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The Immigration-Terrorism Illusory Correlation and Heuristic Mistake

Mary De Ming Fan*

INTRODUCTION

The national broil over immigration reform is fermenting an illusory correlation and mistaken heuristic. Two events illustrate the involvement of legislators in the manufacture and amplification of this heuristic mistake. A controversial bill passed by the House of Representatives in December 2005 explicitly and extensively packaged immigration control with antiterrorism. During his term as a congressman, J. D. Hayworth published a book claiming that inflows of people over the U.S.-Mexico border pose a "terrorist threat," that the nation has witnessed an "illegal alien crime spree," and that high immigration rates from Mexico threaten social instability.

Such pronouncements by legislators generate an illusory correlation between immigration and terrorism. Illusory correlations are distorted perceptions of correlation, including seeing correlations that do not exist or overestimating real correlations. Juxtaposing undocumented immigration with terrorism produces an illusory correlation, because the vast majority of undocumented immigrants remain today what they have long been—people in search of a better life, not terrorists intent on destroying life.

The immigration-terrorism illusory correlation generates a flawed decisional heuristic—immigration control becomes about fighting terrorism and danger, not a complex balancing of humanity, human need, privilege, property, and conscience. Regulation becomes simple but grossly distorted based on the heuristic—everyone is for stamping out the dangerous and the terrorism-tinged by ramping up penalties, walls, and controls, though we

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may have much different, more nuanced responses about how to balance humanity, need, and property.

Preventing terrorists from entering the United States and keeping people safe are important concerns and compelling duties. However, that does not mean we should forgo accurate and fair consideration of the complex issues of immigration policy that America grappled with long before the September 11 nightmare.

Mistakenly equating undocumented immigration with terrorism transforms the complex immigration questions of privilege, property, race, social order, and conscience that confounded the nation long before September 11 into the seemingly simple choice of whether or not we want to fight terrorism and safeguard national security.

This manufacture of illusory correlation and issue substitution has import beyond the rights and wrongs of immigration reform. At issue is the mechanism of legislator-catalyzed cascades in perception that generate mistaken decisional heuristics. Heuristics describe a cognitive process by which people faced with a hard question substitute a simpler one.4 The study of heuristics and biases in social psychology has generated insights into how people simplify complex questions by substituting easier ones through a process called judgment by heuristic. Because the substituted issue or attribute and the real one are different, heuristics inevitably produce predictable decisional errors, called "systematic biases."5

A rich movement in recent legal scholarship has drawn upon insights about heuristics and biases to examine irrationalities in our risk regulation6 and explain how heuristics can cause mistakes in judicial or jury analysis.7 This scholarship has elucidated the distorting impact of general heu-

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7 E.g., Alvin I. Goldman, Simple Heuristics and Legal Evidence, 2 LAW, PROBABILITY & RISK 215, 221 (2003); Chris Guthrie et al., Inside the Judicial Mind, 86 CORNELL L.
istics that are part of the basic mental computations our minds have evolved to make. For example, under an availability heuristic, we naturally use the readiness with which a harm comes to mind as a proxy for the probability of a harm happening.

The manufacture of decisional heuristics by legislators and the social cognitive consequences of promulgating and normalizing such heuristics also warrant examination. The House bill and Congressman Hayworth’s book offer a window into the manufacturing process. From the vantage of this window, this Article analyzes how legislators generate distorted decisional heuristics by promulgating illusory correlations.

The Article also highlights the danger of manufacturing a decisional heuristic through an illusory correlation. The danger is to social cognition. When a group of people are cognitively effaced to simplify policy decisions, we risk planting fear and hostility where none existed before or ramping up existing fear and mistrust to proportions far exceeding rational justification. The people most likely to be effaced by legislative promulgation of illusory correlations are the unrepresented or underrepresented because they lack the typical voter check to jolt more careful rhetoric.

This Article proceeds in three parts. Part I analyzes how legislator-promulgated illusory correlations can generate distorted decisional heuristics. Part I uses the December 2005 House bill mixing immigration control and antiterrorism and Congressman Hayworth’s Whatever It Takes as empirical windows into the process. Part II analyzes the resulting heuristic danger of distorting and inflaming perceptions against the politically under- or unrepresented. Part III offers approaches to ameliorating the danger, drawing on the fundamental insight that people alerted to the fact that they are operating under a potentially distorting heuristic will mentally counteract the distortion. Legislators can illuminate potential distortion and express commitment to caution without constraining free-wheeling debate by using the non-binding concurrent or simple resolutions. Civil society can deploy counterheuristic cascades to jar reason and disrupt distorting heuristics.

I. LEGISLATOR-CATALYZED ILLUSSORY CORRELATION AND HEURISTIC MISTAKE

Two hotspots on our current sociopolitical landscape make the issue of legislator-catalyzed illusory correlation and heuristic mistake salient...
and trenchant. The tough immigration reform bill passed by the House of Representatives that has roused heated protest\textsuperscript{11} and heated support\textsuperscript{12} expressly links immigration control with antiterrorism.\textsuperscript{13}

Lest there be any question that we are in a political moment that is confounding the age-old issue of immigration control with our new heightened fears of terrorism and violence, Congressman J. D. Hayworth followed passage of the House bill with publication of a book unabashedly linking controls on the U.S.-Mexico border with fighting terrorism, crime and social breakdown.

