It's the Economy, Stupid: The Hijacking of the Debate Over Immigration Reform by Monsters, Ghosts, and Goblins (or the War on Drugs, War on Terror, Narcoterrorists, Etc.)

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INTRODUCTION

The title to this conference—“Drug War Madness: Policies, Borders, and Corruption”—brings to mind many images, few of them positive. Although Mexico is not mentioned in the conference title, much of the live symposium at which this paper was originally presented discussed “drug war madness” in connection with the United States and Mexico. My contribution to the discussion will focus on the movement of people from Mexico to the United States, which is a major component of the modern intercourse between the two nations. My approach to the general topic may seem out of place here. The thrust of my remarks is that the drug trade, generally speaking, has little to do with immigration and immigrants. The same is generally true for the “war on terror,” another metaphorical war often connected with immigration. I will be not be saying anything particularly sensational. Drug lords, narcoterrorists, sex trafficking, and Islamic terrorists will not play much of a role in my presentation.

My central point is that most migration to the United States has little to do with the drug war, narcoterrorism, national security, or the many other topics that this symposium touched on. Indeed, I am tired—perhaps irritated is a better word—with the constant and repeated hijacking of the debate over reform of U.S. immigration laws by resorting to hyperbole about the flow of drugs, terrorists, narcoterrorists, and the like across American

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borders, particularly the U.S./Mexico border. It is important for all of us to keep in mind that, for nearly as long as there has been a nation known as the United States, immigrants have been blamed for virtually every social, economic, and political ill that this country has ever faced. From communism to health care reform, from crime to environmental degradation, from terror to drugs, immigrants have been a most convenient—and frequently employed—scapegoat. We often—indeed, regularly—forget this fundamental lesson of American history and repeat the mistakes of the nation’s well-known, and deeply regrettable, nativist past.

Unfortunately, in the United States, hyperbole and high drama often poison any attempt at reasoned discussion of the issue of immigration, especially the longstanding and continuous migration from Mexico to the United States. Perhaps most common is how some politicians and pundits often proclaim that the nation is gripped by nothing less than an “alien invasion.” Similarly, many observers deeply fear that even a small relaxation of U.S. border controls or any liberalization of the nation’s admissions criteria will “open the floodgates” to the unwanted—and, not coincidentally, racially, culturally, religiously, linguistically, and otherwise different—hordes of the world, as well as to drugs, terrorism, and crime. Unfortunately, it is all too infrequent that immigrants are contemporaneously credited for the positive contributions that they regularly make to U.S. society, a truly ironic oddity for a country that often touts itself as a “nation of immigrants.”

1 See generally infra Part I.
As you might surmise from my tone, the tenor of the immigration debate is extremely frustrating for people like myself, who attempt to take immigration, U.S. immigration law, and related issues seriously. My firm conviction is that, despite what Lou Dobbs said on a nightly basis for many years on CNN, immigration is not all about drugs, terrorism, leprosy, September 11, welfare, crime, and just about every other social problem about which certain segments of the public, policymakers, and pundits have profound—and, at times, even legitimate—worries. Rather, if we were to focus on undocumented immigration from Mexico to the United States, we would see that this migration, like migration generally, is primarily about jobs and economic opportunity. I concede that the availability of political and other freedoms in the United States, as well as the desire to reunite with family members here, provides motivation to immigrate, but economics is the magnet that, at an important level, motivates in whole and in part most decisions to journey to this country.

If one accepts that fundamental principle as true, some corollaries naturally follow. Immigration generally is not part and parcel of the drug trade. Immigration generally is not pursued so that noncitizens can commit terrorist acts in the United States. Immigration generally is not accomplished so that immigrants can come to this country to engage in a crime wave. Immigrants generally do not come to the United States to secure public benefits, the vast majority of which they are ineligible for anyway. Immigrants generally do not come here to have “anchor babies” so that an entire village can follow.

Restrictionists regularly rail about what immigrants, the Mexican government, and U.S. “elites” conspire to bring to this country.

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6 See JOHNSON, supra note 4, at 119–20. As it has been historically, immigration today primarily is about the movement of labor across national borders for economic opportunity and material advancement. See also infra Part II.

7 JOHNSON, supra note 4, at 139.

8 Id. at 155–57.

9 Id.

10 Id.


12 Nicole Newman, Note, Birthright Citizenship: The Fourteenth Amendment’s Continuing Protection Against an American Caste System, 28 B.C. THIRD WORLD L.J. 437, 441 (2008) (“[T]he threat of chain migration, pejoratively called the ‘anchor baby’ phenomenon, is the most inflammatory rhetoric that opponents of birthright citizenship employ.”) (footnote omitted).
country through immigration by reciting a massive laundry list of horribles.\textsuperscript{13} In my estimation, those claims are little different in kind from the claim of the “birthers” that hundreds of people who did not know each other conspired close to five decades ago to install a Black foreigner as President of the United States.\textsuperscript{14}

Most fundamentally, immigration to the United States is generally about the migration of people—lawfully and not—to the United States for jobs.\textsuperscript{15} Viewing immigration as predominately an issue of labor migration in the global economy will not inflame passions as effectively or as quickly as viewing it as a drug, health, public benefits, crime, environmental, or security problem. It is not likely to seem like news, or even to seem all that worrisome to some people. Nonetheless, just because something does not spark fireworks does not mean that it is not true.

Unfortunately, the characterization of immigration as primarily about the movement of labor across national borders is much less likely to make the evening news than the sensational claims that immigrants are drug smugglers, terrorists, and disease carriers. It is this kind of sensationalism, however, that makes immigration an extremely difficult policy issue to discuss rationally in mixed company. I believe that the public debate on immigration in the United States, as well as other nations, is all-too-often more irrational than rational.\textsuperscript{16} For that reason, it is imperative that responsible people, including academics, political

\textsuperscript{13} Johnson, supra note 4, at 58–59.

