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## The Fifteenth Annual Dyson Distinguished Lecture

### The Forgotten “Repatriation” of Persons of Mexican Ancestry and Lessons for the “War on Terror”

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My remarks, titled “The Forgotten ‘Repatriation’ of Persons of Mexican Ancestry and Lessons for the ‘War on Terror,’” begin with a forgotten historical incident that spanned a decade and end with the time in which we live. I refer to the “forgotten ‘repatriation’” because many

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1. Associate Dean for Academic Affairs, School of Law, University of California at Davis, Mabie-Apallas Professor of Public Interest Law and Chicana/o Studies; A.B., University of California, Berkeley; J.D., Harvard University. These are edited remarks to the Fifteenth Annual Dyson Distinguished Lecture at Pace Law School on March 10, 2005. The Dyson Foundation deserves kudos for establishing this series in honor of Charles H. Dyson. Thanks to Dean Stephen J. Friedman and Associate Dean and Professor Vanessa Merton for inviting me to give this distinguished lecture, and to Sonia Zawadski who graciously and expertly arranged my trip to New York. Visiting old friends like Tony Varona and Jay Carlisle, a distinguished and dedicated alumni of U.C. Davis School of Law, and making new acquaintances, including Thomas McDonnell, David Dorfman, and Darren Rosenblum, made the trip especially enjoyable. Thanks also to the students of the Latina/o Law Students Association, especially Ruth Noemí Colón, for their warmth and hospitality, as well as for honoring me with the Adalante Award. Parts of this article are adapted from parts of Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295 (2002), Kevin R. Johnson, *September 11 and Mexican Immigrants: Collateral Damage Comes Home*, 52 DEPAUL L. REV. 849 (2003) [hereinafter Johnson, *September 11 and Mexican Immigrants*], and Kevin R. Johnson, *International Human Rights Class Actions: New Frontiers for Group Litigation*, 2004 MICH. ST. L. REV. 643 [hereinafter Johnson, *International Human Rights Class Actions*].

Americans have not heard of the forced removal of approximately one million persons—U.S. citizens as well as noncitizens—of Mexican ancestry from the United States during the Great Depression.<sup>2</sup> This is true despite the fact that the number of repatriates dwarfed by about ten-fold the number of persons of Japanese ancestry who were interned by the United States government during World War II.<sup>3</sup> Unfortunately, the lack of awareness of the repatriation is consistent with the general invisibility of Latina/o civil rights deprivations throughout much of U.S. history.<sup>4</sup>

The United States should acknowledge the repatriation campaign of the 1930s and its long and enduring impact on Mexican-Americans in this country.<sup>5</sup> In a time of severe national economic crisis, the deportation campaign sought to save jobs for true “Americans” and

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2. See FRANCISCO E. BALDERRAMA & RAYMOND RODRÍGUEZ, *DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930s* 21-22 (1995). For further analysis of the history of the repatriation, see CAMILLE GUERIN-GONZALES, *MEXICAN WORKERS AND THE AMERICAN DREAM: IMMIGRATION, REPATRIATION, AND CALIFORNIA FARM LABOR, 1900-1939* (1994); ABRAHAM HOFFMAN, *UNWANTED MEXICAN AMERICANS IN THE GREAT DEPRESSION: REPATRIATION PRESSURES, 1929-1939* (1974).

3. See *Korematsu v. United States*, 323 U.S. 214 (1944). See generally Symposium, *The Long Shadow of Korematsu*, 40 B.C. L. REV. 1, 19 B.C. THIRD WORLD L.J. 1 (1998) (offering a variety of perspectives on the legacy of the internment of persons of Japanese ancestry during World War II); Symposium, *Judgments Judged and Wrongs Remembered: Examining the Japanese American Civil Liberties Cases on Their Sixtieth Anniversary*, 68 LAW & CONTEMP. PROB. 1 (2005) (same). Of course, I do not mean to suggest that the Japanese internment, a true watershed in U.S. civil rights history, was not worthy of the serious attention that it has received.

4. See Juan F. Perea, *Los Olvidados: On the Making of Invisible People*, 70 N.Y.U. L. REV. 965 (1995). This invisibility, in no small part, results from the tendency to narrowly view civil rights concerns as relating to blacks and whites, as opposed to appreciating the richness of a multiracial United States. See Richard Delgado, *Rodrigo's Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary*, 75 TEX. L. REV. 1181 (1997); Juan F. Perea, *The Black/White Binary Paradigm of Race: The “Normal Science” of American Racial Thought*, 85 CAL. L. REV. 1213 (1997); see also Christopher David Ruiz Cameron, *How the García Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 CAL. L. REV. 1347, 1365-82 (1997) (analyzing how racial dualism adversely affects Latina/o attempts to vindicate language rights); Angela Onwuachi-Willig, *When Different Means the Same: Applying a Different Standard of Proof to White Plaintiffs Under the McDonnell Douglas Prima Facie Case Test*, 50 CASE W. RES. L. REV. 53, 57 n.25 (1999) (acknowledging that different minority groups experience racial discrimination in different ways). For efforts to move beyond the black-white paradigm in civil rights law scholarship, see generally TIMOTHY DAVIS ET AL., *A READER ON RACE, CIVIL RIGHTS, AND AMERICAN LAW: A MULTIRACIAL APPROACH* (2001), and JUAN F. PEREA ET AL., *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* (2000).

5. See *infra* text accompanying notes 8-52.

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reduce the welfare rolls by encouraging Mexicans to “voluntarily” leave the country. An economic threat had placed the nation’s future in jeopardy, caused severe economic distress for many U.S. citizens, and effectively compelled the government to act. A discrete and insular minority, the most available and vulnerable target, suffered from the government’s policy choice.

The tragedy of the Mexican repatriation is well worth remembering as the United States continues to wage a “war on terror” in response to the horrible loss of life on September 11, 2001. This “war” has targeted Arab and Muslim noncitizens suspected of no crime and subjected them to special immigration procedures, arrest, detention, and deportation from the United States.

In criticizing the government’s responses to the tragic events of September 11, the specter of the internment of the persons of Japanese ancestry during World War II has often been invoked.<sup>6</sup> The analogy is apt in important ways, with racial profiling based on statistical probabilities at the core of the governmental policies adopted in both incidents.<sup>7</sup> In my estimation, however, the repatriation of the 1930s also has modern relevance in evaluating the measures taken by the U.S. government in the name of national security after September 11. This paper draws out the historic and legal parallels between these two episodes in U.S. legal history and suggests that the nation should pay heed to the excesses of the past in considering its practices and policies in the “war on terror.”

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6. See, e.g., Tania Cruz, *Judicial Scrutiny of National Security: Executive Restrictions of Civil Liberties When “Fears and Prejudices Are Aroused,”* 2 SEATTLE J. SOC. JUST. 129 (2004); 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 (2002); Jerry Kang, *Thinking Through Internment: 12/7 and 9/11,* 27 AMERASIA J. 42 (2001); Eric L. Muller, *Inference or Impact? Racial Profiling and the Internment’s True Legacy,* 1 OHIO ST. J. CRIM. L. 103 (2003); Susan Kiyomi Serrano & Dale Minami, *Korematsu v. United States: A “Constant Caution” in a Time of Crisis,* 10 ASIAN L.J. 37 (2003); Huong Vu, *Us Against Them: The Path to National Security is Paved by Racism,* 50 DRAKE L. REV. 639 (2002). But see MICHELLE MALKIN, IN DEFENSE OF INTERNMENT: THE CASE FOR “RACIAL PROFILING” IN WORLD WAR II AND THE WAR ON TERROR (2004) (defending the reliance on race in the internment of the Japanese and in the “war on terror”).

7. See *infra* text accompanying notes 53-111.

I. The Mexican “Repatriation” During the Great Depression:  
A National Emergency and the Mass Deportation of a Discrete and  
Insular Minority<sup>8</sup>

The Mexican repatriation during the Great Depression, although standard fare in introductory Chicana/o Studies courses, is entirely absent from the national consciousness. Nor has it been analyzed in much detail in legal discourse. It is at most a footnote in most immigration histories and, for the most part, is ignored in immigration law scholarship. The repatriation, however, deserves sustained attention because of the impact it has had on Mexican-American civil rights in the United States, as well as its general lessons about the rights of minorities in times of national crisis.

Although “repatriation” is the term often used to refer to the campaign to remove hundreds of thousands of persons of Mexican ancestry from the United States in the 1930s, it is not entirely accurate. Federal, state, and local governments worked together to involuntarily remove many U.S. citizens of Mexican ancestry, many of whom were born in the United States. These citizens cannot be said to have been “repatriated” to their native land.