We begin our analysis of how legislators trigger cascades of illusory correlation and heuristic mistake through the lenses of the House bill and Congressman Hayworth's \textit{Whatever It Takes}.

\textbf{A. Creating Illusory Correlation: Two Illustrations}

\textit{1. H.R. 4437: Legislative Merger of Immigration Control and Antiterrorism}

By a vote of 239-132, the House of Representatives passed the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 on December 16, 2005.\textsuperscript{14} Designated H.R. 4437, the House bill spent an official total of ten calendar days between introduction in the House and passage.\textsuperscript{15} But its massive portent is better measured by the protests it sparked in March 2006, which were heated and huge—including a record half-million-person turn-out in Los Angeles and similar protests throughout the nation.\textsuperscript{16}


\textsuperscript{14} Id.

\textsuperscript{15} Id.

\textsuperscript{16} Editorial, A Civil Debate, supra note 11; Cynthia H. Cho & Anna Gorman, The Immigration Debate: Massive Student Walkout Spreads Across Southland, L.A. Times, Mar. 28, 2006, at A1; Giblin, supra note 11; Cindy Gonzalez, Immigrant Rights Rally Is Democ-
The House legislation is tough on undocumented immigrants. It transforms illegal presence in the United States from a civil violation to a felony crime. It intensifies the penalties for the crime of illegal re-entry after deportation—imposing new mandatory minimums, a strategy usually reserved for the most objectionable crimes. For example, someone with a prior felony conviction who re-enters the United States after deportation will now face a mandatory minimum of five years in jail. Someone who has no prior convictions at all—and whose sentence would likely be time served under current law—will instead face a mandatory minimum sentence of one year in prison.

The rights or wrongs of the substantive provisions, hotly debated in Congress and the national scene, are not the focus of this Article. This Article focuses on something lurking within the legislation that also warrants scrutiny: the juxtaposition of undocumented people with terrorism, which creates a grave risk of promulgating an illusory correlation.

Behind the substantive content of the legislation, there is a battle over how we see the faces of the affected immigrant. The following juxtaposition of views in a Kentucky newspaper underscores the background battle:

Sen. Majority Leader Bill Frist: “Our country needs security at our borders in order to slow the flow of illegal immigration and make America safer from foreign criminals and terrorists.”

David Quintan, 57, a Chilean who has lived in the United States for 30 years: “This bill is anti-American. It’s discriminatory not only to Latinos but to all immigrants. They’re coming to work, not to steal or do terrorism. We are just workers.”

The House legislation is based on the “foreign criminals and terrorists” paradigm.


18 Id. at § 204.

19 Id. at § 204(2)(A).

20 See U.S.S.G. § 2L1.2. In reality, because of strained budgets and humbly exercised discretion, people with no prior criminal convictions who have simply illegally re-entered after deportation are usually not prosecuted, unless there are extenuating circumstances.

21 H.R. 4437, supra note 17, at § 204(1)(B).

The mixing of immigration control with antiterrorism is clear from the start—the Act is, after all, called the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005.

Section 118 of the Border Protection, Antiterrorism and Illegal Immigration Control Act spells out the Act's organizing paradigm:

Sec. 118. Sense of Congress Regarding Enforcement of Immigration Laws
(A) FINDINGS.—Congress finds the following:
(1) A primary duty of the Federal Government is to secure the homeland and ensure the safety of United States citizens and lawful residents.
(2) As a result of the terrorist attacks on September 11, 2001, perpetrated by al Qaida terrorists on United States soil, the United States is engaged in a Global War on Terrorism.
(3) According to the National Commission on Terrorist Attacks Upon the United States, up to 15 of the 9/11 hijackers could have been intercepted or deported through more diligent enforcement of immigration laws.
(4) Four years after those attacks, there is still a failure to secure the borders of the United States against illegal entry.
(5) The failure to enforce immigration laws in the interior of the United States means that illegal aliens face little or no risk of apprehension or removal once they are in the country.
(6) If illegal aliens can enter and remain in the United States with impunity, so, too, can terrorists enter and remain while they plan, rehearse, and then carry out their attacks.
(7) The failure to control and to prevent illegal immigration into the United States increases the likelihood that terrorists will succeed in launching catastrophic or harmful attacks on United States soil.23

Thus, the illegal immigrant crackdown is expressly linked to the War on Terror, though the overwhelming majority of undocumented border crossers who will be affected are coming to work and not to commit acts of terror. Indeed, while the legislation invokes the frightening specters of the September 11 hijackers, in reality, the hijackers were not undocumented border-crossers—they were not illegal immigrants. The hijackers all entered the United States legally, with visas.24 They were not the undocumented immigrants who risk life and limb for the prospect of work and

23 H.R. 4437, supra note 17, at § 118.
24 James M. Lindsay & Audrey Singer, Editorial, Local Police Should Not Do an I.N.S. Job, N.Y. TIMES, May 8, 2002, at A31 ("The 19 hijackers all entered the United States legally, and 17 of them still had valid visas on Sept. 11.").
life betterment; they were not the people who overwhelmingly will be affected by the legislation. But the legislation covers the faces of those actually affected with the frightening masks of the hijackers.

