered legally, and subsequently lost the right to remain). Lastly, if you were not legally admitted and by extension not legally residing in the United States, it would not be required to carry documents, because the documents must have been issued to you, and the issuance of documents clearly does not accompany unauthorized entry.<sup>132</sup> In light of this, the newly created crime is still worrisome, because courts have held in the past that “evidence of foreign birth plus lack of immigration documents established reasonable suspicion and probable cause,”<sup>133</sup> which, of course, provides greater leeway for arrests.

Failure to register is equally difficult to prosecute. If a person did not enter lawfully, it might be difficult to prove when exactly the person entered. This is important, because if the person has been in the United States less than thirty days he/she need not have registered already. Yet, if the person has been in the United States more than five years and thirty days, the statute of limitations has expired (although there is room for debate on when the statute of limitations begins: with entrance or with arrest).<sup>134</sup>

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<sup>132</sup> G. J. Chin et al., “A legal labyrinth: Issues raised by Arizona Senate Bill 1070,” *Geo. Immigr. LJ* 25 (2010): 50-51.

<sup>133</sup> *Ibid.*, 52.

<sup>134</sup> Chin et al., “A legal labyrinth,” 53.

Moreover, failure to register is difficult to prosecute, due to the principle of mens rea (or guilty mind), which necessitates that a person knew of the duty to register and “willfully” violated this duty. This would be very difficult to demonstrate given: “In a prolonged discussion among a group of law professors who teach immigration law... no scholar was able to identify a specific government form or other mechanism for registration...either there is no way to register and the program is defunct, or the program is so obscure that even specialists do not know how it works.”<sup>135</sup>

Furthermore, courts have held that statutes requiring persons to report or record a criminal violation (as opposed to a civil violation) violates the privilege against self-incrimination under the Fifth Amendment. Therefore registration admitting the crime of entering the country illegally (as the duty to register does not apply to those who have entered legally) is in conflict with the Fifth Amendment.<sup>136</sup>

A similar provision is thought to have created a new crime (and is therefore mentioned here), but in actuality does not: failure to carry not necessarily registration documentation, but rather identification. This presumed violation stems from the provision of SB 1070 stating,

A person is presumed to not be an alien who is unlawfully present in the United States if the person provides to the law enforcement officer or agency any of the following: a valid Arizona driver’s license, a valid Arizona non-operating identification license, a valid tribal enrollment card or other form of tribal identification, if the entity requires proof of legal presence in the United States

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<sup>135</sup> Chin et al., “A legal labyrinth,” 53.

<sup>136</sup> Ibid., 54.

before issuance, any valid United States federal, state, or local government issued identification.<sup>137</sup>

This does not necessarily create a requirement that Arizona residents carry identification evidence of citizenship. It is merely saying that it would be wise to carry such documentation so that you do not have to wait in jail while your status is verified. Many states have a “stop and identify” statute that make it a crime (a class 2 misdemeanor in Arizona) to not provide your true full name to an officer if lawfully detained. In other words, you do not have the right to remain completely silent, and you would need to provide information (your name) that enables an officer to look you up in a database anyway.

A crime that is indeed created by SB 1070 comes out of the section that reads:

It is unlawful for an occupant of a motor vehicle that is stopped on a street, roadway or highway to attempt to hire or hire and pick up passengers for work...if the motor vehicle blocks or impeded the normal movement of traffic. It is unlawful for a person who is unlawfully present in the United States... to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor in this state.<sup>138</sup>

As traffic congestion is a local problem, states can and often do pass legislation in an attempt to ease concerns surrounding it. However, as soon as the legislation goes a step further to create criminal violations for hiring undocumented immigrants, the legislation is preempted by IRCA. IRCA states outright that it preempts “any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for

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<sup>137</sup> Ibid., 54-55.

<sup>138</sup> Russell Pearce, *Support Our Law Enforcement and Safe Neighborhoods Act*, 2010.

a fee for employment, unauthorized aliens.”<sup>139</sup> Moreover, “recent cases from a U.S. District Court in Arizona and another in California have invalidated somewhat similar local ordinances regulating solicitation from streets or highways on First Amendment grounds.”<sup>140</sup>

Yet another newly created crime is found in transporting aliens while committing another crime. “Transporting” includes: moving, harboring, concealing or shielding non-citizens, or encouraging or inducing unauthorized entry into Arizona.<sup>141</sup> In addition, the person “transporting” must “know or recklessly disregard” the fact that the person being “transported” is an unauthorized immigrant.<sup>142</sup>

An issue with this new law is that “in violation of a criminal offense” is not commonly used phrasing in law construction and therefore its meaning and scope is unclear. There are many crimes that are considered to be continuing offenses, such as tax evasion and the possibly the abovementioned failure to register. By not merely citing federal law, but actually rewriting/tweaking an existing federal law, this provision implies the enactment of a new law, which would make violation of transportation of “illegal aliens” (for which federal legal precedent is inconsistent at best) a violation of Arizona law, as well. This means there would be additional sentencing (fines or jail time).

With regard to the scope of who all might be deemed to be in violation of “transporting” undocumented immigrants it is important to look at the

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<sup>139</sup> Chin et al., “A legal labyrinth,” 56.

<sup>140</sup> Chin et al., “A legal labyrinth,” 56.

<sup>141</sup> Pearce, *Support Our Law Enforcement and Safe Neighborhoods Act*.

<sup>142</sup> Ibid.

exemptions. The exemptions from this provision are few – those working for emergency medical services and those working for child protective services. This implies the net catching all those not exempt is quite large.<sup>143</sup>

**New Police Power and Responsibilities.** “The overall point is to have Arizona police more involve in all phases of immigration enforcement.”<sup>144</sup> The first instance of increased involvement to be analyzed is the allowance to arrest for any removable offense, by allowing state and local police to make an arrest without a warrant “if the person to be arrested has committed any public offense that makes the person removable from the United States.”<sup>145</sup> At first glance this is redundant with existing law, because state and local police have the authority to make warrantless arrests (if they have probable cause) and to make arrests for federal crimes.<sup>146</sup> A more in depth reading of this provision in the context of the statute illuminates that this could open up arrests based upon civil immigration warrants in the NCIC database discussed above, and the authority for such arrests is a heavily debated matter with precedence indicating that the authority is not upheld.<sup>147</sup>

The second instance of increased involvement is the mandatory investigation of suspected undocumented non-citizens. The authors of “A Legal Labyrinth: Issues Raised By Arizona Senate Bill 1070” summarized this provision well writing:

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<sup>143</sup> Chin et al., “A legal labyrinth,” 62.

<sup>144</sup> Ibid.

<sup>145</sup> Pearce, *Support Our Law Enforcement and Safe Neighborhoods Act*.

<sup>146</sup> Chin et al., “A legal labyrinth,” 62.

<sup>147</sup> *National Council of La Raza v. Gonzales*, 468 F. Supp. 2d 429, 445 (n.d.).

For any lawful stop, detention or arrest... where reasonable suspicion exists that the person is...unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person... any person who is arrested shall have the person's immigration status determined before... released... The person's immigration status shall be verified with the federal government... A person is presumed to not be... unlawfully present... if the person provides... a valid Arizona driver license... non-operating identification license... tribal identification... any valid United States federal, state or local government issued identification.<sup>148</sup>

This implies that if arrested, even after providing appropriate identification, although a person may be presumed to not be unlawfully present, the immigration status of a person must be verified. Importantly, a lawful stop and citation (ticket for a broken taillight) is defined in Arizona as an "arrest".<sup>149</sup> Therefore, merely for having a broken taillight, a person's immigration status must be verified with the federal government. Proponents of the bill often tout that this can be done in a mere seven minutes. Conversely, federal agents charged with the task have countered that it only takes seven minutes if a person is already in the system (i.e. a visa recipient, previously deported, etc.); citizens are not in the system and it can take days to verify their status. This potentially means days of jail time for a citizen with a broken taillight or similarly menial violation.

It is also important to note that a person can be detained without being suspected of a crime and the provision mandates that for any detention (as well as stop or arrest) a reasonable attempt shall be made to determine the immigration

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<sup>148</sup> Chin et al., "A legal labyrinth," 63-64.

<sup>149</sup> Ibid., 64.

status. Therefore without being suspected of a crime, it might still be mandatory that a person's immigration status be determined.<sup>150</sup>

The third enhancement of police power (or responsibility) lies in the duty to enforce the "full extent" of federal immigration law – or else (citizen suits). The statute reads, "No official or agency... may limit or restrict the enforcement of federal immigration laws to less than the full extent permitted by federal law."<sup>151</sup> Like many other provisions of this statute, the meaning and scope of this provision is a matter of debate. It may only mean that legislation and authority figures in police enforcement cannot hinder typical enforcement of federal immigration law. However, the provision (and with it the ability of a citizen to file a suit against a policy that limits or restricts enforcement) is potentially extremely broad. Someone could conceivably bring a suit merely for police officers not attending to every plausible violation of federal immigration law or not putting all of their resources toward the enforcement of federal immigration law. It might not hold up in court, but the point is that a citizen could tie up resources, personnel, and time with frivolous suits.

**Racial Profiling.** One of the biggest concerns of opponents of the SB 1070 is that it allows for, promotes, and/or intensifies racial profiling. Proponents of the bill state that SB 1070 explicitly protects against racial profiling in the following provision: "A law enforcement official or agency... may not consider

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<sup>150</sup> Ibid., 65.

<sup>151</sup> Pearce, *Support Our Law Enforcement and Safe Neighborhoods Act*.

race, color or national origin in implementing the requirements of this subsection except to the extent permitted by the United States or Arizona Constitution.”<sup>152</sup>

Herein lies the problem: in the Supreme Court case of *United States v. Brignoni-Ponce*, it was held that the U.S. Constitution allows for race to be considered in immigration enforcement stating, “The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor.”<sup>153</sup> It is important to remember that *Brignoni-Ponce* lists several factors that must be present in order to consider race. However, it does allow for race as a factor. Unsurprisingly, the Arizona Supreme Court has also affirmed the use of “ethnic factors” in enforcing immigration law.<sup>154</sup> In combining all of this analysis the authors of “A Legal Labyrinth” put it best writing,

It may be that S.B. 1070 actually requires racial profiling. S.B. 1070 prohibits restricting enforcement of immigration law ‘to less than the full extent permitted by federal law.’ Because federal law permits race to be a ‘relevant factor’ in determining reasonable suspicion for stops and inquiries, the combined effect of these provisions may be to require state actors to use race to the full extent permitted by federal law. If a local police or prosecutorial agency decides not to consider race as a factor, as a matter of policy, then the agency may be sued by a citizen.<sup>155</sup>

Moreover, “the existing law of reasonable suspicion allows the use of multiple factors that are correlated with race and ethnicity,”<sup>156</sup> among others. The gamut includes: “language, accent, clothing... hairstyle... neighborhood...

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<sup>152</sup> Chin et al., “A legal labyrinth,” 65.

<sup>153</sup> *United States v. Brignoni-Ponce*, 422 U.S. 873, 886-887 (S. Ct. 1975).

<sup>154</sup> *State v. Gonzalez-Gutierrez*, 927 P.2d 776, 780 (Arizona Supreme Court 1996).

<sup>155</sup> Chin et al., “A legal labyrinth,” 68.

<sup>156</sup> *Ibid.*, 70.



proximity to border, origin and destination of travel, the nature and location of the vehicle, any evasive driving or walking, nervousness, and ‘furtive behavior’<sup>157</sup>

**Plenary Power and Preemption and Devolving Power.** With regard to the regulation of immigration as a cause for preemption: While immigration regulation is exclusively a federal power under the plenary power doctrine, at times incidental regulation of immigration has been allowed by the Supreme Court. However, SB 1070 is by no means an incidental regulation.<sup>158</sup> Moreover, we have seen that Congress cannot constitutionally (with regard to the reading of the Naturalization Clause) devolve immigration law creation and enforcement power onto the States. So, it cannot be inferred in any manner that the federal government has done so.

Additionally, proponents of SB 1070 often tout that the state legislation is merely a mirror image of federal policy and the federal government should welcome any attempt to help them in their efforts.<sup>159</sup> There are many problems with this argument. First, as we have discussed, state legislation is preempted, if Congress has already occupied the field. If the argument is that the state is enacting similar legislation, the argument admits that Congress has already occupied the field. Moreover, by allowing state and local police the ability to enforce the legislation, the legislation is inherently entirely different from federal legislation, which only authorizes federal agents to enforce the federal legislation. Even more disconcerting is the fact that the state and local enforcement could

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<sup>157</sup> Ibid., 71.

<sup>158</sup> Ibid., 78.

<sup>159</sup> Ibid., 79.

conflict with federal enforcement, if “the federal government would have exercised its power to decline to prosecute criminally and its statutory power to grant some form of relief.”<sup>160</sup> In other words, By referencing federal statute without copying it exactly or simply saying that state and local police must enforce the federal statute, Arizona seeks to enforce something that the federal government can enforce but chooses by policy not to. The United States can deport everyone illegally present, it chooses not to because it is impractical for a myriad of reasons (resources, foreign relations, etc.).

In *Plyer v. Doe* the Court found that Texas cannot deny education to children who are nevertheless subject to deportation, because there is no reason to believe the children will ever be deported. The children may even become citizens or be granted amnesty. Either way, these children enjoy “an inchoate federal permission to remain.”<sup>161</sup> President Reagan’s Attorney General, William French Smith, spoke to this saying, “We have neither the resources, the capability, nor the motivation to uproot and deport millions of illegal aliens, many of whom have become, in effect, members of the community.”<sup>162</sup>

Moreover, in considering the weight this statute has upon the foreign policy decisions of the federal government, it is important to note that foreign governments have not been silent on their concerns over SB 1070. SB 1070 was raised as a human rights concern during the U.N. Human Rights Council's

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<sup>160</sup> Ibid.

<sup>161</sup> *Plyler v. Doe*, 457 U.S. 202, 226 (S. Ct. 1982).

<sup>162</sup> Ibid., 457:218.

Universal Periodic Review in Geneva.<sup>163</sup> More specifically, President Calderon of Mexico has voiced his concern over SB 1070 to the United States Congress directly as did Mexico's federal legislature.<sup>164</sup>

It is important to remember that this speaks to one of the original impetuses for the creation of the plenary power doctrine or "uniform" immigration policy. The United States cannot afford to entrust its relations with foreign governments with state and local police forces, because "A silly, an obstinate, or a wicked [state] commissioner may bring disgrace upon the whole country, the enmity of a powerful nation, or the loss of an equally powerful friend."<sup>165</sup>

SB 1070 is preempted through field occupation and conflict with federal law for the abovementioned reasons as well as for (according to the Department of Justice) conflicting with the Commerce Clause (the DOJ has indicated that the provision in the statute making it a crime to transport, conceal, harbor or shield an alien is in conflict with the Commerce Clause, because "it constitutes an impermissible burden on the flow of commerce"<sup>166</sup>).

Finally, if there were any doubt as to whether or not this piece of legislation was preempted by Congress "occupying the field" states bring that doubt to an end by complaining that the federal government has failed to exercise

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<sup>163</sup> Alessandra Soler Meetze, "Holding America Accountable at International Human Rights Review," *Blog of Rights: Because Freedom Can't Blog Itself*, November 3, 2010, <http://www.aclu.org/blog/author/Alessandra-Soler-Meetze,-Executive-Director,-ACLU-of-Arizona>.

<sup>164</sup> Chin et al., "A legal labyrinth," 84.

<sup>165</sup> *Chy Lung v. Freeman*, 92:279.