Approximately 60 percent of the persons of Mexican ancestry removed to Mexico in the 1930s were U.S. citizens, many of them children who were effectively deported to Mexico when their immigrant parents were sent there.<sup>9</sup> My colleague, Professor Cruz Reynoso, former Associate Justice of the California Supreme Court, was one of the so-called repatriates. A U.S. citizen by birth, a young Cruz could only ask his father “where is Mexico?” when informed that the Reynoso family was moving from southern California to south of the U.S./Mexico border.

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8. The reference to “discrete and insular minority,” of course, is borrowed from *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) in which the Supreme Court revolutionized Equal Protection analysis by proclaiming that “[w]hether prejudice against *discrete and insular minorities* may be a special condition, which tends to seriously curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.” (emphasis added). As Professor John Ely has recognized, noncitizens are a discrete and insular minority denied the ability to fully participate in the political process and are almost universally denied the right to vote. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 161-62 (1980). The persons of Mexican ancestry during the Great Depression and Arab and Muslim noncitizens today, unquestionably are discrete and insular minorities. See *infra* text accompanying notes 53-111.

9. See BALDERRAMA & RODRÍGUEZ, *supra* note 2, at 216.

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The forced “repatriation” of an estimated one million persons of Mexican ancestry from the United States included the removal of hundreds of thousands of people from California, Michigan, Colorado, Texas, Illinois, Ohio, and New York during the Great Depression. It is clear today that the conduct of federal, state, and local officials in the campaign violated the legal rights of the persons repatriated, as well as persons of Mexican ancestry stopped, interrogated, and detained but not removed from the country.<sup>10</sup> The repatriation campaign also terrorized and traumatized the greater Mexican-American community.<sup>11</sup>

A book by Francisco E. Balderrama & Raymond Rodríguez entitled *Decade of Betrayal: Mexican Repatriation in the 1930s* documents the historical events surrounding the repatriation and concisely summarizes the campaign:

[L]ocal agencies, saddled with mounting relief and unemployment problems, used a variety of methods to rid themselves of “Mexicans”: persuasion, coaxing, incentive, and unauthorized coercion. Special railroad trains were made available, with fare at least to the Mexican border prepaid; and people were often rounded up by local agencies to fill carloads of human cargo. In an atmosphere of pressing emergency, little if any time was spent on determining whether the methods infringed upon the rights of citizens.<sup>12</sup>

To assist in the round-up, police conducted raids of public places, including the church La Placita on Olvera Street in downtown Los Angeles, where persons of Mexican ancestry were known to frequent.<sup>13</sup> Olvera Street was not a tourist spot in the 1930s like it is today; then it was simply a meeting place for working class Mexicans near a church serving the Mexican immigrant and Mexican-American community. The people rounded up were often herded onto trains and buses or driven by social workers to the border. This was true for citizens by birth and those who had lawfully naturalized to become citizens.

Immigration and nationality law, which is well-known for its complexities, is certain on one thing—U.S. citizens cannot be deported

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10. See Johnson, *International Human Rights Class Actions*, *supra* note 1, at 664-68; *infra* text accompanying notes 12-52.

11. See *infra* text accompanying notes 21-30.

12. LEO GREBLER, *MEXICAN IMMIGRATION TO THE UNITED STATES: THE RECORD AND ITS IMPLICATIONS* 26 (1966) (Mexican-American Study Project).

13. Unfortunately, immigration raids in recent years are strikingly similar to those of the 1930s. See *infra* text accompanying notes 31-44.

from the country no matter what their conduct.<sup>14</sup> It is a bedrock principle of U.S. immigration law that U.S. citizens cannot be deported, removed, or banished from this country.<sup>15</sup>

Moreover, international law condemns the forced deportation, or exile, of a nation's citizens.<sup>16</sup> The Universal Declaration of Human Rights provides expressly that "[n]o one shall be subjected to arbitrary arrest, detention or exile."<sup>17</sup> The new law creating the international criminal court declares that it is a "crime against humanity" to engage in the "[d]eportation or forcible transfer of population" from a country.<sup>18</sup>

Today, the practice engaged in by state and local government, with the advice and support of the federal government, during the 1930s would be classified as a form of "ethnic cleansing," a phase that entered the international lexicon with the atrocities in the former Yugoslavia in the 1990s that have since resulted in international criminal prosecutions. This is not to suggest that a genocide of persons of Mexican ancestry occurred in the 1930s. Rather, it was only a forced removal of a racial minority from this country. Consequently, the Mexican community of the United States experienced human tragedy other than death.

Specifically, the mass deportation campaign of the 1930s destroyed lives. Families were torn apart. The Mexican-American and Mexican immigrant communities, as a whole, were terrified and the impacts were profound and enduring.

Consider a story of the impacts of the repatriation on one family. José Lopez, born in Detroit in 1926 and thus a U.S. citizen, was sent by train to Michoacan, Mexico in 1931. In 2003, Lopez testified about the repatriation of his family and their experiences in Mexico at a hearing before a committee of the California legislature.<sup>19</sup> This is what he said:

My entire family was forced to relocate from Michigan to Mexico. We traveled by train to the Border . . . . I was five years old when we were forced to relocate . . . . I . . . bec[a]me very sick with whooping cough, and

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14. See Johnson, *International Human Rights Class Actions*, *supra* note 1, at 662-63 n.98 (citing authorities); see also *infra* text accompanying notes 15-18, 28-30 (noting ways in which repatriation violated the law).

15. See *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

16. See Johnson, *International Human Rights Class Actions*, *supra* note 1, at 663 n.99 (citing authorities).

17. UNIVERSAL DECLARATION OF HUMAN RIGHTS, art. 9 (1948).

18. ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, art. 7, U.N. Doc. A/CONF.183/9 (1998), as corrected by the proces-verbaux of 10 Nov. 1998 and 12 July 1999.

19. See *infra* text accompanying notes 45-49.

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suffered very much, and it was difficult to breathe. In Mexico, . . . I was only able to attend school . . . for a few months, because my father needed me to work in the sugar cane fields to help earn money. . . . [M]y oldest two siblings were able to go to school for a short time, but were teased by the other children because they did not speak Spanish very well.

Living conditions in Mexico were horrible, we lived in utter poverty. My family ate only tortillas and beans for a long time. Sometimes only one meal a day. We had no milk. . . . For many years we shared a home with relatives, but we moved around very often, at least eight to ten times. . . .

While in Mexico, my mother passed away. Then my father passed away. Both were in their 40's when they died. My oldest brother also died after an accident in which he fell. My brothers and sisters were living alone when my father died and no one was taking care of us. . . . We returned to Detroit after being absent from the United States for 14 years. We were lucky to come back. . . . But there are others that were not so fortunate . . . .<sup>20</sup>

Remember that José Lopez was a U.S. citizen. But he suffered the fate of a noncitizen caught up in a fast-moving, extralegal deportation process. Any semblance of law, much less due process of law, was absent from his family's removal from the United States.

Another story illustrates the 1930s repatriation's long term effects on the Mexican-American community in the United States. California State Senator Martha Escutia was on the special committee of the California legislature that in 2003 heard testimony on the repatriation. In a public hearing, Senator Escutia emphasized the impact of the importance of the events on the Mexican-American community in East Los Angeles, where she grew up. My grandfather, she said, would never go to the corner grocery store without his passport. She would say "what do you need that for?" "Mija (a term of endearment that literally translated from Spanish means 'my daughter'), I am just an Indian from Chiapas and they will deport me if they stop me and I don't have my papers." Senator Escutia's grandfather, fearful of what was occurring in California with the passage of the anti-immigrant initiative known as

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20. Statement of José Lopez, Deported on Repatriation Trains Pursuant to a Coordinated Michigan and Federal Repatriation Project, California Senate Select Committee on Citizen Participation (July 15, 2003) (transcript on file with author). See *The Story of Los Repatriados*, <http://www.losrepatriados.org> (last visited Nov. 18, 2005), for information about the persons of Mexican ancestry repatriated from the Detroit, Michigan area in the 1930s.

