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The "Ethical" Surplus of the War on Illegal Immigration

Francis J. Mootz III & Leticia M. Saucedo***

I. INTRODUCTION[1]

The Aristotelian philosopher, Gene Garver, argues that rhetorical claims have an "ethical surplus."[2] When a person argues for a policy position, she commits herself to more than the specific claim for which she is arguing and also for more than what that specific claim logically entails. Ethical surplus exists as a result of the nature of practical reasoning, in which the character of the person speaking necessarily plays a role. Garver explains this concept in the context of legal argumentation by emphasizing that *Brown v. Board of Education*[3] re-committed the nation to the equality principle,[4] even though the decision regrettably failed to provide quality, integrated public schools to all children.[5] In this Article, we adopt Garver's thesis of "ethical surplus," but we elaborate his thesis in a negative context. The war on illegal immigration generated a rhetorical commitment that extends beyond the specific claim to secure the borders against unlawful entry. The rhetoric of "war" in this setting generates an ethical surplus—ethical in the sense of an *ethos*, rather than being morally correct. After providing a short context of the rhetoric of "war" used in connection with Arizona's adoption of recent anti-immigrant legislation, we explore the implications of this rhetoric in the

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1. We write this Article in the first person, which deviates from the convention of law review articles. As will become clear, this choice is not merely stylistic. We reject the pretense of neutral objectivity suggested by the rhetorical practices of legal academics and fully embrace our ethical responsibility for what we write in this Article. We appreciate the decision of the editors to permit us to write in a manner appropriate to our thesis.

2. EUGENE GARVER, FOR THE SAKE OF ARGUMENT: PRACTICAL REASONING, CHARACTER AND THE ETHICS OF BELIEF 73–76 (2004).

3. Brown v. Bd. of Educ. of Topeka, Kan., 347 U.S. 483 (1954).

4. GARVER, *supra* note 2, at 83–85.

5. *See generally* GREG J. DUNCAN & RICHARD J. MURNANE, WHITHER OPPORTUNITY?: RISING INEQUALITY, SCHOOLS, AND CHILDREN'S LIFE CHANCES (2011).

more recent effort to eliminate race-conscious educational programs focused on Mexican Americans in the public schools of Arizona. We conclude that the war on illegal immigration has generated its ethical surplus in a manner that betrays the true character of this war. It is not a war against illegal border crossing; rather, it is a war against the perceived threat posed by Mexicans living in the United States. As the ethical surplus of the anti-immigrant hyperbole becomes manifest, it reveals clearly the immoral and discriminatory character of the rhetoric at work.

II. *ETHOS* AND ARGUMENTATION: THE CONCEPT OF "ETHICAL SURPLUS"

Garver's proposition that legal arguments have an ethical dimension might seem strange, given the adversarial and representative nature of the judicial system. Lawyers regularly make arguments in the course of representing clients that are persuasive (in general) and effective (in the particular case) without personally subscribing to the goal of the argument. For example, good men and women regularly make legal arguments that result in guilty individuals walking out of the courtroom as free persons, and even most laypersons understand that good legal arguments can sometimes lead to such results. But it is also clear that a lawyer cannot misrepresent the state of the law in an effort to secure the acquittal of her client. Legal arguments have integrity *as* arguments. The integrity of an argument is not judged solely by the ability of the speaker to achieve the desired result (e.g., her client is acquitted); this would embrace sophism.[6] Nor is the integrity of an argument judged solely by the desirability of that result in its own right (e.g., the wetlands are protected from development); this would embrace instrumentalism.[7] Therefore, a compelling and responsible legal argument might fail to persuade a given judge, or it might result in a guilty person avoiding criminal sanction, without ceasing to have integrity as an exercise of practical reasoning.

If a lawyer cannot demonstrate a claim with logic, some conclude that the resulting argumentation is nothing more than a sophistic effort to secure the (illogical) adherence of the audience. Garver reveals that practical reasoning is more than sophism, and he suggests that legal argumentation is a paradigm of practical reasoning because it cannot claim the status of logical deduction, and yet it is not defined simply by whether one successfully motivates one's audience.[8] Aristotle's view of rhetoric explains

6. See GARVER, *supra* note 2, at 44–69.

7. In other words, the means of argumentation would be judged solely by the end brought about, and therefore practical reasoning would be reduced to an instrument that achieves a predetermined goal.

8. *See* GARVER, *supra* note 2, at 44–68.

how legal arguments have an integrity that cannot be equated with their success in motivating the listener to act.[9] Lawyers argue about matters that are indeterminate, utilizing practical judgment rather than drawing deductions about necessary truths by using strict reason. Effective practical reasoning cannot violate logical rules; however, logical consistency alone is insufficient to resolve legal questions because there always will be multiple resolutions to a legal problem that satisfy this bare minimum.[10] To use Aristotle's terms, practical reasoning employs *logos* (reason), but it also depends on *pathos* (preparing the audience to receive the argument) and *ethos* (the character of the speaker as shown by the integrity of the argument).[11] Thus, Garver insists that "*Brown* is an ethical argument, not an emotional manipulation or a purely logical argument" and that legal argumentation depends on *ethos* to maintain its integrity.[12] The element of *ethos* is critical, because when "the connection between reason and character is severed, the definitive resolutions of the mathematicians and the mere battle of interest and power are the only alternatives. Practical reason has its own integrity when who we are and how we think are intimately connected."[13]

Not all rhetoric has the integrity of practical reasoning. The pejorative assertion that one engages in "mere rhetoric" acknowledges that practical reasoning can be abused and imitated by a sophistic speaker who cares only about successfully motivating the audience to do what the speaker wants.[14] Garver explains that we can distinguish good rhetorical arguments from sophistry by determining if the argument has *ethos*.[15] Practical reasoning implicates *ethos*, but not all rhetoric displays practical wisdom.

9. Garver explains this in drawing from Aristotle's insight that "to rely on the audience as the measure of success for a speech is [in fact to corrupt] the audience." *Id.* at 52.

10. Garver explains that *ethos* "exceeds reason but is never irrational," by which he means that logic defines the boundaries of practical reasoning but does not guide it. *Id.* at 7. As he elaborates, to "think of ethical relations as matters of commitment, reliability, and integrity is to see ethical argument as not illogical but as a development of the logical beyond the reach of reason alone." *Id.* at 106.

11. *See* ARISTOTLE, ON RHETORIC: A THEORY OF CIVIC DISCOURSE 37–39 (George A. Kennedy, trans., 2d ed. 2007); JAMES A. HERRICK, THE HISTORY AND THEORY OF RHETORIC: AN INTRODUCTION 87–90 (4th ed. 2009).