<sup>166</sup> Chin et al., "A legal labyrinth," 87.

its power. This is a fatally flawed argument in support of SB 1070's constitutionality, because it admits that it must therefore be preempted, because Congress does have explicit power to enforce the laws of this statute but is choosing for policy reasons not to.

However, if "Congress still remains silent, then... courts can more easily construe this federal silence as approval of state action by inaction and a "clear and manifest purpose" to occupy the field will be much harder to infer."<sup>167</sup>

However, the executive branch has bought the legislative branch some more time in their efforts by taking action; the DOJ has filed an action seeking to enjoin SB 1070, and it continues to wind its way through the court system.

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<sup>167</sup> Ibid., 90.

### Chapter 3:

#### THEORETICAL: MICHEL FOUCAULT

... a book is made to be used in ways not defined by its writer. The more, new, possible or unexpected uses there are, the happier I shall be... All my books are little tool-boxes. If people want to open them, to use this sentence or that idea as a screwdriver or spanner to short-circuit, discredit systems of power, including eventually those from which my books have emerged... so much the better.<sup>168</sup>

Whenever I have tried to carry out a piece of theoretical work, it has been on the basis of my own experiences, always in relation to processes I saw taking place around me. It is because I thought I could recognize in the things I saw, in the institutions with which I dealt, in my relations with others, cracks, silent shocks, malfunctioning... that I undertook a particular piece of work, a few fragments of autobiography.<sup>169</sup>

These two quotes summarize quite nicely why I and many other scholars have applied Michel Foucault's work. His toolboxes have been applied to an endless range of topics. This thesis utilizes Foucault's Discipline and Punish: The Birth of the Prison as its primary toolbox. I will apply it to processes I see taking place around me, because I have come to recognize in the things I have seen, in the institutions, in my relations with others this book breathing.

At first glance, Foucault's various toolboxes are seemingly completely separate ideas: insanity, sexuality, discipline, power...etc. However, there are themes and common threads woven throughout Foucault's ruminations.

Therefore, before looking at Discipline and Punish specifically, it is important to

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<sup>168</sup> Michel Foucault, *Power, Truth, Strategy* (Prometheus Books, 1979).

<sup>169</sup> Didier Eribon, *Michel Foucault* (Harvard University Press, 1992).

contextualize it among Foucault's other works and the broad themes found in Foucault's work that make Discipline and Power so applicable.

### **Foucault's Background and Time Period**

Foucault was born in Poitiers, France in 1926. His academic background was in philosophy and psychology, and he taught both along with French and French literature. He wrote his doctoral dissertation on Madness and Civilization in 1961. Probably his most often referenced works: The Archaeology of Knowledge, Discipline and Punish: The Birth of the Prison and The History of Sexuality, Volume I: An Introduction were published in 1969, 1975 and 1984 respectively. This timing is important in understanding the works.

In the early 1960s, there was an anti-authoritarian trend in political thought and Foucault took this tendency into the more mundane aspects of everyday life "who lectures to whom in universities and who does the washing up at home, where the personal becomes the political."<sup>170</sup> Foucault believed, "The boundary of politics has changed, and subjects like psychiatry, confinement and the medicalisation of a population have become political problems."<sup>171</sup>

Politically, Foucault joined the French Communist Party, but his membership was brief. He left the party, and in fact became a staunch opponent of the communist party and clung to the belief that Karl Marx had been taken completely out of context and perverted by the times calling for "an unburdening

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<sup>170</sup> Sara Mills, *Michel Foucault*, Routledge Critical Thinkers: Essential Guides for Literary Studies (New York: Routledge, 2003), 15.

<sup>171</sup> David Macey, *The Lives of Michel Foucault* (Vintage, 1995).

and liberation of Marx in relation to party dogma which has constrained it.”<sup>172</sup> Yet this should not be misconstrued as a belief that Marxism should return to its original state, as Foucault felt “Marxism exists in nineteenth century thought as a fish exists in water; that is, it ceases to breathe anywhere else.”<sup>173</sup> Instead, Foucault wanted to conceptualize Marxism free of its limiting constraints to economics and the overbearing role of the State.<sup>174</sup>

His interest in prisons, which brought about Discipline and Punish was also evident in his founding of the Groupe d’Information sur les Prisons in the 1970s. “He wanted to bring about change in the prison structure, not by campaigning on behalf of prisoners as many liberal reformist groups had done before... The group organized demonstrations, discussed conditions with prisoners’ families outside prisons and circulated questionnaires to inmates and their families publishing the results in reports.”<sup>175</sup>

This section situates Foucault’s writings in their particular time period and illuminates the political will of the time, which he subscribed to (anti-authoritarian) and reacted against (the Communist Party), as well as certain causes he fought for, which informed Discipline and Punish. With this backdrop, the next section will delve into Foucault’s writings. However, this section will not proceed from work to work, but rather from theme to theme as “... we can see a certain focus in Foucault’s work which he continually addresses and readdresses, circling

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<sup>172</sup> Michel Foucault and Lawrence D. Kritzman, *Politics, philosophy, culture: interviews and other writings, 1977-1984* (Psychology Press, 1990).

<sup>173</sup> Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences*, First Edition. (Vintage, 1994), 262.

<sup>174</sup> Mills, *Michel Foucault*, 15.

<sup>175</sup> *Ibid.*, 18.

back to consider issues which have surface in earlier works... this notion of a set of concerns which he circles around is important... to give so sense of larger discursive frameworks within which we can try to understand his work.”<sup>176</sup> In this manner, the various themes throughout his works will aid in the understanding of the one work, or toolbox, Discipline and Punish.

### **Foucauldian Themes**

#### **Geopolitics and Post Colonialism**

“Geopolitical relations... have been shaped by the emergence of discourses and forces connected with technology, migration patterns, media forms, the movement of ideologies and values, flows of money... and trade...”<sup>177</sup> All of which, have been heavily influenced by centuries of Western colonization. Thus, although some might label this era as post colonial, colonialism still plays a large role in geopolitics.

The colonialism that Foucault primarily concerns himself with is not this exo-colonialism but rather endo-colonialism. As a prefix, endo means within or internal; thus, endo-colonialism is a colonization of internal territories. One such example is the way in which disciplinary power and the “gaze” (sometimes called the “colonial gaze” or the “panoptic gaze”) colonizes the body.<sup>178</sup> Similarly, this thesis will discuss the ability of a panoptic gaze to colonize the body, and the possible reactions of the body to that gaze.

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<sup>176</sup> Ibid., 23.

<sup>177</sup> Geoff Danaher, *Understanding Foucault* (Thousand Oaks: SAGE Publications, 2000), 105.

<sup>178</sup> Ibid., 106.



However, exo-colonialism cannot be ignored in this thesis, because it is so greatly intertwined with immigration politics. Exo-colonialism includes the Spanish colonization, which determined the trade routes and thus migration routes still in place today. It includes the Mexican-American War and the Gadsden Purchase conducted between Mexico and the United States, which re-drew the borderlines and thus labeled some people “Mexican” and some people “American” – a designation that now manifests itself as “undocumented” and “citizen”, respectively.

Exo-colonialism also affects the flow of migration through legislation. The Chinese Exclusion Act created a thirst for cheap labor previously satiated by Asia to be quenched by Mexico. Conversely, Senate Bill 1070 has as its core aim, “Attrition through Enforcement”, which means it aims to make life in Arizona so incredibly inhospitable to people without documentation that they will willingly migrate out of Arizona.

The role of exo-colonialism in immigration politics will be delved into in greater detail in the next chapter, wherein the reasoning for suggesting a comparison and contrast of Arizona and New Mexico is given. Exo and endo colonial factors are both important to consider when discussing the immigration politics in Arizona, for it is the exo-colonialism of the region’s past that makes the endo-colonialism of the present possible.

### **Governmentality**

“Foucault’s contribution to theories of the art of governing has been to draw out the links between the levels of state and global politics, on the one hand,

and the level of individuals and their conduct in every range of life, on the other. Taken together, this constitutes what he calls ‘governmentality’.”<sup>179</sup>

While it has been mentioned that Foucault wanted to get away from the Marxist economic and State centered analysis. He actually wrote extensively on the role of the state in power relations through the lens of governmentality. This misunderstanding of Foucault led to the following clarifying quote:

I don’t want to say that the State isn’t important; what I want to say is that relations of power, and hence the analysis that must be made of them necessarily extend beyond the limits of the State... because the State, for all the omnipotence of its apparatuses, is far from being able to occupy the whole field of actual relations, and further because the State can only operate on the basis of other, already existing power relations.<sup>180</sup>

It is important here to similarly clarify and reiterate, that (in line with this Foucauldian thought) although illuminating State factors such as Sheriff Arpaio’s policing of Arizona and legislation might make it seem like this thesis aims to analyze the State as a cause for the panoptic gaze and its effect, the State is merely a readily visible and easily quantifiable symptom of the much more complex field of already existing power relations. This field will be expanded upon below. With this in mind, the focus will now turn from the broader forces of geopolitics and colonialism to governmentality and the Nation State.

Foucault discusses two types of Nation State governmentality the Social Contract Model and the Social Warfare Model. The Social Contract Model is, of course, based upon the social contract theory of Hobbes, Locke and Rousseau. It

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<sup>179</sup> Ibid., 82-83.

<sup>180</sup> Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977* (Vintage, 1980), 122.

is the idea that people gave up the freedom inherent in a state of nature for the protection and benefits derived from having a government, and that therefore: “Governments are instituted among Men, deriving their just powers from the consent of the governed”

The problem with this idea, of course, is that we have not each individually agree to this contract. Libertarians would like to see far less government intervention and far more of their naturally derived freedom, whereas socialists swing to the other end of the delicate balance between freedom and government protection/benefits. “Theorists have to set up a make-believe time, a political fantasy, when the rule of sovereign law was ‘agreed’ to.”<sup>181</sup> Moreover, not everyone is allowed to join in the social contract. “These practices of ‘contracting in’ certain groups and excluding others have been central to the development of virtually every social order. Who legitimately belongs to a community can only be judged on the basis of knowing who is excluded. These patterns of inclusion and exclusion are subject to shifts over time.”<sup>182</sup> Borders change; programs/laws are enacted that change activities from “legal” to “illegal”.

The problems for the social contract model in analyzing governmentality in Arizona encompass the abovementioned problem that we did not each individually contract into this system, and the fact that some in Arizona are excluded from contracting in. Even if we did at some “make-believe time” agree to our social contract, our social contract (the Constitution) is not being upheld. In

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<sup>181</sup> Danaher, *Understanding Foucault*, 84.

<sup>182</sup> *Ibid.*, 85.

its original form, it sets up three distinct branches of government that are supposed to act as checks and balances. In spite of this, the history of federal immigration law detailed in the previous chapter shows how immigration law has become exempt from judicial review and is no longer forced to reconcile with our social contract/Constitution. Thus the argument can be made that the social contract has been broken.

With regard to state immigration law, if it is allowed (which in many less extreme cases, state immigration legislation goes uncontested) it goes against the way our social contract has been interpreted through the plenary power doctrine and preemption, and thus breaks the social contract with the people. Additionally, the problem that some are excluded from contracting into this governmentality is put in extreme perspective in Arizona, wherein immigration legislation and the power to enforce immigration regulation is directed explicitly and exclusively upon a population that cannot contract into this social contract model.

The Social Warfare Model is based upon the idea that "... a group or groups seize power, establish themselves as dominant in a society, and set up the state in terms of their own ideas, values and self-interest...Of course this social warfare is ongoing so one group can be overthrown by another, which then sets about rewriting history, the law, rights and values in order to keep themselves in power."<sup>183</sup> For example, Sheriff Arpaio did not originally concentrate upon

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<sup>183</sup> Ibid., 84.

undocumented immigration, and even dubbed it a waste of time, until it bumped him in the polls.<sup>184</sup>

In this way Sheriff Arpaio becomes a symbol of the hegemony of elites in Arizona. As Gramsci termed it, “hegemony... explains how states and state institutions work to win popular consent for their authority through a variety of processes which disguise their position of dominance.” For example, politicians and influential elites can and sometimes do disguise programs and legislation that merely cement a particular group’s dominance in society as legitimate “common sense” arguments by telling people that it is simply “wrong” to do anything illegal. Thus “illegal” (as the ones in power have termed it) border crossing is “wrong”. Doing something wrong warrants punishment. Therefore, by the transitive property, illegal border crossing should be punished. The part that few question is the fact that someone invented the law deeming it illegal to cross the border without consent, and that law can be questioned or changed, so that the action in question is no longer illegal. Such laws cement a particular group’s dominance.

Taking it out of the context of immigration, if those in power used the same logic and deemed it “illegal” to eat over 2,000 calories a day, and therefore eating over 2,000 calories a day is “wrong” and should therefore be punished – people would question those in power deeming eating over 2,000 calories a day “illegal”, which is typically what happens when a government rations food.

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<sup>184</sup> Ted Robbins, “‘America’s Toughest Sheriff’ Takes on Immigration,” *Morning Edition* (National Public Radio, March 10, 2008), <http://www.npr.org/templates/story/story.php?storyId=88002493>.

However, even then, some people trust the government that the food must be rationed. The same is true of borders. People trust the government that there must be borders and mechanism for allowing or disallowing the entry of people.

“While Foucault agrees that governments exploit and repress people while pretending to be just and fair, he doesn’t think that societies and governments are always characterized by warfare directed by one group against another. Foucault suggests that, within societies, power circulates and people are dominated and repressed, but it’s more complex than simply identifying who are the oppressors, and who are the oppressed.”<sup>185</sup> In part, Foucault believes this because power is fluid and because we all have multifaceted identities and identify with various identities’ power depending on the circumstance. In other words, it is not merely between republicans and democrats, but rather the shifting power between various corporations, organizations, groups and even individuals.

Similarly, this can be found in Arizona. To an outside observer, immigration politics may look like warfare directed by one group against another, but truth be told, no one in Arizona can escape the effects of immigration politics and many get involved for multitudinous reasons. Immigration politics plays in the realm of shifting power between corporations, organizations, groups and individuals. There are corporations leveraging pressure against SB 1070, because of a desire for cheap labor in Arizona and there are corporations outside of Arizona who are boycotting the state for moral/ethical reasons. There are organizations fighting against SB 1070 and for the civil liberties at risk under this

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<sup>185</sup> Danaher, *Understanding Foucault*, 87.

particular piece of legislation, and there are organizations instituting “buycotts” in order to show their support for the Arizona legislation as they attempt to pass similar legislation in other states. There are smaller groups on either side of the immigration political divide throwing their political weight behind various organizations or corporations for their own reasons. There are individuals from the prominent activist, Salvador Reza, to the author of the bill, Russell Pearce, wielding whatever community ties and technologies they have at their disposal.

Finding flaws in both the Social Contract and the Social Warfare models, Foucault discusses, “... a movement from focusing on who has power and influence to a rationality based on how power can be exercised most efficiently.”<sup>186</sup> This efficient power maximizes the prosperity of the state, which Foucault dubs “the reason of state”. In order to achieve the ultimate prosperity of the state, government adopts “technologies of governmentality” and takes on the pastoral care of its citizens.

Foucault reasoned, “The Christian institution of pastorship ], with its continuous exercise of power over the lives of individuals achieved through ‘the organization of a link between total obedience, knowledge of oneself, and confession to someone else’, constitutes an important chapter in the history of the government of individuals.”<sup>187</sup> He explains this in part by comparing Christian pastorship and pastorship as a technology of governmentality. In Christianity pastorship assures individual salvation in the next world, whereas government

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<sup>186</sup> Ibid., 89.

