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Feminists at the Border

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ABSTRACT

Ann Scales was a critic of militarism. She challenged her readers to engage in "a radical critique of all of the excuses for and covers for the use of force—that is, a radical critique of militarism—in whatever context it appears." She also cautioned that this critique is perhaps most important in contexts where the influence of militarism is less obvious. This Essay takes up Scales's challenge to call out and critique militarism, and to do so in a context where the influence of militarism may be less obvious, by focusing on immigration law and policy. Part I of this Essay summarizes Scales's critique of militarism. Part II uses Scales's analysis of *Nguyen v. Immigration and Naturalization Service*, which involved a failed sex-based equal protection challenge to a citizenship law, as a starting point for tracing out the broad influence of militarism on immigration law doctrines. Part III explores the obvious ways in which militarized immigration policies legitimate state-sanctioned violence, using the Sixth Circuit's 2013 decision in the case of *Villegas v. Metro Government of Nashville* as an illustrative example. Part IV argues the less obvious point that this violent enforcement is used in the service of an immigration regime that is structured to reinforce gender hierarchies.

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† Professor of Law, University of California, Irvine, School of Law. J.D., Yale Law School; A.B. Stanford University. I would like to thank the participants at the University of Denver Sturm College of Law Symposium to honor Ann Scales. Their ideas and questions were inspirational to me. I would also like to thank Namita Thakkar for her helpful research assistance on this project and the librarians of the U.C. Irvine School of Law, without whom I would get nothing done. Special thanks to Dean Erwin Chemerinsky for his support of my research. This Essay is for my sisters, Cat and Liz.

INTRODUCTION

I think you can tell a lot about a person from the way she is memorialized: the people who gather, the things they talk about, the memories they share. I didn't know Ann Scales in life, but I was given the wonderful opportunity to honor her life at the Symposium held in her honor on March 31, 2013, at the University of Denver Sturm College of Law. I learned a great deal about her that day.

The gathering was diverse. It held students and teachers. It held clinicians and doctrinal faculty and faculty who seek to break down the borders between those groups. It held lawyers and nonlawyers, scholars from across the academy, and many who work outside of the academy. It held men and women of many races, ethnicities, and nationalities. The room was full of people who are gay, lesbian, straight, bisexual, or still questioning their sexual orientation. The room contained feminist scholars and queer scholars who profoundly disagree with one another about many fundamental questions but who all agreed about the importance of Scales's contributions to scholarship and to society. Indeed, keynote speaker Katherine Franke observed that two individuals whose methodological approaches were often in tension or at odds with Scales's own gave the keynote speeches at the Symposium.[1] Even in her passing, Ann Scales gave us an important space in which to "[t]ake a [b]reak from [a]crimony."[2] All of this says something very important about Professor Scales's capaciousness as an intellectual and a human being.

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1. Scales's writing exhibits a unique capacity both to articulate her own strongly-held views and to make space for views that others might read as hopelessly oppositional to hers. My favorite example of this, but certainly not the only one, is her rereading of Angela P. Harris's *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990). Some feminist legal scholars had excoriated Harris's piece. *See, e.g.*, Catharine A. MacKinnon, *Keeping It Real: On Anti-"Essentialism," in* CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 71, 73–74 (Francisco Valdes et al. eds., 2002). Professor Scales's views on poststructuralist attacks on feminist theory certainly aligned with those of Harris's critics. *See* Ann Scales, *Poststructuralism on Trial, in* FEMINIST AND QUEER LEGAL THEORY: INTIMATE ENCOUNTERS, UNCOMFORTABLE CONVERSATIONS 395, 405 (Martha Albertson Fineman et al. eds., 2009). Yet, ultimately, Scales read Harris's work more generously and attentively than many of Scales's allies. Most notably to me, Scales noted that Harris's opening epigraphs set forth both the Constitution's "[w]e, the people" and a quote from Jorge Luis Borges's *Funes the Memorious*, in which the character "could recount experience only by taking more time than it took to live it." *Id.* (alteration in original) (internal quotation marks omitted) (discussing Harris, *supra*, at 581–82); *see* U.S. CONST. pmbl.; JORGE LUIS BORGES, FUNES THE MEMORIOUS (1942). The import was that it was certainly important to avoid the essentialism that effectively disappears some experiences systematically, but that it was also important to avoid "a kind of under-generalization that leads to communicative failure." Scales, *supra*, at 405. Scales understood Harris to be "talking about the need for conversation always to proceed in the territory between saying everything and saying nothing." *Id.* Notwithstanding the admittedly "confrontational" title of her chapter, *id.* at 395, Scales reminded the reader that conversations and progress were possible even among those with distinct theoretical commitments.

2. Katherine Franke, Isidor & Seville Sulzbacher Professor of Law & Dir., Ctr. for Gend. & Sexuality Law, Columbia Law Sch., Keynote Address at the University of Denver Sturm College of

There was a lot of laughter in the room, and there were tears, too. Those who were dearest to Professor Scales were able to say to those who only really knew her through her writing that they recognized "Ann" in our comments. This means that Scales not only wrote what she really thought but also put herself into her writing. Her scholarship not only reflected her thoughts and beliefs but also reflected some essence of her.

I did not know Ann Scales, but at her memorial Symposium, I learned that I would have liked to have known her. With this Essay, I attempt to explore, apply, and perhaps expand one aspect of her feminist jurisprudence: her critique of militarism. Part I of this Essay summarizes Scales's critique of militarism. Part II uses Scales's analysis of *Nguyen v. Immigration and Naturalization Service*,[3] which involved a failed sex-based equal protection challenge to a citizenship law, as a starting point for tracing out the broad influence of militarism on immigration law doctrines. Part III explores the ways in which militarized immigration policies legitimate state-sanctioned violence, using the Sixth Circuit's April 2013 decision in the case of *Villegas v. Metro Government of Nashville*[4] as an illustrative example. Part IV argues the frequently overlooked point that this violent enforcement is used in the service of an immigration regime that is structured to reinforce gender hierarchies.

I. ANN SCALES'S CRITIQUE OF MILITARISM

Ann Scales was a critic of militarism. She theorized that "law and militarism are intimately related, . . . militarism and male dominance are intimately related, and . . . feminism is inconsistent with all of them."[5] Scales defined militarism in slightly different ways over time. In a 1989 article, she defined it as "the pervasive cluster of forces that keeps history insane: hierarchy, conformity, waste, false glory, force as the resolution of all issues, death as the meaning of life, and a claim to the necessity of all of that."[6] Later, she defined militarism as

> the manifestation at every level of policy—military and otherwise—of the logic of war. . . . Every policy, including every domestic policy, must be measured by its effect on military capability and readi-

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Law Symposium Honoring the Work of Ann Scales: Taking a Break from Acrimony: The Feminist Method of Ann Scales (Mar. 30, 2013).

3. 533 U.S. 53 (2001).

4. 709 F.3d 563 (6th Cir. 2013).

5. Ann C. Scales, *Midnight Train to Us*, 75 CORNELL L. REV. 710, 710 (1990) [hereinafter Scales, *Midnight Train*] (describing her article *Militarism, Male Dominance and Law: Feminist Jurisprudence as Oxymoron?*, 12 HARV. WOMEN'S L.J. 25 (1989) [hereinafter Scales, *Militarism*]).

6. Scales, *Militarism*, *supra* note 5, at 26. Other feminist scholars have offered similar definitions to similar concepts. Cynthia Enloe, for example, writes that "[t]o become militarized is to adopt militaristic values (e.g., a belief in hierarchy, obedience, and the use of force) and priorities as one's own, to see military solutions as particularly effective, to see the world as a dangerous place best approached with militaristic attitudes." CYNTHIA ENLOE, GLOBALIZATION AND MILITARISM: FEMINISTS MAKE THE LINK 4 (2007).

> ness, lest some rival gain any small advantage. Cost is no object. Disproportionality is part of the expectedly exorbitant price.[7]

In Scales's view, the forces of militarism and gender "account . . . for the oppression of women in whatever patriarchal institution—religion, state, family, academy—and by whatever method—rape, battering, economic exploitation, rendering invisible."[8] She believed that "[w]e can't overcome gender oppression without demilitarizing ourselves and our world."[9]

Scales noted that the gendered nature of militarism poses a problem for the law because law is "a system of social order backed by the force of the state."[10] The state's ability to fine, arrest, detain, shame, exclude, deport, and even kill lawbreakers is what often gives the law its power. Militarism thus undergirds law; unsurprisingly, judges often in turn use the tools of law to avoid confronting militarism. Specifically, Scales claimed that courts frequently use legal doctrines such as the political question doctrine to dodge their obligations to resolve challenges to militarism.[11] But for Scales, the fact that legal doctrine can be wielded in ways that avoid confronting militarism does not completely undermine the possibility that law can be a tool by which militarism can be confronted.[12]

Scales also recognized that law is not exclusively legitimated by force or the threat of force. Law also functions because it is, at least theoretically, a system of mutual obligation—one that is the product of "mutual promises to abide by agreements."[13] Scales observed, however, that not all of those individuals subject to the law have the same agency with respect to the law, which gives the lie to the purported mutuality of the obligation.[14]

Scales's work illuminates the fact that whether law is a system of rule backed by militaristic force or a set of mutual obligations premised on imperfect mutuality, or some combination of these two things, the law draws its sources of legitimacy from social ordering principles that structurally and historically have excluded women. For Scales, the challenge for feminist jurisprudence is to "change the way law views women and to make possible the autonomy presumed by traditional theory."[15] In her

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7. Ann Scales, *Soft on Defense: The Failure to Confront Militarism*, 20 BERKELEY J. GENDER L. & JUST. 369, 371 (2005).

