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Aliens In Our Midst Post-9/11: Legislating Outsider-Ness Within the Borders

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“Aliens” in Our Midst Post-9/11: Legislating Outsiderness within the Borders

Reviewed by Raquel Aldana & Sylvia R. Lazos Vargas***

Defining America Through Immigration Policy (Mapping Racisms Series). By Bill Ong Hing. Temple University Press, 2003. Pp. 336.

The “Huddled Masses” Myth: Immigration and Civil Rights. By Kevin R. Johnson. Temple University Press, 2003. Pp. 264.

Alienated: Immigrant Rights, the Constitution, and Equality in America. By Victor C. Romero. New York University Press, 2004. Pp. 261.

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INTRODUCTION

Three recent books written by Professors Bill Ong Hing, Kevin R. Johnson, and Victor C. Romero provide skillfully crafted roadmaps with which to understand the key emerging issues that will shape immigration law well into the next decade: the relationship of immigration control to national security. This Review captures the insights provided by these three authors to examine the restrictive laws and policies aimed at noncitizens in the name of national security as highlighted by the current efforts to federalize driver's licenses. As this Review explains, these three books map the current antagonistic attitudes towards noncitizens post-9/11, and serve as a basis from which to critically examine the current legislative push to federalize driver's license requirements.

Post-9/11 national security overrides other domestic policy issues in the United States. George W. Bush's 2004 re-election campaign depicted him as the stalwart defender of the homeland, and emphasized the dark threat of dangers lurking outside our borders.¹ Post election polls support the explanation that President Bush's victory is attributed in no small part to voters considering him the best choice to fight the "war on terror."² In his 2005 inaugural speech,³ President Bush vowed to confront "weapons of mass destruction" and "the enemies of liberty and our country," and "defend our allies and our interests."⁴ He painted a picture of an America threatened by irrational enemies against whom Americans must stand ever vigilant.

America's post-9/11 preoccupation with national security is well captured by a government report, the National Commission on Terrorist Attacks upon the United States ("9/11 report").⁵ This national best seller

¹ James E. Campbell, *The Presidential Election of 2004: The Fundamentals and the Campaign*, FORUM (2004), available at <http://www.bepress.com/forum/fol2/iss4/art1>.

² *Id.* at 4 (noting that Bush was consistently favored over Kerry on handling terrorism by margin of 54 to 37%).

³ President George W. Bush's Inaugural Address (Jan. 20, 2005), available at <http://www.whitehouse.gov/news/inaugural-address.html>.

⁴ *Id.*

⁵ THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 215-41 (2004) (Authorized Edition) [hereinafter 9/11 REPORT].

describes for the record, in vivid detail, the events of 9/11, and attempts to explain why 9/11 happened.⁶ According to the Commission, the 9/11 tragedy had its genesis, in great part, in intelligence failures. The Commission cites specifically to shortfalls in hard-headed analysis at intelligence agency headquarters and a culture that encouraged individual agencies to hoard and not share information at crucial points in the investigation of Al Queda operations.⁷

The 9/11 report also points to failed immigration controls as an underlying cause of the tragedy.⁸ The terrorists who planned and executed the 9/11 attacks were all foreign nationals legally admitted into the country under immigration laws.⁹ As the report makes clear, U.S. immigration law shaped the hijacker lineup. The hijackers were mainly Saudi foreign nationals because they could more easily get visitor's visas to lawfully enter the United States than could nationals from other Arab countries.¹⁰

Once Al Queda's operatives — foreign nationals from Egypt, Saudi Arabia, Lebanon, and Yemen — gained entry,¹¹ they commingled with U.S. citizens and enjoyed free access to the facilities and resources that allowed them to plan and carry out the 9/11 attacks. The hijackers enrolled in U.S. flight training schools, rented cars and apartments, opened bank accounts and had funds wired to them, attended mosques, and finally boarded airplanes that became the deadly weapons that destroyed the World Trade Center Towers and opened the gaping hole in the Pentagon.¹² The 9/11 report concludes that the United States government must do a better job of guarding its borders,¹³ ensuring that foreign nationals who cross the borders are not suspected terrorists,¹⁴

⁶ *Id.* at 47-324.

⁷ *Id.* at 254-74 (recounting numerous missed opportunities where shared information would have made difference in preventing 9/11 attacks).

⁸ *Id.* at 383-84.

⁹ *Id.* at 215-41.

¹⁰ *Id.* at 155-56 (detailing that Osama Bin Laden's original choice to select experienced Yemeni mujahid had to be nixed because, as Yemeni nationals, they would have had problems obtaining visas to enter United States).

¹¹ *Id.* at 58.

¹² *Id.* at 215-53.

¹³ *Id.* at 390. "It is elemental to border security to know who is coming into the country. Today more than nine million people are in the United States outside the legal immigration system. We must also be able to monitor and respond to entrances between our ports of entry, working with Canada and Mexico as much as possible." *Id.*

¹⁴ *Id.* at 385. A Biometric Screening System can be described as follows:

When people travel internationally, they usually move through defined channels, or portals. They may seek to acquire a passport. They may apply for a

and keeping track of foreign nationals inside the United States.¹⁵

Federal and state lawmakers quickly targeted for reform the agencies believed to be responsible for too easily letting the hijackers into the homeland. In record time, Congress dissolved the Immigration National Service and recreated it as a subdivision of the mammoth Department of Homeland Security. Congress also added monies and personnel to reinforce international border security, reformed immigration law to severely restrict visa issuance, substantially increased the monitoring of foreign nationals within the United States, and enabled the secret detention and removal of hundreds of foreign nationals.¹⁶ In addition, Congress joined states in considering legislation that would deny or severely restrict noncitizens' access to driver's licenses.

During the fall of 2004, the final piece of post-9/11 reform legislation — restructuring the national intelligence agencies — made its way through Congress with great controversy and political wrangling. House Bill 10¹⁷ ("H.R. 10") and Senate Bill 2485,¹⁸ the primary legislative vehicles, were designed to reorganize intelligence agencies and centralize the administration of the intelligence community's surveillance power. The intelligence reform bills also attracted provisions to address the Commission's recommendations related to enhanced border security. As is common in the legislative process, however, the immigration provisions went beyond what was recommended by the 9/11 Commission and beyond what it viewed as necessary to ensure the security of the United States. Rather, Congress

visa. They stop at ticket counters, gates, and exit controls at airports and seaports. Upon arrival, they pass through inspection points. They may transit to another gate to get on an airplane. Once inside the country, they may seek another form of identification and try to enter a government or private facility. They may seek to change immigration status in order to remain. Each of these checkpoints or portals is a screening — a chance to establish that people are who they say they are and are seeking access for their stated purpose, to intercept identifiable suspects, and to take effective action.

Id.

¹⁵ *Id.* at 387. "The U.S. border security system should be integrated into a larger network of screening points that includes our transportation system and access to vital facilities, such as nuclear reactors." *Id.*

¹⁶ Homeland Security Act of 2002, Pub. L. No. 107-296 (2002); see also Raquel Aldana, *The September 11 Immigration Detentions and Unconstitutional Executive Legislation*, 29 SIU LJ. 5 (2004); Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611 (2003).

¹⁷ 9/11 Recommendations Implementation Act of 2004, H.R. 10, 108th Cong. (2004).

¹⁸ Senate Bill 2845, formally known as the Intelligence Reform and Terrorism Act of 2004, was passed into law in December 2004. Pub. L. No. 108-458, 118 Stat. 3638 (Dec. 17, 2004).

resorted to the anxiety around national security and foreigners to justify increasing the harsh treatment of "alien" noncitizens.

The immigration provisions proposed under H.R. 10, as passed by the House of Representatives in October 2004, singled out noncitizens for increased, harsh treatment. For example, various sections of H.R. 10 would have significantly curtailed already restricted due process for certain noncitizens.¹⁹ In addition, sections 3051 and 3052 of H.R. 10 federalized driver's licenses to create a "nationwide identity system." Section 3051 would have compelled states, *inter alia*, to require applicants for driver's licenses to produce proof of a social security number, a requirement which only U.S. citizens and legal immigrants eligible to work in the United States are able to meet.²⁰ Moreover, section 3005 of H.R. 10 prohibited federal agencies from accepting the *matrícula consular*,²¹ the identification card issued by foreign governments, most widely Mexico and Guatemala, to their foreign nationals living in the United States. Senator Richard J. Durbin opened hearings on the Senate Bill, explaining that these reforms, which went well beyond those recommended by the 9/11 reports, were necessary because "if you can produce a driver's license, we can assume you are legal, *you are legitimate, you are for real*."²²

¹⁹ Section 3006 would have expanded the use of expedited removal procedures, while section 3009 allowed revocation of visas held by noncitizens, subjecting them to deportation, without any judicial process. H.R. 10, *supra* note 17, §§ 3006, 3009. H.R. 10 would have further restricted noncitizens' access to protection from persecution and torture as required by international law. Section 3008 made procedures for obtaining asylum more difficult, requiring that asylum seekers fleeing from persecution prove that the "central" reason they were fleeing their home regime was because of political ideology, race, or religion, while sections 3007 and 3032 would have denied terrorists asylum and torture protection altogether. *Id.* §§ 3007, 3008, 3032. Section 3033 would have allowed the federal government to deport noncitizens to countries that did not want to accept them, placing them in limbo or in great danger to their physical safety. *Id.* § 3033. Of these, only section 3008, the provision making access to asylum more difficult, became law as part of the Real ID Act of 2005. See Pub. L. 109-13 (2005) § 101(a)(3)(b).

²⁰ *Id.* § 3051. This section became law as part of the Real ID Act of 2005. See Pub. L. 109-13 (2005) § 202(c)(1).

²¹ "For purposes of establishing identity for any Federal employee, an alien present in the United States may present any document issued by the Attorney General or the Secretary of Homeland Security under the authority of one of the immigration laws (as defined in section 101(a)(17)), or an unexpired lawfully issued foreign passport . . . no other document may be presented for those purposes." *Id.* § 3005 (setting forth alien identification standards).

²² Opening Statement of Senator Richard J. Durbin, Chairman of the Subcommittee on Governmental Affairs of the U.S. Senate, *A License to Break the Law? Protecting the Integrity of Driver's Licenses* 3 (Apr. 16, 2002) (emphasis added).

In early December 2004, it appeared that the Senate and House would be unable to work out a compromise bill.²³ One major stumbling block was the inclusion of the driver's license reform provisions, which Senate members opposed. House Judiciary Committee Chairman James Sensenbrenner pressed for their inclusion and made a public stand, stating that an intelligence bill, without the federalization of driver's license requirements, would fail to "prevent another 9/11 from occurring."²⁴ President Bush and the Republican House leadership, who believed the driver's license provisions were "just too controversial,"²⁵ prevailed behind the scenes. At the end of the day, almost all of the noncitizen immigration provisions that had raised substantial concern for noncitizen rights were left out of the final bill.²⁶

Yet, the debate over how best to address the linkages between national security and immigration law was merely delayed. In the letter that President George W. Bush sent to Capitol Hill on the eve of his signing the intelligence bill into law, he stated that he "looked forward to working with Congress early in the next session to address . . . improving our asylum laws and standard for issuing driver's licenses."²⁷ True to this promise, on February 10, 2005, the House of Representatives voted to approve the Real ID Act of 2005, which reinstated many of the same restrictive provisions initially included in H.R. 10²⁸ was attached to the supplemental revenue bill funding operations in Iraq — a "must pass" bill. For example, provisions of the Real ID Act expand the definition of who should be inadmissible and/or removable as "terrorists" under immigration laws and seek to prevent their eligibility for asylum.²⁹ Also,

²³ Charles Babington and Walter Pincus, *Vote is Near on Post 9/11 Reforms*, WASH. POST, Dec. 7, 2004, at A1.

²⁴ Brian De Bose, *Senate Approves Intelligence Bill*, WASH. TIMES, Dec. 9, 2004, at A1.

