

# FROM DENIAL TO ACCEPTANCE: EFFECTIVELY REGULATING IMMIGRATION TO THE UNITED STATES

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## THE POLITICS OF CONTRADICTION

U.S. immigration policy is based on denial. Most lawmakers in the United States have largely embraced the process of economic “globalization,” yet stubbornly refuse to acknowledge that increased migration, especially from developing nations to developed nations, is an integral and inevitable part of this process. Instead, they continue an impossible quest that began shortly after World War II: the creation of a transnational market in goods and services without a corresponding transnational market for the workers who make those goods and provide those services. In defiance of economic logic, U.S. lawmakers formulate immigration policies to regulate the entry of foreign workers into the country that are largely unrelated to the economic policies they formulate to regulate international commerce. Even in the case of Mexico—with which the United States shares a two-thousand-mile border, a hundred-year history of labor migration, and two decades of purposeful economic integration—the U.S. government tries to impose the same arbitrary limits on immigration as it does on a country as remote as Mongolia. Moreover, while the global trade of goods, services, and capital is regulated through multilateral institutions and agreements, U.S. policymakers persist in viewing immigration as primarily a matter of domestic law enforcement.

This quixotic attempt to promote the expansion of trade across national borders while simultaneously imposing arbitrary numerical limits on the movement of foreign-born workers across U.S. borders has failed. Fruitless efforts by the U.S. government to stem the migratory flows produced by its own economic policies and demanded by the U.S. labor market have simply

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driven a large share of immigration to the United States underground and swelled the ranks of the undocumented. In the process, U.S. border-enforcement efforts are accomplishing precisely the opposite of their intended effect. Immigrants who might have returned home after a few years of work are now settling permanently. High profits for people smuggling have attracted large-scale criminal organizations from around the world, which pose a far greater risk to national security than undocumented immigrants themselves. The expansion of an underground labor market has driven down wages and working conditions for all workers in industries that employ large numbers of immigrants. There is an unsustainable contradiction between U.S. economic policy and U.S. immigration policy, and economics is winning.

Lawmakers must devise a realistic solution to this dilemma. Perpetuating the status quo by pouring ever larger amounts of money into the enforcement of immigration policies that are in conflict with economic reality will do nothing to address the underlying problem. Nor is it feasible to wall off the United States from the rest of the world. While observers may debate how the process of globalization should be managed and what rules should govern international trade, globalization itself is now a fact of life. The dependence of the United States upon transnational commerce and immigrant labor cannot simply be undone, at least not without devastating the entire economy in the process. It is too late to try forcing the genie of globalization back into the nativist bottle.

The most practical option is to bring U.S. immigration policy in line with the realities of the U.S. labor market and an increasingly global economy. Lawmakers should craft immigration policies that are as responsive to market forces as their economic policies, while implementing and enforcing tough labor laws to guarantee fair wages and good working conditions for *all* workers, whether native or immigrant. They should establish a process by which undocumented immigrants already living and working in the United States can apply for legal status. And they should treat immigration as the transnational issue it truly is and negotiate migration agreements with other countries, particularly Mexico. By taking these steps, the U.S. government would be able to more effectively control, regulate, and monitor immigration, rather than consigning a large portion to a shadowy and insecure black market.

#### THE IMPOSSIBLE QUEST

The rather conflicted foundation of the modern global economy was laid in 1944 in Bretton Woods, New Hampshire. Representatives of the United States and its World War II allies met to design a new international financial system that would prevent a recurrence of the economic chaos that reigned during the world depression of the 1930s. The blueprint that emerged from the Bretton Woods Conference called not only for a new monetary policy, but also for the lowering of trade barriers among member nations and the creation of multilateral financial institutions to better coordinate international economic

decision making and the movement of capital. Over the next three years, the resulting Bretton Woods Agreement gave birth to the General Agreement on Tariffs and Trade (the predecessor of the World Trade Organization), the International Bank for Reconstruction and Development (World Bank), and the International Monetary Fund.<sup>1</sup> Although the monetary system established by the Bretton Woods Agreement broke down by 1973, these three institutions and the model of global economic integration they represent did not.<sup>2</sup>

In fact, the scale and scope of economic integration have expanded dramatically in the sixty years since Bretton Woods. The alliance of twenty-three nations that created the General Agreement on Tariffs and Trade (GATT) now encompasses the 147 nations of the World Trade Organization (WTO). According to the United Nations Conference on Trade and Development, from 1980 to 2002, exports of merchandise and services worldwide more than tripled from \$2.4 trillion to \$8 trillion.<sup>3</sup> Roughly 65,000 transnational corporations now span the globe and hold reserves of capital that exceed the budgets of many nations.<sup>4</sup> From 1990 to 2000, the total sales of the largest 100 transnational corporations increased from \$3.2 trillion to \$4.8 trillion.<sup>5</sup> In 2000, the largest hundred economic entities in the world consisted of seventy-one national economies and twenty-nine transnational corporations.<sup>6</sup>

However, the post-World War II model of globalization that spurred this economic expansion has been plagued by a fundamental contradiction since the beginning: it does not account for the movement of workers. Generations of policymakers around the world have successfully promoted the expansion of trade in goods, services, and capital across international borders, regulated by a wide array of multilateral institutions and agreements. Yet migration—particularly from developing nations to developed nations—continues to be defined primarily as a matter of national sovereignty, where governments impose arbitrary numerical limits unrelated to global economic forces or even domestic labor demand. As a result, immigration that exceeds those limits is viewed simply as a law-enforcement issue largely unconnected to economic policy.<sup>7</sup> Individual governments are, in effect, trying to impose a set of rules on

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1. Kathryn M. Dominguez, *The Role of International Organizations in the Bretton Woods System*, in *A RETROSPECTIVE ON THE BRETTON WOODS SYSTEM: LESSONS FOR INTERNATIONAL MONETARY REFORM* 357, 357 (Michael D. Bordo & Barry Eichengreen eds., 1993).

