Tennessee Journal of Law and Policy

Volume 2 | Issue 2 Article 4

January 2005

The Clear Act: When the Wars on Terrorism and Immigration Collide

Maya M. Ayesh

THE CLEAR ACT: WHEN THE WARS ON TERRORISM AND IMMIGRATION COLLIDE

Maha M. Ayesh

I. Introduction

In the summer of 2003, Representative Charles Norwood (GA) first introduced the controversial house bill titled the Clear Law Enforcement for Criminal Alien Removal Act (hereinafter "the CLEAR Act").[1] Though the original Act expired with the 108th Congress, Representative Norwood reintroduced the bill in the summer of 2005.[2] The CLEAR Act was designed to address "the growing U.S. criminal alien crisis."[3] In particular, the Act focuses on perceived inadequacies in the current system of enforcing immigration laws.[4] It seeks to improve immigration enforcement by incorporating the help of state and local police in applying stricter penalties to those who violate immigration laws.

The present legislation grew largely out of concerns following the September 11, 2001 terrorist attacks. While there had been a perceived crisis of illegal immigration

---

[1] Clear Law Enforcement For Criminal Alien Removal (CLEAR) Act of 2003, H.R. 2671, 108th Cong. (2003), *available at* http://thomas.loc.gov/cgi-bin/query/z?c108:H.R.2671: (last visited May 24, 2006); *See* Press Release, Congressman Charlie Norwood, Norwood Introduces the CLEAR Act (July 9, 2003), *available at* http://www.house.gov/apps/list/press/ga09_norwood/CLEARAct.html (last visited May 24, 2006).

[2] Clear Law Enforcement for Criminal Alien Removal (CLEAR) Act of 2005, H.R. 3137, 109th Cong. (2005), *available at* http://thomas.loc.gov/cgi-bin/query/z?c109:H.R.3137: (last visited May 24, 2006). *See* Press release, Congressman Charlie Norwood, CLEAR Act 2005 Introduced in U.S. House (June 30, 2005), *available at* http://www.house.gov/apps/list/press/ga09_norwood/CLEAR05.html (last visited May 24, 2006).

[3] Press Release, Norwood, July 9, 2003, *supra* note 1.

[4] *Id.* (referring to "[t]oday's broken enforcement system").

predating this time,[5] the horrifying and unexpected attacks of 2001 drew national attention to immigration issues because all nineteen hijackers were foreign nationals.[6] After news broke just days later that at least sixteen of the hijackers entered the country on legal visas, and that some remained in violation of their visas, many began to feel uneasy about terrorists taking "advantage of America's open society."[7] In the months following the attacks, many people blamed the inefficiencies on the Immigration and Naturalization Service (INS), the federal agency charged with regulating immigration.[8] Furthermore, news that three of the hijackers had encounters with local police officers in the weeks preceding the attacks led many to question whether increased communication and cooperation between various law enforcement agencies could have foiled the terrorist plot.[9] The CLEAR Act addresses this latter issue by affirming the authority of state and local law

---

[5] *See Clear Law Enforcement for Criminal Alien Removal Act of 2003 (CLEAR Act): Hearing Before the Subcomm. on Immigration, Border Sec., and Claims of the House Comm. On the Judiciary*, 108th Cong. 1 (2003) [hereinafter *CLEAR Act 2003 Hearing*] (statement by Rep. Hostetler, Chairman, House Subcomm. on Immigration, Border Sec., and Claims) (referring to the "illegal immigration crisis of epic proportions" and citing INS illegal immigrant statistics from 1996); *see also* discussion *infra* Part II.B.

[6] *CLEAR Act 2003 Hearing*, *supra* note 5, at 22 (prepared statement of Kris W. Kobach, Assoc. Professor of Law).

[7] *See* Peter Slevin & Mary Beth Sheridan, *Suspects Entered U.S. on Legal Visas*, WASH. POST, Sept. 18, 2001, at A6; *see also* Donna Leinwand, *Foreigners Linked to Terror Tricked INS, Report Says*, USA TODAY, May 22, 2002, at 8A (reporting that at least half of forty-eight terrorism suspects since 1993 "manipulated or violated immigration laws").

[8] Leinwand, *supra* note 7 (citing report's "unflattering portrayal of the INS").

[9] *See State and Local Authority to Enforce Immigration Law: Evaluating a Unified Approach for Stopping Terrorists*, Testimony before the United States Comm. on the Judiciary, Subcomm. on Immigration, Border Sec., and Citizenship (Apr. 22, 2004) (prepared statement by Michelle Malkin), *available at* http://judiciary.senate.gov/hearing.cfm?id=1156 (last visited May 24, 2006).

enforcement officers to enforce federal immigration laws;[10] by providing states and local agencies with incentives to enforce immigration laws;[11] and by establishing a system to facilitate communication about immigration violators among federal, state, and local agencies.[12] In addition, the CLEAR Act amends existing immigration laws by creating and increasing criminal and civil penalties for immigration violations.[13]

Supporters of the CLEAR Act applaud it as a solution to the limited resources of federal immigration officials and as a measure to stop the growing number of "illegal aliens."[14] On the other hand, immigration advocates and many others oppose the measure, fearing that it represents a growing assault on immigration, has negative civil rights repercussions, and frustrates current police objectives.[15] To be sure, the CLEAR Act has

---

[10] H.R. 3137 § 2.
[11] *Id.* §§ 3, 7.
[12] *Id.* §§ 5-6.
[13] *Id.* § 4.
[14] *See, e.g.*, NumbersUSA, *HOT TOPIC: State and Local Police in Immigration Law Enforcement,* http://numbersusa.com/hottopic/clearact.html (last visited May 24, 2006). Many immigrant advocates object to the categorization of certain non-citizens as "illegal." *See* Ruben J. Garcia, Comment, *Critical Race Theory and Proposition 187: The Racial Politics of Immigration Law*, 17 CHICANO-LATINO L. REV. 118, 118 n.1 (1995); Margot Mendelson, *The Legal Production of Identities: A Narrative Analysis of Conversations with Battered Undocumented Women*, 19 BERKELEY WOMEN'S L.J. 138, 202-03 (2004). While I prefer using the phrase "undocumented immigrants" to refer to non-citizens in the country without authorization of federal immigration officials, I also use the terms "illegal alien" and "illegal immigrant" when referring to specific provisions of legislation and to public debate. It should be noted, however, that the terms "alien" and "immigrant" have different legal meanings. *See generally* 3A AM. JUR. 2D *Aliens and Citizens* § 901 (2005).
[15] *See* ACLU Statement on H.R. 2671, the "Clear Law Enforcement for Criminal Alien Removal (CLEAR) Act of 2003" before the House Subcomm. on Immigration, Border Sec. and Claims (Oct. 1, 2003), *available at* http://www.aclu.org/ImmigrantsRights/ImmigrantsRights.cfm?ID=13881&c=22 (last visited May 24, 2006).

provided another avenue of discussion in the highly debated field of immigration policy. Although this debate preceded the 9/11 attacks, it has gained strength in its aftermath.

This comment will briefly review the development of relevant immigration law, focusing particularly on legislation aimed at solving the "illegal immigration problem." It will also discuss how the 9/11 attacks impacted immigration policy by framing the immigration debate in the language of national security. As a result, immigration policy has become inextricably linked with anti-terrorism policy and no longer has "an independent policy agenda."[16] The CLEAR Act exemplifies this intertwining; it represents the combination of post-9/11 terrorism concerns and pre-9/11 anti-immigration sentiment. Although the legislation is promoted as a measure to increase the security and welfare of America's citizens, it has the potential to promote racial and ethnic profiling and to actually frustrate local law enforcement efforts. This comment does not address the important legal question of whether local and state law enforcement agencies do indeed have the authority to enforce federal immigration laws, as the CLEAR Act maintains.[17] Rather, it focuses on the CLEAR Act's policy implications. This comment attempts to show that not only is the CLEAR Act potentially dangerous legislation in and of itself, but

[16] Karen C. Tumlin, Comment, *Suspect First: How Terrorism Policy is Reshaping Immigration Policy*, 92 CAL. L. REV. 1173, 1228 (2004).