12. GARVER, *supra* note 2, at 11.

13. *Id.* at 2.

14. "Because practical wisdom requires persuasive power, such persuasive ability is a sign of practical wisdom. Like most signs, however, it can be manipulated and exploited. Therefore, rhetoric can take on a life of its own and so become an opponent of practical wisdom." *Id.*

15. Garver explains how *ethos* is a central feature of rising above sophistic manipulation or limiting oneself to logical deduction: "To think of ethical relations as matters of commitment, reliability, and integrity is to see ethical argument as not illogical but as a development of the logical beyond the reach of reason alone." *Id.* at 106.

Garver explains that one of the important consequences of legal argumentation specifically, and practical reasoning generally, is the generation of what he terms an "ethical surplus." He cites *Brown v. Board of Education*[16] and its legacy as a model of ethical surplus. In *Brown*, the Court premised its holding on the special role of public education in American society;[17] however, this rationale is too limited to justify the civil rights cases that followed *Brown*.

> *Brown* shows how reason generates an *ethos* which then exceeds reason. Practical reasoning generates an ethical surplus that allows us to affirm and be committed to more than reason alone would allow. The *Brown* decision was justified by a premise about the place of education in contemporary society, and so was limited to desegregation in education. But the *ethos* of the opinion quickly justified further antidiscrimination rulings. It opened up a new role for courts, government, and community that went far beyond the initial desegregation order. Far from being lawless, I regard the decision as a perfect example of what ethical reasoning looks like at its best.[18]
>
> . . . .
>
> As a chain of deductions, the line from the Fourteenth Amendment through *Brown* to *Loving* fails. *Brown* relied on the place of education in society. That justification does no work in the further cases. *Brown* transmits something more than the holding and less than the reasoning to further cases. The meaning of *Brown*—its *ethos*—survives in the ethical surplus of the argument. That ethical surplus is the antidiscrimination model by which it commits the Court to desegregation beyond schools. *Brown*'s meaning is its understanding of equality and discrimination. That understanding led to the later decisions.[19]

Thus, *ethos* "allows practical reason to reach conclusions that reason could not authorize by itself. It generates an ethical surplus which makes practical reasoning legitimately ampliative. The conclusion is stronger than the premises that lead to it. Such increase is impossible under a purely deductive conception of rationality."[20]

16. Brown v. Bd. of Educ. of Topeka, Kan., 347 U.S. 483 (1954).

17. *Id*. at 493.

18. GARVER, *supra* note 2, at 9–10.

19. *Id*. at 74.

20. *Id*. at 73. Garver argues that *Griswold v. Connecticut*, 318 U.S. 479 (1965), is another prime example of ethical surplus, beginning as an expression of a right of privacy for married

Garver's discussion of ethical surplus makes an important and insightful contribution to our understanding of how the practical reasoning employed in rhetorical argumentation can be distinguished from sophistic manipulation. We argue about practical matters with integrity when we commit our character to the argument. This commitment has an ampliative effect, generating an ethical surplus that provides the basis for continuing argumentation that extends beyond the initial claim. Legal practice has exemplary significance in this regard: legal arguments have integrity generated by *ethos*, rather than produced solely by *logos*.

Garver explains how the concept of ethical surplus illuminates the nature of legal argumentation. Because *ethos* is an inescapable element of an argument that has integrity, the speaker must take responsibility for the argument and cannot pretend to be a neutral spokesperson for logical truths. Garver concludes *Brown* is a paradigm of legal reasoning not only because the decision had ethical surplus, but because the Justices acknowledged their responsibility for what the decision implied.[21] Responsibility extends beyond the decision reached in the case at hand because the argumentation commits the parties to an ethical surplus that has unknown contours.

> The Supreme Court can declare that the nation is committed to equality so that it must find legal segregation of public schools at variance with its fundamental commitments and therefore unconstitutional. Neither the Court nor the public knows at that time whether this commitment extends to integration, or simply to banning legal segregation. No one knows in advance of actual decisions: that is their ampliative and ethical nature. Court and country have to decide, case by case, what happens to the commitment to equality when it conflicts with other basic values, freedom of association, freedom from government interference, federalism, competing interpretations of equality and equal protection.[22]

couples and gradually expanding to more general conceptions of privacy in intimate aspects of one's life. *Id.* at 225 n.11. On the other hand, he cites *Shelley v. Kraemer*, 341 U.S. 1 (1948), as an example of an important case that gets the answer right, but does so in a cramped, quasi-deductive manner that does not generate an ethical surplus. *Id.* at 228–29 n.29.

21. *Id.* at 79–80.

22. *Id.* at 83–84. We wish to emphasize that we are describing Garver's use of *Brown* to illustrate a feature of practical reasoning, and we do not discount the many controversies surrounding *Brown* and its legacy. By acknowledging the "ethical surplus" of the decision we are not claiming that the Justices worked from a pure moral position, or even that the decision provided a just result to the plaintiffs in the case before the Court. Derrick Bell has famously argued that in our racially oppressive society the majority will recognize the rights of the minority only when the majority's interests are advanced. *See generally* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1979). Specifically, Bell argues that *Brown* was not solely the product of an ethical stand against racial inequality. *Id.* at 524–25. Instead

Practical reasoning is always incomplete in the sense that it is a prelude to future deliberations that cannot all be resolved as part of the original decision. *Ethos* is a relationship between speaker and listener akin to friendship: one cannot determine in advance what a friend will do in recognition of the friendship, although the existence of the friendship clearly must be established by discrete acts.[23]

Additionally, the ethical nature of legal argumentation shapes the manner and style of the argument. Logical arguments consist of numerous small steps that must strictly follow from the preceding step, so these arguments may be long and complex in order to maintain their logical integrity. In contrast, if practical reasoning is too convoluted or extended then the ethical component of the argumentation can be disrupted.

> The ethical terms of that relationship between speaker and audience are violated if a speaker tries to draw consequences that are too remote, but what counts as too remote is a matter for negotiation and trust between speaker and hearer. There is no mathematical measure for an inference being too long or an implication being too remote . . . . In the *Rhetoric*, responsibility for the implications of one's assertions is an ethical responsibility, limited by ethical considerations of proximity and probability.[24]

The result is that as "practical argument gets more philosophical, technical or precise, it gets worse."[25]

powerful white interests recognized it was necessary to end apartheid to secure economic and political growth in the post-War global world, and so they supported the decision. *Id.* Bell acknowledges that his analysis

> may seem insufficient proof of self-interest leverage to produce a decision as important as *Brown*. They are cited, however, to help assess and not to diminish the Supreme Court's most important statement on the principle of racial equality. Here, as in the abolition of slavery, there were whites for whom recognition of the racial equality principle was sufficient motivation. But, as with abolition, the number who would act on morality alone was insufficient to bring about the desired racial reform.

