

# ARTICLE

## THE ALIEN INVASION?

*Ediberto Román\**

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\* Professor of Law, Florida International University. I would like to thank Professors Michael Olivas, Richard Delgado, Gerald Torres, Jean Stefancic, Mario Barnes, Mary Romero, Kevin Johnson, Bill Hing, Berta Hernandez, Angela Onwuachi-Willig, Victor Romero, and my Florida International University College of Law colleagues for their suggestions and comments on earlier drafts of this Article. Special thanks are also in order to Professor Hannibal Travis for his detailed comments and suggestions with web references. I would also like to thank Ms. Sandra Trujillo, Mr. Ricardo Rodriguez, and Mr. Christopher Carbot for their excellent research assistance. Finally, I would like to express my gratitude to Ms. Marisol Floren, FIU's outstanding reference librarian. Her assistance and patience with my frequent 3 a.m. telephone requests for some obscure book or survey were saintly as well as invaluable. This Article is part of an ongoing scholarly effort to question the popular rhetoric and imagination concerning the impact and role of immigrants in this land. This was inspired by my presentations on immigration panels at the 2007 American Association of Law Schools Annual Conference and the 2007 Southeastern Association of Law Schools Annual Conference.

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### I. INTRODUCTION

“Ladies and gentlemen, we interrupt our program . . . to bring you a special bulletin . . . .”<sup>1</sup> Straight from the depths of your nightmares comes an untold terror. From across your borders come “cool and unsympathetic” beings who gaze on this land “with envious eyes . . . slowly and surely dr[awing] their plans against [you].”<sup>2</sup> A faint warning glistens across the wire as the terror grows. “Ladies and gentlemen, this is the most terrifying thing I have ever witnessed . . . Wait a minute! *Someone’s crawling out . . .* Someone or . . . something. . . Good heavens, something’s wriggling out of the shadows like a [brown] snake. Now it’s another one, and another.”<sup>3</sup> The massed crowds focus intensely as the being’s face rises from the darkness. “[I]t’s indescribable. I can hardly force myself to keep looking at it.”<sup>4</sup> As you move closer and closer, the being is “raising up.”<sup>5</sup> Finally one being comes into focus; you see what horror lies in front of you. Confusion reigns supreme as the masses try to make sense of what occurred in front of their very eyes. Then, the soothing voice of the government streams from the airwaves to help you make sense of what is happening:

Citizens of the nation: I shall not try to conceal the gravity of the situation that confronts the country, nor the concern of the government in protecting the lives and property of its people. However, I wish to impress upon you—private citizens and public officials, all of you—the urgent need of calm and resourceful action. Fortunately, this formidable enemy is still confined to a comparatively small area, and we may place our faith in the military forces to keep them there. In the meantime placing our faith in G[od] we must continue the performance of our duties each and every one of us, so that we may confront this destructive adversary with a nation united, courageous, and consecrated to the preservation of human supremacy on this earth. I thank you.<sup>6</sup>

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1. HOWARD KOCH, *THE PANIC BROADCAST* 37 (1970). The infamous *War of the Worlds* episode was originally broadcast on October 30, 1938. *Id.* at 3.

2. *Id.* at 36.

3. *Id.* at 49–50.

4. *Id.* at 50.

5. *Id.*

6. *Id.* at 58.

Your mind races in a futile attempt to make sense of what has occurred. “All that happened before the arrival of these monstrous creatures in the world now seems part of another life . . . a life that has no continuity with the present . . .”<sup>7</sup> Finally, an epiphany rises like the phoenix of old: “They[’re] wreck[ing] the greatest country in the world.”<sup>8</sup> They’re nothing like you—they need to be stopped.

What many view as a cancer has taken root in the United States—a cancer which had remained in remission for decades. Never fully disappearing, it has lingered in isolated clusters across this great nation, but the systematic aggressiveness of this recent resurgence has not been felt since the great migrations of the early twentieth century. This cancer is either the perceived invasion of illegal aliens, or perhaps it is merely the most recent incarnation of nativism. The focus of this so-called “call to arms”—or shameless demagoguery—is the immigration of the largest minority group in the United States: Latinos and Latinas.

## II. THE INVASION?

Loosely based on the brilliant but infamous broadcast of the “War of the Worlds,” the above depiction could easily be tomorrow’s leading news bulletin concerning this country’s alleged immigration crisis.<sup>9</sup> Following increased domestic oversight and arguably isolationist sentiments after September 11, 2001, media,<sup>10</sup> political,<sup>11</sup> academic,<sup>12</sup> and would-be

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7. *Id.* at 68.

8. *Id.* at 72.

9. See, e.g., William H. Calhoun, *Illegal Immigration: The Invasion Continues*, CAPITAL HILL COFFEE HOUSE, Oct. 25, 2006, [http://capitolhillcoffeehouse.com/more.php?id=A1528\\_0\\_1\\_0\\_M](http://capitolhillcoffeehouse.com/more.php?id=A1528_0_1_0_M) (“This is an invasion of America, and there is no other way to see it. Mexico, like most other third-world nations, despises the West. But they know they cannot defeat it in conventional battle, but only invade under the auspices of ‘reverse colonialism.’ The West contains most of the world’s resources, and the third-world hordes regularly invade the West to rape and ravish it of its riches. And it is not just Mexico that invades, but all of South America, Africa, Asia, China and India are coming too.”).

10. See, e.g., Donald L. Barlett & James B. Steele, *Who Left the Door Open?*, TIME, Sept. 20, 2004, at 51, 51–52 (investigating the reasons for and impact of the upturn of “illegal aliens” coming to the United States, primarily from Mexico); see also Jack Miles, *Blacks vs. Browns*, in ARGUING IMMIGRATION: THE DEBATE OVER THE CHANGING FACE OF AMERICA 101–02 (Nicolaus Mills ed., 1994) (likening the Los Angeles riots of 1992 to the fall of Rome).

11. Brian Tumulty & Chuck Raasch, *N.Y. License Plan Tossed: No Go for Illegal Immigrants; Issue Helps Define Candidates*, DETROIT FREE PRESS, Nov. 15, 2007, at A4 (describing the use of tough immigration policy stances by Republican presidential candidates).

12. See, e.g., PETER BRIMELOW, ALIEN NATION: COMMON SENSE ABOUT AMERICA’S IMMIGRATION DISASTER 271–72 (1995) (arguing that minority immigrants are threatening

academic<sup>13</sup> figures have effectively caused fervor over the issue,<sup>14</sup> using virulent attacks aimed largely against the Latino and Latina immigrant groups crossing the Mexican border.<sup>15</sup> FBI reports on domestic hate crimes after 2001 indicate that such crimes against Latinos and Latinas surged from 2003 to 2006.<sup>16</sup> The Mexican American Legal Defense and Educational Fund (MALDEF) blames anti-immigrant sentiments for the surge.<sup>17</sup> Surprisingly, these attacks, which are often hideous and gruesome,<sup>18</sup> have thus far gone largely unchallenged, in part because the alleged basis for limiting immigration is often couched in vague language of “national security” and “the war on terror.”<sup>19</sup> While some view the concerns as mudslinging aimed at stirring racist and xenophobic fears,<sup>20</sup> many Americans have

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to “break[] down white America’s sense of identity”); SAMUEL P. HUNTINGTON, WHO ARE WE? THE CHALLENGES TO AMERICA’S NATIONAL IDENTITY 11, 19–20 (2004) (expressing fear that an increasingly multicultural United States could lead balkanization); PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY 116 (1985) (arguing against birthright citizenship for children of undocumented aliens); MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 32–34 (1983) (suggesting that liberal societies can deviate from norms of internal membership to restrict membership from outsiders).

13. See, e.g., Justin C. Glon, Note, “Good Fences Make Good Neighbors:” *National Security and Terrorism—Time to Fence in Our Southern Border*, 15 IND. INT’L & COMP. L. REV. 349, 352, 361–71 (2005) (suggesting the need for a fence running along the U.S.–Mexico border to deal with the United States’ “most pressing concern”).

14. See Fred Elbel, *Desert Invasion—U.S.: Illegal Immigration Invasion Numbers Analysis*, [http://www.desertinvasion.us/data/invasion\\_numbers.html](http://www.desertinvasion.us/data/invasion_numbers.html) (last visited Sept. 5, 2008) (expressing concern that government statistics of the annual number of immigrants entering the country are grossly underestimated).

15. See, e.g., Jerry Adler, *Sweet Land of Liberties*, NEWSWEEK, July 10, 1995, at 18 (arguing that multiculturalism has resulted in a divided country); *Immigration: Not Fixed Yet*, NAT’L REV., June 26, 1995, at 21 (proposing a moratorium on immigration).

16. FBI Report Documents Hate Crimes Against Latinos at Record Level, <http://nahjsblog.blogspot.com/2007/11/fbi-report-documents-hate-crimes.html> (Nov. 20, 2007, 16:46 EST) (“According to the report, in 2006, Hispanics comprised 62.8% of victims of crimes motivated by a bias toward the victims’ ethnicity or national origin.”).

17. *Id.* (noting that according to MALDEF President and General Counsel, John Trasvina, “Anti-immigrant hatred heard on the radio and cable shows reaches America’s neighborhoods with real consequences . . .”).

18. See, e.g., Julia C. Mead, *4 Are Held in an Attack on Mexican Immigrants*, N.Y. TIMES, June 15, 2006, at B7 (discussing four teenagers who beat and robbed two Mexican immigrants); Julia C. Mead, *Hamptons Teenager Is Accused of Menacing Hispanic Students*, N.Y. TIMES, May 9, 2006, at B6 (explaining an incident where two men assaulted a Hispanic male and shouted ethnic slurs at him); *Texas: Conviction in Brutal Attack*, N.Y. TIMES, Nov. 17, 2006, at A22 (describing an attack where a Neo-Nazi shouted racial slurs and sodomized a Latino boy).

19. See, e.g., Lou Dobbs, *Feds’ Border Action Not Nearly Enough*, CNN, July 5, 2005, <http://www.CNN.com/2005/US/03/31/border.agents/index.html> (“Illegal immigration . . . also [raises] the larger problem of protecting our country from another deadly terrorist attack.”).

20. See Frank H. Wu, *The Limits of Borders: A Moderate Proposal for Immigration Reform*, 7 STAN. L. & POL’Y REV. 35, 36 (1996) (“Under the guise of attacking ‘political

accepted and expressed agreement with the anti-immigrant attacks.<sup>21</sup>

Central to the attacks is the so-called “mass invasion” at our borders.<sup>22</sup> The alarms warn of an effort to take over America<sup>23</sup> and its impact on the U.S. economy.<sup>24</sup> Another vitriolic call for curbing immigration is the alleged crime wave that will inevitably result from the mass migration.<sup>25</sup> This call and others like it are made with little or no evidentiary support, yet have captured the public imagination in a presidential election year<sup>26</sup> and will likely be the focus of political and public policy debates for decades to come.<sup>27</sup> Somewhat surprisingly, not unlike the alleged attack by Martians of decades ago or the more recent eerie depiction of ugly brown figures invading a domestic city in the film *Cloverfield*,<sup>28</sup> today’s invasion is largely accepted as an inevitable future for America.<sup>29</sup>

Consider the alarming tone of the alleged demographic shift resulting from immigration. Media figures such as Fox News Channel talk show host Bill O’Reilly proclaimed the supporters of immigration reform “hate America” and “want to flood the country with foreign nationals . . . to change the

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correctness,’ immigration restrictionists have appealed to a racialized vision of citizenship.”).

21. For instance, a recent poll conducted by Quinnipiac University “found that strong majorities [of those questioned] favor[ed] building a fence along the U.S.–Mexico border, creating national ID cards for all legal residents and refusing drivers’ licenses and free public education to illegal aliens.” David Lightman, *Where Are Democrats on Illegal Immigration?*, KNIGHT RIDDER, Nov. 14, 2007, available at <http://www.mcclatchydc.com/227/story/21539.html>.

22. See, e.g., MICHELLE MALKIN, *INVASION: HOW AMERICA STILL WELCOMES TERRORISTS, CRIMINALS, AND OTHER MENACES TO OUR SHORES*, at ix (2002) (asserting that “Congress, pressured by ethnicity lobbyists, corporations, the travel industry, and open-borders activists, aided the September 11 terrorists”).

23. *Id.* at 3–4.

24. See Calhoun, *supra* note 9 (“Our once great and noble land will be just another third-world wasteland, not unlike Mexico City or New Delhi.”).

25. *Id.* (arguing that the United States will become “an unrecognizable amalgamation of third-world crime”).

26. See Iowa—Republicans—2008 Primary Results Exit Polls, <http://www.msnbc.msn.com/id/21228177> (last visited Sept. 5, 2008) (illustrating that a majority of Iowa Republicans believe illegal immigration is the most important problem facing the United States).

27. See Heather Mac Donald, *Crime & the Illegal Alien: The Fallout from Crippled Immigration Enforcement*, BACKGROUND (Ctr. for Immigr. Stud., Washington, D.C.), June 2004, <http://www.cis.org/articles/2004/back704.html> (discussing the police’s difficulty in addressing immigrant crime caused by the political atmosphere).

28. *CLOVERFIELD* (Paramount Pictures 2007).

29. The popularity of the anti-immigrant attacks are not limited to only isolationist and nativist beliefs; it is also based on the misguided belief that immigration can be stopped, despite the fact that history suggests otherwise.

complexion . . . of America.”<sup>30</sup> Lou Dobbs, a CNN anchor and popular pundit, repeatedly warns against an “illegal alien invasion.”<sup>31</sup> In fact, in one episode Dobbs made five references to an alien invasion.<sup>32</sup> Some of Dobbs’s choices for expert opinion on the issues even include reports from the Council of Conservative Citizens, a national white supremacist organization.<sup>33</sup> Dobbs is also known for blaming undocumented immigrants for a leprosy explosion of 7,000 cases over the last three years, while the actual leprosy figure is 250 cases over that period and is not directly attributed to the immigrant population.<sup>34</sup> Others engage in similar forms of hyperbole to promote a solution to the inevitable population overthrow, while also stoking the flames of fear.<sup>35</sup> For instance, John Gibson implored viewers to “[d]o your duty. Make more babies . . . half of the kids in this country under five years old are minorities. By far the greatest number are Hispanic. You know what that means? Twenty-five years and the majority of the population is Hispanic.”<sup>36</sup>

Comments such as Gibson’s are not only often inaccurate—take for instance his mathematical miscalculation of a Hispanic majority within twenty-five years—but, not unlike prejudicial evidence in a courtroom, once the damning statement’s impact is

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30. Media Matters for America, O’Reilly: Supporters of Liberalizing Immigration Bill Want to “Change the Complexion” of America, <http://mediamatters.org/items/200705310008> (last visited Sept. 5, 2008).

31. See *Lou Dobbs Tonight: Examination of Issues Arising from Illegal Aliens in the U.S.* (CNN television broadcast Mar. 21, 2005) (transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/0503/21/ldt.01.html>). Dobbs’s alien invasion references continued even to the program’s end, where he concluded the evening’s episode by saying, “[p]lease join us tomorrow—the invasion of illegal aliens into this country, our special reports continue. We’ll be reporting on the government’s failure to enforce our immigration laws, and how that led to a state of emergency in one county.” *Id.*

32. *Id.*

33. See Campaign for a United America, Voices of Intolerance—Lou Dobbs, [http://campaignforaunitedamerica.org/index.php?voices/lou\\_dobbs](http://campaignforaunitedamerica.org/index.php?voices/lou_dobbs) (last visited Sept. 5, 2008). Among Dobbs’s sentiments on American cultural homogeny is this statement: “I don’t think there should be a St. Patrick’s Day . . . [W]e ought to be celebrating what is common about this country, what we enjoy as similarities as people.” *Id.*

34. *Id.*; see also Southern Poverty Law Center, Open Letter to CNN about Lou Dobbs from the Southern Poverty Law Center, <http://www.splcenter.org/news/item.jsp?sid=96> (last visited Sept. 5, 2008) (showing that while immigration has increased over time, the rate of leprosy cases in the United States has declined since 1985).

35. See *Bill O’Reilly is a Racist*, Posting of Andrew Dobbs to Burnt Orange Report, <http://www.burntorangereport.com/archives/001301.html> (Mar. 20, 2004) (discussing an interview with a demographer, Bill O’Reilly, in which O’Reilly expressed concern that Caucasians will be in the minority by 2050, but took solace in the fact that he will be dead by then).

36. Massimo Calabresi, *Is Racism Fueling the Immigration Debate?*, TIME, May 17, 2006, <http://www.time.com/time/nation/article/0,8599,1195250,00.html>.

felt, its accuracy becomes largely irrelevant.<sup>37</sup> Specifically, those that heard Gibson's broadcast likely did not have the benefit of having census data before them, which would have established that by 2030, the Hispanic population in the United States will be approximately 20% of the overall population<sup>38</sup>—a far cry from the majority takeover Gibson alleges. In fact, contrary to Gibson's assertion, fifty years from now the majority of Americans will still be white, and the Hispanic population will only be approaching 24%.<sup>39</sup>

Nevertheless, the irresponsible and hyperbolic assertions made by right wing alarmists provoke fear with crass attacks. Take for instance radio talk show host Neal Boortz, who while promoting a massive fence at our southern border declared: "I don't care if Mexicans pile up against that fence like tumble weeds . . . [J]ust run a couple of taco trucks up and down the line."<sup>40</sup> Michael Savage, another radio host, alleged that the civil rights organization "La Raza" is the "the Ku Klux Klan of the Hispanic People."<sup>41</sup>

The media's outspoken critics are not alone in their fear mongering over the "browning" of America. The Washington Post recently profiled the views of the so-called "average American."<sup>42</sup> One interviewee stated that she stopped shopping at Wal-Mart because she noticed she was the only non-Latino customer in the store.<sup>43</sup> She reportedly said, "I'm in the minority, and if we don't get control over this, pretty soon all of America will be

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37. Shortly after making his mathematically challenged comments concerning the demographic shift in this country, Gibson responded to criticism of his "make more babies" comment in a subsequent "My Word" segment. He stated that there are "[s]ome misunderstandings" regarding his earlier comments, adding that although he was accused of being a racist by some, "[M]y concern was simply that I didn't want America to become Europe, where the birth rate is so low the continent is fast being populated by immigrants, mainly from Muslim countries . . ." Media Matters for America, Gibson Responded to Criticism of "Make More Babies" Remarks—By Invoking Europe's Rising Muslim Population, <http://mediamatters.org/items/200605180001> (last visited Sept. 5, 2008) [hereinafter Media Matters].

38. *Id.*

39. *Id.*

40. Think Progress, Pelosi: "Hate Radio" Hijacked Political Discourse With "Xenophobic, Anti-Immigrant" Rhetoric, <http://thinkprogress.org/2007/06/28/pelosi-talk-radio> (last visited Sept. 5, 2008).

