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February 2008

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THE ALIEN INVASION?

By Ediberto Roman¹

I. Introduction

“Ladies and gentlemen, we interrupt our program . . . to bring you a special bulletin . . .”² 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 [drawing] their plans against [you].”³ 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.”⁴ 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.”⁵ As you move closer and closer, the being “ris[es] up.”⁶ 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 air ways 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 our military to keep them there. In the

¹ Copyright 2008 by Ediberto Roman, all rights reserved. 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 Tujillio, 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 3:00 a.m. telephone requests for some obscure book or survey was 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 South Eastern Association of Law Schools Annual Conference.

² Howard Koch, *THE PANIC BROADCAST*, 37(Avon 1970). The infamous *War of the Worlds* episode was originally broadcast on October 30, 1938.

³ *Id.* at 36.

⁴ *Id.* at 50.

⁵ *Id.*

⁶ *Id.*

meantime placing our faith in G_d 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 our way of life. I thank you.⁷

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 . . .”⁸ Finally, an epiphany rises like the phoenix of old: “They[’re] wreck[ing] the greatest country in the world.”⁹ They’re nothing like you . . . they need to be stopped.

What many view as a cancer has taken root in the United States, one which had remained in remission for decades. Never fully disappearing, it has lingered in isolated cloisters 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 crises.¹⁰ Following increased domestic oversight and arguably isolationist sentiments after September 11, 2001, media,¹¹ political,¹² academic,¹³ and would-be academic¹⁴

⁷ *Id.* at 58.

⁸ Koch, *supra* note 1, at 68.

⁹ *Id.* at 7.

¹⁰ William H. Calhoun III, *Illegal Immigration: The Invasion Continues*, Capitol Hill Coffee House, Oct. 25, 2006, available at http://capitolhillcoffeehouse.com/more.php?id=A1528_0_1_0_M (last visited Feb. 15, 2008) (“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 hey 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 invdes, but all of South America, Africa, Asia, China and India are coming too.”) (“The Invasion Continues”).

¹¹ Donald L Barlett & James B. Steele, *Who Left the door Open?*, TIME, Sept. 20, 2004, at 51 (investigating the reasons for and impact of the upturn of “illegal aliens” coming to the U.S., primarily from Mexico); *see also* ARGUING IMMIGRATION: THE DEBATE OVER THE CHANGING FACE OF AMERICA (Nicolaus Mills ed., Bt Bound 1994).

¹² Barbara Koh, *Close the U.S. Border, Mayor Says; Culver City: Steven Gourley Urges the Country to ‘Draw a Line’ Against Illegal Immigrants. His Comments spark Cries of Racism*, L.A. TIMES, Mar. 28, 1991, at J1.

figures have effectively caused fervor over the issue,¹⁵ using virulent attacks aimed largely against the Latino and Latina immigrant groups crossing the Mexican border.¹⁶ FBI reports on domestic hate crimes after 2001 indicate that such crimes against Latinas and Latinos surged from 2003 to 2006.¹⁷ The Mexican American Legal Defense and Educational Fund (MALDEF) blames anti-immigrant sentiments for the surge.¹⁸ Surprisingly, these attacks, which are often hideous and gruesome,¹⁹ 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.”²⁰ While some view the concerns as mud slinging aimed at stirring racist and xenophobic fears,²¹ many Americans have accepted and expressed agreement with the anti-immigrant attacks.²²

¹³ See, e.g., Samuel P. Huntington, *WHO ARE WE? THE CHALLENGES TO AMERICA’S NATIONAL IDENTITY* (Simon & Schuster 2004) (expressing fear that increasingly multicultural United States could lead balkanization); Peter Brimelow, *ALIEN NATION: COMMON SENSE ABOUT AMERICA’S IMMIGRATION DISASTER*, 271-72 (Harper Perennial 1996) (arguing that Latino immigrants are threatening to “break down white America’s sense of identity”); Peter H. Schuck & Rogers M. Smith, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* (Yale University Press 1985) (arguing against birthright citizenship for children of undocumented aliens); Michael Walzer, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (Basic Books 1984) (suggesting that liberal societies can deviate from norms of internal membership to restrict membership from outsiders).

¹⁴ See, e.g., Justin C. Glon, “*Good Fences Make Good Neighbors: National Security And Terrorism - Time to Fence In Our southern Border*,” 15 *IND. INT’L & COMP. L. REV.* 349 (2005) (suggesting the need for a fence running along the U.S.-Mexico border to deal with the United States’ “most pressing concern”).

¹⁵ See Fred Elbel, *Desert Invasion-U.S., Illegal Immigration Invasion Numbers Analysis*, available at http://www.desertinvasion.us/data/invasion_numbers.html (last visited Feb. 15, 2008).

¹⁶ See, e.g., Jerry Adler & Steven Waldman, *What is an American?*, *NEWSWEEK*, Jul. 10, 1995, at 18 (arguing that that multiculturalism has resulted in a divided country); Editorial, *Immigration: Not Fixed Yet*, *NAT’L REV.*, Jun. 26, 1995, at 21 (proposing a moratorium on Immigration).

¹⁷ National Association of Hispanic Journalists Blog: *FBI Report Documents hate Crimes*, Nov. 20, 2007, available at <http://nahjsblog.com/2007/11/fbi-report-documents-hate-crimes.html> (last visited Jan. 20, 2008) (according to a 2006 report, Hispanics comprised 62.8% of victims of crimes motivated by a bias toward the victims’ ethnicity or national origin).

¹⁸ *Id.* (According to MALDEF President and General Counsel, John Trasvina, “Anti-immigrant hatred heard on radio and cable shows reaches America’s neighborhoods with real consequences.”).

¹⁹ New York Times Archives, articles about hate crimes, available at http://topics.nytimes.com/top/reference/timestopics/subjects/h/hate_crimes/index.html?query=Hispanic_Americans7&field=des&match=exact (last visited Feb. 20, 2008) (listing various stories including: a November 17, 2006 story of Neo-Nazi shouting racial slurs and sodomizing a Latino boy; a June 15, 2006 story on four teenagers beating and robbing two Mexican immigrants; a May 9, 2006 story two men assaulting a Hispanic male and shouting ethnic slurs against him).

²⁰ See, e.g., *Lou Dobbs Tonight: Com-Feds’ Border Action not Nearly Enough*, CNN, Jun. 19, 2005, available at <http://www.CNN.com/2005/US/03/31/border.agents/index/html> (last visited Jan. 20, 2008) (“Illegal Immigration...also [raises] the larger problem of protecting our country from another deadly terrorist attack.”)

²¹ See Frank H. Wu, *The Limits of Borders: A Moderate Proposal For Immigration Reform*, 7 *STAN L & POL’Y REV.* 35 (1996) (“under the guise of attacking “political correctness,” immigration restrictionists have appealed to a racialized vision of citizenship”).

²² For instance, a recent poll conducted by Quinnipiac University found that strong majorities of those questioned favored building a fence along the U.S. Mexico border, creating national ID cards for all legal residents, refusing driver’s licenses, and free public education to illegal aliens. See David Lightman, Knight Rider Washington Bureau, McClatchy-Tribune News Service, Nov. 14, 2007.

Central to the attacks is the so-called mass invasion at our borders.²³ The alarms warn of an effort to take over America,²⁴ and its impact on the U.S. economy.²⁵ Another of the vitriolic calls for curbing immigration is the alleged crime wave that will inevitably result from the mass migration.²⁶ This call and others like it are made with little or no evidentiary support, yet have captured the public imagination in a presidential election year²⁷ and will likely be the focus of political and public policy debates for decades to come.²⁸ 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*,²⁹ today's invasion is largely accepted as an inevitable future for America.³⁰

Consider the alarming tone of the alleged demographic shift resulting from immigration. Media figures such as Fox 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 complexion of our society."³¹ Lou Dobbs, a CNN anchor and popular pundit, repeatedly warns against an "illegal alien invasion."³² In fact, in one episode Dobbs made five references to an alien invasion.³³ Some of Dobbs' choices for expert opinion on the issues even include reports from the Council of Conservative Citizens, a national white supremacist organization.³⁴ 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 actually 250 cases over that period, and is not directly attributed to the immigrant population.³⁵ Others engage in similar forms of hyperbole to promote a solution to the inevitable population

²³ See, e.g., Michelle Malkin, *INVASION: HOW AMERICA STILL WELCOMES TERRORISTS, CRIMINALS, AND OTHER MENACES TO OUR SHORES* (Regnery 2002) (asserting that "Congress, pressured ethnicity lobbyists, corporations, the travel industry, and open border activists, aided the September 11 terrorists").

²⁴ *Id.*

²⁵ *The Invasion Continues*, *supra*, note 10 ("Our once great and noble land will be just another third-world wasteland, not unlike Mexico City or New Deli").

²⁶ *Id.* (The United States will become "an unrecognizable amalgamation of third-world crime...").

²⁷ See Iowa-Republicans-Exit Polls, available at www.msnbc.msn.com/id/21228177 (last visited Jan. 20, 2008).

²⁸ See www.washingtonpost.com/wp-dyn/content/article/2008/01/12/AR2008011200329.html (last visited Feb. 15, 2008).

²⁹ *CLOVERFIELD* (Universal Films, 2008).

³⁰ The popularity of the anti-immigrant attacks are not only limited to isolationist and nativist beliefs, it is also based on the misguided belief that immigration can be stopped, despite the fact that history suggests otherwise.

³¹ Think Progress-Pelosi: "Hate Radio" Hijacked Political Discourse, available at <http://thinkprogress.org/2007/06/28/pelosi-talkradio/> (last visited Jan. 20, 2008).

³² *Id.*

³³ See *Lou Dobbs Tonight*, Examination of Issues Arising from Illegal Aliens in the U.S., CNN, Mar. 21, 2005, available at <http://transcripts.cnn.com/TRANSCRIPTS/0503/21/ldt.01.html> (last visited Jan. 20, 2008) (Dobb'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.").

³⁴ See Campaign for a United America, *Voices of Intolerance - Lou Dobbs*, available at http://campaignforaunitedamerica.org/index.php/voices/lou_dobbs/ (last visited Jan. 20, 2008) (among Dobb's sentiments on American cultural homogeneity is his statement of, "I don't think there should be a St. Patrick's Day . . . we ought to be celebrating what is common about this country, what we enjoy as similarities as people.").

³⁵ *Id.*

overthrow, while also stoking the flames of fear.³⁶ For instance, John Gibson implored viewers to “do your duty. Make more babies...half of the kids in this country under five are minorities and by far the greatest number are Hispanic. What does that mean? Twenty-five years from now, the majority of the population is Hispanic.”³⁷

Comments such as those by Gibson 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 felt its accuracy becomes largely irrelevant.³⁸ 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,³⁹ 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 25%.⁴⁰

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...Just run a couple of taco trucks up and down the line.”⁴¹ Another alleged that the civil rights organization “La Raza” is the “the Klu Klux Klan of Hispanic People.”⁴²

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.” One interviewee stated that she stopped shopping at WalMart because she noticed she was the only non-Latino customer in the store.⁴³ She reportedly said, “I’m in the minority, and if we

³⁶ See Andrew Dobbs, *Bill O’Reilly is a Racist*, *Burnt Orange Report*, Mar. 30, 2004, available at <http://www.burntorangereport.com/archives/001301.html> (last visited Jan. 20, 2008).

³⁷ Massimo Calabresi, *Is Racism Fueling the Immigration Debate?*, *TIME*, May 17, 2006, available at <http://www.time.com/time/nation/article/0,8599,1195250,00.html> (last visited Jan. 20, 2008).

³⁸ *Gibson responded to criticism of “Make More Babies” remarks—by invoking Europe’s rising Muslim Population*, *Media Matters*, May 18, 2006, available at <http://mediamatters.org/items/200605180001> (last visited Jan. 20, 2008). Shortly after making his mathematically challenged comments concerning the demographic shift in this country, Gibson responded to criticism of his “make more babies” comments 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, “my 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...”

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See *Think Progress*, *supra* note 31.