Proposition 187,<sup>21</sup> later naturalized and became a citizen. But even as a citizen, he put his passport in his top pocket before leaving the house. As she told the next part of the story, Senator Escutia stood with tears in her eyes in front of the committee and a room full of spectators. “And when he died,” she concluded, “I buried him with his passport in his top pocket.” Senator Escutia then left the room, leaving it clear to all the powerful impact that the repatriation had on her and her family and, I suggest, the greater Mexican-American community that lived through the decade of betrayal.<sup>22</sup>

The repatriation negatively affected the views of Mexican-Americans of government in the United States. This distrust of government remains to this day, with many Latina/os sharing deep fear of law enforcement and immigration authorities. Just ask any immigration attorney or any Mexican immigrant about what they think of “La Migra.” Of course, it was not just the repatriation that helped create the negative perception. The long and notorious history of mistreatment of persons of Mexican ancestry has forged a deeply negative view of immigration authorities in the minds of many Latina/os.<sup>23</sup>

The repatriation campaign, by placing the status of all persons of Mexican ancestry in the United States into question, placed strong pressures on the Latina/o community to assimilate into the mainstream, adopt American values, and abandon their native language and cultural traditions.<sup>24</sup> Such pressures had devastating personal and group impacts.

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21. See Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629 (1995); Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509 (1995); Ruben J. Garcia, Comment, *Critical Race Theory and Proposition 187: The Racial Politics of Immigration*, 17 CHICANO-LATINO L. REV. 118 (1995); see also League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755 (1995) (enjoining most of the initiative from ever going into effect because the federal power over immigration regulation pre-empted any state efforts to regulate the field).

22. See Johnson, *International Human Rights Class Actions*, *supra* note 1, at 663-64.

23. See *infra* text accompanying notes 31-42. See generally ALFREDO MIRANDÉ, GRINGO JUSTICE (1987) (documenting history of abuse of Mexican immigrants by U.S. immigration enforcement officials).

24. For analysis of the assimilation pressures placed on persons of Mexican ancestry in the United States, as well as their impact, see Kevin R. Johnson, “*Melting Pot*” or “*Ring of Fire*”? : *Assimilation and the Mexican-American Experience*, 85 CAL. L. REV. 1259 (1997); see also George A. Martínez, *Latinos, Assimilation and the Law: A Philosophical Perspective*, 20 CHICANO-LATINO L. REV. 1 (1999) (analyzing philosophically the assimilationist demand placed on Latina/os in the United States); Sylvia R. Lazos Vargas, *Deconstructing Homo[geneous] Americanus: The White Ethnic*

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The repatriation contributed to efforts by many Mexican-Americans to adopt a white identity and assimilate into the mainstream at any cost.

Professor Rodolfo Acuña's book *Anything but Mexican: Chicanos in Contemporary Los Angeles*<sup>25</sup> analyzes efforts by Mexican-Americans in pre-1960s Los Angeles to deny Mexican ancestry, pass as "Spanish", and be anything but Mexican. In the Southern California of the 1940s and 1950s, Mexican-Americans embraced their Spanish heritage, ate at Spanish, not Mexican, restaurants, and attempted to adopt a white identity. Through such ploys, they tried to avoid the discrimination suffered by persons of Mexican ancestry in Los Angeles, and much of the Southwest.<sup>26</sup>

The repatriation also had less obvious long-term political impacts. With the removal of about one million persons of Mexican ancestry, the nation lost roughly one-third of its entire Mexican population. This delayed for decades the full emergence of the Latina/o community as a political, economic, and social force in the United States. Consequently, the repatriation

effectively stifled the socioeconomic development of Mexican colonias in the United States. Seemingly, the community had to await the coming of age of a new generation unencumbered by the stifling experience of a decade of betrayal before recovering from the ordeal. That may help to explain why the "Chicano movement" did not occur until twenty-five years after the end of the ominous decade. . . .<sup>27</sup>

Legally, the repatriation program violated the rights of persons of Mexican ancestry in almost too many ways to mention. Violations of the U.S. Constitution, as well as international law,<sup>28</sup> are clear-cut. The Due Process, Equal Protection, and Fourth Amendment rights of persons stopped, detained, and deported from the United States were sacrificed.<sup>29</sup> Through efforts to enforce the immigration laws, state and local

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*Immigrant and Its Exclusionary Effect*, 71 TUL. L. REV. 1493 (1998) (discussing efforts by U.S. society to require assimilation of people of color and comparing them to white ethnic immigrants of past generations).

25. RODOLFO F. ACUÑA, *ANYTHING BUT MEXICAN: CHICANOS IN CONTEMPORARY LOS ANGELES* (1995).

26. See generally RODOLFO F. ACUÑA, *OCCUPIED AMERICA: A HISTORY OF CHICANOS* (1988) (analyzing history of discrimination against Chicana/os in the United States).

27. BALDERRAMA & RODRÍGUEZ, *supra* note 2, at 222.

28. See *supra* text accompanying notes 16-18.

29. See Johnson, *International Human Rights Class Actions*, *supra* note 1, at 664-67.

governments also infringed on the federal immigration power.<sup>30</sup>

The deportation campaign of the 1930s is part of a long history of the enforcement of the immigration laws in violation of the civil rights of persons of Mexican ancestry in the United States. Consider just a few examples. The mass deportation of Mexican immigrants and Mexican-American citizens in 1954 in a massive operation known as Operation Wetback<sup>31</sup> resembled the repatriation in important respects, with hundreds of thousands of Mexican immigrants and U.S. citizens of Mexican descent rounded up and deported. The militarization of the border that began in the 1990s has resulted in the deaths of hundreds, if not thousands, of people, almost all of Mexican ancestry;<sup>32</sup> it, however, has not decreased the undocumented immigrant population in the United States,<sup>33</sup> which today, by most estimates, is close to ten million in number.<sup>34</sup>

The mass round-up of persons of Mexican ancestry in Chandler, a suburb of Phoenix, Arizona, in July 1997, demonstrates that incidents like the repatriation are not simply ancient history.<sup>35</sup> In the Chandler

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30. See *id.* at 668.

31. See JUAN RAMON GARCIA, OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954 (1980).

32. See TIMOTHY J. DUNN, THE MILITARIZATION OF THE U.S.-MEXICAN BORDER 1978-1992: LOW INTENSITY CONFLICT COMES HOME (1996); Wayne A. Cornelius, *Death at the Border: Efficacy and Unintended Consequences of US Immigration Control Policy, 1993-2000*, 27 POPULATION & DEV. REV. 661 (2001); Karl Eschbach et al., *Death at the Border*, 33 INT'L MIGRATION REV. 430 (1999); Bill Ong Hing, *The Dark Side of Operation Gatekeeper*, 7 U.C. DAVIS J. INT'L L. & POL'Y 121 (2001); Guillermo Alonso Meneses, *Human Rights and Undocumented Migration in the Mexican-U.S. Border*, 51 UCLA L. REV. 267 (2003); Jorge A. Vargas, *U.S. Border Patrol Abuses, Undocumented Mexican Workers, and International Human Rights*, 2 SAN DIEGO INT'L L.J. 1 (2001). For personal accounts of the deaths of Mexican migrants attempting to cross the border, see KEN ELLINGWOOD, *HARD LINE: LIFE AND DEATH ON THE U.S.-MEXICAN BORDER* (2004). See also StopGateKeeper, The California Rural Legal Assistance Foundation's Border Project, <http://www.stopgatekeeper.org> (last visited on Oct. 12, 2005) (providing an up-to-date death toll, resulting from one border operation, Operation Gatekeeper, which was implemented at the U.S./Mexico border near San Diego, California).

33. See BELINDA I. REYES ET AL., HOLDING THE LINE? THE EFFECT OF THE RECENT BORDER BUILD-UP ON UNAUTHORIZED IMMIGRATION, viii, xii (Public Policy Institute of California 2002) ("There is *no* evidence that the border enforcement build-up . . . has substantially reduced unauthorized border crossings" and that "[d]espite large increases in spending and Border Patrol resources over the last nine years, the number of unauthorized immigrants increased to levels higher than those [before 1986].") (emphasis added).

34. See Kevin R. Johnson, *Open Borders?*, 51 UCLA L. REV. 193, 250 (2003).

35. See Mary Romero & Marwah Serag, *Violation of Latino Civil Rights Resulting from INS and Local Police's Use of Race, Culture and Class Profiling: The Case of the*

Roundup, local police, with the assistance of the U.S. Border Patrol, stopped, questioned, and detained persons of Mexican ancestry—including many U.S. citizens—in an effort to rid the area of undocumented immigrants; police staked out public places believed to be frequented by undocumented immigrants and questioned people who spoke Spanish, and who fit a crude profile of the undocumented immigrant.<sup>36</sup> The incident reveals how persons of Mexican ancestry continue to be stereotyped as foreigners in the United States who are presumptively subject to the immigration laws.<sup>37</sup> A political outcry followed, which led to various investigations and the promise by local officials not to engage in similar operations in the future.<sup>38</sup>

Less-publicized events like that seen in Chandler occur with grim regularity. For example, a controversy in the Los Angeles area erupted in 2004 with several immigration raids of public places in Mexican immigrant and Mexican-American communities, which struck fear in the hearts of many persons of Mexican ancestry.<sup>39</sup> Latina/os regularly claim that immigration and other law enforcement officers engage in unlawful racial discrimination.<sup>40</sup> Indeed, racial profiling has been sanctioned to a

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*Chandler Roundup in Arizona*, 52 CLEV. ST. L. REV. 75 (2005).

