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## The Politics of Narrative: Law and the Representation of Mexican Criminality

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ARTICLE

THE POLITICS OF NARRATIVE: LAW AND THE REPRESENTATION OF MEXICAN CRIMINALITY

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### INTRODUCTION

Not perhaps since the 1910 Mexican Revolution have conditions of violence and criminality in Mexico so preoccupied the United States. Pages of US newspapers fill almost daily with graphic accounts of horrific crimes throughout Mexico, each more gruesome than the other: decapitations, execution-style mass murders, corpses in barrels of lye.<sup>1</sup> Official US governmental accounts attribute these acts variously to escalating warfare among drug cartels, a militarized response by the Mexican government to drug-cartel violence, and corruption.<sup>2</sup> In its most sensational depiction, Mexico has been

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1. Since 2008, the Los Angeles Times has produced a series covering the “savage struggle” and violence associated with Mexican drug cartels. See *Mexico Under Siege: The Drug War at Our Doorstep*, L.A. TIMES, <http://projects.latimes.com/mexico-drug-war/#/its-a-war> (last visited Nov. 25, 2014); see also Richard Marosi, *Mexico under Siege, Mystery Man Blamed for Gruesome Tijuana Deaths*, L.A. TIMES (Dec. 18, 2008), <http://www.latimes.com/world/la-fg-tijuanadruglord18-2008dec18-story.html#page=2>; Mark Lacey, *With Force, Mexican Drug Cartels Get Their Way*, N.Y. TIMES (Mar. 1, 2009), <http://www.nytimes.com/2009/03/01/world/americas/01juarez.html>; James C. McKinley, Jr., *Mexican Investigator of American’s Killing Is Beheaded*, N.Y. TIMES, Oct. 14, 2010, at A29; *Mexico: State Legislator Hacked to Death During an Interview*, N.Y. TIMES, Sept. 13, 2013, at A8.

2. Paul Richter & Ken Dilanian, *Clinton Says Mexico Drug Wars Starting to Look like Insurgency*, L.A. TIMES (Sept. 9, 2010), <http://articles.latimes.com/2010/sep/09/world/la-fg-mexico-insurgency-20100909>; Adam Entous & Nathan Hodge, *U.S. Sees Heightened Threat in Mexico*, WALL ST. J. (Sept. 10, 2010), <http://online.wsj.com/articles/SB10001424052748703960004575482080017955838>; *Clinton: U.S. Can Do More to Help Mexico Fight Drug Cartels*, CNN (Oct. 16, 2010), <http://www.cnn.com/2010/POLITICS/10/16/clinton.drug.cartels/index.html?hpt=T1>; *Secretary Napolitano and Mexican*

portrayed as a lawless country; violence has been represented as a full-scale drug war at our “doorstep.”<sup>3</sup> Most recently, the crisis of arriving Central American children has been attributed to Mexico’s “very porous border,” its “smuggling corridors,”<sup>4</sup> and the “widespread and well-documented involvement of Mexican authorities with human smugglers and organized crime.”<sup>5</sup>

Accounts of Mexico have become familiar and formulaic. Any totalizing characterization that serves to flatten the Mexican landscape is not only inaccurate, but suggests a type of “Mexico-bashing” that finds sustenance into the dark interior of American nativism and xenophobia. Reports of the threat posed by drug-related violence to national security, fear for public safety posed by Mexican migration, and the depiction of the country as a pathway for human trafficking have assumed distorted proportions.<sup>6</sup> Certainly, the death toll, fear, and suffering have sharply risen since the Mexican government militarized its response to drug cartel violence.<sup>7</sup> As a matter of geography, the tens of thousands of Central Americans fleeing gang-related violence born of failed drug-war policies, trade agreements, and corruption, travel the same corridors that traffickers often use to supply the drugs to meet an almost insatiable demand in the United States. In fact, the crime rate in most of Mexico is unexceptional and the overall murder rate is lower than other

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*Counterparts Sign Arrangements to Bolster Bilateral Border and Aviation Security*, DEPT. HOMELAND SECURITY (Mar. 23, 2010), [http://www.dhs.gov/ynews/releases/pr\\_1269400206038.shtm](http://www.dhs.gov/ynews/releases/pr_1269400206038.shtm).

3. See *Mexico Under Siege*, *supra* note 1.

4. Marv Knox, *Sen. Cornyn: Refugee Influx Demands Broad Response*, (June 30, 2014), <https://www.baptiststandard.com/news/texas/16650-influx-of-refugee-children-demands-broad-response-cornyn-insists>.

5. Jo Tuckman, ‘Flee or Die’: Violence Drives Central America’s Child Migrants to US Border, *THE GUARDIAN* (July 9, 2014), <http://www.theguardian.com/world/2014/jul/09/central-america-child-migrants-us-border-crisis> (noting that during Congressional hearings, the House Homeland Security Committee Chairman blamed the crisis of arriving children on Mexico for not sealing its borders); Maureen Meyer & Clay Boggs, *The Other Crisis: Abuses Against Children and Other Migrants Traveling through Mexico*, WASH. OFFICE ON LATIN AM. (June 27, 2014), [http://www.wola.org/commentary/the\\_other\\_crisis](http://www.wola.org/commentary/the_other_crisis).

6. James Ron & Emilie Hafner-Burton, *The Latin Bias: Regions, the Western Media and Human Rights*, 221 *CIDE* 1, 1 (Nov. 2011), available at <http://www.libriacide.c6om/librospdf/DTEI-221.pdf> (describing and naming the “Latin Bias” in media coverage of abuses that take place in Latin America).

7. See CLARE RIBANDO SEELKE & KRISTIN FINKLEA, CONG. RESEARCH SERV., R41349, U.S.-MEXICAN SECURITY COOPERATION: THE MÉRIDA INITIATIVE AND BEYOND 29 (2014), available at <http://www.fas.org/spp/crs/row/R41349.pdf>.

countries in the region, and similar to the United States.<sup>8</sup> Moreover, the crime rate generally throughout the country has declined.<sup>9</sup>

Mindful of the consequences of the distortions and the misinformation that leads to the misrepresentation of a people, Mexican civil rights groups have attempted to provide a more nuanced view of conditions in Mexico.<sup>10</sup> Paradoxically, US officials repeatedly state that the border is presently as secure as it has ever been.<sup>11</sup> FBI reports and recent data indicate that accounts of “spillover violence” are unfounded.<sup>12</sup> The United States describes the Mexican government as cooperative and working to “prioritize the safe and humane treatment of individuals” who are deported to Mexico.<sup>13</sup>

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8. *Comparing Mexican States With Equivalent Countries: Murderous Matches*, THE ECONOMIST (Nov. 22, 2012), <http://www.economist.com/blogs/graphicdetail/2012/11/comparing-mexican-states-equivalent-countries>; *Who is Behind Mexico's Drug Related Violence?*, BBC NEWS (Feb. 10, 2014), <http://www.bbc.co.uk/news/world-latin-america-10681249>.

9. Damien Cave, *Homicides Decline Near Border, Report Says*, N.Y. TIMES, Apr. 15, 2014, at A9; Damien Cave, *Ciudad Juárez, a Border City Known for Killing, Gets Back to Living*, N.Y. TIMES, Dec. 15, 2013, at A6.

10. For example, Mexico City has a lower homicide rate than many American cities. See Dolia Estevez, *Despite Violence in Parts of Mexico, Mexico City Remains Safe for Americans*, FORBES (Jan. 14, 2014), <http://www.forbes.com/sites/doliaestevez/2014/01/14/despite-violence-in-most-of-mexico-mexico-city-remains-safe-for-americans/>; Andrew O'Reilly, *Drug War Continues But Most of Mexico is Safe for Travel and Business, Experts Say*, FOX NEWS LATINO (Nov. 25, 2013), <http://latino.foxnews.com/latino/lifestyle/2013/11/25/despite-drug-violence-mexico-safe-for-visitors-and-business-experts-say/>; THE TRUTH ABOUT MEXICO, <http://www.thetruthaboutmexico.com> (last visited Oct. 26, 2014).

11. Editorial, *Border News*, N.Y. TIMES, Sept. 5, 2010, at WK7; Randal C. Archibold, *Obama to Send Up to 1,200 Troops to Border*, N.Y. TIMES, May 26, 2010, at A1; Randal C. Archibold, *On Border Violence, Truth Pales Compared to Ideas*, N.Y. TIMES, June 20, 2010, at A16; Martha Mendoza, *Government Study Finds U.S. Side of Mexico Border Area Low on Violent Crime*, THE DALLAS NEWS (June 4, 2010), [http://www.dallasnews.com/sharedcontent/dws/news/world/stories/DN-border\\_04int.ART.State.Edition2.294bf61.html](http://www.dallasnews.com/sharedcontent/dws/news/world/stories/DN-border_04int.ART.State.Edition2.294bf61.html) (quoting a US Customs and Border Protection spokesman noting that the border is safer now than ever); AIDING INSECURITY: FOUR YEARS OF MEXICO'S DRUG WAR AND MERIDA INITIATIVE, CTR. FOR INT'L POL'Y, (July 1, 2011), <https://sites.google.com/site/transborderproject/transborder-policy-report> (reporting that so-called spill-over violence is a myth).

12. Michele Waslin, *U.S-Mexico Border Residents Not Surprised by Falling Crime Stats*, IMMIGRATION POL'Y CTR. (July 19, 2011), <http://immigrationimpact.com/2011/07/19/u-s-mexico-border-residents-not-surprised-by-falling-crime-stats/> (referencing a study compiled by USA Today).

13. See Nick Miroff, *Mexicali has Become Mexico's City of the Deported as U.S. Dumps More People There*, WASH. POST (Jan. 16, 2013), [http://www.washingtonpost.com/world/the-americas/mexicali-has-become-mexicos-city-of-the-deported-as-us-dumps-more-people-there/2014/01/16/c5f037ba-68fa-11e3-997b-9213b17dac97\\_story.html](http://www.washingtonpost.com/world/the-americas/mexicali-has-become-mexicos-city-of-the-deported-as-us-dumps-more-people-there/2014/01/16/c5f037ba-68fa-11e3-997b-9213b17dac97_story.html) (describing the US' defense of its increased rate of deportation to Mexico, noting that officials “work[ ] in close and careful coordination with the Mexican government”).

This is not to minimize the violence that has cost Mexicans dearly. Rather, the seriousness of the situation requires an analysis of the drug-related violence that goes beyond the sensationalist descriptions which may chronicle the current turmoil but reveals little about the political and socio-economic circumstances that give rise to the conditions of a drug war and to the “Mexican-as-criminal” narrative that pervades social relations and legal constructions in the United States.<sup>14</sup>

The construct of the Mexican as a menace is not new. It is possessed of a proper history with origins in the nineteenth century.<sup>15</sup> Mexicans have been described as “‘earless and heartless creatures,’ ‘semi-barbarians,’ who were ‘only interested in satisfying their animal wants’”<sup>16</sup> and as “‘uneducated and grossly ignorant, highly excitable, and given to spasmodic outbursts of passion, outlawry and violence.’”<sup>17</sup> They have been lynched for being “‘too Mexican,’” and harassed for speaking their native language or otherwise expressing their culture.<sup>18</sup> They have long been considered the “‘prototypical illegal alien.’”<sup>19</sup>

The discourse has served to rationalize social and legal policies and practices of exclusion. However, it is important to note that the master narrative of Mexican criminality has also been adopted by well-meaning legal advocates who have availed themselves of the drug violence narrative for humanitarian purposes and deployed to enhance an immigrant’s chance of remaining lawfully in the United States through various forms of immigration relief.<sup>20</sup> Still others have used the specter of drug cartel violence to advocate for reformed, humane drug laws throughout the hemisphere.<sup>21</sup>

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14. For a summary overview of the political economic determinants of Mexico’s drug-related violence, see Deborah M. Weissman, *Remaking Mexico: Law Reform as Foreign Policy*, 35 CARDOZO L. REV. 1471 (2014).

15. Yolanda Vazquez, *Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System*, 54 HOW. L.J. 639, 645 (2011) (describing a history that included lynching); BILL ONG HING, *DEFINING AMERICA THROUGH IMMIGRATION POLICY* 115 (2004).

16. Vazquez, *supra* note 15, at 645-46.

17. Henry Clews, *The Mexican Situation*, 54 ANNALS AM. ACAD. POL. & SOC. SCI. 162 (1914).

18. Vazquez, *supra* note 15, at 645, 649-50.

19. See Mary Fan, *The Case for Crimmigration Reform*, 92 N.C. L. REV. 75, 106-07 (2013).

20. See *infra* Part III.A.

21. See generally Ethan Nadelmann, *Fund Drug Treatment Rather Than Mexican Anti-Drugs Operations*, S.F. CHRON. (Oct. 29, 2007, 4:00AM), <http://www.sfgate.com/>

New narratives about Mexico have recently emerged, however tentatively, that warrant examination: the Obama administration has recast Mexico as a strong and vibrant economic partner to the United States. Business groups and their supporters in Congress have once again extolled the virtues of the laboring Mexican worker and government officials acting on behalf of US oil interests praise Mexico's "ambitious reforms to make [the Mexican] economy more competitive."<sup>22</sup> Recent scholarship, also, has offered a more balanced description of the skill level and expertise that Mexican workers bring to the US workplace, countering the dominant narrative of the "criminal alien" and debunking the myth of the ubiquitous unskilled Mexican worker. New research serves to document the constructive transformation Mexican workers have accomplished in the labor market for all workers and the benefits that Mexican entrepreneurship brings to local communities.<sup>23</sup>

Insofar as narratives are formed as socially-constructed and culturally-contingent artifacts, they provide insight into a larger "truths" about US-Mexico relations. Narratives are not only an expression of social attitudes and nativist sentiments. They also develop in tandem with and within the law and legal discourse. They are both cause and consequence of a public mood.

This Article seeks to contribute to the scholarship that has examined the way that Latin Americans in general and Mexicans in particular have been subordinated through narratives in ways that bear on public policy, national interest, and law. It demonstrates that the discourse has implications that extend beyond US borders into Mexico while reaching deep into local neighborhoods and towns in the United States. It then considers whether alternative uses of the narratives and newly emerging characterizations are sufficiently disruptive of dominant discursive devices used to subordinate Mexicans.<sup>24</sup>

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opinion/article/Fund-drug-treatment-rather-than-Mexican-3301949.php; Matthew S. Jenner, *International Drug Trafficking: A Global Problem With a Domestic Solution*, 18 *IND. J. GLOBAL LEGAL STUD.* 90 (2011).

22. Laura Carlsen, *Obama Downplays Drug War, Recasts Mexico, Central America as Economic Allies*, *AMERICA'S PROGRAM* (May 30, 2013), <http://www.cipamericas.org/archives/9600>.

23. See *infra* Part II.B.

24. See Michael D. Shear & Randal C. Archibold, *In Latin America, U.S. Focus Shifts From Drug War to Economy*, *N.Y. TIMES*, May 5, 2013, at A10 (describing a shift in US focus).

Part I examines the construction of the prevailing political narrative of the Mexican-as-criminal at the transnational, national, and local level. It considers how the discursive uses of such stereotypes act to construct law that is, in turn, constitutive of the narrative. At the transnational, national, and state and local level, legal developments respond to and reinforce the construction of the Mexican as super-predator with dire consequences for communities on both sides of the border. At the transnational level, Mexicans perceived to be a danger to the United States are inscribed into the larger national angst of terrorism to which transnational policing in the form of a military response is deemed necessary. At the national level, the depiction of the criminal Mexican immigrant contributes to xenophobic excesses and is exploited as political scapegoating and often serves to divert attention away from the material reality of the political economic circumstances of migration that might otherwise inform immigration reform.<sup>25</sup> At the state and local level, particularly in communities with histories of nativist sentiments and racial animus, the depiction of the Mexican criminal in their midst, in their schools, on their roads, and at their worksites, is used to justify policies of exclusion and community stratification.<sup>26</sup> Racist tendencies are refueled and reinvigorated as a matter of social practices, particularly in the South.<sup>27</sup>

Part II then considers alternative uses of the dominant narrative of Mexico and Mexicans. It reviews the Mexican-as-criminal narrative as used by well-meaning immigration advocates who discern in the discourse of Mexico as a nation of criminality and lawlessness as a means to assist Mexican immigrants who wish to remain in the United States via asylum claims and other immigration remedies that require a showing of hardship upon returning.<sup>28</sup> It then examines contesting narratives and shifting paradigms: from “Mexican-as-criminal” (bad neighbor) to “Mexican-as-economic partner” (good neighbor)—articulated either as a means to maintain US dominance in the economic affairs in Mexico or as a remedial

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25. See *infra* Part I.B.

26. See generally KEVIN R. JOHNSON & BERNARD TRUJILLO, IMMIGRATION LAW AND THE U.S.-MEXICO BORDER: SÍ, SE PUEDE? (2011).

27. See *infra* Part I.C.

28. See *infra* Part II.A.



description that more accurately depicts changes effected by Mexican immigration.<sup>29</sup>

Narratives serve a purpose that can be discerned through an examination of the social circumstances in which specific discourses flourish. They are best understood when analyzed in the context of the political economic goals they seek to achieve, and by ascertaining who benefits and who is harmed.<sup>30</sup> This Article concludes by suggesting the need to reexamine narratives in order to determine who benefits and who is harmed, and ultimately whether the narrative produces a usable framework to understanding and resolving the political economic structures that produce violence in Mexico.

### I. *NARRATIVES AT WORK: THE MEXICAN-AS-CRIMINAL*

Narratives often function in the realm of contingency, as a matter of national interests and security requirements, shaped through the interaction of foreign policy needs with domestic political requirements. The current “Mexican-as-criminal” narrative provides a discursive framework with which to shape the rationale of a foreign policy designed to expand US economic interests, even as it provides local power contenders the rhetoric to exploit racist attitudes and nativist sentiment for political ends. Indeed, control of the drug cartel violence discourse is critical to regulation of trade, labor, drug policy, gun control, immigration, and politics at all levels.<sup>31</sup>

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29. *See infra* Part II.B.

30. Some scholars point out that solidarity/activists groups have contributed to this phenomenon by frequent use of graphic depictions of violence as a means to call attention to the crisis in Mexico. *See* Claire F. Fox, *Left Sensationalists at the Transnational Crime Scene*, in *WORLD BANK LITERATURE* 184 (Amitava Kumar ed., 2003); *see also* Andria D. Timmer, *Constructing the “Needy Subject”: NGO Discourses of Roma Need*, 33 *POLAR: POL. & LEGAL ANTHROP. REV.* 264 (2010).

31. Laura Carlsen, *New NSA Mexico Leaks Raise Questions on U.S. Security Programs*, *HUFFINGTON POST* (Oct. 22, 2013), [http://www.huffingtonpost.com/laura-carlsen/new-nsa-mexico-leaks\\_b\\_4134434.html](http://www.huffingtonpost.com/laura-carlsen/new-nsa-mexico-leaks_b_4134434.html) (observing that US intervention in the militarization of the drug war “achieved an unprecedented margin to operate in-country, effectively breaking down any remaining nationalist resistance to their activities on Mexican soil.”); Laura Carlsen, *Latin America Builds Momentum Against U.S.-Backed Drug War*, *HUFFINGTON POST* (Oct. 10, 2013), [http://www.huffingtonpost.com/laura-carlsen/latin-america-war-on-drugs\\_b\\_4068005.html](http://www.huffingtonpost.com/laura-carlsen/latin-america-war-on-drugs_b_4068005.html) (observing that the drug war is a critical piece in the Pentagon’s global deployment plans and it feeds hugely powerful defense-intelligence industries); Isabella Bakker & Stephen Gill, *Global Political Economy and Social Reproduction in POWER, PRODUCTION AND SOCIAL REPRODUCTION* 3, 5 (Isabella Bakker & Stephen Gill, eds. 2003) (arguing that the dominant global governance framework associated with neoliberalism seeks to create an economy favorable to transnational corporations and others who dominate world markets).

The law, too, is complicit with the “logic” of the discourse of the violent Mexican as it is constitutive of the narrative. Clifford Geertz has elucidated this relationship, positing that legal thought is “constructive of social realities rather than merely reflective of them.”<sup>32</sup> Transnational legal processes compare similarly with the laws and legal policy at the federal, state, and local level. Each tends to rely on strategies of escalating fear, militarization, and criminalization to address underlying political and socio-economic problems, many of which have structural dimensions and historical antecedents. These legal developments help to construct the phenomenon of the Mexican-as-criminal just as they regulate the day-to-day lives of Mexicans on both sides of the border.<sup>33</sup>

A. *The Transnational: Creating and Responding to the Mexican as the New Terrorist*

1. The Narrative: Mexicans and Drug Cartel Violence—the “New Monolithic Threat”<sup>34</sup>

A powerful narrative about threats posed by Mexican drug cartel violence, criminality, and the loss of control of the US-Mexico border continues unabated. US politicians have described foreign drug trafficking as “the new communism, the new monolithic threat.”<sup>35</sup> The United States Agency for International Development (“USAID”) has declared that drug trafficking-related crime is now considered the most significant threat to regional economic growth and democracy.<sup>36</sup> In the realm of the transnational, drug-related crime has been described as a “narcoinsurgency” posing grave concerns for US homeland security.<sup>37</sup> The cartels have been characterized as “all at

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32. Clifford Geertz, *Local Knowledge: Fact and Law in Comparative Perspective*, in LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 232 (1983).

33. Menachem Mautner, *Three Approaches to Law and Culture*, 96 CORNELL L. REV. 839, 854-55 (2011).

34. Peter Andreas, *The Rise of the American Crimefare State*, 14 WORLD POL’Y J. 37, 37 (1997).

35. *Id.*

36. Damien Cave & Michael S. Schmidt, *Rise in Pill Abuse Forces New Look at U.S. Drug Fight*, N.Y. TIMES, July 17, 2012, at A1 (referencing comments by Mark Feierstein, Associate Administrator for Latin America & the Caribbean, US Agency for International Development).

37. Entous & Hodge, *supra* note 2 (quoting a retired Army officer and professor of international relations and history); UNITED STATES JOINT FORCES COMMAND, JOINT

once, transnational criminal organizations, international terrorist organizations, and insurgents under the law of war<sup>38</sup> and the “the greatest organized crime threat to the United States.”<sup>39</sup>

Former Secretary of State Hilary Clinton and Secretary of Homeland Security Janet Napolitano both have equated the dangers of drug-cartel violence with the threat of terrorism and compared the phenomenon to an insurgency that imperils the national interests of the United States.<sup>40</sup> Members of Congress have likened Mexican drug cartels to al-Qaida, the Taliban, and Hezbollah and have urged their designation as Foreign Terrorist Organizations.<sup>41</sup> As one researcher who studies US-Mexico border policies has observed, “[i]n the new lexicon of the Obama administration, the old ‘war on drugs’ has been superseded by the new combat against ‘transnational threats,’ ‘transnational organized crime’ and ‘transnational criminal organizations’ (‘TCOs’).”<sup>42</sup>

The Pentagon declares the need “to hunt drug cartels in the same way special operations teams hunt al-Qaida.”<sup>43</sup> The US Joint

OPERATING ENVIRONMENT: CHALLENGES AND IMPLICATIONS FOR THE FUTURE JOINT FORCE 34 (2008), available at <https://www.fas.org/man/eprint/joe2008.pdf>.