<sup>187</sup> Barry Smart, *Michel Foucault*, Key sociologists (Chichester: Ellis Horwood, 1985), 128.

ensures a secular salvation of individuals by providing health, well-being, security... etc. Christian pastorship looks after not only the whole community but each individual, as does the State through the diffusion of pastoral power to figures in public and private institutions (police, universities, philanthropic organizations, medical institutions, etc.). Lastly, just as Christian pastorship “requires for its exercise a knowledge of people’s minds, their souls and secrets and details of their actions; a knowledge of conscience and an ability to direct it,”<sup>188</sup> so too does governmentality. The State acquires this knowledge not through confessionals as in the Christian tradition but rather through “the production of knowledges that would allow the state to scientifically analyse that population, which was followed by the introduction of policies that both regulated behavior (for the good of the individual... the good of the state), and kept the population happy and healthy – and therefore production.”<sup>189</sup> This is called biopolitics.

In this manner, although Foucault ardently held that analyzing the exercise of power should not begin with the false premise that the State encompasses and wields all power, “the importance of the modern state as both the ‘political form of centralized and centralizing power’ is both acknowledged and addressed. An evident centralization of political power in the form of the modern state does not

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<sup>188</sup> Ibid., 131.

<sup>189</sup> Danaher, *Understanding Foucault*, 90.



however, exhaust the history of relations of power.”<sup>190</sup> As Michel Foucault himself put it:

... neither the caste which governs, nor the groups which control the state apparatus, nor those who make the most important economic decisions direct the entire network of power that functions in a society... the rationality of power is characterized by tactics that are often quite explicit at the restricted level where they are inscribed... tactics which, becoming connected to one another, but finding their base of support and their condition elsewhere, end by forming comprehensive systems; the logic is perfectly clear, the aims decipherable, and yet it is often the case that no one is there to have invented them.<sup>191</sup>

It seems that Arizona is hiding behind the false premise that it adheres to the Social Contract Model envisioned by the forefathers of this nation, and dealing with the reality of a Social Warfare Model (not between two groups as a classical reading of the Social Warfare Model suggests, but rather among every corporation, organization, group and individuals in Arizona). Unknowingly, this forces Arizona to try to maintain some semblance of pastoral control through it all by utilizing technologies of power to keep the population happy, healthy and productive. These technologies of power will be expanded upon later in this paper.

### **Introduction to Power**

This section serves to introduce Foucault main ideas concerning power, which will be expanded upon in the following sections: reaction to Marx, resistance, biopower, discipline, the Panopticon and the carceral network.

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<sup>190</sup> Smart, *Michel Foucault*, 126.

<sup>191</sup> Michel Foucault, *The History of Sexuality, Vol. 1: An Introduction* (Vintage, 1990), 95.

The question of power remains a total enigma. Who exercises power? And in what sphere? We now know with reasonable certainty who exploits others, who receives the profits, which people are involved... But as for power... We should... investigate the limits imposed on the exercise of power – the relays through which it operates and the extent of its influence on the often insignificant aspects of the hierarchy and the forms of control surveillance, prohibition and constraint. Everywhere that power exists, it is being exercised. No one, strictly speaking, has an official right to power; and yet it is always exerted in a particular direction, with some people on one side and some on the other.<sup>192</sup>

This quote from Michel Foucault is a wonderful beginning to a look at his ruminations on power, because it illuminates how he broke with looking at power as something to be possessed, and saw power rather as a fluid, pervasive force throughout society wielded and performed by everyone in some manner.

Foucault called this web of power relationships a “complex strategical [*sic*] situation” and a “multiplicity of force relations”. For proposed idea for a study, this is an important concept to bear in mind, as it is not necessarily an institution or structure wielding power as a noun over a group of people as an object. Instead, I am positing that immigration legislation is emblematic of the “complex strategical [*sic*] situation” and “multiplicity of force relations” under which immigration legislation is created by a society.

In an additional break with traditional analysis of power, while Foucault did not deny that the State wields and exercises power, he subscribed to a bottom-up model of power. This model proposed that power does not originate in the State and trickle down through various echelons to the people. Rather this micro-

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<sup>192</sup> Michel Foucault, *Language, Counter-Memory, Practice: Selected Essays and Interviews*, New edition. (Cornell University Press, 1980), 213.

level model, “enables an account of the mundane and daily ways in which power is enacted and contested, and allows an analysis which focuses on individuals as active subjects, as agents rather than as passive dupes.”<sup>193</sup>

Importantly, Foucault stressed, “Where there is power, there is resistance”. In fact, he believed that “power depends for its existence on the presence of a ‘multiplicity of points of resistance’ and that the plurality of resistances should not be reduced to a single locus of revolt or rebellion.

Likewise, as discussed above, it is the multiplicities of force relations exerted by some corporations, organizations, groups and individuals in a tangled web of power relationships with other corporations, organizations, groups and individuals representing the multiplicity of points of resistance. It is nothing more than an example of Newton’s third law of physics: for every action there is an equal and opposite reaction.

After conceptualizing power as such, Foucault focused upon two main questions: “What are the technologies of power?” or “How is it exercised?” and “What are the effects of exercised power?”

### **Reaction to Marx**

Not only did Foucault break with Marx’s State centered macro-institutional level of analysis of power in adhering to a bottom-up model of power, Foucault also distanced himself from Marx in refusing to look at power from strictly economic terms. Moreover, Foucault actually argued against an analysis of power relationships and revolt from a macro and economically divided

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<sup>193</sup> Mills, *Michel Foucault*, 34.

perspective of class struggle against a bourgeois power in an attempt to secure freedom from oppression, because, “the State consists in the codification of a whole number of power relations which render its functioning possible, and ... revolution is a different type of codification of the same relations.”<sup>194</sup>

Foucault argues that many struggles “‘of administration over the way people live’ are characterized...as being ‘local’ or ‘immediate’ struggles, since they are instances in which people are criticizing the immediate conditions of their lives and the way that certain people, groups or institutions are acting on their lives... ‘the main objective of these struggles is to attack not so much such and such an institution of power, or group, or elite, or class, but rather a technique, a form of power’”<sup>195</sup> He also believed that such “‘speculative’” adversaries and “‘global solutions set in a distant future (e.g. liberations, revolutions, end of class struggle) assume a relative insignificance.”<sup>196</sup>

Therefore, Foucault moved away from the Marxist study of class struggle and analyzed the power of “‘men over women, of parents over children, of psychiatry over the mentally ill, of medicine over the population, of administration over the ways peoples live’”.<sup>197</sup>

This can certainly be seen in Arizona. The “‘dissidents’” are not necessarily against having a legislative body; they are not against the republican party as a whole, although it was drafted by the republican party; the people are not revolting against an elite class; some are not even necessarily dissatisfied with

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<sup>194</sup> Ibid., 37.

<sup>195</sup> Ibid., 38.

<sup>196</sup> Smart, *Michel Foucault*, 135.

<sup>197</sup> Ibid.

those who passed or signed the bill entirely. Instead, the reaction is against a technique – a form of power legislated through SB 1070. It is against the 287(g) agreement. It is against how this piece of legislation is used as a technique or form of power to give additional techniques and forms of power to the police for immigration law enforcement. It is how this technique of power will change the power relationships in daily encounters. It is how it will make it terrifying to drop their child off at school or go to the grocery store.<sup>198</sup> It is how this technique of power might make it impossible for a father (who would normally solicit work on a street corner) to put food on the table. It is the change SB 1070 creates in the power dynamic between a cop and the person being pulled over, between an employer and a potential employee.

In this way, it is also not a speculative adversary or global solutions set in a distant future. It is not calling for a complete overhaul of the American political system, or calling for a world in which there are no borders anywhere. It is asking to not be harassed in the immediate future.

## **Resistance**

“Where there is power, there is resistance.”<sup>199</sup> Albeit of simple construction, this statement is pregnant with meaning. In part, Foucault means to say that the exercise of power is accompanied by a reaction, for as Foucault put it, “it incites, it induces, it seduces, it makes easier or more difficult; in the extreme it constrains or forbids absolutely; it is nevertheless always a way of acting upon an

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<sup>198</sup> Ana Hernandez-Luna, *Matter of Personal Privilege*, 2011, [http://www.youtube.com/watch?v=iwq\\_F-B6\\_bs&feature=player\\_embedded#at=53](http://www.youtube.com/watch?v=iwq_F-B6_bs&feature=player_embedded#at=53).

<sup>199</sup> Foucault, *The History of Sexuality, Vol. 1*, 95.

acting subject or acting subjects by virtue of their acting or being capable of action.”<sup>200</sup>

However, simple statement above has been misinterpreted to mean, “resistance is always and already colonized by power... and thereby is doomed to defeat. Such an objection is anticipated in Foucault’s observation that although resistances exist by virtue of the strategic field of power relations, this does not mean that they ‘doomed to perpetual defeat’, on the contrary they constitute an ‘irreducible opposite’ of power relations.”<sup>201</sup>

Resistance is not the absence of power, it is a reaction to power and can connote strength. Moreover, Foucault purports extensively that power is fluid and thus ever flowing, therefore the weight of power can shift rapidly into the hands of the “resisters” and be resisted by those who exercised power previously.

This can be seen in the current petition for a recall of Russell Pearce. Those who might have been seen as “resisters” colonized by the power Russell Pearce exercised upon them, have used the legal channels (or technologies of power) at their disposal to canvass throughout Russell Pearce’s district to collect enough votes to force a recall election in the fall.<sup>202</sup> If there is a recall election, the power will have swiftly flowed back into the hands of the “resisters”, and he may be removed from his privileged position and thus unable to exercise as much, or the same type of, power.

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<sup>200</sup> Smart, *Michel Foucault*, 133.

<sup>201</sup> Ibid.

<sup>202</sup> Gary Nelson, “Russell Pearce will likely face recall election,” *azcentral.com*, May 10, 2011, <http://www.azcentral.com/community/mesa/articles/2011/05/10/20110510russell-pearce-recall-election0511.html>.

Moreover, Foucault was adamant that resistance is not confined to revolt or popular uprisings. However, I would like to add that I do not agree with the above statement, “In the extreme it constrains or forbids absolutely,” because there never ceases to be resistance even if a person or group of people succumb to the behavior discipline has dictated, the body resists at a very visceral level of chronic stress.

[Chronic stress] has a variety of physiological consequences, including hyperglycemia ... type II diabetes mellitus, and hypertension (high blood pressure), which can lead to cardiovascular disease... poor concentration, mood swings, agitation, depression, and anxiety. In addition, long-term stress-induced cortisol secretion from the adrenal glands can depress immune function, leading to increased risk of illness. High levels of cortisol also are associated with weight gain, particularly with the accumulation of excess abdominal fat.<sup>203</sup>

Therefore, it is my contention that when power is experienced, resistance enters the body. Foucault believes power is inflicted on the body in another fashion – biopower.

### **Biopower**

Biopower finds expression through technologies born of the human sciences. Human sciences gave those wielding power greater insight into how to most efficiently control, regulate and define the human body, and the behavior it exhibits. The goal of those exercising biopower is to render the body “docile and productive and, thus politically and economically useful.”<sup>204</sup> Taken a step further:

The basic idea of biopower is to produce self-regulating subjects... once our bodies and minds have been formed and formulated in

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<sup>203</sup> “Stress.”

<sup>204</sup> Smart, *Michel Foucault*, 75.

particular ways, we then take it upon ourselves to make sure that we function in these ways, and remain good, healthy subjects. Schools, universities, psychologists, the courts, businesses and the police can only keep us under surveillance some of the time.<sup>205</sup>

Therefore, while power is often thought of in negative terms, power in general and biopower specifically and especially should be thought of in productive terms. In so doing, Foucault argues that biopower aided in the development of capitalism, because it produced a “healthy, active, disciplined population as a workforce; and... the... detailed and function-specific arrangements of space and people... provided the organizational models for nineteenth century factories.”<sup>206</sup>

Another form of production is found in the categorization of individuals. Biopower creates deviants. Utilizing the social sciences, activities and attributes were labeled as abnormal, “the pervert, the deviant, the trouble-maker, the problem child, the homosexual, the hysteric, the kleptomania, the pyromaniac, the psychotic.”<sup>207</sup> Once people are categorized, their “ailments” can be identified and they can be disciplined back into good, healthy subjects.

Unfortunately, proponents of Arizona’s immigration legislation have sought through “Attrition through Enforcement” to force people out of the State and (for them, ideally) out of the Country, because they will feel constantly harassed and “surveilled” into “good behavior”. In this instance “good behavior”

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<sup>205</sup> Danaher, *Understanding Foucault*, 75.

<sup>206</sup> *Ibid.*, 70.

<sup>207</sup> *Ibid.*, 79.



is not being present in this State without being authorized to be present in this State.

Arizona is participating in creating deviants through biopower. Through SB 1070, Arizona is creating new crimes and therefore new classes of criminals and deviants. Moreover, the degree to which law enforcement officials would be forced to consider ethnic attributes under SB 1070 in an arrest also labels certain activities (listening to the Spanish radio station) and attributes (perhaps a certain hairstyle or clothing choice) “abnormal” for an acculturated American and therefore suspected of being “undocumented”. Being “disciplined back into good, healthy subjects” in this situation, means either removal from Arizona, or being forced to hide any incriminating activities or attributes.

### **Discipline**

Discipline is the means by which biopower is wielded. Discipline’s “objective became the economy, efficiency and internal organization of movements; and the exercise of power was to be constant and regular so as to effect an uninterrupted supervision of the processes of activity.”<sup>208</sup> Foucault maintains that this discipline is achieved through hierarchical observation, normalizing judgment, and examination.

Hierarchical observation is coercion by observation, wherein the people to whom the observation is applied are visible along with all of their actions, and there is knowledge of this observation. It akin to children misbehaving when a

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<sup>208</sup> Smart, *Michel Foucault*, 85.

teacher steps out of the classroom, and returning to good behavior once the teacher has reentered the room.

Normalizing judgment utilizes societal norms to define what is normal and what is abnormal (i.e. “the pervert, the deviant, the trouble-maker, the problem child...the psychotic, etc.”<sup>209</sup>). Falling outside the parameters of what is considered normal is deemed undesirable for society and thus for the person who is considered abnormal, as well. Normalizing judgment is a prerequisite for discipline, because non-conformity must be defined before the exercise of disciplinary power can be utilized in order to correct it. Continuing on with the classroom metaphor, it might be completely normal for children in a kindergarten classroom to behave in a manner that would be considered abnormal for children in a second grade classroom. Moreover, the children are made aware of what is considered normal and abnormal behavior.

Examination combines hierarchical observation and normative judgment to create a normalizing gaze, which differentiates them and judges them. This gaze is pervasive and constant, because it is internalized. It is the situation in which the children of the classroom are unsure whether or not they are being watched, and so they regulate their own behavior.

These schoolhouse examples were chosen deliberately in order to demonstrate that there are incredibly productive and helpful usages of discipline. Discipline, even as Foucault describes it, is not necessarily a negative usage of power. It simply happens that the principles of discipline at work in Arizona’s

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<sup>209</sup> Danaher, *Understanding Foucault*, 79.

immigration legislation have a negative impact. Other instances of this same technology of power can be arguably incredibly important in our modern society.