[17] For information on whether federal law preempts local and state authorities from enforcing immigration law, *see generally* Jill Keblawi, Comment, *Immigration Arrests by Local Police: Inherent Authority or Inherently Preempted?*, 53 CATH. U. L. REV. 817 (2004); *see also,* April McKenzie, Comment, *A Nation of Immigrants or a Nation of Suspects? State and Local Enforcement of Federal Immigration Laws Since 9/11*, 55 ALA. L. REV. 1149, 1151-55 (2004); Craig B. Mousin, *A Clear View from the Prairie: Harold Washington & the People of Illinois Respond to Federal Encroachment of Human Rights,* 29 S. ILL. U. L.J. 285, 305-06 (2005); Jeff Sessions & Cynthia Hayden, *The Growing Role for State & Local Law Enforcement in the Realm of Immigration Law*, 16 STAN. L. & POL'Y REV. 323 (2005).

perhaps more importantly, it is premised on bad policy—the policy of equating immigrants with terrorists and criminals.

II. Historical and Legal Development

A. Federal Government's Broad Exclusion Powers

Immigration has been an area of law governed almost exclusively by federal legislation and executive regulations.[18] In fact, courts have taken a decisively hands-off approach to most immigration matters through the use of the plenary power doctrine, which limits judicial oversight.[19] Viewed as a nation's right to control who enters and remains within its territory, immigration laws have long been perceived as intimately related to the sovereign powers of the federal government.[20] In addition,

---

[18] *But see* Hiroshi Motomura, *The Curious Evolution of Immigration Laws: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1627-28 (1992) (noting that in recent years the judiciary has been involved in an increasing number of cases involving immigrants, particularly cases related to equal protection of the laws and freedom from detention).

[19] 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, 840 (1997); Motomura, *supra* note 18, at 1626.

[20] *See, e.g.*, Galvan v. Press, 347 U.S. 522, 530 (1954) (finding the power of Congress to control immigration to be "very broad, touching as it does basic aspects of national sovereignty, more particularly our foreign relations and the national security"); Shaughnessy v. United States ex rel. Mezel, 345 U.S. 206, 210 (1953) ("Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."); Ekiu v. United States, 142 U.S. 651, 659 (1892) ("[E]very sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."); Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581, 606 (1889) (reasserting "the power of the government to

immigration laws are often seen as inextricably linked to and impacting the nation's foreign relations.[21]

At the most fundamental level, illegal immigration has existed since legal immigration has been restricted, and has existed since groups of non-citizens have been excluded from legal entry into, or continued residence within, the United States.[22] Early immigration enactments in the United States sought to restrict immigration by certain ethnic or national groups.[23] In the nineteenth century, for example, lawmakers enacted the "Chinese exclusion laws," which placed a moratorium on entry by Chinese laborers.[24] In 1924, Congress passed a comprehensive immigration policy based on a national origins quota system,[25] which apparently was intended to regulate the ethnic composition of immigrants.[26] This national quota system remained the underlying principle of U.S. immigration law until 1965.

---

exclude foreigners from the country whenever, in its judgment, the public interests require such exclusion").

[21] *See Galvan*, 347 U.S. at 530; *see also* Victor Romero, *Race, Immigration, & the Department of Homeland Security*, 19 ST. JOHN'S J. LEGAL COMMENT. 51, 53-54 (2004) (noting that immigration issues have been ruled political matters in part because of "the extent that the migration of noncitizens impacts foreign relations").

[22] Illegal immigrants fall into two general categories: those who enter the country without passing through inspection and being granted permission from federal authorities and those who lawfully enter the country on legal visas but remain in violation of their visas.

[23] For a discussion of the historic role of race in U.S. immigration law, *see* David Cole, *Enemy Aliens,* 54 STAN. L. REV. 953, 988-94 (2002); Romero, *supra* note 21, at 54.

[24] *See* Ting v. United States, 149 U.S. 698 (1893); *Ping*, 130 U.S. 581. The Supreme Court found such exclusion, which was based on the presence of "foreigners of a different race" whose lack of assimilation presented a danger to peace and security, to be within the sovereign powers of the national government. *Ping*, 130 U.S. at 606.

[25] 43 Stat. 153 (1924), *repealed by* INA Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911.

[26] Cole, *supra* note 23, at 991 (recounting statement of the Commissioner of Immigration in 1925 that "virtually all immigrants now 'looked' like Americans") (citing THOMAS ALEXANDER ALIENIKOFF, DAVID A. MARTIN, & HIROSHI MOTOMURA, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 165 (4th ed. 1998)).

Early immigration laws also sought to prevent alleged politically subversive foreigners from infiltrating society.[27] Many scholars argue that immigration laws were constructed, and groups of immigrants excluded, in response to domestic social change and international conflict.[28] For example, Congress responded to the assassination of President McKinley in 1902 with immigration laws excluding anarchists.[29] Anarchists were also the target of legislation in the early twentieth century in response to such events as the Haymarket Square rally in Chicago and the rise of the Wobblies.[30] By the 1940s and 1950s, immigration legislation focused on deporting and excluding Communists.[31]

In 1952, Congress passed the comprehensive Immigration and Nationality Act (INA), which continues to be the foundation of U.S. immigration law today.[32] The INA originally retained the "national origins formula" that was established in 1924 for regulating immigration and included earlier acts governing the exclusion and deportation of certain immigrants. In 1965, Congress amended the INA to exclude discrimination based on such criteria as race and national origins.[33]

---

[27]The earliest examples of laws limiting "politically undesirable persons" may have been the Alien and Sedition Acts of the late-eighteenth century. Johnson, *supra* note 19, at 834.

[28] *Id.*

[29] Cole, *supra* note 23, at 994.

[30] Johnson, *supra* note 19, at 845-47.

[31] *Id.* at 850-51.

[32] Immigration & Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C. (2003)).

[33] Pub. L. No. 89-236, 79 Stat. 911 (1965).

B. Tackling the "Illegal Immigration Problem"

1. Development of the Immigration Reform and Control Act

Until the 1970s, legislation dealing with illegal immigration focused primarily on enforcing penalties against those who smuggled and harbored illegal immigrants. Under the INA, it was a felony to willfully import, transport, or harbor an undocumented immigrant, though it specifically exempted employers from penalties.[34] Over time, lawmakers increasingly focused on the growing number of undocumented immigrants in the country, the majority of whom came from Mexico.[35] Legislative activity in this area increased, and in 1971, the ninety-second Congress began holding hearings on the issue.[36] Much attention was given to the effects of immigration, particularly undocumented immigration, on the nation's labor market.[37] The common understanding was that immigrant laborers from economically deprived countries depressed the American labor market and increased unemployment among low-skill citizens by taking low-wage jobs.[38] Thus, lawmakers decided that legislation

---

[34] H.R. REP. NO. 99-682(I), at 51-52 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5655-56 (citing INA (1952) §§ 274, 287(a)(3)).

