

OVER THE WALL



Michael C. Hagerty

Law, Human Development, and the Migrant Communities of the Arizona Borderlands

**Notre Dame Law School
Program on Law and
Human Development**

Arizona's struggle with undocumented migration exists within the context of a massive intra-continental human migration. A broad and complex range of economic factors have led millions of Mexicans and Central Americans north to the United States in search of the "American dream."



Program on Law and Human Development

Notre Dame Law School's Program on Law and Human Development provided guidance and support for this report; generous funding came from the Helen Kellogg Institute for International Studies at the University of Notre Dame. The author remains solely responsible for the substantive content.

Permission is granted to make digital or hard copies of part or all of this work for personal or classroom use, provided that copies are not made or distributed for profit or commercial advantage and that copies bear this notice and a full citation on the first page. The proper form for citing Research Papers in this series is:

Author, Title (Notre Dame Program on Law and Human Development Student Research Papers #, Year).

ISSN (online): 2165-1477

**© Michael C. Hagerty
Notre Dame Law School
Notre Dame, IN 46556
USA**

About the author

During the summer of 2011, Michael Hagerty (Candidate for Juris Doctor 2013, B.A. Williams 2008) used Tucson as his base for the exploration of migration issues in the Arizona-Sonora border region. Hosted by the Roman Catholic Diocese of Tucson, Mr. Hagerty conducted interviews in Tucson and Phoenix, as well as in bi-national border cities like Ambos Nogales, Douglas-Agua Prieta, and Lukeville-Sonoita. He made trips into the Arizona desert and the to the U.S.-Mexico border to understand firsthand the migrant's challenges and governmental and civil society responses to undocumented migration. He hiked the desert trails blazed by northward-moving migrants and traveled to the Tohono O'odham Nation's Reservation, a bi-national reservation that has witnessed the highest concentrations of both migrants and migrant deaths along the border in recent years and that is now divided in two by a 75-mile-long border fence.

"I hope that my research plays a small part in shifting the discourse on immigration away from the rhetoric of fear and animosity towards migrants, and helps foster a political environment in which national and border security concerns are not addressed at the expense of human life, nor the civil and human rights of America's economic refugees from the south."

Acknowledgments: This project is dedicated to my parents, Bill and Agnes, who have given me unbounded love and support all my life. I would like to thank Paolo G. Carozza and Christine M. Cervenak for their unparalleled guidance and instruction, as well as Patti J. Ogden for her top-notch editing assistance. I would also like to thank those who worked along with me from the Notre Dame Program on Law and Human Development, Manasi, Rachel, and James. And I would especially thank Joanne Welter, Bill Rimmel, Leo Guardado, Barry Gosling and the Diocese of Tucson for the kindness and hospitality they showed a lost California boy in the desert. Keep fighting the good fight!



About the program



The Program on Law and Human Development serves as a forum and catalyst for interdisciplinary research, scholarship, teaching and service on the role of law and justice in the integral development of human persons and communities. We emphasize an approach to global affairs that is oriented toward the integral development of the human person and the common good of the human family.

The Program is a focal point for international legal studies, broadly defined, at the Notre Dame Law School. At the same time, the Program collaborates closely with actors at the Law School and throughout the University working on issues relevant to human development.

Table of Contents

About the author	2
About the program.....	2
EXECUTIVE SUMMARY	4
INTRODUCTION: IRREGULAR MIGRATION INTO THE UNITED STATES AND ARIZONA	6
I. LEGAL IMMIGRATION INTO THE UNITED STATES: A GUIDELINE	8
A. Permanent Immigration.....	8
B. Legal Temporary Migration.....	10
II. ARIZONA	11
III. MIGRATION THROUGH THE BORDERLANDS: HISTORICAL CONTEXT	14
IV. MIGRATION INTO ARIZONA TODAY: 1994-2011	16
V. BARRIERS TO MIGRATION.....	18
VI. MEXICAN EFFORTS TO AID MIGRANTS	21
VII. HUMANITARIAN CRISIS ON THE U.S.-MEXICO BORDER.....	23
A. Migrant Deaths in the Desert.....	23
B. Humanitarian Response by Activist and Faith-Based Groups.....	24
VIII. THE UNIQUE CASE OF THE TOHONO O’ODHAM RESERVATION	25
IX. DE-HUMANIZATION AND CRIMINALIZATION OF MIGRANTS IN ARIZONA	29
A. During Migration.....	29
B. Migrant Life in Arizona: the Policy of Misery	33
CONCLUSIONS & RECOMMENDATIONS	38

EXECUTIVE SUMMARY

In recent years the state of Arizona has become the most contentious battleground in the national debate on undocumented immigration. Though the state is home to only 3.6 percent of the nation's 11 million total undocumented aliens, Arizona has captured the nation's attention by taking a hardline stance against these aliens by enacting local laws in reaction to the federal government's perceived failure to enforce its own immigration law. Bills such as the heavily publicized S.B. 1070 represent the model for a wave of restrictive anti-immigrant state laws that have emerged in recent years. These laws, and the spirited opposition movements challenging them, have added fuel to the fire, so to speak, by increasing the sense of urgency surrounding the matter of illegal immigration.

To a large extent, Arizona's solution to the "problem" of undocumented migration is a reaction to an increase over the last twenty-five years in the number migrants choosing Arizona as their entry point into the United States. Although the state has only a 200-mile share of the 2,000-mile U.S.-Mexico Border, a shift in federal immigration policy has diverted the flow of migration north from Central America and Mexico, away from historic crossing points in major bi-national cities like San Diego-Tijuana and El Paso-Ciudad Juárez and into the desolate and treacherous Sonoran Desert of southern Arizona. This massive influx of migrants entering the state was an unexpected nuisance for the largely conservative Caucasian residents of Arizona, and the state's policies by and large reflect the discontent felt by its citizenry.

Over the course of the last seventeen years it is estimated that over 6,000 migrants have lost their lives along the U.S.-Mexico border.



The combined effect of U.S. federal immigration policy and Arizona's recent stance against undocumented immigrants has been devastating to undocumented migrant communities. First, the migratory process has become alarmingly difficult and dangerous, particularly for Central American migrants who must traverse the entire 3,000-mile length of Mexico before even attempting to enter the United States. For these migrants, getting across the Arizona border is only the final leg of an epic intra-continental journey. However, Central American and Mexican migrants alike face the possibility of death by exposure in the Arizona desert, violence at the hands of gangs and cartels, and the risk of criminalization upon capture by U.S. law enforcement agencies. Over the course of the last seventeen years it is estimated that over 6,000 migrants have lost their lives along the U.S.-Mexico border.

This human rights crisis has been addressed by a number of humanitarian organizations operating in the Arizona borderlands. These groups devote themselves almost exclusively to the mission of preventing the avoidable migrant deaths that occur all too often in the Arizona desert. Unfortunately, despite this commendable purpose, many humanitarian organizations have had their efforts frustrated thanks to the current state of Arizona's legal system. For a variety of reasons, these groups have been unable to provide aid in the most treacherous regions of the desert, most notably on the Tohono O'odham Indian Reservation, which straddles

the border and has proven to be the one of the deadliest patches of earth for migrants on the U.S-Mexico border.

Secondly, existing legal structures in Arizona have hindered the integration efforts of those migrants who are able to successfully cross the border and settle into Arizona communities. A so-called policy of misery has taken hold in the state, the result being a society of migrants who live as second-class persons. In Arizona, undocumented persons are denied the right to legally work, to receive basic health services, and by and large to rely on local law enforcement for protection. By undertaking even the most routine, quotidian activities these migrants risk potentially permanent separation from their families, and in many cases from their children who are U.S. citizens.

Arizona's struggle with undocumented migration exists within the context of a massive intra-continental human migration. A broad and complex range of economic factors have led millions of Mexicans and Central Americans north to the United States in search of the "American dream." Although the flow of migrants appears to be in decline with the current economic slump in the United States, overall this migration is not likely to abate so long as there exists a relative disparity in wealth between the U.S. and the Latin American states of North America. This stark fact leaves the United States left to resolve a pair of issues.

First, the United States Congress must arrive at a conclusion about what do with the 11 million undocumented migrants already residing within the territory of the United States. These migrants are unlikely to ever be removed from the country, either willingly or by force. Eliminating that possibility, the remaining options for the United States are either to maintain the status quo—a plainly unsustainable proposition—or to arrive at some solution involving the legitimization of the nation's undocumented population. Past examples of such programs, most notably the Reagan Administration's 1986 amnesty, serve as an indication that "amnesty" is feasible, but they do not address the second issue requiring the attention of U.S. immigration policy makers.

In addition to resolving the open-ended problem of what to do with migrants at home, the United States must reform its immigration policy to provide a legal and legitimate means of migration for economic migrants. The current options for such migrants are available in insufficient numbers and are prohibitively expensive for most Mexican and Central American migrants. As a result these migrants have (for the most part) elected the undocumented route for entry into the United States. The solution for the United States is not to build walls or to try to keep migrants out by force. As a matter of policy the proper course of action would be for the United States to streamline both its temporary and permanent visa application processes so as to provide potential migrants with a realistic means to enter the United States without undermining U.S. sovereignty. Such reforms would furthermore end the needless expenditure of billions of taxpayer dollars on border security measures aimed at a class of economic migrants simply hoping for a better life. Generally, the focus of U.S. immigration policy should be shifted away from border security and towards efforts to unite separated families, to prevent avoidable deaths, and to capitalize on the immense economic, social, and cultural potential that migrants bring with them to the United States.

Arizona's struggle with undocumented migration exists within the context of a massive intra-continental human migration.

Over the Wall

LAW, HUMAN DEVELOPMENT, AND THE MIGRANT COMMUNITIES OF THE ARIZONA BORDERLANDS

INTRODUCTION: IRREGULAR MIGRATION INTO THE UNITED STATES AND ARIZONA

It is currently estimated that between ten and eleven million people reside unlawfully in the United States.¹ This figure represents only about 3 percent of the total U.S. population of 300 million, yet it encompasses a full third of the nation's foreign-born population.² Of this total, approximately 6.6 million are thought to be natives of Mexico,³ while a further 1.4 million come from the various countries of Central America, most notably El Salvador, Guatemala, and Honduras.⁴ These same countries top the list of nationalities comprising the undocumented population of the United States. The Department of Homeland Security (DHS) has estimated population totals for each in the accompanying table.

According to these estimates, a total of 8.1 million Mexicans and Central Americans resided in the United States as of 2010, the majority having entered the country clandestinely by way of the United States' southern border with Mexico. Traditionally, the greatest population centers for these undocumented communities were found within the four states straddling the border—California, Arizona, New Mexico, and Texas. Increasingly, however, undocumented Latino migrants have been making their way deeper into the interior of the country before settling.⁶ As of 2011, migrant communities exist in every state, in every major city, and in the vast majority of suburban communities nationwide.⁷ This phenomenon of human mobility has visibly changed the face of America, and, for many citizens of traditionally non-Hispanic communities, has contributed to a growing sense of urgency surrounding the issue of undocumented immigration into the United States. Such

Total Unauthorized Residents in the U.S. (2010) ⁵	10,790,000
Mexico	6,640,000
El Salvador	620,000
Guatemala	520,000
Honduras	330,000

¹ Here, the numbers vary. The Pew Hispanic Center estimates a total of 11.2 million undocumented persons. Jeffrey S. Passel & D'Vera Cohn, Pew Hispanic Ctr., *Unauthorized Immigrant Population: National and State Trends, 2010*, at 1 (2011), available at <http://pewhispanic.org/files/reports/133.pdf>. The Department of Homeland Security puts that number at 10.8 million. Michael Hoefler et al., Dep't of Homeland Sec., *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2010*, at 2 (2011), available at <http://www.dhs.gov/files/statistics/immigration.shtm>.

² Nicholas Parrott, *USA Background Information*, Bundeszentrale für Politische Bildung, http://www.bpb.de/themen/9SSLSV,0,Background_Information.html.

³ KATE BRICK ET AL., MEXICAN AND CENTRAL AMERICAN IMMIGRANTS IN THE UNITED STATES 5 (2011), available at <http://www.migrationpolicy.org/pubs/MexCentAmimmigrants.pdf>.

⁴ See Hoefler et al., *supra* note 1.

⁵ *Id.*

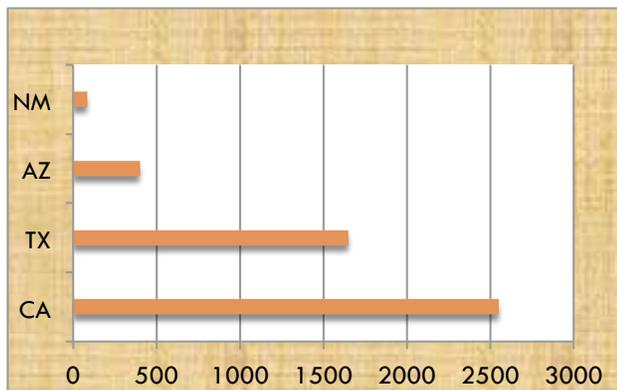
⁶ See generally Migration Policy Inst., *State Proportion of the Mexican-Born Population in the United States* (2009).

⁷ See e.g., Pew Hispanic Center, *Unauthorized Immigrants in the U.S.*, <http://pewhispanic.org/unauthorized-immigration/>

rhetoric is famously vocalized in the coverage of the national news media,⁸ particularly on cable news television.⁹

The Pew Hispanic Center estimates that in 2010 about 400,000 unauthorized immigrants resided in the state of Arizona.¹⁰ Even working under the unlikely assumption that this figure consists exclusively of Mexican/Central American immigrants, this number would still represent only 5% of the total national population of undocumented immigrants. In contrast, the neighboring border states of California and Texas account for 2.5 million and 1.6 million undocumented immigrants, respectively.¹¹

UNAUTHORIZED IMMIGRANT POPULATION, BY STATE
(IN THOUSANDS)



Of course, it is impossible to generate truly accurate statistics for the number of undocumented migrants that reside in the United States. The plain reality is that those migrants who arrive successfully at their destinations in the United States must live, by necessity, “off the grid.” Most of these migrants will never be counted in any formal way. No one will ever know exactly where they are residing, how long they have been in the United States, or whether they ultimately return home. Thus, those who study undocumented immigration are left with the burden of making sense out of quantities that are inherently inaccurate.

Furthermore, statistics, even where reliable, do not adequately depict the true story of undocumented migration into the United States. Border Patrol apprehension statistics, for example, do provide an accurate count of the exact number of migrant arrests in a given year.¹² They do not account, however, for the fact that many migrants are apprehended and repatriated multiple times. Hypothetically, if ten migrants were to be arrested on ten separate occasions, this occurrence would be reflected by Border Patrol statistics simply as one hundred arrests, a highly misleading figure.

By the same token, recording the number of migrant remains found in the desert fails to paint a true picture of the risk of death faced by migrants in the Arizona desert. These figures capture only the number of remains that are recovered. An unknown and unknowable number of migrants have died making their way north, yet those whose remains are ravaged by buzzards and coyotes, buried in a desert wash, or disintegrated by the Arizona sun, will go uncounted forever.

The hardships that migrants face in the Arizona desert certainly beg the question why anyone would voluntarily subject himself to such tribulation. Or, to put the question another way, why don't migrants simply avail themselves of the legal avenues to immigration available to foreigners generally? Indeed, much of the

⁸ See e.g., Gosia Wozniacka, *Latino-Indigenous Mexican Divide Stirs Calif. Town*, Fox News (Aug. 14, 2011), <http://www.foxnews.com/us/2011/08/14/latino-indigenous-mexican-divide-stirs-calif-town/> (reporting on how recent immigration of indigenous Mexicans has turned a small California town upside-down).

⁹ See e.g., O'Reilly Factor (Fox News television broadcast, Apr. 8, 2011), available at <http://video.foxnews.com/v/4633426/why-are-illegal-immigrant-families-collecting-welfare>.

¹⁰ PASSEL, *supra* note 1, at 14.

¹¹ *Id.* at 15.

¹² See generally CUSTOMS AND BORDER PROTECTION, U.S. BORDER PATROL FISCAL YEAR APPREHENSION STATISTICS (2011), available at http://www.cbp.gov/linkhandler/cgov/border_security/border_patrol/usbp_statistics/bp_apps_mexico_99_10.ctt/bp_apps_mexico_99_10.pdf.

confusion regarding the realities of undocumented migration stems from a misunderstanding of this point. To unravel this apparent enigma, it is first necessary to understand the current state of the law with respect to immigration.

I. LEGAL IMMIGRATION INTO THE UNITED STATES: A GUIDELINE

A. Permanent Immigration

There are four ways a foreign national can immigrate to the United States and become a legal permanent resident (LPR).

Employment-Based Visas Issued Annually ¹³		
Preference Level	Type of Skill	Number of Visas Issued
EB-1	Workers of extraordinary ability in the arts, science, education, business, or athletics	40,040 (28.6%)
EB-2	Members of professions with advanced degrees, or persons of exceptional ability	40,040 (28.6%)
EB-3	Skilled workers with at least 2 years training, professionals with Bachelor's degrees, and unskilled workers in occupations in which U.S. workers are in short supply	40,040 (28.6%)
EB-4	"Special Immigrants" – largely religious workers and former employees of the U.S. government.	9,940 (7.1%)
EB-5	Investors who invest at least \$1 million to create at least 10 U.S. jobs	9,940 (7.1%)

The first avenue is via an employment-based visa, which is reserved for foreign employees who can demonstrate "exceptional ability" in science, arts, athletics, etc.—or at least a certain skill set that is in demand in the American economy.¹⁴ Depending on the desirability of the immigrant's skills, he or she may be granted an EB-1 visa, or alternatively, in decreasing levels of desirability, an EB-2, or EB-3 visa, with the EB-3 representing the lowest skill level worthy of an employment-based visa.¹⁵ This employment avenue to immigration requires that an American employer not only petition the U.S. Citizenship and Immigration

¹³ *Id.*

¹⁴ See U.S. CITIZENSHIP AND IMMIGRATION SERV., GUIDE TO PERMANENT WORKER VISAS (2010), <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=cdfd2f8b69583210VgnVCM100000082ca60aRCRD&vgnnextchannel=cdfd2f8b69583210VgnVCM100000082ca60aRCRD> (outlining five preference levels for employment-based immigration – the "EB" visa).

