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Kevin R. Johnson

Bernard Trujillo

*Valparaiso University School of Law*

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## Article

# Immigration Reform, National Security After September 11, and the Future of North American Integration

Kevin R. Johnson<sup>†</sup> and Bernard Trujillo<sup>††</sup>

Ostensibly to meet the challenge of terrorism after September 11, 2001, but also to soothe the nerves of a tense public, the legal terrain surrounding what can be done in the name of national security changed dramatically in the United States over the last five years. Government, and the public, quickly became ready and willing to trade off civil rights—especially those of minorities—in the hopes of improving public safety. Passed with almost unanimous support in Congress, the USA Patriot Act,<sup>1</sup> for example, allows for greater intrusion on Americans' civil rights by, among other things, expanding the electronic surveillance powers of government.<sup>2</sup> In addition, President Bush pushed the civil rights envelope with aggres-

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<sup>†</sup> Associate Dean for Academic Affairs, School of Law, University of California at Davis, Mabie-Apallas Professor of Public Interest Law and Chicana/o Studies. A.B., University of California, Berkeley; J.D., Harvard University. University of California at Davis law student Stella Schmidel provided much-appreciated research assistance. Both authors thank Tino Cuellar for helpful comments.

<sup>††</sup> Professor of Law, Valparaiso University School of Law. A.B., Princeton; J.D., Yale University. Copyright © 2007 by Kevin R. Johnson and Bernard Trujillo.

1. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (Patriot Act), Pub. L. No. 107-56, 115 Stat. 272. After much debate, see Jonathan Weisman & Jeffrey H. Birnbaum, *A Tame End to Patriot Act Debate*, WASH. POST, Mar. 7, 2006, at A15, Congress reauthorized a watered down version of the Patriot Act. See Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (2006) (codified in scattered sections of 8, 15, 18, 21, 28, and 42 U.S.C.).

2. For criticism, see, for example, David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 966–74 (2002); Natsu Taylor Saito, *Whose Liberty? Whose Security? The USA PATRIOT Act in the Context of COINTELPRO and the Unlawful Repression of Political Dissent*, 81 OR. L. REV. 1051, 1111–28 (2002).

sive policies directed at Arabs and Muslims that, on several occasions, a conservative Supreme Court rejected outright.<sup>3</sup>

With few legal constraints and considerable deference from the courts, immigration law and policy quickly emerged as ground zero in the so-called war on terror declared by the Bush administration not long after September 11.<sup>4</sup> By many accounts, the measures unnecessarily sacrificed the civil rights of noncitizens—and, in certain instances, citizens.<sup>5</sup> Each year, deportations rose to record levels as the U.S. government annually removed from the country hundreds of thousands of noncitizens—almost all of whom had nothing whatsoever to do with terrorism.<sup>6</sup> The policies forever changed the lives of thousands of people and their families and friends.

Today it may seem hard to believe, but shortly before September 11, 2001, after much lobbying by immigrant rights advocates, the U.S. Congress had been seriously considering possible liberalization of the immigration laws. “The events of [that day] brought immigration reform to an abrupt halt. Instead of legalization of undocumented workers and reconsideration of the restrictive nature of the 1996 immigration laws, Congress responded six weeks [after the attacks] with the passage of the USA Patriot Act.”<sup>7</sup> September 11 effectively initiated

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3. See, e.g., *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2786 (2006) (holding that military tribunals created by the Bush administration violated the law); *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (ruling that a U.S. citizen held as an “enemy combatant” had the right to a hearing to challenge that classification); see also *Rumsfeld v. Padilla*, 542 U.S. 426, 451 (2004) (finding that the court in which the action was filed lacked jurisdiction over the defendant to entertain a challenge to the detention of a U.S. citizen classified as an “enemy combatant”); *infra* text accompanying notes 40–86 (outlining policies adopted by the Bush administration in the war on terror). The various anti-terror measures represented a “new . . . paradigm of prevention,” that affirmatively seeks to stop terrorism before it is perpetrated. Jules Lobel, *The Preventative Paradigm*, 91 MINN. L. REV. 1407, 1407 (2007) (quoting John Ashcroft, U.S. Att’y Gen., Prepared Remarks Before the Council on Foreign Relations (Feb. 10, 2003), available at <http://www.usdoj.gov/archive/ag/speeches/2003/021003agcouncilonforeignrelation.htm>).

4. See *infra* Part I.A.

5. See *infra* Part I.A.

6. See *Michael Chertoff Holds a Briefing on the Secure Border Initiative*, FDCH CAPITAL TRANSCRIPTS (Aug. 23, 2006), available at 2006 WLNR 14608339 (estimating that the U.S. government would remove a record number of noncitizens from the country in 2006).

7. Barbara Hines, *An Overview of U.S. Immigration Law and Policy Since 9/11*, 12 TEX. HISP. J.L. & POL’Y 9, 12 (2006).

a lengthy hiatus in the discussion of positive immigration reform as the general public sought to seal the borders.<sup>8</sup>

Not until several years after September 11 did the United States again seriously consider much more mundane, and long-standing, issues of immigration reform, particularly the issue of undocumented immigration from Mexico. Those new reform discussions, however, were the mirror image of the ones taking place before September 11. Attention centered not on liberalizing immigration laws but on taking steps in an effort to tighten the border, remove undocumented immigrants from the country, and generally restrict access to foreign nationals to the United States.

In March 2006, the Pew Hispanic Center estimated that between 11.5 and 12 million undocumented immigrants lived in the United States,<sup>9</sup> more than half of whom of Mexican origin.<sup>10</sup> This represented more than double the approximately five million undocumented immigrants in the country when the U.S. government began in the early 1990s to greatly ramp up border enforcement through a series of military-style operations.<sup>11</sup> This fact bears repeating: A dramatic *increase* in the undocumented immigrant population followed the largest enforcement build-up of the U.S./Mexico border in history.<sup>12</sup> Put simply, if one measures the effectiveness of border enforcement by the

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8. See *infra* Part II.

9. JEFFREY S. PASSEL, PEW HISPANIC CTR., THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S., at i (2006).

10. *Id.* at ii (noting that Mexicans represented over half of the undocumented immigrant population in 2005).

11. See U.S. DEP'T OF JUSTICE, 1997 STATISTICAL YEARBOOK OF THE IMMIGRATION & NATURALIZATION SERVICE 200 tbl.N (1999). For a sampling of literature analyzing the deadly impacts of the U.S. government's increased border enforcement measures, see generally TIMOTHY J. DUNN, THE MILITARIZATION OF THE U.S.-MEXICO BORDER, 1978-1992: LOW INTENSITY CONFLICT DOCTRINE COMES HOME (1996); KARL ESCHBACH ET AL., CAUSES AND TRENDS IN MIGRANT DEATHS ALONG THE U.S./MEXICO BORDER, 1985-1998 (2001); JOSEPH NEVINS, OPERATION GATEKEEPER (2002); Wayne A. Cornelius, *Death at the Border: Efficacy and Unintended Consequences of US Immigration Control Policy*, 27 POPULATION & DEV. REV. 661 (2001); Karl Eschbach et al., *Death at the Border*, 33 INT'L MIGRATION REV. 430 (1999); Bill Ong Hing, *The Dark Side of Operation Gatekeeper*, 7 U.C. DAVIS J. INT'L L. & POL'Y 121 (2001); Guillermo Alonso Meneses, *Human Rights and Undocumented Migration Along the Mexican-U.S. Border*, 51 UCLA L. REV. 267 (2003); Jorge A. Vargas, *U.S. Border Patrol Abuses, Undocumented Mexican Workers, and International Human Rights*, 2 SAN DIEGO INT'L L.J. 1 (2001).

12. See BELINDA I. REYES ET AL., PUBLIC POLICY INSTITUTE OF CAL. HOLDING THE LINE? THE EFFECT OF THE RECENT BORDER BUILD-UP ON UNAUTHORIZED IMMIGRATION, at viii, xii (2002).

size of the undocumented population in the United States, enhanced border enforcement has failed.<sup>13</sup>

Many observers agree that the current immigration system is seriously broken and needs to be fixed.<sup>14</sup> The problems and remedies identified by the principals to the national debate, however, diverge dramatically in kind and purpose. Restrictionists alarmed by undocumented immigration unabashedly play on fears of terrorism in insisting upon greater border enforcement and punitive treatment of undocumented immigrants.<sup>15</sup> Those advocating on behalf of immigrants demand fairer treatment of immigrants including, for example, the regularization of the immigration status of undocumented immigrants; put differently, they advocate a new amnesty program, such as the one Congress passed in 1986.<sup>16</sup>

Unfortunately, the national security fears that have gripped the United States since September 11 have tended to drive the most popular reform proposals toward extreme enforcement-oriented policies.<sup>17</sup> Proposals floated in the 109th Congress included border fences, making the mere status of being undocumented a felony, and other harsh measures.<sup>18</sup> Groups like the Minuteman Project,<sup>19</sup> a relatively small move-

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13. Absent the new border operations, the undocumented immigrant population might have grown even more. Nonetheless, at best, the aggressive measures only somewhat dampened the growth in the size of the population and, because these measures resulted in thousands of deaths, are morally and otherwise difficult to justify. *See* Cornelius, *supra* note 11, at 669.

14. *See, e.g.*, BILL ONG HING, *DEPORTING OUR SOULS: VALUES, MORALITY, AND IMMIGRATION POLICY* 204–15 (2006); Hines, *supra* note 7, at 28.

15. *See infra* Part II.

16. *See* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 201, 100 Stat. 3359, 3394–404 (adding the Immigration & Nationality Act § 245A, 8 U.S.C. § 1255a (2000)); *see also* STEPHEN H. LEGOMSKY, *IMMIGRATION AND REFUGEE LAW AND POLICY* 607–10 (4th ed. 2005) (describing the amnesty program).

17. *See infra* Part II.

18. *See* Nicole Gaouette, *Senate Toughens Border Stand, Approves Miles of New Fence*, L.A. TIMES, May 18, 2006, at A1. In the end, after much acrimony and lengthy debate, Congress failed to enact any comprehensive immigration reform proposal and agreed only to enact a law authorizing the extension of the fence along the United States's southern border with Mexico. *See* Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638 (to be codified in scattered sections of 8 U.S.C.).

19. *See* Leo R. Chavez, *Spectacle in the Desert: The Minuteman Project on the U.S.-Mexico Border*, in *GLOBAL VIGILANTES: PERSPECTIVES ON JUSTICE AND VIOLENCE* (David Pratten & Atrayee Sen eds., forthcoming Sept. 2007); Peter Yoxall, Comment, *The Minuteman Project, Gone in a Minute or Here to Stay? The Origin, History and Future of Citizen Activism on the United States-*

ment that received an extraordinary amount of press coverage,<sup>20</sup> supported those and even tougher policies; at times, the Minutemen themselves patrolled the border in search of undocumented immigrants.<sup>21</sup> In contrast, in the spring of 2006, immigrant supporters took to the streets by the tens of thousands in protest of the harsh enforcement-only approach embraced by a punitive bill passed by the U.S. House of Representatives.<sup>22</sup>

This Article critically examines how national security concerns have come to dominate—inappropriately in our view—the much-needed debate over comprehensive immigration reform.<sup>23</sup> Specifically, this Article contends that the security concerns that animated the conduct of the U.S. government after the horrible events of September 11, 2001, later distorted the debate over reform of the immigration laws.<sup>24</sup> When it comes to immigration reform, the myopic fixation with security and the so-called war on terror, has made it next to impossible for law- and policy-makers to see the forest through the trees.<sup>25</sup> This is most unfortunate because meaningful reform of the U.S. immigration laws is long overdue.

