

# NO MATTER WHAT: THE INEVITABILITY OF MEXICAN – U.S. MIGRATION, AND ITS LESSONS FOR BORDER CONTROL STRATEGIES

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## *Table of Contents*

I. INTRODUCTION .....	1851
II. RECENT LEGISLATIVE PROPOSALS AND AMENDMENTS AIMED AT CURTAILING UNAUTHORIZED MIGRATION.....	1854
III. THE EFFECTS OF ENFORCEMENT MEASURES ON THE RATES OF UNAUTHORIZED IMMIGRATION – A HISTORICAL PERSPECTIVE .....	1858
IV. THE INTERRELATEDNESS OF U.S. ECONOMIC POLICY TOWARD AND MIGRATION FROM MEXICO .....	1866
V. TOWARDS A FUNDAMENTAL SHIFT IN US-MEXICO RELATIONS ...	1872

## I. INTRODUCTION

Recent events have unearthed a firestorm around the issue of border enforcement in the United States.<sup>1</sup> The state of Arizona passed S.B. 1070, a law that directs state and local law enforcement to ascertain the immigration status of anyone officers have a “reasonable suspicion” of being “an alien unlawfully in the United States.”<sup>2</sup> The response included protests and an announcement by the Democratic Party of its “framework” for immigration reform.<sup>3</sup> The framework follows the model of bills for immigration reform in recent years, pairing the legalization of undocumented immigrants currently living in the United States with increased enforcement personnel and spending at the border and in the interior of the United States. The latter, which is the focus of this Article, is the reform being stressed in the wake of Arizona’s bold initiative as federal lawmakers rush to concede that Arizonans acted due to a failed

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1. See Randall C. Archibald, *Arizona Enacts Stringent Law on Immigration*, *N.Y. Times*, April 23, 2010, available at [http://www.nytimes.com/2010/04/24-us/politics/24immig.html](http://www.nytimes.com/2010/04/24/us/politics/24immig.html) (last visited May 4, 2010).

2. Arizona S.B. 1070, Section 11-1051(B).

3. Spencer S. Hsu, *Democrats’ Immigration Plan Shows Shift Towards Republicans’ Views*, *WASH. POST*, May 1, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/01/AR2010050100990-.html?hpid=topnews>.

federal border policy.<sup>4</sup> The idea that increased border enforcement will stem the flow of unauthorized migration is built on two assumptions that will be critiqued in this Article. The first assumption is that increased enforcement measures will decrease the number of unauthorized migrants that enter the country each year. Though this premise seems logical on its face, it has been disproved by every entity that has studied the efficacy of past enforcement efforts dating back to 1986.<sup>5</sup> Through various research methodologies, these studies make it clear that the massive increases in spending and personnel to secure the border and increase interior enforcement have not had any appreciable effect on the number of people entering the United States without authorization. In fact, according to some, those same efforts have actually increased the number of people who remain in the United States despite their lack of status because the journey has become so expensive and dangerous.<sup>6</sup>

The second assumption underlying any proposal to increase enforcement is that domestic immigration policy *should* be geared toward controlling the number of migrants that enter the United States without authorization. Others have critiqued this assumption and argued that immigration policy makers should end their obsession with controlling migrant numbers for moral, economic, and geopolitical reasons.<sup>7</sup> Those same authors argue for reexamining the immigration policy that seeks only to decrease the rate of unauthorized migration for pragmatic and theoretical reasons. Some argue that people will continue to migrate and the solution is to expand categories of lawful migration.<sup>8</sup>

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4. Hsu, *supra* note 3.

5. See Jeffrey S. Passel, Pew Hispanic Ctr., *The Size and Characteristics of the Unauthorized Migrant Population in the US: Estimates Based on the March 2005 Current Population Survey* (2006), available at <http://pewhispanic.org/files/reports/61.pdf>; see also Wayne A. Cornelius, *Impacts of Border Enforcement on Unauthorized Mexican Migration to the United States*, House of Representatives, Aug. 2, 2006. See also JORGE DURAND & DOUGLAS S. MASSEY, *CROSSING THE BORDER: RESEARCH FROM THE MEXICAN MIGRATION PROJECT* (2004).

6. DURAND & MASSEY *supra* note 5; Cornelius, *supra* note 5.

7. KEVIN R. JOHNSON, *OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS* (New York University Press 2007); Walter A. Ewing, *From Denial to Acceptance: Effectively Regulating Immigration to the United States*, 16 STAN. L. & POL'Y REV. 445.

8. See, e.g., Ajay Malshe, *From Obsolete to Essential: How Reforming Our Immigration Laws Can Stimulate and Strengthen the United States Economy*, 3 ALB. GOV'T L. REV. 358, 381-82 (arguing for an increase in the number of H-1B nonimmigrant visas and reforms to the per-country limits for employment based immigrant visas); Stephen Yale-Loehr and Christoph Hoashi-Erhardt, *A Comparative Look at Immigration and Human Capital Assessment*, 16 GEO. IMMIGR. L.J. 99, 131-32 (arguing that the U.S. should adopt a point based system for economic immigrants like the systems in Canada and Australia); DEMETRIOS PAPADEMETRIOU & STEPHEN YALE-LOEHR, *BALANCING*

Others argue that migration should be seen through the lens of U.S. and foreign economic policies<sup>9</sup> and the consequences to migrants.<sup>10</sup> This Article builds on the connections drawn by others between the United States and global trade and economic policies and migration to argue that the United States cannot credibly seek to limit migration to our territory when our own economic and trade policies contribute heavily to the conditions for such migration in the first place.<sup>11</sup> Despite this overwhelming academic research indicating that border enforcement is ineffective and morally problematic, it continues to be a feature of proposals to reform the immigration law because it is politically palatable. No politician wants to be known as the person recommending decreased enforcement, particularly in an era when states and localities like Arizona are frustrated by what they see as inadequate enforcement at the federal level.<sup>12</sup> Despite these political hurdles, the empirical evidence is clear enough to require reexamination of the reflexive response to unauthorized migration in the form of increased border security. This requires close examination of the reasons underlying migration, also known as “push factors.” Particularly relevant are examinations of migration from Mexico, since 59 percent of the current population of unauthorized migrants are from Mexico,<sup>13</sup> and because much of the debate surrounding unauthorized migration focuses on migrants from Mexico.<sup>14</sup>

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INTERESTS: RETHINKING U.S. SELECTION OF SKILLED IMMIGRANTS, 28-30 (1996) (arguing that the labor certification for second and third preference employment based immigrants be abolished in favor of a test for long term contribution to the economic strength of the United States).

9. Ewing, *supra* note 7, at 445-46; Lucy A. Williams, *Property, Wealth and Inequality Through the Lens of Globalization: Lessons From the United States and Mexico*, 34 IND. L. REV. 1243 (2001).

10. JOHNSON, *supra* note 7, at 107-125.

11. Ewing, *supra* note 7, at 458.

12. See Paul Davenport and Jonathan J. Cooper, *Governor Jan Brewer Signs Controversial Immigration Bill: Decision Not Made “Lightly,”* THE HUFFINGTON POST, April 23, 2010, available at [http://www.huffingtonpost.com/2010/04/23/jan-brewer-arizona\\_govern\\_n\\_549290.html](http://www.huffingtonpost.com/2010/04/23/jan-brewer-arizona_govern_n_549290.html) (quoting Governor Brewer after signing the law as stating, “We in Arizona have been more than patient waiting for Washington to act . . . . But decades of inaction and misguided policy have created a dangerous and unacceptable situation.”).

13. Jeffrey S. Passel & D’Vera Cohn, Pew Hispanic Ctr., Trends in Unauthorized Immigration Undocumented Inflow Now Trails Legal Inflow (2008), available at <http://pewhispanic.org/reports/report.php?ReportID=94>.