¹⁵ The EB-4 and EB-5 visas are technically employment-based but are not particularly relevant to the issue of undocumented migration, as they pertain to "special immigrants" and "business investors." See *id.*

Services (USCIS) on behalf of the foreign applicant but also serve as the immigrant's sponsor.¹⁶ Currently, 140,000 employment-based visas are made available annually. Of this total, 85.8 percent of the visas are allocated equally among EB-1, EB-2, and EB-3 visa applicants.¹⁷ Thus, at each of the top three priority levels 28.6 percent of the total, or roughly 40,000, visas are issued. The remaining 14.2 percent is divided between EB-4 and EB-5 applicants. For immigrants of the lowest skill level, there are around 40,000 visas available, but they must be divided among skilled workers, university graduates, and in-demand unskilled workers.

Because most undocumented migrants are poor, uneducated, and relatively unskilled, employment-based immigration is not a viable option. Even if a migrant were able to find a business that would sponsor him, the U.S. policy of accepting only "desirable" foreign workers precludes most migrants from utilizing this path to legal immigration.

Type of Family-Based Visa	Preference category applicant requirements	Annual limit on visas ¹⁸	Current cost ¹⁹	Average wait time for issuance of visa ²⁰
F1 (1st preference)	Unmarried adult child of U.S. citizen	23,400	\$750	Most countries – 6 yrs Mexico – 16 yrs
F2	Spouse or child of a green card holder (lawful permanent resident - LPR)	114,200	\$750	Most countries – 5 yrs Mexico – 6 yrs
F3	Married child of U.S. citizens	23,400	\$750	Most countries – 8 yrs Mexico – 16 yrs
F4 (last preference)	Sibling of U.S. citizen	65,000	\$750	Most countries – 11 yrs Mexico – 13-22 yrs

The second means of legal immigration is family-based. Under the Immigration and Nationality Act of 1952, the foreign spouse, minor child, or parent of a U.S. citizen can receive an IR-(1-5) visa²¹ without being subject to numerical immigration limits.²² Those individuals with more distant or non-dependent relatives, such as adult children and siblings, may apply for an F (1-4) visa. These visas, however, are subject to a preference system

¹⁶ See generally MATTHEW SOERENS & JENNY HWANG, WELCOMING THE STRANGER 70-71 (2009).

¹⁷ LAURIE BALL ET AL., EMPLOYMENT-BASED IMMIGRATION: CREATING A FLEXIBLE AND SIMPLE SYSTEM 7 (2010), available at http://www.princeton.edu/research/pwreports_f09/591d_2010.pdf.

¹⁸ *Id.*

¹⁹ Each visa application is subject to an application fee (\$420) and a processing fee (\$330) U.S. DEPT. OF STATE, FEES FOR VISA SERVICES, http://travel.state.gov/visa/temp/types/types_1263.html.

²⁰ See SOERENS, *supra* note 15, at 72-75.

²¹ IR-1: Spouse of U.S. citizen; IR-2: Unmarried Child under 21 years of U.S. citizen; IR-3: Orphan adopted abroad by U.S. citizen; IR-4: Orphan to be adopted in U.S. by U.S. citizen; IR-5: Parent of U.S. citizen of 21 years or older. U.S. Dept. of State, *Family-Based Immigrant Visas*, http://travel.state.gov/visa/immigrants/types/types_1306.html.

²² Immigration and Nationality Act (INA), Pub. L. No. 82-414, 66 Stat. 163 §205 (codified as amended in scattered sections of 8 U.S.C.).

that stipulates annual numerical limits.²³ There is no family-based option for cousins, uncles-aunts, or grandparents of either U.S. citizens or green-card holders.

Unfortunately, as evidenced in the above chart, family-preference based visas are expensive and the wait times are prohibitively long, particularly for Mexican citizens. Even for the eligible fraction of migrants with family in the United States, paying \$750 and waiting five to twenty years for a visa is not viewed as a worthwhile investment in most cases. Of course, illegally entering the United States is not without its costs either. People-smugglers, known as *coyotes* or *polleros*, charge fees well into the thousands of dollars to guide migrants north, but in this scenario the payoff for the migrant can be immediate. With a little luck, a migrant who elects this route can find a job and start earning money in a matter of weeks upon arriving in the United States.

The third legal means of immigration is diversity-based. This approach involves a free lottery that can be entered by citizens of countries whose nationalities are under-represented in the U.S. population. Each year 50,000 applicants are selected globally from this pool and allowed to immigrate to the United States. The diversity requirement of under-representation, however, automatically eliminates most of the migrants crossing the U.S.-Mexico border from eligibility.²⁴ Even for those who remain eligible by virtue of having been born in an under-represented country like Belize or Nicaragua, the likelihood of being selected is astronomically low, making this option a shot in the dark, at best.²⁵

The fourth, and last, avenue of legal immigration is reserved for refugees and those seeking asylum in the United States. There are no numerical limits for this group, whose members are admitted only after immigration officials have recognized them as being in danger in their home country due to their race, religion, ethnicity, political affiliations, etc. This refugee/asylum category, however, does not apply to migrants motivated by economic necessity, thus making it unavailable to virtually anyone currently migrating from within North America.²⁶

B. Legal Temporary Migration

The United States has long made temporary work visas available to unskilled laborers, most notably during periods of labor shortages such as the First and Second World Wars. Historically, Mexico has provided the bulk of this labor force, thanks in part to the famous *Bracero* program in place in the 1940s–60s. Even today, temporary visas are lightning-fast to obtain and widely available to unskilled workers, at least in comparison with the snail-like pace and low odds of success that characterize permanent employer-based visas. In 2008, approximately 600,000 temporary work visas were issued, each taking an average of about a month for processing.²⁷ The problem, however, is that even 600,000 work visas is insufficient to meet the current

²³ U.S. Dept. of State, *Family-Based Immigrant Visas*, http://travel.state.gov/visa/immigrants/types/types_1306.html.

²⁴ Nationals of Mexico, El Salvador, and Guatemala are ineligible to participate in the diversity lottery because these nationalities are too well represented in the population of the United States. Eligible applicants must also provide proof of having completed at least a high school education, further eliminating much of the migrant population. U.S. Dept. of State, *Diversity Visa Lottery 2011 (DV-2011) Results*, http://travel.state.gov/visa/immigrants/types/types_5073.html.

²⁵ For the 2011 lottery, the State Department reports that over 12 million people applied for the 50,000 available spots, giving each applicant a 1-in-240 chance of being selected for a visa. *Id.*

²⁶ Only recently, however, this was not universally the case. In the 1980s and 90s thousands of Central Americans fled oppressive regimes in Guatemala, El Salvador and Nicaragua. Due to the fact that the military governments in Guatemala and El Salvador had the support of the U.S. government, however, the Reagan Administration refused to acknowledge these migrants as amnesty candidates. Thousands were delivered home into the waiting arms of the death squads. The situation was different for Nicaraguans fleeing the communist Sandinista government. These refugees were welcomed into the U.S. with open arms. See Susan Gzesh, *Central Americans and Asylum Policy in the Reagan Era*, MIGRATION POLICY INST. (2006), available at <http://www.migrationinformation.org/Feature/display.cfm?id=384>.

²⁷ Approximately 380,000 people out of this total received an H-1B, H-2A, H-2B, O, or L temporary work visa. The rest received non-work visas authorizing employment, as, for example, certain student visas. Demetrios Papademetriou et al., *Aligning*

demand for labor. And there are still more migrants than there are visas. Furthermore there are millions of undocumented workers who, having already entered the United States unlawfully, are subsequently ineligible for participation in such a program.²⁸

Although temporary work visas provide certain workers with a viable opportunity for legal migration, they—like permanent work visas—favor the skilled labor force and are relatively inaccessible for unskilled workers. The exception to this rule is the H-2A visa, available to unskilled seasonal agricultural workers without stipulated numerical limits, provided the worker has an employer willing to sponsor him.²⁹ In truth, only the H-2B visa affords non-skilled, non-agricultural workers the means to legal temporary migration, and this visa is limited to 66,000 workers per year.³⁰ In addition it requires both employer sponsorship and a showing from the employer that the type of worker he is hiring from abroad is unavailable from within the ranks of the U.S. citizen workforce.³¹

Even those few migrants lucky enough to receive a temporary work visa will see their freedom substantially limited by the scope of their visas. Temporary work visas allow a migrant to work only for a specific employer, leaving employers with no incentive to provide temporary workers with opportunities for advancement within their company. As Papademetriou et al. note in their report for the Migration Policy Institute, the current temporary work visa system “fails to ensure that successful temporary immigrants, [those] with the best potential to contribute economically and socially, [to] have the opportunity to share the full value of their human capital.”³²

At the end of the day, neither temporary nor permanent work visas provide the overwhelming majority of migrants from south of the border with real options for legal migration. With no recourse to legitimate alternatives and under dire economic pressures to migrate north, migrants continue to enter the United States unlawfully.

II. ARIZONA

It is curious that Arizona has become ground zero for the national immigration debate. There are, after all, three other states sharing the Mexican border and Arizona has a relatively small population of undocumented migrants residing within its borders. Most Arizonans will tell you that they did not wish for the attention, yet interested observers nationwide have been watching Arizona closely, waiting to see how the immigration game will play out—waiting to see what Arizona will do next.

The root of Arizona’s prominence in the immigration debate is the drastic increase in the number of undocumented migrants entering the state from Mexico over the course of the last fifteen years. Conservative

Temporary Immigration Visas with Labor Market Needs: the Case for a New System of Provisional Visas, MIGRATION POLICY INST. 7 (2009), available at http://www.migrationpolicy.org/pubs/Provisional_visas.pdf.

²⁸ Federal law assigns a penalty for being in the country unlawfully. A first-time offender must leave the U.S. for five years before being eligible to apply for re-admission. This penalty increases with the number of unlawful-presence convictions a migrant receives. See 8 U.S.C. § 1325-26.

²⁹ See U.S. CITIZENSHIP AND IMMIGRATION SERV., H-2A TEMPORARY AGRICULTURE WORKERS, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=889f0b89284a3210VgnVCM100000b92ca60aRCRD&vgnnextchannel=889f0b89284a3210VgnVCM100000b92ca60aRCRD>.

³⁰ U.S. CITIZENSHIP AND IMMIGRATION SERV., CAP COUNT FOR H-2B NONIMMIGRANTS, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=356b6c521eb97210VgnVCM100000082ca60aRCRD&vgnnextchannel=d1d333e559274210VgnVCM100000082ca60aRCRD>

³¹ The U.S. Citizenship and Immigration Service outlines these requirements. U.S. CITIZENSHIP AND IMMIGRATION SERV., H-2B TEMPORARY NONAGRICULTURAL WORKERS, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=d1d333e559274210VgnVCM100000082ca60aRCRD&vgnnextchannel=d1d333e559274210VgnVCM100000082ca60aRCRD>

³² PAPADEMETRIOU ET AL. *supra* note 26, at 9.

local residents, making up a majority of the state’s voter base, have responded to this development by taking a stand against illegal immigration. The ensuing confrontation is what has captured the world’s attention.

As a border state, migration is not a new phenomenon within Arizona, though it was not until around 1994 that the number of migrants began to climb to the numbers seen today. It was in that year that the federal government, “under political pressure to do something about ‘illegals,’... adopted a new border enforcement strategy”³³ in urban areas straddling the border. Operation Gatekeeper in San Diego, Operation Hold the Line in El Paso, and Operation Safeguard in Nogales all entailed a tightening of border security in the urban areas where undocumented migrants had traditionally attempted to cross.³⁴

Border Patrol Apprehensions by Sector 1986-2010 ³⁵				
Year	San Diego Sector	El Paso Sector	Tucson Sector	Southwest Border Total
2010	68,565	12,251	212,202	447,731
2006	142,104	122,256	392,074	1,071,972
2002	100,681	94,153	333,648	929,809
1998	248,092	125,035	387,406	1,516,680
1994	450,152	79,688	139,473	979,101
1990	473,323	223,219	53,061	1,049,321
1986	629,656	312,892	71,675	1,615,844

As indicated in the chart above, prior to 1994, San Diego and El Paso were the busiest migrant corridors along the border. With the 1994 border clampdown, however, the migrant flow shifted into Arizona’s Tucson sector, where the desert afforded migrants a lower probability of detection. Note, in particular, that in 2010 nearly half of the migrants arrested by Border Patrol were picked up within the Tucson sector, suggesting that a substantial percentage of recent migrants have attempted to enter the United States through this 262-mile corridor that represents a mere 10 percent of the 2,000-mile border with Mexico.

The implementation of the new border security initiatives entailed nothing less than a full militarization of the border region. In addition to beefing up the presence of Border Patrol by augmenting their stock of trucks, horses, and dogs, DHS has constructed walls,³⁶ erected floodlights facing Mexico, and increased the number

³³ KATHRYN FERGUSON ET AL., *CROSSING WITH THE VIRGIN* (2010) (quoting Rev. John Fife).

³⁴ Jacqueline Hagan et al., *The Effects of U.S. Deportation Policies on Immigrant Families and Communities: Cross-Border Perspectives*, 88 N.C. L. REV. 1799, 1813 (2010).

³⁵ CUSTOMS AND BORDER PROTECTION, U.S. BORDER PATROL FISCAL YEAR APPREHENSION STATISTICS, *supra* note 12.

³⁶ Aside from the relevant migration issues, the border wall has also been an ecological disaster. It has divided one ecosystem in two, cut off migration patterns of every land animal larger than a squirrel, and threatens the survival of various endangered species. Perhaps even more troubling is the fact that as a result of the REAL ID Act the Director of the DHS has free reign to waive the dozens of environmental protection laws that formerly stood in the way of the border wall construction. See Andrea C. Sancho, Note, *Environmental Concerns Created by Current United States Border Policy: Challenging the Extreme Waiver Authority Granted to the Secretary of the Department of Homeland Security Under the REAL ID Act of 2005*, 16 SOUTHEASTERN ENVTL. L.J. 421, 425-26

of airplanes, helicopters, and unmanned drones circling the skies in search of migrants.³⁷ Additionally, underground sensors are employed to detect ground vibrations as migrants walk near the border.³⁸ And, as of 2006, the National Guard has been present along the border as well, giving the term “militarization” a literal twist.

The rationale behind the decision to heavily police popular border-crossing points while leaving remote regions only lightly patrolled was that migrants would be incapable of crossing near cities like San Diego and El Paso and unwilling to trek through the dangerous deserts of eastern California and Arizona. Faced with a high likelihood of detection near border cities, and with a high likelihood of death in the remote desert, migrants were supposed to be deterred from entering the United States altogether.³⁹ Instead, the migrants simply moved to where the Border Patrol “wasn’t”—to the desolate Sonoran Desert of southern Arizona, where the chances of detection were low.

Within Arizona itself, the backlash against the influx of migrants into Arizona was (and is) felt most strongly in Phoenix, Arizona’s capital, and in many respects the “nerve-center” of the state. A young city without the bi-national history of more southerly cities like Tucson or Nogales, Phoenix is populated by a much higher concentration of conservative Caucasians, many of whom are natives of states outside the Southwest.⁴⁰ In contrast with Tucson, a 4,000 year-old settlement that has identified itself as a border community for as long as there has been a border, Phoenix strives to be an “American” city, and many of its citizens fear that undocumented migration into the state threatens this aspiration. For this reason, Phoenix has become the center of the anti-immigrant movement for which Arizona has become well known. It is no surprise, then, that Maricopa County, which includes the Phoenix area, is home to Sherriff Joe Arpaio, the highly controversial county official known for his tough stance on illegal immigration. Armed with the self-ascribed moniker “America’s toughest Sherriff,” Arpaio garners the fervent support of many Phoenicians,⁴¹ who appreciate his efforts to clear the streets of Maricopa County of illegal immigrants through whatever means necessary.⁴²

Arpaio’s tactics, like most of Arizona’s recent anti-immigrant initiatives, are reactions to what is often perceived of as an “invasion” of undocumented migrants into Arizona. They represent the state’s response to a problem its citizens feel they have had forced upon them unwillingly by the federal border policy of deterrence, a policy that has effectively proven to be a disease to which increased migration and anti-immigrant reactions are mere symptoms.

(2008). For a good look at the various materials used to construct the wall, see U.S. Customs and Border Protection, *Border Fencing-California* (June 2001),

http://www.cbp.gov/linkhandler/cgov/border_security/border_patrol/usbp_statistics/2435_southwest.ctt/2435_southwest.pdf.

³⁷ See U.S. CUSTOMS AND BORDER PROTECTION, SBINET BLOCK 1 FACT SHEET, available at

http://www.cbp.gov/xp/cgov/border_security/otia/sbi_net/.