⁴² *Id.*

⁴³ *The Carpetbagger Report*, Jun. 30, 2007, available at <http://www.thecarpetbaggerreport.com/archives/11298.html> (last visited Jan. 20, 2008).

don't get control over this pretty soon, all of America will be outnumbered."⁴⁴ Another interviewee reportedly complained that "Latinos turn things into slums."⁴⁵

Immigration has also become a central issue in the 2008 presidential election. For many conservative and independent voters⁴⁶ there is considerable frustration with this government's failure to produce any results with the perceived immigration crisis.⁴⁷ According to one report, "illegal immigration ranks as a top concern for many in an electorate increasingly pessimistic about the future."⁴⁸ According to ABC News, 55% of Republicans say illegal immigration hurts the country, and the issue of immigration is fifth in order of national importance to these voters.⁴⁹ NBC Nightly News reported that "the immigration debate has become the core of the fight for the GOP nomination."⁵⁰ The Republican contenders are responding accordingly. For instance, in their November 28th debate, candidates Rudy Giuliani and Mitt Romney attempted to show themselves as 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.⁵¹ During the New Hampshire primary build-up, Romney ran a television ad that in 15 seconds twice pointed out Senator John Mc Cain's support of amnesty for illegal immigrants.⁵² Candidate Michael Huckabee has similarly taken a get-tough stance, promising to send illegal immigrants home.⁵³ According to Huckabee, "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."⁵⁴ Mitt Romney, one of the last remaining republican candidates, declared "[t]he current system puts up a concrete wall to the best and brightest, yet those without skill of education are able to walk across the border."⁵⁵ Other anti-immigrant candidates take the rhetoric a step further. The group's drum leader warns of the changing face of America and the terrorist threat to America. Republican Presidential Candidate Tom Tancredo, Head of the Immigration Reform Caucus, often speaks to the threat of "radical multiculturalism."⁵⁶ For instance, in his speech before the House of Representatives on halting illegal immigration, Tancredo warned:

⁴⁴ *Id.*

⁴⁵ *Congressional record on destruction of U.S. border forests and border deserts, U.S. House Testimony by Rep. Tom Tancredo*, Mar. 4, 2003, available at http://www.desertinvasion.us/pol/congr_record_2003mar04.html (last visited Jan. 20, 2008).

⁴⁶ See Noelle Phillips, *Immigration Dominates GOP Issues in South Carolina*, THE STATE, Jan 7, 2008, available at <http://www.thestate.com/politics/story/277053.html> (last visited Jan. 20, 2008).

⁴⁷ Michelle Mittelstadt, *Dems Straddle Border, GOP Field Hawkish*, THE HOUSTON CHRONICLE, Nov. 11, 2007.

⁴⁸ *Id.*

⁴⁹ *GOP Debate's Focus on Immigration Drives Coverage*, THE FRONTRUNNER, Nov. 30, 2007.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See Interview with John McCain, *Meet The Press*, Jan. 6, 2008.

⁵³ David Olinger, *Border Wars Personal Out West*, DENVER POST, Jan. 28, 2008, available at http://www.denverpost.com/lacrosse/ci_8088009 (last visited Feb. 15, 2008) (noting a difference by some between "the good Mexicans and the Latinos") (Hereinafter "The Good Mexicans").

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ See House Testimony by Rep. Tom Tancredo, *supra* note 45.

If 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, bringing 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.⁵⁷

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.”⁵⁸ According to Tancredo, we all need to be fearful because federal prisons overflow with illegal immigrants, some of whom aim to harm people.⁵⁹ “They need to be found before it is too late. They’re coming here to kill you, and you, and me, and my grandchildren.”⁶⁰ More recently, Tancredo took hate mongering to new lows when in a recent television commercial, he implies that illegal immigrants are terrorists in the making.⁶¹ The ad in question evidently asserted that radical Jihadists have slipped into the flow of illegal immigration, and as a result attacks are inevitable.⁶² Despite being so offensive

⁵⁷ *Id.*

⁵⁸ United States Border Control – In the news, Jun. 12, 2005, available at <http://www.usbc.org/info/2005/jun/trancredo.htm> (last visited Jan. 20, 2008).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Ruben Navarrette, Jr., *Honesty In Immigration Debate*, SAN DIEGO UNION-TRIBUNE, Nov. 21, 2007, pg B-7 (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.”).

⁶² Brian Tumulty, *N.Y. Driver’s license Controversy Spills Over to 2008 Election*, GANNETT NEWS SERVICE, Nov. 15, 2007, Pg. ARC. See also *Democrats Plot Electoral Strategy On Immigration*, TECHNOLOGY DAILY, Nov. 16, 2007, Vol. 10, No. 9.

that it is actually difficult for this author to believe,⁶³ the outrageous ad depicts what appears to be a shopping mall being blown up as a consequence of illegal immigration.⁶⁴

In a similar vein, conservative leaders from border states have established grass-roots vigilante organizations to halt immigration, often warning against a population, political, or terrorist overthrow.⁶⁵ 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.⁶⁶ 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 editor to local newspapers, and once delivered a speech that caused the Republican governor of his state to denounce the group.⁶⁷ Yet another vocal anti-immigrant organizer is Jim Gilchrist, founder of the Minuteman Project, an armed militia that purportedly attempts to engage in Border Patrol-like policing.⁶⁸ Gilchrist’s statements and tactics “have drawn denunciations from faith leaders, human rights activists and even President George W. Bush, who called Gilchrist and his shotgun-toting posse vigilantes.⁶⁹ According to one report, Gilchrist allowed members of the National Alliance, one of the country’s largest neo-Nazi organizations, to help with his 2005 campaign for the U.S. House of Representatives.⁷⁰

Even the political leaders seeking to challenge the xenophobic tenor of the debate, have nevertheless largely accepted the assertions of the nativists.⁷¹ 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.”⁷² The Senator, like many others in this society, with little or no questioning accepted that the country is enduring a major demographic shift. 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 overrun by darker-skinned people.”⁷³ Despite these comments,

⁶³ The ad, which originally aired in Iowa, never fully reached a wide national viewing audience.

⁶⁴ *Id.*

⁶⁵ See, e.g., Richard D. Lamm & Gary Imhoff, *THE IMMIGRATION TIME BOMB: THE FRAGMENTING AND DESTRUCTION OF AMERICA BY IMMIGRATION* (1985); Lawrence Auster, *THE PATH TO NATIONAL SUICIDE: AN ESSAY ON IMMIGRATION AND MULTICULTURALISM* (American Immigration Control Foundation 1991).

⁶⁶ SPLCenter.org: *Broken Record*, available at <http://www.splcenter.org/intelreport/article.jsp?aid=589&printable=1> (last visited Oct. 18, 2007).

⁶⁷ *Id.*

⁶⁸ Campaign for a United America, *Voices of Intolerance – Jim Gilchrist*, available at http://campaignforaunitedamerica.org/index.php?/voices/jim_gilchrist/ (last visited Jan. 20, 2008).

⁶⁹ *Id.*

⁷⁰ See *Voices of Intolerance-Jim Gilchrist*, *supra* note 68.

⁷¹ 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; Immigration: Pentagon Refuses to Implement senator’s Plan, which It Says lacks Legal Authority*, L.A. TIMES, Aug 6, 1994, at A1.

⁷² See *Broken Record*, *supra* note 66.

⁷³ *Id.*

even democratic presidential hopefuls have recently shown little sympathy in the immigration context. Consider the attacks on presidential hopeful Senator Hillary Clinton when she wavered in answering a question concerning issuing driver's licenses to undocumented immigrants.⁷⁴ After Clinton stated that she understood why a state may want to issue licenses to undocumented immigrants as a tool of identification,⁷⁵ Senator Chris Dodd found Clinton's words "troublesome" and doubted that anyone who flouts our nation's federal laws would be deterred from driving without a license.⁷⁶

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.⁷⁷ The Speaker of the House of Representatives, Nancy Pelosi, observed "talk radio, or in some cases hate radio . . . just go on and on,⁷⁸ in a xenophobic, anti-immigrant" manner.⁷⁹ Even leading republican presidential candidate Senator John McCain, one of the sponsors of the Senate's moderate comprehensive reform bill,⁸⁰ initially supported reform that would include a guest worker program and a path for undocumented workers to achieve citizenship.⁸¹ However, succumbing to the outcry against such reform, he has changed his position on the matter and is now advocating for an enforcement first approach towards immigration.⁸²

Perhaps given the whim to which political leaders respond to the issue, some supporters of reform have questioned the media's role in creating public opinion. Specifically, some have questioned whether cable news conglomerates such as MSNBC, which is co-owned by General

⁷⁴ Jonathan Gurwitz, *Democrats Suffer Dukakis Moment*, SAN ANTONIO EXPRESS-NEWS, Nov. 18, 2007, p. 3H.

⁷⁵ This article chooses to label the subject of recent immigration debates as undocumented workers, in part due to that classification 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 (1981); Linda S. Bosniak, *Exclusion and Membership: the Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955 (1988).

⁷⁶ *Id.*

⁷⁷ See Ediberto Roman, *Coalitions and Collective Memories: A Search for Common Ground*, 58 MERCER L. REV. 637 (2007) (documenting the immigration reform efforts of 2006 and the opposition raised by talk radio). For additional examples of talk radio's attacks, see, e.g., *Savage's Trifecta: Smears of Hispanics, Gays, and Jews*, Media Matters For America, May 12, 2006, available at <http://mediamatters.org/items/200605120017> (last visited Jan. 20, 2008) ("our brown brethren" may "erase" the "European-American, or white person" who is more "benevolent" and "enlightened"). Republican Rush Limbaugh on Illegal Immigration, Hispanics Against Republicans, Jul. 6, 2007, available at <http://hispanicsagainstrepublicans.blogspot.com/2007/07/republican-rush-limbaugh-on-illegal-immigration> (last visited Jan. 20, 2008) (video).

⁷⁹ Pelosi, *supra* note 31.

⁸⁰ The latest iteration of the comprehensive reform bill, the Comprehensive Immigration Reform Act of 2007, S. 1348, failed a cloture motion in June 2007.

⁸¹ *Id.*

⁸² Ruben Navarette Jr., What? Latinos Should Support McCain on Immigration, Immigrationporfblog, January 29, 2008, available at <http://lawprofessors.typepad.com/immigration/2008/01/navarette-latin.html>

Electric/NBC, and Microsoft, are championing bigotry.⁸³ These claims raise legitimate questions concerning who owns the airwaves and why they select, actively market, and advertise spokespersons that openly advocate racially insensitive sentiments.⁸⁴

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.”⁸⁵ 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.”⁸⁶ In another report, the ADL recently observed that “as the national debate over immigration reached a fever pitch, some mainstream advocacy groups have ‘reached for the playbook of hate groups’ - resorting to hateful and dehumanizing stereotypes and outright bigotry to demonize immigrants.”⁸⁷ 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.”⁸⁸ Some of these organizations have even fostered links with extremist hate groups.⁸⁹

Perhaps the most amazing aspect of the anti-immigrant movement’s most irresponsible and outlandish attacks is that they do not provoke mass outrage and scorn.⁹⁰ Why in this day and age are such shameful attacks not only not rejected, but in many respects 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 are made against Asians or a black people, would they become acceptable if the focus of the particular attacks is not citizens? As one national columnist observed, “[w]hile 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 statements were directed against African Americans or

⁸³ See *Action Alert: GE, Microsoft Bring Bigotry to Life, Fairness & Accuracy in Reporting*, Feb. 12, 2003, available at <http://www.fair.org/index.php?page=1632> (last visited Jan. 20, 2008) (questioning MSNBC’s hiring of Michael Savage, who regularly refers to non-white nations as “turd world countries,” and suggests that “[y]ou open the door to [non-white immigrants], and the next thing you know, they are defecating on your country and breeding out of control”).

⁸⁴ *CNN Hire Beck: Illegal immigrants are either “terrorists,” outlaws, or people who “can’t make a living in their own dirtbag country”*, Media Matters for America, Apr. 28, 2006, available at <http://mediamatters.org/items/200604280003> (last visited Jan. 20, 2008).

⁸⁵ Erin Texiera, Associated Press, Jun. 6, 2006, available at http://www.dailybulletin.com/orlet/article/html/fragments/print_article.jsp? (last visited Oct. 18th, 2007).

