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# Mexican Families & United States Immigration Reform

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# MEXICAN FAMILIES & UNITED STATES IMMIGRATION REFORM

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## ABSTRACT

This essay argues that we should understand U.S. immigration policy as a series of bi-national relationships rather than as a single, user-indifferent interface. Applying this regulatory approach to Mexican labor migration (i) allows a more accurate definition of the migrating person in the context of the family he seeks to support; and (ii) highlights the United States' duty to provide for Mexican families.

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## INTRODUCTION

"If you have the facts, argue the facts. If you have the law, argue the law." This old lawyers' adage captures the profile of current debates about reforming U.S. immigration policy. Well-intentioned people, some armed with the facts and others with the law, talk past each other. Advocates of strict enforcement finger well-worn copies of the statutes and color their opponents as scofflaws. Proponents of a comprehensive legal re-write

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brandish social and economic data and suggest that their antagonists are being fastidious about the ancillaries.

This essay suggests that immigration reform should correlate the law with the facts. Part I of this essay clarifies several elements necessary to define the field and initiate the analysis. The essay utilizes a bi-state approach to immigration. I will argue that U.S. immigration policy ultimately owes a duty to Mexican families.

Part II briefly reviews some of the data describing migration patterns, and Part III shows the lawful means of entry that the immigration system provides for migrants from the defined field. The essay concludes by summarizing some recommendations of how the U.S. may better regulate Mexican migration.

## I. FIELD DEFINITION

It is important to first define, then to measure, and finally to regulate. Therefore, Part I offers a "field definition" for the phenomena the United States is trying to regulate.[1]

### A. Bi-State Methodology

One general (and generally admired) characteristic of the law is its user-indifference. No matter who violates the law or applies for its benefits, the law is the same for everyone. Immigration law, just like tax or criminal law, is no respecter of persons. Thus, U.S. immigration law is organized like any other domestic law; it provides benefits and burdens to all potential immigrants alike.[2]

Observations of migration to the United States, however, demonstrate that migrants always come from *somewhere*. Migrants do not drop out of

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1. *See generally* Bernard Trujillo, *Self-Organizing Legal Systems: Precedent and Variation in Bankruptcy*, 2004 UTAH L. REV. 483, 531-35 (following the work of Sally Falk Moore on defining "semi-autonomous social fields"). Field definitions are less a stable structure than a communicable "way of seeing." I thank my friend Marc Galanter for the latter phrase and insight.

2. There are important exceptions to the general characterization of U.S. immigration law as treating all sending-nations alike. Most notably, the visa waiver program provides streamlined entry procedures for some applicants from a list of nations with which the United States is on excellent terms. *See* Immigration and Nationality Act § 217, 8 U.S.C. § 1187 (2006); *see also* 2-12 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 12.04 (Matthew Bender, rev. ed. 2010) (listing the current visa waiver countries as Andorra, Australia, Austria, Belgium, Brunei, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Monaco, the Netherlands, New Zealand, Norway, Portugal, Republic of Korea, San Marino, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom).

the sky or appear mysteriously at points of entry. Every migrant to the United States comes from a certain sending country. These measurable patterns of sending provide crucial regulatory information. Ignoring the sending country as an explanatory variable yields a sad sort of policy solipsism.

United States immigration law is typically seen as an expression with two terms: a single receiver-country (the United States) interfacing simultaneously with applicants from a vector of 194 sender-countries.[3] It might be more useful, however, to re-imagine U.S. immigration as an expression containing 194 terms, each representing a bi-state relationship:[4] United States *and* Slovenia, United States *and* Togo, etc. Attempting such a series of pair-wise analyses would establish U.S. immigration regulation as an extension of U.S. diplomatic strategy generally.

When we re-imagine U.S. immigration policy as a series of bi-state analyses, new regulatory horizons open up. Particular expertise for immigration regulation would come less from the Department of Homeland Security (DHS), and more from the Department of State (DOS). The DHS is charged with the task of defending one homeland from many potential threats, ranging from terrorists to tornados. The DOS, on the other hand, is charged with the task of developing specific relationships with various and unique countries. To do the job well, the DOS cultivates country-specific databases and relationships. These resources, already at the disposal of the DOS's diplomatic mission, could also be made available to the immigration regulators.