³⁸ *Id.*

³⁹ See TODD SORESENSEN ET AL., THE EFFECTS OF BORDER ENFORCEMENT ON MIGRANTS’ BORDER CROSSING CHOICES: DIVERSION OR DETERRENCE? (2007), available at client.norc.org/jole/soleweb/7195.pdf.

⁴⁰ Marc J. Perry, *State-to-State Migration Flows: 1995 to 2000*, at 4, CENSUS BUREAU (Aug. 2003), available at www.census.gov/prod/2003pubs/censr-8.pdf.

⁴¹ See Randy James, 2-Min. Bio: Sherriff Joe Arpaio, TIME MAGAZINE (Oct. 13, 2009),

<http://www.time.com/time/nation/article/0,8599,1929920,00.html>.

⁴² Arpaio’s well-publicized initiatives include running street sweeps for undocumented aliens, conducting workplace raids, and housing detained migrants in an outdoor “tent city.” Anthony C. Thompson, *From Sound Bites to Sound Policy: Reclaiming the High Ground in Criminal Justice Policy Making*, 38 FORDHAM URB. L.J. 775, 811 (2011). While Arpai has ardent supporters, his critics are equally if not more vocal. His questionable tactics have also led to a number of lawsuits and a U.S. Department of Justice investigation. See Daniel González, *Arpaio to Be Investigated Over Alleged Violations*, ARIZONA REPUBLIC (Oct. 30, 2011), <http://www.azcentral.com/arizonarepublic/news/articles/2009/03/11/20090311investigation0311.html>.

III. MIGRATION THROUGH THE BORDERLANDS: HISTORICAL CONTEXT

Although Arizona is currently at the center of the United States' ongoing love-hate relationship with immigrants, the situation has deep historical roots, as humans have migrated into what we now call Arizona for as long as the region has been populated. For centuries the Apache, Navajo, Ute, Hopi, and Tohono O'odham peoples freely traversed this hot, rugged, mountainous region. Later, Spanish conquistadors and missionaries moved north from the viceroyalty in Mexico City in search of El Dorado, eventually settling the uppermost extremities of Spain's vast American empire. By the 1840s, Mexicans were setting out into the Sonoran Desert by the thousands, many hoping to strike it rich in the goldfields of California. When, soon thereafter, the Americans arrived in the borderlands, they were nothing more than the most recent group to migrate into the region.

Southern Arizona became part of the United States with the Gadsden Purchase of 1854. This agreement completed the U.S. process of westward expansion, enabling the federal government to acquire the final 30,000 acres of its continental territory, including the pueblo of Tucson. Thus, with the same stroke of a pen the final, permanent frontier with Mexico was established and the triumphant realization of America's "manifest destiny" was completed.



As with many borders, the new line dividing Mexico from the U.S. was contrived; that is, it divided the border population politically but not culturally, linguistically, or even physically.⁴³ Unlike in Texas, where the Rio Grande was permitted to naturally demarcate the territories of the two countries, Arizona's southern boundary was delineated without any consideration for the local population or the geography of the region. In reality, the line was drawn primarily to facilitate the routing of the southern fork of the transcontinental railroad. More importantly to future migrants, this political line determined citizenship; those who found themselves north of the border automatically became U.S. citizens, while those to the south remained Mexican. This arbitrary division ensured that the borderlands would forever be a bi-national area—one where traditional Mexican culture would exist alongside a newly arrived American culture steeped in racism and a general anti-Mexico bias, thereby setting the stage for conflicts that survive to this day.

For half a century the border was little more than a line on a map, a "porous sieve through which families crossed and re-crossed."⁴⁴ Mexicans and Americans alike dispensed with border formalities such as points of entry. Travel between the neighboring countries could be conducted with the utmost ease regardless of one's nationality. With open international borders and no federal immigration policy, it was therefore all but impossible for an immigrant enter the country illegally.⁴⁵ In 1875, however, the first exclusionary immigration

⁴³ See LUIS ALBERTO URREA, *ACROSS THE WIRE* 81 (1993).

⁴⁴ FERGUSON ET AL., *supra* note 32, at 3.

⁴⁵ States, however, could restrict immigration flows, making it theoretically possible to illegally enter a state from a foreign nation. See KEVIN R. JOHNSON ET AL., *UNDERSTANDING IMMIGRATION LAW* 117 (2009).

law was passed,⁴⁶ and by 1904 the U.S. Commissioner General of Immigration had hired seventy-five men (known as the Mounted Watchmen) to patrol the United States' southern boundary. Their mission was to monitor the 2,000-mile Mexican border, doing their best to keep out Mexican and Chinese border-crossers.⁴⁷ In 1924, the Department of Labor Appropriation Act created the Border Patrol, a federal law enforcement agency operating under the umbrella of the Department of Labor. Originally, this new agency consisted of 450 agents whose mission was to patrol the 6,000 miles of both the Canadian and Mexican borders, upholding the U.S. immigration laws and, during prohibition, intercepting alcohol smugglers. In 1940, Franklin Delano Roosevelt transferred the Border Patrol and the Immigration Service from the Department of Labor to the Department of Justice.

Even during this early period of the Arizona-Mexico border, Mexicans were attracted to life in Arizona. Although exact numbers are cloudy, it is estimated that in 1900, Arizona had around 14,171 Mexican or Mexican/American residents;⁴⁸ by 1930, that number rose to 18,955.⁴⁹ In contrast, the 2010 Census Bureau put the number of Mexican-born residents of Arizona at 514,000.⁵⁰ During this early twentieth-century period strong anti-Mexican sentiments existed throughout the southwest region, but illegal immigration was only a minor regional issue, not garnering the national attention that it does today.

Throughout the twentieth century Mexicans, mainly from the northern states of Sonora, Chihuahua, and Baja California, entered the United States to fill labor gaps in the economy of the Southwest. Most worked in agriculture, mining, or ranching. By the 1920s American growers were utilizing the services of coyotes, people-smugglers who rounded up migrants and herded them across the border to work the harvests. Although at that time, as remains true today, the coyotes were paid by the head for the migrants, originally it was the grower who paid the coyote for bringing him workers, not the other way around.⁵¹

The seasonal nature of the work Mexicans have traditionally done in the Southwest meant that laborers often returned home during the off-season. On the whole, those who migrated for agricultural work had no intention of staying in the United States. They largely identified themselves as Mexicans, sent remittances to the families they left behind in Mexico, and returned home when their work was finished. When work opportunities arose again with the changing of the seasons, the migrants made their way north once more. This pattern of circular migration was the norm in the borderlands for much of the twentieth century, and it was legitimized during World War II with the *Bracero* program, a temporary guest-worker program that afforded Mexicans a legal means of working in the United States. The program served the dual purpose of filling acute wartime manpower shortages in the Southwest as well as of providing Mexican migrants with an avenue to legal employment. The program was in place until 1965, and, apart from some unresolved issues involving violations of workers' rights, the program demonstrated that a migratory labor movement could be officially planned and executed with a great degree of success, to the benefit of both the United States and Mexico.

Throughout the 1940s and '50s, the number of undocumented Mexican aliens in the Southwest continued to grow steadily. To address the issue, Attorney General Herbert Brownell announced the implementation of

⁴⁶ In 1875 Congress prohibited entry into the United States by convicts and prostitutes. Act of Mar. 3, 1875, ch. 141, 18 Stat. 477 (repealed 1974).

⁴⁷ Ineligible for legal immigration after the Chinese Exclusion Act of 1882, many Chinese elected to enter the United States through the country's sparsely populated southern border. History often repeats itself. CUSTOMS AND BORDER PROTECTION, BORDER PATROL HISTORY (Jan. 5, 2010), http://www.cbp.gov/xp/cgov/border_security/border_patrol/border_patrol_ohs/history.xml. See also JOHN ANNERINO, DEAD IN THEIR TRACKS 81 (2009).

⁴⁸ It is unclear whether this figure represents only Mexican-born residents of Arizona or whether it also includes Mexican-Americans. CAREY MCWILLIAMS, NORTH FROM MEXICO 152 (1949).

⁴⁹ *Id.* at 60 (quoting the 1930 U.S. Census).

⁵⁰ Calculated from data provided in Table 3 of Yesenia Acosta & G. Patricia de la Cruz, *The Foreign Born from Latin America and the Caribbean: 2010*, at 5 (American Community Survey Briefs #10-15, 2011), <http://www.census.gov/prod/2011pubs/acsbr10-15.pdf>.

⁵¹ MCWILLIAMS, *supra* note 47, at 165.

Operation Wetback in 1954. Although by this point the Border Patrol was routinely monitoring the border and deporting undocumented migrants on a regular basis, Operation Wetback was the first concerted effort made by the U.S. government to actively round up undocumented persons who had already settled into their lives in the United States. To justify the program, officials used rhetoric that played on the fears of that period, claiming the program was a measure to protect the nation from “subversives.”⁵²

By the mid-1990s the U.S. border policy was unrecognizable from that of its earliest days: gone were the virtually open borders with loosely enforced border restrictions; in its stead, border enforcement became one of the nation’s highest priorities.⁵³ The new national strategy was bifurcated, with aggressive enforcement of U.S. border and immigration laws and implementation of a policy of migration deterrence.⁵⁴ It was with this change that migration patterns shifted and that Arizona began to bear the brunt of the human migration northward into the United States.

IV. MIGRATION INTO ARIZONA TODAY: 1994-2011

Though migration into Arizona has been a constant throughout the state’s history, today’s migration is very different in nature from that of the past. Economic necessity has always been, in large part, the driving force behind migration in Arizona, and in the U.S. more generally, but globalization has fundamentally altered the dynamics of contemporary migration.⁵⁵

Because of economics, the demographics of the Mexican migrant population are currently in a state of flux. For example, many natives of northern and central Mexico are now finding it possible to earn a relatively comfortable living at home. Thus, for the first time in generations, these Mexican citizens have the option *not* to migrate.⁵⁶ As a result, individuals from families that for generations engaged in circular migration are now staying in Mexico, resulting in decreased numbers of Mexicans attempting to enter the United States. Yet, while the overall number of Mexican migrants may well be in decline, not every region of Mexico has experienced such economic growth. Lately, it is the small subsistence farmers of southern Mexico who have felt the pinch. Migrants from this area come in large part from historically agrarian southern states such as Chiapas and Oaxaca; they are often indigenous, many are Mayan, and some do not speak Spanish.

In the past, Mexican migrants were mostly natives of the borderlands.⁵⁷ They lived a bi-national life, with work in the United States and their homes and families in Mexico. They engaged in circular migration to balance the two,⁵⁸ and for the most part everything existed within the regional limits of the borderlands. Today’s migrants, on the other hand, are foreigners in the borderlands; they come from far away and are coming to the U.S. to stay.

One explanation for this development is that “home” for today’s migrants is simply too far away to make circular migration a viable option. Chiapas is over a thousand miles from the U.S. border, and travel is expensive. A better explanation lies, however, in the difficulty of the migratory process. Whereas at one time migrants could return home for Christmas, weddings, or funerals, and then re-enter the United States with

⁵² The politics of fear is a powerful tool used against undocumented immigrants. In 1954 the fear was communism. In 2011 it is terrorism. But in both instances our fears have been exploited and used to mobilize anti-immigrant fervor in the public.

⁵³ JOHNSON ET AL., *supra* note 44, at 31.

⁵⁴ See text accompanying notes 33-39 *supra*.

⁵⁵ Interview with Margo Cowan, Attorney, Pima County Public Defenders Office, in Tucson, Ariz. (June 27, 2011).

⁵⁶ Damien Cave, *Better Lives for Mexicans Cut Allure of Going North*, N.Y. TIMES (July 6, 2011), <http://www.nytimes.com/interactive/2011/07/06/world/americas/immigration.html>.

⁵⁷ Interview with Margo Cowan, *supra* note 54.

⁵⁸ According to one study, of all the undocumented Mexican migrants who entered the United States from 1970 to 1995, approximately 86% returned home. Douglas S. Massey & Kristen E. Espinosa, *What’s Driving Mexico-U.S. Migration? A Theoretical, Empirical, and Policy Analysis*, 102 AM. J. SOCIOLOGY 939, 978 (1997).

relative ease, it is now so difficult to cross the U.S. border that few undocumented migrants ever dare leave the country once they have successfully made it in. Today's migrants must therefore move their entire lives north. Those with families also face the dilemma of whether to bring along wives and children for what is sure to be a risky border crossing, which—even if successful—offers no assurances of a happy outcome; on the other hand, migrants who leave loved ones behind, to be sent for later, know that their wives and children will almost certainly be forced to make that same journey alone.

U.S. border policy has made circular migration unfeasible for undocumented migrants. The dangers involved with re-crossing the border are so great that these migrants have been “locked in” to the United States. Perversely, the border policy of deterrence has not dissuaded migrants from attempting to enter the United States, but it has been very successful in deterring them from ever leaving once they arrive.

In large part, the root cause of today's migration from southern Mexico and Central America is the increasingly globalized nature of international economies. Treaties such as NAFTA have made it impossible for small subsistence farmers in Mexico to compete with U.S. government-subsidized agri-business.⁵⁹ The same has been true in Central America, where the push to migrate has been amplified by natural disasters, political corruption, criminal violence, and civil wars. At home, peasants have flooded the capitals of Chiapas, Oaxaca, Guatemala, Honduras, and El Salvador, and, upon finding no educational or economic opportunities there, have made the decision to pursue a new life in *el Norte*. In this sense, migrants are being “pushed” out of their home countries by the lack of opportunities to be found there.

In a similar fashion, the disparity in wealth between the United States and the sending countries of North and Central America, in combination with the perceived abundance of work opportunities in the U.S., has “pulled” migrants away from home and drawn them north of the Mexican border. In reality, the pull that the United States has on migrants is hard to resist. The allure of jobs in construction, landscaping, babysitting, housekeeping, etc. is made even more intense by the fact that it exists in tandem with a dependence on migrant labor in the United States. Not only does the United States lure migrants north with the promise of jobs, it also depends on that migration to fill a need for cheap, menial labor.⁶⁰

Beginning around 2008 the number of migrants attempting to enter the United States began to fall off dramatically. Although Border Patrol apprehension statistics are inherently unreliable, the fact is that in 2010 the Border Patrol reportedly apprehended only 447,731 migrants. The last time so few migrants were arrested was in 1973, when Border Patrol apprehended a total of 441,066 migrants throughout the entire southwest. Equally remarkable is the drop-off in apprehensions between 2000, the all-time peak year for migrant apprehensions, and 2010, when there were over one million fewer migrant arrests.

Some commentators attribute the drop in migrant apprehensions to the success of U.S. border security measures. It appears more likely, however, that this trend is a result of lack of economic opportunities for migrants in the United States. As is evident from the chart above, migrant apprehensions remained relatively constant from 1988-2006, with a peak period around 1996-2000. It was in 1994 that the United States began to tighten border security in earnest, yet no noticeable decline in migration appears to have followed these efforts. Not even the post-9/11 boost in border security efforts has made a dent in the number of migrants moving north across the border. It was not until 2008, the year the economic recession hit the United States, that the rate of migrants coming into the United States diminished. There was no noteworthy increase in border security between 2006 and 2010, yet there were only half as many apprehensions in 2010 as in 2006. The explanation for this pattern, presumably, is economics.

⁵⁹ “The World Bank estimates 1.5 million small Mexican farmers were driven off the land by 2003, and that the total has now risen to 3.5 million.” (as of 2010). FERGUSON ET AL., *supra* note 32 at xxii (quoting Rev. John Fife).

⁶⁰ See Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503, 550 (2007).

Total Illegal Alien Apprehensions By Fiscal Year (1988-2010)⁶¹			
Fiscal Year	Tucson Sector	Yuma Sector	Southwest Border Total
2010	212,202	7,116	447,731
2008	317,696	8,363	705,005
2006	392,074	118,549	1,071,972
2004	491,771	138,438	1,139,282
2002	333,648	42,654	929,809
2000	616,346	108,747	1,643,679
1998	387,406	76,195	1,516,680
1996	305,348	28,310	1,507,020
1994	139,473	21,211	979,101
1992	71,036	24,892	1,145,574
1990	53,061	36,387	1,049,321
1988	48,683	42,723	942,561

Aside from evidence of the current ebb in the flow of migrants, there are also historical trends suggesting that a lack of jobs in the United States has been the only meaningful deterrent for migrants coming from the south. During the Great Depression, for example, migration from Mexico declined noticeably at the same time as nearly 500,000 undocumented Mexicans returned to Mexico.⁶² Yet, aside from the Depression and the current recession, undocumented migration from Mexico/Central America has steadily increased over the course of the last hundred years.⁶³ Over this same period the borderlands have witnessed a systematic increase in border security, with little impact on the number of migrants attempting to cross. Greater risk to personal safety, it seems, does not deter desperate people from migrating. What deters migrants is the perception of a lack of opportunity in the destination country.

V. BARRIERS TO MIGRATION

⁶¹ CUSTOMS AND BORDER PROTECTION, U.S. BORDER PATROL FISCAL YEAR APPREHENSION STATISTICS, *supra* note 12.

⁶² A substantial fraction of these *repatriados* were deported, however, against their will. Kevin R. Johnson, *The Forgotten "Repatriation" of Persons of Mexican Ancestry and Lessons for the "War on Terror,"* 26 PACE L. REV. 1, 4 (2005).

⁶³ See generally MIGRATION POLICY INST., MEXICAN FOREIGN-BORN RESIDING IN THE UNITED STATES, 1850 TO 2010, <http://www.migrationinformation.org/datahub/charts/fb-mexicans.cfm>.

