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Recommended Citation
Johnson, Kevin R. ( ) "Protecting National Security through More Liberal Admission of Immigrants," University of Chicago Legal Forum: Vol. 2007: Iss. 1, Article 7.
Available at: http://chicagounbound.uchicago.edu/uclf/vol2007/iss1/7

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Protecting National Security through More Liberal Admission of Immigrants

Kevin R. Johnson†

Commentators and pundits have repeated the mantra "September 11 changed everything" so often in the last six years that the phrase has lost nearly any and all meaning. One cannot deny that that fateful day, with the tragic loss of human life, has unquestionably altered U.S. society and the way that Americans look at the world. As a response to the terrorist acts of September 11, 2001, the Bush administration adopted stringent security measures, including mass arrests, interrogations, and indefinite detentions.1 Outside the United States, in addition to wars in Afghanistan and Iraq, the U.S. government engaged in detentions, and at times even torture and abuse, of prisoners.2 Those

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1 See Part I.

2 See, for example, Michael P. Scharf & Rory T. Hood, The Elephant in the Room: Foreword: Torture and the War on Terror, 37 Case W Res J Int'l L 145, 145–46 (2006) (summarizing the aggressive actions taken by the executive, and suggesting that "more and more Americans [have begun] to wonder if the United States government [has] gone too far in the name of national security"); Diane Marie Amann, Abu Ghraib, 153 U Pa L Rev 2085, 2085–86 (2005) (discussing the Abu Ghraib scandal, and arguing that the executive branch self-consciously created "a space so freed from the constraints of law and decency that abuse became possible, even, perhaps inevitable"); Diane Marie Amann, Guantánamo, 42 Colum J Transnatl L 263, 263 (2004) (looking to the norms of international and human rights law because "no constitutional precedent controls resolution," and arguing that the "[r]eported conditions of detention and interrogation, as well as the proposal for trial before special tribunals, may violate core guarantees of the U.S. Constitution"); Sanford Levinson, In Quest of a "Common Conscience": Reflections on the Current Debate About Torture, 1 J Natl Sec L & Pol 231, 240–46 (2005) (exploring the complexities involved in attempting to define "torture"); Marcy Strauss, The Lessons of Abu Ghraib, 66 Ohio St L J 1269, 1271 (2005) (suggesting five lessons that should be learned from Abu Ghraib: 1) "moral ambiguity toward torture inevitably leads to the commission of torture; anything less than absolute, unequivocal condemnation . . . invites the use of torture"; 2) limiting the use of torture to "extreme situations . . . does not work"; 3) "torture is an
whom the President designated "enemy combatants" were afforded precious few legal protections. In the name of national security, the government assumed increased powers to more easily intrude upon the privacy of citizens and immigrants.

When it comes to immigration law and policy, September 11 had especially dramatic consequences. Terrorism fears led the U.S. government to impose tighter immigration restrictions in many areas, from stricter scrutiny and monitoring of foreign scholars and students to new, more restrictive immigration requirements and procedures targeting Arab and Muslim noncitizens, including "special" registration requirements, detentions, and selective removals. Many of the policies, however, were not limited to Arabs and Muslims; rather, they affected other groups ineffective way to obtain valuable information", 4) benefits derived from torture are outweighed by harms engendered; and 5) the debate must be about the definition of torture). Consider Natsu Taylor Saito, From Exclusion to Guantanamo Bay (Colorado 2007) (tracing history of extraordinary U.S. government power over noncitizens from the Chinese exclusion laws in the late 1800s to the modern "war on terror" after September 11, 2001).

See, for example, Hamdan v Rumsfeld, 126 S Ct 2749, 2759 (2006) (holding that military tribunals created by the Bush administration violated both the Uniform Code of Military Justice and Article III of the Geneva Convention); Hamdi v Rumsfeld, 542 US 507, 510 (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 US 426, 430 (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").


See text accompanying notes 46–50.
of immigrants as well. Indeed, a vocal group of observers and policymakers claimed that the fear of another terrorist attack required increased enforcement along the southern border with Mexico, thereby deeply influencing the national debate over immigration reform that began in 2005.

In retrospect, one member of Congress aptly lamented that the necessary pursuit of national security should not have been used . . . to enact unrelated and radical changes in immigration laws under the guise of preventing terrorism. Unfortunately, members of Congress have abused arguments for national security to enact hundreds of radical changes in immigration laws . . . . Instead of enacting rational immigration reform that will indeed strengthen our national security, Congress has enacted immigration changes that 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.

The U.S. government evidently believed it appropriate to sacrifice civil rights, especially those of foreigners, to protect the security of the nation. But a critical question remains: are we a safer nation today because of the various immigration measures enacted by the U.S. government since September 11? According to a majority of the American public, the answer to this question is “probably not.” Nonetheless, as part of the war on terror, calls persist for increased border enforcement and nothing less than monumental efforts to fence, fortify, and close the U.S. border with Mexico. Little can be gained in terms of security, however, through restrictionist laws and policies that cannot effectively be enforced at the ground level. To make matters worse,

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7 See text accompanying notes 56–78.
8 See text accompanying notes 51–54.
10 See David Cole, Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism 4–5 (New 2003) (describing post-September 11 measures targeting undocumented immigrants, and providing examples of comparable measures taken during other times in U.S. history, followed by suggestions as to how similar measures might be avoided in the future).
11 See text accompanying note 55 (discussing public opinion poll on the subject).
12 See text accompanying notes 51–52.
such arbitrary, overbroad, and unfair laws alienate immigrant communities and foreign governments whose assistance is vital to the U.S. government in its fight against global terrorism.

Unrealistic immigration laws, in place for decades, have forced millions of people to evade the law in order to enter and remain in the United States and, once here, have forced them to remain in the recesses of American social life. As President George W. Bush aptly observed in calling for immigration reform in 2006, "illegal 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 part of American life, but they are beyond the reach and protection of American law."13

This article contends that, even assuming such a policy outcome were possible, efforts to improve the nation’s security need not—and, in fact, should not—include closing the borders and deporting all undocumented immigrants from the United States.14 Put differently, a more open society need not be a country whose national security is more at risk than one with nominally closed borders. In fact, a number of informed commentators have proposed more flexible immigration admission systems that would better ensure national security than the regime currently in place.15 To improve security, the United States needs a more reasonable immigration admissions system that better matches the political, social, and economic factors contributing to immigration, a system that does not encourage circumvention of the law and the creation of a shadow population of millions of people.16

