

IMMIGRATION AND NATIONAL SECURITY: THE ILLUSION OF SAFETY THROUGH LOCAL LAW ENFORCEMENT ACTION

David A. Harris*[□]

I. INTRODUCTION

Illegal immigration has long been a subject of controversy in the United States. Just surveying recent decades, illegal immigration became a hot topic in the 1980s, provoking action in the Congress. The legislation that resulted,¹ signed by President Ronald Reagan in 1986, promised to stem the tide of illegal immigration while simultaneously providing a path toward citizenship for those already in the United States.² This compromise held for more than a decade, but in the 1990s, under the weight of an increasing illegal immigrant population, mostly from Mexico and countries in Central America, tension again began to rise over the issue. Most of the arguments had to do with economics and labor: illegal workers were taking the jobs that Americans should have, argued critics; they suppressed wages and made it easy for employers to fire deserving citizens in favor of exploitable foreigners eager and willing to work for peanuts under any conditions, anti-immigration advocates claimed.³ In addition, some argued that

* Distinguished Faculty Scholar and Professor of Law, University of Pittsburgh. My thanks to Andrew Reeves and Oliver Davis for making our symposium at the University of Arizona School of Law a great success. I also thank Emily J. Boardman, University of Pittsburgh School of Law Class of 2012, for her assistance with research for this article.

1. Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359.

2. See, e.g., Steven S. Mukamal, *Viewpoints: Our Hounded Immigrants*, NEWSDAY, March 6, 1987, at 72 (describing IRCA as providing amnesty for settled illegal immigrants while upping penalties on employers); Antonio H. Rodriguez, *Amnesty Proves Insufficient; Gaps In Management and Law Impede Immigration Reform*, L.A. TIMES, Aug. 2, 1987, at 5 (describing amnesty provisions). It is interesting indeed to look back at the passage of the 1986 bill and recall that the path to citizenship for long-settled immigrants was called an amnesty, even by President Reagan himself. See, e.g., Edwin Meese, III, *An Amnesty By Any Other Name . . .*, N.Y. TIMES, May 24, 2006, at A27.

3. See, e.g., Herbert A. Sample, *Do Illegal Migrants Take Minority Jobs? New Research Adds Fuel to Fierce Debate*, SACRAMENTO BEE, Aug. 29, 1993, at A3 (“When Reps. Elton Gallegly and Duncan Hunter talk about stemming illegal immigration, they frequently claim that undocumented workers snare job opportunities from American minorities”); Terry Anderson, *Overrunning America*, SAN JOSE MERCURY NEWS, June 12, 1996, at 6B (arguing that jobs that used to go to black Americans now go to recent immigrants); Mae M. Cheng, *Queens Residents Give a Mixed View*, NEWSDAY, Nov. 8, 1998, at A48 (“Residents of Queens, one of the nation’s most diverse counties, applaud

the large number of Latinos coming into the United States constituted a great burden on American taxpayers, as they overloaded schools, hospitals, and other social services.⁴ Yet others complained that these immigrants were swamping American culture, with their refusals to learn English and their stubborn adherence to their own ways of doing things.⁵ Governor Pete Wilson of California said that it seemed “impossible” for immigrants in his state “to assimilate with our own

immigrants’ contributions to the local economy but also believe these newest New Yorkers have taken jobs from native-born Americans and depressed salaries”); Stuart Silverstein, *Job Market a Flash Point for Natives, Newcomers*, L.A. TIMES, Nov. 15, 1993, at A1 (quoting an American worker as saying that, when foreigners compete for jobs with Americans, “somebody gets hurt. Somebody gets left out in the cold, and I don’t want it to be me. I was born and raised in this country. . . . If Americans want those jobs, they should be able to get those jobs.”); Joseph P. Ritz, *Businesses Aiding Invasion of Illegal Aliens*, BUFFALO NEWS, July 25, 1993, at B14 (immigrants, particularly illegal ones, “blamed for enabling employers to perpetuate low-skilled, low-paying industries while ignoring the desires of poor Americans—especially blacks—to gain higher-skill, higher-paying jobs”); Michael Gormley, *As the U.S. Economy Falls, Resentment of Immigrants Rises*, ALBANY TIMES UNION, Sept. 7, 1993, at A1 (describing “a backlash whipped by fear that newcomers are taking jobs, deflating wages”); Mukamal, *supra* note 2 (“With unemployment as high as 10.4 percent that year, the impulse to protect American workers from competition by aliens spread through Congress.”).

4. See, e.g., *Immigration: Newcomers Are Burdening U.S. Taxpayers*, DALLAS MORNING NEWS, Oct. 17, 1993, at 2J (“In America today, jobs are the principal magnet for immigration. Increasingly, however, taxpayers and government officials are identifying a second magnet: taxpayer-funded social services. . . . Can taxpayers afford to spend billions of social service dollars on people who are present illegally on U.S. soil?”); William Claiborne, *California Faces New Welfare Reality: Counties With Large Immigrant Population Fear Financial Hit*, WASH. POST, Aug. 2, 1996, at A9 (public official, faced with having to provide medical care for illegal immigrants, says “[It’s] just devastating. These people will be at the doorsteps of our hospitals with communicable diseases, and we’ll have to take care of them. It’s an awful situation, because we just don’t have the money.”); Diane Rado, *Study: State Pays \$884-million for Illegal Aliens*, ST. PETERSBURG TIMES, Mar. 13, 1994, at 4B (“Taxpayers [in Florida] are spending \$2.53-billion a year to provide services to a steady stream of immigrants. And an estimated \$884-million of that goes to care for people who shouldn’t even be here—illegal aliens”); Robert L. Jackson, *New Study on Immigration Cites High Costs*, L.A. TIMES, Sept. 23, 1994, at A3 (study comparing taxes paid by immigrants to education and social services provided to them resulted in large net expense to states); Debra Beachy, *Study Estimates Immigrants Cost Texas Government \$4.68 Billion in 1992*, HOUS. CHRON., Mar. 3, 1994, Busines, at 1 (“A new study by a Rice University economist . . . says immigrants—both legal and illegal—cost Texas \$4.68 billion more in 1992 than they paid in taxes.”).