Although American employers are more than willing to provide undocumented migrants with gainful employment, migrants must first navigate a series of increasingly perilous physical barriers before settling down and pursuing their modest economic goals. Beginning with the implementation of the policy of deterrence in the mid 1990s and culminating with the post-9/11 preoccupation with national security and the further clampdown on the U.S.-Mexico border that ensued, the borderlands have borne witness to an ever-intensifying process of militarization. With the state of the border as it is in 2011, border security around urban areas is so tight that the chance of crossing undetected is almost infinitesimal. Accepting this fact, migrants have moved into the remote sections of the Arizona desert where their attempts at crossing are more likely to be successful.

In the desert, migrants are faced with an almost endless list of hardships. They must spend anywhere from three days to a week hiking upwards of sixty miles through the mountainous terrain of southern Arizona.⁶⁴ There, a summer day can reach 115°F, a temperature at which the desert sun seems to suck the moisture out of

the body faster than it is possible to replenish; on winter nights the temperature can reach a low of 20°F. In all seasons the desert is filled with poisonous rattlesnakes, scorpions, black-widow spiders, and wild pigs, called *javelinas*. The terrain is so rocky and so filled with thorny vegetation that migrants are in constant danger of getting scratches, spraining ankles, and even breaking bones as they stumble blindly through the desert at night.⁶⁵ Blisters so big that they make walking nearly impossible are almost universal.⁶⁶

Exacerbating the dangers that migrants face in the desert is the pervasive ignorance migrants have of desert conditions. Unlike the local migrants of years past who were natives of the borderlands accustomed to surviving in the desert, today's migrants come from tropical climates. They come from green rain forests with wet summers. Most have never even seen a desert, let alone crossed one on foot in the middle of June. They are unable to comprehend that as a practical matter it is impossible to carry enough water to survive in the desert; water is simply too heavy. Neither do many migrants truly understand the magnitude of the distances they must traverse. Often *polleros* lie to the migrants, telling them that Tucson is just over the next hill, or that Phoenix is only a four-hour hike north of the border.⁶⁷ And many of the migrants, lacking knowledge of the local geography and climate, are vulnerable to those lies.



⁶⁴ See generally MARGARET REGAN, *THE DEATH OF JOSSELINE: IMMIGRATION STORIES FROM THE ARIZONA-MEXICO BORDERLANDS* (2010).

⁶⁵ See TUCSON SAMARITANS, *DESERT MEDICINE*, <http://www.tucsonsamartans.org/desert-medicine.html>.

⁶⁶ *Id.*

⁶⁷ Alan D. Bersin, *El Tercer Pais: Reinventing the U.S./Mexico Border*, 48 *STAN. L. REV.* 1413, 1415 (1996).

Migrants, to be sure, are not alone out on the trails. They share the desert with the Border Patrol, which hunts them, and with the far more dangerous drug cartels, which smuggle drugs into Arizona at night, and which have been known to extort migrants into working as drug mules. Even the same coyotes and polleros who



guide the migrants north are to be found among the list of dangers migrants face. These desert entrepreneurs sometimes rob their clients and then leave them to die of thirst.⁶⁸ A far more common occurrence, however, is for a pollero to leave behind a tired or injured migrant while the rest of the group continues north.⁶⁹

Women, unsurprisingly, suffer most in the desert. Aside from the natural dangers confronting all migrants, women travel under the constant threat of sexual assault at the hands of gangs, drug smugglers, and even

fellow migrants. The migrant trails of the Arizona desert are littered with so-called “rape trees,” from which the undergarments of violated women are hung on branches as trophies.⁷⁰ This tragedy has even reached the point where many women begin taking birth-control medication weeks in advance of their journey north, out of their awareness of the high likelihood of rape.⁷¹

In recent years an additional obstacle for migrants crossing Arizona has been the presence of American extra-legal “vigilante” groups such as the “Minutemen.” Though their activities are ostensibly legal, many of these individuals are armed, and there is therefore fear of what might happen if and when such an unsupervised individual confronts a group of migrants.⁷² The heyday of the minutemen, thankfully, has passed.⁷³ But while the original organization does still exist, along with a number of copycat groups, they are hardly a force to be reckoned with anymore, and their effect on the flow of migration is negligible at best.⁷⁴

⁶⁸ *Id.* See also Kara C. Ryf, *The First Modern Anti-Slavery Law: The Trafficking Victims Protection Act of 2000*, 34 CASE W. RES. J. INT’L L. 45, 63 (2002).

⁶⁹ See Generally LUIS ALBERTO URREA, *THE DEVIL’S HIGHWAY* (2004).

⁷⁰ Mariela Rosaio, “Rape” Trees Found Along Southern U.S. Border, *LATINA MAGAZINE* (March 11, 2009), available at <http://www.latina.com/lifestyle/news-politics/rape-trees-found-along-southern-us-border>.

⁷¹ Gabriela Diaz & Gretchen Kuhner, *Women Migrants in Transit and Detention in Mexico*, MIGRATION POLICY INST., <http://www.migrationinformation.org/Feature/display.cfm?ID=586>.

⁷² Technically, “civil patrols” like the minutemen are authorized only to observe the border from private property onto which the have been invited and to then call Border Patrol should they spot a group of migrants.

⁷³ Minutemen-type organizations have seen their popularity wane since Shawna Forde, founder of a border vigilante group called “Minutemen American Defense,” was convicted for the murder of a nine year-old Hispanic girl and her father, in a robbery aimed at funding her border-watch group. Elizabeth Aguilera, *Internal Divide Reduces Role of Minutemen*, *SAN DIEGO UNION-TRIBUNE* (June 2, 2011), available at <http://www.thesandiegouniontribune.com/news/2011/jun/02/internal-divide-reduces-role-of-minutemen/>.

⁷⁴ In addition to a decline in popularity, infighting has reduced the organization to a shell of its former self. See Jesse McKinley & Malia Wollan, *New Border Fear: Violence by a Rogue Militia*, *N.Y. TIMES*, June 27, 2009, at A9.

Each of the dangers listed above threatens migrants in equal measure, irrespective of nationality. Migrants from Central America, however, face an additional, even more harrowing, journey through Mexico just to arrive at the U.S.-Mexico border. For Mexicans the trek into Arizona is the journey. For Central Americans it is merely the grand finale to a much longer story.

Most Central Americans cross Mexico via freight trains. This process, often called taking the “*tren de la muerte*,”⁷⁵—the death train—is a harrowing journey that can take upward of a month to complete and that has resulted in an unknowable number of migrant deaths. Migrants sometimes die, and very often lose limbs, as the result of a fall off the moving train. They travel in fear of gangs, who rob and murder migrants, and of drug cartels, who force them to carry contraband into the United States. For many years Central American migrants had to fear abuses at the hands of Mexican law enforcement agencies. And while they may still be subject to deportation as undocumented aliens in Mexico, recently there has been a shift in Mexican immigration policy that has resulted in greater efforts being extended to protect migrants passing through Mexico.⁷⁶

VI. MEXICAN EFFORTS TO AID MIGRANTS

In May 2011 Mexico passed a new law expressly confirming Mexico’s commitment to protecting the basic human rights of migrants, irrespective of nationality, and decriminalizing unlawful entry into Mexico by foreign migrants.⁷⁷ The law even takes the additional step of recognizing the fundamental right to migrate, proclaiming “*Freedom of movement is a universal right, and it is the duty of all authorities to promote and respect that right.*”⁷⁸

With the passage of this law, known as the *Ley de Migración*, the Mexican federal police appear to be making an effort to protect Central American migrants passing through Mexico. The federal police sometimes guard the freight trains on the *tren de la muerte* from gangs, drug cartels, and the local police, who still have a tendency to hassle migrants in search of bribes.⁷⁹ One migrant reported that *los federales* literally stood watch while his freight train lumbered by, heading north through Veracruz.

⁷⁵ For an interesting Spanish-language documentary on the *tren de la muerte*, see Álvaro González de Mendoza, *El Tren de la Muerte*, YOUTUBE (Oct. 31, 2011), http://www.youtube.com/watch?v=X1kIP48H_vY.

⁷⁶ See Carlos Navarro, *President Felipe Calderon, Congress Act to Protect Migrants*, SOURCEMEX ECONOMIC NEWS & ANALYSIS ON MEXICO, May 18, 2011, at 1.

⁷⁷ The *Ley de Migración de 25 de mayo de 2011* states in Article I: “Son principios en los que debe sustentarse la política migratoria del Estado mexicano los siguientes:

Respeto irrestricto de los derechos humanos de los migrantes, nacionales y extranjeros, sea cual fuere su origen, nacionalidad, género, etnia, edad y situación migratoria, con especial atención a grupos vulnerables como menores de edad, mujeres, indígenas, adolescentes y personas de la tercera edad, así como a víctimas del delito. En ningún caso una situación migratoria irregular preconfigurará por sí misma la comisión de un delito ni se prejuzgará la comisión de ilícitos por parte de un migrante por el hecho de encontrarse en condición no documentada...” *Ley de Migración [Migration Law]*, art. I, 25 de Mayo de 2011 (Mex.), available at http://dof.gob.mx/nota_detalle.php?codigo=5190774&fecha=25/05/2011.

⁷⁸ Author’s translation. *Id.* at art. VII (“*El libre tránsito es un derecho de toda persona y es deber de cualquier autoridad promoverlo y respetarlo.*”).

⁷⁹ Jason Beaubien, *Dreams and Danger: Note From the Migrant Trail*, NPR (July 8, 2011), available at <http://www.npr.org/2011/07/08/137703571/dreams-and-danger-notes-from-the-migrant-trail>.

The public face of Mexico's new initiative to protect the human rights of all migrants has been Grupos Beta, a branch of the Mexican federal police force that has been charged with protecting the rights of all migrants found within Mexico's borders.⁸⁰ Though it may seem counterintuitive, many migrants find themselves in a state of exhaustion even before attempting to enter the United States. This is particularly true of Central American migrants. The purpose of Grupos Beta, then, is to provide all migrants in Mexico with emergency medical services and with information about what to expect as they attempt to migrate into the U.S.⁸¹ The organization also works hand in hand with Transportes Fronterizos, a program subsidized by the Mexican government that provides cheap bus fare to migrants who decide to return to their homes rather than attempt to cross, or re-cross, the border.



Notwithstanding these developments, there is probably some truth to the statement that the passage of Ley de Migración is more symbolic than anything else. The Mexican government has long been criticized for its own paltry human rights record with respect to the treatment of Central American migrants in Mexico, particularly given Mexico's vocal complaints regarding the treatment of undocumented Mexican nationals in the United States.⁸² If taken at face value, at least, the new law seems poised to remedy this disparity between Mexico's words and actions. Of course it must be demonstrated that Mexico is able not only to pass laws but to enforce them as well. Should this law prove to be more than a purely rhetorical device it may well be considered an important step towards fostering the development of the human capabilities of migrants at a national policy level. It may also send a message to the United States to better cultivate the human development of its own undocumented migrant community.

By and large the Mexican government takes great interest in the wellbeing of its citizens abroad, of whom 95% are found in the United States.⁸³ Mexican consular services have long been available to Mexican nationals in the U.S., and in recent years the Mexican government has increased its level of participation in efforts to ease the integration process for Mexicans immigrants. To this end the Instituto de los Mexicanos en el Exterior, or IME, was created "to deliver an array of civic, health, education, and financial services" to migrants regardless of legal status in the United States.⁸⁴ Organizations such as these provide migrants with low-cost remittance transfers, free health clinics, English classes, and opportunities for civic engagement—all under the rationale that cultivating the potential of the Mexican population in the U.S. will in the long run benefit both the United States and Mexico.⁸⁵

⁸⁰ INSTITUTO NACIONAL DE MIGRACION, GRUPO BETA DE PROTECCION A MIGRANTES, http://www.inm.gob.mx/index.php/page/Grupo_Beta

⁸¹ Interview with Omar Salvador Campillo Jordan, Coordinador del Grupo de Protección a Migrantes Beta Agua Prieta [Coordinator of Grupos Beta, Agua Prieta] in Agua Prieta, Sonora, Mex. (July 31, 2011).

⁸² See Brian Knowlton, *Calderón Again Assails Arizona Law on Detention*, N.Y. TIMES, May 20, 2010, at A6. See also Traci Carl, *Mexico Blasts U.S. Immigration Policies*, WASHINGTON POST (Sept. 2, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/02/AR2007090200958.html>.

⁸³ LAUREEN LAGLAGARON, MIGRATION POLICY INST., PROTECTION THROUGH INTEGRATION: THE MEXICAN GOVERNMENT'S EFFORTS TO AID MIGRANTS IN THE UNITED STATES 4 (2010).

⁸⁴ *Id.*

⁸⁵ *Id.* at 1.

VII. HUMANITARIAN CRISIS ON THE U.S.-MEXICO BORDER

A. Migrant Deaths in the Desert

It was stated above that migration through the borderlands is nothing new. Neither is it new for migrants to die in the borderlands. Indeed, as long as man has traversed the murderous Sonoran desert, it has claimed human lives; this stark fact is the defining presumption upon which U.S. border policy is based.



The United States' policy of migrant deterrence is centered on the high probability of death that migrants who make their way north through the Arizona desert face. The strategy is to funnel migrants into the most remote, dangerous sections of the desert, where the risk of death will outweigh the potential payoff of getting an American job. But migrants, being brave and desperate enough to start a new life in a foreign land, are not deterred by the mere threat of bodily harm. Most migrants understand there is a risk of death in the desert,⁸⁶ but they also know that the desert is where they stand the best chance of making it through successfully. Thus, though the flow of migration appears to have slowed in recent years, the number of migrants funneled into the desert—and therefore the number of deaths that are the direct result of U.S. border policy—remains high.⁸⁷

Irrespective of the season in which they attempt to cross, migrants die avoidable deaths in the Arizona desert. Most die of hyperthermia, the overheating of the body. Some drown in washes, some suffer rattlesnake bites, and others are abandoned in the desert. During winter many

⁸⁶ Most migrants come from thousands of miles away from the Sonoran Desert and are therefore woefully ignorant of the particular dangers awaiting them in the desert. Yet, if there is one fact that the pervasive rumor mill informing the migrant community has successfully disseminated, it is that to attempt to enter the United States is to take one's life in one's hands.

⁸⁷ See STUART ANDERSON, NAT'L FOUND. AM. POLICY, DEATH AT THE BORDER 4 (2010). But see Daniel Gonzales, *Immigrant Deaths Along Ariz. Border Drop 38%*, ARIZONA REPUBLIC (Aug. 16, 2011), http://www.usatoday.com/news/nation/2011-08-16-arizona-immigrant-deaths_n.htm (Noting that fewer migrant remains were recovered in the Tucson Sector up to that point in 2011, as compared to recent years). It seems to be the case that the apparent drop in migrant deaths is one more indication that migration is in fact tapering off. Damien Cave, *Migrants' New Paths Reshaping Latin America*, N.Y. TIMES, Jan. 5, 2012, at A1.

die of hypothermia at night. The ranks of the dead are filled with men and women, children and the elderly, as well as those whose remains were discovered too late to even discern gender.⁸⁸

No More Deaths, a humanitarian organization based out of Tucson that compiles data on the recovered remains of migrants, puts the total number of dead along the entire border since 1994 at 6,069.

The most alarming fact about migrant deaths is that the number of bodies being recovered in the Arizona desert has remained high even as the total number of migrants attempting to cross the border has been in decline. This suggests that crossing the Arizona desert today is more dangerous than it has ever been. The Border Patrol reports that nearly 500,000 apprehensions took place in the Tucson sector in 2004;⁸⁹ that same year 234 migrant remains were recovered in the Arizona desert.⁹⁰ By comparison, in 2010, Border Patrol made only 200,000 arrests—less than half the 2004 total. Nonetheless, in 2010 a full 253 migrant remains were recovered, 19 more than in 2004.⁹¹ As of the end of fiscal year 2011, No More Deaths has reported a total of 183 migrant remains recovered, actually putting this year among the less deadly in recent memory.⁹²

[A]s long as man has traversed the murderous Sonoran desert, it has claimed human lives; this stark fact is the defining presumption upon which U.S. border policy is based.

B. Humanitarian Response by Activist and Faith-Based Groups

This tragic situation has motivated numerous humanitarian organizations to take action. Both secular and faith-based groups are continuously working to mitigate the human toll caused by a border policy that facilitates migrant deaths. Certain groups, for example Derechos Humanos and Border Action Network, focus their efforts on legislative reform, advocating migrant rights on a policy level. Others, such as the Jesuit-run Kino Border Initiative (KBI), offer services to migrants on the Mexican side of the border, providing recently deported migrants with basic medical services, meals, and help returning home, should they decide to do so. Still other organizations, such as Samaritans, Humane Borders, and No More Deaths, venture out into the desert to provide migrants with food, water, medical services, and clothes. Occasionally volunteers from these groups stumble upon a migrant's remains, but their true focus is on those migrants who can still be saved—those who are lost, injured, and in grave danger in the desert.

For their efforts to prevent migrant deaths, a number of humanitarian workers have suffered legal reprisals. From time to time Samaritan volunteers have been cited by park officials for littering after leaving water on the Buenos Aires National Wildlife Refuge (BANWR), which lies along the U.S.-Mexico border.⁹³ A recent decision in the Ninth Circuit has ostensibly put an end to this enforcement practice, ruling that placing water bottles on a federal wildlife refuge for humanitarian purposes does not constitute “littering” as defined by the applicable statute.⁹⁴ Even more astoundingly, in 2005 a pair of young No More Deaths volunteers were

⁸⁸ In fiscal year 2010–11 there were 183 migrant remains recovered; 112 were male, 20 were female, and 51 were of unknown gender. Ages of identified remains ranged from 18 to 60, though 113 remains were of unknown age. See DERECHOS HUMANOS, ARIZONA RECOVERED HUMAN REMAINS PROJECT, available at <http://derechoshumanosaz.net/projects/arizona-recovered-bodies-project/>.

