Sustaining Tiered Personhood: Jim Crow and Anti-Immigrant Laws

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Abstract

Latino immigrants are moving to areas of the country that have not seen a major influx of immigrants. As a result of this influx, citizens of these formerly homogenous communities have become increasingly critical of federal immigration law. State and local legislatures are responding by passing their own laws targeting immigrants. While many legislators and city council members state that the purpose of the anti-immigrant laws is to restrict illegal immigration where the federal government has failed to do so, opponents claim that the laws are passed to enable discrimination and exclusion of all Latinos, regardless of their immigration status. In challenging one anti-immigration ordinance in Hazleton, Pennsylvania, the American Civil Liberties Union stated that "[i]f the ordinance is allowed to stand, anyone who looks or sounds foreign – regardless of their actual immigration status – will not be able to participate meaningfully in life in Hazleton, returning to the days when discriminatory laws forbade certain classes of people from owning land, running businesses or living in certain places."[1]

This paper theorizes that state and local anti-immigrant laws lead to the segregation, exclusion, and degradation of Latinos from American society in the same way that Jim Crow laws excluded African Americans from membership in social, political, and economic institutions within the United States and relegated them to second-class citizenship. To support this argument, the paper examines the tension that was present between

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1. Second Amended Complaint at 7, Lozano v. City of Hazleton, 496 F. Supp. 2d 477 (M.D. Pa. 2007) (No. 3:06-cv-01586-JMM) [hereinafter *Lozano* Second Amended Complaint]. The American Civil Liberties Union ("ACLU") filed a complaint that challenged Hazleton's ordinance. The ACLU complaint challenged the ordinance on several constitutional grounds, which included the Supremacy Clause, Due Process, Equal Protection, and First Amendment violations. *See generally id.* (alleging constitutional violations).

local, state, and federal governments during Reconstruction, which led to the proliferation of Jim Crow laws, and compares it to modern day tension between federal, state, and local governments over immigration policies, which has led to anti-immigrant laws. Specifically, this paper contrasts and compares the legislative motives behind both Jim Crow and state and local anti-immigrant laws, noting in both instances that states and localities use their constitutional authority to regulate matters of state concern to mask discriminatory motives. A normative theme throughout this paper is how the law reifies race by legislating cultural norms that reinforce racial divisions and hierarchy in our country. In conclusion, the paper acknowledges that change in the perception of the status of Latino immigrants may only come from a change in public opinion along with proper federal government action on immigration reform.

INTRODUCTION

> *In 2006, Jordan Gruver, a 16-year-old boy of Panamanian descent, is attacked by members of the Imperial Klans of America ("IKA") who were recruiting at the Meade County Fairgrounds in Brandenburg, Kentucky. Unprovoked, the Klansmen call the far smaller Gruver a "spic," then beat him severely, leaving Gruver with two cracked ribs, a broken left forearm, and jaw injuries requiring extensive dental repair. Two Klansmen, Jarred R. Hensley, 24, and Andrew R. Watkins, 26, plead guilty to second-degree assault and are each sentenced to three years in prison. The Southern Poverty Law Center filed a lawsuit against the IKA, its national leader Ron Edwards, and another high-ranking IKA official.*[2]

This story demonstrates current growing public hostility toward Latinos.[3] Over the past few years, public animus toward Latino immigrants has reached new levels, and in some areas has culminated with the enactment of state and local anti-immigrant laws.[4] This story exemplifies how the anti-Latino animus fails to differentiate between the complex categories of Latino immigrant status. Even though Gruver was an American citizen, the group targeted him based on their misperception of his immigrant status and because he was Latino. It is important to understand the varied demographic and immigration status of Latinos across the United States. The anti-immigrant animus, however, targets *all* Latinos regardless of their immigration status. Further, when states and localities enact laws targeting immigrants, they are buying into a general anti-immigrant animus that does not differentiate between the diverse populations of Latinos that reside in our country.

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2. Second Amended Complaint, Gruver v. Imperial Klans of America, No. 07-CI-00082 (Ky., Meade Cir. Ct. Div. I June 6, 2008).
3. IMMIGRATION POLICY CTR., EXTREMISTS HIJACK IMMIGRATION DEBATE: INCREASED REPORTS OF HATE CRIMES AND DISCRIMINATION AIMED AT U.S.- AND FOREIGN-BORN LATINOS 4 (Mar. 2008), *available at* http://www.immigrationpolicy.org/sites/default/files/docs/HateCrimes03-08.pdf.
4. Throughout the paper, state and local laws that target immigrants with an anti-immigrant sentiment will be referred to as anti-immigrant laws.

Typically, in discriminating against Latinos immigrants, most actors fail to differentiate between the complex immigration categories of Latino immigrants. For instance, there are longstanding Latino citizens[5] — Latinos who have resided in the United States even prior to the formation of the country, particularly in the Southwestern United States. There are also Latinos who are naturalized citizens.[6] For example, Cubans who arrived as refugees later naturalized to become U.S. citizens. Another category of Latino immigrants are lawful permanent residents. Lawful permanent residents reside in the country, but their status is conditional and they may be deported for committing certain crimes or post-entry acts.[7] The final category of Latino immigrants are undocumented immigrants. Undocumented immigrants are often referred to as "illegal" aliens.[8] An undocumented immigrant does not have permission to live or work in the United States and is at risk of deportation.[9] In enacting anti-immigrant laws that target Latinos, groups, states, and localities fuse together all of these categories, which causes resentment of Latinos and fosters national origin discrimination.

All over America, Latino immigrants are moving to areas of the country that, until now, have not seen a major influx of Latino immigrants.[10] This influx has, in turn, led to public outcry that Latino immigrants are a drain on fiscal resources, unwilling to assimilate to American culture, and

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5. *See* THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA & MARYELLEN FULLERTON, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 1 (6th ed. 2008) (defining citizenship as "a term generally understood to mean full members of the state, entitled to the basic rights and opportunities afforded by the state").
6. Naturalization occurs when a person who is not a U.S. citizen later acquires citizenship status through U.S. immigration procedures. *See generally id.* at 84–85 (describing the process of naturalization); *id.* at 296 ("[M]ost immigrants choose to apply for naturalization after meeting the residence requirement — ordinarily five years — qualify rather routinely, but there is no obligation to apply for citizenship. A person may remain in LPR status indefinitely.").
7. Lawful permanent residents are immigrants who, after admission, are here until they obtain citizenship through naturalization. "Permanent resident status means quite simply that they may stay as long as they wish, provided only they do not commit crimes or a limited list of other post-entry acts that render them deportable." *Id.* at 296.
8. *See id.* ("[An 'immigrant' is defined by statute as] a noncitizen authorized to take up permanent residence in the United States. This is a subset of the group that common or journalistic usage often labels immigrants, meaning noncitizens who have been present for a while and wish to stay indefinitely, legally or illegally").
9. Anyone who is not a U.S. citizen and does not have a green card or a current visa is undocumented.
10. *See generally* Lisa Pruitt, *Latina/os, Localities, and Law in the Rural South*, 12 HARV. LATINO L. REV. 135, 135 (2009) (highlighting "the recent surge in Latina/o immigration into the rural South and consider[ing] how that socio-spatial milieu may influence legal matters at the local level"); Cristina Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 569 n.1 (2008) (reporting studies showing that since 1990 more immigrants have entered the United States than at any other point in history) (citing RICHARD ALBA & VICTOR NEE, REMAKING THE AMERICAN MAINSTREAM: ASSIMILATION AND CONTEMPORARY IMMIGRATION (Harvard Univ. Press 2003); Mary C. Waters & Tomás R. Jiménez, *Assessing Immigrant Assimilation: New Empirical and Theoretical Challenges*, 31 ANN. REV. SOC. 105 (2005)).

largely responsible for rising crime rates.[11] In addition to targeting undocumented immigrants, the laws are also directed at all Latinos who are perceived as unwilling to assimilate to American cultural values. These laws encourage and lend legitimacy to exclusion of "the other" — the Latino other.

Societal exclusion based on racist and nativist tendencies are certainly not novel ideas in American history. During the Jim Crow era, approximately 2,522 African Americans were lynched.[12] Recently, legal scholar Richard Delgado documented the untold history of Latino lynching in America during the same time.[13] In addition, there were numerous beatings, race riots, and unjustified uses of capital punishment towards African Americans.[14] Although anti-immigrant laws are different in kind and degree from the violent, oppressive Jim Crow regimes, for the purposes of this paper, the key point of comparison is the amplification and legitimization effect that the law can have on social norms. Jim Crow laws codified discrimination and second-class status for African Americans, thus giving authority and formal recognition to the irrational hatred and prejudice felt by many Americans. This, in turn, generated new norms and extra-legal discrimination and subjugation. This is evidence that the law does more than proscribe certain behaviors; by performing that basic function, it necessarily sends a message to society about what types of behaviors are socially acceptable.[15] The ratification of the underlying attitudes, the creation of a legal underclass, and the promise that the law would not protect (and in fact would aggressively deny) the rights of African Americans all came together to fuel the creation of the Jim Crow atmosphere of legal and extra-legal subjugation.

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11. Miriam Jordan, *Grassroots Groups Boost Clout in Immigration Fight*, WALL ST. J., Sept. 28, 2006, *available at* http://www.post-gazette.com/pg/06271/725845-84.stm (arguing that current hostility towards immigrants is directed at Latino immigrants, especially illegal immigrants who are described as a burden on taxpayers and a threat to national security); *see also* Karla Mari McKanders, *Welcome to Hazleton! "Illegal" Immigrants Beware: Local Immigration Ordinances and What the Federal Government Must Do About It*, 39 LOY. U. CHI. L.J. 1, 7 (2007).

12. NAT'L ASS'N FOR THE ADVANCEMENT OF COLORED PEOPLE, THIRTY YEARS OF LYNCHING IN THE UNITED STATES, 1889–1918, at 7 (Negro Univ. Press 1969).

13. Richard Delgado, *The Law of the Noose: A History of Latino Lynching*, 44 HARV. C.R.-C.L. L. REV. 297 (2009) (documenting the lynching of Latinos during the Jim Crow era).

14. *See* NAT'L ASS'N FOR THE ADVANCEMENT OF COLORED PEOPLE, *supra* note 12, at 11–28 (detailing by state the number and reasons for lynchings during the period of 1894 through 1918).

15. *See generally* KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 3–4 (Yale Univ. Press 1989) ("[O]ur courts have a crucial role in expanding the circle of belonging, as they translate the Fourteenth Amendment's guarantee of equal citizenship into substantive reality for people previously relegated to the status of outsiders. . . . When the instrument for excluding a group is the law, the hurt is magnified, for the law is seen to embody the community's values."); Note, *What We Talk About When We Talk About Persons: The Language of a Legal Fiction*, 114 HARV. L. REV. 1745, 1746 (2001) ("Through law's expressive function, this metaphor [of personhood] reflects and communicates who 'counts' as a legal person and, to some extent, as a human being.").

With the horrible memory of Jim Crow looming in the not-so-distant past, society's tolerance for blatant discrimination and hatred is much lower today.[16] However, this is only the beginning of the codification of anti-immigrant sentiments, and there is already evidence that the rise in anti-immigrant laws has been accompanied by a rise in extra-legal subjugation, similar to what occurred during Jim Crow. According to a Federal Bureau of Investigation report, there was a thirty-five percent increase in hate crimes against Latinos between 2003 and 2006.[17] These years coincide with the increase of state and local enactments of anti-immigrant laws.[18]

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16. *See* Hugh H. Smythe, *The Concept "Jim Crow,"* 27 SOC. FORCES 45 (1948); *see also* 4 RACE, LAW AND AMERICAN HISTORY, 1700–1990 (Paul Finkelman ed., Garland Pub. 1992); RICHARD WORMSER, THE RISE AND FALL OF JIM CROW, at xi (St. Martin's Press 2003) ("In 1828, Jim Crow was born. He began his strange career as a minstrel caricature of a black man created by a white man, Thomas "Daddy" Rice, to amuse white audiences. By the 1880s, Jim Crow had become synonymous with a complex system of racial laws and customs in the South that ensured white social, legal, and political domination of blacks."). *See generally* Smythe, *supra*, at 46 ("'Jim Crow' . . . refers specifically to a human group in the United States functioning on a basis of inequality in the social system which has resulted in social stratification and segregation. It infers that in the stratified societal pattern of the United States a caste-like group exists (in this instance the Negro) which has been assigned to a low position and for which the contacts with the group on a higher level are regulated; the term 'Jim Crow' is thus used succinctly to describe this situation to which the Negro has become accommodated."). The term "Jim Crow" is also used to describe segregation and discrimination. *See* Delgado, *supra* note 13 (documenting the lynching of Latinos during the Jim Crow era); Smythe, *supra*, at 46 ("It is found widely used in the works on ethnic research in sociology, especially those concerning race relations and pertaining to the segregation of Negroes or to the discrimination practiced against them in various aspects of society.").
17. Brentin Mock, *Immigration Backlash: Hate Crimes Against Latinos Flourish*, SOUTHERN POVERTY LAW CENTER, Winter 2007, http://www.splcenter.org/intel/intelreport/article.jsp?aid=845 (citing Federal Bureau of Investigation Hate Crime Statistics for years 2003 through 2006).
18. *Hate Crimes on the Rise*, REGISTER-GUARD (Eugene, Or.), Mar. 12, 2008, at A10; Dave Montgomery, *Backlash Grows Against Illegal Immigration*, MCCLATCHY NEWSPAPERS, Aug. 19, 2007, *available at* http://www.mcclatchydc.com/227/story/19043.html ("While most of the groups register legitimate, widespread concerns about the impact of illegal immigration on jobs, social services and national security, the intense rhetoric is generating fears of an emerging dark side, evident in growing discrimination against Hispanics and a surge of xenophobia unseen since the last big wave of immigration in the early 20th century. 'I don't think there's been a time like this in our lifetime,' said Doris Meissner, a senior fellow with the Migration Policy Institute and former commissioner of the U.S. Immigration and Naturalization Service. 'Even though immigration is always unsettling and somewhat controversial, we haven't had this kind of intensity and widespread, deep-seated anger for almost 100 years.'"); EDMUND G. BROWN, OFFICE OF THE CALIFORNIA ATTORNEY GENERAL, HATE CRIME IN CALIFORNIA 24 (2007), *available at* http://www.ag.ca.gov/cjsc/publications/hatecrimes/hc06/preface06.pdf (stating that, in 2006, there was a 16% increase since 2005 in hate crimes against Latinos, and 218 of the offenses were anti-Latino offenses); *see also* Roberto Lovato, *Juan Crow in Georgia*, THE NATION, May 8, 2008, *available at* http://www.thenation.com/doc/20080526/lovato/print (discussing a "2005 case of six Mexican farm workers killed execution-style in their trailers which were parked near the cotton and peanut farms they toiled on . . . ."). Lovato reports:

Racist and xenophobic groups within the United States have heard the message from their local legislators that discrimination against Latinos is acceptable and legal. Many of these groups have a common agenda of discriminating against all minorities, including African Americans and Latinos. For example, the Ku Klux Klan ("KKK"), whose main goal since its creation has been to preserve the supremacy of the white race through violent and exclusionary tactics against African Americans has, in part, shifted its focus to Latinos and is currently advocating for restrictive immigration policies.[19] The KKK and similar groups have essentially re-emerged with an anti-immigrant focus, directed towards Latinos.[20] In the immigrant community,

> "[a]long with the almost daily arrests, raids and home invasions by federal, state, and other authorities, newly resurgent civilian groups like the Ku Klux Klan, in addition to more than 144 new 'nativist extremist' groups and 300 anti-immigrant organizations born in the past three years, mostly based in the South, are harassing immigrants as a way to grow their ranks."[21]

> Pretrial motions began last July in the case, in which prosecutors allege that four African American men bludgeoned all of the immigrants to death with aluminum baseball bats and shot one in the head while robbing them in their trailer home. Though the face of anti-immigrant racism in the Juan Crow South is still overwhelmingly identified as white by the immigrants I interviewed, some immigrants also see a black face on anti-immigrant hate.

Id.

19. *See* Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 558 n.87 (M.D. Pa. 2007) ("The Ku Klux Klan, originally organized in the South after the Civil War to intimidate black voters, reappeared in northern areas in 1915 to take part in the debate about immigration, arguing for restrictions. This version of the Klan, unlike 'the first Klan, which admitted white men of every type and background . . . accepted only native-born Protestant white and combined an anti-Negro with an increasingly anti-foreign outlook.'" (citing JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860–1925, at 288 (Rutgers Univ. Press 1988) (1955)); *see also* David Holthouse & Mark Potok, SOUTHERN POVERTY LAW CENTER, THE YEAR IN HATE: ACTIVE U.S. HATE GROUPS RISE TO 888 IN 2007 (2008), http://www.splcenter.org/intel/intelreport/article.jsp?aid=886 (stating that the number of hate groups operating in the United States rose at least 5% and attributing the increase to new groups forming in response to the ongoing debate about immigration). About 150 of the new anti-immigration groups formed in the last three years of the study were classified as "Nativist Extremist." *Id.*
20. *See* Laura Parker, *Klan-busters Fighting on a New Front – Violence Against Immigrants*, USA TODAY, Apr. 11, 2007, *available at* http://www.usatoday.com/news/nation/2007-04-10-klan_N.htm; *see also* Frances Ansley, *Doing Policy from Below: Worker Solidarity and the Prospects for Immigration Reform*, 41 CORNELL INT'L L.J. 101, 107 (2008) (relating how, in the 1980s and 1990s, the Southern Poverty Law Center sued Ku Klux Klan groups that targeted Latino immigrants). The Southern Poverty Law Center won multimillion-dollar judgments, which forced some racial hate groups into bankruptcy. It is using the same strategy with anti-immigrant groups. *See id.* (citing Michelle Rupe Eubanks, *Resurgent Ku Klux Klan Rallies in Tuscumbia*, TuscaloosaNews.com, May 27, 2007, *available at* http://www.tuscaloosanews.com/article/20070527/news/705270447?Title=resurgent-Ku-Klux-Klan-rallies-in-Tuscumbia (referencing the resurgence in the Ku Klux Klan "who believe the rhetoric that the United States in under attack by the latest wave of immigrants, especially those of Hispanic origin")).
21. Lovato, *supra* note 18.