\textsuperscript{14} The U.S. Constitution provides that “[n]o Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of the President.” U.S. Const. art. II, § 1, cl. 5. President Obama’s eligibility for the Presidency has been repeatedly challenged on the grounds that, despite public records showing he was born in Hawaii, he allegedly was born outside of the United States. See Samuel G. Freedman, In Untruths About Obama, Echoes of a Distant Time, N.Y. Times, Nov. 1, 2008, at A21; Frank Rich, The Obama Haters’ Silent Enablers, N.Y. Times, Jun. 14, 2009, at 8; Dana Milbank, President Alien, and Other Tales From the Fringe, Wash. Post, Dec. 9, 2008, at A3. There is even a website devoted to the so-called “birther” movement, see http://www.birthers.org/, which Lou Dobbs gave mainstream credence to before his departure from CNN. See Michael Shain & David K. Li, Dobbs Gave Up on $9M, N.Y. Post, Nov. 13, 2009, at 15.

\textsuperscript{15} See infra Part II.A.

leaders, and the media, who participate in the public discourse over immigration take great care to fairly, reasonably, and thoughtfully discuss the issues in a balanced fashion. Hopefully, fair and rational discussions of the real issues implicated by immigration will make it easier for us to reach common ground on a deeply contentious, yet most pressing, policy area that greatly affects nothing less than real human lives.

Part I of this essay will attempt to debunk the frequently-made, but never persuasively argued, charge that U.S. immigration law and enforcement is central to the so-called “war on drugs,” as well as the “war on terror.” At most, immigration has a very limited role to play in those two metaphorical “wars.” Rather, the berating of immigrants and immigration for everything wrong with America is nothing more than a smokescreen to hide the true political ends of the speaker. The real intent of many users of inflammatory rhetoric is to bring more political heat to bear on immigration and promote a particular restrictionist political agenda. Immigrants are people who many love to hate, and if you add in their so-called involvement with drugs, crime, or terrorism, then you have the perfect enemy: the most unpopular of the unpopular.

Part II of this essay discusses how most immigration is connected, directly or indirectly, to labor migration of individuals and families and the relative economic opportunity in the United States. Family reunification is discussed as a secondary, and often related, major motivating factor for the movement of people across national borders. There are indeed legitimate issues to discuss concerning the labor aspects of immigration, including class, economic, and general social consequences of the migration of workers to the United States.

A true dialogue about immigration must be honest, transparent, and above-board. If, for example, one is concerned with the racial, ethnic, and cultural composition of the immigrants to the United States, we should talk about that, rather than to attempt to restrict migration from Mexico and to deceptively deny that one is racist or anti-immigrant but simply

17 See infra Parts I.A–B.
18 Id.
19 See infra Part II.
is “anti-illegal immigrant.” A rational and honest discussion of immigration would go a long way toward making sensible reform possible.

I. IMMIGRATION AND THE WAR ON DRUGS, THE WAR ON TERRORISM, AND THE WAR ON IMMIGRANTS

Over the last few decades, the United States has been inclined to declare metaphorical wars to politically energize the public to devote substantial resources and adopt drastic measures directed at addressing serious social problems.21 In the 1980s and 1990s, the nation relentlessly pursued the “war on drugs,” with many harsh—some have said draconian—measures.22 That war continues today, and although many people—disproportionately racial minorities and immigrants—have been imprisoned, the costly measures do not appear to have significantly reduced drug consumption, the drug trade, or overall availability of drugs in the United States.23

After the tragic events of September 11, 2001, the nation embarked on another war, known as the “war on terror”—a name which evokes fear, passion, and anger. Not limited to actual armed conflict, and replete with deaths and casualties in Afghanistan and Iraq, this metaphorical war also included a set of harsh measures that disparately affected noncitizens of particular national origins, specifically Arabs and Muslims in the first instance, but had collateral consequences for virtually all noncitizens and many U.S. citizens as well.25 Still, it is not certain that we as a nation are any safer today because of the security measures. Nevertheless, political leaders and pundits regularly remind us that the war on terror is nowhere near an end.26

21 One of the first in recent memory was the “war on poverty” declared by President Lyndon Johnson in the 1960s. See generally BILIANA C.S. AMBRECHT, POLITICIZING THE POOR: THE LEGACY OF THE WAR ON POVERTY IN A MEXICAN-AMERICAN COMMUNITY (1976); HUBERT H. HUMPHREY, WAR ON POVERTY (1964); MICHAEL B. KATZ, THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE (1989); JILL QUADAGNO, THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY (1994).

22 See infra Part I.A.

23 Id.

24 See infra Part I.B.

25 Id.

Perhaps not surprisingly, both the war on drugs and the war on terror have most directly affected people of color and noncitizens in the United States. Today, commentators often characterize immigration as a crime problem, a security problem, or a combination of the two. Consequently, noncitizens and racial minorities are disproportionately affected. Indeed, noncitizens, with fewer legal protections under the U.S. Constitution and laws than American citizens, have proven to be the most vulnerable victims in the war on drugs and the war on terror. Unlike U.S. citizens, for example, noncitizens in both metaphorical wars can be subject to criminal sanctions and deported or excluded from the United States. Both wars have resulted in massive—and record—numbers of deportations, as well as the denial of admission to many noncitizens into the country. Ultimately, many of those directly affected had nothing to do with drugs or terrorism but simply constitute collateral human damage in the “wars” on those two evils.