5. See, e.g., Reena Shah Stamets, *Immigration Crusade Is Personal War*, ST. PETERSBURG TIMES, Aug. 14, 1995, at 1B (quoting an American citizen, herself a child of immigrants, as saying that she “saw America becoming this strange country . . . [Opponents of immigration are] not evil, mean people. We’re just afraid, concerned about our home”).

people or to make any change in their habits,” leading Californians to see “great danger that . . . the state will be overrun by them unless prompt action is taken to restrict their immigration.”⁶

Yet few of these arguments proved to have much traction with the public outside of the core group of anti-immigration advocates and their most ardent supporters. Government at all levels simply ignored the issue, and the federal government, whose job it has always been to enforce immigration law, seemed uninterested. Anti-immigration advocates called for action, and in at least one instance in the 1990s, Congress bestirred itself. It enacted an immigration reform law in 1996.⁷ The law included a provision that allowed for voluntary agreements between the Immigration and Naturalization Service (INS) and any state or local police department, under which a group of officers in the department would receive limited training in immigration law and procedure and become “cross deputized,” with a degree of authority to enforce immigration law.⁸ This law, known colloquially as “Section 287(g),” attracted little notice, despite the fact that those clamoring for stronger immigration enforcement desired the involvement of state and local police. By early 2001, none of the nation’s approximately 17,000 police agencies had decided to enter into a voluntary Section 287(g) agreement.⁹

But, as with so much of American life and policy making, the terrorist attacks of September 11, 2001, brought significant changes. And, over the next several years following the attacks, advocates for stricter immigration enforcement began an effort to bring lawmakers and others around to their side. They did this by “rebranding” their argument, changing their characterization of the issue from one centering on economics and labor, or the changing of American culture, to national security. The borders and their openness risk our security in our post-September 11th world, they cried; with terrorists so clearly out to get us, we cannot risk continuing our same old approach, they said; we have to regard the ease with which undocumented people crossed the southwestern border as a grave risk to our safety.

This article will argue that the rebranding of the immigration problem as a national security issue began a process that culminated in laws at the state level, such as Arizona’s S.B. 1070.¹⁰ While the Arizona law was not intended as a national security measure, it represents exactly what the anti-immigration advocates have longed for—a way to force state and local law enforcement

6. Jeff Jacoby, *We Can’t Let Facts, Logic Get in the Way of a Good Snit at Immigrants*, SUN-SENTINEL, Nov. 26, 1994, at 20A.

7. Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA), Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

8. 8 U.S.C. § 1357(g) (2006).

9. See *infra* note 12.

10. S.B. 1070, 49th Legis., 2d Reg. Sess. (Ariz. 2010), amended by H.B. 2162, 49th Legis., 2d Reg. Sess. (Ariz. 2010).

agencies into the immigration fight. Ironically, S.B. 1070 shows us that, if we wanted to *harm* our national security, we could hardly think of anything more likely to accomplish this than a law that does what S.B. 1070 mandates. It almost guarantees that local law enforcement will cause damage to the most important weapon we have for fighting terrorism: the gathering of intelligence.

II. THE REBRANDING OF IMMIGRATION

Until the mid-2000s, advocates of utilizing local law enforcement to strengthen immigration controls gained little traction. Before September 11, 2001, no state or local police agency had signed a Memorandum of Understanding under Section 287(g) to involve itself in immigration enforcement. In the immediate aftermath of the attacks, only one police agency, the Florida State Police, entered into a 287(g) agreement,¹¹ and even this agreement covered only a very small number of that agency's sworn personnel.¹² No other police department had come forward. A few others eventually joined, such as the Alabama State Police, and a few California law enforcement agencies, including the Costa Mesa Police Department, the Orange County Sheriff's Department, the San Bernardino Sheriff's Department, and a small unit of Los Angeles County Sheriff's Deputies working at the Los Angeles County jail, but not many.¹³ Those opposed to immigration, including many who wanted to supplement the resources of the federal border patrol and customs agencies with local law enforcement efforts, were not getting what they wanted. Thus the rebranding began.

Advocates for organizations that had long been in the forefront of the immigration debate, calling for stronger border enforcement, began to fashion their arguments to include national security concerns. Indeed, they began to lead

11. James Jay Carafano, *No Need for the CLEAR Act: Building Capacity for Immigration Counterterrorism Investigations*, HERITAGE FOUND. (April 21, 2004), <http://www.heritage.org/Research/HomelandDefense/em925.cfm>.

12. See, e.g., Michael Ramage, General Counsel, Florida Dept. of Law Enforcement, Presentation to the International Association of Chiefs of Police Legal Officers Section: Emerging Immigration Issues for Local Law Enforcement (Sept. 25, 2005) (on file with author) (discussing Florida's 287(g) Memorandum of Understanding, which included approximately seventy officers who "[a]re NOT involved in general immigration enforcement efforts" (emphasis in original)); *Southeast Asks Sheriff to Consider Immigration Enforcement*, J. NEWS (Westchester, N.Y.), Feb. 24, 2007, at A1 ("The Florida Department of Law Enforcement was the first to take part in the federal program in 2002. Some sixty-two agents and state and local officers have been trained. The agency has limited its authority to domestic security concerns, in places such as airports and seaports.")