14. This includes the political debate surrounding immigration. See, e.g., Federation for Am. Immigration Reform, Current Immigration in Perspective: Never Before Has Immigration from One Country Been so Massive, [http://www.fairus.org/site/PageNavigator/facts/research\\_current\\_immigration/](http://www.fairus.org/site/PageNavigator/facts/research_current_immigration/) (last visited June 11, 2010); as well

There is much evidence that suggests that migrants face considerable hardship in order to undertake the journey to the United States. Fees for guides or “coyotes” have skyrocketed, the routes have become more and more dangerous, the separation from their families is often much longer than expected, and even once entry is obtained, migrants live in constant fear of being found.<sup>15</sup> These consequences are certainly harsh enough to indicate that the decision to migrate is one of necessity. Once that factor is combined with the economic and political forces underlying the push factors, it becomes necessary to ask ourselves why we continue to seek more punitive and expensive ways to exclude this group of people from the United States.

Part II of this Article summarizes recent proposals for immigration reform, focusing on those aimed at curtailing unauthorized migration. Part III details results from various empirical studies indicating that unauthorized migration has remained unchanged despite increasingly repressive enforcement measures. Part IV examines the factors that cause people to migrate from the perspective of the migrants themselves, drawing attention to the U.S. role in these factors relative to Mexico in particular and illustrating that these push factors are much more responsible for migration than any factors controlled by U.S. immigration policy. Part V argues that, given the U.S. involvement in factors pushing migrants towards it, we cannot credibly seek to control that migration and must instead focus on a solution that takes into account the perspectives of the migrants themselves.

## II. RECENT LEGISLATIVE PROPOSALS AND AMENDMENTS AIMED AT CURTAILING UNAUTHORIZED MIGRATION

Much of the debate in the past three decades on immigration reform has focused on the need to control the flow of unauthorized migration into the United States.<sup>16</sup> Proposed and actual reforms tend to focus on

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as the academic debate on immigration (*see, e.g.* Johnson, *supra* note 7, at 125-29; DOUGLAS MASSEY, JORGE DURAND AND NOLAN MALONE, *BEYOND SMOKE AND MIRRORS: MEXIAN IMMIGRATION IN AN ERA OF INTEGRATION* (2002)).

15. Mollie Cohen, Jonathan Hicken and Jorge Narvaez, *How U.S. Immigration Control Policies Shape Migration from Mexico*, Explaining Outcomes of Immigrations Control Policies: A Comparative Study of Spain and the United States, Final Report, Part 2 Report of Findings 221-238 (manuscript on file with author).

16. *See, e.g.*, PETER SCHUCK & ROGERS SMITH, *CITIZENSHIP WITHOUT CONSENT – ILLEGAL ALIENS IN THE AMERICAN POLITY* 4-5 (1985); Max J. Castro, *Toward a New Nativism? The Immigration Debate in the United States and Its Implications for Latin America and the Caribbean*, Trends in International Migration and Immigration Policy in the Americas 33-49 (1999); and DAVID BACON, *ILLEGAL PEOPLE* v-x (2008).

two types of enforcement mechanisms—increasing personnel and equipment at land borders to stop people from coming in and expanding the punitive measures taken against migrants and their employers once they are already inside the United States to make it more difficult to come or to stay.<sup>17</sup> The most infamous bill seeking to address this issue in the last several years was H.R. 4437, which would have made unlawful presence a felony and spurred hundreds of thousands of people to march in protest.<sup>18</sup> Though that bill did not pass the full Congress, other measures that would create a border fence and increase spending on border and interior enforcement were signed by then-President Bush later that same year.<sup>19</sup> Significantly, no provisions that would legalize the status of undocumented workers on even a temporary basis passed the Congress that year or any subsequent year. Thus, the only reform to occur since the 2006 protests is increased enforcement at the southern border in particular.

Before Arizona's S.B. 1070, Representative Luis Gutierrez (D-Ill.) introduced legislation in the House of Representatives that is more comprehensive than those that have passed in recent years.<sup>20</sup> Following the trend of prior reforms in proposing one-time legalizations and increased funding and personnel for greater security measures both along

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17. For example, as this Article is going to print, the Democratic Party unveiled its framework for immigration reform which includes several stepped up enforcement mechanisms such as expansion of the U.S. Border Patrol, tripling of fines for employers who hire undocumented workers and institutes a national identity card. See, Hsu, *supra* note 3. Past efforts have also emphasized enforcement mechanisms, particularly border enforcement mechanisms. See Antonio Izquierdo Escribano and Wayne Cornelius, *Introduction to Explaining Outcomes of Immigration Controlled Policies: A Comparative Study of Spain and the United States* 15 (unpublished manuscript, on file with the author).

18. See Border Protection, Antiterrorism and Illegal Immigration Reform Control Act of 2005, H.R. 4437, 109th Cong. (2d Sess. 2005); Teresa Watanabe & Hector Becerra, *500,000 Pack Streets to Protest Immigration Bills*, L.A. TIMES, Mar. 26, 2006, at A1; *Protests Go On in Several Cities As Panel Acts*, N.Y. TIMES, Mar. 28, 2006, at A12.

19. See Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638 (2006) (providing for the construction of a 700-mile fence on the U.S.-Mexico border; doubling the funding of the Border Patrol, increasing the number of Border Patrol agents and calling for National Guard posts to be sent to the Mexican border); see also Press Release, Office of the Press Sec'y, Fact Sheet: The Secure Fence Act of 2006 (Oct. 26, 2006), <http://georgewbush-whitehouse.archives.gov/news/releases/2006/10/20061026-1.html>.

20. Comprehensive Immigration Reform for America's Security and Prosperity Act of 2009, H.R. 4321, 111th Cong. (1st Sess. 2009) was introduced in the House of Representatives on December 15, 2009. According to the Library of Congress, it currently has 93 co-sponsors available at <http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.4321>: (last visited Mar. 30, 2010). Note that THOMAS indicates erroneously that the bill was introduced by Rep. Solomon Ortiz (D-Tex). *Id.*

the border and in the interior of the United States, Congressman Gutierrez's Bill begins with "Border Security and Enforcement," which contains thirty-nine provisions aimed at fortifying the border.<sup>21</sup> These proposals would, among other things, increase the number of Customs and Border Patrol officers at either land border by about 6,000 by the year 2014<sup>22</sup> and appropriate \$1 billion to the enhancement of the border security measures in each year from 2010 through 2014.<sup>23</sup> The Bill would also create a new visa category, the "Prevent Unauthorized Migration Transitional Visa."<sup>24</sup> As its name suggests, the visa would be available to persons from countries with high rates of unauthorized migration and would be geared towards persons who are ineligible for one of the current immigrant visa categories. Thus, H.R. 4321 continues the trend towards increased enforcement but with a nod towards the push factors of migration by expanding access to lawful migration.<sup>25</sup>

In the Senate, Charles Schumer (D-N.Y.) and Lindsey Graham (R-S.C.) initially announced their framework for reform in an op-ed in *The Washington Post*.<sup>26</sup> The platform includes promises to strengthen border and interior enforcement and to require that biometric Social Security cards be issued to ensure "illegal workers cannot get jobs."<sup>27</sup> Graham has since backed off the plan which will now be co-sponsored by Senator Robert Menendez (D-N.J.).<sup>28</sup> Though it is unclear whether the proposal will make it to the Senate floor, it clearly mimics past efforts at reform by pairing increased enforcement with a one-time legalization and a proposed increase in temporary employment based non-immigrant visas.<sup>29</sup>

Beyond the specific proposals for immigration reform, the rhetoric surrounding such reform has changed very little in the last 30 years. In particular, the security of the southern border has been a preoccupation of commentators and lawmakers alike. Even some immigrant advocacy

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21. H.R. 4321 Title I, Subtitle A. In addition to border enforcement, the Bill would increase the use of detention (*See* Subtitle B) and creates a host of new internal enforcement measures (*See* Subtitle C).