A. Crime, Immigration, and the “War on Drugs”

For all of recent memory, federal, state, and local law enforcement agencies across the United States have aggressively pursued the “war on drugs.” As politicians from diverse political persuasions embraced “tough on crime” measures, Congress and state legislatures for more than three decades have stiffened criminal penalties for drug crimes and increased law enforcement budgets. Not coincidentally, the U.S. prison population increased six-fold from 1972-2000, with about 1.3 million men incarcerated in state and federal prisons at the dawn of the new millennium. As of 1997, a whopping sixty percent of federal prisoners and

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28 See infra Part I.B.


30 See infra Part I.B.

31 Id.

32 Id.

about twenty percent of state prisoners had been convicted of drug crimes.34

In the early 1990s, the perception among the general public was that crime was simply out of control on the streets of urban America.35 Legislators and law enforcement officers aggressively responded to this widespread public perception. In 1994, for example, President Bill Clinton, a Democrat who supported a firm anti-crime platform in his campaign for the Presidency, signed into law a comprehensive crime bill containing anti-drug measures and even authorizing the imposition of the death penalty for certain federal drug-related offenses.36

Even though the available statistical data suggests that whites, Latina/os, Blacks, and Asian Americans have roughly similar rates of illicit drug use,37 the “war on drugs” as it has been aggressively enforced in the United States has had devastating impacts on minority communities.38 This should not be entirely surprising. In fighting the drug war, police commonly employed drug courier39 and gang profiles in their investigatory activities,40 which almost invariably directed law enforcement attention toward young African American and Latino men. Racial profiling in traffic stops on the nation’s roads and highways emerged as a central law enforcement tool in the “war on drugs.”41 Today, in cities and towns across the country, minorities persistently complain of being stopped for nothing more than “driving while Black” and “driving while Brown.”42

34 Id. at 152.
37 U.S. NAT’L INST. ON DRUG ABUSE, DRUG USE AMONG RACIAL/ETHNIC MINORITIES 29–58.
Studies show that police regularly stop and search African Americans and Latina/os in larger numbers than their percentage of the general population.43 Racially disparate policing has had dramatic, severe, and racially disparate consequences. Race-conscious policing invariably means disparate criminal convictions and incarceration. Not surprisingly, African Americans and Latina/os today are disproportionately represented among prison populations across the country—with prisons being one of the few institutions in American social life in which these groups are over-represented as to percentage of the general population. By 2002, around twelve percent of black men in their twenties were in prison or jail—nothing less than a shocking statistic.44

The war on drugs also dramatically affected noncitizens in the United States. During roughly the same time period that the war on drugs escalated, “criminal aliens,” among the most reviled of all groups in the American psyche,45 suffered punitive attacks in the halls of the U.S. Congress as well. In two pieces of immigration reform legislation in 1996, Congress expanded the criminal grounds for deportation (especially for drug offenses) and the definition of “aggravated felony,”46 imposed mandatory detention on many noncitizens facing removal on criminal grounds, and sought to limit, if not eliminate, judicial review of removal orders of “criminal aliens.”47

43 For example, a much-publicized 1999 study by the New Jersey Attorney General, found that these minority groups represented the “overwhelming majority of searches (77.2%).” Peter Verniero, Attorney General (New Jersey), Interim Report of the State Police Review Team Regarding Allegations of Racial Profiling 27 (1999).
44 See Pettit & Western, supra note 33, at 151 (citation omitted).
A growing body of scholarship has analyzed the intersection of immigration and criminal law. Besides the more punitive treatment of “criminal aliens,” violation of the U.S. immigration laws has been criminalized, with increases in prosecutions for unlawful re-entry into the country resulting in a caseload crisis in the federal courts, particularly in the districts along the U.S./Mexico border. Rather than simply deporting noncitizens who used fraudulent documents to secure employment, as had been the past practice, the U.S. government in recent years has increasingly pursued criminal charges of identity theft against undocumented workers and imprisoned noncitizens before deporting them.

Although immigrants are often blamed for crime, ample evidence demonstrates that the crime rates among immigrants are no greater—and often less—than among the general population. This basic fact, however, fails to dampen the consistent attacks on “criminal aliens,” with politicians and the press often railing about the alleged crime wave created by immigrants in the United States.

B. Immigrants and the “War on Terror”

Following the tragic events of September 11, 2001, President George W. Bush declared a “war on terror.” This new war had an incredible effect on noncitizens in the United States—and not just so-called terrorists. With the onset of the war, record levels

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49 See supra notes 45–47 and accompanying text.

50 See JOHNSON, supra note 4, at 179–82.


52 See JOHNSON, supra note 4, at 155–58.

53 See id.

54 President Bush's Address on Terrorism Before a Joint Meeting of Congress, N.Y. TIMES, Sept. 21, 2001, at B4.

of deportations of noncitizens followed, including the removal of many based on relatively minor crimes; moreover, many other security-related measures had major impacts on noncitizens from Mexico and Central America, almost all of whom had nothing to do with terrorism.

After September 11, 2001, the U.S. government took a variety of immigration-related measures in the name of national security. Security measures in part were directed at noncitizens because a small group of noncitizens were involved in the terrorist acts of September 11. The U.S. government no doubt felt encouraged to take—or at least was not deterred from taking—aggressive measures against noncitizens generally, including those for whom there was no individualized suspicion that they were involved in terrorist activities, because deference to the political branches of government on national security matters involving “aliens” has a lengthy historical pedigree. For example, in *The Chinese Exclusion Case*, which upheld an


59 As some scholars have noted:

As far back as the Alien and Sedition Acts of 1798, and then in the 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 the immigration laws with little recourse to the constitutional protections that would limit government outside of immigration.