13. Miriam Jordan, *The New Immigration Cops; Cities and States Take on Difficult Duty of Handling Undocumented Workers*, WALL ST. J., Feb. 2, 2006, at B1.

with it. The point, they said, was obvious: our porous borders with Mexico¹⁴ could allow penetration by members of al Qaida. If thousands of poor Mexican and Central American peasants could make it into America in search of work day after day, so could a determined terrorist. And while they could cite little or no evidence to support this point, they did not let the (lack of) facts stand in the way of a rhetorically effective argument.

Mark Krikorian, then the executive director of the Center for Immigration Studies, advanced this idea in an article he wrote for the *National Interest*: “In a very real sense, the primary weapons of our enemies are not inanimate objects at all, but rather the terrorists themselves—especially in the case of suicide attackers. Thus keeping the terrorists out or apprehending them after they get in” is the key to prevailing against them.¹⁵ He went on to say that “controlling the Mexican border, apart from the other benefits it would produce, is an important security objective; at least two major rings have been uncovered which smuggled Middle Easterners into the United States via Mexico, with help from corrupt Mexican government employees.”¹⁶ Krikorian cited just one example of terrorist danger flowing from the U.S.-Mexican border to support his argument. He said that Mahmoud Kourani, the brother of Hizbollah’s security chief, allegedly entered the country using this method.¹⁷ Kourani was, in fact, arrested in Dearborn, Michigan, but his arrest stimulated more talk about terrorism than the actual facts of the case could support. The authorities chose to prosecute him only for harboring an illegal immigrant and charged him with no terrorism-related offenses of any kind.¹⁸ He served only a few months in jail—hardly what one would expect had he actually posed the type of danger Krikorian seemed to fear.¹⁹

14. Rarely, if ever, was Canada and its vast border with the United States a subject of concern, though it clearly could have been. *See, e.g.*, U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-93, NORTHERN BORDER SECURITY: DHS’S REPORT COULD BETTER INFORM CONGRESS BY IDENTIFYING ACTIONS, RESOURCES, AND TIME FRAMES NEEDED TO ADDRESS VULNERABILITIES (2008) (Dept. of Homeland Security reported its northern border vulnerabilities, such as terrorism, drug trafficking, and illegal immigration to Congress); *see also* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-97, ENHANCED DHS OVERSIGHT AND ASSESSMENT OF INTERAGENCY COORDINATION IS NEEDED FOR THE NORTHERN BORDER (2010) (calling for “DHS-level oversight and attention to enforcing accountability of established agreements” to meet ongoing challenges with coordination and lack of resources).

15. Mark Krikorian, *Keeping Terror Out*, 75 NAT’L INT. 77, 78 (2004).

16. *Id.* at 82.

17. *Id.* at 83.

18. David Shepardson, *FBI Links Two Terror Cases – Court Filing Says Two Men Indicted in Detroit Sent Thousands of Dollars to Hezbollah*, DETROIT NEWS, April 18, 2004, at 1B.

19. *Id.*

Others followed the same path as Krikorian. Conservative political commentator Tony Blankley, who formerly served as a top aide to then U.S. House Speaker Newt Gingrich after a stint as the editorial page editor of *The Washington Times*, also emphasized the danger to national security posed by illegal immigration from Mexico. In his 2005 book, *The West's Last Chance: Will We Win the Clash of Civilizations?*, Blankley wrote that the Mexican border with the United States represented an important threat to our national security.²⁰ For support, Blankley relied on the Congressional testimony of James Loy, then Deputy Secretary of Homeland Security and the former Commandant of the U.S. Coast Guard. Blankley argued that the porous nature of the Mexican border posed a significant risk of terrorist infiltration,²¹ quoting Loy as testifying that:

Recent information from ongoing investigations, detentions and emerging threat streams strongly suggests that al Qaida has considered using the Southwest border to infiltrate the United States. Several al Qaida leaders believe operatives can pay their way into the country through Mexico and also believe that illegal entry is more advantageous than legal entry for operational security reasons.²²

This statement would seem to support Blankley, Krikorian, and others who argued that illegal Mexican immigration posed a national security threat—until one reads the next sentence of Deputy Secretary Loy’s testimony, omitted by Blankley: “However, there is currently no conclusive evidence that indicates al Qaida operatives have made successful penetrations into the United States via this method.”²³

Other government officials, not mentioned by Krikorian, Blankley, or other advocates for tighter immigration enforcement along the Mexican border on national security grounds, said that the facts presented a far different picture. For example, in 2003, debate flared in the United States over the use of Mexican consular identification documents—called *matricula consular* cards—by Mexicans in the United States. Banks in the United States had begun to accept these cards as sufficient identification for opening bank accounts, and an

20. TONY BLANKLEY, *THE WEST’S LAST CHANCE: WILL WE WIN THE CLASH OF CIVILIZATIONS?* 172 (2005).

21. *Id.*

22. *Id.* (quoting *Current and Projected National Security Threats to the United States: Hearing Before the S. Select Comm. on Intelligence*, 109th Cong. 41 (2005) (statement of Admiral James Loy, Deputy Secretary, U.S. Dept. of Homeland Security)).