[35] *See* Barry R. Chiswick, *The Illegal Immigration Policy Dilemma*, *in* ESSAYS ON LEGAL AND ILLEGAL IMMIGRATION 73, 75 (Susan Pozo ed., W.E. Upjohn Inst. for Employment Research 1986). *But see* Charles J. Ogletree, Jr., Conference Paper, *America's Schizophrenic Immigration Policy: Race, Class, and Reason*, 41 B.C. L. REV. 755, 767 (2000) ("While the stereotypical image of an illegal immigrant is of a Latino crossing the U.S. border at night, more than 40% of illegal immigrants are actually people who entered the country legally but overstayed their visas.").

[36] H.R. REP. NO. 99-682, at 52.

[37] *See generally* George J. Borjas, *Immigrants and the U.S. Labor Market*, *in* ESSAYS ON LEGAL AND ILLEGAL IMMIGRATION 7 (Susan Pozo ed., W.E. Upjohn Institute for Employment Research 1986).

[38] *But see* Thomas J. Espenshade, *Unauthorized Immigration to the*

aimed at decreasing the flow of illegal immigration was necessary "both to protect U.S. labor and economy, and to assure the orderly entry of immigrants into this country."[39]

Various bills dealing with illegal immigration were introduced in the House and Senate throughout the 1970s and into the 1980s.[40] Little headway was made, however, often because the two branches of the legislature could not agree on final resolutions.[41] One law that did pass was the Act of October 5, 1978.[42] This Act created the Select Commission on Immigration and Refugee Policy to study the current state of immigration law and to report its findings and recommendations for reform to the President and Congress.[43]

In March 1981, the Commission published its final report,[44] which affirmed the notion that undocumented immigrants are attracted primarily by employment opportunities.[45] It discussed the "pernicious effects" of undocumented immigration on society, which it argued led to the creation of an underclass of workers who are "at the mercy of unscrupulous employers and coyotes who smuggle them across the border."[46] The Commission saw the most devastating impact of widespread undocumented

---

United States, 21 ANN. REV. SOC. 195, 210 (1995) (arguing that undocumented immigrants actually "help generate employment for others through their work and consumption" and that studies show undocumented immigrants to have contributed to federal budgetary surpluses, rather than deficits).

[39] *See* H.R. REP. NO. 99-682, at 52 (citing H.R. REP. NO. 94-506, at 3 (1975)).

[40] *See id.* at 52-55.

[41] *Id.*

[42] Pub. L. No. 95-412, 92 Stat. 907 (1978).

[43] H.R. REP. NO. 99-682, at 53.

[44] SELECT COMM'N ON IMMIGRATION & REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NAT'L INTEREST: THE FINAL REPORT AND RECOMMENDATIONS OF THE SELECT COMM'N ON IMMIGRATION AND REFUGEE POLICY WITH SUPPLEMENTAL VIEWS BY COMM'RS (U.S. Gov't Printing Office 1980).

[45] *Id.* at 41.

[46] *Id.* at 41-42.

immigration to be "the disregard it breeds for other U.S. laws," including minimum wage, occupational safety, and anti-smuggling laws.[47] To counter this perceived problem, the Commission recommended a three-part program that included enhanced border and interior enforcement, economic deterrents—specifically employer sanctions, and a program for legalizing certain undocumented immigrants.[48]

The Commission's recommendations and the previous attempts at passing legislation culminated in the enactment of the Immigration Reform and Control Act of 1986 (IRCA).[49] This Act emphasized employer sanctions as a mechanism for decreasing illegal immigration. It made the knowing employment of undocumented immigrants unlawful, required employers to check certain documents verifying legal status, and authorized a system of graduated penalties for employers who violate the Act.[50] This Act also added an anti-discrimination provision to the INA,[51] in order to prevent employers from discriminating on the basis of national origin or citizenship (except for undocumented immigrants) out of fear of liability.[52] IRCA further established an amnesty program for certain undocumented immigrants who had continuously resided in the United States since January 1, 1982.[53] In passing this provision, Congress reasoned that many undocumented immigrants, who have resided in the country for several years and have become beneficial members of society, continue to live in

---

[47] *Id.* at 42.
[48] *Id.* at 45.
[49] Immigration Reform and Control Act (IRCA) of 1986, Pub. L. No. 99-603, *reprinted in* 1986 U.S.C.C.A.N. 3359. Upon signing the law, President Reagan called it "the product of one of the longest and most difficult legislative undertakings in recent memory." Statement by President Reagan upon signing S.1200, 1986 U.S.C.C.A.N. 5856-1, 5856-4.
[50] IRCA § 101 (codified at 8 U.S.C. § 1324a).
[51] *Id.* § 102 (codified at 8 U.S.C. § 1324b).
[52] H.R. REP. NO. 99-682, at 68.
[53] IRCA § 201 (codified at 8 U.S.C. § 1255a).

fear due to their undocumented status.[54] Granting legal status to such immigrants would allow the INS to focus on curbing the current flow of illegal arrivals.[55]

2. Immigration Policy in the 1990s

Significant legislation dealing with illegal immigration did not surface again until the mid-1990s. Many people refer to this time as a period of emerging anti-immigration and nativist sentiment,[56] as the tone of the immigration debate dramatically changed in the decade after the enactment of the IRCA. California Proposition 187, which was voted into law by a large margin of the state's citizens in 1994, was of national significance.[57] This law was based on the assumption that California's undocumented immigrant community caused economic hardship to citizens and threatened the public through criminal conduct.[58] Proposition 187 denied publicly funded social[59] and health care services[60] and public education to undocumented immigrants.[61] The law also required the state's law enforcement agencies to "fully cooperate" with the INS in its efforts to arrest undocumented immigrants.[62]

---

[54] H.R. REP. NO. 99-682, at 49.
[55] *Id.* While immigrant advocates generally favor amnesty programs, some fault the IRCA for constructing "the contemporary illegal identity" by distinguishing the category of immigrants whose status could be legalized from others. *See* Mendelson, *supra* note 14, at 203.
[56] *See generally*, Leo R. Chavez, *Immigration Reform and Nativism: The Nationalist Response to the Transnationalist Challenge*, *in* IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRATION IMPULSE IN THE UNITED STATES 61 (Juan F. Perea ed., New York Univ. Press 1997); Stephen H. Legomsky, *E Pluribus Unum: Immigration, Race, and Other Deep Divides*, 21 S. ILL. U. L.J. 101 (1996).
[57] Cal. Prop. 187 (1994).
[58] *Id.* § 1.
[59] *Id.* § 5.
[60] *Id.* § 6.
[61] *Id.* § 7.
[62] *Id.* § 4. Subsequent court decisions found that some of the provisions

While Proposition 187 was not a piece of federal legislation, its passage was important in shaping the national immigration dialogue,[63] especially because California has one of the nation's largest immigrant communities. In fact, Proposition 187 likely influenced the passage of certain provisions in the Personal Responsibility and Work Reconciliation Act of 1996, which limited federal public benefits for legal immigrants and excluded undocumented immigrants from federal benefits programs.[64] Furthermore, Proposition 187 was passed by such a large margin that it "sent a powerful message to Congress regarding immigration as a powerful national political issue."[65] Proving that they were "tough on immigrants"[66] became a politically wise move for lawmakers. Whereas a decade earlier legislators presented an image of undocumented immigrants as victims of merciless employers and smugglers, public discourse shifted to accuse undocumented immigrants of being dangerous elements of society who leached public resources. In addition, the discourse surrounding Proposition 187 and similar enactments carried disturbing racial, particularly anti-Latino, undertones.[67]

---

of Proposition 187 were unconstitutional or preempted by federal law. *See* League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755 (C.D. Cal. 1995), *appeal dismissed in part*, 131 F.3d 1297 (9th Cir. 1997).

[63] *See* Chavez, *supra* note 56, at 65.

[64] Pub. L. No. 104-193, 110 Stat. 2105, Title IV (1996).

