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SYMPOSIUM ON CONFRONTING REALITIES: THE LEGAL, MORAL, AND CONSTITUTIONAL ISSUES INVOLVING DIVERSITY: PANEL II: IMMIGRATION POLICY: DIVERSITY, MASS IMMIGRATION, AND NATIONAL SECURITY AFTER 9/11 - AN IMMIGRATION REFORM MOVEMENT PERSPECTIVE

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LEXISNEXIS SUMMARY:

... Fiat justitia et pereat mundus? Diversity as a legal doctrine in immigration law has become a contradiction, not because of what occurs under the law, but because of what occurs outside the law. ... Diversity has taken on a set of concentric meanings in contemporary immigration law and policy. ... The "diversity visa" originated in a pilot program authorized under the Immigration Reform and Control Act of 1986. ... The diversity visa program was greatly expanded under the Immigration Act of 1990. ... In immigration policy, diversity is said to provide the same benefits on a transnational scale. ... The diversity visa program has had no significant effect on the increasing concentration of sources of U.S. immigration by national origin. ... In effect, the concentration of immigrant flows makes the "visa-rich" richer and the "visa-poor" poorer. ... Helton and immigrant advocates would like to break down any nexus between alien terrorist suspects and the far larger population of millions of illegal immigrants, subjecting the relatively minuscule former group to police scrutiny, while providing the later population some form of national preference treatment, such as eligibility for social benefits and political rights. ... Existing legal theories of diversity do not provide a consistent ethical or predictive basis for the regulation of human migration because they cannot account for environmental limitations that can shift the balance between liberty and security or - under conditions of aggressive mass immigration - under both. ...

TEXT:

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Fiat justitia et pereat mundus? n1 Diversity as a legal doctrine in immigration law has become a contradiction, not because of what occurs under the law, but because of what occurs outside the law. In legal scholarship, diversity is a project of liberal constitutionalism, with its concepts of radical egalitarianism, anti-subjugation protections, and historicism. n2 Adherence to variants of liberal constitutionalism among immigration lawyers is widespread. These shared ideologies and professional interests have encouraged a rhetorical segregation of opponents of mass immigration

at the "nativist" right extreme of the political spectrum. n3

In actuality, the core leadership of the immigration reform movement comes from the environmental movement and has tended to use ecological rather than legal concepts in public discourse. n4 In an attempt to renew dialogue between rights-oriented lawyers and limits-oriented environmentalists, I offer a working paper that [*388] highlights ecologic n5 concepts behind immigration reform advocacy. The paradigm of diversity provides a useful organizing point. Diversity has taken on a set of concentric meanings in contemporary immigration law and policy. I would suggest that most advocates mix and mingle these meanings in legal writing.

I. Diversity Visas

At its most discrete, diversity describes a statutory program for awarding immigrant visas to winners of a lottery from countries that have sent relatively few immigrants to the U.S. in recent years. n6 Congressional sponsors of this legislation described the policy underlying the statute as an equitable provision of current visa preferences to natives of countries that have been disadvantaged by past numerical limits and priority laws. n7

The "diversity visa" originated in a pilot program authorized under the Immigration Reform and Control Act of 1986. n8 The NP-5 program provided for 5,000 visas per year to be made available during 1987 and 1988 to natives of foreign states that had been "adversely affected" n9 by the enactment of the Immigration and Nationality Act of 1965. n10 Certain European countries experienced significant drops in the numbers of nationals eligible for immigrant visas after the 1965 repeal of the nation origins quota system. Thirty-seven countries subsequently were determined to be "adversely affected." n11 Applicants for NP-5 non-preference visas could apply by mail to the U.S. State Department, with priority based on the date the application was received. n12

An unexpectedly high demand for NP-5 visas prompted Congress to extend the program for two more years in 1988 and to increase [*389] the availability of visa numbers to 15,000 per fiscal year. n13 However, Rep. Howard Berman (D-CA) criticized the European orientation of the NP-5 program as a "slap in the face" to the 1965 reforms. n14 Berman was able to include a new OP-1 program to add 10,000 more visa numbers in fiscal years 1990 and 1991 for natives of "underrepresented countries." n15 "Underrepresented countries" were defined as those that had used less than twenty-five percent of the immigrant visa numbers normally available during fiscal year 1988. n16 Unlike NP-5, successful applicants under the OP-1 program would be selected randomly by computer in a visa lottery. n17 One hundred and sixty-two countries were found to qualify, and an unprecedented estimated three million applications were received.

The diversity visa program was greatly expanded under the Immigration Act of 1990. n18 Further technical corrections were enacted in 1991. n19 As part of the largest statutory increase in legal immigration levels, Congress stated that one of its goals was to "promote diversity," although the term was never defined. n20 First, a transitional provision, called the AA-1 program, provided 40,000 visas for use between fiscal year 1992 and 1994 for thirty-four "adversely affected" countries. n21 The program was structured by Sen. Edward M. Kennedy and Rep. Edward J. Markey of Massachusetts to favor natives of Ireland, and in particular, Irish citizens illegally employed in the United States. n22 The AA-1 program also included a family preference provision that granted [*390] derivative status to spouses and children of approved beneficiaries. n23 A second transitional provision added loopholes designed to extend NP-5 eligibility for an additional year to various special interest groups and also lacked any diversity-based policy rationale. n24

The permanent diversity visa provisions enacted in 1990 created the diversity lottery in its present form. n25 Allocation of visas by national origin is based on an extraordinarily complicated formula. n26 The Attorney General must first identify, for each "foreign state," n27 the total number of aliens granted permanent legal residence during the most recent five-fiscal-year period. n28 States for which the total number of aliens granted permanent residency status exceeded 50,000 during the relevant period are designated as high-admission states. n29 Natives of high-admission states are ineligible for diversity visas. n30 Six world regions, which roughly correlate to the primary racial

classifications used by the federal government, are identified either as "high-admission" or "low-admission." n31 Quotas for visa numbers for low-admission states are then created using a weighted formula to favor states in low-admissions regions. n32 Unused visa numbers can be redistributed by region [*391] using the same quota ratios. n33 An absolute ceiling of seven percent of total diversity visas is imposed on each eligible state. n34

Diversity visa applicants are chosen randomly each fiscal year in a lottery and selection process. Winning applicants and their derivative spouses must meet education and work experience qualifications higher than those for a "skilled worker" under a third-preference employment-based visa. n35 Separate extensions of eligibility for various special interest groups were enacted in 1994 and 1996. n36 In 1996, the Nicaraguan Adjustment and Central American Relief Act (NACARA) reallocated 5,000 diversity visa numbers to certain illegal aliens from Central America who became eligible to adjust their status to permanent legal resident. n37

The legislative history of the diversity visa programs is one of targeted relief for domestic special interests. n38 It does not identify a legal principle of diversity with general applicability to immigration law. n39 Designation of diversity beneficiaries by nationality and national origin has been arbitrary, and in policy terms, represents little more than a back-handed acknowledgement of the continuing vitality of the plenary power doctrine in immigration jurisprudence.

In immigration policy debate, diversity has also taken on a more normative meaning that evokes domestic civil rights law, as classically but vaguely defined in the Bakke decision. n40 Civil rights rhetoric has been a determinative factor in shaping policy alternatives available to the United States government for the regulation of immigration. n41 In the United States, this formulation [*392] of diversity has been shaped by the Supreme Court's unwillingness to enforce ethnic quotas or other more stark forms of proportionalism among ascriptive groups. For example, in American legal education, diversity is said to enhance interaction among individuals of different races by expanding the subject matter of discourse and improving communications and insight among people from different backgrounds. n42

II. Transnational Diversity Theory

In immigration policy, diversity is said to provide the same benefits on a transnational scale. In particular, diversity is expressed as an ideology for combating xenophobia. This paradigm has been developed most elaborately in transnational institutions. n43 Traditional U.S. civil rights analysis had two prongs - a constitutional prong, based on equal-protection analysis, and a sociological prong - the harm and benefit thesis, based on social science studies, which found that racial and ethnic isolation damaged the individual performance of members of isolated groups. n44 In immigration law, the constitutional prong has been exercised through sanctions on national-origin discrimination. n45 [*393] The influence of the sociological argument has waned along with the failure of federal integration programs in public education and housing, but it has remained influential in foreign jurisprudence, notably in European antidiscrimination law.

