
January 2008

Crisis Meets Reality: A Bold Proposal for Immigration Reform

Recommended Citation

Crisis Meets Reality: A Bold Proposal for Immigration Reform, 61 SMU L. REV. 191 (2008)
<https://scholar.smu.edu/smulr/vol61/iss1/11>

This Book Review is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

CRISIS MEETS REALITY: A BOLD PROPOSAL FOR IMMIGRATION REFORM

*Karen E. Bravo**
*María Pabón López***

OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS, by KEVIN R. JOHNSON, New York: New York University Press, Critical America Series, 2007, 304 pp, \$35.00, ISBN 0814742866.

I. INTRODUCTION

ILLEGAL ALIENS SUCK! This was the brash message on the bumper sticker on the back of a pick-up truck on the north side of Indianapolis, Indiana. It is a perfect illustration of the deep polarization and raging debate about the situation of the undocumented, migrant, and irregular¹ persons in the United States and immigration law reform in general. The situation of the undocumented persons in the United States—the estimated twelve million² of them—and recent legislation mandating a fence along certain parts of the U.S.-Mexico³ border are but two manifestations of the extreme views held by some that the United States is under siege, in a so-called “immigration crisis.”

The collective social psyche of the United States has struggled recently with the politics and morality of failed immigration reform and, in particular, with the concerns of what to do with its large undocumented population, especially in view of the ever-present post-September 11 national security concerns. Against this highly charged atmosphere, Dean Kevin R. Johnson’s latest offering, *Opening the Floodgates: Why America Needs to Rethink its Borders and Immigration Laws*, boldly proposes that we abandon all pretense of being able to manage or control the borders as currently conceptualized and open the borders by loosening the currently

* Assistant Professor of Law, Indiana University School of Law, Indianapolis.

** Associate Professor of Law, Indiana University School of Law, Indianapolis.

1. The terms “undocumented,” “migrant,” and “irregularly present” are used in this Paper interchangeably to describe those who leave their countries of origin and are present in the United States without legal authorization.

2. See JEFFREY PASSEL, PEW HISPANIC CTR., *THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.: ESTIMATES BASED ON THE MARCH 2005 CURRENT POPULATION SURVEY* (Mar. 7, 2006), available at <http://pewhispanic.org/files/reports/61.pdf>.

3. Secure Fence Act of 2006, Pub. L. No. 109-367, § 3, 120 Stat. 2638, 2638-39 (2006) (amending 8 U.S.C. § 1103 Note).

broken-down immigration system.⁴ In this well-researched, well-documented, and eminently readable volume, Johnson, a renowned immigration law scholar, masterfully marshals arguments based on liberal theory as to why a less restrictive system—that is still very mindful of national security and public safety—is a much better alternative than the current immigration chaos. Invoking a free market approach to immigration, Johnson calls for more focused border controls, not complete dismantling of the borders. Under his suggested reformation, the borders would be deregulated with controls focused on true dangers to U.S. society.

We believe that Johnson's proposal provides a much-needed rational and realistic voice that contrasts with the morass of alarmist immigration sentiment currently prevailing in U.S. political rhetoric. It should be considered seriously by policy makers, academics, and anyone interested in understanding and transforming current immigration law and policy.

This review proceeds in three parts. Part II conducts a chapter-by-chapter exploration of the major themes of Johnson's book and analyzes the main aspects of his thesis. Part III discusses the soundness of Johnson's proposal and what it adds to the existing debate about immigration in this country. Part III further draws conclusions about the suggested immigration reform choices, including by comparing the policy choices of other nations.

II. CHAPTER-BY-CHAPTER REVIEW

A. CHAPTER ONE: A CALL FOR TRULY COMPREHENSIVE IMMIGRATION REFORM

This introductory chapter opens by highlighting the current divide in the United States regarding immigration law and policy.⁵ Johnson discusses the much-needed immigration reform and the failure of recent congressional attempts to enact meaningful reform, including passing two punitive border enforcement laws and further penalizing undocumented persons. Instead of reform, Congress has merely enacted tougher measures that have not solved unauthorized immigration.

The measures passed have increased deaths at the border,⁶ as would-be

4. KEVIN R. JOHNSON, *OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RE-THINK ITS BORDERS AND IMMIGRATION LAWS* 9 (New York University Press 2007).

5. *Id.* at 1–2.

