THE RULE OF LAW, HISTORICAL EQUITY, AND MEXICAN CONTRA PROHIBITION IMMIGRANTS

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I. INTRODUCTION

Events surrounding the recent Presidential election revealed a contentious and politically charged debate regarding immigration issues. President Obama’s failure to uphold his campaign promise to pursue “comprehensive immigration reform”¹ alienated some of his base on the left.² His administration’s recent adoption of regulations providing immigrants brought to the U.S. illegally as children a two-year renewable exemption from deportation and a work permit³ may have lessened that alienation, but it was greeted with criticism by opponents who saw it as an unlawful and opportunistic executive usurpation of Congressional power.⁴ On the GOP side, Speaker Newt Gingrich and Governor Rick Perry were both excoriated during the primary debates

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I am grateful for the research and drafting assistance provided by my graduate assistant, Joshua Smith, for the helpful comments and insights from Professors Craig Stern and César Cuauhtémoc García Hernández, and for the editorial assistance provided by my wife, Laura, and the Regent Journal of International Law (RJIL). It was a privilege to have moderated a panel discussion at the Immigration and the Law: Seeking Solutions for Enforcement and Reform symposium sponsored by the RJIL on February 18, 2012. This article arose from my ideas related to the thoughtful presentations by the panelists at that symposium. Any errors in this piece are solely my own.

⁴ See Review & Outlook: We Believe You, Mr. President, WALL ST. J., June 18, 2012, http://online.wsj.com/article/SB10001424052702303822204577468872677354992.html?KEYWORDS=obama+immigration+opinion (President Obama “sidestepped Congress and announced that young illegal immigrants who came to the U.S. as children would be spared deportation.”) (emphasis added).
for advocating a compassionate, equitable approach to immigrants while also upholding existing legal restrictions on immigration and continued unlawful presence in the U.S.\(^5\) By contrast, the eventual nominee, Governor Mitt Romney, took a very hard line on immigration issues.\(^6\) Consequently, thoughtful debate on immigration reform was noticeably absent from our political process at a time when domestic entitlement reform, previously thought to be untouchable, emerged as a central campaign issue.\(^7\) It might not be too far of a stretch to suggest that immigration reform is becoming the new "third rail" of American politics. The Regent Journal of International Law is therefore to be commended for sponsoring the *Immigration and the Law: Seeking Solutions for Enforcement and Reform* symposium, which was a thoughtful engagement of immigration issues by people of good faith from different segments of the political spectrum. Such engagement, free of demagoguery, is essential to solve our nation's immigration-related problems.

Immigration reform issues are extraordinarily complex and have been the subject of extensive scholarship. I will undertake the relatively modest goal of addressing two issues at the core of the immigration reform debate: a balanced view of the rule of law, and the significance of the unique attributes of the relationship between the United States and Mexico. I will argue that our current laws and enforcement policies are not consistent with the rule of law. Specifically, because the rule of law mandates consonance between laws and reasonable and equitable enforcement standards, our immigration laws must be revised to conform to what is presently equitable and feasible. I will also argue that, given our unique history with Mexico, our laws and policies should give Mexican nationals a favored immigration status. Although I do not advocate an open border, the United States and Mex-


\(^7\) See, e.g., Michael Barone, *Entitlement Crisis Takes Center Stage*, NAT’L REV. ONLINE (Aug. 13, 2012, 12:00 AM), http://www.nationalreview.com/articles/313779/entitlement-crisis-takes-center-stage-michael-barone (arguing that "Romney’s selection of Ryan shows he wants a debate on whether America should follow Obama on the road to a European-style welfare state.").
ico should undertake proactive measures to formulate policies and adopt laws that will further economic development in both countries. Finally, I conclude with a proposal to label immigrants in a more accurate and less divisive way that furthers constructive efforts to solve immigration-related problems.

II. A BALANCED VIEW OF THE RULE OF LAW

American law requires that would-be immigrants fall within a qualifying category and not within classes ineligible to receive visas or to be admitted into the U.S.8 The law also caps the total number of eligible immigrants per year.9 Excluding uncapped visas to certain “immediate relatives” of United States citizens, the federal government issues 675,000 immigrant visas10 worldwide each year:11 480,000 for family-based visas,12 55,000 for diversity immigrants,13 and 140,000 for em-

10 The government also issues a variety of nonimmigrant visas, which permit temporary stay in the United States. These include visas for seasonal or temporary workers, or TN visas for Mexican and Canadian professionals under the North American Free Trade Agreement (TN visas—valid for three years—can be renewed indefinitely). Angelica M. Ochoa, Nonimmigrant Employment-Based Visas, COLONIAL LAW., Feb. 2012, at 27, 30–31, 33.
12 Technically, the unlimited visas given to certain “immediate relatives” of U.S. citizens count against this 480,000 ceiling, frequently reducing the availability of other family-based visas to the guaranteed floor of 226,000. INA § 201(c)(1)(A)(i-iii), 8 U.S.C. § 1151(c)(1)(A)(i-iii) (2006); see Christina Pryor, “Aging Out” of Immigration: Analyzing Family Preference Visa Petitions Under the Child Status Protection Act, Note, 80 FORDHAM L. REV. 2199, 2205 n.47 (2012) (“Although this quota must be at least 226,000—due to high levels of immigration by immediate relatives—it is unusual for it to surpass the statutory minimum.”).
ployment-based immigrants.\textsuperscript{14} Unlawful entry is a crime,\textsuperscript{15} while unlawful presence warrants civil deportation.\textsuperscript{16}

By any fair measure, there is significant incongruity between the letter and enforcement of these laws. Notwithstanding increased enforcement measures during the Bush and Obama Administrations,\textsuperscript{17} the total number of illegally present immigrants has risen steadily and dramatically since the passage of the Immigration Reform and Control


\textsuperscript{15} INA § 275(a), 8 U.S.C. § 1325(a) (2006).

\textsuperscript{16} INA § 237(a)(1)(B), 8 U.S.C. § 1227(a)(1)(B) (2006); Ingrid V. Eagly, \textit{Local Immigration Prosecution: A Study of Arizona Before SB 1070}, 58 UCLA L. REV. 1749, 1773 (2011); see also INA § 275(b), 8 U.S.C. § 1325(b) (2006) (imposing civil penalties for those who are “apprehended while entering (or attempting to enter) the United States at a time or place other than as designated by immigration officers . . . .”).

