

AMERICAN PURGATORY: THE CASE FOR LEGALIZATION OF UNDOCUMENTED IMMIGRANTS

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ABSTRACT

“I have left my home and I have left my two children, and I don't know if I will see them again. . . .” These are the words of one of approximately 12 million undocumented immigrants living in the U.S. today. Congress has not passed a law directly addressing undocumented immigrants since 1986. In part, that is because immigration presents difficult and polarizing problems. The immigration problems of today are shaped by a long history of immigration into the U.S. Immigration from Mexico in particular has shaped American immigration policy. Research shows that the results of American immigration policy have not been in line with its goals. Nevertheless, the immigration status quo is deeply entrenched. This essay analyzes the history of Mexico-U.S. immigration from both a legal and a sociological perspective. It also analyzes the effectiveness of American immigration policy at achieving its goals using empirical data. This essay then proposes that Congress pass “retroactive earned citizenship” to address the settled undocumented population.

I. INTRODUCTION

The wall along the Mexico-U.S. border is now under construction. This marks the current peak of more than thirty years of ratcheting up border security. Thirty years of measures aimed at stopping undocumented immigration from Mexico. Ironically, as explained more fully below, studies show that border enforcement is not an effective way to stop undocumented immigration. In fact, according to the data, increased border enforcement helped cause the settled undocumented population to grow.

The irony does not end there. Entry of new undocumented immigrants has not been a serious problem since 2008.¹ For eleven years much political controversy has been focused on the particular problem of

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¹ Every year since 2008, there has been a net outflow of undocumented immigrants. Jorge Durand & Douglas S. Massey, *Debacles on the Border: Five Decades of Fact-Free Immigration Policy*, 684 ANNALS AM. ACAD. POL. AND SOC. SCI. 6, 12 (2019).

undocumented border crossing which largely ceased to be an issue over those same eleven years.² The current, real problem is that there are millions of undocumented immigrants living in the U.S. While this has also garnered public and political attention, Congress has done little to meaningfully address it.

In this realm, there has been much criticism and commentary. One source of criticism of American immigration policy is the studies that look at how Mexicans make migration decisions. The major source of data on this topic is the Mexican Migration Project (“MMP”).³ The MMP has been gathering data on Mexico-U.S. immigration since 1982 and has currently surveyed over 170,000 individuals. The researchers used this data to create a comprehensive picture of Mexico-U.S. immigration from 1905 to the present.

The MMP research shows flaws in how the U.S. has approached immigration policy. It also can help policy makers to more accurately analyze the individual decisions made by people who cross the border without authorization. The most recent studies using MMP data are mainly focused on how undocumented immigrants living in the U.S. are affected by their lack of legal status. These studies highlight Congress’s failure to address the undocumented population, but they do not consider the difficulty of achieving reform in immigration law.

Apparently the MMP research has fallen on deaf ears in the law-making world, since lawmakers continue to support increases in border enforcement that have had counter-productive effects.⁴ It is also possible that lawmakers are well aware of the MMP research, but immigration reform has not been achievable. Legal scholars

² For clarification, the focus of this essay is Mexican people who come to the U.S. to work without the proper authorization. A separate issue is the people fleeing violence in Central America and coming to the U.S. in search of asylum. Asylum seekers believe that they have a legal basis to enter the U.S. with refugee status and are not attempting to illegally cross the border. Many factors could cause an increase in asylum seekers such as the continued violence in Central America, the collapse of economies like in Venezuela, or increased flooding and storms due to climate change. If there is an increase in the number of asylum seekers, that would implicate different policy issues because asylum seekers are not trying to evade detection at the border. See 8 U.S.C. § 1158 (2018); Silvia Foster-Frau et al., *Biden Faces Border Challenge as Migrant Families Arrive in Greater Numbers and Large Groups*, WASHINGTON POST, (Feb. 7, 2021, 5:50 PM), https://www.washingtonpost.com/national/migrant-families-us-border-biden/2021/02/07/1bf05212-6970-11eb-9ed1-73d434b5147f_story.html.

³ “The Mexican Migration Project (MMP) was created in 1982 by an interdisciplinary team of researchers to further our understanding of the complex process of Mexican migration to the United States. The project is a binational research effort co-directed by Jorge Durand, professor of Social Anthropology at the University of Guadalajara (Mexico), and Douglas S. Massey, professor of Sociology and Public Affairs, with a joint appointment in the Woodrow Wilson School, at Princeton University (US).” MEXICAN MIGRATION PROJECT, <https://mmp.opr.princeton.edu> (last visited January 24, 2020) [<https://perma.cc/KCM5-2SJA>].

⁴ Perhaps border enforcement has become more of a symbolic issue, as the public has lost faith in the federal government’s ability to effectively deal with undocumented immigration. This is the thrust of a feedback loop theory of immigration law. In the feedback loop theory, ineffective enforcement leads to public outcry which leads to symbolic enforcement measures that are equally ineffective. See *infra* Part III.

have set out the practical and structural barriers to immigration reform. Justice Mariano-Florentino Cuéllar provides a particularly comprehensive account in his article *The Political Economies of Immigration Law*⁵, published as part of the *Persistent Puzzles in Immigration Law* symposium⁶.

Another possibility is that lawmakers are aware that border enforcement incentivizes settlement and are purposely implementing an ex post regime⁷ of immigration enforcement. In their article, *The Second-Order Structure of Immigration Law*, Adam Cox and Eric Posner discuss the benefits of an ex post regime and characterize the status quo as a de facto ex post regime. However, Cox and Posner anticipated the passage of the Comprehensive Immigration Reform Act of 2006, which would have legalized many undocumented immigrants. Without a legalization of at least some undocumented immigrants, the picture of the status quo as an ex post regime is incomplete.