More generally, immigration could be regulated as a continuous, rather than binary, phenomenon. A binary variable always takes one of two values: it is either on or off, either zero or one.[5] When immigrants seek entry, a binary regulatory approach views them as either the right or wrong kind of immigrants, and they will either be admitted or rejected on this basis. A continuous variable, on the other hand, can take any value along a range.[6]

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3. It may be useful to express these terms mathematically. Thus, $U.S.|\ [p_1, p_2, p_3, \dots p_{194}]$ where $p$ is a given country. The *U.S.* relates to a vector of countries (e.g., Afghanistan, Albania, Algeria, . . . Zimbabwe), where each country is non-unique for the purposes of the relation.

4. Thus, $U.S.|\ p_1$, $U.S.|\ p_2$, $U.S.|\ p_3$, $\dots U.S.|\ p_{194}$. Of course, the focus of this research is U.S.|Mexico.

5. *See, e.g.*, W.J. Krzanowski, *Discrimination and Classification Using Both Binary and Continuous Variables*, 70 J. AM. STATISTICAL ASSOC. 782, 782 (1975) (noting the "discrete nature" of binary variables).

6. *See, e.g.*, RICHARD COURANT & HERBERT ROBBINS, WHAT IS MATHEMATICS? 274 (2d ed. 1996) ("The domain of variability of a continuous variable may be extended to infinity.").

Instead of categories that are coarse and stark, continuous regulation allows gradations, fine-tuning, and just-in-time adjustments. With binary regulation, the United States has no responsibilities for immigration until the migrants materialize at its doors or are discovered in its interior. With continuous regulation, the U.S. shares responsibility for the ongoing patterns of sending and receiving migrants.[7]

## B. Choosing Mexico

Because resources are limited, simultaneously pursuing 194 unique immigration policies is not feasible. It is obvious that a bi-state approach to immigration regulation requires some prioritizing. It is equally obvious that the U.S./Mexico policy would quickly make its way to the top of the priority list.

Table 1. Foreign-Born Population in the United States, 2007

| | |
|---|---|
| Mexico | 11,739,000 |
| China | 1,930,000 |
| Philippines | 1,701,000 |
| India | 1,502,000 |
| El Salvador | 1,104,000 |
| Vietnam | 1,101,000 |

Table 1 estimates the relative flows of immigrants from the top sending-countries.[8] Suppose that a bi-state method of immigration regulation has some competitive advantage over the conventional, user-indifferent interface. The United States could capture a tremendous amount of that advantage by developing bi-state policies for the six countries on this list, while

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7. When we re-conceive immigration regulation as a continuous enterprise, United States efforts at foreign development properly become a form of migration policy. Following the New Economics of Labor Migration research, the United States can manage migration flows by, for example, helping to correct lapses in capital, employment, and insurance markets in the sending country. *See infra* notes 39-43 and accompanying text.

8. *See* ELIZABETH M. GRIECO, U.S. CENSUS BUREAU, RACE AND HISPANIC ORIGIN OF THE FOREIGN-BORN POPULATION IN THE UNITED STATES: 2007 tbl.2 (2010).

keeping the user-indifferent interface for the remaining 188 potential sending states.[9]

A glance at Table 1 confirms that Mexico is, far and away, the most important piece of the U.S. immigration puzzle. Specifically, the size of the Mexican-born population is more than six times the size of the second-largest population, the Chinese-born. Following the numbers, this essay attempts to contribute to the literature on U.S./Mexico immigration regulation.

### C.    Defining the Migrating Person

The next step in designing a Mexico-specific user interface is to establish the characteristics of a population of relevant users. In the U.S./Mexico field, as the essay has defined it, the "Migrating Person" (MP) represents a member of that set of Mexicans who intend to migrate to the United States in order to support his family with his low-skilled labor.[10]

The MP is thus understood as a migrant-in-context. The individual migrant is seen in the context of both his actual community (the family he supports and by whom he is sustained) and his operational community (the means of his labor, by which he supports his family). Because of the significance of support, the members of the MP's family must be defined narrowly to include only spouse, minor children, and elderly parents of both MP and spouse who lack other means of support.[11]

