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### Reaping the Harvest: The Long, Complicated, Crucial Rhetorical Struggle Over Deportation

Daniel Kanstroom

*Boston College Law School*, [kanstroo@bc.edu](mailto:kanstroo@bc.edu)

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## Response

### Reaping the Harvest: The Long, Complicated, Crucial Rhetorical Struggle over Deportation

DANIEL KANSTROOM\*

“Fear is the parent of cruelty.”<sup>1</sup>

Jennifer Chacón writes stirringly of how the amorphous “rhetoric of security” has infested what ought to be a more nuanced debate over immigration reform.<sup>2</sup> Such clarifying insights are especially necessary these days.<sup>3</sup> As I read Professor Chacón’s article, I thought of the most recent news from New Bedford, Massachusetts, not far from where I live, which was of a dramatic factory raid. Reportedly part of the ironically-named “Operation United Front,” a Department of Homeland Security operation aimed at employers, the New Bedford raid mobilized Immigration and Customs Enforcement (ICE) agents from around the country to take part in an operation in which hundreds of non-citizen workers were arrested.<sup>4</sup> The uniting of the front unfortunately did not

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\* Professor and Director, International Human Rights Program, Boston College Law School. Thanks to Angela Bushnell for research assistance and to Dean John Garvey for continuing support.

<sup>1</sup> 4 JAMES ANTHONY FROUDE, *Party Politics*, in *SHORT STUDIES ON GREAT SUBJECTS* 322, 345 (Charles Scribner’s Sons 1908) (1876).

<sup>2</sup> See Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 *CONN. L. REV.* 1827, 1830 (2007).

<sup>3</sup> See, e.g., Donald Kerwin & Margaret D. Stock, *National Security and Immigration Policy: Reclaiming Terms, Measuring Success, and Setting Priorities* 6 (2006), available at [http://www.ctc.usma.edu/research/National\\_Security\\_and\\_Immigration\\_Policy.pdf](http://www.ctc.usma.edu/research/National_Security_and_Immigration_Policy.pdf).

<sup>4</sup> Karen Lee Ziner, *Seeking Illegal Immigrants—Hundreds Nabbed in Raid*, *PROVIDENCE J.*, Mar. 7, 2007, at A-01, available at *LEXIS*, News Library, PRVJNL File.

apply to those arrested in the raid. Mothers were separated from babies, husbands from wives.<sup>5</sup> Many were transferred to detention centers in Texas before lawyers could meet with them.<sup>6</sup> Community groups have referred to it as “a humanitarian crisis.”<sup>7</sup> Indeed, in an unusual reversal of the typical state/federal relationship in immigration matters, Massachusetts social workers felt compelled to travel to Texas immigration detention facilities to ensure that the children of the detainees were receiving adequate care.<sup>8</sup> Similar raids are taking place throughout the United States as the Administration’s attention has now turned—at least in part—from energetically deporting tens of thousands of “criminal aliens” to workplace raids.<sup>9</sup> Some casually dismiss the recent workplace raids as “a policy ploy to shore up the president’s credibility on the immigration issue.”<sup>10</sup> Such insights have validity, but they need more context and more history. We are still in the midst of a massive deportation episode, of which the current raids are simply the most recent manifestation. This episode may be traced back to the early 1990s as deportation became ever harsher, less forgiving, more widespread, and more insulated from judicial review. Since unusually tough deportation laws were implemented in 1996, millions of non-citizens—many undocumented but also hundreds of thousands with legal immigration status—have been ordered to leave.<sup>11</sup> In the last two

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<sup>5</sup> Carol Rose & Christopher Ott, *Inhumane Raid Was Just One of Many*, BOSTON GLOBE, Mar. 26, 2007, at A9, available at LEXIS, News Library, BGLOBE File; Irene Sege, “*I Hope God Helps Us*”—*For Barthila Solano, Future After New Bedford Raid is Precarious*, BOSTON GLOBE, Mar. 14, 2007, at C1, available at LEXIS, News Library, BGLOBE File.

<sup>6</sup> Pam Belluck, *Lawyers Say U.S. Acted in Bad Faith After Immigrant Raid in Massachusetts*, N.Y. TIMES, Mar. 22, 2007, at A1, available at LEXIS, News Library, NYT File.

<sup>7</sup> Karen Lee Ziner, *Factory Raid Sparks Crisis for Families—Concern Expressed for Children of Immigrants*, PROVIDENCE J., Mar. 8, 2007, at A-01, available at LEXIS, News Library, PRVJNL File.

