

## IMMIGRATION AND IMMIGRATION LAW AFTER 9/11: GETTING IT STRAIGHT

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### I. INTRODUCTION

Few issues, other than the economy and the triple threat of Iraq, Iran, and Afghanistan, have commanded more sustained attention in the United States during the first decade of the 21st century than immigration. It loomed large among policymakers, the broadcast media, and the public. Nativism was in the air. Racial profiling by the federal government to combat terrorism became routine. Immigration even threatened to become a dominant theme of the 2008 presidential campaign during the primaries, but was eventually eclipsed by other issues. We were left wondering: what caused the intense hand-wringing about the threat of immigration? What, specifically, was the role of the suicidal aerial hijackings and ensuing tragedy of September 11, 2001 (9/11)? Beyond the shrill rhetoric of talk radio and cable television, what are the facts about undocumented migration to the United States? Is it significantly linked with terrorism? And what, if anything, should be done to reform the immigration law? Let us begin with the migrants themselves.

Despite the global focus on infiltration of terrorists across national boundaries, the motivation of most migrants is well-intentioned. Around the world today, millions of people are on the move, for good reasons, living or trying to live in countries not their own. An estimated 175 million people today reside outside the country of their birth or nationality.<sup>1</sup> The impetus for this unprecedented movement is varied. Sometimes the movement is voluntary. People move across borders for work, education, pleasure, curiosity, or family reasons. Migration also may be forced, as refugees flee across national borders for reasons of civil unrest, war, natural catastrophes, and famine. Whatever the motivation, mass communications and marketing have heightened the perceptions of opportunities in promised lands.<sup>2</sup> In recent years, the internal displacement of people within their own states also has accelerated—people who cannot even escape their national territory to seek refuge under the protection of international law. The problem of

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1. Michael W. Doyle, *The Challenge of Worldwide Migration*, 57 J. INT'L AFFAIRS 1, 1 (2004).

2. See ALEJANDRO PORTES & RUBÉN G. RUMBAUT, *IMMIGRANT AMERICA: A PORTRAIT* 355 (3d ed. 2006).

internally displaced persons has only recently become a matter of international law, *lex ferenda*.<sup>3</sup>

## II. STATISTICS

The annual admission of permanent resident aliens into the United States—the so-called green-card holders—reached a peak of about 1.5 million in 2000, not including temporary non-immigrants, who number some 39 million.<sup>4</sup> Between 2000 and 2004, largely because of restrictions imposed after 9/11, immigration to the United States declined substantially to less than 1 million annually.<sup>5</sup> Historically, the expansion and contraction of the U.S. economy seems to be the best explanation of such fluctuations in migration. But anti-terrorist constraints put in place after 9/11 may also have deterred visa applicants, thereby helping explain the lower numbers in the years immediately following 9/11.

Perhaps most significant have been declines in quarterly estimates of the undocumented population in the United States.<sup>6</sup> In 2007, for the first time in a decade, the yearly estimated number of undocumented entries was substantially below the number of newly-arrived permanent resident aliens.<sup>7</sup> Likely explanations are toughened border enforcement and, more significantly, the shaky economy. Although the number of undocumented persons may swell again, the important point is that since 9/11 the expansion in numbers is no longer continuous as it had been for many years.

## III. TRENDS AND CHARACTERISTICS

Before we return to the main theme of 9/11 and its impact on immigration matters, it will be helpful to review trends among migrants to the United States, characteristics of law enforcement, and the gist of public opinion. All three of these topics are essential as we struggle to get the facts, policy, and law concerning immigration straight.

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3. See London Declaration of International Principles on Internally Displaced Persons, INTERNATIONAL LAW ASSOCIATION, REPORT OF THE SIXTY-NINTH CONFERENCE 791-821 (2000); see also Guiding Principles on Internal Displacement, U.N. Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998) (containing an earlier and more limited set of Guiding Principles).