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9. Some "sender-specific" migration works include: KEVIN R. JOHNSON & BERNARD TRUJILLO, U.S. IMMIGRATION LAW REFORM AND THE U.S./MEXICAN BORDER: SI SE PUEDE? (forthcoming 2011) (on file with author) (Mexico); Michael A. Olivas, *The Arch of Triumph and the Agony of Defeat: Mexican Americans and the Law* (University of Houston Law Center, Public Law & Legal Theory Research Paper Series, No. 2010-A-18, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1658516## (Mexico); Anupam Chander, *Diaspora Bonds*, 76 N.Y.U. L. REV. 1005, pt. 4 (2001) (India); Kevin R. Johnson, *An Essay on Immigration, Citizenship, and U.S./Mexico Relations: The Tale of Two Treaties*, 5 SW. J.L. & TRADE AMERICAS 121 (1998) (Mexico); Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 LAW & CONTEMP. PROBLEMS 1 (2009); J. Edward Taylor et al., *Migration and Incomes in Source Communities: A New Economics of Migration Perspective from China*, 52 ECON. DEV. & CULTURAL CHANGE 75 (2003) (China); Bernard Trujillo, *Immigrant Visa Distribution: The Case of Mexico*, 2000 WIS. L. REV. 713 [hereinafter Trujillo, *Case of Mexico*] (Mexico) (arguing for demand-sensitive visa distribution).

10. The low-skilled labor migrant is a huge share of the Mexican migration to the United States. *See* JOHNSON & TRUJILLO, *supra* note 9, ch. 8.

11. This definition of family already exists in the federal regulations governing immigration law. *See* 8 C.F.R. § 235.1(g)(1) (2010) (application for Canadian Border Boat Landing Permit). Other instances of legal notice of social support include dependents in tax law, and support in family law.

At first glance, this focus on the Mexican worker/provider might seem to be an instance of the law-and-economics approach to immigration law, which also argues that we should increase our attention to the migrant-as-worker.[12] A notable example of the law-and-economics approach to immigration is the work of Adam Cox and Eric Posner, who have clarified the role that "screening" plays in immigration policy.[13] To Cox and Posner, "[t]he world presents a large pool of potential immigrants, and states have to figure out how to separate those immigrants it considers desirable from those it does not."[14] Other work has suggested that the U.S. should shift its focus away from family-based immigration and move more resources towards employment-based immigration, perhaps learning from Canadian immigration policies that are designed to attract skilled and employable migrants.[15]

If one accepts the premise that migrants are primarily resources to be harvested for the economic benefit of the receiving-state, then one may conclude that the State's job is to screen migrants. This essay questions both that premise and that conclusion. We thus focus on two questions: (i) what is a migrant; and (ii) what is the role of the state in regulating migration.

What is the unit of analysis this essay is calling the "migrant"? In the conventional neo-classical storyline, the migrant, as an economic actor, is a solo performer.[16] He may be more or less rational, more or less free. He may do a better or worse job of gathering information and maximizing wealth. He may or may not have the arm to wield surely his power to con-

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12. *See infra* notes 13-15 and accompanying text.

13. Adam B. Cox & Eric A. Posner, *The Rights of Migrants: An Optimal Contract Framework*, 84 N.Y.U. L. REV. 1403, 1407 (2009) [hereinafter Cox & Posner, *Rights of Migrants*]; *see also* Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 809 (2007) [hereinafter Cox & Posner, *Second-Order*].

14. Cox & Posner, *Rights of Migrants*, *supra* note 13; *see also* Cox & Posner, *Second-Order*, *supra* note 13.

15. *See* Stephen Macedo, *The Moral Dilemma of U.S. Immigration Policy*, *in* DEBATING IMMIGRATION 67 (Carol A. Swain ed., 2007); GEORGE BORJAS, FRIENDS OR STRANGERS: THE IMPACT OF IMMIGRANTS ON THE U.S. ECONOMY 218-25 (2007). *But see* Matthew Lister, *Immigration, Association, and the Family*, LAW & PHIL. (forthcoming 2010) (on file with author). Lister has argued in favor of retaining emphasis on family-based immigration policies, contrary to the law-and-economics trend, in favor of more employment-based immigration. *Id.* Lister bases his argument on the rights that citizens have to free association. *Id.* My argument differs from Lister's in that I regard the families of all, citizens and non-citizens alike, to be intrinsic to the "principal" (i.e., the citizen seeking family unification benefits, or the non-citizen entering to work).

16. *See, e.g.*, ODED STARK, THE MIGRATION OF LABOR 26 (1991) (noting that the conventional "focus of migration theory" has been "individual independence," and arguing instead for a focus on "mutual interdependence").

tract.[17] But whatever he does, he is elementally alone. His character takes the form of a prime, not a composite, number.[18] This is sacred to the neo-classical canon.[19]

By contrast, this essay defines the migrant not as an isolated iota, but rather as an iota raised to the power of a set of family members.[20] Observing the nonlinearity in the expression, I argue that each migrant is a complex system. The role of dependent family members is not affective (pictures in a wallet) nor modular and severable (the next term after the + sign),[21] but rather intrinsic and operational. The MP carries inside of him each of his family members, such that the total quantity is more than (or sometimes less, but never equal to) the sum of its parts.[22] The immigration regulator must countenance the subjects of support, whether they reside in the host or sending country.