[65] Barbara Hines, *So Near Yet So Far Away: The Effect of September 11th on Mexican Immigrants in the United States*, 8 TEX. HISP. J.L. & POL'Y 37, 39-40 (2002).

[66] *Id.* at 40.

[67] Statements made by supporters of Proposition 187 demonstrated fear that the increasing Latino immigrant population threatened the majority status of the region's white population. For instance, Glenn Spencer, founder of the anti-immigrant group, Voice of Citizens Together, feared that immigrants were "part of a reconquest of the American Southwest by foreign Hispanics." Chavez, *supra* note 56, at 68 (quoting Gabe Martinez & Patrick J. McDonnell, *Prop. 187 Forces Rely on Message—Not Strategy*, L.A. TIMES, Oct. 30, 1994, at A1). *See generally* Garcia, *supra* note 14.

In 1996, the 104th Congress, feeding off the anti-immigration sentiment present throughout the country, enacted multiple pieces of legislation affecting immigrants. This legislation reflected not only the growing concerns about illegal immigration, but also the growing concerns about terrorism and crime. By 1996, America had experienced two terrorist attacks: the 1993 World Trade Center bombing and the 1995 Oklahoma City bombing. In response to growing concerns about terrorism and crime, Congress passed the Antiterrorism and Effective Death Penalty Act (hereinafter "AEDPA") in April 1996.[68] Title IV of the AEDPA focuses exclusively on immigrants, in particular on the removal and exclusion of "alien terrorists" and "criminal aliens."[69] Section 439 of the AEDPA authorizes state and local law enforcement officials to arrest and detain immigrants who had previously been convicted of a felony in the United States.[70] Interestingly, while the AEDPA focuses largely on excluding and detaining immigrants who pose a potential terrorist threat, an American citizen perpetrated the Oklahoma City bombing—the most devastating terrorist attack the country had suffered by this time.

Also in 1996, Congress signed the Illegal Immigration Reform and Immigrant Responsibility Act (hereinafter "IIRIRA") into law as Division C of the Omnibus Consolidation Appropriations Act of 1996.[71] The IIRIRA was the most significant piece of legislation dealing with illegal immigration since the IRCA. This Act used a system of tougher border patrol[72] and interior

---

[68] Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, *reprinted in* 1996 U.S.C.C.A.N (110 Stat.) 1214.
[69] *Id.* §§ 401-43.
[70] *Id.* § 439.
[71] Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, *reprinted in* 1996 U.S.C.C.A.N. (110 Stat.) 3009.
[72] *Id.* §§ 101-12.

enforcement[73] to deal with both illegal entry and expired visas. Instead of attempting to deter the employment of undocumented immigrants as the IRCA did, the IIRIRA focused directly on deterring and punishing immigrants through the use of civil, and in some limited instances criminal, penalties against the immigrants themselves.[74] The IIRIRA also instructed the Attorney General to set up an "automated entry and exit control system" to determine whether temporary residents overstayed their visas.[75]

While the AEDPA discussed local law enforcement's involvement in apprehending and detaining criminal aliens, the IIRIRA went a step further by discussing local law enforcement's involvement in apprehending violators of civil immigration laws. The IIRIRA adds a provision to the INA permitting the Attorney General to enter into written agreements with state or local officials to perform the functions of immigration officers.[76] This provision requires, however, that state or local officers "be qualified to perform" the relevant functions of immigration officers, which includes that they have had "adequate training."[77] The IIRIRA also makes it clear that no agreement is necessary for a state or local officer to report information to the Attorney General with regard to someone's immigration status or to cooperate with the Attorney General in identifying, apprehending, detaining, or removing immigrants "not lawfully present."[78] The first state to take advantage of this

---

[73] *Id.* §§ 131-34.

[74] *Id.* §§ 105, 108 (codified at 8 U.S.C. §§ 1325, 758). Section 105 places fines upon "any alien who is apprehended while entering (or attempting to enter) the United States at any time or place other than as designated by immigration officers . . . ." *Id.* § 105. Section 108 imposes criminal penalties on "high speed flight[s] from . . . immigration checkpoint[s]." *Id.* § 108.

[75] *Id.* § 110 (codified at 8 U.S.C. § 1221).

[76] *Id.* § 133 (codified at 8 U.S.C. § 1357(g)).

[77] *Id.*

[78] *Id.* (codified at 8 U.S.C. § 1357(g)(10)).

provision was Florida, six years after the IIRIRA passed.[79]

Many immigration scholars and immigrant advocates criticize the 1996 laws for being overly inclusive and unnecessarily harsh on immigrants when the primary aim was to prevent terrorism and crime.[80] In the legislators' drive to tackle "criminal aliens," they created laws which severely penalized immigrants for crimes committed years ago by making certain offenses automatic grounds for deportation, regardless of when the offenses occurred.[81] The 1996 legislation represents what many refer to as the increasing "criminalization" of immigration law, as the fields of criminal law and immigration law became increasingly intertwined.[82] It also represents the growing tendency to equate illegal immigration with criminality and terrorism.

III. Immigration Policy at the Turn of the Millennium

Despite the growing hostility toward immigrants in the mid-1990s, or perhaps because of it, immigrant advocates appeared to be successful in changing the tone of immigration policy by the end of the twentieth century. The "draconian" 1996 legislation prompted immigrant advocates to increase efforts to liberalize the nation's immigration policy. [83] Many lawmakers also began to

---

[79] McKenzie, *supra* note 17, at 1156.

[80] In fact, upon signing the AEDPA into law, President Clinton himself acknowledged the over-inclusiveness of the Act. Johnson, *supra* note 19, at 878 (citing Statement of the President on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 17 WEEKLY COMP. PRES. DOC. 719 (Apr. 24, 1996) (stating that the AEDPA "makes a number of major, ill-advised changes in our immigration laws having nothing to do with fighting terrorism")).

[81] *Id.*

[82] *See generally* Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 GEO. MASON L. REV. 669 (1997).

[83] Hines, *supra* note 65, at 39, 40.

second-guess the wisdom of the 1996 laws.[84] In the beginning of the twenty-first century, the Supreme Court struck down some of the provisions of the IIRIRA as invalid.[85] Also important, public attitudes toward immigrants improved by 2000.[86]

Barbara Hines and Michael Welch credit two factors for influencing attitudes toward immigrants. In the late twentieth and early twenty-first century, the Hispanic population was growing and it became increasingly clear that this group would constitute an important political constituency.[87] Second, the nation's economic condition improved toward the end of the 1990s, which made immigrants appear as less of an economic threat.[88] More people saw low-wage immigrant workers as necessary for filling labor shortages, rather than as workers who were taking away citizens' jobs.[89] Moves were being made to develop more temporary worker programs for Mexican migratory workers, and as late as September 9, 2001, bilateral talks between Mexico and the United States made a new legalization program for undocumented immigrants seem like a very real possibility.[90] By the fall of 2001, immigrant advocates had high hopes that they would have much success in reversing the tide of anti-immigration legislation and policy.

---

[84] *Id.* at 40; *see also* MICHAEL WELCH, DETAINED: IMMIGRATION LAWS AND THE EXPANDING INS JAIL COMPLEX 180 (2002).
[85] Hines, *supra* note 65, at 40 (citing INS v. St. Cyr, 533 U.S. 289 (2001); Zadvydas v. INS, 533 U.S. 678 (2001)).
[86] WELCH, *supra* note 84, at 180.
[87] *Id.*; *see also* Hines, *supra* note 65, at 41.
[88] WELCH, *supra* note 84, at 180 (discussing the shift in public opinion polls which showed that in 1994, 63% of the public saw immigrants as "an economic drain on the country," and that in 2000, only 38% held similar views); *see also* Hines, *supra* note 65, at 41.
[89] Hines, *supra* note 65, at 41.
[90] *Id.* at 42.