4. See JEFFREY S. PASSEL & ROBERTO SURO, PEW HISPANIC CENTER, RISE, PEAK, AND DECLINE: TRENDS IN U.S. IMMIGRATION 1992-2004 3-4 (2005); RANDALL MONGER & MACREADIE BARR, U. S. DEP'T OF HOMELAND SEC., ANNUAL FLOW REPORT: NONIMMIGRANT ADMISSIONS TO THE UNITED STATES: 2008, at 3 (2009).

5. See NANCY F. RYTINA, U.S. DEP'T OF HOMELAND SEC., ANNUAL FLOW REPORT: U.S. LEGAL PERMANENT RESIDENTS: 2004, at 4 (2005); PASSEL & SURO, *supra* note 4, at 4.

6. Brian Whitley, *With Fewer Jobs, Fewer Illegal Immigrants*, CHRISTIAN SCI. MONITOR, Dec. 30, 2008, at 3 (citing statistics on Latino migrants).

7. See *id.*; see also Miriam Jordan, *Latest Immigration Wave: Retreat*, WALL ST. J., Oct. 2, 2008, at A1 (noting three-year decline of 25% in estimated entries of undocumented persons).

### A. Trends Among Migrants

Four trends among migrants are noteworthy. First, the destinations in the United States of newly-arrived immigrants have broadened substantially, thereby engaging a much broader spectrum of American society and politics as well as related anxieties. For example, Iowa and North Carolina have attracted surprisingly large numbers of foreign migrant workers eager for the kind of work all over the country that nobody else wants.<sup>8</sup> After all, what American wants to cut off a chicken's neck every six seconds in a meatpacking plant or clean toilets? A second trend is that the flow of illegal crossings of the U.S.-Mexico border has dropped significantly at major crossing points, quite likely as a result of both fading economic prospects and the several thousand National Guard troops patrolling the border.<sup>9</sup> Third, and surprisingly, the percentage of undocumented persons who had entered the United States by legal means—that is, with visas or visa waivers—has increased to about 50% of all undocumented persons.<sup>10</sup> In other words, half of all undocumented persons were once documented but have overstayed their visas or violated other terms of entry. The other half are mostly the “illegal border crossers” we usually think of. The fourth trend is toward more permanent and less seasonal migration of undocumented persons.<sup>11</sup> Building walls and strengthening border police along the border have encouraged this trend.<sup>12</sup> By inhibiting seasonal crossing, the walls actually may be keeping more undocumented persons in than keeping them out of the United States.

### B. Characteristics of Law Enforcement

Since 9/11, the enforcement of our immigration law has relied heavily on seven strategies—namely: increased denial and revocation of visas for admission of foreign visitors, sanctions against employers of undocumented aliens, raids of workplaces and elsewhere, self-reporting requirements, notification by local authorities of foreign nationals, criminal prosecutions, and border controls.<sup>13</sup> Federal control is vested primarily in an agency called Immigration and Customs Enforcement—chillingly known as ICE—which was created after 9/11 within the

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8. See Nina Bernstein, *Decline is Seen in Immigration*, N.Y. TIMES, Sept. 28, 2005, at A1; Tamar Jacoby, *Immigration Nation*, FOREIGN AFFAIRS, Nov.-Dec. 2006, at 50, 56-7, 65.

9. See Faye Bowers, *On the Border, Illegal Crossings Drop*, CHRISTIAN SCI. MONITOR, Feb. 15, 2007, at 1 [hereinafter *On the Border*]; Faye Bowers, *For Economy's Future, Ask Illegalss*, CHRISTIAN SCI. MONITOR, May 2, 2007, at 3 (with graph depicting the correlation between the state of the economy and border apprehensions of undocumented persons since 1994).

10. See Jagdish Bhagwati, *Borders Beyond Control*, FOREIGN AFFAIRS, Jan.-Feb. 2003, at 98, 102.

11. Mireya Navarro, *Traditional Round Trip for Workers is Becoming a One-Way Migration North*, N.Y. TIMES, Dec. 21, 2006, at A1.