2. Anne O. Krueger, *Whither the World Bank and the IMF?*, 36 *J. ECON. LITERATURE* 1983, 1985-86 (1998).

3. See U.N. CONF. ON TRADE & DEV., *DEVELOPMENT AND GLOBALIZATION 2004: FACTS & FIGURES* 49 (2004), <http://globstat.unctad.org/html/index.html> (last visited Mar. 22, 2004).

4. U.N. CONF. ON TRADE & DEV., *WORLD INVESTMENT REPORT 2002: TRANSNATIONAL CORPORATIONS AND EXPORT COMPETITIVENESS* at xv (2002).

5. *Id.* at 90.

6. *Id.*

7. Douglas S. Massey, *International Migration at the Dawn of the Twenty-First Century: The Role of the State*, 25 *POPULATION & DEV. REV.* 303, 307 (1999).

one factor of production (labor) that is fundamentally different from the set of rules applied to all other factors of production.<sup>8</sup> And there is no multilateral institution that might offer a forum in which nations could coordinate immigration policies.<sup>9</sup>

This outdated view of immigration would seem to imply that migration is something that occurs in spite of globalization rather than because of it. In fact, much of modern-day migration, especially from developing to developed nations, is an intrinsic part of globalization. At the most basic level, the advances in communications and transportation technology that have fueled globalization make it easier than ever before to move information and people quickly across national borders. More importantly, though, competition 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>10</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). However, the

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8. See Charles B. Keely, *Globalization Transforms Trade-Migration Equation*, 41 INT'L MIGRATION 87, 87-88 (2003).

9. See Saskia Sassen, *The De Facto Transnationalizing of Immigration Policy*, in CHALLENGE TO THE NATION-STATE: IMMIGRATION IN WESTERN EUROPE AND THE UNITED STATES 49, 50 (Christian Joppke ed., 1998), reprinted in SASKIA SASSEN, GLOBALIZATION AND ITS DISCONTENTS 6 (1998) (observing that multilateral, collaborative efforts on immigration policy are "fragmented, incipient, and have not been fully captured at the most formal levels of international public law and conventions.")

10. See PETER STALKER, WORKERS WITHOUT FRONTIERS: THE IMPACT OF GLOBALIZATION ON INTERNATIONAL MIGRATION 21-33 (2003); see also U.N. DEP'T OF ECON. & SOC. AFFAIRS, WORLD FERTILITY REPORT 2003 (2004), <http://www.un.org/esa/population/unpop.htm> (last visited Mar. 23, 2005) (compiling estimates and indicators of fertility in 192 countries since the 1970s).

governments of developed nations continue to impose arbitrary numerical limits on immigration that are much lower than the actual movement of workers across national borders. As a result, a large share of this labor migration has been driven underground.<sup>11</sup>

#### THE U.S.-MEXICO PARADOX

In the United States, the contradiction between unrealistically restrictive immigration policies and the realities of a transnational economic system is most extreme in the case of Mexico (although there are other examples, particularly among the nations of Central America). The U.S. economy has become heavily reliant on the labor of Mexican workers in an increasingly diverse range of industries over the past century. The two nations have actively pursued economic integration over the past twenty years, to the point that Mexico is now the second-largest trading partner of the United States.<sup>12</sup> Yet paradoxically, the U.S. government has attempted to swim against the tide of its own economic policies by trying since the mid-1960s to impose artificial numerical limits on Mexican immigration. The rise of undocumented migration has been the predictable result.

Systematic demand for Mexican labor in the United States began at the end of the nineteenth century, facilitated by the completion of rail lines linking the two nations. U.S. companies that relied on Asian workers for railroads, agriculture, mining, and construction in the American West found this source of labor dwindling in the face of new restrictions on Asian immigration, such as the Chinese Exclusion Act of 1882 and the 1907 "Gentlemen's Agreement" between the U.S. and Japanese governments, which all but ended immigration from Japan.<sup>13</sup> As a result, by the dawn of the twentieth century, these companies were turning to private labor contractors who traveled to Mexico to recruit workers, often by fraudulent means. The disruption of European immigration to the United States with the outbreak of World War I in 1914 only increased the demand for Mexican labor, leading the U.S. government to implement its own worker recruitment program. About 621,000 Mexicans came to the United States during the 1920s,<sup>14</sup> despite rising anti-immigrant sentiment that fueled new legal restrictions on immigration from Southern and

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11. See U.N. DEP'T OF ECON. & SOC. AFF., INTERNATIONAL MIGRATION REPORT 2002 (2002).

12. See OFFICE OF TRADE & ECON. ANALYSIS, U.S. DEP'T OF COMMERCE, U.S. AGGREGATE FOREIGN TRADE DATA tbl. 9 (2003) [hereinafter FOREIGN TRADE DATA], <http://www.ita.doc.gov/td/industry/otea/usfth/tabcon.html> (last visited Mar. 23, 2004).

13. See Enid Trucios-Gaynes, *The Legacy of Racially Restrictive Immigration Laws and Policies and the Construction of the American National Identity*, 76 OR. L. REV. 369, 395 (1997).

14. Jorge Durand et al., *Mexican Immigration to the United States: Continuities and Changes*, 36 LAT. AM. RES. REV. 107, 109 (2001).