²⁵ Richard Simon, *Immigration Debate is Likely to Turn on Drivers Licenses Difference, Even in the GOP*, L.A. TIMES, Dec. 12, 2004, at 38.

²⁶ Human Rights First, *House and Senate Pass Intelligence Bill, Anti-Refugee Provisions Struck From Final Version*, available at www.humanrightsfirst.org/asylum/asylum_10.htm. The Real ID Act of 2005 leaves in place provisions that increase the burden of proof on applicants seeking asylum, see Pub. L. 109-13 (2005) § 101(a)(3)(b)(i), and limits review by federal courts of federal habeas corpus claims in removal proceedings, see Pub. L. 109-13 (2005) § 106.

²⁷ Dena Buris, *Immigration Reformists Oppose Intelligence Bill*, ORANGE COUNTY REG., Dec. 7, 2004.

²⁸ The legislative vehicle was H.R. 1268, An Act Making Emergency Supplemental Appropriations for Defense, the Global War on Terror, and Tsunami Relief, for the fiscal year ending September 30, 2005, and for other purposes. Section B of the supplemental revenue bill was denominated the Real ID Act of 2005 [hereinafter Real ID Act]. Pub. Law 109-13 (2005).

²⁹ *Id.* §§ 103-105; Tracy Toppe Gonzalez, *Individual Rights Versus Collective Security*:

the Real ID Act would compel states to require proof of a person's social security number or proof of ineligibility of one, and evidence of lawful status for that driver's license to be accepted by a federal agency for any official purposes.³⁰ Further, the Act authorizes the issuance of only temporary driver's licenses and identification cards for persons holding temporary visas or whose petitions are pending, which shall expire when the person's authorized stay in the United States expires or for one year if there is no definite end period.³¹ President George W. Bush signed the Real ID Act of 2005 on May 11, 2005.³²

This legislative tale demonstrates that America's new concern for national security and its fear of another 9/11 has vastly expanded the scope of immigration and alienage law, an area where there are few constitutional checks on civil liberties. Professors Hing, Johnson, and Romero's timely books provide us with the analytical tools to

Assessing the Constitutionality of the Patriot Act, 11 U. MIAMI INT'L & COMP. L. REV. 75, 93-96 (2003).

³⁰ Real ID Act, *supra* note 28, § 202(a)-(b), Minimum Document Requirements and Issuance Standards for Federal Recognition.

(c) Minimum Issuance Standards — (1) IN GENERAL — To meet the requirements of this section, a State shall require, at a minimum, presentation and verification of the following information before issuing a driver's license or identification card to a person: (A) A photo identity document, except that a non-photo identity document is acceptable if it includes both the person's full legal name and date of birth. (B) Documentation showing the person's date of birth. (C) Proof of the person's social security account number or verification that the person is not eligible for a social security account number. (D) Documentation showing the person's name and address of principal residence. (2) SPECIAL REQUIREMENTS — (A) IN GENERAL — To meet the requirements of this section, a State shall comply with the minimum standards of this paragraph. (B) EVIDENCE OF LAWFUL STATUS — A state shall require, before issuing a driver's license or identification card to a person, valid documentary evidence that the person — (i) is a citizen of the United States; (ii) is an alien lawfully admitted for permanent or temporary residence in the United States; (iii) has conditional permanent resident status in the United States; (iv) has an approved application for asylum in the United States or has entered into the United States in refugee status; (v) has a valid, unexpired non-immigrant visa or non-immigrant visa status for entry into the United States; (vi) has a pending application for asylum in the United States; (vii) has a pending or approved application for temporary protected status in the United States; (viii) has approved deferred action status; or (ix) has a pending application for adjustment of status to that of an alien lawfully admitted for permanent residence in the United States or conditional permanent resident status in the United States.

Id.

³¹ *Id.* § 202(C).

³² Real ID Act, *supra* note 28.

understand the current dynamics that are transforming immigration and alienage law. Their parallel and complementary approaches — from Hing's historical perspective, to Johnson's comparative parallels of the treatment of noncitizens and domestic racial minorities, to Romero's emphasis on the treatment of noncitizens beyond traditional immigration policy — enrich our understanding. These books foretell post-9/11 tensions. Concerns over national security have sharpened the unease felt towards "aliens."³³ This emotion, unchecked by our better instincts and unfettered by the robust constitutional guarantees that citizens enjoy, is having a deleterious impact on how federal law treats "aliens" — both those who are lawfully and unlawfully living in our midst. These books predict that when there is international turmoil and high immigrant inflows, those responsible for immigration policies tend to enact harsh remedial measures. As the driver's license debate shows, the trend is towards harshly legislating the outsidership of "aliens," singling them out as outsiders within the borders, legalizing their subordinate status, and hardening the social and civic boundaries that locate them as outsiders. This is a sad result of 9/11. As Dean Kevin Johnson notes, the new fears make Emma Lazarus's poem emblazoned on the Statue of Liberty, "Give me your tired, your poor, your huddled masses yearning to breathe free,"³⁴ ironic and meaningless.³⁵

Part I of this Review discusses these three new valuable additions to immigration law and policy. Professor Hing's exhaustive work on the development of immigration law and policy lets the historical facts speak for themselves. Lines between citizens and outsider noncitizens have hardened throughout the history of the United States, often leading to the enforcement of laws with harsh consequences to foreign nationals. Professor Johnson's emphasis is on the failure of constitutional law to provide any rigorous judicial check on state practices directed at "aliens," classified as such by immigration law, or to those who *appear* "alien" because of their different racial and ethnic appearance, language, culture, or religion. Professor Romero focuses on how immigration law legitimizes the continued harsh treatment of noncitizens within our

³³ Susan Akram & Kevin Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. OF AM. LAW 295, 351 (2003); Victor C. Romero, *Beyond Belonging: Challenging The Boundaries of Nationality*, 52 DEPAUL L. REV. 871 (2003); Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the "Racing" of Arab Americans as "Terrorists,"* 8 ASIAN L.J. 1 (2001); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002).

³⁴ EMMA LAZARUS, *THE NEW COLOSSUS* (1949).

³⁵ KEVIN R. JOHNSON, *THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS* 1 (2003).

borders. The conclusion is inexorable. Immigration law has never been free of racist and xenophobic impulses, and immigration law as practiced, is not humane, fair, or rational.

Part II returns to the driver's license controversy. Forms of identification available to "aliens" and immigration reform, more generally, will be the "hot issue" in the 109th Congress.³⁶ If the parting shots of 2004 are any indication, the legislative product of the 109th Congress will be hostile to noncitizens' rights. The creeping expansion of immigration law to the detriment of civil rights, Part II contends, reflects a fear of foreigners.

Finally, this Review concludes that in a country that is increasingly concerned about personal security, those regarded as undesirable foreigners are becoming more easily disembodied from their humanity. The only response is to recognize, as these three books urge, that immigration law arbitrarily defines those worthy of humane treatment based on who, given the winds of time, Americans feel is "American" enough. Instead of giving immigration law free rein to create such harsh boundaries, the law should focus on the humanity of "aliens living in our midst" and incorporate an approach that does not legalize the outsidership of noncitizens, but, once noncitizens co-exist within our borders, treats them for what they are — human beings.

I. IMMIGRATION LAW "IN CONTEXT": THREE COMPLEMENTARY APPROACHES

In the 2003 affirmative action case, *Grutter v. Bollinger*, Justice O'Connor emphasized the importance of working out how the rule of law should function in complex, difficult areas "in context."³⁷ She argued that an abstract constitutional rule, like equal protection, should be applied with regard to the social context and the importance of the policy that the state is trying to achieve.³⁸ Similarly, the three books reviewed provide the historical, legal, cultural, and social context within

³⁶ Craig Gilbert, *Fierce Political Battle Likely Over Immigration Reform: Debate Rages Amid Concern about Terrorism, Economy, Civil Rights*, MILWAUKEE J. SENTINEL, Dec. 28, 2004, at 1; see also Press Release, U.S. House of Representatives Committee on the Judiciary, Sensenbrenner to Introduce Border Security and Immigration Legislation Dropped from the 9/11 Commission Conference Report (Dec. 16, 2004), available at <http://judiciary.house.gov/newscenter.aspx?A=427> (discussing R.F. James Sensenbrenner's (R-Wis.) plans to reintroduce legislation on first day of 109th Congress that would require proof of lawful presence in United States for issuance of driver's licenses).

³⁷ See *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

³⁸ *Id.*

which to understand the true effects of immigration law. Immigration law, masked by technical language, technical terms, and mystifying categorizations, metes out undeniably harsh treatment to "aliens." The authors graphically explain the impacts of immigration law. Their parallel approaches are complementary and enable our understanding of the current challenges facing immigration law.

A. *Bill Ong Hing's Defining America Through Immigration Policy: Historically Mapping Racism and Xenophobia in Immigration Law*

Numerous immigration law scholars have concluded that immigration law has never been free of racial prejudice³⁹ or disassociated from political scapegoating.⁴⁰ Instead of merely asserting this proposition, Professor Bill Ong Hing's *Defining America Through Immigration Policy* makes a tremendous contribution to immigration law by documenting the history of immigration law's development, and allowing the facts to speak for themselves.⁴¹

Bill Ong Hing, a professor of ethnic studies and law at the University of California at Davis, carefully documents the development of immigration law, beginning with the early colonial times when many of the founders were concerned with foreign influence and reticent to allow the immigration of Germans, Irish, and French.⁴² In 1864, during the Civil War, Congress enacted the first comprehensive immigration law. Centered in industrial policy, this law sought to ensure an adequate supply of workers to meet industrial needs during the Civil War; therefore, immigration was open and unrestricted.⁴³ Once the Civil War was over and the former slaves freed, there was a renewed need for cheap manual labor. As a result, Asians were welcome, particularly in the American West where the discovery of gold and the construction of

³⁹ Gabriel J. Chin, *Segregation's Last Stronghold: Race, Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998); Victor Romero, *Changing the Face of Immigration: A Year in Transition: Race, Immigration, and the Department of Homeland Security*, 19 ST. JOHN'S J. LEGAL COMMENT. 51, 54 (2004) ("Our immigration law does not reflect a history of racial or ideological equality"); Jan C. Ting, "Other Than a Chinaman": How U.S. Immigration Law Resulted From and Still Reflects a Policy of Excluding and Restricting Asian Immigration, 4 TEMP. POL. & CIV. RTS. L. REV. 301, 306 (1995); Patrick Weil, *Races at the Gate: A Century of Racial Distinctions in American Immigration Policy (1865-1965)*, 15 GEO. IMMIGR. L.J. 625, 626 (2001).

⁴⁰ Note, *Ideological Exclusions: A Prior Restraint Analysis*, 11 COMMENT. 335 (1989).

⁴¹ BILL ONG HING, *DEFINING AMERICA THROUGH IMMIGRATION POLICY* (Mapping Racisms Series 2003).

⁴² *Id.* at 13-17.

⁴³ *Id.* at 20-21.

large public works, like the transcontinental railroad, made Asian immigrants "indispensable."⁴⁴ By the 1840s, as the Chinese living in the West tipped 350,000, racial animosity was on the rise. Americans' white supremacist attitudes had not died with the Civil War, and the Chinese alien became "undesirable."⁴⁵ As Professor Hing notes, both the Western states and the federal government legalized xenophobia in a series of laws.⁴⁶ States denied Chinese the right to own property, and selectively taxed them (as well as other foreigners, primarily Mexicans). Licensing requirements aimed solely at washing houses, almost wholly operated by Chinese, were challenged in the famous Supreme Court case, *Yick Wo v. Hopkins*.⁴⁷ The Court concluded that such licensing requirements could only be motivated by racial animus, and thus violated the Fourteenth Amendment's equal protection guarantee.⁴⁸ This victory was short-lived. In 1870, Congress denied all Chinese the opportunity to naturalize "because of their undesirable qualities."⁴⁹ Twelve years later, Congress enacted the now notorious Chinese Exclusion Act,⁵⁰ which barred Chinese immigration on the grounds that this racial group was "disreputable," "dangerous and degrading," and akin to "lepers."⁵¹ Asians were indispensable as workers, even regarded by most employers as industrious, but they were never understood to be part of "We the People."⁵² Thus, Asians were legally relegated to second-class status and "treated as commodities."⁵³

Immigration law's rules as to who gets in, who gets to become a citizen, and who gets deported, have all been framed by preconceived notions of who is racially an "American." Professor Hing documents the wide variety of immigration law's technical entry and visa requirements, which he calls "who-is-a-real-American" enactments.⁵⁴ U.S. immigration law provides the greatest number of entry visas to European countries to preserve "diversity," which he shows to mean giving preference to white Europeans over Asians, Africans, and Latina/os.⁵⁵ The obvious racial

⁴⁴ *Id.* at 19, 28.