What is the role of the state when it deals with migrants? For Cox and Posner, the role of the state is to sort migrants into piles of "useful" and "less useful," based on certain criteria (e.g., skills that may spur economic growth).[23] The state then contracts with the useful migrants, for the ultimate benefit of the state and the potential ancillary benefit of the migrants.[24] In this way, immigration law acts as the Human Resources Department of "U.S.A., Inc."

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17. *See generally* GARY S. BECKER, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR 3-14 (1976) (describing information limitations and other limitations on the behavior of the rational actor).

18. *See, e.g.,* STARK, *supra* note 16, at 5 (characterizng immigration modeling as conventionally "individual independence," i.e., taking the actor as a prime, a unit of analysis incapable of being boiled down, rather than "mutual interdependence," i.e., a composite, a unit of analysis that contains important component parts).

19. *See* Michael Todaro & Lydia Maruszko, *Illegal Migration and U.S. Immigration Reform: A Conceptual Framework*, 13 POPULATION & DEV. REV. 101 (1987) (refining the micro theory of neoclassical economics and applying this theory to individual migrants).

20. This re-definition does not merely accrete, but rather complexifies, the iota.

21. Thus, $\iota_1 + \iota_2 + \iota_3 + \ldots \iota_n$, where $\iota_1$ represents the anchor spouse and each subsequent $\iota$ represents the family members. For an example of modular treatment of migrants' families, see Cox & Posner, *Rights of Migrants*, *supra* note 13, at 1438-41. In this sense, the families of migrants are a sort of baggage.

22. We can thus define a given MP as $\iota^\theta_n$, where the $\iota$ is raised to the power of a given family (shown as $\theta$). *See* STEVEN H. STROGATZ, SYNC: THE EMERGING SCIENCE OF SPONTANEOUS ORDER 50-51 (2003) (defining linearity as modular (the whole being equal to the sum of its parts) and nonlinearity as capable of complex behavior). *See generally* Bernard Trujillo, *Randomness and Complexity in Social Explanation: Evidence From Finance and Bankruptcy Law*, 24 GA. ST. U. L. REV. 913, 915 (2008) (discussing legal applications of nonlinear models).

23. *See* Cox & Posner, *Rights of Migrants*, *supra* note 13.

24. *See id.* at 1408.

Alongside the view that the host nation is solely a consumer of migrants, this essay suggests that the state also bears the burden of providing for migrants. Persons are real and durable in a way that states are not. It is unavoidable that states will ask, "what's in it for us?" But the twin aspiration of U.S. immigration policy continues by asking, "what would we be if we did not?" It is this second question that animates, for example, policy regarding refugees and asylum.[25]

Having suggested that the state has a role in providing for the MP, the essay turns now to survey the data.

## II. IF YOU HAVE THE FACTS, ARGUE THE FACTS

In a world without nations and nations' laws, what would we observe about migration? Suppose migration was entirely a product of human behavior, regulated by endogenous factors such as actors' incentives and unregulated by exogenous factors such as law. Asking the question "What do migrants want?," we turn to social science data provided by sociology and economics.

Sociologist Douglas Massey and his colleagues have compiled and analyzed a tremendous amount of data on Mexican migration.[26] These data contain much information about what migrants want and what they will withstand to get it.[27]

At least two theses arise from the Massey data. First, Mexican migrants cross into the United States in order to work.[28] The Mexican to U.S. flow seems less dependent on border enforcement than on the strength of the U.S. economy.[29] A second thesis concerns the phenomenon of return mi-

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25. *See generally*, U.N. High Comm'r for Refugees, *The State of the World's Refugees: A Humanitarian Agenda* (Jan. 1, 1997), http://www.unhcr.org/3eb7bb534.html (focusing on refugees' need for human security, rather than states' interest in profiting by admitting non-citizens).

26. *See* MEXICAN MIGRATION PROJECT, http://mmp.opr.princeton.edu/ (last visited Oct. 18, 2010); *see also* DOUGLAS S. MASSEY ET AL., BEYOND SMOKE AND MIRRORS: MEXICAN IMMIGRATION IN AN ERA OF ECONOMIC INTEGRATION 52-53 (2003) (referencing data collected by the Mexican Migration Project).