Violent acts against Latinos include citizen arrests of immigrants, trafficking, and racially motivated violence.[22] The violent acts contribute to the already-overwhelming fear that Latinos experience on a daily basis once local authorities pass anti-immigrant laws. This fear causes Latinos to flee their communities and inhibits their ability to freely migrate from state to state. Anti-immigrant laws also encourage and empower anti-immigrant groups who advocate violence and extra-legal activities. They feel that because these laws have been passed, they are justified in using violence against Latinos. The underlying anti-immigrant sentiment and social conditions evince a growing need to monitor the passage of new anti-immigrant laws as well as the enforcement of existing ones, to ensure that the anti-immigrant sentiment is not codified to reinforce the exclusion of Latinos.

This paper theorizes that anti-immigrant laws have led to the segregation and exclusion of Latinos from American society similar to the segregation and exclusion of African Americans under Jim Crow laws. The commonalities between Jim Crow segregation and the anti-immigrant ordinances and statutes should be a cause for great alarm. Specifically, Jim Crow regimes demonstrated how the law can be used to justify racial inequalities which exclude African Americans from basic personhood rights under the U.S. Constitution.

In examining anti-immigrant laws, most scholarship has focused on constitutional federalism issues associated with state and local laws.[23] In

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22. *See* Megan Irwin, *Flushing Them Out: Joe Arpaio and Andrew Thomas are Teaching the Rest of the Nation How to Terrorize Illegal Immigrants*, PHOENIX NEW TIMES, Dec. 26, 2007, *available at* http://www.phoenixnewtimes.com/2007-12-27/news/flushing-them-out (stating that immigrants are being held hostage in drop houses where coyotes call families and bribe them to pay money for the return of their family members). One example of hate-fueled violence against Latino immigrants occurred in California in August 2007. An immigrant working as a janitor at a fast-food restaurant was taunted with racist threats such as "Go back to Mexico, you wetback!" and then attacked by three men, one of whom was carrying a loaded gun. IMMIGRATION POLICY CENTER, *supra* note 3, at 4.
23. *See* Anil Kalhan, *Immigration Enforcement and Federalism After September 11, 2001*, *in* IMMIGRATION, INTEGRATION, AND SECURITY: EUROPE AND AMERICAN IN COMPARATIVE PERSPECTIVE 181 (Ariane Chebel d'Appollonia & Simon Reich eds., 2008); Laurel R. Boatright, *Clear Eye for the State Guy: Clarifying Authority and Trusting Federalism to Increase Nonfederal Assistance with Immigration Enforcement*, 84 TEX. L. REV. 1633, 1633 (2006); Michael Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27, 53 (generally opposing state and local involvement in enforcing immigration laws); Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1376 (2006); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008); Tiffany Walters Kleinert, Note, *Local and State Enforcement of Immigration Law: An Equal Protection Analysis*, 55 DEPAUL L. REV. 1103, 1106–07 (2006); *see also* Darnell Weedon, *Local Laws Restricting the Freedom of Undocumented Immigrants as Violations of Equal Protection and Principles of Federal Preemption*, 52 ST. LOUIS U. L.J. 479, 480 (2008). *But see* Roe v. Prince William County, 525 F. Supp. 2d 799, 801–02 (E.D. Va. 2007) (In Prince William County, Virginia, a lawsuit was filed questioning the legality of an ordinance which permitted "[p]olice officers to question otherwise lawfully detained persons about their immigration status and authorizing county personnel to determine what services might be lawfully denied based on immigration status."); Clare Hunting-

my previous papers, *Welcome to Hazleton* and *The Constitutionality of State and Local Laws Targeting Immigrants*, I addressed federalism and constitutional preemption issues surrounding state and local laws targeting immigrants.[24] The argument is that states and localities, in enacting laws that target immigrants, are encroaching on an area that is subject to federal control.[25] Generally, anti-immigrant laws are being challenged in state and federal courts on federal preemption grounds. As scholars attempt to address the constitutionality and legality of state and local laws that target immigrants, we are just beginning to analyze the impact that the laws have on the civil and human rights of both documented and undocumented immigrant populations.[26] Other social scientists, outside of legal scholars, have been comparing laws that target immigrants to Jim Crow laws.[27] For example, Kevin Johnson focuses in on the applicability of the intersectionality theory to federal immigration laws and how the federal immigration system has traditionally excluded minorities.[28] Scholarship in this area is still developing.

This paper takes the next step and focuses on a historical and legal comparative analysis of the discriminatory effects of state and local anti-immigrant laws outside of constitutional preemption issues. It addresses three thought-provoking questions, the answers to which will have profound consequences for civil rights in America: (1) How can the law amplify social norms and create a system that perpetuates tiered personhood? (2) How, throughout history, have the federal government's actions facilitated the proliferation of state and local action targeting

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ton, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 798 (2008).

24. *See* McKanders, *supra* note 11, at 6 n.23; Karla Mari McKanders, *The Constitutionality of State and Local Laws Targeting Immigrants*, 31 U. ARK. LITTLE ROCK L. REV. 579 (2009).

25. *See* McKanders, *supra* note 11, at 6 n.23; McKanders, *The Constitutionality of State and Local Laws Targeting Immigrants*, *supra* note 24.

26. *See* Marisa Bono, *Don't You Be My Neighbor: Restrictive Housing Ordinances as the New Jim Crow*, MOD. AM., Summer/Fall 2007, at 29, *available at* http://www.wcl.american.edu/modernamerican/documents/Bono.pdf; Kevin Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, LAW & CONTEMP. PROBS. (forthcoming) ("Along these lines, ordinances that bar landlords from renting to undocumented immigrants, including ones adopted by Hazleton, Pennsylvania, Valley Park, Missouri, and Farmer's Branch, Texas, have been characterized as the new Jim Crow. The enforcement of these ordinances may result in discrimination against national origin minorities, including U.S. citizens and lawful permanent residents as well as undocumented immigrants."); Rigel C. Oliveri, *Between a Rock and a Hard Place: Landlords, Latinos, Anti-Illegal Immigrant Ordinances, and Housing Discrimination*, 62 VAND. L. REV. 1, 2 (2008); Pruitt, *supra* note 10, at 135 (highlighting "the recent surge in Latina/o immigration into the rural South and consider[ing] how that socio-spatial milieu may influence legal matters at the local level"); Rose Cuison Villazor, *Broadening the Narrative of Property Law's Racialized History*, 87 WASH. U. L.R. (forthcoming 2010) (manuscript at 44) ("[Facially neutral anti-immigrant residential laws use] 'neutral' immigration language as the basis for denying property rights. [The] legislative history and surrounding circumstances demonstrate that the [ordinances] target a racial group, in this case, mainly Latino immigrants.").

27. *See* Lovato, *supra* note 18.

28. *See* Johnson, *supra* note 26.

vulnerable populations? and (3) Will allowing anti-immigrant laws to stand ultimately reinforce divisive cultural norms that exclude Latinos from participating in society? In executing a historical and legal comparison, the paper demonstrates how the law sends a message to society about what types of behaviors are socially acceptable. Although anti-immigrant laws are different in kind and degree from the violent, oppressive Jim Crow regimes, the key point of comparison for this paper is the amplification and legitimization effect that the law can have on social norms.

This paper will show that current hostility toward Latinos, documented and undocumented, is likely to only increase with the passage of more state and local anti-immigrant statutes and ordinances, and will fuel the creation of a system where Latinos are second-class members of society. Part I describes how the law can amplify social norms and create a racial caste system that perpetuates tiered personhood based on race, national origin, or ethnicity. Part II reviews and compares the history and the proliferation of Jim Crow laws with anti-immigrant laws to elucidate the many general and specific commonalities. Part III contrasts and compares the legislative purposes of Jim Crow laws with current state and local anti-immigrant laws and draws parallels between the two different types of laws. I conclude that if anti-immigrant laws are allowed to stand they will also reinforce divisive cultural norms that exclude Latinos from participating in society as full members. This paper calls for the recognition that systemic change may only come from a change in public opinion on the status of Latino immigrants.

I. TIERED PERSONHOOD OF AFRICAN AMERICANS AND LATINO IMMIGRANTS

At different times and in differing degrees in the history of the United States, the law has functioned to perpetuate tiered personhood based on race or ethnicity, forming different groups and classes of persons. The concept of personhood is "a placeholder for deeper concepts that ground our [society's] moral intuitions about human rights."[29] A "person" is defined as "any being whom the law regards as capable of rights and duties."[30] Thus, personhood rights are those rights granted regardless of citizenship status. While the Fourteenth Amendment provides that *all persons* are entitled to equality under the law, this constitutional requirement can be bypassed, essentially by defining certain groups as non-persons based on differences between the dominant and subordinate groups. Once differences are recognized, however inconsequential, and defined

29. Jens David Ohlin, *Is the Concept of the Person Necessary for Human Rights?*, 105 COLUM. L. REV. 209, 248–49 (2005).
30. BLACK'S LAW DICTIONARY 1178 (8th ed. 1999) ("Any being that is so capable is a person, whether a human bring or not, and no being that is not so capable is a person, even though he be a man. Persons are the substances of which rights and duties are the attributes. It is only in this respect that persons process juridical significance, and this is the exclusive point of view from which personality receives legal recognition." (quoting JOHN SALMOND, JURISPRUDENCE 318 (Glanville L. Williams ed., 10th ed. 1947)).

as belonging only to "the other," members of that specific group can all too easily be denied legal and social protections. Essentially, tiered personhood guarantees that the basic humanity of subordinate groups is denied because of their race, ethnicity, or nationality.

Jim Crow laws excluded African Americans from membership in social, political, and economic institutions within the United States and failed to recognize them as citizens and persons, based on their differences from the white race.[31] In a telling play on words, state and local anti-immigrant laws are now being called "Juan Crow" laws because of their similar ability to exclude both citizens and non-citizens from the rights of membership as persons within the United States.[32] Today, Juan Crow laws can be seen in several states and municipalities across the country in the form of laws and ordinances that adversely impact immigrant populations. Thus, entire Juan Crow systems are quietly developing as individual state and local laws are passed with the intent to exclude Latinos, regardless of their immigration status, from formerly homogenous states, cities, and towns.[33] Juan Crow systems are ignoring the requirement that, at a minimum, *every person* in the United States is guaranteed basic rights regardless of their citizenship status.[34]

The idea of denying personhood based on racial differences was carried to an extreme during the Jim Crow era. In essence, Jim Crow allowed one class of persons to classify other groups as different from themselves, and then use those differences, however irrelevant, to justify the exploitation of that "other group." This occurred even when the Reconstruction Amendments entitled African Americans to the full benefits of citizenship.[35] Jim Crow reified the notion that African Americans were

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31. Martin Delany, *Free Blacks and the Fugitive Slave Act*, *in* CIVIL RIGHTS SINCE 1787: A READER ON THE BLACK STRUGGLE 66, 66–69 (Jonathon Birnbaum & Clarence Taylor eds., 2000); *see also* R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 805 (2004) ("The American caste system [of] brutality and forced separation of the races effectuated the economic, political and social exploitation and subordination of generations of African Americans and other racial minorities.").
32. Lovato, *supra* note 18.
33. For a discussion of the impact of Latino immigration to new areas, see Brief of the Chief Justice Earl Warren Institute on Race, Ethnicity, and Diversity at University of California, Berkeley Law School as Amicus Curiae in Support of Plaintiffs-Appellees, Supporting Affirmance at 5, Lozano v. City of Hazleton, 496 F. Supp. 2d 477 (M.D. Pa. 2007), *appeal docketed*, no. 07-3531 (3d Cir. 2008); Roberto Suro, Sonya Tafoya & Rakesh Kochhar, Pew Hispanic Center, The New Latino South: The Context and Consequences of Rapid Population Growth (2005), *available at* http://pewhispanic.org/files/reports/50.pdf ("[S]izeable Hispanic populations have emerged suddenly in communities where Latinos were a sparse presence just a decade or two ago.").
34. For a discussion of tiered personhood, see Henry L. Chambers, Jr., *Dred Scott: Tiered Citizenship and Tiered Personhood*, 82 CHI.-KENT L. REV. 209, 209–10 (2007) (discussing the idea of tiered personhood). Chambers writes, "[t]he tiered personhood issue has two components. The first component focuses on guaranteeing that all persons receive the same set of rights that other persons receive. The second component focuses on ensuring that no set of persons is given a set of rights below the minimum rights guaranteed to all persons in all circumstances." *Id.* at 227.
35. Paul Moreno, *Racial Classifications and Reconstruction Legislation*, 61 J. S. HISTORY 271, 271 (1995) ("An important issue during Reconstruction concerned the status of race

inferior persons not worthy of having the same rights as white Americans. The same thing is beginning to occur with certain classifications of immigrants, mainly Latinos.

The foundation for a more Jim Crow–like system is forming as anti-immigrant sentiment is being roused through a surge of anti-immigration ordinances and statutes that spread fear of the undocumented "illegal immigrant."[36] The stereotypes used against undocumented Latino immigrants likewise extend to those with lawful status who are often assumed to be "illegal." The general public often conflates the different categories of immigration status and assumes that Latino is synonymous with "illegal."[37] The premise of discrimination based on one's race and difference from white Americans is the same premise that reinforced Jim Crow laws and the differential treatment of African Americans. These arguments begin with the nullification of constitutional personhood for illegal immigrants, and ultimately deny the essential humanity of illegal immigrants. Illegality then extends to all Latinos regardless of their actual status. These arguments are based on the groups' "outsider" status and their economic positioning in this country.

During the Jim Crow era, African Americans functioned as members of society who contributed to the social, economic, and political institutions, while being denied the privileges associated with membership in American society. Similarly, Latino immigrants, including undocumented immigrants, contribute to the social, economic, and political institutions by virtue of their being (i.e. working and living) in America.[38] In

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in this new plan of American citizenship. Were black Americans (and Americans of other races) to enjoy equal rights, privileges, and responsibilities with white Americans, or was black citizenship to be different — either a so-called second class citizenship or a specially protected and favored class of citizenship? In short, was the new American citizenship, constitutionally and legally defined, to be color-blind or color conscious?").

36. *Lozano* Second Amended Complaint, *supra* note 1, at 7. Current state statutes and municipal ordinances seem to be targeting "illegal immigrants." The laws define an illegal immigrant as "an alien who is not lawfully present in the United States, according to the terms of 8 U.S.C. § 1101 et seq." *See, e.g.*, HAZLETON, PA., ORDINANCE 2006-18, ILLEGAL IMMIGRATION RELIEF ACT ORDINANCE § 3(D) (Sept. 21, 2006) ("The City shall not conclude that a person is an illegal alien unless and until an authorized representative of the City has verified with the federal government, pursuant to 8 U.S.C. § 1373(a) that the person is an alien who is not lawfully present in the United States."); *see also Lozano*, 496 F. Supp. 2d at 539–41 (citing *Lozano* Second Amended Complaint, *supra* note 1). In the second amended complaint, the ACLU argued against Hazleton's Illegal Immigration Reform Act, stating that the illegal alien definition is very broad and includes many classes of immigrants in the United States. *Id.* The second amended complaint also states that the Immigration Ordinance sets forth a definition of "illegal aliens" that is incompatible with and contrary to federal law and that the Immigration Ordinance classifies numerous individuals as "illegal aliens," when their presence and/or employment in the United States does not violate Federal law. *Id.*

37. *See* STEPHEN LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 1350 (Foundation Press 4th ed. 2005).

38. Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 977–78 ("The undocumented immigrant has a second legal identity often ignored by theoretical and policy literature on clandestine immigration: she inhabits a sphere of circumscribed but real,

explaining the undocumented immigrant workers' outsider status, scholar Linda Bosniak states that:

> At the same time, the incidents of membership [the immigrant] enjoys are severely circumscribed by her status as outsider, constrained directly and indirectly by the state's exclusionary powers. The experience and identity of the undocumented worker are thus defined along two matrices, exclusion and membership. It is this duality that has characterized her existence in United States society.[39]

Thus, despite their contributions, undocumented immigrant's rights are severely restricted formally and informally.

In the United States, the law has operated to reinforce tiered personhood for Latinos and African Americans by sustaining a racially divided labor market. Historically, African Americans started out in agricultural peonage through slavery and sharecropping. After the Great Migration, African Americans moved from the South to the North and into industrial jobs. During the Civil Rights Movement, "[b]ecause most of the farmworkers in the rural South prior to 1960 were African American, any legislation on behalf of farmworkers tended to be viewed as undermining the hierarchical and racially charged social order preserved throughout the South with various Jim Crow laws."[40] This legacy continues today with the disparate treatment of Latino agricultural and industrial workers.[41] This structure remains in place and continues to subordinate minority groups who remain at the bottom of the economic ladder. The main point is that both groups are adversely affected allowing an "underclass" of underpaid laborers to exist within the market.[42]

The examination of the labor system, which creates a tiered system for unskilled labor for persons of color, is reinforced through laws that justify tiered personhood for laborers. African Americans and Latinos have been relegated to a particular social and economic status that reinforces a tiered system of personhood. Employers then hide behind a broken immigration system, similar to past forms of discrimination against African

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civil and social membership. In certain formal and practical spheres, the undocumented alien functions as an acknowledged member of the national community.").

39. *Id.* at 987.

40. Greg Schell, *Farmworker Exceptionalism Under the Law: How the Legal System Contributes to Farmworkers Poverty and Powerlessness*, *in* THE HUMAN COST OF FOOD, FARMWORKERS' LIVES, LABOR AND ADVOCACY 139 (Charles D. Thompson, Jr. & Melinda F. Wiggins eds., 2002).