⁴⁵ *Id.* at 28-29.

⁴⁶ *Id.* at 29-30.

⁴⁷ 118 U.S. 356 (1886).

⁴⁸ HING, *supra* note 41, at 30.

⁴⁹ *Id.* at 36.

⁵⁰ Ch. 126, 22 Stat. 58. (1882).

⁵¹ HING, *supra* note 41, at 37.

⁵² *Id.* at 50.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 63-110.

bias, however, has been rendered invisible by the morass of regulations that make up the nuts and bolts of immigration law.

In the last part of his book, Professor Hing turns to current issues. He recognizes that border control is out of control. But, the "problem" of border control, he argues, has been racialized; border control has become synonymous with Mexican immigration.⁵⁶ Because we see border enforcement through a racial lens, Professor Hing argues, it has become a problem of too many Mexicans illegally crossing the border.⁵⁷ This enables U.S. policymakers and Americans to fail to take responsibility for their own actions that encourage and enable an out-of-control border. Moreover, the "illegals" become dehumanized, and Americans become desensitized to the human cost that harsh border control policies exact. As Professor Hing notes, militarizing the Southwest border has caused 120,000 deaths,⁵⁸ but the U.S. government has not reacted to the Mexican government's sharp accusation that the Southwest border has become a "killing field."⁵⁹

Professor Hing argues that the large presence of undocumented noncitizens in the United States cannot be blamed solely on the noncitizen; U.S. immigration policy encouraged northward migration of cheap laborers. During the 1940s, the "*bracero*" program⁶⁰ drew Mexico's rural poor and unemployed into the U.S. labor pool, and provided the manual labor for America's industrial revolution.⁶¹ Although these laborers were not allowed to settle in the United States, a pattern of labor recruitment developed, and rural areas in Mexico began to export their young male workers into the United States.⁶² Rural Mexican families became dependent on wages sent home, but more significantly, a culture took root that disrespected immigration border enforcement and viewed

⁵⁶ *Id.* at 116.

⁵⁷ *Id.* at 120.

⁵⁸ *Id.* at 190-92.

⁵⁹ Jorge Castaneda, *Mexico's Circle of Misery*, FOREIGN AFF., July-Aug. 1996, at 92; Gretchen Peters, *Mexican Migration Moves Off Fast Track*, CHRISTIAN SCI. MONITOR, Jan. 16, 2003, at 6 (reporting Mexican Foreign Minister Jorge Castaneda resigned in January 2003); see also Tim Weiner, Editorial, *Mexican Foreign Minister Quits: Critic of NAFTA Replaces Him*, N.Y. TIMES, Jan. 11, 2003, at A3.

⁶⁰ The term *bracero* entered the written English language in 1915-20 from Spanish, literally meaning one who swings his arms, i.e., a laborer. Its English meaning is: a Mexican laborer admitted legally into the United States for a short period to perform seasonal, usually agricultural, labor. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000), available at <http://www.bartleby.com/61/93/B0439300.html>.

⁶¹ HING, *supra* note 41, at 118-33.

⁶² *Id.*

the Northern border as a revolving door.⁶³ At the same time, U.S. employers became actively involved in a pattern of recruitment designed to ensure a cheap steady supply of temporary workers.⁶⁴ The United States government also became complicit in this orchestrated dance. On the one hand, employer sanctions were under-enforced, but in order to appear concerned about the problem of "illegals," immigration raids were selectively carried out, mostly on Mexican nationals.⁶⁵ "Problematizing undocumented migrants allow[s] us to demonize them," states Professor Hing, and in turn, "render[s] the inherent racism" of U.S. border policy faultless and invisible.⁶⁶

The hypocrisy of U.S. immigration policy is no secret. Lax and selective enforcement has led to a growing undocumented population, which is a problem of the United States' own making. Media stories and TV personalities, like CNN's Lou Dobbs, weekly, if not daily, address the "problem of illegals." Movies, like *A Day without a Mexican* make a joke of Americans' dependence on cheap undocumented workers, an overwhelmed border patrol, and Americans' eagerness to benefit from a cheap workforce. The jokes are laced with racism against "those Mexicans."

More seriously, with uncanny prescience, Professor Hing foretells the post-9/11 rising alarm with "out of control borders." *Time* magazine's *Who Left The Door Open*, a special report published in the fall of 2004, states that there are "15 million illegals at large in society."⁶⁷ This number is *fifty percent higher* than official estimates.⁶⁸ The article argues

⁶³ *Id.* at 131.

⁶⁴ *Id.* at 121.

⁶⁵ *Id.* at 151.

⁶⁶ *Id.* at 133.

⁶⁷ Donald L. Barlett & James B. Steel, *Who Left The Door Open*, TIME MAG., Sept. 20, 2004.

⁶⁸ According to the Bureau of the Census, based on the 2000 census, the number of foreign born who are unauthorized is 8,835,450. This estimate is part of a technical report reconciling the data gathered in the 2000 census and its estimation methods for the population of the United States prior to the census. See GREGORY J. ROBINSON, BUREAU OF THE CENSUS, ESCAP II, DEMOGRAPHIC ANALYSIS RESULTS, tbl.3-5 (2002). According to the former Attorney General of the United States, John Ashcroft, the total number of undocumented immigrants in the United States may be between six to ten million. John Ashcroft, United States Attorney General, Prepared Remarks on the National Security Entry-Exit Registration System (June 6, 2002). According to recent estimates by the Pew Foundation and the Urban Institute, the number is close to eight million. Frank D. Bean & Jennifer Van Hook, *Estimates of Numbers of Unauthorized Migrants Residing in the United States: The Total, Mexican, and Non-Mexican Central American Unauthorized Populations in Mid-2001* (Pew Hispanic Ctr., Wash., D.C.) (Mar. 21, 2002); B. Lindsay Lowell & Roberto Suro, *How many Undocumented: The Numbers Behind the U.S.-Mexico Migration Talks* (Pew

that "illegals . . . pose a threat" to national security.⁶⁹ The porous border allows "4000 illegal aliens to cross daily" from "countries hostile to America," leaving the country vulnerable to terrorists because there are "No searches for weapons. No shoe removal. No photo-ID checks."⁷⁰ Without citing any official data, *Time* magazine reports that the "open" Southern border invites "thousands of criminals, quite possibly hundreds of thousands."⁷¹ The report also alleges that "stolen cars" are routinely part of the border crossings, again without identifying any official data sources.⁷²

Professor Hing's book is helpful to understand the *Time* magazine report phenomenon of growing hostility towards the "illegals" crossing the southern border. The "problem" is now even more perilous because it is tied to post-9/11 national security anxiety. Professor Hing observes that border safety is viewed with the "inherent racism" of "demonizing undocumented migrants."⁷³ For example, *Time* magazine illogically describes the "illegals" crossing the border simultaneously as: poor rural Mexicans, "from countries hostile to America," criminals, and potential terrorists.⁷⁴ *Time* reporters ignore the definitive 9/11 report, which made clear that the Al Queda operatives crossed the border *legally*, and were *well-financed*, not poor.⁷⁵ Osama Bin Laden did not risk his important operation with a hazardous border entry. Rather, as the 9/11 report makes clear, the hijackers entered the United States with valid visitors' visas in the comfort of airline seats.⁷⁶

Reflective of rising concern with Southern borders, the new director of intelligence, Porter Goss, has recently warned that Al Queda has considered infiltrating the United States through the Mexico border.⁷⁷ These stark warnings were based on nonspecified intelligence that

Hispanic Ctr., Wash., D.C.) (Mar. 21, 2002).

⁶⁹ Barlett & Steel, *supra* note 67.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 133.

⁷⁴ *Id.*

⁷⁵ 9/11 REPORT, *supra* note 5, at 242 (detailing purchases of first class airline tickets by hijackers Shehri, Satam al Suqami, Atta, Shi, Jarrah); *id.* at 224 (reporting Al Queda hijackers received \$114,500); *id.* at 252 (reporting hijackers had leftover funds of \$26,000, which were returned to Al Queda on eve of 9/11).

⁷⁶ See *id.* at 227-31 (describing extensive air travels of key Al Queda operatives); *id.* at 241-42 (detailing first class air travel of hijackers); *supra* notes 8-10 and accompanying notes (discussing how lineup of 9/11 hijackers was shaped by accessibility to visitors' visas).

⁷⁷ Douglas Jehl, U.S. Aides Cite Worry on Qaeda Infiltration from Mexico, N.Y. TIMES, Feb. 17, 2005, at A16.

"strongly suggests" such plans.

Professor Hing shows that immigration law has been built systematically upon the vestiges of racist attitudes, and in times of anxiety, immigration law has treated noncitizens harshly. In this atmosphere of fear, illogical reporting, and rising hostility towards the "illegals," Congress and President George W. Bush have pledged immigration reform. But, achieving reasonable reform seems out of reach. Admittedly, immigration law is broken, but shouldn't it be left alone until cooler heads can prevail? That is what Professor Bill Hing would recommend.

B. Kevin R. Johnson's *The "Huddled Masses" Myth: Immigration and Civil Rights: The Civil Rights of "Aliens" and Those Who Appear "Alien"*

The strength of Dean Johnson's book, *The "Huddled Masses" Myth: Immigration and Civil Rights*, lies in how he consistently draws connections between immigration policies and civil rights. Kevin Johnson, an expert in immigration law and critical race theory, believes that immigration law can mirror how majority groups regard subordinated groups. For Dean Johnson, "immigration law is an illuminating resource for studying the place of domestic groups in the U.S. social hierarchy . . . [because] the government is afforded free reign to treat noncitizens, . . . as it sees fit . . . [I]mmigration laws . . . [reflect] dominant society's views toward the civil rights of subordinated groups in the United States."⁷⁸

In contrast to the constitutional protections the U.S. Supreme Court affords to domestic minorities, Court doctrine has permitted the harsh treatment of "aliens." The plenary power doctrine recognizes Congress' exceptionalism in immigration: "the power of exclusion of foreigners is an incident of sovereignty belonging to the government of the United States as part of its Sovereign powers delegated by the constitution."⁷⁹ The degree of judicial deference to Congressional discretion in the area of immigration and alienage law has meant that the discriminatory provisions in immigration laws have remained immune from judicial scrutiny.⁸⁰ Weakened criminal protections, deferential court review, and results-oriented immigration enforcement create a toxic recipe for civil rights, as Dean Johnson points out. Courts have steadily chipped away at procedural safeguards, required little review by neutral third parties,

⁷⁸ JOHNSON, *supra* note 35, at 3-4.

⁷⁹ *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

⁸⁰ JOHNSON, *supra* note 35, at 17.

and increasingly tolerated prolonged detentions of noncitizens. Heavy-handed treatment of alleged immigration law violators occurs out of public sight.⁸¹ No digital photos have been made public to show what goes on in these immigration detainment centers.⁸² Sadly, the plenary power doctrine has allowed the construction of a legal regime for the treatment of noncitizens that violates fundamental human rights guarantees.