12. *Id.*

13. See Raquel Aldana, *Of Katz and “Aliens”: Privacy Expectations and the Immigration Raids*, 41 U.C. DAVIS L. REV. 1081 (2008) (summarizing tougher immigration enforcement); Editorial, *They Are America*, N.Y. TIMES, Feb. 18, 2007, at 11 [hereinafter *They Are America*].

new Department of Homeland Security.<sup>14</sup> Other federal agencies are also significant, especially the State Department and the Department of Labor.<sup>15</sup>

To focus on the first strategy of law enforcement, the State Department's zealous denial and revocation of visas after 9/11 was understandable, given the origins of 9/11 in the government's failure to scrutinize visa applications carefully or otherwise bar entry to terrorism suspects. Less understandable, however, have been the puzzling, seemingly unwarranted denials and revocations of visas, often without any explanation, that have exasperated professional associations, institutions of higher education, and public forums, not to mention friends and relatives of applicants for visas.<sup>16</sup> Gone, too, is the hope, if not expectation, that even the plenary power doctrine, by which the political branches of government, without judicial review, exercise nearly unlimited authority over immigration, would disappear. Judicial review of the government's actions is less likely today than ever before. Gradually, the situation has improved since the immediate aftermath of 9/11, but it remains an unfortunate consequence of the government's overreaction to 9/11.

In pursuing the second and third strategies, which are directed against employment of undocumented workers, the eponymous ICE has conducted numerous raids and busts this past year in a program of stepped-up enforcement.<sup>17</sup> Arrests by ICE, too often involving racial profiling, increased ten-fold between 2002 and 2007, reaching record numbers in 2008.<sup>18</sup> Showcase examples, such as the dramatic raid of Iowa meatpacking plants in 2006<sup>19</sup> and 2008,<sup>20</sup> make the news, but as law-enforcement measures, have only marginal impact in the long run. State and local governments have also taken to the barricades against

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14. See Chris Nwachukwu Okeke & James A.R. Nafziger, *United States Migration Law: Essentials for Comparison*, 54 AM. J. COMP. L. 531, 540 (Supp. 2006).

15. Okeke & Nafziger, *supra* note 14, at 540. For another overview of United States immigration law and related institutions, see VICTOR C. ROMERO, EVERYDAY LAW FOR IMMIGRANTS 61-63 (2009) (including a chart of "The Federal Immigration Bureaucracy").

16. The examples are legion. See, e.g., *Historical Association Welcomes Bolivian Scholar at Center of Visa Dispute*, CHRON. HIGHER EDUC., News Blog, Jan. 5, 2008; Press Release, American Sociological Association, American Sociological Association Files Complaint Against the U.S. Government for Excluding Prominent South African Scholar Adam Habib from the United States (Sept. 25, 2007); Nina Bernstein, *Music Scholar Barred From U.S., but No One Will Tell Her Why*, N.Y. TIMES, Sept. 17, 2007, at 17; Burton Bollag, *Academic Group Says It Won't Meet in U.S.*, CHRON. HIGHER EDUC., Mar. 31, 2006, at 47.

17. See, e.g., Spencer S. Hsu, *Immigration Raid Jars a Small Town*, WASH. POST, May 18, 2008, at A1.

18. Emily Bazar, *Citizens Sue After Detentions, Immigration Raids*, USA TODAY, June 24, 2008; see also Press Release, U.S. Immigration and Customs Enforcement, ICE Multifaceted Strategy Leads to Record Enforcement Results: Removals, Criminal Arrests, and Worksite Investigations Soared in Fiscal Year 2008 (Oct. 23, 2008).