36. See, e.g., *Nicacio v. INS*, 797 F.2d 700, 704 (9th Cir. 1985) (reviewing case in which Immigration & Naturalization Service (INS) allegedly engaged in a pattern and practice of exclusively race-based stops and INS officials testified that an officer might properly rely, along with Hispanic appearance, on a “hungry look” and the fact that a person was “dirty, unkempt,” or “wears work clothing” in making an immigration stop); *United States v. Magana*, 797 F.2d 777, 781 (9th Cir. 1986) (stating that Border Patrol officers observed that automobile passengers “appeared to be farm workers, one of whom wore a hat which the officers emphasized was indicative of someone who came from the Mexican state of Jalisco”); *United States v. Garcia*, 732 F.2d 1221, 1228 (5th Cir. 1984) (Tate, J., dissenting) (contending “that, stripped to its essence, the stop was based upon no more than the border patrolmen’s [sic] speculation that poor and dirty Hispanic appearing persons might possibly be Mexican aliens who had crossed the border illegally”); *United States v. Hernandez-Lopez*, 538 F.2d 284, 285-86 (9th Cir.), cert. denied, 429 U.S. 981 (1976) (stating that Border Patrol officers observed that person stopped “did not look like he had lived in the United States, but rather looked like a ‘Mexican cowboy’”).

37. See Kevin R. Johnson, *Some Thoughts on the Future of Latino Legal Scholarship*, 2 HARV. LATINO L. REV. 101, 118-29 (1997).

38. See Romero & Serag, *supra* note 35, at 95 (“Without the action of community activists, the Chandler Roundup would have gone unnoticed . . . and would have been buried alongside the unrecorded history of raiding Mexican-American communities.”).

39. See Sandra Murillo, *Latinos, Border Patrol Have Calm Meeting Over Arrests*, L.A. TIMES (Inland Empire ed.), June 18, 2004, at B3.

40. See *supra* text accompanying notes 31-38 (discussing charges of racial profiling in immigration enforcement); see, e.g., *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 308 F.3d 523 (6th Cir. 2002); *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th

certain degree in immigration enforcement. In *United States v. Brignoni-Ponce*,<sup>41</sup> the Supreme Court found that the immigration stop in question violated the Fourth Amendment because Border Patrol officers relied exclusively on “the apparent Mexican ancestry” of the occupants of an automobile; the Court, however, further stated that “[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor” in an immigration stop.<sup>42</sup>

The lengthy history of anti-Mexican immigration enforcement policies and practices suggest the need for the United States to reconsider its border policies in order to reduce racial discrimination and human rights abuses, as well as to ensure that the immigration laws better comport with the social, political, and economic pressures for migration from Mexico.<sup>43</sup> That, however, does not appear to be in the offing.<sup>44</sup>

In any event, despite the wealth of historical research on the Great Depression, decades passed before any significant attention was paid to the 1930s repatriation. Only in the last few years has Latina/o political power grown<sup>45</sup> to a point where political leaders have had the support to fully investigate this sad episode in U.S. history. In 2003, the California Senate Select Committee on Citizen Participation held hearings on the repatriation.<sup>46</sup> On the same day of the hearings, a class action was filed seeking damages for those repatriated to Mexico.<sup>47</sup> The hope was to bring the repatriation to public attention and to begin building a record to

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Cir. 1999) (en banc); *Ramirez v. Webb*, 787 F.2d 592 (6th Cir. 1986); *Ill. Migrant Council v. Pilliod*, 540 F.2d 1062 (7th Cir. 1976), *modified*, 548 F.2d 715 (7th Cir. 1977) (en banc); *Murillo v. Musegades*, 809 F. Supp. 487 (W.D. Tex. 1992).

41. 422 U.S. 873, 885-86 (1975).

42. *Id.* at 886-87 (emphasis added); see Alfredo Mirandé, *Is There a “Mexican Exception” to the Fourth Amendment?*, 55 FLA. L. REV. 365 (2003) (suggesting that the U.S. Supreme Court’s Fourth Amendment decisions have afforded persons of Mexican ancestry little protection). *But see* *United States v. Montero-Camargo*, 208 F.3d 1122, 1135 (9th Cir. 2000) (en banc) (holding that “Mexican appearance” was not indicative of undocumented immigrant status and could not be employed by the Border Patrol in immigration stops). For criticism of racial profiling in immigration enforcement, see Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675 (2000).

43. See Johnson, *supra* note 34, at 215-33, 252-58.

44. *But see id.* (offering arguments for more liberal immigration admissions to the United States).

45. See Kevin R. Johnson, *Latina/os and the Political Process: The Need for Critical Inquiry*, 81 OR. L. REV. 917, 920-22 (2002).

46. See Hearings, California Senate Select Committee on Citizen Participation, July 15, 2003.

47. *Castaneda v. California*, Case No. BC 299062 (Cal. Super. Ct. L.A. County filed July 15, 2003).

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make a case for reparations for the Mexican “repatriates.” The successful movement for Japanese reparations for the internment during World War II was the model pursued by activists seeking redress for the repatriation.<sup>48</sup> The California legislature passed a bill that would have created a commission to historically document the events of the repatriation; Governor Schwarzenegger, however, vetoed the law.<sup>49</sup>

As with the reparations movement for the Japanese internment during World War II<sup>50</sup> as well as the African-American quest for reparations for the institution of slavery,<sup>51</sup> the movement for recognition of the Mexican repatriation is part of a larger struggle by Latina/os for civil rights and racial justice.<sup>52</sup> The litigation faces many formidable legal barriers, including statute of limitations and governmental immunity defenses. However, even if ultimately unsuccessful, it may assist in the campaign to raise the public consciousness about the horrible treatment of persons of Mexican ancestry in the 1930s.

In sum, the repatriation campaign of the Great Depression represented a governmental response to a national crisis in which the political pressure on government to act was great. It targeted, and injured in violation of the law, a vulnerable, discrete and insular minority.

## II. The “War on Terror”: A National Emergency and the Mass Deportation of a Discrete and Insular Minority

Today, the United States is in the midst of a declared “war on terror,” and there is no end in sight to the various national security

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48. See generally ERIC K. YAMAMOTO ET AL., *RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT* (2001) (collecting materials relevant to the internment and the securing of reparations).

49. Legislative Update 9-24-04, <http://www.schwarzenegger.com/news.asp?id=1736> (last visited Sept. 13, 2005). Later, Governor Schwarzenegger signed a resolution providing an “apology” for the repatriation. See Cal. Sen. Bill No. 670, 2005-06 Legis. Sess. (approved by Governor on Oct. 7, 2005) (codified at CAL. GOV’T CODE §§ 8720-23).

50. See *supra* text accompanying note 3.

51. See Charles J. Ogletree, Jr., *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 HARV. C.R.-C.L. L. REV. 279 (2003); Charles J. Ogletree, Jr., *The Current Reparations Debate*, 36 U.C. DAVIS L. REV. 1051 (2003); see, e.g., *Cato v. United States*, 70 F.3d 1103 (9th Cir. 1995).

