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FOR HUMANE BORDERS: TWO DECADES OF DEATH AND ILLEGAL ACTIVITY IN THE SONORAN DESERT

Daniel A. Scharf†

Humane Borders placed this water station under power lines and marked it with a blue flag so dehydrated migrants illegally crossing the U.S.-Mexico border in Organ Pipe Cactus National Monument in Arizona will be able to find lifesaving water and make it through the Sonoran Desert alive.‡

† B.A., Lafayette College (2001); J.D. candidate, Case Western Reserve University School of Law (May 2006). I would like to thank Professor Chodosh for his guidance with this Note and the Case Western Reserve Journal of International Law for its patience and support on this project. I would also like to thank my college advisor Dan Bauer for sharing some of the insights he gained during his fieldwork in Mexico, and my family, especially my mom, for never ceasing to question me about this Note. Finally, I would like to thank the students in the "I have a Dream" Foundation's Forest Grove/Cornelius Project, who served as an inspiration throughout this exercise.

‡ More than six months have passed between the completion of this Note and the time of its publication. While the topic of illegal immigration into the U.S. has recently been the
Mario Alberto Diaz, a biologist nearing completion of his master's degree, crawled under a barbed-wire fence marking the border with the United States one evening this summer. He had 48 hours to go in his illegal trek across the desert.

Desperate for a way to support his family, Diaz had a lead on a job in his specialty, cultivating mushrooms, at a plant in Florida. But not far into Arizona, his dream turned into a nightmare.

He stumbled and sprained a knee. Limping two nights and days, at times in 95-degree heat, left him dehydrated. On the second day, a cactus punctured his plastic bottle, spilling the last of his water. He fainted twice.

Traveling companions revived him, draped his arms over their shoulders and pulled him along. Each time they crossed a road, they urged him to stay behind, flag down the next vehicle and turn himself in. Each time Diaz refused, even after the ghastly sight of a man, woman and child huddling in lifeless embrace in the desert made clear the risk of continuing.

... He showed [a fellow migrant] a photo of his 4-year-old, Sonia, and kept repeating: 'I promised my daughter I would get there.' He didn't.

... [A] job search on the Internet led Diaz to a food-processing plant in Orlando, Fla., and he sent off a resume. The reply was encouraging, but he would need a U.S. visa. When his visa application was denied—because his $400 savings account was too small and the title to his home was not in his name—he decided to go illegally and simply show up at the plant.

... 'My brother was submerged in a depression,' said Alejandro Diaz ... 'That job in Orlando was an illusion that got into his head, and nobody could take it out.'

... Diaz was a strong 6-footer with a black belt in karate and a biologist's knowledge of the dangers of extreme heat.

Yet after hurting his knee that evening, Diaz tried to defy the growing odds against his life ... He refused to give up the trek across a blistering landscape of canyons, copper mines, mesquite shrubs and saguaro cactus.

Eventually, the bulk of the group moved ahead, leaving the limping biologist in the company of Gerardo the smuggler and another of his clients...

What happened next is unclear

subject of much attention, the problems identified in this Note still remain. The death toll for illegal immigrants in the Southwest reached a record high between October 1, 2004 and September 29, 2005. Richard Marosi, Border Crossing Deaths Set a 12-Month Record, L.A. TIMES, Oct. 1, 2005, at A1. Thus, although more recent numbers and commentary are available, the information provided in this Note is as relevant now as it was when it was written.
Sheriff's deputies say they recovered Diaz's body in a dry creek bed by a shrub to which someone—perhaps his departing companions — had tied a bottle containing a third of a gallon of water. The site is in the steep foothills of the Sierra [M]ountains, about 15 miles southwest of the Arizona mining town of Green Valley.¹

I. UNDERSTANDING THE CRISIS AT THE BORDER

Mario Albert Diaz's death is not an anomaly. While the numbers vary depending on the source,² the death toll for people illegally migrating into the United States ("U.S.") along the U.S.-Mexico border ("Border")³ in the America’s Southwestern Deserts has risen since the U.S. government launched Operation Gatekeeper in 1994.⁴ The U.S.'s failure to confront significant issues along the Border, and its continued implementation of a Border policy that is ineffective and lacks humanity, continues to cause an increase in the number of deaths near the Border.