19. Aldana, *supra* note 13, at 1101-02.

20. Hsu, *supra* note 17. The 2008 raid at the Agriprocessors plant, after a 16-month investigation, was the largest in the Bush Administration, resulting in 389 arrests. *Id.* The plant, owned by a Lubavitch Hasidic family, was the country's largest processor of glatt kosher beef, the strictest kosher standard. *Id.* For background on Postville, see Emily Yoffe, *Zip USA 52162: Midwest Kosher*, NAT'L GEOG., June 2005, at 116.

undocumented persons by restricting their access to welfare benefits and driving privileges, and by collaborating with ICE in law enforcement.<sup>21</sup> In court challenges, these measures were largely struck down in 2007, but upheld in 2008.<sup>22</sup> As to sanctions against employers of undocumented persons, fines range from \$275 to \$11,000, depending on the offense.<sup>23</sup> In the 2006-07 fiscal year, ICE fined employers more than \$30 million for violating immigration laws and arrested 92 employers and 771 employees.<sup>24</sup> Nevertheless, the sanctions have had little effect on hiring practices.<sup>25</sup> History has shown that raids and employer sanctions have not been very effective, either in the United States or in such countries as Switzerland and Germany.<sup>26</sup>

Self-reporting, the fourth law-enforcement strategy after 9/11, is just another way of describing the Special Call-In Registration Program, as part of the post-9/11 National Security Entry-Exit Registration System. The Program requires all noncitizen males over age 16 from substantially Muslim countries and North Korea to report for registration and fingerprinting, subject to removal proceedings for improper status or documentation.<sup>27</sup> The Second Circuit Court of Appeals, following other courts, upheld the Program, despite its patently discriminatory elements, based on what the court determined to be a “rational national security balance”—clearly, post-9/11 language.<sup>28</sup>

The fifth law-enforcement strategy, involving notifications by state police and county sheriffs to ICE of all foreign-born suspects, has become commonplace.<sup>29</sup> It is also largely ineffective because it inhibits undocumented criminal suspects from acknowledging their foreign birth or nationality. Additionally, insofar as local authorities take the initiative, the notifications have reduced the incentive for ICE, with all of its more sophisticated resources, to proactively review county jail registers online in order to single out particular suspects for status review.<sup>30</sup>

That leaves criminal prosecution and border controls as obvious strategies for enforcing immigration laws. Again, the federal government has acted vigorously. As early as 2004, immigration violations replaced drug crimes as the leading category of federal prosecutions; so dramatic has been the rise in the number of prosecutions for immigration offenses that they more than doubled over a four-

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21. See, e.g., Bernard J. Pazanowski, *E-Verify Creates Battleground Over Preemption of State Immigration Laws*, 57 DAILY LAB. REP. (BNA) AA-1 (2009).

22. See Julia Preston, *In Reversal, Courts Uphold Local Immigration Laws*, N.Y. TIMES, Feb. 10, 2008, at 16. The most highly publicized of these measures involved four ordinances of Hazleton, Pennsylvania that a federal district court struck down. See Aldana, *supra* note 13, at 1090, 1124-25.

23. Associated Press, *Feds to Hike Fines for Hiring Illegal Immigrants*, Feb. 22, 2008.

24. *Id.*

25. Bhagwati, *supra* note 10, at 103.

26. *Id.*

27. 8 C.F.R. § 264.1(f)(4) (2003).

28. *Rajah v. Mukasey*, 544 F.3d 427, 438-39 (2d Cir. 2008).

29. Marissa Taylor, *Local Police Split Over Immigration Enforcement*, MCCLATCHY NEWSPAPERS, Dec. 7, 2007.

30. See *id.*

year period.<sup>31</sup> This increase has occurred because of a deliberate shift in priorities by federal law-enforcement agencies, largely in response to the threat of terrorism after 9/11. Enforcement of drug laws and other criminal measures, of course, is still substantial, but a significant part of the necessary resources has been diverted to the investigation of immigration violations.<sup>32</sup>

The federal government responded to 9/11 in several ways at the Mexican border. "Operation Jump Start" in 2006 deployed some 6,000 National Guard troops along the border.<sup>33</sup> The Secure Fence Act of 2006 authorized construction of a 700 million dollar, 670-mile fence or wall there.<sup>34</sup> In September 2008, the Bush administration asked Congress for an additional \$400 million to complete the wall because of unanticipated fuel, steel, and labor costs.<sup>35</sup> A related 28-mile "virtual fence" of surveillance technology in Arizona has, so far, failed.<sup>36</sup>