⁸⁹ CUSTOMS AND BORDER PROTECTION, U.S. BORDER PATROL FISCAL YEAR APPREHENSION STATISTICS, *supra* note 12.

⁹⁰ See Derechos Humanos, *supra* note 87.

⁹¹ *Id.*

⁹² NO MORE DEATHS – NO MÁS MUERTES, <http://www.nomoredeaths.org/>

⁹³ See NO MORE DEATHS, FEDERAL TRIAL AGAINST HUMANITARIAN BEGINS JUNE 1, <http://www.nomoredeaths.org/Press-Releases/federal-trial-against-humanitarian-begins-june-1.html> (noting No More Deaths volunteers cited for littering after leaving water on migrant trails).

⁹⁴ *United State v. Millis*, 621 F.3d 914 (9th Cir. 2010) (interpreting 50 C.F.R. §27.94(a)). Had Millis' conviction been affirmed, he would have faced 180 days in jail and a fine. See *United States v. Millis*, No. CR 08-1211-TUC-CKJ, 2009 WL 806731 (D. Ariz. 2009).



arrested and charged with unlawfully transporting an illegal alien, as well as with conspiracy to do the same, after they drove a group of three dangerously dehydrated migrants to a hospital in Tucson.⁹⁵ In this case the defendants, Daniel Strauss and Shanti Sellz, made no attempt to avoid law enforcement, and the Border Patrol was aware of their humanitarian purpose.⁹⁶ Nonetheless, they each faced 15 years in prison and a \$500,000 fine.⁹⁷ Though the case was eventually dismissed by a Federal District Court,⁹⁸ the message to

humanitarian groups was clear. Without a doubt there are those who feel that migrants deserve what they get in the desert, and, for these individuals, any efforts to prevent deaths are tantamount to simply “laying out the welcome mat” to undocumented migrants. Nonetheless, humanitarian organizations continue to save migrant lives, being vigilant to stay within the strict confines of the law.⁹⁹

One further legal snare for these organizations is that there are a number of places where they are unauthorized to enter and offer aid. During the summer of 2011 one such place was the Coronado National Forest, a 1,700,000-acre park that spans southeastern Arizona; on the map it looks more like the spots on a Dalmatian than a single, cohesive park. Thanks to the stifling Arizona heat and the risk of wildfires, the official policy was that only park rangers and the ranchers who live on the forest were allowed to enter.¹⁰⁰ This ban increased the likelihood of migrant deaths, since humanitarian groups were unable to leave water along the migrant trails all summer. The humanitarian problems posed by the closing of the Coronado National Forest pale, however, in comparison with the situation on the Tohono O’odham Indian Reservation.

VIII. THE UNIQUE CASE OF THE TOHONO O’ODHAM RESERVATION

The Tohono O’odham Indian Reservation lies only a few miles west of Tucson. Predating both the Mexican and American states, the Tohono O’odham Nation was split by the creation of the border after the Gadsden Purchase. As a result, the Nation has a bi-national identity. On the American side of the border the reservation encompasses 2.7 million acres of some of the most remote and treacherous territory in southern Arizona—lands as attractive as they are deadly for migrants in the transit north from Mexico.

⁹⁵ Indictment, *United States v. Strauss*, No. CR 05-1499 TUC, 2005 WL 6181764 (D. Ariz. 2005).

⁹⁶ Bill Ong Hing, *The Case for Amnesty*, 3 STAN. J. CIV. RTS. L. 233, 236 (2007).

⁹⁷ Marie A. Failing, “No More Deaths” on Conscience, *Civil Disobedience, and a New Role for Truth Commissions*, 75 UNIV. MO. KANSAS-CITY L. REV. 401, 401–02 (2006).

⁹⁸ The case was dismissed on the grounds that prosecution of these defendants would have violated their due process rights, as they were following a protocol previously followed by the Border Patrol itself, namely allowing third parties to transport injured migrants to hospitals. Maria Lorena Cook, “Humanitarian Aid is Never a Crime”: *Humanitarianism and Illegality in Migrant Advocacy*, 45 LAW & SOC’Y REV. 561, 578 (2011).

⁹⁹ Today, all humanitarian organizations with a presence in the desert strictly restrict their aid to meeting the medical and nutritional needs of migrants, which is entirely legal. Transporting a migrant for any purpose is prohibited by law, though many volunteers would not hesitate to take a dying migrant to the hospital, regardless of the legal ramifications.

¹⁰⁰ 16 U.S.C. 551 (2008); 36 C.F.R. 261.52(e) (2011).

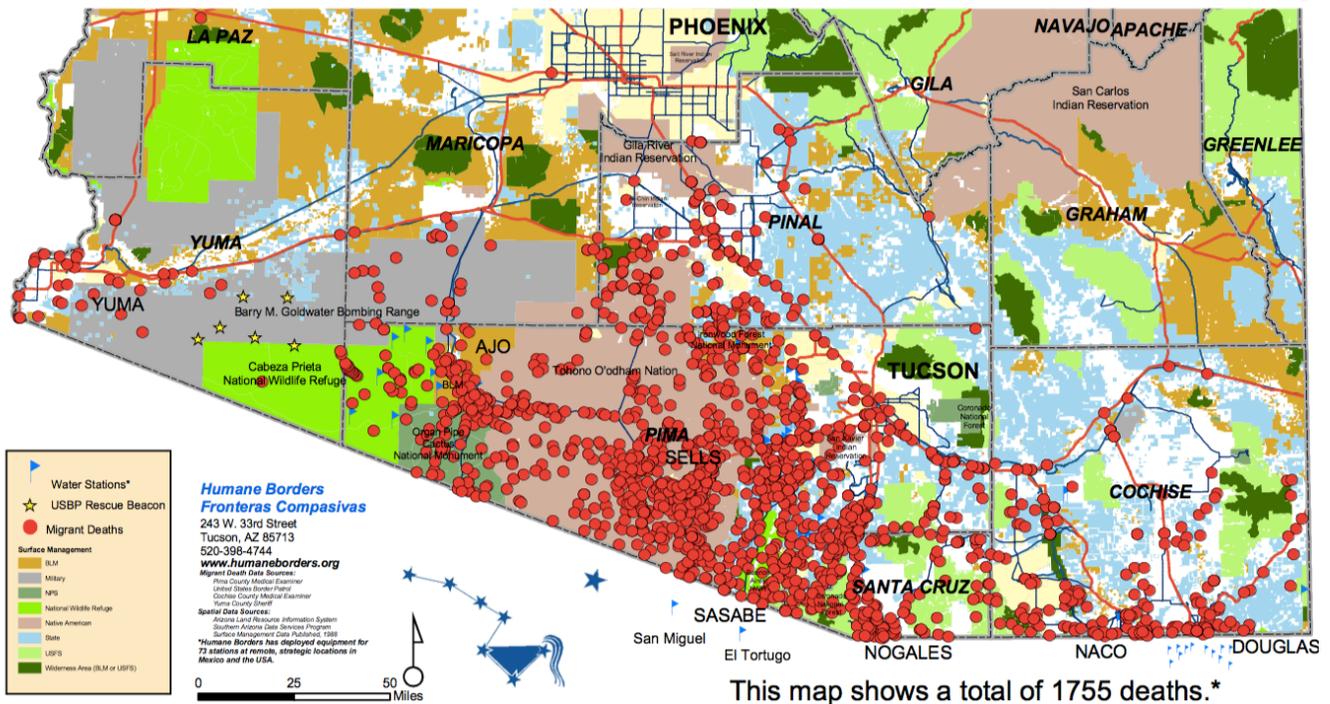


Extracted from U.S. Geological Survey, *Arizona: Federal Lands and Indian Reservations* (2003), Perry-Castañeda Library Map Collection, University of Texas Libraries, http://www.lib.utexas.edu/maps/united_states/fed_lands_2003/arizona_2003.pdf.

The death tally for migrants traversing the reservation must properly be viewed from the larger perspective of the fatality rate along the entire U.S.-Mexico border. The Tohono O’odham Reservation lies entirely within the Border Patrol’s Tucson Sector. The reservation constitutes about 5 percent of that sector’s total area, while the reservation’s Mexican border is roughly seventy-five miles long, compared to 262 miles of border for the Tucson Sector. But along the entire 2000-mile length of the U.S.-Mexico border, that 262-mile border of the Tucson Sector accounted for a disproportionate 44% of known migrant deaths for the decade from 2000 to 2010.¹⁰¹ And, as the red dots on the map below indicate, within the grim Tucson sector, the stretch of border along the reservation accounts for an inordinate number of those deaths.¹⁰²

¹⁰¹ ARIZONA DAILY STAR, *Graphic, Illegal Immigrant Deaths, by Border Patrol Sector* (Aug. 22, 2010), available at http://azstarnet.com/online/pdf/pdf_731dc548-ada5-11df-9449-001cc4c03286.html.

¹⁰² For maps of the locations of recovered human remains, see *1999-2009 Recorded Migrant Deaths*, HUMANE BORDERS, <http://humaneborders.org/news/documents/cumulativemap20002010.pdf> (mapping human remains found in Arizona from 2000-2009).



Source: 1999-2009 Recorded Migrant Deaths, HUMANE BORDERS, <http://humaneborders.org/news/documents/cumulativemap20002010.pdf>

As of August 2011 there were 142 migrant remains recovered along the Arizona-Sonora border during that fiscal year. Thirty-six of these remains, or slightly more than 25% of the total, were recovered on the seventy-five-mile-wide Reservation.¹⁰³

The obvious question in the face of these startling numbers is why migrants die at a higher rate on the reservation. Part of the answer lies with the tribal sovereignty of the reservation. As a sovereign nation, the Tohono O'odham have exercised the right to exclude non-tribal members from the reservation, with the result that humanitarian organizations like No More Deaths and Samaritans cannot leave water along migrant trails or conduct search-and-rescue missions on tribal lands. Non-tribal members are permitted to drive only on the highway that bisects the reservation.¹⁰⁴

In addition, the reservation's desolate terrain is both a blessing and a curse to migrants. Comprising 2.7 million acres, it is foremost a tremendous amount of desert to traverse on foot. But, perversely, with a population density of less than one person per hundred acres, the reservation's desert is also the perfect place for a migrant (or migrant remains) to go undetected. At the same time the reservation's mountainous terrain makes it much more difficult for Border Patrol to track migrants, a fact which also increases the appeal of this route.

Members of the Tohono O'odham Nation are themselves divided on the migration issue. On the one hand, some members sympathize with the migrants, who come from an indigenous background and in many ways are victims of the same European expansion that ravaged the North American Indian population. This sense of solidarity with migrants is, however, a minority view among the tribe.

¹⁰³ See *Derechos Humanos*, *supra* note 87.

¹⁰⁴ See Tohono O'odham Code, Title 4, Ch. 2 §1.1(A)-(B)(3), <http://www.tolc-nsn.org/docs/Title4Ch2.pdf>.

In fact, most tribal members seem to resent the migrants.¹⁰⁵ They are fed up with migrants crossing their land, cutting fences, breaking irrigation lines, and leaving trash in their wake. For this group, humanitarian efforts to prevent migrant deaths are an act of encouragement, inviting more migrants to swarm onto the reservation.

This difference of opinion notwithstanding, the entire Tohono O’odham nation is united in their frustration with the current state of affairs on the border. Traditionally, the land of the Tohono O’odham people stretched into what is today Mexico, so when the reservation was created after the Gadsden Purchase, the Tohono tribe became a bi-national entity. For many years this fact posed no problems for tribal members, as crossing onto tribal lands on opposite sides of the border was entirely unregulated.

Eventually, however, the American preoccupation with border security caught up to the reservation, and a barbed-wire fence was built spanning the entire length of the Tohono O’odham nation’s international border.¹⁰⁶ Currently, tribal members are still authorized to cross the border to reach tribal lands, but only through official ports of entry, none of which are found on the reservation.¹⁰⁷ Thus, to cross from the Mexican side to the American side of the tribal lands, members must leave the reservation and pass through either the port at Lukeville, to the west, or Sasabe, to the east. Tribal aggravation with increased border security was noted by Tohono O’odham

Most Tribal members seem to resent the migrants. They are fed up with migrants crossing their land, cutting fences, breaking irrigation lines, and leaving trash in their wake.

Chairman Ned Norris Jr. in his 2008 testimony before Congress: “We are older than the international boundary with Mexico and had no role in creating the border. But our land is now cut in half, with O’odham communities, sacred sites, salt pilgrimage routes, and families divided. We did not cross the 75 miles of border within our reservation lands. The border crossed us.”¹⁰⁸

In response, the Department of Homeland Security entered into a 2009 agreement with the Tohono O’odham Nation with respect to a new tribal identification card documenting that American-born tribe members are American citizens.¹⁰⁹ In theory, this tribal identification card would be sufficient to enter the United States (and its Mexican counterpart would serve to enter Mexico). The official website of the Tohono O’odham Nation, however, states that Tribal members are forced to produce passports and border identification cards to enter the United States.¹¹⁰ This obstacle has proven particularly problematic for the nation’s elderly members, many of whom were born at home and therefore lack official U.S. or Mexican birth certificates.

¹⁰⁵ See Amanda Lee Myers & Julie Watson, *Migrants Say Arizona Worth Risk of Crossing*, Associated Press (Aug. 31, 2010), <http://www.azcentral.com/news/articles/2010/08/31/20100831migrants-say-arizona-worth-risk.html>.

¹⁰⁶ INDIGENOUS PEOPLES HUMAN RIGHTS INITIATIVE, THE TOHONO O’ODHAM, <http://www.hrusa.org/indig/reports/Tohono.shtm>.

¹⁰⁷ CUSTOMS AND BORDER PROTECTION, LOCATE A PORT OF ENTRY – AIR, LAND, OR SEA, <http://www.cbp.gov/xp/cgov/toolbox/contacts/ports/az/>.

¹⁰⁸ *Walls and Waivers: Expedited Construction of the Southern Border Wall and Collateral Impacts to Communities and the Environment*, Hearing before the Subcomm. on Fisheries Wildlife and Oceans and Subcomm. on Nat. Parks, Forests, and Public Lands of the H. Comm. on Nat. Resources, 110th Cong. 1 (2008) (statement of Hon. Ned Norris Jr., Chairman, Tohono O’odham Nation), available at <http://www.scribd.com/doc/38155314/Congressional-Testimony-Tohono-O-odham-Chairman-Ned-Norris-re-border-walls-April-2008>.

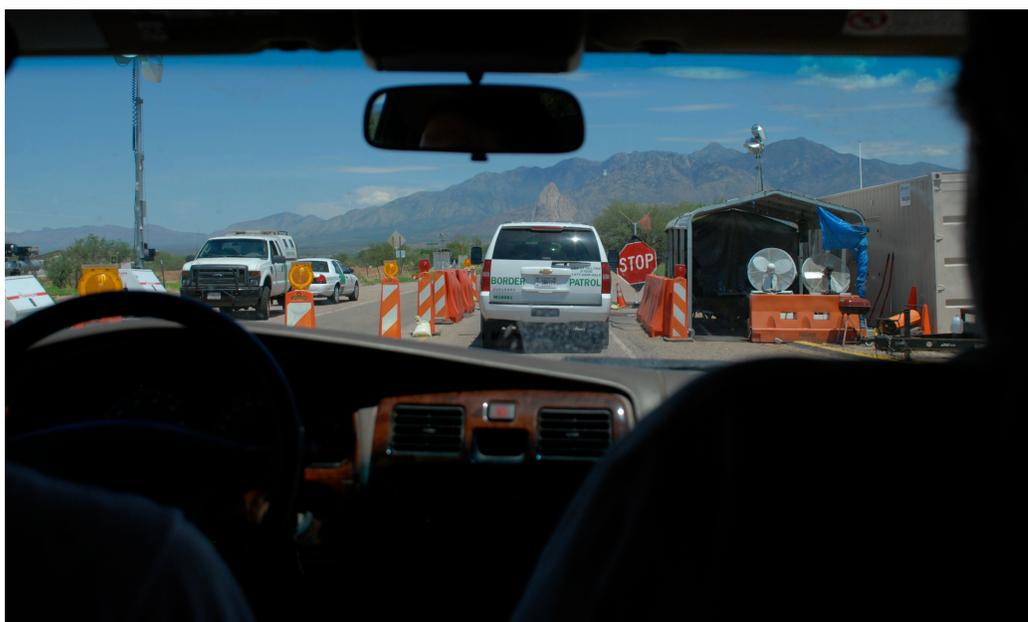
¹⁰⁹ Press Release, Dep’t. Homeland Security, *Dep’t. of Homeland Security and Tohono O’odham Nation Announce Agreement to Develop Enhanced Tribal Card* (Nov. 3, 2009), available at http://www.dhs.gov/ynews/releases/pr_1257272243349.shtm.

¹¹⁰ TOHONO O’ODHAM NATION, HISTORY AND CULTURE, http://www.tonation-nsn.gov/history_culture.aspx.