The legal fiction of the "alien," created by immigration law, permits the law to exclude this category of persons from judicial protections against arbitrary and inhumane treatment that American citizens enjoy under the Constitution. "Aliens" stand outside of "We the People" and are "by definition outsiders."⁸³ Dean Johnson notes that the "alien" terminology has been key to rationalizing harsh and inhumane treatment. For example, in the early 1990s, Haitians fleeing political violence were returned to their homeland without any judicial or administrative process.⁸⁴ In President George H.W. Bush's public explanations of this treatment, which violated international treaty conventions, he referred to the Haitians not as refugees, but as "illegal aliens."⁸⁵ Likewise, under the Clinton Administration, the Cuban "balseros" were held in indefinite detention in tents surrounded by chicken wire in Guantánamo and also in maximum security federal penitentiaries.⁸⁶ Dean Johnson notes that in the first line of the opinion on the due process challenge to this practice the court categorizes the plaintiff-detainee as "an alien."⁸⁷ The due process challenge, of course, went nowhere. In sum, "alien" terminology rationalizes inhumane treatment towards noncitizens, converting them into "faceless, inhuman demon[s]."⁸⁸ Because most immigrants are racial minorities in the popular mind,⁸⁹ "alien" also becomes coda for racial minorities in

⁸¹ Larry Cohler-Esses, "Brooklyn's Abu Ghraib": Some Prisoners Held at Brooklyn's Federal Metropolitan Detention Center Say They Were Abused by Guards, *THE DAILY NEWS* (New York), Feb. 20, 2005 (reporting that Justice Department's inspector general has found that terrorism suspects swept off streets after September 11 attacks were repeatedly stripped naked and frequently were physically abused during detention in New York's federal detention center).

⁸² There are apparently videos available of some of these abuses, but the videos are not publicly available. *Id.*

⁸³ JOHNSON, *supra* note 35, at 7.

⁸⁴ *Id.* at 40-42, 161.

⁸⁵ *Id.* at 161.

⁸⁶ *Id.* at 40-42, 161.

⁸⁷ *Id.* at 161.

⁸⁸ *Id.* at 162.

⁸⁹ *Id.* at 51.

general.⁹⁰

The rhetorical importance of the creation of the "alien" as a legal fiction perhaps can be more easily understood by breaking down how a similar legal fiction was used in a more distant and notorious case, *Dred Scott v. Sanford*.⁹¹ The first and essential step in Justice Taney's opinion is to construct the legal fiction that African Americans could never be citizens under the Constitution, or part of the political community of "We the People."⁹² This conclusion leads to the next step: constitutionally legitimizing White supremacy. Taney argued that because this "inferior" people were part of an enslaved class at the founding of the country, the Constitution fixed their legal status as slaves and chattel.⁹³ Thus, under Justice Taney's analysis the Constitution legitimized White Supremacist attitudes because of the "fixed and universal" belief among the Founders and the ratifiers of the Constitution that African Americans were "a subordinate and inferior class of beings, who had been subjugated by the dominant race."⁹⁴ Justice Taney concluded that the Constitution never intended to allow African Americans, whether enslaved or free, at any time in our history to be part of the citizenry of "We the People" entitled to constitutional protections under the federal scheme.⁹⁵

⁹⁰ *Id.* at 162.

⁹¹ 60 U.S. 393 (1856).

⁹² *Id.* at 407.

⁹³ *Id.* at 408 ("[A] negro of the African race was regarded by them as an article of property, and held, and bought and sold as such, in every one of the thirteen colonies which united in the Declaration of Independence, and afterwards formed the Constitution of the United States.").

⁹⁴ *Id.* at 407.

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.

Id.

⁹⁵ *Id.* at 404-05.

We think they are not, and that they are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore

Dean Johnson contends that harsh treatment towards "aliens" migrates to groups who stand at the margin of U.S. society. Unfettered discrimination against "aliens" may mask "an intent to discriminate against racial minorities."⁹⁶ The lines between a native minority and a foreign-born "alien" are easily blurred.⁹⁷ Most recent immigrants are from Latin America or Asia.⁹⁸ He describes how the United States Supreme Court has steadily chopped away at the constitutional protections of U.S. citizens who seem to have a "foreign appearance."⁹⁹ In *United States v. Brignoni-Ponce*, the Court bought the argument that border patrols required racial profiling as a border enforcement tool, stating that "the likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor" in making investigatory stops.¹⁰⁰ For Mexican Americans living close to the border, this means that if they are as far as sixty miles away from the border, they can be stopped by law enforcement without reasonable suspicion because they "look Hispanic."¹⁰¹ This amounts to a carte blanche to harass the eighty to ninety percent of U.S. citizens living close to the border, who are overwhelmingly of Mexican descent.¹⁰² The Court could very well have chosen to emphasize that because so many U.S. citizens who have resided for generations on the Mexican-U.S. border are of Mexican descent, it was unreasonable and illogical for border patrol to use the appearance of Mexican ancestry as a relevant factor in ferreting out persons crossing the border illegally. As Dean Johnson notes, the myth that most "aliens" are Mexicans accounts for why the Court made the choice it did. Mexican American citizens whose homes are on the border must undergo routine border searches that are invasive

claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

Id.

⁹⁶ JONHSON, *supra* note 35, at 17.

⁹⁷ *Id.* at 51.

⁹⁸ Bureau of Census, Profile of Foreign Born Population in the United States, 2000 (Dec. 2001) at fig.7-2, available at <http://www.census.gov/prod/2002pubs/p23-206.pdf>.

⁹⁹ *United States v. Brignoni-Ponce*, 422 U.S. 873, 886-87 (1975).

¹⁰⁰ *Id.*

¹⁰¹ JONHSON, *supra* note 35, at 30-31.

¹⁰² See Maria Pabon Lopez, *Phoenix Rises From El Cenizo: A Community Creates and Affirms A Latino/a Border Cultural Citizenship Through Its Language and Safe Haven Ordinances*, 78 DENV. U. L. REV. 1017 (2001).

and demeaning. As he notes, the "indignities of immigration stops deprive U.S. citizens and lawful immigrants who look Mexican of their civil rights."¹⁰³ This has caused border cities, like El Cenizo, Texas, to rise up in anger at the invasiveness of the border patrol in their everyday lives.¹⁰⁴ Unfortunately, in the federal scheme, a small border city is no match for the federal government.

When nativism and xenophobia are unleashed, they are difficult to contain.¹⁰⁵ Dean Johnson sees a high correlation between discriminatory immigration laws and the severe treatment of U.S. citizens who are viewed as potentially disloyal or politically subversive.¹⁰⁶ During World War II, Mexican Americans who were U.S. citizens were deported as part of the Los Angeles Zoot Suit raids.¹⁰⁷ The McCarthy era's war on communism led to the persecution of U.S. citizens for their political views.¹⁰⁸ He sees a parallel to the USA PATRIOT Act and its expansive and vague definition of "terrorist activity."¹⁰⁹

Dean Johnson also believes that anti-immigrant initiatives, like California's Proposition 187 and Arizona's recently enacted Proposition 200,¹¹⁰ are passed because of racial animus.¹¹¹ These initiative campaigns reflect antagonism towards "illegal aliens."¹¹² A key ingredient of California's Proposition 187 success was television advertisements that showed Mexicans overrunning the borders like rats.¹¹³ In Arizona, Proposition 200 advocates made the case that "illegal immigration" was "killing" the state. Proposition 200 avers that "illegal immigration" is "causing economic hardship."¹¹⁴ Both Propositions 187¹¹⁵ and 200¹¹⁶ attempted to limit "public benefits" available to noncitizens. Proposition

¹⁰³ JOHNSON, *supra* note 35, at 31.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 42-46, 100-03.

¹⁰⁶ *Id.* at 56.

¹⁰⁷ *Id.* at 4.

¹⁰⁸ *Id.* at 56.

¹⁰⁹ Pabon Lopez, *supra* note 102.

¹¹⁰ See Arizona Proposition 200, available at www.azsos.gov/election/2004/info (last visited Mar. 31, 2005) [hereinafter Proposition 200].

¹¹¹ JOHNSON, *supra* note 35, at 43-44.

¹¹² *Id.* at 42-50.

¹¹³ *Id.* at 42.

¹¹⁴ Proposition 200, *supra* note 110, § 2.

¹¹⁵ Proposition 187 was intended to prevent persons lacking proper citizenship or residency status from obtaining public social services and health benefits, and their children from enrolling in public schools. See California Proposition 187, §§ 5(b), 6(b), 7 (1988), reprinted in LULAC I, 908 F. Supp at 787-90 (App. A).

¹¹⁶ Proposition 200, *supra* note 110, § 2.

200 ties "illegal immigration" to national security, declaring that "illegal immigrants have been given a safe haven in this state with the aid of identification cards that are issued without verifying immigration status . . . [which] undermines the security of our borders and demeans the value of citizenship."¹¹⁷

The issue of initiatives aimed at racial minorities is complex.¹¹⁸ For Dean Johnson, a key explanation is "psychological transference," in which "feelings toward one person are refocused on another."¹¹⁹ In these animus-based initiatives, he contends that the public attacks noncitizens of color because Whites can do so without having to acknowledge racist feelings. For example, attacking "illegal immigrants" can be justified as attacking "lawbreakers," and not racial prejudice, unlike a direct attack on "those" Mexicans or Asians.¹²⁰

Like Professor Hing, Dean Johnson addresses issues of immediate concern. His analysis of the post-9/11 detentions of mostly Arabs and Muslims is a valuable documentation of the willful racial profiling of noncitizens in the name of fighting the "war on terror."¹²¹ As many scholars have noted, the increase in racial profiling tactics in the "war on terror" makes clear that being a U.S. citizen as well as appearing "American," racially, ethnically, accent-wise, and class-wise, has become an important parameter of who may enjoy civil liberties.¹²²

¹¹⁷ *Id.*

¹¹⁸ One of us differs with Dean Johnson on this point. See Sylvia R. Lazos Vargas, *Judicial Review of Initiatives and Referendums in Which Majorities Vote on Minorities' Democratic Citizenship*, 60 OHIO ST. L.J. 399, 462-73 (1999) (arguing anti-minority initiatives can be explained by ideological differences, struggle for dominance, as well as race based animus).

¹¹⁹ *Id.* at 50.

¹²⁰ *Id.* at 50-51.

¹²¹ *Id.* at 77-85.

¹²² See, e.g., Raquel Aldana-Pindell, *The 9/11 "National Security" Cases: Three Principles Guiding Judges' Decision-Making*, 81 OR. L. REV. 985, 1032-33 (2002) (describing detention of noncitizens after 9/11 largely on basis of race); Steven W. Bender, *Sight, Sound, and Stereotype: The War on Terrorism and Its Consequences for Latinas/os*, 81 OR. L. REV. 1153 (2002) (analyzing consequences of "war on terror" for Latina/os); Berta E. Hernández-Truyol, *Globalizing Terror*, 81 OR. L. REV. 941, 960-61 (2002) (examining treatment of Latina/os post-9/11); Bill Ong Hing, *Vigilante Racism: The De-Americanization of Immigrant America*, 7 MICH. J. RACE & L. 441, 444 (2002) (describing ostracism of "Muslims, Middle Easterners, and South Asians in United States in wake of September 11" as "de-Americanization process"); Kevin R. Johnson, *September 11 and Mexican Immigrants: Collateral Damage Comes Home*, 52 DEPAUL L. REV. 849, 863-64 (2003) (examining threat to civil rights and increased local involvement in immigration enforcement); Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11*, 34 COLUM. HUM. RTS. L. REV. 1, 39-41 (2002) (analyzing racial profiling and "racially unbalanced compromises in civil liberties" post-9/11); Sylvia R. Lazos Vargas, *Missouri, The "War on Terrorism," and Immigrants: Legal Challenges Post 9/11*, 67 MO. L. REV. 775, 794-

Following 9/11, the Department of Justice detained thousands of Muslim and Arab noncitizens for questioning. This blanket racial profiling failed to produce any direct evidence of terrorist activity. The Justice Department next interviewed an additional 5000 noncitizen men, most of whom were Arab or Muslim, who had come to the United States since January 1, 2000 on non-immigrant visas. These detainees were held for months, without counsel, without any judicial process, incommunicado, and in secrecy.¹²³ The Office of the Inspector General of the U.S. Department of Justice investigated alleged civil liberties violations allegedly committed against terrorist suspects detained in US facilities.¹²⁴ The report issued by this nonpartisan agency concluded that the civil rights of many had been violated, hundreds were subjected to harsh conditions for weeks and months, and there were actual findings of Brooklyn detainees physically and verbally abused.¹²⁵ The investigation also concluded that the Justice Department had allowed many illegal immigrants with no connection to terrorism to languish in unduly harsh conditions.¹²⁶ It is still not clear whether there continues to be noncitizens in custody who have not been charged with any criminal wrongdoing outside of possible immigration law violations.