41. Johnson, *supra* note 26.

42. Frances Ansley, *Doing Policy from Below: Worker Solidarity and the Prospects for Immigration Reform*, 41 CORNELL INT'L L.J. 101, 108 (2008) ("[Both African Americans and Latinos] are also hurt by a global regime that guarantees that mobility of capital while restricting the mobility of people, and pits worker against worker and community against community around the world. Such a regime drains the institutions of electoral democracy of their capacity to set ground rules for the conduct of businesses and the protection of human labor rights, yet many workers are apparently all too ready to blame 'those Mexicans' in their various guises for the economic insecurity that dominates the current scene.").

Americans, and hire immigrants at depressed wages without any substantive labor and employment rights.[43]

Historically, federal immigration laws perpetuated the tiered labor market by placing restrictions on unskilled labor migration from developing countries.[44] This is based on the premise that the United States would experience an influx of poor immigrants who will over-consume scarce public resources without restrictions.[45] Typically, nativist sentiment occurs during times when the economy is failing. Economist Benjamin M. Friedman posits that there is a correlation between economic distress and the rise of racist and nativist sentiments.[46] He argues that, "rising living standards nurture positive changes in political institutions and social attitudes."[47] He states that, "experience clearly suggests that the *absence* of democratic freedoms *impedes* economic growth, and that the resulting stagnation in turn makes a society even more intolerant and undemocratic."[48]

Typically, during difficult economic times, immigrants are viewed as a threat to American jobs and workers' rights.[49] For example, in the late seventies, California passed the California Labor Code provision "[which] provided[ed] that '[n]o employer shall knowingly employ an alien who is not entitled to lawful residence in the United Sates if such employment would have an adverse effect on lawful resident workers.'"[50] Support for this provision was based on the belief that the em-

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43. *See* Kevin R. Johnson & Bill Ong Hing, *The Immigrant Rights Marches of 2006 and the Prospects for a New Civil Rights Movement*, 42 HARV. C.R.-C.L. L. REV. 99, 123–24 (2007); Julie L. Hotchkiss & Myriam Quispe-Agnoli, *The Labor Market Experience and Impact of Undocumented Workers* 28–29 (Federal Reserve Bank of Atlanta, Working Paper No. 2008-7c, 2008) ("In Los Angeles, young African Americans and those with limited education have experienced a small increase in unemployment due to the influx of Latina/o immigrants with limited education. However, that increase may have resulted from racial discrimination by employers. When low-skilled Latina/o workers became available employers hired them and rejected African American job applicants."); *see also id.* ("Given the limited employment and grievance opportunities of undocumented workers, employers are likely to enjoy some monopsony wage-setting power, which is expected to put extra downward pressure on wages in labor markets that employ undocumented workers.").
44. *See* Johnson, *supra* note 26, at 43 (citing the 1965 Immigration Act as removing quotas based on impermissible categories such as race).
45. *Id.* at 12.
46. BENJAMIN M. FRIEDMAN, THE MORAL CONSEQUENCES OF ECONOMIC GROWTH 3–18, 79–102 (Alfred A. Knopf 2005); *see also* Johnson & Ong Hing, *supra* note 43, at 123–24.
47. FRIEDMAN, *supra* note 46, at 11–12.
48. *Id.* at 16.
49. *See* S. POVERTY LAW CTR., CLOSE TO SLAVERY: GUESTWORKER PROGRAM IN THE UNITED STATES 3, http://www.splcenter.org/pdf/static/Close_to_Slavery.pdf (last visited Apr. 8, 2010) ("[T]he Great Depression arrived and Mexican workers were seen as a threat to American jobs."); *see also id.* at 6 (stating that H-2 guest worker programs were designed to address this by prior approval from the Department of Labor to bring in guest workers, so employers must show that "there are not sufficient US workers who are able, willing, qualified and available to perform work at the place and time needed and the wages and working conditions of workers in the United States similarly employed will not be 'adversely affected' by the importation of guest workers").
50. DeCanas v. Bica, 424 U.S. 351, 351 (1976).

ployment of undocumented workers during "times of high unemployment deprives citizens and legally admitted aliens of jobs; acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions."[51] Given the influence the economy may have on anti-immigrant sentiments, more attention must be paid to laws that target immigrants, in particular Latinos, during depressed economic times.

The idea codified in early federal immigration laws restricting the immigration of unskilled laborers from developing countries can be likened to the same sentiment articulated by Justice Taney in *Dred Scott v. Sanford*.[52] Authoring the Supreme Court opinion, Justice Taney noted the concern that if African Americans were given citizenship rights they would have "the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished."[53] In the same respect, African Americans experienced the dual identity of membership and exclusion from rights enjoyed by other persons. During the Post-Reconstruction era, the law operated to restrict African Americans' migration, as it was believed that African Americans would also engage in the over-consumption of public goods and resources.

Although different in methodology, purpose, and historical foundation,[54] the common element that runs through Jim Crow and anti-immigrant laws is the commitment of the dominant class to maintain inequality based on race, ethnicity, linguistic ability, or nationality and the intent to exclude "the other" — African Americans and Latinos — from full membership in American society. Both types of laws deprive African Americans and Latinos of equality under the Fourteenth Amendment, even when this equality is clearly guaranteed to all persons within

51. *Id.* at 356–57.
52. 60 U.S. 393 (1856).
53. *Id.* at 417.
54. Paul D. Carrington, *Diversity!*, 1992 UTAH L. REV. 1105, 1156 ("There might be a principled basis for distinguishing groups if one were to limit the compensation to genuinely severe disadvantage imposed by law, or by the government of the United States. On this basis, one could reasonably compensate those victimized by slavery without attempting to compensate for lesser wrongs."); Gabriel J. Chin, *Segregation's Last Stronghold: Race, Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 23–24 (1998) ("[S]ome defenders of race conscious policies . . . suggest that African Americans may be the only group with a history of discrimination clearly worthy of redress."). *But see* STEPHEN STEINBERG, THE ETHNIC MYTH: RACE, ETHNICITY AND CLASS IN AMERICA 269 (Beacon Press 3d ed. 2001) (1981) ("Only in the most general sense can it be claimed that Asians, West Indians and African Americans are all 'races' that have been victims of racial stereotyping and discrimination. Although true, this proposition obscures the unique oppression that blacks have endured throughout American history, beginning with two centuries of slavery and another century of official segregation, reinforced by the lynch mob and systematically unequal treatment in all major institutions.").

the jurisdiction of the United States regardless of citizenship and immigration status.[55]

More specifically, anti-immigrant laws are being used to codify discriminatory social norms to target Latino immigrants. The history, content, and legal decisions of Jim Crow must be closely compared with those of anti-immigrant laws to see exactly how similar the emerging anti-immigrant laws are to the former Jim Crow systems and to avoid further entrenching a system of tiered personhood based on race, national origin, or ethnic origin. The anti-immigrant position in the debate over illegal immigration is quite clear on this point: illegal immigrants are non-citizens and thus deserve little respect, due process, and lesser protection of the law. What this viewpoint fails to recognize, however, is that there is a minimum set of rights undocumented Latino immigrants must receive by virtue of their personhood and their physical presence within the jurisdiction of the United States.[56] The anti-immigrant laws are just one of the ways that American law has made Latino immigrants feel unwelcome and reinforces tiered personhood. Many of these efforts are an attempt to legalize and increase pressure so that both documented and undocumented Latino immigrants will leave the country.[57] Together, these efforts deprive Latino immigrants of their constitutionally guaranteed personhood.

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55. U.S. CONST. amend. XIV; *see also* Devon W. Carbado, *Racial Naturalization*, 57 AM. Q. 633 (2005). Carbado writes, "[R]ace is implicated in naturalization not only as a prerequisite — that is as a basis for determining who gets to become an American citizen. Race also determines the kind of American citizenship status one occupies." *Id.* at 641. Additionally, he states that "racism helps to determine who we are as Americans and how we fit into the social fabric of American life. Racism, in other words, is always already a part of America's social script, a script within which there are specific racial roles and or identities for all of us. None of us exists outside of or is unshaped by the American culture racism helps to create and sustain." *Id.* at 651; *see also* Plyler v. Doe, 457 U.S. 202, 210–13, 229–30 (1982) (asserting the concept that all *persons* within the jurisdiction of the United States shall be afforded equal protection of the law, but specifically applying this concept to undocumented immigrant children).

56. U.S. CONST. amend XIV. *But see Plyler*, 457 U.S. at 210 ("Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments. Indeed, we have clearly held that the Fifth Amendment protects aliens whose presence in this country is unlawful from invidious discrimination by the Federal Government.") (citing Mathews v. Diaz, 426 U.S. 67, 77 (1976); Shaughnessy v. Mezei, 345 U.S. 206, 212 (1953); Wong Wing v. United States, 163 U.S. 228, 238 (1896); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886)). Because the holding in *Plyler* is limited to undocumented children, this case leaves open whether undocumented adults are protected under the Fourteenth Amendment. *See Plyler*, 457 U.S. at 220 ("At the least, those who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including, but not limited to, deportation. But the children of those illegal entrants are not comparably situated.").

57. *See generally* Kris Kobach, *Reinforcing the Rule of Law: What States Can and Should Do To Reduce Illegal Immigration*, 22 GEO. IMMIG. L.J. 459, 471 (2008) (supporting state and local anti-immigrant laws and forcing immigrants to self-deport). *See also* McKanders, *supra* note 11, at 4 (stating that the purpose of anti-immigrant laws is to force immigrants to self-deport or leave the state).

II. JIM CROW AND STATE AND LOCAL ANTI-IMMIGRANT LAWS

A. *The Reconstruction Amendments and Jim Crow Laws*

Jim Crow specifically refers to the segregation of African Americans and whites that occurred during the post-Reconstruction era, between the mid-1870s and the 1960s.[58] The Reconstruction Amendments were essentially the first attempt by the United States government to recognize the personhood of African Americans. First, the Thirteenth Amendment, passed in 1865, officially abolished slavery.[59] Next, in 1868, the Fourteenth Amendment was passed and essentially overturned *Dred Scott*. Last, in 1870, the Fifteenth Amendment was passed and prohibited state and local governments from preventing a citizen from voting based on the citizen's race, color, or previous condition of servitude.[60] Congress, based on its newfound authority under the Reconstruction Amendments, also passed the Congressional Civil Rights Acts to ensure enforcement of the amendments.[61] However, many states, especially in the South, viewed the amendments as an effort by the federal government to infringe on states' rights to determine state citizenship rights.[62] Jim Crow laws arose in reaction, and allowed states to circumvent the restrictions of the Reconstruction Amendments.[63] Although Jim Crow laws seemed to clearly violate the newly enacted constitutional amendments and the laws that accompanied them, post-Reconstruction the federal courts narrowly construed the Reconstruction Amendments and allowed states and localities to pass Jim Crow laws.[64] After the Reconstruction Amendments were passed, Congress was not able to enforce the amendments through legis-

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58. Smythe, *supra* note 16, at 45. *See generally* 4 RACE, LAW AND AMERICAN HISTORY, 1700–1990, *supra* note 16; C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 54 (Oxford Univ. Press 1955).
59. Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1324 (1952).
60. U.S. CONST. amend. XV, § 1.
61. Gressman, *supra* note 59, at 1333.
62. Joseph B. James, *Southern Reaction to Proposal of the Fourteenth Amendment*, 22 J. S. HIST. 477, 490 (1956).
63. *See* Gressman, *supra* note 59, at 1342.
64. *Id.* at 1347 (discussing the strict construction of the Reconstruction Amendments). Gressman writes:

    > [The framers of the Fourteenth Amendment] meant well. But their minds moved faster and more precisely than their hands. The result was that the loose imprecise language that had been written into the constitutional additions, particularly the Fourteenth Amendment, permitted the enemies of nationalized civil rights to persuade the strict constructionists of the judiciary that the amendments did not say what the framers had meant them to say. Soon the bold motives and the brave arguments of the architects of the constitutional revolution in civil rights were forgotten under the din of a judicial rewriting of their efforts.

    Id. at 1337; *see also* DAVID A.J. RICHARDS, CONSCIENCE AND THE CONSTITUTION: HISTORY, THEORY, AND LAW OF THE RECONSTRUCTION AMENDMENTS 23–24 (Princeton Univ. Press 1993) (discussing James Madison's ideas on federalism, especially that the federal government was not the one to fear because politics on a national scale would dilute local prejudices and factions). Richards describes Madison's beliefs about the division of power between the states and the federal government, "[f]ederal institutions, regulated by a principle of representation of national scope were not the institutions most to be feared for potential abuse of human rights; their

lation, as the Southern states viewed congressional action as an infringement on their rights as states.[65]

Even the Supreme Court did not apply the Reconstruction Amendments in a manner that invalidated the constitutionality of Jim Crow laws. The Court's failure to uphold the Reconstruction Amendments signaled to Southern legislators that they could enact segregation legislation.[66] The Northern states also acquiesced in passing discriminatory laws.[67] Northern acquiescence coupled with the federal government's limited actions to protect the rights of African Americans signaled that Jim Crow laws were acceptable.[68] Accordingly, even after the Reconstruction Amendments were passed, states and localities still enforced both *de facto* and *de jure* discriminatory practices against African Americans.[69]

During the first thirty years of Jim Crow laws, there was a significant erosion of the rights promised to African Americans under the Reconstruction Amendments starting in the Southern states and cities. The law operated to reinforce the second-class status of African Americans and Latinos as property. This was the beginning of how the law reified concepts of racial inequality. First, African Americans and Latinos were valued according to the cheap labor they supplied. Second, court decisions and laws enacted during this time reinforced African American and Latinos' second-class citizenship status. Legal scholar Devin Carbado explains the process of learning one's role as second-class citizen as the process of naturalization that occurs for minorities in the United States.[70] He notes that "neither the granting of formal citizenship to blacks nor the eradication of Jim Crow has eliminated the constructive role racism plays in naturalizing black people into their subordinated American identities."[71]

During this period, state and local legislatures began passing Jim Crow laws out of dissatisfaction with the federal government's attempts

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representative structure was likely to ensure an impartiality on issues of rights and the public interest." *Id.*

65. *See generally* Gressman, *supra* note 59, at 1323–24 ("This great controversy [the slavery debate] resulted in three new constitutional amendments and five congressional statutes supplementary thereto, all of which went beyond the immediate problems created by the emancipation of the Negro and caused a most profound shift in the status of the federal government relative to the civil rights of all inhabitants. The abolitionists and the Republican party reacted violently to the feeling of anti-federalism which had so long marked this area of human freedom. The states' rights doctrine suffered a complete albeit temporary eclipse. The national government no longer was viewed as the prime threat to civil liberties. Rather it was looked upon as the defender of the individual from assaults on his freedom stemming from state or private action.").
66. *See generally* Chambers, *supra* note 34.
67. Michael J. Klarman, *The Plessy Era*, 1998 SUP. CT. REV. 303, 312 (attributing the proliferation of discriminatory Northern laws to the increase in Black migration to North during the 1890s: "Without northern acquiescence, southern racial practices could not have become as oppressive as they did.").
68. *See id.* at 311–15; *see also* Plessy v. Ferguson, 163 U.S. 537 (1896); Civil Rights Cases, 109 U.S. 3 (1883); Slaughter House Cases, 83 U.S. 36 (1873).
69. *See* Klarman, *supra* note 67, at 312.
70. Carbado, *supra* note 55, at 645.
71. *Id.*

to force all states to acknowledge the personhood and rights of African Americans.[72] Jim Crow laws were essentially a response to Reconstruction and the constitutional amendments that arose out of it.[73] The drafters of the Reconstruction Amendments intended to explicitly acknowledge the personhood of all people, regardless of race, and "create a profound shift in the status of the federal government relative to the civil rights of all inhabitants."[74]

Given that *de facto* Jim Crow segregation practices were already very common, legislative action codifying those practices was inevitable.[75] During the early years of Jim Crow, *de facto* practices constituted the bulk of segregation practices in public accommodations such as railroads, jails, health care facilities, hotels, and restaurants. Jim Crow laws assured the white population that although they would be sharing citizenship with African Americans, they could force African Americans into separate and inferior spheres of existence. Though forced to physically share their community, the white class would remain homogenous. The purported purpose of these laws was to protect "public health, morals, better education, peace, and good order."[76] Although states and localities purported to pass laws to protect the health, safety and welfare of its citizens, the true purpose was much more sinister: to deprive African Americans of personhood and exclude them from society — denying them the fundamental rights to which they were entitled.[77]

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72. *See* Chambers, *supra* note 34, at 231 ("[T]he Reconstruction Amendments were passed to write into the law a single tier of citizenship and a single tier of personhood.").

73. Gressman, *supra* note 59, at 1323–24.

74. *Id.* at 1323. *See generally* RICHARDS, *supra* note 64, at 116 ("The abstract moral judgment, underlying the thirteenth amendment, expresses the truth, following Locke, that persons have inalienable human rights; the legitimacy of political power must be tested against respect for such rights, and revolution is justified against forms of political power that fail to respect such rights. Locke's argument for human rights and associated limited on political power must be constructed within the structure of his seminal defense of an inalienable right to conscience . . . .").

75. NEIL R. MCMILLEN, DARK JOURNEY: BLACK MISSISSIPPIANS IN THE AGE OF JIM CROW 9 (Univ. of Ill. Press 1990) ("Beyond these formal provisions for the recognition of caste, however, racial segregation in Mississippi was largely a matter of custom.").

76. *See, e.g.*, ADAM FAIRCLOUGH, RACE & DEMOCRACY, THE CIVIL RIGHTS STRUGGLE IN LOUISIANA 169–70 (Univ. of Georgia Press 2008) (1995) ("Three bills designed to circumvent *Brown* became law [in Louisiana] after minimal debate: one restricted state support to all but segregated schools; another empowered local school boards to assign pupils to school on an individual basis; a third mandated segregated schools under the 'inherent police power of the state' as a means of *preserving 'public health, morals, better education, peace, and good order.'*") (emphasis added); STATES' LAWS ON RACE AND COLOR 29 (Pauli Murray ed. 1951) ("That the experience of this state in reconstruction times and since has shown that no good can come from changing the normal course of evolution and development of race by arbitrary means, and that such attempts lead only to violence, misunderstanding and destruction of the normal and happy relationship now prevailing between the races in this State, and which will continue to prevail here if they are left in peace and harmony to work out their mutual problems.") (citing Alabama General Acts 1945 Senate Resolution).