2. Congressman Hayworth's Whatever It Takes

Nearly contemporaneously with the passage of the Act and promulgation of the immigration control and antiterrorism message, Congressman J. D. Hayworth published a book expanding on the theme of immigrants and danger entitled Whatever It Takes: Illegal Immigration, Border Security and the War on Terror. The book opens with a strong and unabashed message linking the longstanding debate over the U.S.-Mexico border with new terrorism fears.

Stage-setting the themes of the book, reporter Sean Hannity recalls that, in April 2005, when he and Congressman Hayworth traveled to the Arizona-Mexico border to examine the Minuteman Project, “[w]e discussed at length the issue of illegal immigration and our shared belief that the problem is getting to the point where, unless we act soon, we could be facing another catastrophe on the order of September 11th.” Congressman Hayworth recalls a flight over the U.S.-Mexico border and being told “that a determined and properly equipped enemy with military training—especially Islamic terrorists trained in the mountains of Afghanistan and Pakistan—would have no problem striking out over those mountains [of the U.S.-Mexico border] and sneaking into the country.” He then segues into a discussion about the threat posed by al Qaeda and weapons of mass destruction, including chemical, biological, radiological, and nuclear weapons.

Congressman Hayworth takes issue with testimony by U.S. Admiral Loy before Congress that there has been “no conclusive evidence” that al Qaeda operatives have slipped across the U.S.-Mexico border to “infiltrate the United States.” He writes: “But what would conclusive evidence look like? Another September 11? A mushroom cloud? Some of the September 11 terrorists were in America for more than a year before they struck. . . . How do we know another such terrorist team is not here already?”

Acknowledging that “[t]he vast majority of illegal border crossers are Mexican,” Congressman Hayworth then attacks illegal immigration from another front:

25 Hayworth, supra note 2.
26 Sean Hannity, Introduction, in Hayworth, supra note 2, at ix–x.
27 Hayworth, supra note 2, at 5.
28 Id. at 6.
29 Id. at 5.
30 Id.
31 Id. at 1.
In 1920 the two largest groups of immigrants were Germans and Italians, who together totaled 24% of overall immigration. Today Mexico alone accounts for an unprecedented 30% of overall legal immigrants. Factor in millions of illegal immigrants, 60 to 70% of whom are Mexicans, and the percentages explode...

Allowing one nationality to dominate immigration this way not only violates one of the bedrock principles of our immigration policy—diversity of admission—but also makes assimilation nearly impossible. Out of one, many. But out of two, what? The answer may be a breakdown in social cohesion.

Mark Steyn makes the point: “If there are three, four, or more cultures, you can all hold hands and sing ‘We are the World.’ But if there are just two, that’s generally more fractious. Bicultural societies [sic] are among the least stable in the world.”

To the ominous sound of immigration and terrorism, Hayworth adds a further claim: that immigration threatens to cause social fractiousness and instability.

Congressman Hayworth rings another alarm bell in a section entitled “Illegal Alien Crime Spree.” In this section, Hayworth writes that he is “referring to those Americans murdered, raped or assaulted by criminal illegal aliens each year.” He writes: “Although our first priority must be to stop terrorists from breaching our borders, there are many vicious criminals who also see the U.S. as fertile ground for violence... In fact, illegal aliens have committed many of the most heinous and sensational crimes in recent memory.” He sets forth a bullet-point list of lurid crimes, beginning with serial killings and rapes by “Railroad Killer” Angel Maturino Resendez, who “had been deported several times” and “was able to sneak back into the country with no problem.”

B. Catalysis of Illusory Correlation Cascades

Such legislator messages to the polity can be summarized in one cognitive equation: undocumented “aliens” = danger, particularly terrorism risk. But as a matter of numbers, the meta-message does not fit the vast major-

32 Id. at 52.
33 Id. at 28.
34 Id. at 29.
35 Id.
36 The equation process is transitive:

(1) unauthorized immigration = danger, particularly terrorism risk,
(2) unauthorized immigration = undocumented “aliens” (flow), so, transitively,
(3) undocumented “aliens” = danger, particularly terrorism risk.
ity of undocumented people. Even immigration hard-liners, like Congressman Hayworth, acknowledge that the vast majority of people who come across the border are Mexicans.\textsuperscript{37} According to 2000 U.S. census figures, an estimated 68.7\% of undocumented immigrants in the United States are from Mexico.\textsuperscript{38} Based on a March 2005 Current Population Survey and other sources, the nonpartisan Pew Hispanic Center also estimates that as of March 2005, 56\% of the 11.1 million unauthorized immigrants in the United States were from Mexico.\textsuperscript{39} The vast majority (78\%) of all unauthorized immigrants were from Latin America as a whole.\textsuperscript{40}

Throughout our nation's long history, Mexicans and other Latin Americans have generally not been associated with the terrorism that we now fear so fiercely. Instead, the popular portrayal is of people coming for work and a better life.\textsuperscript{41} As protester David Gonzalez put it: "When did you ever see a Mexican blow up the World Trade Center? Who do you think built the World Trade Center?"\textsuperscript{42}

The array of reported immigrant motivations for moving to the United States are as hopeful and familiar as the inscription on the Statue of Liberty: escaping crushing poverty or persecution, reuniting with family members in the United States, and generally securing a better life.\textsuperscript{43} It is a mistake to conflate people coming to achieve a better life with terrorists intent on destroying life. Terrorism and safety are important concerns, but equating undocumented immigrants with terrorists is overbroad and inaccurate for most immigrants who are affected by legislation and perception predicated on the mistaken equation.