Advocates at the transnational level believe that the definition of xenophobia and the differences between it and racism are "still evolving concepts." n46 There is an implication that xenophobia, as ""an attitudinal orientation of hostility against non-natives in a given population"" encompasses a wider range of politically unacceptable thought than does racism, with its emphasis on measurable differences in behaviors. n47 Although xenophobia is a thought crime, its manifestations are said to derive from "severe economic inequalities and the marginalization of persons from access to basic economic and social conditions." n48 However, a direct causal connection between the demographic representation of migrants in a given population and the level of xenophobia is generally denied. n49

Human rights law, with its postulates of a universal right of migration, is the legal mechanism used to measure unlawful xenophobia. n50 Human rights discourse is given a central role in this analysis of xenophobia, whose target is defined broadly as "outsiders." Human rights-based diversity analysis also minimizes legal distinctions between migrant workers and refugees. n51 Diversity, defined as respect for the values and identities of others, is seen as the social and political tool for reducing and ameliorating xenophobic attitudes. n52 The essential legal tools in this process are

national and transnational anti-discrimination legislation to prohibit both direct and indirect xenophobia and to mandate "respect for diversity." n53

Diversity is also used in its most radical sense to describe an ideological alternative to an unrealistic goal of a single, united [*394] community of Americans. For example, legal scholar Stephen Legomsky argues that the United States, with a 1996 population of 260 million and growing, was already too large to maintain a traditional national cultural identity and social structure. n54 Legomsky wrote that, except during fleeting moments of national crisis, Americans "cannot reasonably expect to feel any sort of enduring kinship with 260,000,000 people spread out over millions of square miles and separated by ethnicity, religion, economic class, education level, age, ideology, and other divides." n55 He does not dispute that today the U.S. is experiencing historic sustained high levels of immigration, unlike the past fluxuations, but sees mass immigration both as a net benefit and as a "crucial component of tolerating and celebrating diversity." n56

A variation of this post-national meaning in European discourse expresses the idea dialectically. Personal social identities are held to be mutable and allow for identification with more than one community. Official neglect or hostility to differences can undermine the social and political fabric at a national level. Diversity in this view becomes a prerequisite for societal and individual development. Social cohesion is to be maintained by equalizing the quality of life between evolving communities and by eliminating the marginalization of existing social groups. n57 Multicultural legal theorist Dr. Warwick Tie sought to illustrate the tensions inherent in this dialectic with an anecdote of a Maori man who was indicted for assault on actors who were reenacting the nineteenth century landing of British colonists in New Zealand (a.k.a. Aotearoa). n58 The defendant rejected the court's authority as a Eurocentric legal institution, yet he could not request that the case be transferred to his culturally preferred institution - the marae - unless he first acknowledged the court's authority. He refused to do so. As a result, the trial proceeded, and the judge found that his resistance was a plea of not guilty.

III. Diversity and Mass Immigration

The immigration reform movement looks with skepticism on [*395] diversity as a legal basis for a national immigration policy. That skepticism has been expressed on both conservative and progressive political grounds. n59 However, the central concern of organized immigration control advocacy since the 1970s has been sustained massive levels of worldwide migration.

Under conditions of mass immigration, the benefits diversity is said to provide mutate into problems. To understand this dilemma, it is helpful to make a conceptual contrast between quantity and quality of diversity in immigration. An immigration flow that emphasized quantitative diversity would allocate visa preferences exclusively to natives of countries whose members would constitute a visible minority in the receiving state. It would essentially be a policy of population replacement. A theoretical policy that promoted qualitative diversity would evenly distribute immigrants across all appropriate sending countries. n60

The diversity visa program has had no significant effect on the increasing concentration of sources of U.S. immigration by national origin. The existence of the diversity lottery is an acknowledgement by lawmakers that an imbalance exists - but no more than that. In 2001, nearly twenty percent of legal immigrants admitted to the United States came from a single sending country. n61 That year, more than forty percent of legal immigrants came from just five n62 of more than 250 sovereign states and dependent territories worldwide. n63 In effect, the concentration of immigrant flows makes the "visa-rich" richer and the "visa-poor" poorer.

The mechanism driving this imbalance is chain migration, which [*396] was built into U.S. immigration law in 1965. n64 Chain migration occurs because immigration in the United States is dominated by the policy of family reunification, which enables members of an extended family to follow a single migrant into the United States and gain permanent resident status, regardless of whether they possess skills, a diverse background, or any other qualities that would make them a net benefit to current citizens. n65 In that sense, U.S. immigration policy is essentially nepotistic.

Nepotism and diversity are contradictory. n66

As a legal preference for undistinguished immigrants, nepotism represents an opportunity cost to any immigration reform project that purports to favor qualitative diversity - it crowds out talented immigrants. n67 In critic Steve Sailer's sardonic example, the brother-in-law of an Indian computer chip designer is admitted on a derivative visa and drives a taxi until he saves enough money to put a down payment on a motel. There, he fires the black maids and hires his newly arrived sisters to clean the rooms. n68 In a liberal-democratic system facing conditions of mass immigration, a doctrine of family reunification, by favoring the blood claims of the most recent arrivals over those of more indigenous stock, functions as an extraordinary mutation of *jus sanguinis*. The practice of transnational nepotism facilitates a preference for immigrants who out compete poor American citizens for taxi and motel jobs, rather than those admitted on the basis of any unique and economically valuable talent. n69 Even where immigrants are initially selected solely on the basis of high achievement, those socially valuable qualities do not persist. "While talent does run in families, it also [*397] fairly rapidly regresses to the mean" n70

An immigration policy that favors qualitative diversity requires the enforcement of a system of national-origin quotas. In fact, the Immigration and Nationality Act provides for such a quota system. n71 Per country ceilings are set at seven percent of total family, employment, and diversity visas granted each year. n72 In practice, however, the body of U.S. immigration law is a labyrinth of loopholes and waivers of those per-country ceilings. n73 This arbitrary framework for adjustment of status, when combined with the exceptionally liberal naturalization regime of the United States, makes the theoretical qualitative diversity of United States immigration law illusory in practice.

The relationship between mass immigration and diversity is also contradictory over time. Absorption is a useful term to describe what might be called "immigrant" policy and law, as opposed to "immigration policy," because it connotes neutrality on whether the impact of immigrants on the receiving society should be viewed as a process of newcomer assimilation or of indigenous adaptation. Total numbers of arriving aliens and diversity of immigration flow are inverse factors for the absorptive capacity of the receiving country. It is in principle more efficient to absorb a million immigrants from a single country than a million immigrants from a hundred countries. The first option, however, does not contribute to diversity in terms of the benefits ascribed to such a policy. n74 In contrast, absorbing a hundred-thousand immigrants from a hundred countries would be relatively easier. Disregarding absorptive capacity in order to promote both mass immigration and increased [*398] diversity is not a sustainable option because it increases conflict. n75

A final conceptual problem inherent in a diversity-driven immigration system is its sustainability. What would a non-discriminatory diversity quotient in immigration law look like? The legal regime that would frame such a construct would require a judicial bureaucracy to define, to monitor, and to redistribute political and social resources among competing ascriptive groups. Such a system would face great difficulties under existing constitutional anti-discrimination and separation-of-powers doctrines. The constitutional dilemma would remain whether the goal of such a diversity-driven immigration statute was a national population whose demographic composition reflected their worldwide distribution, or instead, one in which no ascriptive group constituted a demographic majority.