IV. Immigration Policy in the Aftermath of 9/11

Whatever the hopes of immigrant activists before September 11, 2001, everything changed afterwards. Soon afterward, President Bush announced that the nation would be engaged in an unconventional "war" aimed at defeating "the global terror network."[91] Part of the domestic manifestation of this conflict was an immediate targeting of immigrants and harshening of immigration laws. The 9/11 criminal investigations immediately focused on immigrants, primarily men from predominantly Muslim countries in the Middle East and South Asia. Although none of the immigrants detained in the initial FBI investigations were charged with connections to terrorism, the INS, working with the FBI, used civil immigration laws to detain, investigate, and deport aliens.[92] In addition, Congress immediately reacted with legislation aimed at deterring and punishing "terrorist attacks in the United States and around the world" and enhancing "law enforcement investigatory tools."[93] The USA PATRIOT Act dramatically increased the federal government's surveillance and investigative powers and also contained many provisions affecting immigrants. For instance, it expanded the ability to detain and deport non-citizens who are deemed a "security risk."[94]

---

[91] President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001) (transcript *available at* http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html).

[92] *See generally* U.S. DEPARTMENT OF JUSTICE, 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 (Apr. 2003), *available at* http://www.fas.org/irp/agency/doj/oig/detainees.pdf [hereinafter OIG Report].

[93] The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

[94] *See* Patricia Medige, *Immigration Issues in a Security-Minded America*, 33 COLO. LAW. 11, 19 (2004).

While federal policy continued to apply increased scrutiny to Arab and Muslim immigrants,[95] it appeared that all immigrants came under scrutiny in post-9/11 America. As news reports surfaced suggesting that improved immigration enforcement and communication could have provided clues to the hijackers and their plot,[96] immigration reform became an important battlefront in the "war on terrorism."[97] The AEDPA indicated that policymakers had already drawn a link between terrorism and immigration, but this link was furthered after 9/11. The conceptual link between immigration and terrorism is perhaps made most clear by the abolishment of the INS and the reorganization of its functions in the Department of Homeland Security (DHS), whose primary mission is preventing terrorist attacks and reducing the country's vulnerability to terrorism.[98] Furthermore, public opinion seemed to support measures aimed at reducing immigration and more strictly enforcing immigration laws.[99] Legislators soon began to

---

[95] For example, the INS created a system of "special registration" in 2002 for male visa-holders from predominantly Muslim countries. 67 Fed. Reg. 52,584 (Aug. 12, 2002).

[96] *See, e.g.*, Philip Shenon & David Johnston, *Two Agencies Say Silence Prevented Pair's Tracking*, N.Y. TIMES, Oct. 2, 2002, at A17.

[97] Newspaper headlines and story placement reveal the popular association between immigration and the war on terrorism. *See, e.g.*, Matthew L. Wald, *Officials Arrest 104 Airport Workers in Washington Area*, N.Y. TIMES, Apr. 24, 2002, at A13 (discussing the arrests of undocumented immigrant airport employees). Although this story did not indicate that any of the employees were tied to terrorism, it appeared in a feature section titled "A Nation Challenged."

[98] Homeland Security Act of 2002, Pub. L. No. 107-296 § 111 (Nov. 25, 2002). The INS was dissolved, and its functions were replaced by three DHS bureaus: the Bureau of Citizenship and Immigration Services (USCIS), which handles immigration services; the Bureau of Immigration and Customs Enforcements, which oversees the interior enforcement functions; and the Bureau of Customs and Border Protection, which polices the nation's borders. *See* Medige, *supra* note 94, at 11. Some immigration scholars, while alarmed by the placement of immigration powers in the DHS, believe that the separation of immigration service and enforcement functions into different agencies is a positive change. *See, e.g.*, Romero, *supra* note 21, at 51, 52.

[99] *See* Hines, *supra* note 65, at 45 (discussing two public opinion polls

attack any measures aimed at relaxing immigration laws as potential threats to national security.[100]

V. The Proposed Legislation

In some ways, the CLEAR Act is a continuation of the IIRIRA. The CLEAR Act seeks to punish immigration violators by increasing the civil and criminal penalties provided in the IIRIRA.[101] The 2005 bill goes even further by completely criminalizing the unlawful presence of immigrants; under the CLEAR Act of 2005, it is a felony to be in the country in violation of the INA.[102]

This Act, however, handles the problem of limited resources in a different way from its predecessors. Whereas earlier legislation appropriated increased spending for federal immigration enforcement, particularly border patrol,[103] the new legislation seeks to incorporate resources from outside federal immigration agencies. By authorizing state and local agencies to carry out the functions of immigration officers, hundreds of thousands of police officers would be able to fill the large gaps left by the limited number of federal immigration investigators.[104]

The bill does not stop at merely affirming the authority of state and local law enforcement agencies to enforce immigration laws; it establishes a program to provide incentives for local police to enforce immigration laws. Under the CLEAR Act, any state that has a statute,

---

conducted in aftermath of September 11th).

[100] *Id.*

[101] H.R. 3137 § 4(b), (c).

[102] H.R. 3137 § 4(a). The "felony" language is an addition to the initial CLEAR Act of 2003, H.R. 2671.

[103] *See* IRCA § 111; IIRIRA §§ 101-103.

[104] *See* Press Release, Norwood, June 30, 2005, *supra* note 2; *see also CLEAR Act 2003 Hearing*, *supra* note 5, at 30 (prepared statement of James R. Edwards, Ph.D.) (noting that 2,000 immigration investigators currently cover the entire nation and that funding for interior enforcement is only one-fifth the amount used for border enforcement).

policy, or practice prohibiting law enforcement from enforcing immigration laws will have certain federal funds withheld from it.[105] Any withheld funds would be reallocated to states that do comply with the Act's provisions.[106] Furthermore, the bill requires state and local law enforcement agencies to provide the Department of Justice and the Department of Homeland Security with information on detained immigration violators via the National Crime Information Center database.[107] The CLEAR Act also requires that the DHS produce a training manual, a "pocket guide," and training programs for use by local law enforcement agencies.[108] It does not, however, require that state or local officers have any special training before assisting in federal immigration enforcement.[109] Under the Act, state and local officers are given personal and agency immunity for any liability arising out of the enforcement of federal immigration law.[110]

The CLEAR Act was first introduced in the House of Representatives in 2003 and was referred to the House Judiciary Committee where a hearing on it was held before the Subcommittee on Immigration, Border Security, and Claims.[111] Four witnesses were present at the hearing, with all but one testifying in favor of the CLEAR Act.[112] Still, the hearing was far from being one-sided, as several committee members spoke fervently against the Act.[113] The CLEAR Act stalled in Congress and died despite

---

[105] H.R. 3137 § 3(a).
[106] *Id.* § 3(c).
[107] *Id.* § 5.
[108] *Id.* § 10.
[109] *Id.* § 10(e)(3).
[110] *Id.* § 110.
[111] Cong. Index 35,038 (2003-2004) v.2.
[112] *CLEAR Act 2003 Hearing*, *supra* note 5.
[113] *See, e.g.*, *id.* at 3-6 (statements by Rep. Lee, Member, H. Subcomm. on Immigration, Border Sec., and Claims), 6-8 (statements by Rep. Sanchez, Member, H. Subcomm. on Immigration, Border Sec., and Claims), 9 (statements by Rep. Lofgren, Member, H. Subcomm. on Immigration, Border Sec., and Claims).

having 125 co-sponsors.[114] However, it was quickly reintroduced in June 2005. The new legislation includes changes that reflect some of the previous concerns expressed about the Act,[115] as well as provisions that strengthen its impact.[116] At this writing, the CLEAR Act has seventy-four co-sponsors.[117]

The CLEAR Act's parallel in the Senate is the Homeland Security Enhancement Act (hereinafter "HSEA").[118] The HSEA is also a carry-over from the 108th Congress. It was first introduced by Senator Jeff Sessions (AL) on November 20, 2003,[119] and reintroduced in June 2005.[120] The HSEA is substantially similar to the CLEAR Act; in fact, the CLEAR Act of 2005 appears to have been amended to more closely follow the HSEA.[121] At present, the HSEA has three sponsors.[122]

---

[114] Bill Status & Summary for the 108th Congress, H.R. 2671, http://thomas.loc.gov/cgi-bin/bdquery/z?d108:HR02671:@@@L&summ2=m& (last visited May 26, 2006).