⁸⁶ *Id.*

⁸⁷ *Anti-immigrant Groups Borrow From Playbook of Hate Groups to Demonize Hispanics*, Anti-Defamation League Press Release, Oct. 23, 2007, available at http://www.adl.org/presrele/cv1rt_32/5154_32.htm (last visited Jan. 20, 2008) (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.’”).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ See Alexander Aleinikoff, *The Tightening Circle of Membership*, 22 HASTINGS CONST. L. Q. 915 (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).

Jewish Americans.”⁹¹ 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?⁹² 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 of 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 of us fail to stand up and challenge attacks filled with baseless stereotypes and false assertions?⁹³ And (3) are all accusations and insults acceptable merely because they occur in the name of protecting our borders or Anglo-American Culture?⁹⁴ Instead of outrage by 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: “[t]he 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.”⁹⁵ The Time article nevertheless raised a far more telling irony, namely that national security is typically the basis for proposing closing our southern border, yet “[w]hy is no one proposing sending additional National Guard Troops to secure the U.S.-Canada border?”⁹⁶ The question is not unreasonable, particularly since Ahmed Ressam, also known as the “Millennium Bomber,”⁹⁷ was caught at the Canadian border, and none of the nineteen September 11 terrorists entered the United States from Mexico,⁹⁸ though some from did from Canada and did so legally on airplanes.⁹⁹

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. Given the frequency of these errors,

⁹¹ Andres Oppenheimer, *Time to Hit Back Against Anti-Latino Bigotry*, MIAMI HERALD, Jul. 22, 2007, available at <http://www.miamiherald.com/421/v-print/story/178206.html> (last visited Jan. 20, 2008).

⁹² See Lani Guinier & Gerald Torres, *THE MINER’S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* (Harvard University Press 2003).

⁹³ See *The Invasion Continues*, *supra*, note 10 (“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, disease, corruption, and human filth: a 21st century cesspool.”).

⁹⁴ Heidi Beirich & Mark Potok, *Keeping America White*, Southern Poverty Law Center Intelligence Report, available at <http://www.splcenter.org/intel/intelreport/article.jsp?aid=152&printable=1> (last visited Feb. 15, 2008) (“At a meeting of ‘paleoconservatives,’ former *Forbes* editor Peter Brimelow and others sound the alarm on non-white immigration”).

⁹⁵ See Broken Record, *supra* note 66.

⁹⁶ *Id.*

⁹⁷ Ressam was captured in near the Washington-Canada border en route to attempting to detonate explosives at Los Angeles International Airport on the last New Year’s Eve of the millennium.

⁹⁸ See generally Timothy J. Dunn, *THE MILITARIZATION OF THE U.S.-MEXICO BORDER, 1978-1992: LOW-INTENSITY CONFLICT DOCTRINE COMES HOME* (University of Texas Press 1996) (examining the efforts to militarize the border).

⁹⁹ *Id.*

one has to question whether they are made with the knowledge of their inaccuracy.¹⁰⁰ Another point that needs to be made here is why the anti-immigrant claims go largely unchallenged in the national media. This piece therefore will attempt to engage in what thus far the public discourse has largely failed to do - challenge the three basic premises associated with the so-called illegal immigration invasion. Despite the hateful rhetoric by so many, an examination of the leading empirical studies demonstrate 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. The following pages will examine the leading studies on the effects of recent immigration, which discredit the xenophobes. The next part will address the objections to immigration often made at the state or local level. This will be followed by an overview of this country’s long history of anti-immigrant efforts. The following section will engage in a sociological and psychological examination and explanation of the anti-immigrant efforts. Ultimately, the article will provide a pragmatic political reason why the tenor of the debate will inevitably change.

III. The Empirical Data

In response to increasingly frequent public debates concerning immigration’s effects on the economy, Congress recently created the bipartisan U.S. Commission on Immigration Reform. 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.¹⁰¹ The 12-member panel of demographers, economists, and sociologists were 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.¹⁰² This study resulted in a two-volume examination of these topics. It is considered the most comprehensive empirical examination of the recent immigration debate.¹⁰³ The results of this study will likely be startling to the opponents of immigration that 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

¹⁰⁰ 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. 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 even approaching an invasion and the use of the invasion clause is legally questionable and more likely merely another irresponsible means to promote fear and hatred of the foreigner.

¹⁰¹ National Research Council, *THE IMMIGRATION DEBATE: STUDIES ON THE ECONOMIC, DEMOGRAPHIC, AND FISCAL EFFECTS OF IMMIGRATION* (National Academies Press 1998) (“NRC Report”).

¹⁰² *Id.* at 1.

¹⁰³ *Id.*

supposed invasion on the national economy, and the effects on crime stemming from recent immigration.

-The Alleged Invasion:

In terms of the alleged population explosion resulting from the so-called invasion, the NRC Report specifically noted “although 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 is far more modest.”¹⁰⁴ A chapter specifically examining the issue of the alleged population explosion caused by recent immigration reaches similar conclusions.¹⁰⁵ The drafters bluntly conclude that despite the onslaught of recent accusations of a mass wave of illegal immigration, “[i]mmigration flows were larger in the past.”¹⁰⁶ The authors note, “to put the current immigration flows into proper perspective...our calculations reveal that, in proportionate terms, the current inflow of immigrants is rather modest.”¹⁰⁷ They go on to note, “[i]f we look only at the regular immigrants—that is exclusive of those admitted under the IRC—then the current inflows approximate those in the very *slowest* years from the period between 1840 and the onset of World War I.”¹⁰⁸ The authors went 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.”¹⁰⁹ The NRC Report also concludes that when all current forms of immigration are combined, levels are lower than those from 1850-1930 (in terms of the level of immigration in proportion to the domestic-born population).¹¹⁰ 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 proportion to the overall population, recent immigration flows are not among the largest in history, but in fact are among the smallest in U.S. history.¹¹¹ 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.

-Immigrants’ Economic Impact:

¹⁰⁴ *Id.* at 10 (Chapter one of the report authored by James P. Smith).

¹⁰⁵ *Id.* at 289 (Chapter eight authored by Susan B. carter and Richard Sutch).

¹⁰⁶ *Id.* at 290.

¹⁰⁷ *Id.* at 297.

¹⁰⁸ *Id.* (emphasis in the original).

¹⁰⁹ *Id.*

¹¹⁰ Ronald D. Lee & Timothy W. Miller, *The Current Fiscal Impact of Immigration and Their Descendants: Beyond the Immigrant Household*, NRC Report, *supra* note 101, at 183.

¹¹¹ The conclusions other, less reputable studies reach suggest immigration is at high levels. For instance, according to a study by the Center for Immigration Studies found that illegal and illegal immigration over the past seven years was the highest for any seven-year period in American history. Independent demographers questioned the survey’s conclusions. According to Dowell Myers, a University of Southern California, the study was a “one-eyed portrait,” and University of California political science Professor Wayne Cornelius called Carmrota’s conclusions “misleading.” 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 in the next five years. See Julia Preston, *Immigration at Record Levels, Analysis Finds*, NEW YORK TIMES, Nov. 29, 2007, available at http://www.nytimes.com/2007/11/29/us/29immig.html?_r=1&oref=slogin (last visited Jan. 20, 2008).

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 noted:

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.¹¹²

The NRC Report observed that in 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."¹¹³ 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 \$1,260.00 per person, exceeding their net cost at the state and local levels."¹¹⁴ With 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.¹¹⁵

Therefore, not unlike the conclusions reached with respect to assertions of mass invasions that can literally change the make-up of this country,¹¹⁶ the NRC Report similarly discredits the

¹¹² NRC Report, *supra* note 101, at 194.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 200.

¹¹⁶ Cf. Phillip Johnston, *Record Immigration Sees UK Population Soar*, THE TELEGRAPH, Oct. 25, 2007, available at <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2007/10/23/npopulation423.xml> (last visited Jan. 20, 2008) (calling for "'swift and sweeping changes' to the immigration system in order to stem '[t]he shocking acceleration in the rate of population growth.'").

allegations concerning the tales of woe regarding immigration's negative fiscal and economic impact on the national economy.¹¹⁷

In testimony before the Senate Judiciary Committee, Subcommittee on Immigration, Stephen Moore, Senior Fellow in Economics at the Cato Institute, reached similar conclusions during his testimony on the economic impact of immigration.¹¹⁸ Moore concluded that an accurate "consensus seems to be emerging that immigrants are - as they have been throughout our history, beneficial to our economy and assets to our society in other ways as well."¹¹⁹ Moore also observed a growing consensus within the economics profession that on balance immigrants are assets, not liabilities.¹²⁰ "To be sure, economists still argue about the size of immigration's benefit to the U.S. economy, but almost all of the most respected research indicates that the direction of the impact is on balance positive."¹²¹ 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 "[b]ut it didn't happen, none of these claims have been evidenced in the U.S. economy . . . and here there is little debate."¹²² "High levels of immigration have corresponded with improvement in each of these areas [lower unemployment, 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."¹²³

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 incomes of U.S.-born workers by at least \$10 billion each year."¹²⁴ In terms of the costs of immigrants to the U.S.

¹¹⁷ The NRC Report nevertheless does however refer to certain negative economic impact 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. NRC Report, *supra* note 101 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.* 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.

¹¹⁸ Senate Judiciary Immigration Subcommittee Hearing-S.M., Apr. 4, 2001, *available at* <http://judiciary.senate.gov/aldsite/te040401sm.htm> (last visited Jan. 20, 2008).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² It is interesting that while Europe is experiencing lackluster economic performance, many of its countries, such as England and Germany are considering restrictive immigration policies. An interesting observation is "[w]hat can we conclude about the impact of immigration on the U.S. economy since 1980? Over 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. See <http://judiciary.senate.gov/oldsite/te040401sm.htm> . "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. See <http://www.heritage.org/press/commentary/ed100407a.cfm> .

¹²³ Senate Immigration Subcommittee Hearing, *supra* note 118.

¹²⁴ *Id.*

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 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.”¹²⁵ 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 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.”¹²⁶ Moore also concluded that overall immigrants are “huge net contributors to the Social Security and Medicare programs,” and ‘immigrant entrepreneurs are a major source of new jobs and vitality in the American economy.’”¹²⁷ 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.”¹²⁸

In fact, economic analysts as well as domestic business community mainstays have long advocated for less restrictive immigration policies.¹²⁹ As a leading immigration scholar recently observed, “[t]he U.S. immigration laws must be fundamentally revised to make them and their enforcement more consistent with economic needs of the nation.”¹³⁰ One writer recently noted: “[i]n 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 amounts of money into the enforcement of immigration policies that are in conflict with economic reality will do nothing to address the underlying problem.”¹³¹ Bill Gates, founder of Microsoft, repeatedly complains about strict immigration policies’ impact on the ability for businesses to hire skilled workers.¹³² In terms of other sectors of the economy, an American Farm Bureau Federation study noted 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

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ See e.g., Larry J. Obhof, *The Irrationality of Enforcement? AN Economic Analysis of U.S. Immigration Law*, 12 KAN. J. L. & PUB. POL’Y 163 (2002) (challenging the hyperbolic claims of immigration’s devastating effects on the national economy).

¹³⁰ Kevin Johnson, *OPENING THE FLOODGATES* 132 (New York University Press 2007).

¹³¹ 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.”).

¹³² See Chris Nuttall, *Intel Chief Calls for Easing of Visa Curbs*, FIN. TIMES, Feb. 8, 2006, at 6.

way through the sector.”¹³³ 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 United States 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.¹³⁴

-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.¹³⁵ In the chapter entitled “Immigration and Crime in the United States,” the NRC Report reviews current impact of immigration on crime and compares it to similar historical claims of the negative effects of immigration on crime.¹³⁶ In terms of these claims at the turn of the past century, the NRC Report observes “[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.”¹³⁷ 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.¹³⁸

In terms of recent incarnations of claims of correlations between immigration and crime, the NRC Report concludes, “[o]verall, 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

¹³³ AMERICAN FARM BUREAU FEDERATION, IMPACT OF MIGRANT LABOR RESTRICTIONS ON THE AGRICULTURAL SECTOR 1 (Feb. 2006).

