XENOMORPH!!
Indians, Latina/os, and the Alien Morphology of Arizona Senate Bill 1070

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The national debate over illegal immigration has been dramatically altered since 9/11. In his book *The Latino Threat*, Leo R. Chavez argues that Latina/o immigrants—including those U.S. populations that physically resemble them—have been socially constructed as grave risks to the United States.[1] Arizona Senate Bill 1070 (hereinafter "S.B. 1070") typifies the aggressive backlash that recently occurred in response to this perceived threat.[2] Themes such as immigrant sloth or vice, communicable diseases, reproductive capacity, and criminal "tendencies" are routinely used to drive a wedge between the white majority and non-white immigrants—especially Latina/o immigrants from places like Mexico and Central America. Many of these arguments appear to have their roots in how Latina/o immigrants have been constructed as both exotic and menacing—especially those immigrant populations whose indigenous ancestries are illustrated morphologically.[3] In fact, I believe that the "Latina/o Threat narrative" that Chavez describes is intimately connected to the notion of a "savage alien" vis-à-vis anti-Indian sentiments.

In this article, I discuss how imageries based on the historical typification of Indians have been projected onto Latina/o immigrant populations that are in the United States without proper documentation. I also explore the risk such a typification poses to native-born Latina/o populations who are oftentimes unfairly implicated in surging anti-immigrant backlashes. Key questions this article addresses include: Is the idea of the "Latina/o Threat" materially connected

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[1] *See* LEO R. CHAVEZ, THE LATINO THREAT: CONSTRUCTING IMMIGRANTS, CITIZENS, AND THE NATION 21, 36, 40–43 (2008). For the title of this article, I invoke the imagery of the threatening alien "Xenomorph" from the movie *Alien* to illustrate how undocumented persons have been stripped of their true identities and transformed into alien threats in the context of Arizona's heated debate over undocumented immigration. *See also* Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of NonPersons*, 28 U. MIAMI INTER-AM. L. REV. 263 (1997). For a concise description of how undocumented persons have been unfairly and inaccurately depicted in the current anti-immigrant debate, see Hector Tobar, *Striking a Nerve on Racism*, L.A. TIMES, June 30, 2009, at A2.

[2] Amended portions of S.B, 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010), dealing with enforcement functions have been codified as Ariz. Rev. Stat. § 11-1051(B) (LexisNexis 2010) (authorizing police to conduct alienage investigations in the field) and Ariz. Rev. Stat. § 13-3883(A)(5) (LexisNexis 2010) (authorizing police to conduct warrantless arrests of suspected illegal aliens).

[3] Historically, Indian cultures have been constructed as exotic and menacing, thus threatening the advancement of white civilization. Immigrants who share indigenous ancestries with Indian societies have been constructed in parallel fashion. *See* MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 2, 7–8, 57–58 (2004).

to historical ideas concerning Indian savagery? If so, to what extent is this threat narrative connected to anti-Indian sentiment? How have historical representations of American Indians framed modern debates over the kinds of risks posed by Latina/o immigrants to the U.S.? How have these debates affected recent immigration policy?

In section I, I discuss how S.B. 1070, as amended by Arizona House Bill 2162, frames the Latina/o Threat narrative in subtle racialized terms.[4] Specifically, I evaluate whether Arizona's newly authorized alienage investigations are likely to function in ways that implicate race in a constitutionally impermissible manner. In section II, I demonstrate how the idea of Indian savagery animated the way Americans typically perceived Indian societies. Further, I assert that the savagery that was often associated with Indians was seamlessly grafted onto Mexican immigrants and ultimately sparked an expansive xenophobic fear that drove the development of restrictive immigration laws along racialized lines. In section III, I demonstrate how the mixed-blood descendents (e.g. immigrants) of early indigenous Latina/o populations have been racialized consistent with that of their Indian forbearers. Throughout, I aim to show how the Latina/o Threat narrative has its origins in anti-Indian sentiments which are themselves grounded in a deep-seated fear of a savage alien.