Foucault summarized the culmination of these three elements into discipline perfectly in Discipline and Punish:

He who is subjected to a field of visibility, and who knows it, assumes responsibility for the constraints of power; he makes them play spontaneously upon himself; he inscribes in himself the power relation in which he simultaneously plays both roles; he becomes the principle of his own subjection. By this very fact, the external power may throw off its physical weight; it tends to the non-corporal; and, the more it approaches this limit, the more constant, profound and permanent are its effects: it is a perpetual victory that avoids any physical confrontation and which is always decided in advance.<sup>210</sup>

With regard to the reasoning behind the suggestion looking at the perception of a “gaze” in the next chapter: the more pervasive immigration legislation is, and the more people come to believe that it means they are being watched, the less the immigration legislation will even have to be enforced in order to ensure that this panoptic gaze remains. The panoptic gaze will be “constant, profound and permanent” in its effects. This, of course, means the structural violence caused by the panoptic gaze will be “constant, profound, and permanent” in its effects.

In addition to being an activist for prisoner’s rights, Foucault believed that the prison was a prime example of this disciplinary power, and thus enters Foucault’s book: *Discipline and Punish: the Birth of the Prison*.

### **The History of Punishment and Prison**

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<sup>210</sup> Michel Foucault, *Discipline & Punish: The Birth of the Prison*, 2nd ed. (Vintage, 1995), 202-203.

Discipline and punish historicizes in Foucault's unique manner the shift in the way societies punish people deemed to be criminals. The book begins with the description of a particularly gruesome execution of a man accused of attempted regicide. He is made to hold a torch of hot wax. Flesh is torn from his "breast, thighs and calves with red-hot pincers".<sup>211</sup> His right hand burnt with sulphur. "Molten lead, boiling oil, burning resin, wax and sulphur melted together"<sup>212</sup> were poured on his open wounds. He was drawn and quartered, and the burned to ashes. Unfortunately for the condemned, none of these steps went according to plan. His skin was too difficult to tear in one try, and the drawing and quartering was attempted for a half an hour, before he was hacked to pieces to make it easier. This horribly graphic depiction is then juxtaposed with a tidy list of a prisoner's daily activities only eighty years later encompassing prayer, work, meals, and even school.

He traces how this came to pass writing:

... reformers began to express criticism of the excessive violence and social divisiveness... with prevailing penal practices. Public executions came to be regarded as both ineffective in deterring crime and likely to lead to social disturbance... The objective of the reforms appears thereby to be not so much leniency and humanity as a new economy of punishment, a greater efficiency ... to 'increase its effect while diminishing its economic cost... and its political cost' The new order of punishment formulated by the reformers was based upon a conception of crime as an offence not against the...will of the sovereign but against society... The aim of punishment thereby became both a redress for the offence committed against society...and a restoration of the offender within society.<sup>213</sup>

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<sup>211</sup> Ibid., 3.

<sup>212</sup> Ibid.

<sup>213</sup> Ibid., 82-83.

It is important to note, as was done above in discussing Foucault's approach to history, that this is only a shift in the way societies punish people deemed to be criminals. It is neither an improvement, nor a progression; it is merely different. This change was done, "...not to punish less, but to punish better."<sup>214</sup> It is additionally important to note that, although the body was not the central object toward which punishment was directed and inflicted, the body remained and remains penalized, "confined... forced to labour... sexual deprivation, and to a series of other controls and regulations."<sup>215</sup> It is also the site of internalized stressing the body and the symptoms associated with chronic stress listed above.

In tying this back in to discipline. The prison used the concepts of discipline as outlined above to achieve the increased efficiency. Moreover, the prison utilized the knowledges of the human sciences to achieve this discipline and efficiency. "The emergence of the institution of the prison as the paradigmatic form of punishment was in consequence conceived by Foucault to be associated with the development of a disciplinary technology of power and related forms of knowledge."<sup>216</sup> However, there was one particular prison design that Foucault believed to best represent the embodiment of a disciplinary technology of power – the Panopticon.

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<sup>214</sup> Ibid., 82.

<sup>215</sup> Ibid., 74.

<sup>216</sup> Smart, *Michel Foucault*, 85.

## The Panopticon

Jeremy Bentham's Panopticon is an architectural design intended for a more economical means of running a prison in particular, but more broadly "work-houses, or manufactories, or mad-houses, or hospitals, or schools,"<sup>217</sup> The theoretical foundation for the architectural design, and therefore also for its expanded application upon society is embodied in the following quote:

...in all these instances, the more constantly the persons to be inspected are under the eyes of the persons who should inspect them, the more perfectly will the purpose of the establishment have been attained. Ideal perfection... would require the each should actually be in that predicament during every instant of time. This being impossible, the next thing to be wished for is, that, at every instant, seeing reasons to believe as much, and not being able to satisfy himself to the contrary, he should *conceive* himself to be so.<sup>218</sup>

In other words, Jeremy Bentham had created a blueprint for a 1984 "Big Brother"-like structure in the year 1787. The genius lay in the simplicity, economy and generalizability of the architectural design. In the application of the prison, the entire structure would be circular. The cells would form the periphery and face inward toward a single watchtower. Walls separate prisoners from each other and light enters through a window at the back of the cell shining toward the tower. In this way, the prisoners are backlit and every anonymous movement is visible to the tower. Likewise the tower is visible, yet the inhabitants within the tower are conversely invisible and thus, unverifiable. In this design, a prisoner never knows if or by whom he/she is being watched. Thus the Panopticon

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<sup>217</sup> Jeremy Bentham, *The Panopticon Writings*, Wesleyan (London: Verso, 1995).

<sup>218</sup> *Ibid.*, 5.

employs simple geometric angles, and economical usage of a tower instead of a multitude of guards.

In summarizing the effect of this design, Foucault wrote:

As a result individuals became entangled in an impersonal power relation, one which automatized and disindividualized power as it individualized those subject to it. Thus it became unnecessary ‘to use force to constrain the convict to good behaviour, the madman to calm, to worker to work, the schoolboy to application, the patient to the observation of the regulations... He who is subjected to a field of visibility, and who knows it, assumes responsibility for the constraints of power, he makes them play spontaneously upon himself; he inscribes in himself the power relation in which he simultaneously plays both roles; he becomes the principle of his own subjection.’<sup>219</sup>

Immigration legislation creates the thought that someone could be watching at all times and it is this perceived panoptic gaze that spurs a behavior change (either a conscious, external and thus visible behavior change or an unconscious, internal and thus invisible to the naked eye behavior change). Many of us slow our speed on the highway when we see a police car, but if you believe you personally are being watched extra carefully (because of certain “ethnic factors” you might believe yourself to exhibit) by police (which may be undercover in civilian vehicles), you might always monitor the your own speed on the highway very cautiously.

The Panopticon is a technology of discipline and of power (more specifically biopower). Therefore there should be resistance. Some critics have cited as a problem that “description of disciplinary regimes is that the individual subject is seen to be subjected to the point where resistance to these practices and

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<sup>219</sup> Foucault, *Discipline & Punish*, 202-203.

procedures is futile, so ingrained are they in the individual themselves. This seems to conflict with Foucault's ideas developed in *The History of Sexuality*, where he states that where there is power there is resistance."<sup>220</sup>

Here, again, I would like to offer the following reconciliation. Foucault does seem to go back and forth as to whether or not resistance must be present in a power relationship (as the Panopticon certainly is a power relationship and yet he only speaks of conformity). However, internally the body has a documented response to the heightened stress of oppression and constant vigilance, and that bodily response is the body's form of internal resistance to the power imposed upon it. Changing your behavior because of a power relationship such as that of the Panopticon, wherein power is exerted by planting the seed in someone's mind that they might be at any point being watched, or purposefully not changing your behavior as a form of deviance, or changing your behavior but not in a compliant way but rather in a manner that rails against the power regime – any of these responses are reactions to feeling watched. No matter which route the individual takes in responding to the panoptic-gaze, it is a response, either consciously or subconsciously. It is for this reason that in the discussion of future empirical research to follow, it is not suggested that the researcher look at the behavioral response to feeling watched. It is of greater importance to discover whether or not that panoptic-gaze is experienced, regardless of how that experience may make someone react externally, because if someone feels watched there will be a reaction of resistance internally to the heightened and chronic stress.

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<sup>220</sup> Foucault, *Discipline & Punish*, 202-203.



“Foucault explained that he reached an appreciation of punishment and the prison as belonging to a political technology of the body not from history but from revolts and resistances occurring in prisons through the world in the late 1960s and early 1970s.”<sup>221</sup> Thus, although Foucault believed the Panopticon to regulate behavior, even he knew that the behavioral component was merely a reaction to power. Whether it was compliant with the disciplinary forces or resisting, there is a behavioral reaction to being watched, but it is not necessarily the same for all individuals. Therefore, it would be futile to attempt to analyze the behaviors of the population being studied, because an extreme range of behaviors may be said to be reactions to the panoptic gaze, and it is not for the researcher to determine which actions are more or less of a reaction than others. A reaction from one person might not differ too much from their normal temperament, while that same reaction from another person might be an extreme shift from their normal temperament. Moreover, the reaction might be an internal bodily reaction, in which case it is about bodily behavior (perhaps hormone secretion) that would necessitate an entirely different and medical study.

Lastly, in analyzing the Panopticon, technologies of discipline are once again tied to the production knowledge in that, “In addition to subjecting individuals to the power of observation the Panopticon also functioned as a laboratory... a site for the production of knowledge about those under observation, and a place for experimentation and training.”<sup>222</sup> This can be seen in

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<sup>221</sup> Smart, *Michel Foucault*, 80-81.

<sup>222</sup> *Ibid.*, 88.

Arizona; political proponents of strict immigration legislation and enforcement fabricate “knowledge” by offering statistics showing a positive correlation between a rise in the number of supposed undocumented persons in a state and a rise in the crime rate. Similarly, studies have been done citing the opposite, or showing that actually undocumented persons are much less likely to commit crimes than citizens.<sup>223</sup> Either way, people on either side of the issue are attempting to observe a particular group in society in order to isolate and monitor the actions, and create “knowledge” about that group.

While Bentham asserts the generalizability of his design to the abovementioned prisons, houses of industry, work-houses, poor-houses, lazarettos, manufactories, hospitals, mad-houses, and schools, Michel Foucault believes it to have even more generalizability. He writes:

Bentham dreamt of transforming into a network of mechanisms that would be everywhere and always alert, running through society without interruption in space or in time. The panoptic arrangement provides the formula for the generalization.<sup>224</sup>

The Panopticon... must be understood as a generalizable model of functioning; a way of defining power relations in terms of the everyday life of men... the Panopticon must not be understood as a dream building: it is the diagram of a mechanism of power reduced to its ideal form... it is in fact a figure of political technology that may and must be detached from any specific use.<sup>225</sup>

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<sup>223</sup> R. J Sampson, “Open doors don’t invite criminals,” *New York Times* 11 (2006): 15; E. Press, “Do Immigrants Make Us Safer?,” *IDEA* (2006); R. J Sampson, “Rethinking crime and immigration,” *Contexts* 7, no. 1 (2008): 28–33; K. F Butcher and A. M Piehl, “Cross-city evidence on the relationship between immigration and crime,” *Journal of Policy Analysis and Management* 17, no. 3 (1998): 457–493; J. Hagan, R. Levi, and R. Dinovitzer, “THE SYMBOLIC VIOLENCE OF THE CRIME-IMMIGRATION NEXUS: MIGRANT MYTHOLOGIES IN THE AMERICAS,” *Criminology & Public Policy* 7, no. 1 (2008): 95–112.

<sup>224</sup> Smart, *Michel Foucault*, 88.

<sup>225</sup> Foucault, *Discipline & Punish*, 209.

## The Carceral Network

The Panopticon was the perfected disciplinary technology, and albeit with modification the same technology could be applied in a “whole series of institutions... well beyond the frontiers of criminal law.”<sup>226</sup> “Foucault has described the series of institutions and organizations employing disciplinary techniques of normalizations as a ‘carceral network’...[which] effects a linkage between legal forms of punishment and the most minute forms of correction...with [this]... a normalizing power spread through the entire social body.”<sup>227</sup>

This carceral network occurred because of four processes in particular: “(i) an expansion of disciplinary institutions, (ii) the emergency of positive and productive disciplines, (iii) the de-institutionalization of disciplinary mechanisms, (iv) the organization of a police apparatus.”<sup>228</sup> The expansion of disciplinary institutions merely means that a form of discipline became a typical form of organization in a variety of institutions (“the organization and practices of military hospitals constituted the model for hospital reorganization in general in the eighteenth century”<sup>229</sup>). Emergency of positive and productive disciplines simply speaks to a shift in society from merely punishing and working against certain actions to attempting to generate productive individuals who contribute positively to society. De-institutionalization of disciplinary mechanisms, is the

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<sup>226</sup> Foucault, *Discipline & Punish*, 209.

<sup>227</sup> *Ibid.*, 297.

<sup>228</sup> Smart, *Michel Foucault*, 92-93.

<sup>229</sup> *Ibid.*, 89.

disciplining of those not actually institutionalized (or inside the parameters of the institution). Foucault uses Christian schools as an example, in that information about the parents is gathered concerning life-styles, morals “creating in effect a form of indirect supervision and surveillance over a non-institutionalized population.”<sup>230</sup> Of course the organization of a police apparatus means that even if you belong to a non-institutionalized population (you are not incarcerated) you are still subject to “unceasing surveillance, the reporting and documentation of the behaviour of individuals through the entire social body performed by the institution of the police.”<sup>231</sup>

In this manner, the carceral network has placed everyone in society in a Panopticon of sorts. However, the panoptic gaze is focused more intensely on various populations at various times, depending on the politics and relations of power. Currently, the panoptic gaze in Arizona is focused intensely upon the Latino population. The following sections will demonstrate the spread of a carceral network in Arizona.

**Minutemen.** It is no surprise that coming across the border one might see Border Patrol Agents or even National Guard troops. As far back as 1904, “the Commissioner General of Immigration appointed seventy-six inspectors who monitored the border on horseback.”<sup>232</sup> However, today such appointment is not always necessary. Some United States citizens are flocking to the border in an attempt to take matters into their own hands. These citizens have created their

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<sup>230</sup> Ibid.

<sup>231</sup> Ibid.

<sup>232</sup> Adrian X Esparza, *Colonias in Arizona and New Mexico: Border Poverty and Community Development Solutions* (Tucson: University of Arizona Press, 2008), 78.

own carceral network spanning the countryside in attempt to “help” federal Border Patrol Agents. They call themselves Minutemen, alluding to members of the colonial militia who were quickly and easily deployed at a moment’s notice. Today’s Minutemen look slightly different: “In the spring and summer of 2005, a few hundred anti-immigrant activists brought guns, binoculars, cell phones, sunscreen, lawn chairs, and beer coolers to border areas, first in Arizona...”<sup>233</sup> The Minuteman Project is now accompanied by approximately sixty “spin-off groups”.<sup>234</sup> These groups claim to be patriots, whose only goal is to watch for illegal crossings and report to the Border Patrol, but in reality these groups have been far less innocent.

Yet these groups are being made to appear as a mainstream viewpoint in the media, or at least the media is not exposing the racism and violence behind the Minuteman Project. Representative Tom Tancredo and CNN anchor Lou Dobbs have given the Minutemen a voice in the legislature and have praised their efforts on CNN, respectively. “CNN put Dobbs on camera as an immigration expert... in a stretch from his show to *The Situation Room With Wolf Blitzer*; *Larry King Live*; *Anderson Cooper 360*, and so on, providing a full evening of rabid anti-immigrant mania.”<sup>235</sup>

These groups have absorbed neo-Nazis previously without a “mainstream” home, people “who openly advocate for the assassination, lynching, and murder

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<sup>233</sup> Spickard, *Almost All Aliens*, 437.