Id. at 525. This analysis does not undermine Garver's thesis about ethical surplus. Instead, it strengthens it. Recognizing that many complex factors motivated the decision in *Brown* only highlights the power of the resulting ethical surplus to carry *Brown* far beyond what cautious whites in the 1950s may have envisioned. Ethical surplus has the power to pull us away from prejudices that may have been present when the *ethos* was first embodied.

23. Garver is careful to invoke the Aristotelian notion of civic friendship; he does not have a superficial or naïve concept in mind. He explains: "Civic and rhetorical friendship is not the friendship of love between intimates, but still is friendship and not just a formal legal relation between strangers or enemies." GARVER, *supra* note 2, at 9; *see also id.* at 106.

24. *Id.* at 81–82.

25. *Id.* at 154.

III. THE WAR ON ILLEGAL IMMIGRATION

In this part of the Article, we employ Garver's thesis of "ethical surplus" in a negative sense. By negative we do not mean that the arguments lack *ethos*, but rather that the arguments are supported by an *ethos* that is undesirable and counterproductive. In Part III.A, we describe the rhetoric surrounding the legal, political, and social attacks on illegal immigration and show how the metaphor that the nation is engaged in a "war" on illegal immigration structures the rhetoric. Arizona was one of the first states to most fully realize this rhetoric in contemporary discourse, but it arose against the historical backdrop of a national discourse.[26] In Part III.B, we trace one of the ampliative effects of the argumentative discourse declaring war on illegal immigration—the effort to ban ethnic-conscious educational strategies in the public schools in Arizona. By embracing the rhetoric of fighting a war against illegal immigration, public figures in Arizona have aligned the *ethos* of their argument with exclusionary and discriminatory motives that later came to fruition in the more specific attack on multi-cultural education.

A. The "War on" Rhetoric in Border Enforcement Policy and Practice

We begin by revealing the war rhetoric that sustains the arguments against illegal immigration. This war on illegal immigration is not limited to rhetorical flourishes by contemporary politicians seeking to emphasize the importance of the immigration issue; rather, these expressions reveal much about the deeper justifications at work. Over the past century, politicians have embraced the *ethos* of fighting a war at the border to implement various programs that restrict the immigration of Mexicans to the United States. We begin by describing the *ethos* and then consider the manifestations of this developing *ethos* over time in several public policy and legal issues. We first want to avoid a misunderstanding that has the potential to obscure our thesis. We are not arguing that there was a formal declaration of war and that the logical implication of this declaration was that the United States must fight certain battles and regain certain territory. To the contrary, ethical surplus arises because a person engaged in resolving a discrete problem through practical reasoning generates an *ethos* that is relatively inchoate and subject to further elaboration as future problems are addressed. We seek to provide a sense of the historical development of the *ethos* of the war on immigration, to the extent possible in this short essay.

26. *Common Thread Present in Immigration Law Challenges*, CNN (June 28, 2011), http://www.cnn.com/2011/US/06/28/immigration.laws/index.html.

1. Border Control and the Executive Branch

The U.S. government created the Border Patrol in 1924 to secure the border from outside invaders.[27] In doing so, the executive branch deliberately and self-consciously created a border where essentially none had previously existed.[28] As historian Mae Ngai summarizes, "more than anything else, the formation of the Border Patrol raised the border."[29] Those who urged the establishment of a Border Patrol argued that it was the southern border that needed protection.[30] The first members of the Border Patrol were former law enforcement and military personnel who saw their mission as the establishment and defense of a clear, securable border.[31] Border Patrol officers took it upon themselves to enforce the border through criminal enforcement strategies, even though their mandate was to enforce civil provisions of the immigration statute.[32] The Border Patrol adopted its basic modes of operation at a time of increasing hostility toward Mexicans, and these modes of operation have continued into the present.[33] Today, the specter of the border as highly contested and vulnerable to invasion has only increased immigration-enforcement operations, initiatives, and deportations.[34]

More than eighty years later, the rhetoric demanding protection of the homeland against foreign enemies remains strong. After 9/11, the consolidation of federal immigration agencies into the newly formed Department of Homeland Security (DHS) only emphasized the connection between border enforcement and protecting the homeland from terrorism.[35]

27. MAE NGAI, IMPOSSIBLE SUBJECTS 67 (2004).

28. *Id*.

29. *Id*. at 68.

30. *Id*.

31. *Id*.; *Border Patrol Career Videos: Protecting the Homeland Video*, CBP.GOV, http://www.cbp.gov/xp/cgov/careers/customs_careers/border_careers/bp_agent/videos/ (last visited Apr. 1, 2012).

32. NGAI, *supra* note 27, at 69.

33. *Id*. at 69–70.

34. *See* Press Release, Office of the Press Sec'y, Secretary Napolitano Announces Record-Breaking Immigration Enforcement Statistics Achieved Under the Obama Administration (Oct. 6, 2010), *available at* http://www.dhs.gov/ynews/releases/pr_1286389936778.shtm.

35. In a 2003 report, the DHS stated as its mission, "We will lead the unified national effort to secure America. We will prevent and deter terrorist attacks and protect against and respond to threats and hazards to the Nation. We will ensure safe and secure borders, welcome lawful immigrants and visitors, and promote the free-flow of commerce." DEP'T OF HOMELAND SEC., PERFORMANCE AND ACCOUNTABILITY REPORT FISCAL YEAR 2003, at 6 (2004), *available at* http://www.dhs.gov/x library/assets/PerformanceAccountabilityReportFY03.pdf.

With this development, the role of the Border Patrol became more explicitly militarized, and its mission now fully incorporates both homeland security and anti-terrorism goals.[36] In fact, the newly formed Customs and Border Protection Agency (CBP) states that its top priority is to "keep terrorists and their weapons from entering the United States."[37] The CBP explicitly uses militaristic images in its efforts to appeal to and recruit members.[38] One of its commercials shows military vehicles, helicopters, and men on horseback chasing after people running across desert landscapes.[39] Another has a somber voice-over that announces, "In the twilight hours, while most of the county is sleeping, we're out there, guarding our borders, protecting the homeland . . . the Border Patrol, we protect America."[40]

The continued deployment of military units, such as the National Guard, to aid Border Patrol operations along the southwest border evidences the militaristic character of the CBP.[41] The Secure Fence Act of 2006, which increased funds to border enforcement, authorized funding for surveillance equipment and called for the building of a 2000-mile border fence across the Southwest.[42] This action created an increasingly militarized zone around the border.[43] The Obama Administration has increased the budget for both customs and border enforcement activities, suggesting that the heightened militarism may become a permanent feature.[44]

2. Border Control and the Congressional and Judicial Branches

The rhetoric of fighting a war against illegal immigration has animated

36. *See id.*

37. *CBP: Securing America's Borders*, CBP.GOV (July 15, 2011), *previously available at* http://www.cbp.gov/xp/cgov/border_security/whats_new.xml.