III. Limits to Globalization

The emerging solution to this dilemma among legal scholars is the advocacy of globalization, which - in the immigration context - means the deregulation of migration across national borders, perhaps under a transnational legal regime. n76 Pope John Paul II summarized the benefits of the deregulation of migration in 1991: ""When a nation has the courage to open itself to immigration it is rewarded with increased prosperity, a solid social renewal, and a vigorous impetus toward new economic and human goals." n77 A secular variant of this argument equates diversity with multiculturalism. The United Nations Economic and Social Council (UNESCO) and the United Nations High Commission for Refugees (UNHCR) are examples of international organizations that endorse what they term an "ideological-normative" approach to cultural diversity. n78 Essentially stated, transnational advocates for this [*399] approach to cultural diversity argue that increased ethnic diversity within nation-states "benefits both individuals and

the larger society by reducing pressures for social conflict based on disadvantage and inequality," and is an "an enrichment for the society as a whole." n79

These claims of conflict resolution and net societal enrichment symbolize an enormously complex and currently unsolved dilemma in American law. However, the legal theorists who make these claims, like the Pontiff, generally do not quantify them. Ecologist Garrett Hardin has noted that it is impossible to approach an unsolved problem except through the door of metaphor. n80 Well over two-thirds of the world is desperately poor, and one-third is comparatively rich. Metaphorically, each rich nation amounts to a lifeboat full of rich people. The wretched of the earth are in other, more crowded lifeboats. Poor people continuously fall out of their lifeboats and swim around in the water, hoping to be taken on board. As a question of justice, what should the occupants of the rich lifeboats do?

Lifeboats have a limited capacity, analogous to the ecological concept that the territory of every nation has a finite carrying capacity. n81 When we, as Americans, in our relatively un-crowded rich lifeboat with only twenty-five occupants and a capacity of fifty, see 100 others swimming in the water, what are our choices?

If we act on a theory of egalitarian justice and acknowledge that all persons have the same needs, we would take all needy persons who reach our boat. The boat, with a capacity of fifty and occupancy of 150, would then capsize. Alternatively, we could admit twenty-five, up to the capacity of the lifeboat. But this raises two problems: First, the safety factor is eliminated, so unless our maximum lifeboat population of fifty is restrained from helping anyone else, [*400] the result would also be catastrophic. n82 Second, what theory of justice do we select to discriminate among those whom we do let on board?

Rights-based theories of jurisprudence have great difficulties accommodating models of societal collapse due to environmental factors, which imply a corollary quantitative threshold of acceptable migration. Lawyers and political scientists tend to ignore or deny the probability of such an event, despite many contemporary examples. n83

However, the reality of environmental collapse is implicitly recognized in United States immigration law under the doctrine of "temporary protected status." n84 The Attorney General, exercising Presidential plenary power, may grant "TPS" to nationals of designated foreign states where, inter alia, an "environmental disaster" has resulted in a substantial but temporary disruption of living conditions that the foreign state is unable to handle adequately. n85 The legal status of these environmental refugees is intended to be transient and non-assimilatory, not unlike that imposed on guest workers in other nations. Beneficiaries are granted work authorization but are denied many social and most political rights. n86 In practice, however, this power has been exercised arbitrarily, and few if any alien beneficiaries have returned home.

The numerate analysis by immigration reformers can be applied to culture as well as to demography. In contrast to the dominant view of cultural diversity in legal discourse as the perception that differences among ethnically or racially diverse population segments have social and legal significance, some immigration [*401] reform groups look at culture as quality of life - the idea that "man does not live by bread alone." n87 While there is and can be no universal metric for cultural comparison, Hardin points out that per capita consumption of energy may be used as a crude approximation of the ensemble of luxury, leisure, aesthetic, and interpersonal goods, which, when added to food, shelter, and clothing, comprise our standard of living. n88 The trend of high and increasing energy consumption patterns in the United States and other Western societies provides a crude but valid explanation of why, in a popular sense, so many view Western culture as superior or dominant. The overwhelming attractiveness of the American lifestyle to immigrants also supports this quality-of-life view of culture.

In this framework, cultural diversity is best viewed as a measurement of the accessibility of cultural goods and, as a corollary, a function of the standard of living. No literate person would suggest that an animal existence is acceptable to homo sapiens. The goal of population control is not to reduce population per se, but to reduce misery among the living. All people want to maximize the cultural amenities our society can furnish, in the sense of all the artifacts of human existence: institutions, structures, customs, knowledge, and inventions. n89 For the ecologist, measurement of cultural

carrying capacity cannot be made on a global level, except in a relative sense illustrative of limits. For example, carrying capacity at an urban American quality of life is a fraction of that of a rural Latin American or African. This inverse relationship between the availability of cultural diversity within a society and between societies creates a problem for proponents of a human rights-based theory of globalization (and in particular, the role of migration within that theory) because it implies quantitative limits to the exercise of theoretically unlimited human rights, such as the right to migrate, the right to reproduce, the rights to nondiscriminatory access to social benefits, and the rights to participation in the political process. n90

An anti-globalist counterargument to the ecocentric perspective is an environmental justice critique. From this perspective, the interjection of population statistics into a rights-based analysis of [*402] immigration is merely a subterfuge to make the politically disenfranchised a scapegoat. n91 "Blaming population growth is a convenient way to ignore the varying impacts of different groups of people and institutions." n92 It is asserted that corporate and military interests control both production and individual consumption decisions, and have more effect on the environment than population. n93 As a result, powerless immigrant communities are said to suffer disproportionately from environmental degradation. n94 Anti-globalists argue that population-based immigration controls are "mean-spirited[]" because they use immigrants as a surrogate for the continued exploitation of domestic poor, elderly, and people of color. n95

Despite their differences, both globalizers and anti-globalists share a belief that diverse immigrant cultures and practices in American society are positive factors, in both legal and social terms. Anti-globalists distinguish current migrant flows as coming from places where "sustainable lifestyles and a closer connection to the land" are more prevalent than they are in the United States. n96 This shared misunderstanding of diversity in immigration, based on a flawed conception of sustainable development, is essentially a variant of the globalizing argument.

An ecocentric model - Dr. Hardin's metaphor of the "tragedy of the commons" - demonstrates why deregulated migration or open borders would have catastrophic effects, in both the demographic and cultural context, under both globalizing and sustainable development paradigms. n97 Under a system of private property, owners recognize their responsibility and act accordingly. An intelligent farmer would allow no more cattle to graze in his pasture than its carrying capacity allows.

Now picture a deregulated pasture open as a commons to all. n98 To [*403] maximize his gain, each herdsman calculates the utility of adding one additional animal to his herd. Proceeds from the sale of the incremental animal are profit, while the damage to the pasture from overgrazing by an extra animal is a loss. In a commons, the herdsman would retain all the profit from incremental exploitation, but share the environmental losses with all other herdsmen. Every rational herdsman would continue to add to his herd. Under the constraints of a finite commons, a rational exercise of this freedom to exploit leads inevitably (and tragically) to conflict and mutual ruin.