23. *Current and Projected National Security Threats to the United States: Hearing Before the S. Select Comm. on Intelligence*, 109th Cong. 41 (2005) (prepared statement of Admiral James Loy, Deputy Secretary, U.S. Dept. of Homeland Security).

increasing number of undocumented immigrants began opening accounts with the cards in order to deposit their earnings, so that they would not have to carry large sums of cash with them all the time.²⁴ Carrying thousands of dollars on their persons had made many Mexicans the targets of robberies and violence by predators who knew that the victims would hesitate to report these crimes to police for fear of deportation. The *matricula consular* cards thus became a way to lessen the risk of these robberies through conventional banking.²⁵ Opponents of immigration decried the use of these cards, saying that terrorists could use them to facilitate their actions and launch attacks from across the Mexican border. But David Aufhauser, a former Treasury Department official in the George W. Bush Administration, could not hide his incredulity at these assertions. Noting that those making these statements, like those engaged in rebranding immigration, supplied no supporting evidence, Aufhauser called the idea of a connection between use of the *matricula consular* cards by illegal immigrants from Mexico and terrorism “comic.”²⁶

But, as stated above, those who wished to have stricter enforcement along the U.S.-Mexican border were not to be deterred by a minor inconvenience like a lack of facts backing up what they had decided to say. They forged ahead, making the argument over and over, insisting that only by enlisting local and state law enforcement in the immigration fight could we make the nation safe from terrorist attacks.

III. THE REACTION OF STATE AND LOCAL LAW ENFORCEMENT TO THE REBRANDING OF IMMIGRATION AS A NATIONAL SECURITY ISSUE

Leaders of state and local law enforcement agencies heard the call of these advocates, but they did not heed it. In fact, in contrast to their full-throated embrace of other announced national priorities, such as the “War on Drugs,” non-federal police agencies seemed to want no part of the action against immigration law violators, even if this constituted (as anti-immigration advocates argued) a danger to our national security. As I have shown elsewhere, the answer of state

24. For a fuller picture of these facts and the debate surrounding the *matricula consular* cards, see DAVID A. HARRIS, *GOOD COPS: THE CASE FOR PREVENTIVE POLICING* 190–92 (2005); see also *infra* pp. 392–93.

25. *Id.*

26. *Morning Edition: Popularity of Consular ID Cards Among Illegal Latino Immigrants* (NPR radio broadcast Nov. 25, 2003).

and local police officials to the call for involvement of their agencies in immigration enforcement was a near unanimous refusal.²⁷

For some in local law enforcement, the issue was the proper balance of federal and state relations. These officials said that, for them, the enforcement of immigration law remained a federal responsibility, and state and local agencies simply should not have a role in this effort.²⁸ For others, the additional burdens of enforcing immigration law would impose a fiscal burden that states and localities could not carry.²⁹ In times of ever-leaner budgets for states and cities, this could not help but concern leaders. For yet other agencies, they already found themselves swamped, not just with growing traditional police department duties, but with new responsibilities for homeland security issues, such as seeing to the safety of vulnerable municipal buildings or industrial installations or large public gatherings, a responsibility which had fallen to them since September 11, 2001.³⁰

But one reason for not wishing to get involved predominated in nearly every discussion of whether state and local police should get involved in immigration enforcement: doing so would constitute bad law enforcement policy. It would degrade the ability of departments to accomplish their core mission: providing public safety. Local police involvement in immigration enforcement, they said, was incompatible with what police officers attempted to accomplish day after day.³¹

The reasons for this begin with community policing. Almost any law enforcement agency anywhere in the country will say today that it practices community policing. These words have different meanings in different places; in some police departments, community policing is a pervasive philosophy, practiced at every level of the department; in others, it is an add-on program, seen as mere public relations and not “real policing.”³² But anywhere that it is done in a

27. David A. Harris, *The War on Terror, Local Police, and Immigration Enforcement: A Curious Tale of Police Power in Post-9/11 America*, 38 RUTGERS L.J. 1, 33–44 (2006).

28. *Id.* at 35–36 (“In other police departments, the refusal to get involved in immigration enforcement stemmed from strong beliefs about the proper responsibility of the federal government to secure the nation’s borders . . . [enforcement of immigration law by local police puts those officers], untrained in the law’s unending nuances, at a great disadvantage”).

29. *Id.* at 35 (“[L]ack of resources simply would not allow [local police] officers to take on immigration responsibilities . . . [And] the contemporaneous collapse of the economy in many regions of the country” has made this problem especially acute).

30. *Id.* (Local police forces are especially reluctant to get involved in immigration enforcement “in light of the overwhelming number of new homeland security tasks they now must undertake” in the post-9/11 era).

31. *Id.* at 37–44.

32. See HARRIS, GOOD COPS, *supra* note 24, at 23–24.

meaningful way, it has proven itself effective in creating long-term gains in public safety.

Though it takes myriad forms and can be seen in many types of police departments—urban and suburban, rural towns and big cities—serious, real efforts at community policing have a common core. It begins with the idea of partnership. The police must realize that they cannot fix public safety problems alone. They must have the help, support, and above all else, the information that only the community they serve can provide.³³ Information concerning what is happening on the streets when the police are not there, on which people in the community represent genuine threats, or on who did what and when in terms of a particular crime all must come from the people who live and work in a community.³⁴ The police cannot be everywhere at once, and only the dumbest criminals commit their crimes in front of the police. For its part, the community must realize that, like the police, they cannot make their neighborhoods safe, livable, and thriving places through only their own efforts. They must have the help and support of the police if they are to have stable neighborhoods secure from crime and disorder. Said differently, both the police and the community must understand that they cannot crack the public safety nut unless they work together, as partners, giving each other what is necessary to make their efforts work. Only by working in such a partnership can any city or town create real public safety gains that are sustainable over the long term.

Any true partnership must rest, in fact *can only* rest, on a relationship of trust.³⁵ Police and community must work to make this happen, because this kind of trust cannot simply be requested or pledged or handed over freely; it must be earned, especially when the parties come to the relationship against a background of distrust, built up over many years. Of course, this is often the situation faced by police and communities attempting to build a working relationship, especially (though not only) in urban settings. But, when real community policing takes hold, both sides recognize that there is no alternative to a real partnership and no other way to create it than to build a strong relationship over time in which both partners prove to each other that they can trust one another.