Eastern Europe and the creation of the U.S. Border Patrol in 1924.<sup>15</sup> With the onset of the Great Depression in 1929, employment opportunities for Mexicans quickly evaporated as displaced native-born workers took the few available jobs—even in agriculture—and the U.S. government began mass deportations of Mexicans that totaled 453,000 by 1937.<sup>16</sup>

Demand for Mexican workers surged again after the United States entered World War II in 1941. Native-born workers left the fields for the factories as industries mobilized for the war, resulting in an agricultural labor shortage.<sup>17</sup> The federal government responded by establishing the now-infamous *bracero* program, which brought nearly five million Mexicans to the United States as temporary agricultural workers between 1942 and 1964. The brutality and corruption of the *bracero* program led to its demise in 1965, after which the U.S. government abruptly attempted to stem the flow of Mexican immigrants it had encouraged for decades.<sup>18</sup> In 1968, immigration from the countries of the western hemisphere was subjected to an overall cap for the first time (120,000 per year). In 1976, immigration from each country in the western hemisphere was subjected to the same annual cap of 20,000 (not counting the immediate relatives of U.S. citizens) that was applied to every other country since 1965.<sup>19</sup>

Despite these numerical caps, Mexican migration to the United States continued to increase due to strong countervailing forces. U.S. society had generally come to define agricultural work as “Mexican” work; well-trod migratory paths from Mexico to the United States had been established; and the U.S. economy was generating demand for workers in less-skilled occupations beyond agriculture, especially in manual labor and service industries. As a result, immigrants continued to migrate, although most were now undocumented. From 1965 to 1986, about 28 million undocumented Mexicans entered the United States. Yet the vast majority—23 million—returned home after a few years of work, just as they had in the past.<sup>20</sup>

The contradiction between economic reality and U.S. immigration policy reached new heights in the 1980s. In 1982, the Mexican economy was devastated by a combination of massive foreign debt and falling oil prices, precipitating the demise of the economic model based on government-directed industrialization that had prevailed in Mexico since the 1930s.<sup>21</sup> In response to the crisis, the cash-strapped Mexican government—with strong U.S. encouragement—began the process of “liberalizing” the Mexican economy by

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15. See, e.g., DOUGLAS S. MASSEY ET AL., BEYOND SMOKE AND MIRRORS: MEXICAN IMMIGRATION IN AN ERA OF ECONOMIC INTEGRATION 33 (2002).

16. Durand et al., *supra* note 14, at 109.

17. *Id.* at 110.

18. *Id.* at 111; see also MASSEY ET AL., *supra* note 15, at 34-41.

19. MASSEY ET AL., *supra* note 15, at 43.

20. *Id.* at 45.

21. *Id.* at 73-80.

privatizing government-controlled enterprises, lowering barriers to foreign trade and investment, and reorienting industry and agriculture toward production for export rather than “import substitution.”<sup>22</sup> This process fully crystallized with Mexico’s entry into GATT in 1986 and marked the formal beginning of an accelerating integration of the U.S. and Mexican economies.<sup>23</sup>

Yet, with predictable irony, 1986 also was the year the U.S. Congress passed the Immigration Reform and Control Act (IRCA) in an attempt to better “control” undocumented immigration to the United States. IRCA sensibly provided legal residence to about 3 million formerly undocumented immigrants already working and living in the country, 2.3 million of whom were Mexican. But it sidestepped the question of how to address the future flow of immigrants that would inevitably result from the burgeoning economic ties between Mexico and the United States and the continuing demands of the U.S. labor market. IRCA maintained previous numerical limits on immigration, increased funding for U.S. border enforcement, and created “employer sanctions” to punish businesses that “knowingly” hired undocumented immigrants.<sup>24</sup> While the threat of employer sanctions did not reduce undocumented immigration, it did create a thriving black market for the manufacture of fraudulent identification documents that immigrants could present to employers as proof of their eligibility to work in the United States.<sup>25</sup>

The economic interdependence of Mexico and the United States advanced to a new level with implementation of the North American Free Trade Agreement (NAFTA) in 1994, the goal of which was to promote transnational trade and investment throughout North America under a uniform set of rules. The impact of NAFTA (and the trade agreements that preceded it) on U.S.-Mexican economic integration has been dramatic. According to the U.S. Department of Commerce, from 1985 to 2003 the total value of U.S.-Mexico bilateral trade increased more than seven-fold from \$32.8 billion to \$235.5 billion (see Figure I),<sup>26</sup> making Mexico the second largest trading partner of the United States. In 2003, Mexico was the largest foreign export market for Texas (\$41.6 billion), California (\$14.9 billion), and Arizona (\$3.2 billion); Mexico also was the destination for over \$1 billion in exports each year from Florida, Georgia, Illinois, Indiana, Louisiana, Michigan, New York, North Carolina, Ohio, Pennsylvania, and Tennessee.<sup>27</sup> The Office of the U.S. Trade Representative estimates that from 1993 to 2001 the stock of U.S. foreign direct

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22. Alejandro I. Canales et al., *Mexican Labour Migration to the United States in the Age of Globalisation*, 29 J. ETHNIC & MIGRATION STUD. 741, 752 (2003).

23. MASSEY ET AL., *supra* note 15, at 73.

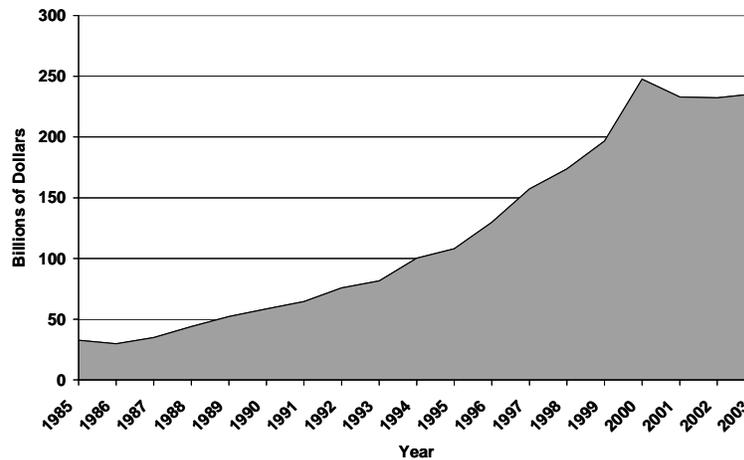
24. *Id.* at 90.

25. *Id.* at 119.

26. See FOREIGN TRADE DATA, *supra* note 12, at tbls. 55-56.

27. See OFFICE OF TRADE & ECON. ANALYSIS, U.S. DEP’T OF COMMERCE, TRADESTATS EXPRESS, available at <http://tse.export.gov> (last visited Nov. 21, 2004).

