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

Kevin R. Johnson
Bernard Trujillo, Valparaiso University

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Article

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

Kevin R. Johnson† and Bernard Trujillo††

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

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

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


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

With few legal constraints and considerable deference from the courts, immigration law and policy quickly emerged as ground zero in the so-called war on terror declared by the Bush administration not long after September 11.4 By many accounts, the measures unnecessarily sacrificed the civil rights of noncitizens—and, in certain instances, citizens.5 Each year, deportations rose to record levels as the U.S. government annually removed from the country hundreds of thousands of noncitizens—almost all of whom had nothing whatsoever to do with terrorism.6 The policies forever changed the lives of thousands of people and their families and friends.

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

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4. See infra Part I.A.

5. See infra Part I.A.


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

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

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

8. See infra Part II.
10. Id. at ii (noting that Mexicans represented over half of the undocumented immigrant population in 2005).
size of the undocumented population in the United States, enhanced border enforcement has failed.\textsuperscript{13}

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

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

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

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

\textsuperscript{15} See infra Part II.


\textsuperscript{17} See infra Part II.


\textsuperscript{19} See Leo R. Chavez, Spectacle in the Desert: The Minuteman Project on the U.S.-Mexico Border, in GLOBAL VIGILANTES: PERSPECTIVES ON JUSTICE AND VIOLENCE (David Pratten & Atreyee Sen eds., forthcoming Sept. 2007); Peter Yoxall, Comment, The Minuteman Project, Gone in a Minute or Here to Stay? The Origin, History and Future of Citizen Activism on the United States-
ment that received an extraordinary amount of press coverage, supported those and even tougher policies; at times, the Minutemen themselves patrolled the border in search of undocumented immigrants. In contrast, in the spring of 2006, immigrant supporters took to the streets by the tens of thousands in protest of the harsh enforcement-only approach embraced by a punitive bill passed by the U.S. House of Representatives.

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

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


21. Id.


24. See infra Part II.

racism contributed to the passage of the infamous laws excluding Chinese immigrants from the United States in the late nineteenth century.26 The Red Scare following World War I, combined with racial anxieties, led Congress to create a discriminatory national origins quota system in 1924.27 In the 1950s, the Cold War brought the nation politically motivated and ideologically driven detentions and deportations of noncitizens even loosely suspected of Communist sympathies.28 In 1996, in response to the bombing of the federal building in Oklahoma City perpetrated by U.S. citizens, which, strangely enough, fueled fears of foreign terrorism, Congress passed two punitive immigration reform laws29 that went well beyond having anything to do with terrorism. These reforms punished immigrants convicted of ordinary criminal offenses through detention and harsh new removal grounds combined with stringent limitations on judicial review of the executive branch’s immigration decisions. Characterized as “radical” by immigration moderates,30 many, if not most, informed observ-


28. *See* Kevin R. Johnson, The Antiterrorism Act, The Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens, 28 ST. MARY’S L.J. 833, 850–60 (1997); *see, e.g.*, Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 215–16 (1953) (finding the U.S. government could indefinitely detain a long-term lawful permanent resident based on secret evidence—later found to be insufficient to justify exclusion—that he was a danger to national security); Galvan v. Press, 347 U.S. 522, 529 (1952) (sanctioning the removal of a long-term lawful resident on account of membership in an organization the U.S. government classified as “Communist”); Harisiades v. Shaughnessy, 342 U.S. 580, 596 (1952) (upholding the deportation of three former Communist party members); United States ex rel. Knauff v. Shaughnessy, 335 U.S. 537, 544 (1948) (declining to disturb the U.S. government’s refusal to allow an alien to come to the United States to be with her U.S. citizen spouse based on secret evidence—later found to be insufficient to justify exclusion—that she was a danger to national security).


30. PETER H. SCHUCK, CITIZENS, STRANGERS, AND IN-BETWEENS 143 (1998) (characterizing the 1996 reforms as “the most radical reform of immigration law in decades—or perhaps ever”).
ers see these measures as unfair, ill-advised, and counterproductive.31

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

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

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

32 See infra Part I.A.
33 See infra Part I.A.
34 See infra Part I.B.
35 See infra Part II.
36 See infra Part II.A.
tant policy goals, is short sighted. The United States requires more realistic laws that better comport with the economic, political and social realities of modern immigration. A truly comprehensive approach to immigration reform, more far-reaching than any contemplated by the U.S. Congress in recent memory, is needed to bring the nation’s immigration laws in line with its various needs in the twenty-first century.