<sup>234</sup> Josh Gryniewicz, “The Minutemen and the neo-Nazis: Continuum of hate,” *International Socialist Review*, no. 50 (n.d.), <http://www.isreview.org/issues/50/minutemen.shtml>.

<sup>235</sup> *Ibid.*

of Blacks, Latinos, and other minorities.”<sup>236</sup> The American Civil Liberties Union analyzed 581 articles and editorials regarding Minutemen and concluded that there was ““an underreporting of participation and promotion of the Minuteman Project from the white supremacist community’; and an almost complete omission of the ‘violence and illegal activity’ perpetrated by the Minutemen.”<sup>237</sup>

Yet there has been violence. The Border Guardians of Tucson, Arizona advocate tactics such as, “steal[ing] the money from any illegal walking into a bank or check-cashing place” and “creat[ing] an anonymous propaganda campaign warning that any further illegal immigrants coming here will be shot, maimed, or seriously messed-up upon crossing the border.”<sup>238</sup> A group called the Ranch Rescue is being charged with holding immigrants at gunpoint, pistol-whipping immigrants, and harassing immigrants with trained attack dogs.

While the Minutemen Civil Defense Corp based in Arizona disbanded in the spring of 2010, the reasoning the President of the group (Carmen Mercer) gave is alarming.

Mercer sent out an e-mail urging members to come to the border “locked, loaded and ready” and urged people to bring “long arms.” She proposed changing the group’s rules to allow members to track illegal immigrants and drug smugglers instead of just reporting the activity to the Border Patrol... Mercer said she received a more feverish response than she expected — 350 personal e-mails she

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<sup>236</sup> Ibid.

<sup>237</sup> Ibid.

<sup>238</sup> Nicole Colson, “‘Respectable’ politicians set the stage for the far right: Two faces of the anti-immigrant bigots,” *SocialistWorker.org*, August 11, 2006, [http://socialistworker.org/2006-2/597/597\\_05\\_Bigots.shtml](http://socialistworker.org/2006-2/597/597_05_Bigots.shtml).

said — and decided the Minuteman Civil Defense Corps couldn't shoulder the responsibility and liability of what could occur.<sup>239</sup>

Moreover, only the national chapter has disbanded. The local Minutemen groups have been encouraged to continue to fight, and the violence has not ended. In May of 2009, the then Executive Director of Minutemen Civil Defense Corp and founder of Minutemen American Defense (M.A.D.) executed a plan with two others to kill and rob a family of three, who she suspected to be in the United States illegally and to possess drugs. The father and nine-year-old girl were killed. Yet, is this horrifying reality confined to a narrow strip in southern Arizona? Is there greater security once a person escapes untrained vigilantes and is in the jurisdiction of a trained professional police force? No.

**Sheriff Arpaio.** At the heart of Arizona, is Maricopa County, which naturally encompasses the Maricopa County Sheriffs Office (MCSO) headed by the infamous Sheriff Joe Arpaio, or “America’s Toughest Sheriff.” He is either the toughest or simply the most eccentric, and it seems he has anyone who crosses him, in his crosshairs. Indeed, there seems to be a chilling comparison to Pastor Niemöller’s often quoted assessment of the progression of the Nazi party:

First they came for the socialists, and I didn't speak out because I was not a socialist. Then they came for the trade unionists, and I didn't speak out because I was not a trade unionist. Then they came for the Jews, and I didn't speak out because I was not a Jew. Then they came for me, and there was no one left to speak out for me.<sup>240</sup>

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<sup>239</sup> Brady McCombs, “AZ-based border Minutemen group calls it quits,” *Arizona Daily Star*, March 24, 2010, [http://azstarnet.com/news/local/border/article\\_7d47c702-378b-11df-95cb-001cc4c03286.html](http://azstarnet.com/news/local/border/article_7d47c702-378b-11df-95cb-001cc4c03286.html).

<sup>240</sup> “Martin Niemöller: ‘First they came for the Socialists...’,” *Holocaust Encyclopedia* (United States Holocaust Memorial Museum, January 6, 2011), <http://www.ushmm.org/wlc/en/article.php?ModuleId=10007392>.

Michael Lacey (editor in chief of the Phoenix New Times and critic of Sheriff Arpaio) parodied, “You begin with prisoners. Then you move on to Mexicans. Then you move on to editors and reporters.”<sup>241</sup>

With regard to treatment of prisoners, Sheriff Arpaio is known for his “Tent City”, which he himself has likened to a concentration camp.<sup>242</sup>

Approximately 2,000 inmates live outside through blistering Arizona desert summer days, and frigid Arizona desert winter nights. Inmates are fed rotting food, and made to wear pink underwear.<sup>243</sup> The International Human Rights community has come down on Arpaio for his use of chain gangs and for the shackling of women’s hands and feet during child labor.<sup>244</sup>

Arpaio has also employed outlandish means of conducting arrests including bombarding a neighborhood with tanks, a swat team, and a bomb squad to arrest an unarmed man accused of cockfighting and euthanize over one hundred birds. If this mental image is not startling enough, now picture actor Steven Seagal riding atop one of the tanks. This occurred, because Sheriff Arpaio paired up with Seagal’s show “Lawman”, when the Jefferson Parish Louisiana Sheriff’s Office ended their partnership with “Lawman” due to multiple allegations that Seagal was guilty of sex trafficking.<sup>245</sup> What is more, that was not the first time Sheriff Arpaio had partnered with a reality television series in his arrests. A show

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<sup>241</sup> Robbins, ““America’s Toughest Sheriff” Takes on Immigration.”

<sup>242</sup> Dan DeVivo and Valeria Fernandez, *Two Americas*, n.d., <http://www.twoamericans.com/downloads/TwoAmericansPreview.mov>.

<sup>243</sup> Robbins, ““America’s Toughest Sheriff” Takes on Immigration.”

<sup>244</sup> Soler Meetze, “Holding America Accountable at International Human Rights Review.”

<sup>245</sup> “Steven Seagal, Sheriff Raid Valley Home,” *KPHO Phoenix News*, March 22, 2011, [http://www.kpho.com/news/27272012/detail.html?sms\\_ss=facebook&at\\_xt=4d892cb1e0a8088b%2C0](http://www.kpho.com/news/27272012/detail.html?sms_ss=facebook&at_xt=4d892cb1e0a8088b%2C0).



self-proclaimed as a cross between “Cops” and “Punk’d” called, “Smile... You’re Under Arrest!” on FOX, was a show about trying to trick people with outstanding warrants with sting operations exclusively in Maricopa County.<sup>246</sup>

With regard to the “Mexicans” portion of Lacey’s quote, Sheriff Arpaio while not always anti-illegal immigration, has now made it his number one goal to track down all undocumented immigrants, in so doing, often simply arresting anyone who looks Latino, which of course includes legal immigrants and citizens. In fact, in April a federal judge ruled that the constitutional rights of a legal immigrant and his son (a citizen) had been violated by the MCSO during a raid.<sup>247</sup> As Lacey put it, "He's got a very famous quote about how he wasn't gonna [*sic*] be busting corn vendors or Mexicans on the street looking for work. That there were real criminals out there...But he discovered there were votes in going after Mexicans and he switched his policy 180 degrees."<sup>248</sup>

Now, he has created a carceral network of an all-volunteer citizen group that helps with immigration sweeps called the Sheriff’s Posse. He and his “Posse” are “busting corn vendors” among others in his raids and sweeps of homes, low wage service jobs (i.e. restaurants and car wash facilities), Cinco de Mayo parties; they even raided Mesa Public Library and Mesa City Hall.

Sheriff Arpaio then took his panoptic gaze to the skies. Launching Operation Desert Sky, Arpaio’s volunteers and deputies fly fixed wing planes

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<sup>246</sup> Randy Cordova, “Sheriff Arpaio gets ‘real’,” *azcentral.com*, November 18, 2008, <http://www.azcentral.com/ent/tv/articles/2008/11/18/20081118sherifftv1120.html>.

<sup>247</sup> Nicholas Riccardi, “In Arizona, Sheriff Joe Arpaio shrugs off a rough April,” *Los Angeles Times*, April 30, 2011, <http://www.latimes.com/news/nationworld/nation/la-na-arpaio-trouble-20110501,0,3084923.story>.

<sup>248</sup> Robbins, “‘America’s Toughest Sheriff’ Takes on Immigration.”

with M-16s, 50 caliber machine guns, among other guns over the Arizona desert in an attempt to find “smugglers”.<sup>249</sup> Of course, here it must be noted that the term “smugglers” has been broadened by the MCSO to encompass any undocumented immigrant under the justification that they have smuggled themselves across the border. No one can claim this man has a lack of creativity.

Arpaio attempts to rationalize these tactics saying that they only arrest those who are guilty of another crime other than unauthorized entry of the country. However, upon visiting the Florence detention center in Arizona, it became ever so clear that there were precious few charges that did not seem entirely fabricated. Admittedly, some were DUI charges. Yet, even those can be completely fabricated, because only the officer and the charged really know how the field sobriety test went, and it is the officer’s word against that of the person arrested. However, it was another charge that put these arrests in perspective: shoplifting bubble gum. One after another the charges for detention were read out as “stealing a pack of gum”. This is something easily fabricated, and it is hard to believe that there is what would appear to be a pandemic of chewing gum thievery.

Obviously, these antics have generated opposition, and so we “move on to editors and reporters.” Sheriff Arpaio has arrested several editors and reporters who critically judge Arpaio (in some cases multiple times) for charges that consistently are unable to hold water and none have been convicted. However, it

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<sup>249</sup> “Arpaio Launches Operation Desert Sky,” *KPHO Phoenix News*, March 29, 2011, [http://www.kpho.com/news/27362559/detail.html?sms\\_ss=facebook&at\\_xt=4d93ba5b0a1871b9%2C0](http://www.kpho.com/news/27362559/detail.html?sms_ss=facebook&at_xt=4d93ba5b0a1871b9%2C0).

is not just editors and reporters who have been arrested, interrogated or investigated, but rather anyone standing in opposition to Arpaio: political opponents running against him for the office, judges who have ruled against Arpaio, numerous activists (most notably the prominent Salvador Reza), attorney for the ACLU – Daniel Pachoda, the Phoenix Mayor Phil Gordon, and Arizona Attorney General Terry Goddard. None have been convicted, yet all know they are constantly being watched.

Through 287(g) and his own creativity Sheriff Arpaio has created a massive carceral network of police and volunteers in his Posse working in tandem to investigate those who stand in his way, observe from the skies, and hunt from the roadside. In a panoptic manner, businesses do not know if they are being investigated and are the next site for a raid and neither do homes. While driving, you do not know if an undercover cop is tailing you. Even while in the remote desert, you do not know if Operation Desert Sky has identified you. If SB 1070 remains in tact after it completes the federal courts obstacle course, the new crimes, level of allowable racial profiling, and responsibilities of the police force will bolster the ability of Sheriff Arpaio to spread and fortify his carceral network and panoptic gaze over Arizona.

Chapter 4:

EMPIRICAL: CALL TO ACTION

### **Introduction**

This thesis has shown that, fortified with over a century of case law, the plenary power doctrine is unwavering, and it makes federal immigration legislation an overly powerful tool in our political system from which the courts can offer little if any protection. Congress walks a fine line between preempting immigration regulation and devolving immigration regulation. SB 1070 and the 287(g) program are two contested areas of immigration regulation, which both exhibit and alter the power relationships of immigration politics in Arizona.

Additionally, the application of the theories of Michel Foucault illuminates the power relationships at play in Arizona – from the power relationships among nation states in the broader political arena of geopolitics and colonialism to the face-to-face power relationship between a police officer and a stopped/detained/arrested person in a Foucauldian carceral network.

This thesis now adds a call for empirical research that would yield an opportunity to analyze these relationships. This section discusses the importance of empirical study. It situates the study within the genre of surveillance studies and its theorists. It analyzes similar studies, and identifies the variables the most illuminating for this analysis.

### **Background**

In 1787, Jeremy Bentham introduced the architectural design of a prison he named the Panopticon. In this design, a prisoner never knows if or by whom

he/she is being watched. Michel Foucault has since applied the idea of the Panopticon theoretically to society as a whole – much like the novel 1984. In modern times, Panopticism can be found in surveillance cameras, the existence of undercover cops, the surveillance of employee computer screens, metal detectors and the like.

It is my belief, that there is a heightened level of Panopticism in Arizona due to the various means of “combating illegal immigration”. It is my hypothesis that immigration legislation and Sheriff Joe Arpaio’s “illegal” immigration crackdown methods have created a heightened sense of the panoptic gaze (or the sense that one might be being watched at any moment) among those who self-identify as Hispanic/Latino.

Feeling as though one is being watched might increase or induce stress and therefore cortisol levels. If there is a constant sense that you are being watched, then a person might enter into a state of chronic stress, as the literature on chronic stress suggests the experience of being watched may produce increased stress and affect the health status of the population.<sup>250 251</sup> The physiological consequences of chronic stress were delineated above to include: hyperglycemia, type II diabetes, hypertension, cardiovascular disease, poor concentration, altered cognition, suppressed immune function and weight gain.<sup>252</sup>

Therefore, if immigration measures in Arizona are causing a subset of the

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<sup>250</sup> M. Andrejevic, *Reality TV: The work of being watched* (Rowman & Littlefield Pub Inc, 2004).

<sup>251</sup> B. C Amick and others, “Stress, computer-based work monitoring and measurement systems: A conceptual overview,” *Applied Ergonomics* 23, no. 1 (1992): 6–16.

<sup>252</sup> “Stress,” *Encyclopedia Britannica*, 2011,

<http://www.britannica.com.ezproxy1.lib.asu.edu/EBchecked/topic/568921/stress>.

population to feel as though they are under constant surveillance, that subset of people might be put in a situation of developing chronic stress and the health risks that are associated with chronic stress. This could be categorized as structural violence.

Authors Johan Galtung and Tord Höivik define structural violence quite well via a juxtaposition with direct violence stating that it is, "...that which kills, although slowly, and undramatically from the point of view of direct violence."<sup>253</sup> It is also typically understood to be anonymous in that, unlike direct violence, a particular author might not be able to be pinpointed. It is rather the sum of various power relationships found in everything from geopolitics to the carceral network, which is one of the reasons a Foucauldian analysis of power relationships can be so illuminating as a base to further study on structural violence.

In his article "The Condition of Illegality", Leo R. Chavez illuminates that the inequalities caused by the structural position of illegality are a form of structural violence.<sup>254</sup> By extension, the exacerbation of these inequalities by immigration legislation is, as well. This view could be supported by the abovementioned assertion that immigration leads to a panoptic gaze; a panoptic gaze leads to chronic stress, and chronic stress leads to health risks that could be said to kill slowly, if these links were properly supported with empirical evidence. Operating under the assumption that the government should not interfere with the fully attainable level of health of its populace via structural violence, these

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<sup>253</sup> J. Galtung and T. Höivik, "Structural and direct violence: a note on operationalization," *Journal of Peace Research* 8, no. 1 (1971): 73–76.

<sup>254</sup> L. R. Chavez, "The condition of illegality," *International Migration* 45, no. 3 (2007): 192–196.

possible links warrant further investigation.