<sup>8</sup> Raja Mishra & Brian R. Ballou, *DSS to Check on Detainees Sent to Texas: Some Workers’ Children May Lack Care, Officials Fear*, BOSTON GLOBE, Mar. 9, 2007, at A1, available at LEXIS, News Library, BGLOBE File.

<sup>9</sup> See, e.g., Yvonne Abraham, *As Immigration Raids Rise, Human Toll Decried: Arrests Across US Break up Families*, BOSTON GLOBE, Mar. 20, 2007, at A1, available at LEXIS, News Library, BGLOBE File; Pamela Constable & N.C. Aizenman, *69 Immigrant Workers Held in Baltimore Area Raids*, WASH. POST, Mar. 30, 2007, at B1, available at LEXIS, News Library, WPOST File; Julia Preston, *Federal Agents Arrest 69 Immigrants in Baltimore in Raids*, Mar. 30, 2007, N.Y. TIMES, at A3, available at LEXIS, News Library, NYT File.

<sup>10</sup> Abraham, *supra* note 9.

<sup>11</sup> Susan Cohen, Op-Ed, *AS YOU WERE SAYING . . . Immigration Law Needs Balance*, BOSTON HERALD, Mar. 19, 2005, at 16, available at LEXIS, News Library, BHERLD File. It is difficult to gauge exactly how many of these deportees are legal entrants and long-term legal residents (LPRs) as DHS generally combines its reports of removals of legal residents with other removals. However, the Executive Office for Immigration Review lists more than 10,000 cases over the past five years—cases in which lawful permanent residents applied for discretionary relief known as cancellation of removal. OFFICE OF PLANNING, ANALYSIS AND TECHNOLOGY, U.S. DEP’T OF JUSTICE, FY 2006: STATISTICAL YEARBOOK, at tbl.15 (2007), available at <http://www.usdoj.gov/eori/statpub/fy06syb.pdf>. One may fairly deduce from this that many more LPRs than these have been deported, as many LPRs are ineligible for discretionary relief, especially those convicted of aggravated felonies. See 8 U.S.C. § 1101(a)(43) (2000). Additionally, a 2006 study found that some 70% of those charged as aggravated felons had lived in the United States for more than a decade. All had entered the United States legally

years alone, according to DHS statistics, more than 400,000 people were formally removed, while more than two million left pursuant to voluntary departure, after having been apprehended by government agents.<sup>12</sup> Tens of thousands are barred by law from ever returning.

As Professor Chacón notes, the use of deportation as a substitute for a comprehensive, rational and fair immigration policy inevitably poses a grave threat both to constitutional order and to human rights.<sup>13</sup> This has long been a complicated problem for the “nation of immigrants.” Indeed, I was struck by the way one of those arrested in a workplace raid in Baltimore echoed the poignant lines of Woody Guthrie’s ballad, *Deportee*, written during a previous deportation “delirium”: “Instead of taking away people who are hurting the country or doing murders, they are taking away people who work hard and want this country to get ahead . . . . They chase us like animals and say they are doing it for the good of the country.”<sup>14</sup> Guthrie put it this way in 1948: “They chase us like outlaws, like rustlers, like thieves.”<sup>15</sup>

The government argues that it is simply in “aggressive pursuit of employers who violate the law . . . target[ing] a key component of the illicit support structure that enables illegal immigration to flourish.”<sup>16</sup> However, as Professor Chacón clearly documents, the discourse over immigration enforcement—much of it from the government—has long involved much more than rule of law concerns.<sup>17</sup>

The ironic, hypocritical or opportunistic misappropriation of decent political ideas always demands two types of response: vigorous analytic deconstruction and plausible reconstruction. Deconstruction is the easier of the two. Dr. Johnson famously quipped, “Patriotism is the last refuge of a scoundrel.”<sup>18</sup> But who remembers what he actually thought genuine

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and the median length of residence was fourteen years. TRAC IMMIGRATION, HOW OFTEN IS THE AGGRAVATED FELONY STATUTE USED? (2006), available at <http://trac.syr.edu/immigration/reports/158>.

<sup>12</sup> U.S. DEP’T OF HOMELAND SECURITY, ALIENS EXPELLED: FISCAL YEARS 1892 TO 2005, at tbl.38 (2005), available at <http://www.dhs.gov/ximgtn/statistics/publications/YrBk05En.shtm> (follow “Table 38” hyperlink).

<sup>13</sup> Chacón, *supra* note 2, at 1891.