Figure I. Total Value of U.S.-Mexico Trade (1985-2003)



investment in Mexico more than tripled from \$15.4 billion to \$52.2 billion.<sup>28</sup>

Still, NAFTA failed to address immigration. This constituted more than a minor omission, given that the process of economic restructuring that international competition promotes has profoundly altered the demand for labor in both the United States and Mexico. The service sector of the U.S. economy has expanded markedly over the past few decades and continues to generate demand for younger workers in less-skilled occupations at the same time the native-born population is steadily growing older.<sup>29</sup> Meanwhile, the lowering of trade barriers in Mexico since the mid-1980s has displaced many workers in formerly government-protected manufacturing industries and agriculture.<sup>30</sup> To date, the creation of new jobs under NAFTA has not offset these job losses. For instance, from 1994 to 2002, the Mexican economy added about 500,000 export-oriented manufacturing jobs, but lost 1.3 million jobs in agriculture.

28. See OFFICE OF THE U.S. TRADE REP., 2003 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 271 (2003), [http://www.ustr.gov/Document\\_Library/Reports\\_Publications/2003/2003\\_NTE\\_Report/Section\\_Index.html?ht=](http://www.ustr.gov/Document_Library/Reports_Publications/2003/2003_NTE_Report/Section_Index.html?ht=) (last visited Mar. 23., 2005); OFFICE OF THE U.S. TRADE REP., 1995 NATIONAL TRADE ESTIMATE, [http://www.ustr.gov/Document\\_Library/Reports\\_Publications/1995/1995\\_National\\_Trade\\_Estimate/Section\\_Index.html](http://www.ustr.gov/Document_Library/Reports_Publications/1995/1995_National_Trade_Estimate/Section_Index.html) (last visited Mar. 23, 2005).

29. U.S.-MEX. BINAT'L COUNCIL, CTR. FOR STRATEGIC & INT'L STUDIES, MANAGING MEXICAN MIGRATION TO THE UNITED STATES: RECOMMENDATIONS FOR POLICYMAKERS 4, 6 (2004); see also Mitra Toossi, *Labor Force Projections to 2012: The Graying of the U.S. Workforce*, 127 MONTHLY LAB. REV. 37, 52 (2004). See generally Daniel E. Hecker, *Occupational Employment Projections to 2012*, 127 MONTHLY LAB. REV. 80 (2004) (forecasting increased employment in many occupations requiring lower levels of educational attainment).

30. JOHN J. AUDLEY ET AL., CARNEGIE ENDOWMENT FOR INT'L PEACE, NAFTA'S PROMISE AND REALITY: LESSONS FROM MEXICO FOR THE HEMISPHERE 47-48 (2003); Canales et al., *supra* note 22, at 752.

Unemployment in Mexico's agricultural sector has been aggravated by the entry of U.S. corn into the country at artificially low prices made possible by the large subsidies that the U.S. government gives to U.S. agribusiness. Moreover, many of the U.S. and other foreign-owned export assembly plants (*maquiladoras*) in Mexico eventually relocated to China and other Asian countries in search of lower labor costs, thereby eliminating about thirty percent of the jobs these plants provided during the 1990s.<sup>31</sup> The combination of these various "push and pull" factors virtually ensured that Mexicans would continue to migrate northward.

Instead of managing migration from Mexico, the U.S. government redoubled its efforts to enforce arbitrary, 1960s-era numerical limits on immigration at precisely the same time it deepened the economic integration of the two countries through NAFTA.<sup>32</sup> The new federal strategy called not only for a massive buildup of U.S. Border Patrol resources, but also for the concentration of those resources in urban areas where undocumented immigrants traditionally crossed the border. In theory, this "prevention through deterrence" approach would either convince immigrants not to cross at all or drive them into more isolated areas where they could be more easily apprehended.<sup>33</sup> The strategy was implemented gradually along various stretches of the U.S.-Mexico border, beginning at the end of 1993 with Operation Hold the Line in El Paso, Texas, and followed by Operation Gatekeeper in California, which started in San Diego in 1994 and extended to El Centro in 1998. Next came Operation Safeguard in Arizona, starting in Nogales in 1995 and expanding to Douglas and Tucson in 1999, followed by Operation Rio Grande in McAllen and Laredo, Texas, in 1997.<sup>34</sup>

As with the employer sanctions of IRCA, the "prevention through deterrence" strategy has not actually reduced undocumented migration. According to the U.S. General Accounting Office,<sup>35</sup> it has simply moved migrant traffic from one place to another.<sup>36</sup> But in doing so, the strategy has yielded a number of other tangible results. More immigrants are dying in the deserts of the Southwest as they attempt to cross the border in more dangerous locales. The U.S. Border Patrol estimates that 1896 border crossers died from

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31. AUDLEY ET AL., *supra* note 30, at 12.

32. MASSEY ET AL., *supra* note 15, at 83; *see also* Peter Andreas, *The Escalation of U.S. Immigration Control in the Post-NAFTA Era*, 113 POL. SCI. Q. 591, 593-98 (1998).

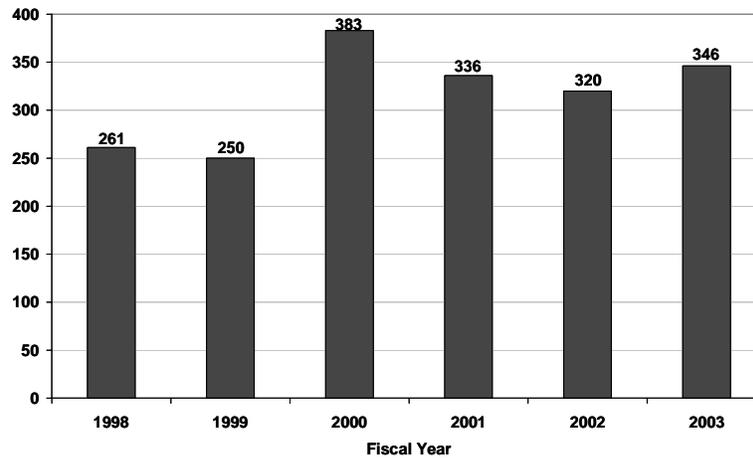
33. *Enhancing Border Security: Hearing Before the Subcomm. on Immigration of the Senate Judiciary Comm.*, 106th Cong. (2000) (statement of Michael A. Pearson, Executive Associate Commissioner for Field Operations, Immigr. & Naturalization Serv.), <http://uscis.gov/graphics/aboutus/congress/testimonies/1999/pearson.pdf> (last visited Mar. 23, 2005).