[115] For example, apparently to address concerns that the legislation would overburden police, the 2005 Act was amended to require the DHS to pay training costs, H.R. 3137 § 10(d), while the 2003 Act allowed for a fee to be charged, H.R. 2671 § 109(b)(1).

[116] *See supra* note 104.

[117] Bill Summary & Status for the 109th Congress, H.R. 3137, http://thomas.loc.gov/cgi-bin/bdquery/z?d108:h.r.02671 (last visited May 26, 2006).

[118] Homeland Security Enhancement Act (HSEA) of 2003, S. 1906, 108th Cong. (2003), *available at* http://www.theorator.com/bills108/s1906.html (last visited July 6, 2006); Homeland Security Enhancement Act (HSEA) of 2005, S. 1362, 109th Cong. (2005), *available at* http://thomas.loc.gov/cgi-bin/query/z?c109:S.1362: (last visited July 6, 2006).

[119] Bill Status & Summary for the 108th Congress, S. 1906, http://thomas.loc.gov/cgi-bin/bdquery/z?d108:s.01906: (last visited May 26, 2006).

[120] Bill Summary & Status for the 109th Congress, S.1362, http://thomas.loc.gov/cgi-bin/bdquery/z?d109:s.01362: (last visited May 26, 2006).

[121] One key difference is the HSEA makes "unlawful presence" a misdemeanor offense, while the CLEAR Act makes it a felony offense. S. 1362 § 5(a); H.R. 3137 § 4(a).

[122] Bill Status & Summary, S. 1906, *supra* note 119.

VI. Potential Dangers of the Legislation

Opponents of the CLEAR Act have many complaints and concerns about it.[123] Two of the most frequently cited reasons for opposing the CLEAR Act as bad policy are (1) that the Act would have the danger of impairing the jobs of police; and (2) that the legislation would likely lead to the abuse of non-citizens and ethnic minorities.

A. Implications for Law Enforcement

Even those who support stricter penalties on undocumented immigrants and strict enforcement of immigration laws should recognize that the CLEAR Act has the potential to do more harm than good. In particular, the CLEAR Act could have a damaging impact upon state and local law enforcement agencies by placing unnecessary burdens upon them. The new law is unnecessary because earlier legislation allowed room for local police to cooperate with and assist federal immigration agents.[124] In addition, local police are authorized to enforce criminal laws against anyone, including undocumented immigrants, and courts have held that local police are not precluded from enforcing laws against immigrants.[125] The primary job of state and local law enforcement, however, is

---

[123] *See, e.g., CLEAR Act 2003 Hearing, supra* note 5, at 35-37 (statement of Gordon Quan, Mayor Pro Tem, Houston, TX); ACLU Statement, *supra* note 15; People for the American Way, *State and Local Police Enforcement of Immigration Law: What Are the Issues?* http://www.pfaw.org/pfaw/general/default.aspx?oid=13338 (last visited May 26, 2006).

[124] *See* 8 U.S.C. § 1357(g)(10) (2006).

[125] *See* Gonzales v. City of Peoria, 722 F.2d 468, 474 (9th Cir. 1983) (holding that federal immigration law does not preempt every state activity involving aliens); Zapeda v. U.S. Immigration & Nationalization Serv., 753 F.2d 719, 731-32 (9th Cir. 1983) (holding that the INS is not prohibited from obtaining assistance from local police agencies).

protecting the public from criminal activity, not getting rid of undocumented immigrants who are not committing crimes.

Thus, the CLEAR Act would unnecessarily add an extra burden to already taxed local agencies.[126] Not only does it ask local officers to assist with federal immigration investigations, it essentially authorizes them to act as immigration agents. Furthermore, the Act would penalize states and agencies by cutting funds if they chose not to enforce immigration laws.[127] This essentially amounts to coercing states to carry out supposedly voluntary functions.[128] Since 9/11, police officers have been asked to be the "first responders" to acts of terrorism.[129] Placing an extra burden on them would make it increasingly difficult for them both to be "first responders" and to continue the normal duties of their work.

The CLEAR Act may further frustrate the efforts of police by making their criminal investigation tasks more difficult. In particular, many police departments fear that by becoming quasi-immigration agents, they will lose trust and respect within immigrant communities.[130] As earlier

---

[126] *CLEAR Act 2003 Hearing, supra* note 5, at 38-39 (prepared statement by Gordon Quan) (discussing the financial burdens state and local police already face).

[127] H.R. 3137 § 3(a).

[128] *CLEAR Act 2003 Hearing, supra* note 5, at 2 (statement of Rep. Hostetler, Chairman, House Subcomm. on Immigration, Border Sec., and Claims) (discussing the discretion retained by police under the Act); *see also* INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE (IACP), *Enforcing Immigration Law: The Role of State, Tribal and Local Law Enforcement* 5 (Nov. 30, 2004), http://www.theiacp.org/documents/pdfs/Publications/ImmigrationEnforcementconf%2Epdf (stating the position of the IACP that any legislation enlisting the assistance of local police in immigration enforcement "be based on completely *voluntary cooperation*" and not "seek to coerce cooperation through the use of sanction mechanisms that would withhold federal assistance funds").

[129] *CLEAR Act 2003 Hearing, supra* note 5, at 4 (statements by Rep. Lee).

[130] *See* Laura Parker, *Police Departments Balk at Idea of Becoming "Quasi-INS Agents,"* USA TODAY, May 7, 2002, at 8A.

reports on illegal immigration noted, undocumented immigrants are often afraid to approach police.[131] Many local law enforcement agencies have worked hard, and continue to work hard, to gain the trust of immigrant communities.[132] This is true even when local police do not actively enforce immigration laws. Undocumented immigrants will become even more hesitant to inform officers of crimes if they know that these officers routinely interrogate people about their immigration status. This would not only put victims at greater risk, but it would also decrease the likelihood of apprehending many criminal offenders.[133] For example, some police fear that the CLEAR Act would make battered immigrant women less likely to report domestic abuse.[134]

The 2005 bill was amended to address some of these concerns by clarifying that police are not *required* to report or arrest crime victims or witnesses.[135] It still, however, gives police the freedom to do so, in part because agencies concerned with preserving their federal funding will want to prove that they are complying with the Act's provisions. Furthermore, even if police do not report victims or witnesses, the reputation of police as immigration enforcers in other contexts likely will be sufficient to deter immigrants from wanting any contact with police. Being seen as immigration officers not only has the potential to damage the police's relationship with undocumented immigrants, but legal immigrants and

---

[131] *See* H.R. REP. NO. 99-682, at 49.

[132] *See CLEAR Act 2003 Hearing, supra* note 5, at 185 (letter from Ray Samuels, Chief of Police, Newark, CA).

[133] *See id.* at 179-180 (letter from Ellen T. Hanson, Chief of Police, Lenexa, KY).