Despite the difficulties of accomplishing this, police departments nationwide do it today because they have seen the results: community policing

33. See, e.g., ROBERT TROJANOWICZ & BONNIE BUCQUEROUX, COMMUNITY POLICING: A CONTEMPORARY PERSPECTIVE 11, 12 (1990).

34. *Id.* at 11 (calling information from the community “the lifeblood of policing. Without the facts, police officers cannot solve problems,” and this type of information must come from “law abiding people, through both formal and informal contacts”).

35. HARRIS, GOOD COPS, *supra* note 24, at 37 (noting that with the growing mainstream popularity of community policing in the United States over the past two decades, “more and more American police departments and their communities” have created “partnerships based on collaboration and trust”).

works. It helps them to understand the communities in which they work, to get more cooperation and information from them, and to know what the law enforcement priorities of the people actually are. And few things sell as well in law enforcement as proven success. Some observers may mistake community meetings between police and the citizens in the communities they serve as political correctness or simple occasions for venting. But this disregards the real self-interests at stake for everyone involved, especially the police themselves. Better, more solid connections with the community, built on a foundation of real trust, produce results. With more public confidence and information, police can do a better job. So the effort, when undertaken fully and in good faith, proves worthwhile.

For example, police in Austin, Texas, noted a spike in violent robberies in which victims were murdered. Most of the victims were Latino immigrants from Mexico and Central America. Because these people did not have access to traditional banks, it was well known that they had to carry large amounts of cash on their persons, making them inviting targets for robbery.³⁶ Despite this, their illegal immigration status made them hesitant to get involved with the police, even to report their own victimization—a vicious cycle making them all the more attractive to predators. Taking all of this into consideration, Austin police theorized that reported robbery/murders were the tip of the iceberg, and many more people were being robbed than they knew about. They decided that they had to solve this problem by working with the community, regardless of immigration status, to help victims overcome the fear of police and to make similarly situated individuals less attractive as targets. Austin police officers began to deliver a new message to immigrant communities, using community meetings and an advertising campaign utilizing Spanish-language media: in Austin, police won't question victims about their immigration status. The police were only interested in making the public safe from criminals, so people could come forward without fear of deportation. Police also created arrangements with local banks to accept Mexican identification cards so that migrants could safely put their money away and not have to carry it around on their person. This resulted in a dramatic change: the immigrant community began to come forward with information about crimes, allowing the police to fight the robbers and killers who had been preying on Austin's poor. The strategy, incidentally, also brought crime down across the city.³⁷

Building this type of relationship with the average constituency of native-born citizens can be difficult. Think how much harder it is to accomplish these things in immigrant communities, as the Austin police did, where a substantial percentage of people in affected neighborhoods speak a language other than

36. See discussion of *matricula* cards, *supra* note 24 and accompanying text.

37. HARRIS, GOOD COPS, *supra* note 24, at 191–93.

English, creating barriers to basic communication. Residents may also be from a culture considerably different than mainstream America, another barrier that must be surmounted and that could cause gross misunderstandings. And some immigrants may come to the United States from countries where police were nearly always corrupt, violent, or predatory.³⁸ A knock on the door from the police in these countries is always bad news—immigrants from these countries always begin with considerable mistrust and fear of police authority. Add to this the fact that, in most immigrant communities, especially those from Latin America, there may be considerable numbers of people in the United States illegally, mixed with a population of those who have become citizens. Some may be American citizens living with parents who do not have legal status. Other households in these communities feature a mixture of immigration statuses: one adult may be legal, while the others are not; children may be natural born American citizens, but their parents may lack legal status.³⁹ As of 2005, 3.2 million people in the United States lived in such “mixed status” households.⁴⁰ This will naturally make people in these immigrant communities reluctant to interact with the police; even those who are legally in the country may hesitate to call the police if they think this would put other members of their household in jeopardy.⁴¹

All of this means that, if police officers want the kinds of partnerships built on trust with immigrant communities that are necessary for community policing to succeed, they must work especially hard to make it happen. And many have done this, realizing that it is just as important to reach out to immigrant communities as any other. This is true not only for large police departments in the traditional immigration gateway cities like New York, Chicago, and Los Angeles, but also for smaller police departments in many rural areas and small towns, which have seen the fastest recent growth in immigrant populations.⁴²

With a keen understanding of both the importance of building relationships with these immigrant communities and the difficulty of this task, local police recognized immediately that getting involved in the enforcement of immigration could only hurt them. If these communities saw them as assisting in

38. Harris, *War on Terror*, *supra* note 27, at 40 & n.13.

39. *Id.* at 39–40.

40. Jeffrey S. Passel, *Unauthorized Migrants: Numbers and Characteristics*, PEW HISPANIC CTR. (June 14, 2005), available at <http://pewhispanic.org/reports/report.php?ReportID=46> (stating that 3.2 million people live in households in which some persons do not have legal status).

41. Harris, *War on Terror*, *supra* note 27, at 40–41 (“[F]or local police, immigrants’ fear of contact with law enforcement emerges as a major obstacle in the constant fight to make the streets safe.”).