This essay aims to integrate the perspectives of the social science community and the legal community in a single analysis. It will then use these integrated perspectives to build on Cox and Posner's framing of the policy dilemma of undocumented immigrants who are settled in the U.S.⁸

Part I summarizes the rich picture of Mexico-U.S. immigration drawn by the MMP. The purpose of this part is twofold: (1) it serves to contextualize the decision to leave Mexico in search of work in the U.S., even without legal work authorization and in the face of an ever more difficult journey; and (2) it reveals how increased border enforcement has failed to achieve its goal, producing the unintended consequence of permanent settlement of seasonal migrants in the U.S.

Part II draws deeply from Justice Cuéllar's article, *The Political Economies of Immigration Law*,⁹ to examine the political barriers to immigration reform. This is important because it is only rational for Congress to pass legislation that works to keep political support. Part III analyzes the philosophy underlying the two main

⁵ Mariano-Florentino Cuéllar, *The Political Economies of Immigration Law*, 2 U.C. IRVINE L. REV. 1 (2012).

⁶ 2 U.C. IRVINE L. REV. 1 – 479 (2012).

⁷ In an ex-post regime, immigrant selection decisions are made using post admission information. Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 812 (2007).

⁸ Whether immigration is generally good or bad for the U.S. and how much immigration is the right amount can be debated. This essay does not attempt to answer those questions. The focus is the millions of people without legal status who have been living in the U.S. for decades.

⁹ Cuéllar, *supra* note 5.

approaches to legalization, amnesty and earned citizenship. The philosophy affects each approach's political palatability and how the undocumented population would assimilate into American society.

Part IV surveys the harms experienced by undocumented immigrants to provide a humanitarian justification for integrative policy choices. Part V proposes that there were justifications for the individual border crossings, implying that legalization is not equivalent to amnesty. Finally, using the tools from the first five parts, Part VI suggests that it is time for Congress to pass legislation to legalize deserving undocumented immigrants. The subset of undocumented immigrants who should be eligible for naturalization are those who have been present in the country for at least ten years and do not have a felony conviction. This is an integrative legalization regime that would be more suitable to enactment by Congress than previous attempts at immigration reform.

II. MEXICAN IMMIGRATION OVER THE LAST CENTURY

Immigration from Mexico into the U.S. to satisfy labor demand began between 1905 and 1907.¹⁰ Over the next hundred years, changes in circumstances caused periods of high and low inflow of immigrants from Mexico with varying legal statuses.¹¹ Using data from the Mexican Migration Project, researchers have analyzed migration behavior of Mexicans and identified distinct eras of migration.¹²

A. Legal Beginnings: Recruitment, Expulsion, Recruitment

The first era, from 1905 to 1942 which this essay will refer to as Recruitment and Expulsion, is defined by recruitment in the beginning and expulsion at the end.¹³ In the beginning of this era, there was no border enforcement at all, and Mexican workers moved back and forth across the border freely.¹⁴ It was common practice for employers to go to Mexico in search of cheap labor.¹⁵ The influx of Mexican labor ended when the Great Depression led to mass deportation of Mexicans through the 1930s.¹⁶ With the arrival of WWII, labor

¹⁰ Jorge Durand & Douglas S. Massey, *Evolution of the Mexico-U.S. Migration System: Insights from the Mexican Migration Project*, 684 ANNALS AM. ACAD. POL. AND SOC. SCI. 21, 29 (2019).

¹¹ *Id.* at 29–31.

¹² *Id.* at 31.

¹³ *Id.* at 35.

¹⁴ *Id.* at 33.

¹⁵ *Id.* at 35.

¹⁶ *Id.* at 30.

shortages caused the American government to negotiate a labor treaty with Mexico.¹⁷ This labor treaty started the Bracero Era.¹⁸

In the Bracero Era, temporary worker visas were widely available to Mexicans.¹⁹ In the period from 1942 to 1964, around 4.6 million Mexicans traveled to the U.S. on temporary worker visas.²⁰ The people using these visas were not staying in the U.S.; they came to the U.S. and worked for part of the year, then returned to Mexico.²¹

In the middle of this era, Congress made it a misdemeanor to cross the border at a non-designated time or place, to elude examination by immigration officials, or to obtain entry to the U.S. with willfully false or misleading representations.²² This did not have a significant impact on Mexican migrants because so many temporary worker visas were available. In the context of the Civil Rights Movement, the Bracero Program was viewed as exploitative, so Congress let it expire in 1964.²³

B. Same Work, Different Status

The end of the Bracero program started the Undocumented Circulation Era. There was still a demand for labor in the U.S. and a large supply of workers in Mexico.²⁴ Networks were now established between American employers and Mexicans looking for work.²⁵ The lack of temporary worker visas did not stop Mexicans from continuing to work in the U.S.²⁶ The only thing that changed from the Bracero Era to the Undocumented Circulation Era was the legal status of the workers.²⁷ The next major change for Mexican workers came in 1986

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 33.

²⁰ *Id.* at 35.

²¹ *Id.* at 34.

²² Immigration and Nationality Act of 1952, Pub. L. No. 414, § 275, 66 Stat. 163, 229 (codified as amended at 8 U.S.C. §1325(a) (2018)).

²³ Durand & Massey, *supra* note 10, at 35. One critique of the Bracero program is that it did not provide a route to citizenship. Mariela Olivares, *The 1986 Immigration Reform and Control Act as Antecedent to Contemporary Latina/o/x Migration*, 37 CHICANA/O LATINA/O L. REV. 65, 67–68 (2020). Another critique is that many of the workers were subjected to “brutal working and housing conditions.” Suzy Khimm & Daniella Silva, *Lured to America—Then Trapped*, NBC NEWS (July 29, 2020), <https://www.nbcnews.com/specials/h2a-visa-program-for-farmworkers-surg-ing-under-trump-and-labor-violations/> [<https://perma.cc/N78L-SG84>]. It is not clear that migrant workers wanted a path to citizenship, but it is certainly bad that they were subjected to such harsh conditions. Whatever the merits and downfalls of the Bracero program, it is not the topic of this essay.