Desertification, deforestation, tuberculosis, and the collapse of world fisheries are literal examples of scarcity caused by misuse of the commons. But global inequality is not. Scarcity of human wealth and human rights may be ubiquitous, but labeling the problem as a global one makes sense only if the plausible solution is also global. Hardin's foundational thesis that rejects the possibility of a limitless global solution can be reiterated as stating that under conditions of overpopulation, the free exercise of human rights in an unmanaged commons brings ruin to all. n99

A third response to the lifeboat problem is to admit on board only a small number of swimmers, ensuring the survival of the people already in the boat. Many (if not most) legal thinkers would find the third option abhorrent because it is unjust. If that is so, the ethical response would be an appeal to conscience, a charity-based approach - let the rich advocate get out of the boat and sacrifice his place to a poor swimmer. n100

From an ecocentric perspective, sustainable development requires an altruistic legal system. Altruism requires discrimination by benefactors among potential beneficiaries. Without discrimination, the benefits of an altruistic "sustainable" system would be communized - so diluted that they would be less than the benefits available from selfish exclusionary practices. In the lifeboat example, this insight explains why sacrificing one's seat to a migrant in distress as

a humanitarian act provides no systemic benefit. Applied to immigration policy, it suggests that the [*404] "promiscuous sharing" premise underlying the social cohesion theory of diversity is also defective. n101 These defects, which are in actuality quantitative limits, restrict the availability of global legal solutions.

A rich democratic nation, like the rich advocate, then faces a dilemma of hubris. Our commonplace Western solutions have been first, a belief that technical progress has always increased carrying capacity faster than population growth, and second, a belief that diversity, as a global extension of distributional justice, can make human impacts benign. The ecologic response is that such solutions are incredible because they do not accurately balance economies of scale, (e.g., from traditional manufacturing economics) with dysfunctions of scale (e.g., from the increasing inefficiency of democratic government as population increases). n102 Wealth subject to regulation under any juridical system can exist in just three modalities - resources, energy, and information. Technology cannot increase all factors of carrying capacity equally. In conditions of overpopulation, the tragedy of the commons is still inevitable even with an unlimited energy supply. The paradigm of replacement immigration, wherein the resource gap between poor and rich is eliminated through declines in reproduction in rich societies coupled with labor migration from poor ones, is nothing but a euphemism for an expansion of the commons, and also leads to universal poverty. n103 To the immigration reform movement, the harsh consequences of a disregard for limits are only heightened by reproductive differences among populations. This is particularly noticeable as between immigrants and the native-born in the United States. n104

Global information-sharing, in theory, does not share the zero-sum constraints of traditional resource transfers. However, the failures of international development work over the last sixty years suggest that sharing wrong information, in the form of mistaken [*405] theory and incomplete data, has arguably caused more harm than good when applied in a transnational context. n105 More mundanely, temporary nonimmigrant guest-worker programs implicitly recognize the limits of knowledge-based globalism. A policy argument in favor of the nonimmigrant specialty occupation worker ("H-1B") program n106 has been that importing of foreign computer programmers prevents the off-shore transfer of United States technology to India or other low-cost jurisdictions. In fact, only small and nonstrategic portions of software development work have moved overseas, as the industry discovered that the interaction of skilled workers in a live community creates more economic value than the savings realized from a global network of job sites. n107

Most variations of diversity theory anticipate the eventual decoupling of the concept of citizenship from the nation-state, where the claims to material and cultural goods embodied in concepts of citizenship in a nation-state are largely replaced by normative-ideological concepts of community. In an immigration reform paradigm, the national unit retains primacy precisely due to its perceived ecologic diversity. Only the scale of a nation-state, as contrasted with those of communities, provides the highest potential quality of life, while the multiplicity of political units provides a prudential safety factor against social collapse. n108 This, in a metaphorical nutshell, is why borders, and the sovereign states they define, have utility and will not disappear, regardless of the expanding exchanges of information that undergird globalization and harmonization. n109

V. Implications For a Post 9/11 World

Almost instinctively, the ferocity of the Al Qaeda attacks on the United States has provoked questioning of the claimed benefits of diversity in immigration policy. Nonetheless, in the post-9/11 environment, transnational immigration theorists have found a new [*406] defense of globalization, and by extension diversity - the ultimate solution to terrorism. n110

In his recent law review article *Globalization, Terror, and the Movements of People*, n111 Arthur Helton, the immigration and refugee law scholar at the Council on Foreign Relations, provides a representative statement of this view. An illustrative set of core propositions can be abstracted from Helton's article - first, massive levels of migration will continue worldwide, upon which national legal regimes will have only a limited effect. n112 Existing levels of diversity and cultural and economic wealth give the United States a clear competitive advantage as globalization continues. n113 Globalization does entail risks - mass communications and travel provoke resentment among the poor

and facilitate international crime in which breakdowns in the rule of law occur. n114 Global diasporas of social groups ("population diversity") increase the likelihood of conflict once any group is perceived as a threat. n115 The root cause of terrorism, however, is global inequality. n116

The migration of terrorists can and will be controlled by international legal institutions. n117 Transnational norms set limits on the ability of national governments to rely on the securitization n118 and militarization of immigration law as anti-terrorism tools. n119 The international harmonization of immigration and nationality law between states is a necessary step. In the absence, however, of a compelling political imperative such as the European Union, American public opinion, which is highly susceptible to domestic political manipulation, will remain an obstacle to the harmonization of United States immigration and refugee law with international [*407] norms. n120 In balance, Helton concludes that "astutely targeted law enforcement," coordinated through multilateral institutions, is the only "decisive" antiterrorist policy for the United States and its allies. n121

Responding to Helton's argument for globalization, it is reasonable to first question the premise that the causes of mass immigration (and terrorism) arise from conditions of global inequality over which nation-states have only limited control. Outside of OECD states, national security concerns have dominated immigration policy development. Interstate conflict and civil conflict are responsible for more migratory flows than economic push-pull factors. Modern Middle East history provides vivid examples of how conflicting immigration and emigration policies of state actors, not economic disparities, are the primary causes of both terrorism and migration. In the Israeli-Palestinian, Saharan, Iranian, and Afghan conflicts, as well as the 1990 Gulf War, immigration policy has been treated by all parties as a national security issue, rather than as a global economic phenomenon. n122 For cases in which modern states have collapsed under stress, there is no indication that diversity has played anything other than a retrogressive role. n123

There is also little evidence to date that transnational institutions have successfully managed or controlled migrant flows so as to reduce ethnic conflict and terrorism. n124 Beyond emergency and humanitarian relief efforts, international institutions and transnational organizations have not succeeded in extending political or social benefits to refugees in their countries of refuge, nor in their countries of origin. The contemporary backlash against perceived threats from asylum seekers and the concomitant rollback of liberal asylum policies in OECD states, notably the European Union and Australia, underline the scope of this failure. The argument that international norms will limit the securitization of [*408] immigration policy also draws little support from the historical record.

From an immigration control perspective, the problems of a diversity-based analysis of immigration policy are particularly evident in a national security context. In 1980, Garrett Hardin disagreed with advocates for egalitarian globalization that the threats of war, terrorism, and aggressive non-violent illegal immigration, conducted by poor populations against rich Western societies, could be resolved through international programs of distributional justice. He pointed out that technology had already shifted the balance of military power further away from poor societies, making war on the rich unlikely. For Hardin, police action was the only rational response to terrorism, despite its imperfections. Meeting the distributive demands of terrorists, which typically include some form of compensation for the past, would only create new inequity. Hardin saw illegal migration as the greatest security threat because it would, under ecologic population theory, expand poverty. n125

Important changes in state responses to international terrorism suggest that Hardin's 1980 thesis that terrorism can be managed by local police action - a position echoed with different motives by Helton in 2002 - has become dated. First, as national populations have become more diverse, the need for government to monitor individuals has increased. The informal arrangements for social control found in homogeneous societies have weakened. A tenet of multiculturalism is that one man's terrorist can be another's freedom fighter or victim of persecution. n126 Our world is full of examples of individuals and population sectors that would fit both profiles. September 11 has simply injected this dilemma into popular discourse. Mass immigration greatly expanded the range of individuals for whom a state can demonstrate a rational basis to "astutely target[]," to use Helton's phrase. n127 Second, increasing population growth and urbanization have increased the risk that individuals can function as implements of mass destruction, without the need for advanced military technology. The ecologic analysis of the immigration reform movement - in particular the

concept of cultural carrying capacity - explains these phenomena far better than does diversity based analysis, with its focus on marshalling the [*409] legal resources of the state to combat irrational mass outbreaks of latent xenophobia.