22. H.R. 4321 § 112.

23. H.R. 4321 § 113.

24. H.R. 4321 § 317.

25. *See infra* notes 131-134 and accompanying text.

26. Charles Schumer and Lindsay Graham, *The Right Way to Mend Immigration*, WASH. POST, March 19, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/17/AR2010031703115.html>.

27. *Id.*

28. Jeanine Cummings, *Lindsey Graham: Immigration Must Be Tabled*, THE POLITICO.COM, available at <http://www.politico.com/news/stories/0410/36383.html> (last visited May 4, 2010).

29. Schumer and Graham, *supra* note 26.

organizations place securing borders as a priority for any immigration effort.<sup>30</sup> In the State of the Union address on January 27, 2010, President Obama gave the issue 38 words, “And we should continue the work of fixing our broken immigration system – to *secure our borders, enforce our laws*, and ensure that everyone who plays by the rules can contribute to our economy and enrich our nation.”<sup>31</sup> More recently, in the wake of Arizona’s S.B. 1070, President Obama said,

Government has a responsibility to enforce the law and secure our borders and set clear rules and priorities for future immigration. And under Secretary Napolitano’s leadership at the Department of Homeland Security, that’s exactly what we’re doing. We’ve strengthened security at our borders, ports and airports and we will continue to do so, because America’s borders must be secure . . . . Indeed, our failure to act responsibly at the federal level will only open the door to irresponsibility by others. And that includes, for example, the recent efforts in Arizona, which threatened to undermine basic notions of fairness<sup>32</sup>

The president’s two references to increasing enforcement measures are by now very familiar to those following immigration reform efforts. The assumption underlying the call for increased enforcement is that “securing the border” and enforcing laws more rigidly will increase the cost of migration enough, both to the migrant herself and to her potential employer, to stem the demand for and flow of undocumented labor.<sup>33</sup> However, as the next section shows, the data contradicts that assumption soundly, suggesting instead that such measures have not prevented unauthorized migration. Rather, they have actually increased the population of persons living in the United States without authorization.

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30. See, e.g., *Immigration Policy Center, Comprehensive Immigration Reform: A Primer*, June 24, 2009, available at <http://www.immigrationpolicy.org/just-facts/comprehensive-immigration-reform-primer>.

31. Press Release, Office of the Press Sec’y, Remarks of President Barack Obama as Prepared for Delivery, “The State of the Union” (Jan. 27, 2010), available at <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address>.

32. See Press Release, Office of the Press Sec’y, Remarks by President at Naturalization Ceremony for Active Duty Serviceman (April 23, 2010), available at <http://www.whitehouse.gov/the-press-office/remarks-president-naturalization-ceremony-active-duty-service-members>.

33. Escribano and Cornelius, *supra* note 17, at 20

### III. THE EFFECTS OF ENFORCEMENT MEASURES ON THE RATES OF UNAUTHORIZED IMMIGRATION – A HISTORICAL PERSPECTIVE

There is a fairly broad consensus amongst independent researchers that increased enforcement efforts have not resulted in any appreciable decrease in unauthorized migration.<sup>34</sup> Unauthorized immigration to the United States has been a prominent feature of migration to the United States throughout its history. Since the federal government started implementing controls on immigration, there have been people who bypassed those controls to enter the United States without authorization. At the same time, policy makers have been preoccupied with finding ways to stem the flow of unauthorized migrants to the United States. What follows is a brief summary of the studies that have been done on migration patterns and the effects of increased enforcement measures on those patterns from 1965 to present. Much of the research focuses on migration from Mexico; thus, this Article limits its analysis and conclusions to reflect the connection between increased enforcement measures in the United States and unauthorized migration from Mexico.<sup>35</sup>

From 1965 to 1986 about 28 million Mexicans entered the United States without authorization.<sup>36</sup> Researchers have conclusively found that after a few years of work in the United States, 23 million of these migrants, or 80 percent of them, returned home.<sup>37</sup> This cyclical migration has been described by many scholars as a key feature of Mexican migration to the United States.<sup>38</sup>

In 1986, this cycle began to change. That year, Congress passed the Immigration Reform and Control Act (IRCA), which resulted in a number of first time immigration controls, including a provision that

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34. See *id.* at 16; DURAND & MASSEY, *supra* note 5, at 12; BELINDA I. REYES, HANS P. JOHNSON AND RICHARD SWEARINGEN, HOLDING THE LINE? THE EFFECT OF THE RECENT BORDER BUILDUP ON UNAUTHORIZED IMMIGRATION, 1-2 (Public Policy Institute of California, 2002). JOHNSON, *supra* note 8, at 133.

35. Catherine Dauvergne argues that the terms “illegal immigrant” and “Mexican” are virtually interchangeable in current political debates about immigration. See CATHERINE DAUVERGNE, MAKING PEOPLE ILLEGAL 155 (2008).

36. MASSEY ET AL., *supra* note 14, at 45; see also Williams, *supra* note 9, at 1246-48 (providing a brief history of Mexican migration to the U.S. and the interrelatedness of labor in the U.S. and Mexico).

37. MASSEY ET AL., *supra* note 14, at 45; see also Williams, *supra* note 9, at 1246-48 for brief history of Mexican migration to U.S. and interrelatedness of labor in the U.S. and Mexico.

38. MASSEY ET AL., *supra* note 14, at 45.



sanctioned employers who hired undocumented workers.<sup>39</sup> By all accounts, these measures did little to stem the then increasing flow of unauthorized migration to the United States.<sup>40</sup> The U.S. government's own figures indicate that despite these controls, the number of people entering the United States without authorization remained constant at a number of about 500,000 per year.<sup>41</sup> Some studies showed a decrease in the number of people seeking entry without authorization in 1988.<sup>42</sup> However, those decreases were not tied to the increases in enforcement but rather the increased level of authorized migration that accompanied the legalization provisions of IRCA.<sup>43</sup> Other research indicates that the number of women and children seeking unauthorized entry actually spiked during this time.<sup>44</sup>

Even assuming there was a decrease in 1988, that decrease was temporary, and from 1989 through 2002, the rates of unlawful entry remained constant despite marked increases in enforcement measures.<sup>45</sup> Conservative estimates indicate that spending on enforcement activities more than quadrupled from 1985 to 2002.<sup>46</sup> This increase broke down into an increase of \$2.1 billion (306 percent) for "appropriations for border control activities, including the Border Patrol, inspections at legal ports of entry, and consular affairs; an increase of \$1.4 billion (751 percent) for detention and removal/intelligence; an increase of \$349

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39. See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986); 8 U.S.C. § 1324(a) (West 2005).

40. Monica L. Heppel & Luis R. Torres, *Mexican Immigration to the United States after NAFTA*, 20:2 FLETCHER FORUM OF WORLD AFFAIRS 51 (1996).

41. Ruth E. Wasem, *Unauthorized Aliens Residing in the United States: Estimates Since 1986*, CONG. RES. SERV. 7-5700, 3 (Aug. 25, 2009), available at <http://www.fas.org/sgp/crs/misc/RL33874.pdf>. Those figures are based on the research of The Pew Hispanic Center, which uses what they call the "residual method," in which the number of people who entered lawfully is subtracted from the number of people who said they were foreign-born in the Current Population Survey. Though the residual method has become widely accepted as a way to count the population of unauthorized migrants, there are some who critique it as undercounting the population because the latter figure comes from surveys that may not reach a number of households with unauthorized members. The authors concede that there is a range of approximately one million between the lowest estimates and the highest estimates from the residual method, and that the figures they report were in the middle of that range.