27. *See* MASSEY ET AL., *supra* note 26; MEXICAN MIGRATION PROJECT, *supra* note 26.

28. *See* CROSSING THE BORDER: RESEARCH FROM THE MEXICAN MIGRATION PROJECT 6-7 (Jorge Durand & Douglas S. Massey eds., 2006) [hereinafter CROSSING THE BORDER] (arguing that Mexicans migrate to earn income in order to overcome Mexico-specific market failure, e.g., mortgage market).

29. *See When Less is More: Border Enforcement and Undocumented Migration: Hearing Before the Subcomm. on Immigr., Citizenship, Refugees, Border Sec., and Int'l Law*, 110th Cong. 4 (2007) (statement of Douglas S. Massey) [hereinafter Statement of Douglas S. Massey] (stating that Mexican migration continues during buildups of border controls); JEFFREY S. PASSEL & D'VERA COHN, MEXICAN IMMIGRANTS: HOW MANY COME? HOW MANY LEAVE?, at i (2009), *available at* http://pewhispanic.org/reports/report.php?Report

gration.[30] Return migration describes a situation in which a migrant enters the host country to work and after a time returns to the sending country.[31] This cycle might be repeated seasonally, over many years.[32]

According to the Massey data, return migration, which had been the normal expectation of the low-skilled Mexican migrant, has been interrupted by U.S. efforts at enhanced border control.[33] While the flows from Mexico continue, they become one-way, affecting what this essay will call "northern capture."[34] The migrants who cross to the United States choose to remain in the United States rather than return to Mexico and bear anew the risks of crossing.[35]

An intriguing, and perhaps counter-intuitive, implication of the Massey data is that the "best" border control might be a weak border control. With weakened border control, we might see more return migration and less northern capture. Weakened border control would not only reduce costs borne by the U.S. (e.g., northern capture), it would also reduce the severe costs borne by migrants, such as border deaths and coyote hijackings.[36]

Economic research complements the picture of migrant behavior. Classical "push/pull" stories represent the migrant as a ball on a slope: If the wage differential between a sending and receiving country crosses a certain

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ID=112 (noting that the inflow of immigrants from Mexico to the United States has declined since the middle of the decade).

30. *See* CROSSING THE BORDER, *supra* note 28, at 12; MASSEY ET AL., *supra* note 26, at 130-33 (theorizing that increased border control lowers return migration probability).

31. The New Economics of Labor Migration (NELM) research provides theoretical backing to the "return migration" phenomenon. *See infra* note 40.

32. *See id.*

33. *See* CROSSING THE BORDER, *supra* note 28, at 12 (prior to 1992, the probability of a Mexican migrant returning to Mexico was between .60 and .70; by 1996, the probability was .45). The Mexican Migration Project estimates that by 2007, the probability had dropped to .05. *See Probability of Return Within 12 Months*, MEXICAN MIGRATION PROJECT, http://mmp.opr.princeton.edu/results/010returnpers-en.aspx (last visited Oct. 29, 2010).

34. *See generally* Alfredo Corchado, *Immigrants' Road to Prosperity Becoming One-Way Route North: Highly Patrolled Border Curtailing Visits Home for Many Mexicans*, DALLAS MORNING NEWS, Sept. 1, 2001, at A1.

35. Mexicans *de afuera* (i.e., those who have migrated out of Mexico and have been subject to northern capture) are self-selected for youth, energy, skills, and intangibles such as daringness. *See* JOHNSON & TRUJILLO, *supra* note 9, ch. 8 (listing data on the characteristics of the migrating population, including youth, skills, and education level). The missing Mexican middle class (i.e., a missing middle in variables such as youth and skills), may have a destabilizing effect on Mexican society, which in turn may make it more likely prey for political and narcotics-based corruption.