The inability to locate individuals among migrant populations has become the primary security liability for governments in the post 9/11 environment. To the extent that aliens cannot be accurately identified and located, the harmonization of conflicting national laws governing migrant classification and protection has lost legal and political urgency. This identity crisis has renewed interest in government control of illegal immigration. Helton and immigrant advocates would like to break down any nexus between alien terrorist suspects and the far larger population of millions of illegal immigrants, subjecting the relatively minuscule former group to police scrutiny, while providing the later population some form of national preference treatment, such as eligibility for social benefits and political rights.

Instead, in the United States, exactly the opposite is occurring. The federal government appears to have tacitly recognized several longstanding policy insights of immigration reform organizations. First, alien terrorists are now seen as a particularly dangerous subset of illegal immigrants. Reducing or eliminating the ability of the larger illegal population to avoid detection and control has become the key variable in restricting the alien terrorist's ability to function. Second, without any overt change in domestic anti-discrimination policy, the liabilities of maintaining multicultural identities have increased. As a consequence of changes in the foreign policy of the United States, often in reaction to hostile acts overseas, immigration preferences and other legal benefits accepted by aliens based on their group membership status under diversity-based law become grounds for increased personal scrutiny. The reactivation of the moribund system of alien registration is at the center of these changes. n128 It is important to note that the immigration reform movement does not disagree with advocates such as David Cole, who argues that a risk exists that "measures initially targeted at noncitizens may well come back to haunt us all." n129 The ecolate analysis views the risk of erosion of citizen liberties as serious as long as conditions of aggressive mass immigration persist.

While Helton notes that an increase in transnational crime is a risk for the globalizing agenda, it can be suggested that he [*410] understates the security threat that immigrant crime presents. One of the most negative manifestations of xenophobia is said to be the association of criminality with alien communities. n130 Advocates for immigrants dislike even the term "illegal alien" for this reason. Helton's recommendation of "astutely targeted law enforcement activities" describes a policy that would increase the legal separation between domestic and immigration law enforcement. n131 A more radical version of this view advocates a criminalization of detention and removal procedures, n132 linked to a de-criminalization of substantive U.S. immigration law through amnesty and liberalized migration. n133 This rights-driven approach ignores the numerate insights of criminology, in particular the parallel between the treatment of immigration violations and identity fraud as insignificant or victimless, and "broken windows" models of policing, which hold that failure to control quality of life violations causes increased lawlessness, such as narcotics, sex trafficking, corruption, and ultimately organized political violence. n134

The dilemma of unrestricted immigration is that it threatens environmental sustainability, national security, and, ironically, diversity - in the sense of reduced social conflict. Existing legal theories of diversity do not provide a consistent ethical or predictive basis for the regulation of human migration because they cannot account for environmental limitations that can shift the balance between liberty and security or - under conditions of aggressive mass immigration - under both. n135 Deregulation of borders will not [*411] reduce social conflict or manage terrorism, because the predicate condition - global equality - cannot be achieved. On both theoretical and empirical levels, only a system of nation-states protecting differentiated communities of cultured citizens offers a real prospect of justice in human migration. The enduring insight of the immigration reform movement is its commitment to count the reasons why.

Legal Topics:

For related research and practice materials, see the following legal topics:
Immigration Law Admission Selection System Preferences & Priorities Immigration

LawAdmissionVisasIssuanceImmigration LawImmigrantsDiversity Immigrants

FOOTNOTES:

n1. "Let justice be done, though the world perish." Holy Roman Emperor Ferdinand I (1503-1564), cited in Garrett Hardin, *An Ecolate View of the Human Predicament*, in *Global Resources: Perspectives and Alternatives* (C.N. McRostie ed., 1980).

n2. See Peter Singer & Renata Singer, *The Ethics of Refugee Policy*, in *Open Borders? Closed Societies?* (Mark Gibney, ed., 1988); see also Stephen H. Legomsky, *Why Citizenship?*, 35 *Va. J. Int'l. L.* 279 (1994); Owen Fiss, *a Community of Equals* (1999); Mark Tushnet, *Immigration Policy in Liberal Political Theory*, in *Justice in Immigration* (Warren A. Schwartz ed., 1995).

n3. See, e.g., Robert Crawford & Terre Rybovich, *Lady Liberty No More: The Anti-Immigrant Movement in the USA*, Searchlight, May 2000, available at www.searchlightmagazine.com/usa/liberty.htm (last visited Feb. 6, 2003).

n4. See, e.g., Garret Hardin, *The Immigration Dilemma: Avoiding the Tragedy of the Commons* (1995); David Reimers, *Unwelcome Strangers* 43-64 (1999); John Tanton, *Rethinking Immigration Policy* (1979); Roy Howard Beck & Leon J. Kolankiewicz, *The Environmental Movement's Retreat from Advocating U.S. Population Stabilization (1970-1998)*, 12 *J. of Pol'y Hist.* (2000), available at http://www.numbersusa.com/interests/env_modernmove.html (last visited Feb. 6, 2003).

n5. Hardin defines "ecolacy" as a working understanding of the complexity of the world and of the way each quasi-stable state gives way to other quasi-stable states over time. Ecolacy requires both literacy and numeracy. The basic insight of the ecolate citizen is that the world is a complex of systems so intricately interconnected that an advocate, in particular a non-numerate advocate, can seldom be confident that a proposed intervention in this system of systems will produce the desired consequences. See Hardin, *supra* note 1.

n6. 8 *U.S.C.* 1153(c) (2000).

n7. See H.R. Rep. No. 101-723, at 48 (1990), reprinted in 1990 *U.S.C.A.A.N.* 6710, 6728.

n8. Pub. L. No. 99-603, 1986 U.S.C.A.A.N. (100 Stat.) 3359.

n9. Id. at 314(b)(1).

n10. Pub. L. No. 89-236, 1965 U.S.C.A.A.N. (79 Stat. 911) 883.

n11. See H.R. Rep. No. 100-1038, at 4, reprinted in 1988 U.S.C.A.A.N. 5558, 5560. The visas were most often issued to citizens of Ireland, Canada, and Great Britain. Id.

n12. NP-5 was popularly known as the "Donnelly visa," after sponsor Rep. Brian Donnelly (D-MA).

n13. Immigration Amendments of 1988, Pub. L. No. 100-658, 2(a), 1988 U.S.C.A.A.N. (102 Stat.) 3908, 3908.

n14. 65 Interpreter Releases 1008 (Oct. 3, 1988).

n15. Immigration Amendments of 1988 3(a). OP-1 was known popularly as the "Berman visa" program.

n16. Id. at 3(e).

n17. 22 C.F.R. 44.1-44.6 (1990).

n18. See Immigration Act of 1990, Pub. L. No. 101-649, 1990 U.S.C.A.A.N. (104 Stat.) 4978.

n19. See Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, 1991 U.S.C.A.A.N. (105 Stat.) 1733.

n20. H.R. Rep. No. 101-723, at 48 (1990), reprinted in 1990 U.S.C.A.A.N. 6710, 6728.

n21. Immigration Act of 1990, Pub. L. No. 101-649, 132, 1990 U.S.C.A.A.N. (104 Stat.) 4978, 5000. Canada and Mexico were explicitly excluded. The former East and West Germany were reunified by 1990. *Id.* at 132(b)(1).