IX. DE-HUMANIZATION AND CRIMINALIZATION OF MIGRANTS IN ARIZONA

A. During Migration

If apprehended in the desert by Border Patrol, a migrant faces a range of possible legal situations. The first, and most common, is “expedited removal”—a return ticket home.¹¹¹ This procedure, authorized under the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), allows the Department of Homeland Security to remove, without a hearing, any alien who has wrongfully entered the United States.¹¹² Expedited removal is a civil proceeding, with no criminal penalty; however, upon removal, the alien is barred from legal re-admission into the United States for five years. Illegal re-entry into the United States is a crime that carries a prison sentence of up to two years.¹¹³



The second possibility is for a migrant to undergo “voluntary departure” proceedings, which differs from expedited removal.¹¹⁴ These proceedings, like expedited removal, are civil in nature, the difference being that voluntary departure involves no ban on legal re-entry into the United States. The Department of Homeland Security has the sole discretion as to when to grant a migrant a voluntary departure. And while at one point voluntary departures were the norm, it seems that lately this option is being used less and less frequently,¹¹⁵ indicating a shift towards a preference for expedited removal proceedings that open the door to future criminal prosecution of migrants.

The final, and most troubling, possibility that a migrant faces upon apprehension is being subjected to criminal prosecution as part of “Operation Streamline.” This program, which hands out felony convictions under 8

¹¹¹ Often Central Americans will claim to be Mexican so as to be deported at the Mexican border, where they can quickly take another stab at crossing the border.

¹¹² INA, *supra* note 19, at §235(b).

¹¹³ 8 U.S.C. §1326(a) (2008).

¹¹⁴ 8 U.S.C. § 1229(c) (2008).

¹¹⁵ Interview with Margo Cowan, *supra* note 54.

U.S.C. §1325 to randomly selected migrants, is part of a “zero-tolerance” border enforcement initiative that targets migrants even after their first attempt at crossing the border.¹¹⁶ In the past, very few of the migrants that today find themselves in Streamline would have faced criminal prosecution. But whereas Streamline makes no distinction between criminal and non-criminal migrants, in previous years criminal proceedings would most likely only have been used to prosecute migrants with histories of violence or of criminal activity in the United States. Today however, “instead of routing non-violent individuals caught crossing the border into civil deportation proceedings, Operation Streamline forces undocumented migrants through the federal criminal justice system and into U.S. [federal] prisons.”¹¹⁷

As of 2011, Streamline has been implemented in eight federal district courts along the border, and even though it is a federal program, the procedural particulars of Streamline vary from court to court. In Tucson, Operation Streamline operates in the following way:

First, seventy to eighty individuals are randomly chosen from Border Patrol’s daily catch of migrants. They are sent—many still wearing the clothes from their desert trek—to the federal courthouse in downtown Tucson, where they are shackled by their wrists and ankles and shuffled into the courtroom. They hear their rights read in English, which is then translated into Spanish via headsets, and in groups of ten they approach the bench, where they individually plead guilty to illegal entry under 8 U.S.C. §1325(a). When the migrants file out of the courtroom each has a fresh misdemeanor criminal conviction to his name. The entire process takes forty-five minutes to an hour, and, according to public defenders working with Operation Streamline, very few migrants understand either the details or the implications of the proceedings.¹¹⁸

The majority of the migrants that go through Streamline have no prior criminal record; although they are eligible for prison terms of up to six months, most are sentenced to time served and subsequently deported.¹¹⁹ Repeat offenders are subject to a felony conviction for illegal reentry with a sentence of up to two years, while a repeat offender with a criminal record can receive a sentence of up to twenty years.¹²⁰

In theory, Operation Streamline is another part of the United States’ policy of deterrence. The idea is to feed horror stories about criminal convictions for migrants into the rumor-mill that pervades the migrant community. If a migrant hears that he could do jail time after being caught just once, so the reasoning goes, he will be dissuaded from further attempts to cross the border. Like every other weapon in the arsenal of deterrence, however, Operation Streamline fails to take into consideration the desperation that drives migrants to migrate. If they are willing to risk possible death in the desert, extortion, physical abuse, etc., it is unlikely that migrants will be deterred by the possibility of a short prison sentence when the payoff for the risk is the possibility of earning double, triple, even quadruple what they might have earned at home. Accordingly, Pia Orrenius has demonstrated that border apprehensions correlate with the overall American job market, tracking—with a six-month lag—its ups and downs.¹²¹

¹¹⁶ Operation Streamline was first implemented in Border Patrol’s Del Rio Sector (in Texas) in 2005. It currently exists in four of the five Federal Court Districts along the U.S. Mexico border. Joanna Jacobbi Lydgate, *Assembly-Line Justice: A Review of Operation Streamline*, 98 CALIF. L. REV. 481, 483–84 (2010).

¹¹⁷ AM. CIVIL LIBERTIES UNION, OPERATION STREAMLINE FACT SHEET 1 (2009), available at www.immigrationforum.org/.../OperationStreamlineFactsheet.pdf. See also Lydgate, *supra* note 115, at 500.

¹¹⁸ Lauren Gambino, *Operation Streamline: The Busiest Border Patrol Sector*, Arizona State University, <http://asu.news21.com/2010/the-busiest-border-patrol-sector/>. For a more in depth look at the issues of procedural unfairness that plague Operation Streamline see Juan Rocha, *Operation Streamline and the Criminal Justice System*, ARIZ. ATT’Y, Nov. 2011, at 30, 31–32.

¹¹⁹ Lauren Gambino, *Operation Streamline: Program Prosecutes Illegal Immigrants Before Deporting Them*, Arizona State University, <http://asu.news21.com/2010/prosecuting-illegal-immigrants/>.

¹²⁰ 8 U.S.C. 1326(a)-(b)(2) (2008). See generally Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L.J. 595, 627–28 (2009).

¹²¹ New York Times, Economix blog, *Illegal Immigration as a Job Market Predictor* (May 15, 2009), <http://economix.blogs.nytimes.com/2009/05/15/illegal-immigration-as-a-job-market-predictor/>

The real effect of Streamline has been, and will continue to be, the rapid criminalization of migrants. Almost none of the migrants prosecuted under the program have ever engaged in any violent or destructive criminal activity, yet they are prosecuted more frequently than any other type of criminal, documented or undocumented. Already, thanks in large part to Operation Streamline, illegal entry and illegal reentry have become the two most common criminal charges in U.S. federal courts.¹²²

Aside from the risk of prosecution, migrants apprehended during the process of migration also are subject to dehumanizing treatment from Border Patrol agents, Immigration and Customs Enforcement (ICE) Agents, and employees of private prison corporations while they are in immigration custody awaiting deportation. Though it would be unfair to draw too many connections between the abusive behavior of certain individuals and the *modus operandi* of the Border Patrol as a unit, there have been far too many violations of migrants' civil and human rights in detention to simply dismiss the issue as the misbehavior of a few bad apples. Indeed, the mistreatments migrants have suffered run the full gamut of dehumanizing behavior from verbal to physical abuse. They are denied food, water, and medical attention; deprived of their possessions; and even separated from family members.¹²³

On the other hand, with respect to the detention of unaccompanied alien minors, there have by many accounts been great improvements recently in the protection of detainees' human and civil rights.¹²⁴ Perhaps the biggest remaining problem regarding child detention is that legal representation is not made available to detainees.¹²⁵ Up to 70 percent of the unaccompanied minors who go before an immigration judge, it seems, do so without the benefit of legal counsel.¹²⁶

Another particularly troubling fact surrounding the detention of migrants in Arizona is the stake that private prison corporations have in the perpetuation of the current system of dehumanization and criminalization of migrants. Private business enterprises like the Corrections Corporation of America (CCA) and GEO Group Inc. make substantial sums of money off of the criminalization of undocumented migrants in the Southwest.¹²⁷ In Tucson, private prison corporations are paid to transport and temporarily imprison each of the migrants sent through Operation Streamline. CCA alone is paid ninety dollars per migrant per day,¹²⁸ while the total cost of Tucson's Streamline campaign is around \$50,000 a week, or \$2.6 million per year.¹²⁹

Though numerous paths lead to it, for nearly all undocumented migrants in Border Patrol custody, the end result is removal and repatriation. And along with migrant detention, removal and repatriation have generated a number of human rights issues in light of recent changes in the U.S. policy of deportation to Mexico. Of these, the most troubling is the geographic shift that is currently underway in the execution of deportation proceedings.

Until only recently, Mexican migrants were for the most part deported at the port of entry nearest to the location of their arrest. In Arizona this commonly meant a trip to Nogales, Agua Prieta, or Naco. As of 2010,

¹²² TRAC Immigration, *Illegal Reentry Become Top Criminal Charge* (June 10, 2011), <http://trac.syr.edu/immigration/reports/251/>.

¹²³ See generally, NO MORE DEATHS, CROSSING THE LINE, HUMAN RIGHTS ABUSES OF MIGRANTS IN SHORT-TERM CUSTODY ON THE ARIZONA/SONORA BORDER (2008), available at www.paranoiamagazine.com/PDFs/CrossingTheLine.pdf.

¹²⁴ Press Release, Inter-American Commission on Human Rights, *IACHR Visits U.S. Immigration Detention Facilities* (July 28, 2009), available at <http://www.cidh.org/Comunicados/English/2009/53-09eng.htm>.

¹²⁵ GLOBAL DETENTION PROJECT, *IMMIGRATION DETENTION AND THE LAW: U.S. POLICY AND LEGAL FRAMEWORK 20-21* (2010), available at http://www.globaldetentionproject.org/fileadmin/docs/US_Legal_Profile.pdf

¹²⁶ *Id.*

¹²⁷ See e.g., Graeme Wood, *A Boom Behind Bars*, BLOOMBERG BUSINESSWEEK (Mar. 25, 2011), http://www.msnbc.msn.com/id/42197813/ns/business-us_business/t/boom-behind-bars/.

¹²⁸ *Id.*

¹²⁹ Interview with the Hon. Bernardo Velasco, Federal Magistrate Judge for the District of Ariz., in Tucson, Ariz. (June 23, 2011). See also Tom Roberts, *A 'Maddening' System From Courtrooms to Shelters*, NATIONAL CATHOLIC REPORTER (July 1, 2011), available at <http://ncronline.org/news/immigration-and-church/maddening-system-courtrooms-shelters>.

however, the number of migrants being repatriated in Arizona is declining. Smaller border towns, such as Agua Prieta and Naco, have seen the number of deportations on their stretch of the border shrink nearly to zero.¹³⁰ In Nogales, the biggest border city on the Arizona-Sonora border, the repatriations do continue, though with much lower numbers than in recent years.¹³¹

This new development has created headaches for faith-based charity efforts aimed at supporting recently deported migrants. These groups have invested time and money developing the necessary infrastructure to minister to the migrant community, only to have the flow of repatriated migrants diverted elsewhere. At the Kino Border Initiative in Nogales, for example, migrants continue to frequent the medical clinic and comedor, but in much smaller numbers than in years past.

This development is traceable, again, to the United States' policy of migrant deterrence. Recognizing that the largest portion of the flow of migrants into the U.S. has been funneled into Arizona, Border Patrol is making a concerted effort to repatriate undocumented migrants as far away from Arizona as possible. The goal of this new practice of "lateral repatriation" is to distance migrants physically from Arizona-Sonora coyotes, with whom migrants have likely established relationships, and thereby to make the migratory process that much more difficult. During the summer months this policy involves flying Mexican nationals all the way to Mexico City,¹³² where presumably they will be more likely to elect to return to their homes in southern Mexico, rather than make the trip north all over again.¹³³ Of course, it is impossible to know how successful the initiative has been in this regard.

Currently, those detainees who are not flown to Mexico are having their deportations diverted to border sectors far from Arizona, such as Baja California, Chihuahua, Coahuila, and Tamaulipas. There, migrants are being delivered right into the waiting arms of gangs like *los zetas*.¹³⁴ In many cases women and children have even been released into dangerous border cities like Tijuana and Ciudad Juarez in the middle of the night.¹³⁵ These dangers facing migrants have not influenced U.S. deportation policy, however, as more and more migrants are deported away from Arizona. The plan, so it seems, is to continue lowering the number of migrants in Arizona until it reaches zero.¹³⁶

On the whole, U.S. border policy has had little success in deterring migrants from risking everything for a chance at a better life in the United States. What it *has* done is to make the process of migration arduous, miserable—even deadly—and to transform a migrant society consisting mainly of workers trying to support families into a class of criminals. But the story does not end in the desert. Even for those migrants lucky enough

¹³⁰ See interview with Fr. Sean Carroll, Director, Kino Border Initiative, in Nogales, Ariz. (June 2011).

¹³¹ *Id.*

¹³² Press Release, Dep't. Homeland Security, *United States and Mexico Resume Voluntary Humanitarian Interior Repatriation Program* (Aug. 24, 2009), available at http://www.dhs.gov/ynews/releases/pr_1251204414233.shtm.

¹³³ In the summer of 2010, a total of 23,384 Mexicans were repatriated via flights from Tucson to Mexico City (on two flights a day, for four months). Though this is a substantial figure, it accounts for only 10% of the total number of migrants apprehended in the Tucson Sector in 2010. Tim Steller, *23,384 Illegal Immigrants Took 'Repatriation' Flights to Mexico City From Tucson, Feds say*, ARIZONA DAILY STAR (Sept. 30, 2010), available at http://azstarnet.com/news/local/border/article_196983b8-ccbb-11df-99c9-001cc4c03286.html.

¹³⁴ Mexican gangs commonly prey upon migrants. Recently, however, the gang crimes have taken a horrendously grisly turn. Reports mention that migrants kidnapped by *los zetas* are currently being made to fight each other to the death in gladiator-style matches. Dane Schiller, *Mexican Crook: Gangsters Arrange Fights to Death for Entertainment*, HOUSTON CHRONICLE (June 11, 2011), available at <http://www.chron.com/news/nation-world/article/Mexican-crook-Gangsters-arrange-fights-to-death-1692716.php>. See also Melissa Del Bosque, *Detainees Beg to Be Deported Anywhere but the Texas Border*, THE TEXAS OBSERVER (June 16, 2011), available at <http://www.texasobserver.org/lalinea/detainees-beg-to-be-deported-anywhere-but-the-texas-border>.

¹³⁵ See generally, OLIVIA WOOD, AN INVESTIGATION INTO EXPLOITATION OF THE MEXICAN FEMALE BODY ALONG THE U.S.-MEXICO BORDER (2008), available at www.womenontheborder.org/documents/OliviaWooddissertation.pdf.

¹³⁶ In smaller border towns like Naco and Agua Prieta, Sonora, the Border Patrol has already stopped the flow of deportations entirely, redirecting migrant repatriations to other border sectors. See Jonathon Shacat, *Naco, Sonora Migrant Resource Center Reduces Hours*, ARIZONA BORDER NEWS (May 8, 2011), available at <http://www.arizonabordernews.com/2011/05/08/naco-sonora-migrant-resource-center-reduces-hours/>.

to reach their destinations, life in the United States is defined by marginalization, by the need to live one's life in the shadows.

B. Migrant Life in Arizona: the Policy of Misery

Because of the doctrine of preemption, states are powerless to regulate immigration in their territory; the United States Supreme Court has ruled definitively that immigration law is within the exclusive legislative domain of Congress.¹³⁷ For this reason, and much to the chagrin of many Arizonans, the state legislature is incapable of enacting laws authorizing state law enforcement agencies to remove undocumented migrants from the state.

Because immigration is a federal issue, states must operate within the federal immigration law framework, which outlines the policies and procedures of U.S. immigration law enforcement, both on the border, as well as within the interior of the country.¹³⁸ With respect to the latter, the federal government has instituted a number of national programs aimed at pursuing migrants who have established themselves in the United States. Ostensibly, these programs operate within the official policy of prioritizing undocumented persons with dangerous criminal backgrounds;¹³⁹ however, in practice they have been used to hunt down innocent migrant workers, to tear families apart, and to contribute to a culture of fear that pervades the migrant community in the United States.¹⁴⁰

The controversial "Secure Communities" program¹⁴¹ theoretically targets and removes dangerous undocumented aliens from the United States.¹⁴² In practice, however, a suspected undocumented person who comes into contact with local law enforcement is run through the federal immigration database, resulting in deportations for thousands of migrants arrested for relatively minor infractions (e.g., public intoxication, fighting, shoplifting) and even the deportation of migrants not involved in any criminal activity, such as victims

¹³⁷ The Constitution does not expressly grant Congress the immigration power, but the U.S. Supreme Court has found this power to be implied within Congress' other enumerated powers, namely through the Commerce Clause, the Naturalization Clause, the Migration and Importation Clause, and the War Power Clause. The Court has also held that the power to regulate immigration is incident to national sovereignty. See e.g., *The Chinese Exclusion Case*, 130 U.S. 581 (1889).

¹³⁸ In other words, there are two concurrent types of immigration enforcement in effect. The first is the interception of undocumented migrants in the migratory process. The second involves discovering undocumented persons living within the United States and repatriating them to their home countries.

¹³⁹ Celia Muñoz, *Immigration Update: Maximizing Public Safety and Better Focusing Resources*, The White House Blog (Aug. 18, 2011), available at <http://www.whitehouse.gov/blog/2011/08/18/immigration-update-maximizing-public-safety-and-better-focusing-resources>.

¹⁴⁰ See, e.g., Ruben Navarrete, *Maquina de Deportaciones*, SAN DIEGO UNION-TRIBUNE (June 10, 2011), http://azstarnet.com/laestrella/noticias/article_eb19a73a-65fc-55b1-9f43-7f6e7ab1bba2.html. But see Catherine E. Scolchet, *Immigration Attorneys: U.S. Deportation Policy Shift Starting*, CNN (Aug. 26, 2011), <http://www.cnn.com/2011/POLITICS/08/26/deportation.policy/> (noting that in August 2011 the Obama administration announced it would re-examine the deportation cases of 300,000 non-violent undocumented migrants, which, in theory, should result in many non-criminal migrants having their deportation cases dropped).