<sup>14</sup> Constable & Aizenman, *supra* note 9.

<sup>15</sup> WOODY GUTHRIE, PLANE WRECK AT LOS GATOS (DEPORTEE) (TRO-Ludlow Music, Inc. 1961), available at [http://www.woodyguthrie.org/Lyrics/Plane\\_Wreck\\_At\\_Los\\_Gatos.htm](http://www.woodyguthrie.org/Lyrics/Plane_Wreck_At_Los_Gatos.htm).

<sup>16</sup> Press Release, U.S. Immigration & Customs Enforcement, Employment Services Firm Allegedly Provided Baltimore Businesses with Illegal Aliens (Mar. 29, 2007), available at <http://www.ice.gov/pi/news/newsreleases/articles/070329baltimore.htm>.

<sup>17</sup> Chacón, *supra* note 2, at 1831–32.

<sup>18</sup> JAMES BOSWELL, LIFE OF JOHNSON 615 (new ed. 1969) (Ambrose Bierce reportedly later said it was the first); see AMBROSE BIERCE, *The Devil’s Dictionary*, in THE COLLECTED WRITINGS OF AMBROSE BIERCE, 323 (Books for Libraries Press 1973) (1946) (entry for patriotism).

patriotism was?<sup>19</sup>

What should we make of “national security” in debates over immigration and deportation? Professor Chacón notes that the term is broad, potentially encompassing protection from physical threats to economic and political interests.<sup>20</sup> She is clearly correct about this. Indeed, I might put it more starkly: “national security” is about as dangerously elastic and potentially inflammatory a phrase as one could possibly conjure. It embeds a warm notion (security) within a malleable political theory (nationalism) as it responds implicitly to a threat from outsiders, strangers, aliens, etc. This is especially true in the context of deportation law. The idea of national security has always been deeply intertwined with fears of foreigners and racial divisions in the “nation of immigrants.” From the very beginning, the security of the republic was seen as potentially threatened by what John Adams, in his inaugural address in Philadelphia ungraciously referred to as “the pestilence of foreign influence, which is the angel of destruction to elective governments.”<sup>21</sup>

Half a century later, faced with the looming crisis of national disintegration, Franklin Pierce invoked national security in support of slavery and the ultimately tragic compromises of 1850. Pierce, in one of the earliest uses of the exact phrase “national security,” asserted “that there is no national security but in the nation’s humble, acknowledged dependence upon God and His overruling providence.”<sup>22</sup> What he actually meant by this, however, was a promise to “interpose a ready and stern resistance” “[t]o every theory of society or government, [e.g., abolition or emancipation] whether the offspring of feverish ambition or of morbid

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<sup>19</sup> In a less well-known formulation, Johnson doubted that in his “degenerate age” one could find even 500 men “virtuously abstracted” in their patriotism. Samuel Johnson, *The Patriot*, available at <http://www.samueljohnson.com/thepatriot.html> (last visited May 31, 2007).

<sup>20</sup> Chacón, *supra* note 2, at 1830.

<sup>21</sup> John Adams, Inaugural Address in the City of Philadelphia (Mar. 4, 1797), available at <http://www.bartleby.com/124/pres15.html>. Adams’s main concern at that time was maintaining free and fair elections.

In the midst of these pleasing ideas we should be unfaithful to ourselves if we should ever lose sight of the danger to our liberties if anything partial or extraneous should infect the purity of our free, fair, virtuous, and independent elections. If an election is to be determined by a majority of a single vote, and that can be procured by a party through artifice or corruption, the Government may be the choice of a party for its own ends, not of the nation for the national good. If that solitary suffrage can be obtained by foreign nations by flattery or menaces, by fraud or violence, by terror, intrigue, or venality, the Government may not be the choice of the American people, but of foreign nations. It may be foreign nations who govern us, and not we, the people, who govern ourselves; and candid men will acknowledge that in such cases choice would have little advantage to boast of over lot or chance.