38. Carrie F. Cordero, *Breaking the Mexican Cartels: A Key Homeland Security Challenge for the Next Four Years*, 81 UMKC L. REV. 290, 291 (2013).

39. Douglas Farah, *Money Laundering and Bulk Cash Smuggling: Challenges for the Mérida Initiative Working Paper Series on U.S.-Mexico Security Cooperation* (May 2010), available at [http://www.strategycenter.net/docLib/20101113\\_MoneyLaundandBulkCash\\_Farah.pdf](http://www.strategycenter.net/docLib/20101113_MoneyLaundandBulkCash_Farah.pdf).

40. Paul Richter & Ken Dilanian, *Clinton Says Mexico Drug Wars Starting to Look like Insurgency*, L.A. TIMES (Sept. 9, 2010), <http://articles.latimes.com/2010/sep/09/world/la-fg-mexico-insurgency-20100909>; Entous & Hodge, *supra* note 2; *U.S. Can Do More to Help Mexico Fight Drug Cartels*, CNN POLITICS (Oct. 16, 2010), <http://www.cnn.com/2010/POLITICS/10/16/clinton.drug.cartels/index.html?hpt=T1>; *Secretary Napolitano and Mexican Counterparts Sign Arrangements to Bolster Bilateral Border and Aviation Security*, Press Release, Office of the Press Secretary (Mar. 23, 2010), available at <https://www.dhs.gov/news/2010/03/23/secretary-napolitano-and-mexican-counterparts-sign-arrangements-bolster-bilateral>.

41. See Andrea N. Sánchez, *Mexico's Drug “War”: Drawing a Line Between Rhetoric and Reality*, 38 YALE J. INT’L L. 467, 477 n.83 (2013); *Emerging Threats and Security in the Western Hemisphere: Hearing Before the H. Comm. on Foreign Affairs*, 112th Cong. 1 (2011) (statement of Rep. Ileana Ros-Lehtinen, Chairwoman).

42. Tom Barry, *ACTing Out at Ground Zero in Arizona—Where the Drug War Now Has a “Unified Command”*, BORDER LINES BLOG (Sept. 9, 2011), <http://borderlinesblog.blogspot.com/2011/09/acting-out-in-arizona-where-drug-war.html> (attributing the official shift in terminology to Strategy to Combat Transnational Organized Crime issued by the White House in July 2011).

43. Kimberly Dozier, *New US Special Operations Headquarters To Help Mexican Forces To Fight Drug Gangs*, EL PASO TIMES (Jan. 17, 2013), available at [http://www.elpasotimes.com/ci\\_22392813/us-commandos-boost-numbers-train-mexican-forces](http://www.elpasotimes.com/ci_22392813/us-commandos-boost-numbers-train-mexican-forces).

Forces Command warns of the need of an “American response” to protect US security interests and has listed Mexico as one of two countries determined to be “worst case scenarios” in the event of the collapse of the state.<sup>44</sup> In May 2013, NATO’s outgoing supreme commander, Admiral James G. Stavridis, speculated that “[d]rug cartels along America’s southern border . . . might come to make common cause with terrorist or militant organizations to bring in weapons or bomber makers.”<sup>45</sup> He concluded that “[t]here are times we have to apply lethal force.”<sup>46</sup> Undersecretary of the Army Joseph Westphal too suggested that the United States consider sending troops to Mexico.<sup>47</sup>

The US Northern Command has called for nothing less than the militarization of the border.<sup>48</sup> Others similarly propose a “power” approach and emphasize the need for a strong US military presence in Mexico in order to “expand American influence and establish the legitimacy of American action” and “achieve American objectives.”<sup>49</sup> President Obama pledged to send 1200 National Guard troops to the border to prevent the violence from spilling over into the United States; his administration has emphasized the need for increasing military and intelligence activities.<sup>50</sup> In the name of US national security, the Obama administration has established an intelligence outpost on a Mexican military base.<sup>51</sup>

It is not only the invocation of the threat of a foreign invasion by dangerous criminals that serves as justification for the heightened US

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44. Entous & Hodge, *supra* note 2 at 36.

45. Thom Shanker, *Globalization Creates a New Worry: Enemy Convergence*, AT WAR BLOG (May 30, 2013), <http://atwar.blogs.nytimes.com/2013/05/30/globalization-creates-a-new-worry-enemy-convergence/?ref=drugtrafficking>.

46. *Id.*

47. Nacha Cattán & Stephen Kurczy, *Mexico Drug War an 'Insurgency'? US Official's Gaffe Sparks US-Mexico Row*, CHRISTIAN SCI. MONITOR (Feb. 10, 2011), available at <http://www.csmonitor.com/World/Americas/2011/0210/Mexico-drug-war-an-insurgency-US-official-s-gaffe-sparks-US-Mexico-row>; *Id.* (Westphal later backed off of his comments).

48. Dudley Althaus, *Fort Hancock Residents Don't Like the Fence, But Value Security*, HOUSTON CHRON. Feb. 28, 2009; *US Poised to Join Mexico Drug War*, BBC NEWS (Mar. 18, 2009), <http://news.bbc.co.uk/2/hi/7949665.stm>.

49. Kevin H. Govern, *Reinforcing the Rule of Law and Human Rights in Mexico Through U.S. Special Operations Forces Missions*, 19 L. & BUS. REV. AMS. 503, 508-09 (2013).

50. Randal C. Archibold, *Obama to Send up to 1,200 Troops to Border*, N.Y. TIMES, May 26, 2010, at A1; Entous & Hodge, *supra* note 2.

51. Mark Mazzetti & Ginger Thompson, *U.S. Widens Role in Mexican Fight*, N.Y. TIMES, Aug. 26, 2011, at A1 (observing that the United States has authorized drones and manned aircraft to fly into Mexico).

military response to Mexico's drug cartels. Drug cartel violence increased as the United States and Mexico were establishing a more integrated economy through NAFTA.<sup>52</sup> Demands for a military response were advanced for the purpose of protecting emerging transnational trade and commercial networks. In fact, plans for new cross-border military initiatives appeared when drug violence began to affect important industrial corridors.<sup>53</sup> As political analyst Laura Carlsen explains, the United States "sought a means to extend its national security doctrine to its regional trade partners."<sup>54</sup> Counterterrorism initiatives, she notes, were in fact designed to protect "strategic resources and investments."<sup>55</sup> Assistant Secretary of State Tom Shannon called these strategies the "armoring [of] NAFTA."<sup>56</sup>

Congressional representatives justify support for transnational intervention against drug cartel violence in defense of US economic well-being.<sup>57</sup> Multinational corporate executives have expressed concern about the loss of profits in areas of construction and tourism due to the violence and have appealed to the US government to curtail the chaos.<sup>58</sup> Others with interests in supply-chain *maquiladoras* and manufacturing interests located in Mexico have expressed concerns about the volatile circumstances in Mexico and the effects on business

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52. Weissman, *supra* note 14, at 1475-77.

53. Mazzetti & Thompson, *supra* note 51.

54. Laura Carlsen, *Perils of Plan Mexico: Going Beyond Security to Strengthen U.S.-Mexico Relations*, AMERICAS PROGRAM (Nov. 23, 2009), <http://www.cipamericas.org/archives/1925>.

55. *Id.*; see also LAURA CARLSEN, ARMORING NAFTA: THE BATTLEGROUND FOR MEXICO'S FUTURE n.2 (2008) (citing Thomas Shannon, US Assistant Secretary of State for Western Hemisphere Affairs using the term "armoring NAFTA," Speech to the Council on the Americas, (Apr. 3, 2008)).

56. CARLSEN, *supra* note 55.

57. *U.S.-Mexico Security Cooperation: Next Steps for the Mérida Initiative Joint Hearing Before the Subcomm. on Border, Maritime, and Global Counterterrorism of the H. Comm. on Homeland Sec., and the Subcomm. on the Western Hemisphere of the H. Comm. on Foreign Affairs*, 111th Cong. 2 (2010) (statement of Rep. Henry Cuellar, Statement of Deputy Assistant Secretary for Policy, Office of International Affairs, DHS); *id.* at 21, 23-24 (statement of Mariko Silver) (noting the "false dichotomy between economic prosperity and national security"); *id.* at 80 (statement of John Negroponte), available at <http://www.gpo.gov/fdsys/pkg/CHRG-111hhr62401/pdf/CHRG-111hhr62401.pdf>.

58. Devin Parsons, *The Nature of the U.S.-Mexico Drug War: Equal Responsibility, Unequal Costs*, COUNCIL ON HEMISPHERIC AFFAIRS (June 9, 2010) <http://www.coha.org/the-nature-of-the-u-s-mexico-drug-war-equal-responsibility-unequal-costs/> (referring to Bloomberg Businessweek's quote of the chief economist at J.P. Morgan Chase in Mexico City who expressed investor concerns).

profitability.<sup>59</sup> The US Chamber of Commerce called for action to address the imminent threat to business interests while invoking the specter of “border-related security challenges and the threat of terrorism.”<sup>60</sup> At the same time, US defense contractors have benefitted from the sale of military equipment, and business interests promote the privatization of security to protect their investments.<sup>61</sup>

That border cities such as El Paso and San Diego, in close proximity with Mexican cities once considered the most dangerous in Mexico, have the lowest crime rates in the United States—as *Congressional Quarterly* data demonstrates—somehow has not fit into the narrative calculus.<sup>62</sup> A study analyzing over a decade of crime data of the four US-Mexico border states, including information from 1,600 local law enforcement agencies as well as federal crime statistics, found that “US border cities were statistically safer on average than other cities in their states. Those border cities, big and small, have maintained lower crime rates than the national average . . .”<sup>63</sup> Moreover, as one researcher has observed, Mexicans attempting to cross the border are all “lumped in with drug and human traffickers,” without distinction between those who seek to migrate to the United States “because of the disastrous economic and employment situation created by policies like NAFTA” and cartel members who may desire to traffic drugs.<sup>64</sup> Whether the threat is

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59. Gary J. Hale, *A Failed State in Mexico: Tamaulipas Declares Itself Ungovernable*, JAMES A. BAKER III INST. PUB. POL’Y RICE U. 6, 23 (2011), <http://bakerinstitute.org/media/files/Research/b0596728/DRUG-pub-HaleTamaulipasFailedState-072611.pdf>.

60. *STEPS TO A 21ST CENTURY U.S.-MEXICO BORDER*, U.S. CHAMBER OF COMMERCE 6, 8-9 (2011), [https://www.uschamber.com/sites/default/files/legacy/reports/2011\\_us\\_mexico\\_report.pdf](https://www.uschamber.com/sites/default/files/legacy/reports/2011_us_mexico_report.pdf).

61. *Id.* at 9; U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-253R, STATUS OF FUNDS FOR THE MÉRIDA INITIATIVE 12 (2010).

62. 2 *U.S.-Mexico Border Cities Boast Lowest Crime Rates, New Data Shows*, HUFFINGTON POST (Feb. 8, 2013), [http://www.huffingtonpost.com/2013/02/08/2-us-mexico-border-cities\\_n\\_2647897.html](http://www.huffingtonpost.com/2013/02/08/2-us-mexico-border-cities_n_2647897.html); Christopher Dickey, *Reading, Ranting, And Arithmetic*, NEWSWEEK (May 27, 2010), <http://www.newsweek.com/2010/05/27/reading-ranting-and-arithmetic.print.html> (reporting on FBI data that indicates that immigrant cities in the Southwest have had a decline in the crime rate). Crime has notably decreased in the Mexican border cities as well. *See* Cave, *supra* note 9.

63. Alan Gomez et al., *U.S. Border Cities Prove Havens from Mexico’s Drug Violence*, USA TODAY (July 18, 2014), [http://usatoday30.usatoday.com/news/washington/2011-07-15-border-violence-main\\_n.htm](http://usatoday30.usatoday.com/news/washington/2011-07-15-border-violence-main_n.htm).

64. Laura Carlsen, *Napolitano in Texas: Tough Talk, Little Coherence*, AMERICAS MEXICOBLOG (Feb. 3, 2011), <http://americasmexico.blogspot.com/2011/02/napolitano-in-texas-tough-talk-little.html> (quoting then Secretary Janet Napolitano issuing one broad threat

expressed as one of gruesome death or the demise of profits, the dominant narrative fosters the misperception of increasing rates of crime and violence along the southwestern border and puts the US on war-footing with Mexico and the ubiquitous Mexican-as-criminal.<sup>65</sup>

## 2. Transnational Legal Processes<sup>66</sup>

The narrative of Mexican drug war violence fits within the description of a “noisy construction [ ] manifest[ed] in moral panic accompanied by high levels of public, political, and media attention.”<sup>67</sup> It performs as the specter of transnational crime and serves as the “new moral imperative” for extraterritorial intervention and transnational policing.<sup>68</sup> The rhetoric of war has shaped the principles around which relations with Mexico are organized.<sup>69</sup> As one expert observed, “[t]o frame the problem as an insurgency almost necessarily invites a military response”—and in this case, it is a response consummated through transnational legal processes.<sup>70</sup> This section reviews the transnational legal agreements that have legitimized the militarization strategies and authorized US intervention in the national security and constitutional legal affairs of Mexico.

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to drug cartel members and immigrants seeking work). Federal agencies that report on illegal border activity do not distinguish between types of border arrests. *See* Barry, *supra* note 42.

65. Gomez et al., *supra* note 63 (noting that 83% of US citizens erroneously believe the rate of violence along the southwestern border is higher than national rates).

66. Transnational law “comprises legal norms that apply across borders to parties located in more than one jurisdiction.” Gregory Shaffer, *Transnational Legal Processes and State Change*, 37 *LAW & SOC. INQUIRY* 229, 232 (2012). Transnational law can include hard and soft rules, and can be bilateral, regional, or multilateral in nature. *Id.* at 233, 237. It generally refers to legal processes that “targets transnational events and activities—that is, transnational situations which involve more than one national jurisdiction.” *Id.* at 233.

67. Michael Welch, *Panic, Risk, Control, Conceptualizing Threats in a Post-9/11 Society*, 17, 21 in *PUNISHING IMMIGRANTS, POLICY, POLITICS, AND INJUSTICE* (Kubrin et al., eds. 2012).

68. *Id.* at 40.

69. *See* MICHAEL HARDT & ANTONIO NEGRI, *MULTITUDE: WAR AND DEMOCRACY IN THE AGE OF EMPIRE* 12 (2012) (describing war as “the primary organizing principle of society”).

70. Entous & Hodge, *supra* note 2 (quoting a retired Army officer and professor of international relations and history).

i. Bilateral legal transactions: legalizing military initiatives

A series of militarization strategies have been countenanced through binational legal transactions enacted between the United States and Mexico.<sup>71</sup> These arrangements are best characterized by agreements that have authorized US intervention in Mexico in the form of an armed offensive against drug trafficking organizations—a war fought on Mexican territory. These agreements have legalized joint law enforcement operations within Mexico and on the US-Mexico border.<sup>72</sup> New accords have authorized US Immigration and Customs Enforcement (“ICE”) agents to carry out “in depth investigations” with Mexican law enforcement agents.<sup>73</sup> US-Mexico pacts have expanded the jurisdiction of the Drug Enforcement Administration (“DEA”) whose agents have been permitted to engage in surveillance, arrests, and seizures in Mexico.<sup>74</sup> They have empowered the US military’s Joint Task Force-Six to conduct covert troop operations, eighty percent of these in Mexico.<sup>75</sup> Some of these agreements require Mexican governmental institutions to accommodate the presence of US agencies within their offices.<sup>76</sup> Recently, US-proposed legislation seeks to militarize Mexico’s southern border through a “Foreign Military Financing Program” in response to the crisis of Central American children fleeing violence.<sup>77</sup> These legal transactions function as a “politics of authority” and reinforce fear and nationalistic rhetoric.<sup>78</sup>

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71. See SEELKE & FINKLEA, *supra* note 7, at Appendix C; JAMES O. FINCKENAUER ET AL., MEXICO AND THE UNITED STATES: NEIGHBORS CONFRONT DRUG TRAFFICKING (2007), available at <https://www.ncjrs.gov/pdffiles1/nij/218561.pdf>.

72. SEELKE & FINKLEA, *supra* note 7, at 5.

73. See SEELKE & FINKLEA, *supra* note 7, at Appendix C (describing Border Enforcement Security Taskforces (“BEST”) teams).

74. *Id.* (describing Project Reckoning).

75. U.S.-MEXICO BORDER POLICY REPORT, BORDER NETWORK FOR HUMAN RIGHTS & BORDER ACTION NETWORK, at 13 (2008), <https://www.utexas.edu/law/centers/humanrights/borderwall/communities/municipalities-US-Mexico-Border-Policy-Report.pdf> (describing more than 4000 such operations and documenting human rights violations, avoidable deaths, and the dangers of smuggling as a result of border security programs).

76. SEELKE & FINKLEA, *supra* note 7, at Appendix C (describing the Electronic Trace Submission System where US Alcohol Tobacco and Firearms maintains a foreign attaché in Mexico City).

77. H.R. REP. NO. 110 (2014), available at <http://appropriations.house.gov/uploadedfiles/bills-113hr-sc-ap-fy2015-stateforop-subcommitteeedraft.pdf>.

78. Welch, *supra* note 67, at 26.



The most important transnational legal response to the narrative of drug violence has been the Mérida Initiative, a congressionally funded mandate to intervene in the Mexican drug cartel phenomenon.<sup>79</sup> Enacted in October 2007, this “regional security partnership” was designed to develop a heightened military response to Mexico’s drug wars.<sup>80</sup> A joint US-Mexico statement set forth its primary purpose: “to maximize the effectiveness of our efforts to fight criminal organizations.”<sup>81</sup> The plan, when first initiated, involved four goals: (1) break the power and impunity of criminal organizations; (2) assist in strengthening border, air, and maritime controls; (3) improve the capacity of justice systems; and (4) curtail gang activity and diminish the demand for drugs in the region.<sup>82</sup>

The Mérida Initiative was enacted to “enhance the ability of the Government of Mexico, in cooperation with the United States, to control illicit narcotics production, trafficking, drug trafficking organizations (“DTOs”), and organized crime” as well as to “strengthen respect for internationally-recognized human rights and the rule of law.”<sup>83</sup> Congress, at the inception, however, promoted the pact as one that needed to focus first and foremost on “assistance to the armed forces of Mexico.”<sup>84</sup> Mérida Initiative funding has exceeded US\$1.2 billion in foreign aid, most of which has been allocated for the Mexican purchase of US military equipment, new surveillance technologies, counter-narcotics, counter-terrorism, and the training of Mexican police.<sup>85</sup> US military officials have deemed the Mérida Initiative a directive to prepare Mexico’s military “for a war much like the ones Washington is waging in Afghanistan and

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79. Act of June 30, 2008, Pub. L. No. 110-252, 122 Stat. 2323; see SEELKE & FINKLEA, *supra* note 7.

80. *Id.*

81. Office of the Spokesman *Joint Statement on the Merida Initiative: A New Paradigm for Security Cooperation*, U.S. DEP’T OF STATE (Oct. 22, 2007), available at <http://2001-2009.state.gov/r/pa/prs/ps/2007/oct/93817.htm>.

82. *Counternarcotics and Law Enforcement Country Program: Mexico*, U.S. DEP’T STATE (Jan. 20, 2009), available at <http://www.state.gov/j/inl/rls/fs/114078.htm>.

83. Merida Initiative to Combat Illicit Narcotics and Reduce Organized Crime Authorization Act of 2008, H.R. REP. NO. 6028, § I(A)(111) (2007-2008), available at [http://thomas.loc.gov/cgi-bin/cpquery/?&sid=cp110h8NYK&refer=&r\\_n=hr673p1.110&db\\_id=110&item=&sel=TOC\\_87483&](http://thomas.loc.gov/cgi-bin/cpquery/?&sid=cp110h8NYK&refer=&r_n=hr673p1.110&db_id=110&item=&sel=TOC_87483&) (noting short-term security efforts are needed to stabilize the situation).

84. *Id.*

85. SEELKE & FINKLEA, *supra* note 7, at 8.

Iraq.”<sup>86</sup> Since 2008, funding for the Initiative has doubled, and it is presently the largest US foreign aid program.<sup>87</sup>

Critics have questioned the very premises of the Mérida Initiative.<sup>88</sup> Mexico experts have observed that the plan’s purpose was wrong-headed from the start:

The official intention to ‘fight criminal organizations . . . [and] disrupt drug-trafficking . . . weapons trafficking, illicit financial activities and currency smuggling, and human trafficking’ . . . cannot be reconciled with the Mexican military’s record of human rights abuses or with the fact that money laundering and weapons trafficking have never been tightly regulated by the United States.<sup>89</sup>

As a result of these transnational agreements, human rights advocates have documented discernible and destructive consequences.<sup>90</sup> According to 145 civil society organizations in the region, these agreements have enabled war strategies that have resulted in a “dramatic surge in violent crime, often reportedly perpetrated by security forces themselves.”<sup>91</sup> Efforts to suppress the cartels through military means demonstrably increased the violence and resulted in untold numbers of human rights abuses, including rapes, murder, harassment of labor and land activists, and torture of innocent citizens at the hands of security forces.<sup>92</sup> Drug cartel operations became more sophisticated in response to Mérida’s military initiatives. Some Mexican soldiers trained by US military

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86. Kristin Bricker, *Merida Initiative Under Scrutiny Following Clinton’s Visit to Mexico*, NACLA, <https://nacla.org/news/merida-initiative-under-scrutiny-following-clinton%25E2%2580%2599s-visit-mexico> (last visited Nov. 22, 2014).

87. Suzanna Reiss, *Beyond Supply and Demand: Obama’s Drug Wars in Latin America*, NACLA REP. AMS., 27-31, 38 (Jan./Feb. 2010), available at <https://nacla.org/news/beyond-supply-and-demand-obama’s-drug-wars-latin-america>.

88. There are no findings demonstrating whether there is a relationship between drug trafficking-related violence in Mexico and in the United States. See SEELKE & FINKLEA, *supra* note 7 at 5.

89. See Julien Mercille, *The Media-Entertainment Industry and the “War on Drugs” in Mexico*, 41 LAT. AM. PERSP. 110, 117 (2013).

90. SEELKE & FINKLEA, *supra* note 7, at 29; Alexander Main, *The U.S. Remilitarization of Central America and Mexico*, 47 NACLA REP. AMS. 65, 68 (2014) (noting that Human Rights Watch has calculated that at least 80,000 Mexicans have died and over 200,000 have been displaced since the United States assisted with the militarization of the war against drug cartels).