n22. Forty percent of AA-1 visas were made available to natives of the country that received the greatest number of visas under 134 of the Immigration Reform and Control Act, *id.* at 132(c), and visas had most often been issued to citizens of Ireland. See H.R. Rep. No. 100-1038, at 4, reprinted in 1988 U.S.C.A.A.N. 5558, 5560. The Immigration Act of 1990 required a firm commitment of employment, Pub. L. No. 101-649, 132, 1990 U.S.C.A.A.N. (104 Stat.) 4978, 5000, and allowed applicants to use a U.S. address. These provisions were intended to assist a claimed population of 200,000 Irish illegal aliens. H.R. Rep. No. 101-955, at 122 (1990), reprinted in 1990 U.S.C.A.A.N. 6784, 6787.

n23. Immigration Act of 1990, Pub. L. No. 101-649, 132(d), 1990 U.S.C.A.A.N. (104 Stat.) 4978, 5000.

n24. *Id.* at 133. Beneficiary classifications were (1) NP-5 beneficiaries for whom annual limits on issuance had expired; (2) NP-5 beneficiaries who were inadmissible due to violations of the Immigration and Nationality Act 212(e) (2-year home country residence requirement for exchange visitors) or Immigration and Nationalization Act 212(a)(19) (false statements in visa applications); and (3) otherwise eligible beneficiaries who were nationals but not natives of an adversely affected country, such as Poles born in the Soviet Union or British citizens who were Asian immigrants. See *id.* Ninety-four percent of the beneficiaries of a final extension of AA-1 1994 benefits through fiscal year 1995 were Irish. See 72 Interpreter Releases 631 (May 8, 1995).

n25. Immigration Act of 1990, Pub. L. No. 101-649, 131, 104 Stat. 4978.

n26. *Id.* The origin of the formula is unclear.

n27. Northern Ireland is treated as a separate state, but every other colony or other component or dependent area of a foreign state is treated as part of the foreign state. *8 U.S.C. 1153(c)(1)(F)* (2000).

n28. *8 U.S.C. 1153 (c)(1)(A)*.

n29. See *8 U.S.C. 1153(c)(1)(B)(ii)(I)(A)*.

n30. *8 U.S.C. 1153(c)(1)(E)*.

n31. Specified regions are (i) Africa, (ii) Asia, (iii) Europe, (iv) North America other than Mexico, (v) Oceania, and (vi) South America, Mexico, Central America, and the Caribbean. *8 U.S.C. 1153(c)(1)(F)*. A high-admission region is defined as having a total number of aliens granted permanent resident status during the applicable five-year period that exceeded one-sixth of all such immigration to the United States. Other regions are "low-admission." *8 U.S.C. 1153(c)(1)(B)(i)(II)*.

n32. The quota formula for low-admission states in low-admission regions is at *8 U.S.C. 1153(c)(1)(E)(ii)*. The formula for low-admission states in high-admission regions is at *8 U.S.C. 1153(c)(1)(E)(iii)*.

n33. *8 U.S.C. 1153(c)(1)(E)(iv)*.

n34. *8 U.S.C. 1153(c)(1)(E)(v)*.

n35. *8 U.S.C. 1153(c)(2)* (requiring a high school education or at least two years of work experience in an occupation that requires two years of training or experience). An immigrant will qualify as a "skilled worker" if he or she is capable of performing trained labor for which qualified workers are not available in the United States. *8 U.S.C. 1153(b)(3)(A)(i)*.

n36. Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, 217, 1994

U.S.C.A.A.N. (108 Stat.) 4305, 4315; Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, Title VI, subtitle C, 637, 1996 U.S.C.A.A.N. (110 Stat.) 3009, 3009-704.

n37. NACARA, Pub. L. No. 105-100, Title II, 203(e), 1997 U.S.C.A.A.N. (111 Stat.) 2160, 2199, amended by Pub. L. No. 105-139, 1997 U.S.C.A.A.N. (111 Stat.) 2644.

n38. One explanation is that diversity visas were a political carrot accepted in 1986 by the sponsors of IRCA to offset the stick of employer sanctions legislation.

n39. Distribution of NP-5 Donnelly visas: Ireland (3,112); Canada (2,078); Gt. Britain & N. Ireland (1,181); Indonesia (810); Poland (592); Japan (518); Italy (315), and W. Germany (311). Distribution of OP-1 Berman visas: Bangladesh (4,974); Pakistan (1,837); Poland (953); Turkey (819); Egypt (790); Trinidad & Tobago (597); Peru (585), and Iran (525). Distribution of AA-1 visas: Ireland & N. Ireland (21,538); Poland (12,077); Japan (6,381); Gt. Britain (3,048); Indonesia (2,950); Argentina (1,449); Germany (656), and France (635). 10 CIS Immigration Review (Spring 1992).

n40. See *Regents of the University of California v. Bakke*, 438 U.S. 265, 311-19 (1978).

n41. See Debra L. DeLaet, U.S. Immigration Policy in an Age of Rights 1 (2000).

n42. Jonathan R. Alger, The Educational Value Of Diversity, 83 *Academe* Jan.-Feb. 1997, at 20, 21 (1997).

n43. Transnational institutions that have been closely associated with these developments include the activities of the International Labor Office, Geneva, the European Monitoring Centre on Racism and Xenophobia, Vienna, and the preparatory conferences for the 2001 World Conference Against Racism, Racial Intolerance, Xenophobia and Related Intolerance, and the Working Group of Intergovernmental Experts on the Human Rights of Migrants of the United Nations Human Rights Commission.

n44. See, e.g., *Brown v. Board of Education*, 347 U.S. 483, 494 (1954).

n45. As a complement to the employer sanctions provisions in the Immigration Reform and Control Act of 1986 101, codified at 8 U.S.C. 1324(a) (2000), the Immigration Reform and Control Act of 1986 102, 8 U.S.C. 1324(b), prohibits discrimination by employers on the basis of national origin or citizenship status. Prior to the enactment of this statute, the primary source of protection provided to aliens against unlawful discrimination was found in case law interpreting and applying Title VII of the Civil Rights Act of 1964. See *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95 (1973). Diversity was not recognized as an element of the problem or the legislation. The policy rationale in the legislative history of the Immigration Reform and Control Act of 1986 stated that "it makes no sense to admit immigrants and refugees to this country, require them to work and then to allow employers to refuse to hire them because of their immigration (non-citizenship) status." H.R. Rep. No. 99-682, at 70, reprinted in 1986 U.S.C.A.A.N. 5649, 5674. Rather, the frame of reference was the elimination of legal disabilities among citizens. See, e.g., *Valdivia-Sanchez* 1 O.C.A.H.O. 106, available at 1989 WL 433897, at 18 n.3 (1989) (stating that "'the idea of equal citizenship focuses on those inequalities that are particularly likely to stigmatize, to demoralize, to impair effective participation in society, or to put the matter more positively, on 'the needs that must be met if we are to stand to one another as fellow citizens.'" See Carlos A. Gonzalez, Standards of Proof in Section 274B of the Immigration Reform and Control Act of 1986, 41 *Vand. L. Rev.* 1323 (1988).

n46. International Migration, Racism, Discrimination, and Xenophobia, at <http://www.unesco.org/most/migration/imdrx.pdf> 2 (last visited Feb. 6, 2003).

n47. *Id.*

n48. *Id.* at 10.

n49. See *id.*

n50. Heikki Mattila, Migrants' Human Rights: Principles and Practices, 38.6 *Int'l Migration* 53-67 (2000).

n51. See *id.* at 57.

n52. See International Migration, Racism, Discrimination, and Xenophobia, *supra* note 46, at 12.