I. Strange Beings Unlike Us: Justifying Arizona's New Alienage Investigations

Fear of the stark racial and cultural dichotomies that delineated Indians from whites is a deeply rooted historical impulse in American society—breeding revulsion as well as a melancholy kind of sadness. The writing of Roy Harvey Pearce describes this mood poignantly:

> Americans who were setting out to make a new society could find a place in it for the Indian only if he would become what they were—settled, steady, civilized. Yet somehow he would not be anything but what he was—roaming, unreliable, savage. So they concluded that they were destined to try to civilize him and, in trying, to destroy him, because he could not and would not be civilized. He was to be pitied for this, and also to be censured. Pity and censure were the price Americans would have to pay for destroying the Indian. Pity and censure would be, in the long run, the price of the progress of civilization over savagism.[5]

Fear of savagism and the desire to censure "barbaric" populations has been re-imagined and re-awakened in Arizona's recent anti-immigrant legislation. As originally conceived, S.B. 1070 empowers Arizona police officers to act in the capacity of immigration agents by stopping individuals they suspect are in the nation without proper documentation.[6] Specifically, S.B. 1070 authorizes Arizona police officers to stop individuals absent any independent offense or infraction, where "reasonable suspicion exists that the person is an alien who is unlawfully present in the United States. S.B. 1070 also presumes a person is unlawfully present in the U.S

[4] H.B. 2162, 49th Leg., 2d Reg. Sess. (Ariz. 2010).
[5] ROY HARVEY PEARCE, SAVAGISM AND CIVILIZATION: A STUDY OF THE INDIAN AND THE AMERICAN MIND 53 (1988).
[6] *See* Ariz. S.B. 1070.

unless the person has any of the following documents on her person at the time of the stop: (1) a valid Arizona driver license; (2) a valid Arizona non-operating identification license; or (3) a valid tribal enrollment card or other form of tribal identification.[7]

In its original form, S.B. 1070 drew immediate and widespread criticism because it raised troubling possibilities that police would target native-born and naturalized Latina/o citizens because of their physical appearance.[8] Moreover, despite the fact that S.B. 1070 stipulates that police are not required to question individuals about their immigration status when such inquiries would "hinder" or "obstruct" an active investigation, there is nonetheless a strong likelihood that the mere enactment of S.B. 1070 has had a chilling effect on immigrant communities, discouraging immigrant victims and witnesses from cooperating in the criminal justice process.[9] The fact that crime may spike as a result of deportation fears will create havoc for law enforcement agencies and breed additional criminal activity that will quickly spread from immigrant communities to non-immigrant communities.

S.B. 1070 was quickly amended by Arizona House Bill 2162 (referred to collectively as the "S.B. 1070 bills"). By omitting the word "solely" in a portion of S.B. 1070 that originally read "may not solely consider race, color or national origin," the S.B. 1070 bills make clear that race, color, or national origin may not be used by Arizona police as justification for determining a person's immigration status. The bills also empower police to inquire about a person's immigration status *only if* the officer has "lawful[ly] stop[ped], det[ained] or arrest[ed]" these individuals for offenses committed independent of their political status—the previous S.B. 1070 language used the far more ambiguous expression "lawful contact." Ostensibly, this amendment eliminated the proclivity for Arizona police impermissibly to use race and racial profiling to enforce the S.B. 1070 bills. Nevertheless, federal complaints filed to challenge the S.B. 1070 bills express grave concerns regarding the bills' potential for fostering unconstitutional police practices.

As plaintiffs, the National Coalition of Latino Clergy and Christian Leaders ("CONLAMIC") allege that the S.B. 1070 bills will result in an "impermissibly punitive regime of arrests and racial profiling in violation of substantive due process[]" under the Fourteenth Amendment.[10] Further, they argue the S.B. 1070 bills are not narrowly tailored and do not serve a compelling government interest.[11] Moreover, procedural due process is also violated because these laws facilitate "no-bond decisions against plaintiffs and the proposed class, based solely on the police officer's finding that there is [reasonable suspicion] to believe that detained individuals have 'entered or remained in the United States illegally.'"[12]

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[7] *Id.*

[8] Mexican American Legal Defense and Education Fund (MALDEF), Sign the Petitino to Veto SB1070, http://maldef.org/truthinimmigration/sign_the_petition_to_veto_sb1070/ (last accessed July 28, 2011); MALDEF Issues Statement in Response to U.S. Dep't of Justice Against Arizona's Anti-Immigrant Law SB 1070, http://maldef.org/news/releases/maldef_issues_statement_in_07062010/ (press release).

[9] *See* Kate Linthicum, LAPD's Beck Joins Other Chiefs to Say Arizona Immigration Law Could Cripple Law Enforcement, L.A. TIMES BLOG, http://latimesblogs.latimes.com/lanow/2010/05/chief-beck-says-arizona-immigration-law-could-cripple-law-enforcement.html (May 26, 2010, 10:24 A.M.).