8. Scales, *Militarism*, *supra* note 5, at 26.

9. *Id.*

10. *Id.* at 30.

11. *See id.* at 65–68.

12. *Id.* at 72.

13. *Id.* at 32 (relying on theories of H.L.A. Hart and Hannah Arendt, Civil Disobedience, in Crises of the Republic 49, 79 (1972)).

14. *Id.* at 34.

15. *Id.* at 36.

view, we must move away from a system of law that is legitimated primarily through militaristic force or that is imposed (forcibly) on those as to whom there is no mutual obligation.[16] Law itself can be a tool toward that end, but Scales also argued in favor of challenging unjust laws through civil disobedience—or "nonviolent direct action."[17] Such challenges allow individuals who are structurally disempowered to participate in legal decision-making, while also "invit[ing] the courts to be directly participatory" in the legal decision-making structure, including "the military decision-making structure."[18]

While attentive to the transformative possibilities of law, Scales realistically acknowledged that the law most often serves the goals of militarism and the exclusionary projects of the liberal state. This is true not only insofar as legal doctrine is manipulated to keep courts from confronting militaristic structures,[19] but also to the extent that the invulnerability of militarism "shapes the debate" over constitutional questions on issues as diverse as abortion, citizenship, self-defense, and doctrines of sovereign immunity in tort law.[20] Recognizing the ubiquity of militarism in legal doctrines and legal logic, and convinced that militarism is "busy reinforcing gender, in its worst non-fluid forms," Scales challenged her readers to engage in "a radical critique of all of the excuses for and covers for the use of force—that is, a radical critique of militarism—in whatever context it appears."[21] She also cautioned that this critique is perhaps most important in contexts where the influence of militarism is less obvious.[22]

This Essay takes up Scales's challenge to call out and critique militarism, and to do so in contexts where the influence of militarism may be less obvious. I focus on immigration law and policy. Scales posited a link between militarism and the construction of oppressive gender norms, but it is often difficult to visualize this link in the abstract. Focusing on one concrete example helps to illustrate both the legitimacy of Scales's assertion, as well as its limits.

II. MILITARISM AND IMMIGRATION POLICY

In *Soft on Defense*, Scales used the case of *Nguyen v. Immigration & Naturalization Service* as a vehicle for exploring "how militarism shapes constitutional jurisprudence in unspoken ways."[23] The case involved an equal protection challenge to U.S. citizenship laws, which

16. *See id.* at 29–30, 33–34.
17. *Id.* at 56 (internal quotation marks omitted).
18. *Id.* at 59.
19. *Id.* at 65–70; *see also* Scales, *supra* note 7, at 374–75.
20. Scales, *supra* note 7, at 377–85.
21. *Id.* at 390, 392.
22. *Id.* at 392.
23. Scales, *supra* note 7, at 377 (discussing Nguyen v. INS, 533 U.S. 53 (2001)).

allowed the children of unmarried U.S. citizen mothers to become U.S. citizens automatically but required unmarried U.S. citizen fathers to satisfy certain additional statutory requirements before their children could become citizens.[24] The Supreme Court rejected the challenge, upholding the differential standards on intermediate scrutiny by a 5–4 vote.[25] The majority concluded that Congress could take account of biological difference to achieve its desire to ensure a genuine biological connection between the citizen parent and the child.[26] The majority reasoned that, unlike a mother, who will always be present at a child's birth, an unwed father may not even know about the child.[27] Justice Kennedy wrote for the majority:

> Given the [nine]-month interval between conception and birth, it is not always certain that a father will know that a child was conceived, nor is it always clear that even the mother will be sure of the father's identity. This fact takes on particular significance in the case of a child born overseas and out of wedlock. One concern in this context has always been with young people, men for the most part, who are on duty with the Armed Forces in foreign countries.[28]

The Court was noticeably concerned that the children of male U.S. citizen soldiers might claim U.S. citizenship. Scales noted that "[t]o grant automatic citizenship to their children, thereby subjecting each and every soldier-father to the possibility of paternity suits, child support payments, and the like, might deprive combat of some of its appeal."[29] In the *Nguyen* decision, Scales saw the Court's investment in the ideas that soldiers need to be able to have sex with women abroad without concern that the consequences may follow them home, and that the nation needs to be

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24. *Nguyen*, 533 U.S. at 57–60.
25. *Id.* at 56.
26. *Id.* at 63.
27. *Id.* at 65.
28. *Id.* at 56, 65.
29. Scales, *supra* note 7, at 379. It is not just wartime service, but also "peacekeeping" that raises this possibility. This is evident in Dina Francesca Haynes's description of Arizona Market, a marketplace that developed in the Brčko District after it was flooded with American troops and made into an American protectorate in the wake of the Dayton Peace Accords. Dina Francesca Haynes, *Lessons from Bosnia's Arizona Market: Harm to Women in a Neoliberalized Postconflict Reconstruction Process*, 158 U. PA. L. REV. 1779, 1792–93 (2010). In time, it became a hotspot of human trafficking, where naked women were sold for sex. *Id.* at 1794–95. Haynes writes:

> By 1999, it was well-known that peacekeepers and other internationals were spending time in Arizona Market—purchasing sex, buying women, and sometimes even selling them. Nevertheless, when High Representative Wolfgang Petrisch belatedly tried to shut down Arizona Market, calling it a "lawless wasteland," an American colonel argued to keep it open, pointing out by way of comparison that Times Square in New York City was far from perfect with its own host of pimps and prostitutes. Such statements suggest that a "boys will be boys" mentality was accepted by some as a justification for the improper behavior of military and international personnel participating in postconflict reconstruction work. The reasoning was that military personnel who were involved in risky and demanding work so far from home ought at least to be allowed the comfort of sex.

Id. at 1796–97 (footnotes omitted).

sure that the spoils of war do not come home in human form to claim the benefits of U.S. citizenship.

Concerns about the military clearly affected the Court's reasoning in *Nguyen*, even though *Nguyen* was not a case about a soldier's child—or even a case about a child abandoned abroad. Scales viewed this as an example of militarism warping constitutional doctrine.

There are, unfortunately, many other examples of constitutional reasoning in citizenship and immigration cases where the military is not necessarily invoked, but where militarism is in evidence. The law around immigration and citizenship is permeated with "the logic of war." Indeed, the constitutional cases undergirding immigration law, which cede largely unreviewable power to Congress to decide the terms of admission and removal of noncitizens, rely quite explicitly on a rationale of national security to justify the abdication of review.[30]

Since national security provides the legal justification for immigration restrictions, militarized interventions in defense of those restrictions are also easily justified as a matter of law and policy. It is therefore unsurprising that our borders have become increasingly militarized. This is true in the case of the physical land border as well as in the interior of the country, where a great deal of extended border enforcement takes place.[31]

One could conceive of many possible models for immigration control, ranging from a fairly *laissez-faire*, open-borders policy in which the

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30. *See* Demore v. Kim, 538 U.S. 510, 522 (2003) ("'[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government.'. . . [T]his Court has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens." (quoting Mathews v. Diaz, 426 U.S. 67, 81 n.17 (1976))); Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893) ("The right of a nation to expel or deport foreigners who have not been naturalized, or taken any steps toward becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country."); Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889) ("The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the [C]onstitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one. . . . Nor can their exercise be hampered, when needed for the public good, by any considerations of private interest.").