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13 Address to the Nation on Immigration Reform, 42 Weekly Comp Pres Docs 924, 931 (May 15, 2006) (emphasis added).
14 Indeed, the evidence in my estimation suggests that it is not possible. See Part II.
15 See, for example, Bill Ong Hing, Misusing Immigration Policies in the Name of Homeland Security, 6 New Centennial Rev 195, 207–16 (2006) (suggesting, among other things, that national security may be improved by adoption of better intelligence strategies and the legalization of undocumented immigrants in the United States); Jan Ting, Immigration Law Reform After 9/11: What Has Been and What Still Needs to Be Done, 17 Temple Intl & Comp L J 503, 512–15 (2003) (contending that current immigration formulas for admission are too rigid in light of the developments since September 11 and that the U.S. government needs greater flexibility to deal with changing social, political, and economic circumstances).
16 See Kevin R. Johnson, Opening the Floodgates: Why America Needs to Rethink Its Borders and Immigration Laws (forthcoming NYU 2007). See also Bill Ong Hing, Deporting Our Souls: Values, Morality, and Immigration Policy 162–63 (Cambridge 2006) ("A smart approach to national security is one that reaches out to noncitizen communities . . . because they are allies in protecting our homeland. [Immigrants bring] economic and social benefits . . . to our nation" and "[t]argeting noncitizens of a certain ethnic, religious,
Depending on the source, somewhere between 10.5 and 12 million undocumented immigrants live in the United States today.\textsuperscript{17} Rather than engaging in futile efforts to close the border, the United States needs to address the economic realities currently fueling immigration and contributing to the growing number of people who live in this country in contravention of U.S. immigration laws. Generations of migrants from Mexico have made their way to the United States.\textsuperscript{18} Legally or illegally, immigrants will continue to come to this country for jobs and to reunite with family members. Thousands of migrants today literally risk life and limb to come to this land of freedom and opportunity.\textsuperscript{19} The current immigration status quo demonstrates that


it makes no sense to simply continue fortifying the borders and engaging in the futile effort to keep all undocumented immigrants out of the country.\(^2\)

A proposal to liberalize admissions to protect national security may seem counter-intuitive. But, as this article contends, a carefully crafted, liberal admissions scheme could lead to a more secure nation. Such an immigration system initially would need to bestow lawful immigration status on the millions of undocumented immigrants already residing in the United States. In addition, the current systems to track lawful immigrants and temporary visitors, which are woefully inadequate, need to be improved.\(^2\)

We have many residents effectively living off the books and not readily identifiable in any way. Basic information about all immigrants in the United States is necessary for effective law enforcement—criminal as well as immigration—and will better serve national security and public safety interests.

Put simply, the United States needs a more realistic immigration scheme that does not result in massive violations of the law and the creation and maintenance of a shadow population of millions of people. Previously, I have equated the current immigration laws and their enforcement with the failed Prohibition-era anti-alcohol laws.\(^2\) In both instances, enforcement of the law failed and, to make matters worse, resulted in widespread negative collateral consequences, thereby undermining the law's very legitimacy.\(^2\)

Part I of this article looks at the current border restrictions in the United States, with a focus on those ostensibly based on national security concerns. Part II contends that less restrictive admissions would contribute to a more secure America. The arti-

\(^{20}\) See text accompanying notes 26–30.

\(^{21}\) See text accompanying notes 102–03.

\(^{22}\) See Kevin R. Johnson, Open Borders?, 51 UCLA L Rev 193, 245–52 (2003) (noting that "[a]lthough the analogy is far from perfect, migration controls resemble in significant ways the United States' efforts to enforce the bar on alcohol trade during prohibition," and concluding "law cannot be effectively enforced when it faces social and economic resistance and the governed do not view as criminal what the law criminalizes").

\(^{23}\) See Part II A.
article argues that U.S. immigration laws must be radically reformed to be more consistent with the economic, social, and political pressures fueling modern migration to the United States.

I. IMMIGRATION LAW AND POLICY SINCE SEPTEMBER 11 IN THE UNITED STATES: BORDER ENFORCEMENT AND MORE BORDER ENFORCEMENT

Recent years have seen increasingly aggressive efforts by the U.S. government to seal its borders, almost exclusively focused on the southern border with Mexico. Nevertheless, a large, and by virtually all accounts growing, undocumented population—more than half from Mexico—lives in the “shadows” of the United States. As many as twelve million undocumented immigrants today reside in this country.

Increased border enforcement efforts over the last fifteen years, to the surprise of many, have been accompanied by a significant increase in the size of the undocumented population. One study concluded that “[t]here is no evidence that the border enforcement build-up . . . has substantially reduced unauthorized border crossings” and that “[d]espite large increases in spending and Border Patrol resources over the past nine years, the number of unauthorized immigrants increased to levels higher than those” before 1986. In that year, Congress passed a reform law that, besides granting amnesty to hundreds of thousands of undocumented immigrants, provided for the imposition of sanctions on the employers of undocumented immigrants; Congress hoped to avoid the emergence of a new undocumented population.

The fact that there are so many undocumented immigrants in the United States confirms what we all know—that the immigration laws are routinely violated and, at least as currently configured, are effectively unenforceable. Undocumented workers know that if they are able to make the often-arduous journey to

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24 See note 19 (citing authorities).
25 See note 17 (citing statistics on undocumented immigration).
the United States, they can obtain work and that the job will pay more than most workers would have been able to earn in their native countries. Employers greatly demand the labor of undocumented workers. A drive to one of the many day-laborer pick-up points in cities and towns across the country clearly demonstrates this fundamental truth.  

In modern times, U.S. immigration enforcement has proven to be the equivalent of tilting at windmills. We simply cannot keep determined migrants—so determined that they are willing to risk their lives—from unlawfully entering the country. In addition, the current computer systems in place are woefully incomplete and poorly track immigrants who have lawfully entered the United States. Thus, even for noncitizens who enter through legal channels, the country lacks reliable systems to track who is here, who is not, when they entered, and when they left (if they did). Given the technology available in the information age, such a result is unacceptable.

Moreover, the U.S. government has made few efforts to remove noncitizens that lawfully entered the country on temporary visas, such as students and tourists, but overstayed their terms. Visa overstays, as they are known, likely constitute somewhere between 25 and 40 percent of the undocumented population. In the last few years, however, interior enforcement of the immigration laws has been reduced, not increased. Indeed, at least through the halfway point of President Bush’s second term, the


29 See Peter Andreas, *Border Games: Policing the U.S.-Mexico Divide* (Cornell 2000) (analyzing the difficulties and limitations of border enforcement combined with the primary benefits accruing to politicians pursuing border enforcement strategies).


Bush administration made workplace enforcement a low priority. In 1999, only 240 full-time employees in the entire United States were devoted to workplace enforcement of the immigration laws; by fiscal year 2003, the number had dropped precipitously to 90. The number of employers prosecuted for employing undocumented immigrants dropped from 182 in 1999 to 4 in 2002; in 1999, the U.S. government imposed fines against 417 companies but against only 3 in 2004.

Beginning in late 2006, the Bush administration engaged in a series of highly publicized immigration raids in workplaces. It is unclear whether the raids will remain part of long-term U.S. immigration enforcement policy or were simply part of a temporary political strategy designed by the administration to help convince Congress that enforcement measures might work and that comprehensive immigration reform, including an earned legalization and guest worker program, should be seriously considered.

The limited nature of interior enforcement in the United States is in some ways understandable. The political resistance from employers as well as immigrant rights advocates makes such enforcement politically hazardous. However, increased

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33 Id at 4. See also Spencer S. Hsu and Kari Lydersen, Illegal Hiring is Rarely Penalized; Politics, 9/11 Cited in Lax Enforcement, Wash Post A1 (June 19, 2006) (citing the same statistics).
34 See Erika Hayasaki, Mayor Criticizes Raid for Disrupting Families: Immigration Arrests in Massachusetts Stranded 140 Youths. Sixty Workers Have Since Won Humanitarian Releases, LA Times A16 (Mar 9, 2007) (describing Immigration and Customs Enforcement raid at factory in Massachusetts); Julia Preston, Immigration Raid Draws Protest From Labor OfficialsNY Times A17 (Jan 26, 2007) (recounting Immigration and Customs Enforcement raid at North Carolina pork-packing plant and discussing union support for immigrants); Julia Preston, Immigrants' Families Figuring Out What to Do After Federal Raids, NY Times A13 (Dec 16, 2006) (reporting on a raid in Colorado and immigrants' fear following the raid).
36 See Jeffrey Manns, Private Monitoring of Gatekeepers: The Case of Immigration Enforcement, 2006 U Ill L Rev 887, 935–44 (noting that “while employers are well positioned to serve as gatekeepers, their economic interests often clash significantly with
border enforcement, without any effort to regulate the availability of jobs to undocumented immigrants, will ultimately do little to change the status quo. Jobs and superior economic opportunity in the United States are the primary magnets attracting immigrants to this country. The continued availability of such opportunity will continue to fuel immigration.