If the U.S. government embraces more border enforcement without considering other policy goals, it would not be the first time that fear has triggered the adoption of tough immigration policies of dubious propriety. Economic insecurity inflamed by

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*Mexico Border*, 37 U. MIAMI INTER-AM. L. REV. 517, 532 (2006) (describing the origins of the Minuteman Project).

20. See, e.g., Charlie LeDuff, *Poised Against Incursions, A Man on the Border, Armed and Philosophical*, N.Y. TIMES, Aug. 14, 2006, at A16 (profiling one of the Minutemen patrolling the southern U.S. border with Mexico).

21. *Id.*

22. See Oscar Avila & Antonio Olivo, *A Show of Strength: Thousands March to Loop for Immigrants' Rights*, CHI. TRIB., Mar. 11, 2006, at A1; Nathaniel Hoffman, *Protest Supports Illegal Workers*, CONTRA COSTA TIMES (San Francisco), Mar. 22, 2006, at A1; Mark Johnson & Linda Spice, *Thousands March for Immigrants*, MILWAUKEE J. SENTINEL, Mar. 24, 2006, at A1; Teresa Watanabe & Hector Becerra, *500,000 Cram Streets to Protest Immigration Bills*, L.A. TIMES, Mar. 26, 2006, at A1.

23. See HING, *supra* note 14, at 140–63; Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. (forthcoming July 2007).

24. See *infra* Part II.

25. This is evidenced by the fact that both the House and Senate passed immigration reform bills—although much different ones—in the 109th Congress. See, e.g., Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006); Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005).

racism contributed to the passage of the infamous laws excluding Chinese immigrants from the United States in the late nineteenth century.<sup>26</sup> The Red Scare following World War I, combined with racial anxieties, led Congress to create a discriminatory national origins quota system in 1924.<sup>27</sup> In the 1950s, the Cold War brought the nation politically motivated and ideologically driven detentions and deportations of noncitizens even loosely suspected of Communist sympathies.<sup>28</sup> In 1996, in response to the bombing of the federal building in Oklahoma City perpetrated by U.S. citizens, which, strangely enough, fueled fears of *foreign* terrorism, Congress passed two punitive immigration reform laws<sup>29</sup> that went well beyond having anything to do with terrorism. These reforms punished immigrants convicted of ordinary criminal offenses through detention and harsh new removal grounds combined with stringent limitations on judicial review of the executive branch's immigration decisions. Characterized as "radical" by immigration moderates,<sup>30</sup> many, if not most, informed observ-

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26. See ALEXANDER SXTON, *THE INDISPENSABLE ENEMY: LABOR AND THE ANTI-CHINESE MOVEMENT IN CALIFORNIA 177-78* (1971); RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE* 110-11 (rev. ed. 1998); see also Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581, 609 (1889) (upholding one of a series of laws excluding immigrants from China).

27. See JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925*, at 222-33 (3d ed. 1994).

28. See Kevin R. Johnson, *The Antiterrorism Act, The Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, 28 ST. MARY'S L.J. 833, 850-60 (1997); see, e.g., Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 215-16 (1953) (finding the U.S. government could indefinitely detain a long-term lawful permanent resident based on secret evidence—later found to be insufficient to justify exclusion—that he was a danger to national security); Galvan v. Press, 347 U.S. 522, 529 (1952) (sanctioning the removal of a long-term lawful resident on account of membership in an organization the U.S. government classified as "Communist"); Harisiades v. Shaughnessy, 342 U.S. 580, 596 (1952) (upholding the deportation of three former Communist party members); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) (declining to disturb the U.S. government's refusal to allow an alien to come to the United States to be with her U.S. citizen spouse based on secret evidence—later found to be insufficient to justify exclusion—that she was a danger to national security).

29. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in scattered sections of 8 and 18 U.S.C.); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

30. PETER H. SCHUCK, *CITIZENS, STRANGERS, AND IN-BETWEENS* 143 (1998) (characterizing the 1996 reforms as "the most radical reform of immigration law in decades—or perhaps ever").

ers see these measures as unfair, ill-advised, and counterproductive.<sup>31</sup>

Part I of this Article analyzes the U.S. government's scatter-shot attempts in the years since September 11 at improving national security by tightening the immigration laws and increasing border enforcement.<sup>32</sup> Besides being overbroad, under-inclusive, and, in many instances, grossly unfair, the measures appear to have done little to truly improve the security of the United States but have done much to alienate the very communities whose help is desperately needed to effectively protect national security in modern times.<sup>33</sup>

Part I further discusses how both Canada and Mexico responded individually to September 11 and worked with the United States on various anti-terrorism measures. Although a certain amount of regional cooperation followed the tragic events of September 11, not nearly enough was done to truly improve the overall security of North America as a region.<sup>34</sup> A safer North America will require future cooperation between the United States, Canada, and Mexico.

Part II of the Article demonstrates how the war on terror has distorted the recent national debate over immigration reform.<sup>35</sup> Security concerns have made it nearly impossible to have a rational discussion of changes to immigration law and policy necessary to fulfill important economic, political, and social goals of the United States. In no small part due to the "close the border" mentality September 11 fostered, border enforcement has increasingly been the only item of consensus in Congress when it comes to immigration reform.<sup>36</sup> However, a focus on border enforcement, to the exclusion of other impor-

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31. See, e.g., Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1934 (2000) ("[The 1996 immigration laws] have caused immense hardship and suffering to thousands of people and have sought to eliminate the judicial branch entirely from any meaningful role in decisions of the most fundamental kind."); Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reform and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 616 (2003) (labeling the 1996 immigration laws as "harsh"); Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1962 (2000) (criticizing the scope and implications of the 1996 reforms).

32. See *infra* Part I.A.

33. See *infra* Part I.A.

34. See *infra* Part I.B.

35. See *infra* Part II.

36. See *infra* Part II.A.



tant policy goals, is short sighted.<sup>37</sup> The United States requires more realistic laws that better comport with the economic, political and social realities of modern immigration.<sup>38</sup> A truly comprehensive approach to immigration reform, more far-reaching than any contemplated by the U.S. Congress in recent memory, is needed to bring the nation's immigration laws in line with its various needs in the twenty-first century.

This Article contends that immigration reform in the United States, coupled with multilateral efforts to address migration and national security concerns, are necessary to begin the overhaul of the immigration laws and their enforcement. Specifically, the United States, Canada, and Mexico—the parties to the North American Free Trade Agreement—must work together on issues of migration and regional security. In the end, a more integrated North America, with freer movement of labor than what currently exists, likely would be a safer continent than it is today. Unfortunately, by alienating other nations with the harsh treatment of their citizens, U.S. immigration policies in the war on terror may undermine those multilateral efforts.<sup>39</sup>

#### I. IMMIGRATION MEASURES IN THE WAR ON TERROR

The horrible events of September 11 transformed the United States in many ways. Immigration law almost immediately became ground zero in the war on terror, and immigrants suffered the consequences.<sup>40</sup> “Overreaction” is one way to describe the U.S. government's swift and immediate response to the tragic loss of life. In a nutshell, the initial result was the punitive treatment of Arab and Muslim noncitizens, followed by the imposition of restrictive policies affecting all immigrants.<sup>41</sup>

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37. See *infra* Part II.B.

38. For a far-reaching argument for more open borders, see KEVIN R. JOHNSON, *OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAW* (forthcoming Oct. 2007); see also HING, *supra* note 14, at 7 (advocating a more moral immigration policy for the United States).

39. See *infra* Part I.B.

40. See Karen Engle, *Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)*, 75 U. COLO. L. REV. 59, 60 (2004); Teresa Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 86–95 (2005).

41. See *infra* Part I.A.

## A. THE U.S. GOVERNMENT'S RESPONSE TO SEPTEMBER 11

After September 11, 2001, the U.S. government took a variety of immigration-related measures in the name of national security.<sup>42</sup> In part, the U.S. government directed security measures at noncitizens because noncitizens were involved in the terrorist acts of September 11.<sup>43</sup> Government actors, however, no doubt felt encouraged—or at least not deterred from—taking aggressive measures against noncitizens because well-settled precedent affords “plenary power” to the political branches of government in immigration matters, particularly those that touch on foreign relations and national security.<sup>44</sup>

Deference to the political branches of government on national security matters has a lengthy historical pedigree:

As far back as the Alien and Sedition Acts of 1798, and then in the

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42. For analysis and criticism of these measures, see, for example, Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURVEY AM. L. 295, 327–55 (2002) (documenting civil rights consequences); Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185, 1192–99 (2002) (describing U.S. government selective enforcement and racial subordination); Cole, *supra* note 2, at 959–77; Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11*, 34 COLUM. HUM. RTS. L. REV. 1, 32–46 (2002); Victor C. Romero, *Decoupling “Terrorist” from “Immigrant”: An Enhanced Role for the Federal Courts Post 9/11*, 7 J. GENDER, RACE, & JUST. 201, 202–06 (2003); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1576–86 (2002). Many reports have documented the civil and human rights abuses occurring during the war on terror. See, e.g., MUZAFFAR A. CHISHTI ET AL., MIGRATION POLICY INSTITUTE, AMERICA'S CHALLENGE: DOMESTIC SECURITY, CIVIL LIBERTIES, AND NATIONAL UNITY AFTER SEPTEMBER 11, at 12–14 (2003); U.S. DEP'T OF JUSTICE, SUPPLEMENTAL REPORT ON SEPTEMBER 11 DETAINEES, ALLEGATIONS OF ABUSE AT THE METROPOLITAN DETENTION CENTER IN BROOKLYN, NEW YORK (2003); U.S. DEP'T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS (2003).

43. See NAT'L COMM'N ON TERRORIST ACTS UPON THE U.S., THE 9/11 COMMISSION REPORT 145–253 (2004) [hereinafter 9/11 COMMISSION REPORT] (outlining the background behind, as well as the various persons involved in, the September 11 plot).

44. See, e.g., *INS v. Abudu*, 485 U.S. 94, 110 (1988) (“[Immigration and Naturalization Service (INS)] officials must exercise especially sensitive political functions that implicate questions of foreign relations, and therefore the reasons for giving agency decisions . . . apply with even greater force in the INS context.” (footnote omitted)); *Mathews v. Diaz*, 426 U.S. 67, 81 (1976) (contending that deference to the legislative and executive branches of government on immigration matters was justified in part because “decisions in these matters may implicate our relations with foreign powers”).

early federal immigration statutes of the late 1800s, immigration law has barred and deported noncitizens from the United States on ideological and national security grounds. Noncitizens can be arrested, detained, and deported under immigration law with little recourse to the constitutional protections that would limit the government outside of immigration.<sup>45</sup>

In the days after September 11, 2001, when the public unequivocally demanded that government act decisively, immigrants could easily be targeted because the law made immigration measures the path of least resistance.<sup>46</sup>

During the nineteenth and twentieth centuries, national security issues sporadically dominated the interpretation and enforcement of U.S. immigration laws. At times, the Supreme Court has been willing to invoke national security to justify racial exclusions in the immigration laws that in reality have only a most attenuated relationship with public safety. For example, in *The Chinese Exclusion Case*, which upheld a law excluding most Chinese immigrants from U.S. shores, the Court in 1889 emphasized:

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 the vast hordes of its people crowding in upon us.* The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth . . . . *If, therefore, the government of the United States, through its legislative department, 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 . . . . its determination is conclusive upon the judiciary.*<sup>47</sup>

As the rationale upholding racial exclusions in *the Chinese Exclusion Case* suggests, the political branches of government in certain instances may excessively rely on the talisman of national security to justify invidious discrimination in immigration measures. However, as one member of Congress emphasized in analyzing immigration reform over the last ten years, including the 1996 immigration reforms, “[i]nstead of enacting rational immigration reform that will indeed strengthen our national security, Congress has enacted immigration changes that

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45. HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 174 (2006).