36. *See* Statement of Douglas S. Massey, *supra* note 29, figs.4 & 6 (data on border deaths and coyote costs); Randal C. Archibold, *72 Migrants Found Dead on a Ranch in Mexico*, N.Y. TIMES, Aug. 26, 2010, at A4 (reporting seventy-two migrants killed by drug hijackers on ranch).

threshold, the ball rolls down the slope (i.e., the migrant leaves home for host country in search of better wages).[37] Neo-classical theories of migration continue this focus on wage differentials between the sending and receiving countries.[38]

More recent research, generally called the "New Economics of Labor Migration" (NELM), attempts to flesh out the neo-classical story in at least two ways.[39] First, NELM suggests that the migrant does not act in isolation, but rather as a representative or agent of his or her family.[40] The household, in effect, sends the migrant as a sort of financial intermediary both to earn income that helps the household to achieve specific goals, and to overcome certain limitations in the home economic environment.[41] These limitations appear not only in the local job market, but also in the capital markets and the insurance markets.[42]

Second, this re-casting of the migrant as financial intermediary for his family illuminates the phenomenon of "return migration." In pre-NELM models, return migration was typically seen as a failure of the migrant to achieve her goals.[43] NELM suggests that the migrant planned to return-migrate from the very beginning.[44] NELM thus argues that return migration forms part of the basic structure of migration and is not the result of migrant miscalculation.

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37. Examples of push/pull models, also called "gravity" models, are Samuel A. Stouffer, *Intervening Opportunities: A Theory Relating Mobility and Distance*, 5 AM. SOC. REV. 845 (1940), and Everett S. Lee, *A Theory of Migration*, 3 DEMOGRAPHY 47 (1966).

38. The Harris-Todaro model is the basic statement of the neo-classical story. *See* John R. Harris & Michael P. Todaro, *Migration, Unemployment, and Development: A Two-Sector Analysis*, 60 AM. ECON. REV. 126 (1970).

39. Significant proponents of NELM research include J. Edward Taylor and Philip Martin. *See, e.g.*, J. Edward Taylor & Philip L. Martin, *Human Capital: Migration and Rural Population Change, in* 1A HANDBOOK OF AGRICULTURAL ECONOMICS 457 (Bruce L. Gardner & Gordon C. Rausser eds., 2001).

40. J. Edward Taylor, *Migration Models, in* ENCYCLOPEDIA OF POPULATION 640 (Paul George Demeny & Geoffrey McNicoll eds., 2003) ("NELM models hypothesize that migration decisions are made not by isolated actors but by larger units of related people, typically households or families; that people act collectively not only to maximize income but also to minimize risks and loosen constraints created by various inadequacies of markets in source areas, including missing or incomplete capital and insurance markets; and that migration decisions may be influenced by the behavior of other actors within the prospective migrant's social group.").

41. *See id.* at 643.
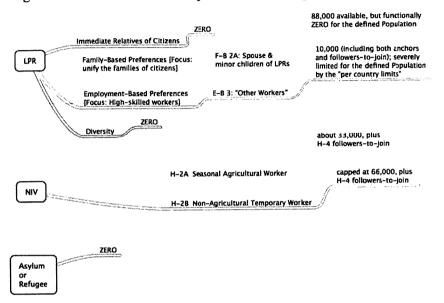
42. *See id.* at 255.

43. *See* Jean-Pierre Cassarino, *Theorising Return Migration: The Conceptual Approach to Return Migrants Revisited*, 6 INT'L J. ON MULTICULTURAL SOCIETIES 253, 255 (2004).

44. *See id.*

### III. IF YOU HAVE THE LAW, ARGUE THE LAW

The essay has defined a population of Mexican MPs as those who migrate to the United States in order to support their families by providing low-skilled labor in exchange for wages. What does U.S. immigration law provide for that population? Figure 1 shows that the answer is "not much."

Figure 1. Lawful Means of Entry for Mexican Migrating Persons



There are three main ways of gaining lawful entry into the United States: "Legal Permanent Resident" (LPR) admission, "Non-Immigrant Visa" (NIV) admission, and admission as a refugee or through asylum.

LPR admissions, also known as "green cards," provide minimal access for Mexican MPs. Six hundred and seventy five thousand green cards are available annually,[45] and the vast majority of them go to unify the families

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45. *See* Immigration and Nationality Act of 1965 § 201, 8 U.S.C. § 1151 (2006). There are 480,000 family-sponsored visas. *Id.* § 1151(c). The actual distribution of these visas will vary based on the number of visas distributed to immediate relatives of citizens under § 1151(b)(2)(A). *See id.* § 1151(b)(2)(A) There are 140,000 employment-sponsored visas. *See* § 1151(d)(1)(A). There are 55,00 diversity visas. *See id.* § 1151(e). This number has been reduced to 50,000 for the foreseeable future based on distributions under the Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, § 203(d)(1), 111 Stat. 2160 (1997).

of citizens.[46] The largest, uncapped category is available only to citizens who bring in their immediate family members.[47] The second largest category, capped at 480,000 green cards annually, is primarily dedicated to unifying the families of citizens, but 88,000 of the green cards belonging to this group are available to bring in the spouse and minor children of those who are already LPRs.[48] Since the anchor spouse must already have the status of an LPR, this category is effectively unavailable to the previously defined Population of Mexican MPs.