The recent upsurge in deaths⁵ in the Sonoran Desert, an area that straddles the Border with parts of California, Arizona, and New Mexico to its north, dates back to October 1, 1994 when the U.S. launched Operation Gatekeeper, a Border initiative that greatly reduced illicit Border activity

² Compare Tyche Hendricks, Fewer Mexicans Die Trying to Cross Border, S.F. CHRON., Feb. 3, 2005, at A4 fig. (citing the Mexican Foreign Ministry's count of 325 migrant deaths in 1998), with BELINDA I. REYES ET AL., PUB. POLICY INST. OF CAL., HOLDING THE LINE? THE EFFECT OF THE RECENT BORDER BUILD-UP ON UNAUTHORIZED IMMIGRATION xii fig.S.5 (2002), available at http://www.ppic.org/content/pubs/R_702BRR.pdf (providing that in 1998 Immigration and Naturalization Service ("INS") counted approximately 255 migrant deaths, while the Center for Immigration Research counted approximately 260 migrant deaths). Two explanations for the discrepancy in the numbers are (1) different groups count dead people found along the Border differently (some groups count unidentifiable bodies, others do not), and (2) whether deceased parties on both sides of the border are counted.
³ In this Note, "Border," unless otherwise specified, refers to the U.S.-Mexico border spanning Texas, New Mexico, Arizona, and California.
⁵ Hendricks, supra note 2 (noting that in 2004, Arizona experienced a 12 to 32 percent increase in migrant deaths along its part of the Border); see also Dennis Wagner, Illegals Dying at Record Rate in Arizona Desert, USA TODAY, Aug. 19, 2005, at A1 (indicating that in 2005 migrant deaths increased from the previous year in and around Arizona).
around San Diego, California. Since its inception, Operation Gatekeeper has served as a model for future U.S. Border operations. Operation Gatekeeper spawned what leading academics have labeled the "Gatekeeper Complex," a term that describes the U.S.'s policy of increasing resources dedicated to preventing illegal Border crossings along traditional migrant paths.

When the U.S. closed off traditional Border crossing routes with Operation Gatekeeper around San Diego, California, and with Operation Hold-the-Line (originally named Operation Blockade) around El Paso, Texas, the U.S. pushed illegal migration into smaller satellite cities and towns along the Border. When the U.S. then increased enforcement around the smaller cities and towns, those who sought to enter the U.S. illegally moved to the sparsely populated deserts.

Today, the U.S. Department of Homeland Security ("DHS") is responsible for preventing illegal immigration into the U.S. The U.S. Customs and Border Protection Agency ("CPB"), a branch of the DHS, has continued the Immigration and Naturalization Service's ("INS") policy of "prevention through deterrence" by increasing its Border Patrol's presence in areas that serve as traditional entry points along the Border. The INS officials who designed the Gatekeeper Complex enforcement policies believed that "intensified and targeted control would discourage many would-be migrants from even attempting the journey [across the Border] because of the additional physical difficulty, and the increased financial and psychological costs of the northbound journey."

The INS's belief has proven to be mistaken, and illegal immigration across the Border has not stopped; migration has merely shifted to more

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7 Id.
8 Eschbach et al., supra note 4, at 40-41.
9 Id. at 41.
10 Id. at 42.
11 Id.
12 With enactment of the Homeland Security Act, the Immigration and Naturalization Service ("INS") was dissolved on November 19, 2002, and the DHS assumed INS's responsibilities for securing the Border. See Alisa Solomon, INS Gatekeeper, Homeland Insecurity: The Once and Future Shambles at the INS, VILLAGE VOICE, Nov. 27 – Dec. 3, 2002.
14 Eschbach et al., supra note 4, at 42.
remote and dangerous places along the Border. Specifically, Figure 1 below makes clear that while illegal immigration slowed in San Diego and El Paso, apprehension rates, a statistic used as a proxy to estimate the number of people who illegally cross the Border, rose significantly around El Centro in California and Yuma and Tucson in Arizona. Those regions in the Sonoran Desert contain some of the harshest conditions anywhere on either side of the Border.

![Figure 1: Percentage of southwest border apprehensions](image)

- **Other sectors** include El Centro, Yuma, Tucson, Marfa, Del Rio, Laredo, and McAllen.

Source: GAO analysis of INS data.

The website also contains multimedia presentations that can serve as a starting point for those interested in learning more about illegal immigration along Border.