46. See *supra* text accompanying notes 42–44.

47. *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 606 (1889) (emphasis added).

*have very little or nothing to do with national security.* [Republican] revolutionaries ‘revolutionized,’ the American tradition of immigration but, unfortunately, did not bring revolutionary change to protecting America from terrorists.”<sup>48</sup>

The post-September 11 era is not the first time that the United States targeted specific groups of noncitizens in times of social stress emanating from tensions with the Arab and Muslim world. When a group of U.S. citizens was held hostage in Iran a little more than twenty-five years ago, the U.S. government deployed immigration law in numerous ways against Iranian nationals. One regulation required only Iranian students on nonimmigrant visas to report to the Immigration and Naturalization Service and provide information about their residence and evidence of school enrollment.<sup>49</sup> The court of appeals in *Narenji v. Civiletti* upheld the nationality-based regulation because it was founded on a “rational basis”; in so doing, the court emphasized that “it is not the business of courts to pass judgment on the decisions of the President in the field of foreign policy.”<sup>50</sup> Courts reviewing other federal regulations directed at Iranian citizens during this time period similarly refused to interfere with the President’s judgment.<sup>51</sup>

*Narenji v. Civiletti* provides legal support for the U.S. government’s use of immigration policies in the war on terror. However, the judicial deference to the federal government’s actions directed at Iranians in the United States during the hostage crisis was criticized in ways that readily apply to the government’s response to the events of September 11:

*Narenji* is troublesome because an executive classification based on

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48. Zoe Lofgren, *A Decade of Radical Change in Immigration Law: An Inside Perspective*, 16 STAN. L. & POL’Y REV. 349, 378 (2005) (emphasis added).

49. See *Narenji v. Civiletti*, 617 F.2d 745, 746–49 (D.C. Cir. 1979), cert. denied, 446 U.S. 957 (1980) (describing the regulation at issue).

50. *Id.* at 748; see also *supra* text accompanying notes 42–48.

51. See, e.g., *Ghaelian v. INS*, 717 F.2d 950, 953 (6th Cir. 1983) (holding that the court lacked jurisdiction to review an Equal Protection challenge to a regulation in a deportation action); *Nademi v. INS*, 679 F.2d 811, 815 (10th Cir. 1982) (upholding a regulation allowing Iranian citizens only fifteen days before voluntarily departing the country); *Dastmalchi v. INS*, 660 F.2d 880, 881 (3d Cir. 1981) (reaching the same conclusion as the court in *Ghaelian*); *Malek-Marzban v. INS*, 653 F.2d 113, 116 (4th Cir. 1981) (reaching the same conclusion as the court in *Nademi*). However, when national security concerns were not at their zenith, the courts intervened to halt discrimination against Vietnamese immigrants in refugee processing. See *Legal Assistance for Vietnamese Asylum Seekers v. Dep’t of State*, 45 F.3d 469, 474 (D.C. Cir. 1995), vacated on other grounds, 519 U.S. 1 (1996).

nationality in a foreign affairs crisis poses the danger that the Executive will overvalue the government interest and undervalue the individual constitutional interest. In a severe crisis, the political and psychological pressures on the Executive are extreme. In this situation, executive measures may be motivated by frustration or desperation rather than by an assessment of their actual usefulness, or they may reflect little more than a desire to appear stern and decisive. Conversely, in times of crisis the individual interests of persons selected for special burdens may be grossly undervalued. Indeed, the virulence of popular feeling against Iranian nationals during the hostage crisis raises the possibility that the Executive, in imposing special burdens on Iranian students, may have been reflecting to some extent a constitutionally impermissible hostility based on national origin. The atmosphere during the hostage crisis was marked by a hostility directed at citizens of Iran that resembled to some extent the hostility that is frequently directed toward citizens of an enemy nation during a war.<sup>52</sup>

After September 11, the panoply of U.S. government policies directed at immigrants in many respects overvalued security, undervalued the rights of immigrants and appears to have done little to make the nation much safer. Panic, fear, and anger seized the day.<sup>53</sup> The U.S. government felt strong pressures to act swiftly and decisively in a tough fashion. The measures unfortunately also reflected generalized suspicion of and hostility toward Arabs and Muslims, with few willing to defend the rights of these immigrant communities. Such hostility no doubt contributed to violence by private citizens against Arabs and Muslims.<sup>54</sup> In the end, Arab and Muslim citizens as well as

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52. Peter E. Quint, *The Separation of Powers Under Carter*, 62 TEX. L. REV. 785, 856 (1984) (emphasis added) (footnotes omitted); see also PETER ANDREAS, *BORDER GAMES: POLICING THE U.S.-MEXICO DIVIDE*, at vii–xii (2000) (concluding that the U.S. government has pursued increased border enforcement for political and symbolic impacts despite its overall lack of effectiveness). Importantly, the policies challenged in cases like *Narenji v. Civiletti* were limited to nationals of one nation, see Akram & Johnson, *supra* note 42, at 338, not the broader, more diffuse—and often religious-based—range of nationalities implicated in the Bush administration’s war on terror.

53. See Jonathan H. Marks, *9/11 = 3/11 = 7/7 + ? What Counts in Counterterrorism*, 37 COLUM. HUM. RTS. L. REV. 559, 559–60 (2006) (analyzing psychological pressures on society to overreact in times of social stress); Adrian Vermeule, *Libertarian Panics*, 36 RUT. L.J. 871, 871–72 (2005) (studying how law often cannot restrain the excesses of society caught in a panic over recent catastrophic events).

54. See Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259, 1265–77 (2004); Bill Ong Hing, *Vigilante Racism: The De-Americanization of Immigrant America*, 7 MICH. J. RACE & L. 441, 442–44 (2002).

noncitizens suffered.<sup>55</sup> Not much later, many different immigrant communities felt the sting of the war on terror.<sup>56</sup>

### 1. Stage 1: Arabs and Muslims

Among other steps in the name of national security, the U.S. government required special registration of certain Arab and Muslim noncitizens, arrested, detained, and interrogated large numbers of Arab and Muslim noncitizens, and engaged in selective deportations of Arab and Muslim noncitizens.<sup>57</sup> The executive branch justified the imposition of special registration requirements on Arab and Muslim noncitizens on the ground that the political branches of the federal government had “plenary power” over immigration, with little, if any, room for judicial oversight. In promulgating the regulations, then-Attorney General John Ashcroft emphasized that “[t]he political branches of the government have plenary authority in the immigration area. . . . In the context of immigration and nationality laws, the Supreme Court has particularly ‘underscore[d] the limited scope of judicial inquiry.’”<sup>58</sup> Other measures directed at noncitizens no doubt were founded on the plenary power rationale and the notion that the courts would—and should—be inclined to defer to the executive branch on matters touching on national security.<sup>59</sup>

Unfortunately, throughout U.S. history, harsh measures with the stated aim of bolstering national security often have

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55. See *infra* Part I.A.1.

56. See *infra* Part I.A.2.

57. See *infra* Parts I.A.1–2.

58. Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 52584, 52585 (Aug. 12, 2002) (citations omitted). This position is consistent with other claims by the Bush administration that ordinary legal principles do not restrict the conduct of the executive branch in the fight against terrorism. See, e.g., Diane Marie Amann, *Abu Ghraib*, 153 U. PA. L. REV. 2085, 2086 (2005) (“The Article shows that [the establishment of a space in which detainee abuses could occur] was the self-conscious creation of the Executive, which asserted that the country was at war, and that in wartime, courts must bow to a boundless and unreviewable presidential prerogative.”); Diane Marie Amann, *Guantánamo*, 42 COLUM. J. TRANSNAT’L L. 263, 265–66 (2004); Erwin Chemerinsky, *The Assault on the Constitution: Executive Power and the War on Terrorism*, 40 U.C. DAVIS L. REV. 1, 1–4 (2006). Even if the plenary power doctrine did not preclude judicial review, there might be a debate over whether the U.S. Constitution applied to the various measures taken by the U.S. government in the war on terror. See Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1029–32 (2004); Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605, 605–10 (2003).

59. See *supra* text accompanying notes 42–56.

been directed at unpopular racial minorities.<sup>60</sup> The internment of persons of Japanese ancestry during World War II is perhaps the most well-known example.<sup>61</sup> Building on previous security-oriented measures, the U.S. government's response to the events of September 11, 2001, proved to be no different, focusing on a discrete and insular minority that lacked meaningful power in the political process.<sup>62</sup>

The months after September 11 saw the U.S. government adopt a flurry of extraordinary policies directed primarily at Arab and Muslim noncitizens.<sup>63</sup> Interrogations, arrests, detention, special registration, and selective deportations of Arab and Muslim noncitizens emerged as a part of national security policy.<sup>64</sup> Secret immigration hearings behind closed doors became the norm in cases involving alleged terrorists.<sup>65</sup> Long af-

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60. See Gil Gott, *The Devil We Know: Racial Subordination and National Security Law*, 50 VILL. L. REV. 1073, 1073–77 (2005).

61. See *Korematsu v. United States*, 323 U.S. 214, 219 (1944) (upholding an order excluding persons of Japanese ancestry from parts of the West Coast); see also Keith Aoki, *No Right to Own?: The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment*, 40 B.C. L. REV. 37, 37–38, (1998) (contending that alien land laws in various states before World War II served as a precursor to internment of persons of Japanese ancestry during World War II). See generally Symposium, *Judgments Judged and Wrongs Remembered: Examining the Japanese American Civil Liberties Cases on Their Sixtieth Anniversary*, 68 LAW & CONTEMP. PROBS. 1, 1 (2005) (utilizing “what might be termed a multi-modal approach to remembering *Korematsu* . . . and other cases from World War II in which Japanese Americans used the courts to contest their eviction and confinement”); Symposium, *The Long Shadow of Korematsu*, 40 B.C. L. REV. 1 (1998) (offering a variety of perspectives on the legacy of the internment of persons of Japanese ancestry during World War II); *supra* text accompanying note 47 (referring to the national security rationale offered by the Supreme Court in the decision upholding the Chinese exclusion law).

62. See Joo, *supra* note 42, at 32–46 (drawing parallels between the Bush administration's war on terror and the internment of the Japanese during World War II).

63. See, e.g., R. Richard Banks, *Racial Profiling and Antiterrorism Efforts*, 89 CORNELL L. REV. 1201, 1201–17 (2004) (describing antiterrorism policies and methods enacted after September 11, 2001).

64. See, e.g., Bill Ong Hing, *Misusing Immigration Policies in the Name of Homeland Security*, 6 NEW CENTENNIAL REV. 195, 202–07 (2006).