It is easy to view the wall simply as a barrier to the entry of undocumented Mexican farmworkers and their families, but the post-9/11 threat of terrorist infiltration was instrumental in generating congressional support.<sup>37</sup> Despite lavish appropriations, however, the wall has had little or no effect as a shield against terrorism.<sup>38</sup> "Everyone can climb it," according to one border crosser; even the Border Patrol itself has acknowledged that the wall is only "a speed bump in the desert" that enables the Patrol to "respond."<sup>39</sup> To be sure, the wall may have stemmed the normal flow of undocumented persons into this country, but even that is not clear. As the then-Governor Janet Napolitano of Arizona famously quipped, "[y]ou show me a fifty-foot wall, and I'll show you a fifty-one-foot ladder."<sup>40</sup> Moreover, as General George Patton long ago observed, fixed fortifications are monuments to the stupidity of man.<sup>41</sup> Inevitably, one thinks of the Berlin Wall when one thinks of the Mexican Border Wall.

### C. *The Gist of Public Opinion*

Fundamentally, even after 9/11, Americans have generally favored a steady flow of immigration in the national interest. The country has steadfastly kept its arms open to prospective migrants, including appropriate levels of undocumented migration.<sup>42</sup> Cheap labor means cheap produce in the market. So long as there is

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31. See Erich Lichtblau, *Prosecutions in Immigration Doubled in Last Four Years*, N.Y. TIMES, Sept. 29, 2005, at A27; see also Gail Russell Chaddock, *Hill Closes in on Immigration Reform*, CHRISTIAN SCI. MONITOR, Mar. 13, 2007, at 1 (arrests of employers tripled in 2006).

32. See Lichtblau, *supra* note 31, at A27.

33. Bowers, *On the Border*, *supra* note 9, at 1.

34. Secure Fence Act of 2006, Pub. L. No. 109-367, § 3, 120 Stat. 2638, 2639 (2006).

35. Eileen Sullivan, *Bush's Border Fence Costs Extra \$400 Million*, HOUSTON CHRON., Sept. 10, 2008, at A9.

36. *Id.*

37. See ROMERO, *supra* note 15, at 46, 89.

38. See Sean Holstege, *Illegal Migrants Have a Higher Hurdle*, ARIZ. REPUBLIC, Nov. 13, 2008.

39. *Id.*

40. Timothy Egan, *Disorder on the Border*, N.Y. TIMES, March 29, 2008, at A17.

41. WILLIAM WEIR, 50 BATTLES THAT CHANGED THE WORLD 233 (2004).

42. See, e.g., David Leonhardt, *The Border and the Ballot Box*, N.Y. TIMES, Week in Review, March 2, 2008, at 1, 8 (summarizing substantial and growing recognition of the contributions of

some process for regularizing their status, this tolerance has normally trumped public concern about illegal border crossings. For example, according to a recent USA TODAY Gallup poll, 78% of the American public favors putting undocumented aliens on the path to citizenship.<sup>43</sup> Even so, public opinion is cyclical, sometimes preferring a more open door for migrants, sometimes a more closed door. Often the doorkeeper is the media, which has certainly been the case since 9/11.

As to the issue of border controls, public opinion polls have overwhelmingly indicated disenchantment with efforts to protect U.S. borders from undocumented migration. In one poll, for example, 41% of the public said they “worry a lot” about the issue.<sup>44</sup> Public disenchantment about border controls is itself not controlling, however. In fact, it is diminishing as the presence of undocumented persons declines.<sup>45</sup> The public, as it turns out, has a much bigger heart than the flame-throwers in the media.