6. The Center for Immigration Research ("CIR") at the University of Houston, which has taken the lead in studying the trends in deaths at the border, has found a substantial increase starting in the mid- to late-1980s, then falling in the mid-1990s, then increasing again from there. See Karl Eschbach, Jacqueline Hagan & Nestor Rodriguez, *Deaths During Undocumented Migration: Trends and Policy Implications in the New Era of Homeland Security*, 26 *IN DEFENSE OF THE ALIEN* 37–52 (2003). The U.S. Government Accountability Office has recently studied this phenomenon and agreed with the data from the CIR, finding that border deaths have seen a two-fold increase since the mid-1990s. See U.S. GOV'T ACCOUNTABILITY OFFICE, *ILLEGAL IMMIGRATION: BORDER-CROSSING DEATHS HAVE DOUBLED SINCE 1995; BORDER PATROL'S EFFORTS TO PREVENT DEATHS HAVE NOT BEEN FULLY EVALUATED*, No. GAO-06-770 (2006), available at <http://www.gao.gov/new.items/d06770.pdf>.

immigrants are still entering the country through dangerous desert areas. Political pressures leading to failed comprehensive immigration reform have stimulated the nation's desire to increase national security and strengthen the borders, but at an unconscionably high human cost. Johnson assesses the wisdom of this situation as follows: "Although it may be politically popular to build a figurative moat around the United States, nobody ordered the U.S. government to transform the borders into a death trap."⁷

Johnson confronts the taboo and widespread fear of open borders, including lawlessness and anarchy. He explores the academic discourse that eschews open borders as utopian and containing playful musings.⁸ By examining the premises underlying such views, explaining that national sovereignty need not be undermined, and stating that mass migration would not necessarily follow an open border,⁹ Johnson demonstrates that the current U.S. immigration law and policy is based on unexamined premises and makes the case for a serious consideration of his proposal.

Johnson further addresses concerns of an open border regime, including the changing of the United States national identity, language, and the loss of social control, and finds that, among other things, race and racism are deeply intertwined in the immigration debate.¹⁰ Thus, he concludes there is currently no political will to open the borders. Here, Johnson argues that the United States will be better "off with liberal immigration admissions and open, welcoming borders" as "overbroad exclusions buttressed by strong border controls simply cannot halt immigration."¹¹

Johnson then takes on the long-time fixture of the plenary power doctrine's limits on immigration and concludes it is the antithesis of the open border. He cites the classic plenary power doctrine language of the Supreme Court: "[W]hether immigration laws have been crude and cruel, whether they may have reflected xenophobia in general or anti-Semitism or anti-Catholicism, the responsibility belongs to Congress."¹² Johnson then asserts that this doctrine is "out of step with world events, the onset of globalization, and the ascendance of international law" and is "wholly inconsistent with evolving notions of international law."¹³ Under an open borders regime, most of the extra-constitutional actions that have been upheld by courts using the plenary power doctrine would no longer

7. JOHNSON, *supra* note 4, at 3. These deaths at the border loom large among the immoral consequences of the closed borders, resulting in a human toll that is nothing less than horrific. Johnson notes how this phenomenon is immoral, even though it appears that the general American public is indifferent to or unaware of the rising death toll. *Id.* at 115.

8. *Id.* at 10–12.

9. *Id.* at 11–12.

10. *Id.* at 13. For a discussion of the possibility of a paradigm shift towards considering race in immigration law, see George A. Martinez, *Race and Immigration Law: A Paradigm Shift*, 2000 U. ILL. L. REV. 517.

11. JOHNSON, *supra* note 4, at 16.

12. *Id.* at 17 (quoting *Harisaides v. Shaughnessy*, 342 U.S. 580, 597 (1952) (Frankfurter, J., concurring)).

13. *Id.*

be part of the U.S. immigration law and policy system. Thus, mainstream immigration law scholarship, which has long criticized the plenary power doctrine because of its anti-constitutional aspects, could avoid its baleful power altogether under an open borders regime.

In essence then, this chapter boldly proclaims the thesis of the book: an attempt "to marshal the strongest possible arguments for open borders" and "to create the intellectual space for a more open and honest conversation about immigration controls."¹⁴ In doing so, Johnson handily addresses the concerns of open borders in turn as follows.

In response to a concern evidenced by the title of his book, Johnson clarifies that there is no evidence of the theoretical millions of would-be immigrants who would enter the country and destroy the current American way of life if persons of different races and cultures could come in freely. Such lack of information makes it impossible to assume that "floodgates" would burst if migration controls were eased."¹⁵

In support of this point, Johnson explains how even within the United States, where there is a right to free movement within the country, there have been no mass migrations to the most desirable states from more depressed states.¹⁶ He also uses the example of the right to free movement in the European Union ("EU"), where the open borders experiment has not resulted in mass migration to the richest EU member nations, despite the economic disparities among EU member states.¹⁷ Finally, Johnson uses an example closer to home: the island of Puerto Rico, which has a large economic disparity with the United States. The right of Puerto Rican citizens to freely move to the continental United States has not resulted in mass Puerto Rican migration to the U.S. mainland.¹⁸

Thus, Johnson's open border "system of migration would be more orderly, humane, and fair than the current one."¹⁹ Johnson makes the case that closed borders have not proven to be a solution, as more undocumented migrants live in the United States now than in its history.²⁰ Under Johnson's proposal, open borders would increase national security, as the focus at the border would shift from the current near-total exclusion of noncitizens to a focused search for individuals who pose national security and public safety concerns.²¹ In short, Johnson proposes an open admissions system, without numerical limitations on the number of entrants to the United States,²² subject only to the exclusion of noncitizens who, by a preponderance of evidence, pose a clear and present

14. *Id.* at 19.

15. *Id.* at 28.