52. See Kevin R. Johnson, *The Continuing Latino Quest for Full Membership and Equal Citizenship: Legal Progress, Social Setbacks, and Political Promise*, in *THE COLUMBIA HISTORY OF LATINOS IN THE UNITED STATES SINCE 1960*, at 391 (David Gutiérrez ed., 2004).

measures put in place since the events of September 11. The national security concerns after September 11 provoked an incredible response from the federal government, followed by an almost equally explosive barrage of criticism from the academy<sup>53</sup> and human rights groups.<sup>54</sup>

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53. See, e.g., Raquel Aldana-Pindell, *The 9/11 "National Security" Cases: Three Principles Guiding Judges' Decision-Making*, 81 OR. L. REV. 985 (2002); Sameer Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185 (2002); Steve W. Bender, *Sight, Sound, and Stereotype: The War on Terrorism and Its Consequences for Latina/os*, 81 OR. L. REV. 1153 (2002); David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002); Berta E. Hernández, *Glocalizing Terror*, 81 OR. L. REV. 941 (2002); Linda E. Fisher, *Guilt by Expressive Association: Political Profiling, Surveillance and the Privacy of Groups*, 46 ARIZ. L. REV. 621 (2004); Joo, *supra* note 6; Seth F. Kreimer, *Watching the Watchers: Surveillance, Transparency, and Political Freedom in the War on Terror*, 7 U. PA. J. CONST. L. 133 (2004); Stephen H. Legomsky, *The Ethnic and Religious Profiling of Noncitizens: National Security and International Human Rights*, 25 B.C. THIRD WORLD L.J. 161 (2005); Jules Lobel, *The War on Terrorism and Civil Liberties*, 63 U. PITT. L. REV. 767 (2002); Teresa Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 86-95 (2005); Peggy Nagae, *Justice and Equity for Whom? A Personal Journey for Local Perspective on Community Justice and Struggles for Dignity*, 81 OR. L. REV. 1133 (2002); Victor C. Romero, *Proxies for Loyalty in Constitutional Immigration Law: Citizenship and Race After September 11*, 52 DEPAUL L. REV. 871 (2003); 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. 941 (2002); Natsu Taylor Saito, *Will Force Trump Legality After September 11? American Jurisprudence Confronts the Rule of Law*, 17 GEO. IMMIGR. L.J. 1 (2002); 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 (2003); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002); Eric K. Yamamoto, Susan K. Serrano, & Michelle Natividad Rodriguez, *American Racial Justice on Trial—Again: African American Reparations, Human Rights, and the War on Terror*, 101 MICH. L. REV. 1269 (2003); see also Appendix I, *The Aftermath of September 11: A Chronology*, 79 INTERPRETER RELEASES 1359 (2002) (providing a chronology of legal responses of the Bush administration to events of September 11, 2001 in the immediate months that followed). *But see* MICHELLE MALKIN, *INVASION: HOW AMERICA STILL WELCOMES TERRORISTS, CRIMINALS, AND OTHER FOREIGN MENACES TO OUR SHORES* (2002) (defending efforts made in the "war on terror" and contending that the United States should pursue additional policies); Jan Ting, *Immigration Law Reform After 9/11: What Has Been and What Still Needs to be Done?*, 17 TEMP. INT'L & COMP. L.J. 503 (2003) (to same effect).

54. See, e.g., MUZAFFAR A. CHRISHTI ET AL., *AMERICA'S CHALLENGE: DOMESTIC SECURITY, CIVIL LIBERTIES, AND NATIONAL UNITY AFTER SEPTEMBER 11* (Migration Policy Institute 2003); STEPHEN WESSLER, *THE FRACTURED AMERICAN DREAM: THE DESTRUCTIVE IMPACT OF U.S. ANTI-TERRORISM POLICY ON MUSLIM, LATINO AND OTHER IMMIGRANTS AND REFUGEES TWO YEARS AFTER SEPTEMBER 11, 2001*, A REPORT BY THE CENTER FOR THE PREVENTION OF HATE VIOLENCE (2003); HUMAN RIGHTS WATCH, *PRESUMPTION OF GUILT: HUMAN RIGHTS ABUSES OF POST-SEPTEMBER 11 DETAINEES* (2002), available at <http://www.hrw.org/reports/2002/us911/USA08082.pdf> (last visited Oct. 12, 2005); LAWYERS COMMITTEE FOR HUMAN RIGHTS, *A YEAR OF LOSS: REEXAMINING CIVIL LIBERTIES SINCE SEPTEMBER 11* (2002), available at

Many of the policy measures focused on immigration and immigrants. This characteristic of the “war on terror” was in no small part because (1) the hijackers of the airplanes, used as weapons of mass destruction on September 11, were noncitizens; (2) the federal government was subject to extraordinary pressures to act aggressively and decisively; and (3) the law affords government broad latitude in dealing with immigrants, especially in the name of national security.<sup>55</sup>

At a most basic legal level, the federal government can do to noncitizens what it could never do to U.S. citizens. For example, the government required the special registration of noncitizens from nations that harbor terrorists,<sup>56</sup> a practice similar to ones that the courts have upheld in the past.<sup>57</sup> Most of us cannot imagine special registration of U.S. citizens from “Blue” states, with even the mere mention of a national identification card for U.S. citizens provoking a firestorm of controversy.

The federal government’s response to September 11 demonstrates the close relationship between immigration law and civil rights in the United States.<sup>58</sup> Historically, noncitizens have been the most vulnerable to civil rights deprivations because the law permits, if not encourages, extreme governmental conduct with minimal protection for the rights of noncitizens.<sup>59</sup> Immigration history is filled with episodes that are considered today to constitute unfair treatment of certain groups of immigrants.

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humanrightsfirst.org/pubs/descriptions/loss\_report.pdf (last visited Oct. 12, 2005).

55. See Akram & Johnson, *supra* note 1, at 295-301.

56. See *infra* text accompanying notes 82-83.

57. See *Narenji v. Civiletti*, 617 F.2d 745 (D.C. Cir. 1979) (upholding, in time of national security concerns due to the holding of hostages in Iran, requirement that Iranian noncitizens report to immigration authorities), *cert. denied*, 446 U.S. 957 (1980); see also *Ghaelian v. INS*, 717 F.2d 950, 953 (6th Cir. 1983) (holding that the court lacked jurisdiction to review an Equal Protection challenge to a regulation directing Immigration & Naturalization Service to review the immigration status of Iranian nationals in the United States); *Dastmalchi v. INS*, 660 F.2d 880, 892 (3d Cir. 1981); *Nademi v. INS*, 679 F.2d 811 (10th Cir. 1982) (upholding regulation allowing Iranian citizens only 15 days before voluntarily departing the country); *Malek-Marzban v. INS*, 653 F.2d 113 (4th Cir. 1981) (same).

58. See generally KEVIN R. JOHNSON, *THE “HUDDLED MASSES” MYTH: IMMIGRATION AND CIVIL RIGHTS* (2004) (analyzing the law’s encouragement of harsh action directed at noncitizens throughout United States history).

59. See Karen Engle, *Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)*, 75 U. COLO. L. REV. 59 (2004); Karen C. Tumlin, Comment, *Suspect First: How Terrorism Policy is Reshaping Immigration Policy*, 92 CAL. L. REV. 1173 (2004).

Many of the government's security measures adopted in response to the events of September 11, 2001 are analyzed in a thoughtful article by Professor Thomas McDonnell, which, among other things, contends that the various actions taken in the "war on terror" constitute poor law enforcement policy.<sup>60</sup> Muslims and Arabs have been subject to crude forms of racial and national origin profiling.<sup>61</sup> This profiling started before September 11,<sup>62</sup> but escalated dramatically after that day. Supporters and critics alike saw the federal government as "pushing the envelope" in restricting civil liberties in the name of national security.

Like the repatriation, the incursions on civil rights in the name of fighting terrorism may have long term adverse impacts on the civil rights of U.S. *citizens* as well as immigrants in the United States. The measures generated great fear in the Arab and Muslim community, among both U.S. citizens and noncitizens. Hate crimes directed at Arabs and Muslims occurred at alarming rates, as passions ran high in the days immediately following September 11.<sup>63</sup>

Moreover, the security measures generated fear in—and directly affected—all immigrant communities and many minority communities. Today, immigration law disproportionately affects Latina/os, the largest immigrant population in the United States. Consequently, the laws and policies put into place in the name of fighting terrorism have disproportionately affected Latina/o immigrants.<sup>64</sup>

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60. See Thomas M. McDonnell, *Targeting the Foreign Born by Race and Nationality: Counter-Productive in the "War on Terrorism"?*, 16 PACE INT'L L. REV. 19 (2004) [hereinafter McDonnell, *Targeting the Foreign Born by Race and Nationality*]; see also Thomas M. McDonnell, *The Death Penalty—An Obstacle to the "War on Terrorism"?*, 37 VAND. J. TRANSNAT'L L. 353 (2004) (analyzing complications resulting from the fact that the United States government may seek the death penalty against accused terrorists).

61. See Mariano-Florentino Cuellar, *Choosing Anti-Terror Targets by National Origin and Race*, 6 HARV. LATINO L. REV. 9 (2003); Deborah A. Ramirez et al., *Defining Racial Profiling in a Post-September 11 World*, 40 AM. CRIM. L. REV. 1195 (2003); see also *infra* text accompanying notes 74-83 (offering examples of policies pursued that focused on select national origin groups, mostly from the Arab world). See generally CIVIL RIGHTS IN PERIL: THE TARGETING OF ARABS AND MUSLIMS (Elaine C. Hagopian ed., 2004) (compiling essays analyzing civil rights deprivations suffered by Arabs and Muslims in the name of the "war on terrorism").