### **New Mexico and Arizona: The Ties That Bind**

Gathering empirical evidence of the effects of a panoptic gaze in Arizona before and after the Immigration Legislation has been passed would be difficult, because it has already passed. Thus, it would be exceptionally beneficial to compare and contrast Arizona to a state without Immigration Legislation, yet a similar immigration history. In the book *Colonias in Arizona and New Mexico: Border Poverty and Community Development Solutions*, authors Adrian X. Esparza and Angela J. Donelson make a compelling argument for comparing and contrasting the border states of Arizona and New Mexico specifically. The authors state, “.. it makes sense to... study... Arizona and New Mexico, because their history, development, and border experiences are similar. At the same time, these states differ in substantive ways from Texas and California.”<sup>255</sup>

During the Spanish colonization of the territory now identified as Arizona and New Mexico the Spaniards created three royal highways to “funnel military troops, missionaries, and settlers,” so as to ultimately colonize and control the northern frontier.<sup>256</sup> The gateway cities for each of these routes grew exponentially, and many traversed into Texas and California via Ciudad Juarez and Tijuana, respectively. Conversely, Arizona and New Mexico remained relatively unsettled. Esparza and Donelson give three main reasons for this:

First, hostile Indians drove settlers away... The Chiricahua Apache and Western Apache of southeastern Arizona and southwestern

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<sup>255</sup> Esparza, *Colonias in Arizona and New Mexico*, 7.

<sup>256</sup> *Ibid.*, 15.

New Mexico were perhaps the fiercest warriors among the Indian groups... Second, the harsh terrain made settlement... immensely difficult. Third... Spain simply lost enthusiasm for settlement efforts. Spain's money, power and authority dwindled toward the end of its conquest in Mexico.<sup>257</sup>

Even once Mexico achieved independence from Spain in 1821, little changed in the way of settlement. Plagued by internal strife, Mexico did not set its sights on Arizona and New Mexico, but rather Texas and California. In 1846, after having warned the United States that war would follow an annexation of Texas (whose independence Mexico had not recognized), the Mexican-American war began. By 1848, it had ended. In the Treaty of Hidalgo, Mexico ceded nearly half of its territory, including: California, Nevada, Utah, almost all of Arizona (the rest was bought in the Gadsden Purchase), and some of New Mexico and Colorado.

The United States had proposed the Gadsden Purchase in 1853, because of a desire to create a railroad to connect the aforementioned gateway cities of Ciudad Juarez/El Paso and Tijuana/San Diego, which were still booming. With that the Southern Pacific Railroad was built. Here Arizona and New Mexico's fates were again tied, as the railroad trekked through both states and brought with it similar settlement and development.

“Southern Arizona and New Mexico were at last opened to permanent settlement... the U.S. government developed military forts and camps... Yet, few settled the area until the military conquered the Apaches in 1886. With the construction of the... railroad... mining companies set up profitable operations in Arizona and New Mexico to extract copper... The railroad and mining industries stimulated southern Arizona and New Mexico

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<sup>257</sup> Ibid., 17.



boomtowns, banking and an emerging agricultural industry. Settlers also continued to migrate to the area in yet another wave, prompted by the Mexican Revolution of 1910.”<sup>258</sup>

Just as Arizona and New Mexico rose together in this period, they also fell together through various boom-and-bust periods due to this narrow economic base. Moreover, Arizona and New Mexico continued to be unique in this aspect as Texas and California had reliable diversified economies and international recognition. Esparza and Donelson cite four reasons for this. First, the Volstead Act of 1919 pushed tourist oriented businesses across the border into Tijuana and Ciudad Juarez, which made San Diego and El Paso considerably more popular destinations. Second, WWI and WWII gave El Paso and San Diego the opportunity to diversify their economies (as well as the creation of Fort Bliss in El Paso and a naval base in San Diego), while it locked Arizona and New Mexico into the lucrative business of copper mining, because the demand for copper during the wars was insatiable. Third, the Bracero Program between 1942 and 1964 invited a large increase in migration, however most chose to go to already booming cities with diversified economies (read El Paso and San Diego). Lastly, Mexico’s 1965 Border Industrialization program sought to invite U.S. raw materials and parts into Mexico to be assembled in the maquiladoras; this meant the maquiladoras needed to be placed near the border in populous areas: El Paso and San Diego.<sup>259</sup>

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<sup>258</sup> Ibid., 19.

<sup>259</sup> Ibid., 20-22.

The peso devaluations of 1982 and 1994, as well as the General Agreement on Tariffs and Trade of 1986 caused the cost of Mexican labor to plummet.<sup>260</sup> This led to U.S. companies crossing the border to create their own maquiladoras, and migrant workers to head north to earn U.S. dollars, which were now worth substantially more than pesos, for remittance.

As abovementioned in the brief history of broader United States immigration legislation, the 1980s onward has seen a shift toward controlling “illegal entry” or undocumented immigration, which began with President Reagan. However, President Reagan also set in motion border policy changes when he waged the War on Drugs. While the President was aiming at Florida as the target due to the Colombian drug cartels, perhaps the greatest impact was on the Southwest. The drug cartels followed the path of least resistance bringing with them cocaine, heroin and methamphetamines. Southern Arizona, generally, was labeled “high intensity drug interdiction zone,” and Nogales, specifically, became known as “cocaine alley”.<sup>261</sup> The response to this was a dramatic increase in surveillance equipment; lights, sensors and cameras were installed and the drug raids began. In another effort to increase the efficacy of surveillance, the U.S. Border Patrol began “to direct efforts at urban centers to push immigrants to rural settings. This, it was believed, would make it easier to spot illegal immigrants.”<sup>262</sup> This trend of steadily increasing surveillance has continued to this day.

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<sup>260</sup> Ibid., 23.

<sup>261</sup> Ibid., 25.

<sup>262</sup> Ibid., 26.

While economic factors have been lightly touched upon in the preceding paragraphs, it is important to explicitly show the relationship between labor necessity and open borders on the one hand and labor shortage and closed borders on the other, since in many analyses of immigration legislation this is referred to as a given. The Chinese Exclusion Act necessitated another source of cheap labor for the railroads, and this source came from Mexico. As abovementioned the 1910 Mexican Revolution (and the incredible dearth of any immigration or border regulations) initiated a wave of migrants, which meant a surplus of Mexican labor drove down the cost of their already cheap labor much to the delight of employers.

This cheap labor was so treasured, that the love-child of the rest of the country's xenophobia and Social Darwinism – the Immigration Act of 1917 – was balked by the border states, because the literacy requirements and \$8.00 head tax excluded most Mexicans. Before the end of the year, the federal government responded with a farm-worker program, excluding Mexican immigrants from the Immigration Act.

The reason for the labor shortage that prompted employers to need the endless amount of cheap labor (WWI), reared its head again (WWII), therefore so did a federal program designed to satiate that need – the Bracero Program from 1942 to 1964. The end of the Bracero Program came primarily because Arizona and New Mexico in the late 1950s and early 1960s saw a huge shift from

agriculture and mining to service oriented jobs, which have never been able to offer the same number of jobs or near the same wages.<sup>263</sup>

There were, of course, secondary reasons. Human rights activists and those with nativist sentiments simultaneously called for the end of the Bracero Program. The human rights activists cited “substandard housing and exploitation of workers, especially poor pay and health issues.”<sup>264</sup> Meanwhile, nativists cried invasion, because “the Bracero Program... unintentionally spurred the flow of undocumented workers... farmers and ranchers were not penalized for stepping outside the law, which meant that workers could be hired at lower rate and with no bureaucratic requirements,”<sup>265</sup> which led to, “the subsequent imposition of Operation Wetback in 1954, wherein over one million Mexicans were deported.”<sup>266</sup> It is ironic that the supporters of Operation Wetback heralding it as a “success” were calling for an end to the Bracero Program, because when the Bracero Program ended, unauthorized immigration skyrocketed and Operation Wetback was completely outpaced.

The response to this had many faces including the federal immigration legislation discussed above (IRCA, Personal Responsibility and Work Opportunity Act, IIRIRA, REAL ID, PATRIOT ACT, etc.). Yet one such response once more tied the fates of Arizona and New Mexico: Operation Blockade in El Paso and Operation Gatekeeper in San Diego. While these operations attacked unauthorized immigration in several ways, both of these

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<sup>263</sup> Ibid., 35.

<sup>264</sup> Ibid., 79.

<sup>265</sup> Ibid., 34.

<sup>266</sup> Ibid., 79.

operations focused primarily on prevention of entry rather than deportation (walls and surveillance). However, stopping it at Texas and California meant that unauthorized immigration was forced into Arizona and New Mexico. This was actually done intentionally. The designers of these programs believe the natural barriers and danger of the desert would be a deterrent, “But this was an ill-conceived and inhumane policy, given the history of deaths on the border in the years that followed.”<sup>267</sup>

However, there was still a labor shortage for certain jobs, because U.S. citizens did/do not take certain jobs. Therefore, there was another swing toward enticing authorized workers from Mexico. Bush’s 2005 plan for a guest worker program for 1.5 million farmworkers and 200,000 new temporary visas per year for low-skilled workers was put in place to aid business “because it would facilitate a regular supply of low-wage workers, primarily to agriculture but also to food processing, hotels and restaurants... Typically, these are hard, dirty, low-paying jobs that in fact can’t find enough workers who are U.S. citizens.”<sup>268</sup> In line with this constant relationship between labor and immigration legislation, 2008 saw a loss of jobs and suddenly a plethora of immigration legislation aimed at “cracking down” on unauthorized immigration. This brings us to present day.

Governor Jan Brewer prides herself on being tough on undocumented immigration, while Governor Bill Richardson attempts to “to integrate immigrants that are here and make them part of society and protect the values of our Hispanic

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<sup>267</sup> Ibid., 84.

<sup>268</sup> Paul Spickard, *Almost All Aliens: Immigration, Race, and Colonialism in American History and Identity*, 1st ed. (Routledge, 2007), 443.

and multiethnic communities.”<sup>269</sup> In 2010, of the passed legislation pertaining to immigration in Arizona, seven are hostile toward undocumented immigrants or the Latino and immigrant populations (only one could be termed favorable).<sup>270</sup> Among these bills passed by the Arizona State legislature was the controversial immigration enforcement bill (SB 1070). In 2010, of the passed legislation pertaining to immigration in New Mexico, eight are favorable to the Latino and immigrant populations (only one could be termed hostile).<sup>271</sup> Among these bills passed by the New Mexico legislature was a resolution unveiling the economic benefits of undocumented immigrants.

### **Surveillance Studies**

As David Lyon defined it in his book Surveillance Studies: An Overview, surveillance “is the focused, systematic and routine attention to personal details for purposes of influence, management, protection and direction.”<sup>272</sup> Surveillance can be literal watching (either in person or through a camera); it can be listening (wiretapping or hearing a car go by with the Spanish radio station on); it can also be the amassing of information (think of the previously discussed NCIC database) often called dataveillance.

Lyon also asserts, “Surveillance studies is about power... Whether it is the massive Department of Homeland Security in the USA or some rural school board

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<sup>269</sup> Randal C. Archibold, “Side by Side, but Divided Over Immigration,” *The New York Times*, May 11, 2010, sec. U.S.,

[http://www.nytimes.com/2010/05/12/us/12newmexico.html?\\_r=1&pagewanted=2](http://www.nytimes.com/2010/05/12/us/12newmexico.html?_r=1&pagewanted=2).

<sup>270</sup> *Immigration Database*, Issues and Research: Immigration (National Conference of State Legislatures, n.d.), <http://www.ncsl.org/default.aspx?TabId=19209>.

<sup>271</sup> Ibid.

<sup>272</sup> David Lyon, *Surveillance Studies: An Overview*, 1st ed. (Polity, 2007), 14.

with cameras in buses, power is generated and expressed by surveillance.”<sup>273</sup>

Surveillance can even be used against those in power. A Phoenix organization called Copwatch consists of activists who do just that; they monitor police agencies in the Valley by showing up to Arpaio’s raids with cameras in hand and rolling.<sup>274</sup>

There are also common threads among surveillance sites. First, there is rationalization, wherein, “...standardized techniques are sought and reason... is prized.” Secondly, there is technology. Here it might be helpful to remember the Panopticon as a technology of power. Technology can be anything that economizes for greater efficiency the process of surveillance. Thus, it can be the central tower of the Panopticon instead of hundreds of guards or it can be a software program that mines for information. The third common thread is sorting. Here we can look back to Foucault’s “dividing practices.” “This process of distinguishing people on the basis of their perceived normality is an example of what Foucault calls dividing practices. Dividing practices operate through various social institutions such as hospitals, dividing the healthy from the sick; psychiatric clinics, dividing the sane from the mad, or the heterosexual from the homosexual; prisons, dividing the lawful from the criminal; and so forth.”<sup>275</sup> The fourth thread is “knowledgeability” or the ability for life-details under scrutiny to be obtained and its impact on the degree to which surveillance is successful. The fifth thread is urgency, which “has become increasingly prominent within the safety-and-

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<sup>273</sup> Ibid., 23.

<sup>274</sup> “Phoenix Copwatch Media”, n.d., <http://www.phoenixcopwatch.org/media.html>.

<sup>275</sup> Geoff Danaher, *Understanding Foucault* (Thousand Oaks: SAGE Publications, 2000), 60-61.

security-oriented world of the present, especially since 9/11...<sup>276</sup> The site of surveillance in Arizona can certainly be said to have this fifth thread, as political rhetoric has made some believe that an invasion from Mexico is imminent.

Surveillance is often tied up with State administration and policing, especially in our literary imagination: George Orwell's Nineteen Eighty-Four, Franz Kafka's The Trial, Margaret Atwood's A Handmaid's Tale, and Lois Lowry's The Giver. Indeed, concern in the United States especially has been raised about undercover cops in civilian automobiles, and alternatively "...police cruisers... complete with wireless laptop systems on which the central police computer system can readily be accessed."<sup>277</sup> Indeed the concerns of the surveillance capabilities and practices of the state and of the police in particular are nothing new, but as "Controls are sought especially against... 'dangerous' offenders – and, even more, 'terrorists' ... it is the poor and the marginal who are most deeply affected,"<sup>278</sup> which is the impetus for this study, and many other surveillance studies.

### **Classical Theorists in Surveillance Studies**

Surveillance studies are interdisciplinary, although they rely heavily on sociology in particular. "This is somewhat ironic in view of the fact that sociologists have been seen both as suitable practitioners of surveillance and as appropriate targets for surveillance."<sup>279</sup> However, all social sciences are "engaged

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<sup>276</sup> Lyon, *Surveillance Studies*, 27.

<sup>277</sup> *Ibid.*, 38.

<sup>278</sup> *Ibid.*, 39.

<sup>279</sup> *Ibid.*, 18-19.



in activities that may... be construed as surveillant,”<sup>280</sup> which is, of course, an argument Foucault makes in biopower, saying that governments have supported the human sciences in order to be more surveillant. It would be difficult to discuss the theoretical basis of a field of study purported to rely heavily upon sociology without at least giving a nod to the fathers of sociology: Karl Marx, Emile Durkheim, and Max Weber.

**Karl Marx.** According to surveillance scholar Christian Fuchs, “Marx not only commented on economic surveillance, but also on the role of political surveillance,”<sup>281</sup> and it was “a fundamental aspect of the capitalist economy and the nation state.”<sup>282</sup> In the economic sense, Marx looked at how surveillance flowed down from the capitalist, to the managers, to the foremen/overseers, onto the workers. With regard to the nation state, “Marx argued that in the United States, population growth in the 19<sup>th</sup> century resulted in the surveillance of the states and regions,”<sup>283</sup> and even referenced police surveillance.