²⁴ Durand & Massey, *supra* note 10, at 35.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

with the Immigration Reform and Control Act (“IRCA”).²⁸ IRCA created a path to legal status for undocumented immigrants who had been in the country for at least four years.²⁹ The IRCA also began the process of militarizing the border that is continuing today.³⁰

C. End of Circulation

IRCA began the Militarization and Settlement Era.³¹ Theoretically, increased border enforcement should reduce immigration into the U.S. by raising the costs of migration.³² Presumably, when contemplating whether to migrate, a prospective migrant will weigh the costs and benefits of each course of action.³³ Since the IRCA, American immigration policy has largely been to raise the costs of immigration to a level where it is not worthwhile to try to immigrate.³⁴

The IRCA was meant to raise the costs of migration by making it harder to cross the border and by making it harder to find work once in the U.S.³⁵ The part of the IRCA that made it harder to cross the border was increasing the amount of border patrol and enforcement.³⁶ The IRCA aimed to make it harder for undocumented immigrants to find work in the U.S. by imposing civil penalties on employers who hire undocumented immigrants.³⁷ The employment restrictions mostly went unenforced,³⁸ so the difficulty of finding work in the U.S. was not increased.

The benefits of migration are so high for many Mexicans that raising the costs did not stop them from coming to the U.S.³⁹ Raising the costs of crossing the border did cause Mexican migrants to stop leaving the U.S. They began to limit their number of border crossings to one—by remaining in the U.S. rather than

²⁸ *Id.*

²⁹ Immigration Reform and Control Act of 1986, Pub. L. No. 99–603, § 201, 100 Stat. 3359, 3394 (codified at 8 U.S.C. 1255(a) (2018)).

³⁰ Durand & Massey, *supra* note 10, at 35–36.

³¹ *Id.*

³² Douglas S. Massey et al., *Why Border Enforcement Backfired*, 121 AM. J. SOC. 1557, 1558 (2016).

³³ Here the word cost is being used in the economic sense. *Id.*

³⁴ *Id.* at 1569.

³⁵ See Immigration Reform and Control Act §§ 101–03, 111–17, *supra* note 29.

³⁶ *Id.*

³⁷ Immigration Reform and Control Act § 101, *supra* note 29.

³⁸ Cuéllar *supra* note 5, at 14.

³⁹ Massey et al., *supra* note 32, at 1564.

returning to Mexico.⁴⁰ Increased border enforcement turned a circular flow of temporary workers into an inflow of permanent settlers.⁴¹

The numbers here are striking. From 1986 to 2017, the border patrol budget skyrocketed from \$330 million to \$3.7 billion.⁴² Within that period, from 1988 to 2008, the undocumented population in the U.S. grew from around 2 million to 12 million at its height.⁴³ This increased investment in border security did not affect the probability that a given Mexican would decide to cross the border without documentation.⁴⁴ It also had little impact on the chances of successful entry by undocumented immigrants.⁴⁵ From 1970 to 2008, the probability of successfully gaining entry to the U.S. for undocumented immigrants from Mexico never fell below 95%.⁴⁶

D. New Legal Circulation

What did finally stop the flow of Mexican immigration was the Great Recession.⁴⁷ Every year since 2008, more undocumented immigrants have exited the U.S. than have entered.⁴⁸ The likely explanation is that the labor market dried up and information about reduced job prospects quickly travelled to prospective migrants in Mexico.⁴⁹ The end of undocumented inflows in 2008 began the current era of Repression and Legal Circulation.⁵⁰

Even though the American labor market has now recovered, undocumented immigration remains low.⁵¹ In part, this is explained by Mexican demographics.⁵² The fertility rate in Mexico has declined from 6.8 children

⁴⁰ *Id.* at 1564–65.

⁴¹ *Id.* at 1582.

⁴² Durand & Massey, *supra* note 1, at 10.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ It became more difficult to cross the border in that migrants had to take more dangerous routes through the Sonoran Desert and rely more on coyotes. It did not become more difficult to cross the border in terms of rate of success. Massey et al., *supra* note 29, at 1578–80.

⁴⁶ *Id.* at 1579.

⁴⁷ Durand & Massey, *supra* note 1.

⁴⁸ *Id.*

⁴⁹ Ricardo Mora Tellez, *A Quick End to a Long Story: Networks and Mexican Migration During the Great Recession*, 684 ANNALS AM. ACAD. POL. AND SOC. SCI. 227, 238–39 (2019).

⁵⁰ Durand & Massey, *supra* note 10, at 37.

⁵¹ Durand & Massey, *supra* note 1, at 13–14.

⁵² Durand & Massey, *supra* note 10.

per woman in 1970 to 2.2 children per woman in 2019, causing the median age to go from 17 to 29.⁵³ There are now fewer Mexicans of an age at which they are likely to migrate.⁵⁴

The decreased flow of undocumented immigrants is also partly explained by the renewed flow of temporary workers.⁵⁵ There is a new system of Mexico-U.S. immigration, and H2 temporary worker visas are the backbone.⁵⁶ H2a is a non-immigrant class of visa for aliens entering the U.S. to engage in temporary agricultural labor.⁵⁷ In the years 2018, 2019, and 2020 there were respectively 196,409, 204,801, and 213,394 H2a visas granted.⁵⁸ This system highlights a duality of treatment between Mexicans seeking temporary work in the U.S. before and after 2008.

Given that undocumented immigration from Mexico has largely ended, it has become a policy issue that does not deserve much attention from lawmakers.⁵⁹ A current policy issue that lawmakers could usefully be focused on is how to treat the undocumented population currently living in the U.S.

III. ENTRENCHMENT OF IMMIGRATION LAW

Since the administration of President George W. Bush, immigration reform has been a major political issue.⁶⁰ There have been many failed attempts under Presidents Bush, Obama, and Trump to pass immigration reform laws.⁶¹ This is not for lack of effort on the part of lawmakers; in 2006 and 2013, the Senate passed

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Durand & Massey, *supra* note 1.