34. MASSEY ET AL., *supra* note 15, at 106-10. *See generally* Andreas, *supra* note 32 (discussing border militarization).

35. On July 7, 2004, the General Accounting Office was renamed the Government Accountability Office.

36. U.S. GEN. ACCOUNTING OFFICE, *INS' SOUTHWEST BORDER STRATEGY: RESOURCE AND IMPACT ISSUES REMAIN AFTER SEVEN YEARS* (2001).

Figure II. Migrant Deaths Along U.S-Mexico Border, FY 1999-2003



Fiscal Year (FY) 1998 through FY 2003 (see Figure II above), and the Mexican Ministry of Foreign Relations places the total at 2455 from 1997 through 2003.<sup>37</sup> In addition, more immigrants are hiring people smugglers to lead them across the border in remote locations.<sup>38</sup> In the two-year period from FY 1997 to FY 1999, the number of undocumented immigrants apprehended by the Border Patrol who had used smugglers increased by eighty percent, rising from nine percent of all apprehended immigrants to fourteen percent.<sup>39</sup> This surge in demand has made people smuggling increasingly lucrative. In the course of one year, from 1999 to 2000, the fee for crossing the border to Phoenix, Arizona, jumped from about \$150 to between \$800 and \$1300.<sup>40</sup> The smuggling of people from Mexico to the United States is now a \$300-million-a-year business, second in profitability only to drug trafficking, and involves anywhere from 100 to 300 smuggling rings.<sup>41</sup>

In what is perhaps the greatest irony of the U.S. border-enforcement strategy, the higher costs and risks associated with crossing the border have not persuaded immigrants to stop coming to the United States, but *have* instead

37. Statistics provided to the author in December 2003 by the Department of Homeland Security's Office of Immigration Statistics (via telephone) and from the Mexican Ministry of Foreign Relations (on file with author). Figure II displays statistics from Homeland Security.

38. MASSEY ET AL., *supra* note 15, at 129; BELINDA I. REYES ET AL., PUB. POL'Y INST. OF CAL., HOLDING THE LINE? THE EFFECT OF THE RECENT BORDER BUILD-UP ON UNAUTHORIZED IMMIGRATION 61 (2002).

39. U.S. GEN. ACCT. OFFICE, ALIEN SMUGGLING: MANAGEMENT AND OPERATIONAL IMPROVEMENTS NEEDED TO ADDRESS GROWING PROBLEM 7 (2000).

40. Wayne A. Cornelius, *Death at the Border: Efficacy and Unintended Consequences of U.S. Immigration Control Policy*, 27 POPULATION & DEV. REV. 661, 668-69 (2001).

41. FED. RESEARCH DIV., U.S. LIBR. OF CONG., ORGANIZED CRIME AND TERRORIST ACTIVITY IN MEXICO, 1999-2002, at 21 (2003) [hereinafter ORGANIZED CRIME].

persuaded more of them to settle permanently once they get here.<sup>42</sup> Immigrants who might have returned to Mexico after a period of work in the United States, as the majority had done for the previous hundred years, now often choose to stay rather than run the risk of having to brave U.S. border enforcement again by going home.

As undocumented immigrants continue to arrive while fewer leave, the undocumented population has expanded together with the U.S. border-enforcement budget and the size of the U.S. Border Patrol. From FY 1993 through FY 2004, the federal government more than quintupled the amount of money spent on border enforcement from \$740 million to \$3.8 billion (see Figure III)<sup>43</sup> and nearly tripled the ranks of the Border Patrol from 3965 to 10,835 agents.<sup>44</sup> Despite these additional resources aimed at curtailing undocumented migration, the number of undocumented immigrants in the United States during this period doubled from roughly 4.5 million to 9.3 million, fifty-seven percent of whom are from Mexico and an additional twenty-three percent of whom are from other Latin American nations.<sup>45</sup>

Undocumented immigrants are now far from a peripheral presence in the United States in either social or economic terms. At least three million have lived here for ten years or more.<sup>46</sup> About 1.6 million are children, and roughly three million native-born, U.S.-citizen children have undocumented parents.<sup>47</sup> According to the Pew Hispanic Center, undocumented workers in 2001 comprised about fifty-eight percent of the U.S. labor force in agriculture, twenty-four percent in private household services, seventeen percent in business services, nine percent in restaurants, and six percent in construction.<sup>48</sup> The purchasing power of undocumented immigrants sustains hundreds of thousands of U.S. jobs. The Center for Urban Economic Development at the University of Illinois estimates that in 2001, undocumented immigrants in the Chicago metro area alone spent \$2.89 billion, which in turn generated an

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42. MASSEY ET AL., *supra* note 15, at 128; REYES ET AL., *supra* note 38, at 26; Cornelius, *supra* note 40, at 669.

43. Budget statistics provided to the author in December 2003 by the U.S. Department of Homeland Security and the Public Policy Institute of California (on file with author).

44. *Evaluating a Temporary Guest Worker Proposal: Hearing Before the Subcomm. on Immigration, Border Sec., and Citizenship of the Senate Judiciary Comm.*, 108th Cong. (2004) (statement of Asa Hutchinson, Undersec'y for Border and Transp. Security, Dep't of Homeland Security), <http://www.dhs.gov/dhspublic/display?content=3160> (last visited Mar. 22, 2005).