¹⁴¹ Secure Communities is a national program wherein local law enforcement agencies submit fingerprints of suspected illegal aliens to a federal database following an arrest for activities in violation of local criminal law. The purpose of the program is to prioritize the deportation of undocumented criminals. See generally, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, SECURE COMMUNITIES, http://www.ice.gov/secure_communities/.

¹⁴² There are, however, a number of federal protections available to undocumented victims of domestic violence. In 1994 Congress passed the Violence Against Women Act, which gives undocumented victims the ability to petition for the suspension of any removal proceedings initiated after an instance of abuse is reported, provided the victim can demonstrate three years of continuous presence in the United States. Violence Against Women Act, Pub. L. No. 103-322, tit. IV, 108 Stat. 1902 (1994) (codified as amended in scattered sections of 8, 16, 18, 28, and 42 U.S.C.). If a victim of domestic violence participates in the investigation or prosecution of the alleged abuser, he or she may also be eligible for U non-immigrant status (commonly known as a "U visa"), which can ultimately lead to legal permanent residence. See Julie E. Dinnerstein, *A Review of Common Areas of Confusion in Domestic Violence-Related Immigration Law*, 219 PLI/NY 273, 288-290 (2012). Additionally, a number of counties across the nation have attempted to opt out of the Secure Communities program, meaning that in those counties local authorities would not be obligated to report undocumented victims to ICE. Many of these federal efforts to protect undocumented victims of domestic violence, however, have been rejected by state governments. See, e.g., Stephanie Kang, *A Rose by Any Other Name: The Chilling Effect of ICE's "Secure Communities" Program*, 9 HASTINGS RACE & POVERTY L.J. 83, 97 (2012).

of spousal abuse taken into custody after a domestic dispute.¹⁴³ Thus the program has been described as a “*máquina de deportaciones*”—a deportation machine—whose practical effect has been to make migrants deeply mistrustful of law enforcement. Since even non-criminal migrants are put at risk solely by having contact with law enforcement, many in the migrant communities feel that the police cannot be relied upon to help them under any circumstances. This perception has frustrated the efforts of local law enforcement agencies, many of which oppose the implementation of Secure Communities.¹⁴⁴

In response to the intense criticism aimed at the Secure Communities program, the Obama administration announced in August 2011 that the Department of Homeland Security would be undergoing a shift in deportation policy.¹⁴⁵ Under the new policy 300,000 pending deportation cases would be reviewed with an eye towards allowing “low-priority” offenders, including “the elderly, crime victims, and people who have lived in the U.S. since childhood” to avoid deportation.¹⁴⁶ This policy change does not terminate the Secure Communities program; in fact, according to Immigration and Customs Enforcement Agency (ICE), it continues to be in full effect in approximately 50 percent of local jurisdictions¹⁴⁷

Thanks to Secure Communities, ICE workplace raids, traffic sweeps,¹⁴⁸ and other migrant round-up tactics, the number of deportations stemming from immigration law enforcement in the interior of the U.S. has risen by a considerably in recent years.¹⁴⁹ These deportations have split families¹⁵⁰ and, perhaps worse, have added to the ranks of migrants willing to take their chances in the Arizona desert so as to be reunited with their loved ones.

¹⁴³ *Id.* See also HUMAN RIGHTS WATCH, FORCED APART (BY THE NUMBERS) 2 (2009), available at http://www.hrw.org/sites/default/files/reports/us0409webwcover_0.pdf (noting that between 1997 and 2007 approximately 77% of migrants deported as criminal were convicted of non-violent crimes).

¹⁴⁴ See e.g., Hugh Holub, *Anger Towards Secure Communities Deportation Program Reaches New Levels*, TUCSON CITIZEN (Aug. 16, 2011), available at <http://tucsoncitizen.com/view-from-baja-arizona/2011/08/16/anger-toward-secure-communities-deportation-program-reaches-new-levels/>. In the past, state government agencies have elected to opt out of participation in Secure Communities; however, in August, 2011, it was announced that participation in the program would be made mandatory, with nationwide implementation of the program scheduled to be completed by 2013. Tara Bahrapour, *Immigration Authority Terminates Secure Communities Agreements*, WASHINGTON POST (Aug. 7, 2011), available at http://www.washingtonpost.com/local/immigration-authority-terminates-secure-communities-agreements/2011/08/05/gIQA1wx80I_story.html.

¹⁴⁵ Robert Pear, *Fewer Youths to Be Deported in New Policy*, N.Y. TIMES, Aug. 18, 2011, at A1.

¹⁴⁶ Christopher Goffard et al., *U.S. Will Review Cases of 300,000 Illegal Immigrants in Deportation Proceedings*, LOS ANGELES TIMES (Aug. 19, 2011), <http://articles.latimes.com/2011/aug/19/local/la-me-0819-obama-immigration-20110819>.

¹⁴⁷ IMMIGRATION AND CUSTOMS ENFORCEMENT AGENCY, ACTIVATED JURISDICTIONS 1 (2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf>.

¹⁴⁸ Traffic sweeps involve local law enforcement patrols identifying potential undocumented aliens and arresting them based on some unrelated “probable cause.” In effect, this practice has resulted in many undocumented migrants being deported after being stopped in traffic for having bent license plates, cracked fenders, broken tail lights, etc. By some accounts, the practice is rife with racial profiling, with the “probable cause” violations serving to mask a process that involves detaining people based on their “Hispanic” appearance. See Carrie L. Arnold, Note, *Racial Profiling in Immigration Enforcement: State and Local Agreements to Enforce Federal Immigration Law*, 49 ARIZ. L. REV. 113, 119 (2007).

¹⁴⁹ Despite its rhetoric in support of undocumented persons in the United States, the Obama administration deported 387,000 undocumented persons in 2010. This figure is up from 254,763 deportations during fiscal year 2008, the final year of the Bush presidency. See Antonio Olivo, *‘Secure Communities’ Program Deportations Spur Frustration with Obama*, CHICAGO TRIBUNE (Aug. 17, 2011), available at http://articles.chicagotribune.com/2011-08-17/news/ct-met-dhs-lawsuit-20110817_1_deportations-national-immigrant-justice-center-immigration-detainers. See also Jazmine Ulloa, *Deportation Numbers Up Under Obama Compared to Predecessor*, THE MONITOR (Aug. 5, 2010), available at <http://www.themonitor.com/articles/obama-41524-immigration-administration.html>.

¹⁵⁰ A large percentage of deported migrants have established families in the United States. Many have spouses and children that are U.S. citizens. These remaining family members are left to fend for themselves after their husband or wife is repatriated. Jennifer Gaie Hellum, *Families Face Wrenching Decisions When Immigrant Parents Departed*, THE SENTINEL (Aug 30, 2010), available at http://www.tucsonsentinel.com/local/report/083010_divided_families/. According to the Department of Homeland Security, between 1998 and 2007 over 108,000 undocumented parents of U.S. citizen children were removed. OFFICE OF INSPECTOR GENERAL, DEP’T. OF HOMELAND SECURITY, REMOVALS INVOLVING ILLEGAL ALIEN PARENTS OF UNITED STATES CITIZEN CHILDREN 1 (2009), available at http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_09-15_Jan09.pdf.

Yet a further federal effort to frustrate migrants' attempt to integrate into American society is the "E-Verify" program. Unlike Secure Communities, E-Verify does not directly lead to the deportation of migrants; however, by making it more difficult for migrants to find gainful employment, E-Verify contributes to the overall marginalization of migrants within American society.

E-Verify requires employers to submit social security numbers for each of their employees into a federal database that will detect and red-flag false and pre-existing numbers. The purpose of the program is to ensure that undocumented migrants do not "take" those jobs that might otherwise have gone to American citizens. By making employee participation in the program mandatory, E-Verify also makes it impossible, theoretically, for employers to knowingly hire undocumented persons.¹⁵¹ The program has had only limited success in practice, however, as evidenced by the numerous cases of fraud that have arisen in participating states.¹⁵²



The fear surrounding the implementation of E-verify arises out of concern, on the one hand, that it will result in American citizens being erroneously "black-listed" by the system, and on the other, that it will give rise to a black market of stolen "clean" identities to be sold to undocumented migrants in need of work.¹⁵³ According to Westat, an independent research organization auditing the success of E-Verify, approximately 54% of undocumented workers are able to sneak past the E-verify system, thanks in part to the successful use of stolen identities.¹⁵⁴

In the end, the enforcement of federal immigration laws by ICE and the federal efforts to limit the employability of undocumented migrants have had a marginalizing effect on migrants nationwide. The members of these communities are finding themselves increasingly fearful of disclosing their legal status for any purpose, resulting in a lack of participation in civil society. Yet for many states, including Arizona, the efforts of the federal government to hold back the undocumented migrant community have been seen as insufficient. In these states the political will to pass immigration laws is present; only federal preemption has stopped them from acting. Nevertheless, these states have been able to legislate around the preemption problem and have in this way been able to indirectly regulate immigration at the state level.

Arizona's approach, which is currently being copied by the legislatures of states like Alabama, Indiana, and South Carolina,¹⁵⁵ is to leave the actual regulation of immigration to the federal government but to punish individuals in the state solely on the basis of immigration status. To this end, Arizona law denies basic state

¹⁵¹ Participation in E-Verify is not mandatory in all states. Arizona, however, does require all employers to participate. The provision making participation mandatory was challenged, and upheld, by the U.S. Supreme Court. *Chamber of Commerce of United States v. Whiting*, 131 S. Ct. 1968 (2011).

¹⁵² Austin Fragomen et al., *Enforcement of Immigration Law Against Employers in the Obama Administration*, in *Practicing Law Institute Corporate Law and Practice Course Handbook Series* 51, 62–63 (2011).

¹⁵³ Even right-wing anti-immigrant groups resist E-Verify for this very reason. See e.g., Alliance for Limited Government, *Why We are Opposed to E-Verify*, <http://www.forlimitedgovernment.org/issues/everify.html>.

¹⁵⁴ Daniel González, *Report: E-Verify Misses Half of Illegal Workers*, ARIZONA REPUBLIC (Feb. 26, 2010), <http://www.azcentral.com/news/articles/2010/02/25/20100225immigration-e-verify-misses-half-of-illegal-workers.html>.

¹⁵⁵ Alabama's newest law, HB-56, actually exceeds SB 1070's anti-immigrant reach, requiring the parents of foreign-born high school students to report the immigration status of their children, in effect turning public school administrators into de facto immigration law enforcement officers. Ala. Code § 31-13-27 (2011) and Ind. Code § 21-14-11-1 (2011) deny migrants in-state tuition for state schools). South Carolina's SB20 was recently partially blocked by a federal district court injunction. Robbie Brown, *Parts of Immigration Law Blocked in South Carolina*, N.Y. TIMES, Dec. 22, 2011, at A18.

services to undocumented migrants.¹⁵⁶ Proposition 200, which passed in 2004, requires proof of citizenship for any and all state social services offered in Arizona.¹⁵⁷ Given their undocumented status, migrants are ineligible for most social services anyway, but this law precludes undocumented parents from collecting state social service benefits on behalf of their legally entitled U.S. citizen children. Consequently, in Arizona only certain services—namely those which states are required to offer regardless of citizenship by federal law¹⁵⁸ and U.S. Supreme Court decisions¹⁵⁹—are available to undocumented migrants. The state furthermore forces local law enforcement agencies to perform the immigration enforcement duties of federal agencies such as ICE. Laws passed to this effect have only exacerbated the federal “misery strategy,” making life all the more unbearable for Arizona’s migrant population.

Of all anti-immigrant Arizona laws, the most widely reported and controversial is SB 1070, “Support Our Law Enforcement and Safe Neighborhoods Act.” This law, enacted in 2010, has partially gone into effect, while the most controversial provisions were enjoined by a district court in Arizona.¹⁶⁰ These enjoined provisions notwithstanding, the surviving terms single out Arizona’s migrant population in such a way as to make life in the state so unendurable that new migrants will be

discouraged from settling there, and that settled migrants will be encouraged to leave. Among the law’s requirements currently being enforced is the provision making it a crime to harbor unauthorized migrants.¹⁶¹ This requirement effectively criminalizes the existence of mixed-status families, making it a criminal offense, for example, for U.S. citizens to drive in the same car as their undocumented spouse or parent,¹⁶² and in some cases even to live with a migrant.¹⁶³

The overall effect of both federal and state laws aimed at impeding the development of migrant communities has been the rise of a migrant “society in the shadows”

The overall effect of both federal and state laws aimed at impeding the development of migrant communities has been the rise of a migrant “society in the shadows,” whose members live in constant state of concern about their nationality and immigration status.¹⁶⁴ Migrant communities, fearful of the police, are unlikely to report crimes to law enforcement, lest they risk deportation. Mixed-status families are being torn apart,¹⁶⁵ and the

¹⁵⁶ Arizona, for example, denies migrants the ability to collect punitive damages in civil suits, Ariz. Rev. Stat. Ann. § 36-2921 (2001); the ability to post bond if arrested, Ariz. Const. art. II, § 22; and the ability to qualify for in-state tuition at state colleges and universities, Ariz. Rev. Stat. Ann. § 15-1803 (2006).

¹⁵⁷ See Ariz. Rev. Stat. Ann. § 46-140.01 (2004). See also *Friendly House v. Napolitano*, 419 F.3d 930 (9th Cir. 2005) (upholding provisions restricting benefits for illegal aliens).

¹⁵⁸ See e.g., *Emergency Medical Treatment and Active Labor Act (EMTALA)*, 42 U.S.C. § 1395(dd) (2008) (requiring hospitals to give emergency care regardless of a patient’s citizenship status).

¹⁵⁹ See e.g., *Plyler v. Doe*, 457 U.S. 202 (1982) (ruling denial of schoolchildren access to public education unconstitutional). See generally LEONARD DINNERSTEIN, *THE SUPREME COURT AND THE RIGHTS OF ALIENS* (1985), available at <http://www.apsanet.org/imgtest/SupremeCourtAlienRight.pdf>.

¹⁶⁰ *United States v. Arizona*, 703 F.Supp.2d 980 (D. Ariz. 2010) (enjoining provisions forcing local police to check the immigration status of all persons pulled over in traffic stops and forcing all foreign nationals to carry their immigration papers at all times). Currently this suit is on track to go before the U.S. Supreme Court. It was affirmed by the 9th Circuit in April 2011 on the grounds that S.B. 1070 was preempted by the federal Immigration and Nationality Act. *United States v. Arizona*, 641 F.3d 399 (9th Cir. 2011).

¹⁶¹ Ariz. Rev. Stat. § 13-2929 (2010).

¹⁶² See Press Release, *No More Deaths*, Comment on Partial Injunction of SB 1070 (July 28, 2010), available at <http://www.nomoredeaths.org/Press-Releases/>.

¹⁶³ In order to be technically “harboring” a migrant, however, one would arguably have to be providing the migrant with housing, not merely living in the same house that a migrant pays for himself.

¹⁶⁴ Cf. Daniel Ibsen Morales, *In Democracy’s Shadow: Fences, Raids, and the Production of Migrant Illegality*, 5 STAN. J. C.R. & C.L. 23, 27 (2009).

¹⁶⁵ According to one estimate, there are 3.1 million U.S. citizen children with at least one undocumented parent living in the United States. These families are torn apart on a regular basis. *The Ethical Imperative for Reform of Our Immigration System: Hearing*

most basic every-day activities, such as driving to work, are now exceedingly risky for undocumented migrants.

Unfortunately the reality appears to be that the widespread anti-illegal immigrant feelings prevalent in Arizona are fueled by racism and xenophobia as much as anything else. These illicit motivations are presumably behind a number of state laws intended not to punish individuals on the basis of citizenship or immigration status but rather to injure Arizona's Hispanic communities because of their "Hispanic-ness."¹⁶⁶

In Tucson, for example, there is currently controversy surrounding the state's attacks on the Tucson Unified School District's Mexican-American Studies Program. This program, which has unarguably led to higher levels of academic success among Hispanic students, was shut down after the passage of a new Arizona law prohibiting classes that are intended to promote the "overthrow of the U.S. government, promote resentment toward a race or class of people, are designed primarily for pupils of one ethnic group, or advocate ethnic solidarity."¹⁶⁷ Yet, in implementing the law, the state has made efforts to dismantle only the Mexican-American Studies Program, leaving intact the district's African-American, Asian-American, and Native American Studies programs. Teachers, students, Hispanic community organizations, and faith-based groups all rallied behind the cause of the ethnic studies program. In their favor they had the determination of an independent audit conducted by the Cambium Learning group at the behest of the Arizona Superintendent of Public Instruction.¹⁶⁸ Unfortunately in the end their efforts failed as the Tucson Unified School District voted to permanently shut down the program in early 2012.¹⁶⁹

The campaign to terminate the Mexican-American Studies Program is indicative of a general anti-Hispanic bias that motivates the passage of certain laws that are characterized by veiled discrimination against Arizona's Latino population. As noted, many of these laws are directed plainly at the undocumented, while others simply punish on the basis of culture and race. The danger of these laws is their shortsightedness. Particularly in the case of the Mexican-American Studies Program, anti-Hispanic biases have led to myopic public policies that could eventually contribute to the presence of an under-educated, unprepared population incapable of competing for jobs. As a result, Arizona's economy could lag behind those of other states with less persecutory policies.