91. Main, *supra* note 90, at 65.

92. See *supra* notes 90–91 and accompanying text; HUMAN RIGHTS WATCH, UNIFORM IMPUNITY 2 (2009), available at [http://www.hrw.org/sites/default/files/reports/mexico0409web\\_0.pdf](http://www.hrw.org/sites/default/files/reports/mexico0409web_0.pdf); Carlsen, *supra* note 22; Reiss, *supra* note 87, at 28.

personnel subsequently left the Mexican army and joined violent cartels where they have carried out acts of gruesome brutality.<sup>93</sup> As one Mexican writer put it, “[y]ou didn’t have to be a genius to see that a military challenge to the narcos would lead to the militarisation of the narcos.”<sup>94</sup> The US State Department’s annual report on human rights in Mexico, while supportive of the Mérida Initiative, also found that “accusations of [Mexican] army abuses had risen sixfold” since the offensive against drug cartels began and documented evidence of extrajudicial killings, kidnappings, and torture.<sup>95</sup> One human rights group observed that the Mérida Initiative has turned Ciudad Juárez into “Mexico’s Baghdad.”<sup>96</sup>

Others have critiqued the initiative as a scheme to benefit US military hardware firms who have “become *de facto* agents of foreign policy.”<sup>97</sup> While a joint initiative in name, it is largely controlled by the United States. Mexican journalists have called the Mérida Initiative “a grotesque and absurd pretension.”<sup>98</sup> Mexico City’s Archdioceses urged “rejection” of the plan and derided it as no more than “offensive charity.”<sup>99</sup> With its focus on the need to control and punish, it replicates historical stereotypes that Mexicans are “‘brutal,’ ‘bloodthirsty,’ [and] ‘barbarous’” without any consideration of the determinants of the violence.<sup>100</sup>

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93. Frank Koughan, *U.S.-Trained Death Squads? How America’s Latest Drug War Could Aid the Cartels and Enrich Military Contractors*, MOTHER JONES (Jul.-Aug. 2009), <http://www.motherjones.com/politics/2009/07/us-trained-death-squads>; see also LAURIE FREEMAN, DÉJÀ VU: DRUG POLICY ON THE US-MEXICO BORDER (2008), available at [http://www.wola.org/sites/default/files/downloadable/Mexico/past/Merida%20Initiative\\_Laurie.pdf](http://www.wola.org/sites/default/files/downloadable/Mexico/past/Merida%20Initiative_Laurie.pdf) (English translation).

94. Álvaro Enríque, *When a Corpse Is a Message*, 36 LONDON REV. BOOKS 21 (May 8, 2014).

95. Marc Lacey, *Rights Group Report Faults Mexican Army’s Conduct in Drug War*, N.Y. TIMES, Dec. 8, 2009 at A12.

96. *POLICY ANALYSIS: New Phase of the Mérida Initiative Brings the Same Violence*, WITNESS FOR PEACE (May 25, 2010), <http://www.witnessforpeace.org/article.php?id=963>.

97. See generally Jeffrey E. Garten, *Business and Foreign Policy*, FOREIGN AFF. (May/June 1997), <http://www.foreignaffairs.com/articles/53047/jeffrey-e-garten/business-and-foreign-policy> (describing the role of US firms).

98. Marc Lacey, *Congress Trims Bush’s Mexico Drug Plan*, N.Y. TIMES, May 23, 2008, at A6 (internal quotation marks omitted) (quoting from an editorial in the Mexican newspaper, LA JORNADA).

99. GEORGE W. GRAYSON, MEXICO NARCO VIOLENCE AND A FAILED STATE? 237 (2010).

100. Colin Campbell, *A Social Constructivist Analysis of US-Mexican Bilateral Military Relations, 2000-2008*, 6 (paper presented at the 2010 Congress of Latin American Studies Association, Toronto, Canada, 6-9 October 2010), <http://lasa.international.pitt.edu/members/congress-papers/lasa2010/files/1270.pdf> (observing that the United States has

Life at the border has been described as “a constant skirting on the edges of death.”<sup>101</sup> As a result of agreements to fortify the border, immigrants attempt dangerous crossings into remote areas where thousands have met horrific deaths in inhospitable desert terrain.<sup>102</sup> Despite reduced numbers of Mexicans seeking to cross the border, the number of migrant deaths has dramatically increased.<sup>103</sup>

Transnational initiatives have also created hardship on the US side of the border, which has been physically transformed from a river to a wall of barbed wire, steel, and concrete—that is, a war zone.<sup>104</sup> Sophisticated military equipment and helicopters are utilized and in full view; residents living in the shadow of such construction cannot but experience fear, intimidation, and hostility.<sup>105</sup> US border towns have been described as “police states” and “militarized zones.”<sup>106</sup> Residents, who endure military-style stops, routine law enforcement stops, checkpoints, and searches, are harassed and terrorized and have begun to protest the intrusions as unlawful, un-American, and

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supported military initiatives in Latin America that have served as repressive mechanisms designed to eliminate “‘subversives’ [as] a matter of ‘national security’”); Leticia M. Saucedo, *Anglo Views of Mexican Labor: Shaping The Law of Temporary Work Through Masculinities Narratives*, 13 NEV. L.J. 547 (2013). For a review of the determinants of violence in Mexico, see Weissman, *supra* note 14; Deborah M. Weissman, *The Political Economy of Violence: Toward an Understanding of The Gender-Based Murders of Ciudad Juárez*, 30 N.C. J. INT’L. & COMM. REG. 795 (2005).

101. Elvia R. Arriola, *Voices from the Barbed Wires of Despair: Women in the Maquiladoras, Latina Critical Legal Theory and Gender at the U.S.-Mexico Border*, 49 DEPAUL L. REV. 729, 750 (2000); U.S.-MEXICO BORDER POLICY REPORT, *supra* note 75, at 12-13 (documenting human rights violations, avoidable deaths, and other dangers as a result of border security programs).

102. See Wayne A. Cornelius, *Death at the Border: Efficacy and Unintended Consequences of U.S. Immigration Policy*, 27 POP. & DEV. REV. 661, 669 (2001) (noting the sharp increase in the numbers of those dying trying to cross into the United States since the militarization of the border crossing has taken place); Kevin R. Johnson, *Open Borders?*, 51 UCLA L. REV. 193, 221-22 (lamenting that “thousands have died agonizing deaths from heat, cold, and thirst”).

103. See *Undocumented Border Crossings Decline, Aug. 22-Sept 4, 2011*, MEXICO SOLIDARITY NETWORK (Sept. 6, 2011), <http://www.mexicosolidarity.org/post/2011/sepember/mexiconewsandanalysisaug22sept42011>.

104. See Cornelius, *supra* note 102, at 663 (describing the thousand of Border Patrol agents, high-intensity lighting, steel fencing, infrared night scopes, motion-detecting sensors, and video surveillance along the Mexico-US border); Arriola, *supra* note 101.

105. Arriola, *supra* note 101.

106. Interview with B. Lucero (2014) (notes on file with author). For a description of the militarization of the US border, see generally National Immigration Forum, *Southwest Border Security Operations*, <http://immigrationforum.org/blog/background-southwest-border-security-operations?>

unnecessary.<sup>107</sup> Nor do oppressive police practices end at the border. Racial profiling of Latinos now occurs with increasing frequency throughout the United States and “[i]n this way, searches and seizures do more than their ordinary or “interior” investigatory work; they perform extraordinary or “border” work as well.”<sup>108</sup>

These transnational legal processes constitute legal norms that validate the moral panic associated with circumstances in Mexico, and contribute to a climate of fear. They reflect the consequences of a narrative that has promoted closer ties between the US and Mexican militaries.<sup>109</sup> They have given power and authority to the narrative of the Mexican-as-criminal.<sup>110</sup>

ii. The mérida initiative phase II and the rule of law program<sup>111</sup>

In 2009, after funds were allocated for military equipment to escalate the war on drug cartels, the Obama administration introduced Phase II, known as *Beyond Mérida*, which called for the remaking of Mexico’s “weak institutions” and the reform of Mexico’s legal system.<sup>112</sup> USAID and the Department of Justice were charged with administering the Mérida Rule of Law program, and in collaboration with the State Department, they have contracted with private international development firms based in Washington, D.C.<sup>113</sup> These

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107. *Id.*; see U.S.-MEXICO BORDER POLICY REPORT, *supra* note 75, at 14. Fernanda Santos, *Border Patrol Scrutiny Stirs Anger in Arizona Town*, N.Y. TIMES, June 28, 2014, at A13 (describing frustrated, angry US citizens who live near the border and are routinely stopped and questioned).

108. Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543, 1547 (2011) (footnote omitted).

109. See Mercille, *supra* note 89, at 112.

110. *Id.* at 23; Thomas Schultz, *Why Being law Matters*, in TRANSNATIONAL LEGALITY: STATELESS LAW AND INTERNATIONAL ARBITRATION (2014), <http://ssrn.com/abstract=2433466> (explaining the effect of law on legitimacy and power).

111. For a thorough critique of the Mérida Rule of Law program, see Weissman, *supra* note 14.

112. SEELKE & FINKLEA, *supra* note 7, at 1; U.S. Gov’t Accountability Office, GAO-10-837, *Mérida Initiative: The United States Has Provided Counternarcotics and Anticrime Support But Needs Better Performance Measures 6* (2010) available at <http://www.gao.gov/new.items/d10837.pdf> [hereinafter *USGAO, Mérida Initiative*].

113. The two primary firms with whom USAID has contracted are Management Information Systems (“MSI”) and Management Sciences for Development, Inc. (“MSD”). *About MSI, Mgmt. Sys. Int’l*, MANAGEMENT SYSTEMS INTERNATIONAL, [http://www.msiworldwide.com/wp-content/uploads/MSI\\_one\\_page\\_eng.pdf](http://www.msiworldwide.com/wp-content/uploads/MSI_one_page_eng.pdf) (last visited Oct. 26, 2014); Brigitte Claney, *Coffey International Limited Awarded USD \$66.3 Million USAID Rule of Law Project in Mexico*, COFFEY (July 3, 2009), <http://www.coffey.com/our-news/media-releases/coffey-international-limited-awarded-usd-66-3-million-usaid-rule-of-law->

firms have drafted, promoted, and managed the processes for comprehensive revisions of Mexico's constitution, specifically as it relates to criminal justice, seizure laws, and federal and state criminal procedure codes.<sup>114</sup>

The Mérida Rule of Law plan is first and foremost a law-and-order plan.<sup>115</sup> Millions of dollars have been allocated to fund espionage systems directed at Mexican citizens, to improve prosecutorial capacity, increase the internal control systems within the Mexican federal police and the Mexican Attorney General's Office, improve extradition processes, and enhance sentencing and other related criminal penalties.<sup>116</sup> New prisons throughout Mexico have been funded.<sup>117</sup> The largest allocations have gone to International Narcotics Control and Law Enforcement and Foreign Military Financing.<sup>118</sup> A central focus of Mérida Phase II's Rule of Law Program has been its program to remake Mexico's criminal legal system and replicate "American-style" criminal trials.<sup>119</sup>

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project-in-mexico; MGMT. SCI. FOR DEV., <http://www.msglobal.com> (last visited Mar. 22, 2014); *Strengthening Justice Systems in Mexico*, MANAGEMENT SYSTEMS INTERNATIONAL, <http://www.msiworldwide.com/project/strengthening-justice-systems-in-mexico> (last visited Mar. 22, 2014); see also USGAO, *Mérida Initiative*, *supra* note 112; *Rule of Law*, U.S. AGENCY FOR INT'L DEV. (Jan. 10, 2014), <http://transition.usaid.gov/mx/ruleoflaweng.html>.

114. See Mgmt. Sys. Int'l, *Mexico Rule of Law Strengthening: Final Report to USAID July 6, 2004 to September 30, 2007*, 4 (2007), available at [http://pdf.usaid.gov/pdf\\_docs/PDACO092.pdf](http://pdf.usaid.gov/pdf_docs/PDACO092.pdf); see also MSD/Proderecho, *Quarterly Report January 1–March 31, 2008*, 1 (2008), available at [http://pdf.usaid.gov/pdf\\_docs/PDACO077.pdf](http://pdf.usaid.gov/pdf_docs/PDACO077.pdf); SEELKE & FINKLEA, *supra* note 72, at 21; Wilson Ctr., Mexico Inst., *Group III—Institution Building and Rule of Law* (2008), available at <http://mexicoinstitute.files.wordpress.com/2012/08/merida-initiative-part2.pdf>.

115. See SEELKE & FINKLEA, *supra* note 72, at 19, 22, 24; U.S. Gov't Accountability Office, *GAO-10-253R, Status of Funds for the Mérida Initiative* 5, 14, 22, 24 (2009), available at <http://www.gao.gov/new.items/d10253r.pdf> (describing new training programs for prosecutors, investigators and forensic experts).

116. SEELKE & FINKLEA, *supra* note 7, at 24; David T. Johnson, *The Mérida Initiative: A New Security Cooperation Partnership*, 18 NAT'L STRATEGY FORUM REV. (2009), available at <http://www.nationalstrategy.com/NSFReview/Fall2009Vol18Issue3USMexico/LeadArticle3.aspx>; see Laura Carlsen, *A Primer on Plan Mexico*, AMS. PROGRAM (May 5, 2008), <http://www.cipamericas.org/archives/1474>.

117. *Mérida Initiative at a Glance: Law Enforcement Achievements*, U.S. EMBASSY IN MEXICO, [http://www.usembassy-mexico.gov/eng/merida/emerida\\_factsheet\\_lawenforcement.html](http://www.usembassy-mexico.gov/eng/merida/emerida_factsheet_lawenforcement.html) (last visited Mar. 12, 2014).

118. THOMAS H. ISOM, *PRI AND THE BEYOND MÉRIDA INITIATIVE 2* (2011), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA555293> (report submitted by student, a Colonel in the US Navy, at the Naval War College).

119. Ronald F. Wright, *Mexican Drug Violence and Adversarial Experiments*, 35 N.C. J. INT'L L. & COM. REG. 363, 381 (2010) (noting that a shift to an "accusatorial" system in Mexico was deemed appropriate by US funders); see U.S. EMBASSY IN MEXICO, FACT SHEET:

The Mexican legal system is most assuredly in need of reform.<sup>120</sup> The climate of impunity has been identified as a fundamental cause of violence.<sup>121</sup> Mexican citizens have little trust in law enforcement agencies and are fearful to report crime.<sup>122</sup> Moreover, Phase II represents a discursive shift from a policy that emphasized military escalation as the priority to “building the rule of law.”<sup>123</sup>

Yet there is reason for skepticism and concern about the Rule of Law program. Mexican human rights groups and civil society generally have long been wary of the excessive power of police and prosecutors.<sup>124</sup> Legal studies have demonstrated that Mexicans have a high rate of distrust for the office of the prosecutor when compared with other nations.<sup>125</sup> In considering how best to reform their legal

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THE MÉRIDA INITIATIVE-MAJOR DELIVERIES IN 2011 (2012), available at [http://photos.state.gov/libraries/mexico/310329/23jan12/2011%20Major%20Deliveries\\_2012.pdf](http://photos.state.gov/libraries/mexico/310329/23jan12/2011%20Major%20Deliveries_2012.pdf); Karla Zabludovsky, *In Mexico, Rehearsing to Inject Drama into the Courtroom*, N.Y. TIMES, Aug. 28, 2012, at A7; see, e.g., Jerry Crimmins, *Train in U.S. for Changes in Their Legal System*, N.Y. TIMES, Apr. 25, 2009, at A12. Funds have been allocated to *School Helps Mexico Change Trial Process*, CHI. DAILY L. BULL. (Aug. 14, 2009), <http://www.globaltort.com/2009/08/differences-in-legal-systems-mexico-and-the-us-on-criminal-law> (describing Chicago-Kent Law School’s involvement in reforming Mexico’s “ancient” criminal trial processes).

120. David Shirk, *The Drug War in Mexico: Confronting a Shared Threat*, Council on Foreign Relations, (March 2011), available at <http://www.cfr.org/mexico/drug-war-mexico/p24262>; see MATTHEW C. INGRAM ET AL., ASSESSING MEXICO’S JUDICIAL REFORM 4 (2012), available at <http://justiceinmexico.files.wordpress.com/2010/07/tbi-assessing-judicial-reform1.pdf>.

121. *Mexico: Intolerable Killings: 10 Years of Abductions and Murders of Women in Ciudad Juárez and Chihuahua: Summary Report and Appeals Cases*, AMNESTY INT’L (2003), available at <http://www.amnesty.org/en/library/asset/AMR41/027/2003/en/e81827cb-d6b3-11dd-ab95-a13b602c0642/amr410272003en.pdf>.

122. JO TUCKMAN, MEXICO: DEMOCRACY INTERRUPTED 108 (2012) (reporting over 80% of crime victims consider it a “waste of time” to report the crime to authorities); HUMAN RIGHTS WATCH, *Mexico*, in WORLD REPORT 191 (2009), available at [http://www.hrw.org/sites/default/files/reports/wr2009\\_web.pdf](http://www.hrw.org/sites/default/files/reports/wr2009_web.pdf).

123. *Human Rights in Mexico: Hearing Before the H. Comm. on Foreign Affairs, Tom Lantos Human Rights Commission*, 112th Cong. 9 (2012) (statement of Maureen Meyer, Senior Assoc., Wash. Office on Latin Am. on Human Rights in Mexico), available at <http://www.wola.org/sites/default/files/downloadable/Mexico/2012/MMeyer%20testimony%20TLHRC.pdf> (urging continued US support for the rule of project).

124. See *Justice Reform Season Opens*, CABLE REFERENCE ID: #07MEXICO4881 (Sept. 10, 2007, 11:03 PM), <http://cablegatesearch.net/cable.php?id=07MEXICO4881&q=07mexico4881>; see Weissman, *supra* note 14, 1497-1500.

125. See Hiroshi Fukurai & Richard Krooth, *The Establishment of All-Citizen Juries as a Key Component of Mexico’s Judicial Reform: Cross-National Analyses of Lay Judge Participation and the Search for Mexico’s Judicial Sovereignty*, 16 TEX. HISP. J.L. & POL’Y 37, 65 (2010).

system, many Mexican human rights activists and grassroots movements have articulated an agenda different than the US-led project; they have demanded an end to the criminalization model and instead have called for locally controlled community safety programs.<sup>126</sup> In spite of the studies' findings, and against the express opposition of many Mexican jurists and human rights groups, the United States has concentrated almost entirely on the training of law enforcement and prosecutors and funding the Mexican Attorney General's office in the face of ongoing scandals related to corruption, bribery, and other crimes that have plagued the bureaucracy.<sup>127</sup> Mexicans have resisted US efforts to revise Mexico's legal system while simultaneously funding weapon systems that have exacerbated the violence. Mexican commentators have denounced the Merida Initiative Rule of Law program as the imposition of the Monroe Doctrine in Mexican courts and the attempted "colonization" of the Mexican judicial system.<sup>128</sup>

The United States has failed to provide any useful means by which to judge the effectiveness of the Rule of Law program on the safety and well-being of citizens of either country.<sup>129</sup> Instead, success has been measured by the speed with which US military equipment has been delivered as well as training opportunities for its use.<sup>130</sup> The Rule of Law program focuses on criminalization and functions as a law and order initiative but fails to promote the fundamental values

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126. *Documents of the Movement in Translation: Manifesto the #I am 132 to the People of Mexico*, UEINTERNATIONAL (July 27, 2012), [http://ueinternational.org/MLNA/mlna\\_articles.php?id=203#1477](http://ueinternational.org/MLNA/mlna_articles.php?id=203#1477) (demanding a change to media, education, the neoliberal economic model, and the fulfillment of health rights).

127. Randal C. Archibold, *Top Mob Prosecutor Resigns*, N.Y. TIMES, Nov. 17, 2012, at A8; *Mexico's Federal Attorney General Investigates Its Own Air Fleet for Drug Trafficking*, THE FULANO FILES (Sept. 8, 2012), <http://fulano.info/wordpress/?p=1379>; GRAYSON, *supra* note 99, at 147; Carlsen, *supra* note 54 (noting that Mexican judges from the Supreme Court to the lower courts have objected to US reform initiatives); *see, e.g.*, U.S.-MEX. STATE ALLIANCE PARTNERSHIP, QUARTERLY REPORT OF ACTIVITIES, APRIL 1, 2011–JUNE 30, 2011, 3D QUARTER REPORT 6–18, 21 (2011), *available at* [http://www.statealliancepartnership.org/activities\\_files/3\\_quarter\\_report\\_FY201011.pdf](http://www.statealliancepartnership.org/activities_files/3_quarter_report_FY201011.pdf) (detailing almost exclusively trainings for prosecutors); *see also* William Hine-Ramsberger, Note, *Drug Violence and Constitutional Revisions: Mexico's 2008 Criminal Justice Reform and the Formation of Rule of Law*, 37 BROOK. J. INT'L L. 291, 315 (2011) (noting that the reforms "perpetuate the expansive power of the public prosecutor").

128. Paco Rodriguez, *Justicia Colonizada*, NOTICIASNET.MX (Jan. 28, 2011), <http://www.noticiasnet.mx/portal/principal/justicia-colonizada>. July 13, 2012

129. *See* SEELKE & FINKLEA, *supra* note 7, at 25.

130. *Id.*



inherent in the rule of law.<sup>131</sup> It does, however, succeed in reinforcing the perception of Mexicans who must be captured and punished.

*B. The National Narrative: Fear and Loathing of Mexican Immigrants*

1. The Narrative: Moral Panic and Mexicans

The transnational narrative breathes new life into the national immigration panic discourse that has long plagued Latin Americans and Mexicans in particular.<sup>132</sup> The US militarized response to drug cartel violence in Mexico cannot help but foment public anxiety at home.<sup>133</sup> Indeed, the narrative of drug-cartel violence has assumed a life of its own and has found a receptive milieu in an environment of fear and economic insecurity. At the same time the media and government officials invoke the threat of terrorist invaders from south of the border and plan military initiatives in Mexico, “interior” terminology such as “surge operations” have entered the lexicon to signal the need to catch the ever-present Mexican criminal at-large within the territory of the United States.<sup>134</sup> The language of US Border Patrol operating within the United States itself now includes “such military terms as ‘deconfliction,’ ‘situational awareness,’ ‘operational control,’ ‘surges,’ ‘forward operating bases,’ ‘common operating picture,’ and ‘defense-in-depth’” all in reference to domestic activity.<sup>135</sup> Politicians invoke similar war metaphors to address the threat of immigrants in the United States as those used to describe the military efforts in Mexico and have made reference to the

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131. See Nick Cheesman, *Law and Order as Asymmetrical Opposite to the Rule of Law*, 6 *HAGUE J. ON THE RULE OF LAW* 96, 98 (2014) (noting that despite the frequent conflation of law and order with the rule of law, they are “asymmetrically opposed” concepts without shared values).

132. LEO R. CHAVEZ, *THE LATINO THREAT* 2, 3 (2008) (describing the “grand tradition of alarmist discourse about immigrants and their perceived negative impacts on society”); see also KEVIN R. JOHNSON & BERNARD TRUJILLO, *IMMIGRATION LAW AND THE US-MEXICO BORDER, ¿SI SE PUEDE?* 4 (2011) (observing that the phrase “illegal alien” refers to undocumented immigrants from Mexico).

133. Nina Bernstein, *In Father’s Memory, Fighting to Stay in Britain*, *N.Y. TIMES*, Aug. 21, 2010, at A1 (noting that the criminal like practices such as detention and deportation have “legitimized treating foreigners a scapegoats”).