1882 law excluding most immigrants from China from U.S. shores (and that remains good law), the Court emphasized that

[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.

After September 11, fear, anger, and outrage seized the day across the United States. The months after the horrible loss of life saw the U.S. government adopt a flurry of extraordinary policies directed primarily at Arab and Muslim noncitizens. Interrogations, arrests, detention, special registration, and selective deportations of Arabs and Muslims emerged as a central part of national security policy. For a lengthy period after September 11, preventative, indefinite detention of Arabs and Muslims became an important component of the “war on terror.” Arrests, detentions, and interrogations, without access to counsel or the handing down of criminal indictments, became commonplace. The U.S. government, at least initially, focused removal efforts selectively on noncitizens from nations that it designated as “harboring” terrorists, identified for the most part

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62 The Chinese Exclusion Case, 130 U.S. at 606 (emphasis added).
63 See Jonathan H. Marks, 9/11 + 3/11 + 7/7 = ?: What Counts in Counterterrorism, 37 COLUM. HUM. RTS. L. REV. 559 (2006) (analyzing psychological pressures on society to act decisively, and at times overreact, in times of social stress); Adrian Vermuele, Libertarian Panics, 36 RUTGERS L.J. 871 (2005) (studying how law often cannot restrain the excesses of a society in panic over contemporary events).
as nations populated predominantly by Arabs and Muslims. For a time, secret deportation hearings became the norm, with the public denied the opportunity to see how its government was treating certain noncitizens.67

Among the set of extraordinary steps taken in the name of national security, the U.S. government required “special registration” of certain Arab and Muslim noncitizens.68 The Executive Branch justified the imposition of special registration requirements on discrete groups of noncitizens based on national origin and religion on the ground that the political branches of the federal government had “plenary power” over immigration, with little, if any, room for judicial oversight.69 Upon voluntarily reporting, thousands of registrants found themselves placed in removal proceedings by the U.S. government; many also were detained.70 Mass protests followed.71 Critics powerfully challenged the special registration program as impermissible racial profiling.72

Although criticized, the targeting of Arab and Muslim noncitizens in various security policies flourished in the several


69 Id. at 52,585.


years after September 11, 2001. To make matters worse, the government’s harsh treatment of noncitizens appears to have encouraged violence by private citizens against both Arabs and Muslims, and those appearing to be Arab and Muslim.

Importantly, the post-September 11 security measures put into place by the U.S. government were built on a sturdy foundation of previous security measures directed at Arabs and Muslims. For example, the definition of “terrorist activity” that subjects noncitizens to exclusion and deportation from the United States has long been a part of the U.S. immigration laws and frequently has been criticized as excessively broad. In the USA PATRIOT Act, Congress, in the wake of September 11, further expanded that definition.

The impacts of the U.S. government’s security measures quickly spread like wildfire beyond Arab and Muslim noncitizens. They, in fact, had far-reaching consequences for virtually all immigrant communities in the United States, as well
as many U.S. citizens of particular national origin ancestries. Record numbers of deportations, aggressive enforcement of the immigration laws, new citizenship requirements for certain security-related jobs, and a general immigration crackdown affected immigrants, with the largest cohort of lawful as well as undocumented immigrants affected from Mexico. Immigration raids, security checks, and removal campaigns have resulted in many more ordinary Mexican immigrant workers, including many who simply were undocumented, being affected than real or imagined terrorists.

“Criminal aliens,” including many Mexicans and Central Americans, ultimately made up most of the collateral damage from the national security measures put into place after September 11, 2001. Since then, the nation each year has set record numbers—in the hundreds of thousands—of detentions and removals of noncitizens from Latin America. Few had any involvement in the least in terrorism, but were nonetheless all victims of the security and public safety measures adopted in the name of the “war on terror.”

Anti-terror measures quickly transformed into proposals to tighten the U.S./Mexico border. Indeed, September 11, 2001 marked a dramatic shift in the nature of the debate over immigration reform in the United States, with terrorism and national security coming to dominate the immigration debate. The horrible losses of September 11 halted the discussion of measures to ameliorate some of the harsh edges of immigration reforms from 1996. Immigration reform, as well as a possible migration agreement that would have regularized labor migration in North America, had been the subject of serious talks between the United States and Mexican governments in the days immediately before September 11.

81 See Johnson, September 11 and Mexican Immigrants, supra note 56, at 852–70. See also Bender, supra note 80.
82 See Johnson, September 11 and Mexican Immigrants, supra note 56, at 852–70. See also Bender, supra note 80 (documenting how “war on terror” measures had adversely affected Latinas/os in the United States).
83 See Johnson, September 11 and Mexican Immigrants, supra note 56, at 856–65.
84 See id.
Moreover, the fear of terrorism, feeding off of a general tendency among many U.S. citizens to restrict immigration and to blame immigrants for the problems of the day, contributed to a general “close the border” mentality that still commands significant popular support in the United States. Politicians from a wide variety of political persuasions advocate enhanced border enforcement in the name of national security.88

Along these lines, increased border enforcement on the nation’s border with Mexico in the name of the “war on terror” became increasingly popular. Among other effects, increased border enforcement exacerbates the problem of human trafficking of migrants—an industry that has grown substantially over the last decade as would-be migrants now pay more (and more) to have guides help them avoid the ever-more-stringent border enforcement obstacles put into place by the U.S. government—from Mexico.89 Increased border enforcement had disparate impacts on Mexican nationals, as suggested by the fact that a majority of undocumented immigrants living in the United States are from Mexico.90

As Professor Enid Trucios-Haynes 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.91


The Sensenbrenner bill, passed by the U.S. House of Representatives in December 2005, was one of the most extreme enforcement-only immigration reform proposals to have received serious consideration in recent years. The bill would have made, for example, the mere status of being an undocumented immigrant a felony and threatened to criminalize the providing of humanitarian assistance, broadly defined, to undocumented immigrants. In a comment all-too-typical of the contemporary public discourse over immigration, Senator John Cornyn (R-Texas) emphasized that the debate over immigration reform “is . . . and I would say first and foremost about our Nation’s security. In a post-9/11 world, border security is national security.” As another member of Congress put it, security is an overriding issue confronting the United States, and if we want enhanced security, illegal immigration must be stopped. In fact, illegal immigration is an addiction that the United States must break, or it will break the United States.