77. *Infra* Part III.

The impact of Jim Crow on Latinos is largely overlooked. Even though African Americans were the primary targets of the segregation laws, Latinos were also affected.[78] Jim Crow especially affected Mexicans living in the South, particularly in Texas.[79] For example, Mexican Americans went to segregated schools to "ensur[e] that Mexican origin students would become loyal and disciplined workers."[80] However, unlike African Americans, "Mexican Americans . . . were segregated by custom rather than law, and they therefore challenged segregation head on, no matter how equal the [separate] facilities as an unlawful violation of the Fourteenth Amendment."[81]

Further, Latinos were viewed as property and segregated accordingly to their value as laborers in America, just as African Americans were valued only based on the cheap labor they provided.[82] "Mexican and Mexican-American workers were paid substandard wages and became the southwest's agricultural working class. They were left to live in the few places they could afford and were welcome in — either *barrios* (ethnically-dense neighborhoods) or *colonias* (rural shanty towns)."[83]

During the Jim Crow era, public accommodations such as railroads, jails, health care facilities, hotels, and restaurants were segregated for La-

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78. Mendez v. Westminster Sch. Dist., 64 F. Supp. 544, 545 (S.D. Cal. 1946).
79. Michael A. Olivas, Hernandez v. Texas: *A Litigation History*, *in* "COLORED MEN" AND "HOMBRES AQUI": HERNANDEZ V. TEXAS AND THE EMERGENCE OF MEXICAN-AMERICAN LAWYERING 209, 210 (Michael A. Olivas ed., 2006) ("It was, in other words, the Deep Jim Crow South but with Mexicans also occupying the bottom rungs of the ladder along with Blacks.").
80. JAMES A. FERG-CADIMA, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, BLACK, WHITE AND BROWN: LATINO SCHOOL DESEGREGATION EFFORTS IN THE PRE- AND POST-BROWN V. BOARD OF EDUCATION ERA 8 (2004) ("Farmers sat on school boards where they could put their educational philosophy into effect. As an instrument of exploitation, the schools often seemed to be hardly more than an extension of the cotton field or the fruit packing shed.") (citing RUBÉN DONATO, THE OTHER STRUGGLE FOR EQUAL SCHOOLS: MEXICAN AMERICANS DURING THE CIVIL RIGHTS ERA 12 (SUNY Press 1997)).
81. Neil Foley, *Over the Rainbow:* Hernandez v. Texas, Brown v. Bd. of Educ., *and* Black v. Brown, 25 CHICANO-LATINO L. REV. 139, 141 (2005); *see also* FERG-CADIMA, *supra* note 80, at 6 ("At the end of the U.S.-Mexico War of 1848, borders shifted but people did not. When Mexico ceded the territory that today is California, New Mexico, Nevada and parts of Colorado, Utah, and Arizona, and also approved the prior annexation of Texas, people of Mexican descent in the Southwest faced segregation in all aspects of life. Under the Treaty of Guadalupe Hidalgo, which ended the war, Mexican nationals remaining in the ceded territory became U.S. citizens one year later and thereby became the first Mexican Americans."); Ian Haney Lopez & Michael A. Olivas, *Jim Crow, Mexican Americans, and the Anti-Subordination Constitution: The Story of* Hernandez v. Texas, *in* RACE LAW STORIES 273, 290 (Rachel F. Moran & Devon Wayne Carbado eds., Found. Press 2008) (discussing the evidence that Mexican Americans were in an inferior, Jim Crow–like position, including exclusion from business and community groups, restaurants, and bathrooms, as well as segregation from schools for children of Mexican descent).
82. FERG-CADIMA, *supra* note 80, at 16 ("Santa Ana[, California's] 'Mexican schools' operated on half-days during walnut-picking season to accommodate local agribusiness demands for child labor and yet received full per-pupil funding from the state.").
83. *Id.* at 7 (citing GILBERT G. GONZALEZ, CHICANO EDUCATION IN THE ERA OF SEGREGATION 19–20 (Companion Press 1990)).

tinos as well as African Americans. In the South, signs were posted barring both Mexican Americans and African Americans from public accommodations. In Texas, separate bathrooms were marked with two signs: one reading "Colored Men" and one reading "Hombres Aqui," or "Men Here."[84] Other commonly placed signs stated "Mexicans and Niggers Stay Out," "Mexicans and Dogs not Allowed in Restaurants," and "No Mexicans Served."[85] "Drinking fountains and cafeterias were segregated too. Mexican Americans were also on occasion lynched and denied burial in white cemeteries. . . . Mexican and Puerto Rican families were denied access to public parks, playgrounds and swimming pools."[86]

The brunt of Jim Crow's vicious cruelty, however, was born by African Americans and was reflected in Supreme Court decisions. The Supreme Court became involved in the deprivation of their personhood in *Dred Scott v. Sanford*.[87] The facts are familiar: In 1857, a black slave who moved to, and resided in, a free state sued for his freedom.[88] In rendering the decision that, as a person of African descent, Mr. Scott could never be a citizen or be protected by the Constitution, Supreme Court Justice Taney opined that "a black man had no rights which the white man was bound to respect."[89] The Supreme Court ultimately held that Scott was a slave who had no right to freedom and classified him as property under the U.S. Constitution.[90] This decision entrenched the idea that African Americans were property not entitled to citizenship, even in states where slavery was illegal.[91]

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84. Haney Lopez & Olivas, *supra* note 81, at 281. In Texas, discriminatory jury practices also presented grave problems for Mexican Americans, and became an issue in *Hernandez v. Texas*, 347 U.S. 475 (1954). *Id.* at 284 ("The idea that 'Mexicans' might judge whites deeply violated Texas' racial caste system — and placing Mexican Americans on juries became critical to the caste system's demise."). LULAC, the League of United Latin American Citizens, is one of the oldest organizations in the United States to work on behalf of Hispanics to combat discrimination. This organization was the leading Hispanic organization when *Hernandez* was being litigated. *Id.* at 276. LULAC "hoped *Hernandez* would topple a key pillar of Jim Crow: the belief that whites should judge all but be judge by none but themselves." *Id.* at 284.
85. Cisneros v. Corpus Christi Indep. Sch. Dist., 324 F. Supp. 599, 612 n.38 (S.D. Tex. 1970) (citing the testimony of Dr. Thomas Carter, Professor of Education and Sociology, University of Texas in El Paso).
86. *Id.*
87. 60 U.S. 393 (1857).
88. *Id.* at 397–400.
89. *Id.* at 407. Justice Taney also opined:

    The words 'people of the United States' and 'citizens' are synonymous terms . . . . The question before us is, whether the class of persons described in the plea in abatement [blacks] composes a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the U.S.

    Id. at 404.
90. *See id.*
91. Carbado, *supra* note 55, at 643 ("*Dred Scott* is problematic not only because it excludes people of African ancestry (from citizenship) but also because it includes them (as American [property]).") (alterations in original) (citation omitted).

In *Dred Scott,* the Supreme Court clearly articulated that African Americans were not included or intended to be included as citizens or persons entitled to protections under the law. In the opinion of historian Stetson Kennedy, the *Dred Scott* opinion confirmed the idea that "no one of slave descent, free or not, could ever claim American citizenship, even though born in America."[92] Moreover, the Supreme Court classified African Americans as property, thus totally prohibited from ever obtaining any rights under the Constitution.[93] Scholar Henry Chambers also posits that, "[t]he structure of Taney's argument, with its clear delineations that treated some groups of citizens differently than other groups of citizens and that treated some groups of persons differently than other groups of persons, recognized and tacitly endorsed tiered citizenship and tiered personhood."[94]

By 1868, most African Americans had been emancipated. However, the victory was bittersweet, as the subsequent passage of Jim Crow laws guaranteed second-class citizenship.[95] During this period, race and ethnicity were the determining factors that accorded social status, privileges, and rights in America. Race and ethnicity determined whether a person was entitled to first-class citizenship. This system was used to maintain subordination.[96] The "law stands out during this period as a critical sphere in implementing the denial of citizenship *and* in sustaining democratic citizenship itself through resistance communities."[97] Accordingly, the term Jim Crow is now "commonly used to refer to segregation and discrimination."[98]

States and localities immediately questioned the legality of the Reconstruction Amendments and began to enact discriminatory laws against African Americans.[99] Southern states believed that the Amendments were the federal government's attempt to control the states, and refused to cooperate and dismantle segregation.[100] Thus, although these amendments gave African Americans formal citizenship rights, Southern states still held deeply rooted prejudices against African Americans, and in

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92. STETSON KENNEDY, JIM CROW GUIDE TO THE U.S.A. 28 (Lawrence & Wishart Ltd. 1959).
93. *Dred Scott,* 60 U.S. at 407.
94. Chambers, *supra* note 34, at 211.
95. Gressman, *supra* note 59, at 1342, 1347; *see also* Carbado, *supra* note 55, at 639 ("By and large, the literature on second-class citizenship understand this status to be constituted by (a) the acquisition of the legal or formal rights of citizenship (such as the right to vote) and (b) economic and social inequality. Thus, in the context of Jim Crow, both black Americans and Japanese Americans were second class citizens; while both groups had acquired formal citizenship as legal status, neither group had achieved social equality.").
96. *See generally* James W. Fox, Jr., *Intimations of Citizenship: Repression and Expressions of Equal Citizenship in the Era of Jim Crow,* 50 How. L.J. 113, 123–30 (2006).
97. *Id.* at 118.
98. Smythe, *supra* note 16, at 48.
99. *See* Robert J. Kaczorowski, *To Begin the Nation Anew: Congress, Citizenship, and Civil Rights after the Civil War,* 92 AM. HIST. REV. 45, 50–51 (1987) ("In their constitutions and laws, Southern states refused to recognize that blacks were citizens possessing the natural rights of free people. State officers commonly failed or refused to protect the personal safety and property of blacks.").
100. *Id.*

practice the citizenship rights were denied. Even the formal rights became restricted, as federal court judges strictly construed federal authority under the Reconstruction Amendments to only prohibit state sponsored discriminatory acts.[101] This furthered private discriminatory acts.[102] More specifically, states did not agree with the federal government's power to enforce broad civil rights against the states.[103] It is evident that judicial opinions and laws impeded the intended advances for African Americans under the Reconstruction Amendments.

In 1896, *Plessy v. Ferguson*,[104] known for institutionalizing the "separate but equal" doctrine[105] dealt a serious blow to the hope that African Americans would achieve equal status with whites. The Reconstruction Amendments began to appear to be nothing more than an empty promise. *Plessy* legalized segregation and discrimination against African Americans. The Supreme Court, with a 7-1 majority, upheld a Louisiana law that provided separate train cars for blacks and whites.[106] Plaintiff Plessy was prosecuted for refusing to move to the colored section of a railroad car.[107] The Court found that "the Fourteenth Amendment could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality or commingling of the two races upon terms unsatisfactory to either."[108] The *Plessy* Court made it clear that the Fourteenth Amendment would not be interpreted to abolish natural, social, and cultural practices that reinforced racial segregation.[109]

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101. Gressman, *supra* note 59, at 1337 ("[O]nly national citizenship received any protection from the privileges and immunities clause and . . . such national citizenship did not comprehend any of the fundamental rights of the individual.") (citing The Slaughterhouse Cases, 83 U.S. 36 (1873)); *id.* at 1339 ("[T]he first section of the Fourteenth Amendment consisted exclusively of restrictions upon the states and that it does not 'add anything to the rights which one citizen has under the Constitution against another.'") (citing United States v. Cruikshank, 92 U.S. 542 (1875)); *id.* at 1340 ("[P]roprietors [of inns, conveyances, theaters, and anyone who was not an agent of the state] were free to discriminate so long as their discriminatory actions had not been affirmatively authorized or permitted by state law.") (citing Civil Rights Cases, 109 U.S. 3 (1883)); *id.* ("[T]he Supreme Court declared void the important criminal conspiracy section of the Ku Klux Klan Act of 1871 . . . . Since the Fourteenth Amendment was construed to concern only state action, it could not be used to sustain such a statutory prescription of private action.") (citing United States v. Harris 106 U.S. 629 (1883)). According to Gressman, "[t]he inevitable effect of these decisions was to transfer back to the states the primary responsibility for the protection of basic civil rights, a result which the legislators of 1866 to 1875 had expressly sought to prevent. The South was thereby enabled to create and perpetuate its rigid rules of segregation." *Id.* at 1342.
102. Gressman, *supra* note 59, at 1340–42.
103. *Id.* at 1338–40 (citing the Civil Rights Acts of 1870, the Klu Klux Klan Act of 1871, and the Civil Rights Act of 1875).
104. 163 U.S. 537 (1896).
105. WOODWARD, *supra* note 58, at 54 ("In *Plessy v. Ferguson*, decided in 1896, the Court subscribed to the doctrine that 'legislation is powerless to eradicate racial instincts' and laid down the 'separate but equal' rule for the justification of segregation.").
106. *Plessy*, 163 U.S. at 539.
107. *Id.* at 538.
108. *Id.* at 544.
109. *Id.* at 551.

The Supreme Court's interpretation of the Reconstruction Amendments, along with the public sentiment towards African Americans, formed bookends that denied African Americans citizenship: African Americans were excluded from the most basic benefits of membership within American society. During the Jim Crow era, legalized segregation demonstrated how the law can operate to reinforce a tiered class system of rights based on one's race.[110] The law can create a dual identity for people who reside within the U.S. jurisdiction but are denied benefits and protections typically granted to those who live within the country.

B. *Proliferation of Anti-Immigrant Laws*

Like Jim Crow laws, anti-immigrant laws are largely an attempt to exclude "undesirables" from once homogenous communities. The problem is that if the federal government is similarly deferential to state and local governments as it was during the Jim Crow era, this will result in the denial of citizenship rights and tiered personhood for Latino immigrants, just as it did for African Americans.[111] In addition, similar to *Dred Scott*'s holding that African Americans were still property even in free states, anti-immigrant laws create a system of tiered personhood where both documented and undocumented Latino immigrants are denied all rights. Essentially, the *Dred Scott* Court allowed our society to perpetuate tiers of citizenship and personhood similar to anti-immigrant laws. Chambers indicates that the *Dred Scott* opinion "allowed tiers of citizenship and tiers of personhood to exist, with various groups of citizens favored over others . . . . [It] allowed governments to pick and choose who was allowed to exercise citizenship rights and rights of personhood with little or no justification for [its] choices."[112]

It is important to note that the U.S. immigration system has not been free from the taint of racial discrimination. Historically, U.S. immigration laws have prohibited the immigration of groups that are deemed inferior races — including persons of color and Latinos.[113] In the late 1800s and

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110. Fox, *supra* note 96, at 116 (defining a holistic version of citizenship: "This vision of citizenship took account of multiple social activities from areas as diverse as family, religion, political action, commerce, and education (to name just a few), and sought to bring freedmen, and to a lesser extent, freedwomen, into this citizenship through the active participation of the federal and state government.").

111. *See supra* Part I.

112. *See* Chambers, *supra* note 34, at 231.

113. *History of Immigration Regulation in America*, MEXICAN TRUCKER, http://mexicotrucker.com/mexican-truck-docs/history-of-immigration-regulation-in-america (last visited Apr. 3, 2010). *See also* MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 37–39 (Princeton Univ. Press 2003) (Congress often aimed such legislation at Asians. Examples include the 1882 Chinese Exclusion Act; the Gentlemen's Agreement of 1907, which prevented the immigration of Japanese laborers; and the 1924 Immigration Act's exclusion of "aliens ineligible for citizenship," which included "peoples of all the nations of East and South Asia."); Kitty Calavita, *The Paradoxes of Race, Class, Identity, and "Passing": Enforcing the Chinese Exclusion Acts: 1882–1910*, LAW & SOC. INQUIRY 1, 4 (2000) (An 1877 Congressional report demonstrates the racial attitudes that drove these policies: "there is not sufficient brain capacity in the Chinese race to furnish motive power for self-government. Upon the point of morals, there is no Aryan or Euro-

early 1900s, the federal government passed the Chinese Exclusion Act, which was intended to be a 10-year ban on Chinese immigration, passed in response to the gold supply drying up in California.[114] The Act clearly constituted discrimination on the basis of race and nationality, and "[r]eflect[ed] a society dominated by the proposition that racial identity determined one's capacity to participate in society, however, late nineteenth-century immigration law enacted much more robust restrictions on immigration from countries identified by contemporary ideology as populated by 'inferior' races."[115] Mexican Americans, historically referred to as "part of an 'unstable' mongrel race," were also subjected to similar immigration restrictions.[116]

One of the first discriminatory federal immigration acts was the 1870 Naturalization Act. "[W]hen Congress adopted the Naturalization Act of 1870 as a corollary of the Thirteenth Amendment abolishing Negro slavery, it not only made possible the naturalization (in negligible numbers) of 'aliens of African nativity and persons of African descent,' but at the same time, at the insistence of California, limited other groups eligible for naturalization to 'free white persons.'"[117] Specifically, federal immigration laws have operated to exclude the poor and working classes from entering the United States.[118] It was only with the passage of the 1965 Immigration Act that the facially discriminatory national-origins quotas were abolished from immigration laws enacted in 1924.[119]

Current state and local anti-immigrant laws should be examined in relation to Jim Crow laws because, as evidenced by the federal immigration system, laws that target immigrants are not free from the taint of racial discrimination. Viewing state and local activity against this historical backdrop, there should be heightened concerns over permitting states and localities to exercise unfettered discretion in enacting laws that target Latino immigrants.[120]

As state and local entities begin enacting laws targeting immigrants, even more similarities to Jim Crow laws are arising. Currently there is a tension between the federal government and state and local entities, which claim anti-immigrant statutes and ordinances are valid exercises of the states' Tenth Amendment police powers,[121] which is similar to the tension that existed during the Jim Crow era. Jim Crow laws involved state

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pean race which is not far superior to the Chinese."); Mae M. Ngai, *The Lost Immigration Debate: Border Control Didn't Always Dictate Policy*, BOSTON REV., Sept. 2006, *available at* http://bostonreview.net/BR31.5/ngai.php.