*Id.*

<sup>22</sup> Franklin Pierce, Inaugural Address (Mar. 4, 1853), available at <http://www.bartleby.com/124/pres29.html>.

enthusiasm, calculated to dissolve the bonds of law and affection which unite us.”<sup>23</sup>

Clearly, national security has always been a complex idea with both negative and positive potential. For example, the phrase appeared in a formulation relating to the Fourteenth Amendment that I suspect Professor Chacón would find more congenial (as do I) in Justice Bradley’s dissent in the *Slaughter-House Cases*.<sup>24</sup> Arguing that any citizen of the United States “has a perfect constitutional right to go to and reside in any State he chooses, and to claim citizenship therein, and an equality of rights with every other citizen,” Bradley concluded that “the whole power of the nation is pledged to sustain him in that right.”<sup>25</sup> His view of “national security” was thus a broadly protective one, embodying a rich theory of equal protection and “privileges and immunities”: “when the spirit of lawlessness, mob violence, and sectional hate can be so completely repressed as to give full practical effect to this right, we shall be a happier nation, and a more prosperous one than we now are.”<sup>26</sup> Most specifically, wrote Bradley, “In my judgment, it was the intention of the people of this country in adopting that amendment to provide *National security* against violation by the States of the fundamental rights of the citizen.”<sup>27</sup> Though he was obviously not writing about immigration law, Bradley’s formulation of national security implied a more rights-based and protective vision of the concept. Indeed, this is consonant with recognition by the Court majority of the broad purposes the post-Civil War Amendments. The Court noted that although “negro slavery alone was in the mind of the Congress which proposed the thirteenth [Amendment],” the Constitution also prohibited other forms of involuntary servitude that became essential aspects of late 19th century debates over immigration control: “If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void.”<sup>28</sup>

Professor Chacón focuses pragmatically on current invocations of what she terms the “rhetoric of security.”<sup>29</sup> Essentially, her argument is that security talk may be meaningful and necessary in some immigration contexts, but it is misleading and pernicious in others. As she rightly suggests, “formulating immigration policy while gazing through a distorting lens of ‘national security’ perversely ensures that the law is ill-

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<sup>23</sup> *Id.*

<sup>24</sup> *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 122 (1872) (Bradley, J., dissenting).

<sup>25</sup> *Id.* at 112–13.

<sup>26</sup> *Id.* at 113 (“If a man be denied full equality before the law, he is denied one of the essential rights of citizenship as a citizen of the United States.”).

<sup>27</sup> *Id.* at 122 (emphasis added).

<sup>28</sup> *Id.* at 72.

<sup>29</sup> Chacón, *supra* note 2, at 1830, 1834, 1850, 1861.

suited to achieve either national security or other immigration policy goals.”<sup>30</sup> In this, she echoes Charles Evans Hughes, who, in 1922 as Secretary of State, wrote that, on the “fundamental matter of national security . . . the instinct of self-preservation causes a quick response to any appeal on this score.”<sup>31</sup> Hughes was not writing about the recently-completed Palmer Raids or the new national origins Quota Laws of that era, but he surely could have been. The great need, he wrote, is for “enlightenment . . . with respect to what *really makes for national security*.”<sup>32</sup>

During the Cold War, immigration and deportation laws were deeply influenced by ideological conceptions of national security. Many were troubled in that context by the elasticity of the phrase, and its potential for misuse.<sup>33</sup> In a 1951 law review article entitled *Freedom and Internal Security*, Professor Arthur E. Sutherland, Jr. noted the risk entailed by anyone writing on such subjects in times of tension and fear.<sup>34</sup> “The somber conservative,” he wrote, “is apt to scan the title with alarm, assuming in advance that the piece is another emanation of crypto-Communism.”<sup>35</sup> On the other side, feared Sutherland, “[t]he more febrile liberals may be suspicious lest the author turn out to be a crypto-reactionary, understanding liberty as freedom to exploit the poor, feigning hatred for treason as a screen for plots against labor unions.”<sup>36</sup> As a precursor to the comprehensive Immigration and Nationality Act of 1952, Congress passed Senator Patrick McCarran’s “Internal Security Act,”<sup>37</sup> which, among other provisions, authorized the exclusion and the retroactive deportation of Communists and members of other organizations considered to be dangerous to public safety.<sup>38</sup> Representative Francis E.

<sup>30</sup> *Id.* at 4.

<sup>31</sup> Charles E. Hughes, *Some Observations on the Conduct of Our Foreign Relations*, 16 AM. J. INT’L L. 365, 370 (1922).

<sup>32</sup> *Id.* at 371 (emphasis added). As Hughes recognized, “In dealing with the problem of developing sound opinion, the fundamental consideration must always be that misinformation is the public’s worst enemy, more potent for evil than all the conspiracies that are commonly feared.” *Id.* at 366.

<sup>33</sup> See generally, DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 200–13* (2007).

<sup>34</sup> See generally Arthur E. Sutherland, Jr., *Freedom and Internal Security*, 64 HARV. L. REV. 383 (1951).