#### IV. THE EFFECT OF 9/11

The terrorist tragedy of 9/11 put the country on edge about migrants. It was clear that the terrorist attacks were, as a federal appeals court found, “facilitated by the lax enforcement of immigration laws.”<sup>46</sup> Encouragement from media personalities stirred the normal debate about immigration. The debate became shrill and polarized, if not downright venomous. In particular, the threat of terrorism was caught up with perennial issues related to the status of undocumented workers in this country. The American public began to forget our traditional hospitality to strangers. Self-appointed vigilantes began to patrol the Mexican border.<sup>47</sup> Members of Congress called for the criminalization of undocumented status itself, and plans unfolded for a full-scale military defense of the Mexican border.<sup>48</sup> Several proposals even called for the amendment of our Constitution to deny citizenship to children of noncitizens.<sup>49</sup> Promising negotiations with Mexico to find common solutions to the issues involved with migration abruptly ended.<sup>50</sup>

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immigrants and less blaming of immigrants for the country’s problems).

43. See Kathy Kiely, *Public Favors Giving Illegal Immigrants in USA a Break*, USA TODAY, Apr. 19, 2007, at 7A.

44. Daniel Yankelovich, *The Tipping Points*, FOREIGN AFF., May-June 2006, at 115, 119; see also Jacoby, *supra* note 8, at 50 (noting that the public remains supportive of immigration but perceives a need to fix the system).

45. See, e.g., Whitley, *supra* note 6.

46. *Rajah v. Mukasey*, 544 F.3d 427, 438 (2d Cir. 2008).

47. See Roger Lowenstein, *The Immigration Equation*, N.Y. TIMES, July 9, 2006, § 6, at 32.

48. See Sullivan, *supra* note 35, at A9.

49. See *They Are America*, *supra* note 13, at 11.

50. See Ricardo Sandoval, *Key Concerns Unresolved After Talks between U.S., Mexico*, DALLAS MORNING NEWS, Nov. 27, 2002, at 18A.

There is something old about this experience and something new. Public opinion, though consistently supportive of immigrants, fluctuates cyclically within a margin of appreciation of general support.<sup>51</sup> It is a small wonder that Congress has typically responded to public opinion in cycles of liberality and restriction. Nearly every decade, almost on schedule, public concern about immigration rules and procedures surges, and Congress responds with new law. 9/11 reinforced that cycle.

Four issues normally have defined the public agenda in recurring cycles: border security, guest workers, more rigorous sanctions against employers of undocumented persons, and expanded opportunities for legalization of residency and citizenship. Unfortunately, a congressional attempt to combine all four of these concerns in a single comprehensive bill<sup>52</sup> failed in 2007. Essentially, the bill had three purposes: to rationalize and liberalize immigrant visas, particularly for workers; to provide for more effective enforcement of the law; and to offer a one-time opportunity for undocumented persons with sufficient roots in the United States to regularize their status and put them on a long path to citizenship.<sup>53</sup> The bill included an overhaul of the current, single-attribute system for issuance of visas, replacing it with a sensible, finely calibrated consideration of multiple attributes of a visa applicant, based on successful merit-point systems of Canada, Australia, New Zealand, and the United Kingdom.<sup>54</sup>

After the demise of the comprehensive immigration bill, several less ambitious bills also failed. One, known as AgJOBS, for example, would have conferred “blue card” status on any foreign worker who could demonstrate previous agricultural work in the United States, his or her own eligibility for admission, a criminal record free of felony or serious misdemeanor convictions, and a timely application.<sup>55</sup> Another bill would have enabled the children of undocumented persons to become eligible for educational benefits, and still another would have made undocumented high school graduates eligible for citizenship after completion of two years of college or military service.<sup>56</sup>

Instead of substantial immigration reform by Congress, however, we have witnessed seven developments: (1) stricter border enforcement, (2) more federal

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51. “As ever, we Americans like to say that we live in a nation of immigrants. But we are also prone to believing that the last great immigrants were the ones who arrived decades ago. The country can never quite make up its mind how open it should be. It was in 1882, after all, that Congress significantly restricted immigration for the first time, by passing the Chinese Exclusion Act. Only four years later, the Statue of Liberty—‘the Mother of Exiles,’ in the words of the Emma Lazarus poem inscribed inside the statue—rose above New York Harbor.” Leonhardt, *supra* note 42, at 8.