⁵⁶ *Id.* at 18.

⁵⁷ 8 U.S.C. 1101(H)(ii)(a)(2018). These workers are sometimes exploited and mistreated like the Bracero workers. Khimm & Silva, *supra* note 23. This mistreatment is enabled by a lack of internal enforcement, a common thread in American immigration problems. *Id.*

⁵⁸ U.S. DEP'T OF STATE – BUREAU OF CONSULAR AFFAIRS, *Nonimmigrant Visas Issued by Classification (Including Border Crossing Cards) Fiscal Years 2016-2020* (2021), https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2020AnnualReport/FY20AnnualReport_TableXV_B.pdf.

⁵⁹ For the unconvinced reader, this essay will suggest that future immigration policy still includes deterrence for future undocumented immigration. Congress could also take action to address the causes of immigration. One viable solution is direct investment in immigration source countries to create jobs in those countries. Molly E. Kammien, Note, *No More Band-Aid Solutions: Improving Immigration Reform by Addressing the Root Causes of Mexican Migration and Refining Foreign Direct Investment*, 80 BROOK. L. REV. 503, 531 (2015).

⁶⁰ Cuéllar, *supra* note 5, at 53.

⁶¹ *Id.*

immigration reform bills.⁶² The House did not vote on either bill.⁶³ These bills went beyond legalization and enforcement.⁶⁴ They would have expanded the temporary agricultural worker program, modified internal enforcement, and altered other immigration categories.⁶⁵

Congressional gridlock is a powerful obstacle to any type of law but, for immigration law, it is only part of the picture.⁶⁶ The entrenchment of immigration law is more fully explained by looking at policy feedback fuelled by existing statutory compromises, implementation difficulty, and public reactions.⁶⁷

The immigration law status quo mainly takes its shape from the IRCA.⁶⁸ The IRCA was meant to rationalize immigration law through a combination of legalization and enforcement.⁶⁹ Ultimately, it had the effect of widening the gap between the policy goals and outcomes of immigration law.⁷⁰ The IRCA began a period of increasing border enforcement and, for the first time, imposed a requirement on employers to verify their employees' authorization to work.⁷¹

Congress wrote increased border enforcement into the IRCA as an essential element of the immigration control program it established.⁷² Enforcement against employers, on the other hand, was not listed as an essential element of the immigration control program.⁷³ The purpose of the employer restrictions was to deter employment of unauthorized aliens and to remove the economic incentive to use and exploit unauthorized aliens.⁷⁴

⁶² See Border Security, Economic Opportunity and Immigration Modernization Act of 2013, 744 S., 113th Cong. (2013); see also Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006); Andy Barr, *The GOP's No-Compromise Pledge*, Politico (Oct. 28, 2010, 8:09 AM), <https://www.politico.com/story/2010/10/the-gops-no-compromise-pledge-044311> [<https://perma.cc/RD6T-WG5F>].

⁶³ Barr, *supra* note 59.

⁶⁴ S. 744, 113th Cong. (2013); S. 2611, 109th Cong. (2006).

⁶⁵ See generally *id.*

⁶⁶ Cuéllar, *supra* note 5, at 9.

⁶⁷ *Id.* at 8–9.

⁶⁸ *Id.* at 4.

⁶⁹ *Id.*

⁷⁰ *Id.* at 5.

⁷¹ See Immigration Reform and Control Act §274(b) *supra* note 29; Cuéllar, *supra* note 5, at 11.

⁷² Immigration Reform and Control Act §111(a)(1) *supra* note 29.

⁷³ *Supra* note 29, at §111(a).

⁷⁴ *Id.*

The restrictions on employers were set up in a way that guaranteed their failure.⁷⁵ The IRCA sets a high standard for authorities to show that employers know about their employees' lack of work authorization.⁷⁶ It also sets out good-faith compliance with its verification procedure as an affirmative defense.⁷⁷ Internal enforcement is limited even more by reactions of the public and powerful interest groups.⁷⁸

A prominent example of public reactions throttling internal enforcement is the failure of Operation Vanguard.⁷⁹ Operation Vanguard was an effort in the late 1990s to crack down on illegal hiring of unauthorized workers.⁸⁰ As part of that enforcement effort, officials began investigating the paperwork on file with Nebraska meat packing plants.⁸¹ The paperwork for thousands of employees had irregularities and workers began to leave the plants.⁸² The employers then reported widespread labor disruptions causing state and federal politicians to speak out against the program.⁸³ This was enough to end the operation.⁸⁴

Limited internal enforcement combined with increasing border enforcement is what led to the large undocumented population.⁸⁵ In this framework, lawmakers have over time continued to increase border enforcement to deal with undocumented immigration.⁸⁶ As the undocumented population rose, the public lost faith in the government's ability to solve the problem.⁸⁷ This type of feedback loop is what Justice Cuéllar calls polarizing implementation.⁸⁸

Some politicians have benefitted from harnessing public scorn for the immigration status quo.⁸⁹ Many voters may have strong opinions about immigration but lack a nuanced understanding of the issues.⁹⁰ Thus,

⁷⁵ Cuéllar, *supra* note 5, at 35.

⁷⁶ See 8 U.S.C. § 1324(a)(3)(A) (2018) (requiring actual knowledge); Cuéllar, *supra* note 5, at 14.

⁷⁷ 8 U.S.C. § 1324(a)(3).

⁷⁸ Cuéllar, *supra* note 5, at 88.

⁷⁹ *Id.* at 26.

⁸⁰ *Id.* at 25–26.

⁸¹ *Id.* at 26.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Massey et al., *supra* note 32, at 1557–58; Cuéllar, *supra* note 5, at 73.

⁸⁶ Cuéllar, *supra* note 5, at 70–71.

⁸⁷ *Id.* at 72.