\textsuperscript{37} Hayworth, supra note 2, at 1.
\textsuperscript{38} Lee, supra note 11.
\textsuperscript{40} Id.
\textsuperscript{42} Peter Prengaman, 500,000 Rally for Migrant Rights, Daily Breeze (Torrance, Cal.), Mar. 26, 2006, at A1.
People's susceptibility to making the mistake can be explained cognitively. The meta-message of aliens = danger, particularly terrorism, is an illusory correlation. Illusory correlations describe distorted perceptions of correlation.\textsuperscript{44}

There are two main bases for the formation of illusory correlations.\textsuperscript{45} The first are termed distinctiveness-based illusory correlations, which relate to the formation of stereotypic attitudes.\textsuperscript{46} The distinctiveness-based theory, a leading explanation for illusory correlation formation, posits that infrequently encountered groups and deviant behaviors are cognitively linked in our perception because both are infrequently encountered and striking in their joint infrequency.\textsuperscript{47}

The second species of illusory correlations, called expectancy-based illusory correlations, relate "to mechanisms whereby existing stereotypes become self-perpetuating and resistant to change."\textsuperscript{48} Stereotypes are "special cases of expectancy-based illusory correlations," whereby the perceiver expects a correlation between a group and a characteristic.\textsuperscript{49} People operating under an expectancy-based illusory correlation have difficulty keeping "old expectations apart from new empirical data" or engaging in "fair and impartial assessment of empirical observations, uncontaminated by the observer's subjective beliefs or wishes."\textsuperscript{50} Under an expectancy-based illusory correlation, information playing upon pre-existing stereotypes leads to overestimation and conflation.\textsuperscript{51} Once a bias has solidified, we tend to focus on belief-confirming incidents and discount information that does not fit our view, a cognitive phenomenon called confirmation bias.\textsuperscript{52}

Both factors are potentially at play in the immigration-terrorism correlation being propagated. Because of their unauthorized status, undocumented migrants live at the margin of frequent public perception.\textsuperscript{53} We "meet" undocumented migrants in lurid, memory-imprinting news events, like the sniper shootings by "illegal alien Lee Boyd Malvo" and terrorist attacks—salient events emphasized by Congressman Hayworth and other get-tough reform proponents.\textsuperscript{54} The tragic events are striking and become

\textsuperscript{44}Fiedler, \textit{supra} note 3, at 27.
\textsuperscript{46}Id. at 45.
\textsuperscript{47}Fiedler, \textit{supra} note 3, at 34.
\textsuperscript{48}Hamilton et al., \textit{supra} note 45, at 45.
\textsuperscript{49}Fiedler, \textit{supra} note 3, at 28.
\textsuperscript{50}Id.
\textsuperscript{51}Hamilton et al., \textit{supra} note 45, at 51.
\textsuperscript{52}Sunstein, \textit{Precautions Against What?}, \textit{supra} note 4, at 28.
\textsuperscript{53}See Lizama, \textit{supra} note 11.
even more salient, because the participants were undocumented immigrants who had previous law enforcement encounters but were not removed. Thus, anger and illegal alienage become mentally linked.

After the formation of the linkage, expectancy-based illusory correlations further cement the mental equation. Each news event involving a crime by an undocumented immigrant reinforces the impression. Cognitive confirmation bias selectively emphasizes news accounts that reinforce the crystallized viewpoint and screens out inconsistent information.

We are all susceptible to this perceptual weakness. The difference between legislators and the rest of us, however, is that legislators have a public megaphone to amplify illusory correlation and create misperception cascades. Social cascades describe the phenomenon whereby information and beliefs are passed along from person to person, each of whom is too busy to apply his or her own analysis. People swept up in an information cascade amplify a social signal, even as they receive the signal, by passing the information on to others. The problem with social cascades is that “early movers” can spread social fear out of proportion to reality.

Legislators are both “early movers” and prime movers, with unique powers. The first aspect of the power is amplified voice derived from the authority of their office and their ready access to media outlets. The second aspect of the power is that legislators are, by position, early movers and thus perception shapers. The polity delegates to its legislators the hard, slow task of processing data and applying reason to complex policy questions. In a sense, we delegate our analysis and reason to legislators and ask them to report back with policies which, ideally, tell us where reasoned analysis should take us.

In reporting back, legislators face a perverse problem, however. We delegate analysis for a reason—it is hard and troubling, and we prefer pre-chewed, easily digested policy bites. When legislators report back they have to present their position to the public in the easily digested policy bites we crave. Thus, not only are legislators human and susceptible to the same cognitive tendencies towards misperception as the rest of us, they labor under a perverse incentive to rely on simplistic and potentially erroneous constructs that ease public digestion. This creates a powerful

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55 See Phyllis Schlafly, Editorial, No Argument Justifies Amnesty for Illegal Aliens, INTELLIGENCER, May 5, 2004, at 6A (referencing the fact that the September 11 hijackers and Malvo were illegal aliens who had previously been apprehended by law enforcement but not removed).