n53. See *id.* at 22, 23. The core goals are found in the wide ratification of the 1990 United Nations Convention on the Rights of Migrant Workers and the Members of Their Families, and International Labor Organization Conventions No. 97 and 143 on migrant workers. *Id.*

n54. Stephen H. Legomsky, *E Pluribus Unum: Immigration, Race, and Other Deep Divides*, 21 *S. Ill U. L.J.* 101, 101-02 (1996).

n55. *Id.* at 101-02.

n56. *Id.* at 109, 111.

n57. Jan Niessen, *Diversity and Cohesion* 12 (2000).

n58. Warwick Tie, *Legal Pluralism: Toward A Multicultural Conception Of Law* 1 (1999).

n59. See, e.g., Lawrence Auster, *The Path to National Suicide: An Essay on Immigration and Multiculturalism* (1990) (illustrating a social conservative critique); Hugh Davis Graham, *Collision Course: The Strange Convergence of Affirmative Action and Immigration Policy* 123-24, 152-160 (2002) (providing a progressive critique).

n60. Inappropriate countries would be those excluded for national security or national interest reasons.

n61. See Office of Policy and Planning, Immigr. and Naturalization Svc., U.S. Dep't. of Justice, Annual Report 7, *Legal Immigration, Fiscal Year 2001*, 2 (2002) (noting that almost twenty percent of the people who legally immigrated to the United States came from Mexico), available at <http://www.ins.gov/graphics/aboutins/statistics/IMM2001.pdf> (last visited Feb. 6, 2003).

n62. See *id.* at 2 (reporting that forty percent of these immigrants were from Mexico, India, China, the

Philippines, and Vietnam).

n63. See Bureau of Intelligence and Research, U.S. Dep't of State, *Independent States in the World* (Nov. 13, 2002) (listing 192 independent states), available at <http://www.state.gov/s/inr/rls/4250pf.htm> (last visited Feb. 6, 2003); see DMOZ Open Directory Project, *Independent Nations and Their Dependencies and Areas of Special Sovereignty* (listing 65 dependent territories), available at <http://dmoz.org/dependents.html> (last visited Feb. 6, 2003).

n64. See Immigration and Nationality Act Amendments, Pub. L. No. 89-236, 201(b), 1965 U.S.C.C.A.N. (79 Stat. 911) 883, 883; S. Rep. No. 89-748 (1965), reprinted in 1965 U.S.C.A.A.N. 3328; Federation for American Immigration Reform, *Shackled by Chain Migration: How "Family Reunification" Drives Up the Annual Number of Immigrants* (describing chain migration as the process where one immigrant sponsors many other immigrants for admission, who then sponsor many others themselves, resulting in a chain reaction), available at <http://www.fairus.org/html/04140708.htm> (last visited January 24, 2002).

n65. See 8 U.S.C. 1151(b)(2)(A)(i) (2000); see also Office of Policy and Planning, Immigr. and Naturalization Svc., U.S. Dep't. of Justice, *Annual Report 7, Legal Immigration, Fiscal Year 2001, 2* (2002) (finding that sixty-four percent of people who immigrated to the United States in 2001 were family sponsored), available at www.ins.gov/graphics/aboutins/statistics/IMM2001.pdf (last visited Feb. 6, 2003).

n66. Except where diversity is used, in the racialist sense, to define a policy of facilitating the demographic reduction of an existing majority to a plurality or minority.

n67. See Steve Sailer, *Brookings Does Diversity, Sort Of*, at <http://www.vdare.com/sailer/brookings.htm> (last visited Feb. 6, 2003).

n68. Id.

n69. See id.

n70. Id.

n71. See 8 *U.S.C. 1152(a)(2)* (2000).

n72. See *id.*

n73. See, e.g., 8 *U.S.C. 1152(e)* (2000) (creating special rules for countries that easily reach their ceiling limitations); 8 *U.S.C. 1154(a)(1)(A)(iii)-(vi)* (2000) (granting special immigrant status for battered spouses of United States citizens); 8 *U.S.C. 1154(f)* (2000) (giving preferential treatment for children fathered by U.S. citizens and born in Korea, Vietnam, Laos, Kampuchea or Thailand); 8 *U.S.C. 1229b* (2000) (providing for the right of the Attorney General to cancel the removal of an inadmissible or deportable alien); 1255(i) (adjustment of status for aliens physically present in the United States); see also Hungarian Refugee Act, Pub. L. No. 85-559, 72 Stat. 419; Cuban Refugee Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161; Indochinese Refugee Resettlement Act, Pub. L. No. 95-145, 91 Stat. 1223; Cuban-Haitian Adjustment Act, Pub. L. No. 99-603, 100 Stat. 3359.

n74. For example, the level of interracial marriage in California has diverged sharply between immigrants and natives. Under massive levels of immigration, the tendency for migrants to marry within ethnic communities more than negated a trend of increasing exogenous marriage among U.S. citizens. See Sonya M. Tafoya, *Mixed Race and Ethnicity in California* (Jan. 2000), available at www.ppic.org/publications/CalCounts2/calcounts2.html (last visited Feb. 6, 2003).

n75. See, e.g., Bill Ong Hing, *Answering Challenges of the New Immigrant-Driven Diversity: Considering Immigration Strategies*, 40 *Brandeis L.J.* 861, 882 (2002) (noting that communities might have challenges in dealing with typical concerns related to migration, such as bilingual education and social services for non-citizens); James H. Johnson, Jr. & Melvin L. Oliver, *Interethnic Minority Conflict in Urban America: The Effects of Economic and Social Dislocations*, 10 *Urban Geography* 449-63 (1989) (stating that the emergence of conflict among ethnic minority groups is a direct consequence of increasing immigration and major demographic changes which place these groups in competition for scarce resources).

n76. See Myron Weiner, *The Global Migration Crisis: Challenge to States and To Human Rights* (1995) (summarizing the writings of John Rawls, Joseph H. Carens, and Peter Singer, among others).

n77. Hardin, *supra* note 4, at 10.

n78. See Christine Inglis, *Multiculturalism: New Policy Responses to Diversity*, Management of Social Transformations (MOST)-UNESCO Policy Paper No. 4, at <http://www.unesco.org/most/pp4.htm> (last visited January 24, 2003).

n79. *Id.* Increased ethnic diversity within a modern state necessarily implies demographically significant levels of immigration.

n80. See Garrett Hardin, *Living on a Lifeboat*, 24 *BioScience* 561, 561 (1974).

n81. Important legal implications of carrying capacity analysis include: (1) carrying capacity, like the environment is variable over time; (2) legislation based on a unique estimate of carrying capacity should thus prefer the minimum of an identified range of policy options, not the maximum, nor even the average; (3) transgressing carrying capacity for one period lowers capacity thereafter, risking a spiral towards collapse; (4) error and unintended negative feedback are highly probable when governmental policy in complex systems is driven by non-numerate ideology - including rights-based legal theory, and (5) the consequences of error in estimating capacity are grave. Once carrying capacity is reached, nondiscriminatory protection of many individual, political or social rights can be quantifiably counterproductive for both the individual and society. See Hardin, *supra* note 1.

n82. See *id.* at 562. The "safety factor" emphasizes the key role of un-utilized environmental carrying capacity. For the estimated 1.2 billion human beings surviving on less than one dollar per day, the range of environmental risks that could provoke a fatal decline in income is lengthy and complex. See generally Joel Cohen, *How Many People Can the Earth Support?* (1996); Walter Youngquist, *GeoDestinies* (1997). Examples of states with no safety factors include the environmentally blighted regions of the former Communist bloc, as well as densely populated least-developed nations.

n83. The small Pacific island nation of Tuvalu is an example of more extensive population-driven collapses. The national territory is expected to soon become uninhabitable due to human-induced climate change. The Tuvaluans are reported to be negotiating with New Zealand to resettle the entire national population as refugees. See John Cairns, Jr., *Environmental Refugees*, 13 *Social Contract*, Fall 2002, at 36-37, available at <http://www.thesocialcontract.com/pdf/thirteen-one/xiii-1-34.pdf> (last visited February 6, 2003).