<sup>35</sup> *Id.* at 383.

<sup>36</sup> *Id.*

<sup>37</sup> Internal Security Act, Pub. L. No. 81-831, 64 Stat. 987, 1006–07 (1950); see also Patrick A. McCarran, *The Internal Security Act of 1950*, 12 U. PITT. L. REV. 481 (1951). See generally Charles Gordon, *The Immigration Process and National Security*, 24 TEMP. L.Q. 302 (1950–1951) (describing the Act).

<sup>38</sup> The Internal Security Act also declared it unlawful to conspire to establish a totalitarian dictatorship, to conceal membership in the American Communist Party when seeking government employment or to use a United States passport. President Truman vetoed it, saying that it “would betray our finest traditions” in its attempt to “curb the simple expression of opinion.” Congress, however, overrode Truman’s veto. President Harry S. Truman, *Speech on the Veto of the McCarran*

Walter, co-author of the 1952 Act, was prone to the same sort of discourse one too often hears today: he reportedly stated that “thousands of criminals and subversive aliens are roaming our streets, a continuing threat to the safety of our people.”<sup>39</sup>

The McCarran bill contained unprecedented, harsh deportation measures, harbingers of 1996. It eliminated statutes of limitation for many types of deportation, reinforced retroactive ideological deportation, limited judicial review, and raised the standard for suspension of deportation.<sup>40</sup> Many criticized McCarran’s approach vigorously and indeed, a major counter-proposal was developed by Senators Humphrey and Lehman.<sup>41</sup> Humphrey argued that the McCarran bill “adopts the arbitrary procedures of the police state.”<sup>42</sup> Though he too was, “thoroughly in favor of deporting and excluding undesirable aliens,”<sup>43</sup> he argued for greater precision of focus. McCarran’s bill was “slipshod,” said Humphrey, and it would “unnecessarily [hurt] the innocent at the same time as it affects the guilty.”<sup>44</sup> In the end though, the rhetoric of fear and national security triumphed, and the major pieces of the current deportation regime were put into place. In the House, Rep. Rankin (D-Miss.) stated that, “[w]e have had too many questionable characters swarming into this country already, bringing . . . communism, atheism, anarchy, infidelity . . . .”<sup>45</sup> He suggested that, rather than admitting more “of that ilk,” the United States should “begin to deport some who have already arrived . . . to save the country from destruction at the hands of the enemies within our gates.”<sup>46</sup>

Recently, scholars have described these tendencies in slightly different terms from Professor Chacón. Some refer to it as a process of “securitization” that has dramatically eroded protections for the human rights of non-citizens.<sup>47</sup> In such a process an issue is typically presented as “an existential threat, requiring emergency measures and justifying actions outside the normal bounds of political procedure.”<sup>48</sup> Some sociologists and criminologists have used the term “moral panic” to describe a similar

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Internal Security Act (Sept. 22, 1950), available at <http://teachingamericanhistory.org/library/index.asp?document=859>.

<sup>39</sup> See Laurent B. Frantz, *Deportation Deliriums*, THE NATION, Mar. 26, 1955, at 258.

<sup>40</sup> *Id.*

<sup>41</sup> 98 CONG. REC. 2140 (1952).

<sup>42</sup> *Id.* at 2141 (joint statement by the sponsors of the Immigration and Nationality Act).

<sup>43</sup> *Id.* at 5239.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 4320.

<sup>46</sup> *Id.*

<sup>47</sup> See, e.g., BARRY BUZAN ET AL., SECURITY: A NEW FRAMEWORK FOR ANALYSIS 23–29, 121–22 (1998).

<sup>48</sup> *Id.* at 23–24; see also H. Richard Friman, Politics, Migrants and Security: The Erosion of Protection in the Name of Order, Paper Prepared for Presentation at the Fairfield University Symposium: Migration Studies and Jesuit Identity: Forging a Path Forward, (June 8–12, 2005) (draft paper on file with Author).



phenomenon. Moral panic, they suggest, facilitates powerful state action against a social group or activity that is said to threaten the very “stability and well-being of society.”<sup>49</sup> Indeed, consonant with Professor Chacón, Michael Welch has argued that such a moral panic largely drove much of the immigration debate of the 1990s.<sup>50</sup> I recall in this regard a statement reportedly made by one U.S. Senator at the beginning of the current crack-down. “Criminal aliens,” suggested New York Senator Al D’Amato, were “savaging our society.”<sup>51</sup> These days, Rep. Lamar Smith, a champion of tough deportation laws, routinely conflates immigrant crime and terrorism: “We should not give criminals who are not U.S. citizens more opportunities to further terrorize our communities.”<sup>52</sup>