[134] IACP, *supra* note 128, at 5; *see also* Karin Almjeld, *CLEAR Act Threatens Immigrant Women Victims of Violence*, NAT'L NOW TIMES (Winter 2003-04), http://www.now.org/nnt/winter-2004/clear.html (arguing that the CLEAR Act "would undermine the Violence Against Women Act" and the Victims of Trafficking and Violence Prevention Act).

[135] H.R. 3137 § 3(b).

citizens may also lose their trust in the police upon hearing the experiences of people they know being apprehended for immigration offenses.

For such reasons, many police departments and law enforcement organizations throughout the country oppose the CLEAR Act. According to the Chief of Police of Newark, California, "the CLEAR Act would make state and local law enforcement officers' jobs nearly impossible and move us further from the goal we all share of making our communities safer."[136]

B. Civil Rights Implications

Another key concern about the CLEAR Act is that it could lead to widespread civil rights violations and ethnic profiling. Presumably, one of the goals of the legislation's supporters is to put local police officers in a position to discover illegal immigrants during the course of their work. Supporters of the Act appear to support the proposition that police officers could detain and question people based on a suspicion of illegal immigration status.[137] What qualifies, then, as justifiable or reasonable suspicion? Immigrants today are identified largely by their race and ethnicity. Professor Victor Romero explains that immigration in America has been historically intertwined with race, and a presumption remains that citizens are either white or black,

---

[136] *CLEAR Act 2003 Hearing, supra* note 5, at 185 (letter from Ray Samuels).

[137] *See id.* at 40-45 (statements by Gordon Quan and Rep. Hostetler). Rep. Hostetler asked Gordon Quan, Mayor Pro Tem and City Council Member of Houston, a series of questions regarding Houston Police Department policy. Rep. Hostetler seemed unsatisfied with Quan's answers that officers are not permitted to ask about citizenship status, detain, or arrest someone based solely on a suspicion of illegal status, though they can contact INS regarding someone known to be an illegal immigrant who is arrested on separate criminal charges. Hostetler seems to prefer a policy of questioning, and perhaps even detaining, people based on suspicion.

while non-citizens are Latino or Asian.[138] To be sure, since the elimination of the national origins quota system in 1965, most immigrants have come from Latin America and Asia.[139]

The CLEAR Act's authorization thus presents the danger that officers, who are under pressure by the Act to uncover immigration violators, may question and even detain people based solely on their ethnicity or assumed ethnicity.[140] Because the Act immunizes local officers and agencies from any civil liability arising from their enforcement of immigration laws,[141] it provides a convenient way to bypass judicial limitations on race and ethnicity-based immigration enforcement.[142]

Proponents of the CLEAR Act and related measures argue that police are already trained to avoid racial profiling.[143] It is true that, prior to the 9/11 attacks, law enforcement agencies around the country appeared increasingly concerned with the problems of racial profiling.[144] It is also true, however, that racial profiling has long been practiced by law enforcement.[145] Furthermore, attitudes toward racial and ethnic profiling

---

[138] Romero, *supra* note 21, at 52-54.
[139] *Id.* at 54.
[140] There is evidence that the INS itself often used ethnic profiling it its immigration enforcement. *See* Sameer M. Ashar, *Immigration, Enforcement, and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185, 1194 (2002) (discussing a study by NYU School of Law Immigrant Rights Clinic, which revealed that INS agents targeted people playing "Spanish music" and having "Hispanic appearance" in its immigration enforcement).
[141] H.R. 2671 § 110.
[142] *See* United States v. Brignon-Ponce, 422 U.S. 873, 885-86 (1975) (holding that while border patrol may take into account a number of factors in deciding whether reasonable suspicion exists to stop a car, suspicion is not reasonable when it is based on ethnicity alone).
[143] *See* Sessions & Hayden, *supra* note 17, at 340.
[144] Kevin R. Johnson, *Racial Profiling After September 11: The Department of Justice Guidelines*, 50 LOY. L. REV. 67, 67 (2004).
[145] *See* Ashar, *supra* note 140, at 1193-94.

changed drastically after 9/11. Prior to 9/11, polls showed that most Americans believed racial profiling should be eliminated.[146] Public opinion changed after 9/11, however, to accept profiling "based on race, national origin, nationality, and religion."[147] The federal government's own policies show that in the post-9/11 world, it is acceptable, even expected and desirable, to use ethnicity as the primary cause for suspicion.[148]

Furthermore, the lack of training that officers would receive under the CLEAR Act is alarming. The CLEAR Act and HSEA provide for the creation of a "training manual" and "pocket guide" for law enforcement agencies and call for the DHS to make training sessions available through various means.[149] Both acts, however, make clear that these provisions "shall not be construed as making any immigration-related training a requirement for, or prerequisite to" immigration enforcement.[150] Thus, the acts would authorize local police to act in the same capacity as immigration officers, although providing little or no training. Immigration law is one of the most complicated and oft-changing areas of American law.[151] It even can be difficult for immigration attorneys and federal immigration agents to keep track of the various nuances that are continually changing in the field of immigration law. How, then, are local and state police officers, whose jobs are not to specialize in immigration matters, to adequately understand the complex laws?

---

[146] Sharon L. Davies, *Reflections on the Criminal Justice System after September 11: Profiling Terror*, 1 OHIO ST. J. CRIM. L. 45, 46 n.5 (citing Gallup poll in which 81% of respondents revealed a disapproval of profiling practices).

[147] Johnson, *Racial Profiling, supra* note 144, at 68; *see also* Davies, *supra* note 146, at 45 n.6.

[148] *See* Ashar, *supra* note 140, at 1191-96.

[149] H.R. 3137 § 10; S. 1362 § 9.

[150] H.R. 3137 § 10(e)(3); S. 1362 § 9(c).

[151] *See* Medige, *supra* note 94, at 11 (discussing the "steady stream of federal and state legislation [that] has changed aspects of immigration law and the rights of immigrants over the past several years").

The lack of adequate training increases the very real potential for mistreatment and civil rights violations. The immunity provisions of the CLEAR Act[152] make the rectification of such problems unlikely. Indeed, supporters of the CLEAR Act are right to worry about the potential liability that local police face when they engage in immigration enforcement. In just one of many prior instances, police officers in Katy, Texas, faced lawsuits in 1994 stemming from the detentions of over eighty Latinos suspected of being illegal immigrants, but who were, in fact, either United States citizens or legal residents.[153] Such examples also prove that opponents of the CLEAR Act have a basis for their concerns about the potential for abuse at the hands of poorly trained police who are charged with the difficult task of enforcing immigration laws along with their many other duties.

V. The Policy Behind the CLEAR Act

A. The False Presumption that Illegal Immigrants are Terrorists and Criminals

The CLEAR Act also should be rejected because it is premised on bad policy: the equation of illegal immigrants to terrorists and criminals. The presumption that illegal immigrants are dangerous criminals is clear from the title of the legislation: the Clear Law Enforcement for *Criminal* Alien Removal Act. The presumption is also clear from the rhetoric of the Act's supporters. Representative Norwood, the main sponsor of the CLEAR Act, contends that drastic measures are necessary to stop "the hordes of vicious foreign criminals invading our country to murder, rape, and molest

[152] H.R. 3137 § 11.
[153] IACP, *supra* note 128, at 4.

Americans."[154] Indeed, proponents of the CLEAR Act and HSEA come to press conferences and legislative sessions equipped with stories of undocumented immigrants who had committed heinous crimes against Americans.[155] Proponents also carry with them the stories of the nineteen foreign hijackers who terrorized America and the three hijackers who had previous encounters with police.[156] Measures like the CLEAR Act, we are to assume, would prevent such terrorists and criminals from infiltrating America.