\textsuperscript{17} See Jennifer M. Chacón, \textit{A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights}, 59 DUKE L.J. 1563, 1565 (2010) (“This is an era of unprecedented immigration enforcement. Never before in the history of the United States has the government removed so many noncitizens in so short a time frame. Between 2003 and 2008, the U.S. government removed 1,446,338 noncitizens from the United States. And not all noncitizens placed in removal proceedings were ultimately removed. Removals are merely the tip of the iceberg with regard to enforcement actions. For every noncitizen who receives a formal order of removal, another four depart ‘voluntarily’ as a result of their encounters with the immigration enforcement bureaucracy. At the same time, federal prosecutions of immigration crimes in criminal courts have reached an all-time high. Over the past five years, immigration crimes have risen to the top of the list of federal prosecutions, and now make up more than half of the federal criminal docket.”); Ingrid v. Eagly, \textit{Prosecuting Immigration}, 104 NW. U. L. REV. 1281, 1281–82 (2010) (“The criminal prosecution of immigration—principal for illegal entry and reentry, alien smuggling, and document fraud—has reached an all-time high. Not since Prohibition has a single category of crime been prosecuted in such record numbers by the federal government. Immigration, which now constitutes over half of the federal criminal workload, has eclipsed all other areas of federal prosecution. Noncitizens have become the face of federal prisons.”). Government statistics indicate that total removals have increased steadily throughout Obama’s presidency. \textit{See Immigration and Customs Enforcement, ICE Total Removals: Through August 25th, 2012 at 1 (2012), available at http://www.ice.gov/doclib/about/offices/ero/ero-removals1.pdf (showing rising numbers of removals from 2007 through 2011); but see Press Release, House Judiciary Committee Chairman Lamar Smith, \textit{Smith: Administration Cooks the Books to Achieve Deportation Numbers} (August 24, 2012), http://judiciary.house.gov/news/082412_Administration%20Cooks%20the%20Books.html (criticizing the accuracy of these numbers).
Act (IRCA) of 1986. IRCA granted amnesty to approximately 2.8 million immigrants.\(^{18}\) By contrast, in January 2011, the number of immigrants who were in the U.S. in violation of U.S. immigration law, either by entering illegally or by staying beyond the terms of their visa, had mushroomed to 11.5 million.\(^{19}\)

Our immigration laws are over-regulative and under-enforced. Proposals to address this problem tend to fall on a spectrum from rigorous enforcement with no discretionary exemptions, to full amnesty and de facto, if not de jure, open borders.\(^{20}\) Neither extreme is reasonable or viable.

On the one hand, proposals approximating full amnesty and open borders would undermine the rule of law and not serve the greater good. Adherence to the rule of law is foundational to a just legal and political system.\(^{21}\) At the heart of the rule of law is the principle that government will faithfully apply existing rules.\(^{22}\) Frequent changes to rules and lack of congruence between the text and administration of the law are corrosive of the rule of law:

[M]any conceptions of the Rule of Law place great emphasis on legal certainty, predictability, and settlement; on the determinacy of the norms that are upheld in society; and on the reliable character of their administration by the state. ... There may be no escaping legal constraints in the circumstances of modern life, but freedom [may] nevertheless [be] possible if people know in advance how the law will operate, and how they must act to avoid its having a detrimental impact on their affairs. Knowing in advance how the law will operate enables


\(^{21}\) See Sandra Day O’Connor & Kim K. Azzarelli, Sustainable Development, Rule of Law, and the Impact of Women Judges, 44 Cornell Int’l L.J. 3, 5 n.9 (2011) ("[P]hilosophers and jurists throughout time and across cultures have heralded justice and the rule of law as the foundation upon which stable societies are built.").

one to plan around its requirements. And knowing that one can count on the law to protect certain personal rights and property rights [may] enable each citizen to deal effectively with other people and the state. On this account, the Rule of Law is violated when the norms that are applied by officials do not correspond to the norms that have been made public to the citizens, or when officials act on the basis of their own discretion rather than norms laid down in advance.23

"If a law, even a bad law, is left unenforced, then respect for law is weakened, and society as a whole suffers."24

Moreover, law must serve the common good.25 Although commentators disagree over the extent to which immigrants who enter or stay in the U.S. provide a net economic burden or benefit,26 the govern-

23 Jeremy Waldron, Essay, The Concept and the Rule of Law, 43 GA. L. REV. 1, 6, 55–56 (2008) (arguing that, although predictability may be an important component of the Rule of Law, it is not the only feature; the Rule of Law also requires "attention to the formalized procedural aspects of courts and hearings [and] to more elementary features of natural justice like offering both sides an opportunity to be heard."); see also F. A. Hayek, THE CONSTITUTION OF LIBERTY 210 (R. Hamowy ed., 2011) ("The interference of the coercive power of government with our lives is most disturbing when it is neither avoidable nor predictable."); Gidon Gottlieb, Relationism: Legal Theory for A Relational Society, 50 U. CHI. L. REV. 567, 610 (1983) ("[A] total failure of congruence may result in something that is not legal ordering at all, if by legal ordering we mean the enterprise of subjecting human conduct to the governance of rules. The problem of congruence arises whenever the formal system and the informal one are fully divorced from one another. Practice that entirely disregards legal instruments and governing rules hardly qualifies as living law... Some connection must remain between the practice and the normative framework; some interaction must take place between agreed rules and actual conduct.").


26 For example, experts have disagreed over the fiscal costs (education, welfare, healthcare, etc.) and related benefits (increased commerce and tax revenues, as well as intangible positive contributions to the community) provided by immigrants who are present in violation of U.S. immigration law. Compare Robert Rector & Christine Kim, The Fiscal Cost of Low-Skill Immigrants to the U.S. Taxpayer, HERITAGE SPECIAL REP. 14, 22 (May 21, 2007), http://www.heritage.org/research/reports/2007/05/the-fiscal-cost-of-low-skill-immigrants-to-the-us-taxpayer ("Current immigration policies with respect to both legal and illegal immigration encourage the entry of a disproportionate number of poorly educated immigrants into the U.S. As these low-skill immigrants (both legal and illegal) take up residence, they impose a substantial tax burden on the U.S. taxpayers. The benefits received by low-skill immigrant households exceed taxes paid at each age level; at no point do these households pay more in than they take out.") with Francis J. Lipman, The Tax-
ment's failure to enforce our immigration laws has undeniably caused public harm. Most immigrants who enter or stay in the U.S. in violation of the law are seeking a productive life for themselves and their loved ones, but some come or stay for far less honorable reasons, such as the drug trade or human trafficking. Although immigrants present in violation of U.S. immigration law may not be more prone to crime than American citizens, the act of illegally immigrating is often accompanied by higher crime—frequently against illegal immigrants. Moreover, as the United States Supreme Court explained in Arizona v. United States, in places within thirty miles of Phoenix, the crime rate is so high that local authorities cannot guarantee and preserve safety and thus have warned citizens to stay away. These problems reflect how non-enforcement perpetuates a culture of disrespect for the law and fails to further the common good. “A legal restraint on the people is a forcible restraint; for if law be not backed with force, it is only a law of rewarding well-doing, which is no restraint, but an encouragement to do evil.” Immigration enforcement decisions must further

27 Stephen H. Legomsy, Portraits of the Undocumented Immigrant: A Dialogue, 44 GA. L. REV. 65, 148 (2009) (“The data—cloudy as they admittedly are—at least reveal an absence of evidence that undocumented immigrants are disproportionately prone to other, independent criminal acts. To the contrary, they suggest a likelihood that if anything, undocumented immigrants tend to be more law-abiding than the native-born.”).  
29 Arizona v. United States, 132 S. Ct. at 2500.  
30 Samuel Rutherford, Lex Rex 118 (1843 ed.); see also Ekow N. Yankah, The Force of Law: The Role of Coercion in Legal Norms, 42 U. RICH. L. REV. 1195, 1198 (2008) (“[C]oercion is best seen as an inherent part of the law; coercion indivi-
the common good—the good of everyone affected by immigration policies, including all Americans—not just the good of the immigrant population. Our government’s failure to enforce the law has caused social harm, and the continued refusal to enforce the law corrodes the rule of law, which is foundational to our system of liberty.