38. *See* BP Hiring, *Border Patrol Tactical 30 Sec*, YOUTUBE (July 2, 2008), http://www.youtube.com/watch?v=jdTQhiVaCEI.

39. *Id.*

40. *See CBP: Securing America's Borders*, *supra* note 37.

41. *Operation Jumpstart*, CBP.GOV (July 6, 2006), http://www.cbp.gov/xp/cgov/news/newsroom/multimedia/video/border_security_videos/bp_videos/; *see also* Lisa Daniel, *Obama: Guardsmen Can Aid Intelligence, Interdiction at Border*, U.S. DEP'T DEF. (May 27, 2010), http://www.defense.gov/news/newsarticle.aspx?id=59375. President Obama authorized the latest deployment of National Guard troops to Arizona in May 2010, shortly after Arizona's Senate Bill 1070 was passed into law. *Id.* The latest deployment of National Guard troops to Arizona occurred shortly after Arizona's Senate Bill 1070 was passed into law in May 2010. *Id.*

42. Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638-2640, *available at* http://www.hsdl.org/?view&did=476360.

43. *Id.*

44. DEP'T OF HOMELAND SEC., 2011 BUDGET IN BRIEF (2011), *available at* http://www.dhs.gov/xlibrary/assets/budget_bib_fy2011.pdf.

the legislation and case law that first defines the "illegal" immigration and then provides for enforcement. Supreme Court decisions on immigration-related issues historically place great emphasis on the need for the federal government to be able to control its borders from invading masses, whether or not these invaders are sponsored by a foreign government.[45] The Supreme Court has firmly established that Congress has the plenary power to control immigration and entry into the United States.[46] It has deemed the regulation of immigration to be a national function and an important element of the country's ability to secure itself against invading foreign "hordes."[47] In *Chae Chan Ping v. United States*, the Court set out the framework that is the foundation of today's extreme deference to congressional power over immigration regulation, including border enforcement.[48] The Court held that Congress had the authority, vested in part in the War Powers Clause, to exclude Chinese nationals from entry and from citizenship.[49] The Court based its rationale on historical rhetoric of self-defense[50] and defense of the sovereignty from foreign invasion.[51] The Court stated,

> To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us.[52]

Although the Chinese immigrants did not appear on our shore bearing arms and wearing the uniform of a foreign country, the Court clearly presented them as invaders whom the United States must repel.

The Court broadened the war rhetoric as it extended congressional power to instances of "peaceful invasion."[53] The Court cited the example of foreigners who sought physical entry into the United States but who also

45. *See, e.g.*, Harisiades v. Shaughnessy, 342 U.S. 580 (1952); Ekiu v. United States, 142 U.S. 651 (1892); Chae Chan Ping v. United States, 130 U.S. 581 (1889).

46. *Chae Chan Ping*, 130 U.S. 581.

47. *Id*. at 609.

48. *Id*.

49. *Id*. at 606.

50. *Id*. at 607–09.

51. *Id*. at 609.

52. *Chae Chan Ping*, 130 U.S. at 609.

53. *See id*.

continued to maintain their foreign identities.[54] The Court explained,

> If, therefore, the government of the United States . . . considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects.[55]

According to the Court, a formal declaration of war was unnecessary.[56] As long as Congress perceived a threat of foreign invasion, it could do all it deemed necessary to protect the sovereignty of the United States.[57] As the Court emphasized, "The existence of war would render the necessity of the proceeding only more obvious and pressing. The same necessity, in a less pressing degree, may arise when war does not exist, and the same authority which adjudges the necessity in one case must also determine it in the other."[58]

The rhetorical move connecting immigration and invading forces has been consistent since *Chae Chan Ping*. Courts use the rhetoric of war to give broad powers to Congress to control entry into, and expulsion from, the United States.[59] The Supreme Court invoked security concerns in a Cold War Era case involving congressional imposition of a deportability ground for current or past members of the Communist Party.[60] The decision affected many noncitizens, including long-term permanent residents of the United States.[61] The Court analyzed the constitutionality of the congressional provision allowing for deportation of past Communist Party members and found the provision constitutional, based on Congress's broad authority to protect the sovereign.[62] The Court stated,

> The Government's power to terminate its hospitality has been asserted and sustained by this Court since the question first arose.
>
> War, of course, is the most usual occasion for extensive resort to the power . . . . But it does not require war to bring the power of

54. *Id.* at 596–97.

55. *Id.*

56. *Id.* at 606.

57. *Id.*

58. *Chae Chan Ping*, 130 U.S. at 606.

59. *See, e.g.*, Harisiades v. Shaughnessy, 342 U.S. 580, 587 (1952); Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893); Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892).

60. *Harisiades*, 342 U.S. at 587.

61. *Id.* at 585–88.

62. *Id.* at 587.

> deportation into existence or to authorize its exercise. Congressional apprehension of foreign or internal dangers short of war may lead to its use. So long as the alien elects to continue the ambiguity of his allegiance his domicile here is held by a precarious tenure.[63]

The Court recognized the dangerous *ethos* at work and shamelessly sought to insulate itself from complicity, while reinforcing Congress's vital role in protecting the country from invasion. The Court stated,

> Under the conditions which produced this Act, can we declare that congressional alarm about a coalition of Communist power without and Communist conspiracy within the United States is either a fantasy or a pretense? . . . Certainly no responsible American would say that there were [when the Act was enacted in 1940] or are now no possible grounds on which Congress might believe that Communists in our midst are inimical to our security.
>
> Congress received evidence that the Communist movement here has been heavily laden with aliens, and that Soviet control of the American Communist Party has been largely through alien Communists. It would be easy for those of us who do not have security responsibility to say that those who do are taking Communism too seriously, and overestimating its danger . . . . We, in our private opinions, need not concur in Congress' policies to hold its enactments constitutional.[64]

We can see the broad-based nature of the war rhetoric used in connection with immigration during the past century. When supporting policy measures, the executive, legislature, and judiciary all rely on the *ethos* of defending the nation from incursion. The Supreme Court granted Congress extensive power to define who could legally enter the United States, and then to wage war against illegal immigration, even as it tried to distance itself from some of the odious tactics employed. This plenary power engendered the militaristic roots of the Border Patrol, which have been magnified since 9/11.[65] With this established *ethos*, we now turn to the expression of the ethical surplus in Arizona.