In reality, these detrimental effects are already being felt in the state. Since the passage of strongly anti-migrant laws like SB 1070, many undocumented residents of Arizona have packed up in fear and fled the state.¹⁷⁰ As of November 2010, an estimated 100,000 Hispanics (legal and undocumented) have fled Arizona.¹⁷¹ The resulting dearth of cheap labor, as well as the corresponding drop in the state's consumer base, has already had a devastating effect on Arizona's economy. It is for this reason that, lately, the

Before the H. Subcomm. on Immigration, Citizenship, Refugees, Border Sec. and Int'l Law, 110th Cong. 15 (2010) (statement of Most Reverend Gerald F. Kicanas, Vice-President, U.S. Conference of Catholic Bishops).

¹⁶⁶ See e.g., Ariz. Const. art. XXVIII § 1-2. (amending the Arizona constitution to make English the state's official language). In Arizona only constitutionally protected foreign-language uses (such as in the medical context) are exempted. Lindsay M. Butler, *New Law Hamstrings Mesa's Bilingual Efforts: Prop 103 Limits Cities' Non-English Information Flow*, MESA TRIBUNE (Dec. 3 2007) available at <http://www.mobilitytechzone.com/news/2007/12/03/3137401.htm>.

¹⁶⁷ The law is known as HB 2281. Emily Gersema, *Tucson Ethnic-Studies Program Violates Law, Schools Chief Says*, ARIZONA REPUBLIC (June 15, 2011), <http://www.azcentral.com/news/articles/2011/06/15/20110615arizona-ethnic-studies-violates-law-chief-says.html>.

¹⁶⁸ Emily Gersema, *Tucson Ethnic-Studies Program Not Illegal, Audit Says*, ARIZONA REPUBLIC (June 16, 2011), <http://www.azcentral.com/news/election/azelections/articles/2011/06/16/20110616tucson-ethnic-studies-audit0616.html>.

¹⁶⁹ Alexis Huicochea, *TUSD Board Shuts Down Mex. American Studies*, ARIZONA STAR (Jan. 11, 2012), available at http://azstarnet.com/news/local/education/precollegiate/tusd-board-shuts-down-mex-american-studies/article_89674600-5584-58a8-9a0f-4020113900f9.html.

¹⁷⁰ Husna Haq, *Hispanics Abandon Arizona, Fleeing Economy, Immigration Law*, CHRISTIAN SCIENCE MONITOR (June 10, 2010), <http://www.csmonitor.com/USA/Society/2010/0610/Hispanics-abandon-Arizona-fleeing-economy-immigration-law>.

¹⁷¹ FUNDACIÓN BANCOMER, BBVA RESEARCH, MÉXICO SITUACIÓN MIGRACIÓN (2010), available at http://www.bbvaresearch.com/KETD/fbin/mult/1011_SitMigracionMexico_04_tcm346-234630.pdf?ts=30102011.

generally right-wing Arizona business community has taken an unforeseen stance against further anti-migrant legislation.¹⁷² This movement, in turn, has actually been fairly successful in influencing the Arizona state government to steer away from the type of hardline anti-migrant legislation that will continue to drive migrants away from the state and to engender further economic damage at the hands of widely publicized boycotts of Arizona.¹⁷³ For example, pressure from Arizona's various Chambers of Commerce was instrumental in convincing Arizona State Senate to vote down five harshly anti-migrant bills that breezed through the Arizona House of Representatives.¹⁷⁴ This action occurred only a year after Arizona governor Jan Brewer enthusiastically signed SB 1070, and it seems that but for the opposition from business leaders, she would happily have signed these five bills into law as well.¹⁷⁵

Apart from marginalizing its migrant population, Arizona has furthermore on occasion failed¹⁷⁶ to respect what minimal constitutional rights undocumented migrants do have in the United States.¹⁷⁷ There are, for example, a profusion of cases involving violations of migrants' rights as workers,¹⁷⁸ of their due process and equal protection rights,¹⁷⁹ as well as of their right to be free from unreasonable searches and seizures.¹⁸⁰ This systematic marginalization by the state of Arizona, compounded with federal and state efforts to hamper the development of migrant communities, point to the need for sweeping reforms of the U.S. immigration system—reforms aimed at reconciling the needs of migrants and the needs of the nation with the realities of global economics.

CONCLUSIONS & RECOMMENDATIONS

There is widespread consensus that the U.S. immigration system is broken. The presence of upwards of 10 million undocumented aliens, with thousands more attempting to enter the country every day, is disadvantageous for the United States. Under the current state of affairs the United States is having its sovereignty undermined, as migrants ignore international boundaries and U.S. law, while the migrants themselves suffer from widespread discrimination and marginalization upon reaching the United States.

¹⁷² The rhetoric used by the Tucson and Phoenix Chambers of Commerce to protest against further anti-migrant legislation is actually quite fascinating. Despite the fact that their actions lend support to the assertion that Arizona's economy depends on migrant labor, the language used by conservative business interests is generally anti-migrant in tone, and is quite sympathetic to the prejudices driving anti-immigrant legislation. It is purely for economic reasons, it seems, that Arizona's business community resists anti-migrant legislation. See e.g., Letter from Phoenix Chamber of Commerce to Sen. Russel Pearce (Mar. 15, 2011), available at <http://www.phoenixchamber.com/news/ceos-immigration-letter>.

¹⁷³ Many cities, including Los Angeles, have boycotted official travel to Arizona, as well as goods produced in Arizona. Rebecca Cathcart, *California: Los Angeles Approves Boycott of Arizona*, N.Y. TIMES, May 12, 2010, at A17. Many musicians are also currently participating in a well-publicized "sound strike" of Arizona venues. Daniel Kraker, 'Sound Strike' Targets Arizona Immigration Law, NPR, July 23, 2010, available at <http://www.npr.org/templates/story/story.php?storyId=128720832>.

¹⁷⁴ These laws would have denied birth certificates to babies born in Arizona to undocumented parents, turned school and hospital employees into immigration-law enforcers, prohibited migrants from attending college, and criminalized them for driving. See Terry Greene Sterling, *Why Arizona is Retreating On Its Immigration Law*, THE DAILY BEAST (Mar. 19, 2011), available at <http://www.thedailybeast.com/articles/2011/03/19/arizona-immigration-law-why-the-republicans-are-retreating.html>.

¹⁷⁵ Richard A. Oppel Jr., *Arizona, Bowing to Business, Softens Stand on Immigration*, N.Y. TIMES, Mar. 18, 2011, at A15.

¹⁷⁶ Among the more egregious failures to protect migrants' rights is the practice of detaining migrants for unreasonable periods of time without any kind of appearance before an immigration judge or without access to an attorney. This practice was held unconstitutional in *Zadvydas v. Davis*, 533 U.S. 678 (2001), yet because immigration detention is inherently temporary in nature, holding migrants for months before granting them a hearing is not an altogether uncommon occurrence. See Daniel Hernandez, *Detention Centers Isolate Illegal Immigrants and Deny Them Rights, Report Says*, LOS ANGELES TIMES (Sept. 14, 2010), <http://latimesblogs.latimes.com/laplaza/2010/09/immigration-detention-report.html>.

¹⁷⁷ The U.S. Constitution does in fact afford undocumented migrants with at least some of the same protections enjoyed by U.S. citizens. See generally *Bridges v. Wixon*, 326 U.S. 135 (1945).

¹⁷⁸ See e.g., *Hagl v. Jacob Stern & Sons, Inc.*, 396 F. Supp. 779 (D. Pa. 1975) (holding that undocumented workers injured on the job can sue for an award of damages).

¹⁷⁹ *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

¹⁸⁰ Undocumented migrants enjoy the protections of the Fifth and Sixth Amendments. *Wong Wing v. United States*, 163 U.S. 228 (1896).

The need for reform in U.S. immigration law is clear, yet any meaningful attempt at such reform must take into consideration not only the needs and desires of the United States but also the realities driving migration and the well-being of those migrants already in the country. At the moment, it seems, there is a notable disparity between the U.S. immigration policy of deterrence and a U.S. economic policy that “invites” undocumented migrants to come and work.

Currently the United States depends on migrants to be the cheap, menial labor pool upon which many industries depend, most notably the construction, agriculture, and hospitality industries. Without these low-skill, low-wage workers, American employers would be forced to increase wages to the point where Americans would be willing to work these difficult jobs, a prospect that would potentially be disastrous for U.S. business interests. Yet despite the need for migrant labor, and despite the fact that U.S. economic policy invites migrants to come and enjoy the jobs that employers are eager to give them, American immigration policy continues to endanger the lives of migrants, criminalize the act of migrating, and simultaneously contribute to the marginalization of the nation’s migrant population.

As a matter of priority, immigration reform efforts must first focus on adjusting the legal status of those undocumented migrants already in the United States. These migrants have established lives and families in the United States, and it is unrealistic to believe they can all be caught and repatriated to their home countries. The only alternative to continuing to have an undocumented “society in the shadows” is to legitimize migrants’ presence in the United States. This idea is often vilified as offering an “amnesty” reward to undeserving criminals, but any other alternative is unworkable.

The only alternative to continuing to have an undocumented “society in the shadows” is to legitimize migrants’ presence in the United States.

Previous amnesty programs, such as that of the Immigration Reform and Control Act of 1986, provide a precedent to guide the documentation of the existing migrant population. Such efforts in the future should involve putting the undocumented residents of the United States on a “path to citizenship,” wherein migrants will be able to enjoy the same rights and privileges as that of legal permanent residents while demonstrating their willingness to “earn” legalization. One suggested option is to offer legalization for a price to qualified migrants. Monetary fines would serve to

penalize undocumented migrants for their previous unlawful presence and may be a way to garner political support; however, any penalization set in the path to legal residency must not be so egregious so as to disincentive migrant participation in the legalization program.¹⁸¹

Future reform efforts must also address the glaring deficiencies in the 1986 amnesty bill, namely that the bill failed to address the issue of future undocumented migration. To rectify this oversight, future reforms must take into account the fact that as long as there is a marked disparity in wealth between the United States and Mexico/Central America, migrants will heed the siren song from the north. These reforms should thus include a streamlined guest-worker program that accounts for both the actual temporary labor needs of American employers as well as the actual number of workers who would likely attempt to enter the United States illegally in the absence of such a legal option. Of course, any reform of U.S. immigration policy, including a guest-worker program, must ensure the protection of migrants’ civil and human rights in the United States, with

¹⁸¹ The idea of making migrants pay for their legalization is geared towards winning over the hearts and minds of anti-migrant conservatives, who currently stand in the way of any immigration reform that does not involve increasing border security and upping the number of deportations. There are, however, equally convincing arguments against forcing migrants to pay fines. There is much to be said, for example, for an equitable solution that accepts migrants’ past contributions as sufficient payment and rewards them for their role in furthering America’s success as a nation.

particular care taken to avoid the instances of exploitation that have characterized previous guest-worker programs, such as the *bracero* program.

There must also be a realistic option for permanent/long-term immigration for unskilled workers. Today, only the tiniest fraction of unskilled Latin American workers has the option of legally migrating to the United States. For the vast majority the necessity to migrate is acutely felt, but the legal means of doing so are non-existent. As long as migrants are pushed to migrate, and as long as there are jobs in the United States pulling migrants away from home, migrants are going to come north. U.S. immigration policy must therefore recognize this reality and allow for the legal, documented movement of these migrants between their homes and the United States.

As a matter of policy, comprehensive immigration reform must also emphasize and facilitate the reunification of families separated by deportation. If, as is often claimed, the family is at the center of the American “way of life,” then this assertion must be reflected in the nation’s immigration policy.

Another significant benefit to opening up the possibility of legal migration is that allowing migrants a fast and easy means of legitimate migration would free up law enforcement on the border to police matters that are actually criminal in nature. At present the vast majority of Border Patrol’s energy and resources are spent hunting migrants whose only goals are to find a job and to support a family and whose only criminal act was to cross the border. At the same time, the deserts of Arizona, California, New Mexico and Texas are full of drug smugglers and human traffickers smuggling women and children into the United States in a modern variation on the slave trade. What’s more, since 9/11 the Department of Homeland Security’s number one priority has ostensibly been to keep America free of terrorists. Arguably, if the Border Patrol were not so distracted by enforcing the laws against economically driven migration, it could be all the more effective in policing these other much more serious law enforcement concerns.

Perhaps the most striking evidence of the need for immigration reform comes from the number of migrants who die in the Arizona desert. As has been stated above, over 6,000 migrants have died in the desert, the vast majority from easily avoidable causes. These deaths are the direct result of a U.S. border policy that forces migrants to risk their lives before being able to reach for the American dream.

Yet aside from addressing the issue of how to deal with the migrants knocking on America’s door, there is also the issue of how to stem the flow of emigration out of the sending countries of North and Central America. In this regard the only realistic approach to curbing the tide of migrants seems to lie in focusing U.S. efforts on fostering economic stability in home countries—in other words, ensuring that potential migrants have the economic opportunities necessary at home to give

them the option of avoiding migration. An important step in any such effort would be recognition of the role international trade agreements have played in causing irregular migration. In response to this reality, the United States should continue to work together with the Mexican government, and with the governments of Central American nations, to create economic opportunities for farmers and unskilled workers in their home

If, as is often claimed, the family is at the center of the American “way of life,” then this assertion must be reflected in the nation’s immigration policy.

countries.¹⁸² Another option would be for the United States to subsidize private businesses that focus on promoting economic sustainability in the countries sending migrants north.¹⁸³

No matter what shape immigration policy reform eventually takes in the United States, it must occur on the federal, not the state, level. The current movement by state governments to enforce immigration laws where the federal government has “failed to do so” is creating a dangerous and confusing patchwork of state immigration laws, many of which are likely to be overly harsh, and even unconstitutionally discriminatory.¹⁸⁴

Until some sort of national immigration reform bill is passed, states like Arizona, which has taken the role of leader in America’s anti-migrant movement, must redirect their energies into fostering an environment where migrant communities can thrive. Contrary to popular belief among Arizona residents, the state’s anti-migrant legislative tendencies have had a very serious destructive effect on the state. These injuries have been felt within migrant communities and throughout the state as a whole.

Arizona’s anti-migrant laws have undermined the effectiveness of local law enforcement, with migrants fearing the police and often refusing to rely on them for help of any kind. As a result, the police in cities like Tucson and Phoenix have lost their working relationships with migrant-heavy communities, confounding police efforts to fight gangs and local crime.

The laws have additionally proven disastrous for Arizona’s economy. The state has lost much of its labor force, as thousands of Arizona’s migrants have fled the force of these laws. This migrant flight has cost the state billions of dollars in wasted production potential.¹⁸⁵ Furthermore, out-of-state boycotts of all things Arizonan have only made things that much more difficult for Arizona business interests trying to weather tough economic times.

Finally, anti-immigrant laws leveled on Hispanics in general have violated the civil rights of U.S. citizens and undocumented migrants alike. In a similar vein, efforts to hinder the development of migrant communities by restricting their access to education are myopic and will undoubtedly have a self-destructive effect as the children of migrants enter the workforce under-educated and unprepared.

Politics and economics aside, there is a very real human element that is often lost in Arizona’s immigration debate. And while the need for political reform is absolutely necessary, it is critical that the United States (and Arizona specifically) go about making those reforms while mindful of the fact that migrants are human beings deserving of the same basic human dignity as any American citizen. No person deserves to be turned into a criminal, to be separated from family members, to live in the shadows, or to be hunted down by the law simply for the “crime” of moving to a country where it is possible to give a decent life to one’s children. On the contrary, all economic migrants in the United States must be afforded the opportunity to thrive economically and socially, and they must be given the full protections afforded to U.S. citizens. After all,

¹⁸² A current example of U.S. aid aimed at the development of small enterprises in Latin America is the State Dept.’s “Pathway to Prosperity in the Americas” program. Press Release, U.S. Dept. of State, 2011 Pathways to Prosperity in the Americas Ministerial Meeting (Oct. 5, 2011), available at <http://www.state.gov/r/pa/prs/ps/2011/10/175063.htm>.

¹⁸³ In Mexico there is currently one such program underway, albeit entirely within the private sector. “Just Coffee” is an enterprise that was started with the purpose of allowing Mexican coffee producers to earn a living at home and to avoid the economic need to migrate. The business is run as a cooperative that owns and operates the entire vertical process of producing their coffee, from growing the coffee plants to selling the finished product. The coffee is sold at a price slightly above market value, and the profits are split among the farmers, roasters, and other members of the co-op. This enterprise has allowed around 90 families in Chiapas to earn a decent living at home, and has demonstrated that with a living wage at home, those who currently feel the need to migrate would happily stay home. See JUST COFFEE, <http://www.justcoffee.coop/>.

¹⁸⁴ Concerns about racial profiling are in large part what make the upcoming legal battles over Arizona’s SB 1070 and Alabama’s HB 56 so contentious. See generally *United States v. Arizona*, 641 F.3d 399 (9th Cir. 2011); *United States v. Alabama*, No. 11-14532-CC, 11-14535-CC, 2011 WL 4863957 (11th Cir. 2011).

¹⁸⁵ RAUL HINOJOSA-OJEDA & MARSHALL FITZ, A RISING TIDE OR A SHRINKING PIE, THE ECONOMIC IMPACT OF LEGALIZATION VERSES DEPORTATION IN ARIZONA 2 (2011), available at http://www.americanprogress.org/issues/2011/03/pdf/rising_tide.pdf.

“America’s border is not properly a barrier for the purpose of keeping foreigners out;” it is “a boundary designating the area in which the U.S. government must protect rights.”¹⁸⁶

¹⁸⁶ Craig Biddle, *Immigration and Individual Rights*, THE OBJECTIVE STANDARD (2008), available at <http://www.theobjectivestandard.com/issues/2008-spring/immigration-individual-rights.asp>.