Moreover, Fuchs argues that Marx’s discussion of accumulation is an untapped application of Marx to surveillance as it “allows to systematically distinguish six forms of economic surveillance: applicant surveillance, workplace surveillance, workforce surveillance, property surveillance, consumer surveillance, and surveillance of competition.”<sup>284</sup>

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<sup>280</sup> Ibid.

<sup>281</sup> Christian Fuchs, “Foundations of the Critique of the Political Economy of Surveillance,” *The Internet & Surveillance-Research Paper Series* (2010): 4.

<sup>282</sup> Ibid., 5.

<sup>283</sup> Ibid., 6.

<sup>284</sup> Ibid., 16.

However, it seems that in most surveillance studies Marx is merely mentioned as if to acknowledge that such a verbose theorist must have some connection with the subject matter, but no attempt is made to integrate Marx into surveillance studies. As Fuchs put it: “Surveillance scholars either claim that Marx ignored the phenomenon of surveillance or acknowledge to a certain degree the importance of Marx for surveillance studies, but at the same time relativize this statement by either conducting multidimensional analyses that miss causal connections, or by implicitly or metaphorically using certain Marxian concepts without connecting the analysis of contemporary surveillance phenomena systematically to Marx’s works.”<sup>285</sup>

**Emile Durkheim.** David Lyon credits Emile Durkheim with contributing to surveillance studies through his theory of crime, in that it explains how socio-economic stratification can lead to greater surveillance. Lyon summarizes it in the following way:

When the gap between the relatively well-off and the relatively disadvantaged is growing... each group will come to see the other, increasingly, as a threat to their security. There may be both real and perceived increases in crime rates, because of the widening inequalities gap, and the better off will respond by supporting more draconian counter measures broadening the definition of ‘crime’. This includes obtaining technologies of self-protection, thus further excluding the more marginalized and targeting offender and innocent alike. Durkheim’s ideas may be extrapolated to suggest that more surveillance would follow, especially to maintain vigilance over public spaces, which would affect some ‘suspect’ categories disproportionately, thus adding to their stigma.<sup>286</sup>

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<sup>285</sup> Ibid.

<sup>286</sup> Lyon, *Surveillance Studies*, 49.

This quote bears an uncanny resemblance to the climate in Arizona. Social stratification in Arizona is increasing; citizens and non-citizens fear each other. Perceived increases in crime rates (whether or not they truly exist) frighten both sides (increased hate crimes in Arizona and increased crime attributed to the undocumented population). Those in power have responded through broadening the definition of crime, and have employed new technologies of surveillance. These technologies are aimed at a marginalized population, target offenders and innocent alike, thereby adding to the stigma of some ‘suspect’ categories disproportionately.

**Max Weber.** In surveillance studies, Max Weber receives acknowledgement for his discussion of bureaucratic administration. “Bureaucratic administration means fundamentally domination through knowledge.”<sup>287</sup> Weber laid out preconditions leading to the emergence of bureaucracy as an administrative system of greater efficiency, which can also be looked to as conditions for greater surveillance (expanding area, population or tasks to be administered)<sup>288</sup> and his rational-legal authority certainly shows the impetus behind the population’s acceptance of bureaucratic record-keeping.

### **Modern Theorists in Surveillance Studies**

While surveillance studies scholars seem to understand their indebtedness to classical theorists and attempt to give credit where credit is due by merely mentioning the names of Marx, Durkheim and Weber, their theoretical

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<sup>287</sup> Richard Swedberg and Ola Agevall, *The Max Weber dictionary: key words and central concepts* (Stanford University Press, 2005), 19.

<sup>288</sup> K. Allan, *Explorations in classical sociological theory: seeing the social world* (Pine Forge Pr, 2005), 172.

contributions are taken for granted as a given and not discussed in any great depth. Current surveillance studies hinge more upon modern theorists: Jacques Ellul and (interestingly) novelist and social critic George Orwell. David Lyon explains this saying, “These figures... lent a moral seriousness and political urgency to the development of surveillance theory in the mid- to late twentieth century.”<sup>289</sup>

**Jacques Ellul.** It is easy to see the reasoning behind early surveillance studies researchers’ and writers’ affinity with Ellul’s writings given that he critiqued totalitarianism, technology and the combination of the two. Ellul spoke of “La Technique” (“a cultural orientation towards ‘means’ rather than ‘ends’”). In other words, Ellul critiqued society’s obsession with creating more and more efficient technology for the means by which we live life, and especially by which we learn, as he was critical of the ways in which students were being taught to process information. Further, Ellul was an opponent of technology, as he saw it limiting our human freedom. Additionally important for surveillance studies, Ellul was critical of the effects of technologized policing in that “it requires more and more be supervised in the hope of apprehending more effectively those who violate rules and laws.”<sup>290</sup>

**George Orwell.**

The telescreen received and transmitted simultaneously... so long as he remained within the field of vision which the metal plaque commanded, he could be seen as well as heard. There was of course no way of knowing whether you were being watched at any

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<sup>289</sup> Lyon, *Surveillance Studies*, 52.

<sup>290</sup> Ibid.

given moment... You had to live... in the assumption that every sound you made was overheard, and, except in darkness, every movement scrutinized.<sup>291</sup>

While this particular nightmarish quote might not ring any particular bells, it has been extracted from a dystopian novel, whose title – albeit a year – is now pregnant with meaning in our English vernacular – Nineteen Eighty-Four. Nineteen Eighty-Four is a dystopian work of political fiction, yet George Orwell did not seek to create a futuristic setting that stood in contrast with the real world. He created a world that was a magnified reflection of his own times, the dictatorships of World War II. Airstrip One, Oceania is under a totalitarian regime controlled by the dictator: Big Brother. As is exemplified by the quote above, the inhabitants of Airstrip One are under constant surveillance. There are telescreens in homes and workplaces. Throughout the city, posters of the dictator are engineered so that his eyes follow you with the caption, “BIG BROTHER IS WATCHING YOU”, and perhaps the most threatening tool of surveillance are the fellow inhabitants of Airstrip One. There is the constant knowledge that someone might report any slight symptom of unorthodoxy to the thought police much the same way citizens in the Soviet Bloc would report neighbors to the KGB. Additionally, much like Argentina’s famous dirty war, the result of such a report would be sudden disappearance – usually accompanying torture and death.

The truly horrifying aspect of this book, and perhaps the reason for its popularity, is its applicability. The KGB and Argentina’s dirty war are only two among thousands of scenarios that resemble 1984. In fact, while many have

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<sup>291</sup> George Orwell, *Nineteen Eighty-Four* (Plume, 2003), 3.

interpreted Orwell's novel to be strictly about communist countries or totalitarian regimes, Orwell clearly criticizes aspects of liberal democracies. In fact, the setting of the book is actually England ("... this was London, chief city of Airstrip One, itself the third most populations of the provinces of Oceania,"<sup>292</sup>).

The setting and the circumstances surrounding the Big Brother government of Oceania, and the technologies of power are familiar enough, yet frightening enough to act at the very least as a call to action for surveillance scholars. Moreover, "Orwell's work... has provided some of the most enduring, best-known and publicly accessible concepts in surveillance studies, above all the figure of Big Brother." At the very least Nineteen Eighty-Four provided surveillance scholars a common language, albeit not newspeak.

### **Postmodern Surveillance Studies**

Postmodern surveillance studies really seem to move out of the realm of classical or modern theory into studies based primarily upon new technologies and surveillance outside of the confines of the nation-state. It is about looking at how the internet has revolutionized surveillance, new methods for tracking consumers, and TSA airport security body scanners. As David Lyon put it, "...surveillance studies has often tilted towards a focus on the surveillance system, its technologies and its powerful institutions, to the neglect of analyzing the activities of those who are its subjects."<sup>293</sup> While the future research called for would not analyze the "activities" per se, it attempts to give voice to the

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<sup>292</sup> Ibid.

<sup>293</sup> Lyon, *Surveillance Studies*, 92.

experience of those who are subjected to the heightened scrutiny of the panoptic gaze, as opposed to merely looking at the new technology present in Operation Desert Sky.

Many in this postmodern phase of surveillance studies espouse a universality of surveillance or a “superPanopticon” of which we are all helplessly a part. Some in surveillance studies merely tout that we are now in a “surveillance society”. Lyon cautions that such broad and often times conspiratorial claims, “are ... potentially misleading, because they suggest merely a total, homogenous situation of ‘being under surveillance’ when the reality is much more nuanced, varying in intensity and often quite subtle.”<sup>294</sup> Indeed, I am surveilled in my online shopping habits, and by swiping my card at the gym. However, that experience is completely different from knowing that shopping at a store with ethnic foods might make you and your home susceptible to heightened scrutiny or an immigration raid.

**Giorgio Agamben.** It is important to note that there is one theorist that can be categorized in postmodern surveillance not so much in taking surveillance outside the confines of the nation-state (as he does not), but at least in the discussion of a constant state of surveillance. Agamben argues that the state of exception post-9/11 has become the rule and a “normal mode of government.” Agamben has something to add here in his idea of the bare life of those who are undocumented and have thus been banned from the political life that leads to good life. Moreover, Arizona can truly be said to be a State of Exception. The

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<sup>294</sup> Ibid., 25.

time of crisis being a post 9/11 world and a time of economic recession, wherein people are made to feel that there is an invasion from the southern border. The government of Arizona has decided that these concerns trump the individual rights of citizens and non-citizens alike. Agamben looks at the effect of the state of exception or the banishment on individuals. It is for this reason, that I do not delve deeper into Agamben. This study seeks more to analyze the effect of the panoptic gaze in particular upon individuals, as opposed to the overall effect of the state of exception or banishment upon individuals.

### **Between Modern and Postmodern**

“Some surveillance theories that may be considered to straddle the ‘modern’ and the ‘postmodern’ rubric originate in the work of Michel Foucault.”<sup>295</sup> It is here, that a surveillance study analyzing the abovementioned panoptic gaze and its effects would lie. While Michel Foucault’s relevance to surveillance has been thoroughly explained above, David Lyon has some criticisms of Foucauldian thought that will be dealt with here.

Lyon claims, “This has yielded a rather one-sided account of surveillance that focuses heavily on the subtly coercive experience of living with the uncertainty of being seen, which for better or worse also lends itself to updating for an era of almost invisible electronic surveillance.”<sup>296</sup> Here it is important to address the visibility issue. The visibility of the tower is important, but only insofar as that is how the prisoners knew they were capable of being watched in

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<sup>295</sup> Ibid., 56.

<sup>296</sup> Ibid., 57.



an era when only another human could physically watch you. This was the 1700s. Now that people inherently know that they can be watched by invisible machinery and recorded for later viewing by a person, the tower is not necessary. All that is necessary is something to plant the seed that you are being watched. Immigration legislation plants that seed.

Lyon also asserts that the Panopticon is overused and irrelevant, because it only pertains to enclosed spaces and does not account for new forms of digital surveillance. However, those who claim this are clearly missing the integral component of the carceral network, wherein the panoptic gaze escapes enclosed spaces and utilizes new technology as new technologies of power to spread the carceral network.

Another criticism, however, of the Panopticon in current surveillance studies is the “failure of the Panopticon to produce docile subjects.”<sup>297</sup> This I do not contest. For this reason, I do not suggest analyzing the behavioral component of Foucault’s theory. As mentioned in the previous chapter, reactions to the panoptic gaze run along the same spectrum of any reaction to any phenomenon in life, and even if bodies seem to be docile on the surface, feeling as though you are constantly watched can stir an internal bodily resistance.

Lastly, Lyon charges:

...many works in the ‘surveillance studies’ genre...stress the strength of panoptic power, constituting and positioning the subject in its thrall. Paradoxically, it is often just because surveillance studies is prompted by genuine concerns for human freedom, dignity or rights that the case for carceral control or Orwellian

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<sup>297</sup> Ibid., 60.

oppression is made in these kinds of terms. But unfortunately such over-determined portrayals not only do a disservice to social science, by fostering the erroneous view that we all lie under the ‘homogenous effects of power’ or some such humbug, but they also fail to respect the active subjects for whose lives they claim to speak. How this is perceived by the surveillance subject may make a difference.<sup>298</sup>

This is precisely what the proposed idea for future empirical research attempts to move away from. Empirical research analyzing the set forth problem should show how Sheriff Arpaio’s carceral network does affect various groups differently and how these groups experience panoptic gaze. It should be held in the premise of the hypothesis that there is no homogenous effect of power over the population of Arizona.

### **Relevant Surveillance Studies**

As acknowledged above, a study analyzing the panoptic gaze in Arizona caused by Immigration Legislation falls somewhere between modern and postmodern surveillance studies as it draws on Foucauldian theory. It does not belong among the postmodern era of the genre tend to focus upon new technological means of surveillance (TSA security body scanners), looking at surveillance outside of the nation-state (surveillance in health insurance), and a tendency to generalize surveillance as a “superPanopticon” or a “surveillance society” in which all are subject to a homogenous ever-present surveillance.

Although more rare, there are studies that analyze surveillance not through new technologies, but rather in how people respond to surveillance. More importantly, these studies analyze how various groups of people respond to

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<sup>298</sup> Ibid., 92.

surveillance. The following studies are each in some ways similar to a study of the panoptic gaze in Arizona, creating a family of studies to be joined. Yet each also differ in important ways from what such a study hopes to analyze, which precludes any ability to use pre-created surveys and scales.

Although psychology scholars have created a well-respected scale for measuring paranoia – the Green et al. Paranoid Thought Scales<sup>299</sup>, it does not capture the heightened sense of a panoptic gaze that this study should look for. First and foremost, it is geared toward measuring whether or not someone believes that anyone and everyone around them is talking about them, checking up on them, judging them, being hostile toward them, thinking about them...etc. It is not geared toward detecting whether or not someone feels the heightened sense of a panoptic gaze from the government or even from a large organization. Instead it measures whether or not people feel an increased level of scrutiny from unconnected individuals in their lives.

Furthermore, if I were to use the term paranoid I would have to redefine it, much in the same manner as Nicholas Holm does in his article, “Conspiracy Theorizing Surveillance: considering modalities of paranoia and conspiracy in surveillance studies.” He argues that the clinical classification does not fit for surveillance studies, because it implies delusions. In fact, “paranoia was renamed ‘delusional disorder’ in order to avoid confusion arising from the more specific lay usage... understood as persecutory delusions... ‘paranoid personality

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<sup>299</sup> C. E. L. Green et al., “Measuring ideas of persecution and social reference: the Green et al. Paranoid Thought Scales (GPTS),” *Psychological medicine* 38, no. 1 (2008): 101–112.

disorder,’ ... refers to a condition that while suspicious, is not solely concerned with observation or surveillance.”<sup>300</sup> Therefore, neither clinical definition is appropriate. Moreover, Holm references George Marcus to point out that there is another (non-clinical) classification as “paranoia within reason” saying, “... under certain socio-political conditions paranoia is not only not irrational but actually the *most* rational response.”<sup>301</sup> The American Psychology Association supports this further, because they “also acknowledge the possibility of ‘healthy paranoia’ in groups who have been subject to discriminatory behavior.”<sup>302</sup> Given that this study would look at the sense of a panoptic gaze among people who have been historically subject to discriminatory behavior, it is not a clinical definition of paranoia that needs to be measured for diagnostic purposes, but rather ‘paranoia within reason’ or ‘healthy paranoia’, which traditional scales of paranoia (such as the Green et al. Paranoid Thought Scales) do not measure. Therefore, the development of a new scale that does measure ‘healthy paranoia’ is necessary.