16. *Id.*

17. *Id.* at 28–29.

18. *Id.* at 29.

19. *Id.* at 28.

20. *Id.* at 36, 114–15.

21. *Id.* at 34.

22. *Id.* at 37.

danger to national security or public safety.²³

The proposal further calls for the abolition of the existing employment and family preferences, as well as the controversial diversity visa system and per country caps.²⁴ All entrants would be required to obtain a visa from the U.S. government prior to entering the country.²⁵ This visa would be issued following the customary background, criminal, and health history check.²⁶ Noncitizens seeking long-term admission into the country would apply for visas that would entitle them to the same benefits currently enjoyed by lawful permanent residents.²⁷

Johnson's proposal would allow for the removal of noncitizens, but on more narrow grounds than those currently in force.²⁸ Significantly, under his plan, U.S. territorial sovereignty would be maintained, with entry regulations for noncitizens that would approximate the regulations currently in place for the entry of goods, services, and capital to the United States.²⁹

Johnson then examines the main benefit to the United States of his open borders plan: Lawful immigration would be more accessible, and once legal avenues replace illegal avenues of immigration into the country, illegal entrants and all their attendant problems would decline.³⁰ Yet, Johnson acknowledges there are limits to his plan. These include increased economic inequalities due to the efficient markets created by greater labor mobility³¹ and the fact that his proposal would not "solve the dilemmas of democracy U.S. style."³²

Johnson concludes this chapter with a second-best alternative to his open borders proposal—examining the EU as a model for immigration reform.³³ While the EU began as a free trade bloc for the flow of goods, services, and capital, over time, it has successfully transformed itself into a formidable entity that generally permits internal migration within EU member states.³⁴ Thus, as a second-best alternative, using the existing North American Free Trade Agreement ("NAFTA") framework, Johnson suggests the implementation of a regime for the free flow of people to complement the current free flow of goods, capital, and services under

23. *Id.* at 38. Notably, the burden of proof would be placed on the government to prove the noncitizen's excludability. *Id.*

24. *Id.* at 37.

25. *Id.*

26. *Id.*

27. *See id.* Visas would entitle immigrants to the protections of most U.S. law, eligibility for certain public benefits, and eligibility for naturalization. *Id.* at 39.

28. *Id.* For a recent in-depth article exploring the relationship between immigration control, crime control, and national security as they relate to the removal of noncitizens, see Jennifer M. Chacon, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827 (2007).

29. JOHNSON, *supra* note 4, at 40.

30. *Id.* at 41–42.

31. *Id.* at 42.

32. *Id.* at 43. Under this category, Johnson highlights the disenfranchisement of domestic minorities and the difficulties of ensuring true democracy. *Id.*

33. *Id.*

34. *Id.* at 43–44.

NAFTA.³⁵ This option would of course only apply to the NAFTA signatories (Canada, Mexico, and the United States), but in Johnson's view, it is a better alternative than the status quo.³⁶

B. CHAPTER TWO: A BRIEF HISTORY OF U.S. IMMIGRATION LAW AND ENFORCEMENT

In this chapter, Johnson provides a succinct historical perspective of the U.S. immigration law and enforcement experience, as well as different policies and historical moments that shaped it. While noting that the United States currently remains more open in terms of admissions and access to citizenship than most other countries,³⁷ Johnson points out that noncitizens in the United States have fewer rights than citizens and are denied full membership in U.S. society.³⁸ For example, the threat of deportation is a notable difference between citizens and noncitizens: citizens can never be deported, but noncitizens can be deported for even minor violations of immigration or criminal laws.³⁹

Johnson further highlights that since 1875, the United States "has had an unbroken history of immigration laws that restrict immigration and attempt to ensure a certain quality standard among immigrants."⁴⁰ Very often, these laws have been racially and ethnically discriminatory, such as the Chinese Exclusion Laws and the national origins quota system.⁴¹ This is a result of the plenary power doctrine, which limits judicial checks on the acts of the federal government in the immigration law arena.⁴² Coupled with a restrictionist tradition, the current fears of a Mexican illegal alien invasion, and the perceived need for immigrant assimilation, history reveals a troubling ignorance that Johnson dispels throughout this work. Johnson concludes that "the United States has much to be proud, and ashamed, of in its immigration history."⁴³

C. CHAPTER THREE: BORDERING ON THE IMMORAL: THE MORAL CONSEQUENCES OF THE CURRENT SYSTEM OF IMMIGRATION REGULATION

This chapter discusses the philosophical arguments for open borders and how the nation's dominant moral and constitutional values would be better served under a liberal immigration scheme. The chapter also examines how the current U.S. immigration laws and their enforcement

35. *Id.* at 44.

36. *Id.*

37. *Id.* at 45.

38. *Id.* at 46.

39. *Id.*

40. *Id.* at 52.

41. For in-depth discussion and analysis of these policies and the civil rights abuses of U.S. immigration laws, see KEVIN R. JOHNSON, *THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS* (2004).