[10] Complaint at 17, 20–21, Nat'l Coal. of Latino Clergy & Christian Leaders v. Arizona (D. Ariz. April 29, 2010) (No. 10-cv-00943-LOA) (dismissed for lack of standing on December 10, 2010 at ECF 43).

[11] *Id,* at 21.

[12] *Id.* The complaint incorrectly substitutes the term probable cause for reasonable suspicion when quoting the bills'

The Mexican American Legal Defense and Education Fund ("MALDEF") and other plaintiff organizations allege that the S.B. 1070 bills were implemented with "the purpose and intent to discriminate against racial and national origin minorities, including Latinos, on the basis of race and national origin."[13] Such discrimination, they argue, impermissibly deprives these groups of the equal protection of the laws under the Fourteenth Amendment.[14]

Plaintiff, Martin H. Escobar, a duly sworn police officer for the City of Tucson, alleged that the S.B. 1070 bills, in practice, would force him to use race in a constitutionally impermissible manner in order to carry out immigration investigations required by the S.B. 1070 bills. Plaintiff Escobar alleged that there are no race-neutral criteria or bases for police, in practice, to conclude that individuals are in the nation without proper documentation. Contextual criteria such as proximity to the border, linguistic characteristics (accent), physical features, manner of dress, language spoken, Spanish radio or television choice, vehicle type, public transportation usage, bearing of Mexican license plates, stereotypical residence patterns, presence of school-age children—individually or collectively—do not provide sufficient bases, absent incorporating an individual's race, to implement the detention and investigative protocols of the S.B. 1070 bills.[15] Rather, the S.B. 1070 bills in practice force police officers to attempt to determine an individual's immigration status "based solely on immutable and mutable characteristics that are common or stereotypical in attribution to Hispanics."[16] Ultimately, Escobar argued that the S.B. 1070 bills compel police officers, under threat of lawsuit, to violate the due process and equal protection clauses of the Fourteenth Amendment.[17]

Escobar's complaint, in particular, makes a persuasive case for these S.B. 1070 bills to be overturned on constitutional grounds. He makes clear that context alone, absent race, is insufficient for a police officer to distinguish between legal and undocumented populations. Stated otherwise, police criteria that purportedly rely on context alone become "predictive" or "indicative" of an individual's legal status only when racial morphology is substantially implicated in the scope of investigatory detention. Thus, circumstantial criteria does not become predictive in race-neutral ways. For instance, it is likely that police officers will not become suspicious of alienage when they encounter white males landscaping, mowing lawns, milling about in front of home-improvement stores, bussing tables, cleaning homes, acting as nannies, or caring for the elderly. Rather, it is only when indigenous Latina/o morphology—olive skin, dark hair, broad nose, almond shaped eyes—is contrasted against European features—white skin, light colored hair and eyes, thin nose—that context matters. Thus, when the S.B. 1070 bills are operationalized at street level, racial profiling becomes its driving force—it is about indigenous Latina/o features and not circumstantial context.

Federal courts have ruled that race may be used in a limited fashion by certified border-patrol officers to initiate limited alienage investigations. In *United States v. Brignoni-Ponce*, 422

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language. The text above is properly corrected.

[13] Complaint at 56, Friendly House v. Whiting, No. 10-cv-01061-MEA (D. Ariz. May 17, 2010).

[14] *Id.*

[15] Though the complaint was dismissed, it is still probative of the formidable challenges police officers would confront in trying to enforce the S.B. 1070 bills. *See* Complaint at 5–9, Escobar v. Brewer, No. 10-cv-00249-DCB (D. Ariz. May 18, 2010) (dismissed Aug. 31, 2010).

[16] *Id.* at 8.

[17] *Id.* at 8–9.

U.S. 873 (1975), the United States Supreme Court ruled that border-patrol agents may use race as one, but not the sole, factor in determining which vehicles to stop to evaluate whether the occupants are in the nation illegally.[18] Conversely, in 2000, the Ninth Circuit ruled that the border patrol could not consider "Hispanic appearance" in making vehicle stops because such a basis "in an area in which a large number of people share a specific characteristic, . . . casts too wide a net to play any part in a particularized reasonable suspicion determination."[19]

HB 2162's requirement that police must first have a lawful independent reason to stop someone before they inquire about alienage does not provide a sufficient safeguard to prevent police from contriving "lawful" stop criteria as pretext to investigate a person's alienage. For instance, police officers routinely utilize boilerplate stop criteria such as: claiming that vehicles were swerving in lanes when they were not; claiming that a vehicle's brake lights were malfunctioning when they were not; claiming that a person was loitering when in fact they were waiting for a ride; claiming that a person was behaving as if they were intoxicated, when they were sober—as well as various car stops based on alleged speed and traffic infractions, and vehicle condition.