41. *Id.*

42. N.C. Aizenman, *Small-Town Residents Helped to Seal Defeat*, WASH. POST, June 29, 2007, at A1.

43. *Id.*

outnumbered.”<sup>44</sup> Another interviewee reportedly complained that Latinos turned his neighborhood into “a slum.”<sup>45</sup>

Immigration has also become a central issue in the 2008 presidential election. For many conservative and independent voters, there is considerable frustration with this government’s failure to produce any results with the perceived immigration crisis.<sup>46</sup> According to one report, “illegal immigration ranks as a top concern for many in an electorate increasingly pessimistic about the future.”<sup>47</sup> According to ABC News, 55% of Republicans believe illegal immigration hurts the country, and the issue of immigration is fifth in order of national importance to these voters.<sup>48</sup> NBC Nightly News reported that “[t]he immigration debate has become the core of the fight for the GOP nomination.”<sup>49</sup> The Republican contenders responded accordingly. For instance, in the coverage surrounding their November 28 debate, former presidential candidates Rudy Giuliani and Mitt Romney attempted to prove themselves as the toughest on immigration. Instead of addressing the issue in an intelligent manner, they exchanged barbs, with Romney accusing former New York City Mayor Giuliani of creating a “sanctuary city,” and Giuliani attacking Romney for allegedly hiring illegal gardeners.<sup>50</sup> During the New Hampshire primary buildup, Romney ran a fifteen second television ad that twice pointed out Senator John McCain’s support of amnesty for illegal immigrants.<sup>51</sup> Former candidate Michael Huckabee similarly took a get tough stance, promising to send illegal immigrants home.<sup>52</sup> Huckabee remarked, “If illegals cannot find work, they will go back where they belong . . . . I will do everything I can to hasten their trip home by denying them employment.”<sup>53</sup> Romney also declared, “The current system puts up a concrete wall to the best

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44. *Id.*

45. *Id.*

46. See Julia Preston, *Immigration Is Defying Easy Answers*, N.Y. TIMES, Dec. 30, 2007, § 1, at 17 (discussing the difficulty in addressing immigration and the resulting voter frustration).

47. *Id.*

48. *GOP Debate’s Focus on Immigration Drives Coverage*, FRONTRUNNER (Bull. News Network, McLean, Va.), Nov. 30, 2007, at 12.

49. *Id.*

50. *Id.*

51. *Meet the Press: Interview with John McCain* (NBC television broadcast Jan. 6, 2008) (transcript available at <http://www.msnbc.msn.com/id/22487036>).

52. David Olinger, *Border Wars Personal Out West*, DENV. POST, Jan. 27, 2008, at A16 (noting a difference for some between “the good Mexicans” and “the Latinos”).

53. *Id.*

and brightest, yet those without skill or education are able to walk across the border . . . .”<sup>54</sup>

Other anti-immigrant former candidates took the rhetoric a step further. The group’s drum leader warned of the changing face of America and the terrorist threat to America. Former Republican presidential candidate Tom Tancredo, head of the Immigration Reform Caucus, often spoke to the threat of “radical multiculturalism.”<sup>55</sup> For instance, in his speech before the House of Representatives on halting illegal immigration, Tancredo warned:

[I]f we were to actually do what is necessary to prevent people from coming into this country to create havoc and to commit acts of terrorism, we would essentially end illegal immigration . . . .

. . . I do not understand how any American, any American regardless of the hyphen, what word we put before the hyphen, I do not understand how any American could say please do not defend our borders because if you do, fewer of my countrymen would be able to come in. Because if you feel that way, then that is your countrymen that we are keeping out, then you are not an American, of course.

. . . .

Then, of course, there are the even more dangerous aspects of this, because the people coming across the border, many of them are carrying drugs, illegal narcotics into the United States. They come with backpacks, 60 to 80 pounds on their back. Sometimes they come guarded by people carrying M-16s or various other automatic weapons. They come across the land in, again, droves, thousands. We have pictures of them.<sup>56</sup>

As the presidential election primaries neared, Tancredo said he intended to visit New Hampshire and Iowa as part of a campaign to get a leader in the White House who “understands the threat illegal immigrants pose to the country’s security.”<sup>57</sup> According to Tancredo, we all need to be fearful because

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54. *Id.*

55. John Hawkins, *An Interview with Congressman Tom Tancredo*, RIGHT WING NEWS, <http://www.rightwingnews.com/interviews/tancredo.php> (last visited Sept. 5, 2008).

56. 149 CONG. REC. H1508–09 (daily ed. Mar. 4, 2003) (statement of Sen. Tom Tancredo).

57. U.S. Border Control—In the News, Tancredo Seeks to Make Immigration a Major Issue in Presidential Race, <http://www.usbc.org/info/2005/jun/trancredo.htm> (last visited Sept. 5, 2008).

“[f]ederal prisons . . . overflow with illegal immigrants, some of whom aim to harm people. . . . They need to be found before it is too late. They’re coming here to kill you, and you, and me, and my grandchildren.”<sup>58</sup> More recently, Tancredo took hate mongering to new lows when, in a television commercial, he implied that illegal immigrants are “terrorists in the making.”<sup>59</sup> The ad in question asserted that “radical jihadists have slipped into the flow of illegal immigrants,” and as a result, attacks are inevitable.<sup>60</sup> Despite being so offensive that it is actually difficult for this Author to believe,<sup>61</sup> the outrageous ad depicts what appears to be a shopping mall being blown up as a consequence of illegal immigration.<sup>62</sup>

In a similar vein, conservative leaders from border states have established grassroots vigilante organizations to halt immigration, often warning against a population, political, or terrorist overthrow.<sup>63</sup> For instance, Glenn Spencer, leader of the anti-immigration American Patrol, operates a website filled with anti-Mexican rhetoric and accuses the Mexican government of secretly plotting to take back the southwest United States.<sup>64</sup> Another vocal advocate warning of the “immigration invasion” is Joe McCutchen, leader of Project Arkansas Now, who has also been accused of writing a series of anti-Semitic letters to the editors of local newspapers and who once delivered a speech that caused the Republican governor of his state to denounce the group.<sup>65</sup> Yet another vocal anti-immigrant organizer is Jim

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58. *Id.*

59. Ruben Navarrette, Jr., *Honesty in the Immigration Debate*, SAN DIEGO UNION-TRIB., Nov. 21, 2007, at B7 (noting that “too many Americans keep falling into old habits and repeating a historically familiar depiction of immigrants—legal or illegal—as inferior to natives, defective in their culture, slow to assimilate, prone to criminal activity and devoid of any positive values”).

60. Tumulty & Raasch, *supra* note 11; *see also* Michael Martinez, *Security; Democrats Plot Electoral Strategy on Immigration*, TECH. DAILY, Nov. 16, 2007, available at [http://www.nationaljournal.com/techdaily/print\\_friendly.php?ID=tp\\_20071116\\_5](http://www.nationaljournal.com/techdaily/print_friendly.php?ID=tp_20071116_5) (stating that “Tancredo created a stir when he began airing a television advertisement that warns that weak immigration policies will lead to future terrorist attacks”).

61. The ad, which originally aired in Iowa, never fully reached a wide national viewing audience.

62. Tumulty & Raasch, *supra* note 11.

63. *See, e.g.*, LAWRENCE AUSTER, *THE PATH TO NATIONAL SUICIDE: AN ESSAY ON IMMIGRATION AND MULTICULTURALISM* 62 (1990) (discussing the possible negative effects of immigration); RICHARD D. LAMM & GARY IMHOFF, *THE IMMIGRATION TIME BOMB: THE FRAGMENTING OF AMERICA* 1–11, 76–87 (1985) (expressing fear about the potential ramifications of increased immigration).

64. Heidi Beirich & Mark Potok, *Broken Record*, INTELLIGENCE REP. (S. Poverty Law Ctr.), Winter 2005, available at <http://www.splcenter.org/intel/intelreport/article.jsp?aid=589>.

65. *Id.*

Gilchrist, founder of the Minuteman Project, an armed militia that purportedly attempts to engage in Border Patrol-like policing.<sup>66</sup> Gilchrist's statements and tactics "have drawn denunciations from faith leaders, human rights activists[,] and even President Bush[,] who called Gilchrist and his shotgun-toting posse vigilantes."<sup>67</sup> According to one report, Gilchrist "allowed members of the National Alliance, one of the United States' largest neo-Nazi organizations, to help with his 2005 campaign for the U.S. House of Representatives."<sup>68</sup>

Even the political leaders seeking to challenge the xenophobic tenor of the debate have largely accepted the assertions of the nativists.<sup>69</sup> Consider the comments of U.S. Senator Ken Salazar, who disagrees with the tone of the current debate, but nevertheless accepted the assertion that America's population is changing in significant ways: "I have no doubt that some of those involved in the debate have their position based on fear and perhaps racism because of what's happening demographically in the country."<sup>70</sup> The Senator, like many others in this society, accepted that the country is enduring a major demographic shift with little or no questioning. At least one democratic aide more accurately captured the tenor of the attacks: "A lot of the anti-immigration movement is jingoistic at best and racist at worst. There is a fear of white people being over run by darker-skinned people."<sup>71</sup> Despite these comments, even former Democratic presidential hopefuls have recently shown little sympathy in the immigration context. Consider the attacks on former presidential candidate Senator Hillary Clinton when she wavered in answering a question concerning the issuing of drivers' licenses to undocumented immigrants.<sup>72</sup> After Clinton stated that she understood why a state may want to issue licenses to undocumented immigrants as a tool of identification,<sup>73</sup> Senator Chris Dodd found Clinton's words

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66. Campaign for a United America, Voices of Intolerance—Jim Gilchrist Minuteman Project, [http://campaignforaunitedamerica.org/index.php?/voices/jim\\_gilchrist](http://campaignforaunitedamerica.org/index.php?/voices/jim_gilchrist) (last visited Sept. 5, 2008).

67. *Id.*

68. *Id.*

69. As alluded to above, conservatives are not alone in their fear of the Mexican border. See, e.g., Glenn F. Bunting, *Boxer's Bid to Put National Guard at Border is Stymied*, L.A. TIMES, Aug. 6, 1994, at A1 (observing Democratic Senator Barbara Boxer's efforts to deploy National Guard troops at the border).

70. Calabresi, *supra* note 36.

71. *Id.*

72. Jonathan Gurwitz, *Democrats Suffer Dukakis Moment*, SAN ANTONIO EXPRESS-NEWS, Nov. 18, 2007, at 3H.

73. This Article chooses to label the subject of recent immigration debates as

“troublesome” and doubted that “anyone who flouts our nation’s [federal] laws would . . . be deterred from” driving without a license.<sup>74</sup>

Despite the use of what appears to be the most simplistic form of demagoguery, the leaders of the anti-immigration agenda have had their impact on the national stage. For instance, the failure of comprehensive immigration reform before Congress in 2006 is largely attributed to the effect of conservative talk show hosts’ calls for massive telephone campaigns directed at congressional leaders in order to kill immigration reform.<sup>75</sup> The Speaker of the House of Representatives, Nancy Pelosi, observed, “[T]alk radio, or in some cases hate radio . . . just go on and on in a xenophobic, anti-immigrant’ manner.”<sup>76</sup> Even Republican presidential candidate Senator John McCain, one of the sponsors of the Senate’s moderate comprehensive reform bill,<sup>77</sup> initially supported reform that would include a guest worker program and a path for undocumented workers to achieve citizenship.<sup>78</sup> However, succumbing to the outcry against such reform, he has changed his position on the matter and most recently advocated for an enforcement first approach towards immigration.<sup>79</sup>

Perhaps given the whim to which political leaders respond to the issue, some supporters of reform have questioned the media’s

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undocumented workers, in part due to that classification more closely resembling their status in this land. In addition, as scholars have previously observed, the logic behind the label “illegal immigrant” is circular and conclusory. See Gerald P. Lopez, *Undocumented Mexican Migration; In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615, 699 & n.470 (1981).

74. Gurwitz, *supra* note 72.

75. See Fred Hiatt, *How to Save Immigration Reform*, WASH. POST, June 26, 2006, at A21 (stating that it would be easy to blame right wing talk radio for the failure of the 2006 immigration reform); see also *How Talk Radio Torpedoed Immigration Reform*, Posting of John W. Mashek to A Capital View, <http://www.usnews.com/blogs/mashek/2007/7/3/how-talk-radio-torpedoed-immigration-reform.html> (July 3, 2007, 10:28 EST) (discussing the effect of conservative talk radio on the 2007 immigration reform).

76. Think Progress, *supra* note 40. For additional examples of talk radio’s attacks, see, for example, Media Matters for America, *Savage’s Trifecta: Smears of Hispanics, Gays, and Jews* (May 12, 2006), <http://mediamatters.org/items/200605120017> (describing Michael Savage as saying, “[O]ur brown brethren’ entering the United States may ‘erase’ the ‘European–American, or the white person,’ who . . . is more ‘benevolent’ and ‘enlightened’ . . . .”); *The Rush Limbaugh Show: Illegal Immigration*, (radio broadcast July 6, 2007), available at [http://www.youtube.com/watch?v=ZHPm\\_TEQ0PA](http://www.youtube.com/watch?v=ZHPm_TEQ0PA).

77. The latest iteration of the comprehensive reform bill, the Comprehensive Immigration Reform Act of 2007, S. 1348, failed a cloture motion in June 2007. 153 CONG. REC. S7313 (daily ed. June 7, 2007).

78. *Meet the Press: Interview with John McCain*, *supra* note 51; *What?! Navarrette: Latinos Should Support McCain on Immigration*, Posting of “KJ” to Immigration Professor Network Blog, <http://lawprofessors.typepad.com/immigration/2008/01/navarrette-latin.html> (Jan. 29, 2008).

79. *Id.*

role in creating public opinion. Specifically, some have expressed concern regarding whether cable news conglomerates such as MSNBC—which is co-owned by General Electric and Microsoft—are championing bigotry.<sup>80</sup> These claims raise legitimate questions concerning who owns the airwaves and why they select, advertise, and actively market spokespersons who openly advocate racially insensitive sentiments.<sup>81</sup>

Mark Potok of the Southern Poverty Law Center noted that hate groups “consistently try and exploit any public discussion that has some kind of racial angle, and immigration has worked for hate groups in America better than any issue in years.”<sup>82</sup> The Anti-Defamation League (ADL) recently reported that “hateful and racist rhetoric” aimed at Latino immigrants has grown “to a level unprecedented in recent years.”<sup>83</sup> In another report, the ADL recently observed that “[a]s the national debate over immigration reached a fever pitch, some mainstream advocacy groups ‘reached for the playbook of hate groups’—resorting to hateful and dehumanizing stereotypes and outright bigotry to demonize immigrants.”<sup>84</sup> The report concluded that a closer look at “many ostensibly mainstream anti-illegal immigration organizations—including those who testified before Congress or frequently appeared on news programs—promote virulent anti-Hispanic and anti-immigrant rhetoric.”<sup>85</sup> Some of these organizations have even cultivated ties with extremist hate groups.<sup>86</sup>

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80. See Fairness & Accuracy In Reporting (FAIR), Action Alert: GE, Microsoft Bring Bigotry to Life (Feb. 12, 2003), <http://www.fair.org/index.php?page=1632> (questioning MSNBC’s hiring of Michael Savage, who regularly refers to nonwhite nations as “turd world nations,” and quoting his comment that “[y]ou open the door to [nonwhite immigrants], and the next thing you know, they are defecating on your country and breeding out of control”).

81. See, e.g., Media Matters for America, CNN Hire Beck: Illegal Immigrants are Either “Terrorists,” Outlaws, or People Who “Can’t Make a Living in Their Own Dirtbag Country,” (Apr. 28, 2006), <http://mediamatters.org/items/200604280003> (detailing offensive comments made by CNN Headline News’ host Glenn Beck).

82. Erin Texiera, *Activists Say Debate on Immigration Stirs Racial Tensions*, LAWRENCE J. WORLD, June 6, 2006, [http://www2.ljworld.com/news/2006/jun/06/activists\\_say\\_debate\\_immigration\\_stirs\\_racial\\_tens](http://www2.ljworld.com/news/2006/jun/06/activists_say_debate_immigration_stirs_racial_tens).

83. *Id.*

84. *Anti-Immigrant Groups Borrow From Playbook of Hate Groups to Demonize Hispanics*, ANTI-DEFAMATION LEAGUE, Oct. 23, 2007, [http://www.adl.org/presrele/cvprt\\_32/5154\\_32.htm](http://www.adl.org/presrele/cvprt_32/5154_32.htm) (noting that among other techniques, anti-immigrant groups describe “immigrants as ‘third world invaders,’ who come to America to destroy our heritage, ‘colonize’ the country and attack our ‘way of life.’”).

85. *Id.*

86. *Id.*

Perhaps the most amazing aspect of the anti-immigrant movement's irresponsible and outlandish attacks is that the comments do not provoke mass outrage and scorn.<sup>87</sup> Why, in this day and age, are such shameful attacks not only not rejected, but either quietly or publicly applauded? Are the Latino and Latina citizens of this land, and their families that are often from the countries where the attacks are focused, less deserving of respect? Are these people less deserving of dignity? If racist statements were made against Asians, African Americans, or other racial or ethnic minorities, would the comments become acceptable if the focus of the particular attacks was on noncitizens? As one national columnist observed, "While the 44 million Hispanics are the biggest minority in America, you don't see the kind of nationwide protests, legal actions or calls for boycotts on a scale you would probably see if these statement[s] were directed against African Americans or Jewish Americans."<sup>88</sup> Is it not time for this land's Latino people, other people of color, and like-minded whites to call for an end to the intolerably racist and largely inaccurate attacks?<sup>89</sup> Perhaps more importantly, the tenor of the current debate confuses the masses, conflates legitimate concerns over the impact of immigration on local and state economies, and unfairly polarizes both sides of the immigration debate. The goal of this project and related ones is to deflate the force of bias as part of a goal to open the door to legitimate dialogue and analysis.

Instead of such undertakings, at best what tends to occur is the ever-so-cautious suggestion that some of the current anti-Latino attacks are insensitive or touch upon race. Frustrations stemming from such cautious critiques raise inevitable questions: (1) Is it so difficult to call a bigot a bigot when the attacks are aimed at Spanish speaking people?; (2) Why do so many fail to stand up and challenge attacks filled with baseless stereotypes and false assertions?<sup>90</sup> and (3) Are all accusations and insults

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87. *Id.*; see also T. Alexander Aleinikoff, *The Tightening Circle of Membership*, 22 HASTINGS CONST. L.Q. 915, 923-24 (1995) (expressing fear about the difficulties of ensuring that the United States include lawful immigrants in the national community when efforts are made to exclude undocumented immigrants).

88. Andres Oppenheimer, *Time to Hit Back Against Anti-Latino Bigotry*, MIAMI HERALD, July 22, 2007, at A14, available at <http://waronracism.blogspot.com/2007/07/time-to-hit-back-against-anti-latino.html>.

89. See LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 237-53 (2002) (reconsidering the social construct of race as more than mere ethnicity).

90. See, e.g., Calhoun, *supra* note 9 ("The beautiful countryside will be devastated, the cities polluted, and untold diseases will infect our population. We will cease to be a 'Western nation,' and become an unrecognizable amalgamation of third-world crime,

acceptable merely because they occur in the name of protecting America's borders or Anglo-American culture?<sup>91</sup> Instead of outrage from an enlightened society, consider what occurs instead—the quiet question of whether race is a part of the immigration debate. For instance, a *Time* Magazine article on increased interest in immigration ever-so-gently noted that race may play a part in the current debate: “The Democratic allegations of racism may sound like just another political ploy, but there certainly is a case to be made that racial fears are informing some of the debate on immigration policy.”<sup>92</sup> The *Time* article nevertheless raised a far more telling irony, namely that while national security is typically the basis for proposing closing our southern border, “[W]hy . . . is no one proposing sending additional National Guard Troops to secure the U.S.–Canada border?”<sup>93</sup> The question is not unreasonable, particularly because while Ahmed Ressaam—also known as the “Millennium Bomber”—was caught at the Canadian border, none of the nineteen September 11th terrorists entered at the Mexican border.<sup>94</sup>

Another troubling aspect of the current anti-immigrant attacks is that the assertions of the nativists are not only misguided, but are all too often false.<sup>95</sup> Given the frequency of these errors, one must question whether they are made with knowledge of their inaccuracy.<sup>96</sup> Another question that needs to

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disease, corruption, and human filth: a 21st-century cesspool.”).