31. *See, e.g.*, DORIS MEISSNER ET AL., MIGRATION POLICY INST., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 11–13 (2013), *available at* http://www.migrationpolicy.org/pubs/enforcementpillars.pdf (detailing both border and interior enforcement measures and concluding that immigration enforcement "now represents the federal government's most extensive and costly law enforcement endeavor"); Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 633–34 (2012) (discussing the militarization of the U.S.–Mexico border); Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1572–73 (2010) [hereinafter *Diversion*] (describing the rise of interior enforcement); Nina Bernstein, *Border Sweeps in North Reach Miles into U.S.*, N.Y. TIMES, Aug. 30, 2010, at A1 (noting that border sweeps actually extend deep into the interior of the country); Kirk Semple, *Report Faults Border Patrol on Tactic Miles from Border*, N.Y. TIMES, Nov. 9, 2011, at A27 (describing a recent report that shows the extensive use of border transportation checks).

state plays little role[32] to a fully militarized, closed-border model like that existing in the inaptly named Korean "Demilitarized Zone."[33] The U.S. model of enforcement is inching ever closer to the latter.[34]

This is not a mere product of right-wing politics. At the grand bargaining tables over comprehensive immigration reform that are currently assembled, almost all parties at the table insist on the objective of border security as a precursor to any further meaningful immigration reform bill. The immigration reform bill that passed in the Senate in June 2013 includes border security goals that must be met before the provisions legalizing the immigration status of qualifying noncitizens will take effect.[35] The border security plan includes a multi-billion dollar expenditure on drones and border fence construction, border patrol agents, stations and bases, additional border crossing technologies, and increased prosecutions of illegal entry and felony reentry crimes.[36]

President Obama has resisted the idea that the border is too insecure to allow for immigration reform.[37] Obama Administration officials urge that the border has never been more secure.[38] But the decision to embrace

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32. *See, e.g.*, KEVIN R. JOHNSON, OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS 18–19 (2007) (advocating for such an open borders model).

33. *See* Joe Havely, *Korea's DMZ: 'Scariest Place on Earth,'* CNN INT'L (Aug. 28, 2003, 03:21 GMT), http://edition.cnn.com/2003/WORLD/asiapcf/east/04/22/koreas.dmz/ ("The Demilitarized Zone (DMZ) that divides the two Koreas is the most heavily fortified border in the world, bristling with watchtowers, razor wire, landmines, tank-traps and heavy weaponry.").

34. For arguments that our border security measures are trending in that direction, see, for example, Mark Koba, *Immigration Bill 'Could Create DMZ' Like Korea*, CNBC (May 24, 2013, 07:19 EST), http://www.cnbc.com/id/100761353 (quoting law professor Mark Noferi's statement that the immigration bill creates "a DMZ like North and South Korea, except [it's] between the U.S. and Mexico—our third largest trading partner" (alteration in original) (internal quotation mark omitted)).

35. Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 3 (2013).

36. The exact price tag is still being negotiated. The initial bill carried a price tag of approximately $6.5 billion in border security measures such as these, and that number increased in subsequent hearings. *See, e.g.*, César Cuauhtémoc García Hernández, *Crimmigration Provisions of Immigration Bill*, CRIMMIGRATION (Apr. 18, 2013, 4:00 AM), http://crimmigration.com/2013/04/18/crimmigration-provisions-of-immigration-bill.aspx (discussing, among other things, the price tag of various border policing proposals). Those numbers were not high enough to garner bipartisan support. In June, the Senate passed a bill that provides for $46 billion in border security expenditures. *See generally* Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013) (as passed by Senate). *See also* Ashley Parker & Jonathan Martin, *Senate, 68 to 32, Passes Overhaul for Immigration*, N.Y. TIMES, June 28, 2013, at A1 (discussing the passage of the bill and describing its contents). The House of Representatives has not yet enacted companion legislation.

37. Press Release, President Barack Obama, Remarks by the President on Comprehensive Immigration Reform in El Paso, Texas (May 10, 2011), http://www.whitehouse.gov/the-press-office/2011/05/10/remarks-president-comprehensive-immigration-reform-el-paso-texas ("We have gone above and beyond what was requested by the very Republicans who said they supported broader reform as long as we got serious about enforcement. All the stuff they asked for, we've done."). Recent independent policy analysis of border security has also reached the conclusion that the borders are quite secure and border enforcement mechanisms are sophisticated and extensive. *See* MEISSNER ET AL., *supra* note 31, at 46–47, 143.

38. *See, e.g.*, Jim Avila & Serena Marshall, *Napolitano on Immigration: Border Is Secure So 'Fix the Entire System,'* ABC NEWS (Mar. 1, 2013),

the militaristic and nationalistic metrics of security long espoused by restrictionists shows that, in some senses, the terms of the debate have shifted. Immigration policy is now measured in the metrics of militarism.

Of course, when one looks to life in Mexican cities like Ciudad Juárez or Tijuana, or contemplates the fate of many migrant border crossers, it is clear that our purported border security actually countenances a great deal of human insecurity in the form of lost lives on both sides of the border.[39] Our conception of border security is narrow. Within the narrowed parameters of the border security discussion, it is not entirely clear how much border security is enough. Border apprehensions have fallen drastically[40] and net migration from Mexico is currently zero,[41] but when four U.S. Senators recently visited Nogales, Arizona, on the Mexican border, they were convinced that the border is still not secure enough.[42]

The term *border security* as it is currently used in the national discourse is a post-9/11 phenomenon. In fact, the term that we have come to view as synonymous with immigration issues has only been a part of this discourse for the last seven years or so. A search of the *New York Times*' online database reveals that the term was never used by that newspaper

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http://abcnews.go.com/Politics/OTUS/napolitano-immigration-border-secure-fix-entire-system/story?id=18630676 ("The amount of manpower, technology, everything else that we have put on that border is simply amazing . . . . This is not the same border that was." (quoting Department of Homeland Security Secretary Janet Napolitano) (internal quotation marks omitted)); Press Release, Press Secretary Jay Carney, Press Briefing (Jan. 28, 2013), http://www.whitehouse.gov/the-press-office/2013/01/28/press-briefing-press-secretary-jay-carney-1282013 ("[O]ur borders now are more secure than they have ever been in history.").

39. *See, e.g.*, Andrew Rice, *Life on Line*, N.Y. TIMES, July 31, 2011, at MM20 (contrasting the rising violence in Juárez against the high levels of security on the U.S. side and noting that "[m]any analysts believe that the absence of violence here is due to a rational choice by the cartels, which calculate that creating chaos in the United States would disrupt this fairly free flow of goods. 'The nature and the cause of violence in Mexico is driven in part by the border itself,' says David Shirk, director of the Trans-Border Institute at the University of San Diego."). For examples of discussions concerning the increase in migrant deaths as a result of increased border militarization, see STEVEN W. BENDER, GREASERS AND GRINGOS: LATINOS, LAW, AND THE AMERICAN IMAGINATION 121–28, 135 (2003) (presenting analysis of Latino stereotypes and culture including the perilous conditions of immigrant border crossings); LUIS ALBERTO URREA, THE DEVIL'S HIGHWAY: A TRUE STORY 24 (2004) (documenting the true story of a border crossing in southern Arizona in 2001); Fernanda Santos & Rebekah Zemansky, *Death Rate Climbs as Migrants Take Bigger Risks to Cross Tighter Borders*, N.Y. TIMES, May 21, 2013, at A14 ("The number of migrant apprehensions declined precipitously in recent years, one of the strongest indicators that fewer people have tried to cross the border illegally. But the number of migrant deaths has remained high. 'Less people are coming across,' said Bruce Anderson, the chief forensic anthropologist at the medical examiner's office, 'but a greater fraction of them are dying.'").

40. U.S. BORDER PATROL, NATIONWIDE ILLEGAL ALIEN APPREHENSIONS FISCAL YEARS 1925–2012, *available at* http://www.cbp.gov/linkhandler/cgov/border_security/border_patrol/usbp_statistics/usbp_fy11_stats/25_10_app_stats.ctt/25_11_app_stats.pdf.

41. JEFFREY PASSEL ET AL., PEW HISPANIC CTR., NET MIGRATION FROM MEXICO FALLS TO ZERO—AND PERHAPS LESS 6 (Apr. 23, 2012), *available at* http://www.pewhispanic.org/files/2012/04/Mexican-migrants-report_final.pdf.

42. Fernanda Santos, *Immigration in Spotlight as Senators Tour Arizona*, N.Y. TIMES, Mar. 28, 2013, at A14 ("Senator John McCain, Republican of Arizona, whose office organized the tour, said that while there has been progress, the border 'is still not as secure as we want it to be or expect it to be.'").

in general discussions of U.S. immigration during the period from 1996 to 2001—and this included the period in the mid-1990s when Congress was enacting bills that were explicitly intended to address issues relating to both immigration and national security.[43] The term "border security" was nowhere to be found in the debates or media coverage. When used at all, the term was used in reference to foreign countries in war zones or with border regions characterized by serious armed conflict.[44]

In the month of March 2006, however, the term burst into the popular discourse. Seventeen *New York Times* stories referenced border security in March 2006.[45] A similar pattern unfolds in other major media outlets. "In the *Los Angeles Times*, the term 'border security[']' appears in twenty articles or editorials in March 2006. But between January 1996 and August 2001, the *Los Angeles Times* search engine turns up no story that contains both the terms 'immigration[']' and 'border security.[']'"[46]

Of course, the United States can date its preoccupation with securing the southern border back much further than 2006. The process of converting the U.S.–Mexico border into a meaningful barrier to entry began in earnest in the mid-1920s, and proceeded in starts and stops from that time.[47] Periodic waves of interior enforcement accompanied this project, as evidenced by the so-called repatriations of Mexicans in the 1930s[48] and Operation Wetback in the 1950s.[49]

In the mid-1990s, sealing the border became a national craze. During the Clinton Administration, U.S. citizens witnessed a spike in the use of military-style operations in which our national government attempted to "secure" fragments of the southern border through the aggressive use of armed force.[50] And in 2003, when the Department of Homeland Security (DHS) was formed and immigration agencies were placed under its auspices, the transformation of immigration policy from a labor issue

43. For a brief summary of the relevant provisions of the Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. No. 104-208, § 303(a), 110 Stat. 3009-546, 3009-646 (codified as amended at 8 U.S.C. § 1103(a) (2012)), and the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, title IV, § 439, 110 Stat. 1276 (1996) (codified at 8 U.S.C. § 1252c (2012)), both of which contained immigration security provisions, see, for example, Jennifer M. Chacón, Commentary, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 Conn. L. Rev. 1827, 1842–46, 1851–53 (2007).