⁸⁸ *Id.* at 58.

⁸⁹ Massey et al., *supra* note 32, at 1561–62; Cuéllar, *supra* note 5, at 70–71.

⁹⁰ Cuéllar, *supra* note 5, at 71.

promises to increase border enforcement can be politically rational. Although increased border enforcement does not prevent undocumented immigration,⁹¹ it serves as a symbol against undocumented immigration.

The funding put toward border enforcement has caused the large settled population of undocumented immigrants, which causes public anger.⁹² That public anger makes it politically rational to promise more border enforcement to deal with undocumented immigration.⁹³ While this process skyrockets the border enforcement budget, agencies responsible for internal enforcement are severely underfunded, making their jobs ever more difficult.⁹⁴ So, the large population of undocumented immigrants continues to go unaddressed, and the cycle continues.⁹⁵

Public anxiety about immigration has not been completely ignored by lawmakers aiming for reform.⁹⁶ The 2013 reform attempt discussed earlier, the Border Security, Economic Opportunity and Immigration Modernization Act, would have created a path to legalization through earned citizenship.⁹⁷ Earned citizenship should be a workable bipartisan solution, and it is time for Congress to enact some form of it.

IV. HOW LEGALIZATION IS FRAMED

The two major approaches to a path to legal status for undocumented immigrants are “amnesty” and “earned citizenship.”⁹⁸ Amnesty means forgiving the illegal border crossings and creating an immediate path to citizenship.⁹⁹ Earned citizenship involves a long probationary period where immigrants need to meet naturalization type requirements (remaining employed for example) to earn their citizenship.¹⁰⁰ The legalization accomplished by the IRCA has been dubbed amnesty by its detractors.¹⁰¹ To have a path to legalization that is distinguishable from amnesty, policy makers created earned citizenship.¹⁰²

⁹¹ Durand & Massey, *supra* note 10, at 36; Massey et al., *supra* note 32.

⁹² Cuéllar, *supra* note 5, at 71–72.

⁹³ *Id.* at 71–72.

⁹⁴ *Id.* at 42.

⁹⁵ *Id.* at 73.

⁹⁶ See Muneer I. Ahmad, *Beyond Earned Citizenship*, 52 HARV. C.R.-C.L. L. REV. 257, 259 (2017).

⁹⁷ S. 744, 113th Cong. (2013); Ahmad, *supra* note 96, at 273.

⁹⁸ Ahmad, *supra* note 96, at 259.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 260.

¹⁰¹ *Id.* at 259.

¹⁰² *Id.*

Amnesty has major political drawbacks as well as benefits. It is criticized because it would essentially allow millions of people to get away with breaking the law.¹⁰³ It is also argued that after the IRCA, another round of amnesty would seriously erode the legitimacy of American immigration restrictions.¹⁰⁴ There is no doubt it would have at least some impact on legitimacy, but so does the status quo of having allowed undocumented immigrants to freely come to the U.S. and work without authorization for decades without finding a policy to resolve their status. The status quo further erodes the legitimacy of American immigration law through the rarity of enforcement against employers.

Critics of amnesty also say it will create the impression that to immigrate to the U.S., one must simply sneak in and wait.¹⁰⁵ This is a valid concern but, can be refuted on two counts. First, the delay between grants of amnesty is long enough that the ‘wait and see’ strategy is not viable. Someone who attempted that strategy in 1987 would now have spent thirty-two years marginalized and waiting. Second, based on MMP research, Mexican demographics have changed such that it is unlikely that the undocumented population would grow to the level where drastic action is required again.¹⁰⁶

Amnesty has major policy benefits because assimilation is a central goal of American immigration policy.¹⁰⁷ As discussed below, undocumented status serves as a barrier to assimilation into American society.¹⁰⁸ Furthermore, Hispanic immigrants (legal or not) are viewed in the light of negative stereotypes.¹⁰⁹ This is partially influenced by the erroneous popular view that Hispanic immigrants are generally criminals.¹¹⁰ Amnesty could be a large step toward shifting public views of Hispanic immigrants and improve ease of assimilation.

Amnesty would involve much lower administrative costs than earned citizenship because it is much simpler to implement.¹¹¹ There is also precedent for amnesty with the IRCA. A new amnesty could be modelled after the IRCA and involve similar compromises.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 290.

¹⁰⁵ See Ahmad, *supra* note 96, at 259.

¹⁰⁶ Durand & Massey, *supra* note 10, at 37.

¹⁰⁷ Cox & Posner, *supra* note 7, at 854–55.

¹⁰⁸ Durand & Massey, *supra* note 10, at 39.

¹⁰⁹ Tian L. Lee & Susan T. Fiske, *Not an Outgroup, Not Yet an Ingroup: Immigrants in the Stereotype Content Model*, 30 INT’L J. OF INTERCULTURAL REL. 751, 754 (2006).

¹¹⁰ Emily Ryo, *Less Enforcement, More Compliance: Rethinking Unauthorized Migration*, 62 UCLA L. REV. 622, 625 (2015).

¹¹¹ See Ahmad, *supra* note 96, at 262, 302–03.