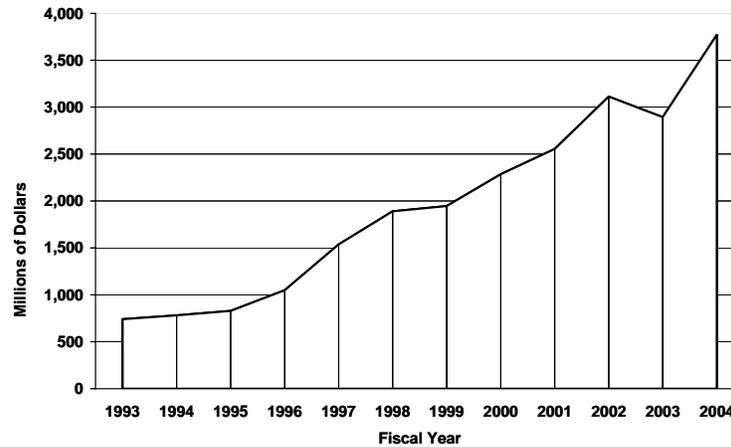
45. OFFICE OF POL'Y & PLAN., U.S. IMMIGR. & NATURALIZATION SERV., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: 1990-2000 at 8 (2003); JEFFREY S. PASSEL ET AL., IMMIGR. STUDIES PROGRAM, URBAN INST., UNDOCUMENTED IMMIGRANTS: FACTS AND FIGURES 1 (2004).

46. OFFICE OF POL'Y & PLAN., *supra* note 45, at 8.

47. PASSEL ET AL., *supra* note 45, at 2.

48. B. LINDSAY LOWELL & ROBERTO SURO, PEW HISPANIC CTR., HOW MANY UNDOCUMENTED: THE NUMBERS BEHIND THE U.S.-MEXICO MIGRATION TALKS 7 (2002).

Figure III. U.S. Border Enforcement Budget, FY 1993-2004



additional \$2.56 billion in local spending.<sup>49</sup> Together, this \$5.45 billion in spending provided the income needed to sustain 31,908 jobs.<sup>50</sup>

#### REALISTIC SOLUTIONS

Lawmakers face three basic choices in dealing with the persistent failure of U.S. immigration and border-enforcement policies in controlling the size of the undocumented population. First, they can continue with the status quo, pursuing the economic integration of North America and the world while devoting even greater amounts of money and manpower to combating the migratory consequences of that integration. Second, they can attempt to somehow undo the integration that has already occurred, forcing the U.S. economy to wean itself from international trade and immigrant labor. Or third, they can reformulate U.S. immigration policies to make them consistent with U.S. economic policies and the realities of globalization.

Maintaining the status quo is, of course, not a viable option given that the current state of affairs is inherently unsustainable. Nowhere is this more apparent than in the case of Mexico. The U.S. government has been trying since at least 1994 to integrate the U.S. and Mexican economies while stemming immigration from Mexico by making it harder for migrants to cross the border. Yet after ten years, \$23 billion in enforcement spending, and 2000 border-crossing deaths, undocumented migration continues unabated, and people smugglers are enjoying an unprecedented boom in business. No matter how much money is devoted to the current border-enforcement strategy, the

49. CHIRAG MEHTA ET AL., CTR. FOR URBAN ECON. DEV., UNIV. OF ILL., CHICAGO'S UNDOCUMENTED IMMIGRANTS: AN ANALYSIS OF WAGES, WORKING CONDITIONS, AND ECONOMIC CONTRIBUTIONS 34 (2002).

50. *Id.*

underlying contradiction between U.S. economic policies and U.S. immigration policies remains. The U.S. economy continues to generate demand for workers in less-skilled occupations that cannot be met by a steadily aging native-born population, and the Mexican economy continues to experience the dislocation of workers that comes with integration into a global market, at least in its early stages. To create a North American equivalent of the demilitarized zone separating North and South Korea is simply not feasible between two countries as integrated in terms of trade and labor as the United States and Mexico.

Another alternative is to try rolling back the process of integration all together. But even if there once was a time the United States could have existed in isolation, that time has long passed. Irrespective of whether NAFTA and other trade liberalization policies have resulted in a net increase or decline in U.S. employment over the decades, the fact remains that millions of U.S. jobs are now dependent on the production of exports. Hundreds of thousands of jobs are based on exports to Mexico alone.<sup>51</sup> Even if one objects to the presence of undocumented immigrants in the United States, it is undeniable that they have become a critical part of the labor force in many industries and that their purchasing power sustains hundreds of thousands more U.S. jobs throughout the economy. Undocumented immigrants are not a socially distinct and separate group. Rather, they are deeply intertwined with businesses, markets, families, and communities in the United States. There is much room for improvement in the way U.S.-Mexican economic integration—and global economic integration more generally—is managed. But the process of integration itself, in terms of both trade and immigration, cannot be undone without wreaking havoc on the U.S. economy and social fabric.

The more realistic solution is to bring the U.S. immigration system out of the 1960s and into the twenty-first century by recognizing that, in a global economy, immigration policies must be as responsive to market forces as economic policies if they are to be workable. To whatever degree lawmakers choose to let the “free market” govern economic policy, this must be reflected in immigration policy as well. Contrary to some alarmist claims that this sort of approach to immigration would cause the mass displacement of native-born workers by creating an “open border,” it would instead represent a decision to effectively regulate immigration that is already taking place. In economic terms, the current immigration system amounts to a form of labor market numerology in which policymakers (incorrectly) attempt to guess every few years how many foreign-born workers the U.S. economy “really” needs. Not only is this system incompatible with a market-based economy, but it also is a poor substitute for the rigorous enforcement of tough labor laws, which is the most effective means of protecting the rights, wages, and working conditions of

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51. OFFICE OF THE U.S. TRADE REP., *NAFTA AT EIGHT: A FOUNDATION FOR ECONOMIC GROWTH* (2002), [http://www.ustr.gov/assets/Trade\\_Agreements/Regional/NAFTA/asset\\_upload\\_file374\\_3603.pdf?ht=](http://www.ustr.gov/assets/Trade_Agreements/Regional/NAFTA/asset_upload_file374_3603.pdf?ht=) (last visited Mar. 23, 2005).

all workers, foreign and native-born alike.