On the other hand, to uphold the rule of law, the law must be both valid and reasonably enforceable, which implicates the fundamental issue of the proper substance of just law. According to Aquinas, law is an ordinance of right reason promulgated for the common good by one who has care for the community. To be valid, law must be applied and coercive. Legal norms that are not of right reason and thus lead to unjust results are not true law. Although it is generally preferable to leave few items to the discretion of rulers, thereby making the law clear and enhancing the likelihood of obedience, laws can and should be changed when necessary to further the common good. Applying these foundational principles, there are four reasons why strict enforcement of our present immigration laws is neither required to uphold the rule of law nor consistent with the common good.

First, as a contextual point, the government does not have a strict obligation to enforce laws that regulate conduct that is not inherently wrong. There is a distinction between things that are inherently evil (malum in se) and things to which the law is naturally indifferent but which can nonetheless be prohibited to serve the common good (malum prohibitum). "There is, it is true, a great number of indifferent

duates the law as a normative system."); cf. ROBERT H. BORK, THE TEMPTING OF AMERICA 96 (1990) ("It is quite arguable that this is an improper use of law, most particularly of criminal law, that statutes should not be on the books if no one intends to enforce them.").

AQUINAS, supra note 25, Q. 90, Art. 4, at 995. The standard of “one who has care for the community” is uniquely complex in the federal system of the United States. The Supreme Court recently held that the federal government has primary care for the community with regard to immigration issues, and thus the states cannot take steps even to complement the enforcement of federal laws. See Arizona v. United States, 132 S. Ct. at 2510. President Obama’s recent change in immigration enforcement policies has implicated the issue of the constitutional roles of the executive and legislative branches. See supra notes 1–4 and accompanying text.

AQUINAS, supra note 25, Q. 90, Art. 3, Reply Obj. 2, & Art. 4, at 995.

Id. Q. 95, Art. 2, at 1014.

Id. Q. 95, Art. 1, Reply Obj. 2, at 1014.

Id. Q. 97, Arts. 1–2, at 1022–23.

Id. Q. 92, Art. 2, at 1002. An amoral legal positivist would disagree. See, e.g., HANS KELSEN, GENERAL THEORY OF LAW AND STATE 52 (1945) ("Certainly, the legislator must first consider a certain kind of behavior harmful, a malum, in order to attach to it a sanction. Before the sanction is provided, however, the beha-
points, in which both the divine law and the natural leave a man at his own liberty; but which are found necessary for the benefit of society to be restrained within certain limits.”37 Inherently wrong acts, such as murder, theft, and the like, can and should be consistently proscribed.38 By contrast, things that are malum prohibitum are wrong only when properly regulated to further the common good.39 Governmental officials therefore have the discretion to decide whether or not to enforce laws against things merely malum prohibitum. Although nations have the right to regulate migration across their borders, migrating to one country from another is not inherently evil.40 The nature of this wrong does not obligate the government to enforce immigration laws strictly, unlike laws against, e.g., murder, theft, sexual assault, etc.41

vior is no malum in the legal sense, no delict. There are no mala in se, there are only mala prohibita, for a behavior is malum only if it is prohibitum.”).

37 1 WILLIAM BLACKSTONE, COMMENTARIES *42.
38 AQUINAS, supra note 25, Q. 96, Art. 2, at 1018.
39 BLACKSTONE, supra note 37, *55 (“[T]hings in themselves indifferent... become either right or wrong, just or unjust, duties or misdemeanors, according as the municipal legislator sees proper, for promoting the welfare of society, and more effectively carrying on the purposes of civil life.”)
40 See, e.g., Legomsky, supra note 27, at 144–45 (“[T]he question here--how much emphasis one should attach to the fact that undocumented immigrants have violated the law--is one of degree. That issue turns on where we place immigration violations in the hierarchy of offenses. All else being equal, the fact that the law tolerates and even values the same conduct when others engage in it speaks to the level of moral culpability and, therefore, makes immigration violations different in kind from most other violations of law. Perhaps more importantly, the same distinction separates immigration violators themselves from the vast majority of other law-breakers.”). Nevertheless, because illegally crossing the border has long been considered a strict liability criminal offense, our immigration system imputes criminal intent to all illegal entrants. Victor C. Romero, Decriminalizing Border Crossings, 38 FORDHAM URB. L.J. 273, 279 (2010).
41 Cf. Hiroshi Motomura, The Rule of Law in Immigration Law, 15 TULSA J. COMP. & INT’L L. 139, 144–45 (2008) (suggesting “a more complex view of the rule of law, namely that immigration law is not self-executing. According to this vision of the rule of law, the content of immigration law is ambiguous. The rule of law requires the exercise of discretion in individual cases, and further requires that enforcement be tempered and counterbalanced by due process. The rule of law also means that it is important to minimize the chances of inaccurate or otherwise unfair results in individual cases. The natural consequence of this vision of the rule of law would be to narrow the group of actors who have authority to enforce immigration law.”); Victor C. Romero, Christian Realism and Immigration Reform, 7 ST. THOMAS L.J. 310, 331–32 (2010) (“Regardless if one agrees with the current criteria for admission, it is reasonable to expect that a nation will act to secure its borders, facilitating the entry of only those with proper documents and deporting others who
Second, the rule of law does not mandate full, non-discretionary enforcement of the law in general.\(^42\) Although the rule of law requires that law not be applied “at the ruler’s fancy,” it does not require enforcement “with [a] crabbed literalness.”\(^43\) Regardless of the source of norm, sometimes even a good law can lead to an unjust result; in such cases, in order to serve the common good and to do justice in the individual case, the law should not be enforced.\(^44\) This principle, which is foundational to equity jurisprudence,\(^45\) belies the suggestion that the rule of law mandates full enforcement.