42. *Id.* at 37–38 (noting that many cities and towns in every region of the country, not just traditional large immigrant destination cities, have burgeoning immigrant populations and have made strong efforts to work with these populations).

anti-immigration “sweeps” or enforcement operations, they reasoned, it would destroy any trust that police had managed to build with these communities. Trust would be replaced by fear—fear of the state and its police, fear of investigation, and, most of all, fear of deportation. Fear would keep people from communicating with the police; many would be hesitant to contact the police for any reason, even when they or their family members became victims of serious crimes, for fear that deportation would lead to the destruction of their families and households. This fear would mean, in blunt terms, less information for police in their pursuit of criminals and predators in these communities, leaving such people on the street, free to victimize others.⁴³

This explains why so many police leaders and police departments strongly opposed rebranding efforts that would press them into the realm of immigration enforcement. They saw this effort as diametrically opposed to their interest in promoting public safety. “It’s very difficult in the immigration communities to get information,” said Hans Marticiuc, President of the Houston Police Officers Unions. “[I]f there’s fear of being reported . . . because of illegal status, then it just makes our job that much more difficult and it makes the city have that much more criminal activity.”⁴⁴ The Major City Chiefs, a national organization of police chiefs from the largest cities in the United States, took the same position. Enforcement of immigration law by local police departments would, in their opinion, “undermine the level of trust and cooperation between local police and immigrant communities,” resulting in “increased crime against immigrants and in the broader community.”⁴⁵ Without the community on their side, they could not get the help and information they needed to do their jobs well. And that was a sacrifice, one they saw as profoundly unwise, they did not want to make.

IV. THE LIKELY EFFECT ON NATIONAL SECURITY OF FORCING LOCAL POLICE INTO IMMIGRATION ENFORCEMENT

We now come to the present. In 2010, the advocates for tougher border enforcement, and particularly for the use of local police in immigration enforcement, finally got their wish. The State of Arizona enacted a law that requires all of its police officers, “if practical,” to inquire into immigration status whenever a police officer has a “reasonable suspicion” that someone they legally

43. *Id.* at 40–42.

44. Peggy O’Hare, *HPD Policy on Aliens is Hands-Off*, HOUS. CHRON., Mar. 3, 2003, at A15.

45. MAJOR CITY CHIEFS, IMMIGRATION COMMITTEE RECOMMENDATIONS FOR ENFORCEMENT OF IMMIGRATION LAWS BY LOCAL POLICE AGENCIES 6 (2006), available at <http://judiciary.house.gov/media/pdfs/wiles081706.pdf>.

encounter or stop may be an illegal immigrant.⁴⁶ No law enforcement agency can opt out.⁴⁷ The law, S.B. 1070, is the first piece of statewide legislation anywhere in the country to require police to investigate immigration status. And, while not a national law, it does accomplish (if only in one state) what anti-immigration advocates have long wanted—local police in Arizona now must serve as part of the immigration enforcement apparatus. At this writing, a federal district court has enjoined this part of the law along with some others; other portions of the statute were upheld.⁴⁸ The U.S. Court of Appeals for the Ninth Circuit upheld the judge’s decision on appeal.⁴⁹ The U.S. Supreme Court agreed to hear the case, and advocates expect to win.⁵⁰

This gives us a chance to ask an important question. Suppose that the provision mandating local police inquiry into immigration status ultimately goes into effect . . . how would this effect national security? Arizona is, of course, a state that borders Mexico, and by all accounts it is among the most frequent crossing points into the United States for undocumented workers.⁵¹ Thus we can

46. S.B. 1070 § 11-1051B (“[W]here reasonable suspicion exists that the person [whom police encounter] is an alien who is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person.”).

47. *Id.* § 11-1051A (“[N]o official or agency of this state or a county, city, town or other political subdivision of this state may adopt a policy that limits or restricts the enforcement of federal immigration laws to less than the full extent permitted by federal law.”).

48. *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (enjoining key parts of the statute, while allowing other aspects to go into effect).

49. *United States v. Arizona*, 641 F.3d 339, 366 (9th Cir. 2011) (upholding district court’s decision).

50. Marc Lacey, *Appeals Court Rules Against Arizona Law*, N.Y. TIMES, April 11, 2011, at A12 (main sponsor of bill in state legislature calling the fight over S.B. 1070 “a battle of epic proportions” that would ultimately be settled in the Supreme Court; state attorney general predicting that the Supreme Court would uphold the law).

51. See Donald L. Bartlett et al., *Illegal Aliens: Who Left the Door Open?*, TIME, Mar. 30, 2006, available at <http://www.time.com/time/magazine/article/0,9171,995145,00.html>; John Lantigua, *Vigilantes Sweep Desert for “Chickens,”* PALM BEACH POST, Dec. 8, 2003, Special section at 6 (“Local church and legal authorities estimate that during the peak winter and spring seasons, more than 2,000 undocumented migrants per day cross the eastern Arizona border”); Daniel Gonzalez, *Bush Policy Turns Mesa Airport into Deportation Hub*, ARIZ. REPUBLIC, Mar. 4, 2007, at A1 (“Arizona is the country’s main crossing point for undocumented immigrants along the southern border . . .”); *Photographer Recounts Crossing U.S. Border With Mexican Illegal Immigrants*, NAT’L GEOGRAPHIC ADVENTURE (Oct. 28, 2010), http://news.nationalgeographic.com/news/2003/01/0123_030123_border.html (calling a 261-mile-long stretch of the Sonoran Desert in Southern Arizona “[t]he busiest gateway for illegal immigrants crossing the U.S.-Mexico border for the past five years”).

engage in a thought experiment. Would the involvement of state and local police in immigration enforcement make us safer from terrorist threats to our national security? It is important to note that the advocates for S.B. 1070 appear not to have considered national security as the reason for enacting the law; in fact, there is no evidence that concerns about national security impacted the debate over the law in the state.⁵² But the question remains legitimate: whether intended or not, how would S.B. 1070 impact national security along the Mexico-Arizona border? Would it, as advocates for local law enforcement involvement in immigration law argued previously, make the country more secure from terrorism?