91. See, e.g., Heidi Beirich & Mark Potok, *Keeping America White*, INTELLIGENCE REP. (S. Poverty Law Ctr.), Winter 2003, at 31, 31 available at <http://www.splcenter.org/intel/intelreport/article.jsp?aid=152> (“At a meeting of ‘paleoconservatives,’ former *Forbes* editor Peter Brimelow and others sound the alarm on non-white immigration.”).

92. Calabresi, *supra* note 36.

93. *Id.*

94. Ressaam was captured near the Washington–Canada border en route to detonate explosives at Los Angeles International Airport on the last New Year’s Eve of the millennium. *United States v. Ressaam*, 474 F.3d 597, 600 (9th Cir. 2007), *rev’d on other grounds*, 128 S. Ct. 1858 (2008); see also NAT’L COMM’N ON TERRORIST ATTACKS, THE 9/11 COMMISSION REPORT 236–37 (2004).

95. See, e.g., *Media Matters*, *supra* note 37 (refuting Fox News’ John Gibson’s predication of a future immigrant majority by noting the U.S. Census Bureau’s 2004 population projection).

96. The anti-immigration advocates have also attempted to invoke a legal basis for their characterization of the so-called “invasion.” Some have pointed to the “Invasion Clause” of the U.S. Constitution, which provides that the “United States shall protect every state against invasion,” to justify the need for a fence running across the U.S.–Mexico border. Glon, *supra* note 13, at 375. This use of legal doctrine to characterize immigration as an invasion fails to consider that, in terms of the effect on the population, immigration is simply not approaching the level of invasion. Additionally, the use of the invasion clause is legally questionable and more likely merely another irresponsible means to promote fear and hatred of the foreigner.

be asked is why the anti-immigrant claims go largely unchallenged in the national media. This Article therefore will attempt to engage in what the public discourse has thus far largely failed to do—challenge the three basic premises associated with the so-called “illegal immigration invasion.” Despite the hateful rhetoric used by so many, an examination of the leading empirical studies demonstrates that the demagogues are wrong with respect to all three of their basic premises: (1) that there is an “invasion” of illegal immigrants; (2) that the invasion will lead to devastating economic harm to the country; and (3) that unprecedented crime will accompany this illegal invasion. Part III examines the leading studies on the effects of recent immigration, which discredit the xenophobes. Next, Part IV addresses the objections to immigration often made at the state or local level. This is followed by Part V, which provides an overview of this country’s long history of anti-immigrant efforts. Subsequently, Part VI engages in a sociological and psychological examination and explanation of the anti-immigrant efforts. Ultimately, the Article provides a pragmatic political reason for why the tenor of the debate will inevitably change.

### III. THE EMPIRICAL DATA

In response to increasingly frequent public debates concerning immigration’s effect on the economy, Congress recently created the bipartisan U.S. Commission on Immigration Reform.<sup>97</sup> “In 1995 the Commission asked the National Research Council (NRC) to convene an expert panel to assess the demographic, economic, and fiscal consequences of immigration.”<sup>98</sup> The twelve-member panel, which consisted of demographers, economists, and sociologists, was asked to address three significant issues relating to the effect of immigration: (1) “the future size and composition of the U.S. population,” (2) “the U.S. economy and its workers,” and (3) “the fiscal balances of federal, state, and local governments.”<sup>99</sup> This study (the NRC Report) resulted in a two-volume examination of these topics, and is considered the most comprehensive empirical examination of the recent immigration debate.<sup>100</sup> The results of this study will likely startle the opponents of immigration that

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97. Immigration Act of 1990, Pub. L. No. 101-649, § 141, 104 Stat. 4978, 5001–04 (1990).

98. James P. Smith, *Introduction* to NAT’L RESEARCH COUNCIL, THE IMMIGRATION DEBATE 1 (James P. Smith & Barry Edmonston eds., 1998).

99. *Id.*

100. *Id.*

truly have an interest in ascertaining the facts, especially with respect to the perceived “population explosion” associated with the immigration invasion, the fiscal impacts of the supposed invasion on the national economy, and the effects on crime stemming from recent immigration.

A. *The Alleged Invasion*

In terms of the alleged population explosion resulting from the so-called “invasion,” the NRC Report specifically notes that “[a]lthough the absolute number of current immigrants rivals the peak levels at the beginning of the twentieth century, expressed relative to the size of the existing U.S. population, current immigration is far more modest.”<sup>101</sup> A chapter specifically examining the issue of the alleged population explosion caused by recent immigration reaches similar conclusions.<sup>102</sup> The drafters bluntly conclude that despite the onslaught of recent accusations of a mass wave of illegal immigration, “[i]mmigrant flows were larger in the past.”<sup>103</sup> The authors note, “To put the current immigration flows into proper perspective, . . . [o]ur calculations reveal that, in proportionate terms, the current inflow of immigrants is rather modest.”<sup>104</sup> They go on to state, “If we look only at the ‘regular’ immigrants—that is, exclusive of those admitted under the IRCA—then the current inflows approximate those in the very *slowest* years from the period between 1840 and the onset of World War I.”<sup>105</sup> The authors continue on to observe that “only the disruptions of World War I pushed the flow of immigrants relative to the native population to levels before the relatively low levels that we experience today.”<sup>106</sup> The NRC Report also concludes that when all current forms of immigration are combined, levels are lower than those from 1850 to 1930 (in terms of the level of immigration in proportion to the domestic born population).<sup>107</sup> Thus, despite recent media portrayals and conservative political pundits’ efforts to portray a mass invasion of illegal aliens, the NRC Report illustrates that in terms of their

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101. *Id.* at 10.

102. Susan B. Carter & Richard Sutch, *Historical Background to Current Immigration Issues*, in NAT’L RESEARCH COUNCIL, THE IMMIGRATION DEBATE, *supra* note 98, at 290 (comparing current immigration trends to those of the past).

103. *Id.*

104. *Id.* at 296–97.

105. *Id.* at 297.

106. *Id.*

107. *Id.* at 297 fig.8-6 (illustrating that the number of people living in the United States that were foreign born, as a percentage of the total population, was higher for each year from 1850–1930 than it was for 1990).

proportion to the overall U.S. population, recent immigration flows are not among the largest in U.S. history, but in fact are among the smallest.<sup>108</sup> Therefore, the efforts to create hysteria over the so-called “mass invasion” that will literally change the face of America are simply without factual support.

*B. Immigrants’ Economic Impact*

In terms of the second major basis for the recent attacks on immigration—the alleged deleterious effects on the U.S. economy—the NRC Report similarly refutes the modern xenophobes’ assertions. In fact, the report notes several of immigration’s significant positive impacts on the federal fiscal picture. For instance, the NRC Report states:

[A] net positive fiscal impact with immigrants and their concurrent descendants paying nearly \$51 billion [in 1994–1995 dollars] more in taxes than they generate in costs. . . . Particularly important were transfers from immigrants and their descendants of about \$28 billion to the rest of the nation through the Social Security system (OASDHI), reflecting the young age distribution of this group.<sup>109</sup>

The NRC Report observes that “[i]n per capita terms, immigrants . . . contributed about \$700 more in payroll taxes than they received in OASDHI benefits each year, whereas the balance of the population just broke even.”<sup>110</sup> “For the remainder of the federal budget, immigrants . . . [were found to pay] \$500 or \$600 more in taxes than they cost in benefits, and in total they had a positive federal fiscal impact of about \$1,260 [per person], exceeding their net cost at the state and local levels.”<sup>111</sup> With

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108. *Id.* The conclusions of other, less reputable, studies suggest immigration is at high levels. For instance, according to a study by the Center for Immigration Studies, legal and illegal immigration “over the past seven years was the highest for any seven-year period in American history.” Julia Preston, *7-Year Immigration Ration Is Highest in U.S. History*, N.Y. TIMES, Nov. 29, 2007, at A20. However, independent demographers have questioned the survey’s conclusions. According to Dowell Myers, a demographer at the University of Southern California, the study was a “one-eyed portrait,” and University of California political science Professor Wayne Cornelius called the conclusions of Steven A. Carmrota, the director of the Center for Immigration Studies, “misleading.” *Id.* Furthermore, a 2005 study by demographer Jeffrey Passel of the Pew Hispanic Center “found that the rate of growth of immigration peaked in 2000 and declined somewhat in the next five years.” *Id.*

109. Ronald D. Lee & Timothy W. Miller, *The Current Fiscal Impact of Immigrants and Their Descendants: Beyond the Immigrant Household*, in NAT’L RESEARCH COUNCIL, THE IMMIGRATION DEBATE, *supra* note 98, at 194.

110. *Id.*

111. *Id.*

respect to overall economic impact, the NRC Report concludes:

Our calculations indicate that definition of the study population is critical to the outcome. If limited to immigrants themselves, the overall fiscal impact is \$1,400 (taxes paid less costs generated) per immigrant. If limited to immigrants plus their U.S.-born children under the age of 20, corresponding to the immigrant household formulation, the average fiscal impact is about -\$600 per immigrant (or -\$400 per immigrant and young child). If extended to all descendants of living immigrants, the average fiscal impact is \$1,000 expressed per immigrant, or \$600 expressed per immigrant and descendants. Therefore, the most widely used method based on the immigrant household is the only one that returns a negative value.<sup>112</sup>

Therefore, not unlike the conclusions reached with respect to assertions of mass invasions that can literally change the makeup of this country,<sup>113</sup> the NRC Report similarly discredits the allegations concerning the tales of woe regarding immigration's negative fiscal and economic impact on the national economy.<sup>114</sup>

In testimony before the Senate Judiciary Committee, Subcommittee on Immigration, Stephen Moore, Senior Fellow in Economics at the Cato Institute, reached similar conclusions on the economic impact of immigration.<sup>115</sup> Moore concluded that an accurate "consensus seems to have emerged . . . that immigrants are—as they have been throughout most of our history—

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112. *Id.* at 200.

113. *Cf.* Phillip Johnston, *Record Immigration Sees UK Population Soar*, TELEGRAPH, Oct. 25, 2007, available at <http://www.telegraph.co.uk/news/uknews/1567068/Record-immigration-sees-UK-population-soar.html> (calling for "swift and sweeping changes" to the immigration system in order to stem "[t]he shocking acceleration in the rate of population growth").

114. *See* Lee & Miller, *supra* note 109, at 200 (declaring the "immigrant household approach" to estimating the fiscal impact of immigration "is flawed because it includes the U.S.-born descendants only while they are young, costly, and reside in their immigrant parents' homes," causing studies which use this approach to inaccurately estimate a negative fiscal impact of immigration). The NRC Report does, however, refer to certain negative economic effects on state and local economies stemming from increased use of government services if immigrants' families' economic impact is limited only to the immigrant's immediate household's impact. *Id.* at 196. According to the authors, when a more accurate basis of including adult immigrants, their underage children, and adult children are used, "we find a net positive fiscal impact of about \$24 billion." *Id.* at 198. Also, this part of the NRC Report does not fully explore whether and how the impact at the state and local level is or can be offset by immigrants' positive impact on the national economy.

115. *Immigration Policy: An Overview: Hearing Before the Subcomm. on Immigration of the S. Comm. On the Judiciary*, 107th Cong. 19–22 (2001) [hereinafter *Hearing*] (statement of Stephen Moore, Senior Fellow in Economics, Cato Institute).

beneficial to our economy and assets to our society in other ways as well.”<sup>116</sup> Moore also observed a “growing consensus within the economics profession that immigrants are on balance economic assets, not liabilities. . . . To be sure, economists still argue about the size of the benefit of immigration to the U.S. economy, but almost all of the best research indicates that the direction of the impact is on balance positive.”<sup>117</sup> Moore specifically addressed the allegations of economic woe allegedly resulting from current immigration rates. In terms of the accusations of increased unemployment, higher poverty rates of native born Americans, lower incomes of American workers, and overall rates of economic growth, Moore concluded that “it didn’t happen. None of these claims have been evidenced in the U.S. economy. . . . And here there is little debate.”<sup>118</sup> “High levels of immigration have corresponded with improvement in each of these areas [increased employment of native born workers, higher incomes for American workers, lowering of welfare dependency, and increasing overall economic growth rates], not with the problems getting worse.”<sup>119</sup>

In terms of specific economic impacts, Moore referred to the NRC Report, observing that “[i]n the most comprehensive study ever conducted on immigration, the National Research Council of the National Academy of Sciences found that immigrants inflate the incomes of U.S. born workers by at least \$10 billion each year.”<sup>120</sup> In terms of the costs of immigrants to the U.S. and local economies, Moore similarly noted:

Immigrants pay their own way when it comes to services used and taxes paid. Immigrants use many government services—particularly at the state and local levels—but

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116. *Id.* at 19.

117. *Id.*

118. *Id.* It is interesting that while Europe is experiencing lackluster economic performance, many European countries, such as England and Germany, are considering restrictive immigration policies. In regards to immigration’s impact on the U.S. economy, it has been observed that “[o]ver the past 20 years the U.S. economy has experienced a \$10 to \$15 trillion increase in net wealth, according [to] Federal Reserve Board data.” *Id.* at 20. In contrast:

According [to] the OCED Economic Survey of the European Union . . . the EU and other European countries are falling further and further behind the United States in standard of living as the U.S. economy continues to outgrow those of Europe.

. . . .

. . . European levels of employment continue to lag behind those of the United States and Japan.

Helle C. Dale, *Euro-Syndrome*, HERITAGE FOUND., Oct. 4, 2007, <http://www.heritage.org/press/commentary/ed100407a.cfm>.

119. *Hearing, supra* note 115, at 19.

120. *Id.* at 20.

they . . . also pay a lot in taxes. Conservatively estimated, in 1998 immigrant households paid an estimated \$133 billion in direct taxes to federal, state and local governments. Adding the tax receipts paid by immigrant businesses brings the total annual tax contributions of immigrants to about \$162 billion for 1998. In any given year, immigrants may use more in services than they pay in taxes, but over their lifetimes, immigrants are a fiscal bargain to native taxpayers. As their earnings rise over time, immigrant taxes exceed the benefits received.<sup>121</sup>

Moore also concluded that overall, “[i]mmigrants are huge net contributors to the Social Security and Medicare programs,” and “[i]mmigrant entrepreneurs are a major source of new jobs and vitality in the American economy.”<sup>122</sup> Moore ended his testimony with the following observation:

It is in America’s economic self-interest—and in the interests of immigrants themselves—that we keep the golden gates open to newcomers from every region of the world. The net gains to U.S. workers and retirees are in the trillions of dollars. Given the coming retirement of some 75 million baby boomers, we need the young and energetic immigrants now more than ever before . . . .<sup>123</sup>

In fact, economic analysts as well as domestic business community mainstays have long advocated for less restrictive immigration policies.<sup>124</sup> As a leading immigration scholar recently observed, “The U.S. immigration laws must be fundamentally revised to make them and their enforcement more consistent with the economic needs of the nation.”<sup>125</sup> One writer recently noted:

In defiance of economic logic, U.S. lawmakers formulate immigration policies to regulate the entry of foreign workers into the country that are largely unrelated to the economic policies they formulate to regulate international commerce.

. . . .

. . . Perpetuating the status quo by pouring ever larger

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121. *Id.* at 20–21 (emphasis omitted).

122. *Id.* at 21 (emphasis omitted).

123. *Id.* at 22.

124. *See, e.g.*, Larry J. Obhof, Comment, *The Irrationality of Enforcement? An Economic Analysis of U.S. Immigration Law*, 12 KAN. J.L. & PUB. POL’Y 163, 174–76 (2002) (challenging the hyperbolic claims of immigration’s devastating effects on the national economy).

125. KEVIN R. JOHNSON, OPENING THE FLOODGATES 132 (2007).

amounts of money into the enforcement of immigration policies that are in conflict with economic reality will do nothing to address the underlying problem.<sup>126</sup>

Bill Gates, founder of Microsoft, repeatedly complains about strict immigration policies' impact on the ability for businesses to hire skilled workers.<sup>127</sup> In terms of other sectors of the economy, an American Farm Bureau Federation study notes that "if agriculture's access to migrant labor were cut off, as much as \$5–9 billion in annual production of . . . commodities . . . would be lost in the short term. Over the longer term, this annual loss would increase to \$6.5–12 billion as the shock worked its way through the sector."<sup>128</sup> Preeminent economist John Kenneth Galbraith effectively responded to those who have advocated for closed borders and mass deportation of our undocumented workers:

Were all the illegals in the United States suddenly to return home, the effect on the American economy would . . . be little less than disastrous. A large amount of useful, if often tedious, work . . . would go unperformed. Fruits and vegetables in Florida, Texas, and California would go unharvested. Food prices would rise spectacularly. Mexicans wish to come to the United States; they are wanted; they add visibly to our well-being. . . . Without them, the American economy would suffer . . . .<sup>129</sup>

### C. Immigrants' Impact on Crime Rates

Regarding the third leading basis for the assault on recent immigration—the massive criminal impact of immigration—the NRC Report again refutes these claims.<sup>130</sup> In the chapter entitled

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126. Walter A. Ewing, *From Denial to Acceptance: Effectively Regulating Immigration to the United States*, 16 STAN. L. & POL'Y REV. 445, 445–46 (2005) (challenging the contradictory effects of harsh immigration policy by noting that, among other things, "[h]igh profits for people smuggling have attracted large-scale criminal organizations from around the world, which pose a far greater risk to national security than undocumented immigrants themselves").

127. See Chris Nuttall, *Intel Chief Calls for Easing of Visa Curbs*, FIN. TIMES (London), Feb. 8, 2006, at 6 (noting Bill Gates is one of numerous technology leaders to criticize "restrictions on foreign workers").

128. AM. FARM BUREAU FED'N, IMPACT OF MIGRANT LABOR RESTRICTIONS ON THE AGRICULTURAL SECTOR 1 (2006), available at [http://www.pma.com/view\\_document.cfm?docID=35](http://www.pma.com/view_document.cfm?docID=35).

129. JOHN KENNETH GALBRAITH, THE NATURE OF MASS POVERTY 134 (1979).

130. John Hagan & Alberto Palloni, *Immigration and Crime in the United States*, in NAT'L RESEARCH COUNCIL, THE IMMIGRATION DEBATE, *supra* note 98, at 367, 380 (finding after numerous statistical analyses "no consistent or compelling evidence . . . that immigration causes crime").