II. Racial Impurities and Other Unspeakable Alchemies

As previously mentioned, contemporary ideas of the savage alien have deep roots in how non-white immigrants have been racialized vis-à-vis their mixed Indian heritage. Mexican immigrants, in particular, often originate from populations that possess pronounced characteristics reflecting their Indian ancestry. Thus, to understand how contemporary immigrants have been constructed as alien threats, one needs to understand how Indians have historically been typified as threatening savages.

Professor Robert A. Williams has written about how from our nation's earliest times, Europeans have characterized Indian populations as "irreconcilably savage."[20] Perhaps it was the stark morphological contrasts between Indian and white populations that first began to fuel the construction of white identity relative to the dark Indian other.[21] Historically, white Americans have not constructed their individual and collective racial identities as compatible with Indian taxonomies and culture—in fact, they have constructed their identities in opposition to the Indian other. Often, these fictive identities assumed confrontational tones animated by crude racial logics that were emblematic of the following mantra: that which is dark is not white and likely evil—that which is evil is always threatening.

In the mid-nineteenth century, dark racial logics like this fueled the rapid escalation of American expansionism under the banner of Manifest Destiny.[22] In his classic work, *Race and Manifest Destiny*, Reginald Horsman described how nationalistic hubris, religion, and racism

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[18] 422 U.S. at 884–887.
[19] United States v. Montero-Camargo, 208 F.3d 1122, 1134 (9th Cir. 2000).
[20] ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA 47 (2005).
[21] *See* REBECCA BLEVINS FAERY, CARTOGRAPHIES OF DESIRE: CAPTIVITY, RACE, AND SEX IN THE SHAPING OF AN AMERICAN NATION 12 (1999); PAULINE TURNER STRONG, CAPTIVE SELVES, CAPTIVATING OTHERS: THE POLITICS AND POETICS OF COLONIAL AMERICAN CAPTIVITY NARRATIVES 1 (1999).
[22] LAURA E. GÓMEZ, MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE 4–5 (2007).

melded caustically in ways that drove America's expansionist agendas. As one example, Andrew Johnson argued that Mexico as a nation would fail. Invoking Johnson's spirit and words, Horsman writes, "God intended to punish the 'perfidious and half-civilized' Mexico, and 'the Anglo-Saxon race has been selected as the rod of her retribution.'"[23] In 1846, Americans looked upon the Indian and mixed-blooded Mexican populations as degraded and impure, and unfit to rule southwestern territories.[24] In fact, some scholars have argued that Mexico's inability to stop Indian raiding into their northern borderlands was seen by U.S. officials as being inextricably linked to the impure racial heritage of Mexicans themselves.[25]

The incorporation of non-white populations resulting from the U.S. conquest of the southwest was a matter of deep concern to some high-level political leaders. To them, it would oblige the nation to absorb significant numbers of non-white Indian and mixed-blood populations. Senator John C. Calhoun's comments during the ratification debates of the Treaty of Guadalupe Hidalgo, the document that would end the U.S.-Mexico War in 1848, captures many of the widespread social concerns of the day regarding the risks associated with racial amalgamation:

> We have conquered many of the neighboring tribes of Indians, but we have never thought of holding them in subjection or of incorporating them into our Union. They have been left as an independent people in the midst of us, or have been driven back into the forests. Nor have we ever incorporated into the Union any but the Caucasian race. To incorporate Mexico would be the first departure of the kind: for more than half of its population are pure Indians, and by far the larger portion of the residue mixed blood. I protest against the incorporation of such a people. Ours is a government of the white man. The great misfortune of what was formerly Spanish America, is to be traced to the fatal error of placing the colored race on an equality with the white. That error destroyed the social arrangement which formed the basis of their society. . . . It is a remarkable fact, in this connection, that, in the whole history of man, as far as my information extends, there is no instance whatever of any civilized colored race, of any shade, being found equal to the establishment and maintenance of free government, although by far the largest portion of the human family is composed of them; and even in the savage state we rarely find them anywhere with such governments. . . . [A]re we to associate ourselves as equals, companions, and fellow-citizens, the Indians and mixed races of Mexico? I would consider such association as degrading to ourselves and fatal to our institutions.[26]