63. *Id.*

64. *Id.* at 590.

65. *See* DEP'T OF HOMELAND SEC., *supra* note 44.

B. The "War on" Rhetoric in Arizona's Senate Bill 1070

Despite the Supreme Court's clear deference to Congress on immigration issues, there has been a constant tension between the federal government and border state governments about how best to protect the country at the border. The most recent clash came to a head in Arizona with the passage and signing of Senate Bill 1070, the Support Our Law Enforcement and Safe Neighborhoods Act.[66] The Act's intent is stated in the legislation,

> The legislature finds that there is a compelling interest in the cooperative enforcement of federal immigration laws throughout all of Arizona. The legislature declares that the intent of this act is to make attrition through enforcement the public policy of all state and local government agencies in Arizona. The provisions of this act are intended to work together to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.[67]

The rhetoric surrounding the passage of the Act mirrors much of the federal judicial, legislative, and administrative rhetoric on the need to maintain security by defending a border against alien hordes. The proponents of Senate Bill 1070 repeatedly stressed the need to secure the state's borders and to protect citizens from invasion in light of the failure of the federal government to provide an adequate defense of the border.[68]

Arizona Governor Jan Brewer issued a statement at the bill signing in which she emphasized the security goals of the legislation, even though the legislature ostensibly intended to target illegal immigration. She stated,

> There is no higher priority than protecting the citizens of Arizona. We cannot sacrifice our safety to the murderous greed of drug cartels. We cannot stand idly by as drop houses, kidnappings and violence compromise our quality of life . . . . We cannot delay while the destruction happening south of our international border creeps its way north . . . . Yesterday, I announced the steps I was taking to enhance security along our border. Today–with my unwavering signature on this legislation–Arizona strengthens its

66. S. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

67. *Id.*

68. Mark B. Evans, *Statements from Opponents, Proponents of SB 1070* (Apr. 23, 2010), TUCSONCITIZEN.COM, http://tucsoncitizen.com/mark-evans/archives/237 ("It is incumbent upon our states to protect the jobs, wages, health, taxes, and lives of American citizens, when Presidents fail to honor their oaths of office and Constitutional requirements to enforce the laws of Congress and protect all states from invasion.").

security within our borders.[69]

One of the most controversial features of the legislation is that it allows law enforcement to stop someone and question him or her if the official has a reasonable suspicion that the person may be undocumented.[70] Opponents argued that racial profiling would lead to the harassment of Mexican Americans in Arizona.[71] In response, Governor Brewer spent a great deal of time reassuring state residents that a law targeting noncitizens could and would be implemented without infringing the rights of Mexican Americans.[72] Ironically, by framing her advocacy in these terms, she highlighted the inevitable collateral damage of a war on noncitizens in a state bordering Mexico. The fact that she and proponents of the legislation framed undocumented immigration as a "Mexican problem" made the issue one of race or national origin.

Arizona State Senator Russell Pearce, the original sponsor of Senate Bill 1070, also focused on the importance of the legislation as a tool to stop invasion, stating, "I will not back off until we solve the problem of this illegal invasion . . . . Invaders, that's what they are. Invaders on the American sovereignty and it [cannot] be tolerated."[73] When attempting to frame the problem in terms of illegal immigration to a reporter, however, the Senator conflated national origin, culture, and immigration status in his explanation for sponsoring state immigration enforcement legislation.[74] He stated, "Drive around parts of Phoenix. I get calls all the time and it's not because they're Hispanic, it's because the culture is different. The gangs are bigger. There's more violence, kidnappings are way up."[75] Senator Pearce responded to the U.S Department of Justice's lawsuit to enjoin implementation of Senate Bill 1070 by continuing to defend the right of the state to maintain its war on illegal immigration.[76] Senator Pearce referred to

69. *See* Jan Brewer, Governor, Ariz., Statement by the Governor (Apr. 23, 2010), *available at* http://azgovernor.gov/dms/upload/PR_042310_StatementByGovernorOnSB1070.pdf (emphasis omitted).

70. *See* S. 1070, 49th Leg., 2d Reg. Sess. § 11-1051(B) (Ariz. 2010).

71. *See* Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES, Apr. 23, 2010, http://www.nytimes.com/2010/04/24/us/politics/24immig.html ("Opponents have called it an open invitation for harassment and discrimination against Hispanics regardless of their citizenship status.").

72. *See* Brewer, *supra* note 69.

73. Ted Robbins, *The Man Behind Arizona's Toughest Immigrant Laws*, NPR (Mar. 12, 2008), http://www.npr.org/templates/story/story.php?storyId=88125098.

74. *Id*.

75. *Id*.

76. *Statement of State Senator Russell Pearce, Author of Arizona's SB 1070, Seeks to Intervene in Federal Lawsuit To Defend AZ Immigration Law*, JUD. WATCH (July 15, 2010),

the defense of the legislation as part of that war and explained,

> The purpose of SB 1070 is to protect the citizens of Arizona from the devastating and deadly impact of rampant illegal immigration. And it is outrageous that the Obama administration would attack Arizona for simply protecting its own citizens, especially when it has failed so miserably to do its constitutional duty and secure the border. This is a legal battle of epic proportions. As a Senator in a state on the frontlines, I see firsthand the damage being done to our state and our country. What happens here in Arizona will impact every state in the country interested in protecting its citizens by enforcing the rule of law. We are a nation of laws. We must have the courage – the fortitude – to enforce, with compassion but without apology, those laws that protect the integrity of our borders and the rights of our lawful citizens.[77]

Governor Brewer and Senator Pearce both utilized war rhetoric, and their statements reveal the true enemy in this war. Their characterization of the issue gave every indication that they were referring to people of Mexican national origin when they discussed the threat facing Arizona. Their rhetoric led them to move from protecting the physical border, to dealing with undocumented immigrants in their midst, and to protecting the country—and its traditional American values—from invasion by Mexican Americans and other Latinos.

IV. THE ETHICAL SURPLUS OF THE WAR ON ILLEGAL IMMIGRATION: THE WAR ON LATINOS

We have described how immigration policy at the federal level has been rooted in the war metaphor during the past century and how Arizona has embraced this metaphor in its challenge to the notion of federal supremacy on immigration policy.[78] Arizona officials have turned the war rhetoric against the federal government, essentially accusing it of a de facto surrender that calls for an extraordinary response by State officials to rebuff the unrelenting enemy.[79] The United States must fight wars against enemies, and since the Mexican government is not at war with the United States, the enemy is seen as the Mexican people. Their weapons are not tanks and missiles, but instead are drugs, crime, and the invasion of a servile and un-American class of people.

http://www.judicialwatch.org/news/2010/jul/state-senator-russell-pearce-author-arizona-s-sb-1070-seeks-intervene-federal-lawsuit- [hereinafter JUD. WATCH].