16 *Id.*

17 Donald L. Barlett & James B. Steele, *Who Left the Door Open?*, TIME, Sept. 20, 2004, at 53 (indicating that for every illegal immigrant caught, an estimated three enter the U.S. undetected); *but see* Gabriela Rico, *Border Patrol Claims 80% Rate of Capture*, TUCSON CITIZEN, July 3, 2004, at 4A (indicating that Border Patrol captures 4 out of 5 people who illegally enter the U.S. along certain parts of the Border in Arizona).


In response to the escalating death count around the Border, several humanitarian groups have joined together to pursue a common goal—increasing the chance of survival for migrants who pass through the Southwest’s inhospitable deserts.\(^{20}\) The need for private citizens to ensure that people do not perish in the Desert demonstrates the dire circumstances along the Border. Rather than reconsidering the assumptions the U.S. used to formulate Operation Gatekeeper and recent Border initiatives based on prevention through deterrence, the U.S. instead relies on humanitarian groups to help minimize the loss of life that has resulted from its Border policy.

The Gatekeeper Complex is funneling potential immigrants through some of the harshest conditions in North America and is conditioning their entrance into the U.S. on three factors: (1) the expertise of human smugglers, (2) physical endurance, and (3) luck. By reconsidering its Border policy in light of the available evidence, the U.S. can formulate a new Border policy that is both effective and humane. Thus, the U.S. will no longer need to rely on private citizens in the Southwest to serve as a crutch supporting a failing U.S. Border policy that has led to the unnecessary deaths of thousands of migrants due to exposure and dehydration in the Sonoran Desert.\(^{21}\) Such a policy must acknowledge that people will continue to try to enter the U.S. in the Southwest, legally or otherwise, regardless of the dangers involved. By routing immigrants seeking employment or reunification with family through official ports-of-entry, the U.S. can better monitor the northward migration and at the same time use its resources along the Border more efficiently to combat drug trafficking and terrorist activity taking place in the Sonoran Desert.

Section II of this Note discusses the Border with a focus on those who enter the U.S. illegally, and what the U.S. is doing to secure its Border. Next, Section III examines the effectiveness, or lack thereof, of the U.S.’s Border control strategy. Section IV explores the possibility of a strategy that can create a less chaotic Border where the U.S. can more easily identify significant security threats, while preventing senseless deaths in the Sonoran Desert at the same time. Finally, this note concludes that it is possible for the U.S. to create a secure and humane Border if it acknowledges the flaws in its current policy and bases future policy decisions on a more thorough understanding of the complex factors that affect illegal Border activity.

\(^{20}\) For a list and description of several humanitarian groups operating along the Border, see Kirsten Anderberg, *US-Mexico Borders: Stop Chasing Migrants to Death*, http://users.resist.ca/~kirstena/pageborderangels.html (last visited Nov. 6, 2005).

II. THE BORDER TODAY

A. Who is Crossing the Border?

Historically, with the exception of early Chinese immigrants, most of those who entered the U.S. illegally along the Border were Mexican.\(^\text{22}\) Today, however, while the majority of the migrants entering the U.S. along the Border are from Mexico, many illegal immigrants are also from Central America and South America.\(^\text{23}\)

Until the U.S. passed the Immigration Act of 1917 ("Immigration Act"), Mexicans were free to enter the U.S. without any restrictions.\(^\text{24}\) Before the Immigration Act, U.S. Border security focused on apprehending Chinese immigrants who were trying to avoid Chinese exclusion laws.\(^\text{25}\) As a result of the increase of Mexican citizens seeking entrance into the U.S. during the Mexican Revolution, the U.S. began to focus on slowing the northward migration.\(^\text{26}\)

The Immigration Act required parties seeking to enter the U.S. to pay a one-time tax of eight dollars per person and pass a literacy test.\(^\text{27}\) Also, the Immigration Act continued a prohibition against contract labor.\(^\text{28}\) When a Mexican citizen sought entry into the U.S. and was either illiterate or could not afford the eight dollar head tax, the Mexican national typically avoided the official port-of-entry into the U.S. and crossed at an unguarded spot.\(^\text{29}\) That avoidance of official ports-of-entry can be considered the origin of today's illegal Border crossings.

More recently, non-Mexicans (also referred to as OTMs, or Other-than-Mexican) have joined Mexicans in entering the U.S. illegally along the

\(^{22}\) U.S. Citizenship and Immigration Services, This Month in Immigration History: February 1848, http://uscis.gov/graphics/aboutus/history/feb1848.htm (last visited Nov. 6, 2005).