As evidenced by Calhoun's statement, the U.S. annexation of the Mexican West thrust issues of race and racial identity to the forefront of U.S. politics and society in the mid-

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[23] REGINALD HORSMAN, RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLO-SAXONISM 237 (1981).
[24] Robert F. Castro, *Law, Non-Linear Racialization, and Asymmetrical Hierarchies in the American West: An Ode to Manifest Destinies*, 10 RUTGERS RACE & L. REV. 469, 470–71 (2009); HORSMAN, *supra* note 23, at 239–40.
[25] *See* Brian DeLay, *Independent Indians and the U.S.-Mexican War,* 112 AM. HIST. REV. 35, 48–50 (2007).
[26] CONG. GLOBE, 30TH CONG., 1ST SESS. 51 (1848).

nineteenth century. The fact that Indian and mixed-blood populations did not fit neatly into what had principally been a black and white system of race relations was puzzling to many. How should mixed-blood populations like Mexicans be racially defined? Were they Indian? White? Something in-between? In her work on New Mexico, Laura Gómez argues that the American colonization of the Southwest created opportunities for elite New Mexicans to claim a nominal form of "whiteness" under the rule of American law.[27]

Gómez goes on to clarify, however, that most Mexican-American elites were nonetheless treated socially as non-white persons.[28] While this may indeed be the case, it is equally likely that the more expansive subsistence class of Mexicans and Mexican-Americans, which comprised the bulk of the Hispanic population in places like New Mexico, was unable to claim figurative kinds of legal whiteness because the members of that class were among the darker-skinned populations. Due to their strong Indian ancestry, the Mexican-American subsistence class was racialized consistent with detribalized American Indians and discriminated against based on that apparent cultural nexus.[29] There is evidence to suggest that Americans during this period saw Mexicans as being closer to Indians than any other group and, accordingly, viewed them with suspicion.[30]

Parallel racial logic holds true today as well. The text of Arizona's S.B. 1070's enforcement criteria sounds suspiciously familiar to the policies enacted against reservation Indians. As previously noted, S.B. 1070 expressly provides that if an individual does not have on his person specific documents at the time police stop this individual, she is presumed to be an alien that is unlawfully present in the United States. One of the required documents is a valid tribal enrollment card or other form of tribal identification.[31] Such a requirement is strongly reminiscent of how military officers and Indian agents used to require reservation Indians to obtain and possess official passes to demonstrate their lawful presence off the reservation to any white person choosing to inquire about their status.[32] The racialized context of these reservation passes are captured in the following examples:

Example Reservation Pass One:

Navajo Agency
Ft. Defiance, Arizona
Aug 14th 1884.

Pass
To whom it may concern,
The bearers "Del – bushes- he gay" and "The little captain," two members of this tribe have my

[27] Gómez, *supra* note 22, 78, 82–84.
[28] *Id.* at 78.
[29] Castro, *supra* note 24, 483–84.
[30] *See id.*; NGAI, *supra* note 3, at 50; HORSMAN, *supra* note 23, at 231.
[31] Reservation Passes Signed by John H. Bowman, U.S. Indian Agent at Navajo Agency, Fort Defiance, Arizona, August 14, 1884; Letters Sent 1881-1927, Box 4, Folder 1884; Records of the Bureau of Indian Affairs, Record Group 75; National Archives and Records Administration-Pacific Region (Riverside).
[32] LUANA ROSS, INVENTING THE SAVAGE: THE SOCIAL CONSTRUCTION OF NATIVE AMERICAN CRIMINALITY 52 (1998); 1878 COMM'R OF INDIAN AFFAIRS ANN. REP. TO SEC. OF INTERIOR 154.

permission to leave their reservation and go to the center part of this territory for the purpose of trading and to be absent for (40) forty days from this date. They are both industrious Indians and try to support themselves by the result of their own labor, and should be entitled to the fair treatment and the good will of all whites as long as they behave themselves and no longer.