44. *See* Chacón, *supra* note 43, at 1853 n.146.

45. *Id.*

46. *Id.*

47. *See* KELLY LYTLE HERNÁNDEZ, MIGRA!: A HISTORY OF THE U.S. BORDER PATROL 12–14 (2010) (explaining the growth of the U.S. Border Patrol and fortification of the U.S.–Mexico border throughout the 1900s); *see also* Victor C. Romero, *Decriminalizing Border Crossings*, 38 FORDHAM URB. L.J. 273, 292–96 (2010) (discussing the historical and contemporary militarization of the southern border).

48. FRANCISCO E. BALDERRAMA & RAYMOND RODRÍGUEZ, DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S (1995).

49. JUAN RAMON GARCÍA, OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954, at xiii–xiv (1980).

50. *See, e.g.*, Bill Ong Hing, *The Dark Side of Operation Gatekeeper*, 7 U.C. DAVIS J. INT'L L. & POL'Y 121, 127–30 (2001) (describing and criticizing these border militarization operations).

(managed by the Department of Labor) to a crime issue (managed by the Department of Justice) to a national security matter (managed by DHS) seemed complete.

But it was not until 2006 that we, as a national community, latched on to the term "border security." Why did we suddenly become so interested, as a nation, in border security in 2006?

In 2006, comprehensive immigration reform proposals were wending their way through Congress. There was a bipartisan spirit to the whole project.[51] Citizens and denizens were advocating for change. Spanish-language media were calling for reform, and activist DJ Piolín began calling for marches.[52] By May 1, the supporters of reform were sufficiently organized to stage nationwide marches in support of immigration reform.[53] Wearing white, marching peacefully, and waving American flags, these people—citizens and denizens, students and elder-care providers, gardeners and journalists, domestic workers and construction workers, farm workers and academics, restaurant workers and lawyers—took to the streets nationwide to demonstrate in favor of the right of long-term residents to some sort of stable and legal status in exchange for their long-term contributions to U.S. culture and the economy.[54]

Restrictionists offered two main responses to these calls for reform. One was a law-and-order narrative: Respect for the rule of law demands that we punish, not reward, the lawbreakers. The second was the militaristic response: The very presence of these masses of unauthorized migrants is a testament to our insecure borders. We can't even talk about legalizing migrants until the border is secured.

Both of these responses are appeals to militarism. The second one quite obviously appealed to classic fears of invasions and infiltration. Less obviously, the rule-of-law claims are also rooted in militarism. The legal violations that are actually at stake here—civil infractions such as

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51. One of these bills ultimately passed in the Senate in May 2006. Rachel L. Swarns, *Senate, in Bipartisan Act, Passes Immigration Bill; Tough Fight Is Ahead*, N.Y. TIMES, May 26, 2006, at A19. The process repeated itself again the following year. Robert Pear & Jim Rutenberg, *Senators in Bipartisan Deal on Broad Immigration Bill*, N.Y. TIMES, May 18, 2007, at A1. Both times, the deal ultimately foundered and no legislation came to pass.

52. Editorial, *Piolín's Progress; He Rallied Latino Listeners to March for Immigration Reform; Now He's Behind a Push for Citizenship*, L.A. TIMES, July 16, 2007, at A14 (noting that he "rallied thousands of May Day marchers in 2006 and . . . worked all [of 2007] for immigration reform").

53. Rachel L. Swarns, *Immigrants Rally in Scores of Cities for Legal Status*, N.Y. TIMES, Apr. 11, 2006, at A1.

54. For discussion of the marches and the use of the legacy of the civil rights movement see, for example, Kevin R. Johnson & Bill Ong Hing, *The Immigrant Rights Marches of 2006 and the Prospects for a New Civil Rights Movement*, 42 HARV. C.R.-C.L. L. REV. 99, 99–102 (2007) (arguing that the marches offered only an incomplete and nascent attempt at a new, multi-racial civil rights movement and noting obstacles to future collaborations); Cristina M. Rodríguez, *Immigration and the Civil Rights Agenda*, 6 STAN. J. C.R. & C.L. 125, 125, 145–46 (2010) (arguing that a civil rights paradigm offers an incomplete framework for immigration reform).

visa overstays, misdemeanors such as entry without inspection, felony reentry offenses, and visa fraud offenses—are not *malum in se* offenses. They are only crimes because our legislators have made them so, invoking the prerogative of sovereignty as a justification. The individuals who have broken these particular civil and criminal laws have run afoul of laws designed to protect state sovereignty. Here, the law is operating not to defend citizens from particular wrongs, but to protect the body politic from violations of the nation's borders and to repel individuals who are characterized, oddly, as simultaneously so dependent as to be undesirable and so superhumanly criminal as to require violent containment. Taken together, these responses were sufficient to drown out the call for reform, and comprehensive immigration reform initiatives were scuttled in 2007, leaving millions of immigrant families and workers in limbo.

How did the fever-pitched determination to secure the border in that time period manage to trump all other purported value goals in immigration, including family reunification, labor and workforce needs, and humanitarianism? Scales cautioned about that: "If militarism is working its magic, [the disproportionality of the response it engenders] is largely invisible; it is treasonous to notice it, much less question it."[55] She is right. It is bad form to call attention to our border excess. Nevertheless, it is important to scrutinize these practices.

III. MILITARISM IN ENFORCEMENT

The consequences of our militarized immigration regime are harsh. Our sovereign prerogative to be free of the sometimes-wanted, sometimes-unwanted migrant becomes a logic that justifies a host of violent state practices, including protracted and indefinite civil immigration detention, sometimes under highly punitive conditions;[56] the fragmentation of mixed-status families;[57] and the pervasive fear of over-reaching law

55. Scales, *supra* note 7, at 371–72.

56. DORIS MEISSNER ET AL., MIGRATION POLICY INST., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 10 n.32 (2013), *available at* http://www.migrationpolicy.org/pubs/pillars-reportinbrief.pdf (noting that the current system of "immcarceration" now takes in over 400,000 noncitizens each year); Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 43–45, 50–51 (2010) (describing and proposing reforms from the growing system of "immcarceration"); Note, *Improving the Carceral Conditions of Federal Immigrant Detainees*, 125 HARV. L. REV. 1476, 1476 (2012) (describing some of the violent and demeaning conditions in immigration detention); Ian Urbina & Catherine Rentz, *Immigrants Held in Solitary Cells, Often for Weeks*, N.Y. TIMES, Mar. 24, 2013, at A1; DORA SCHRIRO, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 2–3 (Oct. 6, 2009), *available at* http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf (documenting widespread, systemic problems in immigration detention and recommending solutions and improvements).

57. Jacqueline Bhabha notes that citizen children whose parents are being deported cannot assert the rights of their parents to stay in the United States. The standard results in "exceptional and extremely unusual hardship," and she notes that "[r]ather than acknowledging and mitigating the trauma of family separation, particularly for young children, the rule requires decision makers to revoke deportation only when the applicant demonstrates that the hardship incurred is 'substantially different from, or beyond, that which would normally be expected from the deportation of an alien

enforcement in communities like Maricopa County, Arizona, with large immigrant and Latino populations.[58] And these are just the domestic costs.

There are also a host of externalities that we ought to take more time to internalize: the violence in Mexico that occurs as a result of our drug demands, our guns, and our militarized border policies—with the deaths of hundreds of women in Juárez[59] being only one poignant example of how this violence touches the lives of vulnerable populations.