\(^{23}\) Combating Illegal Immigration: A Progress Report: Hearing Before the Subcomm. on Immigration and Claims, Comm. on the Judiciary, 105th Cong. 5 (1997) (statement of George Regan, Acting Associate Commissioner, Enforcement, Immigration and Naturalization Service), http://uscis.gov/graphics/aboutus/congress/testimonies/1997/970423.pdf; see also Barlett & Steele, supra note 17, at 52 (indicating that from October 1, 2003 through August 25, 2004, about 55,890 apprehended illegal immigrants were ‘other than Mexicans’ (OTM). The OTMs who were apprehended came from Latin America, Afghanistan, Bulgaria, Russia, China, Egypt, Iran and Iraq. An estimated 190,000 OTMs entered the United States undetected so far this year.).


\(^{25}\) Id.

\(^{26}\) Id.

\(^{27}\) Id.

\(^{28}\) Id.

\(^{29}\) Id.
Border. The vast majority of OTMs come from Central and South America, but between 2003 and 2004 the Border Patrol apprehended 132 OTMs from North Africa and the Middle East.\textsuperscript{30} Non-government sources, however, indicate that the number of OTMs entering the U.S. from "terrorist countries" is greater than the number the government has disclosed to the public.\textsuperscript{31} In evaluating the U.S.'s Border policy, one must not forget that some individuals that enter the U.S. illegally are doing so for reasons other than economic opportunity, and may present a security threat to the U.S.

\textbf{B. Why They Cross}

Most commentators agree that the majority of people who enter the U.S. illegally along the Border today are doing so in search of economic opportunity. The U.S. has a per capita Gross Domestic Product ("GDP") of approximately $40,100,\textsuperscript{32} whereas Mexico's per capita GDP is approximately one fourth of that amount.\textsuperscript{33} Mexico also suffers from a highly unequal distribution of wealth.\textsuperscript{34} Therefore, it should come as no surprise that many Mexicans seek job opportunities in the U.S.

Legal commentator Bill Ong Hing notes that the vast majority of those attempting to enter the U.S. illegally are "from deep within Mexico" and have made a great sacrifice to attempt to enter the U.S.\textsuperscript{35} Hing identifies four categories of Mexicans who cross the Border into San Diego.\textsuperscript{36} The first category consists of those attempting to cross the Border for the first time.\textsuperscript{37} In general, this first group is leaving Mexico for economic reasons and is the easiest group for the U.S. to deter.\textsuperscript{38} The second category consists of those who cross multiple times a year for temporary jobs in California.\textsuperscript{39}
Because of this group's experience with crossing the Border, it is more difficult to deter than the first type. The third category of those illegally entering San Diego is even more difficult to stop. This group consists of seasonal workers who have been crossing the Border for decades. They have crossed many times and are adept at finding new ways to enter the U.S.

Finally, the fourth, and most difficult type to deter, consists of Mexicans who have families that are already in the U.S. Persons in this group identify the U.S. as their home and are highly motivated to enter the U.S. at any cost.

C. Border Patrol

In the wake of Prohibition and World War I, Congress established the U.S. Border Patrol on May 28, 1924. The Border Patrol was made up of 450 men who were responsible "for enforcing Section 8 of the Immigration Act . . . which prohibited smuggling, harboring, concealing, or assisting a migrant not duly admitted by an immigration inspector or not lawfully entitled to enter or reside in the United States."  

Originally employing horses and receiving training from the U.S. Government, the Border Patrol from the 1920s and 30s has continued to grow. Today, the Border Patrol still uses horses to patrol the desert, but that is not to say that they have not kept up with the times. For example, the Border Patrol now uses helicopters, manned and unmanned fixed wing aircraft, night-vision goggles, an IDENT fingerprint identification system to track repeat crossers (and identify human smugglers), underground sensors, improved fencing and lighting, and improved infrastructure to increase the Border Patrol's access to remote areas. This new technology is not limited to the tracking and capturing of would-be immigrants. The Border Patrol is also using this technology to combat the illegal importation of drugs across

40 Id.
41 Id.
42 Id.
43 Id.
44 Id.
45 U.S. Customs and Border Protection, supra note 24.
46 Id.
47 "Border Patrol" for the remainder of this Note refers to the Border Patrol in the Southwest U.S., i.e., Texas, New Mexico, Arizona, and California, and not the Border Patrol for the entire country.
the Border and to provide aid to persons crossing the Border who are in need of medical assistance.50