Very respectfully
John H. Bowman
U.S. Indian Agent[33]

Example Reservation Pass Two:

To whom it may concern,
The bearer of this Da-ga-tat-tah (this martiade) has my permission to leave his reservation and go to the vicinity of Albuquerque for the purpose of seeing his daughter who was taken and has been held as a captive since the year 1868 and to be absent for a period of thirty days from this date.
He is entitled to the good will and respect of all white people so long as he behaves himself and no longer.[34]

Example Reservation Pass Three:

To whom it may concern,
The bearer of this says that about sixteen years ago his daughter was taken as a captive by some settlers on the Rio Grande River, that he believes she is still alive and in that vicinity, he wishes to go and see her and find out her present condition, and if feasible induce her to return to her people. I think his mission [sic] very commendable and hope all who may have an opportunity of so doing will assist him in the undertaking and that the girl will return with her father should her present said condition render it feasible and proper for her to do so.[35]

Example Reservation Pass Four:

To whom it may concern,
The bearer of this [name unreadable] has my permission to leave this reservation and go to San Carlos Agency and be absent for the period of fifteen days from this date.
He is entitled to the good will and respect of all Americans as long as he behaves himself and is quiet and orderly and no longer.[36]

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As these historical passes demonstrate, Indians had to obtain permission from white authorities to leave the reservation, but were obligated to: (1) be engaged in constructive activities; (2) police their personal conduct; and (3) surrender their pass to any white person who

[33] *Id.* (since Agent Bowman signed each pass in the same manner, his signature is hereinafter omitted).
[34] *Id.*
[35] *Id.*
[36] *Id.*

could then authenticate that Indian's legitimate right to be off the reservation. The fact that such passes existed at all imposed an obligation on all reservation Indians—and those that resembled them—to carry these passes on them at all times to avoid drawing more unwanted scrutiny.

Similarly, under S.B. 1070, American Indians who are stopped because they resemble indigenous immigrants from places like Mexico would be presumed to be illegal aliens if they do not have their tribal identification cards on them at the time police detain them. Unreasonable burdens such as these explain why federally recognized tribes like Arizona's Tohono O'odham nation have announced their opposition to Arizona's implementation of S.B. 1070.[37]

Conflating the racial identities of Indians and Mexicans has historically resulted in the kindred treatment of these populations under American law.[38] The establishment of the 1848 U.S.-Mexico border fueled the rapid atomization of the region's Indian and Mexican communities. The newly minted border delineated new geo-political boundaries between the U.S. and Mexico; it also compartmentalized what had heretofore been unified indigenous communities that had occupied the borderland regions for generations. The new border fragmented traditional dwelling and migration routes of ancient Indian cultures, changed those indigenous populations on the U.S. side of the border into "American Indians," and transformed Indian societies on the Mexican side of the border into "Mexicans." In the newly minted Mexican North, resident populations—many of whom shared ancestral blood lines with American Indian groups—would, along with their descendents, continue to exhibit Indian-oriented morphologies.

A poignant example lies in the historical experience of Arizona's Yaqui Indians. Yaqui Indians immigrated from Sonora, Mexico to southeastern Arizona beginning in the late-nineteenth century. However, they remained deeply woven into the cultural fabric of Northern Mexico: many spoke Spanish, shared Mexican cultural traits, and had kinship ties with Mexican settlements.[39] In the 1960s, after having grown up in Mexican American barrios in places like Tucson, Yaqui community leaders sought federal recognition of the Yaqui people as an Indian nation.[40] Critics of the Yaqui crusade for recognition struggled with Yaqui ethnicity and claimed that Yaquis were not Indians in the "proper sense of the word [because] [t]hey are a mixture of several breeds—they have no nationality—no home and are not citizens of any country."[41] Instead, it seemed to many critics, that these Yaqui descendents were much more aligned with Mexicans, who were themselves a "dangerous blending of races and alien status."[42] The push by Yaqui leaders for recognition of their indigenous heritage and the subsequent backlash against it underscores how social parochialisms—oftentimes relied on to create highly fungible categories like "Indian" and "Mexican"—obscure genuine racial and cultural affinities shared among borderland populations.[43]

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[37] *See* Press Release, Tohono O'odham Nation, Tohono O'odham Nation Opposes New Immigration Law (May 20, 2010), *available at* http://www.tonation-nsn.gov/press_releases_details.aspx?id=29.
[38] *See* Martha Menchaca, *Chicano Indianism: A Historical Account of Racial Repression in the United States*, 20 AM. ETHNOLOGIST 583, 592-93 (1993).
[39] ERIC V. MEEKS, BORDER CITIZENS: THE MAKING OF INDIANS, MEXICANS, AND ANGLOS IN ARIZONA 2–3 (2007).
[40] *Id.* at 1.
[41] *Id.* at 2.
[42] *Id.*
[43] *Id.* at 4–5.