The Sixth Circuit's March 2013 decision in *Villegas v. Metro Government of Nashville* provides a microcosmic window on the pain and suffering inflicted by our border militarization schemes.[60] According to Judge Clay, who wrote for the panel majority:

> Plaintiff Juana Villegas's saga began on July 3, 2008[,] when her car was stopped by Berry Hill, Tennessee police officer Tim Cole-

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with close family members here.'" Jacqueline Bhabha, *The "Mere Fortuity of Birth"? Children, Mothers, Borders, and the Meaning of Citizenship*, *in* MIGRATIONS AND MOBILITIES: CITIZENSHIP, BORDERS, AND GENDER 187, 209 (Seyla Benhabib & Judith Resnik eds., 2009) (quoting *In re* Monreal-Aguinaga, 23 I.&N. Dec. 56, 65 (B.I.A. 2001)); *see also* David B. Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*, 11 TEX. HISP. J.L. & POL'Y 45, 52–53 (2005) (recording the difficulties—including separations—encountered by mixed-status families in U.S. family courts); *Frontline: Lost in Detention* (PBS television broadcast Oct. 18, 2011), *available at* http://www.pbs.org/wgbh/pages/frontline/lost-in-detention/ (recording Cecilia Muñoz, an Obama White House official and long-time immigrants rights activist, justifying the Administration's policy of enforcing laws that separate families).

58. In December 2011, Assistant Attorney General Thomas E. Perez of the Civil Rights Division of the Department of Justice wrote a letter to Bill Montgomery, the County Attorney for Maricopa County, summarizing the results of a prolonged investigation of the Maricopa County Sheriff's Office (MCSO). The Department found "that MCSO, through the actions of its deputies, supervisory staff, and command staff, engages in racial profiling of Latinos; unlawfully stops, detains, and arrests Latinos; and unlawfully retaliates against individuals who complain about or criticize MCSO's policies or practices . . . ." Letter from Thomas E. Perez, Assistant Attorney Gen., U.S. Dep't of Justice, Civil Rights Div., to Bill Montgomery, Cnty. Attorney, Maricopa Cnty., Ariz. (Dec. 15, 2011), *available at* http://www.justice.gov/crt/about/spl/documents/mcso_findletter_12-15-11.pdf. That same month, the Civil Rights Division issued findings of similar misconduct by the East Haven, Connecticut police. Assistant Attorney General Thomas E. Perez stated that the Department had found that

> [East Haven Police Department] engages in discriminatory policing against Latinos, including but not limited to targeting Latinos for discriminatory traffic enforcement, treating Latino drivers more harshly than non-Latino drivers after a traffic stop, and intentionally and woefully failing to design and implement internal systems of control that would identify, track, and prevent such misconduct. The pattern or practice of discriminatory policing that we observed is deeply rooted in the Department's culture and substantially interferes with the ability of EHPD to deliver services to the entire East Haven community.

Letter from Thomas E. Perez, Assistant Attorney Gen., U.S. Dep't of Justice, Civil Rights Div., to Joseph Maturo, Jr., Mayor, Town of E. Haven, Conn. (Dec. 19, 2011), *available at* http://www.justice.gov/usao/ct/Press2011/East%20Haven%20Findings%20Letter%2012-19-11.pdf. And on May 24, 2013, Judge Snow of the federal district court in Arizona ruled that the Maricopa County Sheriff's Office had unlawfully instituted a pattern and practice of targeting Latino drivers and passengers in Maricopa County during traffic stops under the guise of immigration enforcement. Ortega Melendres v. Arpaio, No. PHX-CV-07-02513-GMS, 2013 WL 2297173, at *1–3 (D. Ariz. May 24, 2013).

59. Rice, *supra* note 39.

60. 709 F.3d 563 (6th Cir. 2013).

> man. At the time of the stop, Plaintiff was nine months pregnant. When Plaintiff failed to produce a valid driver's license, Coleman arrested Plaintiff and transported her to the jail operated by the Davidson County Sheriff's Office ("the jail"). Once there, a jail employee, working as an agent of the United States through Immigration and Customs Enforcement's 287(g) program, *see* 8 U.S.C. § 1357(g), inquired into Plaintiff's immigration status and determined that Plaintiff was not lawfully in the United States. Due to her illegal status, a detainer was placed on Plaintiff, which meant that federal immigration officials would delay taking any action until after resolution of Plaintiff's then-pending state charges. After being unable to post bond, Plaintiff was, as a result of the immigration detainer, classified as a medium-security inmate.
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> Plaintiff was held in the jail from Thursday, July 3, 2008[,] until late on Saturday, July 5, 2008. At 10:00 p.m. on July 5, 2008, Plaintiff informed a jail guard that her amniotic fluid (or "water") had "broke" and that she was about to have her baby. Plaintiff was transported to the jail infirmary where a nurse confirmed that Plaintiff's water had broken and summoned an ambulance to take Plaintiff to Nashville General Hospital (the "Hospital"). For transportation in the ambulance, Plaintiff was placed on a stretcher with her wrists handcuffed together in front of her body and her legs restrained together. . . .
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> . . . .
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> . . . . According to hospital records, when the shackles were removed, Plaintiff had only dilated to 3 centimeters ("cm"). . . . Plaintiff gave birth without any complications at approximately 1:00 a.m. on July 6, 2008—roughly two hours after Peralta removed her shackles. Plaintiff remained unshackled until shortly before Peralta's shift ended at 7:00 a.m., when he re-restrained Plaintiff to the bed at one of her ankles. Plaintiff was never handcuffed postpartum.
>
> At the time of Plaintiff's discharge from the Hospital, Defendant did not allow Plaintiff to take the breast pump that the Hospital staff had provided her. Defendant justified this based on safety concerns, and that under its policy, it did not consider a breast pump to be a "critical medical device," which would have allowed Plaintiff to take it back to the jail.[61]

The district court was concerned by these facts and granted Plaintiff's partial summary judgment motion, allowing a jury to deliberate on damages, which the jury awarded.[62] The Sixth Circuit, however, reversed the trial court's grant of summary judgment. Although it concurred that shackling during labor and delivery is generally considered a rights violation, the Sixth Circuit noted that there are exceptions where the shack-

61. *Id.* at 566–67 (footnote omitted).
62. *Id.* at 567.

led individual poses a "security or flight risk," and Ms. Villegas was classified as a medium-security inmate.[63]

Why was Villegas a flight risk? She was a flight risk because, after her arrest by Nashville authorities, Immigration and Customs Enforcement (ICE) issued a detainer for her. Her arrest prompted ICE to issue a detainer because she was in the country in violation of the law—a civil immigration violation. With the logic of militarism driving immigration policy, the commission of a civil immigration violation was enough to establish that Villegas was frighteningly risky from a security perspective—risky enough to require shackling throughout early labor and shortly after childbirth; risky enough to deprive her of a breast pump on "safety" grounds.

These risk characterizations are raced of course. The fact that she is Latina probably helps to account for the stop of her vehicle in the first place.[64] But Villegas's threat was evident to her jailer not just because of her race but also because of her sex. The potent act of birth itself—her giving birth to an American citizen—was a frightful border breach.[65] We have seen the trope of the threateningly fertile Latina in the context of the discussion around birthright citizenship and anchor babies.[66]

The Sixth Circuit was therefore unconvinced that the local agents who shackled Ms. Villegas were aware that they were violating her rights. The facts of her case did not establish their deliberate indifference as a matter of law. The circuit court determined that it was not clear as a matter of law that Ms. Villegas's captors understood that shackling posed a risk to her childbirth process. "On remand," the court wrote,

> a jury will need to determine whether Plaintiff was a flight risk in her condition and whether Defendant had knowledge of the substantial

63. *Id.* at 573–74 (internal quotation mark omitted).

64. The ACLU of Tennessee concluded that the 287(g) program in Davidson County, Tennessee, had increased the racial profiling of Latinos in the County, which includes Nashville. LINDSAY KEE, ACLU-TN, CONSEQUENCES AND COSTS: LESSONS LEARNED FROM DAVIDSON COUNTY, TENNESSEE'S JAIL MODEL 287(G) PROGRAM 11 (Dec. 2012), *available at* http://www.aclu-tn.org/pdfs/287g%28F%29.pdf. Similar reports had emerged elsewhere. MEISSNER ET AL., *supra* note 31, at 1592–93 (noting these reports and explaining the incentives for profiling inherent in the governing Fourth Amendment jurisprudence).

65. *See* LEO R. CHAVEZ, COVERING IMMIGRATION: POPULAR IMAGES AND THE POLITICS OF THE NATION 215 (2001). Chavez's analysis reveals "magazine covers that reference Mexican immigration . . . ha[ve] been overwhelmingly alarmist." *Id.* Of particular note, some magazine covers deploy images of women in ways that "suggest a more insidious invasion, one that includes the capacity of the invaders to reproduce themselves." *Id.* at 233.