The Border Patrol is a DHS agency. The Homeland Security Act of 2002 § 471 provided for the abolition of the Department of Justice’s INS, and transferred the services provided by the INS to the DHS.51 The Border Patrol is now part of the DHS’s Customs and Border Protection ("CBP") branch.52 CBP is part of the DHS’s Border and Transportation Security Agency, which also includes the Transportation Security Administration and Immigration and Customs Enforcement (ICE).53 Today, the Border Patrol works closely with other federal agencies within, and outside of, the DHS.54 CBP’s website notes that “[w]hile the Border Patrol has changed dramatically since its inception over 75 years ago, its primary mission remains unchanged: to detect and prevent the illegal entry of aliens into the United States.”55

D. United States Immigration Law

Title VIII of the Immigration and Naturalization Act provides that any person who is not a citizen or national of the U.S. who “(1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers” is violating the law.56 Parties caught crossing the Border illegally are subject to possible fines and/or imprisonment.57 Border Patrol’s customary practice for handling Mexicans caught illegally entering the U.S., however, is to fingerprint the Mexican citizen, and then provide him or her with a trip back to the Mexican side of the Border through an official port-of-entry.58

50 See U.S. Customs and Border Protection, supra note 24.
55 U.S. Customs and Border Protection, supra note 48.
57 Id.
58 See Timothy Egan, Border Desert Proves Deadly for Mexicans, N.Y. TIMES, May 23, 2004, at A1 (noting that Leon Stroud, a Border Patrol agent, compared apprehending parties illegally crossing the Border to “catch-and-release fishing,” with at least one instance in which the same offender was arrested three times in one week).
The procedure for OTMs caught illegally entering the U.S. at the Border is different. After the Border Patrol catches an OTM, the Border Patrol usually releases the OTM on his or her own recognizance, pending a deportation hearing. Because fewer than fifteen percent of the released OTMs appear for their hearings, inhabitants of Border communities are concerned that OTMs are left free to roam the U.S.

The Immigration and Naturalization Act also prohibits human smuggling by making it illegal for parties to bring aliens into the U.S. through unofficial channels. The news media recently brought human smuggling along the Border to the public’s attention after nineteen people died in a trailer discovered in Victoria, Texas on May 14, 2003. Two men, Victor Jesus Rodriguez and Fredy Giovanni Garcia-Tobar, were found guilty of conspiracy and aiding in the transport of immigrants resulting in death.

Except for a narrow exemption for battered women and children, any “alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.” Thus, a person who illegally enters the U.S. is committing a crime, and is continuing to commit a crime by remaining in the U.S. As Figure 2 indicates, U.S. laws have not deterred millions of people from crossing the line that separates Mexico and the U.S.

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U.S. Border laws are unlikely to have a strong effect on illegal immigration. As one commentator has noted, the typical undocumented farm worker is not familiar with nor concerned about immigration laws. Instead, the worker is likely more concerned that "chances are good that employment can be found picking fruits or vegetables in California, Oregon, or Washington." Such a farm worker has no intention of remaining in the U.S. permanently, and is likely saving money for family back home.

**E. Operation Gatekeeper and Beyond: “Prevention Through Deterrence”**

In February of 1994, the U.S. Attorney General announced a strategy that he believed would result in the increased enforcement of U.S. immigration laws. The first part of the Attorney General’s strategy, which is most relevant to the present discussion, focused on strengthening the U.S.’s control of the Border.
The Attorney General’s plan for strengthening the Border involved four phases. First, personnel and new technology were dedicated to San Diego and El Paso, the Border sectors where illegal immigration activity was believed to be highest. The next two phases allowed for the allocation of resources based on perceived illegal immigration patterns in the Southwest, continuing from Phase 1 with areas the government believed were subject to the most illegal Border crossings. The final phase involved strengthening the Northern border, Gulf Coast, and coastal waterways, and is irrelevant to this discussion.

The INS had already implemented Operation Hold-the-Line in El Paso prior to the Attorney General’s announcement. Next, the INS launched Operation Gatekeeper along the Border in San Diego. As Figure 3 demonstrates, these operations were successful in accomplishing the INS’s goal of pushing illegal immigration away from urban centers, and particularly farther away from San Diego.