Third, full enforcement of current American immigration laws would be inequitable. Our government’s failure to enforce the law makes it complicit in the resulting influx and retention of immigrants present in violation of the law. People have little incentive to abide by rules they know the government will not enforce.\(^46\) Moreover,

> [f]idelity to the Rule of Law demands not only that a government abide by its verbalized and publicized rules, but also that it respect the justified expectations created by its treatment of situations not controlled by explicitly announced rules. Even more plainly it requires that government apply written rules in accordance with any generally accepted gloss written into those rules in the course of their administration.\(^47\)

This does not mean that the government is *legally precluded* from enforcing the law. Laws are repealed by desuetude only when they go fully unenforced for a long time,\(^48\) and equitable doctrines like estop-

\(^{42}\) *Cf. AQUINAS, supra* note 25, Q. 96, Arts. 2–3, at 1018–19 (arguing that laws should prohibit the most grievous, not all, vices, for overregulation makes it impossible for citizens to comply with the law and thus undermines the force of law).

\(^{43}\) *FULLER, supra* note 22, at 82.

\(^{44}\) AQUINAS, *supra* note 25, Q. 96, Art. 6, at 1021, & Q. 97, Arts. 1–2, at 1022–23.

\(^{45}\) Indeed, equity has been defined as “[t]he recourse to principles of justice to correct or supplement the law as applied to particular circumstances . . . .” BLACK’S LAW DICTIONARY 619 (9th ed. 2009). In other words, equity owes its existence to the occasional need to mitigate the strict letter of the law.

\(^{46}\) *FULLER, supra* note 22, at 217.

\(^{47}\) *Id.* at 234.

\(^{48}\) 1A SUTHERLAND STATUTORY CONSTRUCTION § 23:26 (7th ed.) ("The determinative factors in application of the doctrine of desuetude are whether the statute
pel, acquiescence, and laches generally do not apply to the government. There is therefore a distinction between poor enforcement and longstanding non-enforcement. Nevertheless, even though the government has a right to enforce the law, equitable considerations suggest the government should account for its complicity in more than 11 million immigrants being present contrary to law.

involves traditional criminal behavior, whether it has been openly, notoriously and perversely violated without prosecution for a long time, and whether there has been a conspicuous policy of nonenforcement.”). The United States Supreme Court has generally disfavored arguments that laws are repealed by desuetude. See, e.g., Jones v. Alfred H. Mayer Co., 392 U.S. 409, 437 (1968) (“The fact that the statute lay partially dormant for many years cannot be held to diminish its force today.”) (internal quotation omitted); Dist. of Columbia v. John R. Thompson Co., 346 U.S. 100, 113–14 (1953) (“The failure of the executive branch to enforce a law does not result in its modification or repeal.”); United States v. Morton Salt Co., 338 U.S. 632, 647–48 (1950) (“We know that unquestioned powers are sometimes unexercised from lack of funds, motives of expediency, or the competition of more immediately important concerns. We find no basis for holding that any power ever granted . . . has been forfeited by nonuse.’'); Kelly v. State of Washington ex rel. Foss Co., 302 U.S. 1, 14 (1937) (“Where the state police power exists, it is not lost by nonexercise but remains to be exerted as local exigencies may demand.”); Louisville & N. R. Co. v. United States, 282 U.S. 740, 759 (1931) (“Long-continued practice and the approval of administrative authorities may be persuasive in the interpretation of doubtful provisions of a statute, but cannot alter provisions that are clear and explicit when related to the facts disclosed. A failure to enforce the law does not change it.”).

United States v. California, 332 U.S. 19, 40 (1949) (holding that acquiescence, like laches, does not apply to the federal government); 31 C.J.S. Estoppel and Waiver § 232 (2012) (“[E]stoppel should not be applied against governmental bodies except in rare and unusual, or exceptional, circumstances.”).

See, e.g., Juliet P. Stumpf, Doing Time: Crimmigration Law and the Perils of Haste, 58 UCLA L. REV. 1705, 1720–21 (2011) (“[W]hen the government has consented to any period during which noncitizens can be present in the country, the natural consequence of that admission will be the formation of ties within the community. Having created the conditions for that consequence, the government should be held to have assumed a risk that noncitizens will form ties within the country. Those ties, viewed as a measure of affiliation with the United States, resist blithe decisions to deport noncitizens. With respect to relief from deportation for noncitizens who entered without authorization, the affiliation argument asserts that the government has simply failed to act to displace unlawfully present noncitizens from the community for too long a time. The more time it takes the government to deport a noncitizen, the stronger the affiliation argument becomes.”); cf. Christopher Angervine, Amnesty and the “Legality” of Illegal Immigration: How Reliance and Underenforcement Inform the Immigration Debate, 50 S. TEX. L. REV. 235, 254–55 (2008) (arguing that “illegal aliens’ reliance upon underenforced immigration laws makes a strong case for an amnesty provision. Amnesty . . . does not conform with the letter of the immigration statutes, but it tracks the spirit of the social reality of immigration . . . Amnesty, though likely overinclusive, fits a ‘nation of laws’ well.
Finally, strict enforcement is not practical. As shown above,\textsuperscript{51} our government has fallen far short of full enforcement of immigration laws, which is not surprising given the staggering costs such enforcement would entail. The budget for FY 2013 requests $5,644,061,000 in funding for U.S. Immigration and Customs Enforcement, as well as $11,979,454,000 for the U.S. Customs and Border Protection,\textsuperscript{52} for a total of over $17.6 billion. By contrast, a study initiated in 2002 by James Ziglar, then Commissioner of the Immigration and Naturalization Service (INS), concluded that INS funding would be adequate to meet congressional enforcement mandates only if increased to $46 billion.\textsuperscript{53} Ziglar conducted his study a decade ago, when the unauthorized population was an estimated 9.4 million, approximately 2 million less than today.\textsuperscript{54} These numbers elucidate the fiscal and political problems associated with strict enforcement.

Moreover, the border with Mexico remains relatively porous, and questions have been raised about the feasibility and desirability of sealing the border,\textsuperscript{55} particularly given the exorbitant cost of building an effective “wall”:

In 2009, the Congressional Search Service reported that the Department of Homeland Security had spent roughly up to $21 million per mile to build a primary fence near San Diego. The cost had ballooned as the fence extended into hills and gullies along the line.

The same year, Customs and Border Protection estimated costs of building an additional 3.5 miles of fence near San Diego at $16 million per mile. Even this lower figure would yield

\textsuperscript{51} See supra notes 17–19 and accompanying text.
\textsuperscript{54} Id.
\textsuperscript{55} See, e.g., Denise Gilman, Seeking Breaches in the Wall: An International Human Rights Law Challenge to the Texas-Mexico Border Wall, 46 TEX. INT’L L.J. 257, 279 (2011) (“There are no plans to build a solid border wall, and it seems unlikely (and undesirable as a human rights matter) that a solid border wall will ever be built given the length of the border between the United States and Mexico, the rough terrain it covers, and the prohibitive cost.”).
a rough projection of $22.4 billion for a single fence across the 1,400 miles remaining today.