56 Sunstein, Precautions Against What?, supra note 4, at 21–22.

57 Id. at 22.

58 Id. at 22–23.
incentive to simplify a position and make it intuitively compelling, which can lead to legislative promulgation of erroneous constructs as a basis for simplifying—but ultimately misleading—decisions on complex issues.

When legislators promulgate such constructs in legislation and through media channels, they trigger cascades of illusory correlation which ripple through the perception of the polity. Legislator-spurred cascades are particularly powerful because they are triggered by those delegated to analyze data and delivered through a polity who is without the relevant data. People without the data to fully analyze an issue are particularly susceptible to data gap-filling "with epistemic expectations, which afford useful default knowledge."\textsuperscript{59} The ease of spread of an illusory correlation, like the alien-danger equation, is facilitated by the fear surrounding it; studies show that fear is a powerful mechanism in propagating and cementing illusory correlations.\textsuperscript{60}

C. Manufactured Heuristic Mistake

In publicly promulgating a simplifying construct, like equating immigration control with antiterrorism and undocumented migrants with danger, legislators manufacture a decisional heuristic. Heuristics describe a cognitive process by which people faced with a hard question substitute a simpler one.\textsuperscript{61} Heuristics "are judgmental shortcuts, efficient ways to organize and simplify political choices" in the absence of full information.\textsuperscript{62} Using heuristics, people "substitute low-cost cues for the detailed information that they lack."\textsuperscript{63}

Once immigration is equated with terrorism and danger, an obvious decisional heuristic is manufactured: do we want to ramp up our protections against danger and terrorism? That easy question, with an obvious answer, replaces the hard question of balancing conscience, privilege, property, race, social order, and control that has long perturbed the nation in the context of immigration.

One of the fundamental insights of the "heuristics and biases program" pioneered by social psychologists Daniel Kahneman and Amos Tversky is that we sometimes deviate from rational decision-making because

\textsuperscript{59} Fiedler, supra note 3, at 30.
\textsuperscript{60} Galen V. Bodenhausen, Emotions, Arousal and Stereotypic Judgment: Heuristic Model of Affect and Stereotyping, in AFFECT, COGNITION, AND STEREOTYPING, supra note 45, at 13, 18; Hamilton et al., supra note 45, at 52.
\textsuperscript{61} Kahneman, Perspective, supra note 4, at 707; Sunstein, Precautions Against What?, supra note 4, at 14.
of reliance on heuristics.\textsuperscript{64} Much of the analysis of heuristics has centered on the basic, general estimations that our minds have evolved to make.\textsuperscript{65} For example, under the availability heuristic, when we do not know the probability of a risk befalling us or a risk’s magnitude, we tend to substitute a cognitive rule of thumb: how readily do examples of the harm come to mind?\textsuperscript{66}

Heuristics all involve attribute substitution, “in which difficult judgments are made simpler by substituting conceptually or semantically related assessments that are simpler and more readily accessible.”\textsuperscript{67} In place of a hard-to-assess concept, called the target attribute, people substitute another, easier issue or measure, called the heuristic attribute.\textsuperscript{68}

Because the simplified measure may not map accurately to the actual attribute, and heuristics are applied to the neglect of other considerations, deviations from rational judgment may occur.\textsuperscript{69} In the heuristics and biases school of thought, the term bias denotes when people relying on a heuristic depart from normative rational theory, a marker for the heuristic underneath.\textsuperscript{70} For example, people relying on an availability heuristic may misjudge the probability and magnitude of a harm because they base their measure on recollection of a dramatic case.\textsuperscript{71} A risk that is remote or not typical of a situation may still look alarmingly real if it arouses the imagination in a way that seems plausible.\textsuperscript{72} Heuristics can therefore lead “to severe and systematic errors” that can be analyzed and anticipated.\textsuperscript{73}

Just as reliance on the natural heuristics our minds have evolved to use can lead to decisional error, reliance on a heuristic manufactured using an illusory correlation can lead to decisional error. Indeed, the risk of error is much greater in the case of the manufactured heuristic. The natural heuristics our minds rely on are, in many contexts, quite sensible means of quick and rough estimation; that is why our minds have evolved to rely on those rules.\textsuperscript{74} There is no such mental evolutionary vetting process with a manufactured heuristic. Rather, as in the case of the alien dan-