134. U.S. Immigration and Customs Enforcement, Statement of Alonzo Peña, Deputy Assistant Secretary for Operations, DEP’T OF HOMELAND SEC. 2 (May 27, 2010), <http://www.ice.gov/doclib/news/library/speeches/100527pena.pdf>; see DANIEL KANSTROOM, *DEPORTATION NATION* 4 (2007).

135. Barry, *supra* note 42.

domestic “battlefields” of crime and illegal immigration.<sup>136</sup> More than just illegal drug activity—some have put the full blame for the sex-slave industry and other violent enterprises within the United States on Mexicans.<sup>137</sup>

Congressional hearings on immigration-related matters have resorted to the use of “tabloid-style titles” and function as a “largely fact-free performance” that seize upon dramatic stories that distort the truth and offer anecdotes that have been refuted by FBI data regarding crime on the border.<sup>138</sup> Congressional witnesses reported that the “civil authorities, law enforcement agencies as well as [US] citizens are under attack around the clock” notwithstanding national, state, and local criminal justice data that confirm the decreasing rates of violent crime rates on the border and that border cities of all sizes demonstrate lower crime rates than the national average.<sup>139</sup> Indeed, much of the discourse around violent drug cartels functions to produce a “moral panic” about Mexicans in the United States.<sup>140</sup>

The specter of the “Mexican-as-criminal” crossing the border is said to “gladden[ ] the hearts of politicians on the right.”<sup>141</sup> It is

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136. Martha Mendoza, *U.S.-Mexico Border Isn't So Dangerous, Border Patrol Agents Face Less Danger Than Street Cops in Cities, Data Show*, ASSOCIATED PRESS (June 30, 2010) (quoting Arizona Governor Jan Brewer), [http://www.msnbc.msn.com/id/37493275/ns/world\\_news-americas/](http://www.msnbc.msn.com/id/37493275/ns/world_news-americas/); *Transcript of G.O.P. Debate*, N.Y. TIMES (June 5, 2007), <http://www.nytimes.com/2007/06/05/us/politics/05cnd-transcript.html?pagewanted=6> (quoting Tom Tancredo: “[w]hat we’re doing here in this immigration battle is testing our willingness to actually hold together as a nation or split apart into a lot of Balkanized pieces.”).

137. Walter Ewing, *Arizona Governor Jan Brewer Still Cannot Connect the Dots Between Immigration Reform and Border Security*, IMMIGRATION IMPACT (Aug. 7, 2013), <http://immigrationimpact.com/2013/08/07/arizona-governor-jan-brewer-still-cannot-connect-the-dots-between-immigration-reform-and-border-security/>.

138. Walter Ewing, *House Hearing, New Report Add to Hysterical Narrative on Border Security*, IMMIGRATION IMPACT (Oct. 17, 2011), <http://immigrationimpact.com/2011/10/17/house-hearing-new-report-add-to-hysterical-narrative-on-border-security/> (describing the House Homeland Security Subcommittee on Oversight, Investigations, and Management’s hearing entitled, “A Call to Action: Narco-Terrorism’s Threat to the Southern U.S. Border”).

139. *Id.*

140. Jodi Lane, *Fear of Gang Crime: A Qualitative Examination of the Four Perspectives*, 39 J. RES. CRIME & DELINQ. 437, 466 (2002) (describing theoretical models about the exaggerated fear of gang violence and attributing such excessive fear as the “likely local and national presence of a moral panic about gangs”).

141. *Editorial, Border News*, N.Y. TIMES Sept. 5, 2010, at WK7; Randal C. Archibold, *Obama to Send Up to 1,200 Troops to Border*, N.Y. TIMES (May 26, 2010), <http://www.nytimes.com/2010/05/26/us/26border.html> (reporting that both Democrats and Republicans rushed to take credit for the Obama administration’s decision to send troops to the border); see PETER ANDREAS, *BORDER GAMES, POLICING THE U.S.-MEXICO DIVIDE* 43

fodder for political demagoguery for those politicians who seek to project a tough-on-crime image; Mexicans provides them with readily identifiable scapegoats.<sup>142</sup> Political fear-mongering about Mexicans offers a proven method to gain leverage in electoral contests.<sup>143</sup> Senator John McCain accused Mexican immigrants of setting devastating wild fires in Arizona and New Mexico despite the lack of any proof to support such a charge.<sup>144</sup> Republican Presidential candidate Fred Thompson and members of the conservative media have attributed the recent US financial crisis to fraud in lending practices involving Mexican immigrants.<sup>145</sup> Others have invoked fear of massive voter fraud, claiming that unauthorized immigrants, most of whom are Mexicans, would be attempting to vote *en masse* illegally, and thereby affect the outcome of US elections.<sup>146</sup>

The US State Department often discourages college students from traveling to Mexico for their spring break, warning of crime and danger.<sup>147</sup> For good measure they also issued travel warnings to Mexico regarding the risk of “swine flu,” a disease that some scholars have observed, “reinforced the ‘dirty,’ ‘unkempt,’ and ‘uncivilized’ representations of Mexicans, notwithstanding the fact that the disease, later renamed H1N1, first originated in a town where

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(2000) (noting that the military initiative in Mexico has benefitted both Democrats and Republicans who seek to out-tough each other on the issue).

142. See Kevin R. Johnson, *It's The Economy Stupid: The Hijacking of the Debate Over Immigration Reform by Monsters, Ghosts, and Goblins (Or the War on Drugs, War on Terror, Narcoterrorists, Etc.)*, 13 *CHAP. L. REV.* 583, 584 (2010) (noting the historical scapegoating of immigrants for all social ills).

143. See *infra* notes 219-221 and accompanying text (discussing of the role of “policy entrepreneurs” in fomenting anti-immigrant sentiment).

144. Roberto Cintli Rodriguez, *John McCain's Wildfire Accusations*, *THE GUARDIAN*, (June 21, 2011), <http://www.theguardian.com/commentisfree/cifamerica/2011/jun/21/john-mccain-arizona-wildfire>; Marc Lacey, *As Arizona Fire Rages, So Does Rumor on Its Origin*, *N.Y. Times*, June 2, 2011, at A16.

145. Michael Finnegan, *Well Ya Got Trouble, Fred, Right Here in River City*, *L.A. TIMES* (Dec. 23, 2007), <http://articles.latimes.com/2007/dec/23/nation/na-thompson23> (pandering to accusation about Mexicans “taking over” California, abusing welfare, and culpable for the mortgage crisis); see also LOU DOBBS TONIGHT (CNN Oct. 9, 2008), available at <http://mediamatters.org/research/200810100022#03300902>.

146. Morgan Weiland, *Report: Conservative Media Consistently Scapegoat Undocumented Immigrants*, *ACORN*, (Apr. 7, 2009) <http://mediamatters.org/reports/200904070005>; *Illegal Elections and the Electoral College*, *FEDERATION FOR IMMIGRATION REFORM*, <http://www.fairus.org/issue/illegal-aliens-in-elections-and-the-electoral-college> (last visited Nov. 12, 2014).

147. Alfredo Carlos, *Mexico “Under Siege”: Drug Cartels or U.S. Imperialism*, 41 *LAT. AM. PERSP.* 43, 48 (2013).

a US hog-operation corporation improperly handled waste.<sup>148</sup> The judiciary too is implicated in the invocation of this narrative: indeed, the US Supreme Court has suggested that Mexican immigrants may have greater proclivity toward criminal activity than native-born citizens.<sup>149</sup>

These discursive strategies help to define national membership in ways that suggest that most Mexicans ought to remain outside of US society.<sup>150</sup> They ignore now well-established study statistics about crime and immigrants focusing on Mexican immigrants that demonstrate that immigrants have lower rates of criminal activity than their US citizen counterparts.<sup>151</sup>

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148. *Id.*

149. *Arizona v. United States*, 567 U.S. \_\_\_\_ (2012) (“Aliens are reported to be responsible for a disproportionate share of serious crime.”); see Heidi Beirich, *CIS: The “Independent” Think Tank*, SOUTHERN POVERTY LAW CENTER (Feb. 2009), <http://www.splcenter.org/publications/the-nativist-lobby-three-faces-of-intolerance/cis-the-independent-think-tank> (claiming that the Supreme Court relies on a report by the Center for Immigration Studies which has been faulted as “flawed” and produced by an organization long identified as nativist and biased); see also Walter Ewing, *Does the Supreme Court Think Most Immigrants are Criminals?*, IMMIGRATION IMPACT (June 26, 2012), <http://immigrationimpact.com/2012/06/26/does-the-supreme-court-think-most-immigrants-are-criminals/#sthash.nuEkv6Ys.dpuf>.

150. KARTHICK RAMAKRISHNAN ET AL., ILLEGALITY, NATIONAL ORIGIN CUES, AND PUBLIC OPINION ON IMMIGRATION, 11-12 (2010), available at <http://politicalscience.osu.edu/faculty/mneblo/papers/Illegality4Web.pdf> (observing that most Americans view Mexicans less favorably than other foreigners and have difficulty distinguishing between lawful and unauthorized Mexicans immigrants).

151. *Id.* at 1473-74; Ruben G. Rumbaut et al., *Debunking the Myth of Immigrant Criminality: Imprisonment Among First-and Second-Generation Young Men*, MIGRATION POL’Y INST. (June 2006), <http://www.migrationpolicy.org/article/debunking-myth-immigrant-criminality-imprisonment-among-first-and-second-generation-young>; Marjorie S. Zatz & Hilary Smith, *Immigration, Crime, and Victimization: Rhetoric and Reality*, 81 ANN. REV. LAW SOC. SCI. 141, 142 (2012) (identifying the numerous studies that demonstrate that immigrants commit fewer crimes than native-born persons and that immigration populations may actually “serve a protective function, reducing crime”); Robert J. Sampson, *Rethinking Crime and Immigration*, 7 CONTEXTS 28, 29, 33 (2008); Mai Thi Nguyen & Hannah Gill, *The 287(g) Program: The Costs and Consequences of Local Immigration Enforcement in North Carolina Communities*, 14-19 (Feb. 2010), <http://cgi.unc.edu/uploads/mediaitems/287g-report-final.original.pdf>; see Emily M. Wright & Michael L. Benson, *Immigration and Intimate Partner Violence: Exploring the Immigrant Paradox*, 57 SOC. PROBS. 480 (2010) (finding that lower rates of crime associated with immigrants and immigrant enclaves holds true for the phenomenon of intimate partner violence).

## 2. Federal Legal Responses: Crimmigration and Comprehensive Immigration Reform

### i. Crimmigration

The narrative of Mexican immigrants threatening the nation has contributed to legal developments at the federal level. As one scholar has written, “[t]he very act of Mexican border crossing provides the exemplary theater for staging the spectacle of ‘the illegal alien’ that the law produces.”<sup>152</sup> Politicians, relying on national security grounds and the moral panic about Mexican invaders, have enacted increasingly harsh laws to control immigration that have been used to achieve their removal in numbers disproportionate to other foreign nationals.<sup>153</sup>

While Mexicans have long been vilified and subjected to harsh legal immigration restrictions, the interplay between the status of Mexican-as-criminal and Mexican-as-immigrant finds its fulcrum at the intersection of criminal law and immigration law. In recent years, a number of scholars have identified the way in which criminal laws and processes and immigration laws have converged to create its own field of law termed “cimmigration.”<sup>154</sup> Juliet Stumpf explained the use of the term as “the criminalization of immigration law”<sup>155</sup> where “immigration violations have become federal criminal violations and criminal law has come to dominate the development of the law of deportation.”<sup>156</sup> Stephen Legomsky has examined the phenomenon of the intersection of criminal law and immigration law and articulated

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152. Nicholas De Genova, *The Legal Production of Mexican/Migrant “Illegality”*, 2 *LATINO STUD.* 177 (2004); Zatz & Smith, *supra* note 151, at 145-46 (reviewing the restrictive immigration laws that developed in response to the moral panic about Latino, and in particular Mexican immigrants).

153. See Mary Bosworth & Emma Kaufman, *Foreigners in a Carceral Age: Immigration and Imprisonment in the United States*, 22 *STAN. L. & POL’Y REV.* 429, 435 (2011) (observing a disproportionate focus on Mexicans in detention and removal proceedings); De Genova, *supra* note 152, at 167-75 (tracing the history of immigration law reform from the 1960s which have had a disproportionately harder impact on Mexicans than other immigrants); see also César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 *BYU L. REV.* 1457, 1491 (2013).

154. See generally Juliet P. Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 *AM. U. L. REV.* 367 (2006).

155. *Id.* at 376.

156. *Id.* at 378.

the way that increasingly, violators of immigration law suffered severe criminal consequences in new if not shocking ways.<sup>157</sup>

The study of crimmigration is well-developed and thus, for purposes of this Article, requires only a summary overview.<sup>158</sup> Changes to federal laws, as Stumpf has indicated, have “created parallel systems in which immigration law and the criminal justice system are merely nominally separate.”<sup>159</sup> She has articulated that “(1) the substance of immigration law and criminal law increasingly overlaps, (2) immigration enforcement has come to resemble criminal law enforcement, and (3) the procedural aspects of prosecuting immigration violations have taken on many of the earmarks of criminal procedure.”<sup>160</sup>

Crimmigration is manifested through new federally created categories of criminal behavior with severe immigration consequences including “aggravated felonies”—offenses that may not otherwise be felonies and may involve no acts of violence and serve

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157. Stephen H. Legomsky, *The New Path Of Immigration Law: Asymmetric Incorporation Of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 471 (2007) (observing that it is no longer rare for asylum seekers to be prosecuted for illegal entry into the United States); see also Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 137 (2009) (observing that immigration issues are now a matter for the criminal justice system).

158. The literature on crimmigration law is abundant; nearly two hundred law review articles address the topic. See, e.g., Stumpf, *supra* note 154; Legomsky, *supra* note 157; Chacón, *supra* note 157; Jennifer Chacón, *Whose Community Shield?: Examining the Removal of the “Criminal Street Gang Member”*, U. CHI. LEGAL F. 317 (2007); Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th “Pale of Law”*, 29 N.C. J. INT’L L. & COM. REG. 639 (2004); Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, B.C. THIRD WORLD L. J. 81 (2005); Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281 (2010); Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105 (2011). The issue has been analyzed in books and articles in related fields. See, e.g., MARJORIE ZATZ, *THE BORDERS OF PUNISHMENT: MIGRATION, CITIZENSHIP, AND SOCIAL EXCLUSION* (Katja Franko Aas & Mary Bosworth eds., 2013). One legal scholar maintains a useful crimmigration law blog. See CRIMMIGRATION.COM, created and maintained by César Cuauhtémoc García Hernández, and the topic is now the discrete subject of academic conferences and law school seminars. See, e.g., *Crimmigration Law & Policy Workshop: Immigration Detainers*, UNIVERSITY OF DENVER STURM COLLEGE OF LAW, <http://www.law.du.edu/index.php/constitutional-rights-and-remedies/crimmigration-law-policy-workshop> (last visited Oct. 27, 2015); *Course Catalog: Crimmigration: The Intersection of Criminal Law and Immigration Law Clinical Seminar*, HARVARD LAW SCHOOL, <http://www.law.harvard.edu/academics/curriculum/catalog/index.html?o=66096> (last visited Oct. 27, 2015).

159. Stumpf, *supra* note 154, at 376.

160. *Id.* at 381.

to increase the numbers of people deportable.<sup>161</sup> In addition, federal laws that apply retroactively have created a new category of “immigration crimes” for acts once considered civil immigration-related infractions that now carry increased criminal penalties.<sup>162</sup> Immigrants are now not only subject to removal on new and expanded grounds, they are also subjected to the mechanisms of the criminal justice system before their departure.<sup>163</sup>

As a result of crimmigration, the vernacular structure of the criminal justice system has been extended to immigration matters.<sup>164</sup> That the melding of criminal and immigration law occurred during the rise of the “carceral state” facilitated the opportunities to criminalize immigrants including those lawfully residing in the United States.<sup>165</sup> Federal prosecutorial resources have been marshaled to seek the removal of the unauthorized immigrants.<sup>166</sup> The United States, as one study has determined, “spends more on immigration enforcement agencies than on all its other principal criminal federal law enforcement agencies combined.”<sup>167</sup> Immigration enforcement “represents the federal government’s most extensive and costly law

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161. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440, 110 Stat. 1214, 1277 (1996); Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222, 108 Stat. 4305, 4320-22 (1994); *see also* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), Pub. L. No. 104-208, Div. C., § 321, 110 Stat. 3009-546, 3009-627 (1996) (codified as amended at 8 U.S.C. § 1101(a)(43)(F)-(G) (2000)) (expanding the definition of an aggravated felony to include an offense which carried a one-year sentence).

162. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, §§ 108, 213, 215, 324. César Cuauhtémoc García Hernández identifies many of the particular legal reforms through which these changes occurred; *see* García Hernández, *supra* note 153, 1468; Ben Bowling, *Epilogue: The Borders of Punishment: Towards a Criminology of Mobility, in THE BORDERS OF PUNISHMENT: MIGRATION, CITIZENSHIP, AND SOCIAL EXCLUSION* 291, 294 (Katja Franko Aas & Mary Bosworth eds., 2013).

163. Bowling, *supra* note 162.

164. Jonathan Simon, *GOVERNING THROUGH CRIME* 4 (2007) (discussing the use of “technologies, discourses, and metaphors of crime and criminal justice” outside of the criminal justice system).

165. García Hernández, *supra* note 153, at 1502.

166. *See* CHAVEZ, *supra* note 132, at 3, 25; Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 *CONN. L. REV.* 1827, 1838-39 (2007); Michelle Waslin, *New Data Shows Government Prioritizes Immigration Prosecutions over Dangerous Crime*, *IMMIGRATION IMPACT* (June 30, 2011) <http://immigrationimpact.com/2011/06/30/new-data-shows-government-prioritizesimmigration-prosecutions-over-dangerous-crime/>.

167. DORIS MEISSNER ET AL., *IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY* 9 (2013), *available at* <http://www.migrationpolicy.org/research/immigration-enforcement-united-states-rise-formidable-machinery>.

enforcement endeavor.”<sup>168</sup> Crimmigration law relies on “intelligence gathering and surveillance; policing and law enforcement; a specialized legal process, courts, and tribunals; and detention centres, prisons, and other means of ‘disposing’ of cases.”<sup>169</sup> As one scholar has observed, crimmigration law has created its own “migration-control industry” in the United States that parallels binational military strategies in Mexico.<sup>170</sup>

The convergence of criminal and immigration law, however, has not resulted in additional constitutional protections for immigrants in immigration proceedings. For example, immigration status—“appearance of Mexican ancestry”—is deemed a relevant factor in determining whether reasonable suspicion exists for investigating a violation of immigration law.<sup>171</sup> Thus, while Mexicans—and all Latino-appearing individuals—are more likely to be subjected to searches and seizures, which can then trigger removal procedures, they have limited Fourth Amendment protections to challenge unlawful police practices in immigration court.<sup>172</sup> Nor do they have a right to counsel at the expense of the state notwithstanding the US Supreme Court’s acknowledgement that deportation is “the equivalent of banishment or exile.”<sup>173</sup>

Crimmigration law has had grave consequences for Mexicans whose identity has been conflated with “illegality” and “criminality.”<sup>174</sup> Mexicans are profoundly and disproportionately affected by, if not the focus of, new legal arrangements.<sup>175</sup> They comprise the largest group of foreign nationals with a historically well-established home community in the United States while maintaining patterns of migration circularity.<sup>176</sup> New harsh

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168. *Id.* at 13.

169. *Id.*; David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 *NEW CRIM. L. REV.* 157, 159 (2012) (noting that a “vast network of administrative holding facilities has emerged for individuals accused of immigration violations . . . operating at the federal, state, and local levels.”).

170. Bowling, *supra* note 162, at 293.

171. *United States v. Brignoni-Price*, 422 U.S. 873, 886-87 (1975).

172. Carbado & Harris, *supra* note 108, at 1549.

173. *Padilla v. Kentucky*, 550 U.S. 356, 373 (2010).

174. See CHAVEZ, *supra* note 132, at 3, 25; Chacón, *supra* note 166, at 1843.

175. Kevin Johnson & David Fitzgerald, *Mexican Migration and the Field of Law*, in *BEYOND LA FRONTERA: THE HISTORY OF MEXICO-U.S. MIGRATION* 179, 192 (Mark Overmyer-Velázquez ed., 2011) (describing illegal immigration as the “Mexican problem”).

176. See SHARON PICKERING ET AL., *THE CRIMINOLOGY OF MOBILITY* 18 (2014), available at <http://ssrn.com/abstract=2451108> (noting that Latinos comprise over 90% of immigrants held in detention, 94% of those removed).



crimmigration laws have disrupted their families and economies.<sup>177</sup> As an ethnic and racialized group, they have been subjected to “aggressive migration control tactics.”<sup>178</sup> Mexicans are most likely to be criminally prosecuted for unlawful entry and benefit the least from the exercise of agency discretion which would allow them to avoid deportation.<sup>179</sup> A recent UN High Commissioner on Refugees (“UNHCR”) report found that Mexican immigrant children suffer comparative disadvantage under the Trafficking Victims Protection Act and are entitled to fewer avenues of legal relief than other children who come across the border as unaccompanied minors.<sup>180</sup> According to the UN Report, “in all sectors (of the border) visited, C[ustoms] and B[order] P[atrol] communicated to UNHCR that Mexican unaccompanied alien children are always returned to Mexico.”<sup>181</sup>

Crimmigration law, moreover, must be considered in the context of other federal laws that serve to create hardship in the day-to-day lives of migrants. Laws such as the Personal Responsibility and Work Opportunity Reconciliation Act exclude immigrants from almost all forms of government assistance programs.<sup>182</sup> Immigrants are denied civil legal assistance from federally funded legal services programs, the mainstay of legal aid for the poor, leaving them vulnerable to additional exploitation by landlords, employers, creditors, and others who may be conscious of their anomaly status with regard to legal

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177. See *supra* notes 174-75 and accompanying text; see also DOROTHEE SCHNEIDER, *CROSSING BORDERS: MIGRATION AND CITIZENSHIP IN THE TWENTIETH-CENTURY UNITED STATES* 238-39 (2011).

178. Garcia Hernández, *supra* note 153, at 1491.

179. Juliet P. Stumpf, *The Process is the Punishment in Crimmigration Law*, in *THE BORDERS OF PUNISHMENT: MIGRATION, CITIZENSHIP, AND SOCIAL EXCLUSION*, *supra* note 158, at 58, 62 (describing the prosecutorial requirements of Operation Streamline on the US-Mexico border); Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1704 n.115 (2009) (citing to DHS guidance which restricted border and ICE agents’ and instituting “zero-tolerance” along the US-Mexican border).

180. Under the 2008 Trafficking Victims Protection and Reauthorization Act, Congress sought to restrict the opportunities that the law presented for Mexican children and developed a quick screen process applicable to only those children from Mexico or Canada. Of course, there are no statistics demonstrating that children come from Canada and thus the law was clearly designed to disadvantage Mexican children. See Dara Lind, *The Process that Congress Wants to Use for Child Migrants is a Disaster*, VOX (July 15, 2014), <http://www.vox.com/2014/7/15/5898349/border-children-mexican-central-american-deport-quickly-2008-law>.