52. See Amanda Paulson, Faye Bowers & Daniel B. Wood, *To Immigrants, US Reform Bill is Unrealistic*, CHRISTIAN SCI. MONITOR, May 21, 2007, at 11 (giving a capsule summary of the bill).

53. Julia Preston, *In Increments, Senate Revisits Immigrant Bill*, N.Y. TIMES, Aug. 3, 2007, at A1; see also Chaddock, *supra* note 31.

54. See Peter Grier, *Who Gets In? Skills vs. Family Ties*, CHRISTIAN SCI. MONITOR, May 24, 2007, at 1.

55. Faye Bowers, *Along Border, not Enough Hands for the Harvest*, CHRISTIAN SCI. MONITOR, Feb. 22, 2007, at 2.

56. See Preston, *supra* note 53, at 1, 17.

raids of workplaces, (3) local crackdowns on day laborers and a big debate about their rights, (4) restrictions on the civil liberties and due process of non-citizens, (5) massive fingerprinting of non-citizen visitors (the database currently numbers 90 million new fingerprints, with 20-23 million added every year) and proposals for DNA testing of all noncitizens, (6) a pay-as-you-go maze for non-citizens seeking to enter the country, adjust their status, or become citizens, and (7) an alarming rise of anxiety about foreigners in this country and attacks on them.<sup>57</sup> For example, the FBI reports that anti-Latino hate crimes rose by almost 23% between 2003 and 2005.<sup>58</sup>

What is quite new about the immigration issue today has been the edginess of the American public and greater political posturing, thanks to the audacity of broadcast media personalities who took up the issue with little regard for the facts. Their medium was entertainment, not journalism. Purely and simply, they exploited public fear of terrorism for commercial ends. Suddenly, the public was confronted with the specter of a porous border, allegedly wide open to terrorist infiltration as well as such acknowledged threats to domestic security as drug trafficking. Suddenly, too, the ongoing search for effective controls over undocumented migration took a radical turn, at least until the economy became the number one public nightmare. In addition, this turn was not only radical but also unrealistic. Just imagine, for example, trying to round up millions of newly minted criminals if a House bill in Congress to make undocumented status itself a felony had ever become the law.

#### V. GETTING IT STRAIGHT

The argument for drastic action against undocumented persons is often expressed in terms of sheer numbers. The consensus is that there are an estimated eleven to twelve million undocumented persons among us,<sup>59</sup> but nobody knows for sure. The total number is actually nothing new. Over thirty years ago, in 1974, the federal government estimated six to twelve million undocumented workers,<sup>60</sup> much the same as the estimates today. If we account for the substantial increase in the general population as well as the much greater capacity of law-enforcement agencies to detect undocumented persons, even the low number of six million is roughly comparable to today's estimate.

Most studies, with a few exceptions, have shown that immigrants, fully documented or otherwise, make an immense contribution to the national economy.<sup>61</sup> Surprisingly perhaps, the net contribution of immigrants as a whole is

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57. See generally Aldana, *supra* note 13; *They Are America*, *supra* note 13. Regarding the massive fingerprinting of foreigners in the name of anti-terrorism, see Alexandra Marks, *More Fingerprinting for Tourists*, CHRISTIAN SCI. MONITOR, Mar. 27, 2008, at 3.

58. Brentin Mock, *Furia Contra el Otro* [Raging Against the Other], INTELLIGENCE REP., Winter 2007, at 32 (Spanish language source).