Comprehensive immigration reform based on the principle of consistency between economic and immigration policies would have two components: first, creating legal channels for immigration—both permanent and temporary—that respond to the demands of the U.S. labor market; and second, establishing a mechanism by which undocumented immigrants already working in the United States could apply for legal status. In addition, immigration reform would be most effective if implemented as part of a broader, multilateral process of negotiation between the United States and the nations from which most immigrants come, particularly Mexico. U.S. and Mexican policymakers should cooperate to manage migration in ways that are most beneficial to both countries. Such cooperation should include a wide range of issues, such as the creation of targeted development programs in those Mexican communities from which most U.S.-bound migrants originate and the evaluation of how particular trade policies affect labor markets and therefore influence the economic factors that drive migration.<sup>52</sup>

#### THE BENEFITS OF COMPREHENSIVE IMMIGRATION REFORM

The case of Mexico illustrates well the many advantages of injecting a healthy dose of reality into the U.S. immigration system through comprehensive reform. Reform would enhance U.S. national security in ways the current border-enforcement strategy cannot, while preventing needless deaths among border crossers. Reform would improve wages and working conditions for all workers in U.S. industries that employ large numbers of immigrants. Finally, reform would foster greater economic and social stability in both the United States and Mexico.

#### Enhancing National Security

Given a choice, the vast majority of immigrants to the United States would prefer to enter the country legally rather than risk death by hiking through the desert or placing their fate in the hands of increasingly ruthless smugglers. By offering undocumented immigrants a path to legal status and directing future immigration through legal channels, the U.S. government would stop wasting border-enforcement resources on the pursuit of jobseekers and could focus instead on identifying those individuals who may actually pose a threat to national security or public safety. Comprehensive immigration reform would allow the U.S. government to screen and run background checks on immigrants who are now being funneled into an unregulated black market. In the process,

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52. See generally U.S.-MEX. BINAT'L COUNCIL, *supra* note 29; U.S.-MEX. MIGRATION PANEL, CARNEGIE ENDOWMENT FOR INT'L PEACE, MEXICO-U.S. MIGRATION: A SHARED RESPONSIBILITY 29 (2001).

millions of individuals who are not a danger to anyone would be eliminated from the list of potential security risks. If finding terrorists is analogous to finding a needle in a haystack, comprehensive reform would effectively decrease the size of the haystack.

In addition, expanding legal channels for immigration to the United States would significantly undercut the market for people-smugglers, who pose a far greater security risk than the immigrants they exploit. The rising profitability of people-smuggling from Mexico under the current border-enforcement strategy has attracted the interest of organized crime groups from as far away as Japan, China, Russia, and Ukraine, which also trade in weapons, drugs, and sex slaves. In conjunction with Mexican smuggling rings, these criminal organizations offer one-stop shopping for false identification documents and illicit transport across the U.S.-Mexico border for virtually anyone in the world who is willing to pay.<sup>53</sup> These criminal syndicates, not the immigrants they smuggle, represent the primary threat to U.S. national security arising from the current chaotic border situation. Creating adequate legal channels for immigration from Mexico would deprive smugglers of a major source of income while also allowing the U.S. government to focus more on dismantling the smuggling networks themselves rather than expelling the people they victimize.

#### Improving Wages & Working Conditions

Because undocumented immigrants always have the threat of deportation hanging over their heads, they are less likely than their lawfully present counterparts to openly protest low wages, poor working conditions, or violations of labor laws. They also are less likely to experience upward mobility in their jobs or to acquire the skills and training that are often needed to do so. The presence in an industry of a large number of undocumented immigrants who will work for substandard pay or under substandard conditions therefore results in lower wages and worse working conditions for all workers in that industry, regardless of legal status. By removing the threat of deportation and conferring legal status upon formerly undocumented workers, a legalization program can therefore translate into higher wages, better working conditions, and upward job mobility over time for all workers. Despite its many flaws, IRCA partially demonstrated this truth: the U.S. Department of Labor found that the wages of immigrants who received legal status under IRCA had increased by roughly fifteen percent in five years.<sup>54</sup>

However, IRCA also provided other lessons as to how a poorly conceived

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53. ORGANIZED CRIME, *supra* note 41, at 21-33; U.S. GEN. ACCT. OFFICE, *supra* note 39, at 9-10.

54. SHIRLEY SMITH ET AL., U.S. DEP'T OF LAB., EFFECTS OF THE IMMIGRATION REFORM AND CONTROL ACT: CHARACTERISTICS AND LABOR MARKET BEHAVIOR OF THE LEGALIZED POPULATION FIVE YEARS FOLLOWING LEGALIZATION 43 (1996).

immigration reform program can lower wages. Despite the modest gains in income experienced by IRCA beneficiaries, the wages of Mexican (and other Latino) immigrant workers as a whole—undocumented and lawfully present alike—declined after IRCA. This was due in part to the fact that IRCA did not expand legal channels of immigration, which meant that the problems associated with a large undocumented workforce simply reappeared. In addition, IRCA's reliance on employer sanctions lowered wages as well. Some employers passed on to workers, in the form of lower wages, the bureaucratic costs associated with the law's new requirements to verify workers' eligibility for employment. Other employers sought to distance themselves from the risk of sanctions by turning to labor subcontractors for workers, who in turn took a cut of the workers' wages. And some employers, as a form of insurance against the possibility that they *might* be subject to federal penalties for hiring undocumented workers at some point in the future, lowered the wages of all their workers in a discriminatory fashion.<sup>55</sup>

Both the positive and negative consequences of IRCA demonstrate that a comprehensive immigration reform program can improve the wages, working conditions, and job prospects of workers if the program is structured properly. Specifically, the program must establish sufficient legal channels for future immigration (rather than rely on employer sanctions as its primary enforcement tool) and both strengthen and improve enforcement of wage and labor laws. Without these basic elements, any new reform program is destined to repeat the mistakes of IRCA.

