Immigration: The Missing Requirement for an Ethics of Race

José Jorge Mendoza

In her latest book, *The Ethics and Mores of Race*, Naomi Zack writes: "[t]here remains a big rhetorical and social distance between philosophical and formal ethical treatments of race, on the one hand, and what race means in practice and how ordinary people think about it, on the other."[1] In other words, while academics have developed sophisticated condemnations of racism, in the public sphere these same condemnations have either been dismissed as mere opinion or misunderstood as being a potential source of conflict. According to Zack, the disconnection between these two different sets of discourse, for example the discourse of network news programs as opposed to the discourse within Ethnic Studies departments, stems from not having a developed ethics of race. As Zack writes:

> What may be genuine ethical judgments about race often sound like attacks on existing mores because the common ground on which they can be expressed and understood, as ethical judgments concerning race, does not yet exist. (xiv)

As this quote from Zack suggests, part of the reason that these discourses are so disconnected from each other is that the difference between "ethics" and "mores" has not been sufficiently appreciated. This is where philosophers might be able to help. Understanding the difference between ethics and mores is tricky, because the difference between the two is not immediately obvious. Both ethics and mores aim to provide normative guidance, but this is really where the similarities come to an end. The difference, according to Zack, is something like the following. Mores "are closely tied to understanding and agreement within groups, occurring at the same time, often defined

1. Naomi Zack, *The Ethics and Mores of Race: Equality after the History of Philosophy* (Lanham, MD: Rowman & Littlefield, 2011), xiii–xiv. All subsequent citations of this work will be parenthetical.

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by place" (xii). While ethical validation requires "only the comprehension and agreement of individuals, who do not have to be in the same place and time as either one another or the philosopher being read" (xii). In short, mores provide a particular, localized, form of normative guidance that, while perhaps helpful in navigating within a particular community, might be valid only within that particular community. In contrast, acting ethically might land us in trouble—as it did Socrates, whose ethical questioning of Athenian mores earned him a hemlock beverage for his troubles. The aim of acting ethically, however, is to provide normative judgments that aspire towards universal validity.

But even if we accept this distinction and believe that it is important enough to always keep it in mind, we might still want to ask why we should develop an ethics of race as opposed to working towards changing the mores of current race relations? To that question Zack reminds us that: "Mores were not the original ground for racial liberation or social justice in American society. Ethics used to be the primary tool against white oppression" (xiv). As evidence for this, Zack cites the abolitionist movements against slavery and civil rights movement of the 1960's. In short, Zack's answer to the question, why develop an ethics of race, is that appeals to ethics, rather than mores, have historically been (and will likely continue to be) the true catalyst for bringing about social justice—especially with regards to race.

But even if this further point is accepted, a persistent critic might still want to ask: Why develop an ethics of race as opposed to simply broadening ethics in the general sense? With regard to this question Zack states:

> It would not be necessary to have an ethics of race, distinct from race-neutral ethics, if the human rights of individuals and groups were not consistently violated in ways motivated by, and affecting, racial identities. An ethics of race is like a codicil to ethics in general, just as recognition of women, the disabled, and children were codicils to the UDHR [the Universal Declaration of Human Rights]. (165)

As a starting point for developing an ethics of race, Zack's book offers us a critical and historical examination of philosophical ethics. This comprehensive and illuminating examination of philosophical ethics concludes by yielding twelve requirements for an ethics of race. While these twelve requirements are not in themselves an ethics of race, the hope is that these requirements will be sufficient to finally allow us to explicitly engage in ethical treatments of race. This, in turn, should improve our public discussions of race (in particular discussions about racism), as well as make the subject of ethics more inclusive (xvii).