\textsuperscript{64} Gilovich & Griffin, supra note 8, at 4.
\textsuperscript{65} Id. at 1, 3.
\textsuperscript{66} Sunstein, Precautions Against What?, supra note 4, at 14.
\textsuperscript{67} Daniel Kahneman & Shane Frederick, A Model of Heuristic Judgment, in The Cambridge Handbook of Thinking and Reasoning 287 (Keith J. Holyoak & Robert G. Morrison eds., 2005) [hereinafter Kahneman & Frederick, A Model].
\textsuperscript{68} Kahneman, Perspective, supra note 61, at 707.
\textsuperscript{69} Amos Tversky & Daniel Kahneman, Extensional Versus Intuitive Reasoning: The Conjunction Fallacy in Probability Judgment, in Heuristics and Biases, supra note 5, at 19, 20.
\textsuperscript{70} Gilovich & Griffin, supra note 8, at 3.
\textsuperscript{71} Id.
\textsuperscript{72} Karl Halvor Teigen & Wibecke Brun, Anticipating the Future: Appraising Risk and Uncertainty, in Decision Making: Cognitive Models and Explanations 112, 121 (Rob Ranyard et al. eds., 1997).
\textsuperscript{73} Amos Tversky & Daniel Kahneman, Judgment Under Uncertainty: Heuristics and Biases, in Judgment Under Uncertainty 3 (Daniel Kahneman et al. eds., 1982).
\textsuperscript{74} Gilovich & Griffin, supra note 8, at 1, 3.
ger heuristic, the manufactured heuristic can draw wholly from mistaken perception, an illusory correlation.

II. HEURISTIC DANGEROUSNESS

There are dangers in legislative promulgation of an overbroad immigrant-danger equation. The risk in the dangerous alien construct is the promulgation and conditioning of the intuition that undocumented "aliens" are dangerous and the concomitant masking of the complex questions in immigration reform that require full public airing and careful consideration.

There are at least two harms to social cognition. The first is propagation of instinctive fear and mistrust toward a group of people who have no political voice or voting check by which to seek redress or moderation in legislative rhetoric. The second is the short-circuiting of social conscience with an illusory correlation that permits blame in lieu of the harder social self-searching that comes with legislating in the clash between social justice and social order.

As a general matter, heuristics can plant fear and mistrust where none existed before or amplify existing fear and mistrust to proportions far exceeding rational justification. In legislative dialogue, there is a danger that heuristics of mistrust and fear will be deployed against those who are unrepresented or underrepresented because there is not the typical voter check to induce more careful constructs.

In the instance of immigration reform’s illusory correlation, promulgation of an equation between undocumented people and danger crystallizes a stereotype of danger and terrorism that inflames perceptions against more than 11 million people in our populace. Stereotypes are, after all, a species of judgmental heuristic, ill-fitting rules of thumb applied to people instead of reasoned perception. Once entrenched, mistaken stereotypes are hard to rectify.

The stereotype of danger and terrorism is inaccurate for the overwhelming majority of the more than 11 million undocumented people in our populace. The vast majority of people who will be affected by such stereotyping are economic refugees who remain today what they long have been—people with clean records besides their undocumented entry, who are driven by need, their dreams, and a desire to work. This overwhelming majority of affected people did not somehow change following the heartbreaking events of September 11—only the rhetoric and the heuristic caricature imposed on them have changed.

75 Bodenhausen, supra note 60.
77 See supra notes 39–40 and accompanying text.
The group against which fears are inflamed has a predominantly ethnic or racialized face. The Pew Hispanic Center estimates that the vast majority—78%—of all unauthorized immigrants, are from Latin America. The second largest percentage—13%—also present a racialized face; they are Asian. Stirring sentiments and stereotypes of danger to security against a group visually marked by ethnicity or race risks reinforcing or incorrectly justifying negative perceptions of those ethnicities or races generally.

A July 2006 poll by the Pew Hispanic Center bears out this concern. More than half of 2,000 Latinos surveyed believed that discrimination has increased after passage of the House bill and the ensuing fierce immigration debate.

The data troublingly demonstrates the disruption of a relative cognitive peace. A March 2006 survey by research groups CIDAC and Zogby International, for example, found that 67% of Americans believed that Mexicans make a positive contribution to the economy and 85% of Americans had a favorable or very favorable view of Mexicans. The survey noted, "On the whole, Americans questioned viewed Mexicans as hardworking and honest." Though jobs have long been a fractious issue, a Field Poll found that two-thirds of the polity in California, a border state, favored a temporary guest worker program and 70% were not worried about illegal immigrants taking jobs away. Why disturb this relative peace in perception by injecting new imageries of danger and terrorism?

There is a second type of harm even more subtle than the first. Sometimes compassion and the venerable ideal of equality of opportunity clashes with taken-for-granted notions of property and privileges. The heuristics of dangerousness are a tool to avoid guilt and searching examination over the allocation of privileges by heaping blame on those who would otherwise goad us into guilt. We mute our social conscience and concern over people who overwhelmingly are persistent dreamers like the ancestors or parents of most of us who are privileged to be born in this nation.

As a short-term strategy, we may have the gratification of cognitive relief from wrestling with hard conflicting interests and our conscience. But the costs are heavy. When we impose tropes of fault and fear upon a group distinct predominantly by national origin and race, we—not they—generate social volatility.

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78 Passel, supra note 39, at 4.
79 Id.
82 Id.
III. MITIGATION

We can ameliorate the harm of catalysis of illusory correlation, heuristic mistake, and heuristic dangerousness. We can do this by addressing the problem at the start, when the cascades are activated. The strategies for mitigation are based on a fundamental social psychological insight: people alerted to the fact that they are operating under a heuristic will cognitively counteract the distorting effect. Reducing distortions from intuitive error is the task of the cognitive system of reason. Our cognitive system of reason kicks in to override or modify intuitive judgments that we have identified as distorted. This insight is relied on in other aspects of law; for example, jurors whose perception may be distorted by an outrage heuristic are instructed to consider other factors. Distortions caused by neglected variables can be mitigated by drawing attention to them.