42. *Id.*

43. Reyes et al., *supra* note 34, at 12-13; Wasem, *supra* note 41, at 6.

44. Cohen et al., *supra* note 15, at 243.

45. Passel, *supra* note 5, at 2; Wasem, *supra* note 41.

46. See Migration Policy Institute, *Immigration Enforcement Spending Since IRCA*, 10 IMMIGR. FACTS 4 (Nov. 2005); cf. Cornelius, *supra* note 5 (indicating that spending increased by six times over the same period).

million (320 percent) for interior investigations.<sup>47</sup> “Spending allocated specifically to detention and removal (not looking at legal proceedings or intelligence) increased 806 percent between 1985 and 2003, growing from \$141 million in 1985 to \$1.3 billion in 2003.”<sup>48</sup> Like the statutory amendments, these increases in spending did not curtail the rates of unauthorized migration. In fact, the number of migrants who remained in the United States without authorization actually doubled despite the border and interior enforcement strategies.<sup>49</sup>

The enforcement efforts continued to intensify regardless of the political party that was in power. Just as President Reagan and a Republican Congress passed new interior enforcement mechanisms, the Clinton administration vastly increased border enforcement spending and militarization.<sup>50</sup> Starting in 1994, the administration increased funding for the U.S. Border Patrol, created new border checkpoints, and erected physical barriers to entry aimed at curtailing migration from Mexico in particular.<sup>51</sup> The operations were aimed at particular points of entry for unauthorized migrants, including Operation Hold the Line in El Paso, Texas, starting in 1993; Operation Gatekeeper, which started in San Diego in 1994, and extended to El Centro in 1998; Operation Safeguard starting in Nogales in 1995, and expanding to Douglas and Tucson in 1999; and Operation Rio Grande in McAllen and Laredo, Texas, in 1997.<sup>52</sup> The same administration worked with a then Republican Congress to pass the Illegal Immigration Reform and Immigrant Responsibility Act (IIR-IRA) of 1996, which provided for even more funding for technological improvements and increased manpower concentrated at the southern border.<sup>53</sup> IIR-IRA also saw the advent of 287(g), the mechanism by which local and state law enforcement agencies could become deputized to screen persons for deportability.<sup>54</sup>

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47. Migration Policy Institute, *supra* note 46, at 2.

48. *Id.*

49. Passel et al., *supra* note 13, at 2, Table 2.

50. United States General Accounting Office, GAO/GGD-99-44, *Illegal Immigration: Status of Southwest Border Strategy Implementation*, 3-4 (May 1999); Reyes et al., *supra* note 34, at 1.

51. Reyes et al., *supra* note 34, at 1.

52. MASSEY ET AL., *supra* note 14, at 106-10.

53. United States General Accounting Office, *Border Patrol Staffing and Enforcement Activities* GAO/GGD-96-65 (Mar. 11, 1996); United States General Accounting Office, *Report to the Comm. on the Judiciary, U.S. Senate & the Comm. on the Judiciary, House of Rep., Illegal Immigration Southwest Border Strategy Results Inconclusive: More Evaluation Needed*, GAO/GGD-98-21, (Dec. 11, 1997); General Accounting Office, *supra* note 50.

54. See 8 U.S.C.A. §1357(g) (West 2010) amended by Pub. L. No. 104-208, § 133.

Yet this massive investment in interior and border enforcement efforts was as unsuccessful as its predecessors in the 1980s. As one commentator noted,

[T]he 1990s were a decade of radical change in Mexico-US migration and a period in which U.S. policy responses were increasingly misplaced and inadequate. The attempts to make the border impervious with respect to the movement of Mexican labor . . . has proved worse than failure; it has achieved counterproductive outcomes in virtually every instance.<sup>55</sup>

One of those counterproductive outcomes is that migrants must take new and more dangerous routes to cross into the United States, requiring more and more to hire smugglers and resulting in more and more people dying in an attempt to cross the U.S.-Mexico border.<sup>56</sup> Another counterproductive outcome is that those who crossed the U.S.-Mexico border in more recent years remain on the U.S. side for much longer because the cost and danger of the journey mitigate against the prior, more cyclical migration pattern.<sup>57</sup>

A 2002 study that modeled both the behavior of first-time migrants and more experienced migrants from Mexico found that remigration, or subsequent unlawful entries into the United States, actually increased in the late 1990s during the peak enforcement years.<sup>58</sup> Interviews with these migrants both in Mexico and the United States revealed that the buildup of border patrol agents had no effect on the decision to migrate.<sup>59</sup> More recently, researchers at the Center for Comparative Immigration Studies (CCIS) at the University of California, San Diego, conducted a broad range of interviews with potential migrants in three towns in Mexico and family members of those persons in the United States to determine what effects the past thirty years of increased border enforcement had on migration patterns.<sup>60</sup> The researchers found that despite widespread knowledge of border crossing difficulties, this knowledge had no impact on the decision to migrate.<sup>61</sup>

Researchers did find that knowledge of the difficulties in crossing the border caused people to pay increasingly exorbitant fees for

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55. DURAND & MASSEY, *supra* note 5, at 16.

56. For a detailed account of recent deaths at the U.S.-Mexico border, see Johnson, *supra* note 7, at 111-116.

57. DURAND & MASSEY, *supra* note 5, at 12-13.

58. Reyes et al., *supra* note 34, at 14.

59. *Id.* at 8-10.

60. Escribano and Cornelius, *supra* note 17, at 16.

61. *Id.*

“polleros,” or guides, to help get them through the increasingly sophisticated barriers.<sup>62</sup> The CCIS report found that migrants pay as much as \$2,500 to cross the border,<sup>63</sup> a figure that represents about 382 hours of work for these migrants once they are in the United States.<sup>64</sup> This leads intending migrants to remain in the United States longer in order to ensure that their debt to the polleros is properly paid off.<sup>65</sup>

Not surprisingly, the aftermath of the terrorist attacks of 2001 saw the largest increase in spending on immigration enforcement.<sup>66</sup> Funding for border enforcement during this period increased from \$2.1 billion in FY 2001 to \$2.8 billion in FY 2002.<sup>67</sup> At the same time, “U.S. policy shifted from a ‘risk management approach,’ to border security, which focused on identifying and mitigating potential threats along the border.”<sup>68</sup> The policy of increasing the Border Patrol’s presence and erecting more formidable fencing along the southwestern border continued, along with an increase in technology-based security measures, including the US-VISIT program (which tracks the fingerprints and digital photo ID of entrants) and the Western Hemisphere Travel Initiative (WHTI), which requires U.S. Mexican, and Canadian citizens to use passports to cross the borders.<sup>69</sup> In 2006, Congress approved the extension of a border fence along the U.S.-Mexican border with the passage of the Secure Fence Act, which called for the construction of 670 miles of new physical fencing and vehicle barriers.<sup>70</sup> This same act provided funds to hire more Border Patrol agents, and for the planning of a new, electronic “virtual fence” along the Southwest border.<sup>71</sup> Though the program suffered substantial technical setbacks, the Obama Administration has continued building both the 670 miles of physical fencing as well as seeking a virtual fence on the entire U.S.-Mexico

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62. *Id.* Note that the term “pollero” was used in this study on Mexican migrants. Many others refer to these guides as “coyotes.”

63. Cohen et al., *supra* note 15, at 230.

64. *Id.* at 224.

65. *Id.*

66. Migration Policy Institute, *supra* note 46, at 2, 7, Table 1.

67. *Id.*

68. JOSIAH MCC. HEYMAN & JASON ACKLESON, UNITED STATES BORDER SECURITY AFTER SEPTEMBER 11, BORDER SECURITY IN THE AL-QAEDA ERA 37-74 (2009).

69. Cohen et al., *supra* note 15, at 217.

70. The Secure Fence Act of 2006, Pub. L. No. 109-367 (providing for the construction of a 700-mile fence on the U.S.-Mexico border; doubling the funding of the Border Patrol, increasing the number of Border Patrol agents and calling for National Guard posts to be sent to the Mexican border); *see also* Fact Sheet: The Secure Fence Act of 2006, *available at* <http://georgewbushwhitehouse.archives.gov/news/releases-2006/10/20061026-1.html> (last visited June 3, 2010).