¹³⁴ John Kenneth Galbraith, THE NATURE OF MASS POVERTY 134 (Penguin Books 1979).

¹³⁵ NRC Report, *supra* note 101, at 367 (Chapter nine authored by John Hogan and Alberto palloni).

¹³⁶ *Id.*

¹³⁷ *Id.* at 368-69.

¹³⁸ *Id.* 370.

involved in crime.¹³⁹ Regarding claims of the criminal element within Mexican immigration, the NRC Report concludes: “we find that Mexican immigrants are found in state prisons at an adjusted rate that is not strikingly different from U.S. citizens.”¹⁴⁰ A 2005 study by economists Kristen F. Butcher and Ann Morrison Piehl, released by the Federal reserve bank of Chicago, likewise concluded that immigrants are a “self-selected” group with “low criminal propensities.”¹⁴¹ Similarly, a 2007 study by University of California, Irvine sociologist Ruben G. Rumbault concluded that among men of the aged 18-39 (who comprise the vast majority of the U.S. prison population), the incarceration rate for native-born persons was five times higher (at a rate of 3.5 %) than the rate for immigrants (0.7 %) in 2000.¹⁴² The study also found that incarceration rates for immigrants from Mexico, El Salvador, and Guatemala, who account for the majority of undocumented immigrants, were lower than native-born inmates.¹⁴³ In 2000, only 0.7 % of Mexican men and 0.5 % of Salvadoran and Guatemalan men were in prison.¹⁴⁴

With respect to the claim of a nexus between illegal immigration and terrorism, a report sponsored by the Migration Policy Institute observed that “terrorism 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 policy objectives on this issue.”¹⁴⁵ This report nonetheless concluded “irregular immigrants and terrorists are fundamentally different. The former seek the opportunity to reunify with their families. The latter follow the dictates of religious firebrands apparently seek to promote religious and political goals at home through terrorist acts there or abroad. Recruiting terrorists from among irregular immigrants is certainly a possibility, but so far neither seems to be a preferred option.”¹⁴⁶ The report went on to note that most would-be terrorists are likely to continue to enter through legal ports of entry.¹⁴⁷ The “best visa and border inspection systems cannot prevent such entries because the intelligence which a state’s frontline officials make decisions about whom to allow in will never be foolproof and is not an ‘immigration’ issue,” but an issue of trying to make error-free decisions concerning international travelers who cross our borders each year.¹⁴⁸ The report goes on to conclude that protecting a country from terrorism will require governments to do more than simply improve border enforcement.¹⁴⁹ Accordingly, the suggested approach to curbing immigration included: 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,

¹³⁹ *Id.* at 381.

¹⁴⁰ *Id.*

¹⁴¹ See Top 5 Immigration Myths of This Campaign Season, Immigration Law Prof. Blog, available at <http://lawprofessors.typepad.com/immigration/2008/01/rebutting-the-t.html> (January 22, 2008 posting by Dean Kevin Johnson) (last visited Feb. 15, 2008).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Demetrios G. Papademetriou, *The Global Struggle with Illegal Migration: No End in Sight*, Migration Information Source, September 1, 2005, available at <http://www.migrationinformation.org/feature/display.cfm?id=336> (last visited Jan. 20, 2008) (“Global Struggle”).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

and engagement of ethnic and immigrant communities into key allies, rather than incubators and protectors of the next wave of terrorists.¹⁵⁰

Thus, with respect to all three of the leading arguments against all forms of immigration the current nativistic critics bring forth - population explosion, negative economic impact, and a crime wave - the leading empirical studies in these areas conclusively find that 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) the economic impact is not only 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.¹⁵¹

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, When 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 been motivated by a legitimate concern over the need to follow the rule of law.¹⁵²

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 local 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. 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.¹⁵³

In light of the above, it is the goal of this piece to not only highlight the tenor of the current anti-immigration debate, which all too often is clouded by raced and venomous attacks, but to call for its end. This call for change is not only a plea to end vile racist attacks, which is

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² See *supra* notes 74-77 and accompanying text.

¹⁵³ See Michael Olivas, *Preempting Preemption: Foreign Affairs, State Rights, and Alienage Classifications*, 35 VA. J. INT'L L. 217 (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).

obviously a legitimate basis unto itself, but the call 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 debates and deliberation 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 work 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 data, in an effort to address one of the most significant public policy issues of our day.¹⁵⁴

V. 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.¹⁵⁵ 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.¹⁵⁶ Local police resorted to this tactic after the federal authorities declined to take action against the suspects. However, on August 12, 2005 a state judge dismissed these charges, stating that they represented an unconstitutional attempt to regulate the enforcement of immigration violations.¹⁵⁷ 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.¹⁵⁸ Following these events, more and more local municipalities and states have tried to regulate immigration at their own borders.¹⁵⁹

¹⁵⁴ Thank you to Professors Andre Smith and Victor Romero for encouraging me to confront this matter. Addressing this difficult question, i.e., are all anti-immigrant stances raced 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.

¹⁵⁵ Olivas, *supra* note 153.

¹⁵⁶ 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, 179-80 (2002).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ 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, available at http://www.dallasnews.com/sharedcontent/dws/news/city/carrollton/stories/DN-fbimmigration_21met.ART.North.Edition1.3e0478e.html (last visited Feb. 19, 2008).

In recent years, particularly when facing rising unemployment, state and local communities have contended that immigrants, in particular undocumented immigrants, are responsible for taking jobs away from American citizens.¹⁶⁰ 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 2002.¹⁶¹ Specifically, a study conducted by Rice University economist Donald Huddle concluded that illegal aliens had cost taxpayers \$5.4 billion in public assistance in 1990.¹⁶² He 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.¹⁶³ Huddle predicted that illegal aliens would displace millions of American jobs, generating costs in the hundreds of billions of dollars.¹⁶⁴ A related argument raised by state and local officials is the impact of lost jobs is especially concentrated in the area of low-skilled American workers. They argue that there is an estimated forty to fifty percent wage loss due to undocumented immigrants.¹⁶⁵

Even shortly after its release, the Huddle study was severely criticized,¹⁶⁶ and the most comprehensive study on the matter, the highly regarded and bi-partisan NRC Report calls into serious doubt many of the economic conclusions raised by Huddle.¹⁶⁷ As congressional testimony on the subject concluded “the National Research Council of the National Academy of Sciences found that immigrants inflate incomes of U.S.-born workers by at least \$10 billion each year.”¹⁶⁸ Moreover, the overwhelming majority of economists flatly refute the Huddle study and

¹⁶⁰Ryan 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, 1379-80 (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.”).

¹⁶¹Turoff, *supra* note 156, at 179.

¹⁶²See Donald Huddle, THE NET NATIONAL COSTS OF IMMIGRATION (Carrying Capacity Network, 1993) (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.”).

¹⁶³*Id.*

¹⁶⁴*Id.*

¹⁶⁵Frei, *supra* note 160, at 1379.

¹⁶⁶See, e.g., Juan O. Tamayo, *U.S. Mexican Summit to Focus on Trade*, UPI, May 29, 1981, LEXIS, Nexis Library, UPI File. The Mexican President was planning to offer President Ronald Reagan the results of a 4-year study showing that illegal immigrants made a positive contribution to the U.S. economy. A Mexican official went on to state that illegal aliens pay taxes, use few tax-supported public services, and lower inflation because they work for low wages. *Id.* See also Patrick Lee, *Studies Challenge View That Immigrants Harm Economy*, L.A. TIMES, Aug. 13, 1993, at A1. An Urban Institute study concluded both legal and illegal immigration help create jobs in urban areas. *Id.* Furthermore, Dr. Huddle’s methodology has been questioned by, among others, Stephen Moore of the Cato Institute, and Jeffrey Passel and Michael Fix of the Urban Institute. See Stats Spotlight, *Statistical Controversies in Immigration Policy*, available at <http://www.stats.org/spotlight/immigration.html> (last visited Oct. 26, 2002). Recently, a RAND study argued that “in 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.” See Blake Harris, *State and Federal Agencies Are Using a Variety of Technological Tools to Help Prevent Illegal Immigrants from Obtaining Benefits to Which They Are Not Entitled*, available at <http://www.interlog.com/~blake/soft.htm> (Jan. 1997) (last visited Feb. 15, 2008).

¹⁶⁷See NRC Report, *supra* note 101, and accompanying text.

¹⁶⁸See Moore Testimony, *supra* note 166, and accompanying text.

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.¹⁶⁹ For instance, a 2006 study by the University of California, Davis economist Giovanni Peri concluded that because immigrant workers "complement" rather than substitute for native workers, immigration tends to increase productivity and wages for all employees.¹⁷⁰ 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.¹⁷¹

Aside from the argument of mass job displacement,¹⁷² many communities contend that immigrant groups pose a massive burden on local governments and their communities. The Huddle study estimated that \$5.4 billion was spent in public assistance to undocumented immigrants in 1990.¹⁷³ That same study stated that \$11.9 billion was spent in public assistance and displacement costs for an undocumented population of 4.8 million in 1992.¹⁷⁴ 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.¹⁷⁵ As a 2007 Congressional Research Service report concluded, undocumented immigrants are not eligible to receive public "welfare" benefits. Moreover, legal permanent residents must pay into the Social Security and Medicare systems for roughly 10 years before becoming eligible to receive benefits when they retire.¹⁷⁶ Though the claims by state and local leaders will likely persist and continue to be the subject of headlines and court action, much of the leading arguments made thus far by these groups, not unlike the claims by anti-immigrants at the national level, are simply not supported by fact.¹⁷⁷

¹⁶⁹ See Top 5 Immigration Myths, *supra* note 141.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² 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. Note, Michael J. Almonte, *State And Local Law Enforcement Response To Undocumented Immigrants: Can We Make The Rules, Too?*, 72 Brooklyn L. Rev. 655 (2007). I suspect the above claim relates more to bias against outsiders invading Anglo lands, which will be addressed below in section seven addressing the psychology of immigration.

¹⁷³ Turoff, *supra* note 156, at 183.

¹⁷⁴ *Id.*

¹⁷⁵ See Top 5 Immigration Myths, *supra* note 141.

¹⁷⁶ *Id.* See also a 2007 study by the Urban Institute that concludes that less than 1 % of households headed by undocumented immigrants receive cash assistance for needy families, compared to 5 % of households headed by native-born U.S. citizens. *Id.*

¹⁷⁷ Michael Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. Chi. Legal F. 27 ("when 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").

V. A History of Invitation and Exclusion

Despite the universally recognized characterization of the United States as “a nation of immigrants,” this country’s treatment of immigrants is largely a tale of selective inclusion and assistance¹⁷⁸ on the one hand, and exclusion and mistreatment on the other.¹⁷⁹ During the times of exclusion and deportation, popular rhetoric of the time included characterizations of immigrants that resemble the recent venomous incarnations.¹⁸⁰ When one examines this country’s governing documents and governing principles, there is little evidence suggesting how this country should treat immigrants. For instance, the United States Constitution, with exception to Congress’s power to regulate naturalization,¹⁸¹ says virtually nothing concerning immigration.¹⁸² Congress, for its part, initially failed to enact legislation regulating immigration.¹⁸³ 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.¹⁸⁴ And when Congress eventually acted on immigration, it declared only “free white person[s]” were worthy of naturalization, or in other words, citizenship.¹⁸⁵ It was not until the late 1800s that the United States established a structure of comprehensive immigration laws.¹⁸⁶ In 1875, with increasing immigration rates, Congress enacted the first immigration law, which forbade immigration by prostitutes and convicted criminals.¹⁸⁷ In 1882 Congress followed up with laws

¹⁷⁸ See Kevin Johnson, *The Forgotten “Repatriation” of Persons of Mexican Ancestry and Lessons for the War on Terror*, 26 PACE L. REV. 1, 4 (Fall 2005) (during the 1930’s for instance, “Federal, 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.”).

¹⁷⁹ Johnson, FLOODGATES, *supra* note 130, 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.”).

¹⁸⁰ 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 Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327 (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.”).