As one member of Congress aptly observed in analyzing immigration reform in recent years:

The necessary pursuit of national security should not have been used by the new majority in power 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.96

C. Conclusion

Together, the dual wars on drugs and terror in the United States unfortunately have had disparate impacts on people of color and immigrants. Some commentators contend that the harsh steps pursued by the government in both wars were serious mistakes.97 As will be explained in Part II, immigration should not primarily be thought of as about drugs, crime, or national security.

II. THE REAL ISSUES BEHIND IMMIGRATION: LABOR MIGRATION AND MORE

While the public and policy-makers chase paper tigers that deflect them from the real issues raised by immigration, immigrants, and immigration reform, there are legitimate issues that should and must be addressed. To do so, the nation needs to, at a minimum, admit that immigration generally is about labor migration—not drugs or terrorism—in an increasingly integrated global economy.98 That, however, should not end the discussion. Indeed, there are some important issues related to labor migration that need to be addressed in thinking about immigration, immigrants, and reform of the U.S. immigration laws.

A. The Exploitation of Undocumented Workers

Immigration, including undocumented immigration, is primarily about labor migration, a fundamental truth backed up by study after study. While some noncitizens who come to the United States are fleeing civil war, political and other persecution, as well as severe poverty, and thus deserve humanitarian treatment under our laws, most leave their native land to come to work in the country (or come to the United States to flee persecution and poverty, and to work). Economists appreciate that labor and capital are factors of production and necessary for a healthy domestic economy. The U.S. immigration laws, however, fail to adequately calibrate the admission of immigrants to the nation’s labor needs.

As has long been the case, the economic and other freedoms and opportunities in this great nation serve as a beacon to people the world over. True, recent economic times have been difficult, a fact seen in the stabilization of the undocumented immigrant population in the United States in recent years. Nonetheless, immigrants, generally speaking, historically have been attracted by the economic opportunities that exist in this country. They come to work and earn more than they would in their native countries, thereby improving the quality of their lives and the lives of their families.


101 See Max J. Pfeffer, The Underpinnings of Immigration and the Limits of Immigration Policy, 41 CORNELL INT’L L.J. 83, 92–93 (2008) (highlighting that economic conditions in Mexico have led an increasing number of Mexicans, particularly from rural communities, to leave Mexico in search of employment in the United States).


U.S. immigration laws and their enforcement, unfortunately, fail to allow for adequate levels of lawful migration of labor to the United States. Specifically, they leave few opportunities for many low- and medium-skilled workers to migrate lawfully, and thus effectively encourage undocumented migration by these workers. With few enforceable legal protections, undocumented immigrants are paid substandard wages and work under difficult, at times harsh, conditions. Through its restrictiveness, the current system of immigration contributes to the exploitation of undocumented immigrants in the workplace.

Because immigration, in certain respects, resembles international trade, some observers believe that foreigners should be allowed freer access to the U.S. labor market than that permitted under current U.S. law. Arguments therefore have been made for more liberal admission of workers into the United States.

Labor migration, however, is distinct from trade in the minds of many. For that reason, free labor movement does not necessarily accompany free trade arrangements between nations. For example, the North American Free Trade Agreement (NAFTA), the most significant international accord among the North American nations in recent memory, does not generally address migration between the member nations, the United

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110 Id. at 377, 410–11.
States, Mexico, and Canada. The European Union (EU), which generally permits labor migration within the member nations, started off without permitting the movement of labor across national boundaries before moving to a system in which labor migration between the EU nations is generally permitted.

While jobs attract workers to the United States, the public response to immigration and immigrants is complicated. This, in large part, is because the migration of labor to the United States also involves the movement of human beings to the national community, who bring distinctive races, national origins, cultures, religions, languages, and colors, all of which may generate fears, concerns, and negative reactions among segments of the American public. An uneasiness with change helps to explain some of the nativist outbursts in the United States. Racism and nativism are others. It is important to remember that, historically, one of the nation’s strengths has been its ability to adjust and, for the most part, integrate immigrants into U.S. society.

Immigration often is said to be connected with a number of other social problems, such as health, crime, the environment, and related issues. This is in no small part because, as previously mentioned, immigration is about the movement of people. People possess many distinctive characteristics, engage in a wide variety of economic and other activities, experience and contribute to social problems, and become a part of the

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114 For a famous quote illustrating this point, see Max Frisch, Überfremdung I, in SCHWEIZ ALS HEIMAT? 219 (1990) (“We wanted workers, but people came.”) (“Man hat Arbeitskräfte gerufen, und es kommen Menschen.”).

115 See supra note 2 (citing authorities). Racism helps explain some of the negative reaction as well. See infra Part II.E.


communities in which they (and we) live, even if they are not always offered the rights of full members of the community.