The 9/11 Arab and Muslim detentions show that the plenary power doctrine supports extremely harsh treatment of noncitizens within the borders. More disturbing, the tale of Arab and Muslim detainments related by Dean Johnson shows that racial and ethnic profiling of noncitizens is a key element of the Bush Administration's war against

95 (2002) (arguing increased local involvement in immigration enforcement could undermine community relationships and cause increase in racial profiling); Peggy Nagae, *Justice and Equity for Whom? A Personal Journey and Local Perspective on Community Justice and Struggles for Dignity*, 81 OR. L. REV. 1133 (2002) (analyzing impact of heightened security measures on racial minorities); Natsu Taylor Saito, *Whose Liberty? Whose Security? The USA PATRIOT Act in the Context of COINTELPRO and the Unlawful Repression of Political Dissent*, 81 OR. L. REV. 1051, 1125 (2002) (noting effects of USA PATRIOT Act on Arab-American and South-Asian communities); Adrien Katherine Wing, *Civil Rights in the Post 9-11 World: Critical Race Praxis, Coalition Building, and the War on Terrorism*, 63 LA. L. REV. 717, 739-56 (2003) (suggesting "war on terror" may create opportunities for political coalitions among racial minorities); Eric K. Yamamoto et al., *American Racial Justice on Trial — Again: African American Reparations, Human Rights, and the War on Terror*, 101 MICH. L. REV. 1269 (2003) (discussing implications of "war on terror" for quest for racial justice).

¹²³ Aldana, *supra* note 16.

¹²⁴ U.S. Department of Justice, Office of the Inspector General, Report to Congress on Implementation of Section 1001 of the USA PATRIOT Act (Jan. 2004) available at <http://www.usdoj.gov/oig/special/0401a/index.htm>.

¹²⁵ *Id.*

¹²⁶ *Id.*

terror.¹²⁷ He concludes that “the legal measures taken by the federal government reinforce deeply-held negative stereotypes — foreignness and possibly disloyalty — about Arabs and Muslims.”¹²⁸

Immigration law has expanded beyond the federal government’s power to regulate noncitizens’ presence in the United States, and, as now interpreted in the war against terror, the plenary power doctrine also permits the U.S. government to violate noncitizens’ fundamental due process rights. The Supreme Court acknowledged in *Hamdi v. Rumsfeld* that some “war on terror” detainees may well be innocents, at the “wrong place at the wrong time,” or be unfortunate in not looking the part of real “Americans.”¹²⁹ This has also been true for the post-9/11 noncitizen detainees, yet no legal protections have developed to curb detainments based on racial profiling. Dean Johnson’s own *sangre froid* calculation is that post-9/11 selective questioning and screening of Arabs and Muslims will likely pass constitutional scrutiny.¹³⁰ It is hard to argue with his conclusion: when it comes to civil rights violations, racial biases, and ethnic prejudices in immigration law, “the courts and the law have become largely irrelevant.”¹³¹

C. *Victor Romero’s Alienated: Immigrant Rights, the Constitution, and Equality in America: Alienage and Outsider Status*

Professor Romero, an expert on the intersection of constitutional and immigration law, puts a human face to the immigrant story and offers a multidimensional and interdisciplinary analysis of immigrant rights that supports an equality-based reading of the U.S. Constitution. In his book, *Alienated: Immigrant Rights, the Constitution, and Equality in America*, his overarching theme is that the government has used citizenship as a “legitimate” proxy for otherwise invidious, and often unconstitutional, discrimination on the basis of race.¹³² Profiling on the basis of

¹²⁷ See also Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEG. F. 163, 163-64 (2002) (contending that attitudes toward racial profiling have changed since 9/11); Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185, 1192-93 (2002) (chronicling race-based enforcement of immigration laws after 9/11); Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1418-30, 1436-37 (2002) (proposing factors to identify racial profiling and concluding that it is uncertain whether governmental actions after 9/11 constitute ethnic profiling).

¹²⁸ JOHNSON, *supra* note 35, at 77-85.

¹²⁹ 124 S. Ct. 2633, 2660 (2004).

¹³⁰ JOHNSON, *supra* note 35, at 80.

¹³¹ *Id.* at 117.

¹³² VICTOR C. ROMERO, *ALIENATED: IMMIGRANT RIGHTS, THE CONSTITUTION, AND*

citizenship, Professor Romero notes, remains largely unchecked.¹³³ In his book, he adopts an anti-essentialist and anti-subordination model to provide a new theoretical and practical vision of constitutional immigration law, one that more fully preserves the personhood of noncitizens.

Professor Romero offers a nuanced analysis of immigrant rights to uncover how issues of power, fear, and subordination motivate immigration policy. He focuses on the treatment of immigrants and the war on terror after 9/11 to document how the "criminal type" is a social construction, etched by the dominant class and ethnic prejudices of a given society. He examines the government's initial decision to engage in national origin profiling, its use of the immigration power to enhance its investigatory might, and its approach toward admitting commuting students at the border.¹³⁴ His critique is three-fold. First, like Professor Hing and Dean Johnson, Professor Romero cautions the government against "using such incidents of birth and culture as proxies for disloyalty, especially when such profiling promotes essentialist stereotyping and subordination without the promise of enhanced security."¹³⁵ Second, he reveals the fallacy of employing the deportation power to deny due process to suspected terrorists where the end result is to release potential terrorists who may well strike again.¹³⁶ Third, he contrasts the emotional legislative responses to 9/11, like the USA PATRIOT Act, to the more rational Border Commuter Student Act of 2002, to show how the government can use its immigration power effectively to separate the "terrorist" from the "immigrant" without relying on faulty proxies for disloyalty.

Professor Romero also thematically weaves topics that have generally received less attention in immigration scholarship, but which reveal how deeply rooted the construction of the immigrant of color as an outsider is in shaping immigration law. He offers an insightful comparison of two pieces of family unification immigration legislation, one which strengthened the U.S. citizen parent-noncitizen child bond, The Child Citizenship Act ("CCA"),¹³⁷ and one which denied similar benefits to the noncitizen parent-U.S. citizen child relationship, The Family

EQUALITY IN AMERICA 5 (2005).

¹³³ *Id.*

¹³⁴ *Id.* at 12.

¹³⁵ *Id.* at 25.

¹³⁶ *Id.*

¹³⁷ The Child Citizenship Act of 2000, Pub. L. No. 106-395 (Oct. 30, 2000).

Reunification Act ("FRA").¹³⁸ His comparison reveals the inherent biases that perpetuate subordination as well as race and class difference.¹³⁹ He uses empirical evidence to point to the differences in race and class of the parent-beneficiaries of these two pieces of legislation. While the CCA involves mostly white and middle class applicants, the FRA involves mostly nonwhite and lower class applicants.¹⁴⁰ He argues that, in general, the parent's citizenship status is ascribed to the child.¹⁴¹ However, in spite of Congress' suggestion in the CCA that children should be ascribed the same citizenship status as their parents, the FRA, the legislation that mostly applies to immigrants of color, this ascription does not hold true.¹⁴² Thus, because of the way immigration law works, the child adopted under CCA provisions can avoid the harsh deportation provisions if he or she commits a minor crime as a juvenile, while children adopted under the FRA will face the full brunt of the deportation provisions.¹⁴³ Indeed, under the FRA, children who were adopted by noncitizens and who have been life-long residents from a very young age can still be sent back to their unfamiliar countries of "origin" for the commission of minor crimes. This, Professor Romero concludes, undermines the FRA's purported objectives of family unification and punishment proportionality, which he ascribes to the different socio-economic status and race of the applicant-beneficiary pools for each statute.¹⁴⁴

Professor Romero next examines the dangerous expansion of legal exceptionalism in the few judicial attempts to limit Fourth Amendment protections to the undocumented, who are predominantly nonwhite and poor. Following the lead of Justice Rehnquist's plurality opinion in *United States v. Verdugo-Urquidez*,¹⁴⁵ U.S. District Court Judge Paul Cassell ruled in *United States v. Esparza-Mendoza*¹⁴⁶ that a previously deported undocumented immigrant was not protected by the Fourth Amendment's prohibition against unreasonable government searches.¹⁴⁷ These efforts to exclude the undocumented from the protections of the

¹³⁸ The Family Reunification Act of 2003, H.R. 2585.

¹³⁹ ROMERO, *supra* note 132, at 53-59.

¹⁴⁰ *Id.* at 60-62.

¹⁴¹ *Id.* at 62.

¹⁴² *Id.*

¹⁴³ *Id.* at 52, 60.

¹⁴⁴ *Id.* at 64-65.

¹⁴⁵ 494 U.S. 259, 262-63 (1990).

¹⁴⁶ 265 F. Supp. 2d 1254 (N. D. Utah 2003).

¹⁴⁷ ROMERO, *supra* note 132, at 69.

Bill of Rights, Professor Romero argues, is contrary to the text of the Fourth Amendment. It expressly refers to "people" and not solely citizens. By focusing on the citizenship status of the criminal defendant, the *Esparza-Mendoza* court shifts the focus away from the Amendment's purpose of deterring unlawful government conduct, and, instead, allocates fundamental rights based on an individual's relationship to the United States.¹⁴⁸ Moreover, the racial implications of this trend, Professor Romero notes, cannot be ignored. As Professor Hing documents, immigration law arbitrarily constructs legal and illegal alien status based on centuries-old biases that favor "whiter" nations.¹⁴⁹ Professor Romero challenges this trend by creatively employing parallel lessons from tort law that emphasize the apportionment of responsibility based on societal norms of reasonable conduct as to all persons.¹⁵⁰

The creation of these exceptions to the protections of the Fourth Amendment are similar to the Bill of Rights carve-outs applied to "enemy combatants" in the context of the war on terrorism. The detention of "enemy combatants" has become the Executive's most effective tool for conducting secretive, unreviewable detentions. The Executive's unilateral designation of "enemy combatants" has denied these detainees any rights they may have under U.S. and international law. The extra-territorial nature of these detentions has effectively stripped the federal courts of jurisdiction over the detainees held overseas. Although the U.S. Supreme Court in *Rasul v. Bush* ordered habeas corpus federal jurisdiction in Guantánamo Bay,¹⁵¹ the delay involved in the case-by-case effort to assert detainees' rights in court is a slow process. In addition, courts' deference under political question doctrine to the Executive's war powers effectively afford very limited judicial protection to "war on terror" detainees.¹⁵² These factors have allowed the Administration to detain such "enemy combatants," some of them citizens, indefinitely, without trial in order to interrogate them, probably under torture, and try them in military tribunals.

Professor Romero also challenges states' denial of access to secondary education to the undocumented on policy grounds. He argues that such policies perpetuate a permanent second class of undocumented children,

¹⁴⁸ *Id.* at 75.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 78-90.

¹⁵¹ 124 S. Ct. 534 (2004).