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

I. IMMIGRATION MEASURES IN THE WAR ON TERROR

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

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

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

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


[44] See, e.g., INS v. Abudu, 485 U.S. 94, 110 (1988) (“[Immigration and Naturalization Service (INS)] officials must exercise especially sensitive political functions that implicate questions of foreign relations, and therefore the reasons for giving agency decisions . . . apply with even greater force in the INS context.” (footnote omitted)); Mathews v. Diaz, 426 U.S. 67, 81 (1976) (contending that deference to the legislative and executive branches of government on immigration matters was justified in part because “decisions in these matters may implicate our relations with foreign powers”).
early federal immigration statutes of the late 1800s, immigration law has barred and deported noncitizens from the United States on ideological and national security grounds. Noncitizens can be arrested, detained, and deported under immigration law with little recourse to the constitutional protections that would limit the government outside of immigration.45

In the days after September 11, 2001, when the public un-equivocally demanded that government act decisively, immigrants could easily be targeted because the law made immigration measures the path of least resistance.46

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

To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or from the vast hordes of its people crowding in upon us. The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth . . . . If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security . . . . its determination is conclusive upon the judiciary.47

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

46. See supra text accompanying notes 42–44.
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.\[48\]

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

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

Narenji is troublesome because an executive classification based on


\[50\] Id. at 748; see also supra text accompanying notes 42–48.

\[51\] See, e.g., Ghelialian v. INS, 717 F.2d 950, 953 (6th Cir. 1983) (holding that the court lacked jurisdiction to review an Equal Protection challenge to a regulation in a deportation action); Nademi v. INS, 679 F.2d 811, 815 (10th Cir. 1982) (upholding a regulation allowing Iranian citizens only fifteen days before voluntarily departing the country); Dastmalchi v. INS, 660 F.2d 880, 881 (3d Cir. 1981) (reaching the same conclusion as the court in Ghelialian); Malek-Marzban v. INS, 653 F.2d 113, 116 (4th Cir. 1981) (reaching the same conclusion as the court in Nademi). However, when national security concerns were not at their zenith, the courts intervened to halt discrimination against Vietnamese immigrants in refugee processing. See Legal Assistance for Vietnamese Asylum Seekers v. Dep’t of State, 45 F.3d 469, 474 (D.C. Cir. 1995), vacated on other grounds, 519 U.S. 1 (1996).
nationality in a foreign affairs crisis poses the danger that the Executive will overvalue the government interest and undervalue the individual constitutional interest. In a severe crisis, the political and psychological pressures on the Executive are extreme. In this situation, executive measures may be motivated by frustration or desperation rather than by an assessment of their actual usefulness, or they may reflect little more than a desire to appear stern and decisive. Conversely, in times of crisis the individual interests of persons selected for special burdens may be grossly undervalued. Indeed, the virulence of popular feeling against Iranian nationals during the hostage crisis raises the possibility that the Executive, in imposing special burdens on Iranian students, may have been reflecting to some extent a constitutionally impermissible hostility based on national origin. The atmosphere during the hostage crisis was marked by a hostility directed at citizens of Iran that resembled to some extent the hostility that is frequently directed toward citizens of an enemy nation during a war.52

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

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


noncitizens suffered. Not much later, many different immigrant communities felt the sting of the war on terror.

1. Stage 1: Arabs and Muslims

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

Unfortunately, throughout U.S. history, harsh measures with the stated aim of bolstering national security often have
been directed at unpopular racial minorities.\textsuperscript{60} The internment of persons of Japanese ancestry during World War II is perhaps the most well-known example.\textsuperscript{61} Building on previous security-oriented measures, the U.S. government’s response to the events of September 11, 2001, proved to be no different, focusing on a discrete and insular minority that lacked meaningful power in the political process.\textsuperscript{62}

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

\textsuperscript{60} See Gil Gott, The Devil We Know: Racial Subordination and National Security Law, 50 Vill. L. Rev. 1073, 1073–77 (2005).