66. *See generally* Rachel E. Rosenbloom, *Policing the Borders of Birthright Citizenship: Some Thoughts on the New (and Old) Restrictionism*, 51 WASHBURN L.J. 311, 324 (2012) (critiquing the misleading deployment of "anchor baby" rhetoric in debates around birthright citizenship (internal quotation marks omitted)). For an example of such an argument made in a more scholarly tone, but still tellingly invoking the visual image of the "border crosser," see Peter H. Schuck, Op-Ed., *Birthright of a Nation*, N.Y. TIMES, Aug. 14, 2010, at A19 (arguing that "anchor babies"—the children of a mother who "briefly crosses the border to give birth"—are not entitled to and should not be granted birthright citizenship (internal quotation marks omitted)).

> risk, recognized the serious harm that such a risk could cause, and, nonetheless, disregarded it, recognizing that such knowledge may be established through the obviousness of the risk.[67]

Regarding the deprivation of the breast pump, the court wrote that "[a]bsent proof that the breast pump was prescribed, as is necessary under a diagnosed medical-needs theory, Plaintiff must show that it was so obvious that even a layperson would recognize the need to provide Plaintiff with a breast pump."[68]

The dissenting judge, Judge Helene White, critically engaged the majority's characterization of Villegas as a flight risk in terms that apply quite well to almost all of the categorical risk determinations that are currently acceptable in immigration law and yet unacceptable in almost any other context. She wrote:

> Here, Defendant maintained that Villegas's restraints were "consistent with" her medium-security designation and that illegal immigrants *in general* pose a danger of flight. But Villegas's medium-security designation did not take into account her late-term pregnancy or that she had gone into labor, nor was it based on any assessment of flight risk or risk of harm—it was automatic because of the Immigration and Customs Enforcement (ICE) detainer. Villegas was not being held for a crime of violence and had not been convicted of any crime. She was not individually assessed for flight risk or risk of harm to herself or others, and she had not engaged in any conduct evidencing such. . . . Neither the ICE detainer's automatic designation of Villegas as "medium-security" nor generalized evidence that illegal immigrants may pose a flight danger constitute "clear evidence" that Villegas was a security or flight risk.[69]

Judge White also noted that the laboring Villegas was at all times accompanied by an armed guard.[70]

To me, what is extraordinary about Villegas's case is the ordinariness of so many of its features in the universe of immigration enforcement: the inhumane conditions of detention—even detention itself—without individualized assessments of risk, and the invocation of national security as a justification to detain individuals for long periods of time and separated from families and from counsel.[71]

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67. *Villegas*, 709 F.3d at 578 (citation omitted).

68. *Id.* at 579.

69. *Id.* at 582. (White, J., dissenting) (internal quotation marks omitted).

70. *Id.*

71. The 1996 amendments to the immigration detention provisions have obviated the need for individualized determinations regarding detention in a wide range of immigration cases. *See* Margaret H. Taylor, Demore v. Kim*: Judicial Deference to Congressional Folly*, *in* IMMIGRATION STORIES 343, 344 (David A. Martin & Peter H. Schuck eds., 2005); *see also* Kalhan, *supra* note 56, at 43. For a discussion of the problematic conditions of immigration detention, see, for example, RUTHIE EPSTEIN & ELEANOR ACER, HUMAN RIGHTS FIRST, JAILS AND JUMPSUITS: TRANSFORMING THE U.S.

The *Villegas* case, and the many cases and stories that it stands in for, also illustrate just how right Scales was when she asserted that militarism is "gendered to the ground."[72] This is true not simply because the "logic of war" is used to justify the use of shackles and the threat of arms against a woman in labor who poses no actual threat to anyone, but also because militarism in immigration enforcement exacerbates the sex and gender inequalities that permeate our immigration policies.

IV. MILITARISM AND THE REIFICATION OF GENDER INEQUALITY IN IMMIGRATION LAW

We like to think of our post-1965 immigration admissions policies as facially neutral—a product of the civil rights revolutions of the time. Certainly, the code is now free of any express reference to race and free of the national origin quotas of old. That said, the laws are not neutral in their application. Some of this is probably by design on the part of at least some of the laws' drafters; some of this is the result of unconscious bias and policy blinders that infect most of the work that all of us do in a society so long characterized by its social hierarchies of race, class, gender, disability, and sexual orientation.

Elsewhere, I have written, as have many others, about the persistent racial bias in our immigration policies.[73] In similar ways, the immigration categories also contain sex and gender bias. The admissions criteria tend to reproduce patriarchal, heteronormative family structures. Ann Scales was keenly aware that "laws that privilege traditionally gendered families reinforce the social marginalization of sexual and gender minorities, and not just (not even primarily) by excluding the minorities from those institutions."[74] Unfortunately, immigration law is unquestionably a site of such privileging.

One obvious example is immigration law's refusal to acknowledge same-sex unions as recently as the summer of 2013. Until 1990, gays and lesbians were explicitly barred from admission on medical grounds.[75]

IMMIGRATION DETENTION SYSTEM—A TWO-YEAR REVIEW 25 (2011), *available at* http://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Jails-and-Jumpsuits-report.pdf (noting a host of problems with conditions of detention); Urbina & Rentz, *supra* note 56.

72. Scales, *Militarism*, *supra* note 5, at 52 n.102 (quoting Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 655 (1983)) (internal quotation marks omitted). There are plenty of other examples we might use to illustrate Scales's perspicacity in this regard, including the ongoing sex abuse scandal in the military and the stereotypical gender norms enacted to achieve the sexual humiliation and torture of the prisoners held by U.S. soldiers at Abu Ghraib. Seymour M. Hersh, *Torture at Abu Ghraib*, NEW YORKER, May 10, 2004, at 42, *available at* http://www.newyorker.com/archive/2004/05/10/040510fa_fact.

73. *See, e.g.*, Jennifer M. Chacón, *Loving Across Borders: Immigration Law and the Limits of* Loving, 2007 WIS. L. REV. 345, 347–48 (2007); Rose Cuison Villazor, *The Other* Loving*: Uncovering the Federal Government's Racial Regulation of Marriage*, 86 N.Y.U. L. REV 1361 (2011).

74. Scales, *supra* note 1, at 398.

75. INA § 212(a) formerly contained a provision that excluded individuals of "psychopathic personality" and this was interpreted to include homosexuals. STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 271–72 (5th ed. 2009) (internal

Although that bar was revoked, there were still barriers to entry. Most significantly, notwithstanding the Obama Administration's declaration that the Defense of Marriage Act (DOMA) was unconstitutional, prior to the Supreme Court's decision in *United States v. Windsor*,[76] U.S. Citizenship and Immigration Services (USCIS) continued to deny the spousal visa applications of legally married same-sex couples.[77] In immigration law, marriage was still bureaucratically defined as between a man and a woman.[78] This affected not just those seeking a green card, but could also affect long-term nonimmigrant visa holders[79] who had to rely upon discretionary work-arounds to bring their spouses to the United States.

Hope for a legislative fix as part of a comprehensive immigration reform package in 2013 seemed to die with Senator Leahy's proposed amendment to achieve marriage equality in immigration; he withdrew that amendment in the Senate Judiciary Committee when it became clear that he lacked the support to get the amendment passed.[80] But when the United States Supreme Court declared DOMA unconstitutional in *Windsor*,[81] the Administration finally ended the long history of discrimination in immigration law—United States Citizenship and Immigration Services announced that it would accord married same sex-couples the designa-

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quotation marks omitted). This provision was later revised to include "sexual deviation," which Congress intended to encompass homosexuality. *Id.* at 271 (internal quotation marks omitted). For references to the ban, see Adams v. Howerton, 673 F.2d 1036, 1040 (9th Cir. 1982) (using the ban as evidence that Congress could not have intended "spouse" to include a same-sex spouse (internal quotation marks omitted)); *see also* Rosenberg v. Fleuti, 374 U.S. 449, 451, 462–63 (1963) (avowing application of the ban through an interpretation of the statute that treated Fleuti as if he had not left the country).

76. 133 S. Ct. 2675 (2013).

77. The USCIS Adjudicators Field Manual included a reference to DOMA's admonition that "[f]or a relationship to qualify as a marriage for purposes of Federal Law, one partner must be a man, and the other a woman." USCIS, ADJUDICATOR'S FIELD MANUAL § 21.3(a)(2)(I), *available at* http://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-15.html. Shortly prior to *Windsor*, the Administration granted deferred action status to avoid breaking up same-sex couples, but this was discretionary. Kirk Semple, *U.S. Drops Deportation Proceedings Against Immigrant in Same-Sex Marriage*, N.Y. TIMES, June 30, 2011, at A16.

For descriptions and criticisms of the failure of immigration law to recognize same-sex couples, see generally Chacón, *supra* note 73, at 361–62; Matthew Lister, *A Rawlsian Argument for Extending Family-Based Immigration Benefits to Same-Sex Couples*, 37 U. MEM. L. REV. 745, 746 (2007); Victor C. Romero, *The Selective Deportation of Same-Gender Partners: In Search of the "Rara Avis,"* 56 U. MIAMI L. REV. 537, 537–38 (2002).