Earned citizenship has a different set of benefits and drawbacks. In his article, *Beyond Earned Citizenship*, Muneer Ahmad criticizes earned citizenship for its theoretical ramifications.¹¹² The most developed attempt to pass earned citizenship into law is S.744, the Border Security, Economic Opportunity and Immigration Modernization Act, a 2013 bill.¹¹³ S.744 is the immigration reform bill that passed the Senate in 2013 and had support from the president but was never voted on by the House.¹¹⁴

The major theoretical drawback of earned citizenship is that it accepts the restrictionist theory that undocumented immigrants are at a moral deficit and need to repent in order to be accepted into American society.¹¹⁵ The major drawback of this paradigm is that it maintains the negative stereotype of the Hispanic immigrant as a criminal. This contributes to the difficulty Hispanic immigrants face in trying to assimilate. Accepting the restrictionist point of view theoretically should make earned citizenship more amenable to Congress.¹¹⁶ In practice, the act was not enough to get passed.¹¹⁷

S.744 includes all the core characteristics of the earned citizenship framework.¹¹⁸ Under S.744, undocumented immigrants would have to meet certain criteria over a period of more than ten years to become citizens.¹¹⁹ The novel criteria compared with traditional naturalization are a requirement of continuous employment (or education) and the payment of fines.¹²⁰

Given that most undocumented immigrants have been in the U.S. for more than ten years, there could be an opportunity for compromise between the two views. This compromise could be that undocumented immigrants are able to earn citizenship retroactively. Of course, that would require Congress to act on this issue. Many commentators, including Ahmad, are skeptical that immigration reform legislation will pass under the current political climate.¹²¹ The prevalence of exclusionary rhetoric makes this a reasonable assumption but it could, instead, galvanize people to action.

¹¹² *Id.* at 258.

¹¹³ S. 744, 113th Cong. (2013); Ahmad, *supra* note 96, at 273.

¹¹⁴ Ahmad, *supra* note 96, at 273.

¹¹⁵ *Id.* at 259.

¹¹⁶ *See id.* at 288.

¹¹⁷ *Id.* at 273.

¹¹⁸ *Id.* at 274.

¹¹⁹ *Id.* at 277.

¹²⁰ *Id.* at 275-76.

¹²¹ *See id.* at 288-89.

V. HARM CAUSED BY UNDOCUMENTED STATUS

It is not obvious that a humanitarian argument matters for what makes good policy. However, the American legal tradition is built on concepts of liberty and justice. Legal scholars take the justness of a law seriously in evaluating the legitimacy of even the Constitution, the most fundamental American law.¹²² Therefore, whether a law is good policy depends, among other criteria, on whether it leads to a just outcome.

According to the most recent estimate, there are around 12 million undocumented immigrants living in the U.S.¹²³ About 94% of these immigrants entered the country before 2009.¹²⁴ More than half of undocumented immigrants are from Mexico.¹²⁵

Viewed in light of the last 100 years of Mexico-U.S. migration, the predicament of the undocumented immigrants living in the U.S. today is ironic. The undocumented immigrants settled in the U.S. are people who responded to the same incentive scheme that existed for most of the century. They are people who used a network that was established under legal auspices during the Bracero Era. Because of bad timing, they missed participating in a government sanctioned program,¹²⁶ and now live in the U.S. without legal status. They are people whose undocumented status is a barrier to integration into American society.¹²⁷

The social and legal marginalization of undocumented immigrants causes measurable harm. Undocumented immigrants are the targets of hateful rhetoric.¹²⁸ Undocumented immigrants earn lower hourly wages than their documented counterparts for the same work.¹²⁹ Undocumented immigrants are doubly disadvantaged in earnings because the work they can get pays low wages to begin with.¹³⁰ Undocumented

¹²² See ILAN WURMAN, A DEBT AGAINST THE LIVING AN INTRODUCTION TO ORIGINALISM 48 (2017).

¹²³ Bryan Baker, *Estimates of the Illegal Immigrant Population Residing in the United States: January 2015*, POPULATION ESTIMATES: ILLEGAL ALIEN POPULATION RESIDING IN THE UNITED STATES: (Dec. 2018), https://www.dhs.gov/sites/default/files/publications/18_1214_PLCY_pops-est-report.pdf

¹²⁴ *Id.* at 4.

¹²⁵ *Id.* at 2.

¹²⁶ They missed the Bracero Agreement before they migrated, and they missed open access to H2 visas after they migrated. See, Durand & Massey, *supra* note 10, at 35; Durand & Massey, *supra* note 1, at 18.

¹²⁷ See generally David P. Lindstrom, *Mexican Migrant Integration in the United States, 1965–2015*, 684 ANNALS AM. ACAD. POL. AND SOC. SCI. (2019).

¹²⁸ See e.g., Durand & Massey, *supra* note 10, at 39; Massey et al., *supra* note 32, at 1560.

¹²⁹ Durand & Massey, *supra* note 10, at 40.

¹³⁰ *Id.*

immigrants and their children tend to suffer more from poor physical and mental health.¹³¹ There are around four million U.S. citizen or permanent resident children of undocumented immigrants.¹³²

This more individualized view of undocumented immigrants lays the foundation for a humanitarian case for government intervention. Undocumented immigrants are socially and legally marginalized in the U.S. They experience real harms because of this marginalization. Society is also harmed because undocumented immigrants are blocked from assimilating.

The most efficient solution, as well as the most humane, would be for Congress to pass an integrative legalization regime. This is a difficult task as the immigration law status quo is deeply entrenched.¹³³ Immigration reform failed under the Obama administration even using the framework of earned citizenship, which adopts the view that undocumented immigrants start at a moral deficit.¹³⁴

V. JUSTIFICATION FOR UNAUTHORIZED BORDER CROSSING

It could be argued that undocumented immigrants should be deported, not legalized, because they entered (or remained in) the country unlawfully. Notwithstanding the structural forces and the differential treatment for the same actions at different times, undocumented immigration from Mexico occurred under circumstances that make it both justified and desirable. Deportation is justified under the general rationale of the necessity defense and desirable as part of an ex post immigration regime. This is not to say that undocumented immigrants would likely succeed in court by raising the following defenses. The point of this section is that Congress could make findings that would justify an adjustment in the status of undocumented immigrants. This is so because “a legislature is not a court of law. And Congress, unlike courts, must, and does, routinely draw general conclusions -- for example, of likely motive or of likely relationship to legitimate need -- from anecdotal and opinion-based evidence”¹³⁵

These justifications can be seen by applying settled criminal law principles. Undocumented immigrants who arrived as children did not choose to do anything illegal. They merely did as they were directed to do. A

¹³¹ *Id.* at 39.

¹³² *See id.* at 40.