71. *See* The Secure Fence Act of 2006 § 2, 5.

border.<sup>72</sup> Despite all these efforts and all this expense, research indicates that the numbers of those who entered unlawfully actually increased after 2001 from 500,000 per year to 650,000 per year.<sup>73</sup>

In addition to the expansive border control policies, interior enforcement mechanisms were also increased in the post-September 11 period. For example, under the REAL ID Act of 2005, states were prohibited from providing driver's licenses to undocumented immigrants.<sup>74</sup> The George W. Bush administration stepped up the use of worksite raids, particularly in 2006 and 2007, in places of business suspected of employing undocumented workers, with the aim of reducing the number of undocumented workers in the United States and deterring future unauthorized migration.<sup>75</sup> These interior enforcement mechanisms have had a limited impact on migration and settlement of unauthorized migrants. As one study found,

[t]he series of workplace raids between 2006 and 2008 by Immigration and Customs Enforcement, and the increasing frequency of random police stops have made life more difficult for Tunkaseños living in the United States. However, U.S.-based respondents indicated that, although they live in a constant state of fear of arrest and deportation, they prefer to remain in the United States, where wages are higher, rather than return to Mexico.<sup>76</sup>

The Pew Hispanic Center recently found that inflows of unauthorized immigrants have decreased since 2005 based on a combination of CPS data, data from the Mexican National Survey of Employment and Occupation, and data on the number of apprehensions by the Customs and Border Patrol.<sup>77</sup> This research is backed by the more migrant-focused research at UC-San Diego which found that fewer

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72. April Reese, *U.S.-Mexico Fence Building Continues Despite Obama's Promise to Review Effects*, N.Y. TIMES, Apr. 19, 2009, available at <http://www.nytimes.com/gwire/2009/04/16/16greenwire-usmexico-fence-building-continues-despite-obam-10570.html>.

73. Passel & Cohn, *supra* note 13, at 2.

74. See REAL ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 231 (May 11, 2005).

75. Michael Chertoff, *Leadership Journal Archive: Myth vs. Fact: Worksite Enforcement*, U.S. DEP'T OF HOMELAND SECURITY LEADERSHIP JOURNAL (July 9, 2008), available at <http://www.dhs.gov/journal/leadership/2008/07/myth-vs-fact-worksite-enforcement.html>.

76. Cohen et al., *supra* note 15, at 263.

77. Passel & Cohn, *supra* note 13, at i-ii (finding that unauthorized entries started to decline in 2005 and continued to decrease every year up to 2008).

people are leaving Mexico for the United States.<sup>78</sup> Though the DHS claims that this decrease is due to the success of enforcement mechanisms, independent research indicates that there are a number of possible explanations for this decrease that have nothing to do with enforcement efforts suddenly taking effect after decades of failure.<sup>79</sup> It is true that the number of apprehensions by the Border Patrol increased from 2005-2009.<sup>80</sup> However, these figures do not account for persons apprehended more than once and cannot account for those never apprehended. Thus, the more instructive figure is from studies of migrants, which indicate that those who have attempted entry since 2005 were still extremely successful, especially after two or three attempts.<sup>81</sup> Thus, a person may show up as being apprehended by CBP once or even twice in that period, but research shows that a whopping 97% of those who seek to enter eventually do successfully enter the United States without authorization.<sup>82</sup> This led one analyst to comment, “the massive border enforcement build-up seems to have made no appreciable difference in terms of migrants’ ability to enter the United States clandestinely.”<sup>83</sup> The UC-San Diego study also found that “the increase in border security had the ironic effect of increasing the number of unauthorized migrants who remain in the United States unlawfully for a longer period of time because the prior patterns of coming and going are now too dangerous and very costly.”<sup>84</sup>

What, then, explains the decrease in the number of people leaving Mexico for the United States? One plausible explanation outlined by CCIS and backed by interviews with migrants themselves is that fewer people are going back and forth between Mexico and the United States, so the decrease in the number of people entering actually points to people who entered earlier remaining in the United States.<sup>85</sup> This lack of “circularity” as the study calls it, could explain why fewer recent migrants are entering for a second or third time, unlike in earlier years.

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78. Cohen et al., *supra* note 15, at 211.

79. *Id.* at 262-63.

80. *Id.* at 232-33.

81. *Id.* at 233.

82. Escribano and Cornelius, *supra* note 17, at 5-6; *see also* Cohen et al., *supra* note 15, at 234.

83. Escribano and Cornelius, *supra* note 17, at 6; *see also* Cohen et al., *supra* note 15, at 214.

84. Escribano and Cornelius, *supra* note 17, at 18 (explaining that one of the main reasons Mexican migrants do not return to their hometown is the necessity of paying a coyote to navigate the crossing and the rising costs of these coyotes); *see also* MASSEY ET AL., *supra* note 14, at 128-131; Reyes et al., *supra* note 34, at 14-15.

85. Cohen et al., *supra* note 15, at 221-25.

The reasons for this decrease in circularity are two-fold—first, the journey has become extremely dangerous, and second, the fees migrants are forced to pay to coyotes in order to ensure safe passage into the United States, have increased exponentially.<sup>86</sup> Jeffrey Passel's recent article confirms that the trend for Mexican migrants to remain in the United States has not changed in recent years and that fewer and fewer migrants return to Mexico after a few months or years in the United States.<sup>87</sup>

Yet another explanation was put succinctly by Edward Alden, a senior fellow at the Council on Foreign Relations, who, in stating the conclusions of a task force on immigration policy, stated, "[t]he biggest reason for the drop [in unauthorized migration] is the decline of the [U.S.] economy."<sup>88</sup> Researchers at the Migration Policy Institute confirmed that the decline in the U.S. economy accounted for the decrease in first-time unauthorized entries but were doubtful that the slowdown would cause return migration to Mexico given their high attachment to the U.S. labor force and increasingly troubling conditions in Mexico.<sup>89</sup> Though the study cited increased enforcement and anti-immigrant animus as other factors contributing towards decreased migration,<sup>90</sup> it did not cite to sources for this information and indeed the weight of evidence suggests that this is not the case. Indeed, as the study itself points out, enforcement measures were expanded much more in the late 1980s and 1990s without the accompanying decrease in levels of unauthorized migration.<sup>91</sup> This suggests that the role played by enforcement measures in migrants' decisions is minimal at best. The decrease in numbers is also attributed to worsening economic conditions in Mexico, which raises the issue of push factors more directly.<sup>92</sup>

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86. *Id.* at 224.

87. Jeffrey Passel & D'Vera Cohn, Pew Hispanic Ctr., *Mexican Immigrants: How Many Come? How Many Leave* (2009), available at <http://pewhispanic.org/reports/report.php?reportID=112>.

88. Walter Shapiro, *Immigration, Yet Another Issue: How Many Votes Can Congress Take?*, *POLITICS DAILY*, Nov. 17, 2009, available at <http://www.politicsdaily.com/2009/11/17/immigration-yet-another-issue-how-many-votes-can-congress-take/>.

89. Demetrios G. Papademetrious & Aaron Terrazas, *Immigrants in the United States and Current Economic Crisis*, *The Migration Policy Institute Feature Story*, April 2009, available at <http://www.migrationinformation.org/Usfocus/display.cfm?ID=723>.