78. *See, e.g.*, *Adams*, 673 F.2d at 1042 (finding that Congress intended to "confer spouse status under section 201(b) [of the INA] only upon the parties to heterosexual marriages" and that this policy "has a rational basis and therefore comports with the due process clause and its equal protection requirements").

79. The INA generally uses the term "nonimmigrants" to refer to individuals who are entering the country but who have no intent to remain permanently. Examples include student visa holders and tourist visa holders, as well as certain categories of short- and medium-term work-related visas.

80. David Welna, *Fears of Killing Immigration Bill Doomed Same-Sex Amendment*, NPR (May 22, 2013, 5:18 PM), http://www.npr.org/blogs/itsallpolitics/2013/05/22/186075168/fears-of-killing-immigration-bill-doomed-same-sex-amendment.

81. *Windsor*, 133 S. Ct. at 2695.

tion of a "spouse" under immigration law.[82] Moreover, the Board of Immigration Appeals recently granted immigration benefits to a same-sex spouse, citing *Windsor*.[83]

This monumental change to immigration policy is an important breakthrough. Nevertheless, immigration laws continue to promote and replicate traditional family structures. Only those individuals who are eligible under the immigration code's highly technical definitions of "spouses" and "children" are eligible for family-based immigration at all.[84] Individuals in civil unions, for example, do not qualify as "married" for immigration purposes. Those who wish to acquire family unification privileges must marry in jurisdictions where their marriages are lawful.

Immigration law and policy have also reified traditional gender roles in other ways. Economic migration and humanitarian migration, which, along with family-based migration form the three major legal paths to admission in western countries such as Australia, Canada, and the United States, "have created patterns [of] reinforcing notions of women's dependence and men's independence."[85] In the category of economic migrants, many of the admissions categories tend to favor highly educated workers who, in many sending countries, are predominantly male. At a March 2013 hearing held by the Senate Judiciary Committee, Mee Moua of the Asian-American Justice Center testified

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82. Press Release, Secretary of Homeland Security Janet Napolitano, Napolitano Statement on the Implementation of the Supreme Court Ruling on the Defense of Marriage Act (July 1, 2013), http://www.dhs.gov/news/2013/07/01/statement-secretary-homeland-security-janet-napolitano-implementation-supreme-court.

83. Zeleniak, 26 I. & N. Dec. 158, 2013 WL 3781298, at *159 (B.I.A. July 17, 2013). The Board concluded:

> The Supreme Court's ruling in *Windsor* has . . . removed section 3 of the DOMA as an impediment to the recognition of lawful same-sex marriages and spouses if the marriage is valid under the laws of the State where it was celebrated. This ruling is applicable to various provisions of the Act, including, but not limited to, sections 101(a)(15)(K) (fiancé and fiancée visas), 203 and 204 (immigrant visa petitions), 207 and 208 (refugee and asylee derivative status), 212 (inadmissibility and waivers of inadmissibility), 237 (removability and waivers of removability), 240A (cancellation of removal), and 245 (adjustment of status), 8 U.S.C. §§ 1101(a)(15)(K), 1153, 1154, 1157, 1158, 1182, 1227, 1229b, and 1255 (2012).

Id.

84. The terms "child" and "parent" are defined for immigration purposes at 8 U.S.C § 1101(b) (2012). Additional requirements are imposed in certain cases for citizenship purposes. 8 U.S.C. § 1401 (2012).

85. Seyla Benhabib & Judith Resnik, *Introduction* to MIGRATIONS AND MOBILITIES: CITIZENSHIP, BORDERS, AND GENDER, *supra* note 57, at 9; Catherine Dauvergne, *Globalizing Fragmentation: New Pressures on Women Caught in the Immigration Law–Citizenship Law Dichotomy*, *in* MIGRATIONS AND MOBILITIES: CITIZENSHIP, BORDERS, AND GENDER, *supra* note 57, at 333, 337–39. For analyses of the ways in which immigration law has operated historically to create and define gender categories, see generally NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 132–55 (2000); MARTHA GARDNER, THE QUALITIES OF A CITIZEN: WOMEN, IMMIGRATION, AND CITIZENSHIP, 1870–1965 (2005); *see also* Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 648 (2005) (arguing that "the regulation of sexuality, morality, and marriage was a pervasive regulatory force in the development of immigration law").

that women are significantly underrepresented in employment-based visas and rely on family-based migration as a means to immigrate.[86]

Consequently, under the current system, it is most often wives and children who enter with immigration statuses that depend upon their relationship with the primary employment visa holder. For many of the spouses of workers who enter on nonimmigrant visas, the right of entry does not even carry with it a right to work,[87] which only deepens their dependency and fuels the replication of traditional gender roles that could just as easily be subverted through other conscious choices in immigration policy.

There are several significant implications that flow from the policy choice to deny work eligibility to the dependents of primary visa holders. The first is that, to the extent current immigration reform proposals favor a reduction in immigration visas based on family ties in favor of granting more visas to individuals with certain professional skills, these proposals run the risk of further aggravating the gender gap that already exists in terms of access to channels for legal immigration. An express commitment to gender equality in immigration reform might significantly alter the terrain of reform proposals, but existing reform proposals purport to promote security without regard to the effects of the resulting policy choices on equality.

Second, the current system—where women are often dependent on men for their status—has resulted in exploitation in some immigrant families. The structure of U.S. immigration law actually provides power to potential abusers by rendering other family members dependent on the primary visa holder for both financial support and immigration status.[88] Recognizing this, Congress has devised legislative mechanisms aimed at insulating dependent immigrants from abuse and exploitation by the primary immigration visa beneficiary, but these legislative solutions are not always adequate and raise problems of their own.

One legislative solution has been to allow victims of domestic abuse to self-petition for lawful permanent resident status so that they are not

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86. *Senate Judiciary Has Hearing on Women and Family Issues Under Immigration Laws*, 90 NO. 12 INTERPRETER RELEASES, 747, 747–48 (2013) ("Ms. Mee Moua, President and CEO of the Asian American Justice Center . . . not[ed] that women are significantly underrepresented in employment-based visas and thus must rely on family-based immigration to immigrate to the U[nited] S[tates] on their own or rely on their spouses to immigrate through employment channels.").

87. USCIS cautions that

> [o]nly a few nonimmigrant classifications allow you to obtain permission work in this country without an employer having first filed a petition on your behalf. Such classifications include the nonimmigrant E-1, E-2, E-3[,] and TN classifications, as well as, in certain instances, the F-1 and M-1 student and J-1 exchange visitor classifications.

Temporary (Nonimmigrant) Workers, U.S. CITIZENSHIP & IMMIGR. SERVS. n.1, http://www.uscis.gov/working-united-states/temporary-workers/temporary-nonimmigrant-workers (last updated Sept. 7, 2011). This list does not include the spouse of H-1B visa holders, for example.

88. H.R. REP. NO. 103-395 (1993).

dependent on an abusive spouse to provide long-term, lawful permanent resident status.[89] This is sometimes known as VAWA self-petitioning, because the right was created as part of the Violence Against Women Act.[90] Another has been to provide special U visas that offer legal immigration status to individuals who are the survivors of domestic abuse and who are willing to testify against their abusers.[91]

VAWA self-petitioning and U visa eligibility are helpful to individual immigrants, but they are band-aids on structural problems, and they in turn reinforce the gender assumptions and norms that lead to the underlying problems of partner dependency and exploitation in the first place. They leave dependent spouses and children in a supplicant position not faced by the primary visa holder—needing to establish abuse in order to be allowed to regularize their immigration status. In the case of U visas, this requires cooperation with law enforcement,[92] which can be daunting to individuals with little knowledge of the U.S. legal system. And it requires law enforcement to certify the helpfulness of applicants, which can be a dicey proposition when law enforcement is undereducated or simply hostile to such claims.[93]

Immigrant women are critical contributors to the U.S. economy. Some of these women are themselves the recipients of visas as highly skilled immigrant workers. Sometimes, women are able to accompany partners with visas that also allow them to work in the formal economy, and they do so. Some of them are entrepreneurs and small business owners who have found creative and economy-boosting work-arounds to prohibitions on employment.[94] Many women work under the table as home elder-care providers, nannies, and maids.[95] Almost all of them do work within their households.

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89. 8 U.S.C.A. §§ 1154(a)(1)(A)(iii)–(iv), (B)(ii)–(iii) (West 2013).

90. 8 U.S.C.A. § 1154(a)(1)(K) (West 2013).

91. 8 U.S.C.A. § 1101(a)(15)(U) (West 2013).

92. *Id.* § 1101(a)(15)(U)(i)(III); 8 U.S.C.A. § 1184(p)(1) (West 2013) (requiring cooperation).