Of the 140,000 "employment-based" green cards that can be distributed annually,[49] most of them are available only to bring in highly-skilled and well-educated workers, or migrants with substantial means.[50] Of these 140,000 employment-based green cards, only 10,000 are available for members of the defined Population,[51] and that number is substantially diminished by imposition of the per-country limits.[52] For a Mexican applicant, the waiting time for one of these green cards can run upwards of nine years.[53]

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46. Green cards are distributed, without annual quota, to the immediate relatives of citizens. *See* 8 U.S.C. § 1151(b)(2)(A). Among the five family-sponsored visa categories listed at § 1153(a), three go to unite the families of citizens. *See id.* 1153(a)(1), (3), (4). The other two categories are available for the families of Legal Permanent Residents. *See id.* § 1153(a)(2)(A) (spouses and children); *id.* § 1153(a)(2)(B) (unmarried sons and daughters under twenty-one years of age); *see also id.* § 1101(b)(1).

47. *Id.* § 1151(b)(2)(A)(i) (defining immediate relatives of citizens).

48. *See* 8 U.S.C. § 1153(a)(2)(B) (authorizing a target of 114,200 green cards to be distributed in the family-sponsored category for LPRs, with not less than .77 of that number (87,934) going to unify LPRs with their spouses and minor children). As always, actual visas will vary, since the number of family-sponsored visas is adjusted based on the number of visas distributed to the immediate relatives of citizens under 8 U.S.C. § 1151(b)(2)(A). *See id* § 1153(a)(2)(B).

49. *See id.* § 1151(d)(1)(A).

50. *See id.* § 1153(b) (authorizing the employment-based preference categories). All of the employment-based visas except those specified in § 1153(b)(3) (known as "EB-3" visas) are available only to professional workers or entrepreneurs. *See id.*

51. The defined Population comprises the "other workers" section of EB-3. *See id.* § 1153(b)(3)(A)(iii), (b)(3)(B). The 10,000 visas available in the "other workers" section of EB-3 have been reduced to 5000 for the foreseeable future based on distributions under the Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, § 203(e), 111 Stat. 2160 (1997).

52. *See* 8 U.S.C. § 1152(a)(2). In earlier work, I have criticized the application of the per-country limits in the Mexican case. *See* Trujillo, *Case of Mexico, supra* note 9, at 718-19 (critiquing demand-insensitive distribution of goods).

53. The Department of State (DOS) releases a monthly bulletin used by practitioners to estimate the waiting time for a green card. *See* U.S. DEP'T OF STATE, *Visa Bulletin*, TRA-VEL.STATE.GOV, http://travel.state.gov/visa/bulletin/bulletin_1360.html (last visited Dec. 1, 2010) (providing links to upcoming, current, and archived visa bulletins). For an extended discussion of the DOS visa bulletin, see Trujillo, *Case of Mexico, supra* note 9. In figure one, the horizontal axis specifies the sending country; the vertical axis specifies the prefe-

The final set of green cards is available by lottery to applicants from fa-vored nations, mostly in Europe and Africa.[54] Applicants from Asia and Latin America have severely limited access to this set of 55,000 "diversity" green cards, and access for applicants from the highest traffic countries, in-cluding Mexico, is barred completely.[55]

Besides green cards, migrants can also gain lawful admission as "non-immigrant visa-holders" (NIVs).[56] United States immigration law general-ly countenances that NIVs will come to the United States for a limited time only, and then return to the sending country.[57] There are many NIV cate-gories, most of them dedicated to high-skilled workers, short-term visitors, and students.[58] Members of the Mexican MP Population generally enter on either the H-2A (farm-worker) or the H-2B (non-agricultural temporary worker) category.[59] There is no annual cap on H-2A visas, but data from 2002 to 2006 shows that an average of about 33,000 are distributed each year.[60] H-2B visas are capped annually at 66,000.[61] Spouses and minor children of these NIVs can "follow-to-join" the anchor spouse.[62]

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rence category under which the applicant is seeking admission; the date in the cell is the ap-plication date of those for whom visas are now available. Trujillo, *Case of Mexico, supra* note 9, at 713-14 fig.1. Literally, a "waiting time of nine years" means that applicants who applied nine years ago are now receiving visas.