¹⁵² See, e.g., *Khalid v. Bush*, 2005 WL 100924 (2005) (dismissing challenge by "enemy combatant" in Guantánamo Bay because no viable legal theory rendered his custody unlawful); see also Aldana-Pindell, *supra* note 122.

while the United States reaps substantial economic benefit from the labor of the undocumented parent.¹⁵³ He questions the rationality of the several stated policies offered for denying in-state tuition to the undocumented. For example, myriad exceptions, like exceptions made for graduate students of state universities, allow many newcomers to benefit from in-state residency tuition where they, unlike the undocumented, lack the duration of past residence or the future intent to remain in the state.¹⁵⁴ Similarly, he reveals the fallacy of the assumption that the cost of providing the undocumented with access to higher education would surpass its economic benefits. Each year, between 50,000 and 65,000 students who have been in the United States for more than five years graduate from American high schools. However, they have limited prospects for continuing with their education or legally obtaining a job.¹⁵⁵ Professor Romero contrasts the cost of subsidizing the college education of the very small number of successful undocumented students who would benefit from in-state tuition to the substantial tax and labor contributions that they could make to the U.S. economy.¹⁵⁶ He dismisses the deterrence argument that denying benefits to the undocumented discourages their immigration. As applied to higher education, most of the beneficiaries were brought to the United States as children by their parents, so that most undocumented students most likely had no say in their parents' decision to cross the border illegally.¹⁵⁷ While Professor Romero notes that a few states have enacted laws to provide in-state tuition to the undocumented,¹⁵⁸ he urges Congress to nationalize the benefits of such proposals. Specifically, he champions the earned legalization of young adults who will contribute to U.S. society as professionals,¹⁵⁹ and enact the pending federal DREAM Act (Development, Relief, and Education Relief for Alien Minors Act),¹⁶⁰ which would allow certain long-term immigrant students with good moral character to apply for legal residence. He also urges the repeal of the federal provision that interferes with a state's right to determine

¹⁵³ ROMERO, *supra* note 132, at 92-93.

¹⁵⁴ *Id.* at 95.

¹⁵⁵ Jeffrey S. Passel, *Further Demographic Information Relating to the DREAM Act*, The Urban Institute, available at http://www.nilc.org/immlawpolicy/DREAM/DREAM_Demographics.pdf.

¹⁵⁶ ROMERO, *supra* note 132, at 96.

¹⁵⁷ *Id.* at 96-97.

¹⁵⁸ *Id.* at 97-99.

¹⁵⁹ *Id.* at 99, 102-05.

¹⁶⁰ The Development, Relief, and Education for Alien Minors (DREAM) Act, S. 1291 108th Congress and H.R. 1684 (2003).

which students qualify as "residents" for purposes of in-state tuition and access to higher education.¹⁶¹

As Professor Romero recognizes, *Plyler v. Doe*, the case in which the Court recognized that children who came to the United States illegally have a constitutional right to attend elementary school,¹⁶² could be the basis on which to argue that the Equal Protection Clause constitutionally mandates access to secondary education for undocumented children. Professor Michael Olivas has made this argument.¹⁶³ *Plyler v. Doe* makes the key arguments that Professor Romero advocates in the policy context. Denying university education to undocumented children, when examined closely, does not deter illegal immigration or make sense from a cost-benefit analysis. In *Plyler*, the Court reasoned that denying undocumented children a primary and secondary education will leave a "lasting impact of its deprivation on the life of the child."¹⁶⁴ Professor Romero makes parallel policy arguments. Under current laws, the United States is producing "highly educated farmworkers," rather than producing contributing and loyal members of U.S. society.

As explored in Part II below, efforts by states to deny driver's licenses to the undocumented raise similar issues to the denial of access to higher education. The consequences of driver's license denials to noncitizens are dire; it is not simply a denial of a "privilege" to drive.¹⁶⁵ In many cities, the inability to drive is not a mere inconvenience. In urban areas, public transportation is not always available twenty-four hours a day, and in rural areas, where many new immigrants are now settling,¹⁶⁶ public transportation is not available. Hence, driving a motor vehicle rises to the level of a necessity, because driving is required to undertake the routine activities associated with living — from working, buying groceries, to seeking medical care, and even worshipping.¹⁶⁷ The widespread use of licenses to conduct regular business transactions also means that the denial of driver's licenses deprives such persons of an

¹⁶¹ *Id.*

¹⁶² *Plyler v. Doe*, 457 U.S. 202 (1982).

¹⁶³ See Michael A. Olivas, *Plyler v. Doe, Toll v. Moreno, and Postsecondary Admissions: Undocumented Adults and "Enduring Disability,"* 15 J.L. & EDUC. 19 (1986); Michael A. Olivas, *Storytelling Out of School: Undocumented College Residency, Race, and Reaction*, 22 HASTINGS CONST. L.Q. 1019 (1995).

¹⁶⁴ *Plyler*, 457 U.S. at 221.

¹⁶⁵ See Kevin R. Johnson, *Driver's Licenses and Undocumented Immigrants: The Future of Civil Rights Law?*, 5 NEV. L.J. 213, 220-31 (2004).

¹⁶⁶ For a description of the hardships that immigrants, both citizen and noncitizen, must endure in order to obtain a driver's license see Lazos Vargas, *supra* note 122, at 798-811.

¹⁶⁷ *Id.* at 803-04.

identity, and, as a result, arguably exacerbates their underclass status, a fundamental concern in *Plyler v. Doe* that the millions of undocumented who were already within the U.S. borders not become a "caste" or a permanent underclass.¹⁶⁸ Rhetorically, the driver's license debate has been framed solely as a problem of keeping dangerous foreigners outside our borders. The absence of discussion of the human cost of this policy arguably has been enabled, as Professor Romero notes, because "foreignness" is again being used as a proxy for disloyalty.¹⁶⁹

Finally, emphasizing again the theme of "otherness" in the construction of immigration policy, Professor Romero draws a clear link between civil rights and immigration policy by examining the denial of spousal benefits to gay noncitizen partners. In the area of gay rights and marriage, he is cautiously optimistic. Professor Romero traces an evolving trend of greater acceptance by the American public and globally toward government sanction of same-gender unions.¹⁷⁰ He links this trend to immigration's family unification policy to argue that it is time to re-think the deportation of foreign same-sex partners.¹⁷¹ He finds hope in the U.S. Supreme Court's 1999 dicta of the "possibility of a rare case in which the alleged basis of discrimination is so outrageous"¹⁷² that the targeting of homosexuals for removal will not be tolerated, even under the plenary power doctrine.¹⁷³ Romero's insightful contribution is to re-examine the definition of outrageous persecution under immigration law by looking at recent cases on gay and immigrant rights, like *Lawrence v. Texas*,¹⁷⁴ to argue that gay men and lesbians might suffer "outrageous" discrimination.

In his final chapter, Professor Romero discusses the role of state legislatures in addressing the inequities created by immigration policy. His focus is not on the federal government, which has been traditionally viewed as possessing exclusive authority over immigration. Instead, he challenges the expansion of immigration law into areas such as "alienage law." Policies that only indirectly affect the admission or removal of foreign nationals into the United States, he argues, should not be

¹⁶⁸ *Plyler*, 457 U.S. at 202.

¹⁶⁹ ROMERO, *supra* note 132, at 25.

¹⁷⁰ *Id.* at 109-10.

¹⁷¹ *Id.* at 109.

¹⁷² *Reno v. American-Arab Anti-Discrimination Committee (AADC)*, 525 U.S. 471 (1999) (denying equal protection challenge to selective targeting of Arabs and Muslims for removal).

¹⁷³ ROMERO, *supra* note 132, at 113-14.

¹⁷⁴ 123 S. Ct. 2472 (2003).

regarded as part of immigration law, which, under the plenary power doctrine, would only receive minimal judicial review. He argues that immigration law's reach should be limited to border control, naturalization, and regulation of who can issue entry visas. Issues, such as access to education, are alienage law issues, and state legislatures should be permitted to freely legislate in these areas. State legislatures may opt to treat "aliens" in their midst more like neighbors than "others" who stand outside the polity. The evidence on state DREAM Acts, which provide undocumented children access to public education by making them eligible for in-state tuition, is that states see the reasonableness of not punitively treating state residents who participate in the growth and life of local communities. Texas, Kansas, and Utah have enacted state DREAM Acts, largely because state activists have succeeded in arguing that it is equitable and in the best interest of the state that education policy not discriminate on the basis of alienage.¹⁷⁵

Professor Romero's book documents how the interplay between the construction of the "other" — the noncitizen — and the framing of their fundamental rights as privileges has expanded beyond immigration control into areas affecting noncitizens' day to day interactions with the government. In other words, he reveals how "aliens" are increasingly left without a legal remedy for governmental abuses, while the denial of basic public services essential to their self-realization as persons entrenches their status as second-class citizens. His solution is to defy this paradigm by reconstructing the personhood of the noncitizen and restoring the status of his rights, not as a member of society, but as a person who resides within the border.

II. ALIENAGE, NATIONAL SECURITY, AND DRIVER'S LICENSES

The insights provided by Professor Hing, Dean Johnson, and Professor Romero allow us to take a deeper look at the driver's license controversy. This issue took center stage in the 109th Congress. Our key concern, shared by the three authors and others,¹⁷⁶ is that when the Real ID Act's driver's license provisions are implemented in May 2008, they will become the vehicle for legislating the outsidersness of noncitizens within our borders.

¹⁷⁵ Michael A. Olivas, *The War on Terrorism Touches the Ivory Tower — Colleges and Universities After September 11: An Introduction*, 30 J.C. & U.L. 233 (2004).

¹⁷⁶ See Johnson, *supra* note 165; Lazos Vargas, *supra* note 122, at 798-811; Maria Pabon Lopez, *More Than a License to Drive: State Restrictions on the Use of Driver's Licenses by Noncitizens*, 29 S. ILL. U. L.J. 91 (2004).

According to the 9/11 Commission, all but one of the hijackers acquired some form of U.S. identification.¹⁷⁷ A report tracking down the driver's license 9/11 myth concluded that the hijackers held thirteen driver's licenses among them (two of which were duplicate).¹⁷⁸ As recently as December 2004, Representative Sensenbrenner alleged that the terrorists possessed, not thirteen, but *sixty-three* driver's licenses!¹⁷⁹ Regardless, the ability of the terrorists to easily obtain a form of identification so widely accepted in the United States¹⁸⁰ unnerved many and served to incite far-reaching reforms.

In the months following the attacks, forty-five states considered legislation pertaining to driver's license security. During the 2001-02 congressional session, twenty-one states successfully enacted driver's license security legislation.¹⁸¹ All of these reforms restricted noncitizens' access to driver's licenses.¹⁸²

At the federal level, the 9/11 Report recommended that the federal government set standards for the issuance of driver's licenses, noting that "at many entry points to vulnerable facilities, including gates for boarding aircraft, sources of identification are the last opportunity to ensure that people are who they say they are and to check whether they are terrorists."¹⁸³ Fraudulent driver's licenses are "no longer just a problem of theft."¹⁸⁴ Accordingly, coordination of state driver's license requirements was needed to ensure grater national security.¹⁸⁵

The Real ID Act of 2005, however, goes further than the 9/11 Report's recommended coordination of state requirements. Instead, the Congressional proposal arguably federalizes driver's license

¹⁷⁷ See 9/11 REPORT, *supra* note 5, at 390 (detailing daily lives of hijackers upon their arrival to United States).

¹⁷⁸ Lisa Friedman, *Tracking Down a 9/11 License Myth*, PASADENA STAR NEWS, Dec. 20, 2004.

¹⁷⁹ *Id.*

¹⁸⁰ Currently, about 188 million drivers are licensed in the United States, and states issue an additional 73 million licenses and identification cards each year. United States General Accounting Office, Report to Congressional Requesters, *Social Security Numbers: Improved SSN Verification and Exchange of States' Driver Records Would Enhance Identity Verification* GAO-03-920 5 (Sept. 2003).

¹⁸¹ Testimony of Betty Karnette before the Subcommittee on Highways and Transit of the Committee on Transportation and Infrastructure of the House of Representatives 7 (Sept. 5, 2002); Lopez, *supra* note 122.

¹⁸² Pabon Lopez, *supra* note 176; National Immigration Law Center, *Driver's Licenses for Immigrants: Broad Diversity Characterizes States' Requirements*, IMMIGRANTS' RIGHTS UPDATE 7 (Nov. 22, 2002).