¹³³ Cuéllar, *supra* note 5, at 1.

¹³⁴ Ahmad, *supra* note 96, at 261.

¹³⁵ *Bd. of Tr. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 379–80 (2001) (Breyer, J., dissenting).

fundamental principle of criminal law is that a voluntary act is required for criminal liability to attach.¹³⁶ A voluntary act is not present for any child who migrated to the U.S. only on the instructions of an adult.

For undocumented immigrants arriving from Mexico as adults, the decision could be viewed as justified. It is justified under the general rationale of the necessity defense. Necessity is an accepted affirmative defense in the American legal tradition.¹³⁷ Necessity applies when the actor believes his conduct is necessary to avoid a harm to himself or another and the harm avoided is greater than the harm the actor causes.¹³⁸

For Mexican migrants, many believe that working in the U.S. is the only way to provide for themselves and their families.¹³⁹ Some anecdotal examples can be found in interview excerpts from Emily Ryo's *Less Enforcement, More Compliance: Rethinking Unauthorized Migration*. One migrant describes the decision this way:

When I came over, I made my decision because I have two sons and I am a single mother. The reason why I came over is because I was working in a factory but I was earning only \$35 a week. It wasn't enough for my children's education. It wasn't even enough to pay for bus fare. It was then that I made the decision to come over here, leaving my sons, and migrating here.¹⁴⁰

Another migrant provides this story:

I have left my home and I have left my two children, and I don't know if I will see them again . . . I have to cross, to give my children a better life. . . I don't ask God to give me riches; I just ask that I won't be in this poverty that I'm in, because . . . it hurts. It hurts as a parent. It hurts, if you're the father of the family, and you can't provide for them. All of that makes one risk one's life to come here [to the United States].¹⁴¹

As to the harm caused, it is not clear that these migrants are causing a harm by crossing the border away from a port of entry or by presenting false documents. In fact, most Americans benefit from these immigrants in the economy.¹⁴² So most migrants squarely fit within the framework of the necessity defense.

¹³⁶ See MODEL PENAL CODE § 2.01 (Am. Law Inst. 1984).

¹³⁷ See *id.* at § 3.02.

¹³⁸ “(1) Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that: (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear. (2) When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this Section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.” *Id.* at § 3.02.

¹³⁹ Ryo, *supra* note 110, at 651.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 652.

¹⁴² Cuéllar, *supra* note 5, at 19. Although, as discussed earlier, the benefit could be greater if they had legal status.

Of course, it could be argued that undocumented immigrants fall outside the technical scope of the necessity defense. Traditionally, the defense does not cover conduct that is merely conducive to ameliorating a harm.¹⁴³ The conduct must be necessary to prevent the harm.¹⁴⁴ Necessity also does not typically apply to economic harm. Working in the U.S. likely was not the lone way that undocumented immigrants could have made money. So, under a technical view, the defense does not apply. However, using a technical view of necessity misses the point of applying it in this case. The idea is not that an undocumented immigrant would be acquitted of improper entry at trial. The idea is that undocumented immigrants' actions are justified enough within the American legal tradition that it would be good policy to adjust their status even though they did not cross the border legally.

Furthermore, it would be good policy as a matter of institutional design.¹⁴⁵ Congress has three options, it could do nothing, it could deport all undocumented immigrants, or it could implement legalization. Doing nothing will preserve the harms discussed above. Total deportation is impractical and would tear apart the families of the four million citizen children of undocumented immigrants. Legalization with some criteria would allow undocumented immigrants to assimilate, and cure the harms discussed above.

VI. HOW TO LEGALIZE

A. Recent Immigration Reform Proposals

Some immigration reform proposals that have been under consideration in the last two years are The Securing America's Future Act, the Secure and Succeed Act, the Uniting and Securing America Act, and the Development Relief and Education for Alien Minors (DREAM) Act. All of these proposals involve some form of legalization for undocumented immigrants who arrived as children.¹⁴⁶

The Securing America's Future Act would provide temporary legal status, but no path to citizenship.¹⁴⁷ The other proposals would provide conditional permanent residence and a path to citizenship.¹⁴⁸

¹⁴³ MODEL PENAL CODE cmt. part I (Am. L. Inst. 1984).

¹⁴⁴ *Id.*

¹⁴⁵ See Cox & Posner, *supra* note 7, at 856.

¹⁴⁶ Dream Act of 2019, H.R. 2820, 116th Cong. (2019); Securing America's Future Act of 2018, H.R. 4760, 115th Cong. (2018); Uniting and Securing America Act of 2018, H.R. 4796, 115th Cong. (2018); 164 CONG. REC. 27, 856.

¹⁴⁷ H.R. 4760, 115th Cong. (2018).

¹⁴⁸ H.R. 2820, 116th Cong. (2019); H.R. 4796, 115th Cong. (2018); SENATE COMMITTEE ON THE JUDICIARY, SECURE AND SUCCEED ACT OF 2018: STRENGTHENS BORDER AND ENTRY SECURITY,

The Secure and Succeed Act would enact an earned citizenship framework that takes twelve years and imposes the following criteria on applicants: they must have obtained a high school diploma or equivalent if they are over 18 years of age; they must have arrived in the U.S. before June 15, 2012; they must have been under the age of 31 on June 15, 2012; they must pass a criminal background check; they must sign a conditional departure order; and if they are older than 18 they have to serve in the military, pursue postsecondary education, or maintain full time gainful employment.¹⁴⁹

The Uniting and Securing America Act provides a path to eligibility for naturalization with the following earned citizenship requirements:

(B) [The applicant] has not abandoned the alien's residence in the United States; and (C)(i) has acquired a degree from an institution of higher education or has completed at least 2 years, in good standing, in a postsecondary vocational program or in a program for a bachelor's degree or higher degree in the United States; or (ii) has served in the Uniformed Services for at least the period for which the alien was obligated to serve on active duty and, if discharged, received an honorable discharge; or (iii) has been employed for periods totaling at least 3 years and at least 80 percent of the time that the alien has had a valid employment authorization, except that any period during which the alien is not employed while having a valid employment authorization and is enrolled in an institution of higher education, a secondary school, or an education program described in section 3(b)(1)(D)(iii), shall not count toward the time requirements under this clause.¹⁵⁰

Finally, the DREAM act sets out an earned citizenship framework that mirrors the requirements of the Uniting and Securing America Act.¹⁵¹

These proposals show that earned citizenship has firmly taken root in the debate over how to deal with the undocumented population. These proposals are underinclusive because they only legalize childhood arrivals. Adult arrivals who have benefitted American society should also be eligible for legalization. If more inclusive legalization is not currently palatable to Congress, these proposals are at least a step in the right direction.