181. *Id.*

182. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 402(a), 110 Stat. 2105, 2262.

remedy.<sup>183</sup> These laws create incentives for Mexicans to self-deport as an alternative to a life lived in the shadows or in a detention center awaiting legal process.

ii. The “Mexican-as-Criminal” Factor and Comprehensive Immigration Reform

Immigration reform has been debated in the context of the global political economy, national security interests, and electoral concerns. Proposals for comprehensive immigration reform (“CIR”) that might accomplish pathways to legal status for undocumented immigrants in the United States came to the fore in 2004, when Senators Edward Kennedy and John McCain and Congressmen Luis Gutierrez and Jeff Flake unsuccessfully introduced a comprehensive package to amend the Immigration and Nationality Act (“INA”).<sup>184</sup> Additional efforts to reform immigration were subsequently proposed in 2006 but were largely rejected.<sup>185</sup> In 2013, Congress again undertook the task of amending the INA. The Senate passed the “Border Security, Economic Opportunity, and Immigration Modernization Act,”—Senate Bill 744 of 2013—and currently there are a number of House bills pending.<sup>186</sup>

Border enforcement looms large in the context of CIR. It is the prevailing emphasis of the Senate bill, the majority of House bills, as well as President Obama’s framework for reform, notwithstanding the complexity of comprehensive immigration reform and the multiple

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183. Pub. L. No. 97-276, §122, 96 Stat. 1186, 1194-95 (1982); see Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, §504(a)(11), 110 Stat. 1321, 1354-55; Restrictions on Legal Assistance to Aliens, 61 Fed. Reg. 45, 750 (Aug. 29, 1996).

184. This Article limits its review of immigration reform to recent initiatives. See Mary Giovagnoli, *Overhauling Immigration Law: A Brief History and Basic Principles of Reform*, IMMIGRATION POLICY CENTER (Feb. 14, 2013), <http://www.immigrationpolicy.org/perspectives/overhauling-immigration-law-brief-history-and-basic-principles-reform>.

185. *Id.* But see *infra* note 199 and accompanying text.

186. See *Special Report: A Guide to S.744: Understanding the 2013 Senate Immigration Bill*, IMMIGRATION POLICY CENTER (July 10, 2013), <http://www.immigrationpolicy.org/special-reports/guide-s744-understanding-2013-senate-immigration-bill> (analyzing S. 744); *What’s On The Menu? Immigration Bills Pending in the House of Representatives in 2014*, IMMIGRATION POLICY CENTER (Mar. 26, 2014), <http://www.immigrationpolicy.org/just-facts/what%E2%80%99s-menu-immigration-bills-pending-house-representatives-2014> (listing and analyzing House Bills pending); see also *Side by Side Comparison of 2013 Senate Immigration Bill with Individual 2013 House Bills*, MIGRATION POLICY INSTITUTE (Aug. 2013), <http://www.migrationpolicy.org/research/side-side-comparison-2013-senate-immigration-bill-individual-2013-house-bills>.

issues that must be addressed.<sup>187</sup> Congressional proposals seek to marshal federal resources estimated to be in excess of US\$40 billion to double the size of the border patrol, to pay for troops at the border, and for the costs of military surveillance equipment, 700 miles of fencing, and drones.<sup>188</sup> Both S. 744 and H.R. 1417 require “[s]ituational awareness’ of the entire southwest border; meaning 100 percent surveillance” and “[o]perational control’ of the entire southwest border; meaning that at least 90 percent of all unauthorized entries into the United States are deterred.”<sup>189</sup> Many of these provisions, particularly those found in S. 744, function as “triggers” or benchmarks which must be realized before undocumented immigrants already in the United States might begin the process of legalization, and before the operationalizing of other structural reforms that might allow immigrants seeking entry to lawfully migrate.<sup>190</sup> House versions of CIR would require an increase in detention of immigrants and a further expansion of crimes defined as “aggravated felonies.”<sup>191</sup>

Testimony offered by opponents of CIR routinely invoke the danger of Mexican cartels, gun and drug-traffickers from Mexico infiltrating the country, and insist that there is a war at the border.<sup>192</sup>

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187. *Id.*; Daniel I. Morales, *Immigration Reform and the Democratic Will*, 16 U. PA. J.L. & SOC. CHANGE 49, 54 n.24 (2013) (noting that “the Obama administration’s framework for immigration reform and that of the bipartisan group of senators includes more border enforcement.”); Maureen A. Sweeney, *Where Do We Go from Padilla v. Kentucky? Thoughts on Implementation and Future Directions*, 45 NEW ENG. L. REV. 353, 371 (2011) (observing that President Obama, notwithstanding his support for CIR, “has targeted its enforcement efforts and rhetoric against ‘criminal aliens’”). Of course, there are a number of progressive reform proposals in the bills. See, e.g., Dylan Matthews, *The Senate Immigration Bill: Here’s What You Need to Know*, WASH. POST, (Apr. 16, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/04/16/the-senate-immigration-bill-heres-what-you-need-to-know/>.

188. Justin Feldman, *A Raw Deal An Anti-Immigrant Bill Masked as Reform*, COUNTERPUNCH (June 26, 2014), <http://www.counterpunch.org/2013/06/26/an-anti-immigrant-bill-masked-as-reform/>; see also *Side by Side Comparison*, *supra* note 186.

189. Jennifer M. Chacón, *Policing Immigration After Arizona*, 3 WAKE FOREST J.L. & POL’Y 231, 234, n.19 (2013); Morales, *supra* note 187, at 70-72; *An Unlikely Couple: The Similar Approaches to Border Enforcement in H.R. 1417 and S. 744*, IMMIGRATION POLICY CENTER (July 24, 2013), <http://www.immigrationpolicy.org/just-facts/unlikely-couple-similar-approaches-border-enforcement-hr-1417-and-s-744>.

190. See *An Unlikely Couple*, *supra* note 189.

191. *Cracking the Safe Act: Understanding the Impact and Context of H.R. 2278, The “Strengthen and Fortify Enforcement Act”*, IMMIGRATION POLICY CENTER (2013) (analyzing H.R. 2278 §§ 106, 301(a), 307(a), 309).

192. See Roll Call, Inc. Verbatim Transcript, House of Representatives, Comm. on the Judiciary, Comm. Hearing, Rep. Robert W. Goodlatte Holds a Hearing on the Strengthen and Fortify Enforcement Act, June 13, 2013, 2013 WL 2951093 (testimony of sheriffs from

CIR adversaries warn of kidnaping and extortion at the hands of Mexican criminals inside the United States.<sup>193</sup> CIR hearings include sorrowful testimony by parents whose children were tragically killed by “illegal alien gang members from Mexico with a history of violence” or an “illegal immigrant in a pickup truck who had two drunken driving convictions but was not in possession of a driver’s license.”<sup>194</sup> They “steal” jobs from Americans. Prior versions of the INA have been deemed too soft with regard to undocumented Mexican workers whose unauthorized stays have grown longer over time, and justify calls for greater enforcement mechanisms.<sup>195</sup>

In order to protect against Mexican criminals, elected officials argue for a version of CIR that would triple the number of border patrol agents on the US-Mexico border.<sup>196</sup> Senator John McCain supported such CIR proposals, stating, “[w]e’ll be the most militarized border since the fall of the Berlin Wall.”<sup>197</sup> Indeed, the rhetoric serves the interests of those who would profit from a further increase in border enforcement, including private prison contractors who build and house immigrant detainees, as well as corporations with contracts to produce the border military and surveillance technology.<sup>198</sup> The

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Arizona and North Carolina referencing the need for armed soldiers and double fencing at the US-Mexico border); Roll Call, Inc., Verbatim Transcript, Senate Comm. on the Judiciary, Comm. Hearing, Sen. Patrick J. Leahy Holds a Markup on the Border Security, Economic Opportunity, and Immigration Modernization Act, Part Two May 9, 2013, 2013 WL 1930088 (calling attention to the “spike” in criminal activity at the Mexican border).

193. Roll Call, Inc., Verbatim Transcript, House of Representatives, Comm. on the Judiciary, Comm. Hearing, Rep. Robert W. Goodlatte Holds a Hearing on the Immigration Reform and Control Act of 1986, May 22, 2013, 2013 WL 2299208.

194. Roll Call, Inc., Robert W. Goodlatte Holds a Hearing on the Strengthen and Fortify Enforcement Act, June 13, 2013, 2013 WL 2951093 (statement of Mr. Jamiel Shaw); *id.* (statement of Ms. Sabine Durbin).

195. See Goodlatte Holds a Hearing on the Immigration Reform and Control Act, *supra* note 193.

196. See Sen. Patrick J. Leahy Holds a Markup on the Border Security, Economic Opportunity, and Immigration Modernization Act, *supra* note 192 (statement of Sen. Cruz).

197. McCain: ‘Most Militarized Border Since Berlin Wall’, HUFFINGTON POST (June 26, 2013), [http://www.huffingtonpost.com/2013/06/26/mccain-border-berlin-wall\\_n\\_3503261.html](http://www.huffingtonpost.com/2013/06/26/mccain-border-berlin-wall_n_3503261.html).

198. Eric Lipton, *As Wars End, a Rush to Grab Dollars at the Border*, N.Y. TIMES, June 7, 2013, at A1 (noting that the nation’s largest military contractors were expecting to collect billions of dollars if immigration reform passed and reporting on their lobbyists as pushing for immigration reform); see Chris Kirkham, *Private Prisons Profit From Immigration Crackdown, Federal and Local Law Enforcement Partnerships*, HUFF. POST (June 7, 2012), [http://www.huffingtonpost.com/2012/06/07/private-prisons-immigration-federal-law-enforcement\\_n\\_1569219.html](http://www.huffingtonpost.com/2012/06/07/private-prisons-immigration-federal-law-enforcement_n_1569219.html) (noting the increasing numbers of immigrants in private detention centers).

only bill to be approved in 2006 authorized the funding of the construction of a wall across 670 miles of the US-Mexico border.<sup>199</sup>

Congressional debates about CIR reflect, as they construct, discriminatory attitudes against Mexican immigrants. One study found that US citizens not only “conflate immigrants in general with illegal immigrants” but they also “treat illegal immigrants from Mexico differently than those from other regions of the world.”<sup>200</sup> As Gerald López has written, “[a]lmost everyone... sees undocumented Mexicans as convincing proof that something is ‘broken’—in the United States and in Mexico.”<sup>201</sup>

### C. *State and Local: Concerns of Place Converge with Law*

#### 1. The Narrative: Threatened, Unwelcomed, and Marginalized

Anti-Mexican rhetoric serves to facilitate the socio-legal exclusion and physical expulsion of immigrants at the state and local levels. “Invaders” who crossed the border are now intruders who have entered the familiar places of the local. Public officials, local law enforcement, and worried citizens evoke “the fabled imagery of ‘Small Town, USA,’<sup>202</sup> now subject to ruin and fear that the influx of Mexicans will undermine the existing social order, local culture, and local values.”<sup>203</sup>

In towns and cities across much of the United States, the subordinating narrative tends to focus on crime, threats to the

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199. See Secure Fence Act of 2006, Pub. L. 109-367, 120 Stat. 2638-40 (2006) (codified as 8 U.S.C. § 1103 & 14 U.S.C. § 637) (authorizing the construction of a fence and greater monitoring of the US-Mexican border); Robert A. Pastor, *Speed Bumps, Potholes, and Roadblocks on the North American Superhighway*, 19 L. & BUS. REV. AM. 9, 12 (2013); J. Brian Johns, *Filling the Void: Incorporating International Human Rights Protections into United States Immigration Policy*, 43 RUTGERS L.J. 541, 550 (2013) (noting that immigration reform has focused on securing the southern border with Mexico).

200. See Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *Immigration Federalism: A Reappraisal*, 88 N.Y.U. L. REV. 2074, 2145 (2013) (citing a study based on a Cooperative Congressional Election Study).

201. Gerald P. López, *Don't We Like Them Illegal?*, 45 U.C. DAVIS L. REV. 1711, 1715 (2012); see also Johnson, *supra* note 142, at 584, 610 (noting the use of hyperbole and false accusations particularly targeted at Mexico and Mexicans as a means to influence immigration reform).

202. See Jamie G. Longazel, *Rhetorical Barriers to Mobilizing for Immigrant Rights: White Innocence and Latina/o Abstraction*, 39 L. & SOC. INQUIRY 580, 590 (2014).

203. *Id.* at 584. Residents of Hazelton, PA also claimed that immigrants were “tarnishing a legacy.” *Id.* at 593.

economy, and racial upheaval.<sup>204</sup> Indeed, anti-immigrant activity has been characterized as most virulent at the local level.<sup>205</sup> Mexicans are the new social problem who threaten to overwhelm public education, exhaust public coffers, endanger health, harm the elderly, take from veterans, and compromise the very safety of community residents.<sup>206</sup> Community health providers often consider immigrants “undeserving patients” who “drain” the system.<sup>207</sup> They are deemed unwilling to assimilate as evidenced by their continued use of the Spanish language.<sup>208</sup> Their immigrant status provides the basis to characterize their presence as a nuisance if not illegal.<sup>209</sup> These narratives exploit economic uncertainty and individual insecurity which are the principal threats perceived by long-term residents when newcomers arrive in their communities.<sup>210</sup>

Fear enters the public imagination in the form of concrete problems: Mexicans drive illegally, establish businesses illegally, rent homes illegally, obtain bank loans illegally, and attend school illegally or otherwise drop out and thus become a social menace.<sup>211</sup>

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204. Gabriel Sanchez et al., *Filling the Void: Factors Leading to Punitive Immigration Policy Across the American States*, W. POL. SCI. ASS'N, Working Paper, at 5 (2012), available at <http://wpsa.research.pdx.edu/meet/2012/sanchezgabriel.pdf>.

205. Keith Aoki & John Shuford, *Welcome to Amerizona-Immigrants Out!: Assessing "Dystopian Dreams" and "Usable Futures" of Immigration Reform, and Considering Whether "Immigration Regionalism" Is an Idea Whose Time Has Come*, 38 *FORDHAM URB. L.J.* 1, 5 (2010).

206. Longazel, *supra* note 202, at 586, 593 (e.g., burdening the city of Hazleton, PA, with requests for interpreters, crashing various governmental support systems).

207. Meredith Glenn Cabell, *Mexican Immigrant Integration in the U.S. Southeast: Institutional Approaches to Immigrant Integration in Owensboro, Kentucky*, *THE CTR. COMP. IMMIGRATION STUD.*, Working Paper 153, at 41 (2007) (finding such attitudes despite studies demonstrating that Mexican immigrants generally pay more often than their US citizen counterparts).

208. See James H. Johnson, Jr. et al., *A Profile of Hispanic Newcomers to North Carolina*, *POPULAR GOV'T* 5 (Fall 1999) (describing hostility towards Spanish speaking newcomers).

209. A number of local ordinances have been enacted to abate the “nuisance of illegal immigration.” See, e.g., Hazleton, Pa., Ordinance 2006-18, *Illegal Immigration Relief Act Ordinance* (Sept. 21, 2006); City of Valley Park, Missouri, *Ordinance Relating to Illegal Immigration*, Valley Park, Mo., Ordinance No. 1708 (2006).

210. See Heather M. Creek & Stephen Yoder, *With a Little Help from Our Feds: Understanding State Immigration Enforcement Policy Adoption in American Federalism*, 40 *POL'Y STUD. J.* 647, 678 (2012) (explaining group theory conflict in the context of local immigration concerns).

211. Lisa García Bedolla & Claire Jean Kim, *Beyond Whiteness, Asian Americans and Latinos in U.S. Educational Discourse*, in *THE NATION AND ITS PEOPLES, CITIZENS, DENIZENS, MIGRANTS*, 95, 102-103 (John S.W. Park & Shannon Gleeson eds., 2014)

They “steal” jobs from local residents. Mexicans serve as scapegoats and they are blamed for much of what often ails local communities. The rhetoric is vitriolic. After the tragic murder of three teenagers in Newark, New Jersey attributed to “illegal aliens” one politician stated, “[t]welve million illegal immigrants later, we are now living in a nation that is beset by people who are suicidal maniacs and want to kill countless innocent men, women, and children around the world.”<sup>212</sup> In North Carolina, the President of Americans for Legal Immigration Political Action Committee had this to say about immigrants in his state: “[y]ou’re dealing with a criminal culture that where they’re from, no one ever gets charged . . . . Many illegal immigrants have a rape and pillage mentality.”<sup>213</sup> Words often imply deeds: one local anti-immigrant group urged its members to come to a rally organized by and for Mexican day laborers and to bring baseball bats, stating, “if we’re lucky, we’re gonna need them.”<sup>214</sup> Another proponent of anti-immigration legislation suggested that the problem of illegal immigration could be solved by “empty[ing] the clip.”<sup>215</sup> Minutemen volunteers arrive at designated locations to “hunt Mexicans” while wearing t-shirts that read “Some people are alive simply because it is illegal to kill them.”<sup>216</sup>

On the other hand, the Mexican-as-criminal narrative often serves as an important source of additional revenue. In North Carolina, a county commissioner noted the importance of undocumented immigrants whose capture promised to help maintain

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(describing the under-educational achievement of children who need help from the “outside” to achieve); see Aoki & Shuford, *supra* note 205, at 14-15.

212. Sampson, *supra* note at 151, at 29 (quoting Fred Thompson).

213. Bertrand M. Gutierrez, *Immigrant Data Shatters Crime Misconception*, WINSTON-SALEM J. (Nov. 6, 2011), [http://www.journalnow.com/news/local/immigrant-data-shatter-crime-misconceptions/article\\_d61bf28b-f297-5552-a1fc-090eba16b4d0.html](http://www.journalnow.com/news/local/immigrant-data-shatter-crime-misconceptions/article_d61bf28b-f297-5552-a1fc-090eba16b4d0.html). Texas Governor Rick Perry recently made wildly inaccurate statements about crime and immigrants from Mexico and Central America. See Walter Ewing, *Texas Governor Invokes Nonsensical Statistics On Immigrant Crime in His State*, IMMIGRATION IMPACT (Aug. 5, 2014), <http://immigrationimpact.com/2014/08/05/texas-governor-invokes-nonsensical-statistics-on-immigrant-crime-in-his-state/>.

214. Monica W. Varsanyi, *Neoliberalism and Nativism, Local Anti-Immigrant Policy Activism and an Emerging Politics of Scale*, 35 INT’L. J. URB. REGIONAL RES., 295-302 (2010).

215. *On the Rise in Alabama*, N.Y. TIMES, Nov. 13, 2011, at A28.

216. *Id.* at 141; see also William Arrocha, *From Arizona’s S.B. 1070 to Georgia’s H.B. 87 and Alabama’s H.B. 56: Exacerbating the Other and Generating New Discourses and Practices of Segregation*, 48 CAL. W. L. REV. 245, 246 (2012) (describing calls on the Neo-Nazi National Socialist Movement by the Minutemen to “launch a campaign of violence” against illegal immigrants—Hispanics).

jail revenues.<sup>217</sup> In Phoenix, the Public Safety Manager falsely inflated the number of kidnappings related to Mexican criminals in order to qualify for grant funds to enhance resources used to remove Mexicans.<sup>218</sup>

At the local level, policy entrepreneurs invoke the transnational and national anti-immigrant discourse to manipulate fears about Mexicans.<sup>219</sup> They have called for local citizens to take up the war against “illegal” Mexican immigrants as much to protest the “failed” federal policies as to defend against “dangerous invaders.”<sup>220</sup> These individuals are often politicians, or other political actors who enter into local spaces “with singular focus” to repackage and reapply nativist concerns to achieve progress on an agenda unrelated to local concerns.<sup>221</sup> Anti-immigrant sentiment is often “largely the product of political partisanship” designed to create a micro-politics to convince localities that their particular community concerns are linked to a national restrictionist agenda.<sup>222</sup> In their empirical study on policy entrepreneurs and local immigration policies, S. Karthick Ramakrishnan and Pratheepan Gulasekaram demonstrate that at a state and local level, a restrictionist response to immigration:

is not a simple matter of homegrown solutions to persistent and thorny local problems, as legislators often portray the issue. Instead, it often involves sponsorship and expertise from outside actors, who make critical choices on venues based on political opportunities (large Republican majorities in the legislature and a

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217. Chris Lavender, *Empty cells: Inmate population down at jail*, TIMES-NEWS (June 19, 2011), <http://www.thetimesnews.com/news/population-45104-down-empty.html>.

218. Marc Lacey, *Arizona: Phoenix Public Safety Chief Is Suspended*, N.Y. TIMES, March 4, 2011, at A14; Monica Alonzo, *Police Chief Jack Harris is Retiring—Again*, PHOENIX NEW TIMES (Apr. 15, 2011), [http://blogs.phoenixnewtimes.com/valleyfever/2011/04/phoenix\\_police\\_chief\\_jack\\_harr\\_2.php](http://blogs.phoenixnewtimes.com/valleyfever/2011/04/phoenix_police_chief_jack_harr_2.php).

219. For an overview of the use of the term “entrepreneur” in social and political economic contexts, see David E. Pozen, *We Are All Entrepreneurs Now*, 43 WAKE FOREST L. REV. 283, 300-05 (2008). For a review of the term “policy entrepreneur” (or issue entrepreneurs) as more specifically related to anti-immigrant sentiment, see generally S. Karthick Ramakrishnan & Pratheepan Gulasekaram, *The Importance of The Political in Immigration Federalism*, 44 ARIZ. ST. L.J. 1431 (2012).

220. CHAVEZ, *supra* note 132, at 132-34.

221. Pozen, *supra* note 219, at 301-02.

222. Ramakrishnan & Gulasekaram, *supra* note 219, at 1434. The authors note that political partisanship is more likely to produce restrictionist policies in localities that are more heavily Republican than Democrat. *Id.* at 1440; Creek & Yoder, *supra* note 210, at 679 (observing that local restrictionist policies are often driven by outsiders and elites); Charis E. Kubrin et al., *Introduction*, in PUNISHING IMMIGRANTS, *supra* note 67, at 1, 4 (noting that politicians and commentators proclaim the need to control illegal Mexicans).



Republican governor), to build a case for the necessity and constitutionality of subfederal action.<sup>223</sup>

National media stories are reframed to incite local suspicion and scorn.<sup>224</sup> Political maneuvering finds fertile ground in localities with deeply held nativist sentiments that prevent local residents from imagining immigrants as members of the community.<sup>225</sup> Incidents of nativist hostility have been reported in all regions of the United States.<sup>226</sup> Communities that tend to live and work in racially stratified circumstances, with limited contact to persons from different backgrounds, are especially susceptible to anti-Mexican sentiments.<sup>227</sup> Fear mongering has taken particular hold in the South, a region of the country where increasing arrival of Latinos has resulted in a significant demographic shift.<sup>228</sup> Immigrants are disadvantaged by the South's preference for a common culture and a cultural construction of daily life as local concerns mediated through long-term personal

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223. Ramakrishnan & Gulasekaram, *supra* note 219, at 1457 (citations omitted).

224. See Cabell, *supra* note 207, at 50 (describing how media personalities like Lou Dobbs and Rush Limbaugh contributed to the stereotyping of Mexican immigrants in one local town in Kentucky).