¹⁸¹ U.S. Const. Art. IV.

¹⁸² Cf. U.S. Const Art I, Sec. 9, which provides with respect to slave imports: “[t]he 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.”

¹⁸³ 1790 Naturalization Act.

¹⁸⁴ *Id.*

¹⁸⁵ Richard A. Boswell, *Racism and Immigration Law: Prospects for Reform After “9/11”?*, 7 J. GENDER RACE & JUST. 315 (2003).

¹⁸⁶ See Johnson, FLOODGATES, *supra* note 130, at 52.

¹⁸⁷ Immigration Act of March 3, 1875, ch. 141, § 5, 18 Stat. 477 (repealed 1974).

excluding criminals, indigents, and other undesirables.¹⁸⁸ As one immigration scholar recently noted “[s]ince comprehensive federal immigration came into place in 1874, the United States has had an unbroken history of immigration laws that restrict immigration and attempt to ensure a certain quality standard among immigrants.”¹⁸⁹ With the Immigration Act of 1917, Congress passed legislation containing literacy requirements and the power to deport aliens convicted of specified offenses.¹⁹⁰

The characterizations of immigrant groups and the assaults against and scapegoating of immigrant workers, which as demonstrated above are often baseless and motivated by the vile emotions of fear and hate, are not new in this land.¹⁹¹ Perhaps what is worse is that in times of hostility towards immigrants, a group that is vulnerable because of their status of having 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.¹⁹² It is this threat along with subordinated rights that makes all immigrants among the most vulnerable in this land.¹⁹³

In addition, this country has an unfortunate long history of subjugating immigrants.¹⁹⁴ With respect to Latino and Latina workers, there is similarly a long history of inviting undocumented workers from the South when market needs call for cheap labor.¹⁹⁵ Such invitations were inevitably followed by domestic efforts to oust them once the formerly valuable workers were deemed unnecessary when there was a perceived decline in demand for such labor, or when unrelated events lead to isolationist sentiments in the land.¹⁹⁶ 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 or anyone that resembled them when the economy changed or perceived crisis provoked mass hysteria.

¹⁸⁸ Immigration Act of August 3, 1882, ch. 376, 22 Stat. 214 (repealed 1974).

¹⁸⁹ See Johnson, FLOODGATES, *supra* note 130, at 52.

¹⁹⁰ Act of February 5, 1917, ch. 29, 39 Stat. 874, 877 (repealed 1952) (also prohibited immigration from a broader portion of Asia).

¹⁹¹ The following books provide exhaustive examinations of this country immigration history. John Higham, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925 (Rev. ed. 1963); John Higham, SEND THESE TO ME: IMMIGRATION IN URBAN AMERICA (Johns Hopkins University Press 1984); Lawrence H. Fuchs, THE AMERICAN KALEIDOSCOPE: RACE, ETHNICITY AND THE CIVIC CULTURE (Wesleyan 1990); Bill Ong Hing, MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850-1990 (Stanford University Press 1993); Kevin Johnson, THE HUDDLED MASSES MYTH (New York University Press 2003).

¹⁹² See e.g., Johnson, FLOODGATES, *supra* note 130.

¹⁹³ *Id.*

¹⁹⁴ See generally, Gerald L. Neuman, STRANGERS TO THE CONSTITUTION (1996).

¹⁹⁵ 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. See Migrant and Seasonal Agricultural Protection Act, U.S. Department of Labor, available at <http://www.dol.gov/compliance/laws/comp-msawpa.htm> (last visited Jan. 20, 2008).

¹⁹⁶ 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. Instead of questioning whether anyone should stay or go, this country has repeatedly begged immigrant workers “please stay” only to be followed shortly thereafter with a scream of, “now go.”

Immigrants of color in general, and Asian immigrants in particular,¹⁹⁷ 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 be followed by efforts to deport them, frequently after not being paid the promised wages.¹⁹⁸ Perhaps the most infamous of these episodes occurred in the late 1800s when federal, state, and local governments used all of their resources to initially invite, but later exclude and deport Chinese immigrants.¹⁹⁹ These efforts led to Congress's passage of the Chinese exclusion laws,²⁰⁰ which sought to halt all forms of Chinese immigration.²⁰¹ Ultimately, the United States Supreme Court, citing national sovereignty concerns, refused to overturn the laws.²⁰² In the two leading decisions on the matter, *Fong Yue Ting v. United States*,²⁰³ and the notorious *Chinese Exclusion Case*,²⁰⁴ the Court refused to intervene. In the *Chinese Exclusion Case*, referring to the "obnoxious Chinese," the Court stated that "[t]he 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."²⁰⁵ 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."²⁰⁶

Congress eventually extended their exclusionary laws to other Asians.²⁰⁷ For instance, the Gentleman's Agreement between the United States and Japan in 1907-08 greatly restricted immigration from Japan.²⁰⁸ The immigration Act of 1917 expanded Chinese exclusion to prohibit immigration from the "Asiatic barred zone,"²⁰⁹ which also included the entire Middle East.²¹⁰ In addition, the 1924 Immigration act established the infamous discriminatory national

¹⁹⁷ See Ronald Takaki, *STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS* (Back Bay Books 1998).

¹⁹⁸ Interestingly, the constitution of the state of California (1879) 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." See Edward D. Castillo, *A Short Review of Californian Indian History*, available at <http://www.nahc.ca.gov/califindian.html> (last visited Jan. 20, 2008).

¹⁹⁹ See e.g., Johnson, *HUDDLED MASSES MYTH*, *supra* note 191.

²⁰⁰ 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*, 60 U.S. 393 (1854), which similarly concluded that African Americans were excluded from eligibility for citizenship. See also Ediberto Roman, *The Citizenship Dialectic*, 20 *GEO. IMMIG. L.J.* 557 (2006).

²⁰¹ *Id.*

²⁰² *Fong Yue Ting v. United States*, 149 U.S. 228, 233 (1893).

²⁰³ *Id.*

²⁰⁴ See Hing, *MAKING AND REMAKING*, *supra* note 191, at 44-45, 1859-1990.

²⁰⁵ *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889) (also known as the Chinese Exclusion Case).

²⁰⁶ *Fong Yue Ting v. United States*, 149 U.S. 698, 707 (1893).

²⁰⁷ See Hing, *MAKING AND REMAKING*, *supra* note 191.

²⁰⁸ See Johnson, *HUDDLED MASSES MYTH*, *supra* note 191, at 30.

²⁰⁹ Ch. 29, § 3, 39 Stat. 874, 875-76 (repealed 1952), see also Hing, *MAKING AND REMAKING*, *supra* note 191.

²¹⁰ 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) (the Asiatic Barred Zone encompassed the "East Indies, western China, French Indochina, Siam, Burma, India, Bhutan, Nepal, eastern Afghanistan, Turkestan, the Kirghiz Steppe, and the southeastern portion of the Arabian Peninsula.").

origin quota system, and allowed for the exclusion of noncitizens ineligible for citizenship, significantly affecting Asians who were prohibited from naturalizing.²¹¹ The 1924 Immigration Act had the effect of imposing strict national-origin quotas on southern and eastern Europeans because of the belief that those immigrants were racially inferior.²¹² 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.²¹³ The 1924 Immigration Act established the National origins system, which restricted annual immigration from foreign countries to two percent of the country's population living in the United States, as determined by the 1890 census.²¹⁴ Because most of the foreign-born immigrants in the United States at the time were from northern or western Europe, the 1924 immigration Act had the effect of reinforcing patterns of white immigration and staving off immigration from areas such as Asia, Latin America, and Africa.²¹⁵ As a result, until the 1960s, roughly two-thirds of all legal immigrants to the United States were from Europe and Canada.²¹⁶

In the context of naturalization, the United States similarly created the naturalization prerequisite that in order to be eligible for naturalization, an applicant had to be "white."²¹⁷ For instance, in *United States v. Thind*,²¹⁸ the Supreme Court held that an immigrant from India was not White and therefore ineligible for naturalization.²¹⁹ Likewise, in *Ozawa v. United States*²²⁰ a Japanese Immigrant was deemed non-white and therefore could not naturalize.²²¹

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.²²² 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.²²³ As a result of this American

²¹¹ Immigration Act of 1924, ch. 190, § 11(d), 43 Stat. 153, 159 (repealed 1952). The quotas set forth may be found at: <http://historymatters.gmu.edu/d/5078/> (last visited Jan. 20, 2008).

²¹² See Johnson, FLOODGATES, *supra* note 130, at 53 (citing the Dillingham Commission reports).

²¹³ *Id.*

²¹⁴ See General's Report, Mental health: Culture, Race, Ethnicity-Chapter 2, Demographic Trends, available at http://mentalhealth.surgeonmhsa.gov/cre/ch2_demographic_trends.asp (last visited Feb. 15, 2008).

²¹⁵ *Id.*

²¹⁶ *Id.* The Immigration Act of 1965 replaced the national Origins System and allowed annual immigration of 20,000 individuals from each country in the Eastern Hemisphere. The 1965 Act also gave preferences to individuals in certain occupations. The effect was that immigration from Asia skyrocketed from 6 percent of all immigrants in the 1950s to 37 percent by the 1980s. The 1965 act also provided for family unification by providing a preference to people with relatives in the United States. The provision contributed to the growth immigration from Latin America. During this period, immigration from Europe fell from 68 percent to 12 percent. *Id.*

²¹⁷ See generally Ian Haney Lopez, WHITE BY LAW (New York University Press 1996).

²¹⁸ *United States v. Thind*, 261 U.S. 204 (1923).

²¹⁹ *Id.* at 205.

²²⁰ *Ozawa v. United States*, 260 U.S. 178 (1922).

²²¹ *Id.*

²²² David G. Gutierrez, WALLS AND MIRRORS: MEXICAN AMERICANS, MEXICAN IMMIGRANTS AND THE POLITICS OF ETHNICITY 19 (University of California Press 1995).

²²³ *Id.*

perception of Mexican competition and inferiority, coupled with gerrymandering by Americans, Mexican-Americans' influence in politics was greatly diminished by the 1800s.²²⁴ Although Mexican influence in politics decreased, their 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."²²⁵ 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.²²⁶ 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.²²⁷

The very concept of guest workers in this land is far from new. Indeed, such programs were in existence since 1917,²²⁸ when the government in response to a labor crises caused by ever increasingly strict immigration laws established a guest worker program for agricultural laborers from Mexico.²²⁹ Roughly 72,000 guest workers participated in the program from 1917 to 1921.²³⁰ 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.²³¹ In 1931, the U.S. government began conducting raids aimed at locating and deporting all undocumented workers.²³² As a result, during the Great Depression of the 1930s,²³³ United States citizens, residents, and undocumented aliens of Mexican descent were "repatriated" to Mexico.²³⁴ However, the term "repatriated" was inaccurately applied to this event because many people of Mexican descent who were forced to leave the United States and reside in Mexico had actually acquired United States citizenship status.²³⁵ The vast majority of those deported between 1929 and 1934 to Mexico were United States citizens, including children born on United States soil.²³⁶ Both local and federal authorities participated in forcing citizens and non-citizens of Mexican ancestry to leave the United States and return to Mexico.²³⁷ Those authorities did not consider the rights of the numerous citizens whom they deported.²³⁸ The

²²⁴ *Id.*

²²⁵ *Id.* at 45.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ Alexandra Villarreal O'Rourke, *Embracing reality: The Guest Worker program Revisited*, 9 HARV. L. REV. 179 (2006) (examining the U.S. history of using guest worker programs).

²²⁹ *Id.* at 180.

²³⁰ *Id.*

²³¹ See Kiera Lobreglio, *The Border Security and Immigration Improvement Act; A Modern Solution to a Historic Problem*, 78 ST. JOHN'S L. REV. 933, 936-9 (2004).

²³² 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 Bureau of Immigration, "which was then under the authority of the Department of Labor, [located and removed] all non-citizens illegally in the United States, targeting particular immigrants involved in labor disputes.").

²³³ See Francisco E. Balderrama & Raymond Rodriguez, *DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S*, at 98-99 (University of New Mexico Press 1995) (exploring the history of "repatriation" during the Great Depression).