There thus can be little doubt that Professor Chacón’s basic rhetorical critique is as correct in the current era as it would have been in 1798, 1919, 1952, and 1996. Then we must ask a deeper question: so what? Granted, overblown rhetoric is annoying. But is it dangerous? And, if so, why? And with what would we replace it? I will concentrate in the balance of this Essay on the danger, in deference to the thrust of Professor Chacón’s article. In the immigration and deportation contexts the deepest danger, I believe, is that of targeting discrete, insular, (largely) politically powerless, ethnically, religiously or racially identified, and often voiceless minority groups. As David Cole has put it, “democratic society [optimally] strikes the balance between liberty and security in ways that impose the costs of security measures equally on all . . . .”<sup>53</sup> When the burden of security falls disproportionately on a particular group, the result is both “constitutionally and morally wrong.”<sup>54</sup> Vague hyperventilation about national security tends to deflect attention from the importance of maintaining this balance. Though many would agree in general that those who would “trade a little liberty for a little order”<sup>55</sup> are making a profoundly risky choice, the fact is

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<sup>49</sup> GARY W. POTTER & VICTOR E. KAPPELER, *CONSTRUCTING CRIME: PERSPECTIVES ON MAKING NEWS AND SOCIAL PROBLEMS* 7 (1998); see also Erich Goode & Nachman Ben-Yehuda, *Moral Panics: Culture, Politics, and Social Construction*, 20 ANN. REV. SOC. 149, 149–71 (1994).

<sup>50</sup> MICHAEL WELCH, *DETAINED: IMMIGRATION LAWS AND THE EXPANDING I.N.S. JAIL COMPLEX* 37 (2002).

<sup>51</sup> Peter H. Schuck & John Williams, *Removing Criminal Aliens: The Pitfalls And Promises of Federalism*, 22 HARV. J.L. & PUB. POL’Y 367, 426, n.273 (1999) (citing *D’Amato Says INS Fails to Protect City*, UPI, Mar. 23, 1986).

<sup>52</sup> *Prepared Statement of Honorable Lamar Smith Chairman Before The House Judiciary Committee Subcommittee on Immigration and Claims Subject—Detention of Criminal Aliens and Additional New Border Patrol Agents*, FED. NEWS SERVICE, Feb. 25, 1999, available at LEXIS, News Library, FEDNEW File.

<sup>53</sup> DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* 5 (2003).

<sup>54</sup> *Id.* at 7.

<sup>55</sup> This formulation is routinely attributed to Thomas Jefferson. However, I have been unable to determine its exact source. A variant is attributed to Benjamin Franklin: “They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.” BENJAMIN FRANKLIN, *HISTORICAL REVIEW OF PENNSYLVANIA* (1759), available at <http://bartleby.com/100/>

that a referendum along those lines would pass by overwhelming majority if there is any hint of fear of foreigners in the air.

Professor Chacón notes how in the current debate, irregular migration, non-citizen criminal activity, and terrorism tend to be “subsumed under the broad rubric of national security threats.”<sup>56</sup> This illustrates a second set of dangers that flow from securitization, moral panic, and fear-mongering: the problems of the blunt instrument. As one axiom from my youth in Brooklyn puts it: you don’t kill a fly with a bazooka. This is not primarily out of concern for the fly. Fear-mongering is a tactic most typically used by those in power to protect power. As Justice Murphy once noted, “we must not forget that few indeed have been the invasions upon essential liberties which have not been accompanied by pleas of urgent necessity advanced in good faith by responsible men.”<sup>57</sup> Indeed, the phrase “fear-mongering” is etymologically linked to basic human rights. The suffix, “monger” has its generally negative connotation for good reasons: it derives from Middle English *mongere*, from the Old English *mangere*, and from the Latin *mango*, a word—probably of Greek origin—that meant a “dealer in slaves.”<sup>58</sup> Overbroad security rhetoric obviously facilitates overbroad laws. As Justice Brandeis famously put it: “men feared witches and burnt women.”<sup>59</sup> A foolish consistency may indeed be “the hobgoblin of little minds, adored by little statesmen and philosophers and divines,”<sup>60</sup> but it is certainly easier for legislatures to package bills together under a broad security rubric than to address each separate aspect of an immigration problem with the nuance it requires. The “PATRIOT Act” is an obvious case in point, as were IIRIRA and AEDPA. Second, as Professor Chacón also notes, a more subtle problem with overbroad laws is that they may actually *hinder* the achievement of the national security goals at which they are ostensibly aimed.<sup>61</sup> I would add a more particular concern here: the linkage of immigration with national security tends to support excessive judicial deference and jurisdictional-preclusion statutes that dangerously empower the executive branch.<sup>62</sup> This is obviously problematic for those non-citizens unlucky enough to be caught in the American deportation gulag, but it also has distorting effects on