The key, then, is to alert policy leaders and perceivers to potential distorting illusory correlations and resultant misguiding heuristics. There are two complementary ways to activate reason and dispel distortion. Each approach involves key institutional players: (1) the cascade catalyzers, legislators, and (2) alert-amplifying civil society elements like the media, advocacy groups, and the ultimate amplifier and perceiver, the polity.

A. Legislators: Resolutions and Commitmentalism

We rely on legislators to engage in vigorous and free-wheeling debate of a character at the core of First Amendment protections, political speech. No curative approach with regard to legislative speech can or should restrain speech content. The approach should not be external constraint; it should be internal restraint. It should be the illumination of possible distorting illusory correlations and heuristics so that they can be recognized and voluntarily ameliorated through a process of reason. The illumination can also constitute a commitment to reason.

Legislators have a mechanism to illuminate and express commitment without constraint—the nonbinding resolution. In Congress, there are two forms of nonbinding resolutions. A nonbinding resolution passed by both

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84 For a summary of studies showing the distortion-eliminating effect of alerting the perceiver to a misguiding heuristic, see Kahneman, Perspective, supra note 61, at 711–12.
85 Kahneman & Frederick, Representativeness Revisited, supra note 5, at 68.
86 Kahneman, Perspective, supra note 61, at 711.
88 Kahneman & Frederick, Representativeness Revisited, supra note 5, at 69.
houses of Congress is called a concurrent resolution. Concurrent resolutions are not signed by the president and do not have the force of law, but they can be used to express the "sense of Congress" on an issue. Alternatively, each house can pass its own nonbinding simple resolution. A simple resolution also is "not legally binding or enforceable" and is not signed by the president. The simple resolution can be used to express the sense of the passing chamber on an issue.

Using resolutions, Congress can promulgate its own alert to distorting effects and express commitment towards caution. The text of the resolution can be based on messages that several legislators have been commendably trying to circulate to counter the illusory correlation. For example, Congresswoman Sheila Jackson Lee has stated clearly and crisply: "immigration does not equate to terrorism."

A resolution can crystallize commitment towards fair imagery and responsible rhetoric. A resolution can express the sense of Congress that though recent tragic terrorist acts have drawn attention towards border security, the vast majority of people flowing over the borders are hard-working people who contribute to the nation rather than pose a danger. The attention to border security does not reflect negative perception of immigrants. Rather, we are focusing on border security to safeguard against the probability of the dangerous slipping in undetected with the vast majority of hard-working immigrants.

Though resolutions are non-binding, they have a subtle power. The power derives from commitment. Congressional insiders have repeatedly remarked on one of Congress's most little-known and admirable cultural characteristics—honoring commitments.

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91 Congressional Quarterly, Inc., How Congress Works 61 (3d ed. 1998). As one court put it:

[A] concurrent resolution, is, by its very nature a nonbinding expression of the sense of both houses of the Congress. Because concurrent resolutions cannot become law, they are not presented to the White House for approval. See, Procedural Steps in the Legislative Process, Sen.Doc. 20, 97th Cong.2d Sess. 8. By contrast, a House or Senate bill which is approved in each chamber and signed by the President becomes a public law affecting the nation as a whole.

92 Congressional Quarterly, Inc., supra note 91, at 61.
93 Davidson & Oleszek, supra note 90.
94 Congressional Quarterly, Inc., supra note 91, at 61.
Former Indiana Congressman Lee H. Hamilton has written, "[o]n Capitol Hill, trust is the coin of the realm." Former New Jersey Senator Bill Bradley recalled, "[i]f people give you a commitment, it is unlikely that they will renege on it; that's part of the honor of the Senate. Your word is one of the few currencies that can be spent."

In joining a resolution that commits to distinguishing between the vast majority of immigrants and the heightened focus on terrorism risk, legislators not only activate their own reason, they activate their commitment towards promulgating reasoned rhetoric.

B. Civil Society: Counterheuristic Cascades

Correction for distorting effects can come from another, powerful front: the message amplifiers of civil society. Media is, of course, one of the largest megaphones and an historical political check. But so are organized groups of the passionately committed. And, of course, the ultimate amplifier of all is the polity as a whole. Imagery cascades may be initiated by the media or organized and deployed by passionately committed groups. But the curatives flow from each individual perceiver in the polity who both receives and amplifies the message.

In the heuristics and biases literature, media is often described as the mode of propagating distorted perceptions of risk; for example, fueling perceptions of an epidemic when there is none. But this powerful engine of perception can also be deployed for counterheuristic cascades to disrupt or disturb the cascades of heuristic dangerousness catalyzed by legislation or legislators. For example, a New York Times editorial injected a counterheuristic during the height of the boil over immigration reform:

The illegal immigrants who trim our hedges, prepare our food and care for our children have been compared to an invading army. If so, they have descended on a land desperate for occupation. This is a nation that insists on paying as little as possible for goods and services, and as long as it remains impractical to send lawns, motel beds and dirty dishes overseas, determined immigrants and semiporous borders will continue to feed the American addiction to cheap labor.