²³⁴ *Id.*

²³⁵ Johnson, *HUDDLED MASSES MYTH*, *supra* note 191.

²³⁶ *Id.* at 6.

²³⁷ *Id.*

²³⁸ *Id.*

repatriation campaign confirmed the subordinate status given to Mexican Americans. These governmental efforts to deport people of Mexican ancestry to Mexico arguably violated the federal immigration power as well as Due Process, Equal Protection, and Fourth Amendment rights.²³⁹ 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 1942²⁴⁰ the United States established the Bracero Program, a guest worker program that allowed Mexicans to come to the United States and fill the demand for agricultural labor.²⁴¹ The United States established this program upon the negotiation of a treaty between the United States and Mexico on April 4, 1942.²⁴² In 1943, Congress endorsed the Bracero Program through Public Law 45.²⁴³ 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.²⁴⁴ By 1959, the Bracero program had grown substantially, and in that year alone over 450,000 Mexican nationals were admitted into the program.²⁴⁵ When the first Braceros returned to Mexico, they reported discrimination as well as substandard working and housing conditions.²⁴⁶ 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.²⁴⁷ Moreover, the Mexican government became dissatisfied with the United States upon hearing about abuses of civil and human rights.²⁴⁸ The Mexican government eventually temporarily banned the importation of Mexicans to Texas in 1943,²⁴⁹ temporarily closing the doors on Mexicans who sought entry into Texas under the Bracero Program.²⁵⁰ Ultimately, the United States allowed roughly 5 million Mexicans to enter and work in the United States as contracted braceros under the Program, which ended in 1965.²⁵¹

²³⁹ *Id.* at 10.

²⁴⁰ See generally Lorenzo A. Alvarado, *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).

²⁴¹ See, e.g., O'Rourke, *supra* note 228.

²⁴² Kitty Calavita, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S.*, 19 (Routledge 1992).

²⁴³ See 57 Stat. 70-73. Extensions, modifications, and additional appropriations were enacted in December 1943 (57 Stat. 643); February 1944 (58 Stat. 11); December 1944 (58 Stat. 853); July 1945 (59 Stat. 645); and April 1947 (61 Stat. 55).

²⁴⁴ See Alvarado, *supra* note 240, at 57 (noting how the lack of U.S. government control led to many abuses by domestic employers against immigrant workers).

²⁴⁵ LoBreglio, *supra* note 231, at 937.

²⁴⁶ Barbara A. Driscoll, *THE TRACKS NORTH: THE RAILROAD BRACERO PROGRAM OF WORLD WAR II*, 56 (University of Texas Press 1999).

²⁴⁷ LoBreglio, *supra* note 231, at 937.

²⁴⁸ Driscoll, *supra* note 246, at 56.

²⁴⁹ Gutierrez, *supra* note 222, at 40.

²⁵⁰ Such abuses are prohibited in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. See G.A. res. 45/158 annex, 45 U.N. GAOR Supp. (No.49A) at 262, U.N. Doc. A/45/49 (1990).

²⁵¹ Calavita, *supra* note 242, at 1.

The Agricultural Bracero Program had its railroad counterpart in the 1940s, namely the Railroad Bracero Program of World War II.²⁵² In January 1943, a United States 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.²⁵³ In April 1943, Mexico and the United States reached an agreement with respect to allowing Braceros to supply labor for the railroads.²⁵⁴ About 6,000 nonagricultural workers were to be contracted to work on the railroads in the United States.²⁵⁵ Braceros were contracted in Mexico City and transported to the Mexico-U.S. border.²⁵⁶ Numerous Braceros died on the railroads while off-duty due to natural causes, as well as train and rail accidents, suicides, and fights.²⁵⁷ The last group of railroad Braceros arrived in the United States in August of 1945.²⁵⁸ On August 28, 1945, the United States issued a termination order and about 50,000 railroad braceros were to be repatriated to Mexico.²⁵⁹ The Bracero Programs, agricultural and railroad, "were consistent with the thrust of U.S.-Mexican relations at the time."²⁶⁰

The implementation and termination of the Bracero Program 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 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."²⁶¹ During the years of the Bracero Program, illegal immigration increased.²⁶²

The United States' policy of bringing in a labor force from Mexico during times of high labor demand and sending them back to Mexico when the labor supply exceeded the demand paved a bumpy path for Mexicans aspiring to become United States 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 United States dollar and Mexican peso. 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 United States Government.²⁶³ Some Mexicans returned to Mexico and eventually made or tried to make their way back into the United States by crossing the United States-Mexico border, while others remained in the United States, risking removal by deportation or repatriation.²⁶⁴

²⁵² See Gutierrez, *supra* note 222, at 13.

²⁵³ *Id.* at 67.

²⁵⁴ *Id.* at 71.

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 77.

²⁵⁷ *Id.* at 117.

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 152.

²⁶⁰ *Id.* at 39.

²⁶¹ Calavita, *supra* note 242, at 108.

²⁶² *Id.* at 32.

²⁶³ *Id.*

²⁶⁴ *Id.*

The United States in the mid-1950s established “Operation Wetback” to monitor the presence of Mexicans in the United States and deport any Mexican unlawfully in the United States.²⁶⁵ This program occurred during the start of the cold war,²⁶⁶ a period of heightened fear of non-citizens. As a result of the Bracero Program, many Mexicans moved to the northern parts of Mexico to be closer to the United States-Mexico border. Although many therefore lived closer to the border, the United States locked its doors by terminating the Bracero Program. Consequently, immigration issues became pressing as the United States did not want Mexicans in the country, yet many crossed the border unlawfully. “Operation Wetback” specifically targeted individuals of Mexican descent. During this massive campaign, over one million Mexican immigrants,²⁶⁷ as well as United States citizens of Mexican ancestry²⁶⁸ and undoubtedly other Latinas and Latinos, were deported.²⁶⁹ “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 racial groups, which meant that the burden of proving citizenship fell totally upon people of Mexican descent.”²⁷⁰ Those unable to present such proof were arrested and sent to Mexico.²⁷¹ Hence, the hasty process of proving documentation infringed upon the rights of many Mexican-Americans who were United States 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.²⁷²

Not unlike what occurred in the 1950’s, 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 terrorists attacks, increased fear of outsiders resulted in increased attention to our borders and consequently in increased scrutiny of this country’s immigration policy.²⁷³ With the renewed fear of the foreigner highlighted by the non-American backgrounds of the perpetrators of the 9/11 attacks, more and more pundits and politicians began referring to loaded and emotionally charged terms and catchphrases such as the “immigration invasion”.²⁷⁴ 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

²⁶⁵ Juan Ramon Garcia, OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN AMERICAN UNDOCUMENTED WORKERS IN 1954 229-231 (Greenwood Press 1980); *see also* Julian Samora, LOS MOJADOS: THE WETBACK STORY 52 (University of Notre Dame Press 1971).

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 227.

²⁶⁸ *Id.*

²⁶⁹ *See* Ronald T. Takaki, A DIFFERENT MIRROR (Little, Brown & Co. 1993).

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *But see*, The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, and the Antiterrorism and Effective Death Penalty Act of 1996, which doubled the numbers of immigrants in detention within 2 years. *See* Analysis of Immigration Detention Policies, American Civil Liberties Union, Aug. 8, 1999, available at <http://www.aclu.org/igrant/detention/11771leg19990818.html> (last visited Jan. 20, 2008).

²⁷⁴ *See supra* notes 31-60 and accompanying text. *See also* sources identified at <http://www.google.com/search?q=aliens+arabs+site:cnn.com/transcripts&hl=en&start=10&sa=N> (last visited Jan. 20, 2008).

2004, sought to reach a compromise and proposed comprehensive immigration reform, which included a guest worker program.²⁷⁵ 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.²⁷⁶ The Act provides for the funding of a 700-mile fence along the U.S.-Mexico border.²⁷⁷ Some have argued that the Secure Fence Act of 2006 is a necessary first step for immigration reform.²⁷⁸ 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.²⁷⁹

The House and Senate Comprehensive Immigration Reform bills thus far failed to provide anything resembling comprehensive reform. Though both bills went further than merely proposing fencing our borders, the primary distinguishing factor between the H.R. 4437 and S. 2611 is that there is a citizenship path proposed in S. 2611. The Senate version, S. 2611's H-2C visa, known as a blue card, permits employers to bring in foreign workers for up to six years.²⁸⁰ In the 109th Congress, H.R.418 was passed and enacted into public law to strengthen border security and the country's national security overall. 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. Only U.S.-issued documents and valid foreign passports may be used to establish the identity of applicants. Each applicant provides proof of U.S. citizenship or lawful presence in the United States, and documents presented during the application process must be independently verified.²⁸¹

²⁷⁵ See Stephen Dinan, *Bush Signs the Fence Bill; Measure Boosts Agents, pays for border barrier*, WASHINGTON TIMES, Oct. 5, 2006, available at 2006 WLWR 17255319.

²⁷⁶ See Secure Fence Act, H.R. 6061, 109th Cong. (2006).

²⁷⁷ *Id.*

²⁷⁸ See Rachel L. Swarms, *Split Over Immigration Reflects nation's Struggle*, N.Y. TIMES, Mar. 29, 2006, available at 2006 WLNR 5217845 (discussing both the House of representative and more lenient Senate bills on immigration reform).

²⁷⁹ *Id.*

²⁸⁰ 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. Also, S.2611 does not mention any expanded role for local law enforcement for border enforcement tasks, but H.R. 4437 does. The Senate bill includes an English-only proposal that makes English the "national language" of the United States, thereby taking aim at discouraging services in any other language than English. Notwithstanding the bill's focus on heightened border security and making English the nation's sole official national language, some analysts have compared it to the Immigration Reform and Control Act of 1986.

²⁸¹ Several resolutions, such as H.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. This bill is the comprehensive immigration reform proposed in December 2005 and referred to the Senate in January 2006. The purpose is to strengthen the enforcement of immigration laws (codified in the INA) and enhance border security. The major focus points of the act include changing some of the terminology in Immigration and Nationality Act (INA), securing U.S. borders (title I), fencing and other border security improvements (title X), employment eligibility verification (title VII), judicial review of visa revocation (title VIII Sec. 802). Another comprehensive immigration bill introduced in the 109th Congress and passed by the

The above paragraphs illustrate that the recent outcry against immigration is not only not new, but 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,²⁸² but when economic strife or perceived national security fears caused mass isolationist efforts, such needs waned and the workers were deported. Thus, the hysteria over the recent so-called immigration invasion is not only not new, but has somehow left the collective psyche of this government and its people with little recollection of its prior efforts and manipulations.²⁸³

V. 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 it shapes public opinion on immigrants as well as all those

Senate in May 2006, S.2611 known as the "Comprehensive Immigration Reform Act of 2006," has not been enacted.

²⁸² See e.g., John Bowe, *NOBODIES: MODERN AMERICAN SLAVE LABOR AND THE DARK SIDE OF THE NEW GLOBAL ECONOMY* (Random House 2007) (a study of locations in 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 generally, Alvarado, *supra* note 240, at 65 (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").

marked with the label of foreigner, including Latino and Latina U.S. citizens and legal residents.²⁸⁴

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 in massive public condemnation and scorn.²⁸⁵ Consider for example the public condemnation of radio talk show host Don Imus' insensitive and bigoted on-air statements concerning the Rutgers University Women's Basketball Team.²⁸⁶ 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.²⁸⁷ 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,²⁸⁸ yet these comments are largely either not read or disregarded by the national media.²⁸⁹ Nevertheless, the works of some of them prove useful in understanding the nexus between law and the role of television and the media.²⁹⁰ 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.²⁹¹ The study concluded

²⁸⁴ 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 (1998).

²⁸⁵ Such examples include the public outcry following Michael Richards' (better known Kramer from the television show *Seinfeld*) public and repeated 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 stating he "hate[s] gay people" during a radio interview. *See Kramer Apologizes, Says He's Not Racist*, CBS NEWS, Nov. 21, 2006, available at <http://www.cbsnews.com/stories/2006/11/20/entertainment/main2201817.shtml> (last visited Jan. 20, 2008); *Isaiah Washington Explains Why He Used Slur*, PEOPLE, Jul. 2, 2007, available at <http://www.people.com/people/article/0,,20044381.00.html> (last visited Jan. 20, 2008); *Hardaway Banned for Anti-Gay Slur*, ASSOCIATED PRESS, Feb. 16, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/02/15/AR2007021501895.html> (last visited Jan. 20, 2008).