77. *Id.*

78. *See supra* Part III.B.

79. *See, e.g.*, JUD. WATCH, *supra* note 76.

In this part of the Article, we trace the extension of the war metaphor beyond questions of border security or drug enforcement and illustrate its manifestation in the contemporary culture wars. We begin by emphasizing that this is not a simple story of racism clothed with sophistic justification. We are addressing a far more subtle and dangerous phenomenon—the power of ethical surplus. Undoubtedly there are some Arizonans who detest people of Mexican ethnicity and who use seemingly neutral factors such as border security to support their goal of minimizing the presence of Mexicans in their state. We do not claim that the Arizona officials we discuss below are express racists, although they may well be. Rather, we argue that the ethical surplus of the war on illegal immigration expands far beyond the original scope of border security and amounts to a war on Mexican Americans and Mexicans living in Arizona.

A. The War and Self-Defense Language Surrounding House Bill 2281

On May 11, 2010, a few days after passage of Senate Bill 1070, Governor Jan Brewer signed House Bill 2281 into law.[80] The law amended the Arizona education code to prohibit ethnic studies curricula in public schools.[81] The Act's main provision prohibits courses or classes that: (1) promote the overthrow of the U.S. government; (2) promote resentment toward a race or class of people; (3) are designed primarily for pupils of a particular ethnic group; and (4) advocate ethnic solidarity instead of the treatment of pupils as individuals.[82] Tom Horne—then the Arizona Superintendent of Public Instruction and the driving force behind House Bill 2281—advocated for the legislation by emphasizing the threatening implications of the Tucson Unified School District's (TUSD) ethnic studies curriculum. Horne claimed offense at what he described as the distortion of American history, including the program's portrayal of the Alamo and of the U.S. occupation of Mexican lands in the 1800s.[83] Horne cited quotations from textbooks and related materials used in the program to illustrate how the curriculum challenged the "true" mainstream version of American history.[84] Horne claims this alternative view facilitates an invasion from

80. Nicole Santa Cruz, *Arizona Bill Targeting Ethnic Studies Signed into Law*, L.A. TIMES, May 12, 2010, http://articles.latimes.com/2010/may/12/nation/la-na-ethnic-studies-20100512.

81. H.R. 2281, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

82. *Id.*

83. Letter from Tom Horne, Superintendent of Pub. Instruction, to the Citizens of Tucson (July 11, 2007), *available at* http://www.scribd.com/doc/32001977/An-Open-Letter-to-the-Citizens-of-Tucson.

84. *Id.*

within by Mexicans and their proxies.[85] In a letter proposing action against the Tucson School District, Horne disparaged the language of one of the program's textbooks.[86] Horne noted, "The textbook states: 'Texans had never come to grips with the fact that Mexicans had won at the Alamo.'"[87] Horne then commented, "It is certainly strange to find a textbook in an American public school taking the Mexican side of the battle at the Alamo."[88]

Horne's articulation of the problem with ethnic studies courses that "take the Mexican side" illustrates just how the "war on" rhetoric has an ethical surplus that bleeds into areas of dispute wholly outside the specific questions of immigration policy. This is dramatically evidenced by the language of the bill, which targets ethnic-conscious educational programs and also bans promoting the overthrow of the U.S. government, as if these offenses are somehow related.[89]

The ethical surplus stemming from a "war on" mentality in the immigration context encompasses an Anglo-centric point of view in education that necessarily excludes the minority view. The ethical surplus of the war rhetoric conflates illegal immigration and the educational efficacy of an ethnic studies program that is factually accurate but not ideologically compliant with mainstream views. Horne sees the two issues as part of the same broad principle about the superiority of the American (read Anglo) perspective and the need to protect it from invasions that include not only illegal immigration but also educational subversion of the U.S. government.

Proponents of anti-ethnic studies legislation have alleged that an ethnic studies curriculum encourages or condones illegal immigration when its textbooks cover the United States–Mexico border.[90] Horne, for example, quotes one textbook as saying, "Apparently the U.S. is having as little success in keeping the Mexicans out of Aztlan as Mexico had when they tried to keep the North Americans out of Texas in 1830."[91] Horne interpreted this statement as alluding to illegal immigration control, rather than either legal immigration regulation or the growth of the Mexican population in the southwestern United States. Using this textbook excerpt as an illustration, Horne condemned the program, warning that "books paid for by American taxpayers used in American public schools are gloating over

85. *Id.*

86. *Id.* at 2–3.

87. *Id.*

88. *Id.*

89. H.R. 2281, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

90. *See, e.g.*, Letter from Tom Horne, *supra* note 83.

91. *Id.*

the difficulty we are having in controlling the border."[92] Horne conjured up images of self-defense, implying that failure to stop such programs could lead to a re-conquest or a re-invasion. He uses another textbook excerpt to warn of impending danger at the hands of Latinos. He notes that the textbook excerpt "goes on to state: '. . . the Latinos are now realizing that the power to control Aztlan may once again be in their hands.'"[93] He further invokes excerpts of the MEChA[94] constitution to demonstrate the threat, not just of invasion, but of disregard of borders, thus linking ethnic identification and illegal immigration in one fell swoop.[95] Horne quotes the MEChA language, implying that the organization's radical mission statement of the 1970s is still operational today, "'Aztlán belongs to those who plant the seeds, water the fields, and gather the crops and not to the foreign Europeans. We do not recognize capricious frontiers on the bronze continent.'"[96] In Horne's view, this invasion continues under the guise of ethnic studies, and it must be stopped.[97] The campaign to repel invasive forces must therefore expand from the illegal immigration realm and Senate Bill 1070 to include the eradication of ethnic studies programs, which themselves constitute a threat.

B. Making the Connections: The War on Latinos and Ethnicity

In November 2010, Tom Horne won his campaign for Attorney General of Arizona,[98] and as soon as he took office, he publicized his intention to defend Senate Bill 1070.[99] When the Ninth Circuit affirmed the trial court's injunction against portions of Senate Bill 1070, he made clear that he would support the law.[100] He continues to speak out about his perceived duty to

92. *Id.*

93. *Id.*

94. MEChA, the Movimiento Estudiantil Chicano de Aztlan, is a student group that originated as a student movement in 1969 and is still active. *About Us*, MOVIMIENTO ESTUDIANTIL CHICANO DE AZTLÁN, http://www.nationalmecha.org/about.html (last visited Apr. 1, 2012).