III. Resistance Against Semi-Barbarity is No Vice

By the late-nineteenth century, the mixed-blood descendents of the newly minted Mexican North had begun to migrate from their settlements to the American Southwest where the demand for cheap labor was widespread.[44] If Americans thought of Indians and Mexicans as distinct from one another, both groups were nonetheless unified in the bitter treatment they shouldered as non-white persons within the United States.[45] According to many, America was a white nation and Mexican immigrants occupied an inferior status due to their alien race, culture, and nationality.[46]

In modern times, some white males have formed militia groups (e.g. minutemen) to patrol the U.S.-Mexico border in order to protect the nation and repel alien populations.[47] For white males in groups like the minutemen:

> [I]t is the colored bodies of immigrants that make[] immigrants more primitive and brings them closer in proximity to the 'unbridled biological urges and passions of animals' . . . . As white men, they believe their racial pedigree obligates them to protect the nation from mixed-blood hordes attempting to invade their domain, with the southern border representing the key threshold they must defend.[48]

It is the spirit of this ideological framework that has been resurrected in Arizona's S.B. 1070 bills. In our post 9/11 world, Mexican ancestry has become synonymous with illegal immigration. In turn, this has rendered all Latino populations suspect regardless of their actual citizenship status.[49] Latino populations are viewed with suspicion because they share similar racial characteristics with many immigrant groups, and S.B. 1070's enforcement criteria is triggered by these same taxonomies: indigenous features, dark skin hue, and other "alien morphologies."[50] Police use these physical characteristics as their primary basis to justify

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[44] RODOLFO ACUÑA, OCCUPIED AMERICA: A HISTORY OF CHICANOS 107, 163–64 (4th ed. 2000).
[45] Mae M. Ngai observes, "The repatriation of Mexicans was a racial expulsion program exceeded in scale only by the Native American Indian removals of the nineteenth century." NGAI, *supra* note 3, at 75.
[46] *See id.* at 23; Meeks, *supra* note 39, at 2.
[47] *See* Robert F. Castro, *Busting the Bandito Boyz: Militarism, Masculinity, and the Hunting of Undocumented Persons in the U.S.-Mexico Borderlands*, 6 J. OF HATE STUD. 7 (2007).
[48] *Id.* at 9 (citation omitted).
[49] Sang Hea Kil & Cecilia Menjívar, *The "War on the Border": Criminalizing Immigrants and Militarizing the U.S.-Mexico Border*, in IMMIGRATION AND CRIME: RACE, ETHNICITY, AND VIOLENCE 168–72 (Ramiro Martinez, Jr. & Abel Valenzuela, Jr. eds., 2006); Cesar Cuauhtemoc Garcia Hernandez, *La Migra in the Mirror: Immigration Enforcement, Racial Profiling, and the Psychology of One Mexican Chasing after Another*, 72 Alb. L. Rev. 891, 895 (2009); Leti Volpp, *Impossible Subjects: Illegal Aliens and Alien Citizens*, 103 MICH. L. REV. 1595, 1597 (2005) (reviewing Ngai, *supra* note 3).
[50] Kevin R. Johnson, *Immigration and Latino Identity*, 19 CHICANO-LATINO L. REV. 197, 204 (1998); Kevin R. Johnson, *On the Appointment of a Latina/o to the Supreme Court*, 5 HARV. LATINO L. REV. 1, 9 (2002); Cynthia Willis-Esqueda, *Racial Profiling as a Minority Issue*, in SOCIAL CONSCIOUSNESS IN LEGAL DECISION MAKING: PSYCHOLOGICAL PERSPECTIVES 81–82 (Richard L. Wiener et al. eds., 2007).

alienage investigations. But enforcement mechanisms like this lack the necessary specificity and certainty in relation to individual suspects, their acts, and personal status. S.B. 1070 legislation is misguided precisely because it leverages its racialized suspect criteria against innocent populations (e.g. Mexican American), permitting local police to detain individuals at will in a manner that is arbitrary and capricious.