42. JOHNSON, *supra* note 4, at 53.

43. *Id.* at 86.

lead to immoral consequences. Finally, the chapter outlines how bringing immigration laws in line with the national commitment to individual rights can lead to the amelioration of such impacts.⁴⁴

With regard to liberal and communitarian theory on immigration restrictions, Johnson discusses Joseph Carens's view that liberal theory requires a strong presumption in favor of admission of noncitizens, and that only under an imminent threat to public safety should there be restrictions upon entry.⁴⁵ Johnson then considers the view of theorist Michael Walzer, who firmly espouses the view that a "community should be able to adopt criteria to limit the admission of outsiders in order both to preserve community self-definition and to allow the community to make decisions that reflect shared community values."⁴⁶ After reviewing the tensions between the two theories, Johnson states that, ultimately, Walzer's communitarian perspective is "ill suited to justify modern U.S. immigration law and policy."⁴⁷

Liberal theory is then contrasted with the plenary power doctrine. After reviewing trends in international law regarding sovereignty and recent developments in the U.S. war against terror, Johnson contends that "a move beyond complete sovereign power over immigration controls appears to be in order."⁴⁸

Johnson finally explains how liberal theory, with its emphasis on individual rights, morally justifies more open borders than are provided under existing law.⁴⁹ The current restrictions are difficult to justify morally, considering migration is more common than ever.⁵⁰ Open borders would reduce the immoral consequences that are the direct result of the closed border systems, such as racial discrimination, exploitation in the labor market, human trafficking, and slavery.⁵¹ Furthermore, following September 11, aggressive actions to protect borders and national security "have encouraged vigilantes to join in the hunt for undocumented immigrants."⁵² Open borders "would allow for orderly and safe entry into the United States by migrants looking to work in the United States."⁵³

Finally, Johnson highlights the immoral treatment of immigrants and refugees by pointing out that, for the Department of Homeland Security, "[b]order enforcement continues to trump all other immigration func-

44. *Id.* at 87.

45. *Id.* at 93 (citing Joseph M. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 *REV. POL.* 251 (1987)).

46. *Id.* at 93 (citing MICHAEL WALZER, *SPHERES OF JUSTICE* 35–42, 61–63 (1983)).

47. *Id.* at 95.

48. *Id.* at 99.

49. *Id.* at 100.

50. *Id.* at 102.

51. See generally Karen E. Bravo, *Exploring the Analogy between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade*, 25 *B.U. INT'L. L.J.* (forthcoming 2008); Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 *FORDHAM L. REV.* 2977 (2006).

52. JOHNSON, *supra* note 4, at 115.

53. *Id.* at 115–16.

tions.”⁵⁴ This is the case even with respect to the Refugee Act of 1980, which protects noncitizens fleeing persecution, so that even “asylum decisions are often subtly guided by U.S. foreign policy, rather than humanitarian concerns.”⁵⁵

D. CHAPTER FOUR: THE ECONOMIC BENEFITS OF LIBERAL MIGRATION OF LABOR ACROSS BORDERS

In *The World is Flat*,⁵⁶ while identifying the challenges to the United States of rapidly transformative processes of globalization, Thomas Friedman celebrates the flattening of the world—that is, the diminution in the importance of borders, geographic boundaries, time zones, and other barriers to economic activity. The world is *not* flat for would-be migrants, particularly migrants coming from economically vulnerable countries. In the search for economic opportunities in countries other than their own, migrants face not only physical challenges of distance and arduous land or seascapes; they face the barriers of state borders and restrictive border enforcement.

In this Chapter, Johnson advances and explains utilitarian economic arguments that support his advocacy of liberalized borders. In their masterful and thought-provoking 1998 work, migration scholar Douglas Massey and his co-authors decry the failure of immigration scholars to theorize about migration.⁵⁷ Johnson’s book responds both to the plea for an immigration-law theoretical framework for understanding and dealing with migration (by applying both free market and liberal theories) and puts forward a mechanism (open borders) that accepts and takes advantage of the role of economic forces in a globalizing world.⁵⁸

Massey and his co-authors contextualize modern migration within the ongoing process of globalization and examine multi-faceted aspects of modern migration flows.⁵⁹ Among the issues discussed by the authors is the disjuncture between neoclassical economic theories regarding labor markets and actual migration flows.⁶⁰ The authors note that neoclassical

54. *Id.* at 116.

55. *Id.* at 118.

56. See THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* (1st Expanded & Updated ed. 2006).

57. DOUGLAS S. MASSEY ET AL., *WORLDS IN MOTION: UNDERSTANDING INTERNATIONAL MIGRATION AT THE END OF THE MILLENNIUM* 286 (1998) (“When it comes to policy . . . the efforts of immigration scholars have been practical rather than theoretical, focusing on the degree to which specific programmes and procedures might succeed in ‘controlling’ immigration.”)

58. *Id.* at 289 (“In both theoretical and practical terms it has proved difficult to lower barriers to the movement of capital, information, and goods while at the same time raising barriers to the movement of workers. Immigration is simply the labour component of globalizing factor markets.”).

59. *Id.*

60. *Id.* at 14.