95. Letter from Tom Horne, *supra* note 83, at 3.

96. *Id.*

97. *Id.*

98. Mary Jo Pitzl, *Tom Horne's Narrow Attorney General Victory Finishes GOP Sweep of Arizona*, REPUBLIC, Nov. 11, 2011, http://www.azcentral.com/arizonarepublic/local/articles/2010/11/11/20101111arizona-attorney-general-tom-horne-victory.html.

99. Press Release, Tom Horne, Attorney Gen., Ariz., New Era at Attorney General's Office as Horne Officially Joins State Effort To Defend S.B. 1070 Against Obama Administration Legal Change (Jan. 3, 2011), *available at* http://www.azag.gov/press_releases/jan/2011/1070%20DEFENCE.html.

100. Press Release, Joint Statement by Governor Jan Brewer and Attorney General Tom Horne

secure the Arizona border.[101] In his capacity as Attorney General he filed a counterclaim in the federal government's challenge to Senate Bill 1070, charging the federal government with negligence in its border enforcement efforts.[102]

Now charged with defending House Bill 2281 against court challenge, Attorney General Horne is in a position to ensure the implementation of the law that he championed. As one of his last acts as state schools superintendent, just hours before he took office as Attorney General, Horne found that the Tucson Unified School District out of compliance with A.R.S. 15-122(b), the codification of House Bill 2281.[103] He continues to speak publicly about the importance of the anti-ethnic studies legislation he championed.[104]

It is not merely coincidence that Horne places such emphasis on these two laws. In rhetorical argumentation one must display *ethos*, which generates an ethical surplus that moves people to adopt positions that do not logically follow from the initial decision supported by the *ethos*.[105] We have traced the ethical surplus of the war on illegal immigration from questions of security and protection to the view that ethnic studies programs undermine our security as a nation. A campaign ad used by Tom Horne in his successful run for Attorney General of Arizona embodies this ethical surplus.[106] The ad starts with an explanation of Horne's tireless advocacy for an ethnic studies ban, and without any logical connection, or any manner of explanation, the ad ends with the tag, "As Attorney General, Tom Horne will protect our

re: Monday's Ninth U.S. Circuit Court of Appeals Decision on SB 1070 (Apr. 11, 2011), *available at* http://www.azag.gov/press_releases/april/2011/Decision%20on%20SB%201070%204-11-11.html.

101. *On the Border and in the Line of Fire: U.S. Law Enforcement, Homeland Security and Drug Cartel Violence, Hearing Before the Subcomm. on Oversight, Investigations & Mgmt. of the H. Comm. on Homeland Sec.*, 112th Cong. (2011) (statement of Thomas C. Horne, Att'y Gen. of Arizona), *available at* http://homeland.house.gov/sites/homeland.house.gov/files/Testimony%20Horne.pdf.

102. Press Release, Jan Brewer, Governor, Ariz., Arizona Files Suit Against Federal Government over Failure To Secure the Border, Protect Our Citizens (Feb. 10, 2011), *available at* http://azgovernor.gov/dms/upload/PR_021011_Counterclaim.pdf.

103. *Horne's Finding on TUSD Ethnic Studies*, TUCSON SENTINEL, Jan. 3, 2011, http://www.tucsonsentinel.com/documents/doc/010311_horne_tusd_finding/.

104. *See* Press Release, Tom Horne, Attorney Gen., Ariz., Ethnic Studies Subject of Discussion as AG Tom Horne to Address University of Arizona Latino Law Students (Mar. 21, 2011), *available at* http://www.azag.gov/press_releases/march/2011/UNIVERSITY%20OF%20ARIZONA%20ADDRESS%203-21-11.html.

105. *See supra* Part II.

106. Tom Horne for AG, *Tom Horne for Attorney General Video*, YOUTUBE (May 20, 2010), http://www.youtube.com/watch?v=n2fjOjjmWsc.

borders."[107] As a logical extension, the ad makes an unsupported and ridiculous leap. However, as an embodiment of the war rhetoric adopted in Arizona, voters intuitively understand this ad, with the result that the discriminatory connections necessary to extend the ethical surplus remain hidden from view, perhaps even Horne's view. This permits voters who share Horne's *ethos* to regard themselves as a tolerant and accepting people who are simply doing what is necessary to protect the country from an invasion.

Horne continues to link ethnic studies programs with support for illegal immigration as he makes his case for restrictive state legislation to protect the country from a Mexican invasion. When teachers in Tucson's ethnic studies program filed a lawsuit seeking an injunction against House Bill 2281's implementation, Horne issued a press statement that again made the connection explicit.[108] Horne stated,

> The 'Derechos' group [which he claimed was behind the lawsuit, although not a named party] is an open-borders group that opposes the very existence of a physical border between the United States and Mexico, uses inflammatory language to denigrate it[s] opponents, and favorably cites academic studies that compare the treatment of illegal immigrants in the U.S. to apartheid.[109]

Horne concludes that an immigrant advocacy group supporting a legal challenge to an ethnic studies program ban proves that ethnic solidarity, Mexican immigration, and border security must be linked.[110] The ethical surplus of the war rhetoric that encompasses self-defense, security, and military protection against an invading Mexican force almost naturally encompasses an anti-ethnic studies attitude. It has led proponents to conclude that teaching high school history that acknowledges the border as a historically contested boundary necessarily subverts efforts to defend the border against intrusion by illegal immigrants.

V. CONCLUSION

Our thesis should not be an earth-shattering revelation. Employing the rhetoric of "war on" invariably leads to demonizing an "other," particularly on racial grounds. During World War II there was express, official, and

107. *Id.*

108. Press Release, Tom Horne, Superintendent, Ariz. Dep't of Educ., State Schools Superintendent Tom Horne Statement on 'Derechos' Ethnic Studies Lawsuit (Oct. 18, 2010), *available at* http://ftpcontent.worldnow.com/kgun/KGUN/10%2018%20Horne%20statement.pdf.

109. *Id.*

110. *See id.*

destructive discrimination against Japanese Americans,[111] but there was also discrimination against German Americans, despite their race and close ties to the mainstream cultural consciousness of America.[112] The Cold War generated backlashes against foreign elements that were racialized as an attack on subversive Jewish elements, which was sadly epitomized in the executions of Ethel and Julius Rosenberg.[113] War and racism seem to go hand in hand.