To find an answer, we should look not to advocates for either stronger immigration enforcement through local police or to their opposites in the debate. Rather, let us look to people who know something about national security and how it may be achieved. And the public record gives us the opportunity to do just that.

First, we would do well to listen to two individuals with long experience in these matters: Harry “Skip” Brandon and Vincent Cannistraro.⁵³ Brandon served in the FBI for twenty-three years. During that time, he was the Bureau’s deputy assistant director for counterterrorism and counterintelligence. He had worldwide responsibility for the Bureau’s anti-terrorism and national security efforts and worked in coordination with all of the intelligence communities of the government.⁵⁴ Cannistraro was the former chief of operations and analysis in the CIA’s Counterterrorism Center. He also served as special assistant for intelligence in the Office of the Secretary of Defense. For a number of years, he worked as a clandestine CIA operative in the Middle East, Africa, and Europe.⁵⁵ These two men possess an unmatched combination of experience and insight into fighting terrorism.

52. The proponents of S.B. 1070 made their motives clear in the bill itself. While S.B. 1070 made use of the criminal law and law enforcement, its purpose was not to fight crime or to enhance national security. It was simpler: to use “attrition” to rid the state of illegal immigrants. As the “Intent” section of the law states, “The legislature declares that the intent of this act is to make attrition through enforcement the public policy of all state and local government agencies in Arizona. The provisions of this act are intended to work together to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.” S.B. 1070, § 1.

53. Harry “Skip” Brandon and Vincent Cannistraro, Remarks at the 26th National Legal Conference on Immigration & Refugee Policy, Session I: National Security and Immigrant Rights, Washington, D.C. (Apr. 2, 2003), in *IN DEFENSE OF THE ALIEN: VOLUME XXVI, PROCEEDINGS OF THE 2003 ANNUAL NATIONAL LEGAL CONFERENCE ON IMMIGRATION AND REFUGEE POLICY* (Joseph Fugolo ed., 2003) [hereinafter Brandon & Cannistraro Remarks].

54. HARRIS, *GOOD COPS*, *supra* note 24, at 219.

55. *Id.*

In the aftermath of the attacks on September 11, 2001, there was an unprecedented focus on what law enforcement and intelligence agencies should do vis-à-vis our communities of Muslim immigrants. What would make us safer and help secure our country against terrorism? Both Brandon and Cannistraro participated in this debate, and on matters of how to handle and work with immigrant communities amidst a terrorist threat, they found common ground. The arguments they have made about working with Muslim communities apply with equal force to working with other groups of immigrants. Brandon says that the only way a terrorist attack such as the one on September 11, 2001, might have been prevented would have been for the nation to have a better developed, more precise intelligence gathering capability, especially in the United States.⁵⁶ Cannistraro emphatically agrees. “I have always said that the problem of [preventing] terrorism is the one of getting intelligence,” he says. “If we do not have good intelligence, we do not have good anti-terror measure[s] because . . . intelligence is supposed to give us early warning.”⁵⁷ Cannistraro explains that only one source exists to get this kind of intelligence when some small number of immigrants may be involved in terrorist activity: the intelligence can only come from immigrant communities themselves. Members of these communities are the ones on the ground who will see potentially suspicious behavior, notice those who do not fit in, and spot people who differ from the norm in specific ways.⁵⁸

If al Qaida operatives attempted to come into the United States via the same routes and methods used by Mexican and Central American immigrants seeking work, virtually the only ones who might see this and notice something amiss would be those same Mexican and Central American immigrants. Thus, the ability to work with immigrant communities, and to get information from them, is vital. If al Qaida operatives hide in our Muslim communities in the United States, law enforcement *must* be able to work with those communities to unearth this information. If al Qaida operatives cross the border among Mexican and Central American migrants, the same principle applies. Law enforcement at every level “needs to be able to collect intelligence on imminent threats in the United States,” Cannistraro says. “To do that, it needs to work with immigrant communities.”⁵⁹ Treating whole communities with suspicion—in the Arizona context, seeing anyone who “looks Mexican” as “reasonably suspicious” and therefore deserving of an immigration inquiry—will destroy any chance to obtain information, because it will cause mistrust and fear. If we are serious about national security at the border, we simply cannot afford to have this happen, “because we need to

56. Brandon & Cannistraro Remarks, *supra* note 53, at 25.

57. *Id.* at 11, 13.

58. *Id.* at 12.

59. *Id.* at 11.

have the trust and cooperation of people in those communities,” Cannistraro says.⁶⁰

The other authorities worth listening to on the subject of fighting terrorist attacks are members of the U.S. military, particularly in the context of the recent struggles in Iraq. In 2006, Iraq seemed to be sliding toward chaos and civil war. Sectarian violence was rife, with suicide bombings occurring in many densely populated neighborhoods.⁶¹ The military fought a constant struggle against terrorists using improvised explosive devices to attack military vehicles and personnel.⁶² At roughly this point, President Bush put General David Petraeus in command.⁶³ Petraeus, himself a Princeton Ph.D., convened a council of “warrior scholars” to help him rewrite the Army’s counterinsurgency protocols in order to fight the terrorists they were facing more effectively.⁶⁴ The resulting strategies changed the course of the war. For example, in a document titled “Multinational

60. *Id.* at 12.

61. See, e.g., Alissa J. Rubin & Damien Cave, *In a Force for Iraqi Calm, Seeds of Conflict*, N.Y. TIMES, Dec. 23, 2007, at A1 (describing the organization of “Awakening” groups as a possible prelude to yet more conflict and even civil war); Robin Wright & Peter Baker, *Iraqi Shiite Leader Speaks Bluntly in Washington*, WASH. POST, Dec. 5, 2006, at A23 (describing “the danger of a civil war” and “escalating sectarian strife” in Iraq); Jeffrey Fleishman & Qaisar Ahmed, *The Conflict in Iraq: Possible Cabinet Shake-Up; Growing Diaspora*, L.A. TIMES, Dec. 14, 2006, at A1 (describing Iraq as “tumb[ing] into civil war” amidst “a numbing diary of suicide bombings, sectarian militia attacks and dusk-to-dawn bloodshed”).