S.B. 1070's reliance on alien morphology runs the distinct risk of infringing on the liberty interests of U.S. citizens in areas where there are high density Latino populations. Two incidents that deal with the enforcement of federal immigration laws by joint local and federal task forces are particularly instructive on this point. On July 27, 1997, the Chandler, Arizona, Police Department and the U.S. Border Patrol launched an expansive five-day raid on local Mexican American neighborhoods.[51]

The main objective of the Chandler raids was to apprehend illegal immigrants. Taskforce members stopped, questioned, and arrested several individuals based on their perceived Mexican characteristics.[52] Individuals of "apparent" Mexican ancestry were contacted by police while they were walking down the street, shopping, driving in their vehicles, or simply residing in their private dwellings. Only a small fraction of those individuals arrested actually turned out to be illegal immigrants. Professor Mary Romero noted "the wide net that was cast made it inevitable that citizens and legal residents would be stopped by police."[53]

The liberty interests of Latino citizens fared little better nine years later when Texas's Irving Police Department ("IPD") and Immigrations and Customs Enforcement ("ICE") tried to implement ICE's Criminal Alien Program ("CAP"). CAP's principal objective was to facilitate the removal from the United States of criminal aliens who had serious criminal histories.[54] In September 2006, IPD partnered with ICE to screen arrested individuals in order to determine if these individuals were illegal immigrants. IPD was not supposed to arrest individuals on the basis of immigration violations, but rather only to evaluate their immigration status once individuals had been arrested for serious offenses unrelated to their immigration status. In 2007, however, IPD began aggressively arresting local Hispanic residents for Class C misdemeanors—minor traffic violations and public intoxication—and referring them to ICE for deportation evaluation.[55] After studying arrest statistics, researchers at the University of California, Berkeley concluded that IPD arrest rates had accelerated so dramatically that it was likely that IPD was referring lawful residents to ICE.[56]

The IPD policies exhibited an unstated racial animus that is shared by the current Arizona law. In both operations, authorities clearly cued themselves by focusing on the racial ancestry of the individuals they were stopping. Profiling tactics like these stigmatize and devalue the liberty

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[51] Mary Romero, *Racial Profiling and Immigration Law Enforcement: Rounding Up of Usual Suspects in the Latino Community*, 32 CRITICAL SOCIOLOGY 447, 453–458 (2006) [hereinafter *Usual Suspects*]; *see also* Mary Romero & Marwah Serag, *Violation of Latino Civil Rights Resulting from INS and Local Police's Use of Race, Culture, and Class Profiling: The Case of the Chandler Roundup in Arizona*, 52 CLEV. ST. L. REV. 75 (2005).

[52] *Usual Suspects*, *supra* note 51, at 463.

[53] *Id.* at 462.

[54] Trevor Gardner II & Aarti Kohli, *The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program* 1 (Chief Justice Earl Warren Institute on Race, Ethnicity & Diversity, U.C. Berkeley Law School, Policy Brief Sept. 2009*), available at* www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf.

[55] *Id.* at 5, 7.

[56] *Id.* at 7.

interests of Mexican Americans and other lawful residents (e.g. native born, naturalized citizens as well as legal residents) because these tactics force individuals within these communities into custodial circumstances where they have to demonstrate repeatedly their lawful presence in the United States, or alternatively, take burdensome precautions (e.g. carrying birth certificates on them at all times etc.) in the event that they are stopped by overly aggressive immigration authorities. Latino citizen populations like Mexican Americans have the absolute right to be free from such unwarranted government scrutiny because they have not committed any kind of immigration offense and are lawfully present within the boundaries of their homeland.

U.S. District Court Judge Susan R. Bolton, in her Order of July 28, 2010, found such policing actions unacceptable and enjoined large portions of Arizona's S.B. 1070 bills. Judge Bolton wrote:

> Requiring Arizona law enforcement officials and agencies to determine the immigration status of every person who is arrested burdens lawfully present aliens because their liberty will be restricted while their status is checked. . . . [A]ll arrestees will be required to prove their immigration status to the satisfaction of state authorities, thus increasing the intrusion of police presence into the lives of legally-present aliens (and even United States citizens), who will necessarily be swept up by this requirement.[57]

Judge Bolton correctly recognized the important liberty interests that are at stake. Her Order enjoining S.B. 1070's enforcement mechanisms identifies a key issue: the grave threat posed in these circumstances comes not from alien populations per se, but rather from those individuals and state institutions that willfully deny important constitutional rights to innocent Americans whose heritage happens to evince indigenous ancestries.

[57] United States v. Arizona, 703 F. Supp. 2d 980, 995 (D. Ariz. 2010) (granting preliminary injunction), *aff'd*, 641 F.3d 339 (9th Cir. 2011).