“Immigration and Crime in the United States,” the NRC Report reviews the current impact of immigration on crime and compares it to similar historical claims of the negative effects of immigration on crime.<sup>131</sup> In terms of these claims at the turn of the past century, the NRC Report observes that “[a]side from highly questionable writings associated with the eugenics movement, the research of this earlier era provided little evidence of a causal association between immigration and crime.”<sup>132</sup> In terms of past efforts to draw a causal connection, the NRC Report observes:

Where causality was seen to operate, its direction often was in the opposite direction expected. A report by the United States Immigration Commission found higher crime rates among the children of native-born parents and among children of immigrants than among immigrants themselves . . . . Such findings provided early support for the view that it was the acculturation of immigrants into American life that most notably increased their likelihood of involvement in crime.<sup>133</sup>

In terms of recent incarnations of claims of correlations between immigration and crime, the NRC Report further concludes: “Overall, we did not find consistent evidence in macro- or micro-level data that immigrants are much more likely than citizens of similar ages and gender to be involved in crime.”<sup>134</sup> Regarding claims of the criminal element within Mexican immigration, the NRC Report concludes: “[W]e find that Mexican immigrants are found in state prisons at an adjusted rate that is not strikingly different from U.S. citizens.”<sup>135</sup> Likewise, “[a] 2005 study by economists Kristen F. Butcher and Ann Morrison Piehl, released by the Federal Reserve Bank of Chicago, conclude[s] that . . . immigrants are a ‘self-selected’ group with ‘low criminal propensities.’”<sup>136</sup> Similarly, “a 2007 study by University of California, Irvine, sociologist Rubén G. Rumbaut [concludes that] among men age 18–39 (who comprise the vast majority of the U.S. prison population), the incarceration rate for the native-born

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131. *Id.* at 367–87.

132. *Id.* at 369.

133. *Id.* at 370.

134. *Id.* at 381.

135. *Id.*

136. *Top 5 Immigration Myths of This Campaign Season*, Immigration Law Professor Network Blog, <http://lawprofessors.typepad.com/immigration/files/myths.pdf> (last visited Sept. 5, 2008) (citing Kristen F. Butcher & Ann Morrison Piehl, *Why Are Immigrants' Incarceration Rates So Low? Evidence on Selective Immigration, Deterrence and Deportation* 10 (Fed. Reserve Bank of Chi., Working Paper No. 2005-19, 2005)).

(3.5 percent) was five times higher than the rate for immigrants (0.7 percent) in 2000.”<sup>137</sup> “The study also f[inds] that incarceration rates were lower for immigrants from Mexico, El Salvador, and Guatemala—who account for the majority of undocumented immigrants.”<sup>138</sup> Furthermore, the 2007 study states that “[i]n 2000, only 0.7 percent . . . of Mexican men and 0.5 percent of . . . Salvadoran and Guatemalan men were in prison.”<sup>139</sup>

With respect to the claim of a nexus between illegal immigration and terrorism, a report sponsored by the Migration Policy Institute observes that “[t]errorism experts have targeted controlling illegal immigration as a top priority, and many opponents of immigration have jumped on the opportunity to promote their policy and political objectives on this issue.”<sup>140</sup> This report nonetheless concludes:

[I]rregular immigrants and terrorists are fundamentally different. The former seek . . . the opportunity to reunify with their families. The latter follow the dictates of religious firebrands who apparently seek to promote religious and political goals at home through terrorist acts there and abroad. Recruiting terrorists from among irregular immigrants . . . is certainly a possibility, but so far neither seems to be a preferred option.<sup>141</sup>

The report goes on to note that “most would-be terrorists are likely to continue to enter through . . . legal port[s] of entry.”<sup>142</sup> And:

[T]he best visa and border inspection systems cannot prevent such entries because the intelligence on which a state’s frontline officials make decisions about whom to allow in will never be foolproof. This is not an ‘immigration’ issue; it is an issue of trying to make error-free decisions about the billions of international travelers who cross [our] borders each year.<sup>143</sup>

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137. *Id.* (citing Letter from Rubén G. Rumbaut, Professor of Sociology, Univ. of Cal., Irvine, to the President of the U.S., Members of Congress and Governors of States (July 2, 2007), available at <http://www.immigrationpolicy.org/images/File/misc/Open%20Letter%20on%20Crime%20for%20Web%2011-6-07.pdf>).

138. *Id.*

139. *Id.*

140. Demetrios G. Papademetriou, *The Global Struggle with Illegal Migration: No End in Sight*, MIGRATION INFO. SOURCE, Sept. 1, 2005, <http://www.migrationinformation.org/feature/display.cfm?id=336>.

141. *Id.*

142. *Id.*

143. *Id.*

The report concludes that the government must do more than improve border enforcement to fully protect our country from terrorism.<sup>144</sup> Accordingly, the suggested approach to curbing immigration includes: intelligence and police work as first line defenders, deeper international cooperation between nation states, examinations of “foreign political and economic relations with an eye toward identifying policies that fuel hatred,” and “systematically promoting [the] inclusion, participation, and engagement . . . [of] ethnic and immigrant communities [to turn them] into key allies in the fight against terrorism, rather than incubators and protectors of the next wave of terrorists.”<sup>145</sup>

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Thus, with respect to all three of the leading arguments against all forms of immigration that the current nativist critics bring forth—population explosion, negative economic impact, and a crime wave—the leading empirical studies in these areas conclusively find these claims are not only inaccurate, but the empirical data suggests the facts are actually the opposite of what the nativists assert. Specifically, on all three fronts of the attacks on undocumented immigrants: (1) the alleged population increase is relatively small in terms of the overall native population, and it is at rates among the lowest in U.S. history; (2) not only is the economic impact not negative in terms of its fiscal impact to the national government, but in fact has a marked positive impact; and (3) there is simply no basis to conclude that immigrants are more likely to foster a terrorist or criminal element than the native population.

However, the arguments made in this Article are not intended to lead to a conclusion that all concerns or arguments to limit immigration are solely or in any major way motivated by racial hostility towards minorities in general and ethnic immigrants in particular. For instance, although Senator Dodd questioned Senator Clinton’s equivocation concerning driver’s licenses for undocumented workers may have come across as racially motivated, especially in the current political climate associated with immigration, it could also just as easily have been motivated by a legitimate concern over the need to follow the rule of law.<sup>146</sup>

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144. See *id.* (discussing methods to protect a country from terrorism).

145. *Id.*

146. See *supra* text accompanying notes 72–74 (describing the recent debate over undocumented immigrants and drivers’ licenses between Senators Clinton and Dodd).

On a related but broader scale, both sides of the immigration debate tend to avoid the difficult questions, and as a result, troubling issues tend to be avoided. For instance, anti-immigrant advocates largely fail to acknowledge the positive economic impact undocumented workers have on the national economies, and by the same token, pro-immigrant advocates tend to avoid struggling with the economic strain undocumented workers can have on local and state economies, particularly with respect to elementary and secondary school education as well as increased health care costs resulting from fairly rapid growths in populations.<sup>147</sup> While it may be the case that in the long run, the benefits of undocumented workers outweigh any short-term costs deriving from their migration, such an answer often provides little solace for local officials confronting calls by their constituents for immediate efforts to curb immigration. Instead of proposing reasoned reform or federal governmental assistance, state and local responses tend to materialize as efforts at implementing restrictive enforcement, which more often than not is precluded by federal preemption doctrines.<sup>148</sup>

In light of the above, it is the goal of this Article to not only highlight the tenor of the current anti-immigration debate, which all too often is clouded by racist and venomous attacks, but also to call for its end. This call for change is not only a plea to end vile racist attacks, which is obviously a legitimate basis unto itself, but is also one to promote sound deliberation. Unless the attacks cease to victimize Latinos and Latinas in general, and undocumented workers in particular, polarization will just continue among the populace. Under that scenario, it will be extraordinarily difficult and unlikely for any politician or public policy advocate to engage in reasoned and honest debate concerning the economy and the law. What will likely result will be continued polarization and struggles in the political arena until one side merely outnumbers the other. In other words, a primary goal of this Article is not only to expose and shame those that engage in hateful and unwarranted speech, but to do so in order to create space for legitimate debate, based upon facts and

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147. Emily A. Harrell & David L. Franklin, *The Economic Realities of Immigration in the United States: Implications for Policy* 8–15, 18 (2008) (unpublished manuscript), available at [http://works.bepress.com/cgi/viewcontent.cgi?article=1002&context=emily\\_harrell](http://works.bepress.com/cgi/viewcontent.cgi?article=1002&context=emily_harrell).

148. See Michael A. Olivas, *Preempting Preemption: Foreign Affairs, State Rights, and Alienage Classifications*, 35 VA. J. INT'L L. 217, 223–25 (1994) (responding to Professor Peter Spiro's question of whether immigration policy should be "regulated by the individual states rather than being preempted by federal powers").

data, in an effort to address one of the most significant public policy issues of our day.<sup>149</sup>

#### IV. THE STATE AND LOCAL GOVERNMENT ATTACKS AGAINST IMMIGRATION

Notwithstanding the invalidity of the leading claims aimed at curbing immigration, there are several other anti-immigrant arguments, many of which are based on the negative effects of immigration on local and state governments.<sup>150</sup> For instance:

In 2005, in the towns of New Ipswich and Hudson, New Hampshire, local police arrested eight suspected undocumented immigrants on charges of criminal trespass when they failed to provide proper identification. Local police resorted to this tactic after the federal authorities declined to take action against the suspects. . . . On August 12, 2005, however, a state judge dismissed these charges, stating that they represented an unconstitutional attempt to regulate the enforcement of immigration violations. The judge reasoned that the police action violated the supremacy clause because the federal regulation was 'so pervasive' that it left no room for supplementation by the states.<sup>151</sup>

Following these events, more and more local municipalities and states have tried to regulate immigration at their own borders.<sup>152</sup>

In recent years, particularly when facing rising unemployment, state and local communities have contended that

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149. Thank you to Professors Andre Smith and Victor Romero for encouraging me to confront this matter. Addressing this difficult question, i.e., whether all anti-immigrant stances are race based and therefore bigoted, can obviously lead to different conclusions. However, blaming all criticism of immigration on racism can not only miss valuable insights, it can create a divide that can serve to stifle, instead of promote, honest engagement.

150. See Olivas, *supra* note 148, at 227–28 (describing the use of a 1992 study that indicated a negative fiscal impact of immigration to Los Angeles County by former California Governor Pete Wilson “to fan a campaign of inaccurate anti-alien sentiment generally . . . and to introduce restrictionist legislation”).

151. Michael J. Almonte, Note, *State and Local Law Enforcement Response to Undocumented Immigrants: Can We Make the Rules, Too?*, 72 BROOK. L. REV. 655, 655–66 (2007).

152. For instance, in 2006, the city of Farmers Branch, Texas, explored various measures to curb immigration in the city, “including prohibiting landlords from leasing to illegal immigrants, penalizing businesses that employ them, making English the city’s official language and ceasing publication of any documents in Spanish, and eliminating subsidies for illegal immigrants in the city’s youth programs.” Stephanie Sandoval, *FB Studies Tough Provisions Aimed at Illegal Immigrants*, DALLAS MORNING NEWS, Aug. 21, 2006, at A1.

immigrants, in particular undocumented immigrants, are responsible for taking jobs away from American citizens.<sup>153</sup> “Empirical studies conducted in the early 1990s estimated that the total cost of job displacement due to undocumented immigrants would reach approximately \$171.5 billion between 1993 and 2002.”<sup>154</sup> Specifically, “[a] study conducted by Rice University economist Dr. Donald Huddle concluded that illegal aliens had cost taxpayers \$5.4 billion in public assistance in 1990.”<sup>155</sup> Dr. Huddle “estimated that the 1992 illegal alien population of 4.8 million had generated \$11.9 billion in public assistance and displacement costs net from the taxes they contributed.”<sup>156</sup> Furthermore, “Huddle predicted that illegal aliens would displace millions of American jobs, generating costs in the hundreds of billions of dollars.”<sup>157</sup> A related argument raised by state and local officials is that the impact of lost jobs is especially concentrated in the area of low skilled American workers. The officials argue that there is an estimated 40% to 50% wage loss due to undocumented immigrants.<sup>158</sup>

Even shortly after its release, the Huddle study was severely criticized,<sup>159</sup> and the most comprehensive study on the matter, the

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153. Ryan D. Frei, Comment, *Reforming U.S. Immigration Policy in an Era of Latin American Immigration: The Logic Inherent in Accommodating the Inevitable*, 39 U. RICH. L. REV. 1355, 1379 (2005) (“One of the most common anti-immigration complaints is the claim that foreign-born immigrants, especially those entering the United States *illegally*, are taking American jobs and displacing American workers.”).

154. Almonte, *supra* note 151, at 659.

155. David M. Turoff, Note, *Illegal Aliens: Can Monetary Damages Be Recovered from Countries of Origin Under an Exception to the Foreign Sovereign Immunities Act?*, 28 BROOK. J. INT’L L. 179, 183 (2002) (citing DONALD HUDDLE, THE NET NATIONAL COSTS OF IMMIGRATION (Carrying Capacity Network, 1993) [hereinafter HUDDLE REPORT]).

Dr. Huddle, a Rice University economist, also concluded that in 1992 some 2.07 million American workers were displaced from jobs by immigrants, legal and illegal, costing \$11.9 billion. The study was commissioned by Carrying Capacity Network (“CCN”), a nonprofit organization that “works to increase understanding of the interrelated nature of environmental degradation, population growth, resource conservation, and quality of life issues.”

*Id.* at 179.

156. *Id.* at 183–84.

157. *Id.* at 184.

158. Frei, *supra* note 153, at 1379.

159. See, e.g., Patrick Lee, *Studies Challenge View That Immigrants Harm Economy*, L.A. TIMES, Aug. 13, 1993, at A1 (asserting that Huddle’s study “has drawn fire from academics critical of its assumptions”). An Urban Institute study concluded both legal and illegal immigration help create jobs in urban areas. *Id.* Huddle’s methodology was questioned by Stephen Moore of the Cato Institute, and Jeffrey Passel and Michael Fix of the Urban Institute. Stats Spotlight, *Statistical Controversies in Immigration Policy*, <http://www.stats.org/spotlight/immigration.html> (last visited Sept. 5, 2008). In 1996, a RAND study argued that “[i]n spite of their proliferation, recent studies on the net fiscal costs of immigration do not provide a reliable estimate of what those net costs are.”

highly regarded and bipartisan NRC Report, calls into serious doubt many of the economic conclusions raised by Huddle.<sup>160</sup> As congressional testimony on the subject concluded, “[T]he National Research Council of the National Academy of Sciences found that immigrants inflate the incomes of U.S. born workers by at least \$10 billion each year.”<sup>161</sup> Moreover, the overwhelming majority of economists flatly refute the Huddle study and related arguments of immigration depressing wages. Indeed, the economists conclude the opposite is true—immigrants increase this nation’s economic productivity and therefore likewise increase wages of all employees, including native-born employees.<sup>162</sup> For instance, “a 2006 study by the University of California, Davis economist Giovanni Peri found that because immigrant workers generally ‘complement’—rather than substitute for—native workers . . . immigration tends to increase productivity” and wages for all employees.<sup>163</sup> Similarly, a 2007 report by the White House Council of Economic Advisors concluded that as a result of the phenomenon of “complementarity,” “roughly 90% of native-born workers experience wage gains from immigration, which total between \$30 billion and \$80 billion per year.”<sup>164</sup>

Aside from the argument of mass job displacement,<sup>165</sup> many communities contend that immigrant groups create a massive burden on local governments and their communities. The Huddle study estimates that \$5.4 billion was spent in public assistance to

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GEORGES VERNEZ & KEVIN K. MCCARTHY, *THE COSTS OF IMMIGRATION TO TAXPAYERS*, at xvii (1996).

160. Thomas MaCurdy, Thomas Nechyba & Jay Bhattacharya, *An Economic Framework for Assessing the Fiscal Impacts of Immigration*, in NAT’L RESEARCH COUNCIL, *THE IMMIGRATION DEBATE*, *supra* note 98, at 13, 60 (asserting the Huddle study “ignore[s] the possibility that immigration might expand the job opportunities for natives in the long run”).

161. *Hearing*, *supra* note 115, at 20.

162. See Immigration Law Professor Network Blog, *supra* note 136 (declaring that “immigrants increase the economic productivity and thus the wages of natives”).

163. *Id.* (citing Gianmarco I.P. Ottaviano & Giovanni Peri, *Rethinking the Effects of Immigration on Wages* (Nat’l Bureau of Econ. Research, Working Paper No. W12497, 2006)).

164. *Id.* (citing COUNCIL OF ECON. ADVISORS, EXECUTIVE OFFICE OF THE PRESIDENT, *IMMIGRATION’S ECONOMIC IMPACT* (2007)).

165. One of the more troubling complaints concerning the alleged mass migration at the Mexican border is that such migrations create unseemly sites for local residents. See Almonte, *supra* note 151, at 658–60 (remarking that “many communities contend [immigrants] create ‘unsanitary conditions’ and are simply ‘aesthetically detrimental’ to their neighborhood”). I suspect the above claim relates more to bias against outsiders invading Anglo lands, which will be addressed below in Section VI, discussing the psychology of immigration.

undocumented immigrants in 1990.<sup>166</sup> That same study states that \$11.9 billion was spent in public assistance and displacement costs for an undocumented population of 4.8 million in 1992.<sup>167</sup> Somewhat surprisingly, the use of the Huddle study by anti-immigrant advocates simply fails to recognize that undocumented immigrants are largely not eligible to receive any public assistance, such as “welfare” payments.<sup>168</sup> As a 2007 Congressional Research Service report concludes, “[U]ndocumented immigrants . . . are not eligible to receive public ‘welfare’ benefits . . . .”<sup>169</sup> Moreover, “legal permanent residents . . . must pay into the Social Security and Medicare systems for approximately 10 years before . . . [becoming] eligible to receive benefits when they retire.”<sup>170</sup> Though the claims by state and local leaders will likely persist and continue to be the subject of headlines and court action, many of the leading arguments made thus far by these groups, not unlike the claims of anti-immigrant advocates at the national level, are simply not supported by fact.<sup>171</sup>

## V. A HISTORY OF INVITATION AND EXCLUSION

Despite the universally recognized characterization of the United States as “a nation of immigrants,”<sup>172</sup> this country’s treatment of immigrants is largely a tale of selective inclusion and assistance<sup>173</sup> on the one hand, and exclusion and

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166. Turoff, *supra* note 155, at 183 (citing HUDDLE REPORT, *supra* note 155).

167. *Id.* at 183–84.

168. See Immigration Law Professor Network Blog, *supra* note 136 (explaining that “undocumented immigrants are not eligible to receive any ‘welfare’ benefits and even legal immigrants are severely restricted in the benefits they can receive”).

169. *Id.* (emphasis omitted).

170. *Id.* A 2007 study by the Urban Institute concludes “that less than 1 percent of households headed by undocumented immigrants receive cash assistance for needy families, compared to 5 percent of households headed by native-born U.S. citizens.” *Id.* (emphasis omitted); see also N.C. Aizenman, *Illegal Immigrants in Md. And Va. Out-Earn U.S. Peers, Study Says*, WASH. POST, Nov. 29, 2007, at A10.

171. Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27, 54 (2007) (“[W]hen I count the rise of immigration-related proposals at the local and state level, I am convinced that no good can come from sub-federal assumption of immigration powers.”).