A. Crossing Borders After September 11

The U.S. government's understandable preoccupation with terrorism since September 11, 2001 arguably makes this an inopportune historical moment to raise the possibility of reducing immigration controls and easing entry of immigrants into the United States. The horrific events of that day understandably raised legitimate national security and public safety concerns in this country. Indeed, terrorism has affected the entire world, and led to military conflicts causing the deaths of thousands of civilians as well as combatants in Afghanistan and Iraq.37

Not surprisingly, in the name of national security, the highest levels of the U.S. government engaged in a sustained effort to close, not open, the borders.38 In line with that effort, the public grew more supportive of tighter immigration restrictions after New York City's World Trade Center crumbled to the ground.39

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37 See Simon Reeve, And You Call This Winning, Mr President?; War on Terror Five Years on 50,000 Civilians Dead . . . 3,092 UK and US Forces Killed, The Mirror 16 (Oct 7, 2006) (discussing the vast amounts of money spent on, and the tens of thousands of lives lost in, the Iraq and Afghanistan conflicts).

38 See The Aftermath of September 11: A Chronology, 79 Interpreter Releases 1359 Appendix I (Sept 9, 2002) (providing a chronology of the Bush Administration's immediate legal responses to the events of September 11, 2001). See also Viet D. Dinh, Freedom and Security After September 11, 25 Harv J L & Pub Pol 399, 401 (2002) (stating that, "[t]o respond to [the] threat of terrorism, the Department [of Justice] has pursued an aggressive and systematic campaign that utilizes all available information, all authorized investigative techniques, and all legal authorities at our disposal").

39 See Margaret Graham Tebo, The Closing Door: U.S. Policies Leave Immigrants Separate and Unequal, ABA J 43, 47 (Sept 2002) (discussing immigration policy before and after September 11, and noting a "scattershot of changes" after that date). See also Michele R. Pistone, A Times Sensitive Response to Professor Aleinikoff's Detaining Plenary Power, 16 Georgetown Immig L J 391, 399–400 (2002) (observing that, after September 11, the nation moved from contemplating more liberal admissions to considering policy options and controls that would enhance security). Restrictionist and nativist outbursts in response to social stress often have been especially virulent at the state and
Specifically, the public has generally backed government anti-terrorism efforts that tend to focus on Arabs and Muslims, whether or not the measures constitute racial and religious profiling, which is generally disfavored in today's political culture in the United States.\textsuperscript{40} At first glance, this all may seem entirely understandable. After all, noncitizens, all of whom were Muslim, perpetrated the terrorist acts of September 11.\textsuperscript{41} But not all Muslim noncitizens are terrorists, and the immigration measures targeting this group were overbroad as well as discriminatory.

In no small part because the law allows the government great latitude in its policies toward immigration and immigrants, immigration law has served as a convenient domestic foundation for the U.S. government's so-called "war on terror."\textsuperscript{42} Put differently, immigration proved to be a handy anti-terrorism tool after September 11 as the Bush administration felt compelled to act decisively in a high profile manner. The deference that courts show to the immigration decisions of the political branches facilitated the aggressive action by Congress and the Executive Branch and ensured minimal interference by the courts.


\textsuperscript{42} See, for example, Karen Engle, \textit{Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)}, 75 U Colo L Rev 59, 63 (2004) (suggesting that dichotomies between "good" and "bad" aliens have served to legitimize the "restrictions on freedom and foreign policy decisions that are designed (or asserted) to pursue the war"); Teresa Miller, \textit{Blurring the Boundaries Between Immigration and Crime Control After September 11th}, 25 BC Third World L J 81, 85–86 (2005) (arguing that the war on terror has further blurred the distinction between criminal punishment and immigration law, and that a social control function now pervades immigration law enforcement).
meaningful judicial review.\textsuperscript{43} Although the doctrine has been much-maligned in light of the constitutional revolution over the last century,\textsuperscript{44} it remains the law of the land. Indeed, as recently as 2003, the Supreme Court invoked the plenary power doctrine in upholding the detention of criminal aliens pending their removal from the United States.\textsuperscript{45}

The many opportunities offered by the plenary power doctrine have not been lost on the U.S. government in responding to the events of September 11, 2001. For example, in promulgating the regulations allowing for special immigration procedures, including requiring certain (primarily Arab and Muslim) noncitizens to report and register with the Immigration & Naturalization Service, Attorney General John Ashcroft emphasized that

[t]he political branches of the government have \textit{plenary authority} in the immigration area. See \textit{Fiallo v. Bell}, 430 U.S. 787, 792 (1977); \textit{Mathews v. Diaz}, 426 U.S. 67, 80–82

\textsuperscript{43} See, for example, \textit{INS v Abudu}, 485 US 94, 110 (1988) ("[INS] officials must exercise especially sensitive political functions that implicate questions of foreign relations, and therefore the reasons for giving deference to agency decisions . . . apply with even greater force in the INS context."); \textit{Fiallo v Bell}, 430 US 787, 792 (1977) (refusing to disturb gender preferences in immigration admission criteria, and noting that "[t]his Court has repeatedly emphasized that over no conceivable subject is the legislative power of Congress more complete than it is over the admission of immigrants") (citations and internal quotation marks omitted); \textit{Mathews v Diaz}, 426 US 67, 81 (1976) (contending that deference to the U.S. government on immigration matters was justified in part because "decisions in these matters may implicate our relations with foreign powers"). The doctrine was spawned in the Supreme Court's decision upholding one of a series of laws providing for the general exclusion of Chinese immigrants from the United States. See \textit{Chae Chan Ping v United States (The Chinese Exclusion Case)}, 130 US 581, 606 (1889). See also Linda Bosniak, \textit{The Citizen and the Alien: Dilemmas of Contemporary Membership} 50 (Princeton 2006) ("American courts describe the immigration power as 'plenary' in character, by which they mean that the judiciary has virtually no authority to scrutinize what the political branches do in this domain."); Hiroshi Motomura, \textit{Americans in Waiting: The Lost Story of Immigration and Citizenship in the United States} 174 (Oxford 2006) ("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.").

\textsuperscript{44} See, for example, T. Alexander Aleinikoff, \textit{Semblances of Sovereignty: The Constitution, the State, and American Citizenship} 5 (Harvard 2002) (arguing that "a constitutional law for the twenty-first century needs understandings of sovereignty that are supple and flexible . . . [y]et our constitutional law, at least as declared by the Supreme Court, is moving in the opposite direction"); Gerald L. Neuman, \textit{Strangers to the Constitution—Immigrants, Borders, and Fundamental Law} 51 (Princeton 1996) (criticizing the plenary power doctrine, and suggesting "it is anachronistic to project this modern constitutional doctrine into the earlier period"); Gabriel J. Chin, \textit{Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration}, 46 UCLA L Rev 1, 1 (1998) (arguing that the plenary power cases were decided by the same court that decided \textit{Plessy v Ferguson}, and based on principles "emphatically rejected by the Court since \textit{Brown v Board of Education}").