What is critical for the nation and Congress to realize is that labor is central, not peripheral, to immigration to the United States. For the law to operate effectively and efficiently, the U.S. immigration laws must appropriately address labor demand. Only with that understanding will it be possible for the nation to discuss, formulate, and enact truly lasting immigration reform.118

B. The “New” Jim Crow

Besides a segmented labor market with undocumented immigrants exploited in one of them, there is a racial caste quality to the labor market structure in the modern United States. People of color comprise a large percentage of the undocumented population, a majority of whom are from Mexico and Central America, and these individuals often find themselves relegated to lower wages and poorer working conditions than most Americans. The result might be termed the “new” Jim Crow.119

Enforcement of wage and labor protections to ensure the protection of all workers would help to minimize, if not eliminate, the dual labor market structure that currently exists in the United States.120 In any event, my point here is that the answer to the segmented labor markets most definitely is not some misguided attempt to close the borders. As recent history has proven, this is simply not possible.121 Instead, worker protections and their aggressive enforcement would do much to level the playing field and eliminate the dual labor market structure.

C. The Impacts of Immigration on U.S. Citizen Workers

Immigration has negative impacts on our lowest skilled and other workers, even though most estimates show that the impacts are relatively small.122 Still, the most vulnerable citizens in U.S. society—those without high school diplomas—appear to be the most economically vulnerable to immigration, specifically the migration of unskilled labor to the United States.123 Politically speaking, we ignore at our peril the fears and concerns of our nation’s most vulnerable.

118 See Johnson, Ten Guiding Principles, supra note 98.
119 See JOHNSON, supra note 4, at 119–25.
120 See id. at 125.
121 See id. at 172–76.
122 See id. at 146.
123 See id.
As the U.S. immigration laws currently operate, employers are encouraged by rational economic incentives to move jobs to the unregulated, and more inexpensive, labor market.\textsuperscript{124} Unionization of workers then becomes more difficult, especially given the limits of federal labor law in protecting the rights of undocumented immigrants to organize collectively.\textsuperscript{125}

In this vein, some restrictionists attempt to justify efforts to limit migration on the ground that immigrants adversely affect U.S. workers, especially African Americans.\textsuperscript{126} This claim cannot be ignored. However, rather than futile attempts to close the borders, it makes more sense to protect workers, including African American workers, through wage and condition protections and enhanced educational opportunities.

Immigration also may exacerbate wealth disparities in the United States, widening the gap between the richest and the poorest in American society.\textsuperscript{127} Tax redistribution policies might help alleviate some of that inequality.\textsuperscript{128} Although enacting such policies is difficult, closing the borders is simply not a viable policy alternative.

D. State, Local, and Federal Tensions Over Immigration

Over the last few years, there has been much ferment over the role of state and local governments in immigration and immigrant law.\textsuperscript{129} For example, a 2010 law passed by the

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\begin{footnotesize}
\textsuperscript{124} See id. at 120.


\textsuperscript{127} See JOHNSON, supra note 4, at 143–47.

\textsuperscript{128} Id. at 146.

\end{footnotesize}
Arizona legislature, which sought, through a variety of means, to make “attrition through enforcement the public policy of all state and local government agencies in Arizona,” generated national controversy.130

Part of the increased state and local involvement in immigration regulation results from what I have termed elsewhere as a “fiscal disconnect” between the revenues and costs of immigration; put simply, the bulk of the tax revenues from immigration and immigrants go to the federal government and much of the costs of immigration and immigrants are imposed on state and local governments.131 As with other effects of labor migration, this problem can be addressed through means other than closing the borders, such as revenue sharing by the federal government with state and local governments. As will be discussed, some states have pursued a strategy of securing funds


from the federal government to help cover the state and local costs of immigration.

Until recently, the conventional wisdom has been that federal power over immigration is exclusive, leaving little room for state and local regulation.132 Nonetheless, in the last few years, a growing number of state and local governments, frustrated with the failure of Congress to enact comprehensive immigration reform, and increasingly uneasy over the real and imagined changes brought by new immigrants to their communities,133 have adopted harsh measures that purport to address undocumented immigration. Class and race, as well as legitimate concerns such as the unequal distribution of the costs of immigration between the federal and state and local governments, unquestionably have influenced the passage of these measures.134

Ever-tightening budgets experienced by state and local governments have contributed to the support for these immigration measures. Some costs imposed by immigration, such as elementary and secondary school education for undocumented students,135 for the most part are paid by state and local governments, while the federal government reaps the bulk of tax revenues attributable to immigration and immigrants.136 This “fiscal disconnect” contributes to state and local concern with immigration and immigrants. In the past, states such as Arizona, New Mexico, and, at times, California, have successfully sought support for the costs of immigration from the federal government.137 Efforts to directly address the budgetary impacts of immigration are more likely to bear fruit than those devoted to closing the borders, or chasing immigrants out of the city limits.

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133 See Rick Su, A Localist Reading of Local Immigration Regulations, 86 N.C. L. REV. 1619, 1623 (2008) (questioning accounts that recent efforts of local governments to regulate immigration and immigrants was a response to the failure of Congress to pass comprehensive immigration reform). See also Rick Su, Notes on the Multiple Facets of Immigration Federalism, 15 TULSA J. COMP. & INT'L L. 179 (2008) (analyzing complex issues raised by local involvement in immigration and immigrant law); supra note 129 (citing authorities on federal versus state powers over immigration regulation).
134 See JOHNSON, supra note 4, at 152–55.
136 See JOHNSON, supra note 4, at 152–55.
137 See id. at 153–54.
One report recommended that Congress should define the “appropriate spheres of legislative activity for itself and the states.”\footnote{UNIVERSITY OF DENVER—STRATEGIC ISSUES PROGRAM—2009 IMMIGRATION PANEL, ARCHITECTURE FOR IMMIGRATION REFORM: FITTING THE PIECES OF PUBLIC POLICY 15 (2009), available at http://www.du.edu/issues/reports/documents/2009IMMIGRATIONREPORT.pdf.} This might be a helpful step. But, more immediately, Congress could do much to calm immigration tensions at the state and local levels through passing meaningful immigration reform that addresses the true causes of the undocumented migration of workers, and by directly addressing the costs of immigration through assistance to state and local governments.