65. Courts have reached conflicting decisions about the constitutionality of the blanket closure of deportation proceedings in “special interest” (i.e., terrorist) cases. Compare *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002) (holding that a policy denying press access to hearings violated the First Amendment), with *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 220–21 (3d Cir. 2002) (finding the policy constitutional). For criticism of the secret procedures, see Lauren Gilbert, *When Democracy Dies Behind Closed Doors: The First Amendment and “Special Interest” Hearings*, 55 RUT-

ter September 11, preventative detention of thousands of Arabs and Muslims remained a part of the war on terror.<sup>66</sup> Arrests, detentions, and interrogations, without access to counsel or the handing down of criminal indictments, became commonplace.<sup>67</sup>

But there is much more. In Operation Absconder, the U.S. government focused removal efforts selectively on noncitizens from nations that “harbored” terrorists, identified for the most part as nations populated predominantly by Arabs and Muslims.<sup>68</sup> Although criticized as impermissible racial profiling, the targeting of Arabs and Muslims in various immigration policies flourished for several years after September 11, 2001.<sup>69</sup>

Consider one prominent example of an extraordinary policy adopted by the Bush administration in the name of counterterrorism. As part of the National Security Entry/Exit Registration System, generally known as “special registration,” the Department of Homeland Security required male noncitizens

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GERS L. REV. 741, 743–55 (2003); Heidi Kitrosser, *Secrecy in the Immigration Courts and Beyond: Considering the Right to Know in the Administrative State*, 39 HARV. C.R.-C.L. L. REV. 95, 95–101 (2004); Gregory P. Magarian, *Substantive Due Process as a Source of Constitutional Protection for Nonpolitical Speech*, 90 MINN. L. REV. 247, 264–67 (2005).

66. See David Cole, *The Priority of Morality: The Emergency Constitution's Blind Spot*, 113 YALE L.J. 1753, 1753 (2004) (“As of January 2004, the government had detained more than 5000 foreign nationals through its antiterrorism efforts.” (citation omitted)); Jules Lobel, *The War on Terrorism and Civil Liberties*, 63 U. PITT. L. REV. 767, 778–85 (2002).

67. See Akram & Johnson, *supra* note 42, at 327–55. For criticism of the Bush administration’s violation of the law through these and other measures, see Raquel Aldana, *The September 11 Immigration Detentions and Unconstitutional Executive Legislation*, 29 S. ILL. L.J. 5, 5–11 (2004).

68. See Kevin Lapp, *Pressing Public Necessity: The Unconstitutionality of the Absconder Apprehension Initiative*, 29 N.Y.U. REV. L. & SOC. CHANGE 573, 573–76 (2005); Karen C. Tumlin, Comment, *Suspect First: How Terrorism Policy Is Reshaping Immigration Policy*, 92 CAL. L. REV. 1173, 1190–93 (2004).

69. See Banks, *supra* note 63, at 1212–15; Mariano-Florentino Cuéllar, *Choosing Anti-Terror Targets by National Origin and Race*, 6 HARV. LATINO L. REV. 9, 13–16 (2003); Sharon L. Davies, *Profiling Terror*, 1 OHIO ST. J. CRIM. L. 45, 46–53 (2003); Thomas M. McDonnell, *Targeting the Foreign Born by Race and Nationality: Counterproductive in the “War on Terrorism”?*, 16 PACE INT’L L. REV. 19, 21–23 (2004); Andrew E. Taslitz, *Racial Profiling, Terrorism, and Time*, 109 PENN. ST. L. REV. 1181, 1183–85 (2005); see also Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1413–15 (2002) (discussing controversy over racial profiling following security measures put into place by the U.S. government after September 11, 2001); Stephen H. Legomsky, *The Ethnic and Religious Profiling of Noncitizens: National Security and International Human Rights*, 25 B.C. THIRD WORLD L.J. 161, 163–72 (2005) (criticizing profiling in many of the Bush administration’s policies in the war on terror).



over age sixteen from twenty-five predominantly Muslim nations to register for fingerprinting, photographing, and interviews.<sup>70</sup> Nearly thirteen thousand registrants—upon voluntarily reporting—were placed in removal proceedings and hundreds were detained.<sup>71</sup> Angry protests followed the arrests and detentions.<sup>72</sup> As with other anti-terrorism measures adopted by the U.S. government, critics claimed that the special registration program constituted impermissible racial, national origin, and religious profiling.<sup>73</sup> However, a lawsuit challenging special registration failed, with the court relying heavily on the precedent of *Narenji v. Civiletti*.<sup>74</sup> To add insult to injury, the U.S. government never claimed that special registration uncovered any terrorists. Given that the Bush administration discontinued the program, it seems unlikely that special registration uncovered any significant leads in the war on terror.

The post-September 11 security measures were built on a foundation of previous security measures directed at suspected Arab and Muslim “terrorists.”<sup>75</sup> For example, the definition of “terrorist activity”<sup>76</sup> has long been a part of the U.S. immigra-

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70. 8 C.F.R. §§ 214.1(f), 264.1(f) (2006).

71. See Hing, *supra* note 64, at 203.

72. See Emily Bazar, *New Battle on Civil Rights Front*, SACRAMENTO BEE, Jan. 20, 2003, at A1; Wyatt Buchanan, *Hundreds Protest INS Registration*, S.F. CHRON., Jan. 11, 2003, at A13.

73. See Hiroshi Motomura, *Immigration and We the People After September 11*, 66 ALB. L. REV. 413, 420–21 (2003); Ty S. Wahab Twibell, *The Road to Internment: Special Registration and Other Human Rights Violations of Arabs and Muslims*, 29 VT. L. REV. 407, 411–19 (2005); Heidee Stoller et al., Note, *Developments in Law and Policy: The Costs of Post-9/11 National Security Strategy*, 22 YALE L. & POLY REV. 197, 220–22 (2004); see also Kathryn Lohmeyer, Comment, *The Pitfalls of Plenary Power: A Call for Meaningful Review of NSEERS “Special Registration,”* 25 WHITTIER L. REV. 139, 139–41 (2003) (advocating judicial review of a special registration program).

74. See *Roundahal v. Ridge*, 310 F. Supp. 2d 884, 892 (N.D. Ohio 2003); see also *Kandamar v. Gonzales*, 464 F.3d 65, 69–74 (1st Cir. 2006) (rejecting the argument that evidence obtained through registration should be suppressed based on Constitutional violations); *Ali v. Gonzales*, 440 F.3d 678, 681–82 (5th Cir. 2006) (finding, in a removal case, that special registration did not violate the Equal Protection guarantee); *supra* text accompanying notes 49–52 (discussing *Narenji v. Civiletti*).

75. See Akram & Johnson, *supra* note 42, at 301–26.

76. The Immigration & Nationality Act, § 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B), provides a lengthy definition of terrorist activities, which includes providing material support to a “terrorist organization” as designated by the U.S. government. 8 U.S.C. § 1182(a)(3)(B) (2000). For criticism of the material support provisions, as amended, see David Cole, *The New McCarthy-*

tion laws and has been criticized as excessively overbroad.<sup>77</sup> The USA Patriot Act further expanded the definition.<sup>78</sup> The terrorism provisions come up most frequently as the basis for denying relief from deportation to noncitizens, such as asylum for those who claim to fear persecution if returned to their native land.<sup>79</sup> In addition, the U.S. government for a number of years before 2001 conducted so-called secret evidence hearings in cases in which the government sought to deport Arabs and Muslims based on evidence never revealed to the noncitizens.<sup>80</sup> Such policies can only deepen the divide between the Muslim world and the United States and discourage much-needed cooperation with the U.S. government.

Besides immigration-related measures, the U.S. government has made some highly publicized criminal arrests in the name of fighting terrorism, almost all of which, despite the initial sensational headlines, have turned out to be of little consequence. Perhaps the most well-known example is the case of Jose Padilla, a U.S. citizen by birth who converted to Islam. The U.S. government held Padilla, originally accused by Attorney General John Ashcroft of involvement in a plot to detonate a “dirty bomb” on U.S. soil,<sup>81</sup> as an enemy combatant for more than three years, only to later charge him with relatively minor criminal offenses.

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*ism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 8–15 (2003).

77. See Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1131 (1994); Gerald L. Neuman, *Terrorism, Selective Deportation and the First Amendment After Reno v. AADC*, 14 GEO. IMMIGR. L.J. 313, 322–27 (2000); Michael J. Whidden, Note, *Unequal Justice: Arabs in America and United States Antiterrorism Legislation*, 69 FORDHAM L. REV. 2825, 2871–74 (1999).

78. See Patriot Act, Pub. L. No. 107-56, Stat. 272 (2001); Cole, *supra* note 2, at 966–70; Kevin R. Johnson, *September 11 and Mexican Immigrants: Collateral Damage Comes Home*, 52 DEPAUL L. REV. 849, 855–57 (2003).

79. See, e.g., *McAllister v. Attorney Gen.*, 444 F.3d 178, 186–87 (3d Cir.), *cert. denied*, 127 S. Ct. 667 (2006); *Kelava v. Gonzales*, 410 F.3d 625, 629–30 (9th Cir. 2005) *amended and superseded by* 434 F.3d 1120 (9th Cir. 2006); *Singh-Kaur v. Ashcroft*, 385 F.3d 293, 296–301 (3d Cir. 2004); *Cheema v. Ashcroft*, 383 F.3d 848, 854–59 (9th Cir. 2004); *Perinpanathan v. INS*, 310 F.3d 594, 598–99 (8th Cir. 2002); *In re S-K-*, 23 I. & N. Dec. 936, 946 (BIA 2006).

80. See Akram & Johnson, *supra* note 42, at 321–26.

81. See James Risen & Philip Shenon, *U.S. Says It Halted Qaeda Plot to Use Radioactive Bomb*, N.Y. TIMES, June 11, 2002, at A1 (reporting Padilla's arrest).

Put simply, the U.S. government initially targeted Arabs and Muslims in the war on terror. However, it did not end there.

## 2. Stage 2: All Other Immigrants

The impacts of the U.S. government's September 11 security measures spread well beyond Arab and Muslim noncitizens. Instead, the new measures had a general impact on immigrant communities across the United States. Record numbers of deportations, aggressive enforcement of the immigration laws, citizenship requirements for certain jobs, and a general immigration crackdown affected immigrants, with the largest cohort of immigrants being from Mexico.<sup>82</sup> Immigration raids, citizenship requirements, and removal campaigns affected many more ordinary Mexican immigrants than suspected terrorists.

This is part of a more general problem. Today, unlike the days of old, the U.S. immigration laws for the most part are facially neutral and do not expressly discriminate on the basis of race. However, the enforcement of immigration law often has disparate impacts.<sup>83</sup> For example, annual ceilings on immigrant admissions from a single country in any year apply to all nations but have a disproportionate impact on prospective immigrants from Mexico and other developing nations such as China, India, and the Philippines, because demand for immigration from there for reasons of, among others, proximity, jobs, and family ties, greatly exceeds the annual ceiling of 25,600.<sup>84</sup>

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82. See Johnson, *supra* note 78, at 858–63 (discussing the disproportionate impacts of new immigration laws on Mexican immigrants); see also Steven W. Bender, *Sight, Sound, and Stereotype: The War on Terrorism and Its Consequences for Latinas/os*, 81 OR. L. REV. 1153, 1161–65 (2002) (documenting how war on terror measures have adversely affected Latinas/os in the United States).