114. James F. Smith, *A Nation that Welcomes Immigrants? An Historical Examination of United States Immigration Policy*, 1 U.C. DAVIS J. INT'L L. & POL'Y 227, 229–30 (1995).

115. Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 557–58 n.86 (M.D. Pa. 2007).

116. Ngai, *The Lost Immigration Debate*, *supra* note 113 ("The nativists, who opposed Asians and southern and eastern Europeans as racial undesirables, also opposed Mexicans, whom they considered an unstable 'mongrel' race.").

117. KENNEDY, *supra* note 92, at 38.

118. Johnson, *supra* note 26, at 3.

119. *Id.*

120. *Supra* section II.B.

121. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

and local refusal to adhere to the Reconstruction Amendments, while anti-immigrant laws involve the relationship between the federal, state, and local governments and the states and localities defiantly enacting laws in reaction to the federal government's failure to enact comprehensive immigration reforms.[122] Some state and local legislators allege that the federal government's inaction has adversely affected their citizens. For this reason, states and localities have exploited the federal government's failure to act and have enacted their own immigration policies.

A second similarity is the speed and manner in which anti-immigrant laws are being enacted. Both Jim Crow and anti-immigrant laws quickly spread across the country, as the success of each new law emboldened state and local legislators to take action. In 2008, approximately 1,700 state and local immigration-related laws were passed.[123] In 2009, the National Conference of State Legislatures found that approximately 1,500 bills on immigrants and refugees were introduced in states across the country.[124] Also, like the federal courts during the Jim Crow era, some federal judges are similarly deferential to states and localities passing laws that target Latino immigrants.[125] Recent federal court decisions are signaling to states and localities that they have the authority to enact legislation that affects immigrants under states' Tenth Amendment police

122. *But see* Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. REV. 1557, 1561 (2008) (alleging that it is a simplistic view to argue that states are passing immigration laws because of the federal government's failure to act). Stumpf specifically states that "[t]he usual explanation for the intense state and local interest in immigration law is that the federal government is stymied in enforcing immigration laws. In the face of federal legislative deadlock and agency inaction, the states have stepped in to fill the vacuum." *Id.* at 1561–62 (citing Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 798 (2008)); *see also* Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27, 34 ("This extraordinary rise in such legislative interests is undoubtedly due to overburdened locales [and] well publicized and highly polarized federal failures in immigration enforcement . . . ."); Rodriguez, *supra* note 10, at 570 (crediting legislative inaction).

123. DIRK HEGEN, NAT'L CONFERENCE OF STATE LEGISLATURES IMMIGRANT POLICY PROJECT, STATE LAWS RELATED TO IMMIGRANTS AND IMMIGRATION 2008, at 1 (Ann Morse ed., 2009), http://www.ncsl.org/Portals/1/documents/immig/StateImmigReport Final2008.pdf; MEXICAN AM. LEGAL DEF. & EDUC. FUND (MALDEF), LEGAL AND POLICY ANALYSIS: LOCAL ILLEGAL IMMIGRATION RELIEF ACT ORDINANCES (2009), http://maldef.org/immigration/public_policy/state_legislation_ordinances. The calculated figure combines the state figure from NCSL with the citations from MALDEF.

124. DIRK HEGEN ET AL., NATIONAL CONFERENCE OF STATE LEGISLATURES IMMIGRANT POLICY PROJECT, 2009 STATE LAWS RELATED TO IMMIGRANTS AND IMMIGRATION (Ann Morse ed., 2009), http://www.ncsl.org/default.aspx?tabid=19232.

125. *See generally* Chicanos Por La Causa v. Napolitano, 544 F.3d 976, 982–86 (9th Cir. 2008) (upholding Arizona Legal Workers Act, which targets employers of illegal immigrants by revoking their business licenses, based on constitutional preemption grounds). This case is currently on certiorari review to the United States Supreme Court, captioned as U.S. Chamber of Commerce v. Candelaria, No. 09-115, 2009 WL 3517907 (Nov. 2, 2009). Howard Fischer, *High Court Asked to Nullify Employer Sanctions*, E. VALLEY TRIBUNE, July 27, 2009, *available at* http://www.eastvalleytribune.com/story/142233. The Supreme Court will likely accept this petition and hear the case.

powers.[126] For example, in Arizona, the federal district court and Ninth Circuit upheld the Legal Arizona Workers Act[127] that targeted undocumented workers.[128] The Legal Arizona Workers Act revokes the business license of employers who hire undocumented immigrants.[129] The proliferation of state and local anti-immigrant laws mirrors the proliferation of Jim Crow laws. In both instances, there is a fundamental disagreement amongst the federal, state, and local government regarding authority over regulation of either immigration or, in the case of Jim Crow, prohibiting state and local discriminatory action. In both cases, the failure to resolve the disagreement results in the increase of state and local laws targeting vulnerable populations.

III. CONTENT AND MOTIVES OF DISCRIMINATORY JIM CROW AND ANTI-IMMIGRANT LAWS

The intent behind passing anti-immigrant laws is similar to that behind Jim Crow laws in that they both seek to exclude a group from full membership in American society and deprive its members of their legal and social personhood. Historically, both Latinos and African Americans have been in subordinate social and economic positions that are reinforced by the enactment of laws codifying discriminatory social norms and second-class citizenship (or no class citizenship). It must be noted, however, that there are some differences between anti-immigrant laws and Jim Crow laws. First, most of the anti-immigrant laws do not overtly discriminate against Latinos (i.e. the laws typically do not explicitly bar Latinos from living, working, or from utilizing public accommodations).[130] The drafters of anti-immigrant laws are more attuned to how to draft laws to withstand legal challenges.[131] Second, there is no historical presence of chattel slavery that prompted the passage of the Fourteenth Amendment in 1868 nor the continuation of the oppressive laws against African Americans. Despite these important differences, it appears that some state and local anti-immigrant laws have passed with an underlying intent to discriminate against Latinos in the same way that Jim Crow laws

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126. *See* McKanders, *supra* note 11, at 27 (citing *Chicanos Por La Causa*, 544 F.3d at 983–984; Gray v. City of Valley Park, No. 4:07CV00881 ERW, 2008 WL 294294, at *18 (E.D. Mo. Jan. 31, 2008)).
127. ARIZ. REV. STAT. ANN. § 23-212 (2008).
128. *Chicanos Por La Causa*, 544 F.3d at 988.
129. ARIZ. REV. STAT. ANN. § 23-212. The Act also requires employers to use the e-verify system. E-verify is an internet based system that allows an employer to verify an employee's work authorization status. It is an alternative to the I-9 verification system where employers must obtain documentation from perspective employees to verify their citizenship status prior to hiring. *Id.*
130. The Hazleton city council made several amendments to the ordinances to make them facially neutral. *See generally* Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 539 (M.D. Pa. 2007).
131. Bono, *supra* note 26, at 29 ("[M]any do not recognize that [Jim Crow] laws have since been reincarnated in forms that are much less conspicuous and significantly more savvy and mature than their predecessors. Facially neutral, they operate without reference to the racial prejudice that stirred their rebirth, and for this reason they are difficult to identify. But as Supreme Court Justice Potter Stewart once said of another subject matter similarly difficult to define, we know it when we see it.").

were passed to discriminate against African Americans.[132] This section contrasts and compares the similarities and differences between the legislative content, structure, and motives of a cross-section of Jim Crow and anti-immigrant laws.

A. *Discerning Discriminatory Motives*

A common element between Jim Crow and anti-immigrant laws is the alleged reasoning for passing the laws. Jim Crow laws on their face overtly excluded African Americans from certain communities and asserted neutral reasons to justify the laws. Anti-immigrant laws, however, are neutral on their face but have an underlying discriminatory motive. Under current frameworks for addressing discriminatory laws, the ways in which the laws are crafted make it more difficult to address the underlying discriminatory motives articulated by the drafters but not included in the texts of the laws. The laws are passed under states' Tenth Amendment police powers to protect the health, safety, and welfare of the community. When a law is passed pursuant to a state's police powers the laws are presumptively valid.[133] Upon close examination, both Jim Crow and anti-immigrant laws have no objective evidence to show adverse effects on the health, safety, and welfare of their populations. Accordingly, anti-immigrant laws, like Jim Crow laws, should be closely scrutinized to discern any improper discriminatory motives.

In the United States, there has been a long-running pattern of using the law to exclude certain groups under the guise of protecting the welfare of the state and local citizens. Jim Crow laws used state police powers to exclude African Americans from their communities. The statutes and ordinances alleged to be protecting the health, safety, and welfare of citizens, but were actually discriminating without objective evidence to support the purported reasons for passing the laws.[134] For example, in 1945, the Alabama state Senate passed a resolution exempting the state from giving force to the federal Fair Employment Practices Act, which prohibited racist hiring practices.[135] The resolution cited the presence of more African Americans as creating the need to oppose the act: "That in Alabama there exist conditions with respect to the relationship between the races which are not general to the Country as a whole as, for instance,

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132. *Lozano* Second Amended Complaint, *supra* note 1, at 45.

133. *See* Jacobson v. Massachusetts, 197 U.S. 11, 21–30 (1905) (holding that, in a Massachusetts required vaccination case, the Tenth Amendment allows states and localities to enact legislation aimed at protecting, preserving, and promoting the health, safety, and welfare of the people). It should be noted that when challenges were brought against Jim Crow school segregation cases, states and localities argued that education fell within state and local police powers. However, the Supreme Court held that the "Tenth Amendment's reservation of nondelegated powers to the States is not implicated by a federal-court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment." Milliken v. Bradley, 433 U.S. 267, 291 (1977).

134. *See generally Lozano*, 496 F. Supp. 2d at 538–43; Doe v. Vill. of Mamaroneck, 462 F. Supp. 2d 520, 542–61 (S.D.N.Y. 2006) (discussing equal protection challenges to anti-immigrant ordinances).

135. STATES' LAWS ON RACE AND COLOR, *supra* note 76, at 29 (citing Alabama General Acts 1945).

that in certain Counties of this State the colored population very greatly exceeds in number the white population."[136] The resolution further stated that the Senate must oppose the Act because enforcement would lead to violence:

> [T]he experience of this State in reconstruction times and since has shown that no good can come from changing the normal course of evolution and development of race by arbitrary legal means, and that such attempts lead only to violence, misunderstanding and destruction of the normal and happy relationship now prevailing between the races in this State . . . ."[137]

Similarly, in 1912, Virginia passed a housing law to preserve "the public morals, public health and public order, in the cities and towns of this commonwealth is endangered by the residence of white and colored people in close proximity to one another."[138] There was no objective evidence to support the need for the statutes. States and localities, however, passed the laws under the guise of promoting the health, safety, and welfare of the community.

Today, the perceived neutrality of immigration laws may make it difficult to discern any discriminatory motivations behind the laws. Many states and municipalities are passing immigration ordinances based on the unsubstantiated belief that immigrants, mainly Latino immigrants, are making their cities and states unstable by contributing to higher crime rates,[139] delinquency, and placing a drain on local resources.[140] Similar to Jim Crow laws, today's state and local legislatures are purporting to pass anti-immigrant laws for the purpose of protecting the public health, morals, and the peace and good order in the state.[141]

For example, in 2007, in Forsyth County, North Carolina, the county passed an anti-immigrant resolution requiring all county employees to "provide documentation indicating authorization to work," and required county managers to receive training to ensure that all county employees complied with federal employment law.[142] The resolution stated:

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136. *Id.*
137. *Id.*
138. FRANKLIN JOHNSON, THE DEVELOPMENT OF STATE LEGISLATION CONCERNING THE FREE NEGRO 198 (Arbor Press, Inc. 1919) (1918) (citing Virginia Act of 1912, Ch. 157).
139. Kathleen Kingsbury, *Immigration: No Correlation with Crime*, TIME, Feb. 7, 2009, *available at* http://www.time.com/time/nation/article/0,8599,1717575,00.html ("Despite our melting-pot roots, Americans have often been quick to blame the influx of immigrants for rising crime rates.").
140. McKanders, *supra* note 11, at 7 n.35 ("[O]ne recurring manifestation of state involvement in foreign affairs is the regulation of aliens and immigration. Outsiders by definition, aliens are often viewed as threatening a states cultural and political identity, undermining its communitarian vales and taxing its public resources." (quoting Karl Manheim, *State Immigration Laws and Federal Supremacy*, 22 HASTINGS CONST. L.Q. 939, 941 (1995)).
141. *See, e.g.*, Chicanos Por La Causa v. Napolitano, 544 F.3d 976, 989 (9th Cir. 2008); Gray v. City of Valley Park, No. 4:07CV00881 ERW, 2008 WL 294294, at *8 (E.D. Mo. 2008) (holding that state and local laws addressing education, crime, health, safety, and welfare are clearly matters outside the scope of immigration law).
142. NAT'L ASSOC. OF COUNTIES, ISSUE BRIEF: COUNTIES AND IMMIGRANTS: SOME RECENT RESOLUTIONS, ORDINANCES AND INITIATIVES 3 (2007), *available at* http://www.

> WHEREAS, Forsyth County is concerned about the use of County resources by residents who are in the County without legal justification;
>
> . . . .
>
> WHEREAS, this Resolution is not motivated by any racial issues or stereotypes, or directed at Hispanics or any other race or group of people.
>
> NOW, THEREFORE, BE IT RESOLVED by the Forsyth County Board of Commissioners that all prospective employees of Forsyth County will be required to provide adequate documentation and assurance that they are authorized to work in the United States, and therefore Forsyth County, in compliance with the law.[143]

Similarly, in Oklahoma, U.S. Representative John Sullivan encouraged Tulsa's city council to pass a measure that would deputize local sheriffs to enforce immigration laws.[144] In support of this measure, Sullivan stated that "[he] want[ed] to create fear in rapists, drunk drivers, drug dealers and people who conceal weapons."[145] At the same time, the Oklahoma legislature considered passing the Oklahoma Taxpayer Citizen Protection Act, which was designed to restrict undocumented immigrants' access to driver's licenses, identification cards, public assistance, and higher education benefits.[146]

Upon close examination of the rationale for enactment of some anti-immigrant laws, there is no objective evidence to support claims of adverse effects on the health, safety, and welfare of the community. An example of the role of discriminatory intent can be found in San Bernardino, California. San Bernardino started the wave of illegal immigration ordinances that were copied by several municipalities across the country. The city council believed that immigrants were a threat to the city's resources,[147] so in 2006, Joseph Turner, the County Supervisor for San Bernardino, drafted illegal immigration legislation with the goal of saving "California from turning into a 'Third World cesspool' of illegal immi-

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naco.org/Template.cfm?Section=publications&template=/ContentManagement/ContentDisplay.cfm&ContentID=25632.

143. *Resolution Outlining Compliance with the Federal Immigration Laws in County Recruitment, Hiring and Contracting Practices, Hearing before the Forsyth County Board of Commissioners, in* Minutes of the October 23, 2006 Meeting of the Forsyth County Board of Commissioners at 1103376, *available at* http://www.mccinnovations.com/weblink/docview.aspx?id=188876.

144. Kari Huus, *Tulsa's Illegal Immigration Wreck*, MSNBC, July 9, 2007, *available at* http://www.captc.org/newspdf/tulsa%20immigration_msnbc_070907.pdf (discussing § 287(g) agreements between the federal government and state and local police officers that permit local police officers to exercise certain immigration responsibilities in entering into a memorandum of understanding with the federal government).

145. *Id.*

146. 2007 OKLA. SESS. LAW 112; *see also* Emily Bazar, *Strict Immigration Law Rattles Okla. Businesses*, USA TODAY, Jan. 10, 2008, *available at* http://www.usatoday.com/news/nation/2008-01-09-immigcover_N.htm.

147. McKanders, *supra* note 11, at 12.

grants."[148] The proposed ordinance contained English-only provisions for all governmental city activities, a provision that sanctioned employers for hiring undocumented immigrants, and a provision that sanctioned landlords for renting to undocumented immigrants. Turner also started the Save Our State organization, whose members have made public inflammatory statements such as "recommend[ing] archery as an effective tactic against Mexicans."[149] The "Third World cesspool" language is evidence of the drafter's discriminatory intent. It demonstrates the intent to exclude all those who Turner deems inferior. This reinforces the notion that certain groups, mainly Latinos, should not be permitted live in certain states and cities.[150] This ordinance ultimately did not pass in San Bernardino.

In 2006, Hazleton, Pennsylvania, was the first municipality in the country to pass Turner's law by directly copying the failed San Bernardino ordinance.[151] The city of Hazleton alleged that the immigrant population's presence led to higher crime rates, fiscal hardship, burdens on public services, and a diminishing quality of life within the city.[152] The Hazleton case is an example of the influence of the San Bernardino law to get rid of "Third World Cesspool."[153] During the trial challenging the ordinance, Hazleton's mayor denied discriminatory intent and the trial court found that the ordinances were passed to address public safety, crimes, and community resources expended on policing, education, and health care.[154] Accordingly, the district court dismissed the plaintiffs' equal protection claim.[155] Even though the equal protection challenge failed, the Mayor did not present objective evidence to prove that immigrants had an adverse impact on the city or its capability to provide safety and services for its inhabitants.[156] Shortly after Hazleton passed its

148. *Id.* at 12–13 (citing Jordan, *supra* note 11); *see also California Anti-Immigrant Leader Joe Turner Begins Job for San Bernardino County*, ANTI-DEFAMATION LEAGUE, Apr. 7, 2009, *available at* http://www.adl.org/immigration/Joe_Turner.

149. Susy Buchanan & David Holthouse, *White Hot: Across the Country the Overheated Immigration Debate Fuels Racist Extremism and Violent Anti-Hispanic Hate Crimes*, INTELLIGENCE REPORT, SOUTHERN POVERTY LAW CENTER, Summer 2006, *available at* http://www.splcenter.org/intel/intelreport/article.jsp?aid=642.

150. McKanders, *supra* note 11, at 13 (citing Jordan, *supra* note 11); *see also California Anti-Immigrant Leader Joe Turner Begins Job for San Bernardino County*, *supra* note 148.