62. See Akram & Johnson, *supra* note 1, at 301-27.

63. See Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259 (2004); Bill Ong Hing, *Vigilante Racism: The De-Americanization of Immigrant America*, 7 MICH. J. RACE & L. 441 (2002).

64. See Johnson, *September 11 and Mexican Immigrants*, *supra* note 1.

As mentioned previously,<sup>65</sup> the law provides considerable leeway to the political branches of the federal government in dealing with immigration and immigrants. The Supreme Court has upheld racial, national origin, political, and other forms of discrimination in the immigration laws.<sup>66</sup> This great legal latitude helped result in the extreme policies that were followed in the “war on terror,” with the federal government utilizing the leeway in the law as a window of opportunity for aggressive anti-terrorism policies. In a number of instances, courts intervened to halt some of the excesses of the federal government’s zeal in fighting terrorism.<sup>67</sup>

The federal government’s ferocious response to the events of September 11 included Congress’s swift passage of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act,<sup>68</sup> known popularly as the USA PATRIOT Act. This controversial law, among many things, included appropriations for increased border enforcement, even though there was *no* evidence that the terrorists evaded inspection at the national borders. This is the latest chapter in a military buildup along the U.S./Mexico border that has caused thousands of deaths since the early 1990s.<sup>69</sup>

The USA PATRIOT Act further provides that a spouse or child of a “terrorist” generally will not be admitted into the United States.<sup>70</sup> A noncitizen also may not be admitted if they are “associated with a terrorist organization,” broad and vague language apparently based on the principle of guilt by association, a discredited law enforcement technique popular during the dark days of the McCarthy era.<sup>71</sup> Fears

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65. *See supra* text accompanying note 55.

66. *See generally* JOHNSON, *supra* note 58 (offering many examples).

67. *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Padilla v. Hanft*, 389 F.Supp.2d 678 (D.S.C.), *rev’d*, 423 F.3d 386 (4th Cir. 2005).

68. USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

69. *See supra* text accompanying note 32.

70. *See* USA PATRIOT Act § 411.

71. *Id.*; *see Cole, supra* note 53, at 966-69 (analyzing various provisions of USA PATRIOT Act organized around the principle of “guilt by association”). Even before passage of the USA PATRIOT Act, critics claimed that the definition of “terrorist activity,” as amended in 1996, amounted to guilt by association. *See* Joseph Furst, Note, *Guilt By Association and the AEDPA’s Fund Raising Ban*, 16 N.Y.L. SCH. J. HUM. RTS. 475 (1999); Andy Pearson, Note, *The Anti-Terrorism and Effective Death Penalty Act of 1996: A Return to Guilt By Association*, 24 WM. MITCHELL L. REV. 1185 (1998); *see also* Linda S. Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1131 (1994) (noting broad definition of “terrorist activity” in immigration law before 1996); Gerald L. Neuman, *Terrorism, Selective Deportation and the First Amendment after Reno v. AADC*, 14 GEO. IMMIGR. L.J. 313, 322-27 (2000)

have been expressed that the expanded definition of “terrorist activity” in the USA PATRIOT Act will adversely affect bona fide asylum-seekers fleeing persecution in their native lands.<sup>72</sup>

The Executive Branch took even more aggressive action than Congress in the “war on terror.” Early on, President Bush issued an order allowing alleged noncitizen terrorists to be tried in military courts in which the accused are guaranteed few rights.<sup>73</sup> He later labeled noncitizens and a few citizens as “enemy combatants” to justify their indefinite detention and deny them any rights under the law.<sup>74</sup>

Within weeks of September 11, the U.S. government arrested and detained more than 1,200 Muslim and Arab immigrants.<sup>75</sup> This dragnet failed to produce *any* direct links to the terrorist acts; some of the detainees were charged with minor crimes and another 500 remained in custody on minor immigration-related matters. Arabs and Muslims were held for weeks without charges and without being provided information about why federal authorities continued to hold them. A pair of chilling reports prepared by agencies of the federal government carefully documented the mistreatment and abuse of Arab and Muslim detainees.<sup>76</sup> The mass detention had a ready apparatus in place for implementation because the use of detention as an immigration control policy had escalated since Congress enacted immigration reform legislation in

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(same); Susan Dente Ross, *In the Shadow of Terror: The Illusive First Amendment Rights of Aliens*, 6 COMM. L. & POL’Y 75 (2001) (same); Nadine Strossen, *Criticisms of Federal Counter-Terrorism Laws*, 20 HARV. J.L. & PUB. POL’Y 531 (1997) (same); Michael J. Whidden, *Unequal Justice: Arabs in America and United States Antiterrorism Legislation*, 69 FORDHAM L. REV. 2825, 2871-74 (2001) (same).

72. See Regina Germain, *Rushing to Judgment: The Unintended Consequences of the USA PATRIOT Act for Bona Fide Refugees*, 16 GEO. IMMIGR. L.J. 505 (2002).

73. See Akram & Johnson, *supra* note 1, at 328; Juliet Stumpf, *Citizens of an Enemy Land: Enemy Combatants, Aliens, and the Constitutional Rights of the Pseudo-Citizen*, 38 U.C. DAVIS L. REV. 79 (2004). The Supreme Court will review the lawfulness of the military courts. See *Hamdan v. Rumsfeld*, 126 S. Ct. 622 (2005).

74. See Diane M. Amann, *Guantánamo*, 42 COLUM. J. TRANSNAT’L L. 263 (2004); Laura A. Dickinson, *Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law*, 75 S. CAL. L. REV. 1407 (2002); Carl Tobias, *Detentions, Military Commissions, Terrorism, and Domestic Case Precedent*, 76 S. CAL. L. REV. 1371 (2003).

75. See Akram & Johnson, *supra* note 1, at 331-34.

76. See U.S. DEP’T OF JUSTICE, SUPPLEMENTAL REPORT ON SEPTEMBER 11 DETAINEES’ ALLEGATIONS OF ABUSE AT THE METROPOLITAN DETENTION CENTER IN BROOKLYN, NEW YORK (2003); U.S. OFFICE OF THE INSPECTOR GENERAL, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS (2003).

1996.<sup>77</sup>

The Justice Department later sought to conduct “voluntary” interviews of about 5,000 people—almost all of them Arab and Muslim men between the ages of 18 and 34 years old who had entered the country with certain categories of nonimmigrant visas.<sup>78</sup> There was *no* evidence that any of the 5,000 had been involved in terrorist activity. It is simply implausible to believe that any young male Arab and Muslim noncitizen would consider a call from the Federal Bureau of Investigation, in the days and months immediately following the events of September 11, 2001, as an invitation for a truly “voluntary” interview.<sup>79</sup>

The dragnet directed at Arabs and Muslims is contrary to fundamental notions of equality and the individualized suspicion ordinarily required for a stop under the Fourth Amendment of the U.S. Constitution. The law generally requires individualized suspicion before a person can be targeted for law enforcement activity.<sup>80</sup> The government’s targeting of a discrete and insular minority after September 11 is reminiscent of the roundup of persons of Mexican ancestry in the 1930s.<sup>81</sup>

The profiling continued in a series of policies adopted by the federal government, all of which focused on Arab and Muslim noncitizens. A special registration program required noncitizens of certain designated nations classified as harboring terrorists to register as such.<sup>82</sup> Operation Absconder focused deportation efforts on nationals of countries that harbor “terrorists,” which sounds like selective enforcement of the law

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77. See Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1946-47 (2000); Margaret H. Taylor, *Dangerous by Decree: Detention Without Bond in Immigration Proceedings*, 50 LOY. L. REV. 149 (2004). See generally MARK DOW, *AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS* (2004) (documenting use of detention by U.S. immigration authorities).

78. See Akram & Johnson, *supra* note 1, at 336-38.

79. See Tracey Maclin, “Voluntary” Interviews and Airport Searches of Middle Eastern Men: *The Fourth Amendment in a Time of Terror*, 73 MISS. L.J. 471 (2003).