172. See JOHN F. KENNEDY, *A NATION OF IMMIGRANTS* (1964).

173. See Kevin R. Johnson, *The Forgotten “Repatriation” of Persons of Mexican Ancestry and Lessons for the “War on Terror,”* 26 PACE L. REV. 1, 4, 15 (2005) (contending that during the 1930s, for instance, “[f]ederal, state, and local governments worked together to involuntarily remove many U.S. citizens of Mexican ancestry, many of whom were born in the United States”).

mistreatment on the other.<sup>174</sup> During the times of exclusion and deportation, popular rhetoric included characterizations of immigrants that resemble the recent venomous incarnations.<sup>175</sup> When one examines this country's governing documents and principles, there is little evidence suggesting how the United States should treat immigrants. For instance, the U.S. Constitution, with the exception of Congress's power to regulate naturalization,<sup>176</sup> says virtually nothing concerning immigration.<sup>177</sup> Congress, for its part, initially failed to enact legislation regulating immigration.<sup>178</sup> Nonetheless, both the Constitution and the early Congress made laudable proclamations concerning rights of those within this society, but also made clear that the membership of those in society was not universal. For instance, African Americans and the indigenous people of this land were considered less than true members of this democracy.<sup>179</sup> And when Congress eventually acted on immigration, it declared only "free white persons" were worthy of naturalization, or in other words, citizenship.<sup>180</sup> It was not until the late 1800s that the United States established a structure of comprehensive immigration laws.<sup>181</sup> In 1875, with increasing

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174. See JOHNSON, *supra* note 125, at 45 ("U.S. immigration law is famous for its cyclical, turbulent, and ambivalent nature. At times, the nation has embraced some of the most liberal immigration admission laws and policies in the world. . . . At other times in U.S. history, however, the nation has capitulated to the nativist impulse and embraced immigration laws and policies that, in retrospect, make us cringe with shame and regret.").

175. The use of stigma and stereotyping is obviously not limited to ethnic and racial minorities. Legal scholars have examined a variety of the effects of stigma on other outsider groups. See, e.g., William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1331–32 (2000) ("No promo homo arguments and their antigay policies thus can be sustained most easily either as a signal of status denigration for GLBT people or as a state effort to closet variant gender and sexuality from the public culture. . . . [These arguments essentially rest] on more abrasive claims, namely, that GLBT people should be second-class citizens and that the state should encourage them to closet their identities in the public culture.") (emphasis omitted).

176. U.S. CONST. art. I, § 8, cl. 4.

177. Cf. U.S. CONST. art. I, § 9, cl. 1 (providing with respect to slave imports: "The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.").

178. Paul Brickner & Meghan Hanson, *The American Dreamers: Racial Prejudices and Discrimination As Seen Through the History of American Immigration Law*, 26 T. JEFFERSON L. REV. 203, 204 (2004) ("For more than one hundred years after our nation's founding, Congress failed to enact legislation that directly addressed immigration.").

179. Act of Mar. 26, 1790, ch. 3, 1 Stat. 103 (repealed 1795).

180. Richard A. Boswell, *Racism and Immigration Law: Prospects for Reform After "9/11?"* 7 J. GENDER RACE & JUST. 315, 317 (2003).

181. See JOHNSON, *supra* note 125, at 52.

immigration rates, Congress enacted the first immigration law, forbidding immigration by prostitutes and convicted criminals.<sup>182</sup> In 1882, Congress followed up with laws excluding criminals, indigents, and other undesirables.<sup>183</sup> As one immigration scholar recently noted, “Since comprehensive federal immigration came into place in 1875, the United States has had an unbroken history of immigration laws that restrict immigration and attempt to ensure a certain quality standard among immigrants.”<sup>184</sup> With the Immigration Act of 1917, Congress passed legislation containing literacy requirements and the power to deport aliens convicted of specified offenses.<sup>185</sup>

The characterizations of immigrant groups and the assaults against and scapegoating of immigrant workers, which are often baseless and motivated by the vile emotions of fear and hate, are not new in this country.<sup>186</sup> Perhaps what is worse is that in times of hostility towards immigrants, their vulnerability, due to the fact they have fewer rights than citizens, likely makes them feel even more threatened. After all, the threat of deportation always lingers, irrespective of their documented or undocumented status.<sup>187</sup> It is this threat along with subordinated rights that makes all immigrants among the most vulnerable.<sup>188</sup>

In addition, this country has an unfortunate history of subjugating immigrants.<sup>189</sup> With respect to Latino and Latina

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182. Act of Mar. 3, 1875, ch. 141, § 5, 18 Stat. 477 (repealed 1974).

183. Act of Aug. 3, 1882, ch. 376, § 2, 22 Stat. 214.

184. JOHNSON, *supra* note 125, at 52.

185. Act of Feb. 5, 1917, ch. 29, § 3, 39 Stat. 875, 875–77 (repealed 1952). Under the Act, “all aliens over sixteen years of age, physically capable of reading” must be able to do so or they would not be admitted into the United States. *Id.* at 877. Furthermore, the Act listed numerous offenses for which an alien could be deported and prohibited immigration from a broader portion of Asia. *Id.* at 875–76.

186. The following books provide exhaustive examinations of this country’s immigration history: LAWRENCE H. FUCHS, *THE AMERICAN KALEIDOSCOPE: RACE, ETHNICITY, AND THE CIVIL CULTURE* 57 (1990) (noting that during the period from 1880 to 1920, “native-born workers worried about the negative effect that immigrants would have on wages and working conditions”); JOHN HIGHAM, *SEND THESE TO ME: IMMIGRANTS IN URBAN AMERICA* 121 (John Hopkins Univ. Press 1984) (1975) (revealing anti-Jewish sentiment existing in America at least as far back as the 1840s); JOHN HIGHAM, *STRANGERS IN THE LAND* 9 (1955) (asserting “the xenophobia of the 1850s included anxiety over the threat of immigrant radicals to American institutions”); BILL ONG HING, *MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY: 1850–1990*, 21 (1993) (contending Chinese miners on the West Coast “encountered fierce racial animosity in the 1840’s”); KEVIN R. JOHNSON, *THE HUDDLED MASSES MYTH: IMMIGRATION AND CIVIL RIGHTS* 13 (2004) (exposing the “long history” in the United States of poor treatment of racial minorities, especially noncitizen minorities).

187. *See, e.g.*, JOHNSON, *supra* note 125, at 46.

188. *Id.* (stating that “[n]oncitizens . . . can be forcibly ejected from the country for a wide variety of transgressions”).

189. *See generally* GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION* (1996)

workers, there is similarly a long history of inviting undocumented workers from the South when market needs call for cheap labor.<sup>190</sup> Such invitations are inevitably followed by domestic efforts to oust them once the formerly valuable workers are deemed unnecessary due to a perceived decline in demand for such labor, or when unrelated events lead to isolationist sentiments in the country.<sup>191</sup> The twentieth century in particular evidenced several periods of government sponsored efforts to promote Latino and Latina guest worker immigration, only to be followed by harsh governmental undertakings aimed to deport the very same worker groups when the economy changed or perceived crises provoked mass hysteria.<sup>192</sup>

Immigrants of color in general, and Asian immigrants in particular,<sup>193</sup> have long experienced times when they were initially welcomed or invited to meet the country's agricultural demands or build this land's infrastructure or industries, only to later meet efforts to deport them, frequently after not being paid the promised wages.<sup>194</sup> Perhaps the most infamous of these episodes occurred in the late 1800s, when federal, state, and local governments used their resources to initially invite, but later

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(explaining how the Constitution relates to immigration law and aliens in general). This work also noted that in the late 1800s, "[e]ven the criteria for the deportation of alien residents from the United States received no constitutional scrutiny from the courts." *Id.* at 14.

190. See JOHNSON, *supra* note 125, at 80–81 (discussing the invitation of Mexican laborers by the United States to work in agriculture through the Bracero Program). The terms of the Migrant and Seasonal Agricultural Worker Protection Act identify the typical abuses against such workers, including unpaid wages and poor working conditions. Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801–1872 (1994).

191. See Johnson, *supra* note 173, at 4–5 (detailing the “repatriation” of people of Mexican ancestry during the economic downturn of the 1930s). This country's historical treatment of Latino and Latina workers from South and Central America reminds this Author of the Clash song “Should I Stay or Should I Go,” with a slight twist. THE CLASH, SHOULD I STAY OR SHOULD I GO? (Epic Records 1982). Instead of questioning whether anyone should stay or go, this country has repeatedly begged immigrant workers to “please stay” only to be followed shortly thereafter with a scream of, “now go!”

192. Johnson, *supra* note 173, at 4–5.

193. See RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS 111 (1989) (chronicling the passage of anti-Chinese legislation in the 19th century).

194. *Id.* at 116–17 (describing the battle Chinese miners faced in living on the wages they earned after having to pay for the necessities of life in the United States as well as the “foreign miner's tax”). Interestingly, the 1879 constitution of the State of California stated: “The presence of foreigners ineligible to become citizens of the United States is declared to be dangerous to the well-being of the state, and the legislature shall discourage their immigration by all the means within its power. Asiatic coolieism is a form of human slavery, and is forever prohibited in this state, and all contracts for coolie labor shall be void.” CAL. CONST., art. XIX, § 4 (repealed 1952).

exclude and deport Chinese immigrants.<sup>195</sup> These efforts led to Congress's passage of the Chinese exclusion laws,<sup>196</sup> which sought to halt all forms of Chinese immigration.<sup>197</sup> Ultimately, the United States Supreme Court, citing national sovereignty concerns, refused to overturn the laws. In the two leading decisions on the matter, *Fong Yue Ting v. United States*,<sup>198</sup> and the notorious *Chinese Exclusion Case*,<sup>199</sup> the Court refused to intervene. In the *Chinese Exclusion Case*, referring to the "obnoxious Chinese," the Court stated, "The power of exclusion of foreigners . . . [is] an incident of sovereignty belonging to the government of the United States, as . . . part of . . . [its] sovereign powers delegated by the Constitution. . . ."<sup>200</sup> In *Fong Yue Ting*, the Court ruled that "[t]he right of a nation to expel or deport foreigners . . . is as absolute and unqualified as the right to prohibit and prevent their entrance into the country."<sup>201</sup>

Congress eventually extended their exclusionary laws to other Asians.<sup>202</sup> For instance, the "Gentleman's Agreement" between the United States and Japan in 1907 and 1908 "greatly restricted immigration from Japan."<sup>203</sup> The Immigration Act of 1917 expanded Chinese exclusion to prohibit immigration from the "Asiatic barred zone,"<sup>204</sup> which also included the entire Middle East.<sup>205</sup> In addition, the 1924 Immigration Act established the

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195. See, e.g., JOHNSON, *supra* note 186, at 17 (describing the "shameful treatment of Chinese immigrants by federal, state, and local governments").

196. *Id.* As I and other authors have noted, during the period of anti-Asian immigrant efforts, the U.S. Supreme Court decided the infamous *Scott v. Sanford* (Dred Scott), 60 U.S. 393 (1856), which similarly concluded that African Americans were excluded from eligibility for citizenship. *Scott*, 60 U.S. at 406; see also Ediberto Román, *The Citizenship Dialectic*, 20 GEO. IMMIG. L.J. 557, 576 (2006) (describing the Supreme Court's endorsement of "unequal treatment and inferior status of various groups that should have been considered citizens").

197. See Román, *supra* note 196, at 577 & n.113 (noting the expansion of the Chinese Exclusion Act of 1882 for "ten years . . . [in order to] tighten all immigration and travel from China").

198. *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

199. *Chae Chan Ping v. United States (Chinese Exclusion Case)*, 130 U.S. 581, 609 (1889).

200. *Id.* at 609; see also HING, *supra* note 186, at 25 (noting the Court's refusal in the Chinese Exclusion Case of 1889 to overturn the Scott Act).

201. *Fong Yue Ting*, 149 U.S. at 707.

202. See HING, *supra* note 186, at 32 (detailing numerous laws aimed at excluding Asian immigrants).

203. JOHNSON, *supra* note 186, at 18.

204. Act of Feb. 5, 1917, ch. 29, § 3, 39 Stat. 874, 875–76 (repealed 1952); see also HING, *supra* note 186, at 32 (stating that the Act extended the Chinese exclusion laws to all other Asians).

205. See Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 14 & n.83 (1998) (explaining that the Asiatic barred zone "include[d] the East Indies, western China, French Indochina,

infamous discriminatory national origin quota system, and allowed for the exclusion of noncitizens ineligible for citizenship, significantly affecting Asians who were prohibited from naturalizing.<sup>206</sup> The Immigration Act of 1924 had the effect of imposing strict national origin quotas on southern and eastern Europeans because of the belief that those immigrants were racially inferior.<sup>207</sup> Scholars have argued that through the quota system, “Congress sought to restore the racial demographics of the United States as of 1890, a time” prior to the significant migration “of southern and eastern European immigrants.”<sup>208</sup> The Immigration Act of 1924 also established the National Origins System, which restricted annual immigration from foreign countries to 2% of the country’s population living in the United States, as determined by the 1890 census.<sup>209</sup> Because most of the foreign-born immigrants in the United States at the time were from northern or western Europe, the Immigration Act of 1924 “reinforced patterns of white immigration and staved off immigration from other areas, including Asia, Latin America, and Africa.”<sup>210</sup> As a result, until the 1960s, roughly two-thirds of all legal immigrants to the United States were from Europe and Canada.<sup>211</sup>

In the context of naturalization, the United States similarly created the naturalization prerequisite, which required that all applicants, in order to be eligible, had to be “white.”<sup>212</sup> For instance, in *United States v. Thind*, the Supreme Court held that an immigrant from India was not white and therefore ineligible

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Siam, Burma, India, Bhutan, Nepal, eastern Afghanistan, Turkestan, the Kirghiz Steppe, and the southeastern portion of the Arabian Peninsula”).

206. Immigration Act of 1924, ch. 190, § 11(d), 43 Stat. 153, 159 (repealed 1952). For numeric quotes established by the Act, see History Matters, Who Was Shut Out?: Immigration Quotas, 1925–1927, <http://historymatters.gmu.edu/d/5078> (last visited Sept. 5, 2008).

207. See JOHNSON, *supra* note 125, at 53 (citing the Dillingham Commission reports).

208. *Id.*

209. See U.S. DEP’T OF HEALTH & HUMAN SERVS., MENTAL HEALTH: CULTURE, RACE, AND ETHNICITY—A SUPPLEMENT TO MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL 41 (2001) (describing the impact of the National Origins System on U.S. demographics).

210. *Id.*

211. *Id.* The Immigration Act of 1965 allowed annual immigration of 20,000 individuals from each country in the Eastern Hemisphere, with preferences to individuals in certain occupations. *Id.* The Act also provided for family unification by providing a preference to people with relatives in the United States. *Id.* Following the passage of the Act of 1965, the percentage of immigrants from Europe fell from 68% in the 1950s to 12% in the 1980s. *Id.*

212. See generally IAN F. HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996) (discussing the origin and history of the “white persons” naturalization restriction).

for naturalization.<sup>213</sup> Likewise, in *Ozawa v. United States*, a Japanese immigrant was deemed nonwhite, and, therefore, could not naturalize.<sup>214</sup>

Latino and Latina immigrant workers also experienced the revolving door of immigration. For instance, in the mid 1800s, Americans welcomed Mexicans to California in order to learn, among other things, Mexican mining techniques.<sup>215</sup> Once the Americans learned those techniques, at least one scholar has argued, Americans began to perceive Mexicans as undesirable foreign competition, and in 1850, the California Legislature passed the Foreign Miners Tax to discourage Mexicans from gold mining.<sup>216</sup> As a result of this American perception of Mexican competition and inferiority, coupled with gerrymandering by the American government, Mexican Americans' influence in politics was greatly diminished by the 1800s.<sup>217</sup> Although their political influence decreased, Mexicans' importance in the workforce increased. "By the 1920s Mexican immigrant and Mexican American workers dominated the unskilled and semiskilled sectors of the regional labor market."<sup>218</sup> Mexican American laborers were not limited to agricultural labor, but also participated in construction, railroad construction and maintenance, and other tasks that Americans were not willing to perform.<sup>219</sup> While during these periods of economic growth those of Mexican descent were openly welcomed, when the domestic economy took a turn for the worse, these vulnerable inhabitants were attacked and ousted.<sup>220</sup>

The very concept of guest workers in this land is far from new.<sup>221</sup> Indeed, such programs have been in existence since 1917, when the government, in response to a labor crisis caused by

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213. *United States v. Thind*, 261 U.S. 204, 214–15 (1923) ("As so understood and used, whatever may be the speculations of the ethnologist, [the words 'free white persons' do] not include the body of people to whom the appellee belongs.").

214. *Ozawa v. United States*, 260 U.S. 178, 198 (1922) ("The applicant, in the case now under consideration, however, is clearly of a race which is not Caucasian and therefore belongs entirely outside the zone on the negative side.").

215. DAVID G. GUTIÉRREZ, *WALLS AND MIRRORS: MEXICAN AMERICANS, MEXICAN IMMIGRANTS AND THE POLITICS OF ETHNICITY* 19 (1995).

216. *Id.*

217. *Id.* at 24.

218. *Id.* at 45.

219. *See id.* at 45–46.

220. *See id.* at 71–72 (describing the effect of the Great Depression on Mexican immigrants, who were being seen as a "menace").

221. *See* Alexandra Villarreal O'Rourke, Comment, *Embracing Reality: The Guest Worker Program Revisited*, 9 HARV. LATINO L. REV. 179, 180 (2006) (examining the U.S. history of using guest worker programs).

ever-increasingly strict immigration laws, established a guest worker program for agricultural laborers from Mexico.<sup>222</sup> Roughly “72,000 guest workers participated in the program between 1917 to 1921.”<sup>223</sup> However, by the mid-1920s, a slowing U.S. economy led the government to discontinue the program and instead create the U.S. Border Patrol in an effort to curb illegal immigration.<sup>224</sup> In 1931, the U.S. government began conducting raids aimed at locating and deporting all undocumented workers.<sup>225</sup> As a result, during the Great Depression of the 1930s, U.S. citizens, residents, and undocumented aliens of Mexican descent were “repatriated” to Mexico.<sup>226</sup> However, the term “repatriated” was inaccurately applied to this event because many people of Mexican descent who were forced to leave the United States for Mexico had actually acquired U.S. citizenship status.<sup>227</sup> It is possible that the vast majority of those deported between 1929 and 1934 to Mexico were U.S. citizens, including children born on U.S. soil.<sup>228</sup> Both local and federal authorities participated in forcing citizens and noncitizens of Mexican ancestry to leave the United States and return to Mexico.<sup>229</sup> Those authorities did not consider the rights of the numerous citizens whom they deported.<sup>230</sup> The repatriation campaign confirmed the subordinate status of Mexican Americans. These governmental efforts to deport people of Mexican ancestry to Mexico arguably violated the federal immigration power as well

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222. *Id.*

223. *Id.*

224. See Kiera LoBreglio, Note, *The Border Security and Immigration Improvement Act: A Modern Solution to a Historic Problem*, 78 ST. JOHN'S L. REV. 933, 936 (2004) (describing changes to U.S. immigration policy in the 1920s).

225. Lauren Gilbert, *Fields of Hope, Fields of Despair: Legisprudential and Historic Perspectives on the AgJobs Bill of 2003*, 42 HARV. J. ON LEGIS. 417, 427 (2005) (“By 1931, in the midst of the Great Depression, the United States determined that it was time for the Mexicans to depart.” The Department of Labor directed the Bureau of Immigration “to locate and remove all non-citizens illegally in the United States, targeting particular immigrants involved in labor disputes.”).

226. See FRANCISCO E. BALDERRAMA & RAYMOND RODRÍGUEZ, *DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S 98–99* (1995) (exploring the history of “repatriation” during the Great Depression).

227. JOHNSON, *supra* note 186, at 27–28.

228. See BALDERRAMA & RODRÍGUEZ, *supra* note 226, at 216 (“[A]pproximately 60 percent of those summarily expelled were children who had been born in the United States and were legally American citizens.”).