83. See Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111, 1131–36 (1998).

84. See Bernard Trujillo, *Immigrant Visa Distribution: The Case of Mexico*, 2000 WIS. L. REV. 713, 715 (2000); see also Stephen H. Legomsky, *Immigration, Equality and Diversity*, 31 COLUM. J. TRANSNAT'L L. 319, 326–30 (1993) (commenting on the racial impacts of per-country ceilings); Jan C. Ting, *"Other Than a Chinaman": How U.S. Immigration Law Resulted from and Still Reflects a Policy of Excluding and Restricting Asian Immigration*, 4 TEMP. POL. & CIV. RTS. L. REV. 301, 308 (1995) (same).

Similarly, increased border enforcement on the southern border with Mexico obviously has had, and will continue to have, a disproportionate impact on Mexican citizens. Among other effects, enhanced border enforcement tends to exacerbate the problem of human trafficking of migrants—an industry that has grown substantially over the last decade—from Mexico.<sup>85</sup>

Most of the immigration reform proposals that Congress considered in 2005–06 would have disproportionately affected certain groups of immigrants. A majority of undocumented immigrants living in the United States are from Mexico.<sup>86</sup> Mexican immigrants—as well as many citizen family members—thus have a vital interest at stake in the enactment of proposals, for example, to regularize their immigration status. Increased border enforcement also would disparately impact undocumented Mexican migrants, especially because most of the proposals for heightened enforcement focus almost exclusively on the U.S./Mexico border.

#### B. NORTH AMERICA'S RESPONSE TO SEPTEMBER 11

The national security responses to September 11 were not limited to those of the U.S. government. That fateful day prodded the governments of many nations to take counter-terrorism measures.<sup>87</sup> Specifically, the governments of all the nations of North America individually responded to the terrorist acts of September 11. Canada, Mexico, and the United States also worked together in small ways to improve regional security. Much more, however, remains to be done.

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85. See generally Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 *FORDHAM L. REV.* 2977 (2006) (analyzing the modern problem of trafficking in human beings). Human trafficking is a problem for citizens of other nations as well. See Conference Report, *Transatlantic Workshop on Human Smuggling*, 15 *GEO. IMMIGR. L.J.* 167 (2001) (outlining instances of human trafficking in various countries).

86. See PASSEL, *supra* note 9, at i (estimating that about fifty-six percent of undocumented immigrants are Mexican nationals).

87. See Kim Lane Scheppelle, *Other People's PATRIOT Acts: Europe's Response to September 11*, 50 *LOY. L. REV.* 89 (2004) (providing an overview of post-September 11 legislation in some European countries and pan-European organizations); see also Kent Roach, *Must We Trade Rights for Security? The Choice Between Smart, Harsh, or Proportionate Security Strategies in Canada and Britain*, 27 *CARDOZO L. REV.* 2151 (2006) (analyzing the trade-off between national security and civil rights in security measures taken by Canada and Britain).

## 1. National Responses

Not long after September 11, Canada passed its own immigration legislation designed to improve national security.<sup>88</sup> In December 2001, Canada enacted the Anti-Terrorism Act, which expanded the government's surveillance and other powers in fighting terrorism.<sup>89</sup> Although less extreme than the USA Patriot Act, Canada evidently felt—with the encouragement, no doubt, of the U.S. government—that it must do something to protect itself from terrorist acts as well as to aid America's war on terror.<sup>90</sup>

Mexico also agreed to take steps consistent with the U.S. government's counter-terrorism measures.<sup>91</sup> Mexico, at the behest of the U.S. government, has continued to restrict immigration through its territory so that fewer migrants from Central America will attempt to make the journey to the United States.<sup>92</sup> In addition, the leaders of the United States and Mexico frequently discuss cooperation on immigration and security issues.<sup>93</sup>

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88. See ABA Immigration and Nationality Comm., *The Canada-U.S. Border: Balancing Trade, Security and Migrant Rights in the Post 9/11 Era*, 19 GEO. IMMIGR. L.J. 199, 218–24 (2004) (describing legislation passed in Canada in response to September 11); Kent Roach, *Did September 11 Change Everything? Struggling to Preserve Canadian Values in the Face of Terrorism*, 47 MCGILL L.J. 893, 895 (2002) (discussing the Canadian response to September 11); Reg Whitaker, *Keeping Up with the Neighbours? Canadian Responses to 9/11 in Historical and Comparative Context*, 41 OSGOODE HALL L.J. 241, 259–60 (2003) (highlighting the historical foundations and uniquely Canadian nature of Canada's Anti-Terrorism Act).

89. Anti-Terrorism Act, 2001 S.C., ch. 41 (Can.); see David Jenkins, *In Support of Canada's Anti-Terrorism Act: A Comparison of Canadian, British, and American Anti-Terrorism Law*, 66 SASK. L. REV. 419, 422 (2003).

90. See Michel Coutu & Marie-Helene Giroux, *The Aftermath of 11 September 2001: Liberty vs. Security Before the Supreme Court of Canada*, 18 INT'L J. REFUGEE L. 313, 314 (2006).

91. See *infra* text accompanying notes 92–93.

92. See Joseph Contreras, *Stepping over the Line: Don't Try Sneaking North Across Mexico's Other Border*, NEWSWEEK, June 5, 2006, at 38 (calling attention to Mexico's treatment of undocumented workers); Ginger Thompson, *Mexico Worries About Its Own Southern Border*, N.Y. TIMES, June 18, 2006, at A1 (describing ways in which the Mexican government deals with illegal immigration into Mexico).

93. See, e.g., Hale E. Sheppard, *Salvaging Trade, Economic and Political Relations with Mexico in the Aftermath of the Terrorist Attacks: A Call for a Reevaluation of U.S. Law and Policy*, 20 B.U. INT'L L.J. 33, 63–64 (2002); Ginger Thompson & David E. Sanger, *Bush and Fox Repeat Vows on Immigration*, N.Y. TIMES, Apr. 1, 2006, at A7.

All told, the nations of North America adopted incremental internal immigration and related reforms ostensibly directed at terrorism. They also cooperated in adopting limited regional measures.

## 2. Multilateral Responses

Security is not just an issue for the United States but one facing all of North America. It also is a global issue. As the process of globalization continues, the world slowly integrates economically and politically. Domestic reform of the U.S. immigration laws unquestionably is necessary. Moreover, international cooperation on the related issues of migration and national security needs is essential. Multilateralism is necessary to help the North American nations to improve national and regional security.

A model for regional cooperation is readily available. With the emergence of a common market with a unitary currency, Europe through the emergence of the European Union (EU) is far ahead of North America in terms of the integration of the political and economic institutions of the various nations. International integration through the EU has dramatically changed immigration law and policy in Europe, with labor mobility generally permitted between most of the member nations.<sup>94</sup> Such mobility has grown as the EU has expanded to include more member nations.

In sharp contrast, the United States, Canada, and Mexico have accomplished only a partial integration of their economies through the North American Free Trade Agreement (NAFTA).<sup>95</sup> The trade pact provided for the expanded free trade of goods and services in North America. However, the NAFTA parties failed to address immigration, labor mobility, and related regional security issues. In the long run, the nations comprising North America must work together to address security concerns.<sup>96</sup>

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94. See Kevin R. Johnson, *Free Trade and Closed Borders: NAFTA and Mexican Immigration to the United States*, 27 U.C. DAVIS L. REV. 937, 971–73 (1994); John A. Scanlan, *A View from the United States—Social, Economic, and Legal Change, the Persistence of the State, and Immigration Policy in the Coming Century*, 2 IND. J. GLOBAL LEGAL STUD. 79, 125–32 (1994) (summarizing the theoretical justifications and goals of the European Union's labor migration policies).

95. U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

96. See *infra* text accompanying notes 97–124.

In formulating the North American trade pact, the United States steadfastly refused to discuss, much less address, labor migration in any meaningful way.<sup>97</sup> Consequently, NAFTA left a critical economic issue off the bargaining table and, in the end, failed to provide a comprehensive, integrated regional approach to immigration. For the time being, the United States could improve security by working more closely with Canada and Mexico on common immigration and security concerns.<sup>98</sup> At this point, however, Canada, Mexico, and the United States have only cooperated to a limited extent.<sup>99</sup> However, more will be necessary in the future to ensure regional security.

Importantly, the U.S./Canada border implicates the safety and security of the United States. While the U.S. border with Mexico has received the bulk of attention of U.S. policy-makers, the northern border of the United States indeed requires consideration.<sup>100</sup> As Doris Meissner, former Commissioner of the Immigration and Naturalization Service and influential student of immigration policy, observed,

I can predict there will be far more focus on Canada. Canada as a gateway for terrorists is very much on the agenda. I hope that we can be reasonable and recognize the folly of attempting to fortify our land border with Canada. More resources directed at the northern border are needed. But ultimately the security issue with Canada must be handled through international cooperation by joining forces to share intelligence, cross designate personnel, treat Canadian airport operations as equivalent to entering the U.S., and comparable measures. . . . It is a direction that envisions North American perimeter security through bilateral and international cooperation and integra-

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97. See Johnson, *supra* note 94, at 956–64 (describing the drafters’ reasons for excluding labor migration considerations from NAFTA); Scanlan, *supra* note 94, at 86–87 (highlighting the purposeful exclusion of integrated labor market provisions from NAFTA); M. Jeanette Yakamavich, Comment, *NAFTA on the Move: The United States and Mexico on a Journey Toward the Free Movement of Workers—A NAFTA Progress Report and EU Comparison*, 8 LAW & BUS. REV. AM. 463, 472–73 (2002) (hypothesizing reasons for excluding labor migration from NAFTA).

98. See John Noble, *Fortress America or Fortress North America?*, 11 LAW & BUS. REV. AM. 461, 475–76 (2005) (discussing the possibility of forming a North American Community with integrated security measures).

99. See, e.g., *id.* at 472–74.

100. See Russell C. Gray, Note, *Run from the Border: The United States Re-Evaluation of Its Northern Boundary*, 27 SUFFOLK TRANSNAT’L L. REV. 77, 89–90 (2003); see also Daniel Schwanen, *Deeper, Broader: A Roadmap for a Treaty with North America*, 10 LAW & BUS. REV. AM. 345, 355–56 (2004) (envisioning a “community of North Americans” in which security is one of the goals of increased integration).

tion as the only sound platform upon which to build public safety and security for us and for our neighbors.<sup>101</sup>

However, precious little effort has been devoted to the security of the Canadian border, with almost all security measures myopically directed to the U.S. border with Mexico.<sup>102</sup> This is true despite the fact that, just a few years ago, at least one terrorist sought to enter the United States from the North.<sup>103</sup>

To this point in time, there has been a limited amount of regional cooperation on migration and security issues in North America. But increased interest in binational border control programs between the United States and Canada and law enforcement initiatives since September 11 are evident.<sup>104</sup> In December 2001, the United States and Canada entered into a “smart border” agreement designed to increase security while facilitating lawful cross-border movement of persons and goods between the two nations.<sup>105</sup> Consistent with the NAFTA mission, this agreement included a number of security measures while also facilitating the mobility of goods, services, and people. Canada and the United States also agreed to require migrants to seek asylum in the first of the two countries that they enter.<sup>106</sup> In August 2006, no doubt in response to pressure from the United States, Canada promised to take further steps to tighten border security.<sup>107</sup>

The NAFTA nations today should recognize that North American integration is directly related to regional security.<sup>108</sup>

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101. Doris Meissner, *Immigration in the Post 9-11 Era*, 40 BRANDEIS L.J. 851, 858 (2002).

102. See *infra* Part II (analyzing the current debate over immigration reform).

103. See *infra* text accompanying note 170 (mentioning the case of the Millennium Bomber, who attempted to enter the United States from Canada).