²⁸⁶ Michael Savage, *Deport Protestors*, newsmax.com, Jul. 15, 2007, available at http://www.newsmax.com/scripts/printer_friendly.pl (Imus referred to team members as "nappy-headed hos").

²⁸⁷ *Id.*

²⁸⁸ *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. 1 (2008) (the construction of race has constructed the identity of the Latino People).

²⁸⁹ *See e.g.,* Kevin Johnson, *National Identity in a Multicultural Nation: The Challenge Of Immigration Law and Immigrants*, 103 MICH. L. REV. 1347 (2005); Johnson, *Heart of Darkness*, *supra* note 284; Kevin Johnson, *Immigration, Civil Rights, and Coalitions for Social Justice*, 1 HASTINGS RACE & POVERTY L.J. 181 (2003).

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 (1997-1998).

²⁹¹ *Id.*; *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 (1996).

these media stereotypes had a distinct impact on race relations in American society.²⁹² More recently, the commission issued another report in which it concluded that “news media has tremendous influence on the attitudes of viewers and readers regarding domestic race relations.”²⁹³ The study concluded that 40 percent of the white children questioned attributed their knowledge of how they believed blacks looked, talked, and dressed to what they saw on television.²⁹⁴ 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.²⁹⁵ 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.²⁹⁶ 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 possessors off as deviant, flawed, spoiled, or undesirable.²⁹⁷ 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.²⁹⁸

In his groundbreaking work entitled “Stigma,” Erving Goffman observed that “society establishes the means of categorizing persons and the compliment of attributes felt to be ordinary and natural for the members of each of these categories.”²⁹⁹ The concept goes on to provide that “when 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.”³⁰⁰ 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.”³⁰¹ Goffman noted that when the stranger is present before us, “evidence 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.”³⁰² He is

²⁹² See Mao, *supra* note 290.

²⁹³ *Id.*

²⁹⁴ See Worthy, *supra* note 291, at 524.

²⁹⁵ James Flynn, Paul Slovic, & Howard Kunreuther, RISK, MEDIA, AND STIGMA 3 (Earthscan Pub. 2001) (“RISK, MEDIA, AND STIGMA”).

²⁹⁶ *Id.*

²⁹⁷ *Id.* at 14

²⁹⁸ *Id.*

²⁹⁹ Erving Goffman, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 2 (Touchstone 1986).

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² Prior to Goffman, then NAACP attorney Thurgood Marshall used psychological and sociological studies on the effect of separate and supposedly equal schools on African American children in *Brown*, and the Supreme Court relied upon these studies in its analysis. See Frederick Robinson, THURGOOD MARSHALL: WARRIOR AT THE BAR,

thus reduced in our minds from a whole and usual person, to a tainted, discounted one.³⁰³ Goffman observed that the term “stigma” is an attribute of the stigmatized that is deeply discrediting.³⁰⁴ By definition, the person with a stigma is not quite human.³⁰⁵ Stigma can take three different forms, including physical abnormalities, blemishes in character, and tribal stigma of race, nation, and religion.³⁰⁶ 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.³⁰⁷

According to stigma theory,³⁰⁸ society constructs an ideology to explain the stigmatized group’s inferiority and rationalize society’s animosity towards it, an animosity based on the differences highlighted by the stigma.³⁰⁹ 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.³¹⁰ 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.³¹¹

The leading learning theorist of his day, Hobart Mowrer, concluded that human behavior is essentially guided and controlled in a sensible and adaptive manner by conditioned emotional responses to images that could be viewed as “prospective gains and losses.”³¹² More recently, theorists have observed that human thought is made largely from images, broadly construed to include perceptual and symbolic representations.³¹³ Through experience, these images are “marked” by positive and negative feelings, also referred to as conditioning.³¹⁴ When an image becomes marked, it provokes feelings which in turn motivate action.³¹⁵ Thus, when a negative marker is linked to an image it sounds a sort of alarm within an observer, motivating avoidance and perhaps even stronger reactions.³¹⁶

REBEL ON THE BENCH (1993) (book review), *available at* findarticles.com/p/articles/mi_m1365/is_n2_v24/ai_13287097 (last visited Jan. 20, 2008).

³⁰³ See Goffman, *supra* note 299, at 2-3.

³⁰⁴ *Id.* at 3.

³⁰⁵ *Id.* at 5.

³⁰⁶ *Id.* at 4.

³⁰⁷ *Id.* at 5.

³⁰⁸ See, e.g., Sheila T. Murphy, *The Impact of Factual Versus Fictional Media Portrayals in Popular Film*, 560 ANNALS AM. ACAD. POL. & SOC. SCI. 165 (1998).

³⁰⁹ Goffman, *supra* note 299, at 5-6.

³¹⁰ See Murphy, *supra* note 308.

³¹¹ Margaret M. Russell, *Race and the Dominant Gaze: Narratives of Law and Inequality in Popular Film*, 56-7, in CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed., Temple University Press 1995).

³¹² See RISK, MEDIA, AND STIGMA, *supra* note 295, at 332.

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.*

The marking of a stigma possessor plays an essential role in the impact of a stigma.³¹⁷ The mark or stigma identifies and signifies the deviant status and typically has devastating effects on the person or place.³¹⁸ The mark “need not be physical but may be embedded in, and identifiable from, particular behavior, features, biography, ancestry, or location.”³¹⁹ The mark or stigmas come to arouse in outside observers strong feelings of repugnance, fear, and disdain.³²⁰ The stigmas or marks also may become linked through attributional processes to responsibility, which are also deemed as deviant and repugnant.³²¹ The authors of a leading study on the role of the media and stigma conclude “[w]hen 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.”³²²

Several studies on aggression and stigma shed considerable light on the role the media plays on the impressions of immigrants. A recent study on the “Formation of Attitudes Towards New Immigrant Groups” found that initial information concerning any new immigrant groups tends to be the most important information in terms of creating societal attitudes toward that group.³²³ This study also found that attitudes, once formed, predicated further perceptions of the immigrants and behavioral intentions toward group members.³²⁴ 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.³²⁵ In light of these facts, the authors suggested that the media should avoid presenting extreme negative portrayals of immigrant groups, which the study specifically found the media is inclined to make.³²⁶ They found 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.³²⁷

The findings of yet another study on the role of the media on immigrant groups concluded 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 found that people who hold ambivalent attitudes toward a group are more likely to systematically process persuasive messages about a group than are people who hold nonambivalent attitudes toward the particular group.³²⁸ These conclusions in and of themselves demonstrate why the current attacks on immigrants are so

³¹⁷ *Id.* at 15.

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ *Id.*

³²² *Id.*, citing Goffman, *supra* note 299.

³²³ Gregory R. Maio, Victoria M. Esses, and David W. Bell, *The Formation of Attitudes Toward New Immigrant Groups*, 24 JOURNAL OF APPLIED SOCIAL PSYCHOLOGY 1762 (1994).

³²⁴ *Id.* at 1764-65.

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *Id.* at 1772.

³²⁸ Gregory Maio, David W. Bell, & Victoria M. Esses, *Ambivalence and Persuasion: The Processing of Messages About Immigrant Groups*, 32 J. EXPERIMENTAL SOCIAL PSYCHOLOGY, 513-36 (1996).

damning, 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 witness on an almost nightly basis on any one of many cable news stations, such as Fox News and CNN News), 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 study recommends.

In another study on the role of the media and its affect on stigma, the authors observed that "the greatest contributor to stigma, by far, is the news media through the process known as social amplification of risk."³²⁹ According to this study, risk amplification may occur when there is discovery of an event, such as for example a minor or major traffic accident, and the risk 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.³³⁰ Thus, risk amplification is analogous to a stone being dropped in a pond causing ripples spread outward, encompassing first the directly affected victims of the accident in our example, then the responsible driver, and perhaps even the industries affected. The important feature of social amplification is that the direct impacts need not be large to trigger significant indirect impacts.³³¹ Consider for example the media story of the Tylenol capsules adulterated with cyanide, or the report of the Three Mile Island nuclear-reactor accident. 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.³³² Two other mechanisms that contribute to amplification include the fact that an event may enter into the agenda of a particular group and that interpretation of unfortunate events may act as clues of signals regarding the magnitude of the risk.³³³ 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,³³⁴ yet those in the media may view themselves as having a responsibility to warn the public of dangers.³³⁵ As a result a tension

³²⁹ See RISK, MEDIA, AND STIGMA, *supra* note 295, at 335.

³³⁰ *Id.*

³³¹ *Id.*

³³² *Id.*

³³³ *Id.* at 335-36.

³³⁴ *Id.* at 336.

³³⁵ *Id.*

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, which in turn increases the chances that media coverage will stigmatize. The power of repetition and innuendo has lead researchers to conclude that even subtle and indirect associations in the media between products or technologies and undesirable characteristics or events can induce stigma.³³⁶

The studies on the role of the media and stigma are significant because in many respects media portrayals of Latina and Latino 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.³³⁷

Leading immigration scholar Kevin Johnson has in a similar vein looked to the psychological theories of transference,³³⁸ displacement,³³⁹ and dissonance,³⁴⁰ in order to assist in explaining why immigrants of color are “society’s scapegoats.”³⁴¹ Not unlike the arguments made here, Johnson examines the demonization of noncitizen immigrants as a reminder to citizen minorities of the spillover effect of such efforts.³⁴² Johnson argues that psychological theory may be an effective tool for analyzing the legal implications of racial discrimination.³⁴³ Johnson observed 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 which would be unacceptable against citizen minority groups. 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 non-citizens are accepted (and arguably even applauded), where similar statements against minority citizens would be intolerable. Modern sensibilities largely forbid insensitive and racist statements against formal members of

³³⁶ *Id.* at 336-37.

³³⁷ Ediberto Roman, *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 (2000).

³³⁸ See Thomas L. Shaffer, *Undue Influence, Confidential Relationship, and the Psychology of Transference*, 45 NOTRE DAME L. REV. 197, 205 (1970) (noting that is psychoanalytic theory transference refers to the patient’s transference of feelings toward a particular individual to the therapist); see also C.G. Jung, *THE PSYCHOLOGY OF THE TRANSFERENCE* (R.F.C. Hull trans., Princeton University Press 1966).

³³⁹ See David Krech Et Al., *ELEMENTS OF PSYCHOLOGY* 768 (2d ed. 1969).

³⁴⁰ See Leon Festinger, *A THEORY OF COGNITIVE DISSONANCE* (Stanford University Press 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).

³⁴¹ Johnson, *Heart of Darkness*, *supra* note 284.

³⁴² See generally, Elizabeth F. Loftus, *Unconscious Transference in Eyewitness Identification*, 2 L. & PSYCH. REV. 93 (1976); Francis A. Gilligan et al., *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).

³⁴³ *Id.* at 1154-55.

society, but identical racist statements against outsiders are treated differently, particularly those levied against undocumented workers from Mexico, Central or South America. This phenomenon allows and invites those with an anti-Latino or anti-non-White agenda to direct their venom against largely defenseless victims.

The related construct of displacement may also be another way to assist us in understanding the treatment of undocumented immigrants.³⁴⁴ Displacement is “[a] defense mechanism in which a drive or feeling is shifted upon a substitute object, one that is psychologically more available.”³⁴⁵ A classic example of displacement is the use of scapegoats, which allows aggressive impulses to be redirected or displaced upon people or objects that are not the sources of the frustration, but safer to attack.³⁴⁶ Johnson observed that studies demonstrate how displaced frustration could unconsciously result in the development of racial prejudice.³⁴⁷ He also observed 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.³⁴⁸ A prime example of displacement is the German people’s use of the German Jews as the scapegoats for the German failures during and after the First World War.³⁴⁹ 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.”³⁵⁰ While prejudice is a complex and difficult to define phenomenon, the above theories and related studies help explain the related phenomenon of scorn against immigrant groups, particularly the hardworking members in the undocumented category.