229. See *id.* at 219 (discussing the collaboration of the Labor Department, the Immigration Service, local police, and the court system).

230. See *id.* at 216 (“The wanton disregard of legal constraints in denying deportees their constitutional rights was so flagrant that groups as diverse as the Los Angeles Bar Association, the Wickersham Commission, industrialists, and ranchers felt compelled to condemn the illegal tactics, but to no avail.”).

as Due Process, Equal Protection, and Fourth Amendment rights.<sup>231</sup> Nevertheless, the acceptance and later rejection of Mexican immigrants did not end with the Great Depression.

As a result of the labor shortages created by World War II, in 1942, the United States established the Bracero Program,<sup>232</sup> a guest worker program that allowed Mexicans to come to the United States and fill the demand for agricultural labor.<sup>233</sup> The Program was established upon the negotiation of a treaty between the United States and Mexico on April 4, 1942.<sup>234</sup> In 1943, Congress endorsed the Bracero Program through Public Law 45.<sup>235</sup> Under the Bracero Program, Mexicans could live and work in the United States for up to nine months per year. The United States government nonetheless made it very clear that these imported workers could not displace domestic workers.<sup>236</sup> By 1959, the Bracero Program had grown substantially, and in that year alone, over 450,000 Mexican nationals were admitted into the Program.<sup>237</sup> When the first Braceros returned to Mexico, they reported discrimination as well as substandard working and housing conditions.<sup>238</sup> The Program also began to face strong opposition from both domestic civil rights groups and the labor sector over the poor treatment of these workers by their domestic agricultural employers.<sup>239</sup> Moreover, the Mexican government became dissatisfied with the United States upon hearing about

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231. See Kevin R. Johnson, *International Human Rights Class Actions: New Frontiers for Group Litigation*, 2004 MICH. ST. L. REV. 643, 665–68 (2004) (detailing the violations of federal and state laws during the “repatriation” programs).

232. See generally Lorenzo A. Alvarado, Comment, *A Lesson from My Grandfather, The Bracero*, 22 CHICANO–LATINO L. REV. 55 (2001) (providing a vivid and well-documented history of the Bracero Program).

233. See O’Rourke, *supra* note 221, at 181 (“The program allowed for the temporary admission of unskilled workers to fill U.S. job openings, most of which were in agriculture.”).

234. KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S.* 19 (1992).

235. See Act of Apr. 29, 1943, ch. 82, 57 Stat. 70, 70–73 (1943) (providing appropriations for implementation of the Bracero Program). Public Law 45 was extended one month by Act of Dec. 23, 1943, ch. 381, 37 Stat. 643 (1943), extended through 1944 by Farm Labor Supply Appropriation Act, 1944, ch. 16, 58 Stat. 11 (1944), extended through 1945 by First Supplemental Appropriation Act, 1945, ch. 660, 58 Stat. 853, 862–63 (1945), and extended through 1947 by Act of Apr. 28, 1947, ch. 43, 61 Stat. 55 (1947).

236. See Alvarado, *supra* note 232, at 58 (“[T]he class of labor we want is the kind we can send home when we get through with them.” (quoting ERNESTO GALARZA, *MERCHANTS OF LABOR: THE MEXICAN BORDER* 43 (1964))).

237. LoBreglio, *supra* note 224, at 937.

238. See BARBARA A. DRISCOLL, *THE TRACKS NORTH: THE RAILROAD BRACERO PROGRAM OF WORLD WAR II* 56 (1999) (discussing a series of reports from early Braceros published in Mexican newspapers).

239. See LoBreglio, *supra* note 224, at 937 (citing opposition by labor unions and civil rights groups as reasons for the Program’s eventual end).

abuses of civil and human rights.<sup>240</sup> The Mexican government eventually banned Bracero recruiting in Mexico City for one month in February 1943, temporarily closing the doors on Mexicans who sought entry under the Bracero Program.<sup>241</sup> Ultimately, the United States allowed roughly 5 million Mexicans to enter and work in the United States as Braceros under the Program, which ended in 1965.<sup>242</sup>

The agricultural Bracero Program had its railroad counterpart in the 1940s, namely the railroad Bracero Program of World War II.<sup>243</sup> In January 1943, a U.S. Ambassador to Mexico was ordered by the State Department to meet with Mexico's Secretary of Exterior Relations (Secretaría de Relaciones Exteriores) to expand the Bracero Program beyond the agricultural industry.<sup>244</sup> In April 1943, Mexico and the United States reached an agreement with respect to allowing Braceros to supply labor for the railroads.<sup>245</sup> About six thousand nonagricultural workers were to work on the railroads in the United States.<sup>246</sup> Braceros were contracted in Mexico City and transported to the U.S.–Mexico border.<sup>247</sup> Numerous Braceros died on the railroads while off duty due to natural causes, as well as train and rail accidents, suicides, and fights.<sup>248</sup> The last group of railroad Braceros arrived in the United States in August of 1945.<sup>249</sup> On August 28, 1945, the United States issued a termination order and approximately fifty thousand railroad Braceros were to be repatriated to Mexico.<sup>250</sup> The Bracero Programs, agricultural and railroad, were “consistent with the thrust of U.S.–Mexican relations at the time.”<sup>251</sup>

The implementation and termination of the Bracero Programs directly affected the influx of illegal immigration. “By legalizing the supply of workers who otherwise would have entered illegally, the Bracero Program temporarily deflected the

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240. See DRISCOLL, *supra* note 238, at 56 (describing modifications to the U.S.–Mexican agreement that originally created the Bracero Program).

241. *Id.*

242. CALAVITA, *supra* note 234, at 1.

243. See generally DRISCOLL, *supra* note 238 (providing a detailed history of the railroad Bracero program).

244. *Id.* at 67.

245. *Id.* at 71.

246. *Id.*

247. See *id.* at 77 (describing the recruitment process in Mexico).

248. *Id.* at 117.

249. *Id.* at 152.

250. *Id.*

251. *Id.* at 39.

contradictions surrounding illegal immigration and thereby relieved the pressure on the INS. But those contradictions by no means disappeared, nor did the conflicts that they gave rise to.”<sup>252</sup> During the years of the Bracero Programs, illegal immigration increased.<sup>253</sup>

The United States’ policy of bringing in a labor force from Mexico during times of high demand and sending them back to Mexico when the labor supply exceeded the demand paved a bumpy path for Mexicans aspiring to become U.S. citizens. Mexicans who came to the United States as guest workers established ties in the United States, and many of them economically benefited from the low wages they earned because of the high rate of exchange between the U.S. dollar and Mexican peso.<sup>254</sup> This economic benefit, coupled with the establishment of families, gave many Mexicans an incentive to remain in the United States beyond the time permitted by the U.S. government.<sup>255</sup> Some Mexicans returned to Mexico and eventually made or tried to make their way back into the United States by crossing the U.S.–Mexico border, while others remained in the United States, risking removal by deportation or repatriation.<sup>256</sup>

In the mid-1950s, the United States established “Operation Wetback” to monitor the presence of Mexicans in the United States and deport those who were unlawfully in the country.<sup>257</sup> This program occurred during the start of the Cold War, a period of heightened fear of noncitizens.<sup>258</sup> As a result of the Bracero Programs, many Mexicans moved to the northern parts of Mexico to be closer to the U.S.–Mexico border.<sup>259</sup> However, the United States subsequently terminated the Bracero Programs, effectively locking its door to these relocated Mexican citizens.<sup>260</sup> Consequently, immigration issues became more pressing, as many Mexicans crossed the border unlawfully during this

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252. CALAVITA, *supra* note 234, at 108.

253. *Id.* at 31–32.

254. See, e.g., JULIAN SAMORA, *LOS MOJADOS: THE WETBACK STORY 75–77* (1971) (describing an illegal alien seeking to save \$800 to buy land back in Mexico).

255. See JUAN RAMON GARCÍA, *OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN AMERICAN UNDOCUMENTED WORKERS IN 1954*, at 227–29 (1980).

256. *Id.* at 227–30.

257. SAMORA, *supra* note 254, at 52; see also GARCÍA, *supra* note 255, at 169 (giving a detailed history of the planning and execution of “Operation Wetback”).

258. See CALAVITA, *supra* note 234, at 49–50, 53–54 (detailing “Cold War rhetoric” on the topics of border security and illegal immigration in the 1950s).

259. See GARCÍA, *supra* note 255, at 40 (analyzing rates of Bracero entries and the apprehensions of illegal aliens).

260. See CALAVITA, *supra* note 234, at 142 (detailing the end of the Bracero Program).

period.<sup>261</sup> “Operation Wetback” specifically targeted individuals of Mexican descent.<sup>262</sup> During this massive campaign, over one million Mexican immigrants,<sup>263</sup> as well as U.S. citizens of Mexican ancestry and undoubtedly other Latinas and Latinos, were deported.<sup>264</sup> “Operation Wetback” treated individuals of Mexican ancestry similar to the way Mexican Americans were treated during the repatriation in the 1930s. The Mexican–American community was directly affected by this campaign because it was “aimed at only one racial group, which meant that the burden of proving one’s citizenship fell totally upon people of Mexican descent. Those unable to present such proof were arrested and returned to Mexico.”<sup>265</sup> Hence, the hasty process of proving documentation infringed upon the rights of many Mexican Americans who were U.S. citizens or lawful permanent residents because some of them were unable to readily provide authorities with the documentation necessary to show their legal status in the United States.<sup>266</sup>

Not unlike what occurred in the 1950s, the most recent tension between labor demands and governmental reactions to Mexican and other Latino immigrants arose during the beginning of this century. Shortly after the September 11, 2001 terrorist attacks, increased fear of outsiders resulted in increased attention to our borders and, consequently, in increased scrutiny of this country’s immigration policy.<sup>267</sup> With the renewed fear of the foreigner highlighted by the non-American backgrounds of

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261. See GARCÍA, *supra* note 255, at 230 (“The mass repatriation and deportation of ‘illegals’ once again attested to the fact that Mexicans were welcomed here only as long as there was a need for their labor.”).

262. See *id.* at 230–31 (describing the impact of “Operation Wetback” on Mexican–American society).

263. See *id.* at 227 (questioning the official count of 1.3 million illegals who were deported or who left voluntarily due to “Operation Wetback”).

264. See *id.* at 230–31 (describing the process of returning people of Mexican descent to Mexico).

265. *Id.*

266. *Id.*

267. But, for an indication that some of these changes predate the 2001 terrorist attacks, see Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-627 (codified at 8 U.S.C. § 1101(a)(43)) and Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, 1276 (codified at 8 U.S.C. § 1252c) which nearly doubled the numbers of immigrants in detention within two years. See also Am. Civil Liberties Union, Analysis of Immigration Detention Policies (Aug. 18, 1999), <http://www.aclu.org/immigrants/detention/11771leg19990818.html> (concluding two policies of IIRAIRA and AEDPA, mandatory detention of noncitizens in deportation proceedings and indefinite detention of noncitizens deportable to countries that will not accept them, have contributed to doubling the number of immigrants detained by the INS between 1996 and 1998).

the perpetrators of the 9/11 attacks, more and more pundits and politicians began using loaded and emotionally charged terms and catchphrases such as the “alien invasion.”<sup>268</sup> In response to the increasing interest in immigration and his personal beliefs in the benefits of this land’s immigration history, President George W. Bush, beginning in 2004, sought to reach a compromise and proposed comprehensive immigration reform, which included a guest-worker program.<sup>269</sup> In 2006, proposals and debates regarding immigration reform caught the nation’s attention. Notwithstanding news coverage, lobbying, and protests, the only legislative act regarding comprehensive immigration reform in the 109th Congress was the Secure Fence Act (H.R. 6061), the primary aim of which is to strengthen border controls.<sup>270</sup> The Act provides for the funding of a 700-mile fence along the U.S.–Mexico border.<sup>271</sup> Some have argued that the Secure Fence Act of 2006 is a necessary first step for immigration reform.<sup>272</sup> However, the main comprehensive immigration reform bill included provisions providing for the tightening of the nation’s borders and increasing the enforcement of immigration laws at several levels.<sup>273</sup>

The House and Senate comprehensive immigration reform bills thus far have failed to provide anything resembling comprehensive reform. Though both bills went further than merely proposing fencing our borders, the primary distinguishing factor between H.R. 4437<sup>274</sup> and S. 2611<sup>275</sup> is a citizenship path proposed in S. 2611.<sup>276</sup> The Senate version’s H-2C visa, known as a “blue card,” permits employers to bring in foreign workers for

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268. See *supra* notes 30–61 and accompanying text (describing a litany of anti-immigration arguments put forth by both politicians and members of the media).

269. See Stephen Dinan, *Bush Signs the Fence Bill*, WASH. TIMES, Oct. 5, 2006, at A1.

270. See Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638 (codified as amended in scattered sections of 8 U.S.C.).

271. *Id.*

272. See Rachel L. Swarns, *Split Over Immigration Reflects Nation’s Struggle*, N.Y. TIMES, Mar. 29, 2006, at A17 (discussing both the House of Representatives and the more lenient Senate bills on immigration reform); see also Press Release, Walter Jones for Congress Comm., Jones and Colleagues Demand Action on Fence by Date Certain Act (June 10, 2008) (quoting Grassfire.org President Steve Elliot as calling the Secure Fence Act of 2006 a “necessary first step in providing illegal immigration reform and securing our borders”), available at <http://www.walterjonesforcongress.com/jones-and-colleagues-demand-action-on-fence-by-date-certain-act>.

273. See Swarns, *supra* note 272.

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

275. Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006).

276. *Id.* § 245B.

up to six years.<sup>277</sup> In the 109th Congress, the Legislature passed the REAL ID Act of 2005 to strengthen border security and the country's national security overall.<sup>278</sup> The law requires that the expiration date of a license or ID card issued to a temporary foreign visitor match the expiration date of the visa. If there is no expiration date on the visa, the license or ID card must expire in one year.<sup>279</sup> Only U.S.-issued documents and valid foreign passports may be used to establish the identity of applicants.<sup>280</sup> Each applicant must provide proof of U.S. citizenship or lawful presence in the United States, and documents presented during the application process must be independently verified.<sup>281</sup>

The above paragraphs illustrate that the recent outcry against immigration follows a long pattern of manipulating markets and people desirous of working in this land. During these periods, immigrant workers were only accepted when our markets needed cheap disposable labor,<sup>282</sup> but when economic

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277. *Id.* § 218A. Another major point of difference between the Senate and House bills for comprehensive immigration reform is that S. 2611 proposes a 370-mile fence along highly populated areas near the border, while H.R. 4437 proposes a 700-mile fence. *Id.* § 106(c); H.R. 4437 § 1002. Also, S. 2611 does not mention any expanded role for local law enforcement for border enforcement tasks, but H.R. 4437 does. H.R. 4437 § 501(7)(B). The Senate bill includes a proposal that makes English the "national language" of the United States, thereby taking aim at discouraging services in any language other than English. S. 2611 § 767(a). Notwithstanding the bill's focus on heightened border security and making English the sole official national language, some analysts have compared it to the Immigration Reform and Control Act of 1986 (IRCA). *See* Romano L. Mazzaoli & Alan K. Simpson, *Enacting Reform, Again*, WASH. POST, Sept. 15, 2006, [http://www.washingtonpost.com/wp-dyn/content/article/2006/09/14/AR2006091401179\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2006/09/14/AR2006091401179_pf.html) (claiming the Senate bill is based on elements that are merely "modified versions" of the elements underlying the IRCA).

278. REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, 302 (2005) (to be codified at 49 U.S.C. § 30301).

279. *Id.* § 202(c)(2)(C)(ii).

280. *Id.* § 202(c)(2)(B).

281. *Id.* § 202(c)(2)(B)-(C). Several resolutions, such as H.R. Res. 610 and 621, supporting H.R. 4437 (comprehensive immigration reform bill known as "Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005"), were proposed in the House, but ultimately went nowhere. H.R. Res. 610, 109th Cong. (2005); H.R. Res. 621, 109th Cong. (2005); H.R. 4437, 109th Cong. (2005). This bill is the comprehensive immigration reform proposed in December 2005, and referred to the Senate in January 2006. *See* H.R. 4437, 109th Cong. (2005). The purpose is to strengthen the enforcement of immigration laws (codified in the Immigration and Nationality Act (INA)) and enhance border security. *Id.* The major points of the Act include changing some of the terminology in the INA, securing U.S. borders (title I), fencing and other border security improvements (title X), employment eligibility verification (title VII), and judicial review of visa revocation (title VIII § 802). *Id.* Another comprehensive immigration bill introduced in the 109th Congress and passed by the Senate in May 2006, S. 2611 known as the "Comprehensive Immigration Reform Act of 2006," has not been enacted. S. 2611, 109th Cong. (2006).

282. *See, e.g.,* JOHN BOWE, NOBODIES: MODERN AMERICAN SLAVE LABOR AND THE DARK SIDE OF THE NEW GLOBAL ECONOMY 119-20, 161-62 (2007) (a study of locations in

strife or perceived national security fears caused mass isolationist efforts, such needs waned and the workers were deported.<sup>283</sup> Thus, the hysteria over the recent so-called “immigration invasion” has somehow left the collective psyche of this government and its people with little recollection of its prior efforts and manipulations.<sup>284</sup>

#### VI. THE PSYCHOLOGICAL IMPACT OF THE ANTI-IMMIGRANT ATTACKS

After examining the data concerning the positive impact of immigration and the history of immigration inclusion and exclusion, the questions that remain are: (1) In all the talk against immigration or amnesty, why is it so rare for anyone to address similar programs previously implemented by this government?; and (2) Are the recent attacks against immigrants of consequence if in fact they are largely inaccurate? The answers to these questions are complex and are addressed more fully below. Nevertheless, a quick response to these questions is that most people are simply ill-informed of past immigration efforts and do not recognize the inaccuracies of the recent attacks. As a consequence, these incorrect assertions have a significant impact on the public’s impressions, as well as on political discourse and public policy. This Section more fully examines the psychological impact of stigma and its role in the formation of societal attitudes and perceptions. These works assist us in understanding the impact of the recent attacks on immigrants and how they shape public opinion on immigrants as well as all those marked with the label of foreigner, including Latino and Latina U.S. citizens and legal residents.<sup>285</sup>

Modern sensibilities suggest that insensitive and demeaning comments directed at racial and ethnic minority groups are intolerable. There are many examples of such outbursts resulting

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Florida, Oklahoma, and the U.S.-owned Pacific island of Saipan, where slavery cases have been brought to light as recently as 2006).

283. See *supra* note 274 and accompanying text.

284. See generally Alvarado, *supra* note 232, at 66, 72–73 (concluding that current proposals for guest-worker program should be rejected because “there is no need for a temporary worker program, and the risks associated with its implementation necessitate its rejection. This is the lesson that should be learned from my grandfather’s life as a Bracero.”).

285. Legal scholars have long argued that the attacks levied against Latino and Latina immigrant groups negatively impact Latino and Latina legal residents and citizens. See, e.g., Kevin Johnson, *Race, The Immigration Laws, and Domestic Race Relations: A “Magic Mirror” into the Heart of Darkness*, 73 IND. L.J. 1111, 1150–52 (1998).

in massive public condemnation and scorn.<sup>286</sup> Consider for example the public condemnation of radio talk show host Don Imus's insensitive and bigoted statements concerning the Rutgers University Women's Basketball Team.<sup>287</sup> The outcry resulting from those comments eventually led to a public apology by Imus (a tactic virtually never used by modern nativists after they make their all too common anti-Latino and anti-immigrant comments) and ultimately his firing from his radio broadcasting position.<sup>288</sup> Unfortunately, similar racist comments directed at illegal immigrants, as well as the slippage effect on Latina and Latino legal immigrants and citizens, not only do not lead to similar outcries, but in fact go virtually unchecked and sadly often lead to mass followings by the American public.