In the context of immigration and nationality laws, the Supreme Court has particularly "underscore[d] the limited scope of judicial inquiry." Fiallo, 430 U.S. at 792.46

The law affords considerable latitude to the government in the realm of immigration, especially when national security is involved. Immigrants effectively possess a smaller bundle of rights that the government must respect under the law than do U.S. citizens. In the wake of September 11, the U.S. government arrested, interrogated, detained, and removed from the country thousands of Arab and Muslim noncitizens.47 The government

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took the extraordinary step of implementing a special registration system for noncitizens in the United States from a select group of nations, resulting in many arrests, detentions, and deportations of Arabs and Muslims. Although the special registration program—since discontinued—was criticized as impermissible racial profiling, courts rejected constitutional challenges to the program. To add insult to injury, special registration, and the many other related security measures, did not appear to yield many, if any, discernible security benefits.

Incendiary arguments continue to be made about the need to close the borders to all immigrants in support of the war on terror. The “close the border” approach has been applied to undocumented immigrants who evade inspection, even though, by all accounts, not one of the September 11 terrorists entered without inspection. In the modern discussion of immigration in the United States, undocumented immigration is often characterized

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48 See note 46 (citing regulation creating program).
50 Roudnahal v Ridge, 310 F Supp 2d 884, 892 (ND Ohio 2003). See also Kandamar v Gonzales, 464 F3d 65, 69–74 (1st Cir 2006) (rejecting argument that evidence obtained through special registration should be suppressed based on constitutional violations, and concluding that any error that occurred was harmless); Ali v Gonzales, 440 F3d 678, 681–82 (5th Cir 2006) (finding, in removal case, that special registration did not violate Equal Protection guarantee, and, even if it did, any error would be harmless). There was some precedent supporting the special registration program. In the Iranian hostage crisis during the Carter administration, the courts upheld special immigration regulations applicable only to Iranian students. See Narenji v Civiletti, 617 F2d 745 (DC Cir 1979). For criticism of this approach, see, for example, Peter E. Quint, The Separation of Powers Under Carter, 62 Tex L Rev 785, 856 (1984) ("Narenji is troublesome because an executive classification based on nationality in a foreign affairs crisis will overvalue the government interest and undervalue the individual constitutional interest.").
51 See, for example, Patrick J. Buchanan, State of Emergency: The Third World Invasion and Conquest of America (St Martin’s 2006); Michelle Malkin, Invasion: How America Still Welcomes Terrorists, Criminals, and Other Foreign Menaces To Our Shores (Regnery 2002). See also Jan C. Ting, Unobjectionable but Insufficient—Federal Initiatives in Response to the September 11 Terrorist Attacks, 34 Conn L Rev 1145 (2002) (questioning, in a more balanced manner, whether the United States had done enough in the “war on terrorism”).
as a terrorism risk. As Professor Enid Trucios-Haynes observed,

[i]mmigration 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 re-
quires the most strenuous methods of border enforcement.
In the eyes of many, immigration reform proposals since
2001 have focused exclusively on enforcement without suf-
cient acknowledgment of the human consequences on the
noncitizens, both authorized and unauthorized, through-
out our community.

In a comment typical of the tenor of the modern debate over im-
migration reform, Senator John Cornyn in 2006 emphasized that
the national dialogue on immigration reform is “first and fore-
most about our Nation’s security. In a post-9/11 world, border
security is national security.”

In sum, the flexibility in the law did not deter, and perhaps
even encouraged, the U.S. government to target immigrants in
the war on terror. The courts, for the most part, declined to in-
tervene. Despite hyper-aggressive efforts directed at Arabs and
Muslims in the name of fighting terrorism, a majority of Ameri-
cans do not feel that the nation is any safer today than before
September 11.

B. Collateral Impacts

Unfortunately, the war on terror has been used to rational-
ize an array of aggressive policies tightening immigration laws
having little to do with national security and public safety. For
example, in the name of fighting terrorism, the Department of
Justice announced that it would begin enforcing a rule allowing

52 See Kris W. Kobach, The Quintessential Force Multiplier: The Inherent Authority of
53 Enid Trucios-Haynes, Civil Rights, Latinos, and Immigration: Cybrecascades and
Other Distortions in the Immigration Reform Debate, 44 Brandeis L J 637, 638 (2006)
(emphasis added).
54 152 Cong Rec S 2551, 2552 (Mar 30, 2006) (Senator Cornyn) (emphasis added).
55 See Poll: 1 in 4 Americans Believe U.S. Was Safer Before 9/11, CNN.com (Aug 23,
visited Apr 4, 2007) (reporting survey results that 43 percent of those polled thought that
the United States is safer now than it was before the September 11 attacks, while 25
percent believe it is less safe now than before the attacks).
for the deportation of immigrants who fail to report their change of address within ten days of moving. Attorney General John Ashcroft threatened to deport terrorists for “spitting on the sidewalk.” He also found that national security concerns justified the detention of an otherwise ordinary Haitian asylum seeker without bond even though the noncitizen in question had no links whatsoever to terrorism: in his words,

there is a substantial prospect that the release of such aliens into the United States would . . . encourage future surges in illegal migration by sea. . . . [Such surges . . . injure national security by diverting valuable Coast Guard and [Department of Defense] resources from counterterrorism and homeland security responsibilities.]

One court invoked concerns with terrorism to justify a run-of-the-mill border check at a port of entry along the U.S.-Mexico border that escalated into the tearing apart of a spare tire in the search for drugs.

Previously condemned in law enforcement, racial, ethnic, and religious profiling became a centerpiece of the war on terror. But racial profiling in this context has many of the same flaws identified in the ordinary criminal law enforcement context. These include, but are not limited to, embarrassment, humiliation, and related dignitary injuries resulting from being the focus of an unjustified criminal investigation based on impermissible racial stereotyping. As Steve Legomsky has emphasized, profiling in law enforcement must be rational and “any gains in the efficacy or efficiency of the inspection process must be balanced against the substantial harms of government-sponsored discrimination.” The benefits of racial profiling in the war on terror are far from certain while the costs have been great.

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60 See Akram and Johnson, 58 NYU Ann Surv Am L at 351–55 (cited in note 40).
Profiling, security checks, and removal campaigns resulted in record levels of deportations, with almost all of the noncitizens having nothing whatsoever to do with terrorism. Importantly, the vast majority of the record numbers of immigrants deported since September 11 have been citizens of Mexico and Central America, who comprise a large segment of the undocumented and legal immigrant population in the United States. Similarly, citizenship requirements for security personnel at airports implemented after September 11 affected many more Latina/o and Asian immigrants than Arab or Muslim ones.62

Fears over a repeat of September 11 have served as a convenient excuse for more punitive immigration law enforcement proposals, and pursuit of an ardently restrictionist immigration agenda. As mentioned previously, proposals for increased border enforcement along the U.S. border with Mexico have been claimed to be necessary to improve national security.63 But there is little evidence to suggest that there is a realistic threat of terror from Mexico. Indeed, one study found that "[n]ot one terrorist has entered the United States from Mexico."64 Oddly enough, there has been little focus on the U.S. border with Canada despite the fact that a bona fide terrorist, the Millennium bomber, was apprehended seeking to enter the United States from the north.65

While the war on terror has dominated the national and international consciousness, constructive immigration reform efforts have, to this point, fallen by the wayside. Serious discussions of a bilateral agreement regularizing migration between the United States and Mexico ended abruptly on September 11.66 Efforts to remove the punitive edges of the 1996 immigration

63 See text accompanying notes 51–54.
64 Peter Beinart, The Wrong Place to Stop Terrorists, Wash Post A25 (May 4, 2006) (discussing study making this finding). For the study itself, see Robert S. Leiken and Steven Brooke, The Quantitative Analysis of Terrorism and Immigration: An Initial Exploration, 18 Terrorism and Polit Violence 503, 503 (2006) ("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.") (footnote omitted).
reform laws—described by one influential observer at the time to be perhaps as "radical" as any in U.S. history—as also evaporated on that day. The political climate made any liberalization of the immigration laws next to impossible, at least in the short run.