80. See *United States v. Sokolow*, 490 U.S. 1, 7 (1989); *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

81. See *supra* text accompanying notes 8-52.

82. See McDonnell, *Targeting the Foreign Born by Race and Nationality*, *supra* note 60, at 30-32; Mary M. Sevandal, Special Note, *Special Registration: Discrimination in the Name of National Security*, 8 J. GENDER RACE & JUST. 735 (2005); Tumlin, *supra* note 59, at 1187-90.

based on national origin.<sup>83</sup>

The array of policy measures directed at Arabs and Muslims spawned a climate of fear in the Arab and Muslim communities. Such fear understandably increased pressures on Arabs and Muslims to assimilate into the mainstream religiously, politically, and culturally.<sup>84</sup> Nor are the pressures limited to Arabs and Muslims. The Indian Sikh community, for example, was especially terrified; some Sikhs, in the days after September 11, attempted to distance themselves from the Muslim community by highlighting the differences between Sikhs and Muslims.<sup>85</sup> Such attempts did nothing to minimize previously existing tension between these groups.

Unfortunately, the dragnet was not the most extreme policy option considered in the wake of September 11. Using torture to extract information, or threatening to send a suspect to a country that engaged in torture, was seriously debated publicly as a possibility.<sup>86</sup> The rationale is that torture is needed because we are dealing with inhuman religious fanatics<sup>87</sup> and a new—and different—war of indefinite duration requiring new and extreme measures.

Sadly, the United States apparently has engaged in acts of torture condoned by high levels of the federal government. This conduct, besides its violation of international law, may well hurt the nation—and U.S. troops—in the long run. The U.S. Inspector General and the Justice Department courageously documented abuses of Arab and Muslim detainees jailed by the United States.<sup>88</sup> The pictures from Abu Ghraib in Iraq tell it all, with military trials of U.S. officers bringing to light the

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83. See Kevin Lapp, *Pressing Public Necessity: The Unconstitutionality of the Absconder Apprehension Initiative*, 29 N.Y.U. REV. L. & SOC. CHANGE 573 (2005).

84. See Jennifer S. Livengood & Monika Stodolska, *The Effects of Discrimination and Constraints Negotiation on Leisure Behavior of American Muslims in the Post-September 11 America*, 36 J. LEISURE RES. 183 (2004).

85. See Guy Taylor, *Sikhs Celebrate New Year Amid Crisis of Identity*, WASH. TIMES, Apr. 7, 2002, at A10.

86. See, e.g., ALAN DERSHOWITZ, *WHY TERRORISM WORKS* 149-63 (2002); Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681 (2005); Johan D. Van der Vyver, *Torture as a Crime Under International Law*, 67 ALB. L. REV. 427 (2003); Sanford Levinson, "Precommitment" and "Postcommitment": *The Ban on Torture in the Wake of September 11*, 81 TEX. L. REV. 2013 (2003); Seth F. Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278 (2003); Marcy Strauss, *Torture*, 48 N.Y.L. SCH. L. REV. 201 (2003-2004).

87. See Akram & Johnson, *supra* note 1, at 302-16 (discussing the racialization of Arabs and Muslims).

88. See *supra* note 76 (citing reports).

pervasiveness of the mistreatment of Muslim prisoners.<sup>89</sup>

The federal government's reaction to the events of September 11, promises to have a deep and enduring impact on the civil rights of U.S. citizens. Law is a set of rules. Cases create precedent. Law develops from precedent. We have seen, for example, how the government has sought to strip two U.S. citizens, Yaser Hamdi and Jose Padilla, of their fundamental constitutional rights.<sup>90</sup> The U.S. government argued that Padilla, a U.S. citizen, had no rights because he had not entered the country when he was arrested at O'Hare airport in Chicago. This entry fiction was borrowed from immigration law in which a noncitizen has no constitutional rights unless he has officially entered the country at a port of entry or successfully evaded one.<sup>91</sup> The U.S. government attempted to expand the rule to citizens, an attempt that the court flatly rejected.<sup>92</sup>

Ordinary immigrants have been directly affected by the anti-terrorism policies. For example, the Aviation and Transportation Act, which placed airport security in the hands of the federal government, made U.S. citizenship a qualification for airport security jobs.<sup>93</sup> It has injured many lawful immigrants who had held these low-wage positions. Ironically, while immigrants can be conscripted into the military, serve as armed guards at the airports, and die in combat in Afghanistan and Iraq, they cannot serve as baggage screeners at airports.

Immigration raids in the name of national security, such as

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89. See MARK DANNER, *TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR* (2004); SEYMOUR HERSH, *CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB* (2004); *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* (Karen J. Greenberg & Joshua L. Dratel eds., 2005); *THE ABU GHRAIB INVESTIGATIONS: THE OFFICIAL INDEPENDENT PANEL AND PENTAGON REPORTS ON THE SHOCKING PRISONER ABUSE IN IRAQ* (Steven Strasser ed., 2004); Diane Marie Amann, *Abu Ghraib*, 153 U. PA. L. REV. 2085 (2005).

90. See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

91. See *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) ("This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative.") (citations omitted); see also *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985) ("[S]earches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable . . . This longstanding recognition that searches at our borders without probable cause and without a warrant are nonetheless 'reasonable' has a history as old as the Fourth Amendment.") (citations omitted).

92. See *Padilla v. Hanft*, 2005 389 F. Supp. 2d 678, 685 n.9 (D.S.C.) *rev'd on other grounds*, 423 F.3d 386 (4th Cir. 2005).

93. See Aviation and Transportation Act of 2001, § 111 (a)(2), 115 Stat. 597, 617 (2001) (codified at 49 U.S.C. § 44935(e)(2)(A)(ii) (2005)).

Operation Tarmac at airports across the United States, had dramatic impacts on communities having nothing to do with terrorism.<sup>94</sup> Recent years have seen record levels of deportations, with 80-90 percent of those deported from Mexico and Central America, for immigration violations wholly unrelated to terrorism.<sup>95</sup>

The “war on terror” had more far-reaching impacts as well. The events of September 11 adversely affected contemplated reforms to immigration law and enforcement. Not long before that day, immigrant rights advocates believed it possible that Congress would ameliorate some of the harsh provisions of the 1996 immigration reform legislation. Professor Peter Schuck has characterized the new laws as the “most radical reform of immigration law in decades—or perhaps ever.”<sup>96</sup> Immigration rights activists had mobilized support of a coalition of groups for a series of immigration reforms to “Fix 96,” a response to the harsh consequences of the 1996 immigration reforms. These legislative proposals quietly died on September 11.<sup>97</sup> The failure of the efforts to reform the harsh 1996 legislation will affect families, communities, and employers, all of which include U.S. citizens.

Days before September 11, public discussion had been ongoing about the possibility of dramatic changes to the migration relationship between the U.S. and Mexico. The Mexican government supported a program that would allow for the “regularization” of the immigration status of many undocumented Mexican migrants in the United States, while the Bush administration pushed for a temporary worker program providing low wage labor to American employers. A compromise agreement appeared to be on the immediate horizon. Discussion of comprehensive immigration reform disappeared abruptly after September 11.<sup>98</sup> Only recently has the nation begun again to consider immigration reform; the various proposals are controversial, with all of them scrutinized under the specter of the threat of international terrorism.

The “war on terror” has come to dominate any debate over policy

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94. See Johnson, *September 11 and Mexican Immigrants*, *supra* note 1, at 861 n.76; see also Jun Roh, Comment, *The Aftermath of September Eleventh: Increased Exploitation of Undocumented Workers in the Workplace*, 5 WYO. L. REV. 237 (2005) (contending that undocumented workers have suffered increased exploitation after the imposition of security measures in response to September 11).

95. See U.S. DEP’T OF HOMELAND SECURITY, OFFICE OF IMMIGRATION STATISTICS, 2003 YEARBOOK OF IMMIGRATION STATISTICS 149-50 (2004).

96. PETER H. SCHUCK, *CITIZENS, STRANGERS, AND IN-BETWEENS* 143 (1998).

97. See Johnson, *September 11 and Mexican Immigrants*, *supra* note 1, at 866-67.

98. See *id.*

issues touching on immigration and immigrants. For example, a public discussion about the issuance of driver's licenses to undocumented immigrants in California became a debate about national security.<sup>99</sup> Tunnels crossing the U.S./Mexico border used by drug smugglers and human traffickers, have been viewed by the U.S. government as possible national security problems.<sup>100</sup> As the abrupt end of the discussion of a Mexico/U.S. migration accord on September 11, 2001 reveals,<sup>101</sup> all debates over immigration in these times gravitate toward national security.