93. 8 U.S.C.A. § 1184(p)(1) (West 2013) (requiring law enforcement certification). For a discussion of the variability of law enforcement attitudes to U visa certification, see Tracie L. Klinke & Alpa Amin, *U Non-Immigrant Status: Encouraging Cooperation Between Immigrant Communities and Law Enforcement Agencies*, 5 J. MARSHALL L.J. 433, 461–63 (2012). For a discussion of the benefits and limitations of U visas, see Leticia M. Saucedo, *Immigration Enforcement Versus Employment Law Enforcement: The Case for Integrated Protections in the Immigrant Workplace*, 38 FORDHAM URB. L.J. 303, 323–25 (2010).

94. SUSAN C. PEARCE ET AL., IMMIGRATION POLICY CTR., OUR AMERICAN IMMIGRANT ENTREPRENEURS: THE WOMEN 15 n.14 (Dec. 2011), *available at* http://www.immigrationpolicy.org/sites/default/files/docs/Women_Immigrant_Entrepreneurs_120811.pdf ("575,740 foreign-born women who immigrated as adults reported that they were self-employed in their own incorporated or unincorporated businesses . . . .").

95. Richard Dunham, *Top Jobs for Undocumented Workers: For Men, Construction; for Women, Housekeeping*, TEX. ON POTOMAC (May 10, 2013), http://blog.chron.com/txpotomac/2013/05/top-jobs-for-undocumented-workers-for-men-construction-for-women-housekeeping/) ("Nearly half of the women working in the U.S. without proper legal documents are in housekeeping or child-care jobs.").

With the exception of the primary visa holders, however, the law reduces the complexity and contribution of these immigrant women into three categories: (1) the dependent beneficiary of a spouse's employment-based immigrant or nonimmigrant visa who has no independent labor significance; (2) the supplicant of the state who seeks to terminate the dependency on the primary visa holder by providing law enforcement assistance to the state; and (3) the "illegal alien" worker who is outside the law. In none of these categories is the woman migrant a prototypically "desirable" neoliberal actor.

Nor are the legal limits on economic and family migration the only ways that immigration policy facilitates gender stereotypes. Scales's analysis of the *Nguyen* case highlights how citizenship requirements that impose higher barriers to the children of unmarried U.S. citizen men as compared to the children of unmarried U.S. citizen women both reflect and institutionalize sex and gender stereotyping around parenthood.[96] Scholars have also written about how the public–private distinction has resulted in the favoring of male asylum applicants over female applicants who suffer violence at the hands of nonstate actors.[97] There are other examples, but the above discussion suffices to sketch out the ways that neutral laws result in a situation where, generally speaking, women and men often enter the United States as immigrants on very different legal terms. Reform proposals have tended to ignore the significance of this fact and have not made sex and gender equality an objective of immigration reform legislation.

Ann Scales's work helps to illuminate how these policy choices—and the constitutional doctrines that make them possible—are rooted in militarism. Catherine Dauvergne has pointed out that there is a "widely shared assumption . . . that sovereign nations 'are morally justified in closing their borders, subject to exceptions of their choosing.'"[98] In the United States, this justification has translated into the Court's acknowledgement of Congress's plenary power to define who can come to and who can stay in the United States.[99] This power supersedes constitutional protections on the rights of noncitizens and citizens, including their First Amendment rights, their right to equal treatment under the law, and their right to due process. The courts do little to scrutinize these congressional choices because immigration powers are viewed as rooted in national security. This is true whether or not national security is actually implicat-

96. *See* discussion *supra* Part II.

97. *See, e.g.*, Deborah Anker, *Refugee Status and Violence Against Women in the "Domestic" Sphere: The Non-State Actor Question*, 15 GEO. IMMIGR. L.J. 391, 392–94, 400–01 (2001); Jennifer Moore, *From Nation State to Failed State: International Protection from Human Rights Abuses by Non-State Agents*, 31 COLUM. HUM. RTS. L. REV. 81, 111–13 (1999); *see also* Talia Inlender, *Status Quo or Sixth Ground? Adjudicating Gender Asylum Claims*, *in* MIGRATIONS AND MOBILITIES: CITIZENSHIP, BORDERS, AND GENDER, *supra* note 57, at 356, 356–79.

98. Benhabib & Resnik, *supra* note 85, at 11 (quoting Dauvergne, *supra* note 85, at 336).

99. *See* cases cited *supra* note 30 (discussing the plenary powers doctrine).

ed by the discriminatory laws. Militarism trumps equality and justifies replicating prevailing hierarchies in immigration law.

Once the inequalities that undergird the current immigration admission system are exposed, it becomes easier to see the damage that these inequalities wreak on immigration policy more broadly. When the woman migrant is frequently placed by law into the categories of a dependent, a supplicant, or a lawbreaker, it is not surprising that lawmakers are not actively seeking to improve avenues of legal admission to women workers. The structural inequalities embedded in immigration law ultimately work to reinforce the recurring trope of migrant women as state dependents who seek to anchor themselves to the country through pregnancy and childbirth. This in turn, provides fodder for arguments in favor of limiting channels of immigration and also of eliminating birthright citizenship.[100]

These distorted understandings of women migrants that emerge from policy choices also result in policy choices purportedly undertaken to assist victimized migrant women that actually worsen the plight of these women. I have written elsewhere about how domestic strategies designed to combat human trafficking have perversely increased the vulnerability of migrants because anti-trafficking is used to justify a host of militarized immigration enforcement strategies that make migrant crossings more dangerous and costly, drive unauthorized migrant workers further underground, and fuel a myth of migrant criminality that further justifies militarization of border enforcement in a tragic feedback loop.[101] These policies frequently exacerbate the sexual exploitation of and violence against men, women, and children both as they migrate and in the workplace. I see our approach to human trafficking as a further reflection of our nation's outsized fear of dependent, non-contributory, and criminal immigrants. This world view has resulted not just in self-defeating anti-trafficking approaches, but in a sweeping militarization of immigration enforcement.

CONCLUSION

Ann Scales ends *Militarism, Male Dominance and Law* with a poem by Adrienne Rich that hopes for the obsolescence of violence.[102] I do not think it is surprising that Ann Scales made the mission of peace so central to her equality agenda. In so doing, she was echoing the calls made

100. *See* Rosenbloom, *supra* note 66, at 314–16; Schuck, *supra* note 66 (discussing the discourse around "anchor babies" and birthright citizenship).

101. Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 3009–12, 3032–39 (2006).

102. Scales, *Militarism*, *supra* note 5, at 73 (quoting Adrienne Rich, *Twenty-One Love Poems, No. VI*, *in* THE DREAM OF A COMMON LANGUAGE: POEMS, 1974–1977, at 21, 27–28 (1978)). Scales's work places women at the center of these efforts toward an end to violence. *Id.*

by great equality activists like Dr. Martin Luther King.[103] Dr. King recognized the power of militarism to replicate existing social hierarchies and stamp out quests for equality. Scales's work draws upon the hard-fought lessons of Dr. King, as well has his belief that change requires not only activism that relies upon the law but also activism that is not afraid to act peacefully outside the law.[104]

Ann Scales's work on militarism is important because it asks us to bring to the surface and question the logic of war wherever it taints our quest for gender equality. I can see militarism's influence in immigration policy and have focused on those issues here, but I also recognize its influence in many other spheres as well.[105] Much more work needs to be done to understand the role that militarism plays in engendering social inequality, but Ann Scales has given us a magnificent running start. May she rest in peace.

103. For a discussion of King's peace activism, see, for example, Russell Baker, *Bravest and Best*, 45 N.Y. Rev. Books 6 (Apr. 9, 1998) (book review) (describing how in the later days of his activism, King "saw race, war, and poverty as evils inextricably bound and decided that all three must be tackled as one.").

104. *Compare* Scales, *Militarism*, *supra* note 5, at 56 (calling for "nonviolent direct action" (internal quotation marks omitted)), *with* MARTIN LUTHER KING, JR., *Letter from Birmingham City Jail*, *in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 289, 293–94 (James Melvin Washington ed., 1986) ("One may well ask, 'How can you advocate breaking some laws and obeying others?' The answer is found in the fact that there are two types of laws: there are *just* and there are *unjust* laws. I would agree with Saint Augustine that '[a]n unjust law is no law at all.' . . . An unjust law is a code that a majority inflicts on a minority that is not binding on itself. This is difference made legal. On the other hand a just law is a code that a majority compels a minority to follow that it is willing to follow itself. This is sameness made legal. . . . There are some instances when a law is just on its face and unjust in its application.").

105. President Obama recently offered his view that the "war on terrorism" also needs to be defined and limited. Press Release, President Barack Obama, Remarks by the President at the National Defense University (May 23, 2013), http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university. That is a welcome acknowledgement, but it is unlikely to demilitarize national policy. Mary Dudziak has pointed out that war is an "enduring condition" that is strategically invoked to justify deviations from peacetime legal norms. MARY L. DUDZIAK, WAR TIME: AN IDEA, ITS HISTORY, ITS CONSEQUENCES 5, 11–32 (2012).