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70 Id.
71 Issues Remain After Seven Years, supra note 65, at 3-4.
72 Id. at 4.
73 Id.
74 Id.
76 Id.
77 See Southwest Border Strategy Results Inconclusive, supra note 69, at 13.
78 Issues Remain After Seven Years, supra note 65, at 12 fig.2 (showing INS data).
Almost immediately, as the INS had anticipated, illegal entry into the U.S. along the Border shifted from California to Arizona. U.S. statistics indicate that the El Paso and San Diego border sectors saw over a 50% combined drop in apprehension rates from 1993 to 1997. Also evident is the more than two-fold increase of apprehensions in some other sectors along the Border over the same period. (see Figure 1).

Following Operation Gatekeeper, the Border Patrol implemented Operation Safeguard to respond to the movement of illegal Border crossings to the Tucson sector. Operation Safeguard eventually covered Nogales, Douglas, and Naco in Arizona (see map in Appendix for a detailed list of ports-of-entry along the Border). Next, "[i]n August 1997, the INS launched Operation Rio Grande in the Rio Grande Valley area in south Texas," which had been subject to an increase of illegal Border activity after Operation Hold-the-Line. Operation Rio Grande focused on the McAllen and Laredo sectors in Texas. Additionally, Operation Gatekeeper was expanded east in California to the El Centro sector in California’s Imperial Valley. The INS was funneling illegal Border crossing further into the Sonoran Desert.

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79 Id. at 14.
80 See Southwest Border Strategy Results Inconclusive, supra note 69, at 35 fig.11.
81 See Issues Remain After Seven Years, supra note 65, at 31 tbl.4.
82 Id. at 5. See also Miki Meek, Life and Death on the Southwest Border, NAT’L GEOGRAPHIC ONLINE EXTRA, Nov. 2003, http://magma.nationalgeographic.com/ ngm/0311/feature1/online_extra.html (quoting Arizona Rep. Jeff Flake endorsing a plan that calls for the issuance of work visas to be linked to the U.S. demand for foreign labor, saying that he didn’t “[s]ee Operation Desert Safeguard changing anything . . . [The U.S. is] just squeezing a balloon that’s going to pop out somewhere else.”).
83 Issues Remain After Seven Years, supra note 65, at 5.
84 Id. at 6.
85 Id.
The DHS continued the INS’s Border control strategy with Operation Ice Storm. Through Operation Ice Storm, the DHS hoped to reduce smuggling operations along the Border.\textsuperscript{87} Ice Storm coordinated resources from ICE, the U.S. Attorney’s Office, CPB, the Bureau of Alcohol, Tobacco, Firearms and Explosives, the Maricopa County Attorney’s Office, the Arizona Department of Public Safety, and several Arizona police departments and sheriffs’ offices.\textsuperscript{88} Operation Ice Storm’s focus is on illegal Border activity in the Phoenix metropolitan area.\textsuperscript{89}

In the wake of Operation Ice Storm, the DHS “kicked-off” the Arizona Border Control Initiative (“ABC”) on March 16, 2004.\textsuperscript{90} With the ABC, the DHS temporarily added Border Patrol agents who are “specially trained in search, rescue and remote tactical operations” to “deliver life-saving medical treatment in remote parts of the Arizona desert when necessary.”\textsuperscript{91} The ABC also included plans to assign 200 experienced Border Patrol agents to Arizona for the summer of 2004.\textsuperscript{92} Furthermore, the ABC

\textsuperscript{86} Issues Remain After Seven Years, supra, note 65, at 18 fig.5.
\textsuperscript{88} Id.
\textsuperscript{89} Id.
dedicated resources to increase the Border Patrol’s air presence over the Sonoran Desert in Arizona, as well as “[o]utreach efforts in order to warn would-be illegal migrants of the dangers of contracting smugglers and using the remote Arizona desert to effect their illegal entry into the United States.”

While the ABC has led to many migrant rescues, the death toll in Arizona has continued to rise.

F. Impact on Border Communities

Illegal immigration also affects Border towns in the U.S. A decline in illegal immigration is often correlated with an increased quality of life. Conversely, an increase in illegal immigration is often accompanied by “loss of business, destruction of private property, and environmental degradation.” At least one commentator has noted, however, that it is partying Mexican teens and sidewalk vendors that are disrupting the quality of life in Border communities, not long distance travelers who seek only to pass through the Border towns on their way to jobs and family in the interior of the U.S.