225. Leo Chavez, *Outside the Imagined Community: Undocumented Settlers and Experiences of Incorporation*, 18 AM. ETHNOLOGIST 257, 259 (1991).

226. There is need to avoid the phenomenon of "internal orientalism" that burdens the South. See David R. Jansson, *The Haunting of the South: American Geopolitical Identity and the Burden of Southern History*, 12 GEOPOLITICS 400, 407 (2007).

227. Kevin O'Neill & Marta Tienda, *A Tale of Two Counties: Natives' Opinions Toward Immigration in North Carolina*, 44 INT'L. MIGRATION REV. 728, 756 (2010) (noting that residents with greater interaction with immigrants might account for a more welcoming attitude); L. Jason Anastasopoulos, *(When) Race Matters: How Undocumented Immigrant Race and Place Shape Immigration Policy Attitudes*, (Oct. 1, 2014), available at <http://ssrn.com/abstract=2462349> (demonstrating that individuals experience heightened anti-immigrant and racist sentiments when Mexican immigrants reside in their city); see Patricia L. Price, *Race and ethnicity: Latino/a Immigrants and Emerging Geographies of Race and Place in the USA*, 36 PROGRESS HUM. GEO. 800, 803 (2011) (noting that as a historical matter, as a region, the South has been more insulated than others with little exposure to Latino/a immigrants). One study focusing on the South from 1994 to 2008 found that Southerners consistently supported measures for decreasing immigration more than residents of any other US region. See Krista Perriera, *Mexican Families in North Carolina: The Socio-Historical Contexts of Exit and Settlement*, 51 SE. GEOGRAPHER 260, 276 (2011).

228. Johnson, *supra* note 208, at 2. The term "gateway communities" refers to border areas or other places where immigrants first enter and settle—for example, Los Angeles, California. See Francis Lee Ansley, *Rethinking Law in Globalizing Labor Markets*, 1 U. PA. J. LABOR & EMP'T L. 369, 397 (1998). Communities with large concentrations of immigrants are often at the center of the immigration debate which reflects nativist anxieties: whether "these others/outsideers cost 'us' more than 'they' contribute." Berta Esperanza Hernández-Truyol, *Natives, Newcomers and Nativism: A Human Rights Model for the Twenty-First Century*, 23 FORDHAM URB. L.J. 1075, 1095 (1996).

relationships tied to place.<sup>229</sup> More Southerners—mostly white Southerners—than individuals from any other region express that they are “strongly opposed” to living in neighborhoods where Latinos comprised half or more of the residents.<sup>230</sup>

North Carolina has been especially impacted by changing demographics and has provided a case study for many scholars examining the convergence of place and anti-immigrant sentiment.<sup>231</sup> A University of North Carolina at Chapel Hill School of Journalism poll confirmed rising anxiety and distrust of Latino newcomers with particular resentment towards those with limited English-speaking skills.<sup>232</sup> Approximately two-thirds of respondents indicated an unwillingness to welcome them into their neighborhoods.<sup>233</sup> Hate groups have become active in the state’s anti-immigrant organizing and are brazen in their anti-immigrant rhetoric.<sup>234</sup> In 2009, a group that calls itself NC FIRE that seeks to “educate American citizens who turn a blind eye to the many costly and destructive aspects of

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229. Jansson, *supra* note 226, at 408.

230. *Id.*

231. North Carolina has been the focus on many studies on this issue. See Hannah Gill & Deborah M. Weissman, *Adapting to a Plural Culture and the Future of the South*, in *A WAY FORWARD: BUILDING A GLOBALLY COMPETITIVE SOUTH* 173 (Daniel P. Gitterman & Peter A. Coclanis eds., 2011). From 1990 to 2000, the state had the fastest growing Latino population, most of whom are Mexican. The 2010 census numbers revealed a 110% growth in the Latino population, which now makes up 8.4% of the state’s total population. *Id.*; Christina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 584-88 (2008); Marie C. Scott, *Resegregation, Language, and Educational Opportunity: The Influx of Latino Students Into North Carolina Public Schools*, 11 HARV. LATINO L. REV. 123 (2008); Lisa R. Pruitt, *Latino/as, Locality, and Law in the Rural South*, 2 HARV. LATINO L. REV. 135 (2008); Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619, 1654-77 (2008); Kathleen Ann Griesbach, *Local-Federal Immigration Enforcement in North Carolina: Mapping the Criminal Immigration Overlap*, 2011 NORTEAMÉRICA: REVISTA ACADÉMICA DEL CISAN-UNAM 191; Raymond A. Mohl, *The Latino Migration Experience in North Carolina: New Roots in the Old North State*, 88 N.C. HIST. REV. 434 (2011); Owen J. Furueth & Heather A. Smith, *Localized Immigration Policy: The View From Charlotte, North Carolina, A New Immigrant Gateway*, in *TAKING LOCAL CONTROL: IMMIGRATION POLICY ACTIVISM IN U.S. CITIES AND STATES* 173-91 (Monica Varsanyi ed., 2010).

232. Johnson, *supra* note 208, at 9.

233. *Id.*

234. Reports have documented an alarming rise in the Ku Klux Klan’s once-diminishing numbers as fears over illegal immigration are exploited. North Carolina has grown from twenty-seven to thirty-five extremist groups, including eight Klan chapters with illegal immigration at the top of the list of concerns. Franco Ordoñez, *More Joining Hate Groups*, NEWS AND OBSERVER, Feb. 12, 2007, at 4B (quoting the imperial wizard of the Mount Holly-based chapter of the Klan in Gaston County who says he has not seen membership grow so fast since the 1960s, when he joined).

illegal immigration, including the 8 Ways Illegals Make You Sick” organized against a county deemed to be too soft on immigration enforcement, and solicited groups as the N.C. Minuteman Patriots and the Minuteman Civil Defense Corps to become involved in their anti-immigrant efforts.<sup>235</sup> In August 2014, a spokesman for the North Carolina branch of the Ku Klux Klan stated his belief that “the situation at the US-Mexico border with people attempting to enter the United States [is] . . . a ‘land war.’ ‘I think we should have our troops there with a shoot-to-kill policy,’” he said. “‘These people are obviously not getting the picture that we don’t want them here.’”<sup>236</sup>

Political actors are unabashed in their hostility toward Mexicans. One sheriff complained about the newly arriving undocumented Mexicans, claiming that they were more likely to commit crimes than other residents in the area.<sup>237</sup> He made brazenly racist claims to the news media about Mexicans, stating, “[t]heir values are a lot different—their morals—than what we have here . . . . In Mexico, there’s nothing wrong with having sex with a 12-, 13-year-old girl . . . . They do a lot of drinking down in Mexico.”<sup>238</sup> The president of the North Carolina Sheriffs’ Association claimed that Mexicans were “trashy,” that they “breed [. . .] like rabbits,” and that they “rape, rob and murder’ American citizens.”<sup>239</sup> He claimed to be fulfilling the requests of the residents of his county and maintained that everywhere he went, “people say, ‘Sheriff, what are we going to do about all these Mexicans?’”<sup>240</sup> As one immigrant advocate recently noted, the methods used by anti-immigrant forces are emblematic of those strategies relied on by Southern segregationists in the past.<sup>241</sup>

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235. Taylor Sisk, *Conservative Group, ICE Supporters Clash in Chatham*, THE CARRBORO CITIZEN (Mar. 5, 2009), <http://www.carrborocitizen.com/main/2009/03/05/conservative-group-ice-supporters-clash-in-chatham/#more-5083>.

236. Jordan Green, *Grand Dragon Says Troy is the True Location of Klan Rally*, TRIAD CITY BEAT (Aug. 8, 2014), <http://triad-city-beat.com/grand-dragon-says-true-location-of-klan-rally-is-troy/>.

237. Kristin Collins, *Tolerance Wears Thin*, NEWS & OBSERVER (Sept. 4, 2008), <http://www.newsobserver.com/news/immigration/story/1209646.html>.

238. *Id.*

239. *Id.*

240. *Id.*

241. Patrick O’Neill, *287(g) Law Has Echoes in Jim Crow Era*, GREENSBORO NEWS & RECORD (May 31, 2009), [http://www.news-record.com/content/2009/05/28/article/patrick\\_oneill\\_287g\\_law\\_has\\_echoes\\_in\\_jim\\_crow\\_era](http://www.news-record.com/content/2009/05/28/article/patrick_oneill_287g_law_has_echoes_in_jim_crow_era).

## 2. The Organizing Principles of Local Law in Response to Nativism: Hardship and Exclusion

At the local level, law replicates transnational and national perspectives: it transmits notions of the Mexican-as-criminal and in circular fashion, reconstitutes the narrative. State and local anti-immigrant legislation has dramatically increased. The most notable example is Arizona's SB 1070, a law intended to make life difficult for immigrants, that is, mostly Mexican immigrants.<sup>242</sup> The Act was the fruition of a distorted narrative that portrayed parts of Arizona under siege from Mexican criminals.<sup>243</sup> It is now known that at the signing of Arizona's controversial immigration bill, Governor Jan Brewer, as a means of justification for the bill, falsely claimed that decapitated heads had been found within the state and declared, "[w]e cannot sacrifice our safety to the murderous greed of drug cartels."<sup>244</sup> Much of the law was struck down as unconstitutional by the US Supreme Court.<sup>245</sup> But SB 1070 was not Arizona's only effort to send a message to Mexicans that they were unwelcome.<sup>246</sup> In addition to a myriad of other bills, including one that sought to end birthright citizenship, Arizona enacted legislation to ban ethnic studies and shut down Mexican-American studies programs, claiming that the programs were "brainwashing" students and promoting "Mexican solidarity."<sup>247</sup>

Arizona was not the only state to enact harsh laws focused on the expulsion of immigrants. "Copycat" legislation was introduced in

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242. S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010), available at <http://www.azleg.gov/legtext/49leg/2r/bills/sb1070s.pdf>. The text of the bill included the following: "The legislature declares that the intent of this act is to make attrition through enforcement the public policy of all state and local government agencies in Arizona." *Id.*

243. See Adalberto Aguirre, *Arizona's SB1070, Latino Immigrants and the Framing of Anti-Immigrant Policies*, 10 *LATINO STUD.* 385, 386 (2012).

244. *Governor Admits Error About Beheadings*, N.Y. TIMES, Sept. 4, 2010, at A12 (arguing that politicians in Arizona are "selling a vision of border chaos and violence disconnected from reality").

245. *Arizona v. United States*, 132 S. Ct. 2492, (2012). Notwithstanding the Court's decision to clearly circumscribe the authority of the states to regulate immigration, it too made reference to the perception of Mexicans as criminals. *Id.*

246. Aguirre, *supra* note 243, at 386.

247. *Ariz. Rev. Stat. Ann.* §15-112 (2010); Marc Lacey, *Rift in Arizona as Latino Class is Found Illegal*, N.Y. TIMES, Jan 8, 2011, at A1; see Aguirre, *supra* note 243, at 388-40, for a description of additional bills proposed or enacted. For a fuller discussion of this law, see Yxta Maya Murray, *Inflammatory Statehood*, 30 *HARV. J. RACIAL & ETHNIC JUST.* 227 (2014); Kevin Terry, *Community Dreams and Nightmares: Arizona, Ethnic Studies, and the Continued Relevance of Derrick Bell's Interest-Convergence Thesis*, 88 *N.Y.U. L. Rev.* 1483 (2013).

a number of states.<sup>248</sup> One Alabama legislator promoted Alabama's immigration enforcement law, described as "the cruelest in the nation"<sup>249</sup> as one "designed to make it difficult for [Latinos] to live here so they will deport themselves."<sup>250</sup> Another Senator was more specific in articulating the purpose of the bill: ". . . these Mexicans . . . [Y]ou all are trying to get as many in here out and trying to stop as many coming in [as you can] . . ."<sup>251</sup>

Local anti-immigrant laws might be described as a "legislative epidemic" that proceed to incorporate greater restrictionist provisions over time.<sup>252</sup> The local politics of immigration do not always reflect the distorted narrative of Mexican-as-criminal, of course.<sup>253</sup> But many localities have signed-on to local immigration enforcement programs such as 287(g) and Secured Communities ("S-Comm") which shifted the power to exclude immigrants from the United States from the

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248. *State Laws Related to Immigration and Immigrants*, NAT'L CONFERENCE ON STATE LEGISLATURES, <http://www.ncsl.org/research/immigration/state-laws-related-to-immigration-and-immigrants.aspx> (last visited Oct. 27, 2014); Zatz & Smith, *supra* note 151, at 146; *SB 1070 Four Years Later, Lessons Learned* NATIONAL IMMIGRATION LAW CENTER (2014), available at <http://www.nilc.org/sb1070fouryearsater.html>; see Aoki & Shuford, *supra* note 205, at 15-19. These laws have been largely successfully challenged in litigation. *Id.* For a comprehensive review of state and local immigration enforcement laws, see *State and Local Enforcement*, LEGAL ACTION CENTER, <http://www.legalactioncenter.org/clearinghouse/litigation-issue-pages/state-and-local-law-enforcement#AL> (last visited Oct. 27, 2014); ARIZONA AND THE NATIONAL IMMIGRATION CRISIS, <http://libguides.law.ucla.edu/content.php?pid=129802&sid=1113372> (last visited Oct. 27, 2014).

249. *The Nation's Cruelest Immigration Law*, N.Y. TIMES, Aug. 29, 2010, at A22.

250. *No Way to Live*, HUMAN RIGHTS WATCH (Dec. 14, 2011), available at <http://www.hrw.org/node/103511/section/2>.

251. See *Hispanic Interest Coalition of Alabama v. Robert Bentley*, ACLU, available at [https://www.aclu.org/files/assets/1-0\\_complaint.pdf](https://www.aclu.org/files/assets/1-0_complaint.pdf).

252. See Catherine L. Carpenter, *Legislative Epidemics: A Cautionary Tale of Criminal Laws That Have Swept the Country*, 58 BUFF. L. REV. 1, 3, 7 (2010) (describing the phenomenon of a slew of legislative initiatives motivated by the dedicated group of people committed to enacting these laws, tragic stories to whip up support, as well as other political and legal factors that aid in their widespread promulgation).

253. Some towns and cities provide opportunities for the inclusions of immigrants and create opportunities to devise policies that advance strategies of community integration. Recent debates about immigration enforcement have considered whether devolution to the local could result in positive outcomes for immigrants including local safe havens for the undocumented and opportunities for community-driven progressive policies. See Rick Su, *Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619, 1633 (2008) (describing local immigration laws as an extension of local interests). Sanctuary cities and communities that have refused to sign on to local immigration enforcement mechanisms such as 287(g) or Secured Communities are examples of "progressive localist visions" that prefer integrative strategies with regard to newcomers. Aoki & Shuford, *supra* note 205, at 5.

exclusive control of the federal government to a shared arrangement with states and local governments.<sup>254</sup> At the same time, localities have enacted subnational restrictions burdening the day-to-day lives of immigrants by denying them access to health care, employment, housing, and education.<sup>255</sup>

Restrictionist laws and ordinances in the South match the region's anti-immigrant rhetoric.<sup>256</sup> Law enforcement agencies in the region have embraced local immigration enforcement programs more than any other area of the country.<sup>257</sup> North Carolina once again serves as an example of the tendencies of new destination locations in the South. The state has the highest number of 287(g) programs, notwithstanding the fact that the Department of Justice has sued one of the first North Carolina 287(g) counties for violating the civil rights of Latinos.<sup>258</sup> Local governments have piled on the resolutions, ordinances, and statutes in the name of keeping residents safe from Mexican immigrants. County resolutions have been enacted that call for the termination of funds for any local programs that serve "illegal residents," and for the County Sheriff to "diligently battle the ever-

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254. An amendment to the Immigration and Nationality Act ("INA") known as § 287(g) authorized the US Immigration and Customs Enforcement ("ICE") to enter into agreements known as Memoranda of Agreement ("MOA") with local law enforcement agencies that choose to enter into immigration enforcement activities. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1357(g) ("287(g)" refers to the statutory numbering of the Immigration and Nationality Act). For the government's description of its Secured Communities program, see *Immigration Enforcement: Secured Communities*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, [http://www.ice.gov/secure\\_communities/](http://www.ice.gov/secure_communities/) (last visited Oct. 27, 2014).

255. See, e.g., Keith Aoki et al., *(In)Visible Cities: Three Local Government Models and Immigration Regulation*, 10 OR. REV. INT'L L. 453, 496-99 (2008).

256. Zatz & Smith, *supra* note 151, at 146.

257. The great majority of 287(g) agreements are in southern states. S-Comm is now mandatory throughout the United States, but a review of the government's fact sheet showing activation dates demonstrates that southern states and its political subdivisions were among the first to sign on voluntarily. *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, <http://www.ice.gov/news/library/factsheets/287g.htm> (last visited Oct. 27, 2014); *Secured Communities, Activated Jurisdictions*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, <http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf> (last visited Oct. 27, 2014).

258. Dep't. of Justice, Press Release, *Justice Department Files Civil Rights Lawsuit Against the Alamance County, N.C., Sheriff's Office* (Dec. 20, 2012), available at <http://www.justice.gov/opa/pr/2012/December/12-crt-1534.html>. The 287(g) program with Alamance county was terminated in the fall of 2012. See Billy Ball, *DOJ Program ends Federal Immigration Program in Alamance County*, INDYWEEK.COM (Sept. 26, 2012), <http://www.indyweek.com/indyweek/doj-ends-federal-immigration-program-in-alamance-county/Content?oid=3157331>.

increasing criminal element which is growing daily with the influx of illegal residents,<sup>259</sup> to limit city services to undocumented residents, and to increase all measures to enforce immigration laws.<sup>260</sup> The town of Carrboro enacted an anti-lingering ordinance criminalizing day laborers, the overwhelming majority of whom were Mexican, who remained on the corner past 11:00 a.m., for fear that without limiting the association of Latino workers, the community would be plagued with criminal behavior.<sup>261</sup>

Criminal justice practices reveal the ways in which Mexican immigrants have been unfairly targeted and unlawfully profiled due to perceptions of them as criminals.<sup>262</sup> Racial profiling practices have been justified on the claim that Mexicans are known substance abusers.<sup>263</sup> One North Carolina sheriff explicitly ordered his deputies to “go get them Mexicans” and to “lock up any damn Mexicans you can” during vehicle checkpoints.<sup>264</sup> Another former deputy sheriff admitted that law enforcement officers in his county targeted

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259. Lindsey Nash, *Expression by Ordinance: Preemption and Proxy in Local Legislation*, 25 GEO. IMMIGR. L.J. 243, 281 (2011); (NC Lincoln County Resolution, June 18, 2007).

260. *Id.* (NC Gaston County Resolution, Nov. 9, 2006).

261. Gill & Weissman, *supra* note 231; see UNC IMMIGRATION/HUMAN RIGHTS POLICY CLINIC, A LEGAL ADVOCACY GUIDE TO BUILDING INTEGRATED COMMUNITIES IN NORTH CAROLINA 88 (2012), available at <http://www.law.unc.edu/documents/clinicalprograms/buildingcommunitiespart2.pdf> (the ordinance was rescinded in November 2011 after community organizing efforts). This is not a complete list of the resolutions, ordinances, and statutes proposed or enacted in order to achieve attrition of North Carolina’s Latino immigrant population. See Mai Thu Nguyen, *Anti-Immigration Ordinances in NC: Ramifications for Local Governance and Planning*, in CAROLINA PLANNING 32, 36 (2007).

262. Although the 287(g) program was intended to target and remove undocumented immigrants convicted of “violent crimes, human smuggling, gang/organized crime activity, sexual-related offenses, narcotics smuggling and money laundering.” However, most of the arrests undertaken pursuant to local law enforcement 287(g) authority have been for traffic infractions and low level misdemeanors and S-Comm triggered deportations have largely resulted from low-level offenses. *Partners*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, available at [http://www.ice.gov/partners/287g/Section287\\_g.htm](http://www.ice.gov/partners/287g/Section287_g.htm) (last visited Oct. 28, 2014); *State Immigration Enforcement: Broken Strategies*, AM. IMMIGRATION LAWYERS’ ASS’N, (Jan. 28, 2014), available at <http://www.aila.org/content/default.aspx?bc=25667|47262>.

263. *State v. Villeda*, 165 N.C. App. 431, 433-34, 599 S.E.2d 62, 64-65 (2004). The study was introduced into evidence in the case, where a state trooper admitted to patrolling a specific area “for the purpose of looking for Hispanic males,” and asserted that “[e]veryone knows that a Hispanic male buying liquor on a Friday or a Saturday night is probably already drunk.” *Id.*

264. See United States Brief in Support of Its Motion for Summary Judgment at 4-6, *United States v. Johnson*, No. 12-cv-1349 (M.D. N.C. Mar. 3, 2014), available at [http://www.acluofnc.org/files/Alamance\\_MSJ\\_3-3-14.pdf](http://www.acluofnc.org/files/Alamance_MSJ_3-3-14.pdf) (itemizing facts not in dispute).

Mexicans when making motorist stops and were trained to “escalate” the situation for the purpose of justifying a search.<sup>265</sup>

The narrative that constructs Mexicans as a threat to be contained and expelled by law also asserts itself when Mexicans attempt to use the law for their own needs and protection. They are deemed to have misused the law if they invoke legal protections or legal rights.<sup>266</sup> An anti-immigrant demonstration in North Carolina was organized to protest Mexicans who were seeking legal assistance from the Mexican consulate which offers services through a mobile unit traveling throughout North and South Carolina.<sup>267</sup> The protestors claimed that these services would enable Mexicans to break the law.<sup>268</sup> Mexicans who sought legal assistance, they claimed, were seeking special privileges. Said one protestor, “It’s not fair, it’s just not . . . . We have to do what we have to do as Americans. They’re getting everything free, and we have to suffer for it.”<sup>269</sup> Similarly, immigrants in Hazelton, Pennsylvania were denounced for seeking assistance from the Mexican American Legal Defense and Education Fund (“MALDEF”) to obtain justice for the murder of an undocumented Mexican by two white boys: “First of all, MALDEF has no right in our legal system. This is our country, not the Spanish country. You know what I mean? What right does MALDEF have to put their nose in our legal system?”<sup>270</sup>

The consequences of exclusionary and restrictionist laws at the local level are well-documented. Local immigration enforcement initiatives often dissuade immigrants from reporting crimes, thus compromising the public safety of all members of the community.<sup>271</sup>

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265. Troy Williams, *A War on America’s Minority Communities: Reflections from a Former Drug Copy*, RIGHTS WORKING GROUP (July 18, 2011), available at <http://www.rightsworkinggroup.org/content/war-drugs-a-war-america%E2%80%99s-minority-communities-reflections-a-former-drug-cop>.

266. Longazel, *supra* note 202, at 584.

267. Jennifer Swartz, *Protesters Picket Latino Fair*, THE DAILY REFLECTOR (Aug. 7, 2011), [http://www.reflector.com/news/protesters-picket-latino-fair-606945#.Tj\\_5MTwY\\_pM.email](http://www.reflector.com/news/protesters-picket-latino-fair-606945#.Tj_5MTwY_pM.email).