n84. See 8 U.S.C. 1254a (2000).

n85. 8 U.S.C. 1254a(b)(1)(B).

n86. 8 U.S.C. 1254a(f).

n87. Garrett Hardin, Cultural Carrying Capacity: A Biological Approach to Human Problems, 36 *BioScience* 599, 602 (1986) (noting that there is a difference between "mere existence and the good life").

n88. See *id.* at 602-03.

n89. See *id.*

n90. See Garrett Hardin, *Living Within Limits* 204-14 (2000).

n91. See, e.g., Cathi Tactaquin, *The Greening of the Anti-Immigrant Agenda*, available at www.nnirr.org/news/archived_netnews/thegreening.htm (last visited Feb. 6, 2003).

n92. Political Ecology Group, *Immigration and Environment Campaign Position Statement*, at http://www.cwpe.org/issues/dangerous_html/greening/political.html (last visited Feb. 6, 2003).

n93. See *id.* (asserting that corporate and governmental decision-making is based on private short-term gain, rather than for the long-term public good).

n94. See *id.* (arguing that immigrant communities are exposed to environmental problems, such as pesticides and chemicals, at a higher rate than other groups in the United States).

n95. Id.

n96. Id.

n97. Garrett Hardin, *The Tragedy of the Commons*, 162 *Science* 1243, 1243-48 (1968).

n98. See *id.* at 1244. Whether the commons are open under a socialistic or capitalistic system of property is not significant to the analysis.

n99. See *id.*

n100. See Hardin, *supra* note 80, at 562. One of the most malicious attacks on ecologically-based immigration reform advocacy has been the canard that Hardin, Tanton, and other theorists would contemplate human liquidation or extermination as a policy option. See, e.g., Tucker Carlson, *The Intellectual Roots of Nativism*, *Wall St. J.*, Oct. 2, 1997, at A22. The ecologically view is fully in accord with traditional common law rejecting the morality of human jettison. See, e.g., *United States v. Holmes*, 26 *F. Cas.* 360 (*C.C.E.D. Pa.* 1842) (No. 15,383); *The Queen v. Dudley & Stephens*, 14 *Eng. Rep.* 273 (*Q.B.* 1884).

n101. Hardin, *supra* note 90, at 23-36.

n102. See *id.* at 98-100, 123-24.

n103. Hardin makes the rhetorical point that the very concept of "world resources" is an echo of Proudhon's maxim, "property is theft." Hardin, *supra* note 1.

n104. Under competition, low living standards will drive out high ones. Although the poor outnumber the rich two to one globally, assume an equal ratio of rich natives to poor immigrants. Further assume a purely egalitarian legal system requiring the equal sharing of available resources. If, as has been the case, the immigrant

birth rate is higher than that of natives, inexorably the disparity in resource allocation between the two groups will increase. That shift in the share of resources in favor of the immigrant group accelerates where, as is the case in this country, the rate of population increase falls faster among the indigenous group. See Hardin, *supra* note 90, at 263-64.

n105. See *id.*

n106. See 8 U.S.C. 1101(a)(15)(H)(i)(b) (2000); 8 U.S.C. 1182(n) (2000).

n107. See Debunking the Myth of a Desperate Software Labor Shortage: Testimony to the U.S. House Judiciary Committee on Immigration (Apr. 21, 1998) (statement of Dr. Norman Matloff), at <http://heather.cs.ucdavis.edu/itaa.real.html> (last updated December 9, 2002).

n108. The village in McLuhan's oxymoronic "global village" brought small-group ethics into legal theory, while the compressive term global permitted advocates to ignore the demands that large numbers make on anyone living in a totally interdependent world. As ideology, it freed ethical debate from the embarrassing burden of scale effects. See Garrett Hardin, *The Ostrich Factor* 91-93 (1999).

n109. Barring the appearance of galactic aliens as a common enemy.

n110. See, e.g., David Cole, *Enemy Aliens*, 54 *Stan. L. Rev.* 953, 958 (2002) (asserting that as terrorism is not confined to certain countries or continents, it requires transnational consideration).

n111. Arthur C. Helton & Dessie P. Zagorcheva, *Globalization, Terror, and the Movements of People*, 36 *Int'l Law* 91 (2002).

n112. See *id. at 91*. (stating that "more people are moving across borders, both pushed or pulled, with or without permission" every year).

n113. See *id.* at 92.

n114. See *id.*

n115. See *id.* at 93.

n116. See *id.* at 92 (noting that the widening gap between the rich and the poor can create resentment and violence).

n117. See *id.* at 94-97.

n118. See, e.g., *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001* (U.S.A. PATRIOT Act), Pub. L. No. 107-56, 2001 U.S.C.A.A.N. (115 Stat.) 272 (delineating methods to prevent terrorism, and similar legislation overseas).

n119. See Helton, *supra* note 111, at 99-100.

n120. See Anthony Romero, *In Defense of Liberty in a Time of National Emergency*, ABA Individual Rights & Responsibilities Section (Winter 2002) (noting a connection between post 9/11 security measures and national leaders' fears of sabotage by foreigners during crisis periods), available at www.abanet.org/irr/hr/winter02/romero.html (last visited Feb. 6, 2003).

n121. Helton, *supra* note 111, at 99.

n122. See Weiner, *supra* note 76, at 131-132 (providing a recitation of recent mass migrant flows).

n123. See, e.g., Robert D. Kaplan, *The Coming Anarchy*, *Atlantic Monthly*, Feb. 1994, at 44 (asserting that criminal anarchy, rather than egalitarian diversity, is the consequence of the decline of the nation-state in conditions of environmental breakdown and overpopulation).

n124. See Weiner, *supra* note 76, at 155-64.

n125. See Hardin, *supra* note 1.

n126. Note in this regard the continuing international backlash against attempts to force the international asylum and refugee regime to accommodate economic and sexual refugees.

n127. See Helton, *supra* note 111, at 99.

n128. See *67 Fed. Reg. 52,584* (Aug. 12, 2002) (to be codified at 8 C.F.R. pt. 214, 264).

n129. Cole, *supra* note 110, at 959.

n130. See *International Migration, Racism, Discrimination, and Xenophobia*, *supra* note 46, at 11 ("The deliberate association of migration and migrants with criminality is an especially dangerous trend, one which tacitly encourages and condones xenophobic hostility and violence.").

n131. See Helton, *supra* note 111, at 99 (arguing that law enforcement is a more effective weapon for fighting terrorism than immigration law).

n132. For example, the application of constitutional standards for criminal procedure in such areas as habeas corpus, due process, evidentiary rules, and judicial review to immigration violations.

n133. See, e.g., Rep. Luis Gutierrez (D-IL), Democratic Immigration Principles: An Access to Earned Legalization, available at <http://luisgutierrez.house.gov/pdf/ImmigrationPrinciples-Final1.pdf>. (Aug. 2001).

n134. James Q. Wilson & George L. Kelling, Broken Windows, *Atlantic Monthly*, March 1982, at 29 (arguing that failure to police small transgressions of social norms undermines willingness of population to enforce social order and asserting that this failure to police leads to higher levels of crime and violence).

n135. See, e.g., Kaplan, *supra* note 123.

Mention the environment or "diminishing natural resources" in foreign-policy circles and you meet a brick wall of skepticism or boredom. To conservatives especially, the very terms seem flaky. Public-policy foundations have contributed to the lack of interest, by funding narrowly focused environmental studies replete with technical jargon which foreign-affairs experts just let pile up on their desks.

Id. (emphasis omitted).