54. *See* 8 U.S.C. § 1153(c); U.S. DEP'T OF HOMELAND SEC., 2006 YEARBOOK OF IMMI-GRATION STATISTICS 32 tbl.11, *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2006/OIS_2006_Yearbook.pdf (describing the distribution of diversity visas by region).

55. *See* 8 U.S.C. § 1153(c)(1)(B)(i)(I) (requiring the Attorney General to identify "high admissions states" for exclusion from the diversity lottery); GORDON ET AL., IMMIGRATION LAW AND PROCEDURES, *supra* note 2, § 40.4(5)(b) ("Natives of the following nineteen coun-tries were excluded from participating in the DV-2010 program because they sent a total of more than 50,000 immigrants to the United States in the previous five fiscal years: Brazil, Canada, China (mainland-born), Colombia, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, India, Jamaica, Mexico, Pakistan, the Philippines, Peru, Poland, South Korea, the United Kingdom (except Northern Ireland) and its dependent territories, and Vietnam.").

56. *See* 8 U.S.C. § 1101(a)(15).

57. *See, e.g., id.* § 1101(a)(15)(B) (stipulating that an applicant must convince an immi-gration officer that the applicant has a home in the sending country to which she intends to return).

58. *See generally id.* § 1101(a)(15)(A)-(V). For example, § 1101(a)(15)(B) covers visi-tors for business or pleasure and § 1101(a)(15)(F) covers foreign students.

59. *See id.* § 1101(a)(15)(H).

60. *See* DEP'T OF HOMELAND SEC., NONIMMIGRANT VISAS ISSUED BY CLASSIFICATION FISCAL YEARS 2002-2006 tbl.XVI(B) [hereinafter DHS FY2002-06].

61. *See* 8 U.S.C. § 1184(g)(1)(B). Despite the fact that the number is capped by statute, the data show that an average of 75,000 H-2B visas were distributed from 2002 to 2006. *See* DHS FY2002-06, *supra* note 60.

62. *See* 8 U.S.C. § 1101(a)(15)(H)(iii). The last sentence of § 101(a)(15)(H)(iii) autho-rizes admission of the spouse and immediate family members of the H-3 applicant; these are

Finally, a migrant can enter the United States as a refugee, or be granted asylum upon showing a well-founded fear of persecution if returned to the sending country.[63] Unless a member of the defined Population (i.e., Mexicans coming to support families with low-skilled labor) happens to also possess a well-founded fear of persecution (say, from drug corruption), the refugee and asylum categories are largely unavailable to these MPs.

In summary, the members of the defined Population may have a shot at a few hundred employment-based green cards, for which they will have to wait over nine years. They also have access to about 100,000 NIVs annually. All told, there are about 100,000 lawful entry points for low-skilled laborers, a remarkably low number, given the typically huge demand for such labor.[64]

In light of these numbers, what can be expected? The rational U.S. regulator must expect that both the suppliers and demanders of low-skilled labor will resort to self-help mechanisms that circumvent the law. "Enforcement first" bromides ring hollow when the rules to be enforced are so completely out of touch with reality.

## CONCLUSION

The regulatory environment should adapt to the facts in at least four ways. First, U.S. immigration law should move from a "user-indifferent" interface to a series of bi-state analyses. Foremost among these analyses should be an immigration interface that is specific to the U.S./Mexico relationship. Second, U.S. immigration law should more sharply define the Mexican MP. It should reject conventional modular definitions of the migrant and understand the Mexican MP in the context of the family, both as an object of support and subject of sustenance. Third, the state, as regulator of migration, should likewise be more sharply defined. Alongside the image of state-as-consumer-of-migrants, we should resuscitate the image of state-as-provider. Last, U.S. immigration law, thus re-conceived, must broaden its notice of the family. The law already commits substantial resources to provide for the families of U.S. citizens. In order to properly and effectively regulate migration, the law must recognize that it also owes a duty to Mexican families.

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the so-called "H-4" admissions. *See* 8 C.F.R. § 214.1(a)(2) (2010). It is not clear how many low-skilled NIVs utilize the H-4 "following to join" provisions. Data from 2002 to 2006 show an average of only about 75,000 H-4 visas per year, with many of those going to the "followers to join" of high-skilled anchor spouses. *See* DHS FY2002-06, *supra* note 60.

63. *See* 8 U.S.C. § 1231(b)(3)(A).

64. *See* JOHNSON & TRUJILLO, *supra* note 9, ch. 5.