268. *Id.*

269. *Id.*

270. Longazel, *supra* note 202, at 584. He also points out that political actors complained about legal services offered in Spanish as unlawful discrimination. *Id.* at 593.

271. AMERICAN CIVIL LIBERTIES UNION & IMMIGRATION & HUMAN RIGHTS POLICY CLINIC, THE POLICIES AND POLITICS OF LOCAL IMMIGRATION ENFORCEMENT LAWS: 287(G) IN NORTH CAROLINA 32-35 (2009), available at <http://www.law.unc.edu/documents/clinicalprograms/287gpolicyreview.pdf>; HANNA GILL, THE LATINO MIGRATION EXPERIENCE IN NORTH CAROLINA: NEW ROOTS IN THE OLD NORTH STATE 44-45, (2010).



Fears that parents will be deported affect the emotional well-being and performance of children at school.<sup>272</sup> Families live in execrable conditions as a result of inattention to housing and landlords who threaten to “turn them in” if they complain.<sup>273</sup> Law at the local level acts as an agent of regional and racialized politics and perpetuates a false and harmful narrative about Mexican immigrants.

### III. *RE-PRESENTING AND ALTERNATIVE USES; DIVERGENT NARRATIVES*

As examined in Part I, foreign policy, federal immigration laws, and restrictionist local laws are formulated and justified on the basis that Mexican drug-cartels are a national security threat and that Mexicans who cross the border arrive to the United States with the disposition of dangerous criminals. But it is also true that narratives based on the very same discourse of drug violence and criminality are used for humanitarian purposes. Moreover, there is evidence of a shifting narrative that situates Mexico and Mexicans as praiseworthy for their economic productivity that is critical to US global economic well-being.

#### A. *Alternative Uses of the Drug War at our Doorstep: Asylum*

The prevailing narratives that have facilitated the development of social and legal policies and practices designed to exclude, segregate, and expel Mexicans have also served the needs of immigration advocates who seek legal remedy for their clients to obtain legal residence in the United States. A number of immigration remedies depend upon proof of hardship or threat of harm suffered by a claimant if deportation were to ensue.<sup>274</sup> In these circumstances, the narrative of drug cartel violence serves as a strategy for social inclusion rather than exclusion.

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272. GILL, *supra* note 271, at 48.

273. *Id.* at 50.

274. For example, requests for Asylum, Trafficking Visas, U Visas, Cancellation of Removal, Withholding of Removal, Convention Against Torture claims, and Special Immigrant Juvenile Status, among others, require an immigrant to demonstrate the likelihood of harm if she were returned to her home country. 8 U.S.C. §§1101(a)(42)(A), 1158(b)(1)(A) (asylum); 8 U.S.C. §§ 1101(T)(i)(IV) (Trafficking visa); 8 U.S.C. §§ 1101(a)(15)(u)(ii); 1255(m)(1)(B), 8 C.F.R. §§ 245.24(g)(3), (h)(iv) (U visa); 8 U.S.C. § 1229b(b)(1)(D) (Cancellation of Removal); 8 U.S.C. § 1231(b)(3)(A) (Withholding of Removal); 8 C.F.R. § 1208.16(b)(1)(i) (Convention Against Torture claims); 8 U.S.C. §§ 1101(a)(27)(J)(ii) (Special Immigrant Juvenile Status).

In recent years, Mexican asylum requests have increased substantially. Asylum requests are said to be a relatively new phenomenon. From 2012 to 2013, the numbers of asylum claims, described as a surge, more than doubled.<sup>275</sup> The rise in asylum claims has garnered significant media attention.<sup>276</sup> Journalists report prototypical details of the circumstances of asylum seekers whose stories tell of having to flee gruesome violence in Mexico.<sup>277</sup> Often entire family networks have sought refuge from drug cartels that have seized control of their villages and towns with impunity.<sup>278</sup> Newspapers describe in graphic detail the consequences of those who do not or cannot comply with the demands of extortionists.<sup>279</sup>

Attorneys use various forms of the media to explain the plight of their clients. They describe harms their clients have suffered and the dangers they face; one attorney disclosed that he has been threatened and warned to stop representing Mexican asylum claimants.<sup>280</sup> Immigration lawyers endeavor to educate the public about the obstacles Mexicans encounter in presenting relevant facts in the context of the nuances of asylum law and the challenges of representing their clients before skeptical asylum officers and

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275. Sandra Dibble, *Rising Numbers of Mexicans Seek Asylum*, SAN DIEGO UNION TRIBUNE (Mar. 12, 2014), <http://www.utsandiego.com/news/2014/Mar/12/mexican-asylum-seekers/3/?#article-copy> (reporting some recent evidence that the upward trend is slowing); Damien Cave, *Servant in Mexico Tests U.S. on Asylum*, N.Y. TIMES, Dec. 29, 2013, at A1; Brian Skoloff, *Southwest Border Sees Surge in Asylum Requests* (Aug. 17, 2013), available at [http://www.washingtonpost.com/politics/southwest-border-sees-surge-in-asylum-requests/2013/08/17/ec079db0-0768-11e3-88d6-d5795fab4637\\_story.html](http://www.washingtonpost.com/politics/southwest-border-sees-surge-in-asylum-requests/2013/08/17/ec079db0-0768-11e3-88d6-d5795fab4637_story.html); Ted Hesson, *What Could Happen if Border Asylum Claims Keep Rising*, FUSION.NET (Aug. 19, 2013), available at <http://fusion.net/justice/story/happen-border-asylum-claims-rising-15451>.

276. This Article does not parse the requests in terms of claims made at the border, affirmative claims made by Mexicans already present in the United States, or withholding of removal claims made after the denial of affirmative asylum claims. See Maria Baldini-Potermín, 87 INTERPRETER RELEASES 2385 (2010) (thoroughly reviewing the differences with regard to claims by Mexicans).

277. Dibble, *supra* note 275 (describing an asylum seeker who said his sons had been killed and his daughter kidnapped and raped, and a man whose legs were cut off when he refused to pay extortionists.).

278. *Id.* (telling a family's story from the state of Guerrero).

279. Deborah Hastings, *Fleeing Wrath of Vicious Cartels, Record-Breaking Numbers of Mexicans Seek Political Asylum in U.S.*, N.Y. DAILY NEWS (Oct. 23, 2013), <http://www.nydailynews.com/news/world/mexicans-fleeing-drug-cartel-mayhem-seek-ing-u-s-asylum-record-breaking-numbers-article-1.1493183>; Molly Hennessey-Fiske, *More Mexicans Seek Asylum in U.S. As Drug Violence Rises*, L.A. TIMES (Oct. 28, 2012), available at <http://articles.latimes.com/2012/oct/28/nation/la-na-texas-asylum-20121028/2>.

280. Hennessey-Fiske, *supra* note 279.

immigration judges.<sup>281</sup> Scholarly publications articulate the arguments for granting asylum to Mexicans fleeing the drug cartel violence and identify flaws in the processes that disproportionately burden such claims.<sup>282</sup> Practical guides encourage attorneys to undertake representation of Mexican asylum seekers.<sup>283</sup> Online petitions have circulated advocating for “Protection and Legal Relief for Mexican Nationals Affected by and Fleeing Violence in Mexico.”<sup>284</sup> The Washington Office on Latin America has chastised the US government for endangering migrants who are returned to Mexico.<sup>285</sup> These undertakings all rely on the master narrative of violence associated with Mexico.

The data reveals that most Mexican asylum claims are rejected and at a disproportionate rate relative to other asylum seekers.<sup>286</sup> Moreover, the outcomes are often arbitrary. Some family members have been successful while others have been denied although they have been subject to the same threats and harm and rely on the same evidentiary materials.<sup>287</sup> The government insists that these claimants

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281. SARAH CAMPOS & JOAN FRIEDLAND, *MEXICAN AND CENTRAL AMERICAN ASYLUM AND CREDIBLE FEAR CLAIMS* (May 2014); Baldini-Potermin, *supra* note 276; Jillian Tuck, *Mexico Urges U.S. to Facilitate Asylum Claims for Victims of Violence*, PHYSICIAN’S FOR HUMAN RIGHTS (Jan. 22, 2014), <http://physiciansforhumanrights.org/blog/mexico-urges-us-to-facilitate-asylum-claims-for-victims-of-violence.html>; Jason Dzubow, *Mexican Asylum Seekers Need Not Apply*, ASLYUMIST.COM (Nov. 13, 2013), <http://www.asylumist.com/2013/11/13/mexican-asylum-seekers-need-not-apply/> (quoting an attorney setting forth the elements of an asylum claim, the relationship between the cartels and the state in the context of asylum claims based on extortion); Dibble, *supra* note 275 (quoting an attorney representing Mexican asylum claimants explaining that asylum officers and judges believed her clients were seeking economic benefits but were not refugees).

282. See generally Whitney Drake, *Disparate Treatment: A Comparison of United States Immigration Policies Toward Asylum-Seekers and Refugees from Colombia And Mexico*, 20 TEX. HISP. J. L. & POL’Y 121 (2014); Benjamin H. Harville, *Ensuring Protection or Opening the Floodgates?: Refugee Law and its Applications to Those Fleeing Drug Violence in Mexico*, 27 GEO. IMMIGR. L.J. 135 (2012); Jillian N. Blake, *Gang and Cartel Violence: A Reason to Grant Political Asylum from Mexico and Central America*, 38 YALE J. INT’L L. ONLINE 31 (2012); Sergio Garcia, *Asylum for Former Mexican Police Officers Persecuted by the Narcos*, 31 B.C. THIRD WORLD L.J. 245 (2011).

283. Baldini-Potermin, *supra* note 276.

284. See *Petition for Protection and Legal Relief for Mexican Nationals Affected by and Fleeing Violence in Mexico*, IPETITIONS, available at <http://www.ipetitions.com/petition/protectionformexicannationals/> (last visited Dec. 4, 2014).

285. Clay Boggs, *What Happens to Migrants after They Are Deported?*, WOLA.ORG (May 13, 2013), available at [http://www.wola.org/commentary/what\\_happens\\_to\\_migrants\\_after\\_they\\_are\\_deported](http://www.wola.org/commentary/what_happens_to_migrants_after_they_are_deported).

286. Skoloff, *supra* note 275 (citing DHS’ statements to this effect); Cave, *supra* note 275; Dibble, *supra* note 275; Tuck, *supra* note 281; Hennessey-Fiske, *supra* note 279.

287. Hennessey-Fiske, *supra* note 279.

seek an improvement in their economic circumstances and are otherwise not credible asylum applicants.<sup>288</sup> Officials raise the specter of the “floodgates” and warn that granting asylum to a Mexican applicant will result in an outpouring of claims.<sup>289</sup> Other political actors claim that Mexicans are simply trying to exploit “loopholes” to gain access to the United States and refer to them as “narco refugees” without legitimate claims.<sup>290</sup> Indeed, the Republican chairman of the House Judiciary Committee expressed concerns that Mexican asylum claimants are “criminals [who] are abusing the asylum process, cheating their way into the country.”<sup>291</sup> Federal officials have suggested that violence has quieted down, that the Mexican government has gained some control over the cartels, and thus asylum is not warranted—an ironic position considering heightened military intervention and demands for the sealing of the US-Mexico border.<sup>292</sup>

Each asylum claim, of course, is submitted based on the specific circumstances of the individual claimant. Many of these cases are likely to rely on the narrative of drug-war violence. Petitions enumerate facts to support the client’s claims to escape the wrath of vicious cartels. A typical submission would include the journalistic accounts of the violence with blaring headlines about brutal crime from which there is no escape or accountability.<sup>293</sup>

Well-meaning intent notwithstanding, the narrative of criminality in asylum cases also contributes to the prevailing stereotypes of Mexico and Mexicans. Critical legal theorists have long expressed concerns that narratives deployed in asylum cases may contribute to cultural essentialism and national stereotypes.<sup>294</sup> Makau

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288. Dibble, *supra* note 275.

289. Drake, *supra* note 282, at 144.

290. Hesson, *supra* note 275 (quoting Fox news); Hennessey-Fiske, *supra* note 279.

291. Cave, *supra* note 275.

292. *Id.* Some speculate that a grant of asylum might serve to pronounce Mexico as a “failed state”—something the United States is reluctant to do. PERRY NAVA, THE CASE FOR THE MEXICAN ASYLUM SEEKER FLEEING CARTEL VIOLENCE (2013), available at [http://works.bepress.com/perry\\_nava/1](http://works.bepress.com/perry_nava/1). Interestingly, the Mexican government has encouraged the United States to grant asylum requests. *Id.*

293. See Baldini-Potermin, *supra* note 276, at 2385-86; Caroline Bettinger-Lopez et al., *Redefining Human Rights Lawyering Through the Lens of Critical Theory: Lessons for Pedagogy and Practice*, 18 GEO. J. POVERTY L. & POL’Y 337, 366 (2011) (discussing this issue).

294. See Michelle A. McKinley, *Cultural Culprits*, 24 BERKELEY J. GENDER L. & JUST. 91, 97-99 (2009); Bettinger-Lopez et al., *supra* note 293, at 355; Jacqueline Bhabha, *Internationalist Gatekeepers?: The Tension Between Asylum Advocacy and Human Rights*, 15 HARV. HUM. RTS. J. 155, 162-63 (2002); Leti Volpp, *Talking “Culture”: Gender, Race,*

Matua's warning about human rights work bears consideration: "[T]he human rights movement is marked by a damning metaphor. The grand narrative of human rights contains a subtext that depicts an epochal contest pitting savages, on the one hand, against victims and saviors, on the other."<sup>295</sup>

This critique, albeit important, has complicated consequences. The immediate goal of immigration advocates is to assemble a strong case on behalf of clients who generally have a compelling need to stay in the United States. One would be hard pressed to argue against bringing asylum claims unless prohibited by the criteria set forth by the asylum statute itself and/or legal ethical standards. Moreover, this critique resonates problematically with immigration adjudicators who are already unnecessarily skeptical of asylum claims generally.<sup>296</sup>

A more constructive critique would give greater attention to the distortions produced more from what is omitted in the asylum narrative than what is included. The structure of an asylum claim provides little opportunity to set forth the relationship between the complex historical determinants of violence and the violence itself. That is, due to the constraints of the legal structures within which these claims are developed, advocates are likely to omit from asylum narratives the historical and structural determinants of Mexico's drug war, particularly US policies that contribute to drug violence.<sup>297</sup> The discourse on crime and drugs moving north de-contextualizes the issue of drug violence from conditions associated with the aftermath of the Washington Consensus dictates and the United States as Mexico's drug-demand side gun supply-side neighbor.<sup>298</sup> That NAFTA has produced tens of thousands of displaced workers who

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*Nation, and the Politics of Multiculturalism*, 96 COLUM. L. REV. 1573 (1996); Isabelle R. Gunning, *Global Feminism at the Local Level: Criminal and Asylum Laws Regarding Female Genital Surgeries*, 3 J. GENDER RACE & JUST. 45, 61 (1991). See generally Tracy E. Higgins, *Anti-Essentialism, Relativism, and Human Rights*, 19 HARV. WOMEN'S L.J. 89 (1996) (critiquing a tendency in human rights work to essentialize cultures, particularly in the realm of feminist international work).

295. Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L.J. 201 (2001).

296. See *supra* notes 291-95 and accompanying text.

297. See Bettinger-Lopez et al., *supra* note 293, at 366.

298. Mercedes González de la Rocha, *The Urban Family and Poverty in Latin America*, 22 LATIN AM. PERSP. No. 2, at 12 (1995) (describing the impact of the free trade zones on the economies of Mexican urban areas); see Weissman, *supra* note 100, at 843-45 (describing how conditions attached to the use of IMF and World Bank funds, as well as agreements with the United States affected the ability of Mexico to carry out its responsibilities to reduce violence).

have moved into drug-trade related activities appears to have no apparent relevance in these cases.<sup>299</sup> The US trade in guns and demand for drugs as factors that contribute to drug violence are not likely considered relevant to asylum proceedings.<sup>300</sup> Similarly, that the circumstances of globalization and financial deregulation have allowed drug traffickers to move their goods and launder their profits with greater ease does not easily fit within the client's asylum petition.<sup>301</sup> Indeed, it is difficult to construct a proper means for introducing these facts in the context of individual asylum claims.

The narrative of the Mexican-as-criminal thus reproduces itself in asylum claims, both by the asylum advocate seeking to assist the claimant who desires to enter or remain in the United States, as well as by asylum foes who depict asylum seekers as cheats and criminals.<sup>302</sup> Advocates must continue to search for ways to address the structural issues that contribute to the violence from which their clients flee, and to determine whether and how to make these concerns relevant to asylum claims.<sup>303</sup>

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299. Mark Weisbrodt et al., *Did NAFTA Help Mexico? An Assessment After Twenty Years*, CTR. ECON. & POL'Y RESEARCH, at 9 (2014), <http://www.cepr.net/documents/nafta-20-years-2014-02.pdf> (measuring higher rates of unemployment since NAFTA among other deteriorating economic conditions); Eduardo Zepeda et al., *Rethinking Trade Policy for Development: Lessons From Mexico Under NAFTA*, CARNEGIE ENDOWMENT FOR INT'L PEACE, at 5 (2009), [http://carnegieendowment.org/files/nafta\\_trade\\_development.pdf](http://carnegieendowment.org/files/nafta_trade_development.pdf) (noting how NAFTA contributed to inequality and extreme poverty); Jason Beaubien, *As Drug War Turns into Quagmire, Fear Rules Mexico*, NPR (Aug. 2, 2010, 12:00AM) <http://www.npr.org/templates/story/story.php?storyId=128804488> (noting that the vast number of unemployed facilitates the ease with which cartels recruit "foot soldiers").

300. Since 2006, Mexican authorities have confiscated over 60,000 weapons from drug cartels purchased from US gun dealers. James V. Grimaldi & Sari Horwitz, *Mexican Cartels Wielding American Weapons*, WASH. POST, Dec. 13, 2010, at A01; see Katherine Eban, *The Truth About Fast and Furious*, CNN MONEY (June 27, 2012), <http://features.blogs.fortune.cnn.com/2012/06/27/fast-and-furious-truth/>; Katie Soltis, *Mexican Drug Violence Fueled by U.S. Guns*, COUNCIL ON HEMISPHERIC AFF. (June 27, 2011), <http://www.coha.org/mexican-drug-violence-fueled-by-u-s-guns/#more-13110>.

301. Betty Horwitz, *The Role of the Inter-American Drug Abuse Control Commission (CICAD): Confronting the Problem of Illegal Drugs in the Americas*, 52 LATIN AM. POL. SOC. 139, 140 (2010).

302. See *supra* notes 297-301, and accompanying text.

303. For a good example of how historical circumstances, including European and US colonialism, imperialism, and exploitation contribute to exploitation in third world countries, see INSTITUTE FOR JUSTICE AND DEMOCRACY IN HAITI OMNIBUS MOTION TO ADMINISTRATIVELY CLOSE ALL CASES INVOLVING HAITIAN RESPONDENTS (Thomas F. Griffin, Principle author), available at <http://ijdh.org/wordpress/wp-content/uploads/2009/12/Model-Motion-to-Stop-Haitian-Deportations.pdf>.

## B. *Divergent Narratives*

### 1. Mexico as Economic Partner: Trade, Oil, and Labor

#### i. A nation “on the rise”

In addition to the alternative uses of the discourse of criminality, a new narrative has emerged that takes a rhetorical turn from the threats posed by Mexico to promote its transformation to a regional and global economic power. Since 2013, US officials have begun to emphasize the role of Mexico as one of its most important economic partners. The “new” Mexico has been described as a nation “on the rise;” it is predicted to enjoy even greater economic growth and stability.<sup>304</sup> In fact, in recent years, Mexico’s rate of economic growth has surpassed regions in the world, including the United States.<sup>305</sup>

The shift in the discourse has been notable.<sup>306</sup> Media attention has focused on positive economic improvements in Mexico.<sup>307</sup> Journalists report that the Mexican manufacturing sector is gaining on, or has surpassed those in other regions in the world and has become especially attractive to international investors.<sup>308</sup> Experts have praised Mexico’s reforms and have suggested that the country is moving toward greater parity with the United States.<sup>309</sup> At a recent summit on Latin America’s economies, Mexico was described as “vital” to the global economic interests of the United States.<sup>310</sup> As the

304. John Marczak, *Immigration: Changing Dynamics and a New Latin America*, in THE ASPEN INSTITUTE, *LATIN AMERICA’S CHANGING ECONOMIES, SOCIETIES AND POLITICS: OPPORTUNITIES AND CHALLENGES FOR THE UNITED STATES* 29, 30 (2014) [hereinafter *LATIN AMERICA’S CHANGING ECONOMIES*].

305. Christopher E. Wilson, *A U.S.-Mexico Economic Alliance: Policy Options for a Competitive Region*, in *LATIN AMERICA’S CHANGING ECONOMIES*, *supra* note 304, at 5, 9.

306. Shear & Archibald, *supra* note 24.

307. *One Year after Enrique Peña Nieto’s Election, Has there been a significant shift in Mexico’s security strategy?*, WOLA.ORG (July 2, 2013), [http://www.wola.org/commentary/one\\_year\\_after\\_enrique\\_pena\\_nieto\\_s\\_election](http://www.wola.org/commentary/one_year_after_enrique_pena_nieto_s_election). There has also been suggestions of a shift in the narrative as a means to attract Latino voters in general, a topic beyond the scope of this Article.

308. Damien Cave, *For Migrants, New Land of Opportunity is Mexico*, N.Y. TIMES, Sept. 23, 2013, at A1 (also observing that Mexico has become a favored destination for American and European immigrants); Damien Cave, *As Ties With China Unravel, U.S. Companies Head to Mexico*, N.Y. TIMES, June 1, 2014, at A6.

309. *Id.*

310. Shannon O’Neil, *Rapporteur’s Summary*, in *LATIN AMERICA’S CHANGING ECONOMIES*, *supra* note 304, at 1.

two economies develop deeper dependencies, commentators now refer to a US-Mexico global economic partnership.<sup>311</sup>

Mexico's economic productivity and the increasingly important role it plays in trade with the United States have served to downplay the Mexican-as-criminal narrative.<sup>312</sup> Recently, President Obama has moderated his concerns about drug-cartel violence, lamenting the fact that "so much of the focus ends up being on security" and has called for efforts to "put the old mindsets aside."<sup>313</sup> One politician suggested the border should be viewed as an "opportunity" rather than a "threat," and that too much emphasis has been given to the idea of Mexico as a danger.<sup>314</sup> In contrast to concerns about a failed state that justify a militarized border, some Mexican experts have now proclaimed that Mexico "has developed a highly competitive democratic system, and its rising middle class, solid macroeconomic footing and positive outlook for economic growth make the country a pillar of strength in a complex and volatile global environment."<sup>315</sup> President Peña Nieto, who was featured on the cover of *Time* magazine with the caption, "Saving Mexico,"<sup>316</sup> has made clear his intentions to "recalibrate" the US-Mexico relationship so that issues related to drug cartel violence no longer characterize conditions in Mexico.<sup>317</sup>

Vast oil reserves may account for the recent discursive turn. Mexico ranks among the ten largest oil producers in the world, and

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311. Wilson, *supra* note 305.