151. McKanders, *supra* note 11, at 12–13.

152. *See* HAZLETON, PA., ORDINANCE 2006-18, ILLEGAL IMMIGRATION RELIEF ACT ORDINANCE (Sept. 21, 2006).

153. *See* James Sterngold, *San Bernardino Seeking 'Relief': Struggling City's Proposal Targets Illegal Immigrants*, S.F. CHRONICLE, June 11, 2006, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/06/11/MNGM5JCE0B1.DTL (stating that the organization behind the San Bernardino initiative says that illegal "invaders" are turning the city into "a Third World cesspool").

154. Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 541 (M.D. Pa. 2007) ("Discriminatory intent implies that the decision maker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon identifiable groups.") (citing Antonelli v. New Jersey, 419 F.3d 267, 274 (N.J. 2005)).

155. *Id.* at 542.

156. *Id.* at 556 (equal protection claim fails); *see also* Doe v. Vill. of Mamaroneck, 462 F. Supp. 2d 520, 545 (S.D.N.Y. 2006) (the city's stated purpose for passing day laborer laws could not be directly proven with objective statistical evidence).

ordinances, many states and localities began to pass similar immigration laws.[157]

While the statutes and ordinances were allegedly enacted to protect the health, safety, and welfare of the community, states and localities are actually using unsubstantiated statistics as a guise to remove Latinos from their communities.[158] This is readily apparent when local officials make statements like, "[t]he Alamance County Sheriff, who has directed his deputies to check the immigration status of all foreign persons arrested, characterized Mexicans as having 'different' morals exemplified by heavy drinking and sexual exploitation of minors."[159] Similarly, in Irving, Texas, where the Latino population has grown to constitute over 40% of the city, the community and mayor are considering passing anti-immigrant legislation, asserting that "[t]he people who are here illegally across the border are not educated people . . . they do not have any culture or any respect for the U.S."[160] In addition, in Farmers Branch, Texas, a City Council member stated, in reference to Latinos, that "the city's commercial center just keeps filling up with Spanish-speaking business and restaurants . . . you don't need seven or eight Mexican restaurants in one center . . . . If you have 10 restaurants three blocks from your house, you don't want them to be Italian."[161]

Contrary to the assertions made by state and local officials in support of anti-immigrant laws, as described above, immigrants often have a positive impact on local communities. In Hazleton, Pennsylvania, the influx of Latino immigrants caused the downtown area to blossom.[162]

The hidden discriminatory motives in the anti-immigrant laws are also akin to the facially neutral Chinese laundry laws.[163] In 1886, the Supreme Court addressed Chinese laundry laws that were facially neutral, but discriminatory in their application. In *Yick Wo v. Hopkins*, the Supreme Court found unconstitutional a San Francisco municipal ordinance required all public laundry facilities within the limits of the municipality to be operated in wooden buildings.[164] The law was facially neutral, but administered in a discriminatory manner. The Court found that the city's practice violated the Constitution as it conferred upon the municipal authorities arbitrary power to give or withhold consent as to persons or places, without regard to competency.[165] In *Yick Wo*, the Court held that

157. McKanders, *supra* note 11, at 7.
158. *See generally Lozano*, 496 F. Supp. 2d at 538–43; *Vill. of Mamaroneck*, 462 F. Supp. 2d at 558–59 (discussing equal protection challenges to anti-immigrant ordinances).
159. Stumpf, *supra* note 122, at 1615.
160. Randy Kennedy, *Texas Mayor Caught in Deportation Furor*, N. Y. TIMES, Apr. 5, 2009, at A1.
161. Villazor, *supra* note 26, at 48–49 (citing Patrick McGee, *Texas City Divided Over Illegal Immigration*, CHARLESTON GAZETTE & DAILY MAIL, Jan. 27, 2007, at 1C).
162. McKanders, *supra* note 11, at 7.
163. This paper does not focus on the constitutional analysis, but rather on how the motivations can be hidden through facially neutral laws. It should be noted, however, that courts focus on the discriminatory effect of the law over the discriminatory motive. *See* Lawrence A. Alexander, *Introduction: Motivation and Constitutionality*, 15 SAN DIEGO L. REV. 925, 927 (1978).
164. Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886).
165. *Id.* at 374.

the San Francisco ordinance was a covert attempt by the municipality to make arbitrary and unjust discrimination against the Chinese race. The Supreme Court stated that:

> [B]y reserving an arbitrary discretion in the enacting body to grant or deny permission to engage in a proper and necessary calling, a discrimination against any class can be made in its execution, thereby evading and in effect nullifying the provisions of the national Constitution, then the insertion of provisions to guard the rights of every class and person in that instrument was a vain and futile act.[166]

In striking down the Chinese Laundry law, the Court stated that we "may be a government of laws and not of men. For the very idea that one may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."[167]

Another example of a facially neutral anti-immigrant law that was found to be unconstitutional was enacted by the town of Jupiter, Florida. Jupiter enacted laws that targeted landlords who provided affordable housing to Latino immigrants.[168] Under the Jupiter law, lay citizens can submit a complaint alleging that a landlord rented to an undocumented immigrant. The Jupiter law provided the complainant total discretion to determine who may be legal and illegal. This discretion opened the door to profiling individuals that community members believed were undocumented immigrants. Invalidating the Jupiter law, the Eleventh Circuit found that "the discriminatory motive behind this ostensibly neutral ordinance was clear throughout the enactment process . . . officials reassured local residences that a complaint driven scheme focusing on overcrowding would allow the town to target only the landlords of Latino immigrant tenants for enforcement, without affecting the rights of other property owners."[169]

B. Comparisons of Discriminatory Laws

1. Anti-Solicitation and Vagrancy Laws

Current anti-solicitation day laborer laws are similar to Jim Crow vagrancy laws. During the Jim Crow era, vagrancy laws gave discretion to law enforcement officers to decide who was a vagrant. Post Reconstruction, many states and localities passed vagrancy laws.[170] Although they did not mention race, these laws were enforced strictly against African Americans.[171] These laws allowed state and local officers to arrest people

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166. *Id.* at 362.
167. *Id.* at 370.
168. Young Apartments, Inc. v. Town of Jupiter, 529 F.3d 1027, 1033 (11th Cir. 2008).
169. *Id.*
170. HOWARD RABINOWITZ, RACE RELATIONS IN THE URBAN SOUTH, 1865–1890, at 34–35 (Oxford Univ. Press 1978).
171. *Id.* at 35.

who did not have a job or a means of supporting themselves.[172] Because the officers had so much discretion, coupled with the discriminatory attitudes that prevailed at the time, enforcement of these laws in the South resulted in mass arrests of African Americans.[173] Typically, the punishment for a violation was a fine. If the person could not pay the fine, they were either sentenced to a term of labor with the county or hired out to a private employer.[174] In this way, the application of vagrancy laws often resulted in African Americans being forced to work in indentured servitude situations with their former employers.[175]

It is important to note that the laws were purportedly passed to prevent African Americans from becoming criminals.[176] Vagrancy laws were therefore facially neutral but were discriminatorily applied to African Americans. The unstated, but understood, goal of vagrancy laws was to maintain control over African Americans by forcing them into labor.[177]

Like the Jim Crow vagrancy laws, anti-solicitation laws give law enforcement officers the discretion to arrest immigrants for attempting to find day labor. The discretionary element leaves the door open for the discriminatory application of the laws to Latinos. Several municipalities have recently passed anti-solicitation laws.[178] For centuries, day laborers

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172. *Id.* ("[Vagrancy laws] empowered state officers to apprehend all idlers or those following no 'labor, trade, occupation or business and [who] have no visible means of subsistence, and can give no reasonable account of themselves or their business.' Such persons would be hired out for three months for the 'best wages that can be procured.'").

173. The pettiness of the crimes for which African Americans were arrested indicates that the arrests were not part of a legitimate law enforcement effort, but were the result of officers' abuse of discretion. *See id.* at 44 (stating that "the great majority of Negro arrests were for vagrancy, disorderly conduct, petit larceny, and other misdemeanors"); *see also* Papachristou v. Jacksonville, 405 U.S. 156, 162 (1972) (holding a Florida vagrancy statute unconstitutionally vague because it "'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,' and because it encourages arbitrary and erratic arrests and convictions" (quoting United States v. Harriss, 347 U.S. 612, 617 (1954))).

174. RABINOWITZ, *supra* note 170, at 35–37.

175. CHARLES S. MANGUM, JR., THE LEGAL STATUS OF THE NEGRO 27 (Univ. of N.C. Press 1940) ("The apprentice, vagrancy, and other provisions of these statutes forced the Negro into situations where he would be under the uncontrolled supervision of his former master or other white men who were ready and willing to exploit his labor."); *see also id.* at 163 ("There were vagrancy laws and other types of statutes designed to give the white man authority over the freedmen.").

176. RABINOWITZ, *supra* note 170, at 35 ("'If severe penal legislation shall become necessary to prevent the free negro from becoming a vagabond and thief' stated the Richmond [Virginia] *Times* in June 1865, 'the Legislature will provide the remedy.'").

177. *Id.* at 46 ("Authorities took pains to disguise their motivation, claiming that both whites and blacks were targets [of vagrancy laws], but their actions and often their words gave them away.").

178. *See, e.g.*, AGOURA HILLS, CAL., MUNICIPAL CODE § 3209(a) (2009) ("It shall be unlawful for any person, while standing in any portion of the public right-of-way, including but not limited to public streets, highways, sidewalks and driveways, to solicit, or attempt to solicit, employment, business or contributions of money or other property from any person travelling in a vehicle along a public right-of-way, including, but not limited to public streets, highways or driveways."); REDONDO BEACH, CAL., MUNICIPAL CODE § 3-7.1601 (1989) (amended) ("It shall be unlawful for any person to stand on a street or highway and solicit, or attempt to solicit, employment

have been permitted to gather in areas within towns and cities to find jobs. It was only when the racial and ethnic composition of the day laborers changed, that states and localities began to enact anti-solicitation laws targeting Latino immigrants.[179] Although facially neutral, the targets of the laws are Latino immigrants attempting to find work in day labor centers. For example, in Carrboro, North Carolina, the city passed an anti-solicitation ordinance, targeting day laborers, which prohibits congregation in an area traditionally used for soliciting day labor between the hours of 11:00 a.m. and 5:00 a.m. the following day.[180] Other provisions

. . . ."); PALMDALE, CAL., MUNICIPAL CODE § 10.04.120, ch. 15.109(B)(1) (1995) ("It is unlawful for any person to stand in any portion of the public right-of-way while vending, or attempting to vend, any merchandise to any person traveling in a motor vehicle located on or within a public right-of-way, or while soliciting, or attempting to solicit, any employment, business transaction, or contributions of money or other property from any person traveling in a motor vehicle located on or within a public right-of-way."); HERNDON, VA., CODE OF ORDINANCES § 42-136 (2005) ("[I]t is unlawful for any person, while occupying as a pedestrian any portion of a highway, sidewalk, driveway, parking area, or alley to solicit or attempt to solicit employment."); LAKE WORTH, FLA., CODE OF ORDINANCES § 14-28 (2007) ("It is unlawful for any person, while the occupant of any vehicle, to solicit, or attempt to solicit, employment or business from a person who is on public property . . . ."); VALLEY PARK, MO., ORDINANCE 1708 (2006); *see also* IMMIGRATION REFORM LAW INST., STATE AND LOCAL LEGISLATION BULLETIN (Sharma Hammond, ed.), http://www.irli.org/bulletin807.html (last visited Apr. 3, 2010) ("Cobb County, Georgia: On August 14, the County Commissioners temporarily scrapped a proposed ordinance to fine employers who hire day laborers."); Proliferation of Local Anti-Immigrant Ordinances in the United States: Hearing before Jorge Bustamante, The United Nations Special Rapporteur On the Human Rights of Migrants, May 12, 2007 (statement of Udi Ofer, Legislative Counsel, New York Civil Liberties Union) [hereinafter Testimony on Local Anti-Immigrant Ordinances], *available at* http://www.nyclu.org/node/1006/print ("Suffolk County legislators . . . announced the introduction of an anti-loitering/solicitation bill."); Arturo Gonzalez, *Day Labor in the Golden State*, 3 CAL. ECON. POL'Y 16 (July 2007), *available at* http://www.ppic.org/content/pubs/cep/EP_707AGEP.pdf (showing chart on "Cities with Worker Centers and Day Labor Ordinances, by Metropolitan Area").

179. *See* Doe v. Vill. of Mamaroneck, 462 F. Supp. 2d 520, 554 (S.D.N.Y. 2006).

180. BOARD OF ALDERMEN CARRBORO N.C., AGENDA ITEM ABSTRACT: PUBLIC HEARING TO CONSIDER THE ADOPTION OF A TIME LIMITED ANTI-LINGERING ORDINANCE FOR THE AREA AROUND THE INTERSECTION OF DAVIE RD. AND JONES FERRY RD. at 1, Oct. 23, 2007, *available at* http://www.ci.carrboro.nc.us/BoA/Agendas/2007/10_23_2007_2.pdf ("This ordinance would be in effect daily in a circumscribed area near the intersection of Davie Rd. and Jones Ferry Rd. from 11:00a.m. through the afternoon and night until 5:00a.m. the next morning. The purpose of the ordinance is to reduce the trash and behavior problems occurring near the intersection . . . .") (ordinance adopted at that meeting); *see also* ORANGE, CAL., MUNICIPAL CODE § 9.37 (2008) (Ordinance bans solicitation from sidewalks that are adjacent to streets without parking lanes, prohibits solicitation from private property without the owner's written permission, and ban solicitation while driving. In addition, private property owners who wish to run job centers for laborers must get a conditional use permit. The ordinance is currently in effect.); PALMDALE, CAL., MUNICIPAL CODE § 10.04.120, ch. 15.109(B)(1) (1995) ("It is unlawful for any person to stand in any portion of the public right-of-way while vending, or attempting to vend, any merchandise to any person traveling in a motor vehicle located on or within a public right-of-way, or while soliciting, or attempting to solicit, any employment, business transaction, or contributions of money or other property from any person traveling in a motor vehicle located on or within a public right-of-way.").

have made, or would make it, illegal for day laborers to stand along the roadside soliciting work.[181] In Cave Creek, Arizona, the city council passed an ordinance that made it "unlawful for '[any] person . . . to stand on or adjacent to a street or highway and solicit, or attempt to solicit, employment, business or contributions from the occupant of any vehicle."[182] The anti-solicitation provisions are allegedly passed to promote local governmental interests, "including promotion of safer and more efficient traffic flow, and minimizing the public safety risk of impromptu street-side employment transactions . . . also sought to reduce the harmful secondary effects of day laborers congregating for such transactions, including littering, public drunkenness and fighting."[183] The underlying motivation, however, is to rid the city of Latino immigrants.

A recent federal district court decision of the Southern District of New York struck down an anti-solicitation law because of its discriminatory motivations. The court held that the Village of Mamaroneck's anti-solicitation law unconstitutionally targeted Latinos in violation of the equal protection clause of the Fourteenth Amendment.[184] The history of day labor in the village elucidates the discriminatory purpose behind passing the anti-solicitation law. In Mamaroneck, for a half-century or more, immigrants gathered in a central location in the village to solicit employment.[185] Before the early nineties, the immigrants seeking employment were predominately white.[186] At the time the anti-solicitation provision was passed, those seeking employment were almost exclusively Latino.[187] In 2004, in response to the growing Latino population, village officials in Mamaroneck launched a law enforcement campaign to discourage the gathering of day laborers.[188] The "Village's purported justification for the increase and unprecedented police presence in [and] around the [s]ite during morning hours [was] that there had been a sudden up-swing in so

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181. *See* Testimony on Local Anti-Immigrant Ordinances, *supra* note 178 ("The proposed [Suffolk County] legislation attempted to create two new misdemeanor offenses in order to ban day laborers from seeking employment along county roadways. First, IR 1022 would make it unlawful for day laborers to loiter or stand along county roadways while unreasonably hindering the free passage of pedestrians or cars. Second, it would outlaw loitering or standing along county roadways for the purpose of attempting to solicit or sell any product or service to a vehicle occupant.").

182. Lopez v. Town of Cave Creek, 559 F. Supp. 2d 1030, 1031 (D. Ark. 2008).

183. Michael Torres & Scott Smith, *Regulation of Day Laborers: Between the Street and a Hard Place*, CAL. ST. B. PUB. L.J., Summer 2007, at 4.

184. Doe v. Vill. of Mamaroneck, 462 F. Supp. 2d 520, 554 (S.D.N.Y. 2006); *see also* Lopez v. Town of Cave Creek, 559 F. Supp. 2d 1030, 1031 (D. Ark. 2008) (district court judge granted preliminary injunction based on plaintiffs' constitutional challenge to ordinance on free speech and Fourteenth Amendment grounds); Comite De Jornaleros de Redondo Beach v. City of Redondo Beach, 475 F. Supp. 2d 952, 955 (C.D. Ca. 2006) (holding that the city's free speech challenge to an ordinance prohibiting solicitation of employment on streets and highways failed to meet First Amendment requirements because it was not narrowly tailored to address the city's interests and did not leave open ample alternative channels for the speech it proscribed).

185. *Vill. of Mamaroneck*, 462 F. Supp. 2d at 525.