104. See ABA Immigration and Nationality Comm., *supra* note 88, at 232–33.

105. See *id.* at 224–33 (describing some facets of the agreement’s thirty-point action plan); Joseph L. Parks, Comment, *The United States-Canada Smart Border Action Plan: Life in the FAST Lane*, 10 LAW & BUS. REV. AM. 395 (2004).

106. See Audrey Macklin, *Disappearing Refugees: Reflections on the Canada-U.S. Safe Third Country Agreement*, 36 COLUM. HUM. RTS. L. REV. 365, 371–72 (2005).

107. See Christopher Mason, *Canada to Arm Its Border Guards*, N.Y. TIMES, Sept. 1, 2006, at A8. U.S. lawmakers previously had complained of lax Canadian border security. See Stephen Handleman, *Think Outside the Border*, N.Y. TIMES, June 12, 2006, at A17.

108. See Jason Ackleson, *Achieving “Security and Prosperity”: Migration and North American Economic Integration*, IMMIGR. POL’Y IN FOCUS, Feb.



In March 2005, the United States, Canada, and Mexico announced the establishment of a Security and Prosperity Partnership.<sup>109</sup> Through multilateral cooperation the partnership seeks to improve the security of North America, strengthen internal security within each nation, and promote regional economic growth.<sup>110</sup> According to a recent report on its progress, discussions between the three partners have continued on a variety of initiatives, with some incremental measures actually being implemented.<sup>111</sup> Only time will tell whether the Security and Prosperity Partnership will lead to greater cooperation among the nations on matters of national security.

Future multilateral cooperation in North America will need to focus on immigration and security issues.<sup>112</sup> One important move would be to allow greater internal migration within the United States, Mexico, and Canada akin to that which currently exists in the European Union.<sup>113</sup> Freer labor migration would fit comfortably into the trade relationship that currently exists between the NAFTA member nations. One could envision a Fortress North America like the Fortress Europe that has emerged in the EU,<sup>114</sup> with a concentrated focus on securing the perimeter of the member nations. Although that development in the EU has been criticized in some quarters,<sup>115</sup> freer

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2006, at 2; see also Rafael Fernández de Castro & Rossana Fuentes Berain, *Hands Across North America*, N.Y. TIMES, Mar. 28, 2005, at A17 (suggesting that a partnership might move the United States, Canada, and Mexico toward greater regional integration akin to that existing in the European Union).

109. See Ackleson, *supra* note 108, at 5.

110. See *id.*

111. See *Industry Canada: Ministers Report to Leaders on Security and Prosperity Partnership Initiatives*, CCNMATTHEWS, Sept. 7, 2006, <http://www.cdn-news.com/news/releases/show.jsp?action=showRelease&searchText=false&showText=all&actionFor=611059>.

112. See generally Daniel C. Stiles, *Border Crisis: Time for a New Collective Review of Tri-Nation Border Security*, 29 TRANSP. L.J. 299 (2002) (calling for the United States to cooperate with Canada and Mexico in order to balance the need for border security with the need to efficiently transport goods across our borders). For a study of the possibilities for multilateral cooperation in this area, see Symposium, *North American Migration, Trade and Security*, 11 LAW & BUS. REV. AM. 321 (2005).

113. See T. Alexander Aleinikoff, *Legal Immigration Reform: Toward Rationality and Equity*, in *Blueprints for an Ideal Legal Immigration Policy* 5–6 (Richard D. Lamm & Alan Simpson eds., Ctr. for Immigr. Stud., Working Paper No. 17, 2001).

114. See Noble, *supra* note 98, at 475–76.

115. See, e.g., Lydia Esteve González & Richard Mac Bride, *Fortress Europe: Fear of Immigration? Present and Future of Immigration Law and Policy in Spain*, 6 U.C. DAVIS J. INT'L L. & POL'Y 153, 191–92 (2000); Bob Hep-

migration within North America, with heightened border controls at the perimeter of the continent, might be more politically acceptable than entirely open borders.

### 3. U.S. Immigration Law and Policy Since September 11 Has Hindered Multilateral Cooperation on National Security Matters.

Rather than facilitating multilateral cooperation to improve global and regional security, U.S. immigration law and policy in the post-September 11 period has had detrimental impacts on such cooperation. The harsh treatment of noncitizens has alienated Arab, Muslim, and other communities in the United States and has also estranged their home governments.<sup>116</sup> Similarly, the harsh impacts of tighter immigration laws, as well as the terms of the immigration debate, have hindered relations with other nations, especially Mexico.<sup>117</sup>

Indeed, U.S immigration law and policy has caused serious rifts between Mexico and the United States.<sup>118</sup> In 2005 and 2006, the Mexican government reacted negatively to the harsh border enforcement bills pending in the U.S. Congress. Eleven Latin American countries, including Mexico, lobbied against the Sensenbrenner bill,<sup>119</sup> a strict border enforcement measure the U.S. House of Representatives passed at the end of 2005 that provoked mass marches throughout the United States.<sup>120</sup> The extension of the fence along the U.S./Mexico border authorized by Congress in 2006 drew loud protests from Mexican political leaders as well.<sup>121</sup>

International tensions over migration are not limited to the United States and Mexico, however. Tighter border controls on the northern U.S. border after September 11 elicited protests from the Canadian government over the treatment of its citi-

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ple, *Race and Law in Fortress Europe*, 67 MOD. L. REV. 1 *passim* (2004).

116. See *supra* Part I.A.

117. See *supra* Part I.B.1–2.

118. See *The Border: A Festering Issue*, MEXICO & NAFTA REP., Jan. 17, 2006.

119. See H.R. 4437, 109th Cong. (2005).

120. See Jerry Seper, *Pro-Immigration Forces to March on Washington*, WASH. TIMES, Feb. 20, 2006, at A3.

121. See Héctor Tobar, *Mexicans See Good and Bad Side to Wall*, L.A. TIMES, Oct. 1, 2006, at A27 (“[Mexican] President Vicente Fox and President-elect Felipe Calderon have denounced the new [border] fence, as have a host of Mexican political leaders.”).

zens.<sup>122</sup> More generally, the proposed elimination of a visa waiver program for citizens of certain nations, designed to improve U.S. security, may have more general adverse foreign relations repercussions. According to the U.S. General Accounting Office, “[t]he decision to eliminate the program could negatively affect U.S. relations with participating countries, could discourage some business and tourism in the United States, and would increase the need for State Department resources.”<sup>123</sup>

Multilateralism will be essential to fighting terrorism in the future,<sup>124</sup> as well as ensuring peace in the twenty-first century. Harsh treatment of immigrants since September 11, 2001, has caused international tensions and has hindered multilateral efforts to improve national security. Consequently, improving foreign relations through immigration reform is a benefit well worth considering.

### C. THE END RESULT

What is the end result of the security measures implemented in North America after September 11? Noncitizens in the United States experienced removals and increased immigration enforcement—and selective enforcement of the immigration laws.<sup>125</sup> There is no evidence that any actual terrorists have been deported, and few terrorists have been convicted. Zacarias Moussaoui, the best-known terrorist arrested in connection with the acts of September 11, 2001, was in custody on September 11. He pled guilty to charges for his involvement for his role in the terrorist plot and was given a life sentence.<sup>126</sup> Even if terrorists have been removed from the United States, it is not intuitively obvious that the removals improved public

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122. See Glenn Kessler, *Powell Aims to Reassure Canadians*, WASH. POST, Nov. 15, 2002, at A30; Tonda MacCharles, *We're Both at Risk, Powell Tells Canada*, TORONTO STAR, Nov. 15, 2002, at A7; see also Jim Rankin, *Canadian in Passport Fiasco*, TORONTO STAR, Feb. 14, 2003, at A1 (reporting that the Immigration and Naturalization Service accused a Canadian citizen of using a forged Canadian passport and subjected her to expedited removal to India).

123. U.S. GEN. ACCOUNTING OFFICE, BORDER SECURITY: IMPLICATIONS OF ELIMINATING THE VISA WAIVER PROGRAM 3–4 (2002).

124. See John W. Head, *What Has Not Changed Since September 11—The Benefits of Multilateralism*, 12 KAN. J.L. & PUB. POL'Y 1, 3–5 (2002) (discussing the dangers of unilateralism today).

125. See *infra* Part I.A.

126. Neil A. Lewis, *Moussaoui Given Life Term by Jury over Link to 9/11*, N.Y. TIMES, May 4, 2006, at A1.

safety. Rather, removal of true terrorists would allow them to operate freely outside the country.

Of course, some increased security measures are necessary to protect the United States. Immigration law and enforcement that considers security in addition to other goals is consistent with the recommendations of the 9/11 Commission Report.<sup>127</sup> The report suggests the need for a better system of tracking noncitizens within the United States and cooperation with other nations in exchanging information about terrorist activity. It specifically recommends an entry/exit system recording who is present in the United States at any given point in time. A complete database remains in the works to track lawful immigrants and temporary visitors to the United States.<sup>128</sup> Even when such a system is created, it would not account for the millions of undocumented immigrants living in the country. A tracking system cannot be effective if thousands, if not millions, of people—undocumented immigrants—are entering the country outside authorized channels and thus are not part of any record-keeping system.<sup>129</sup>

Today, undocumented immigrants live and work under the government's radar. They are effectively invisible, unidentified, and unknown. Keeping better track of the millions of undocumented immigrants living in this country is essential if we are serious about protecting the nation from terrorist acts. The United States has no record of perhaps as many as twelve million undocumented immigrants in the country.<sup>130</sup> If one is interested in better tracking of people in the United States, some effort must be made to maintain a record of this population. However, current law and policy ensures that undocumented immigrants remain invisible. Many states, for example, deny

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127. See 9/11 COMMISSION REPORT, *supra* note 43, at 390.

128. See *Visa Overstays: Can We Bar the Terrorist Door?: Hearing Before the H. Subcomm. on Oversight and Investigations of the H. Comm. on International Relations*, 109th Cong. 20 (2006) (statement of Margaret D. Stock, Professor, U.S. Military Academy at West Point) (listing U.S. General Accountability Office studies noting various deficiencies in computerized immigrant tracking systems used by the Department of Homeland Security); Editorial, *Think All Illegal Immigrants Are Sneaking in? Think Again*, USA TODAY, May 2, 2006, at 12A (discussing flaws in the current tracking system); Nicole Gaouette, *U.S. Installs Visitor Tracking Stations*, L.A. TIMES, Dec. 31, 2005, at A17 (mentioning the same effect); Spencer S. Hsu, *Immigrant Processors Fall Behind*, WASH. POST, Jan. 4, 2007, at A3 (same).

129. See *supra* notes 9–10 and accompanying text (offering an estimate of 11.5–12 million undocumented immigrants living in the United States).

130. See *supra* text accompanying notes 10–11.

undocumented immigrants driver's licenses,<sup>131</sup> thereby denying them a basic identification document relied upon heavily by law enforcement authorities.

To this end, the United States must work with other nations to secure accurate intelligence about persons who seek entry into the United States. Better coordination between law enforcement agencies of the three North American governments would do much to improve the national security of the United States. Some steps have been taken but much more work remains to be done.