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96 LEE H. HAMILTON, HOW CONGRESS WORKS AND WHY YOU SHOULD CARE 82 (2004).
97 BILL BRADLEY, TIME PRESENT, TIME PAST 61 (1996).
98 See, e.g., Sunstein, Precautions Against What?, supra note 4, at 20 ("In many cases of high-visibility, low-probability dangers, such as sniper attacks, shark attacks, contaminated blood, and the kidnapping of young girls, the sources of availability are not obscure. The mass media focus on those risks; people communicate their fear and concern to one another; the widespread fact of fear and concern increases media attention; and the spiral continues until people move on.").
The editorial combats the threatening martial imagery of the immigrant as dangerous with a counterheuristic of the immigrant as a commonly encountered, hard-working, and contributing part of our social fabric. If the larger social cognitive battle is over imagery, who better to duel in imagery than those whose special skill is imagery generation?

Organized groups can also mobilize mass movements to bring the human faces distorted by illusory correlations back into focus. Groups have the power of grassroots mobilization of the most powerful imagery of all—people in protest. Groups can give amplified voice to those effaced by illusory correlations. For example, Max Montesino’s group, the Hispanic Leadership Coalition of Northeast Indiana, was among those rallying in protest in Fort Wayne, Indiana, against the House bill. Said Montesino of the House bill: “It lumps together terrorists and immigrants, and that’s absolutely wrong.”

Religious groups are powerful forces as well. Religious leaders have also tried to inject reason and humanity to defray the terrorist alien heuristic. For example, Los Angeles Roger Cardinal Mahoney has forcefully intervened in the immigration reform battle, emphasizing: “[t]he war on terror isn’t going to be won through immigration restrictions.”

To take another, salient example, some of the most compelling faces in the immigration clash are the children affected. To get youth faces in the forefront, Ricardo Martinez, co-director of the student-led sixty-member Jovenes Unidos (Youth United) at his school, helped mobilize students to join a massive protest against the House bill. Many of the youths said they and their families would be affected by tougher immigration laws. In another protest in Utah, twelve-year-old Alicia Basto said: “I’ve got to stand up for my parents, for my people.” In Miami, student protest organizer Franco Caliz-Aguilar said: “Youths are definitely going to be hurt by [the House] legislation which is why it has received such a strong reaction from coast to coast.”

The media and mobilized groups are mutually reinforcing. The media directs its cameras and pens towards the most salient imagery that the mobilized groups generate. For example, newspapers around the country focused on the phenomenon of students in their community galvanized to action because of fears for their families. The elements of civil society

100 Lee, supra note 11.
102 Rosa Ramirez, Rally for Immigrants: Westminster High Students Gather in Civic Center, ROCKY MOUNTAIN NEWS (Colo.), Mar. 29, 2006, at 21A.
103 Id.
104 Bulkeley & Toomer-Cook, supra note 16.
105 Students Plan Walk out to Protest House Immigration Bill, MIAMI HERALD, Mar. 29, 2006.
106 E.g., Susan Abram, Students Return to Class: Reflect on Turbulent Week, DAILY NEWS (L.A.), Mar. 30, 2006, at N4; Cho & Gorman, supra note 16; Cynthia H. Cho & Kelly-Anne Suarez, Protesters Face Truancy: San Diego's Buzzing, L.A. TIMES, Mar. 30, 2006; Cyndee
Harvard Latino Law Review
together produce a strong counterheuristic to the illusory correlation of the non-citizen “alien” with danger.

Such vivid counterheuristics flow through the polity and are amplified when processed and passed from perceiver to perceiver. In the clash of heuristics and countervailing cascades, reason is jarred. And that is the best goal and hope of deliberative democracy.

IV. CONCLUSION: RECOGNITION EDUCATION

Before we get to the rights and wrongs of substantive immigration reforms, we need to redress the cognitive pathology of conflation now in circulation. A cognitive battle is being waged underneath the more visible war over the rights and wrongs of the substantive content of legislation. The rhetoric over immigration has been so dismaying that President Bush recently intervened, asking that Congress and other commentators “make sure the rhetoric is in accord with our traditions” and urging: “[n]o one should play on people’s fears or try to pit neighbors against each other.”

Cognitive conflation is a dangerous basis for reform. Legislator promulgation of illusory correlation can trigger cascades of misperception and a mistaken decisional heuristic scarring our social cognition.

If we learn to recognize the mistakenly manufactured cognitive pathology, we can ameliorate the harms wrought. Recognition education calls for understanding why illusory correlations crystallize and how legislators can catalyze cascades of misperception. Lifting the distorting lens of illusory correlation brings into focus the real, hard questions of conscience, property, privilege, order, humanity, and human need that are at issue in immigration reform.

There are no easy answers to such intractable issues, and it is tempting to short-circuit the painful social self-examination involved in formulating an answer. But it is better to invest the energy and reason in confronting the hard issues at the outset, rather than labor under a mistaken heuristic that masks the harms this nation inflicts on itself and on those who look to it as a cherished dream.