186. *Id.*

187. *Id.*

188. *Id.*

called 'quality of life' issues — such as prostitution, drug dealing, public intoxication, urination and defecation, and criminal activity."[189] The police records at trial, however, revealed that there were no day laborers arrested for these offenses. The court found that the "complaints and purported fears of certain Village residents were motivated, consciously or unconsciously, by racial animus towards the day laborers."[190]

In the challenge to Mamaroneck's anti-solicitation law, the court "found that racially discriminatory intent motivated the town's enforcement campaign against day laborers who used a public park, given the sorts of statement[s] town residents made during the debate over how to crack down on the day laborers."[191] The district court held that the undisputed evidence showed that day laborers were exclusively or almost exclusively Latino. In the application of the laws, the city's law enforcement violated the Latino resident's equal protection rights by applying a facially neutral policy in a discriminatory manner.[192] In support of its holding, the court found that the statements made by city officials comparing day laborers to "locusts" and "takers" who "won't ever give back to the community" was evidence of discriminatory intent.[193] Additional proof of discriminatory intent included evidence that the village herded laborers onto a single site, excessive police presence at that site, the sudden enforcement of various local traffic ordinances, and harassment.[194]

Like Jim Crow era vagrancy laws, anti-solicitation laws allow city officials to disguise their discriminatory motivations behind facially neutral laws by allowing officers to use their unfettered discretion in enforcement. Where Jim Crow vagrancy laws permitted the apprehension of all idlers, it was mainly enforced against African Americans; similarly, anti-solicitation laws allowed the village of Mamaroneck to implement facially neutral policies in an intentionally discriminatory manner against Latinos within their community. In both cases, the discretionary element led to the discriminatory application of the laws against African Americans and Latinos.

2. *Residential Laws*

Today's anti-immigrant residential laws are also similar to the residential laws under Jim Crow. Residential Jim Crow laws forced African Americans to move away from communities that passed restrictive legislation, sometimes the communities where they had lived for years. Similarly, anti-immigrant laws restrict the communities where Latinos can reside.[195] Even though the substance of the Jim Crow laws may have been

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189. *Id.* at 530.

190. *Id.* at 540.

191. CRISTINA RODRIGUEZ, MAZAFFAR CHISHTI & KIMBERLY NORTMAN, TESTING THE LIMITS: A FRAMEWORK FOR ASSESSING THE LEGALITY OF STATE AND LOCAL IMMIGRATION MEASURES 39 (Nat'l Ctr. on Immigration Policy 2007) (citing *Vill. of Mamaroneck*, 462 F. Supp. 2d 520).

192. *Vill. of Mamaroneck*, 462 F. Supp. 2d at 546–47.

193. *Id.* at 533.

194. *Id.*

195. Villazor, *supra* note 26, at 44 (recognizing that facially neutral anti-immigrant residential laws use "'neutral' immigration language as the basis for denying property

different from current discriminatory residential laws, the effects of the laws are the same: Latinos are being segregated. Like Jim Crow laws, residential immigration laws result in highly segregated residential communities.[196] During the Jim Crow era, "towns passed ordinances barring African Americans [from appearing] after dark or prohibiting them from owning or renting property; still others established policies by informal means, harassing and even killing those who violated the rule. . . . [T]owns similarly kept out Jews, Chinese, Mexicans, Native Americans, or other groups."[197]

Anti-immigrant residential laws fall into three main categories: laws that prohibit landlords from renting to undocumented immigrants; laws that attempt to incorrectly define renting to undocumented immigrants as harboring undocumented immigrants; and laws that place restrictions on the number of persons residing in a dwelling unit.[198] These laws force landlords to refuse to rent to anyone who they may, accurately or inaccurately, perceive to be an undocumented immigrant. In all of these contexts, the anti-immigrant laws are either applied in a discriminatory manner or the motives behind passing the laws are discriminatory.[199]

While the Fourteenth Amendment of the Constitution forbids states from depriving any person of property without due process of the law, individuals can only challenge property discrimination if "property was

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rights. . . . [The] legislative history and surrounding circumstances demonstrate that the [ordinances] target a racial group, in this case, mainly Latino immigrants.").

196. *See* Oliveri, *supra* note 26, at 57–58 (noting that recent state and local anti-immigrant ordinances that target immigrants will cause discrimination in violation of the federal Fair Housing Act).

197. JAMES W. LOEWEN, SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM 4 (New Press 2005).

198. *See, e.g.*, HAZLETON, PA., ORDINANCE 2006-18, ILLEGAL IMMIGRATION RELIEF ACT ORDINANCE § 3(D) (Sept. 21, 2006) (establishing a registration program for residential rental properties); ESCONDIDO, CAL., ORDINANCE 2006-38R, § 16E-1 (Oct. 10, 2006); CHEROKEE COUNTY, GA., ORDINANCE 2006-003, § 18-503 (Dec. 5, 2006); *see also* Corey Kilgannon, *Crackdown on L.I. Landlords is Criticized as Harassment of Immigrants*, N.Y. TIMES, Jan. 15, 2008, at B1 ("[L]ast August the town board [of Westhampton, N.Y.] approved a comprehensive rental law intended to stop the crowding of multiple families into single units. The law, which went into effect on Jan. 1, requires landlords to obtain rental permits from the town, for which they must pay a fee, to provide details on each unit and to identify each tenant. Violations carry stiff penalties, including fines of $1,500 to $15,000 and six-month jail sentences for three convictions within 18 months."); FAIR IMMIGRATION REFORM MOVEMENT (FIRM), DATABASE OF RECENT LOCAL ORDINANCES ON IMMIGRATION (2007), http://www.stateimmigrationlaws.com/NR/rdonlyres/edqegfctoziye73tdxebiaqdlvx3xos45xv36g3qwlojvgflxhllcdoxcqziubd6ftzcmhsshns5bedvvbiy2jtcmnf/FAIRImmigrationLocalChart.pdf (citing numerous local ordinances on immigration affecting housing, including: (1) Northport, Ala., "an ordinance that makes it illegal for more than two adults to live in a bedroom. The ordinance is targeted at residents of a local motor home park, many of whom are immigrant workers"; (2) Hoover, Ala., "Maximum-Occupancy Ordinance limits occupation of a bedroom to two adults ages 19 and up"; (3) Pelham, Ala., "Maximum-Occupancy Ordinance, limiting occupation of a bedroom to two adults ages 19 & up;" and (4) Riverside, N.J., "'Riverside Township Illegal Immigration Relief Act' . . . would impose $1000 fines on landlords who rent to undocumented immigrants and . . . ban employers from hiring them.").

199. *See supra* section III.A (citing discriminatory motives of legislators, mayors and city council members).

acquired in accordance with some Federal provision."[200] Accordingly, during the Jim Crow era, many municipalities passed zoning laws that "set aside certain sections of the city for the exclusive habitation of whites, and consigned all nonwhites to other (undesirable) sections."[201] The state courts upheld these laws as valid exercises of the state's power to promote the general welfare of its citizens.[202]

The first type of laws prohibits the renting of property to undocumented immigrants. Unlike some Jim Crow laws, however, the anti-immigrant residential laws do not directly prohibit Latinos from residing in certain communities. Legislators have become savvy to the unconstitutionality of facially discriminatory laws. Accordingly, the current immigration ordinances and statutes limit landowners from renting to undocumented immigrants, regardless of their race; however, the laws are discriminatorily applied to Latino immigrants.

For example, Hazleton, Pennsylvania's landlord ordinance states that each person who seeks to occupy a rental dwelling must obtain an occupancy permit from the city of Hazleton.[203] The prospective resident must supply documents to the Hazleton Code Enforcement Office proving citizenship or lawful permanent resident status.[204] If the landlord rents a unit to a tenant without an occupancy permit, the landlord faces a fine for each illegal occupant for each day the landlord continues to rent to the tenant.[205]

Given the circumstances surrounding the passage of these laws, there is little doubt regarding which prospective tenants tend to be asked about their immigration status.[206] Societal discrimination tends to make it more likely that persons of Latino descent will be asked for proper immigration

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200. KENNEDY, *supra* note 92, at 72.

201. *Id.* at 73 ("The Virginia statute, adopted in 1912 was typical: The map so prepared and certified and corrected shall be *prima facie* evidence of the boundaries and racial designation of such districts. . . . Nothing contained herein shall preclude persons of either race employed as servants by person of the other race from residing upon the premises of which said employer is the owner or occupier.").

202. *Id.* ("The courts of Virginia, Georgia, and Kentucky, among others, upheld [residential segregation laws] as a valid exercise of a state's powers 'to promote the general welfare.'").

203. HAZLETON, PA., ORDINANCE 2006-18, ILLEGAL IMMIGRATION RELIEF ACT ORDINANCE § 3(D) (Sept. 21, 2006) (establishing a registration program for residential rental properties); *see also* Bono, *supra* note 26, at 34 ("Typically white landowners or municipal government officials articulated this concept (racial nuisance) to challenge the presence of black people in white neighborhoods. 'Race nuisance' encapsulated the notion that by virtue of race alone the African American presence created a nuisance that disrupted the quiet enjoyment of land for white property owners. This theory was also used to protest the presence of Mexicans in Texas.") (citations omitted).

204. Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 530 (M.D. Pa. 2007) (describing the Illegal Immigration Relief Act Ordinance which states that a landlord is prohibited from allowing occupancy of a rental unit unless all the occupants have obtained an occupancy permit).

205. *Id.*

206. Oliveri, *supra* note 26, at 57.

documentation.[207] The ordinances are structured so that the owner and/or property manager must require, as a prerequisite to entering into a lease, validation of the renter's immigration status.[208] The property manager has total discretion to request and review immigration status documents and determine the documents' authenticity. This may cause property owners to question anyone who appears to be an immigrant, which lends itself to discriminatory application of the law, leading to racial profiling of Latinos.[209]

Under the second type of rental laws, municipalities have stated that renting to an undocumented immigrant constitutes harboring an illegal alien.[210] For example, a municipality in Cherokee County, Georgia, passed an ordinance that prohibited renting to undocumented immigrants.[211] Under the Cherokee County ordinance, "if undocumented immigrants were found among tenants, landlords would have five days to evict the tenants."[212] Comparable to the Jim Crow residential segregation state and local laws, the Cherokee County ordinance's purpose clause stated that it was "in the best interest of and will serve and benefit the health, safety and welfare of the public and law-abiding business entities and property owners to adopt policies and procedures to deter and pre-

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207. *See, e.g.*, Recalde v. Bae Cleaners, 862 N.Y.S.2d 781, 833 n.1 (N.Y. Sup. Ct. 2008) ("Recent changes in federal immigration law intended in part to discourage the entry of undocumented aliens into the United States have aroused fears among immigrants of a growing bias within the community against those who may look or sound foreign. It has come to the city's attention that such people have been asked to document their citizenship status when such documentation was not required by law.").

208. *See, e.g.*, Villas at Parkside Partners v. City of Farmers Branch, 577 F. Supp. 2d 858, 872–75 (N.D. Tex. 2008) (outlining the steps that property managers must take to verify the immigration status of renters, which includes obtaining a declaration of eligible immigration status, a form signed by United States Immigration and Customs Enforcement, and a signed verification consent form).

209. *See, e.g.*, *Lozano*, 496 F. Supp. 2d at 496–99.

210. *See, e.g.*, *Lozano*, 496 F. Supp. 2d at 529–30 ("'Harboring' is defined as letting, leasing or renting a dwelling unit to an illegal alien or permitting the occupancy of a dwelling unit by an 'illegal alien' knowingly or in reckless disregard of the fact that the alien has come to, entered or remains in the United States in violation of the law.") (citing HAZLETON, PA., ORDINANCE 2006-18, ILLEGAL IMMIGRATION RELIEF ACT ORDINANCE (Sept. 21, 2006)); Garrett v. City of Escondido, 465 F. Supp. 2d 1043, 1047–48 (S.D. Cal. 2006) (finding that the ordinance sought to penalize "'any person or business that owns a dwelling unit' in the city of Escondido . . . who 'harbor[s] an illegal alien in the dwelling unit, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, unless such harboring is otherwise expressly permitted by federal law'") (citing ESCONDIDO, CAL., ORDINANCE 2006-38R, § 16D (Oct. 10, 2006)).

211. CHEROKEE COUNTY, GA., ORDINANCE 2006-003, § 18-503 (Dec. 5, 2006) (prohibiting renting to undocumented immigrants and requiring landlords to prove the immigration status of all its tenants). Local residents challenged the ordinance as violating the United States Constitution, as well as federal and state law. The District Court Judge issued a Temporary Restraining Order barring the enforcement of the cases until the Hazleton and Valley Park, Missouri cases were decided. The cases were then administratively closed. *State and Local Law Enforcement*, THE AMERICAN IMMIGRATION LAW FOUNDATION, June 30, 2009, http://www.ailf.org/lac/clearinghouse_120706.shtml.

212. CHEROKEE COUNTY, GA., ORDINANCE 2006-003, § 18-503 (Dec. 5, 2006).

vent the *harboring* of illegal aliens, and criminal activity by illegal aliens."[213]

Another example is when the city of Escondido, California, adopted an ordinance titled "Establishing Penalties for the Harboring of Illegal Aliens."[214] In Escondido, if a landlord rents to an undocumented immigrant, the landlord's business license can be suspended. Suspension of a landlord's business license precludes him or her from collecting rent or payment from any tenant or occupant in the dwelling unit.

The Escondido ordinance is a direct example of a city incorrectly taking the term "harboring" out of its immigration context. Under the Immigration and Nationality Act, harboring is defined as the illegal transporting of immigrants into the country.[215] This term is given a narrow meaning in the context of immigration laws and specifically refers to transporting an immigrant across the border without authorization. States and localities have taken this term outside of its immigration context to punish landlords for renting to undocumented immigrants. States and localities are using this narrow immigration term in a manner that is misleading and inaccurate to the general public.

Under the last type of rental laws, many states and localities have targeted Latino immigrants by purporting to focus on overcrowding of residential areas.[216] The town of West Hampton, New York passed an

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213. *Id.* § 1, pt. 7. Many other localities passed similar ordinances. *See also* Kilgannon, *supra* note 198; FAIR IMMIGRATION REFORM MOVEMENT (FIRM), *supra* note 198 (citing localities that have passed anti-immigrant housing ordinances, including: (1) Riverside, N.J., "impose $1000 fines on landlords who rent to undocumented immigrants." This ordinance is currently not being enforced because of pending litigation challenging its constitutionality; (2) Willingsboro Township, N.J., "illegal for anyone to knowingly employ or rent to an undocumented immigrant"; (3) Gaston County, N.C., "prevents illegal immigrants from receiving any services funded by the county . . . [and] amends minimum housing requirements, limit[ing] the number of people who can live in rental properties"; (4) Altoona, Pa., ordinance punishing employers and landlords, based on Hazleton model; (5) Berwick, Pa., "requiring renters to prove that they are legal U.S. residents"; (6) Bridgeport, Pa., "ordinance requiring landlords to register housing units, forbidding renting to undocumented immigrants, prohibiting overcrowding housing units, barring employers from employing undocumented immigrants, and declaring the town English-only"; (7) Gilberton, Pa., "Illegal Immigration Relief Act"; (8) McAdoo, Pa., ordinance based on Hazleton's Illegal Immigration Relief Act; and (9) Barnstable, Ma., "requir[ing] landlords to keep a list of names of occupants and make the list available to health officials and police").

214. *Garrett*, 465 F. Supp. 2d at 1047–48 (citing ESCONDIDO, CAL., ORDINANCE 2006-38R, § 16E-1 (Oct. 10, 2006)).

215. 8 U.S.C. § 1324(a) makes it a criminal act to harbor immigrants stating that anyone who "brings to or attempts to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner, regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States and regardless of any future official action which may be taken with respect to such alien" shall be guilty of a crime. 8 U.S.C. § 1324(a) (2006).

216. FAIR IMMIGRATION REFORM MOVEMENT (FIRM), *supra* note 198 (citing numerous local ordinances on immigration, including: (1) Northport, Ala., "illegal for more than two adults to live in a bedroom. The ordinance is targeted at residents of a local motor home park, many of whom are immigrant workers"; (2) Hoover, Ala., "Maximum-Occupancy Ordinance limits occupation of a bedroom to two adults ages 19

anti-immigrant rental law that was "intended to stop the crowding of multiple families into single units."[217] The law "requires landlords to obtain rental permits from the town, for which they must pay a fee, to provide details on each unit and to identify each tenant."[218]

In Jupiter, Florida, local landlords filed a suit alleging that they suffered significant financial injury as a result of the city's discriminatory attempts to eliminate the affordable housing available to Hispanic immigrants.[219] Jupiter is an affluent Palm Beach County community. The city's Hispanic population began rapidly increasing after 2000 from immigrant workers seeking jobs in the construction and labor sectors.[220] In response, the Jupiter city council adopted the Overcrowding Ordinance. The ordinance "required, among other things, that no more than five persons occupy any housing unit, unless all members of the housing unit are related by blood or marriage."[221] This ordinance targeted landlords in an attempt to eliminate available affordable housing for Hispanic immigrant workers.[222]

In Jupiter, during the debate over the Overcrowding Ordinance, several people made statements to the effect that the ordinance could address overcrowding, but could also be enforced in a manner that only targeted Hispanic residents.[223] It became clear that the city council in-

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and up"; (3) Pelham, Ala., "Maximum-Occupancy Ordinance limits occupation of a bedroom to two adults ages 19 & up"; (4) Riverside, N.J., "'Riverside Township Illegal Immigration Relief Act' . . . would impose $1000 fines on landlords who rent to undocumented immigrants and . . . ban employers from hiring them."); *see also* Young Apartments, Inc. v. Town of Jupiter, 529 F.3d 1027, 1034 n.2 (11th Cir. 2008) ("[The Jupiter Overcrowding Ordinance is] codified in Article VIII of the Jupiter Housing Code at Sections 21-206, 21-254, and 21-255. Section 21-206, containing the five-person limitation, provides that '[f]amily is one or more persons occupying a single housekeeping unit and using common cooking facilities; provided that unless all members are related by blood or marriage, no such family shall contain over five persons.' Section 21-254 assigns levels of occupants to square footage levels, setting forth limitations on the number of occupants based on available space, with an exemption for children under the age of eighteen. Finally, Section 21-255 provides that '[a]n unlawful structure is one found in whole or in part to be occupied by more persons than permitted under this Code or was erected, altered or occupied contrary to law. Such structures are deemed unfit for human occupancy and shall be vacated unless the number of occupants is reduced to meet the requirements of section 21-254. Failure of the owner to comply will cause the premises to be condemned and utility services terminated to the property pending compliance with this chapter.' Once a rental property has been condemned, its owner may not lease that property to tenants until it has been brought into compliance with the Housing Code."); Kilgannon, *supra* note 198 ("Several notices of violations were issued to the landlord [of apartments in Westhampton, New York that were raided]. The citations and other details of the inspection were posted on the town's Web site, along with those of other inspections carried out 'to identify and crack down on unsafe and overcrowded living conditions within Southampton Town.'").