Legal scholars have repeatedly noted that recent incarnations of immigration debates have racial overtones,<sup>289</sup> yet these comments go either unread or largely disregarded by the national media. Nevertheless, some of their works prove useful in understanding the nexus between law and the role of television and the media.<sup>290</sup> One work noted the 1977 U.S. Civil Rights Commission study that tied stereotypical portrayals of racial and ethnic minorities on television to the "beliefs, attitudes, and behavior" of the viewing public.<sup>291</sup> The study concluded these media stereotypes had a distinct impact on race relations in

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286. Such examples include the public outcry following actor Michael Richards's public use of the "N" word, *Grey's Anatomy* actor Isaiah Washington's use of a homophobic slur during a much publicized on-set confrontation with a costar, and former professional basketball player Tim Hardaway's statement that he "hate[s] gay people" during a radio interview. 'Kramer' Apologizes, Says He's Not Racist, CBS NEWS, Nov. 21, 2006, <http://www.cbsnews.com/stories/2006/11/20/entertainment/main2201817.shtml>; Mike Fleeman, *Isaiah Washington Explains Why He Used Slur*, PEOPLE, July 2, 2007, <http://www.people.com/people/article/0,,20044381,00.html>; *Hardaway Banned for Anti-Gay Slur*, WASH. POST, Feb. 16, 2007, at E8.

287. See *CBS Fires Don Imus Over Racial Slur*, CBS NEWS, Apr. 12, 2007, <http://www.cbsnews.com/stories/2007/04/12/national/main2675273.shtml> (reporting that Imus referred to team members as "nappy-headed hos").

288. *Id.*

289. See, e.g., Tom I. Romero, II, *¿La Raza Latina?: Multiracial Ambivalence, Color Denial, and the Emergence of a Tri-Ethnic Jurisprudence at the End of the Twentieth Century*, 37 N.M. L. REV. 245, 306 & n.406 (2007) (concluding that the construction of race has constructed the identity of the Latino People).

290. See, e.g., Jeng Fen Mao, Comment, *The Racial Implications of the Telecommunications Act of 1996: The Congressional Mandate of Neighborhood Purity*, 41 HOW. L.J. 501, 532-33 (1998) (criticizing the Telecommunications Act of 1996 for failing to actively promote minority participation in broadcast media, and purporting that this will lead to further racial stereotypes and housing segregation).

291. *Id.* at 528-29 (quoting U.S. COMM'N ON CIVIL RIGHTS, WINDOW DRESSING ON THE SET: WOMEN AND MINORITIES IN TELEVISION 47 (1977)); see also Patricia M. Worthy, *Diversity and Minority Stereotyping in the Television Media: The Unsettled First Amendment Issue*, 18 HASTINGS COMM. & ENT. L.J. 509, 535 (1996).

American society.<sup>292</sup> The study included research conducted by Dr. Bradley Greenberg, which finds that 40% of the white children questioned attributed their knowledge of how they believed blacks looked, talked, and dressed to what they saw on television.<sup>293</sup> More recently, the Commission issued another report in which it concludes that “news media has tremendous influence on the attitudes of viewers and readers regarding [domestic] race relations.”<sup>294</sup> The question that remains is the extent of the nativist alarmists’ societal impact on the perception of immigration, immigrants, and the Latina–Latino community in general. The following is a brief examination of sociological theory, psychological theory, and law and psychology studies on the role of media, as they relate to the perception of immigrants.

The ancient Greeks used the word “stigma” to refer to a mark placed on an individual to signify infamy or disgrace.<sup>295</sup> Current usage continues the original meaning of the term, “but usually refers to an attribute of people, places, technologies, or products that is deeply discrediting or devaluing.”<sup>296</sup> Instead of the possessors of stigmas being viewed as “normal or commonplace,” they are “viewed as different, with this difference involving important qualities that set the possessor[s] off as deviant, flawed, spoiled, or undesirable.”<sup>297</sup> “Whereas [the term] stigma may be related to hazards and involve fear on the part of the beholder, [the label of a] stigma goes beyond the notion of hazard to refer to something that overturns or destroys a positive condition, and, accordingly blemishes or taints the possessor.”<sup>298</sup>

In his groundbreaking work entitled *Stigma: Notes on the Management of Spoiled Identity*, Erving Goffman observed that “[s]ociety establishes the means of categorizing persons and the complement of attributes felt to be ordinary and natural for members of each of these categories.”<sup>299</sup> He goes on to provide

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292. U.S. COMM’N ON CIVIL RIGHTS, *supra* note 291.

293. *Id.*

294. *See* Worthy, *supra* note 291, at 529 (quoting MINN. ADVISORY COMM. TO THE U.S. COMM’N ON CIVIL RIGHTS, STEREOTYPING OF MINORITIES BY THE NEWS MEDIA IN MINNESOTA 35 (1993)).

295. Robin Gregory, James Flynn & Paul Slovic, *Technological Stigma*, in RISK, MEDIA, AND STIGMA: UNDERSTANDING PUBLIC CHALLENGES TO MODERN SCIENCE AND TECHNOLOGY 3 (James Flynn, Paul Slovic & Howard Kunreuther eds., 2001).

296. *Id.* at 14.

297. *Id.*

298. Roger Kasperson, Nayna Jhaveri & Jeanne X. Kasperson, *Stigma and the Social Amplification of Risk: Toward a Framework of Analysis*, in RISK, MEDIA, AND STIGMA, *supra* note 295, at 14 (citing Gregory et al., *supra* note 295, at 3).

299. ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 2 (First Touchstone ed. Simon & Schuster, Inc. 1986) (1963). Prior to Goffman, then

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that

[w]hen a stranger comes into our presence, then, first appearances are likely to enable us to anticipate his category and attributes . . . .

. . . .

Typically, we do not become aware that we have made these demands or aware of what they are until an active question arises as to whether or not they will be fulfilled. It is then that we are likely to realize that all along we had been making certain assumptions as to what the individual before us ought to be.<sup>300</sup>

Goffman noted that when the stranger is present before us,

[E]vidence can arise of his possessing an attribute that makes him different from others in the category of persons available for him to be, and of a less desirable kind—in the extreme, the person is thoroughly bad, or dangerous, or weak. He is thus reduced in our minds from a whole and usual person, to a tainted, discounted one.<sup>301</sup>

Goffman observed that the term “stigma” is an attribute of the stigmatized that is deeply discrediting.<sup>302</sup> By definition, the person with a stigma is not quite human.<sup>303</sup> Stigma can take three different forms, including physical abnormalities, blemishes in character, and “tribal stigma of race, nation, and religion.”<sup>304</sup> Through the assignment of stigma to certain groups, society exercises a variety of discriminatory practices, which effectively—and often subconsciously—reduce the life chances of the stigmatized persons.<sup>305</sup>

According to stigma theory,<sup>306</sup> society constructs an ideology to explain the stigmatized group’s inferiority and rationalize society’s animosity towards it, an animosity based on the

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NAACP attorney Thurgood Marshall used psychological and sociological studies concerning the effect of separate and supposedly equal schools on African American children in *Brown v. Board of Education*, 347 U.S. 483, 492–95 (1954), and the Supreme Court relied upon these studies in its analysis. See Frederick Robinson, *Thurgood Marshall: Warrior at the Bar, Rebel on the Bench*, BLACK ENTERPRISE, 1993, available at [findarticles.com/p/articles/mi\\_m1365/is\\_n2\\_v24/ai\\_13287097](http://findarticles.com/p/articles/mi_m1365/is_n2_v24/ai_13287097).

300. GOFFMAN, *supra* note 299, at 2.

301. *Id.* at 2–3.

302. *Id.* at 3.

303. *Id.* at 5.

304. *Id.* at 4.

305. *Id.* at 5.

306. See, e.g., Sheila T. Murphy, *The Impact of Factual Versus Fictional Media Portrayals on Cultural Stereotypes*, 560 ANNALS AM. ACAD. POL. & SOC. SCI. 165 (1998) (elucidating the impact of stigma theory on targeted populations).

differences highlighted by the stigma.<sup>307</sup> One study concluded that “we do not enter the perceptual arena empty handed but, rather, with what is sometimes referred to as perceptual baggage,” which “includes our unique idiosyncratic collection of experience, needs, and desires as well as more common, culturally shared beliefs.”<sup>308</sup> The stigmatizing perspective subtly invites the viewer–society to justify the stigmatizing viewpoint as “natural, universal, and beyond challenge; it marginalizes other perspectives to bolster its own legitimacy in defining narratives and images.”<sup>309</sup>

The leading learning theorist of his day, Hobart Mowrer, “concluded that human behavior is [essentially] guided and controlled by conditioned emotional responses to images that could be viewed as ‘prospective gains and losses.’”<sup>310</sup> More recently, theorists have observed “that human thought is made largely from images, broadly construed to include perceptual and symbolic representations.”<sup>311</sup> “Through experience, these images are ‘marked’ by positive and negative feelings,” also referred to as conditioning.<sup>312</sup> When an image becomes marked, it provokes feelings which in turn motivate action.<sup>313</sup> Thus, “[w]hen a negative marker is linked to an image it sounds an alarm” within an observer, motivating avoidance<sup>314</sup> and perhaps even stronger reactions.

The marking of a stigma possessor “plays an essential role in the impact of a stigma. . . . The mark or stigma identifies and signifies the deviant status and typically has devastating effects on the person or place. The mark need not be physical but may be embedded in, and identifiable from, particular behavior, features, biography, ancestry, or location.”<sup>315</sup> The marks or stigmas “come to arouse in outside observers strong feelings of repugnance, fear, and disdain.”<sup>316</sup> The stigmas or marks also may “become linked through attributional processes to responsibility,” which are also

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307. GOFFMAN, *supra* note 299, at 5.

308. Murphy, *supra* note 306, at 166.

309. Margaret M. Russell, *Race and the Dominant Gaze: Narratives of Law and Inequality in Popular Film*, in CRITICAL RACE THEORY: THE CUTTING EDGE 56–57 (Richard Delgado ed., 1995).

310. Howard Kunreuther & Paul Slovic, *Coping with Stigma: Challenges and Opportunities*, in RISK, MEDIA, AND STIGMA, *supra* note 295, at 332 (citation omitted).

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.*

deemed as deviant and repugnant.<sup>317</sup> The authors of a leading study on the role of the media and stigma conclude, “When we think of the prime targets for stigmatization in our society, members of minority groups, the aged, homosexuals, drug addicts, and persons afflicted with physical deformities and mental disabilities, we can appreciate the affect laden images that, rightly or wrongly, are associated with such individuals.”<sup>318</sup>

Several studies on aggression and stigma shed considerable light on the role the media plays on the impressions of immigrants. A recent study, *The Formation of Attitudes Towards New Immigrant Groups*, finds that initial information concerning any new immigrant group tends to be the most important information in terms of creating societal attitudes toward that group.<sup>319</sup> This study also determines that attitudes, once formed, predicated further perceptions of the immigrants and behavioral intentions toward group members.<sup>320</sup> The implications of those findings led the authors to suggest that the media needs to be especially sensitive to its portrayal of new immigrant groups.<sup>321</sup> In light of these facts, the authors suggest that the media should avoid presenting extreme negative portrayals of immigrant groups, which the study specifically finds the media is inclined to make.<sup>322</sup> The study further finds that such depictions need to be avoided because negative depictions tend to bias attitudes of individuals who have had little or no direct contact with the immigrant group.<sup>323</sup>

The findings of yet another study on the role of the media on immigrant groups concludes that the media can have a consequential impact on those that have not decided on their positions with respect to a particular group. The study finds that people who hold ambivalent attitudes toward a group are more likely to systematically process persuasive messages about that group than are people who hold nonambivalent attitudes toward the particular group.<sup>324</sup> These conclusions in and of themselves demonstrate why the current attacks on immigrants are so

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317. *Id.*

318. *Id.* (citing GOFFMAN, *supra* note 299).

319. Gregory R. Maio, Victoria M. Esses & David W. Bell, *The Formation of Attitudes Toward New Immigrant Groups*, 24 J. APPLIED SOC. PSYCHOL. 1762, 1762–63 (1994).

320. *Id.* at 1764–65.

321. *Id.* at 1765.

322. *Id.* at 1765, 1772.

323. *Id.*

324. Gregory R. Maio, David W. Bell & Victoria M. Esses, *Ambivalence and Persuasion: The Processing of Messages about Immigrant Groups*, 32 J. EXPERIMENTAL SOC. PSYCHOL. 513, 513–14 (1996).

damming, dangerous, and despicable. Just as these researchers found, current media depictions of immigrant groups, some of which are referred to in the first part of this Article (but can be easily witnessed on an almost nightly basis on any one of many cable news stations, such as Fox News and CNN) tend to be extremely negative, and such stories have a significant impact on society's impression of immigrants. Despite such findings, the media largely fails in taking the cautious and balanced approach the above studies recommend.

In another study on the role of the media and its affect on stigma, the authors observe that "the greatest contributor to stigma, by far, is the news media through the process known as social amplification of risk."<sup>325</sup> According to this study, risk amplification may occur when there is discovery of an event, such as a minor or major traffic accident, and "[r]isk amplification reflects the fact that the adverse impacts of . . . an event sometimes extend far beyond the direct damages to [the] victims and . . . result in massive indirect impacts."<sup>326</sup> Thus, risk amplification is analogous to a stone being dropped in a pond causing ripples to spread outward, encompassing first the direct victims of the accident in our example, then the responsible driver, and perhaps even the industries affected.<sup>327</sup> The "important feature of social amplification is that the direct impacts need not be large to trigger [significant] indirect impacts."<sup>328</sup> Consider, for example, the media story of the Tylenol capsules adulterated with cyanide,<sup>329</sup> or the report of the Three Mile Island nuclear reactor accident.<sup>330</sup> Though the groups directly affected by these reports were small, the reactions to the reports were significant and lasting.

These researchers conclude that there appear to be multiple mechanisms that contribute to social amplification of risk. First among these mechanisms is the fact that "media coverage of an event can contribute to heightened perceptions of risk, propagation of stigmatizing images, and amplified impacts."<sup>331</sup> Two other mechanisms that contribute to amplification include the fact that an event may enter into the agenda of a particular

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325. Kunreuther & Slovic, *supra* note 310, at 335.

326. *Id.*

327. *Id.*

328. *Id.*

329. *Id.*; see also Michael Norman, *F.B.I. Is Assigning Tylenol Inquiry "Highest Priority,"* N.Y. TIMES, Feb. 15, 1986, § 1 at 1.

330. *Id.*; see also *A Nuclear Nightmare,* TIME, Apr. 9, 1979, available at <http://www.time.com/time/magazine/article/0,9171,920196,00.html>.

331. *Id.* (citation omitted).

group and that interpretation of unfortunate events may act as signals regarding the magnitude of the risk.<sup>332</sup> One need not look much further than the all-too-common print news pictures or video clips of dark-skinned persons crossing the border to provoke the belief in an invasion, despite empirical data demonstrating otherwise. It is thus the phenomenon of social amplification of risk that perhaps most significantly influences current perceptions of the darkening of America.

In addition to the consequential nature of social amplification of risk, the media plays a significant role in the creation of stigma by virtue of the use of innuendo. “Besides reporting certain hazardous events or risk stories in considerable detail, the news media are often accused of covering” such stories “in a biased or sensationalized” manner, yet those in the media may view themselves as having a responsibility to warn the public of dangers.<sup>333</sup> As a result, a tension between reporting facts and creating marks arises. If those in the media view themselves as protectors of society, like a modern day lighthouse or Paul Revere, reporters are not only encouraged to inform the public of dangers, but will also be tempted to sensationalize their reports in order to ensure that the public is adequately warned. The quest for ratings and sales further increases the possibilities of such an approach, and this in turn increases the chances that media coverage will stigmatize. The power of repetition and innuendo has led researchers to conclude “that even subtle and indirect associations in the media between products or technologies and undesirable characteristics or events can induce stigma.”<sup>334</sup>

The studies on the role of the media and stigma are significant because, in many respects, media portrayals of Latino and Latina immigrants have largely defined the dominant negative impression of these groups. In fact, an earlier Article by this Author concluded that contemporary media portrayals of the Latin community, though repackaged with ostensibly positive titles such as the “Latin Explosion” or “Latin Boom,” are nothing more than new ways to continue to objectify and commodify a community with classic stereotypes of, among other things, illegal immigration.<sup>335</sup>

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332. *Id.* (citations omitted).

333. *Id.* at 336.

334. *Id.* at 337.

335. See generally Ediberto Román, *Who Exactly is Living La Vida Loca?: The Legal and Political Consequences of Latino-Latina Ethnic and Racial Stereotypes in Film and Other Media*, 4 J. GENDER RACE & JUST. 37, 42–48 (2000) (advocating greater awareness

Leading immigration scholar Kevin Johnson has, in a similar vein, looked to the psychological theories of transference,<sup>336</sup> displacement,<sup>337</sup> and dissonance,<sup>338</sup> in order to assist in explaining why immigrants of color are “society’s scapegoats.”<sup>339</sup> Not unlike the arguments made by scholars applying principles of psychology to victims of sex offenses<sup>340</sup> and courtrooms,<sup>341</sup> Johnson examines the demonization of noncitizen immigrants as a reminder to citizen minorities of the spillover effect of such efforts.<sup>342</sup> Johnson argues that psychological theory may be an effective tool for analyzing the legal implications of racial discrimination.<sup>343</sup>

Johnson observes that the concept of transference, whereby feelings toward one person are refocused on another, allows the general public to attack members of outsider minority groups (such as illegal aliens) in a manner that would be unacceptable against citizen minority groups.<sup>344</sup> A quick review of the outlandish statements made by members of the media and politicians noted earlier are vivid examples of how outrageous statements against noncitizens are accepted (and arguably even applauded),<sup>345</sup> where similar statements against minority citizens would be intolerable. Modern sensibilities largely forbid insensitive and racist statements against formal members of society, but identical racist statements against outsiders are

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among the media of the potential political ramifications of their portrayals).

336. See Thomas L. Shaffer, *Undue Influence, Confidential Relationship, and the Psychology of Transference*, 45 NOTRE DAME L. REV. 197, 205 (1970) (noting that psychoanalytic theory transference refers to the patient’s transference of feelings toward a particular individual); see also C.G. JUNG, *The Psychology of the Transference*, in THE PRACTICE OF PSYCHOTHERAPY 163 (R.F.C. Hull trans., Princeton Univ. Press 1966) (1946) (discussing the origins of transference theory).

337. See DAVID KRECH, RICHARD S. CRUTCHFIELD & NORMAN LIVSON, ELEMENTS OF PSYCHOLOGY 768 (2d ed. Alfred A. Knopf, Inc. 1969) (1958) (defining displacement).

338. See LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE 3 (Stanford Univ. Press 1962) (1957) (hypothesizing that upon being confronted with internally inconsistent ideas, a person will try to reduce cognitive dissonance by avoiding situations and information that would likely increase the inconsistency).