62. See, e.g., Nancy Trejos, *5 U.S. Troops Added to Death Toll in Iraq*, WASH. POST, Dec. 29, 2006, at A20 (in December 2006, when approximately 100 U.S. troops died in Iraq, “most were killed by roadside bombs”); Solomon Moore, *Monthly U.S. Toll at 2-Year High*, L.A. TIMES, Dec. 30, 2006, at A6 (“More than half the fatalities in December occurred during attacks involving improvised explosive devices”); *Iraq Digest*, CHI. TRIBUNE, Dec. 29, 2006, News, at 20 (“Roadside bombs and exploding vehicles accounted for 408 of the 807 fatalities suffered by U.S. forces in Iraq this year—or 51 percent of the year’s fatalities as of Thursday.”).

63. Michael R. Gordon & Thom Shanker, *Bush to Name a New General to Oversee Iraq*, N.Y. TIMES, Jan. 5, 2007, at A1 (reporting that President Bush would name Petraeus commander in Iraq); Mark Tran, *Bush Poised to Name New Iraq Commander*, THE GUARDIAN (London) (Jan. 5, 2007), <http://www.guardian.co.uk/world/2007/jan/05/iraq.usa> (reporting Bush’s imminent announcement naming Petraeus as new commander in Iraq).

64. James Joyner, *Petraeus’ Princeton PhD Posse*, OUTSIDE THE BELTWAY (Feb. 2, 2007), http://www.outsidethebeltway.com/archives/petraeus_princeton_phd_posse/. For a brief account of this series of actions, see JACK L. COWELL & CHARLES “CHIP” HUTH, UNLEASHING THE POWER OF UNCONDITIONAL RESPECT: TRANSFORMING LAW ENFORCEMENT AND POLICE TRAINING 103–05 (2010). I encountered the sources cited here regarding the military’s new counterinsurgency materials in Cowell and Huth’s very insightful book, and I thank them for bringing this information to my attention.

Force Iraq's Counterinsurgency Guidance," dated September 16, 2008, the following appears under the heading "How We Think":

The environment in which we operate is complex and demands that we employ every weapon in our arsenal, kinetic and non-kinetic. To fully utilize all approaches we must understand the local culture and history. Learn about the tribes, formal and informal leaders . . . understand how the society functions.⁶⁵

Studies of successful military efforts in Iraq revealed that this was exactly how the units that had done the best had operated. "Overwhelmingly, the units that seemed to be winning the fight had made significant inroads with local leaders, had found proactive ways to understand and respect local cultural norms, and had addressed specific community needs."⁶⁶ By understanding these needs, successful commanders and their units were able to build relationships and, over time, create trust with those in charge of neighborhoods and villages.⁶⁷ Trust, it turned out, not greater firepower or more soldiers, was what led to the most successful efforts.

These stories inexorably lead one to two observations. First, it is easy to see that counterterrorism intelligence-gathering and military success against insurgents who use terrorism as a primary weapon both look a lot like something local law enforcement agents in the United States understand well: community policing. All of these efforts come down to the use of knowledge and intelligence gained on the ground, requiring the cooperation of the local population. Whether that population lives in an American city or an Iraqi village does not turn out to make a significant difference; what counts in both settings is building relationships based on trust. Second, those relationships lead to support and intelligence, and intelligence is the lifeblood of success, whether the struggle is for domestic public safety, the unearthing of al Qaida sleeper cells, or the winning of the battle against insurgents in Iraq.

It follows that anything that would interfere with this method of operation, any strategy or policy that would hurt the ability of law enforcement or counterintelligence personnel to make these connections, must be seen as, at best, a net loss. And it is difficult to see S.B. 1070, and its requirement that Arizona's police make immigration inquiries, as anything but an effort that would damage whatever trust might exist between police and immigrant communities. With the

65. HEADQUARTERS: MULTI-NATIONAL FORCE – IRAQ, MULTINATIONAL FORCE IRAQ'S COUNTERINSURGENCY GUIDANCE (Sept 16, 2008), available at http://www.marshallarmyrotc.org/documents/COINGuidance_000.pdf.

66. Lt. Col. Jack Marr et al., *Human Terrain Mapping: A Critical First Step to Winning the COIN Fight*, MILITARY REV., Mar.–Apr. 2008, at 18.

67. *Id.*

police required to focus on immigrants, required to question them about their immigration status, and required to get proof of citizenship, it seems inevitable that the immigrant communities of Arizona will become fearful of interaction with the police. The curtailment of communication in such a situation is inevitable.

V. CONCLUSION

To be sure, those who supported the passage of Arizona's S.B. 1070 do not seem to have wanted the measure to become law in order to address issues of national security. But the existence of the law gives us a chance to consider what might happen to our national security as a result of S.B. 1070's central operating principle: local police should enforce immigration law. Given what experts tell us about fighting terrorism—that the collection and use of intelligence is all important to our success, and that terrorist-defeating intelligence can only come from those living in close physical, cultural, and linguistic proximity to potential terrorists—there is every reason to think that getting local police into the fight against illegal immigration represents exactly the wrong strategy. Let us hope that the advocates who “rebranded” immigration enforcement as national security in order to press local police into the effort do not ultimately triumph in the debate. If they do, they will get just the opposite of what they have advertised: less safety and less security for all of us.