These estimates do not include the costs of acquiring land, nor the expense of maintaining a fence that is exposed to constant efforts by illegal crossers to bore through it or under it or to bring it down. In March, Customs and Border Protection estimated it would cost $6.5 billion 'to deploy, operate and maintain the existing border fencing over an expected maximum lifetime of 20 years. The agency reported repairing 4,037 breaches in 2010 alone.\(^\text{56}\)

In sum, although the rule of law requires predictable enforcement, the law must be just and reasonable. The government’s failure to enforce our immigration laws reflects not just a failure of will but that the law currently imposes unreasonable standards that cannot be consistently or reasonably enforced. A balanced commitment to the rule of law rejects both full amnesty with open borders and hyper-literal enforcement. The rule of law can be properly upheld only if the law is reformed to be more equitable and reasonable, coupled with an explicit commitment to consistent enforcement of the revised law.

III. EQUITABLE CONSIDERATIONS UNIQUE TO AND FAVORING MEXICAN IMMIGRANTS

Amending immigration laws to make them just and reasonably enforceable will require careful consideration of numerous issues and concerns. As the law is reformed, it should grant limited, preferential treatment to Mexican nationals, for two reasons, one pragmatic, the other historical and equitable.

First, the vast majority of actual and would-be immigrants to the U.S. are from Mexico. Of the estimated 11.5 million immigrants present in violation of immigration laws, close to 60% (over 6 million) were Mexican nationals.\(^\text{57}\) Mexico is by far the leading country of origin for U.S. immigrants, accounting for approximately one-third of all foreign-born residents.\(^\text{58}\) "The U.S. today has more immigrants from

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\(^{57}\) HOEFER, supra note 19, at 1 (estimating that 59% of immigrants present in violation of the law in 2011 were Mexican).

Mexico alone—12.0 million—than any other country in the world has from all countries of the world.”

“The next largest sending country—China (including Hong Kong and Taiwan)—accounts for just 5% of the nation’s current population of about 40 million immigrants.”

Notwithstanding the significant number of Mexicans who want to immigrate here, Mexicans are given no priority for legal immigration. As noted above, the federal government issues 675,000 visas worldwide each year: 480,000 for family-based visas, 55,000 for diversity immigrants, and 140,000 for employment-based immigrants. Regarding employment-based and family-based immigrant visas, the INA allocates only 7% of the total number of available visas (9,800 employment-based visas and 15,820 family-based visas) to immigrants from any single foreign state in a given fiscal year. Thus, family-based “immigrant visas become unavailable to natives of a particular country when either the worldwide quota (226,000) or the native’s per-country quota (15,820) is reached, [and] Mexicans [typically] reach the per-country quota before reaching the worldwide quota.”

And yet, no adjustment is made for the significantly higher interest from Mexico. “Consequently, many would-be immigrants from Mexico enter the country illegally because of oversubscription.”

Given the desire Mexicans have to immigrate to the U.S., and the large number of Mexicans present in violation of the law, it makes sense to increase opportunities for legal immigration from Mexico. Such an adjustment would be a sign of good will that could encourage Mexicans to immigrate legally and thus help reduce illegal entry.

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60 Id.

61 See supra notes 10–14 and accompanying text.


63 Samuel W. Bettwy, A Proposed Legislative Scheme to Solve the Mexican Immigration Problem, 2 SAN DIEGO INT’L L.J. 93, 100–01 (2001). Several other countries, such as the Philippines, India, and China, also face substantial backlogs for certain visa categories. Margaret W. Wong et al., Why Immigration Reform is Critical, 3 ALB. GOV’T L. REV. 57, 64 (2010).

64 Admittedly, Mexicans have access to TN visas under NAFTA to pursue certain professional employment. Ochoa, supra note 10, at 33. These visas are limited, however, because “[t]he most common minimum requirement is a baccalaureate degree or licensure, if required for the profession.” Id.

Second, our shared border is a result of conquest, and the vast majority of Mexican immigrants who enter or remain in violation of U.S. immigration law are migrating to former Mexican territory. Although the law of conquest vested the United States with title to and control over the conquered territory, our immigration problems from Mexico flow from that conquest, which created a common border and caused social and economic harm to Mexico and Mexican nationals. As Charles Wilkinson has argued:

In 1845, during President Polk’s tenure, the United States annexed Texas, then an independent republic. The Mexican-American War, for which there was no clear cause except the Americans’ expansionist fervor, culminated in the Treaty of Guadalupe Hidalgo in 1848, in which the United States forced Mexico to cede California, Nevada, Utah, most of Arizona, and parts of New Mexico, Colorado, and Wyoming. In all, the territory of the Republic of Mexico was cut nearly in half. The 1848 Treaty purported to respect prior Spanish and Mexican land grants, but federal laws and American enterprise managed to separate Hispanics in California and the Southwest from most of their land.

Fearing full annexation, and under pressure from British money brokers to accede to American demands, Mexican officials agreed to

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67 See Palmer v. Low, 98 U.S. 1, 28, 30 (1878) (Noting that with regard to land in San Francisco, “[u]pon the conquest, the United States succeeded to the rights and authority of the Mexican government, subject only to their obligations under the treaty of Guadalupe Hidalgo.”); see also Johnson v. McIntosh, 21 U.S. (1 Wheat.) 543, 588 (1823) (“Conquest gives a title which the Courts of the conqueror cannot deny . . . .”).

68 Charles F. Wilkinson, The Law of the American West: A Critical Bibliography of the Nonlegal Sources, 85 Mich. L. Rev. 953, 969 (1987); see also George A. Martinez, Dispute Resolution and the Treaty of Guadalupe Hidalgo: Parallels and Possible Lessons for Dispute Resolution Under NAFTA, 5 Sw. J.L. & Trade Am. 147, 150 (1998) (“Much of the American West and Southwest was acquired by the United States in the 529,000 square mile cession by the Republic of Mexico. Thus, the United States conquered Mexico in 1848. The Treaty of Guadalupe Hidalgo completed that conquest and, therefore, completed the conquest of the Southwest.”).
the one-sided treaty, which the Whigs condemned as immoral. 69 "The new, arbitrary international border separated family from family and remains the geographical manifestation of an immigration policy that is satisfactory to almost no one—American farmers, federal officials, or Hispanics in, or seeking to migrate to, their former homeland." 70

Moreover, the protections the Treaty offered were not fully honored. 71 "Poverty in unincorporated and impoverished colonies populated primarily by Mexican-Americans along the United States-Mexico border today serve as stark reminders of the failure of the Treaty’s promise to achieve full membership rights for persons of Mexican ancestry." 72

This is not to suggest an open border or a Mexican right to return, but rather that an equitable adjustment is warranted in part because our immigration-related problems are traceable to conquest of Mexican territory. This proposal is ironically less liberalized than American immigration policies in the late 19th and early 20th centuries. "[M]igration across the border, both to and from the United States, had had an informal, unregulated character from the late nineteenth century to World War I." 73 The development of railroads enabled greater Mexican immigration starting in the 1880s. 74

Immigration inspectors ignored Mexicans coming into the southwestern United States during the 1900s and 1910s to work in railroad construction, mining, and agriculture. The Immigration Bureau did not seriously consider Mexican immigration within its purview, but rather as something that was regulated by labor market demands in . . . border states. 75