Little besides anecdotal evidence exists, however, that tackling illegal immigration and removing undocumented immigrants will make the country any safer. Very seldom is any proof presented that immigrants, documented or undocumented, are more likely than others to commit violent crimes.[157] The construction of the debate, though, leads one to believe that undocumented immigrants are by nature terrorists or violent criminals of some kind. Such rhetoric ignores proof that the majority of

---

[154] Representative Charlie Norwood, A Five-Minute Address to the U.S. House of Representatives (Apr. 29, 2005), *available at* http://www.house.gov/apps/list/speech/ga09_norwood/CLEARspeech.html.

[155] *See* Prepared Statement of Michelle Malkin, *supra* note 9 (discussing gang rape of a Queens, NY mother by illegal aliens with long criminal records and an illegal alien accused of kidnapping and raping a nine-year old girl); *CLEAR Act 2003 Hearing, supra* note 5, at 2 (statements by Rep. Hostetler) (recounting the same stories of Queens mother and nine-year old girl); Press Release, Norwood, June 30, 2005, *supra* note 2 (telling story of "an illegal alien and convicted criminal being sought for the . . . kidnapping, molestation, and murder" of a young girl in Georgia).

[156] *See* Prepared Statement of Sen. Saxby Chambliss, *State and Local Authority to Enforce Immigration Law: Evaluating a Unified Approach for Stopping Terrorists*, Testimony before the U.S. Comm. on the Judiciary, Subcomm. on Immigration, Border Sec., and Citizenship (Apr. 22, 2004), *available at* http://judiciary.senate.gov/member_statement.cfm?id=1156&wit_id=2624.

[157] *See* Legomsky, *supra* note 56, at 109 (noting that "[i]mmigrants . . . are neither more nor less law-abiding than the native-born U.S. population").

undocumented immigrants come to America seeking work,[158] not to wreak havoc.[159] Under the CLEAR Act, even a young child brought to the country by his or her parents could be considered a "criminal." Furthermore, a large percentage of those considered "illegal immigrants" are actually people who entered the country on legal visas, but who overstayed or otherwise violated the terms of their visas.[160] This could include, for example, those who mistakenly believe they do not need to renew their temporary visas while in the process of having their status adjusted. Under the CLEAR Act, a person would have to prove that "an exceptional and extremely unusual hardship or physical illness" caused his or her visa violation in order to not be charged with a felony offense.

Furthermore, by perpetuating the myth of immigrants as terrorists and criminals, legislation like the CLEAR Act has the potential to increase racial tensions.[161] As noted earlier, race and immigration are closely linked in the minds of most Americans.[162] People of certain races and ethnicities are generally presumed to be immigrants. The CLEAR Act, by painting the picture of immigrants in a dangerous light, will possibly lead to increased stereotyping and marginalization of certain races and ethnicities.

---

[158] *See* Espenshade, *supra* note 38, at 211.

[159] *See Immigration & Naturalization Services (INS) Interior Enforcement Strategy: Hearing before the Subcomm. on Immigration, Border Sec., and Claims of the H. Comm. on the Judiciary*, 107th Cong. 2 (2002) (statement of Rep. Gekas, Chairman of the Subcomm. on Immigration, Border Sec., and Claims).

[160] Linda S. Bosniak, *Opposing Prop. 187: Undocumented Immigrants & the National Imagination*, 28 CONN. L. REV. 555, 594 n.95 (1996).

[161] Romero, *supra* note 21, at 52.

[162] *Supra* notes 140-41 and accompanying text.

B. The Consequences of Co-opting Immigration Policy into Anti-Terrorism Policy

It is clear that immigration policy is inextricably linked with anti-terrorism policy.[163] As a result, it has become impossible to discuss immigration without reference to national security concerns. The fact that immigration policy is shaped in the context of other policy is not new. Immigration has often been an area of law highly vulnerable to changes in other areas that have little to do with immigration. For example, immigration became a key issue during the heated welfare debate of the mid-1990s. California's Proposition 187 reflects this attitude because the legislation was aimed at denying public benefits to "undeserving" aliens.[164] Congress also included provisions excluding immigrants from public benefits in its anti-welfare legislation, the Personal Responsibility and Work Reconciliation Act of 1996.[165] In the mid-1990s, immigration policy was co-opted by economic and welfare policy; in post-9/11 America, immigration policy has been co-opted by anti-terrorism policy.

When legislators view immigration exclusively in terms of national security, they lose sight of what really is appropriate *immigration* policy.[166] Consider that immediately preceding the 9/11 attacks, lawmakers were on the verge of enacting measures that would liberalize immigration policy.[167] Immediately after the attacks, however, the direction of immigration policy abruptly changed. This was, more than anything, a reactionary move. The nation was justifiably shaken by the attacks and

---

[163] *See supra* Part II.D.
[164] *See supra* notes 59-64 and accompanying text.
[165] Pub. L. No. 104-193, 110 Stat. 2105 (1996).
[166] *See* Tumlin, *supra* note 16, at 1228 (stating that "immigration policy has lost its independent policy agenda").
[167] *See generally,* Hines, *supra* note 65.

was left feeling very vulnerable. New immigration proposals were evaluated, first-and-foremost, on the basis of national security policy.[168] Even those legislators who generally support liberalized immigration reform are understandably hesitant to oppose any measure characterized as "necessary" for national security.

At the same time, the CLEAR Act and other immigration legislation in its vein are not merely reactions to the threat of terrorism. Rather, the emergence of what some label a "new nativist" movement, which is characterized by harsh immigration laws, predated 9/11,[169] although the movement lost some steam at the turn of the millennium.[170] The 9/11 attacks created a new incentive to fight illegal immigration, and, for many, the attacks justified disdain toward immigrants. Linking immigration with terrorism, however, merely masks those factors that initially led to the anti-immigration reaction of the previous century.[171] Supporters of new, stricter immigration measures now feel justified in arguing that lax immigration enforcement can, and has, produced disastrous effects on the country. It becomes easier for the nation to invoke harsher immigration reform under this guise of national security.

VII. Conclusion

Given the history of United States immigration law and policy, that immigration is playing such a key role in a national security-minded America comes as no surprise.

---

[168] Tumlin, *supra* note 16, at 1228.

[169] *See generally,* IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES (Juan F. Perea ed., New York Univ. Press 1997).

[170] *See supra* Part II.C.

[171] *See* Chavez, *supra* note 56, at 69 (listing as factors related to increasing anti-immigration sentiment xenophobia as a result of an increasing number of non-white immigrants, economic recession, the failure of previous laws, and emerging nationalism).

As immigration attorney Asli Bali points out, "periods of national crisis have revealed the vulnerability of immigrants' rights to hysteria and repression."[172] In many ways, the current "war on terrorism" has manifested itself in the domestic front as a "war on immigration." The CLEAR Act is one example of the anti-immigration and anti-terrorism forces colliding, because the Act is justified on the grounds of protecting America from both the "criminal" aliens and the potential terrorists coming across our borders. The Act, however, seems to rely on the false presumption that undocumented immigrants are inherently dangerous. Moreover, by coercing local and state police to act as immigration agents, the CLEAR Act has the potential to prevent effective community policing while increasing the potential for abuse of ethnic minorities at the hands of police. Hopefully, the language of national security will not cloud these very real concerns from the view of the lawmakers currently considering the Act. Lawmakers should recognize that, more than anything, the CLEAR Act is unnecessary anti-immigration legislation, and as such, it should be opposed.

[172] Asli U. Bali, *Changes in Immigration Law and Practice After September 11: A Practitioner's Perspective*, 2 CARDOZO PUB. L. POL'Y & ETHICS J. 161 (2003).