Over the last few years, President Bush's efforts to reopen discussion of immigration reform, and his advocacy of a guest worker program, faced strong resistance from the restrictionist wing of the Republican Party. The Mexican government also failed in its efforts to move the United States forward in jointly addressing migration between the two nations.

Beginning in 2005, the nation has been engaging in an extended, and fractious, national debate over reform of the immigration laws, with a special focus on undocumented immigration from Mexico. In December 2005, the House of Representatives passed a severe enforcement-oriented bill, known as the Sensenbrenner bill, which provoked protests of thousands of people on the streets of cities across the United States. The Senate passed a more moderate alternative, which included legalization and

67 See, for example, Peter H. Schuck, Citizens, Strangers, and In-Betweens 143 (Westview 1998) (characterizing the 1996 reforms as "the most radical reform of immigration law in decades—or perhaps ever").


71 Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, HR 4437, 109th Cong, 1st Sess (2005). The Sensenbrenner bill, among other things, 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 would have imposed criminal sanctions on persons who provided any sort of humanitarian assistance to undocumented immigrants. See id at §§ 203 and 205. For a summary of the myriad of immigration reform proposals floated in Congress over the last few years, see Hing, Deporting Our Souls at 17–38 (cited in note 16).

guest worker components in addition to enhanced immigration enforcement measures.\textsuperscript{73} Ultimately, the controversy ended with Congress failing to enact anything akin to comprehensive immigration reform in 2006 but only passing a law authorizing the extension of the fence along the U.S.-Mexican border.\textsuperscript{74} Congress did so even though there is no evidence that the extension of the border fence—or any other border enforcement-only measure—will decrease the number of undocumented immigrants in the United States.\textsuperscript{75}

The post-September 11 period unfortunately brought with it a serious distortion of the immigration debate. Restrictionists effectively capitalized on fear in an effort to persuade Congress to pass tough border enforcement measures.\textsuperscript{76} The war on terror derailed reasoned discussion of ordinary immigration reform, with any proposal to liberalize the immigration laws challenged vociferously as endangering national security.\textsuperscript{77}

To this point, although necessary, truly comprehensive immigration reform has proven to be politically impossible. At least in 2006–07, an election year, tough measures like border fences proved much more likely to carry the day than comprehensive approaches addressing the United States' true immigration needs and realities. Things, of course, may change should a national consensus on immigration reform emerge in the future,\textsuperscript{78} which may be more likely—but is by no means assured—now that Democrats control the U.S. Congress.

\textsuperscript{75} See text accompanying notes 25–29 (discussing failure of increased border enforcement to reduce undocumented immigrant population).
\textsuperscript{76} See text accompanying notes 51–54.
\textsuperscript{77} See Hing, Deporting Our Souls at 140–63 (cited in note 16) (suggesting that closing the United States' borders to "newcomers or visitors" will not make the nation safer); Jennifer M. Chacón, Unsecured Borders: Immigration Restrictions, Crime Control and National Sovereignty, 39 Conn L Rev (forthcoming 2007). See also Johnson and Trujillo, Immigration Reform, 91 Minn L Rev at 1396–1404 (cited in note 70) (analyzing how the "war on terror" distorted the debate over immigration reform).
\textsuperscript{78} For an optimistic view of the possibilities for comprehensive immigration reform in the near future, see Tamar Jacoby, Immigration Nation, 85 Foreign Aff 50 (2006).
II. LIBERAL ADMISSIONS WOULD RESULT IN A MORE SECURE UNITED STATES

Historically, U.S. immigration laws have been dramatically overbroad in attacking the perceived evil of the day, whether it be racial minorities, the poor, political dissidents, or other undesirables.79 Today, "terrorists" and undocumented immigrants are the stated targets of immigration law and its enforcement. To be effective, the war on terror should attempt to exclude from admission the true dangers to national security and public safety, rather than engage in the doomed effort to seal the borders to all migrant workers, which has proven to be virtually impossible.

The intuitive reaction to the suggestion of liberalizing immigration admissions is that the United States cannot open the floodgates to poor and working people from all over the world. Such fears today are exacerbated by concerns with terrorism. It is often assumed that if the U.S. were more liberal in admitting immigrants, the nation would be overrun with migrants; terrorists would come to the United States with the masses.80 Liberal admissions therefore might hurt national security. That, however, is not necessarily the case.

In my estimation, the floodgates concerns are greatly overstated. Most people the world over would prefer to stay put in their native lands. As one commentator observed,

Most people have no inclination to leave their native soil, no matter how onerous conditions become. Would-be emigrants must fight off the ties of family, the comfort of familiar surroundings, the rootedness in one’s culture, the security of being among “one’s own,” and the power of plain inertia. Conversely, being uprooted carries daunting


80 See note 51 (citing authorities).
prospects: adjusting to alien ways, learning a new language, the absence of kith and kin, the sheer uncertainty of it all.\(^{81}\)

Most Mexicans, for example, prefer to—and in fact do—stay in Mexico. The mass migration feared in the expanding European Union, which generally permits labor migration between member nations, has not come to pass.\(^{82}\) The ease of travel between U.S. states (and the U.S. territory of Puerto Rico), despite economic disparities between the states and territories, has not led to mass migration from poorer to richer regions. Even if they would encourage greater migration, realistic immigration laws that are effectively enforced might improve, not undermine, the security of the nation. Immigration laws that better fulfill the nation’s labor needs would eliminate a powerful incentive to circumvent the law for employers and migrants and would allow for government to have better information about the identities of all the nation’s residents.

A. Why Liberal Admissions in an Age of Terror?

Suppose the U.S. embraced immigration laws that made it easier to lawfully immigrate to the United States. In a forthcoming

\(^{81}\) Alan Dowty, *Closed Borders: The Contemporary Assault on Freedom of Movement* 223 (Yale 1987). See Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* 38 (Basic 1983) ("Most human beings ... are ... inclined to stay where they are unless their life is very difficult there."). See also Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 Rev Pol 251, 270 (1987) (arguing that "borders should generally be open ... subject only to the sorts of constraints that bind current citizens in their new country"). As Rubén G. Rumbaut observed,

*[It] never ceases to surprise me that, in a world of 6.5 billion people, 98 percent are "stayers," living in the country of their birth; that the remaining two percent, international migrants of a bewildering variety of origins, migration motives, and modes of adaptation to their new environments, are at heart ambitious, determined, and intrepid souls, which is what makes migration the "selective" process that it is; and that, all things considered, so little focused attention is paid to either of those two facts.


ing book, which expands on a law review article,\(^8\) I propose minimal border controls that, consistent with the concern for national security and public safety, would be much narrower in scope than those found in current U.S. immigration laws.\(^4\) Efforts would be made to bar hardened criminals, those reasonably suspected of terrorist activities, and those posing public health risks from entering the United States. By targeting a small group of noncitizens from entering the country, immigration authorities would deny admission to true threats to our national security and public safety. Law-abiding noncitizens seeking nothing more than to work in the United States would find admission much easier than they do under current U.S. immigration law.