The State and its policies are thus central to explaining contemporary migration for theoretical as well as practical reasons. Nothing invalidates traditional approaches to migration as effectively as border control policies. Indeed, “it is precisely the control which states exercise over borders that

economic theory cannot fully explain modern migration flows, identify the role of borders in influencing those flows, and point to the often perverse effect of modern immigration laws, which contradict the liberalization policies implemented toward other factors of economic production.⁶¹ The authors explain that the role of states and border protection, while virtually ignored in neoclassical economic theory, is crucial in affecting and determining migratory flows.⁶² They also assert that state policies fail to conceptualize the role of those very states, their borders, and their enforcement policies.⁶³ As a consequence, immigration laws are all too often short-sighted and ill-informed, produced through the mechanisms and purposes of political expedience.⁶⁴ The authors point out that the

defines international migration as a distinctive social process." Border controls reduce the applicability of standard economic models by impeding the free circulation of labour as a factor of production, and, consequently, preventing the development of international migration to its fullest potential.

Id. (citations omitted)

61. For example, Massey described U.S. immigration law and its effects as follows:

Although officials and the general public may believe that *repressive enforcement* will reduce the volume of unwanted immigration, recent evidence from the USA suggests that, *in reality, they do not deter new migrants from coming or experienced migrants from re-entering*. They have a stronger effect on the composition of international migration, pushing immigrants towards a clandestine existence that leaves them economically exploitable and socially vulnerable

In sum, repressive policies seeking to regulate immigration by influencing the costs and benefits of immigration seem likely to fail, a conclusion that certainly holds for industrial democracies As long as the world's powerful, capital-rich economies are incorporated within global trade, information, and production networks, they will tend to receive international migrants. In both theoretical and practical terms it has proved difficult to lower barriers to the movement of capital, information, and goods while at the same time raising barriers to the movement of workers. Immigration is simply the labour component of globalizing factor markets.

Id. at 288–89 (emphasis added and internal citations omitted).

62. *Id.* at 288.

63. *Id.*

The failure of States to recognize the complex, multi-causal nature of contemporary international migration thus yields the worst of all possible worlds: continuing immigration from abroad combined with lower wages, poorer working conditions, increased crime, more disease, and greater social marginalization at home. . . . State efforts at immigration control typically conceptualize international movement in relatively simple neoclassical terms. By patrolling the border, castigating employers who hire unauthorized workers, barring immigrants from social programmes, and limiting the rights of the foreign born to housing, health care, schooling, and employment, public officials seek to drive up the costs and lower the benefits of international migration, in hopes of reducing the incentives for entry.

Id.

64. *Id.* at 288.

Faced with mounting public pressure to 'control' immigration, but with the root causes of international migration lying largely beyond their reach, elected leaders and bureaucrats increasingly have turned to *symbolic* policy instruments to create an *appearance* of control. Police actions at the border, the internal harassment of aliens, the purging of immigrants from the public service rolls, and the implementation of restrictions on the civil liberties of foreigners are not very effective in stopping immigrants; but these measures serve important political purposes: they are visible, concrete, punitive, and

best possible course going forward is state understanding of the role and inevitability of migration flows in a globalizing economy, along with realistic efforts to channel such flows.⁶⁵

In addressing the economic consequences of U.S. immigration laws and describing the economic bases for his advocacy of liberalized borders, Johnson displays a thorough understanding of the role of the movement of labor in the globalizing economy of the United States, as well as the challenges posed to the U.S. economy as a whole by rapid globalization.⁶⁶

Asserting that U.S. immigration laws and rhetoric run counter to economic reality,⁶⁷ Johnson points out that immigrants play a crucial role in the U.S. economy, providing low-cost labor that supports industries such as construction and meat-packing.⁶⁸ Johnson summarizes well-known conflicting claims about the costs of immigrants to the public coffers (health care, education, criminal activities, and entitlement programs, for example) and the effects on domestic (particularly low-income and minority) workers of noncitizens' willingness to work for lower wages. Johnson asserts that the impact of immigrants on the wages of low-income and minority workers has been estimated at one percent.⁶⁹ This figure may be true overall, but Johnson acknowledges that the figure may mask deeper effects of competition between domestic workers and noncitizens for jobs within particular industries or in particular locations. The effects there are deep and narrow, not captured by the one percent overall figure.⁷⁰

Scholars have not yet reached an agreement concerning whether the costs of immigration outweigh the benefits.⁷¹ Johnson notes that the economic arguments deployed against immigration and immigrants are tainted by discrimination and prejudice—the ill-considered and repellent nativist fears and stereotypes that underlie anti-immigrant rhetoric.⁷² He points to, for example, the *2005 Economic Report of the President*, which

enable otherwise feckless public officials to appear decisive, tough, and actively engaged in combating the rising tide of immigration.

Id. (emphasis in original).

65. *Id.* at 289

Rather that [sic] trying to stop international migration through repressive means, a more successful (and realistic) approach might be to consider immigration a natural outgrowth of a country's insertion into the global economy and to encourage its desirable features while working to mitigate its negative consequences.