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

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


\textsuperscript{65} Courts have reached conflicting decisions about the constitutionality of the blanket closure of deportation proceedings in “special interest” (i.e., terrorist) cases. Compare Detroit Free Press v. Ashcroft, 303 F.3d 681, 683 (6th Cir. 2002) (holding that a policy denying press access to hearings violated the First Amendment), with North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 220–21 (3d Cir. 2002) (finding the policy constitutional). For criticism of the secret procedures, see Lauren Gilbert, When Democracy Dies Behind Closed Doors: The First Amendment and “Special Interest” Hearings, 55 Rut-
ter September 11, preventative detention of thousands of Arabs and Muslims remained a part of the war on terror.\textsuperscript{66} Arrests, detentions, and interrogations, without access to counsel or the handing down of criminal indictments, became commonplace.\textsuperscript{67}

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

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


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

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

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71. See Hing, supra note 64, at 203.
74. See Roundahal v. Ridge, 310 F. Supp. 2d 884, 892 (N.D. Ohio 2003); see also Kandamar v. Gonzales, 464 F.3d 65, 69–74 (1st Cir. 2006) (rejecting the argument that evidence obtained through registration should be suppressed based on Constitutional violations); Ali v. Gonzales, 440 F.3d 678, 681–82 (5th Cir. 2006) (finding, in a removal case, that special registration did not violate the Equal Protection guarantee); supra text accompanying notes 49–52 (discussing *Narenji v. Civiletti*).
75. See Akram & Johnson, supra note 42, at 301–26.
tion laws and has been criticized as excessively overbroad. The USA Patriot Act further expanded the definition. The terrorism provisions come up most frequently as the basis for denying relief from deportation to noncitizens, such as asylum for those who claim to fear persecution if returned to their native land. In addition, the U.S. government for a number of years before 2001 conducted so-called secret evidence hearings in cases in which the government sought to deport Arabs and Muslims based on evidence never revealed to the noncitizens. Such policies can only deepen the divide between the Muslim world and the United States and discourage much-needed cooperation with the U.S. government.

Besides immigration-related measures, the U.S. government has made some highly publicized criminal arrests in the name of fighting terrorism, almost all of which, despite the initial sensational headlines, have turned out to be of little consequence. Perhaps the most well-known example is the case of Jose Padilla, a U.S. citizen by birth who converted to Islam. The U.S. government held Padilla, originally accused by Attorney General John Ashcroft of involvement in a plot to detonate a “dirty bomb” on U.S. soil, as an enemy combatant for more than three years, only to later charge him with relatively minor criminal offenses.
Put simply, the U.S. government initially targeted Arabs and Muslims in the war on terror. However, it did not end there.

2. Stage 2: All Other Immigrants

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

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

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


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

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

B. NORTH AMERICA’S RESPONSE TO SEPTEMBER 11

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


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

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

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

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

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91. See infra text accompanying notes 92–93.

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

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

2. Multilateral Responses

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

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

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

96. See infra text accompanying notes 97–124.
In formulating the North American trade pact, the United States steadfastly refused to discuss, much less address, labor migration in any meaningful way. Consequently, NAFTA left a critical economic issue off the bargaining table and, in the end, failed to provide a comprehensive, integrated regional approach to immigration. For the time being, the United States could improve security by working more closely with Canada and Mexico on common immigration and security concerns. At this point, however, Canada, Mexico, and the United States have only cooperated to a limited extent. However, more will be necessary in the future to ensure regional security.

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

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

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


99. See, e.g., id. at 472–74.

tion as the only sound platform upon which to build public safety and security for us and for our neighbors.\textsuperscript{101}

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

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

The NAFTA nations today should recognize that North American integration is directly related to regional security.\textsuperscript{108}


\textsuperscript{102} See infra Part II (analyzing the current debate over immigration reform).

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

\textsuperscript{104} See ABA Immigration and Nationality Comm., \textit{supra} note 88, at 232–33.

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


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

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

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

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

110. See id.


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

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


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

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

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

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116. See supra Part I.A.
117. See supra Part I.B.1–2.
120. See Jerry Seper, Pro-Immigration Forces to March on Washington, WASH. TIMES, Feb. 20, 2006, at A3.
121. See Héctor Tobar, Mexicans See Good and Bad Side to Wall, L.A. TIMES, Oct. 1, 2006, at A27 ("[M]exican President Vicente Fox and President-elect Felipe Calderon have denounced the new [border] fence, as have a host of Mexican political leaders.").
zens.122 More generally, the proposed elimination of a visa waiver program for citizens of certain nations, designed to improve U.S. security, may have more general adverse foreign relations repercussions. According to the U.S. General Accounting Office, “[t]he decision to eliminate the program could negatively affect U.S. relations with participating countries, could discourage some business and tourism in the United States, and would increase the need for State Department resources.”123

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

C. THE END RESULT

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

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


125. See infra Part I.A.

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

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

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

129. See supra notes 9–10 and accompanying text (offering an estimate of 11.5–12 million undocumented immigrants living in the United States).
130. See supra text accompanying notes 10–11.
undocumented immigrants driver’s licenses, thereby denying them a basic identification document relied upon heavily by law enforcement authorities.