The idea of permeable borders as the foundation for U.S. immigration law may well be a pipe dream. Nonetheless, for purposes of this article, consider the possibility of more liberal immigration laws than the United States currently has, even if the borders are not completely opened, and the impacts of such laws on national security.

Contrary to popular intuition, liberal admissions policies that better fulfill the demand for labor in the United States and minimize the undocumented population are entirely consistent with efforts to protect the nation from terrorist acts. More liberal migration with fewer time-consuming bureaucratic paperwork requirements would allow the U.S. government to focus its enforcement efforts on the true dangers to public safety and national security.\(^5\) Rather than detailed checks on mundane matters, such as income levels of the migrants and their sponsors, U.S. immigration authorities could limit their inquiry to denying admission to terrorists, dangerous criminals, drugs and other contraband, and public health risks. With a true national security emphasis in immigration enforcement, there would no longer be a need to engage in the endless search for a reason to keep every noncitizen out of the country, which is how U.S. immigration laws tend to be currently enforced. Enforcement efforts could move beyond the morass of visa requirements, exclusion grounds, per country ceilings, and the many complexities of the

\(^{83}\) See Johnson, Open Borders? at 263–65 (cited in note 22).
\(^{84}\) See Johnson, Opening the Floodgates at 51–60 (cited in note 16).
\(^{85}\) See Judith Golub, Immigration Reform Post-9/11, 13 US-Mex L J 9, 14 (2005) ("If a dysfunctional law is enforced, and if the only policy created serves to strengthen enforcement, then the result will simply be more dysfunction.").
Immigration and National Security

Immigration and Nationality Act\textsuperscript{86} that have also made its enforcement difficult,\textsuperscript{87} as well as ineffective\textsuperscript{88} and unfair.\textsuperscript{89}

To make matters worse, the United States lacks an immigration bureaucracy that effectively and efficiently enforces the law and commands the respect of the public. Respect and legitimacy lag in no small part due to the fact that the immigration laws are routinely violated because they are not realistic. Narrower, more realistic laws are more likely to be effectively enforced and generate respect and legitimacy for the agency enforcing them.

In addition, the Immigration and Naturalization Service ("INS"), which until the spring of 2003 had primary responsibility for enforcing the immigration laws, has long been criticized as inefficient, arbitrary, and incompetent. The agency focused almost exclusively on enforcement, not service.\textsuperscript{90} In essence, the INS lacked the confidence of the public and respect in many quarters.

Criticism of the INS’s competence hit a fever pitch when the agency mailed visa renewals to two September 11 hijackers months after their deaths.\textsuperscript{91} This inexplicable and indefensible

\textsuperscript{86} Pub L No 414, 66 Stat 163 (1952), codified as amended in 8 USC §§ 1101–1524.

\textsuperscript{87} See Castro-O’Ryan v INS, 847 F2d 1307, 1312 (9th Cir 1988) (“With only a small degree of hyperbole, the immigration laws have been termed ‘second only to the Internal Revenue Code in complexity.’”).

\textsuperscript{88} See text accompanying note 17 (discussing the millions of undocumented immigrants in the United States).

\textsuperscript{89} Consider, for example, Bernard Trujillo, Immigrant Visa Distribution: The Case of Mexico, 2000 Wis L Rev 713 (showing how per country ceilings of less than 26,000 per year on certain immigrant admissions from a single country in any year apply to all nations but have a disproportionate impact on prospective immigrants from Mexico, and noncitizens from several other developing nations, because demand for immigration from there for reasons of proximity, jobs, and family ties, greatly exceeds the annual ceiling). See also Stephen H. Legomsky, Immigration Equality and Diversity, 31 Colum J Transnatl L 319, 321 (1993) (commenting on disparate 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 Temple Polit & Civ Rts L Rev 301, 309 (1995) (same).


\textsuperscript{91} See Elizabeth A. Palmer and John Godfrey, Sensenbrenner Leading the Charge for
error contributed significantly to the congressional push to reorganize the immigration bureaucracy and to create the Department of Homeland Security ("DHS"), which assumed most of the U.S. government's immigration functions.

Despite the reorganization, the DHS, to this point, appears as enforcement-oriented as the old INS. Nor has there been any dramatic improvement in bureaucratic efficiency with the dismantling of the INS. Unless the DHS learns to better balance its enforcement and service functions, pouring more and more resources into a dysfunctional agency is hardly likely to improve things. Specifically, paying for more Border Patrol officers without improving training is likely to make matters worse, not better.

1. Liberal admissions would encourage better adherence to the immigration laws.

A system that allows for easier migration of labor to the United States would likely decrease the incentive for circumventing the immigration laws. Narrower exclusion grounds in the U.S. immigration laws would be more enforceable than the current blanket exclusions that, for example, bar the immigration of

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[That to the extent that the nation's immigration powers will be placed under the Department of Homeland Security suggests to me that any existing racial stereotypes regarding immigrants will be perpetuated rather than diminished. Put simply, post-9/11, the age-old stereotype of the foreign, Arab terrorist has been rekindled, and placing our immigration functions under the auspices of an executive department charged with "homeland security" reinforces the stereotype of the "immigrant as terrorist." ]

poor and working people from the developing world for no other reason than that they are poor and working people.  

With relaxation of the exclusion grounds, the nation could devote scarce enforcement resources to efforts to bar the entry into the United States of criminals, terrorists, and other dangers to society. Such a true security and public safety emphasis in the enforcement of the immigration laws would make the United States much safer than the current diffused, unfocused enforcement emphasis that has pervaded U.S. border controls and their enforcement since the early twentieth century.

With a more liberal immigration admission scheme, complex inquiries into migrants' family histories, incomes, and purposes for entering the country, could be made for the most part irrelevant to the U.S. government. Such inquiries today are the bread-and-butter of border enforcement officers and the bane of immigrants who are subject to lengthy visa applications, consular officer interviews, immigration stops, and document checks. Time and effort would be saved in the vast majority of immigrant admissions, with time better spent on the relatively few cases involving serious criminal and terrorist activities—the very cases that deserve careful attention by a government seeking to protect the safety of its citizens.

As seen in other areas of law enforcement, more focused enforcement of immigration laws has a greater likelihood of rooting out unlawful conduct than scattershot efforts that infringe on the civil rights of many people, even if they are "only" noncitizens whose rights are not highly valued in the political process. Consider that racial profiling by police has done little to make the nation's streets safer but has alienated, angered, and injured the

94 See Immigration & Nationality Act § 212(a)(4), 8 USC § 1182(a)(4) (2000) (providing that "[a]ny alien . . . likely at any time to become a public charge is inadmissible"). Consider Johnson, The "Huddled Masses" Myth at 91–108 (cited in note 79) (analyzing history of excluding poor and working noncitizens from the United States). For statistics for fiscal year 2002 showing that the public charge exclusion was by far the substantive ground (as opposed to procedural grounds, such as an incomplete application, for example) most frequently relied upon in denial of an immigrant visa by the State Department, see Department of State, Report of the Visa Office at Table XX: Immigrant and Nonimmigrant Visa Ineligibilities (2003), available at <http://travel.state.gov/visa/about/report/report_1476.html> (last visited Apr 4, 2007).