217. Kilgannon, *supra* note 198.
218. *Id.*
219. *Young Apartments*, 529 F.3d at 1036.
220. *Id.* at 1033.
221. *Id.* at 1034.
222. *Id.* at 1033.
223. *Id.* at 1033–34. The overcrowding ordinance is strikingly similar to the Chinese laundry laws that were adopted during the 1880s in California. *See, e.g.*, Yick Wo v.

tended to disparately enforce the Overcrowding Ordinance against landlords renting to Hispanic immigrants.[224] The citizens of the town wanted to put additional pressure on Hispanic immigrants to leave the town.[225]

Given the discriminatory motivation in passing the ordinance alleged by the town's landlords, the Eleventh Circuit found that the apartment complex had standing and remanded the case back to the district court to decide section 1983 claims under the Fourteenth Amendment of the Constitution.[226] This case illustrates how the passing of local immigration ordinances can be discriminatorily motivated but crafted to be facially neutral. The city of Jupiter clearly wanted Hispanic immigrants to self-deport or to move out of their town and passed the facially neutral overcrowding ordinance to accomplish this goal.

Ordinances of this type affect communities in unforeseen ways as well. For example, during the Jim Crow era, landlords were opposed to restrictive covenants that prohibited the sale of land to certain races because it made it difficult to freely sell/rent property.[227] Like landlords during the Jim Crow era, a number of today's landlords are opposed to enforcing the anti-immigrant provisions.[228] Many landlords are parties to litigation seeking to stop the enforcement of anti-immigrant residential laws.[229] For example, in Escondido, California, residential property owners and real estate professionals filed an amicus brief in support of the temporary restraining order.[230] In the brief, the landlords asserted that they were opposed to the ordinance because it would invite numerous lawsuits and possibly limit their contractual right to collect rent on their properties.[231]

Even though these laws result in excluding Latinos, many cities, like Escondido, allege that the purpose of anti-immigrant residential statutes is to address the concern that "residential overcrowding costs the city potentially millions of dollars in services and facilities, and that illegal

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Hopkins, 118 U.S. 356, 373–74 (1886). These laws, which restricted the operation of certain commercial laundries, were facially neutral but applied in a discriminatory manner against Chinese owned laundry facilities. *Id.* The law required laundries operated in wooden buildings to obtain a permit for operation. *Id.* at 366. In practice, no permits were granted to Chinese people, while only one out of eighty non-Chinese laundry owners were denied. *Id.* at 373–74. These laws were held to violate the equal protection clause of the Fourteenth Amendment. *See id. See also supra* section III.A.

224. *Young Apartments*, 529 F.3d at 1033.

225. *Id.* at 1034.

226. *Id.* at 1037, 1046.

227. Mangum, *supra* note 175, at 139 (citing 1915 Virginia Segregation Ordinance); *see, e.g.*, Murray, *supra* note 76, at 188 (describing an ordinance prohibiting landlords from renting to blacks and whites in the same dwelling unit, specifically providing that no person or corporation shall rent an apartment house or other like structure to person not of same race) (citing LA. CODE CRIM. PROC. ANN. art. 1315 (1932).

228. *See, e.g.*, *Young Apartments*, 529 F.3d at 1033; Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 488–90 (M.D. Pa. 2007). Landlords were plaintiffs in both lawsuits.

229. *See, e.g.*, *Young Apartments*, 529 F.3d at 1033; *Lozano*, 496 F. Supp. 2d at 488–90.

230. Garrett v. City of Escondido, 465 F. Supp. 2d 1043, 1048 (S.D. Cal. 2006).

231. Amicus Brief in Support of Plaintiffs' Application for Temporary Restraining Order 3–4, *Garrett*, 465 F. Supp. 2d 1043 (S.D. Cal. 2006) (No. 3:06 CV 02434).

immigrants are most likely to share living quarters."[232] In Escondido, the deputy mayor believed that there was a direct correlation between illegal immigration and the decline of the quality of life in the city.[233] Nevertheless, if the concern is overcrowding, more direct regulation of residential permits for residency limits would appear to be a more straightforward approach to resolving the problem than a complicated ban on certain classes of renters.

In reviewing the impact of anti-immigrant laws, it is evident that anti-immigrant laws that exclude immigrants from renting property will result in the exclusion of Latinos from certain residential communities. The right to own property confers membership on individuals. Hence, denying Latinos the right to own land relegates them to second-class (or no class) citizenship within our country and reinforces tiered personhood.[234] In all of these contexts, the anti-immigrant laws are either applied or may be applied in a discriminatory manner, or the motives behind passing the laws are discriminatory.[235]

3. *Employment Laws*

The *Dred Scott* opinion held that African Americans were property, only to be valued on their labor. Similarly, today immigrant Latinos are often viewed as property and valued based upon the cheap labor they provide.[236] Both Latinos and African Americans have a similar history of being exploited in low-paying agricultural jobs. Historically, African Americans started out in agricultural peonage through slavery and sharecropping. During the civil rights movement, "[b]ecause most of the Farmworkers in the rural South prior to 1960 were African American, any legislation on behalf of farm workers tended to be viewed as undermining the hierarchical and racially charged social order preserved throughout the South with various Jim Crow laws."[237] Latino migrant workers share a similar history.

There are currently two different types of anti-immigrant laws addressing employment. First, there are the anti-immigrant laws that focus

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232. David Fried, *Escondido Ordinance Would Ban Renting to Illegal Immigrants*, N. COUNTY TIMES, Sept. 29, 2006, *available at* http://www.nctimes.com/articles/2006/09/30/news/inland/21_38_069_29_06.txt.

233. Emily Bazar, *Cities Get at Illegal Immigrants Through Cars*, USA TODAY, Aug. 14, 2007, *available at* http://www.usatoday.com/news/nation/2007-08-14-towing15_N.htm (quoting Councilman Abed as saying: "Every time there's a house for sale, three or four families buy it. There are 10 cars out front . . . . Some people cannot park in front of their own homes.").

234. Villazor, *supra* note 26, at 47 ("[T]he ability to rent property confers an individual and her family with important attributes of membership in the community in the same way that the right to own property has historically provided a person with membership rights.").

235. *See supra* section III.A (discussing legislators, mayors, and city council members' discriminatory motives).

236. FERG-CADIMA *supra* note 80, at 16 (describing segregated schools in Santa Ana, California, as "'Mexican schools' operated on half-days during walnut-picking season to accommodate local agribusiness demands for child labor and yet received full per-pupil funding from the state").

237. Schell, *supra* note 40, at 142–43.

directly on employment of illegal immigrants. These are clear attempts to limit Latinos' ability to work. The anti-immigrant proponents claim that laws attempt to regulate employment in order to prevent undocumented immigrant workers from being exploited. Second, there are laws that target employers. This section focuses on the state and local laws that target employers.

Many states and localities have passed anti-immigrant employment laws sanctioning employers for hiring undocumented immigrants. While Jim Crow laws helped employers maintain control over African Americans, anti-immigrant laws work to displace undocumented workers. In the past, however, immigration laws that targeted undocumented workers and imposed sanctions against employers have not been enforced.[238] The Arizona's Legal Workers Act is the most comprehensive law targeting businesses that hire undocumented immigrants.[239] Arizona's act suspends the business license of employers who hire undocumented workers and requires state employers to verify the status of employees using a federal electronic verification system.[240] Both the towns of Hazleton, Pennsylvania and Valley Park, Missouri passed ordinances that sanctioned employers for hiring undocumented workers.[241] Both ordinances suspend an employer's license to operate within the city.[242] After Hazleton passed its ordinance, many houses went up for sale and many Latinos, both documented and undocumented, moved out of Hazleton.[243] The ACLU noted that "[m]any of those affected by the overly broad ordinance are here legally and have lived, worked and worshiped in Hazleton for a long time. In desperation and fear, some of those residents have already decided to close their businesses, move out of Hazleton, or, simply hide as best they can behind closed doors."[244]

In *Lozano*, the Hazleton ordinances addressed the "presence and employment of illegal aliens."[245] The American Civil Liberties Union sued the municipality of Hazleton, alleging that the ordinance violated the U.S. and state constitutions.[246] Hazleton's employment ordinance prohibits businesses from hiring undocumented workers.[247] The Hazleton plaintiffs argued that "employers and landlords facing steep fines and only limited process to protect their rights, would probably choose to end a relation-

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238. *See* McKanders, *supra* note 11, at 39.

239. *See* ARIZ. REV. STAT. ANN. § 23-212 (2008) ("An employer shall not knowingly employ an unauthorized alien.").

240. Chicanos Por La Causa v. Napolitano, 544 F.3d 976, 979 (9th Cir. 2008).

241. HAZLETON, PA., ORDINANCE 2006-18, ILLEGAL IMMIGRATION RELIEF ACT ORDINANCE § 3(D) (Sept. 21, 2006); Gray v. City of Valley Park, No. 4:07CV00881 ERW, 2008 WL 294294, at *11 (E.D. Mo. Jan. 31, 2008).

242. HAZLETON, PA., ORDINANCE 2006-18, ILLEGAL IMMIGRATION RELIEF ACT ORDINANCE § 3(D) (Sept. 21, 2006); *Gray*, 2008 WL 294294, at *16.

243. McKanders, *supra* note 11, at 11.

244. Letter from Plaintiffs to Louis Barletta, Mayor, City of Hazleton (Aug. 15, 2006) (on file with the U.S. District Court for the Middle District of Pennsylvania).

245. Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 484 (M.D. Pa. 2007).

246. *Id.* at 517–25.

247. *Id.* at 484–85.

ship with anyone accused of illegal status, whether that accusation was warranted or not."[248]

Laws targeting employment of undocumented immigrants are presumptively legal because they are targeting subjects whose illegality gives them little or no entitlements to legal protection. This presumption leads to the discriminatory treatment of Latinos. The main concern with anti-immigrant employment laws is that employers will implement "defensive hiring practices." Defensive hiring practices occur when employers refuse to hire people they believe may be undocumented immigrants.[249] The concern is that employers, untrained in immigration laws, will discriminate against anyone perceived to be undocumented.[250] Often, Latinos, regardless of their actual immigration status, are stereotyped as being undocumented. So, even if the employment statute is neutral on its face, employers can exercise their discretion and apply the statute in a discriminatory manner against Latinos.[251]

There is social science evidence that many employers have already implemented defensive hiring practices.[252] The Warren Institute in its amicus brief in the *Hazleton* case cited numerous cases where Latino U.S. citizens and lawful permanent residents, were "denied employment because their lawful documents were rejected by employers suspicious even though a non-Hispanic United States citizen presented similar documents that were accepted."[253] The concern is that employers, untrained in immigration laws and abundantly cautious not to violate the statute, will discriminate against anyone perceived to be undocumented.[254]

An additional concern involves employers who are aware of the law, but still desire to exploit cheap Latino labor, and will accept and even at times supply false documents to employees so that they can hire undocumented immigrants to work. Federal enforcement of the Immigration Reform and Control Act[255] against employers has historically been relatively rare and ineffective when implemented.[256] This means that the state and

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248. *Id.* at 540; *see also* McKanders, *supra* note 11, at 35–44 (stating that the fear with the passing of the Immigration Reform and Control Act was that it would be discriminatory in its application).
249. *Lozano*, 496 F. Supp. 2d at 540.
250. *Id.* at 540–41.
251. McKanders, *supra* note 11, at 36–37. The fear of defensive hiring practices was also a concern when the federal government passed a similar law barring the hiring of undocumented immigrants in 1986 with the Immigration Reform and Control Act. *Id.*
252. Brief of the Chief Justice Earl Warren Institute on Race, Ethnicity, and Diversity at University of California, *supra* note 33, at 7.
253. *Id.*
254. *Lozano*, 496 F. Supp. 2d at 540–41.
255. 8 U.S.C. § 1101 (2006).
256. Peter Brownell, *The Declining Enforcement of Employer Sanctions*, MIGRATION INFORMATION SOURCE, Sept. 2005, http://www.migrationinformation.org/Feature/display.cfm?ID=332 (stating that in a "1990 report on the early implementation of IRCA, the Urban Institute's Michael Fix and Rand Corporation's Paul Hill found that the same issues of low levels of enforcement and limited intra- and interagency coordination, which had made for ineffective employer sanctions in the countries the GAO studied, threatened to make IRCA's sanctions provisions ineffective").

local anti-immigrant employment laws can actually have two effects. First, some employers will stop hiring Latinos altogether. Second, given the current market in which undocumented immigrants are employed, it is likely that other employers will go further underground in their practices to hire undocumented workers at suppressed wages and implement more restrictive policies that violate their rights. In some respects this mirrors employers during the Jim Crow era whose ultimate goal was to maintain control over the supply of cheap African American labor. Here, the illegal immigrant employment laws will meet resistant employers who may come up with ways to circumvent the law's requirements to maintain a cheap supply of labor.

Ultimately, defensive hiring practices and underground employment are causing Latinos, whether documented, undocumented, or citizens, to move away from states and localities that have passed restrictive employment laws. The right to deny a person livelihood is "tantamount to the assertion of the right to deny them entrance and abode" into our country.[257] An inability to support themselves and their families will ultimately cause self-deportation, even in cases where the immigrant has full legal rights to remain in the United States. The immediate effect is that, if no work is available, Latinos are forced to leave in search of work.[258] This restricts Latinos' freedom to choose where they want to reside and often causes them to self-deport or move to other states.[259]

CONCLUSION

Today, we must recognize the role that social norms have in influencing the law and vice versa. In holding that the Fourteenth Amendment was not intended to abolish racial distinctions or social order, the *Plessy* Court reinforced divisive social norms.[260] Even though Reconstruction Amendments gave African Americans citizenship rights, Southern states still held deeply rooted prejudices against African Americans and first segregated public facilities in a *de facto* manner and then passed laws that reinforced segregation.

The lessons from the Jim Crow era demonstrate how the law can operate to deny certain classes of people substantive rights even when they are legally entitled to personhood rights.[261] Overcoming Jim Crow laws transformed life for African Americans and many minority communi-

257. Truax v. Reich, 239 U.S. 33, 42 (1915) (striking down an employment statute and holding that "the assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode").
258. McKanders, *supra* note 11, at 3, 27–30.
259. *See id. But see* Kris Kobach, *supra* note 57, at 471 ("Jobs are the primary magnet that draws illegal aliens to the United States. Removing this magnet can significantly reduce illegal immigration and can encourage many illegal aliens to leave the U.S. on their own."); *id.* at 472 (describing how, after Arizona passed an anti-immigrant law in January 2008, "illegal aliens were already self-deporting by the thousands").
260. Plessy v. Ferguson, 163 U.S. 537, 544 (1896).
261. Fox, *supra* note 96, at 116 (defining a holistic version of citizenship which takes "account of multiple social activities from areas as diverse as family, religion, political action, commerce, and education").

ties.[262] The elimination of Jim Crow laws and *de facto* practices occurred on many levels from a shift in cultural norms, legislative action, and also court decisions. The parallels between Jim Crow and anti-immigrant laws are important because we are at the very start, or at least the middle, of an anti-immigrant backlash to some extent. The ways in which Jim Crow laws reified exclusionary social norms can be used as a point for critically analyzing anti-immigrant laws that target Latinos.

The ACLU's predicted anti-immigrant laws, although different in historical foundations and intent from Jim Crow laws, are having the effect of denying Latinos' personhood and civil rights and return us to the days when certain classes of people were denied rights.[263] The laws essentially create unjustified tiered personhood wherein the act of "illegally" entering or remaining in the county constitutes rationale for denying or removing the personhood and basic civil rights of groups.

In some instances, like the Village of Mamaroneck case in New York and the Jupiter, Florida case, the city council members are frank about their desire to displace Latino immigrants. In other places, like Hazleton, Pennsylvania, the mayor used unsubstantiated statistics as evidence to support the enactment of anti-immigrant laws for the health, safety, and welfare of the their communities. Even though the legislative actors may claim to not be conscious of the discriminatory effects of passing the laws, the laws will have a substantially similar effect as Jim Crow laws — segregating communities, denying certain populations access to certain jobs and public accommodations, and legitimizing violent extra-legal activities. Ultimately, anti-immigrant laws deprive Latino immigrants of their basic personhood and humanity to which they are entitled as persons within the jurisdiction of the United States.

Clearly the anti-immigrant residential, anti-solicitation, and employment laws allow state and local authorities to make decisions regarding a person's immigration status and deny that person rights according to their arbitrary determination. This discretion leaves room for discriminatory application regarding to whom landlords can rent, whom businesses can employ, and the methods through which immigrants can seek employment. The laws have wide range effects on both documented and undocumented Latino immigrants. In order to address the laws, first, there must be a collective paradigm shift in the way that Latino immigrants, both documented and undocumented, are perceived in our country. People must be educated about the different categories of immigrants so that we do not conflate the various categories of immigrants, especially Latino immigrants. Along with this strategy, we must make a concerted effort to educate those persons (i.e. the mayors, the members of city council, and state legislators) passing the laws so that they are not carrying discriminatory motives into the enactment of the laws.

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262. JOHNSON & ONG HING, *supra* note 43, *at* 110 ("Although critical race theorists complain of the legacy of discrimination that continues in the United States, they cannot dispute that the demise of Jim Crow represented a major transformation of United States social life.").

263. *Lozano* Second Amended Complaint, *supra* note 1, at 7.

Even though the structure and content of the laws may be different, state and local anti-immigration laws have the same effect as Jim Crow laws resulting in segregation and discrimination against Latinos.[264] Historically, Jim Crow laws demonstrated how race is reified through legislating cultural norms that reinforce racial divisions in our country. If anti-immigrant laws are allowed to stand they will also reinforce divisive cultural norms that result in the exclusion of Latinos from basic rights and continue to further tiered personhood and the denial of civil rights.

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264. *Lozano* Second Amended Complaint, *supra* note 1, at 7.