E. Nativism, Racism, Hate

Unfortunately, racism and xenophobia often infect the dialogue over immigration in the United States.\footnote{See supra note 2 (citing authorities).} The tone of the debate can be described as nothing less than hateful and frightening, particularly to immigrants and U.S. citizens of particular national origin ancestries. Moreover, hate crimes directed at immigrants and Latina/os have increased in recent years, as public concerns have flared over immigration.\footnote{See infra notes 162–171 and accompanying text.} To facilitate meaningful reform of the U.S. immigration laws, calm, respect, and a commitment to reasonable dialogue are all critically important.

Unfortunately, advocates of restrictionism often seek to inflame—not calm—anti-immigrant sentiment to build support for stringent immigration measures. The works of Samuel Huntington,\footnote{See generally HUNTINGTON, supra note 20.} Victor Davis Hanson,\footnote{See generally VICTOR DAVIS HANSON, MEXIFORNIA: A STATE OF BECOMING (2003).} Michelle Malkin,\footnote{See generally MICHELLE MALKIN, INVASION: HOW AMERICA STILL WELCOMES TERRORISTS, CRIMINALS, AND OTHER FOREIGN MENACES TO OUR SHORES (2002).} and Peter Brimelow,\footnote{See supra Part I. Blogs can be even more incendiary. See, e.g., VDARE.com, http://www.vdare.com (last visited Apr. 11, 2010); Michelle Malkin, http://michellemalkin.com (last visited Apr. 11, 2010).} exemplify the common ploy of immigrant restrictionists who seek to capitalize on public fears—racial, economic, cultural, social, environmental, and otherwise—of immigration and immigrants.\footnote{See generally VICTOR DAVIS HANSON, MEXIFORNIA: A STATE OF BECOMING (2003).} Such fast-and-loose characterization of the current state of immigration plays into, and reinforces, the oft-made dire claims of an “alien invasion” of the United States—a war-like situation in which outsiders are viewed as unwanted intruders who restrictionists frequently
claim deserve immediate, drastic, and almost invariably harsh action.146

Moreover, the facts suggest that the alarm over the current level of immigration is not justified. The nation simply is not experiencing anything like an “invasion.”147 Over the last decade, somewhere in the neighborhood of a million immigrants—out of a total U.S. population of more than 300 million (less than 0.5 percent)—have lawfully come each year to the United States.148 Today, roughly twelve million undocumented immigrants—approximately four percent of the nation’s overall population—live in the United States.149

The bottom line is that—although numerically greater than past epochs—the percentage of immigrants in the United States today is not all that different as a percentage of the total U.S. population from that in other periods of American history.150 Indeed, the percentage of immigrants of the total U.S. population is equaled, and in some instances surpassed, by those seen during the early twentieth century.151

True, as is the case today, growing pains resulted from the sizeable flow of immigrants.152 Nonetheless, the nation ultimately more or less accomplished the integration into U.S.

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147 See supra notes 1–4 and accompanying text.


149 See PASSEL, supra note 90, at i. Reports suggest that the lagging U.S. economy has resulted in a stabilization in the undocumented population. See PASSEL & COHN, supra note 103, at i.


152 For analysis of nativism in the early twentieth century, see HIGHAM, supra note 2.
society of this wave of immigrants. There is no reason to believe that, in the long run, the prospects for today’s immigrants are any different.

Rather than deriding immigrants and pursuing steps that make their lives miserable, government should constructively take steps to encourage immigrant assimilation, such as improving access to naturalization, increasing access to English as a second language classes, facilitating access to higher education, and pursuing other measures that might promote immigrant assimilation. In the end, punishing immigrants in the United States is both unfair and counterproductive since we cannot “deport them all” or keep all of them from entering the country.

Still, we as a nation cannot ignore that there is much anti-immigrant sentiment out there, which is especially vocal at times at the state and local levels. Consider the following description of an anti-immigrant rally in Hazleton, a rural town in Pennsylvania, home of a much-publicized immigration ordinance that generated national controversy:

[T]he anger displayed at the rally—held in support of Hazleton’s anti-immigration mayor, Lou Barletta—was enough to give anyone with a soul a serious case of the chills. . . . About 700 people attended the rally, where some in attendance tried to link illegal Mexican immigrants with the 9/11 attacks. Other speakers accused illegal immigrants of carrying infectious diseases, increasing crime and lowering property values. If Alabama’s late segregationist Gov. George Wallace had been present, he would have wondered who hired away his speechwriters.

In a similar troubling vein, the mayor of Valley Park, Missouri, which enacted an immigration ordinance similar to Hazleton’s, complained that: “You got one guy and his wife

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153 See generally SALINS, supra note 116 (summarizing assimilation of immigrants into U.S. society over history).
154 See JOHNSON, supra note 4, at 188–93.
155 See id. For example, allowing undocumented immigrants to be eligible to secure driver’s licenses would help them feel safer and more secure in our society. See supra note 16 (citing authorities).
156 See Lozano v. Hazleton, 496 F. Supp. 2d 477, 554 (M.D. Pa. 2007) (invalidating Hazleton’s immigration ordinance on the grounds that it was preempted by federal law).
158 See Gray v. City of Valley Park, 567 F.3d 976 (8th Cir. 2009). For some background on the Valley Park ordinance, see Sarah E. Mullen-Dominguez, Comment, Aliening the Unalienable: Equal Protection and Valley Park, Missouri’s Illegal Immigration Ordinance, 52 ST. LOUIS L.J. 1317 (2008). See also Oliveri, supra note 129
that settle down here, have a couple kids, and before long you have Cousin Puerto Rico and Taco Whoever moving in."\textsuperscript{159}