Illegal Border activity also negatively impacts national parks, forests, and monuments in the U.S. Organ Pipe Cactus National Monument, in Arizona, is frequently cited as an example of such destruction. Recently labeled by National Park Service Rangers as the most dangerous of all National Parks, Organ Pipe is located along Arizona’s Sonoran Desert Border. Illegal Border crossings by migrants and drug smugglers take a toll on

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94 Issues Remain After Seven Years, supra note 65, at 3.
95 See id.
96 See id.
97 See Operation Hold the Line in Texas, Migration News, Mar., 1994 (paraphrasing remarks by Frank Bean, Professor of Sociology at the University of California-Irvine and former Director of the Center for U.S./Mexico Border and Migration Research at the University of Texas-Austin, in Santa Fe on Feb. 12, 1994), http://migration.ucdavis.edu/mn/more.php?id=25002 (last visited Nov. 7, 2005).
the Park’s resources by creating trash and causing damage to delicate ecosystems and archeological sites.\(^{100}\)

Park officials believe illegal Border activities frighten endangered animals such as the Lesser Longnose Bat, Pygmy Owls, and the Sonoran Pronghorn.\(^{101}\) Also suffering from illegal immigration through the Park are cacti such as the Saguaro and Organ Pipe, which require shady areas that migrants seeking shelter from the Sonoran Desert’s heat often clear away.\(^{102}\) Park officials have also expressed concern over both damage to the Park’s prehistoric sites and the refuse left by migrants, including water jugs, clothing, and human excrement.\(^{103}\) In March of 2005, illegal Border activity in Organ Pipe Cactus National Monument was so prevalent that access to areas of the Park along the Border was restricted to the Border Patrol and Park Officials.\(^{104}\) The Park’s Visitor Center even provided guests with a prepared written statement about illegal immigration and other illicit Border activity taking place within the Park’s boundaries.\(^{105}\)

Migrants and drug traffickers crossing the Border illegally are not the only parties damaging the U.S.’s wildlife resources. Several environmentalist groups have expressed their concern over the environmental impact of the ABC.\(^{106}\) Environmentalists note that by using off-road vehicles, motorcycles, all-terrain vehicles, helicopters, and airplanes, the Border Patrol is significantly contributing to the adverse environmental impact already taking place along the Border.\(^{107}\) Interested parties will have to wait and see whether the impact of the U.S. effort to secure the Border will cause more damage to the delicate ecosystem than the illegal activities it is attempting to stop.

\(\textbf{G. Humanitarian Response}\)

Responding to the increase in deaths of migrants in the Sonoran Desert, humanitarian groups began providing life sustaining aid to those ille-


\(^{101}\) Id. at 27.

\(^{102}\) Id.

\(^{103}\) Id.

\(^{104}\) Author’s visit to Organ Pipe Cactus National Monument, Mar. 6-8, 2005.

\(^{105}\) Id.


\(^{107}\) Id.
gally crossing the Border. Border Angels, a humanitarian group founded by Enrique Morones in 2001, maintains three hundred and forty water stations in the Imperial Valley Desert region in California. Another humanitarian group, Paisanos al Rescate (Countrymen to the Rescue), uses aircraft to search for migrants who are lost in the desert and works to ensure that stranded migrants receive emergency medical attention. Humane Borders is still another humanitarian group that seeks to "take death out of the migration equation" by maintaining water stations along the U.S. side of the Border in Arizona. These humanitarian groups serve as a foil to the increasingly inhumane Border policy implemented by the U.S.

These groups that provide lifesaving assistance to undocumented aliens crossing the Border are not operating in a clandestine fashion. Rather than modeling themselves after past humanitarian movements like the Underground Railroad, which relied on secrecy amongst those involved, these humanitarian groups operate in the plain view of the U.S. government and the public. In fact, one of Humane Borders' water stations in Organ Pipe Cactus National Monument is only a short distance from one of the Park's scenic roads, and the Rangers at the Park cite the water station as one of their attractions that visitors are encouraged to inspect. By allowing and at times encouraging the operation of humanitarian assistance to those crossing the Border illegally, the U.S. is acknowledging that people are still successfully crossing the Border illegally. In accepting the presence and necessity of humanitarian groups, the U.S. is demonstrating its awareness of at least one inhumane consequence of its Border control strategy.