90. *Id.*

91. *Id.*

92. *Id.*

#### IV. THE INTERRELATEDNESS OF U.S. ECONOMIC POLICY TOWARD AND MIGRATION FROM MEXICO

The harsh consequences and expense risked by migrants coming to the United States force us to ask what propels them to come despite these dangers. Most commentators have found that the enormous and enduring difference in wages between Mexico and the United States for the same work is a key factor.<sup>93</sup> This difference was made clear by a recent migrant who explained, “[i]n one whole day of work here, you make about 100 pesos. That is about \$8 and this is how much you can make in the U.S. per hour.”<sup>94</sup> Other migrants talked about the effects of liberalization policies such as the end of price controls for agricultural products and the lack of investment in infrastructure.<sup>95</sup> Still others found that the decision to migrate was fueled not by desperation but rather as a way to adjust to transitions in available work in Mexico. For example, the Mexican Migration Project found that “[f]or the most part, households turn to migration quite rationally and use it instrumentally as an adaptive strategy to compensate for missing and failed markets in Mexico.”<sup>96</sup> In all of the studies that asked migrants why they decided to leave Mexico for the United States, the answer was economic – the need for better wages,<sup>97</sup> the need to help finance business and agricultural ventures in Mexico,<sup>98</sup> and/or the need to finance buying a home.<sup>99</sup>

As some of the migrants themselves recognized, underlying this difference in wages and lack of infrastructure are economic forces such as liberalization and the accompanying divestment from public works and services in many developing countries, including Mexico, which

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93. See, e.g., COMM’N FOR THE STUDY OF INT’L MIGRATION AND COOP. ECON. DEV., UNAUTHORIZED MIGRATION: AN ECONOMIC DEVELOPMENT RESPONSE (1990) [hereinafter COMM’N] (indicating that the wage differential between Mexico and the United States was one to ten at the time); Johnson, *supra* note 7, at 139; PETER STALKER, WORKERS WITHOUT FRONTIERS 21 (2000) (reporting on a study finding that the wage differential between Mexico and the United States in 1996 was \$31 per week to \$278 per week, or a ratio of 1:9); Heppel & Torres, *supra* note 40, at 58 (finding the wage differential to be 1:8 in 1996).

94. REYES ET AL., *supra* note 34, at 19.

95. *Id.* at 20.

96. DURAND & MASSEY, *supra* note 5, at 6.

97. Marcela Cerrutti and Douglas Massey, *Trends In Mexican Migration to the United States, 1965 to 1995*, in CROSSING THE BORDER, *supra* note 5; STALKER, *supra* note 93, at 21.

98. See Patricia Arias, *Old Paradigms and New Scenarios in a Migratory Tradition: U.S. Migration from Guanajuato*, in CROSSING THE BORDER, *supra* note 5, at 171.

99. Emilio Parrado, *U.S. Migration, Home Ownership and Housing Quality*, in CROSSING THE BORDER, *supra* note 5, at 73-79.



lead to contracting job markets.<sup>100</sup> In order to fully understand the relationship between U.S. economic policy and migration from Mexico, it must be understood that the deterioration of various sectors of the labor market in Mexico is a direct result of so-called “structural adjustment,” or the set of conditions, imposed by the International Monetary Fund (IMF) and the World Bank on developing countries in exchange for loans to help alleviate economic crises requiring those countries to open their markets to foreign trade, divest from domestic social programs, and decrease government support of industries; and the effects of the North American Free Trade Agreement’s (NAFTA’s) provisions requiring traditionally protected markets in Mexico to open up to competition from its northern neighbors.<sup>101</sup>

The IMF and the World Bank are two international lending institutions, both headquartered in the United States. Though they ostensibly have very different missions, both institutions lend money to developing nations via contracts that require those nations to agree to a number of economic reforms in exchange for the loan.<sup>102</sup> Though the IMF is not officially a U.S. program, it is clear that there is a strong relationship between U.S. economic and foreign policy interests and the conditions placed by the IMF on countries that receive its assistance.<sup>103</sup> The IMF is made up of representatives from all creditor and debtor countries and includes a Board of Governors from those countries which in turn elects a twenty-four member Executive Board who are at once answerable to their own governments and to the fund itself.<sup>104</sup> The United States is by far the most powerful presence on the Executive Board as it is the sole actor with veto power over the Fund’s activities.<sup>105</sup> There are also strong institutional links between the IMF staff economists who propose loan agreements, the U.S. Department of

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100. MASSEY ET AL., *supra* note at 14.

101. See Patricia Fernandez-Kelly and Douglas S. Massey, *Borders for Whom? The Role of NAFTA in U.S.-Mexico Migration*, 610 ANNALS 98, 104 (March 2007).

102. For a detailed account of the IMF and the World Bank and the differences between the two, see Ngaire Woods, *The United States and the International Financial Institutions: Power And Influence Within the World Bank and the IMF*, in US HEGEMONY AND INT’L ORGS. 92 (Oxford University Press, Rosemary Foot Et al. eds. 2003) [hereinafter Woods, *The U.S. and the IMF*].

103. See HAROLD JAMES, INTERNATIONAL MONETARY COOPERATION SINCE BRETTON WOODS (1996); See also Woods, *The U.S. and the IMF*, *supra* note 102, at 94; NGAIRE WOODS, THE GLOBALIZERS: THE IMF, THE WORLD BANK, AND THEIR BORROWERS 15 (2006) [hereinafter WOODS, THE GLOBALIZERS].

104. WOODS, THE GLOBALIZERS *supra* note 103, at 19.

105. Woods, *The U.S. and the IMF*, *supra* note 102, at 99; WOODS, THE GLOBALIZERS, *supra* note 103, at 27.

Treasury, and even Congress.<sup>106</sup> As one researcher noted, senior management at the IMF almost always runs potential loan agreements by the U.S. Treasury before proposing them to the Executive Board for approval.<sup>107</sup> Finally, the United States has control over the IMF's budget and the weight of each country's vote in the Executive Board.<sup>108</sup> Thus, the Fund's decisions about who to fund, at what level, and with what conditions are largely determined by U.S. economic and foreign policy.

Similarly, the World Bank is not officially a U.S. institution but it, too, is largely influenced by the U.S. Treasury and Federal Reserve policies.<sup>109</sup> In Mexico's case, the U.S. relationship is particularly prevalent. Mexico first turned to the IMF for loans to combat its debt and currency crises in 1982.<sup>110</sup> Subsequently, the economy began to improve slowly, and the Mexican government began to engage in liberalization, starting with trade liberalization at the behest of the World Bank.<sup>111</sup> The liberalization in trade policy was so radical that it caused the many small and medium sized Mexican businesses to collapse.<sup>112</sup> A similar pattern emerged in banks, financial markets, and, perhaps most significantly for potential migrants, agriculture.<sup>113</sup> By 1989, the Mexican government had accepted the World Bank's agenda to reduce subsidies to domestic farmers based on evidence that such reforms would bring future gains.<sup>114</sup> This resulted in large-scale divestment from several programs that had previously supported distribution of food items to the impoverished and supported the work of many small and medium-scale farms.<sup>115</sup> The National Council for People's Subsistence or CONASUPO, a state-owned agricultural enterprise, was dismantled in 1990, creating an uneven balance between Mexican farmers and their subsidized U.S. counterparts.<sup>116</sup> At the exact same time, Mexican farmers were forced to

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106. *Id.* at 111-114.

107. *Id.* at 111.

108. See WOODS, *THE GLOBALIZERS*, *supra* note 103, at 22.

109. See *id.* at 53-56.

110. WOODS, *THE GLOBALIZERS*, *supra* note 103, at 84.

111. *Id.* at 92-94. Woods points out that several powerful players in the Mexican government were also in favor of the overhaul of trade policies and that the World Bank and IMF were able to use their respective resources and conditionality with these forces to bring about liberalization more rapidly. See *id.* at 84-103.

112. *Id.* at 94.

113. José Martínez, *Globalization and Its Impact on Migration in Agricultural Communities in Mexico*, 3-6 Univ. of Cali. – San Diego, Working Paper Series, Paper No. 161 (2007), available at <http://www.ccis-ucsd.org/PUBLICATIONS/WP%20161.pdf> (last visited Apr. 2, 2010).