#### Promoting Greater Economic and Social Stability

Beyond improving the lives and livelihoods of workers in many occupations, comprehensive immigration reform would have more broadly stabilizing effects on the U.S. economy and society. Industries that now rely on significant numbers of undocumented workers would have a more stable labor force, without workers who vanish overnight because they have been deported or are trying to avoid deportation. Immigrants from Mexico who wish to return home after a job stint in the United States—as most did throughout much of the twentieth century—would more easily be able to do so. Public safety and quality of life in U.S. border communities would improve as uncontrolled immigration and the violence of the smugglers who profit from it declined. Families that include someone who is undocumented could more readily plan

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55. MASSEY ET AL., *supra* note 15; Cynthia Bansak & Steven Raphael, *Immigration Reform and the Earnings of Latino Workers: Do Employer Sanctions Cause Discrimination?*, 54 INDUS. & LAB. REL. REV. 275 (2001); Alberto Dávila et al., *The Impact of IRCA on the Job Opportunities and Earnings of Mexican-American and Hispanic-American Workers*, 32 INT'L MIGRATION REV. 79 (1998); Julie A. Phillips & Douglas S. Massey, *The New Labor Market: Immigrants and Wages After IRCA*, 36 DEMOGRAPHY 233 (1999).

for the future and thus integrate more fully into U.S. society. The undocumented status of parents would not disrupt the lives and educations of their U.S.-citizen children.

The economic and social stability of the United States is also enhanced by the stability of Mexico given the close proximity of the two nations and their strong economic ties. Events and policies that spark economic or political crises in Mexico have the potential both to disrupt U.S.-Mexico trade and to increase the pressures that motivate Mexicans to migrate to the United States. Comprehensive immigration reform would help avoid such crises in two ways. First, it would ensure that undocumented immigrants who are filling available jobs in the United States will not be summarily expelled back to an economy that does not have sufficient jobs for them. Second, immigration reform would add further stability to the enormous flow of money sent by Mexicans and Mexican Americans in the United States to their families in Mexico. From 1996 to 2003, remittances to Mexico—primarily from the United States—more than tripled from \$4.2 billion to \$13.2 billion. For better or worse, remittances provide the primary source of income for many families and communities in Mexico and in 2003 exceeded the value of new foreign direct investment for the first time.<sup>56</sup> Given that about twenty percent of the Mexican-origin population in the United States is currently undocumented,<sup>57</sup> policies that affect undocumented immigrants have a significant impact on remittances.

Some observers contend that these concerns have nothing to do with the United States and are “Mexico’s problem,” but this is a shortsighted view. If, by the wave of a restrictionist wand, all undocumented Mexicans in the United States were magically transported back home, Mexico would be filled with millions of newly unemployed people at the same time millions of other Mexicans were deprived of hundreds of millions of dollars in income from remittances. Such a situation would only worsen the condition of the Mexican economy and provoke even greater levels of migration to the United States by increasingly impoverished Mexicans.

#### MOVING FORWARD

The chaos that currently reigns along the U.S.-Mexico border is a textbook example of how the U.S. government has doomed its immigration policies to failure by remaining intentionally blind to economic reality. In the final analysis, most immigration is driven by economics. Migrants leave countries

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56. MANUEL OROZCO, PEW HISPANIC CTR., *THE REMITTANCE MARKETPLACE: PRICES, POLICY AND FINANCIAL INSTITUTIONS* 2 (2004); TASK FORCE ON REMITTANCES, INTER-AM. DIALOGUE, *ALL IN THE FAMILY: LATIN AMERICA’S MOST IMPORTANT INTERNATIONAL FINANCIAL FLOW* 3-7 (2004).

57. PASSEL ET AL., *supra* note 45, at 1; ROBERTO R. RAMIREZ & G. PATRICIA DE LA CRUZ, U.S. CENSUS BUREAU, *THE HISPANIC POPULATION IN THE UNITED STATES: MARCH 2002*, 1-2 (2003).

that lack sufficient economic opportunities and go to countries with jobs that pay more than those in their home countries. Regardless of the other personal considerations that motivate the decision to migrate, the simple fact remains that large numbers of migrants would not go to another country unless there were jobs available for them.<sup>58</sup>

Ultimately, immigration from Mexico to the United States will decline either when the Mexican economy creates more, better-paying jobs or when there are no longer jobs available in the United States. But that day has not yet arrived. The native-born workforce of the United States continues to grow older, while the U.S. economy continues to demand workers in less-skilled occupations. Meanwhile, the Mexican economy remains unable to meet the needs of its people, many of whom have been displaced from their traditional livelihoods by the disruptions associated with integration into the global market. Instead of efficiently and effectively managing Mexican migration, the federal government is engaged in a futile attempt to use border enforcement as a means of limiting immigration that its own economic policies and the demands of the U.S. labor market produce. Rather than actually reducing immigration, this strategy has succeeded only in driving it underground and into the hands of smugglers—to the detriment of U.S. national security, the U.S. economy, and immigrants themselves.

The time has come for policymakers to stop throwing ever greater amounts of money and manpower into a broken system and to accept that immigration is part of globalization and the economic integration of North America. The time has come to try a different approach. The only real effect of current U.S. border-enforcement policies is to funnel undocumented immigrants into deadly border terrain and then trap them in the United States. The nation would be much better served by a system that regulates the flow of immigrants across the border and allows undocumented immigrants already living in the United States to apply for legal status. This kind of comprehensive immigration reform would enhance national security by bringing undocumented immigrants out of the shadows and weakening the grip of smugglers, would improve wages and working conditions for all workers in industries that employ immigrants, and would save billions of dollars now wasted by treating job seekers as criminals.

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58. U.S.-MEX. BINAT'L COUNCIL, *supra* note 29, at 1.