With regard to the effect of immigration legislation, studies have been done analyzing the effects of immigration reform on: tourism, the labor market, the taxpayer, the number of immigrants, etc. Some come closer to the aim of this study (analyzing the effect of immigration legislation upon the people it targets) by analyzing the effect of immigration legislation on: immigrant’s access to

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<sup>300</sup> Nicholas Holm, “Conspiracy Theorizing Surveillance: considering modalities of paranoia and conspiracy in surveillance studies.,” *Surveillance & Society* 7, no. 1 (2009): 37, [www.surveillance-and-society.org](http://www.surveillance-and-society.org).

<sup>301</sup> *Ibid.*, 39.

<sup>302</sup> *Ibid.*

health care<sup>303</sup>, families and communities<sup>304</sup> and psychological distress.<sup>305</sup>

However, none actually discuss the effect of immigration legislation on a heightened sense of feeling watched.

“Re-Thinking Illegality as a Violence Against Not By Mexican Immigrants, Children and Youth” looks at the structural violence caused by immigration legislation, yet it is not through the heightened sense of being watched accompanying immigration legislation, but rather through immigration legislation’s contribution to a discourse of undocumented immigrants as “ ‘illegal’ subjects worthy of disparagement...and of exploitation...”<sup>306</sup>

One study comes a little closer to the heart of the issue stating as its purpose:

... to examine differences between documented and undocumented Latino immigrants in the prevalence of three immigration-related challenges (separation from family, traditionality [*sic*], and language difficulties), which were made more severe after the passage of restrictive immigration legislation in 1996. Specifically, the study sought to determine the combined and unique associations of legal status, the three immigration-related challenges listed above and fear of deportation to acculturative stress related to family and other social contexts.<sup>307</sup>

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<sup>303</sup> J. Hagan et al., “The Effects of Recent Welfare and Immigration Reforms on Immigrants’ Access to Health Care1,” *International Migration Review* 37, no. 2 (2003): 444–463.

<sup>304</sup> N. Rodriguez and J. M Hagan, “Fractured Families and Communities: Effects of Immigration Reform in Texas, Mexico, and El Salvador,” *Latino Studies* 2, no. 3 (2004): 328–351.

<sup>305</sup> R. Rodriguez and A. DeWolfe, “Psychological distress among Mexican-American and Mexican women as related to status on the new immigration law.,” *Journal of consulting and clinical psychology* 58, no. 5 (1990): 548.

<sup>306</sup> J. Solis, “Re-thinking illegality as a violence against, not by Mexican immigrants, children, and youth,” *Youth Perspectives on Violence and Injustice* 59, no. 1 (2003): 16.

<sup>307</sup> C. Arbona et al., “Acculturative stress among documented and undocumented Latino immigrants in the United States,” *Hispanic Journal of Behavioral Sciences* 32, no. 3 (2010): 362.

Interestingly, “Only fear of deportation emerged as a unique predictor of...acculturative stress.”<sup>308</sup> This study lends credence to the argument that immigration legislation can create heightened stress, however it does not pinpoint a heightened feeling of being watched in light of immigration legislation as the cause of this stress, but rather fear of deportation specifically. Respondents in this survey were asked if they avoided or did not engage in certain activities, due to a fear of being deported. The activities included: walking in the streets, asking for help from government agencies, reporting a criminal or civil violation to the police, attending court if requested to do so, applying for a driver’s license or waiting on a street corner to solicit work.<sup>309</sup> The surveys used for this study are not, therefore, directly applicable to highlighting a panoptic gaze, because the questions are not aimed specifically at finding out if people feel watched, but rather whether or not they avoid certain activities to avoid the possibility of being deported. While the participants might be avoiding these activities, because they feel watched, this question is not directly asked in the study.

The article “‘Eyes on Me Regardless’: Youth Responses to High School Surveillance” does look at “social panopticism” in schools exercising heightened surveillance on ‘problem populations.’<sup>310</sup> However, it too does not look at the experience of being watched or the question of whether or not students feel watched when cameras decorate the school hallways and stairwells. Rather, the study looks at the response to “not merely the violence of feeling so heavily

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<sup>308</sup> Ibid., 363.

<sup>309</sup> Ibid., 369.

<sup>310</sup> J. Weiss, “‘Eyes on Me Regardless’: Youth Responses to High School Surveillance.,” *Educational Foundations* (2007): 48.

watched, but the violence that accompanies unjust school policies directed at low-income, urban youth of color students in these schools...<sup>311</sup> The article looks more specifically at various forms of resistance as a response in high schools with high levels of surveillance.

Other studies analyzing urban youth approach the idea of a panoptic gaze spread through the carceral network of police, and the idea that it is targeted more predominantly upon certain groups over others (“Wortley and Tanner... found that Black youth who were not involved with drugs or other delinquent activities were more likely to be stopped and searched by the police than those White youth who admitted involvement in illegal behavior,”<sup>312</sup>). However, these studies tend to rely upon an Attitudes Toward Police survey made up of four scales measuring: demeanor (ODEM scale), responsibility (RCC scale), discretion (DISC scale), patrol (APS scale), and officer characteristics (OCHR scale).<sup>313</sup> None of these ask questions about whether people feel more or less subject to police surveillance. It would more helpful to have a survey with questions aimed at discovering how people perceive police attitudes toward the public or particular groups, as opposed to gleaning the public’s attitude toward police.

“‘Anything Can Happen With Police Around’: Urban Youth Evaluate Strategies of Surveillance in Public Places,” does go beyond the Attitudes Toward Police survey to incorporate surveys regarding comfort in schools, trust toward

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<sup>311</sup> Ibid., 49.

<sup>312</sup> M. Fine et al., “‘Anything Can Happen with Police Around’: Urban Youth Evaluate Strategies of Surveillance in Public Places,” *Journal of Social Issues* 59, no. 1 (2003): 144.

<sup>313</sup> V. J Webb and C. E Marshall, “The relative importance of race and ethnicity on citizen attitudes toward the police,” *American Journal of Police* 14, no. 2 (1995): 51-52.

adults, and rating how safe various places they frequent are. However, none of the questions get at whether or not the students feel a heightened sense of surveillance.<sup>314</sup>

“Lines and Shadows: Perceptions of Racial Profiling and the Hispanic Experience,” is the closest study among the literature to the study proposed in this thesis, and points to compelling reasons for the study, stating, “Most unfortunate was that little research examined racial profiling perceptions among Whites, Blacks and Hispanics. In fact, to date only two studies (that the authors were aware of) existed on comparing profiling perceptions across race, and both failed to examine Hispanics.”<sup>315</sup> Additionally, the study listed reasons why it believed it worthwhile to study Hispanics as a separate group (as the authors of the study noted that often Hispanics are lumped in with other minority groups as simply: non-white).

... it might be that the experience of Hispanics with the police was different in important ways from the experience of other racial and ethnic groups (Carter, 1983; Herbst & Walker, 2001). For example, Carter (1985, p. 489) suggested that one must recognize that the ethnic characteristics embodied in language, name, culture, and appearance create the same minority group dynamics found in racial discrimination. As these unique characteristics related to differing cultural norms, language barriers, familial upbringing and styles of dress, coupled with other exogenous variables such as neighborhood characteristics (e.g., crime rates) and socioeconomic status, Hispanics’ interactions with the criminal justice system could differ considerably from both non-Hispanic Blacks and Whites.<sup>316</sup>

No mention is made of the fact that unlike other minorities Hispanics have a

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<sup>314</sup> Fine et al., “‘Anything Can Happen with Police Around’.”

<sup>315</sup> J. D Reitzel, S. K Rice, and A. R Piquero, “Lines and shadows: Perceptions of racial profiling and the Hispanic experience,” *Journal of Criminal Justice* 32, no. 6 (2004): 608.

<sup>316</sup> *Ibid.*, 610.



greater propensity to be racially profiled for being undocumented, especially in states with laws aimed at immigration enforcement, and especially along the southern border. However, the study was conducted in New York (although, as shown in the legal section of this thesis, there have been pieces of legislation that would further marginalize the Hispanic population in New York).

The questions asked in order to discern the level of perceived racial profiling were:

1. It has been reported that some police officers stop people of certain racial or ethnic groups because the officers believe that these groups are more likely than others to commit certain types of crime. Do you believe that this practice is widespread in New York City, or not? 0=no, 1=yes
2. Do you believe that this practice is justified for police officers or not? 0 – not justified; 1 = justified.
3. Have you ever felt you were stopped by the police just because of your race or ethnic background? 0= no; 1 = yes<sup>317</sup>

While these questions hint at the question of a panoptic gaze, they are not sufficiently honed to the particular aim of this study. The hoped for study aims to find out if people feel more watched, not whether or not racial profiling is prevalent in the area, and this study does not aim to find out if various groups believe racial profiling is justified. The last question gets the closest to whether or not people feel more or less watched, however it misses the mark slightly. A person may feel more intensely watched by a mall cop, when they enter a store than someone else without ever having been stopped by the police, or ever having been stopped by the police in a manner that they believed it was due to their race or ethnic background. Moreover, such direct questioning might tap into (and

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<sup>317</sup> Ibid., 611.

therefore solicit answers based upon) political ideology and political stances within immigration politics in Arizona, which could taint the study, and not yield true feelings of whether or not a person actually feels more or less watched than another person in normal everyday life.

It is interesting to note: this study found Hispanic participants to be more likely than non-Hispanics to believe both that profiling was widespread and additionally that they personally had been profiled.<sup>318</sup> With this finding the study ends with the following call to action, “Given the paucity of perceptual research on racial profiling in general, and that which incorporated Hispanics particularly, the findings suggested a strong need to better understand Hispanics’ experiences and perception.”<sup>319</sup> This thesis echoes this call.

### **Future Research**

This thesis has unveiled the need for further research to assess the effects of structural violence via immigration legislation on the well being of the Latino population. There should be further investigation as to whether Latinos feel as though they are being watched more so than their Caucasian counterparts. Additional research should analyze whether or not the sense that one is being monitored among Latinos is greater in states with greater numbers of hostile immigration legislation. Moreover, further research should analyze whether or not the gap between this sense of a panoptic-gaze among Latinos and this sense among Caucasians is greater in states with hostile immigration legislation. As

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<sup>318</sup> Ibid., 614.

<sup>319</sup> Ibid., 615.

abovementioned, a good place to start in comparing states would be Arizona and New Mexico.

Foucault cautions about creating knowledges about people, and more specifically about marginalized populations. Future research on this topic must be executed with particular care, given that the study seeks to create knowledge about a marginalized population. Great attention must be paid to an ethical and respectful approach to the future research for which this thesis has laid the groundwork.

Chapter 5:

## CONCLUSION

Immigration legislation is a powerful tool. The plenary power doctrine created in the 1800s has been fortified with over a century of case law. *Harisiades v. Shaughnessy* contributed to this fortification deeming immigration law to be, “exclusively entrusted to the political branches... largely immune from judicial inquiry or interference.”<sup>320</sup> *Mathews v. Diaz* gives these political branches even greater deference adding that political decisions “need... flexibility... rather than the rigidity ... of constitutional adjudication.”<sup>321</sup>

The case law discussed in this thesis shows how discrimination in creating subclasses of non-citizens was allowed first with regard to the person’s relationship to the United States (status and length of residency) in *Mathews v. Diaz*. Then *Fiallo v. Bell* extends this discrimination to permit the creation of subclasses based on gender, and *Naranji v. Civiletti* stretches the net of acceptable discrimination to include nationality. Lastly, *INS v. St. Cyr* implicitly grants Congress the power to strip aliens of Habeas Corpus without abiding by the prerequisites in the Suspension Clause. Thereby making recourse for any discrimination faced in immigration law more difficult and in some cases impossible.

There are some who argue that there is simply no longer a way to justify the constitutionality of immigration law exceptionalism, and others argue that this

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<sup>320</sup> *Harisiades v. Shaughnessy*, 342 U.S. 580, 588 (U.S. 1952).

<sup>321</sup> *Mathews v. Diaz*, 426 U.S. 67, 81 (U.S. 1976).

plenary power conflicts with modern day international politics. *Nguyen v. INS* and *Zadvydas v. Davis* did show a willingness on the part of the Supreme Court to not rely unquestioningly upon the plenary power doctrine. However, the plenary power doctrine is still unwavering, and it makes federal immigration legislation an overly powerful tool in our political system from which the courts can offer little if any protection.

The plenary power doctrine combines with the Supremacy Clause of the Constitution to create preemption, or the displacement of state law by federal law. *De Canas v. Bica* created a three-part test to determine whether or not a state law is preempted. However, in laying out such a test, *De Canas* implied that some state immigration legislation, or at least some provisions within state immigration legislation, would not be preempted. This is one of the reasons SB 1070 remains a daunting and powerful tool. While the execution of some provisions is on hold while the legislation winds through the court system, other provisions are already in effect. “As the case is litigated, Arizona will be able to block state officials from so-called ‘sanctuary city’ policies limiting enforcement of federal law; require that state officials work with federal officials on illegal immigration; allow civil suits over sanctuary cities; and to make it a crime to pick up day laborers.”<sup>322</sup>

Nevertheless, even if the entire bill were to be struck down as preempted, the state still has worrisome authority over immigration law. Despite several

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<sup>322</sup> “Arizona Set to Appeal Judge’s Ruling on Immigration Enforcement Law,” Text.Article, July 28, 2010, <http://www.foxnews.com/politics/2010/07/28/supporters-arizonas-immigration-law-solace-remaining-portions/>.

impediments to Congress devolving power onto the legislative branch of the state (created in part by *Graham v. Richardson* and *Aliessa v. Novello*), Congress has found a way to devolve federal immigration law enforcement onto the executive branch of the state – INA provision 287(g). The coupling of (non-preempted) provisions in state immigration legislation (and the threat of other provisions being found in the future to not be preempted), and provisions in federal legislation is troubling; it can create a Foucauldian carceral network through which a panoptic gaze is placed upon those who self-identify as Latino/Hispanic in Arizona.

In analyzing the various powers in immigration politics (either among federal branches of government, between the state and federal government, or between a government actor and a person subject to the technologies of power they wield) a theoretical lens helps to clarify the power relationships. The application of the theories of Michel Foucault provides fascinating insight into immigration politics in Arizona. This thesis illuminated the power relationships at play in Arizona from the power relationships among nation states in the broader political arena of geopolitics and colonialism to the face-to-face power relationship between a police officer and a stopped/detained/arrested person in a Foucauldian carceral network. At each level, Foucault's theories can be seen in Arizona's immigration politics.

Revealing Arizonian immigration politics and Michel Foucault's theories of power as analogous, while intriguing, only goes so far. It might be assumed that the Latino/Hispanic community in Arizona experiences the carceral network

executing a panoptic gaze negatively, but this has not yet been tested. Several studies have looked at the impact of immigration legislation, but not upon whether or not a population feels a heightened sense of being watched. Other studies have looked at reactions toward being watched, or attitudes toward police and perceptions of racial profiling. Yet all fall short of finding out whether or not a population feels a heightened sense of being watched.

This is important, because it can lead to structural violence of a kind not discussed in immigration politics. As abovementioned, constantly feeling watched could bring about chronic stress, and the health risks associated with chronic stress.

Therefore, this thesis calls for further research that would yield an opportunity to analyze these relationships. This thesis discusses the importance of studying this phenomenon empirically. It situates the study within the genre of surveillance studies and its theorists. It analyzes similar studies, and identifies the variables the most illuminating for this analysis. This thesis is written in the hope that a researcher will pick up where this thesis has left off.

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