114. WOODS, *THE GLOBALIZERS*, *supra* note 103, at 98.

115. Martínez, *supra* note 113, at 4-6.

116. *Id.* at 1.

compete with their U.S. counterparts due to the trade features of NAFTA.<sup>117</sup>

With the signing of NAFTA in 1995, the more subtle maneuvers of the U.S., through the IMF and World Bank contracts, to open Mexican markets to U.S. products became official policy.<sup>118</sup> NAFTA's explicit requirement that Mexico open its markets to goods, particularly crops, from the United States and Canada combined with previously imposed divestment from public works and social programs to create a perfect storm of economic turbulence.<sup>119</sup> Prior price protections and subsidies for farmers were cut steadily throughout the 1990s, ending with the termination of subsidies to corn farmers in 1995, one year after NAFTA was signed.<sup>120</sup> At the same time, NAFTA required that Mexico open its markets to goods from the U.S. and Canada, resulting in a flood of subsidized U.S. grown crops in the Mexican market.<sup>121</sup> This in turn caused the closure of many small and large scale farms and also negatively impacted the economies of cities close to these devastated agricultural centers.<sup>122</sup> Though NAFTA also provided for job development programs in Mexico, most research indicates that these programs had little effect in the face of the larger structural changes in the Mexican economy brought on by the U.S.-backed IMF.<sup>123</sup> These factors caused widespread divestment from the farming industry and

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117. Heppel & Torres, *supra* note 40, at 58.

118. See Martínez, *supra* note 113, at 3.

119. See *id.* at 1-20; see also Heppel & Torres, *supra* note 40, at 58.

120. Martínez, *supra* note 113, at 4.

121. See *id.* at 2; Williams, *supra* note 9, at 1256. U.S. farmers continue to be heavily subsidized even after NAFTA. One estimate found that U.S. agriculture is subsidized at a rate of 40% of the output value of the product. See STALKER, *supra* note 93, at 48.

122. See Heppel & Torres, *supra* note 40, at 55-56.

123. See Martínez, *supra* note 113, at 13; Williams, *supra* note 9, at 1256.

The reverse of this equation is reflected in an implicit assumption when the NAFTA was ratified that the flow of goods and finances from Mexico to the United States would be substituted for the flow of people, an assumption that required a pervasive economic development/job creation program in Mexico. However, working at odds with such economic development in Mexico is the reduction (mandated by the International Monetary Fund structural macroeconomic adjustments) of agriculture subsidies that had benefitted both large- and small-scale farmers in rural areas. The resulting agricultural crisis has resulted in both farm foreclosures (with resulting dislocation) and reduced economic activity in urban areas situated near prosperous agricultural areas.) (internal citations omitted). Contrary to the assumption that NAFTA would reduce undocumented immigration, Census 2000 data indicate the opposite. The number of undocumented residents appears to be nine to eleven million rather than the six million that was predicted.

Heppel & Torres, *supra* note 40 at 57.

eliminated jobs in the agricultural and supporting sectors of the Mexican economy.<sup>124</sup> This then forced people to move to places where wages were more sustainable, namely the United States.<sup>125</sup> It comes as no surprise then that the vast majority of undocumented Mexicans in the United States work in the agricultural sector.<sup>126</sup> Thus people are almost literally being pushed from one country to another to perform the exact same job.

The effects of neo-liberalism on migration patterns has not gone unnoticed in the United States. As early as 1986, part of IRCA sought to address push factors to migration by setting up the U.S. Commission for the Study of International Migration and Cooperative Economic Development.<sup>127</sup> That Commission concluded that the economic development models being pursued by the world's developing nations would, at least initially, drive people to migrate out of their home countries in order to seek economic survival.<sup>128</sup> Some of the pressures pointed to in the study include the exact factors brought about by structural adjustment, NAFTA's privatization of key industries in Mexico and the Caribbean, and a restructuring of many of those countries' economic priorities to make them dependent on access to foreign markets.<sup>129</sup> The commission ended on a hopeful note, predicting that in the long run, those same models would result in increased wealth in developing countries and eventually decrease the rates of migration to the U.S.<sup>130</sup> However, the reverse has been true. As the above analysis shows, a combination of liberalizations required by the IMF, the World Bank, and NAFTA actually increased the flow of migrants to the United States in statistically significant numbers.<sup>131</sup> This is part of a global trend in which people in developing countries are forced to seek survival-level wages in more developed countries. As Professor Walter Ewing points out:

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124. Martínez, *supra* note 113, at 5, 11; Williams, *supra* note 9, at 1256; STALKER, *supra* note 93, at 49.

125. One group of economists predicted this pattern of migration before NAFTA was ratified. One model predicted that about 1.4 million rural Mexicans would be displaced with about 600,000 of those migrating to the United States. Raul Hinojosa & Sherman Robinson, in PHILIP MARTIN, *TRADE AND MIGRATION: NAFTA AND AGRICULTURE* (1992).

126. STALKER, *supra* note 93, at 42.

127. See COMM'N, *supra* note 93, at 1.

128. See *id.* at 34-35.

129. *Id.* at 37, 39-41.

130. *Id.* at 37-38.

131. See Williams, *supra* note 9, at 1256; Fernandez-Kelly and Massey, *Borders for Whom?*, *supra* note 101, at 105.

[M]uch of modern-day migration, especially from developing to developed nations, is an intrinsic part of globalization. . . . [C]ompetition in a global market has inevitably had very different consequences for developed and developing countries. Developed nations, the centers of wealth and power in the global system, have well-established market economies that demand both highly skilled professionals and less-skilled service workers. At the same time, birth rates in developed countries have fallen or will soon fall below replacement levels, meaning that their native-born populations are beginning to shrink and grow older. In contrast, developing nations are far less wealthy and powerful than developed nations, have market economies that are generally less established, and have been opened rather abruptly to international economic competition. As the economies of developing countries are restructured to conform to the rules of the global market, government-owned businesses are privatized and government price controls eliminated, thereby displacing many workers and farmers who are not readily reabsorbed by newer, capital-intensive industries that employ fewer people and require different skills. Meanwhile, the native-born populations of most developing countries are still increasing.<sup>132</sup>

The end result of these economic and demographic trends is that there are too few jobs in the developing world and too few native-born workers in many occupations in the developed world. Not surprisingly, workers respond to this fundamental imbalance in the international supply of and demand for labor by moving from areas where jobs are relatively scarce (developing countries) to areas where jobs are more plentiful (developed countries).<sup>133</sup>

With such deep-seeded structural push factors to migration, it is no wonder that the past twenty-five years of increased enforcement spending has not curtailed unauthorized migration. According to the data, migration is an inevitable result of the economic changes occurring in Mexico and the long history of temporary migration to the United States. This suggests that the United States needs to look outside of immigration policy in order to take account of reasons people migrate. Otherwise, we will continue to pour money down an endlessly thirsty

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132. Ewing, *supra* note 9, at 448.