Id.

66. See JOHNSON, *supra* note 4, ch. 4.

67. *Id.* at 133.

68. *Id.* at 134. Johnson also notes that in the absence of such low-wage labor, some industries might leave the United States. *Id.* at 148–49.

69. *Id.* at 146.

70. *Id.* at 144–45.

71. See, e.g., Howard F. Chang, *The Immigration Paradox: Poverty, Distributive Justice, and Liberal Egalitarianism*, 52 DEPAUL L. REV. 759, 761–62 (2003) (noting mixed diagnosis of the economic benefits and costs of immigration into the United States and advocating guest worker program as next-best alternative).

72. JOHNSON, *supra* note 4, at 150–51.

indicated that the benefits offered by immigration outweigh the negatives advanced by immigration opponents.⁷³ Johnson recognizes the stresses experienced by state and local governments who bear the costs of social services to immigrants (education, health, and entitlement programs, for example) but who do not receive a proportionate share of the tax payments made by undocumented immigrants.⁷⁴ He points out that the United States Supreme Court's interpretation of the plenary power of the federal government over immigration means that the immigration policies adopted at the federal level may be disconnected from the experiences of state and local governments.⁷⁵ In effect, states bear the brunt of costs, but they are not reimbursed for those costs by the federal government.⁷⁶

Johnson's proposed deregulation of the border responds to the foregoing economic concerns. He believes that an open borders policy would be the best economic alternative,⁷⁷ but, noting the current anti-immigrant political and social climate,⁷⁸ Johnson suggests that deregulation of the borders, allowing movement among regional trading partners, is the second-best alternative.⁷⁹ In tandem with this, he suggests federal revenue sharing with state and local governments to defray the costs of immigration,⁸⁰ wealth redistribution through the tax system,⁸¹ and using some money saved from border enforcement to enforce wage and labor protections in all labor markets.⁸² In his opinion, deregulation in conjunction with the foregoing measures is more likely to address the real economic costs of immigration than failed attempts to close the border.

Although Johnson displays an understanding of the economic factors and trends that affect international immigration, he does not address an important factor that contributes to the increase in Mexican immigration into the United States. NAFTA appears to have lived up to its promise as a trade liberalization mechanism that would increase the economic prosperity of the three signatory states. According to officially generated statistics, the volume of trade among Mexico, Canada, and the United States

73. *Id.* at 136–37 (citing ECONOMIC REPORT OF THE PRESIDENT 93 (2005)).

74. Many undocumented noncitizens make Social Security payments and pay federal taxes. Many hope that the creation of a paper trail and recognition of their contributions to American society will better their chances of regularizing their status. *Id.* at 152.

75. *See id.* at 153.

76. *Id.* at 152–53. Only a few states have successfully pursued federal funds. *Id.*

77. In that scenario, most would-be entrants would be welcome, with limitations asserted only against those who pose real terrorist, health and safety, and criminal threats. *Id.* at 196–99.

78. *Id.* at 166.

79. He notes that, despite anti-immigrant fears, the United States will eventually act in its economic interests: “Economic benefits make labor migration from Mexico desirable. Indeed, economic reality may make labor migration from Mexico inevitable.” *Id.* at 166.

80. *Id.* at 154, 166–67.

81. *Id.* at 146. However, particularly in view of anti-entitlement and individualistic rhetoric in the United States, the suggestion regarding ameliorative transfer payments to adversely affected workers would be difficult to implement.

82. *Id.* at 187.

increased,⁸³ and the economic prosperity of the three trading partners—as reflected in their gross domestic product—has certainly improved.⁸⁴ However, some scholars have linked the increase in migration from Mexico to the dislocations caused by Mexico's assimilation into the North American regional arrangement.⁸⁵ While the long-term benefits are almost certain to continue to increase for the overall Mexican economy, the job losses stemming from economic transformations have sent formerly rural workers across the border in search of work.⁸⁶ It seems, then, an omission not to discuss more deeply the relationship between NAFTA and the migration flows into the United States from Mexico. To the extent that the United States' own regional trade liberalization policies have served to increase the flow of migrants, the United States bears some responsibility for their fate.

It therefore appears ironically appropriate to use the very mechanism (the existing regional trading agreement) that spurred such dislocations to rectify the economic costs borne by both U.S. and Mexican workers. And, as Johnson notes, “the key ingredient to significantly reducing migration from Mexico [the most significant source of migrants] is economic growth in Mexico.”⁸⁷

E. CHAPTER FIVE: WHY OPEN BORDERS ARE GOOD FOR ALL AMERICANS

In chapter five, invoking both an exhortation to liberal U.S. principles (such as racial equality, multi-culturalism, and democratic theories of full membership despite immigration status) and calling for recognition of the reality that faces the United States (noncitizens live and work within the nation's borders), Johnson rejects ineffectual incremental reform for more fundamental reform that reflects espoused values of the United States.⁸⁸

The many benefits that Johnson argues will be gained by the United States span the moral, political, and social realms, and include economic and national security benefits. He lists several such benefits: (i) The

83. Ranko Shiraki Oliver, *The Twelve Years of NAFTA, the Treaty Gave to Me . . . What, Exactly?: An Assessment of Economic, Social, and Political Developments in Mexico Since 1994 and Their Impact on Mexican Immigration Into the United States*, 10 HARV. LATINO L. REV. 53, 72–77 (2007) (describing official reports of NAFTA's economic benefits).