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69 Martínez, supra note 68, at 151.
70 Wilkinson, supra note 68, at 969.
71 See, e.g., Kevin R. Johnson, An Essay on Immigration, Citizenship, and U.S./Mexico Relations: The Tale of Two Treaties, 5 SW. J.L. & TRADE AM. 121, 129 (1998) (explaining how the Treaty’s guarantee of rights to the Mexicans who became U.S. citizens and their descendants was circumvented); Christine A. Klein, Treaties of Conquest: Property Rights, Indian Treaties, and the Treaty of Guadalupe Hidalgo, 26 N.M. L. REV. 201, 217–18 (1996) (describing how the Treaty’s guarantees that private property rights would be “inviolably respected” and that the inhabitants of the conquered territory would be “maintained and protected in the free enjoyment of their liberty and property” were not upheld).
72 Johnson, supra note 71, at 129.
75 Ngai, supra note 73, at 64 (internal quotation omitted).
Prior to the 1920s, there was no cap on immigration, although immigrants from some countries—most notably China—were excluded.\(^{76}\) During and following World War I, American nationalism and anti-radical/Bolshevik sentiments led to restrictions on immigration from Europe.\(^{77}\) In 1917, a literacy test was imposed and the head tax was doubled,\(^{78}\) but these restrictions did not immediately apply to Mexicans.\(^{79}\) When Congress passed the Immigration Act of 1924, capping immigration and establishing quotas, it “placed no numerical restrictions on immigration from countries of the Western Hemisphere, in deference to the need for labor in southwestern agriculture and American diplomatic and trade interests with Canada and Mexico.”\(^{80}\) Quotas were suggested but not imposed for Mexican immigration.\(^{81}\) By the late 1920s, Americans began to draw hard distinctions between legal and illegal immigration, and perceptions of Mexican immigrants as a race problem in the Southwest began to emerge, resulting in a dramatic rise in deportations of Mexicans.\(^{82}\) Nevertheless, this brief historical survey demonstrates that it would not be unprecedented to give Mexicans favored immigration status.

The ideal solution to Mexican poverty is, however, not greater immigration opportunities but increased prosperity in Mexico. The United States can best serve Mexicans by engaging in public and private efforts to assist Mexico in addressing its social and economic problems.\(^{83}\) Even the most strident amnesty opponent should support

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\(^{76}\) Id. at 17–18.

\(^{77}\) Id. at 19.

\(^{78}\) Id. at 19, 64.

\(^{79}\) Id. at 64.

\(^{80}\) Id. at 22–23.

\(^{81}\) See id. at 52–55.

\(^{82}\) Id. at 55, 67.

\(^{83}\) See Bill Ong Hing, ETHICAL BORDERS: NAFTA, GLOBALIZATION, AND MEXICAN MIGRATION 134–41 (2010) (suggesting that, among other things, the United States should invest in Mexico to stem illegal immigration); Sanford E. Gaines, NAFTA as a Symbol on the Border, 51 UCLA L. REV. 143, 175 (2003) (noting how educational deficiencies harm the Mexican economy, with the average Mexican worker having only eight years of schooling); Brandon Batt, Comment, Private Foreign Investment: Why Mexico’s Economic Future Depends on It, 41 ARIZ. ST. L.J. 1111, 1129–30 (2009) (arguing that Mexico’s difficulties in attracting investment are caused by a slow banking system and by perceptions of government corruption or unpredictability); cf. Ranko Shiraki Oliver, In the Twelve Years of NAFTA, the Treaty Gave to Me ... What, Exactly?: An Assessment of Economic, Social, and Political Developments in Mexico Since 1994 and Their Impact on Mexican Immigration into the United States, 10 HARV. LATINO L. REV. 53, 84 (2007) (“The United States’
such efforts because "[t]he most obvious reasons that the economic and political health of Mexico matters to the United States is that Mexicans who are discontented with conditions at home are likely to relocate to the United States."\textsuperscript{84} A prosperous Mexico would hopefully result in immigration patterns more similar to those from Canada.\textsuperscript{85} Moreover, as Michael Scaperlanda has argued, emigration is an inherent, although often necessary, evil, because it disassociates people from the native culture in which God placed them, harming both the individual and the community he or she leaves.\textsuperscript{86} Improved conditions in Mexico will better serve the needs of Mexican nationals and help minimize immigration-related problems.

Recently, under the auspices of the Pacific Council for International Policy (PCIP) and the Mexican Council on Foreign Relations (COMEXI), thirty businessmen, civic leaders, and former governmental officials from Mexico and the United States formed a task force to devise ways to improve management of the border. The task force issued a report in 2009 entitled \textit{Managing the United States-Mexico Border: Cooperative Solutions to Common Problems},\textsuperscript{87} that proposed concrete and achievable action steps in six areas: (1) public safety and security;\textsuperscript{88} (2) facilitation of legal transit and commerce;\textsuperscript{89} (3) econom-

decision to enter into free trade agreements with other developing countries is likely to negatively impact Mexico's manufacturing sector. When Mexico entered into a free trade agreement with the United States, Mexico was in the unique position of being the first low-wage, developing country to do so.

\textsuperscript{84} Oliver, \textit{supra} note 83, at 55.

\textsuperscript{85} In 2010, the unauthorized immigrant population from Canada and Europe combined made up only four percent of the undocumented population; those from Mexico made up fifty-eight percent. JEFFREY S. PASSEL & D'VILLA COHN, PEW HISPANIC CTR., \textit{UNAUTHORIZED IMMIGRANT POPULATION: NATIONAL AND STATE TRENDS}, 2010 at 11 (2011), \textit{available at} http://www.pewhispanic.org/files/reports/133.pdf.


\textsuperscript{88} \textbf{Both countries should take the following steps immediately}:\textsuperscript{\textdagger}

\begin{itemize}
  \item \textbf{Mexico should restructure its federal law enforcement institutions along the border to create a direct counterpart to U.S. border enforcement authorities, similar to the approach that Canada took after the terrorist attacks of September 11, 2001.}
\end{itemize}
Mexico should begin converting its Customs authority (Aduanas) into a multifunctional agency capable of addressing the threats posed by cross-border trafficking of all sorts. Mexican Customs and the Office of Field Operations of U.S. Customs and Border Protection should develop joint plans for securing all land ports of entry along the border.

The United States and Mexico should expand cooperative law enforcement efforts along the border, such as the OASISS program (through which information collected by U.S. officials is used by Mexican authorities to prosecute smugglers apprehended in the United States).

The United States should intensify efforts to curtail the smuggling of firearms, ammunition, and bulk cash into Mexico by aggressively investigating gun sellers, regulating gun shows, reestablishing the Clinton-era ban on assault weapons, conducting targeted inspections of southbound traffic, and providing leads to a more robust Mexican Customs authority.