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

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

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

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

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


132. See infra Part II.A.

133. See infra Part II.A–B.

134. See id.

135. See Johnson, supra note 78, at 866–67.
to be close to convincing Congress to ameliorate some of the harshest provisions of the 1996 immigration reforms. Both reform efforts stopped in their tracks on September 11, as the United States immediately became preoccupied with public safety and national security. Since then, the focus in reforming U.S. immigration law and policy has been on fortifying the borders with border fences, providing additional officers and resources to the Border Patrol, and related measures; regularizing the flow of migrants from Mexico to the United States, humane treatment of immigrants, and equitable enforcement of the immigration laws took a back seat.

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

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

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

136. See Hines, supra note 7, at 21; see also supra text accompanying notes 29–31 (discussing the harsh effects of the 1996 immigration reform laws).
137. See infra Part II.A–B.
139. See supra text accompanying notes 135–37.
our Nation’s security. *In a post-9/11 world, border security is national security.*”

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

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

B. The Fixation on National Security Has Skewed the Debate over Immigration Reform.

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

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143. See supra Part II.A.
1. Immigration Monism

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

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

Since September 11, 2001, immigration monism has predominated in U.S. immigration law and policy. Recent immigration legislation, including the USA Patriot Act, the Home-
land Security Act creating the Department of Homeland Security,148 the REAL ID Act,149 and the Secure Fence Act of 2006,150 focus almost exclusively on border enforcement, with little attention paid to the economic, political, and social goals of immigration law and policy. We hear the echoes of immigration monism in the remarkable consensus, both in Congress and on Main Street, in favor of a “close the border” approach to immigration reform, including more Border Patrol officers and the allocation of ever-increasing resources to border enforcement.151 The plenary power doctrine, which some commentators not long before September 11 claimed to be in its death throes,152 was a central tool of the Bush administration in seeking to justify various border enforcement and national security measures.153

2. Immigration Pluralism

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

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151. See supra Part I.
153. See supra text accompanying notes 57–59; see also Johnson, supra note 28, at 870 (“To paraphrase Mark Twain, any claims of the [plenary power] doctrine’s death have been greatly exaggerated. Though perhaps not as potent as in days past, the plenary power doctrine survives to this day and re-surfaces frequently in Supreme Court and lower court decisions.” (footnotes omitted)).
ments by the U.S. government as part of the war on terror. Sectors of the U.S. economy dependent on highly-skilled labor demand concessions from U.S. immigration law in securing workers.

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

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


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


159. However, employer sanctions, as implemented, failed to successfully deter employers from employing undocumented workers. See Michael J. Wishnie, Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails, 2007 U. CHI. LEGAL F. (forthcoming 2007).
logy and sexual preference while also creating new employment and diversity visa programs. The LIFE Act, among other things, eased the restrictions on noncitizens seeking to regularize their immigration status.

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

3. The Current Immigration Reform Debate

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

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160. See supra text accompanying notes 94–115.
In a similar overemphasis on enforcement, Attorney General John Ashcroft found that national security concerns justified the detention of a Haitian asylum seeker without bond even though the noncitizen in question had no links whatsoever to terrorism: “[T]here is a substantial prospect that the release of such aliens into the United States would... encourage future surges in illegal migration by sea... .[S]urges in such illegal migration by sea... injure national security by diverting valuable Coast Guard and [Department of Defense] resources from counterterrorism and homeland security responsibilities.”

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

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

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166. See Johnson, supra note 131, at 232–35.
one terrorist has entered the United States from Mexico.”

Furthermore, “despite media alarms about terrorists concealed in the illegal traffic crossing the Mexican border, not a single [person charged or convicted of terrorist acts, or killed in such acts] entered from Mexico.”

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

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

CONCLUSION

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

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


171. See supra text accompanying notes 100–03.

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

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

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

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


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

\(^{175}\) See supra text accompanying note 9–10.

\(^{176}\) See Hing, supra note 64, at 207–16.
Making undocumented immigrants eligible for driver’s licenses might well improve security. Unfortunately, a preoccupation with national security has poisoned the debate over driver’s licenses, just as it has with immigration reform generally. At a time when the United States needs to retool and revisit its immigration laws to protect national security, as well as to promote legitimate political, social, and economic goals, the nation appears to be the slave of fear. Because fear to this point has prevailed, the United States has failed to thoughtfully reform its immigration laws and, among other things, improve its national security.

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


178. See supra Part II.