On the other hand, we hope that we have clarified why it is a mistake to read these events as nothing more than the expression of pre-existing racial discrimination. It is the power of the war rhetoric that leads the speaker who embodies its *ethos* far beyond the initial, reasonable determination of what is necessary to secure the country from attack. *Ethos* can be a powerful force through the ethical surplus it generates, which means that we must remain vigilant in reviewing the *ethos* to which we commit ourselves.

Ethical surplus gains strength over time, and so it is important to attend to history. The generation of racist policies as the "ethical surplus" of war rhetoric is not something new to Arizona. In her account of the infamous

111. *Internment History, Children of the Camps*, PBS, http://www.pbs.org/childofcamp/history/index.html (last visited Apr. 1, 2012). During World War II, the U.S. government removed approximately 120,000 people of Japanese descent to internment camps. *Id.*

112. *See generally* ARNOLD KRAMMER, UNDUE PROCESS: THE UNTOLD STORY OF AMERICAN'S GERMAN ALIEN INTERNEES (1997) (providing a history of German internees). More than 10,000 alien German citizens were placed in relocation camps during World War II without due process protections. *Id.* at ix.

113. Recent scholarship based on declassified documents after the fall of the Soviet Union reveal that Julius Rosenberg was certainly a spy for the Soviet Union, but also that the trial of the couple was fueled by hysteria and political goals that depended on a rhetoric of a foreign enemy within our midst. *See generally* EMILY ARNOW ALMAN & DAVID ALMAN, EXONERATION: THE TRIAL OF JULIUS AND ETHEL ROSENBERG AND MORTON SOBELL (2010); WALTER SCHNEIR, FINAL VERDICT: WHAT REALLY HAPPENED IN THE ROSENBERG CASE (2010). Interestingly, it was many Jewish groups who helped to quell a potential upsurge in anti-Semitism by disavowing the Rosenbergs and emphasizing the trustworthiness of American Jews. Arnon Gutfeld, *The Rosenberg Case and the Jewish Issue*, TEL AVIV U., http://www.tau.ac.il/anti-semitism/asw2002-3/gutfeld.htm (last visited Apr. 1, 2012). It was foreign observers who noted that America seemed to be experiencing its own Dreyfus Affair, while indigenous groups remained silent. RONALD RADASH & JOYCE MILTON, THE ROSENBERG FILE 352 (1997). Ironically, the paranoid, murderous, and comprehensive anti-Semitism of the Soviet Union under Stalin probably blunted anti-Semitism within the United States as we sought to differentiate ourselves from our enemy. Gutfeld, *supra*. The effect of anti-Semitism during this time, even if muted, was real. One vignette displays the sensitivity of Jews to their standing outside of mainstream American legal culture. At the beginning of the Cold War, the U.S. Solicitor General—Philip Perlman, a Jew—decided to eliminate the names of the authors of the brief in a landmark civil rights case because all four of them were Jewish. As related by Arnold Raum, Perlman's assistant, "[i]t's bad enough that Perlman's name has to be there, to have one Jew's name on it, but you have also put four more Jewish names on. That makes it look as if a bunch of Jewish lawyers in the Department of Justice put this out." Philip Elman & Norman Silber, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-60: An Oral History*, 100 HARV. L. REV. 817, 819 (1987).

1917 Bisbee deportation,[114] historian Katherine Benton-Cohen demonstrates that justifications framed by war rhetoric fueled this overtly racist and patently unconstitutional act of massive vigilantism against perceived threats from men of Mexican or Eastern European ancestry.[115] In the literal and obvious sense, the Bisbee County Sheriff, Harry Wheeler, justified the deportation of activist miners seeking labor concessions from the Phelps-Dodge mining company as being necessary to ensure the material support for the United States's involvement in World War I and to protect the United States from the destabilizing civil war waged by Pancho Villa in Mexico.[116] The war rhetoric was so strong an influence, though, that Sheriff Wheeler could make the astounding assertion that the deportation was not in response to a labor disturbance.[117]

Confirmation of the power of the ethical surplus of the war rhetoric came in stark terms in the early 1920s when 210 vigilantes were acquitted of criminal charges of kidnapping.[118] Defense lawyers utilized the legal doctrine of "necessity" to defend the deportation of workers, arguing that the kidnappings constituted a legitimate repulsion of an invader threatening U.S. security and tranquility.[119] Despite the overwhelming evidence adduced during the three-month trial, the jury acquitted the defendants on the first ballot.[120]

It is sobering to consider the power of ethical surplus. Tom Horne is not engaged in faulty or illogical reasoning that can be exposed with clarity and certainty. He is not arguing that two plus two equals five. Rather, he is participating in an *ethos* that many people acting in good faith share, and the conclusions regarding the danger of ethnic studies legislation are plausible positions within this *ethos*. Calling these supporters racist will have no effect, because they have embraced an ostensibly non-racist *ethos* that subtends their practical reasoning about public affairs. In short, we must challenge the *ethos* on its own terms to reverse some of its troubling applications.

Countering the rhetoric of a war on illegal immigration requires a

114. KATHERINE BENTON-COHEN, BORDERLINE AMERICANS: RACIAL DIVISION AND LABOR WAR IN THE ARIZONA BORDERLANDS 211–16 (2009).

115. *Id.* at 198–99. Benton-Cohen summarizes the racist effect of the deportation: "About 90 percent of the deportees were born outside the United States. They claimed thirty four nationalities, but fully half of those deported were either Mexican or eastern European, the men who had always been at the margins of the white man's camp." *Id.* at 225.

116. *Id*. at 4, 221.

117. *Id*. at 221.

118. *See id.* at 235–36.

119. *Id*. at 235.

120. BENTON-COHEN, *supra* note 114, at 235.

reconstitution of the rhetorical space for public debate so that we may replace the strong and abiding *ethos* that has shaped immigration policy during the modern era. Although profoundly difficult, this task is not impossible. Consider Garver's example of the positive force of ethical surplus. *Brown v. Board of Education* confronted head on the apartheid state and its racist underpinnings, generating an ethical surplus that persisted through decades of cases that implemented the equality principle in diverse areas of American life.[121] The question of equal education remains troubling today, but the legacy of *Brown* has reached far beyond the specific matter before the Court. As Garver once commented, "Because of *Brown* we have handicapped parking spaces."[122] We have plenty of rhetorical resources from which to draw in reconfiguring the *ethos* of the immigration debate: Ellis Island, the Statue of Liberty, "strength through diversity," "equal opportunity," and so on. And, we must do so.

121. GARVER, *supra* note 2, at 85.

122. Conversation Between Francis J. Mootz III and Eugene Garver (Mar. 12, 2011).