84. *Id.* at 77 (describing official figures summarizing NAFTA signatories' economic growth in terms of GDP “U.S. growth: 48%; Mexico's growth: 40%; and Canada's growth 49%”).

85. *Id.* at 61 (“NAFTA has significantly contributed to the wave of (mostly illegal) Mexican immigration to the United States in the last twelve years . . .”).

86. *Id.* at 86–89.

87. JOHNSON, *supra* note 4, at 165.

88. Comparing contemporary immigration law with Prohibition, Johnson notes the impossibility of enforcing laws in the face of overwhelming social, economic, and political resistance to their enforcement. *Id.* at 176. For example, despite dramatically increased border enforcement following September 11, the level of undocumented immigration has returned to pre-September 11 levels. *Id.* at 36.

United States will be able to direct resources more wisely to protect the nation from true dangers to public safety and national security, such as keeping out individuals who represent true terrorist, criminal, or public health threats, rather than ineffectively and punitively dispersing its resources implementing draconian policies; (ii) Transformative immigration reform by the United States would reduce the international tensions between the United States and its neighbors that have been exacerbated by the post-September 11 border enforcement activities; (iii) Immigration reform could reduce the tension between the federal and state governments arising from the uneven spread of costs and benefits of immigration between them; (iv) Social and moral benefits would accrue from promoting the integration of immigrants into society; (v) Disparate policing of minority and low-income communities would be eliminated and racial tensions would decrease as law enforcement abandons attempts to enforce unenforceable laws; and (vi) The overburdened caseload of the federal courts, which have been swamped by immigration cases as a result of post-September 11 draconian immigration laws, would be reduced.

F. CHAPTER SIX: THE INEVITABILITY OF PERMEABLE BORDERS

In Johnson's view, in order for U.S. immigration laws to work effectively, they must be transformed rather than incrementally changed. The U.S. immigration laws are contrary to the economic liberalization policies that are pursued by the U.S. government domestically and worldwide with respect to the movement of capital, goods, and services.⁸⁹ Johnson advocates limited liberalization of the borders by the inclusion of labor movement within the regional trading regime (NAFTA) created by the United States, Mexico, and Canada.⁹⁰ Pointing to the EU, where barriers to the movement of workers among member states have been incrementally lowered, he identifies potential economic and other benefits to the United States of adopting such a system.⁹¹

Johnson characterizes U.S. immigration laws as both ineffectual and immoral, and he calls for a fundamental transformation in perspective and approach. Johnson's call for the recognition of the inevitability of permeable borders echoes Massey's assertion regarding the need for states to work with, rather than *against*, the economic forces of

89. *Id.* at 206 ("In an era of globalization, labor, as well as capital and goods, should be permitted and encouraged to cross national borders."). Indeed, in our opinion, the failure to include labor liberalization in the globalization enterprise represents the betrayal of economic principle to political expedience.

90. *Id.* at 204.

91. *Id.* ("Generally, the United States would gain from more permeable, more open borders. The European Union, which allows labor migration among its member nations, provides one model. A North American Union would allow a more orderly system of migration between nations. This labor integration would be much more consistent with the economic interests of the United States and the economic reality on the street than is the current immigration system.").

globalization.⁹²

One of the chief virtues of Johnson's work is his contextualization of U.S. immigration laws and policies within U.S. history. Not only does he describe historical trends, but he describes the underlying social, political, and economic realities that shaped public perception and legislative action. Johnson is never afraid to point out the gap between the U.S. liberal rhetoric and rights-based ideals and the social, political, and legal realities. The parallel that he draws between current immigration law and Prohibition⁹³ is particularly illuminating, highlighting the similarities in public (even law-abiding public) reaction to the immigration laws and the Prohibition regime.⁹⁴ For example, he notes that "border enforcement shares many of Prohibition's negative side effects. It promotes criminal activity, increases abusive law enforcement practices, contributes to a caseload crisis in the courts, and undermines the moral force and legitimacy of the law."⁹⁵

III. CONCLUSION

Johnson's book proposes a bold new approach to addressing the conundrum that has become the U.S. immigration system. It would be a unified, humane, practical, and effective way to address the national security concerns raised by the specter of the numbers of noncitizens entering our borders. It would take into account the needs of the U.S. economy, which must contend with the reality of an aging population. It would align U.S. immigration law with the needs of the U.S. workforce and eliminate the hypocrisy of not recognizing the worth of those whom it needs and of whom, in the view of some, it takes advantage.