¹⁸³ 9/11 REPORT, *supra* note 5, at 390.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

requirements. First, all state-issued driver's licenses must comply with the Act's proof of identity standards as well as verifiability of that proof in order for the federal government to accept such state issued identification.¹⁸⁶ Second, the Act requires that driver's licenses that will be accepted by federal agencies must have been issued by states that require social security numbers and legal residency.¹⁸⁷

Professor Hing, Dean Johnson, and Professor Romero's work helps us see that while the driver's license reforms were framed as a national security issue, anti-immigrant animus drove the harshness of the proposals and rendered invisible the human impact on noncitizens. Proponents argued that it was vital to national security that "illegals" as well as *legal* noncitizens be denied driver's licenses. Thomas E. Petri, Chairman of the Subcommittee on Highways and Transit, emphasized that "the September 11th terrorists possessed *valid State driver's licenses*, and . . . their licenses were *one way that they were able to hide undetected* in our society while they planned their attack."¹⁸⁸

Professor Hing, Dean Johnson, and Professor Romero would urge us to consider that the current reforms are not rational. Rather, they are driven by emotion. As Dean Johnson notes, "alien" rhetoric rationalizes policies that would be unacceptable if they were to be applied to citizens.¹⁸⁹ The rhetoric of "aliens" and "illegals" being a threat to national security has rendered civil liberties concerns insignificant. "Illegals," by definition, break the law; as such, they are criminals. Why should the state legitimize them by providing them with access to the most basic of all needs, an identity?

The federal driver's license provisions of the Real ID Act were hurriedly enacted in the 109th Congress, yet they clearly merited more careful consideration. When effective in May 2008, the new driver's license requirements will have far-reaching impacts on federal-state relations, civil liberties, and the rights of noncitizens, as detailed below.

¹⁸⁶ See *supra* notes 30-32 and accompanying text (discussing driver's license provisions of Real ID Act).

¹⁸⁷ *Id.*

¹⁸⁸ Opening Statement of Thomas E. Petri, Chairman of the Subcommittee on Highways and Transit of the Committee on Transportation and Infrastructure of the House of Representatives, Driver's License Security Issues 1 (Sept. 5, 2002) (emphasis added).

¹⁸⁹ JOHNSON, *supra* note 35, at 4-12.

A. *Federalizing a Traditional Area of State Concern*

The Real ID Act of 2005 arguably *federalizes* an area that has been “traditionally an area of state concern.”¹⁹⁰ Driver’s licenses do not only serve as a form of identification; more practically, they are a *licensing* requirement designed to certify who can drive safely on local roads. When people drive down the street to pick up their children from school or buy milk, they want to be assured that the other drivers sharing the road know the basic rules of driving and will not endanger lives. Thus, licensing drivers is essentially a *local* concern.

Under the Rehnquist Court’s interpretation of the Commerce Clause¹⁹¹ and the Tenth Amendment,¹⁹² the Court has cut down on Congress’ ability to legislate local issues, leaving states free to make their own determinations of what are essentially local matters. More specifically, under *Printz v. United States*,¹⁹³ the federal government cannot “command” local law enforcement to take on a task that is essentially federal in character. The same principles would prohibit the federal government from requiring state or local executive officers to take on the responsibilities and costs of administering federal law in policing “aliens” within the borders.¹⁹⁴

It is troubling that what has always been a local issue, the administration of driver’s licenses, has seamlessly morphed into a federal immigration law issue, with naught a complaint from the quarters who can usually be relied upon to oppose the Rehnquist Court’s “new federalism.” States are being coerced to manage the equivalent of

¹⁹⁰ See *United States v. Morrison*, 529 U.S. 598 (2000) (holding Violence Against Women Act exceeded Congress’ Commerce Clause authority because legislating crimes, such as rape, was “traditional state concern”); *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (holding that Gun Free Zone Safety Act was unconstitutional because, among other things, criminal law is area of “traditional state concern”).

¹⁹¹ See, e.g., *Morrison*, 529 U.S. at 598; *Lopez*, 514 U.S. at 558-59 (redefining interstate commerce more narrowly than prior case law to encompass only regulation of: (1) channels of interstate commerce; (2) instrumentalities of interstate commerce; and (3) activities that have “substantial relation” to interstate commerce, and warning that Congress should not regulate non-economic matters that were area of traditional state concern).

¹⁹² The Tenth Amendment provides that “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X; see *New York v. United States*, 505 U.S. 144, 156 (1992) (holding Congress had exceeded its regulatory power when it *coerced* states to take title of nuclear waste) (emphasis added).

¹⁹³ 521 U.S. 898, 910 (1997).

¹⁹⁴ See Lazos Vargas, *supra* note 122; Huyen Pham, *Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965 (2003).

a national identity system, without any commitment to funding having been made at this time and without states having the leeway to incorporate their own state policies. Professor Hing, Dean Johnson, and Professor Romero would note that the constitutional consequences of the Real ID Act have been re-framed as an immigration law issue in which the federal government always has had the upper hand. As the boundaries of immigration and national security expand, so, too, does federal power increasingly encroach on the sovereignty of the states.

B. National Identity System and Its Threat to Civil Liberties

The 9/11 Report, in its section on the protection of civil liberties, recommended that the "burden of proof for retaining particular governmental power should be on the executive, to explain (a) that the power actually materially enhances security and (b) that there is adequate supervision of the executive's use of powers to ensure protection of civil liberties."¹⁹⁵ Before 9/11, federal and state governments sought to regulate the requirements for the issuance of driver's licenses, primarily to curtail fraud. For example, in 1996, as part of the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA") and the Illegal Immigrant Reform and Immigrant Responsibility Act ("IIRIRA"), Congress passed legislation that would have required that all state driver's licenses display a Social Security number.¹⁹⁶ At the time, Congress' purpose was to reduce the number of forged identity documents allegedly employed by the undocumented to gain federal benefits.¹⁹⁷ These requirements were suspended in 1999, however, due to complaints about their impact on privacy and federalism.¹⁹⁸

A key civil rights concern is the erosion of privacy. The government combines information from various databases to create mosaics and dossiers. Government agencies also resort to commercial databases and combine them with their own data to create individual profiles, which now appear to have been compiled in the Department of Homeland Security's no-fly lists. Both the Computer Assisted Passenger

¹⁹⁵ 9/11 REPORT, *supra* note 5, at 394-95.

¹⁹⁶ Richard Sobel, *The Demeaning of Identity and Personhood in National Identification Systems*, 15 HARV. J.L. & TECH. 319, 321 (2002).

¹⁹⁷ *Id.* at 327.

¹⁹⁸ *Id.* at 360; Alexander L. Mounts, Note, *A Safer Nation? How Driver's License Restrictions Hurt Immigrants and Noncitizens, not Terrorists*, 37 IND. L. REV. 247, 249-40, 254-55 (2003).

Prescreening System ("CAPPS II")¹⁹⁹ and the Registered Traveler Programs²⁰⁰ intend to share information about travelers suspected of terrorism with law enforcement and intelligence agencies.²⁰¹ The federalization of driver's licenses will make the compilation of these databases easier and more far-reaching. They will likely represent a significant invasion of privacy, particularly if these government databases are not restricted to their original purpose, airport security. In this regard, past experience is sobering. For example, despite promises by President Roosevelt and members of Congress that the Social Security card would be kept confidential, Congress has mandated that they be used for identification purposes more than forty times,²⁰² including use by state agencies.²⁰³ In addition, federal agencies have routinely resorted to loopholes in the law to escape the requirements of the Privacy Act in order to obtain personal information.²⁰⁴ There are also concerns that the existence of government databases will increase the likelihood of privacy

¹⁹⁹ CAPPS II is set to replace the existing CAPPS I program and will require airlines to turn over all passenger records and other personal information to the TSA for processing by a commercial database in order to validate the identity of the passenger. CAPPS I is a national database on passenger travel habits and history which profiles passengers checking bags for additional screening. See Jamie L. Rhee, *Rational and Constitutional Approaches to Airline Safety in the Face of Terrorist Threats*, 49 DEPAUL L. REV. 847, 859 (2000).

²⁰⁰ Under the Registered Traveler Program, the TSA would collect biographical information and a biometric from airline passengers who volunteer to submit to a security threat assessment, which would include checking their identities (i.e., as found in driver's licenses) against terrorist-related and criminal databases for outstanding warrants. After TSA review, the name of any passenger posing or suspected of posing a security threat would be forwarded to the appropriate law enforcement agency for action or further investigation. Those not identified as a terrorist threat would receive a smart card that would identify the individual as a "trusted traveler." Presently, the smart card is being publicized as a convenience, although it is less clear whether having such a card may become a prerequisite to boarding a plane in the future. For a detailed description of the program, see Transportation Security Administration, Registered Traveler Pilot: Privacy Impact Assessment (June 24, 2004), available at http://www.tsa.gov/interweb/assetlibrary/PIA_RT_OMB.pdf; see also Eric P. Hass, *Back to the Future? The Use of Biometrics, Its Impact on Airport Security, and How this Technology Should be Governed*, 69 J. AIR L. & COM. 459, 481 (2004).

²⁰¹ In fact, the Fourth Amendment implications of this type of data collection is likely to depend on whether the Court applies an administrative search doctrine analysis to CAPPS II and the Registered Traveler Program, which may not result if the information revealed from these database searches is routinely used in criminal prosecutions. It may also depend on the Court's application of the consent doctrine, at least to the Registered Traveler Program, which is voluntary. See, e.g., John D. Woodward, *Biometric Scanning, Law & Policy: Identifying the Concerns-Drafting the Biometric Blueprint*, 59 U. PITT. L. REV. 97 (1997).

²⁰² Sobel, *supra* note 196, at 350.

²⁰³ *Id.* at 359.

²⁰⁴ *Id.*

infringements, because the PATRIOT Act gives law enforcement easy access to private information.²⁰⁵ In addition, any database system is prone to mistakes and errors.²⁰⁶ As the recent comedic fracas with Cat Stevens shows, the compiled profiles may not necessarily be accurate; they are only approximations of individual profiles.²⁰⁷ The consequences of errors could be devastating, as post-PATRIOT Act terrorist suspects are entitled to fewer procedural due process safeguards.²⁰⁸

Moreover, especially given the elusive nature of the domestic war on terror, the state cannot be trusted to strictly construe the information it collects for legitimate national security purposes.²⁰⁹ In a time when knowledge is power, centralized information yields concentrated power that could easily lead to abuses. Scholars point to historical abuses of social control and discrimination made possible through identification systems and documents.²¹⁰

It is an open question whether standardizing how state and local governments administer driver's licenses, requiring that states maintain databases with extensive personal information, and requiring encryption of personal identification data on driver's licenses will accurately screen out potential terrorists. The answer will greatly depend on whether the proposed reforms are effective in preventing document fraud. Biometric encryptions, required by the Real ID Act of 2005, will not necessarily decrease document fraud, because biometrics can be counterfeited, inappropriately accessed, and reproduced if centralized in a national database.²¹¹ It is also doubtful that biometric encryption would prevent "identity theft." According to the Electronic Privacy Information Center ("EPIC"), centralizing authority over personal identity both increases the

²⁰⁵ *Id.* at 361.

²⁰⁶ Drawing personal data from private databanks for government purposes, for example, raises significant concerns. Data dossiers will provide detailed descriptions and even create profiles of individuals, even though such collections are not fully accurate or secure from unauthorized uses, inappropriately authorized users, or hackers. Woodward, *supra* note 201, at 364.

²⁰⁷ *Detained Cat Stevens Heading Home*, CNN News, Sept. 22, 2004, available at <http://www.cnn.com/2004/US/09/22/plane.diverted.stevens> (last visited Apr. 25, 2005); Stephen Schwartz, *Is Cat Stevens a Terrorist? Why Yusuf Islam was turned away from the United States*, WEEKLY STANDARD, Sept. 22, 2004, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/004/667bkgnr.asp> (last visited Apr. 25, 2005).

²⁰⁸ See, e.g., Muneer L. Ahmad, *A Rage Shared By Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259 (2004); David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. REV. 1 (2003).