My view is that Zack's argument is basically on solid footing. My only concern, however, is that in her exposition Zack does not emphasize the issue of immigration enough. This is not to say that Zack ignores the issue

completely, she does make repeated mention of the issue throughout the book (76, 138), nor is this to say that requirements 1, 4, 5, 7, 9, 11, and 12 would be insufficient, if cobbled together in the right way, to provide a defense of immigrant rights. My concern is that the issue of immigration, much like the issue of slavery (although very different in many important ways), has historically played an important role in the construction of "whiteness" and in particular in the establishment of white privilege and the perpetuation of white supremacy. So, similar to the way slavery is specifically prohibited by requirement 8, I believe that the issue of immigration merits its own specific "requirement of content" within the lager set of requirements for an ethics of race. Such a requirement might read as follows: *Arbitrary and discriminatory immigration controls must be held to be ethically wrong. An ethics of race demands that with regard to immigration admission, exclusion, expulsion, and enforcement, the presumptive right be on the side of immigrants and not on the side of the state. A legitimate state (i.e., a state that respects human equality) does have a right to self-determination and security, but these rights may be checked by a commitment to the moral equality of all persons and the political equality of all citizens. In short, if a legitimate state wishes to control immigration into its territory, it faces a substantial burden of proof to show how its immigration policies and strategies do not violate a prior commitment to universal equality.*

In the rest of this article I make a case as to why I think this should be included as a requirement for an ethics of race. To make my case, I point out how immigration controls in the U.S. have historically helped to construct "whiteness" and functioned to establish and maintain white privilege and white supremacy. To be clear, I look at the history of the U.S. not because the U.S. is unique in this regard. In fact, some European countries (e.g., Germany) might better exemplify the connection between immigration controls and "white supremacy." I look specifically at the U.S. in order to mirror Zack's exposition on the connection between slavery and race (71–74).

Immigration and White Supremacy

Any historical account of U.S. immigration controls must begin by acknowledging the language of the Naturalization Act of 1790. That Act made it emphatically clear that only "white persons" were eligible for naturalized U.S. citizenship.[2] This view of U.S. citizenship was later reaffirmed in the 1857 Supreme Court ruling of *Dred Scott v. Sandford*. In that case, Scott's request for freedom was denied by a margin of 7-2 on the grounds that "A free negro of the African

2. 1790 Naturalization Act, Chap. 3; 1 Stat 103., 1st Cong., 2nd sess. (March 26, 1790).

race, whose ancestors were brought to this country and sold as slaves, is not a 'citizen' within the meaning of the Constitution of the United States."[3]

Less than ten years after the *Dred Scott* case, the end of the Civil War brought with it the end of slavery and the ratification of what are now known as the Civil War Amendments (i.e., the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution). These amendments allowed former slaves and their descendents to become citizens of the U.S. and extended the right of due process and equal protection to all persons, thus nullifying the *Dred Scott* decision. Yet, as Kevin Johnson has argued in the *Huddled Masses Myth*, as African-Americans began to gain some legal rights, other groups began to bear the brunt of new discriminatory laws. Johnson writes:

> Congress passed the first wave of discriminatory immigration laws not long after the Fourteenth Amendment to the Constitution . . . and other Reconstruction amendments went into effect. With the harshest treatment generally reserved for African Americans formally declared unlawful, the nation transferred its animosity to another discrete and insular racial minority—one whose immigration status, race, and perceived impact on the fortunes of white workers made the treatment more socially acceptable.[4]

In other words, while the Civil War Amendments exempted people of African decent from the "whiteness" clause of the Naturalization Act, these same amendments did not do away with the "whiteness" clause altogether. The protections of these new amendments did not extend to cases of immigration (i.e., cases involving the admission, exclusion, and expulsion of non-citizens).[5] Overt forms of discrimination were allowed to continue in immigration cases because the U.S. federal government was understood to enjoy *plenary power* over immigration. This means that, as a legitimate and self-determined state, the U.S. federal government was (and is still) presumed to have the right to regulate immigration free from judicial review.