<https://www.judiciary.senate.gov/imo/media/doc/Secure%20and%20Succeed%20Act%20of%202018%20-%20One-Page%20Summary.pdf> (last visited May 4, 2021) [https://perma.cc/C4WM-LQVU]

¹⁴⁹ SENATE COMMITTEE ON THE JUDICIARY, SECURE AND SUCCEED ACT OF 2018: STRENGTHENS BORDER AND ENTRY SECURITY,

<https://www.judiciary.senate.gov/imo/media/doc/Secure%20and%20Succeed%20Act%20of%202018%20-%20One-Page%20Summary.pdf> (last visited May 4, 2021) [https://perma.cc/C4WM-LQVU]

¹⁵⁰ H.R. 4796, 115th Cong. (2018) § 104(a)(1)(B–C).

¹⁵¹ H.R. 2820, 116th Cong. (2019).

B. Retroactive Earned Citizenship

Immigration reform should be integrative and workable. It should be integrative so that it creates just results and improves the likelihood of assimilation. It must also appeal to both Democrats and Republicans to have any realistic chance of being enacted. Given the lack of public faith in the government's ability to address immigration issues, reform should be passed in stages that gradually demonstrate efficacy of the government and build confidence in the policies themselves. Congress has already taken a first step in this direction by expanding the H2 temporary agriculture worker program.

Retroactive earned citizenship would work by making any immigrant who arrived at least ten years prior to enactment and who has no felony conviction a legal permanent resident with eligibility to apply for naturalization. The message of retroactive earned citizenship is integrative in nature, as it broadly applies and recognizes the American-ness of the undocumented population. It also accepts the view that immigrants need to earn their place in the U.S., but it simultaneously credits them with earning it. The retroactivity also pays homage to the larger structural forces at play in each individual decision to migrate—especially the idea that the labor networks between American employers and Mexican workers were originally government sanctioned and have practically become sanctioned again by H2 visas.

For practical reasons, retroactive earned citizenship combined with funding for the border wall should be the next step in immigration reform. The reasons to include border wall funding are: 1) anti-immigration lawmakers would view it as a positive aspect of the legislation; 2) it is likely to garner some public support, at least with people who generally oppose immigration; and 3) it ensures that the legalization program does not send the message that new immigrants should come to the U.S. and wait for the next legalization. It is particularly important for public support because it sends the message that Congress is still serious about maintaining border security, even combined with a legalization program.

Legalization should be included in the next step of immigration reform because it is a pressing issue. The lives of millions of people on the margins of American society can be improved through legalization. Legalization would also help legitimize Congress in this arena because it would show that Congress can take effective action. Once undocumented immigrants start to assimilate, it will also remove the underlying feature

that causes much of the public scorn. Legalization is also a good political move for lawmakers as 81% of Americans favor a path to citizenship.¹⁵²

Further steps in immigration reform would be other initiatives that were included in failed immigration reform bills. Once confidence starts to increase, Congress could implement more internal enforcement. Congress could also update the skilled work visa categories and modify quotas.

This essay suggests that a good way to frame legalization is retroactive earned citizenship. This framework takes a middle ground between amnesty and previously proposed earned citizenship. Practically, the effect would be close to amnesty. Philosophically, retroactive earned is completely in line with earned citizenship. Retroactive earned citizenship recognizes that most undocumented immigrants have lived in the U.S. for at least ten years, and their presence has benefited most Americans. It avoids keeping the undocumented population on the margins for longer than necessary by saying that the right to be legalized has already been earned.

Retroactive earned citizenship would likely be criticized for being covert amnesty. This criticism is valid in that the effect of amnesty on the undocumented population would be much like that of retroactive earned citizenship. The mechanisms and underlying philosophies are different enough, however, that it should survive this criticism. Unlike the amnesty regime, retroactive earned citizenship both requires that immigrants have been in the U.S. long enough to have started assimilation and are not detrimental to American society.

Another criticism is that a second legalization may create the expectation that to immigrate to the U.S., one must simply sneak in and wait. This is reasonable on its surface, but with the complex history of Mexico-U.S. immigration in mind, it falls apart. The data shows that whether or not legalization happens, there is no longer a large inflow of undocumented immigrants.¹⁵³ Of course, circumstances could change to create a new

¹⁵² *In Depth: Topics A to Z: Immigration*, GALLUP, <https://news.gallup.com/poll/1660/immigration.aspx> (last visited Dec. 20, 2019) [<https://perma.cc/LX74-JPBC>].

¹⁵³ Net undocumented entries went from 1.85 million in the period between 2000 and 2005 to 659,000 between 2005 and 2007 to negative 1.35 million between 2008 and 2016. Durand & Massey, *supra* note 1, at 12.

flow of immigrants. That is why this legalization should be combined with border security. That way the law can respond to changes in circumstances.



The current political climate is testing the character of the U.S. in many ways. The issues raised by immigration policy are multifaceted and subject to a bright public spotlight. American immigration law also has a long and complicated history. The research shows that the border control strategy taken over the last 40 years has had unintended results. It is time for Congress to fix the problem it created and pass retroactive earned citizenship into law.