## II. THE DELETERIOUS EFFECTS OF TERRORISM CONCERNS ON IMMIGRATION LAW AND ENFORCEMENT AND IMMIGRATION REFORM

September 11, 2001, represented a turning point in the debate over immigration reform in the United States. The horrible human losses of that day halted in its tracks the discussion of any easing of immigration restrictions.<sup>132</sup> Moreover, the fear of terrorism, feeding off of a general tendency among many U.S. citizens to blame immigrants for the problems of the day, helped to create a general "close the border" mentality that commanded substantial support among the general public.<sup>133</sup> As a result, politicians from a wide variety of political persuasions endorsed some sort of border enforcement strategy.<sup>134</sup>

### A. A SHIFT IN THE TERMS OF THE IMMIGRATION REFORM DEBATE

Before September 11, 2001, the U.S. and Mexican governments were seriously discussing entering into a migration accord that would have regularized labor migration between the two nations.<sup>135</sup> Similarly, immigrant rights advocates appeared

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131. See Kevin R. Johnson, *Driver's Licenses and Undocumented Immigrants: The Future of Civil Rights Law?*, 5 NEV. L.J. 213, 216–17 (2004); Maria Pabón López, *More Than A License to Drive: State Restrictions on the Use of Driver's Licenses by Noncitizens*, 29 S. ILL. U. L.J. 91, 95 (2004); see also Sylvia R. Lazos Vargas, *Missouri, the "War on Terrorism," and Immigrants: Legal Challenges Post 9/11*, 67 MO. L. REV. 775, 798–807 (2002) (analyzing the controversy in Missouri over driver's license eligibility for undocumented immigrants).

132. See *infra* Part II.A.

133. See *infra* Part II.A–B.

134. See *id.*

135. See Johnson, *supra* note 78, at 866–67.

to be close to convincing Congress to ameliorate some of the harshest provisions of the 1996 immigration reforms.<sup>136</sup> Both reform efforts stopped in their tracks on September 11, as the United States immediately became preoccupied with public safety and national security. Since then, the focus in reforming U.S. immigration law and policy has been on fortifying the borders with border fences, providing additional officers and resources to the Border Patrol, and related measures; regularizing the flow of migrants from Mexico to the United States, humane treatment of immigrants, and equitable enforcement of the immigration laws took a back seat.<sup>137</sup>

September 11 thus had serious and detrimental long term consequences on positive immigration reform. It completely reversed the momentum of the debate, shifting it from possible liberalization of admissions and easing of removal and detention to stricter border controls, narrower admissions criteria, and harsher detention and removal proposals. Many of the most popular proposals would have restricted migration from many different countries, and were in no way limited to excluding Arab and Muslim noncitizens.<sup>138</sup> Immigrant advocates moved from making a concerted effort at advocating for positive immigration reform to devoting energies and resources toward defending against the passage of punitive immigration laws.<sup>139</sup>

As Professor Enid Trucios-Haynes correctly observed,

*Immigration dominates policy discussions in the post-September 11, 2001 world in a manner that has distorted traditional issues and concerns relating to noncitizens. To some, the perception or reality of porous U.S. borders requires the most strenuous methods of border enforcement. In the eyes of many, immigration reform proposals since 2001 have focused exclusively on enforcement without sufficient acknowledgment of the human consequences on the noncitizens, both authorized and unauthorized, throughout our community.*<sup>140</sup>

In a comment consistent with the tenor of the current immigration debate, Senator John Cornyn emphasized that the debate over immigration reform “is . . . first and foremost about

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136. See Hines, *supra* note 7, at 21; see also *supra* text accompanying notes 29–31 (discussing the harsh effects of the 1996 immigration reform laws).

137. See *infra* Part II.A–B.

138. See *supra* Part I.A.2.

139. See *supra* text accompanying notes 135–37.

140. Enid Trucios-Haynes, *Civil Rights, Latinos, and Immigration: Cybercascades and Other Distortions in the Immigration Reform Debate*, 44 BRANDEIS L.J. 637, 638 (2006) (emphasis added).

our Nation's security. *In a post-9/11 world, border security is national security.*"<sup>141</sup>

Similarly, conservative pundits Patrick Buchanan and Michelle Malkin have made incendiary arguments on the need to close the borders in the war on terror.<sup>142</sup> Such fears unfortunately have generated some of the push for immigration reform. Although the threat of terrorism stemming from ordinary immigration into the United States has been exaggerated, the security arguments provide insights into the kinds of concerns held by many U.S. citizens. It goes without saying that, in 2005–06, national security concerns greatly influenced the discussion of immigration reform.<sup>143</sup>

The Sensenbrenner bill, passed by the U.S. House of Representatives in December 2005, perhaps was the most extreme enforcement-only immigration reform proposal.<sup>144</sup> Among other things, the bill would have made the mere status of being an undocumented immigrant a felony subject to imprisonment as well as deportation from the United States, and apparently would have allowed for the imposition of criminal sanctions on persons who provided humanitarian assistance to undocumented immigrants. The Sensenbrenner bill's "close the border" approach is consistent with the national security emphasis prevailing in the debate over immigration in recent years.

#### B. THE FIXATION ON NATIONAL SECURITY HAS SKEWED THE DEBATE OVER IMMIGRATION REFORM.

We offer two competing models of immigration law and policy, which we call "immigration monism" and "immigration pluralism." Both models persist throughout the history and development of U.S. immigration law, with each model at times dominant, while at other times, subservient.

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141. 152 CONG. REC. S2551 (daily ed. Mar. 30, 2006) (statement of Sen. Cornyn) (emphasis added).

142. See PATRICK J. BUCHANAN, STATE OF EMERGENCY: THE THIRD WORLD INVASION AND CONQUEST OF AMERICA 245–70 (2006); MICHELLE MALKIN, INVASION: HOW AMERICA STILL WELCOMES TERRORISTS, CRIMINALS, AND OTHER FOREIGN MENACES TO OUR SHORES 3–28 (2002); see also Jan C. Ting, *Unobjectionable but Insufficient—Federal Initiatives in Response to the September 11 Terrorist Attacks*, 34 CONN. L. REV. 1145, 1157–62 (2002) (questioning whether the United States had done enough in the war on terror).

143. See *supra* Part II.A.

144. See Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005).

### 1. Immigration Monism

Immigration monism postulates that all possible objectives of immigration law ultimately collapse into the sole goal of national security, broadly defined. Immigration monism has a long, if inglorious, history. It marred the birth of federal immigration law: Congress's regulation of Chinese migration in the 1880's and the U.S. Supreme Court's subsequent announcement of the "plenary power doctrine" as necessary to protect the United States from "foreign aggression" and corruption of the national identity, which the Court characterized as a national security concern.<sup>145</sup> In that foundational instance, the United States deployed immigration law as a weapon of national self-definition and self-defense.

The monistic view considers the protection of national sovereignty to be the primary goal of immigration law. All other goals, whether economic, social, or political, are secondary to the defense of the nation-state. The monistic project involves defining and enforcing strong borders, creating categories of "insider" and "other," subsidizing the insider by penalizing the other, and creating mechanisms strictly limiting the ability of others to become insiders. Immigration monism is entirely consistent with what has been termed "classical immigration law," in which the power of the executive and legislative branches reigns supreme, with the judiciary possessing a limited role in reviewing the immigration laws; although incursions have been made, classical immigration law has resisted the revolution in constitutional rights over the twentieth century.<sup>146</sup>

Since September 11, 2001, immigration monism has predominated in U.S. immigration law and policy. Recent immigration legislation, including the USA Patriot Act,<sup>147</sup> the Home-

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145. See *supra* Part I.A. Similar arguments have been made in modern times, with Samuel Huntington being the most prominent academic arguing for restricting immigration from Mexico to preserve the national identity. See SAMUEL P. HUNTINGTON, *WHO ARE WE? THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY* (2004). For criticism of Huntington's arguments, see Kevin R. Johnson & Bill Ong Hing, *National Identity in a Multicultural Nation: The Challenge of Immigration Law and Immigrants*, 103 MICH. L. REV. 1347 (2005).

146. See Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 3 (1984) (analyzing the apparent shift in "classical immigration law" focusing on sovereignty to one more consistent with a liberal conception of individual rights).

147. See Patriot Act), Pub. L. No. 107-56, 115 Stat. 272 (2001); Johnson, *supra* note 78, at 855-57 (discussing certain immigration provisions of the



land Security Act creating the Department of Homeland Security,<sup>148</sup> the REAL ID Act,<sup>149</sup> and the Secure Fence Act of 2006,<sup>150</sup> focus almost exclusively on border enforcement, with little attention paid to the economic, political, and social goals of immigration law and policy. We hear the echoes of immigration monism in the remarkable consensus, both in Congress and on Main Street, in favor of a “close the border” approach to immigration reform, including more Border Patrol officers and the allocation of ever-increasing resources to border enforcement.<sup>151</sup> The plenary power doctrine, which some commentators not long before September 11 claimed to be in its death throes,<sup>152</sup> was a central tool of the Bush administration in seeking to justify various border enforcement and national security measures.<sup>153</sup>

## 2. Immigration Pluralism

On the other hand, immigration pluralism appreciates that immigration law and policy serves many goals, none of which have a structural claim to superiority. Along with the important goal of national security, immigration law also must serve the legitimate economic, political, and social needs of the United States. For example, universities and research institutions benefit, along with the entire U.S. economy (through technological innovation), from the admission of foreign national students and scholars. For that reason, educational institutions have vocally criticized the tightening of visa require-

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Patriot Act).

148. See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified in scattered sections of 5, 6, 18, 44, and 49 U.S.C.).

149. REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (codified in scattered sections of 8 U.S.C.).

150. Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638 (to be codified in scattered sections of 8 U.S.C.).

151. See *supra* Part I.

152. See, e.g., Cornelia T.L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in Miller v. Albright*, 1998 SUP. CT. REV. 1, 32–40 (1998); Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339, 339–42 (2002).

153. See *supra* text accompanying notes 57–59; see also Johnson, *supra* note 28, at 870 (“To paraphrase Mark Twain, any claims of the [plenary power] doctrine’s death have been greatly exaggerated. Though perhaps not as potent as in days past, the plenary power doctrine survives to this day and resurfaces frequently in Supreme Court and lower court decisions.” (footnotes omitted)).

ments by the U.S. government as part of the war on terror.<sup>154</sup> Sectors of the U.S. economy dependent on highly-skilled labor demand concessions from U.S. immigration law in securing workers.<sup>155</sup>

While the monist sees the nation as a sovereign to be defined and defended, the immigration pluralist sees the nation as a composite of overlapping societies. The role of the nation-state, according to the pluralist view, is to balance the competing claims of these various societies. The task is not always easy, but it is essential to the formation of sound public policy, including sound immigration policy.

Immigration pluralism can be seen in some of the more constructive immigration reforms of the last few decades. The Immigration Reform & Control Act of 1986 (IRCA),<sup>156</sup> the Immigration Act of 1990,<sup>157</sup> and the Legal Immigration Family Equity Act of 2000 (LIFE),<sup>158</sup> for example, offered multi-faceted, multipurpose reforms to the U.S. immigration laws. IRCA both granted an amnesty (to normalize the status of long-time undocumented residents), and created a regime of employer sanctions (to limit the attraction of jobs that draw the undocumented workers to the United States).<sup>159</sup> The Immigration Act of 1990 eliminated outdated exclusions regulating political ide-

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154. See, e.g., Sylvia H. Kless, *We Threaten National Security by Discouraging the Best and Brightest Students from Abroad*, CHRON. HIGHER EDUC., Oct. 8, 2004, at B9; see also Michael A. Olivas, *The War on Terrorism Touches the Ivory Tower—Colleges and Universities After September 11: An Introduction*, 30 J.C. & U.L. 233, 236 (2004).