The grossest example of race-based exclusions was undoubtedly the 1882 Chinese Exclusion Act. These Acts prevented further immigration from China and made all Chinese immigrants ineligible for U.S. citizenship, thereby converting Chinese nationals who were already in the United States into legal permanent residents.[6] Challenges to these Acts eventually reached the Supreme Court. In the most famous of these cases, *Chae Chan Ping v. United States*, the Court concluded that

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3. *Dred Scott v. Sandford*, 60 U.S. 393 (1856).
4. Kevin R. Johnson, *The "Huddled Masses Myth: Immigration and Civil Rights* (Philadelphia: Temple University Press, 2004), 19.
5. Mae Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton, NJ: Princeton University Press, 2004), 38.
6. Chinese Exclusion Act, Chap. 126; 22 Stat. 58., 47th Cong., 1st sess. (May 6, 1882).

> the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power.[7]

Four years later, in *Fong Yue Ting v. United States*, the Supreme Court ruled that besides having the presumptive right to admit and exclude non-citizens, the federal government also has the unilateral power to expel non-citizens without judicial review. "The power of Congress . . . to expel, like the power to exclude aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers."[8] Furthermore, because deportation was not considered a punishment, the due process protections of the Constitution were not applicable to removal cases.

> The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty or property, without due process of law; and the provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, have no application.[9]

The *Chinese Exclusion Acts*, supplemented by these Supreme Court decisions, set the tone for the first two comprehensive immigration reforms in U.S. history. The first of these was the 1917 Immigration Act. This Act vastly expanded the scope of those ineligible for U.S. citizenship, which came to include all immigrants from a geographical area referred to as the "Asiatic Barred Zone." This zone included not just China, but also Japan and most of India.[10] Seven years later, the Johnson-Reed Act of 1924 introduced a system of "national origin" quotas and barred from entry any and all persons ineligible for citizenship.[11] The numbers used to determine the quotas for different nations were derived from the 1890 Census. The reasoning behind using this particular set of numbers was that the 1890 Census best captured the true

7. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).
8. *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).
9. Ibid.
10. 1917 Immigration Act, H.R. 10384; Pub.L. 301; 39 Stat. 874., 64th Cong., 2nd sess. (February 5, 1917).
11. 1924 Immigration Act, H.R. 7995; Pub.L. 68-139; 43 Stat.153. 68th Cong., 1st sess. (May 26,1924).

racial and ethnic composition of the U.S.[12] These numbers, not surprisingly, disproportionately favored northern Europeans. In this way, the notion of the U.S. as a "white" nation was perpetuated through immigration law.

These overtly racial exclusions remained in affect until the 1952 Immigration and Nationality Act put an end to race-based exclusions and the 1965 Immigration and Nationality Act put an end to the "national origins" quota.[13] But while U.S. admission and exclusion policies are now technically non-discriminatory, the *plenary power doctrine*—which the U.S. government used to justify these discriminatory policies in the first place—still remains in effect. The continued impact of this doctrine can be seen in immigration enforcement and expulsion strategies, such as "Prevention through Deterrence" (e.g., the push to further militarize the U.S. border) and "Attrition Through Enforcement" (e.g., Arizona's notorious immigration bill SB 1070).

It should come as no surprise that these strategies disproportionately affect certain communities within the U.S. and in turn mark the members of these communities as less than fully "American" and thereby as less than fully "white." What this shows is that immigration controls—by which I mean not only immigration admission and exclusion policies, but also immigration enforcement and expulsion strategies—need to be accounted for in an ethics of race. My requirement would, I believe, prove sufficiently adequate if added to the list already begun by Zack. — • —

12. Ngai, *Impossible Subjects*, 23.
13. 1952 Immigration and Nationality Act, H.R. 13342; Pub.L. 414; 182 Stat. 66. 82nd Cong., 2nd sess. (June 27, 1952) and 1965 Immigration and Nationality Act, H.R. 2580; Pub.L. 89-236; 79 Stat. 911. 89th Cong., 2nd sess. (October 3, 1965).