The United States should dramatically expand assistance to Mexico beyond the Mérida Initiative, in order to help Mexico build up its law enforcement capacity.

The United States should reduce demand for illegal drugs through enhanced prevention efforts, increased access to treatment programs, stricter street-level enforcement, expanded drug testing of a portion of the workforce (e.g., employees of firms with government contracts), and more careful surveillance of the prison and parolee populations. Mexico should also intensify its own efforts to reduce domestic drug consumption.

The following steps should be taken within the next three years:

Mexico should complete the establishment of a federal frontier police, either as a division of an existing entity or as a new federal law enforcement agency dedicated to securing the areas between the ports of entry on both Mexico’s northern and southern borders.

Mexico should consider bringing the federal frontier police and a transformed Customs authority together into a single, unified border protection agency.

Mexico and the United States should reconfigure the zones of operation of their respective border enforcement agencies so that they mirror each other.

Cross-deputized Mexican and U.S. border patrol officers should conduct joint operations between the ports of entry.

Mexico and the United States should reconfigure their ports of entry so that appropriate officials on both sides have access to real-time data on vehicles and individuals crossing the border. Customs officers from both sides should meet regularly to review operations at their ports of entry.

Id. at 8–9.

Both countries should take the following steps immediately:[89]

Encourage public-private partnerships to erect new ports of entry, along the lines of Otay Mesa East, permitting whatever toll structures are necessary to finance these projects.

Require that planning for every new port of entry and the infrastructure that feeds into it be conducted by a single binational body or (failing that) by mirror-image bodies in which representatives of each country sit on the planning board of the other.
ic development;\textsuperscript{90} (4) water management;\textsuperscript{91} (5) the environment;\textsuperscript{92} and (6) migration.\textsuperscript{93} The work of this task force is an excellent example of

- Expand trusted traveler (such as SENTRI) and shipper (FAST-C-TPAT/EXPRESS-AEO) programs without lowering the bar for inclusion in these programs.
- Staff ports of entry adequately to cope with the current volume of trade and transit, and eliminate transaction costs associated with customs broker inspections.
- Undertake a cost-benefit analysis of projects to be financed by new economic stimulus plans in both countries, channeling more spending toward the ports of entry if border infrastructure has a higher multiplier effect than other projects. Both countries should take the following steps \textit{within three years}:
  - Give officers at the ports of entry the equipment necessary to communicate directly and instantaneously with their counterparts.
  - Fully deploy, on both sides of the border, non-intrusive inspection technologies that reduce wait times without jeopardizing security.
  - Encourage the formation of a border-wide network—possibly virtual—of state and local governments, community organizations, and business groups to advocate for policies that expedite legal commerce and transit.
  - Complete planning and begin construction of new SENTRI and FAST/EXPRESS lanes to accommodate increasing travel and trade between Mexico and the United States.

\textit{Id.} at 11.

\textsuperscript{90} \textbf{To promote economic development in the border region, Mexico and the United States should take the following step immediately:}
  - Expand the NADBank's mandate to allow it to invest in new sorts of infrastructure projects, including those that intimately affect border communities but are not necessarily located in the border region (e.g., logistics corridors).

Both governments should take the following steps \textit{within three years}:

- Create a binational Border Development Authority that would coordinate all the activities of the NADBank under a broader mandate, with higher levels of capitalization and access to grant money to help local governments develop their administrative capacity.

- Once the Border Development Authority demonstrates its ability to integrate the interests of legislators, governors, mayors, business groups, and grassroots organizations, it should be charged with encouraging regional development initiatives and coordinating infrastructure planning along the border.

- Reestablish the trans-border land transportation demonstration project.

\textit{Id.} at 12.

\textsuperscript{91} \textbf{To better manage shared water resources, Mexico and the United States should take the following steps immediately:}
  - Negotiate a new series of Minutes that give the IBWC jurisdiction over transboundary groundwater, allow it to better address environmental concerns, and expand its ability to conduct long-range planning (which in turn will allow it to identify further opportunities for improvement in water management).

- Add U.S. states and the American Section of the IBWC to the relevant Mexican Water Basin Councils as "Guests" (an arrangement analogous to the inclusion of Canadian provinces in the Great Lakes Commission), to encourage comprehensive watershed management.
• Permit the cross-border sale of water of different grades (e.g., wastewater vs. drinkable water)—again, through the federal government on the Mexican side if necessary.

Mexico and the United States should take the following steps within three years:
• Create a more powerful IBWC—possibly renamed a Binational Water Board—that would have the ability to comprehensively manage all transboundary surface and ground waters, finance new investments in water infrastructure, develop new sources of supply, regulate cross-border water sales, create incentives for conservation, and work with Mexico’s National Water Commission and U.S. states to reduce pricing distortions, and educate the public on water management.
• Begin negotiations on a new water Treaty or Agreement, based on the 1944 Treaty but updated to reflect the importance of conservation and environmental concerns.
• Launch a communication campaign aimed at educating legislators, policymakers, residential consumers, and holders of water rights about water management.
• Adopt policies to conserve and better allocate water throughout the border region, including changes in pricing.

_id. at 13-14.

92 [The two countries] should take the following steps immediately:
• Substantially increase funding for the Border Environment Infrastructure Fund.
• Harmonize regulatory standards in the border region and require that new plants along the frontier conduct transboundary environmental impact assessments (TBEIAs).

Mexico and the U.S. should take the following steps within three years:
• Devise strategies to improve water and air quality in the border region, including regional emissions trading systems if appropriate.
• Give the Binational Water Board (discussed in the previous section) the authority to develop standards for water quality and reduce non-point source pollution in shared waterways.

_id. at 15.

93 To reduce unauthorized migration—and its deleterious effects on individuals, families, and communities in both countries—the following steps should be taken immediately:
• The United States should officially acknowledge that, when it comes to migration, Mexico is unique and that addressing Mexican migration requires a set of policies tailored to the situation.
• Mexico and the United States should establish a joint commission of economists, demographers, prominent businessmen, and labor leaders to analyze the labor market complementarities produced by long-term demographic trends and economic integration; the Commission should report to the President and Congress of each country. If a joint commission is not possible, the two governments should establish parallel commissions with the same charge, which should work in tandem.
• Both governments should jointly develop a plan for managing future flows (both temporary and permanent) that takes into account the demographic and labor market realities of both countries. This plan must address the potential for fraud by recruiters and ensure that labor rights are fully protected.

The following steps should be taken within the next three years:
• The United States should adopt a set of policies that addresses both the status of unauthorized Mexicans living in the country and future flows from Mexico. The
a comprehensive and cooperative approach to immigration reform that reflects a balanced understanding of the rule of law, U.S. safety concerns, and the need to improve conditions that contribute to emigration from Mexico. Implementation of these policies would go a long way toward solving the issues related to Mexican immigrants coming to or remaining in the U.S. in violation of the law.