95 See Legomsky, Immigration and Refugee Law and Policy at 444–95 (cited in note 27) (summarizing admission procedures for immigrants).

96 See Kevin R. Johnson, U.S. Border Enforcement: Drugs, Migrants, and the Rule of Law, 47 Vill L Rev 897, 916–19 (2002) (noting how policy change limiting discretion had improved customs enforcement and that many states and municipalities were limiting police discretion through policies designed to reduce racial profiling).
very communities whose cooperation is needed to effectively fight crime.\textsuperscript{97} Similarly, immigration enforcement that is carefully crafted is less likely to frighten immigrant communities—the very communities whose assistance is essential if the United States truly seeks to successfully fight global terrorism. Unfortunately, the war on terror has frightened Arabs and Muslims living in the United States and no doubt discouraged them from cooperating with the government in counterterrorism efforts.\textsuperscript{98}

Most importantly, a system in which illegal migration is reduced—and the undocumented population in the United States is legalized—would allow for improved tracking of all noncitizens living in the United States. If that occurred, the nation would be far better positioned to maintain records, including names and addresses, of all immigrants in the country. Currently, millions of undocumented immigrants live and work in this country, without much governmental knowledge about them.\textsuperscript{99} We know precious little about who they are and where they live, much less what they are doing in the United States. It is difficult to see how the existence of a shadow population of millions of people could in any way be in the national interest, especially in a time when national security concerns are at their zenith. Nor is there any evidence that the U.S. government as a practical matter could end undocumented immigration under the current laws and remove all of the undocumented immigrants from the country.\textsuperscript{100}

2. More liberal admissions would dampen the likelihood of the emergence of a new undocumented immigrant population.

Despite great increases in resources devoted to sealing the border, increased border enforcement has failed to reduce the undocumented immigrant population in the United States. Nor

\textsuperscript{97} See David A. Harris, \textit{The Stories, the Statistics, and the Law: Why “Driving While Black” Matters}, 84 Minn L Rev 265, 298–300 (1999) (noting how differently whites and blacks view the criminal justice system and suggesting that the racial profiling of African-Americans contributes to the difference in views).

\textsuperscript{98} See Akram and Johnson, 58 NYU Ann Surv Am L at 327–55 (cited in note 40) (“In a time when Arab and Muslim communities might be of assistance in investigating terrorism, they are being rounded up, humiliated, and discouraged from cooperating with law enforcement by fear of arrest, detention, and deportation.”).

\textsuperscript{99} See text accompanying note 17.

\textsuperscript{100} See Johnson, \textit{Open Borders?} at 245–52 (cited in note 22).
does the U.S. government truly enforce the immigration laws in the interior of the country.

It seems highly unlikely that tighter enforcement of the immigration laws with mass removals would meaningfully reduce the undocumented immigrant population. Despite record levels of deportations in the years since September 11, officials at the highest levels of the U.S. government recognize that removal of all undocumented immigrants is simply not possible. In 2004, Undersecretary of the Department of Homeland Security Asa Hutchinson candidly admitted that it is "not realistic" to believe that all undocumented immigrants can be removed from the country and, in any event, doubted that "the American public has the 'will . . . to uproot' those aliens." In 2006, President George W. Bush himself acknowledged that "[m]assive deportation of the people here is unrealistic. It's just not going to work."

The cost of the massive campaign needed to deport all undocumented immigrants from the United States would break the federal budget. A 2005 study estimated that it would cost $41 billion a year for five years to fund a serious effort to remove all undocumented immigrants from the country. It further concluded that

*While the net benefits of adopting such a policy are largely speculative, we do know that spending $41 billion annually over five years ($206 billion in total) would:*

- Exceed the *entire* budget of the Department of Homeland Security for FY 2006 ($34.2 billion);
- Approach the *total* amount of money required by the 33 federal agencies responsible for homeland security activities for FY 2006 ($49.9 billion);
- *More than double* annual spending on border and transportation security ($19.3 billion);
- Comprise *half* the annual cost of the Iraq War ($74 billion); and

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More than double the annual cost of military operations in Afghanistan ($16.8 billion).\textsuperscript{104}

Currently, many undocumented immigrants live in the United States. The nation needs to regularize the status of long-term residents and enact a set of laws that will avoid the creation of such a population in the future. Put simply, because mass removals are not possible, the nation needs a realistic legalization program. And it needs sensible immigration admissions criteria to avoid the emergence of a new undocumented immigrant population.

3. Liberal admissions would minimize other adverse consequences of current immigration enforcement.

There are many other collateral consequences of current U.S. enforcement of unrealistic immigration laws. Increased border enforcement has resulted in deaths, as migrants have resorted to more dangerous routes to the United States than in the past in an effort to evade immigration enforcement officers concentrated at major border hubs such as El Paso, Texas and San Diego, California.\textsuperscript{105}

In addition, millions of undocumented immigrants seek to evade the law, which has resulted in the emergence of highly organized criminal networks that pose true risks to national security.\textsuperscript{106} In no small part due to tighter immigration enforcement, the trafficking of human beings is big business and a growth industry, with its tentacles reaching across the entire United States. Thriving international criminal syndicates, which dominate the trafficking industry, profit handsomely.

Misery and death often directly result from human trafficking. Some immigrants able to survive the journey are effectively enslaved to pay off smuggling fees, with thousands of immigrant women forced into the sex industry and other exploitative work


\textsuperscript{105} See note 19 (citing authorities).

arrangements.\textsuperscript{107} The trafficking of human beings—with its devastating impacts—flows immediately from heightened immigration enforcement.

Immigration enforcement has more general labor market consequences. There have been increasing reports of slavery and involuntary servitude of immigrants in the United States.\textsuperscript{108} Immigration enforcement also has less extreme negative impacts on the labor market. Many undocumented workers are exploited in the workplace\textsuperscript{109} and lack basic legal protections.\textsuperscript{110} The failure to enforce wage and condition laws encourages employers to exploit undocumented workers and to avoid hiring U.S. citizens and lawful immigrants in certain sectors of the economy.

Because many undocumented immigrants are people of color, a racial caste exists in the U.S. labor market. The large undocumented population harkens back to the days of slavery and Jim Crow in the United States, with a racial caste of workers subject to exploitation and abuse in the secondary labor market. More realistic immigration laws and policy, which would minimize the size of the labor market composed of workers lack-


ing basic legal protections, would tend to minimize the troubling labor market consequences of the current system.

4. Conclusion

As it turns out, effectively closing the borders to undocumented immigrants simply is not a likely or realistic policy alternative. Neither is deporting all undocumented immigrants from the United States. Consequently, we as a nation must then consider how to better deal with the undocumented population living and working in this country. The current treatment of the undocumented worker is simply indefensible morally, legally, and as a matter of public policy.

B. Improving National Security Through Realistic Immigration Law and Policy

Philip Heymann, an expert in national security, sets forth three goals in designing strategies to improve the security of the United States and address the threat of terrorism in the future: (1) reducing the probability and harm of terrorism; (2) calming public fear and anger; and (3) respecting civil rights. Consideration of each goal proves useful in evaluating the U.S. government’s use of immigration law and policy as a counterterrorism device.