339. Johnson, *supra* note 285, at 1154–59.

340. See generally Francis A. Gilligan, Edward J. Imwinkelreid & Elizabeth F. Loftus, *The Theory of “Unconscious Transference”: The Latest Threat to the Shield Laws Protecting the Privacy of Sex Offenses*, 38 B.C. L. REV. 107, 111–17 (1996) (demonstrating the interplay between a witness’s biases and their memory of a particular crime).

341. See generally Elizabeth F. Loftus, *Unconscious Transference in Eyewitness Identification*, 2 L. & PSYCH. REV. 93 (1976) (explaining the dangerous effect transference can have upon jury deliberations and verdicts).

342. Johnson, *supra* note 285, at 1152–53.

343. *Id.* at 1154.

344. *Id.*

345. See *supra* note 286.

treated differently, particularly those levied against undocumented workers from Mexico, Central America, or South America. This phenomenon allows and invites those with an anti-Latino or anti-nonwhite agenda to direct their venom against largely defenseless victims.

The related construct of displacement may be another way to assist us in understanding the treatment of undocumented immigrants.<sup>346</sup> Displacement is “[a] defense mechanism in which a drive or feeling is shifted upon a substitute object, one that is psychologically more available.”<sup>347</sup> A classic example of displacement is the use of scapegoats, which allows aggressive impulses to be redirected or displaced upon people or objects “who are not the sources of the frustration, but are safer to attack.”<sup>348</sup> Johnson observes that studies demonstrate how displaced frustration could unconsciously result in the development of racial prejudice.<sup>349</sup> He also observes that studies of displaced aggression find that negative attitudes towards those of Japanese and Mexican ancestry increase after children are subjected to tedious testing that caused them to miss a planned trip to the movies.<sup>350</sup> A prime example of displacement is the German people’s use of the German Jews as the scapegoats for Germany’s failures during and after the First World War.<sup>351</sup> As Gordon Allport aptly observed, “Most Germans did not see the connection between their humiliating defeat in World War I and their subsequent anti-Semitism.”<sup>352</sup> While prejudice is a complex and difficult phenomenon to define, the above theories and related studies help explain the related phenomenon of scorn against immigrant groups, particularly the hardworking members in the undocumented category.

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346. Johnson, *supra* note 285, at 1155.

347. *Id.* (quoting KRECH ET AL., *supra* note 337).

348. *Id.* (emphasis omitted).

349. *Id.*; see also Neal E. Miller & Richard Bugelski, *Minor Studies of Aggression: II. The Influence of Frustrations Imposed by the In-Group on Attitudes Expressed Toward Out-Groups*, 25 PSYCHOL. 437, 441 (1948) (studying the relationship between frustration and perceptions of race).

350. Johnson, *supra* note 285, at 1155; see also Miller & Bugelski, *supra* note 349, at 441 (which noted that the children tested displaced their animosity from the test givers, immune from attack by virtue of their positions of authority, to defenseless racial minorities).

351. See JACK R. FISCHER, *THE HOLOCAUST* 3 (1998) (noting Hitler’s anti-Semitism “resonated with Germans who found themselves . . . suffering the humiliation of wartime defeat”); JEFFREY HERF, *THE JEWISH ENEMY* 264 (2006) (attempting to shed light on the German psyche during World War II).

352. GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 352 (1954).

## VII. THE TRUTH REVEALED?

Shortly after the “War of the Worlds” radio broadcast, the hoax concerning the invasion came to light.<sup>353</sup> The aftermath was a country in despair, but fortunately safe. Though the broadcast made several famous, not the least of whom was Orson Wells,<sup>354</sup> nearly a hundred years later that broadcast highlights the power of the media’s ability to distort reality. In many respects, this Article demonstrates the parallels between a hyperbolic broadcast that alarmed this land of a Martian invasion, and today’s vitriolic attacks against vital immigrant workers in an effort to stir fervor against Latino immigrants and close our borders irrespective of the economic need for those workers.<sup>355</sup> While perhaps the recent incarnations of the “War of the Worlds” broadcast will lead alarmists like Tom Tancredo to become Orwellian in stature, the likelihood is that history will portray our current era in a manner more akin to the McCarthy-led witch hunts of the past. For whatever reason, thus far the alarmists have considerable momentum, though more reasoned souls appear to be standing up to the racist and inhumane nature of the discourse against Latino immigrants.<sup>356</sup>

As the current leading study on stigma suggests, one key strategy for possibly altering the number and content of images reaching the public is to educate the media and the regulatory community about the effects their messages may cause.<sup>357</sup> This would suggest that challenges to media portrayals should not be limited to law review publications.<sup>358</sup> As the authors of the above study warn, the media will likely not be easily persuaded to change their ways of “reporting on risk.”<sup>359</sup> Nevertheless, the importance of the undertaking is necessary in order to attempt to

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353. See KOCH, *supra* note 1, at 24.

354. *Id.*

355. See generally Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multicultural Society*, 81 CAL. L. REV. 863 (1993) (examining the race and culture based rationales of modern assimilationist sentiments regarding immigration).

356. See Michael Gerson, *Erasing America? Latinos Don't Endanger the Nation, Just Republicans Who Don't Get It*, PITTSBURGH POST-GAZETTE, May 25, 2007, at B7 (comparing the sponsors of the Chinese Exclusion Act with the opposition to the Comprehensive Immigration Reform Act of 2007).

357. Kunreuther & Slovic, *supra* note 310, at 344.

358. On a related note, this Author recognizes that while this work and related ones may have some slight impact on legal educators, more is likely needed. More legal texts on the subject are warranted, op-eds need to be undertaken, and further engagement in the public arena needs to be made.

359. Kunreuther & Slovic, *supra* note 310, at 344.

educate members of the media and others about the nature and potency of stigma.<sup>360</sup>

Even if inertia, stubbornness, or genuine philosophical differences cause the media and political leaders to refuse to change the tenor of their rhetoric,<sup>361</sup> the power of political reality may be the interest convergence that provides a pragmatic mandate for change.<sup>362</sup> Despite the repeated nature of the attacks and the demonization of Latino immigrants and Latinos and Latinas in general, the realities are that the Latino and Latina community is of a substantial size<sup>363</sup> and the fastest growing group in America.<sup>364</sup> In addition to being the largest ethnic or racial minority group in this country,<sup>365</sup> constituting 14.1% of the total U.S. population with a population of over 40 million, only 16.1 million of those 40 million are eligible to vote.<sup>366</sup> And for the most part, they have strong collective memories of how they have been treated and are becoming increasingly politically active.<sup>367</sup> As Simon Rosenberg, president of the New Democrat Network, warned, “Republicans should be terrified [because] [t]he positions most of their candidates are taking now will make it very difficult for them to win the presidency.”<sup>368</sup> Some conservatives, such as President George W. Bush,<sup>369</sup> have sought to promote a

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360. *Id.* at 345.

361. *Cf.* Michael Gerson, *The Right Ought to Embrace Hispanics, Not Fear Them*, NEWARK STAR-LEDGER, May 29, 2007, at 11 (advocating a renewed effort by Republicans to court the Hispanic vote).

362. *See generally* Derek Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, (1980) (discussing the interest convergences surrounding the political and legal milestone of *Brown v. Board of Education*).

363. *See* Shirin Hakimzadeh, *41.9 Million and Counting*, PEW RESEARCH CTR. PUBL'NS, Sept. 28, 2006, <http://pewresearch.org/pubs/251/41.9-million-and-counting> (concluding that the U.S. Hispanic population is 41.9 million, accounting for over half the total population growth in the U.S. over the last five years).

364. U.S. DEPT OF HEALTH AND HUMAN SERVS., MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL 81 (1999).

365. *Hispanics Now Largest U.S. Minority*, CBS NEWS, Jan. 21, 2003, <http://www.cbsnews.com/stories/2003/01/21/national/main537369.shtml>.

366. LINDSAY DANIELS & CLARISSA MARTINEZ DE CASTRO, THE LATINO ELECTORATE: PROFILE AND TRENDS 1–2 (2007), *available at* [http://www.americanprogress.org/events/2007/02/latino\\_electorate.pdf](http://www.americanprogress.org/events/2007/02/latino_electorate.pdf).

367. *See Latinos and the 2006 Mid-Term Election*, PEW HISPANIC CTR., Nov. 27, 2006, *available at* <http://pewhispanic.org/files/factsheets/26.pdf> (noting that the 2002 mid-term elections showed that Latinos and Latinas went 61% in favor of Democrats and only 37% in favor of Republicans).

368. David Lightman, *Democrats Sidestep Immigration Issue*, MIAMI HERALD, Nov. 15, 2007, at A6, *available at* <http://www.miamiherald.com/news/nation/story/308400.html>.

369. *But see* Juan Mann, *Its Official! Bush Betrayal Triggered Wave of Illegals*, [http://www.vdare.com/Mann/bush\\_betrayal2.htm](http://www.vdare.com/Mann/bush_betrayal2.htm) (June 14, 2004) (inferring that President Bush's calls for amnesty enticed an immigration spike in the United States).

moderate stance on immigration reform,<sup>370</sup> and recently, in his State of the Union address, Bush declared in terms of the pressing challenges facing America:

[W]e also need to acknowledge that we will never fully secure our border until we create a lawful way for foreign workers to come here and support our economy. . . . This will take pressure off the border and allow law enforcement to concentrate on those who mean us harm. We must also find a sensible and humane way to deal with people here illegally. Illegal immigration is complicated, but it can be resolved. And it must be resolved in a way that upholds both our laws and our highest ideals.<sup>371</sup>

However, with few exceptions, conservative leaders have sought immediate results by joining the anti-immigrant bandwagon.<sup>372</sup> Journalist Fred Barnes recently warned that “[b]y dwelling, often emotionally, on the problem of illegal immigration as a paramount issue and as if nothing is being done to deal with it, Republicans are alienating Hispanic Americans, the fastest growing voting bloc in the country.”<sup>373</sup> Though at this juncture the likelihood that the recent immigration attacks will lead to a political shift is mere conjecture, such efforts are unquestionably of considerable risk.<sup>374</sup> For instance, recent reports and polls suggest such a backlash.<sup>375</sup> President George W. Bush “won 44 percent of the Hispanic vote in 2004, but Republican Congressional candidates received only 29 percent in 2006, according to exit polls. A recent Gallop Poll showed that only 11 percent [of Latinos and Latinas] now identify as Republicans.”<sup>376</sup>

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370. See, e.g., Papademetriou, *supra* note 140 (noting modest gains globally in creating bilateral agreements that included guest-worker programs.) “There are some modest precedents for experimenting with this approach. For instance, Italian and Greek bilateral efforts to stem illegal migration from Albania and other Balkin states, in the largest part through the issuance of legal work visas, are thought to have borne substantial public and labor market order gains.” *Id.*

371. President George W. Bush, State of the Union Address (Jan. 28, 2008), transcript available at <http://www.whitehouse.gov/news/releases/2008/01/20080128-13.html>.

372. Fred Barnes, *Immigration Overkill?*, WKLY. STANDARD, Aug. 18, 2007, <http://www.weeklystandard.com/content/public/articles/000/000/013/996dngwl.asp>.

373. *Id.*

374. *Illegal Immigration: Nowhere to Hide*, ECONOMIST, July 5, 2007, at 34 (“Those who defeated the Senate’s immigration bill won a Pyrrhic victory.”).

375. See generally Ruth Morris & Elizabeth Baier, *Hispanic Voters Could Make GOP Pay Defeat of Immigration Legislation*, S. FLA. SUN-SENTINEL, July 1, 2007, <http://www.sun-sentinel.com/news/local/southflorida/sfl-flbvote0701nbju101,2687319.story?coll=sfla-home-headlines> (suggesting Republican’s role in the collapse of a recent immigration bill may cause them to forfeit 2004 election gains within the Hispanic voting bloc).

376. Mort Kondracke, *Immigration Failure Gives Senate Profile in Political*

In another poll, “[w]hen asked what fuels the current anti-immigrant sentiment in the United States, 64 percent of Hispanics in the poll mentioned one factor: ‘racism against immigrants from Latin America.’”<sup>377</sup>

[A] Pew Research Center survey [recently] found, the gap between Latinos identifying themselves as Democrats and Republicans jumped 13 percentage points, giving Democrats a 34-point advantage. The survey also noted that Latinos and Latinas make up a sizable share of voters in four “swing states” that [President] George W. Bush narrowly carried in 2004: Colorado, Nevada, New Mexico, and Florida.<sup>378</sup>

Moderate politicians who respond accordingly will not only make economic sense, they also are likely to gain political support from their stance. For instance, Senator Barack Obama recently noted, “[F]or reform to work, we must also respond to what pulls people to America. Where we can reunite families, we should. Where we can bring in more foreign born workers with the skills our economy needs, we should.”<sup>379</sup> In perhaps a slightly more moderated stance, Senator Clinton noted that she favors “a path to earned legalization to undocumented immigrants who are willing to work hard, play by the rules, learn English and pay fines.”<sup>380</sup>

While thus far the alarmists have had their impact on the national stage,<sup>381</sup> more scholars, advocates, reasoned media, and political spokespersons need to examine the facts and speak out.<sup>382</sup> Population growths, political realities, and mobilization may lead to dramatic political shifts in these areas in years to come. For instance, at least one scholar has observed that changing population demographics may one day lead former minority groups to use political doctrines, such as the plenary

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Cowardice, REAL CLEAR POL., July 2, 2007, [http://www.realclearpolitics.com/articles/2007/07/immigration\\_failure\\_profile\\_in.html](http://www.realclearpolitics.com/articles/2007/07/immigration_failure_profile_in.html).

377. See Oppenheimer, *supra* note 88 (observing that 76% of U.S. Hispanics agree with the statement that “anti-immigrant sentiment is growing in the United States”).

378. See Olinger, *supra* note 52.

379. *Id.*

380. *Id.*

381. See Selwyn Duke, *Getting the Government the Third World Deserves*, INTELL. CONSERVATIVE POL. & PHIL., June 6, 2007, <http://www.intellectualconservative.com/2007/06/06/getting-the-government-the-third-world-deserves> (serving as an example of polemic discourse regarding immigration).

382. See Kevin R. Johnson, *September 11 and Mexican Immigrants: Collateral Damage Comes Home*, 52 DEPAUL L. REV. 849, 852–53, 859–60 (2003) (supplying more balanced discourse to the immigration debate).

powers doctrine, to shift the pendulum of immigration policy in their favor.<sup>383</sup>

However, for the time being, the tenor of the debate has not changed sufficiently. Despite the truth demonstrated by leading scientists, researchers, and demographers in their studies on immigration, too many non-Latino Americans believe that we are in the midst of an invasion that will lead to economic plight and crime ridden streets. Not unlike the retraction issued after the “War of the Worlds” broadcast, academics, political leaders, and the media need to demand accountability and accuracy.<sup>384</sup> As columnist Andres Oppenheimer recently argued, national Latino civil rights groups such as La Raza or the Puerto Rican Legal Defense Fund, as well as other Latino and non-Latino leaders, should launch a nationwide “Ya Basta” campaign,<sup>385</sup> which would expose and shame those who bash Latinos and Latinas.<sup>386</sup>

Such a campaign or similar effort should also be part of an ongoing and transformative political effort.<sup>387</sup> Not unlike the suggestions made by other legal scholars in their calls for coalitional movements, calling for reformulations of identity politics with labels such as political race,<sup>388</sup> Latinos and Latinas should seek alliances with like-minded people of color, business leaders, and civic leaders to create a counter-narrative not only in the media, but also in our collective psyche.<sup>389</sup> Upon doing so,

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383. See, e.g., Victor C. Romero, *On Elián and the Aliens: A Political Solution to the Plenary Power Problem*, 4 N.Y.U. J. LEGIS. & PUB. POL'Y 343, 367–68 (arguing that Asians and Latinos upset at the current state of immigration policy may use the plenary power doctrine to their advantage as the demographics shift and they gain more political power).

384. Despite their active role in seeking the presidential nomination for their respective parties and the ease in which pandering to fear could lead to political gains, Governor Bill Richardson deserves considerable praise for his efforts in seeking humane and honest discussions concerning immigration. He should be applauded for his leadership.

385. Such a campaign, which in English would be translated as “Enough Already,” could, like this small effort, challenge dominant perceptions of my fellow beautiful, loyal, proud, and productive Latino and Latina members of this land.

386. See Oppenheimer, *supra* note 88 (“If anti-Hispanic sentiment is allowed to keep growing, we will soon have an underclass of 12 million immigrants that will feel not only frustrated by not having a legal path to citizenship but increasingly insulted by the mainstream media.”).

387. Edward Telles, *Mexican Americans and the American Nation: A Response to Professor Huntington*, AZTLAN, Fall 2006, at 7, 22 (“Rather than making Mexicans an easy scapegoat for a host of American problems . . . we need to move in the direction of a ‘truly participatory democracy.’”).

388. See GUINIER & TORRES, *supra* note 89, at 9–10 (advocating individuals identify themselves with political parties, rather than racial or social classifications).

389. See Ediberto Román, *Coalitions and Collective Memories: A Search for Common Ground*, 58 MERCER L. REV., 637, 643–44 (propounding the use of interminority group coalitions as vehicles for social change).

the truth of the positive impact of all forms of immigration will, at the very least, challenge the current dominant discourse.<sup>390</sup> Such a strategy is not unlike the grassroots efforts by immigrant groups seeking to oppose the proposed restrictive House of Representative version of reform, the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, otherwise known as H.R. 4437.<sup>391</sup> Though this effort may have led to the talk radio backlash discussed above and perhaps the ultimate passage of the restrictive and enforcement focused Secure Fence Act, H.R. 6061,<sup>392</sup> the protests in over 100 U.S. cities by over 1 million Americans should not be forgotten and, in fact, should be a basis of cultural pride for Americans. Instead of shying away from modern day bullies and ignorant cowards, advocates of an inclusive and productive America should remember April 10, 2006 not as a day of ethnic divisiveness as the nativists would have one believe, but as a day of recognition of the value of immigrants and diversity in this land.<sup>393</sup>

Once efforts like these—or even less ambitious ones (such as mass educational movements)—commence, perhaps legitimate discussions concerning safety and economic growth will lead to honest reform efforts that may result in changes that will allow access for immigrant workers and economic supply for U.S. industry.<sup>394</sup>

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390. See Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185, 1199 (2002) (encouraging cross-cultural organization in support of immigrants' interests); Bill Ong Hing, *Vigilante Racism: The De-Americanization of Immigrant America*, 7 MICH. J. RACE & L. 441, 456 (2002) (arguing that the de-Americanization of immigrants is counterproductive because the foundations of America are the immigrant community).

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

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

393. See Román, *supra* note 389, at 643–44 (noting that the grassroots efforts of April 10, 2006, were the timeliest example of interethnic coalitions that included Latinos and Latinas from lands not only believed to be points of origin for many undocumented workers, but also immigrants from other lands, such as Ireland and China, as well as other U.S. citizens, such as Puerto Ricans).

394. I pray that one day when our great-grandchildren read of these times and learn of the bias that engulfed much of legitimate membership debates, they realize that proud Latinos and Latinas were willing not only to proclaim “presente” to announce that they were proud of their culture and history, but also to announce “I am present” to stand up to challenge the cowardly, the ignorant, and the fearful. While many of us stem from beautiful African, Indigenous, and European bloodlines, our greatest pride is that one day we will truly be counted as equals in this beautiful and prosperous land.