VI. THE TRUTH REVEALED?

Shortly after the War of the Worlds radio telecast, the hoax concerning the invasion came to light.³⁵¹ The aftermath was a country in despair, but fortunately safe. Though the telecast made several famous, not the least of which was the launching of Orson Wells’ career, nearly a hundred years later that telecast highlights the power of the media’s ability to distort reality. In many respects, this article demonstrates the parallels between a hyperbolic telecast that alarmed

³⁴⁴ *Id.* at 1155.

³⁴⁵ *Id.*

³⁴⁶ *Id.* (citing David Krech al., *supra* note 339).

³⁴⁷ Johnson, *Heart of Darkness*, *supra* note 284; *see also* Neal E. Miller & Richard Bugelski, *Minor Studies of Aggression: II The Influence of Frustrations Imposed by the In-Groups on attitudes Expressed Toward Out-Groups*, 25 *PSYCHOL.* 437 (1948).

³⁴⁸ Miller & Bugelski, *supra* note 347 (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).

³⁴⁹ *See* Jeffery Herf, *THE JEWISH ENEMY: NAZI PROPAGANDA DURING WORLD WAR II AND THE HOLOCAUST* (Belknap Press 2006); Jack Fischel, *THE HOLOCAUST, JEWISH (1039-1945)* (1998), *available at* <http://books.google.com/books?id=HrW-b3Q-3ewC&pg=PA3&dq=stab+in+the+back%22>

³⁵⁰ *See* Gordon W. Allport, *THE NATURE OF PREJUDICE* 352 (Doubleday-Anchor 1954).

³⁵¹ *See supra* note 2.

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.³⁵² While perhaps the recent incarnations of the War of the Worlds telecast 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.³⁵³

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.³⁵⁴ This would suggest that challenges to media portrayals should not be limited to law review publications.³⁵⁵ As the authors of the above study warn, the media will likely not be easily persuaded to change their ways of "reporting on risk."³⁵⁶ Nevertheless, the importance of the undertaking is necessary in order to attempt to educate members of the media and others about the nature and potency of stigma.³⁵⁷

Even if inertia, stubbornness, or genuine philosophical differences cause the media and political leaders to refuse to change the tenor of their rhetoric,³⁵⁸ the power of political reality may be the interest convergence that provides a pragmatic mandate for change.³⁵⁹ 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,³⁶⁰ and is the fastest growing group in America.³⁶¹ In addition to being the largest ethnic or racial minority group in this country, constituting 14.1% of the total U.S. population³⁶² with a

³⁵² 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).

³⁵³ Michael Gerson, Erasing America? *Latinos Don't Endanger The Nation, Just Republicans who Don't Get it*, PITTSBURGH POST-GAZETTE, May 25, 2007, pg. B-7 (comparing the sponsors of the Chinese Exclusion Act with the opposition to the Comprehensive Immigration Reform Act of 2007).

³⁵⁴ See RISK, MEDIA, AND STIGMA, *supra* note 295, at 344.

³⁵⁵ On a related note, this author recognizes that 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.

³⁵⁶ See RISK, MEDIA, AND STIGMA, *supra* note 295, at 344.

³⁵⁷ *Id.* at 345.

³⁵⁸ Cf. Michael Gerson, *The Right Ought to Embrace Hispanics, Not Fear Them*, THE NEWARK STAR-LEDGER, May 29, 2007, p. 11.

³⁵⁹ See generally, Derek Bell, *Brown v. Board of Education and the Interest Conversion Dilemma*, 93 HARV. L. REV. 518 (1980).

³⁶⁰ See Shirin Hakimzadeh, *41.9 Million and Counting*, Pew Hispanic Research Center, Sep. 28, 2006, available at <http://pewresearch.org/pubs/251/41.9-million-and-counting> (last visited Jan. 20, 2008) (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).

³⁶¹ Surgeon General's Report, *supra* note 214.

³⁶² The Latino Electorate, profile and Trends, national Council of La Raza (2007) (Latino Vote Briefing Edition), available at www.nclr.org (last visited Jan. 20, 2008).

population of over 40 million, only 16 of those 40 million is eligible to vote.³⁶³ And for the most part, they have strong collective memories of how they have been treated and are becoming increasingly politically active.³⁶⁴ As Simon Rosenberg, president of the New Democrat Network, warned that “republicans should be terrified...the positions most of their candidates are taking now will make it very difficult for them to win the presidency.”³⁶⁵ Some conservatives such as President George W. Bush³⁶⁶ have sought to promote a moderate stance on immigration reform,³⁶⁷ and just a few weeks ago in his State of the Union address declared in terms of the two pressing challenges facing America:

We also need to acknowledge that we will never fully secure our borders 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.³⁶⁸

However, with few exceptions, conservative leaders have sought immediate results by joining the anti-immigrant bandwagon.³⁶⁹ 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.”³⁷⁰ Though at this juncture the likelihood that the recent immigration attacks will lead to a political shift is mere conjecture,³⁷¹ such efforts are unquestionably of considerable risk.³⁷² For instance, recent reports and polls suggest such a

³⁶³ *Id.*

³⁶⁴ See *Latinos and the 2006 Mid-term Election*, William C. Velasquez Institute, Pew Hispanic Center, Nov. 27, 2006, available at http://wcvi.org/press_room/pree_clippings/2006/pew_112706.htm (last visited Jan. 20, 2008) (noting that the 2002 mid-term elections showed that Latinos and Latinas went 61% vs. 37% in favor of democrats).

³⁶⁵ David Lightman, *Democrats Sidestep Immigration Issue*, MIAMI HERALD, Nov. 15, 2007, available at <http://www.miamiherald.com/news/nation/story/308400.html> (last visited Feb. 17, 2008).

³⁶⁶ *But see*, Juan Mann, *Its Official! Bush Betrayal Triggered wave of Illegals*, vdare.com, Jun. 14, 2004, available at http://www.vdare.com/asp/printPage.asp?url=http://www.vdare.com/mann/bush_betrayal (last visited Feb. 15, 2008).

³⁶⁷ See e.g., Global Struggle, *supra* note 145 (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, Italy and Greek bilateral efforts to stem illegal migration from Albania and other Balkin states in part through the issuance of legal work visas, are thought to have borne substantial public market order gains.”).

³⁶⁸ 2008 Presidential State of the Union Address.

³⁶⁹ Fred Barnes, *Immigration Overkill*, Weekly Standard, Aug. 18, 2007, available at <http://www.weeklystandard.com/content/pub/articles/000/000/013/996dngwl.asp> (last visited Jan. 20, 2008).

³⁷⁰ *Id.*

³⁷¹ See e.g., Gutierrez, *supra* note 222 (examining Mexican American ambivalence concerning immigration).

³⁷² *Nowhere To Hide; The Failure of Immigration Reform Will Have Unfortunate Consequences*, THE ECONOMIST, Jul. 27, 2007, available at http://www.economist.com/world/na/displaystory.cfm?story_id=9443515 (last visited Jan. 20, 2008) (“those who defeated immigration bill won a pyrrhic victory”).

backlash.³⁷³ For instance, 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.³⁷⁴ A recent Gallop Poll showed that only 11 percent of Latinos and Latinas now identify as Republicans.³⁷⁵ In another poll, “[w]hen asked what fuels the current anti-immigrant sentiment in the United States,” 64 percent of Hispanics in poll mentioned one factor: “racism against immigrants from Latin America.”³⁷⁶ 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.³⁷⁷ The survey also noted that Latinos and Latinas make up a sizable percentage of voters in swing states that President George Bush carried in 2004, including Colorado, Nevada, New Mexico, and Florida.³⁷⁸ 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, “for 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 skills our economy needs, we should.”³⁷⁹ 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.”³⁸⁰

While thus far the alarmists have had their impact on the national stage,³⁸¹ more scholars, advocates, and reasoned media and political spokespersons need to examine the facts and speak out.³⁸² 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 in the future use political doctrines, such as the plenary powers doctrine, to shift the pendulum of immigration policy in their favor.³⁸³

³⁷³ See generally Ruth Morris & Elizabeth Baier, *Hispanic Voters Could Make GOP Pay Defeat of Immigration Legislation*, SOUTH FLORIDA SUN-SENTINEL, Jul. 1, 2007, available at www.sun-sentinel.com/news/local/southflorida/sfl-flbvote0701nbju101,2687319.story?coll=sfla-home-headlines (last visited Jan. 20, 2008).

³⁷⁴ Mort Kondracke, *Immigration Failure Gives senate Profile In Political cowardice*, Real Clear Politics, Jul. 2, 2007, available at http://www.realclearpolitics.com/articles/2007/07/immigration_failure_profile_in.html (last visited Jan. 20, 2008).

³⁷⁵ *Id.*

³⁷⁶ See Oppenheimer, *supra* note 91 (observing that 76 percent of U.S. Hispanics agree with the statement that “anti-immigrant sentiment is growing in the United States”).

³⁷⁷ See “Good Mexicans,” *supra* note 53.

³⁷⁸ *Id.*

³⁷⁹ *Id.*

³⁸⁰ *Id.*

³⁸¹ Selwyn Duke, *Getting the Government the Third World Deserves*, Intellectual Conservative Politics and Philosophy, Jun. 6, 2007, available at <http://www.intellectualconservative.com/2007/06/06/getting-the-government-the-third-world-deserves> (last visited Feb. 15, 2008).

³⁸² See Kevin R. Johnson, *September 11 and Mexican Immigrants: Collateral Damage Comes Home*, 52 DEPAUL L. REV. 849 (2003).

³⁸³ See, e.g., Victor Romero, *On Elian and the Aliens: A Political Solution to the Plenary Power Problem*, 4 N.Y.U. J. OF LEGIS. & PUB. POL’Y 343 (2000-01) (arguing that Asians/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).

However, for the time being, the tenor of the debate has thus far 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 mist of an invasion that will lead to economic plight and crime-ridden streets. Not unlike the retraction issued after the War of the Worlds telecast, academics, political leaders, and the media need to demand accountability and accuracy.³⁸⁴ As Columnist Andres Oppenheimer recently called for, 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,³⁸⁵ which would expose and shame those who bash Latinos and Latinas.³⁸⁶

Such a campaign or similar effort should also be part of an ongoing and transformative political effort.³⁸⁷ 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,³⁸⁸ 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.³⁸⁹ Upon doing so, the truth of the positive impact of all forms of immigration will at the very least challenge the current dominant discourse.³⁹⁰ Not unlike the grass-roots 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. 4437.³⁹¹ 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, the protests in over 100 U.S. cities by over one 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.³⁹²

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 for his efforts in seeking humane and honest discussions concerning immigration. He should be applauded for their leadership.

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

³⁸⁶ See Oppenheimer, *supra* note 91 (“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 mainstream media.”).

³⁸⁷ Edward Telles, *Mexican Americans and the American Nation, A Response to Professor Huntington*, 31 *Aztlan: a Journal of Chicano Studies*, 7 (2006) (“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, *MINER’S CANARY*, *supra* note 92.

³⁸⁹ See Roman, *Coalitions and Collective Memories*, *supra* note 77.

³⁹⁰ See Bill Ong Hing, *Vigilante Racism; The De-Americanization of Immigrant America*, 7 *MICH. J. RACE & L* 441 (2002); Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 *CONN. L. REV.* 1185 (2002).

³⁹¹ H.R. 4437, 109th Cong. (2005).

³⁹² See Roman, *Coalitions and Collective Memories*, *supra* note 77, at 644 (noting that the grassroots efforts of April 10, 2006, was the timeliest example of inter-ethnic coalitions that included Latinas and Latinos from lands believed

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 United States industry.³⁹³

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).

³⁹³ 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 Latinas and Latinos were willing to proclaim “presente,” to announce that they were not only proud of their culture and history, but also to announce “I am present” to stand up to challenge of the cowardly, the ignorant, and the fearful. While many of us stem from beautiful African, Indigenous, European bloodlines, our greatest pride is to one day we will truly be counted as equals in this beautiful and prosperous land.