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245.1.html. According to one historian, the phrase was often used in the Revolutionary period, appearing as early as November, 1755, in an answer by the Assembly of Pennsylvania to the Governor. *Id.* It forms the motto of Franklin’s “Historical Review,” appearing also in the body of the work. See RICHARD FROTHINGHAM: RISE OF THE REPUBLIC OF THE UNITED STATES 413 n.1 (1872).

<sup>56</sup> Chacón, *supra* note 2, at 1831.

<sup>57</sup> *Hirabayashi v. United States*, 320 U.S. 81, 113 (1943) (Murphy, J., concurring).

<sup>58</sup> AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1135 (4th ed. 2000).

<sup>59</sup> *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

<sup>60</sup> RALPH WALDO EMERSON, SELF-RELIANCE 5 (1841).

<sup>61</sup> Chacón, *supra* note 2, at 1832 & n.13.

<sup>62</sup> See, e.g., Daniel Kanstroom, *The Better Part of Valor: The REAL ID Act, Discretion, and the “Rule” of Immigration Law*, 51 N.Y.L. SCH. L. REV. 162, 162–65 (2006).

administrative and civil rights law more generally. It is linked in that sense to yet another well-known problem with overbroad “securitized” laws: the problem of the slippery slope. The concern here is that government actions that are first tolerated against non-citizens may too readily expand to citizens. Much of U.S. immigration law history supports this concern. One should consider the exact progression of government action in the 1790s, the Palmer Raids, the McCarthy era, and post-9/11.<sup>63</sup> No objection to the targeting of non-citizens for security enforcement has been more consistently expressed throughout U.S. history. Among Thomas Jefferson’s most resonant concerns for the attack by the Federalists on the “friendless alien” was that “the citizen will soon follow.”<sup>64</sup> To be sure, many statements in support of vigorous enforcement of deportation laws often include an affirmation that the United States is a “nation of immigrants” and that newcomers will always be welcomed. In the same spirit with which it is said that the constitution “is not a suicide pact,”<sup>65</sup> many argue for strict controls on non-citizens.<sup>66</sup> Some would consider the notion of “liberty by security,” articulated most famously in the past by Edmund Burke, as especially instructive when applied to the immigration/deportation law context.<sup>67</sup> Indeed, one of the leading Bush Administration supporters of strict enforcement, former Assistant Attorney General for the Office of Legal Policy Viet Dinh, wove together the three critical elements of immigration, liberty, and security:

9/11 . . . was a shock for me personally because I did not know very much about terrorism. I did not know very much about America, to tell you the truth, being a newcomer to this country . . . . I fundamentally reject any notion that liberty

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<sup>63</sup> See generally, KANSTROOM, *supra* note 33.

<sup>64</sup> Thomas Jefferson, *The Kentucky and Virginia Resolutions of 1798*, in DOCUMENTS OF AMERICAN HISTORY 178, 181 (Henry Steele Commager ed., 8th ed. 1968).

<sup>65</sup> *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159–60 (1963).

We deal with the contending constitutional arguments in the context of certain basic and sometimes conflicting principles. Citizenship is a most precious right. It is expressly guaranteed by the Fourteenth Amendment to the Constitution, which speaks in the most positive terms. . . . The powers of Congress to require military service for the common defense are broad and far-reaching, for while the Constitution protects against invasions of individual rights, it is not a suicide pact.

*Id.* at 159–60.

<sup>66</sup> As President John Adams once put it: “If we glory in making our country an asylum for virtue in distress and for innocent industry, it behoves [sic] us to beware, that under this pretext it is not made a receptacle of malevolence and turbulence, for the outcasts of the universe.” John Adams, To the Grand Jury of the County of Dutchess, New York (Sept. 22, 1798), in 9 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 223 (Charles Francis Adams ed., 1854).