155. See S. Mitra Kalita, *For Green Card Applicants, Waiting is the Hardest Part*, WASH. POST, July 23, 2005, at D1; Chris Nuttall, *Intel Chief Calls for Easing of Visa Curbs*, FIN. TIMES, Feb. 8, 2006, at 6.

156. Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.); see LEGOMSKY, *supra* note 16, at 1209 (noting that the law included both legalization programs and employer sanctions).

157. Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended at 29 U.S.C. § 2920 and in scattered sections of 8 U.S.C.).

158. Pub. L. No. 106-553, 114 Stat. 2762. In 2000, Congress also passed the American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251, which eased restrictions on various types of employment visas. See Susan Martin et al., *U.S. Immigration Policy: Admission of High Skilled Workers*, 16 GEO. IMMIGR. L.J. 619, 628–34 (2002); Enid Trucios-Haynes, *Temporary Workers and Future Immigration Policy Conflicts: Protecting U.S. Workers and Satisfying the Demand for Global Human Capital*, 40 BRANDEIS L.J. 967, 1008–13 (2002).

159. However, employer sanctions, as implemented, failed to successfully deter employers from employing undocumented workers. See Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. (forthcoming 2007).

ology and sexual preference while also creating new employment and diversity visa programs. The LIFE Act, among other things, eased the restrictions on noncitizens seeking to regularize their immigration status.

Immigration pluralism, which recognizes the many goals of immigration law and policy, strives to balance many competing goals and objectives rather than to focus myopically on national security. In an era of much-heralded globalization and the increasing integration of the world economy, pluralistic approaches to immigration regulation are especially important. To this end, in the pursuit of economic development in the United States and Mexico, the movement of labor between the United States and Mexico should be normalized, not militarized.<sup>160</sup> Put differently, we should have Greyhound buses bringing workers from Mexican towns to the United States, not bloodhounds hunting down migrants along the U.S./Mexico border.<sup>161</sup>

### 3. The Current Immigration Reform Debate

Some activists and policy-makers seize on fears over terrorism to advocate restrictionist reforms, including those directed at undocumented immigration from Mexico.<sup>162</sup> The U.S. government appears ready to commit tremendous resources to the construction of a wall along the U.S. border with Mexico, and other border enforcement measures have gained great popularity.<sup>163</sup> As one commentator observed, “enhanced border enforcement is a *certain* component for any [immigration reform]

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160. See *supra* text accompanying notes 94–115.

161. See Bernard Trujillo, *Bloodhounds or Greyhounds: Reconsidering Optimal Border Policy for Regulating Mexican Migration to the United States* (working paper, 2007).

162. See, e.g., Michael M. Hethmon, *Diversity, Mass Immigration, and National Security After 9/11—An Immigration Reform Movement Perspective*, 66 ALB. L. REV. 387, 405–11 (2003).

163. See, e.g., Justin C. Glon, “Good Fences Make Good Neighbors.” *National Security and Terrorism—Time to Fence in Our Southern Border*, 15 IND. INT’L & COMP. L. REV. 349, 361–71 (2005) (endorsing a border fence); Sunil Varghese, *Developments in the Legislative Branch*, 20 GEO. IMMIGR. L.J. 157, 157 (2005) (discussing proposals in Congress for a border fence because of national security, rising illegal immigration, and increasing crime along the border). The Secure Fence Act of 2006 authorized the future appropriation of funds to build a seven-hundred-mile wall along the U.S./Mexico border. See Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638 (to be codified in scattered sections of 8 U.S.C.).

legislation.”<sup>164</sup> In a similar overemphasis on enforcement, Attorney General John Ashcroft found that national security concerns justified the detention of a Haitian asylum seeker without bond even though the noncitizen in question had no links whatsoever to terrorism: “[T]here is a substantial prospect that the release of such aliens into the United States would . . . encourage future surges in illegal migration by sea . . . . [S]urges in such illegal migration by sea . . . injure national security by diverting valuable Coast Guard and [Department of Defense] resources from counterterrorism and homeland security responsibilities.”<sup>165</sup>

Unfortunately, national security today dominates the debate over virtually any immigration-related measure. In California, Governor Arnold Schwarzenegger emphasized national security concerns as justifying repeal of the law and vetoing others laws that would have allowed undocumented immigrants to be eligible to secure driver’s licenses.<sup>166</sup> The federal REAL ID Act<sup>167</sup> later created uniform national standards governing the issuance of driver’s licenses by the states. However, a system in which millions of people who live and work in this country but lack basic identification cannot conceivably benefit national security or aid ordinary criminal law enforcement.

One important fact should be highlighted. Throughout the immigration reform debates of 2005–06, in which terrorism fears often arose, there was a myopic focus on bolstering enforcement along the southern border with Mexico despite the fact that there is *no* evidence of terrorists entering the United States through Mexico. Nor is there any evidence of any special need from a national security standpoint to greatly fear migration from Mexico. A 2006 study found that no known noncitizen accused of terrorist acts in the United States came from the South. Although proposals for increased border enforcement along the U.S. southern border with Mexico have been claimed to improve national security, one study concluded that “[*n*ot

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164. Katherine L. Vaughns, *Restoring the Rule of Law: Reflections on Fixing the Immigration System and Exploring Failed Policy Choices*, 5 U. MD. J. RACE, RELIGION, GENDER & CLASS 151, 181 (2005) (emphasis added).

165. *In re D-J-*, 23 I. & N. Dec. 572, 579 (A.G. 2003); see Judy Amorosa, Note, *Dissecting In re D-J-: The Attorney General, Unchecked Power, and the New National Security Threat Posed by Haitian Asylum Seekers*, 38 CORNELL INT’L L.J. 263 (2005) (analyzing the ruling).

166. See Johnson, *supra* note 131, at 232–35.

167. REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (to be codified in scattered sections of 8 U.S.C.).

one terrorist has entered the United States from Mexico.”<sup>168</sup> Furthermore, “despite media alarms about terrorists concealed in the illegal traffic crossing the Mexican border, not a single [person charged or convicted of terrorist acts, or killed in such acts] entered from Mexico.”<sup>169</sup>

Ironically enough, the only terrorists in recent years who attempted to cross physical borders on foot were from the North, with the so-called Millennium Bomber probably the most well-known.<sup>170</sup> This demonstrates the need to focus to a greater extent on the United States’ northern border with Canada, which is much more open, and much less militarized, than the southern border.<sup>171</sup> The disparate treatment of the northern and southern borders regularly brings forth claims that something else besides border security, such as racial animus, is at work.

As this discussion suggests, the nations of North America need to consider multilateral measures that improve security and address the difficult issues of managing—not halting—migration.<sup>172</sup> To this point, Congress has not seriously considered truly comprehensive immigration reform. Instead, border enforcement and more border enforcement have carried the day. This, we argue, is a mistake and fails to ensure that U.S. immigration law and policy satisfies the multiple goals that it must if the United States wants to remain politically, economically, and socially strong—and safe.

## CONCLUSION

Nobody, of course, can dispute that protecting the national security of the United States is an important public policy objective of the U.S. government in the modern world. As a nation, the U.S. government, consistent with our constitutional values and commitment to freedom and equality, should do all

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168. Peter Beinart, *The Wrong Place to Stop Terrorists*, WASH. POST, May 4, 2006, at A25 (discussing a study making this finding) (emphasis added).

169. Robert S. Leiken & Steven Brooke, *The Quantitative Analysis of Terrorism and Immigration: An Initial Exploration*, 18 TERRORISM & POL. VIOLENCE 1, 2 (2006) (footnote omitted).

170. See Sam Howe Verhovek, *2nd Man Sought for Questioning in Bomb Plot*, N.Y. TIMES, Dec. 19, 1999, § 1, at 42; Scott Sunde & Elaine Porterfield, *Wider Bomb Plot Possible*, SEATTLE POST-INTELLIGENCER, Dec. 18, 1999, at A1.

171. See *supra* text accompanying notes 100–03.

172. See *supra* Part I.B.2–3.

that it can to make the nation safe. We as a nation, however, should expect and demand that security measures must be calculating, fair, and effective—not overbroad, arbitrary, capricious, and ineffective.

Since September 11, 2001, the United States unfortunately has seen national security concerns skew immigration law and enforcement. This development is evident in the discussion over immigration reform. The nation must work to avoid the distortion of the debate and reject measures that focus myopically on border enforcement. Border enforcement-only policies are not realistic and simply will not be effective at significantly reducing undocumented immigration. Closing the borders at this time in U.S. history is nothing less than a pipedream.<sup>173</sup> The nation instead desperately needs a rational and comprehensive approach to immigration law and enforcement.

True antiterrorism measures might include such steps as providing identification of some sort to undocumented immigrants, a new earned legalization program for long-time undocumented residents, and better tracking of immigrants and temporary visitors. At a most fundamental level, the United States needs an immigration policy that, as President Bush has advocated,<sup>174</sup> ensures that there no longer is a shadow population of millions of undocumented persons living in the United States.<sup>175</sup> This is not safe, or sensible, and is inconsistent with our constitutional values.

Some relatively easy legal steps could be taken in the short term to improve public safety. Professor Bill Hing, for example, has suggested the need for better intelligence strategies and legalization of undocumented immigrants to bring millions of people out of the shadows.<sup>176</sup> Along these lines, immigrants can prove helpful in the war on terror. Law enforcement officers need to work with, rather than alienate, immigrant communities through enforcing the immigration laws. Immigration policies thus are critical in the promotion of national security.

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173. See Kevin R. Johnson, *Open Borders?*, 51 UCLA L. REV. 193, 245–52 (2003).

174. See Address to the Nation on Immigration Reform, 20 WEEKLY COMP. PRES. DOC. 931 (May 22, 2006) (“[I]llegal immigrants live in the shadows of our society. . . . [T]he vast majority . . . are decent people who work hard, support their families, practice their faith, and lead responsible lives. They are a part of American life, but they are beyond the reach and protection of American law.”).

175. See *supra* text accompanying note 9–10.

176. See Hing, *supra* note 64, at 207–16.

Making undocumented immigrants eligible for driver's licenses might well improve security.<sup>177</sup> Unfortunately, a preoccupation with national security has poisoned the debate over driver's licenses, just as it has with immigration reform generally.<sup>178</sup> At a time when the United States needs to retool and revisit its immigration laws to protect national security, as well as to promote legitimate political, social, and economic goals, the nation appears to be the slave of fear. Because fear to this point has prevailed, the United States has failed to thoughtfully reform its immigration laws and, among other things, improve its national security.

National security concerns, however, should not bar the United States from considering economic, political, and social aims in the formulation of immigration law and policy. Well-crafted, manageable, and effective policies must carefully weigh all facets of immigration and its impacts on the United States. Along these lines, as the national experience since September 11, 2001, has made clear, it is not necessarily the case that efforts to close the borders will result in a more secure America. Rather, a balanced immigration system can make for a safer nation as well as one that better realizes the maximum economic, political, and social benefits from immigrants and immigration.

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177. See DONALD KERWIN & MARGARET D. STOCK, NATIONAL SECURITY AND IMMIGRATION POLICY: RECLAIMING TERMS, MEASURING SUCCESS, AND SETTING PRIORITIES 45–46 (2006).

178. See *supra* Part II.