The climate of fear pervading the nation after September 11 has generally impacted racial minorities. We have seen the comeback of racial profiling, which has had, and will continue to have, impacts on a variety of minority communities. For several years before September 11, the use of racial profiling in criminal law enforcement had undergone sustained attack, with Presidential candidates, Attorney General nominees, and police disavowing racial profiling and vowing to be tough in eradicating the practice.<sup>102</sup> The argument had been powerfully made that race-based enforcement of the immigration laws is inappropriate.<sup>103</sup>

After the tragedy of September 11, persons of apparent Arab ancestry were questioned for possible links to terrorism, removed from airplanes, and generally subject to extra scrutiny at every turn.<sup>104</sup> Public opinion quickly shifted to favor racial profiling in the war on terrorism.<sup>105</sup> The federal government's profiling of Muslim and Arabs in

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99. See Kevin R. Johnson, *Driver's Licenses and Undocumented Immigrants: The Future of Civil Rights Law?*, 5 NEV. L.J. 213, 232-35 (2004); Sylvia R. Lazos Vargas, *Missouri, the "War on Terrorism," and Immigrants: Legal Challenges Post 9/11*, 67 MO. L. REV. 775 (2002); Maria Pabón López, *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).

100. See James C. McKinley, Jr., *At Mexico Border, Tunnels, Vile River, Rusty Fence*, N.Y. TIMES, Mar. 23, 2005, at A8.

101. See *supra* text accompanying notes 97-98.

102. See Robert S. Chang, *(Racial) Profiles in Courage, or Can We Be Heroes Too?*, 66 ALB. L. REV. 349, 349-51 (2003); Kevin R. Johnson, *Racial Profiling After September 11: The Department of Justice's 2003 Guidelines*, 50 LOY. L. REV. 67, 70-74 (2004).

103. See *supra* note 42 (citing authority).

104. See *supra* text accompanying notes 54-95.

105. For various perspectives on the changing views of racial profiling since September 11, see Richard Banks, *Racial Profiling and Antiterrorism Efforts*, 89 CORNELL L. REV. 1201 (2004); Leonard M. Baynes, *Racial Profiling, September 11th and the Media: A Critical Race Theory Analysis*, 2 VA. SPORTS & ENT. L.J. 1 (2001); Stephen J. Ellmann, *Changes in the Law Since 9/11: Racial Profiling and Terrorism*, 46 N.Y.L. SCH. L. REV. 675 (2002-2003); Samuel R. Gross & Debra Livingston, *Racial*

the investigation of the attacks promotes the legitimacy of racial profiling,<sup>106</sup> that is, law enforcement activity based on statistical probabilities. In short, the U.S. government's response to the loss of life of September 11 promises to have long term immigration and civil rights impacts. The impacts may well be felt by citizens as well as immigrants. In this vein, the efforts to eradicate racial profiling of African Americans and Latina/os before September 11 effectively stalled and have been relegated to the proverbial back-burner.

Moreover, the United States has experienced a spate of anti-immigrant activity directed at Mexican immigrants who had nothing to do with the events of September 11. For example, an organization in Farmingville New York agitated to eliminate Mexican day laborers from the community,<sup>107</sup> with the heated campaign becoming the subject of a documentary film.<sup>108</sup> A local group vigorously advocated that the federal government should deport undocumented immigrants. The group has photographed and videotaped laborers and their families and submitted the films to immigration authorities.

In arguing for tougher enforcement of the immigration laws, some people are motivated by racial animus. In September 2000, two men picked up two Mexican day laborers from a street corner in Farmingville, hired the men to clean a basement, and beat and stabbed both of them, leaving them for dead. This crime, of course, was before September 11, but the response to the events of that day has exacerbated tensions and frictions that previously existed in Farmingville.

Consider a few items ripped from the headlines of recent newspapers that reveal general anti-immigrant antipathy. "Vigilantes," the term used by President Bush to refer to a group set on patrolling the Mexican border,<sup>109</sup> known as "the Minutemen." The Minutemen hunt

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*Profiling Under Attack*, 102 COLUM. L. REV. 1413 (2002).

106. See *supra* text accompanying notes 54-95.

107. See Mauricio A. Espana, *Day Laborers, Friend or Foe: A Survey of Community Responses*, 30 FORDHAM URB. L.J. 1979, 2000-01 (2003).

108. FARMINGVILLE (New Video Group 2004).

109. See James G. Lakely, *Bush Decries Border Project*, WASH. TIMES, Mar. 24, 2005, at A1 (quoting President Bush). For a report on the activity of the Minutemen, as they descended upon southern Arizona in large numbers in April 2005, see David Kelly, *Minutemen Prepare to Lay Down the Law*, L.A. TIMES, Apr. 2, 2005, at A15. Tensions ran high; Congressman Tom Tancredo, a staunch advocate of border enforcement, supported the Minutemen and wrote that "[i]f violence breaks out . . . , the ultimate responsibility rests squarely on the federal government for failure to secure our borders." Tom Tancredo, *Minutemen's Weapons are Cell Phones and Cameras*, TUCSON CITIZEN, Apr. 1, 2005, at 5B.

down Mexicans in southern Arizona, an unfortunate occurrence that has been ongoing for several years.<sup>110</sup> Students on the campus of the University of North Texas held a “Capture an Illegal Immigrant Day,” to bring attention to the problem of undocumented immigration.<sup>111</sup> In these and many other ways, evidence points to the fact that the so-called war on terror has contributed to the intolerance toward not only Arab and Muslim noncitizens, but also toward all immigrants and racial minorities.

### Conclusion

In this lecture, I have tried to establish the parallels between the repatriation of Mexicans in the 1930s and the modern “war on terror” that followed the tragic events of September 11, 2001. In both instances, we see a nation giving in to fear, panic, and intense pressure on government to act to protect national security. Although the threats were different in kind, with one economic and the other safety-related, both resulted in policies targeted at some of the most vulnerable people in U.S. society. The response was poorly gauged legal and policy measures that have had, and will have, long term impacts on citizens as well as noncitizens.

As a nation, we must be most careful in times of severe national stress. In such times, as history has shown time and time again, the nation often has acted aggressively but mistakenly, frequently punishing minorities—in no small part because that tack was feasible politically and legally—in ways that we as a society later regret. Years from now, we may look back on the days after September 11, 2001 in a way that we look today at the Alien and Sedition Acts,<sup>112</sup> the Chinese exclusion laws,<sup>113</sup> the Palmer Raids,<sup>114</sup> the Japanese internment,<sup>115</sup> the McCarthy

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110. See Robert F. Castro, *Exorcising Tombstone's Evil Spirits: Eradicating Vigilante Ranch Enterprises Through Public Interest Litigation*, 20 LAW & INEQ. J. 203 (2002).

111. See Matthew Zabel, *UNT Mock Roundup Riles Some: Student Group Stages “Immigrant Hunt” to Call for More Enforcement*, DALLAS MORNING NEWS, Jan. 27, 2005, at 1B.

112. See Kevin R. Johnson, *The Antiterrorism Act, The Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, 28 ST. MARY'S L.J. 833, 842-43 (1997). See generally JOHN MORTON SMITH, *FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES* (1956) (documenting history of the Alien and Sedition Acts).

113. See Kevin R. Johnson, *Race, The Immigration Laws, and Domestic Race Relations: A “Magic Mirror” Into the Heart of Darkness*, 73 IND. L.J. 1111, 1122-27 (1998). See generally LUCY SALTER, *LAWS AS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* (1995) (analyzing history surrounding

era,<sup>116</sup> and surveillance of Martin Luther King Jr. and other civil rights activists in the 1960s.<sup>117</sup> For that reason, we should pause and be vigilant in an attempt to avoid acting rashly and at cross-purposes with our true goal of protecting the nation and its values. We all should be vigilant in evaluating the impacts on civil rights of national policies implemented in the name of national security, especially when the rights being infringed are those of a discrete and insular minority. Importantly, a system of laws and judicial review is a most essential safeguard during these difficult times.

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Chinese exclusion laws).

114. See Harlan Grant Cohen, Note, *The (Un)Favorable Judgment of History: Deportation Hearings, the Palmer Raids, and the Meaning of History*, 78 N.Y.U. L. REV. 1431 (2003).

115. See *supra* text accompanying notes 3, 6-7.

116. See Johnson, *September 11 and Mexican Immigrants*, *supra* note 1, at 850-60; see also David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1 (2003) (comparing policies pursued in “war on terror” with those of the McCarthy era).

117. See JAMES KILPATRICK DAVIS, *SPYING ON AMERICA: THE FBI’S DOMESTIC COUNTERINTELLIGENCE PROGRAM* 41-44 (1992).