IV. LABELING

Labels are important. They either persuade or alienate, and they are either accurate or misleading. Because the common labels used on the extremes of the immigration debate are polarizing and inaccurate, I suggest more thoughtful, neutral terminology.

Advocates of a strict adherence to the rule of law often prefer "illegal alien," or perhaps "illegal immigrant." "Illegal alien" is admittedly used in federal immigration law, and for that reason, it is not surprising the term often occurs in legal documents and federal court

level of future legal flows should be flexible, reflecting economic conditions and the demand for labor.

1 Once such reforms are in place, Mexico should actively prevent unauthorized northward migration by ensuring that people who leave the country to enter the United States do so at designated crossing points and with the required documents.

Id. at 16–17.

See Kobach, supra note 20, at 155 n.1:
I use the term "illegal alien" because it is a legally accurate term used repeatedly in the immigration laws of the United States. See, e.g., 8 U.S.C. § 1356(r)(3)(ii) (2006) ("expenses associated with the detention of illegal aliens"); 8 U.S.C. § 1366(1) (2006) ("the number of illegal aliens incarcerated in Federal and State prisons"). Another phrase that is used throughout the immigration laws of the United States is "alien not lawfully present in the United States." See, e.g., 8 U.S.C. § 1229a(c)(2) (2006) ( "the alien has the burden of establishing... (B) by clear and convincing evidence, that the alien is lawfully present in the United States"); 8 U.S.C. § 1357(g)(10) (2006) ("for any officer or employee of a State or political subdivision of a State... (B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States."). This term, however, is a bit too cumbersome for a writing of this nature. A third term, "unauthorized alien," is found in federal immigration laws, but is limited to the employment context. See, e.g., 8 U.S.C. § 1324a(a) (2006) ("making employment of unauthorized aliens unlawful"); 8 U.S.C. § 1324b(a)(1) (2006) ("other than an unauthorized alien, as defined in section 1324a(h)(3) of this title"). In contrast, the ambiguous terms "undocumented immigrant" and "undocumented alien" do not appear anywhere in the immigration laws of the United States. See, e.g., § U.S.C. § 1101(a)-(l) (2006). Accordingly, I will use the shorter of the two appropriate terms recognized by federal statute, namely "illegal alien."

Id.
opinions. 95 "Illegal alien" nevertheless misleads by not reflecting full and fair consideration of the equities of an immigrant’s circumstances:

The prevalence of ‘illegal alien’ in legal opinions is extraordinary given that the law provides no clear definition of the term. Although ‘illegal alien’ is often used to refer to people who overstay their visas or enter the country without inspection, there are several scenarios in which these immigrants may remain lawfully in the United States. For example, many of the people described as ‘illegal aliens’ have family connections, community ties, or legitimate fears of persecution that entitle them to discretionary relief. But when courts use ‘illegal alien’ as a descriptive term, these rights have rarely been adjudicated.96

“Illegal alien” also carries needlessly negative connotations. "Alien" is both a metaphor and a statutory term. In addition to defining immigrants as noncitizens in the INA, ‘alien’ conveys three distinct qualities: otherness, illegality, and ethnicity.”97 Even worse, “alien” suggests a non-human.98 With regard to the offense of staying in the country illegally after entering legally,

the illegal alien metaphor distorts the severity of an immigrant's offense. . . [N]early half of all people described as ‘illegal aliens’ obtained their ‘illegal’ status by overstaying valid visas—a civil immigration violation that involves no criminal conduct whatsoever. Nevertheless, the language of alienage equates these . . . non-criminal acts with serious crimes . . . 99

Moreover, the adjective “illegal” suggests wholesale illegality of the “alien,” rather than the person’s entry or presence. In sum, “illegal alien” facially invalidates the person and his or her rights.

95 See Keith Cunningham-Panneter, Alien Language: Immigration Metaphors and the Jurisprudence of Otherness, 79 FORDHAM L. REV. 1545, 1573 (2011) (identifying 4,200 post-1965 federal court decisions that contained any combination of the adjective “illegal,” “unauthorized,” or “undocumented” with the noun “immigrant,” “alien,” or “noncitizen,” and finding that “illegal alien” was by far the most common term, appearing in 69% of opinions (2905 cases).”).
96 Id. at 1574.
97 Id. at 1569.
98 See id. (observing that “aliens are nonhuman”).
99 Id. at 1575–76.
On the other hand, although “undocumented immigrant” avoids the above problems, it masks the immigrant’s wrongdoing and minimizes the resulting harm to the rule of law and, in some instances, society at large.100 “Undocumented immigrant,” which is not currently used or recognized in law, suggests the person is simply missing a document—like not having a ticket to enter an entertainment venue—not that the immigrant violated the law. “Undocumented worker” can be even more misleading because not all undocumented immigrants are in the U.S. to work.

Adopting a fair label would be an important step toward constructively addressing immigration-related issues. The label should accurately describe the nature of the problem—a non-citizen whose presence violates the law—but no more. I propose grounding the preferred label in the Latin phrase for “present contrary to prohibition,” which is praesens contra prohibitionem. Because this phrase is a bit long, I would shorten and slightly Americanize it, to coin the phrase “contra prohibition immigrant.” This phrase avoids the use of “alien,” pinpoints the nature of the legal issue surrounding the immigrant’s presence, and reinforces that the immigrant’s offense is malum prohibitum and not inherently evil. Latin is scholarly, commonly used in law (e.g., res ipsa loquitur, void ab initio, etc.), and the foundation for all Romance languages, including Spanish. I cannot think of a single reasonable objection to this label, other than the fact that it is not used in law. I would therefore urge Congress to amend all federal immigration laws to substitute “contra prohibition immigrant” for “illegal alien” or any other similar phrase and to instruct affected administrative agencies to do likewise in their regulations.101

V. CONCLUSION

Having over 11 million contra prohibition immigrants in the United States is unacceptable and requires thoughtful action that furthers the rule of law while treating each immigrant fairly and equitably. Recently, the number of immigrants coming to the United States illegal-

100 See supra notes 21–30 and accompanying text.

101 Another commentator made a thoughtful attempt to address this labeling problem by using the phrase “immigration outside the law” “as an attempt to be more literally accurate and more neutral than ‘illegal’ or ‘undocumented’ immigration.” See Hiroshi Motomura, Immigration Outside the Law, 108 COLUM. L. REV. 2037, 2038 & n.1 (2008).
ly, particularly from Mexico, has decreased, presumably tracking the state of the American economy. These circumstances should be viewed as an incentive to address immigration reform rather than a reason to avoid it, because the reduced influx of immigrants makes it easier to consider equitable legal reform, including how to deal fairly with existing *contra prohibition* immigrants. I hope the proposals in this article will play a constructive role in the needed reform process.

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102 *Net Migration from Mexico Falls to Zero—and Perhaps Less, supra* note 59, at 17–28 (noting that the gross inflow from Mexico dropped from more than 700,000 in 2000 to less than 150,000 in 2010 and that border patrol apprehensions have also decreased).