<sup>67</sup> See Viet Dinh, Assistant Attorney Gen. for the Office of Legal Policy, U.S. Dept. of Justice, Conference Comments, *In Life After 9/11: Issues Affecting the Courts and the Nation*, 51 U. KAN. L. REV. 219, 220–21 (2003). Dinh acknowledges his debt to Edmund Burke (though he cites Robert Bork, too) for this construct. *Id.* at 221 & n.1. As Burke put it more than two centuries ago, “[t]he only liberty I mean is a liberty connected with order; that not only exists along with order and virtue, but which cannot exist at all without them.” *Id.* at 221.

and security are competing goals that must be balanced in this war on terrorism. Rather, we seek to protect liberty by providing security.<sup>68</sup>

This is a compelling formulation, but it is particularly dangerous when applied to immigration law. It can easily lead to a rough, legitimating convergence between very different types of deportation laws: extended border control laws and post-entry social control laws.<sup>69</sup> The call to “regain control of the border” can result in exceptional deference to government enforcement power and prosecutorial discretion. Such power can then be applied—as happened after 9/11—to legal permanent residents targeted for all sorts of problematic reasons: race, national origin, political opinions, religion, etc. Undocumented residents have also suffered. Backlash against “illegal aliens”—a term that implies inherent criminality—inspires new, harsh laws against them. Inflammatory depictions of “criminal aliens” may lead to crack-downs against migrant workers. One is reminded of Aldous Huxley’s observation that “tidiness is undeniably a good—but a good of which it is easily possible to have too much and at too high a price.”<sup>70</sup>

#### CONCLUSION

The struggle to define the deep values reflected in immigration and deportation laws has been a *leitmotif* throughout U.S. history. Shortly after this nation’s founding, Jefferson and Madison crafted some of their most memorable political discourse in opposition to the Alien and Sedition Acts.<sup>71</sup> Professor Chacón’s article highlights another crucial period of deportation law development and discourse: the late 19th century, when laws were enacted to exclude and then deport Chinese workers.<sup>72</sup> That era had its own rhetorical battles. A resolution adopted at a large rally in New York City protesting the Chinese Registration Act in 1892 reflects the tension that surrounded the contemporary immigration and deportation issues of the time:

Whereas, [t]he Congress of the United States . . . unjustly and wickedly . . . has traversed and contravened the fundamental principles of common law and the Constitution . . . [w]e, citizens of the United States . . . do hereby resolve

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<sup>68</sup> *Id.* at 220–21.

<sup>69</sup> See generally KANSTROOM, *supra* note 33.

<sup>70</sup> ALDOUS HUXLEY, PRISONS 13 (1949).

<sup>71</sup> See KANSTROOM, *supra* note 33, at ch.1.

<sup>72</sup> See Chacón, *supra* note 2, at 1832–34.

and declare that said the bill is monstrous, inhuman, and unconstitutional . . . .<sup>73</sup>

Four decades later, Senator Robert F. Wagner of New York was reportedly quite alarmed by the harsh tactics employed by immigration agents in a raid of a dance at the Finnish Workers' Education Association in New York City.<sup>74</sup> Wagner, who had witnessed the Palmer raids, suggested that the methods used were contradictory to the "tradition of the United States as a country founded as a haven for political refugees."<sup>75</sup> When this concern was suggested to William Doak, the man in charge of all the deportations, Doak cavalierly replied: "Yes . . . and we've been reaping the harvest ever since."<sup>76</sup> The major motivations for Doak's drive to deport *all* potentially deportable aliens in the 1930s may now seem quaintly anachronistic: the Depression, widespread racketeering, (led, as he put it, "largely by Sicilians expelled from Italy by Mussolini") and "anti-red" sentiment.<sup>77</sup> But the laws that facilitated such actions have only gotten harsher. The system is much larger, better funded, and better linked to other enforcement agencies. And the rhetorical battle over how to describe such laws remains complex, fierce, crucial, and surely worth the fight.

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<sup>73</sup> *Chinamen Free Their Minds*, N.Y. TIMES, Sept. 23, 1892, at 2.

<sup>74</sup> See Gardner Jackson, *Doak the Deportation Chief*, THE NATION, Mar. 18, 1931, at 295. The harsh tactics employed by the twenty Department of Labor agents and ten New York policemen who raided the dance included "the blocking of all exits of the Fifth Avenue dance hall . . . the lining up of the 1,000 guests, and the command that each of them show credentials proving his right to be in America." *Id.* Eighteen of the dancegoers were subsequently taken to Ellis Island for deportation. *Id.*

<sup>75</sup> *Id.* at 295-96.

<sup>76</sup> *Id.* at 296.

<sup>77</sup> *Id.*