Johnson calls for no less than a fundamental and transformative reform not just in immigration law and policy, but in the way that the United States views itself. For example, on page 205, he asserts:

The fundamental problem with current U.S. immigration law is that it is founded on the idea that it is permissible, desirable, and necessary to restrict immigration into the United States. A border is viewed as a barrier to entry, rather than as a port of entry To reform U.S. immigration laws, the nation must reconceptualize the importance and meaning of the international border.⁹⁶

92. MASSEY ET AL., *supra* note 57, at 289 ("As long as the world's powerful, capital-rich economies are incorporated within global trade, information, and production networks, they will tend to receive international migrants.").

93. During the Prohibition era of the early 20th century, through a series of state laws and culminating in the Eighteenth Amendment to the U.S. Constitution, the sale, purchase, and consumption of alcohol was forbidden. The prohibition was impossible to enforce and gave rise to adverse societal consequences such as lack of respect for legal institutions. In addition, the legally mandated illicitness of alcohol was not accepted by the general public, and mechanisms of enforcement created economic incentives for the emergence of lucrative underground markets supported by increased criminal activity.

94. JOHNSON, *supra* note 4, at 206.

95. *Id.*

96. *Id.* at 205.

In suggesting reform, Johnson never loses faith in the nation's belief in its liberal ideals. In his view, the fundamental injustices that have co-existed with those ideals are ill-considered phases.

A cynical question that occurs is whether Johnson, in order to appeal to the general audience to whom the book is targeted, deliberately shies away from the possibility that the current immigration laws are *designed* to foster exploitation. That is, the values and philosophy embodied by current immigration laws are ones that favor punishment for perceived lawbreakers and create cheaper labor for business interests. Johnson's arguments in favor of open borders are cogent and well-thought-out, and explain that the United States as a whole (including undocumented migrants) will benefit from realistic and transformative immigration and border reform. However, in the current incarnation of American democracy, it is not the prospect of benefits to all that will overcome opposition. Citizens are persuaded, whether through their own discriminatory impulses or the fear-mongering of others, that they should fear immigrants and what immigrants represent. The punitive policies that impose society-wide costs and bring benefits to few (anti-immigrant politicians and the purveyors of border enforcement merchandise and services) are supported by many who are unable to discern the true linkage among disparate economic and social factors.

Johnson's suggestions for re-thinking U.S. immigration laws present sane and well-thought-out alternatives for the transformation of a system that suffers all of the drawbacks identified by him (and others).⁹⁷ As he points out, the incremental and politically expedient reforms of the past are inadequate. The United States, to regain its political and moral authority, to live up to its liberal ideals, and to compete in the global economy, needs to transform its immigration laws so that they work with, rather than against, economic theories and realities. Johnson's proposal, while not at the moment politically viable, fires the opening salvo in the coming battle over the future of immigration policy in the United States and will hopefully shift the paradigm by its thorough examination of the myths and assumptions behind the current piecemeal approach to immigration reform.

Other countries, such as Spain, have recognized that “[i]f we want to maintain our economic model and a reasonable growth index, we need immigrant work.”⁹⁸ Thus, while Spain has opened its borders somewhat via its membership in the EU, it has gone further. For example, “[i]n a move calculated to appear welcoming to the immigrants, [the] State Sec-

97. Johnson calls for no less than a re-thinking of American identity—an open society that abandons the discriminatory practices that have always contravened the rights-based rhetoric of the United States.

98. See María Pabón López, *Immigration Law Spanish-Style: A Study of Spain's Normalización of Undocumented Workers*, 21 GEO. IMMIGR. L.J. 571, 582 n.109 (2007) (quoting Manuel Pimentel, *Bienvenida la Regularización*, CINCO DIAS, Feb. 9, 2005, available at http://www.cincodias.com/articulo/opinion/Bienvenida/regularizacion/cdsopiE00/20050209cdsdiopi_6/Tes/).

retary for Immigration, relocated her office from . . . the Interior Ministry”—in charge of policing—“to the more immigrant-friendly Ministry of Labor.”⁹⁹ Such a significant act serves as a vivid contrast to the “misery strategy” employed in the United States, where enforcement and punishment are the order of the day when it comes to immigration law and policy.¹⁰⁰

With this book, Johnson, a well-respected and meticulous scholar, asserts what may be perceived as a provocative stance based on his reasoned opinion, gathered over decades of toil in the immigration law and policy academic arena. Yet *Opening The Floodgates* is not an idealistic, ivory tower tome. Once the predictable partisans in the immigration debate—politicians, business and labor interests, anti-immigration activists, and nativists, among others—overcome their initial distaste at the very term “open border,” they may eventually realize that this is the only way to fix the immigration system that, all agree, is broken. Importantly, the United States will return to its history as a country of immigrants, but this time with a realistic point of view and without any more of the crisis mentality we currently endure.

Without the open borders remedy advocated by Johnson, the already shattered U.S. immigration law system will continue in its downward decline, doomed to fail: The U.S. economy needs the workers, but the U.S. public rhetoric still demands punishment of and enforcement against immigrants.

99. *Id.* at 581.

100. Editorial, *The Misery Strategy*, N.Y. TIMES, Aug. 9, 2007, at A18.