312. Cave, *As Ties with China Unravel*, *supra* note 308 (noting that experts and officials agree that trade must be just as important as border security). Main, *supra* note 90.

313. Main, *supra* note 90; Shear & Archibold, *supra* note 24 (describing a "vastly different message" coming from President Obama); Carlsen, *supra* note 22 (quoting the President praising Mexico for its ambitious reforms).

314. *A Study in Contrasts: House and Senate Approaches to Border Security: Hearing Before the Subcomm. on Border and Maritime Security of the H.R. Comm. Homeland Sec.*, 113th Cong. (2013) (statements of Congressman O'Rourke and Jayson Ahern, Comm'r US Customs and Border Protection), available at <http://www.gpo.gov/fdsys/pkg/CHRG-113hrg86033/html/CHRG-113hrg86033.htm> (noting that Mexico is one of the most important trading partners and suggesting that border reform issues should be viewed as trade opportunities).

315. CHRISTOPHER E. WILSON ET AL., *NEW IDEAS FOR A NEW ERA: POLICY OPTIONS FOR THE NEXT STATE IN U.S.-MEXICO RELATIONS* 9 (2013).

316. *Saving Mexico*, TIME (Feb. 24, 2014), <http://content.time.com/time/covers/pacific/0,16641,20140224,00.html>.

317. Eric L. Olson, *The Future of U.S.-Mexico Security Collaboration*, in *LATIN AMERICA'S CHANGING ECONOMIES*, *supra* note 304, at 17, 21; Shear & Archibold, *supra* note 24.



among the top three in the Western Hemisphere.<sup>318</sup> Since Peña Nieto's election in 2012, he promised broad changes to its energy industry, a development that has been of great interest to the United States and oil companies.<sup>319</sup> In 2013, an oil reform law was passed that provided foreign investors access to what was previously a state-controlled oil sector.<sup>320</sup>

The United States has long had its sights set on Mexico's state-run oil company, PEMEX—or *Petróleos Mexicanos*, and has encouraged its privatization.<sup>321</sup> National security documents from as far back as the early 1950s have confirmed US intentions to access Mexico's oil reserves and other Latin American "raw materials essential to US Security."<sup>322</sup> A number of US oil companies have been eager to bid for contracts and joint ventures that will net billions of dollars in profit.<sup>323</sup> President Obama praised Mexico for its privatization of PEMEX.<sup>324</sup> US State Department representatives visited Mexico to explore ways to develop a strategic partnership

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318. Nancy E. Brune, *Energy: Latin America's Growing Heft in Global Oil Markets*, 17 in *LATIN AMERICA'S CHANGING ECONOMIES*, *supra* note 304. On August 12, 2014, Mexico signed into law an energy reform bill that allowed for foreign investment and privatization schemes with regard to oil. *Mexico Signs Energy Reform Into Law Ending a 76yr Monopoly*, RT.COM (Aug. 12, 2014), <http://rt.com/business/179824-mexico-signs-energy-reform-law/>

319. Peter Baker & Elisabeth Malkin, *Politics to Shadow Obama's Trade Talks in Mexico*, N.Y. TIMES, Feb. 19, 2014 at A3.

320. Brune, *supra* note 318, at 19. In August 2014, Peña Nieto signed additional laws that will further facilitate private companies to profit from Mexico's oil, gas, and electricity industries. See Walter Russell Mead & Staff, *Mexico Energy Reforms Signed Into Law* AMERICANINTEREST.COM (Aug. 13, 2014), <http://www.the-american-interest.com/blog/2014/08/13/mexican-energy-reforms-signed-into-law/>.

321. Laura Carlsen, *Mexico's Oil Privatization: Business*, FOREIGN POL'Y FOCUS (May 27, 2014), <http://fpif.org/mexicos-oil-privatization-risky-business/>.

322. U.S. Dep't of State, Department of the Historian, Statement of Policy by the National Security Council, Foreign Relations of the United States, 1952–1954 Volume IV, The American Republics, Document 12, (Sept. 3, 1954), <https://history.state.gov/historicaldocuments/frus1952-54v04/d12> (last visited Oct. 27, 2014).

323. Zain Shauk & Jim Polson, *Mexico Oil Fields Are Boon for Energy Companies as Frontier Teeters*, BLOOMBERG NEWS (Aug. 7, 2014), [http://business.financialpost.com/2014/08/07/mexico-oil-fields-are-boon-for-energy-companies-as-frontiers-teeter/?\\_lsa=ea49-36a6](http://business.financialpost.com/2014/08/07/mexico-oil-fields-are-boon-for-energy-companies-as-frontiers-teeter/?_lsa=ea49-36a6); Juan Pablo Spinetto & Brendan Case, *PEMEX CEO Sees First Production Ventures as Early as This Year*, BLOOMBERG REPORTS (Jan. 27, 2014), <http://www.bloomberg.com/news/2014-01-27/PEMEX-ceo-sees-first-production-ventures-as-early-as-this-year.html> (noting the Chevron and Shell among others expressed interests); Nick Cunningham, *What Mexico's Energy Reform Means for Big Oil*, OILPRICE (Aug. 10, 2014), <http://oilprice.com/Energy/General/What-Mexicos-Energy-Reform-Means-for-Big-Oil.html>.

324. Carlsen, *supra* note 22 (referring to PEMEX as the "crown jewel" for US oil companies and Pentagon planners).

concerning energy.<sup>325</sup> The office of Congressional Research Service confirms the importance of Mexico's oil and gas production to US interests.<sup>326</sup> Experts have described the possibility of investment in Mexican oil as a "tantalizing prospect."<sup>327</sup> They have suggested that Mexico is now in a position to bestow favors upon the United States and "provide a boost to the US economy."<sup>328</sup> It is a definitive turn from the narrative of Mexico as a failed state.

Some Mexican specialists have questioned the efficacy of this shift, and have suggested that the drug cartel violence continues to demand prominence in the discourse.<sup>329</sup> Human rights groups fear that the change could signal reduced interests in ending impunity and have suggested that the new rhetorical turn is a matter of political convenience.<sup>330</sup> Others argue that the rhetoric, whether it focuses on the economy or drug cartel violence, is an effort to reshape and profit from Mexico's economy in furtherance of the goals of US foreign policy.<sup>331</sup>

Mexican citizens have expressed disbelief at the pronouncements that Mexico is a "nation on the rise."<sup>332</sup> As one Mexican expert noted:

Both presidents painted a rose-colored picture of Mexico as an up-and-coming middle-class society that utterly ignored the rise in poverty and inequality, violence and human right violations. The Los Angeles Times coverage of Obama's speech aimed at young people quoted several students smitten by the U.S. president but stumped by the distance between the his portrayal of their country and their own experience. According to the Times, they wondered out loud, "what country is he talking about?"<sup>333</sup>

Moreover, many Mexicans oppose the privatization of PEMEX, which has triggered concerns about the loss of sovereignty and injury

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325. *Id.* (quoting a State Department head).

326. CLARE RIBANDO SEELKE, CONG. RESEARCH SERV. R42917, MEXICO'S PENA NIETO ADMINISTRATION: PRIORITIES AND KEY ISSUES IN U.S.-MEXICAN RELATIONS (2013), available at <http://fpc.state.gov/documents/organization/213989.pdf>

327. Duncan Wood, *Growing Potential for U.S.-Mexico Energy Cooperation*, in LATIN AMERICA'S CHANGING ECONOMIES, *supra* note 304, at 43, 47.

328. Wilson, *supra* note 305, at 9.

329. Olson, *supra* note 317, at 17.

330. Shear & Archibold, *supra* note 24.

331. Mercille, *supra* note 89, at 115.

332. Carlsen, *supra* note 22.

333. *Id.*

to national pride.<sup>334</sup> Others have expressed concerns that transnational oil companies are too powerful for their government to manage and control and question who will benefit.<sup>335</sup> They have expressed concerns about the environmental impact occasioned by privatization, the likelihood of layoffs and higher rates of unemployment, and the possible violent displacement of populations.<sup>336</sup>

Nor has the new narrative interrupted the flow of funds for the “war” against drug cartels or resulted in a shift in legal policy toward Mexican immigrants. Opponents of CIR continue to characterize Mexicans as criminals and focus on the Mexican role in drug cartels. Moral panic has not diminished; many Americans continue to disproportionately fear Mexicans compared with other immigrant groups.<sup>337</sup>

Mexicans continue to suffer as a result of the ongoing military strategy. Human rights groups continue to press for an end to US strategies that have “militarized [ ] societies in the name of the ‘war on drugs,’” while protesting the prospect of US oil companies in their midst.<sup>338</sup> The “new” narrative appears to promote a different idea of Mexico, but one with questionable benefits for Mexico or Mexicans. Nonetheless, the United States has been transparent about its intent “to take advantage of this American moment . . . on energy” and to “bring countries together”<sup>339</sup>—something less likely to occur if the United States continues to characterize Mexico as a national security threat, a lawless country, and its citizens heartless criminals.

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334. *Id.*; Carlsen, *supra* note 321; Richard Fausset, *Tens of Thousands Protest Mexican Oil Reforms*, L.A. TIMES (Sept. 8, 2013), <http://articles.latimes.com/2013/sep/08/world/la-fg-wn-thousands-protest-mexican-oil-reforms-20130908>; Manuel Roig-Franzia, *For Many Control of State-Run Pemex is About National Pride*, WASH. POST, April 30, 2008.

335. Carlsen, *supra* note 321 (quoting an open letter to Peña Nieto stating that “Oil transnationals in the world have as much power as many governments . . .”).

336. Christopher Sellers, *The Environmental Consequences of Privatizing Mexico’s Oil*, DISSENT MAGAZINE (Sept. 3, 2013), <http://www.dissentmagazine.org/blog/the-environmental-consequences-of-privatizing-mexicos-oil>; Carlsen, *supra* note 22.

337. Scott Clement, *The Data on White Anxiety over Hispanic Immigration*, WASH. POST (Aug. 14, 2014), <http://www.washingtonpost.com/news/storyline/wp/2014/08/14/the-data-on-white-anxiety-over-hispanic-immigration/?hpid=z6>.

338. Main, *supra* note 90; *see supra* notes 90-96 and accompanying text.

339. Carlsen, *supra* note 22.

ii Mexican immigrants: productive entrepreneurs and skilled workers

Yet another shift in the narrative derives from recent field work by sociologists and studies by economists who have examined the skill level of immigrants in the United States and the value they create for our national economy. Mexicans are generally not portrayed as high-skilled or inventive workers as are some other immigrant groups.<sup>340</sup> At best, they are described as less-educated, unskilled workers who nonetheless provide economic benefits.<sup>341</sup> On occasion, the need for low-skilled farm labor trumps anti-immigration sentiment.<sup>342</sup> As others have put it, “their main contribution is the savings they bring to consumer society in the form of cheaper goods and services. In other words, their low wages, and vulnerability, while clearly bad for them, is good for us.”<sup>343</sup>

Recent studies, however, suggest that the assessment of Mexican labor is skewed. Just as Mexico is now a site of economic productivity, some now view Mexicans as highly productive immigrants. Advocates have demonstrated that immigrants revitalize cities and towns and are credited with reversing population decline, reducing crime rates, and have re-established neighborhoods.<sup>344</sup> Various studies describe Mexicans as savvy entrepreneurs who have

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340. Julia Preston, *U.S. Plan Aims to Draw Immigrants With Technology Skills*, N.Y. TIMES, May 7, 2014, at A17 (describing proposed reforms to help highly skilled immigrants and their families from China, India, and the Philippines); GIOVANNI PERI ET AL., STEM WORKERS, H-1B VISAS AND PRODUCTIVITY IN US CITIES, at 59 (2013), available at [http://www.norface-migration.org/publ\\_uploads/NDP\\_09\\_13.pdf](http://www.norface-migration.org/publ_uploads/NDP_09_13.pdf) (finding that Mexicans receive only 3% of all H-1B high-skilled visas).

341. See Miguel R. Salazar & Andrew Selee, *Facing the Future: The Changing Dynamics of U.S.-Mexico Migration*, in LATIN AMERICA’S CHANGING ECONOMIES, *supra* note 304, at 27, 38; see also Marczak, *supra* note 304 (referencing Mexican immigrants and the US need for low and medium-skilled workers).

342. SENATE COMMITTEE ON THE JUDICIARY, THE BORDER SECURITY, ECONOMIC OPPORTUNITY, AND IMMIGRATION MODERNIZATION ACT, S.744. (Apr. 22, 2013), available at <http://www.aila.org/content/fileviewer.aspx?docid=44075&linkid=260652> (various witnesses testifying on the need for agricultural workers in and in support of immigration reform).

343. Nichola Lowe & Natasha Iskander, *Beyond the Wal-Martization of Immigration* (2011), available at <http://isa.unc.edu/latino-migration-project/guest-blog>; see Susan Leigh Star & Anselm Strauss, *Layers of Silence, Arenas of Voice: The Ecology of Visible and Invisible Work*, 8 COMPUTER SUPPORTED COOPERATIVE NETWORK 9, 15-16 (1999) (describing the way those who do domestic work are viewed or “created” as nonpersons).

344. Paul McDaniel, *How Immigration is Key to New York City’s Renaissance*, IMMIGRATION IMPACT (Apr. 16, 2014), available at <http://immigrationimpact.com/2014/04/16/how-immigration-is-key-to-new-york-citys-renaissance/#sthash.7JLqrDro.dpuf>.

helped to grow the economy by establishing small businesses.<sup>345</sup> According to the Council on Foreign Relations, Mexicans are the largest group of immigrants establishing new companies.<sup>346</sup> Mexican immigrants have been described as the drivers of local economies.<sup>347</sup>

Furthermore, recent empirical studies have demonstrated that Mexican immigrants heretofore categorized as less-educated and low-skilled in fact have significant “technical and social skills and competences acquired informally on and off the job.”<sup>348</sup> The findings reveal that many Mexicans come to the United States with substantial and complex competencies and specialized crafts that are then transferred to and benefit the US labor market and US building and trades industry.<sup>349</sup> The studies challenge the way that skills are measured and argue that informal skills should not be conflated with unskilled.<sup>350</sup>

These studies have broad implications, not only to disrupt the narrative of the low-skilled Mexican worker—a description, as Leticia Saucedo has noted, that is historically tied to a type of masculinity in need of monitoring and regulation—but may shift law

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345. See Michele Waslin, *Immigrant Laborers Continue to Strengthen American Workforce, Economy*, IMMIGRATION IMPACT (Sept. 2, 2011), available at <http://immigrationimpact.com/2011/09/02/immigrant-laborers-continue-to-strengthen-american-workforce-economy>; Paul McDaniel, *More than 600 Businesses Urge Congress to Act on Immigration Reform*, IMMIGRATION IMPACT (Feb. 28, 2014), available at <http://immigrationimpact.com/2014/02/28/more-than-600-businesses-urge-congress-to-act-on-immigration-reform/>.

346. ALEXANDRA STARR, *LATINO IMMIGRANT ENTREPRENEURS, HOW TO CAPITALIZE ON THEIR ECONOMIC POTENTIAL* (2012), available at [http://i.cfr.org/content/publications/.../CFR\\_WorkingPaper13\\_Starr.pdf](http://i.cfr.org/content/publications/.../CFR_WorkingPaper13_Starr.pdf).

347. FISCAL POLICY INSTITUTE, *IMMIGRANT SMALL BUSINESS OWNERS, A SIGNIFICANT AND GROWING PART OF THE ECONOMY* 2, 26 (2012), available at <http://www.fiscalpolicy.org/immigrant-small-business-owners-FPI-20120614.pdf>; Paul McDaniel, *From Coast to Coast, Immigrants Drive Local Economies*, IMMIGRATION IMPACT (Oct. 3, 2013), available at <http://immigrationimpact.com/2013/10/08/from-coast-to-coast-immigrants-drive-local-economies/>.

348. Jacqueline Hagan et al., *Identifying and Measuring the Lifelong Human Capital of “Unskilled” Migrants in the Mexico-U.S. Migratory Circuit*, 2 J. ON MIGRATION AND HUMAN SECURITY 76 (2014).

349. *Id.* at 87-88; see also Jacqueline Hagan et al., *Skills on the Move: Rethinking the Relationship Between Human Capital and Immigrant Economic Mobility*, 38 WORK AND OCCUPATION 149, 150, 161-63 (2011) (noting Mexican expertise in bricklaying, tile-making, carpentry, masonry, etc.).

350. Hagan et al., *supra* note 348, at 78, 83-84 (observing that skills developed at the workplace usually are not recognized in the same way as skills developed in educational settings).

and legal policies.<sup>351</sup> As the authors of the studies point out, at the transnational level, findings suggest that Mexico can develop programs that recognize and reward return migrants, and help to further develop entrepreneurial ventures.<sup>352</sup> At the federal level, a more accurate assessment of immigrant skills might contribute to inclusion of Mexican workers in a different category for purposes of employment-based visas and provide them more opportunities for legalized status at higher pay commensurate with their abilities.<sup>353</sup> As the narrative shifts from Mexican-as-criminal to Mexican-as-craftsman, the greater recognition of skills might contribute to local policies that are more inclusionary.

### CONCLUSION

Narratives about Mexico function in the realms of social circumstances and policy from which they emerge and to whose purpose they are given. They serve to obscure other—larger—questions bearing on the determinants of drug-cartel violence, particularly on political-economic factors, including neoliberal trade agreements, US drug demand, and US-to-Mexico gun trafficking. They serve the economic interests of military contractors and avail themselves of the conventional wisdom about Mexico to influence political decisions and policies that militarize the drug war. They thus inhibit the consideration of policies designed to mitigate structural and systemic issues that underlie drug-related violence.<sup>354</sup> The use of the narrative as political fodder contributes to an environment in which a dispassionate discussion of important legal values and principles becomes difficult if not impossible.

When used for humanitarian purposes, the narrative often fails to identify the relationship between politico-economic conditions, on the one hand, and drug-cartel violence, on the other, and in its own way further contributes to a distorted understanding of circumstances in Mexico. It is difficult to ascertain if the rhetorical turn by which

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351. Saucedo, *supra* note 100, at 562.

352. Hagan et al., *supra* note 348, at 95.

353. The Immigration Act of 1990 amended the Immigration and Nationality Act, § 203, 8 U.S.C. § 1153 by creating new subsection INA § 203(b)(3)(B), 8 U.S.C. § 1153(b)(3)(B), and reduced the number of visas for unskilled immigrants are capped at 10,000. It also created a “no spillover” provision which prevents any increase in the number of immigration visas issued to unskilled workers due to unused visas in other categories. *Id.*

354. See Grimaldi & Horwitz, *supra* note 300.

Mexico has been recast as a global economic partner and Mexican immigrants have come to be appreciated as economically productive and skill savvy workers will counteract the narrative of the Mexican-as-criminal.

Perhaps the most promising developments originate with activists on both sides of the border, both Mexican and US citizens, who seek to create a movement to reframe the discourse and the current policies that result from a militarized response to drug violence. Across the hemisphere, activists seek to replace the narrative of criminality with the narrative of human rights. They call attention to social inequalities, poverty, and healthcare as opposed to the war on crime/drugs motif.<sup>355</sup> Latin American and global commissions have been established to study ways to reform drug laws; they have emphasized decriminalization and regulation as the most propitious strategies.<sup>356</sup> In 2011, Javier Sicilia, the leader of Mexico's Movement for Peace with Justice and Dignity, urged reforms to address drug-related violence that would, out of necessity, challenge the paradigmatic neoliberal economic developments that he describes as constituting "the legal form of criminality."<sup>357</sup> The movement has created an alliance on both sides of the border as groups affected by the war on drugs in Mexico and the United States seek common cause.<sup>358</sup>

In the United States, immigrant advocacy groups, such as the 1996 Blog Committee, organize for justice in all matters relating to

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355. ARIADNA ESTÉVEZ, HUMAN RIGHTS AND FREE TRADE IN MEXICO: A DISCURSIVE SOCIOPOLITICAL PERSPECTIVE 62 (2008).

356. See *Drugs and Democracy: Toward a Paradigm Shift*, LATIN AM. COMM'N ON DRUGS & DEMOCRACY (2009), available at [http://www.drogasedemocracia.org/Arquivos/declaracao\\_ingles\\_site.pdf](http://www.drogasedemocracia.org/Arquivos/declaracao_ingles_site.pdf) (headed by Ernesto Zedillo, the former president of Mexico, and the former presidents of Brazil and Colombia—all countries with a history of problems with drug cartels seeking an end to the militarization and criminalization strategies); *War on Drugs: Report of the Global Commission on Drug Policy*, GLOBAL COMM'N ON DRUG POL'Y, at 5, 15 (2011), available at [http://www.globalcommissionondrugs.org/wp-content/themes/gcdp\\_v1/pdf/Global\\_Commission\\_Report\\_English.pdf](http://www.globalcommissionondrugs.org/wp-content/themes/gcdp_v1/pdf/Global_Commission_Report_English.pdf) (opposing criminalization strategies to respond to drug violence as exacerbating the problem).

357. Fred Rosen, *Interview with Javier Sicilia Part II: Reweaving Mexico's Social Fabric*, NACLA (Feb. 14, 2012), <https://nacla.org/blog/2012/2/14/interview-javier-sicilia-part-ii-reweaving-mexico%E2%80%99s-social-fabric>.

358. Laura Carlsen, *Heart-to-Heart on the Drug War*, HUFF. POST (Sept. 21, 2012), [http://www.huffingtonpost.com/laura-carlsen/hearttoheart-on-the-drug-\\_b\\_1903718.html](http://www.huffingtonpost.com/laura-carlsen/hearttoheart-on-the-drug-_b_1903718.html) (describing the Mexican Caravan in the United States and meeting of mothers from both countries mourning the loss of family members as a result of the drug wars).

crimmigration.<sup>359</sup> Together with Families for Freedom, a center for families affected by criminalization and deportation,<sup>360</sup> and other coalition members, advocates seek to promote a new discourse that honors the strength and creativity of immigrants to “heal, analyze, strategize, force change in unjust laws, and inspire community empowerment.”<sup>361</sup> They call for an end to any form of discourse that promotes the good immigrant/bad immigrant narrative:

[W]e contest social exclusion and develop the leadership of directly affected people in their own liberation. Resisting the labels of ‘Illegal Immigrant’ and ‘Criminal Alien’ that posit us as an exception to U.S. Civil Rights, FFF assert our common humanity by situating our work in a human rights framework.<sup>362</sup>

This binational effort to shift the narrative addresses the larger context for drug cartel violence and the root causes of migration. Rather than maligning Mexicans as a threat to the social order and cultural fabric of the United States, a new discourse may help restructure public perceptions about Mexican immigrants so that they are no longer the target of laws and policies of exclusion.

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359. See *Welcome to the 1996 Blog!*, 1996 BLOG, <http://1996blog.org/2014/04/10/welcome-to-the-1996-blog/> (last visited Oct. 27, 2014) (organizing against “deportation, prison, and criminal legal systems”).

360. See FAMILIES FOR FREEDOM, <http://familiesforfreedom.org/> (last visited Oct. 27, 2014).

361. *Welcome to the 1996 Blog!*, *supra* note 359.

362. FAMILIES FOR FREEDOM, *supra* note 360.