133. *Id.*

drain. As one migrant said, “[i]t is impossible to stop immigrants . . . No matter what, we will still come.”<sup>134</sup>

#### V. TOWARDS A FUNDAMENTAL SHIFT IN US-MEXICO RELATIONS

As Alejandro’s statements succinctly illustrate, the money spent on increased border enforcement, which will reach an estimated \$9.4 billion in 2009<sup>135</sup> has not been money well spent. Far from having its desired effect of stemming unauthorized migration, these measures have only brought about the destruction of numerous lives and increased the cost and danger of an inevitable journey. The reason for this is fairly simple—the forces pushing people out of Mexico are stronger than any enforcement mechanisms that the United States can construct. Looking at unauthorized migration through the lens of the migrants of themselves, we discover that even the risk of death along the journey is not enough to sway potential migrants from starting the journey. Those who do begin this journey are successful nearly 100 percent of the time. Thus the factors pushing people to come combined with the ability of guides to adjust to varying strategies by the Border Patrol result in a remarkably successful and consistent migration pattern from Mexico to the United States.<sup>136</sup> But that pattern, and particularly the endurance of that pattern, have been completely ignored in recent debates about immigration reform. Despite knowledge of the inefficacy of border control policies, every reform bill to come before Congress including the current one has had as a key feature increasing resources to control entry at the Southern border.<sup>137</sup>

The futility of these efforts should be of more central concern to lawmakers, but thus far, it has not been. Given that lawmakers know perfectly well that border control efforts have been fantastically unsuccessful, the reasons for their continued and unquestioning prominence in immigration reform bills seems to be that it is politically popular to make securing the border a main feature of any immigration reform. That political popularity crosses party lines as we are seeing in

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134. Interview by Mollie Cohen with “Alejandro,” an experienced Tunkaseno migrant, April 8, 2008 (transcript on file with author).

135. OFFICE OF MGMT. & BUDGET, DEP’T OF HOMELAND SEC. BUDGET 2009, *available at* <http://www.whitehouse.gov/omb/rewrite/budget/fy2009/homeland.html> (last visited June 11, 2010).

136. Fernandez-Kelly and Massey, *supra* note 101, at 110-111; Cohen et al., *supra* note 15, at 233; MASSEY ET AL., *supra* note 14, at 109.

137. *See supra* notes 18-25 and accompanying text.

the current immigration reform proposals.<sup>138</sup> This suggests a kind of consensus around the fallacy that migration from Mexico in particular can be controlled.

But, beyond this consensus, there is an even more insidious agreement that whether migrants can or cannot be controlled, we should be controlling their behavior. It is this latter claim that must be critiqued more deeply as it contains several underlying assumptions. If we know that border control policies are as ineffective as they are, the legitimacy of their continued implementation is questionable at best. Particularly when seen in light of the risks to human health and life, it becomes clear that attempts to control unauthorized migration do more harm than good. The question then becomes what should the policy be? Most immigration scholars and policy analysts who have looked at this issue would expand the ability of migrants to enter the U.S. lawfully.<sup>139</sup> Indeed, Representative Gutierrez seems to have heard this call, as evidenced by his inclusion of a new visa category for migrants primarily from Mexico.<sup>140</sup> How successful that category will be, however, in capturing current unauthorized migrants is unclear as the ceiling of 100,000 such visas per year and the requirement that the applicant hold a 4-year college degree makes it less likely that it would encompass the current flow of 500,000 unauthorized migrants per year, most of whom lack even a high school education.<sup>141</sup>

Others urge a more fundamental shift from policies based on exclusion and enforcement to those based on regulation. For example, Kevin Johnson argues that we must “reverse the presumptions in U.S. immigration laws and make the admission of migrants the norm and their exclusion the exception.”<sup>142</sup> He urges U.S. policymakers to consider a model along the lines of the European Union, which he argues allows the

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138. Adam Nagourney, *Immigration Issue Poses a Complex Test for 2 Parties*, N.Y. TIMES, April 27, 2010; Charles Schumer and Lindsey Graham, *supra* note 26 (outlining the four parts of their bill as: “requiring biometric Social Security cards to ensure that illegal workers cannot get jobs; fulfilling and strengthening our commitments on border security and interior enforcement; creating a process for admitting temporary workers; and implementing a tough but fair path to legalization for those already here. Graham has since dropped his co-sponsorship of the bill.”) Graham has since withdrawn his co-sponsorship of the bill but continues to call for more border enforcement. *See* Hsu, *supra* note 3.

139. Ewing, *supra* note 7, at 459-62.

140. *See generally* H.R. 4321, *supra* note 21 (NIF analysis that PUM visa would be mostly available to Mexican nationals).

141. *See id.* § 317; *see also* Jeffrey S. Passel, Pew Hispanic Ctr., *Unauthorized Migrants: Numbers and Characteristics* 22 (2005), available at <http://pewhispanic.org/files/reports/46.pdf>.

142. JOHNSON, *supra* note 7, at 204.

free movement of labor between its member states.<sup>143</sup> Johnson would remove numerical limitations on the number of immigrants who are allowed to enter each year altogether and decrease the number of grounds upon which a migrant can be excluded.<sup>144</sup> While this would certainly go a long way towards bringing U.S. policy in line with the realities of migration, only increasing the immigrant quotas would act as a valve through which economic pressures caused by liberalization are alleviated. Rather than challenging the conditions that create poverty, then, the immigration system would act as a safety valve, legitimizing the poverty created in developing countries like Mexico by these liberalizations.

One could envision a system, for example, in which the inevitability of migration was taken into account but the United States was also forced to account for the disparity in wealth created by unbalanced government subsidies for agriculture. Outside the legal academy, analysts encourage an approach that includes shifts in U.S. immigration policy and shifts in Mexican economic policy that would allow that country to develop more sustainable industries within Mexico that can absorb the labor force displaced by past liberalizations.<sup>145</sup> While arguing for shifts in Mexican economic policy is beyond the scope of this article, it would certainly address the concerns of migrants more comprehensively and thus be a more migrant-centered solution.

Beyond specific proposals, it seems clear that Mexican migration to the United States exerts pressure on the very notion of sovereignty, forcing us to consider whether any border between these two nations makes sense. Not only are these migrants able to enter the United States with phenomenal success, they are also almost instantaneously absorbed into the domestic economy.<sup>146</sup> As Lucy Williams argues:

A nation-state focus rests on several increasingly problematical assumptions, including, e.g., that nation-states can control the impact of capital flight and currency fluctuations; that immigration can be regulated through border enforcement of legal prohibitions established by nation-states . . . . Although perhaps some of these assumptions were plausible in the postwar years, current social reality is rapidly pushing in a different direction . . . . In light of currently unfolding trends toward

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143. *Id.*

144. *Id.* at 36-38.

145. Hepple & Torres, *supra* note 40, at 63

146. See William A. Kandel, *A Profile of Mexican Workers in U.S. Agriculture*, in *CROSSING THE BORDER*, *supra* note 5, at 257-60.



global economic integration, the concept of citizenship anchored solely in the nation-state is anachronistic . . . . All of this is in addition to the moral and political imperative for people in the developed world to accept responsibility for addressing the gross maldistribution of wealth and resources on a world scale . . . .<sup>147</sup>

Similarly, Catherine Dauvergne, argues that in order to properly deal with globalization and the inevitable migration that it brings, nations must move beyond previously held notions of sovereignty and the inherent right of sovereigns to exclude.<sup>148</sup> Dauvergne does not offer a particular proposal for reform as she states that “[t]his task is, at present, at the very limits of the collective imagination of Western states and Western advocates and even of my own imagination,”<sup>149</sup> but concludes that “decentering sovereignty is the only way forward.”<sup>150</sup> I tend to agree with these conclusions and would urge U.S. policymakers to consider a more comprehensive approach to migration, one that includes all of the relevant factors. Though this type of transformation in U.S. policy would not make a good sound bite, it is the only humane and realistic option. If the United States insists on continuing to make incremental and, in the case of border security, ill-advised reforms to its immigration system, it will be doomed to failure again and again. Regardless of which improvement on the current system one advocates, it is clear that, given the political realities in the United States today, the first step is to reframe the debate about immigration itself. Though many would like to isolate immigration from other issues, it is clear that migration is only one part of a larger picture of globalization and economic reforms taking place worldwide. Though it is certainly more complex to understand and try to deal with migration as part of this larger context, it is vital to ensure that migrants’ very lives are protected.

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147. See Williams, *supra* note 9, at 1245.

148. DAUVERGNE, *supra* note 35, at 190.

149. *Id.*

150. *Id.*