1. Minimizing the threat of terrorism.

As all would no doubt agree, the United States needs an immigration system that reduces the probability and harm of terrorism. The events of September 11 demonstrate that terrorists can skillfully exploit weaknesses in the U.S. immigration system. Almost all of the terrorists involved in the airplane hijackings entered the United States lawfully on nonimmigrant visas. This fact suggests the need for better visa monitoring, which has been a continuing—but uncompleted—project of the U.S. government. Given that most of the terrorists entered the country lawfully on temporary visas, it is curious that one of the U.S. government’s most visible responses to September 11 has

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113 See text accompanying note 30.
been to try to close the borders to undocumented immigrants, especially those from Mexico, a country not known to be a haven for terrorists.\textsuperscript{114}

Liberal admissions, with screening focused on true dangers to U.S. society, are unlikely to dramatically increase illegal entry by terrorists, which is difficult, expensive, and dangerous. With a liberal admission system, the flow of illegal entrants would be reduced and those who are attempting to enter without inspection would be more likely to pose a security risk (thus justifying the imposition of strict border enforcement measures). Currently, much of the traffic of undocumented immigrants is composed of otherwise law-abiding migrants seeking work in the United States who lack a legal avenue for admission.

A number of concrete steps could be taken to ensure that the immigration laws help to minimize the threat of terrorism. Importantly, the laws could be narrowed so that the noncitizens excluded were in fact threats to the national security or public safety. Better security and background checks could be required before allowing a noncitizen entry into the United States. Grounds for exclusion could focus on denying entry to terrorists, criminals, and diseased immigrants, not overbroad attempts at prohibiting admission of most poor and working noncitizens.

In addition, better tracking of all noncitizens in the United States is an important first step toward improving national security.\textsuperscript{115} Improved visa monitoring is consistent with more liberal admissions. Once noncitizens enter the country on valid visas, we could ensure that they are in compliance with those visas and have lawful purposes for remaining in the country.

2. Calming the public.

The United States requires a new-and-improved immigration system that instills faith and confidence in the public at large. The long, sordid history of the INS has done much to contribute to a serious lack of confidence in, and respect for, the nation’s immigration laws and their enforcement.\textsuperscript{116} To that end, the nation also must ensure that immigration enforcement avoids alienating the immigrant communities whose very assistance must be enlisted in the fight against terrorism.\textsuperscript{117} The

\textsuperscript{114} See text accompanying notes 63–65.
\textsuperscript{115} See text accompanying note 30.
\textsuperscript{116} See Part II A.
\textsuperscript{117} See text accompanying note 98.
many measures the U.S. government directed at Arabs and Muslims after September 11 estranged these communities, thereby damaging the nation's efforts to collect necessary intelligence. Besides raising serious questions over their legality, overbroad immigration measures that lack procedural safeguards appear to be discriminatory, fail to improve security, and are, at best, counterproductive.

Again, narrower exclusions and better tracking of non-citizens would do much to calm the public and inspire confidence in the immigration laws and their enforcement. The public does not have faith in the current system in terms of effective enforcement, fairness, and safety. It is the worst of all worlds, engendering little confidence and respect, lacking legitimacy with the public at large, and not working effectively.

3. Respecting civil rights.

The United States needs immigration laws and policies that respect American constitutional traditions. It unfortunately is often relatively easy for government, as well as the general public, to lash out at immigrants in times of national tragedy, just as occurred after the events of September 11, 2001. This nation has a history of unfairly and harshly treating immigrants at precisely such times. Our children's history books, I believe, will record the nation's treatment of Arabs and Muslims after the horrible events of September 11 as fitting in well with the more unsavory episodes of U.S. immigration history.

Future security measures that employ the immigration laws should scrupulously respect civil rights, avoid the appearance of impermissible racial profiling, and strive to be calculated, discerning, and rational, rather than arbitrary, capricious, and overbroad. Security measures in the immigration laws that appear measured and reasonable will help generate public confidence in the enforcement of those laws, confidence that is sorely lacking in today's counterterrorism efforts. Again, narrower exclusions that allow law-abiding workers to more easily enter the

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119 See text accompanying note 79.
120 Id.
United States, combined with better tracking of all immigrants, would demonstrate the requisite respect for the civil rights of citizens and noncitizens.

**CONCLUSION**

With time, the jitters generated in the United States by the horrors of September 11, 2001 will fade. Indeed, as a nation, emotions have calmed noticeably over the last few years. After an exclusive focus on strict anti-terrorism measures, the United States returned to serious consideration of immigration reform in 2005. However, none of the reform proposals on the table, then or now, in my estimation, would do much to regularize the migration between the United States and Mexico on a long-term basis, or to stem the rampant violation of the immigration laws. They instead at most offer short term "solutions" and purported quick fixes that will likely necessitate reform efforts in a matter of years. Most importantly, such half-baked solutions will result in, ten to twenty years from now, a new undocumented immigrant population of millions clamoring for legalization.

The United States needs and deserves immigration laws that recognize that the migration from the south into this country has been continuous over many generations and is spurred by economic opportunity and the desire for family reunification. Given the economic, political, and social realities of the situation, including the economic disparities between the United States and Mexico, the flow of migrants to this country does not appear to have an immediate end in sight.

When the appropriate time comes, this nation will hopefully engage the serious challenges posed by the great demand for labor migration and embark on regularizing the flow of labor from Mexico into the United States. Only true comprehensive reform that allows for the admission of significantly larger numbers of labor migrants—not the incremental reform floated about in Congress over the last few years—will diminish the incentives for illegal immigration and minimize the tragic human costs re-

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121 See Hing, *Deporting Our Souls* at 8–51 (cited in note 16) (summarizing various reform proposals).

resulting from the restrictive nature of current immigration laws.\footnote{123}

In this era of globalization, the United States requires a system of immigration admissions that better comports with social, political, and economic factors contributing to immigration than does the current broken immigration system. At a most fundamental level, the nation needs immigration laws that discourage migrants from entering the country unlawfully and the creation of a large undocumented immigrant population. It also needs to better track noncitizens residing in the country. The history of failed border enforcement suggests that just adding more and more border enforcement, including additional Border Patrol officers and technology, more detention facilities, and extending the border fence, will not result in diminishing the undocumented immigrant population in the United States.

Although it is not strictly an immigration concern, national security is unquestionably an issue in which immigration and immigrant policy can play a role. The possibilities for meaningful reform that addresses security as well as economic goals of immigration law and enforcement, are numerous and have not been analyzed in detail in this article.\footnote{124} At a most fundamental level, the United States needs more realistic immigration laws.\footnote{125}

National security unfortunately has come to dominate discussion of immigration law and enforcement, as well as the thorny topic of immigration reform.\footnote{126} The central contention of this article is that a more liberal immigration admission system is entirely consistent with the interests of the United States in protecting itself from another terrorist attack, a goal shared by virtually all residents—citizens and noncitizens—of this country.

\footnote{123} See Part II A.


\footnote{125} A more secure nation also requires improved communication and coordination between immigration and intelligence agencies, see Hing, 6 New Centennial Rev at 207–16 (cited in note 15), a conclusion reached by the 9/11 Commission, see National Commission on Terrorist Acts Upon the United States, The 9/11 Commission Report at 399–419 (cited in note 41).

\footnote{126} See text accompanying notes 9–10, 51–55.
Unfortunately, the current system, which has contributed to a shadow population in the country of millions of people, makes little sense from the standpoint of national security and public safety. Rather, the United States would do better to embrace immigration laws in which the admission of immigrants better approximates the demand for immigrant labor. Such a law would be both better for the national economy and for national security.