²⁰⁹ Aldana, *supra* note 122, at 1027-34.

²¹⁰ Woodward, *supra* note 201, at 343-49.

²¹¹ Sobel, *supra* note 196, at 364.

risk of ID theft and the scope of harm when it occurs.²¹² Instead, privacy and security are best protected by “documents serving limited purposes and by relying on multiple and decentralized systems of identification in cases where there is a genuine need to establish identity.”²¹³

Importantly, the Real ID Act of 2005 places administrative responsibility at the state level. To work, the system must avoid the “garbage in, garbage out” syndrome. Local DMV employees must be able to competently establish proof-positive identity to issue driver’s licenses.²¹⁴ DMVs must necessarily continue to rely on “breeder” documents such as birth certificates, other states’ driver licenses, and Social Security cards to establish identity. Yet, at this time, these documents are easily forged and are the main source of identity fraud.²¹⁵

The driver’s license debate has been misleadingly conceived as affecting only noncitizens, and, thus, has succeeded in shifting the focus away from important civil liberties and practical concerns. It is clear that the driver’s license proposals are far-reaching and require thorough scrutiny and weighing of the costs and benefits. Unfortunately, legislators and politicians have capitalized on an anti-immigrant fervor to mute any significant debate on the civil rights implications of the driver’s license debate. Whatever national security gains the government claims to gain from the driver’s license reforms, these must be balanced against the civil rights of citizens and noncitizens, including privacy. Yet, even as to the rights of citizens, especially when fear is high, achieving a reasonable balance between security and privacy is exceedingly challenging when the tendency is to overvalue the positive effects on security of certain actions and to undervalue their detrimental consequences on privacy on the basis of empirically suspect assumptions.²¹⁶ When the debate is perceived as a choice between security and the rights of noncitizens, any attempt to achieve a balance is virtually non-existent.

²¹² Electronic Privacy Information Center, *Watching the Watchers: Policy Report # 1, Your Papers, Please: From the State Drivers License to a National Identification System*, 2 (Feb. 2002) [hereinafter EPIC Report].

²¹³ *Id.* at 4.

²¹⁴ *Id.* at 6. Similar criticism has been noted in relationship to IRCA’s requirement that private employers verify the worker’s eligibility to work lawfully in the United States. See Sobel, *supra* note 196, at 336. Real Id Act, *supra* note 28, §202(c)(3).

²¹⁵ EPIC Report, *supra* note 212, at 7. In May 2002, for example, a SSA official stated that noncitizens wrongly received about 100,000 SSN in 2000. House Research Organization of the Texas House of Representatives, *Focus Report: Standardizing Driver’s Licenses: Security, Privacy, and Other Issues*, May 31, 2002.

²¹⁶ Shaun B. Spencer, *Security v. Privacy*, 79 DENV. U.L. REV. 519 (2002).

C. The Rights of Noncitizens

When implemented in 2008, the Real ID Act will require "proof of the person's social security account number or verification that the person is not eligible for a social security account number" for the issuance of a license.²¹⁷ In 2003, all states, with the exception of six, required that applicants for driver's licenses produce a Social Security number.²¹⁸ The Social Security number ("SSN") requirement would, de facto, bar the undocumented and most foreign nationals from procuring driver's licenses. The undocumented have never been eligible for SSNs. Since March 2002, the Social Security Administration began to deny SSNs to lawful non-immigrants (most of whom are ineligible to work), who wanted one solely for the purpose of procuring a driver's license.²¹⁹

The consequences of denying driver's licenses to noncitizens are dire. Driving is a necessity, rather than a privilege in the United States. First, as mentioned, in many cities the inability to drive is more than a mere inconvenience; it may be necessary to buy groceries, earn a living, obtain medical care, or go to a place of worship. As such, the denial of a driver's license exacerbates the underclass status of thousands of foreign nationals living in the United States.²²⁰

Second, the denial of a driver's license amounts to a denial of identity. The original purpose of driver's licenses may have been (and perhaps should remain) to certify the safety of drivers on the road. In the absence of a national identification system in the United States, however, driver's licenses have become *de facto* the primary form of identification. U.S. residents must use them to conduct most essential activities of daily living, whether with private or public entities. Driver's licenses are widely accepted and sometimes required to obtain services from federal and state agencies, open a bank account, request credit, and rent an apartment or buy a home. As such, the real effect of driver's license denials is to "delegitimize" foreign nationals by rendering them invisible, which, ultimately, robs them of their personhood.

The challenge to framing the consequences of driver's license denials as an infringement on the fundamental rights of citizens, however, is that

²¹⁷ Real ID Act, *supra* note 28, at §202 (c)(1)(C).

²¹⁸ The states that do not currently require a social security number for a driver's license are Kansas, Maryland, Minnesota, Mississippi, Oregon and Vermont. *See Driver's Licenses for Immigrants, supra* note 182. Thirty-seven states only required a social security number from persons who had been assigned or were eligible for one, while five other states had other exceptions to the requirement.

²¹⁹ Mounts, *supra* note 198, at 254.

²²⁰ *See supra* notes 165-69 and accompanying text.

noncitizens who have overstayed their visas or crossed the border illegally do not have a right to be present in the United States. Admittedly, such noncitizens should also not have access to privileges, like jobs or services. Once within our borders, however, undocumented noncitizens do not cease to be persons by virtue of their status as "illegals." Noncitizens should have access to those things which are essential to the expression of their humanity and provide a means to their subsistence. Further, *Plyler v. Doe*'s concept of the due process guarantee would reason that the government should not withdraw benefits that would isolate noncitizens and exacerbate their underclass status.²²¹ For these reasons, driver's licenses should be understood as a right to an identity, and not a privilege, such as working.

Granting undocumented noncitizens driver's licenses would not confer upon them the right to stay in the United States. Instead, such a policy recognizes the reality of the large number of undocumented persons who work and live in our communities. There are an estimated 9.3 million unauthorized persons residing in the United States who either entered clandestinely or overstayed their visas.²²² Each year, hundreds of thousands more join them.²²³

Every state has a duty to administer the state bureaucracy that can maintain and subsequently protect each individual's legal or official identity. It is essentially this right that every comprehensive international human rights instrument on civil and political rights conceptualizes. These instruments codify the right of every person to be recognized as a person before the law, including the International Covenant on Civil and Political Rights ("ICCPR"), which was ratified by the United States.²²⁴ Similarly, the specialized International Convention

²²¹ See *Plyler v. Doe*, 457 U.S. 202 (1982) (holding constitutional protections applied to right of children of undocumented workers to go to school). In *Plyler v. Doe*, the United States Supreme Court held that the undocumented merited constitutional protections because some "will remain in this county indefinitely and become lawful residents or citizens. . . . States (should not) . . . promot(e) the creation and perpetuation of a subclass." *Id.* at 230.

²²² Jeffrey S. Passel et al., The Urban Institute, *Undocumented Immigrants: Facts and Figures*, Jan. 12, 2004, available at www.urban.org/UploadedPDF/1000587_undoc-immigrants_facts.pdf (last visited Apr. 25, 2005).

²²³ Ruth Ellen Wasem, Congressional Research Service Report for Congress, *Unauthorized Aliens in the United States Estimates Since 1986*, Sept. 15, 2004, at 1.

²²⁴ See Article 6 of the *Universal Declaration on Human Rights*, G.A. Res. 217A(III), U.N. Doc. A/1810 at 71 (1948) ("Everyone has the right to recognition everywhere as person before the law."); Article 16 of the *International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976 ("Everyone shall have the right to recognition everywhere as a person before the law"); Article 3 of the *American Convention on Human*

on the Protection of the Rights of all Migrant Workers and Members of their Families, adopted by the United Nations Commission on Human Rights, prescribes that "[e]very migrant worker and every member of his or her family shall have the right to recognition everywhere as a person before the law."²²⁵

A 2002 article on Government Surnames and Legal Identities makes the insightful historical observation that "there is no state-making without state-naming."²²⁶ Indeed, by necessity, governments have required names to create the police state, for the development of the private property regime (i.e., sometimes in the context of war and colonization), and, in the modern state, to give rise to the concept of democratic citizenship — the idea of rights and duties *vis a vis* subjects and states.²²⁷ Today, the granting of legal identities is intrinsic to any project of governance requiring intervention in local affairs.²²⁸ Admittedly, when abused, state identification systems can enhance the capacity of the state to carry out the most gruesome projects of surveillance and repression.²²⁹ They can also, however, serve as the basis of beneficial state interventions that save lives, promote human welfare, and confer human rights, without which contemporary life is scarcely imaginable.²³⁰

Governments can insist that a person within its jurisdiction make use of her legal identity in all official acts (e.g., birth, marriage, inheritance, legal contracts, wills, taxes, and court filings). Correspondingly, the greater the sphere occupied by the state and state-like institutions, the

Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978 ("Every person has the right to recognition as a person before the law."); Article 3 of the *African (Banjul) Charter on Human and People's Rights*, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986. The *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 222, entered into force Sept. 3, 1953 as amended by Protocol 11 entered into force November 1, 1998, does not contain a parallel provision. However, the European Court on Human Rights has interpreted Article 8 of the same, which protects a right to privacy, to encompass a right to a name. Case C-168/91, *Konstantinidis v. Stadt Altensteig-Standesamt*, 1993 E.C.R. I-1191 (1992).

²²⁵ Article 24 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, U.N. GAOR, 45th Sess., Supp. No. 49A, at 266, U.N. Doc. A/45/49 (1990). The United States has not yet ratified this treaty.

²²⁶ James C. Scott et al., *Government Surnames and Legal Identities in National Identification Systems*, in NATIONAL IDENTIFICATION SYSTEMS: ESSAYS IN OPPOSITION 11, 12 (Carl Watner ed., 2003).

²²⁷ *Id.* at 20-26.

²²⁸ *Id.* at 39.

²²⁹ *Id.* at 43.

²³⁰ *Id.*

more frequent the instances in which an official name becomes the only appropriate identity.²³¹ The hegemony of state institutions such as schools, Social Security, hospitals, military service, property registration, tax paying, and transportation, ensure the dominance of state identification practices.²³² Moreover, the incorporation of the private sector into state functions — as, for example, employer verification of legal status under the Immigration Reform and Control Act (“IRCA”) — implies that the state is willing to use its coercive power to enforce state identification practices.²³³ Finally, although not compelled, the private sector, including banks, lessors, vendors, and employers, can insist on official proof of official identity — increasingly driver’s licenses — to conduct business. Therefore, when so much of every day life depends on state-issued identification systems, individuals who are denied access to such lose the fundamental right to personal identity.

CONCLUSION

Professor Hing, Dean Johnson, and Professor Romero are respected immigration law scholars who have developed powerful insights on how race and nativism have driven immigration law to results that do not concord with America’s traditions of basic individual civil liberties. Each has shown that in times of anxiety over national security, there is reason to be ever more vigilant of “reforms” that purport to enhance our safety but, in practice, further subordinate noncitizens and domestic minorities who do not appear sufficiently American. The Real ID Act of 2005 is one such example.

Post-9/11 racial animosity is on the rise. It is in this atmosphere that the Real ID Act of 2005 became law and further legal reforms of immigration law are being considered. These three great scholars would have the country be watchful of impulses that scapegoat outsiders. They also have perceptively described the current trend to expand immigration law within the borders, to legislate the outsidersness of noncitizens as “aliens,” to create an underclass within our civic community who do not deserve humane treatment. This is a sentiment that cooler heads must resist. The historical and analytical lessons

²³¹ *Id.* at 41.

²³² *Id.*

²³³ Under IRCA, which made it illegal for the first time to hire the undocumented, employers must verify that a new employee is authorized to work in the United States by completing an I-9 form, which requires the employee to present a series of state-issued documents establishing work eligibility. HING, *supra* note 41, at 179-80.

offered by them provide the tools to do what is needed in these times of peril. Hopefully, members of Congress will heed these lessons and soon enact a comprehensive immigration reform that rectifies the burdens that the Real ID Act's restricted access to driver's licenses places on noncitizens.