Similar examples abound. Joe Arpaio, Sheriff of Maricopa County, Arizona, popularly known as “America’s Toughest Sheriff,” has pursued controversial immigration and other law enforcement policies—such as forcing detainees to wear pink underwear—that regularly draw the ire of the civil rights and immigrant communities.\textsuperscript{160} The racially-tinged, anti-Mexican, anti-immigrant campaign culminating in the landslide passage of California’s Proposition 187, a measure that, among other things, denied undocumented immigrant children access to the public schools and would have required school teachers, administrators, police, and other local employees to report suspected undocumented immigrants to federal authorities, was nothing less than an anti-immigration landmark of the 1990s.\textsuperscript{161}

As this suggests, racism to some degree influences the immigration debate. To make matters worse, as anti-immigrant rhetoric escalated in the last few years, along with the national debate over immigration reform, hate crimes against Latina/os have gone up.\textsuperscript{162} In 2008, Latino immigrants were killed in vicious attacks in rural Pennsylvania and suburban New York,\textsuperscript{163} two locales that in recent years had seen the emergence of visible Mexican immigrant communities. The facts surrounding the killing of a lawful Ecuadoran immigrant, Marcelo Lucero, in Long Island in 2008 are deeply troubling.\textsuperscript{164} A group of young men allegedly began the events of a hate-filled evening with the statement: “Let’s go find some Mexicans.”\textsuperscript{165} The \textit{New York


\textsuperscript{164} \textit{See A Death in Patchogue, supra note 163.}

\textsuperscript{165} \textit{See id.}
Times later reported: “Every now and then, perhaps once a week, seven young friends got together . . . to hunt down, and hurt, Hispanic men. They made a sport of it, calling their victims ‘beaners.’”

The increase in hate crimes against Latina/os appears to be tied to the heated, at times hateful, public debate regarding immigration, which has included the scapegoating of immigrants and Latina/os for social ills ranging from crime to environmental degradation to destroying “American culture.” It hardly seems mere coincidence that hate crimes against Latina/os are on the rise at the same time there has been an overheated debate about immigration and immigrants, and immigrants have been blamed for just about every social problem imaginable.

Consider the specific context surrounding the hate murder of Marcelo Lucero. In Long Island, New York, the local county executive had railed against undocumented immigrants for months. Tempers flared and a gang of teenagers subsequently killed a Latino immigrant. Similarly, earlier in 2008, in Shenandoah, Pennsylvania, a group of young men beat to death an immigrant from Mexico. Not that long before, tensions ran high with passage of the anti-immigrant ordinance (which a court enjoined) in Hazleton, a rural Pennsylvania town about twenty miles away.

The local immigration measures serve as a bellwether for the racism that generally influences the formation of the immigration and immigrant laws and their enforcement. The animus, which often is rawer at the local level, since it tends to be less sanitized than the debate in Washington, D.C., almost inexorably animates some of the debate over immigration reform at the national level and influences national immigration law

168 See supra notes 139–161 and accompanying text.
170 See Medina, supra note 163.
171 See supra notes 156-157 and accompanying text. After a jury acquitted the defendants on the most serious charges, the U.S. government brought a hate crime prosecution, along with charges against local police, for a cover-up of the crime. See Sean D. Hamill, Federal Charges Are Filed In Killing of Immigrant, N.Y. TIMES, Dec. 16, 2009, at A27.
and policy. For example, despite its judicial invalidation, Proposition 187, with anti-Mexican sentiment at its core,\textsuperscript{172} led to aggressive federal action to tighten the border and resulted in legislation that limited benefit eligibility for lawful immigrants\textsuperscript{173} and dramatically increased noncitizen detention and deportation.\textsuperscript{174} Because such measures fail to go to the root of undocumented immigration, undocumented immigration continues.

CONCLUSION

There are unquestionably many important issues to discuss concerning immigration to the United States. Many of them are not altogether easy to answer. Nonetheless, these are precisely the questions that do not get addressed when we are deceived by fiery rhetoric that alleges that drugs, terrorism, and [fill in the blank with your favorite social ill] are at stake when we discuss immigration. The nation, however, suffers when the debate is hijacked into realms far afield from the core issues truly at stake in immigration reform.

Although drugs and terrorism are worthy of concern, they should not be the primary concerns when it comes to immigration. The nation does a serious disservice to both itself and the issue when it forgets that simple fact and ventures into previously charted waters that have taken us into some of the most sordid chapters of U.S. history.\textsuperscript{175} Indeed, I do not think that it will be long before it will become the conventional wisdom that the Bush administration’s “war on terror”—complete with mass detentions, removals, special registration, and even torture—was a mistaken endeavor, much like the Japanese internment during World War II or the Mexican “repatriation” during the Great Depression.\textsuperscript{176} The same is true for the “war on drugs,” with its devastating impacts on minority and immigrant communities.

The time is ripe for a sober discussion of immigration reform. To do so, we must ensure that we focus on the true issues at stake, not the demons of immigration that inflammatory and

\textsuperscript{172} See JOHNSON, supra note 4, at 150–55, 193. See also supra notes 132–134 and accompanying text.
\textsuperscript{173} See JOHNSON, supra note 4, at 150–55, 193.
\textsuperscript{174} See supra Part I.A.
\textsuperscript{175} See supra note 2 (citing authorities).
insensitive talk often seeks to capitalize on and which frames much of the modern public discourse over immigration.