59. Thomas Frank, *Number of Illegal Immigrants Declines*, USA TODAY, Feb. 24, 2009, at 3A.

60. IMMIGRATION AND NATURALIZATION SERVICE, U.S. DEP'T OF JUSTICE, ANNUAL REPORT iii (1974) (on file with author).

61. See Jacoby, *supra* note 8, at 50.

very positive,<sup>62</sup> even to the point that undocumented workers are given credit for helping prop up the ailing social security system.<sup>63</sup> Moreover, immigrants generally do not take jobs from citizens or depress fair and decent wages, so long as the domestic labor force is adequately protected. That was the conclusion of a research report by the well-respected Pew Foundation, subject to exceptions in some local job markets.<sup>64</sup> Indeed, immigrant workers tend to raise wages rather than lower them by complementing rather than competing with native workers.<sup>65</sup> For example, a greater availability of daycare workers makes it possible for homemakers to take outside employment. Studies also have confirmed the reliance of consumers and the national economy on migrant labor above current authorized levels of migration.<sup>66</sup> The United States is already facing long-term shortages of unskilled workers,<sup>67</sup> even taking into account cyclical and episodic downturns in the economy, and the problem will only get worse in a graying society as some 75 million baby boomers retire.<sup>68</sup>

Other studies, focused on immigration processes in other countries, have revealed a correlation between the character of immigration controls and the locus of authority for those controls within governments.<sup>69</sup> For example, countries whose military plays a significant role in immigration control are apt to be particularly concerned about law enforcement, whereas vesting more authority within a ministry of labor may betoken particular concern for protection of the domestic workforce. Understandably, then, the shift of authority after 9/11 from the Department of Justice to the new Department of Homeland Security has involved a closer association between the endless terrorist threat and the presence

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62. See Daniel Altman, *Shattering Stereotypes About Immigrant Workers*, N.Y. TIMES, June 3, 2007, § 3, at 4 (stating that the presence of illegal immigrants actually increases the overall supply of labor in the United States).

63. See Editorial, *How Immigrants Saved Social Security*, N.Y. TIMES, Apr. 2, 2008, at A26. Several regional and state studies have also confirmed the positive economic contributions of undocumented workers. For example, the Oregon Center for Public Policy issued a fact sheet in 2007 that estimated that undocumented workers in Oregon paid \$134 million to \$187 million in taxes in 2006, including state income, Social Security, Medicare, property and excise taxes. OREGON CENTER FOR PUBLIC POLICY, UNDOCUMENTED WORKERS ARE TAXPAYERS, TOO 4 (2007). The center also estimated that Oregon employers paid \$97 million to \$136 million in state unemployment, Social Security and Medicare taxes on the wages of undocumented workers. *Id.* at 1. In addition, a substantial portion of the state's unauthorized workers' roughly \$2 billion earned in annual income is spent on goods, services and taxes, which benefit the state's economy, the center's researchers said. *Id.* at 2.

64. PEW HISPANIC CENTER, GROWTH IN THE FOREIGN-BORN WORKFORCE AND EMPLOYMENT OF NATIVE BORN (2006).

65. See Jacoby, *supra* note 8, at 57.

66. See *id.* at 50.

67. See DORIS MEISSNER ET AL., IMMIGRATION AND AMERICA'S FUTURE: A NEW CHAPTER 3 (2006); *Immigration: Impact on U.S. Economy*, 56(3) NAT'L VOTER 12, 12 (2007); Altman, *supra* note 62.

68. See Jacoby, *supra* note 8, at 50; *Immigration: Impact on U.S. Economy*, *supra* note 67, at 12. See MEISSNER ET AL., *supra* note 67, at 3 (discussing the economic implications of immigrants).

69. See, e.g., James A.R. Nafziger, *A Comparison of Processes for Reforming Migration Laws in Transitional States: China, Kazakhstan, and Albania*, 70 WASH. L. REV. 757 (1995).

of undocumented workers in this country, regardless of their origins or motivations.

The administrative restructuring of federal authority over immigration after 9/11 should not stand in the way, however, of decoupling the normal, even cyclical, issues of migration from terrorist threats to homeland security. We must resist the siren call of media personalities. There simply is no correlation between the number of undocumented workers and the security issues that beset us as a society. If 9/11 made anything clear, it was the need for strengthening and fine-tuning enforcement of the law directed at specific terrorists and acts of terrorism, expanding public resources on homeland security, and improving public education in this nation of immigrants can help effectively achieve this goal.