III. THE CONTINUATION OF A FLAWED SYSTEM

"Prevention through deterrence" has not effectively reduced illegal immigration along the Border. While the policy has accounted for an increase in the number of arrests, the death toll has never been higher. The U.S. has failed to reconsider its Border policy in light of recent evidence and an ever-increasing understanding of the Border-crossing culture. By ignoring its mistakes and failing to reevaluate the assumptions that have driven its Border control policy, the U.S. is needlessly causing the deaths of

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108 For a fairly comprehensive list of humanitarian groups that operate along the Border, see links provided by No More Deaths, http://www.nomoredeaths.org/Links.html (last visited Nov. 11, 2005).
112 See Author's photograph on cover page of this note.
would-be immigrants, while at the same time failing to provide the U.S. with a secure Border.

A. Incorrect Assumptions

The U.S. General Accounting Office noted that the U.S. Attorney General envisioned achieving “three distinct but related results” by implementing a strategy that deterred illegal entry along the Border by forcing it to less forgiving terrain. First, the Attorney General believed that fewer aliens would be able to cross the Border illegally. Second, because fewer aliens would be able to cross the Border, the Attorney General believed fewer aliens would try to enter the U.S. illegally. Third, because fewer aliens would be crossing the Border, the Attorney General reasoned, the number of illegal aliens in the U.S. would decrease.

Because there are so many variables involved in evaluating the U.S. battle against illegal immigration (the statistics collected rely primarily on data collected from apprehended aliens and do not offer much insight on aliens who successfully enter the U.S. illegally), it is difficult to determine whether the INS’s goals are being achieved by the DHS. Arrest rates are the best information available to estimate the number of persons illegally entering the U.S., and as the charts above indicate, arrest rates are on the rise. Not only does it appear that more people are crossing the Border illegally, it also appears that because of the increased difficulty and cost of sneaking across the Border, those who make it across are less likely to leave the U.S. Thus, in strengthening its Border, the U.S. may be locking in, not just keeping out, undocumented aliens.

The U.S. also believed its Border “[s]trategy [would] make it so difficult and so costly to enter [the U.S.] illegally that fewer individuals [would] even try.” The INS anticipated that its strategy would push the remainder of illegal immigration away from urban areas into the more dan-

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113 Southwest Border Strategy Results Inconclusive, supra note 69, at 45.
114 Id.
115 See id.
116 See id.
117 Id. at 47.
118 Because many migrants come to the U.S. for seasonal work, they have historically entered and exited the U.S. seasonally. It is possible that with a border that is more difficult to cross, migrants will be less likely to return South knowing that reentering the U.S. will be more difficult, more costly, or even not possible, thus leading to more illegal immigrants remaining in the U.S. See id.
119 Id. at 50 (quoting U.S. DEP’T OF JUSTICE, IMMIGRATION AND NATURALIZATION SERV., BUILDING A COMPREHENSIVE SOUTHWEST BORDER ENFORCEMENT STRATEGY 3 (1996)).
The INS failed, however, to allow for a timely increase in Border Patrol agent positions in the Yuma, Arizona sector, which is probably the most remote and hazardous area of the Border. By continuing forward with its “prevention-through-deterrence” strategy but failing to put the necessary safeguards in place, the U.S. created a situation that lead to both a porous Border and the unnecessary deaths of migrants. It is both inhumane and irrational for the U.S. to avoid confronting the foreseeable consequences of its Border control strategy. That inhumanity and irrationality has fueled much of the tension surrounding the Border today.

In forcing illegal immigration further into the Sonoran Desert in an effort to reduce illegal immigration across the Border, the U.S. failed to acknowledge the differences in the risk-taking behavior between those crossing the Border and those who designed the Border policy. Many of those who decide to enter the U.S. by crossing the Border illegally come from rural areas that lack the everyday securities that U.S. citizens are accustomed. For example, the average person’s expectation of safety on a day-to-day basis in America may be significantly greater than the average person’s expectation of safety on a day-to-day basis in the home country of an undocumented alien.

Because many of the people illegally crossing the Border face greater risks than Americans do in their daily lives, their tolerance for risk is likely greater than that of Americans. Thus, when the INS believed that the harsh Sonoran Desert could deter would-be immigrants, it was likely basing

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120 Id. at 73 tbl.III.1. While populated areas like San Diego, Tucson, El Paso, and McAllen saw large increases in Border Patrol Agents from 1994-1997, Yuma and Marfa received zero additional agents until 1998, with El Centro, Del Rio, and Laredo receiving no more than a three percent increase in agent positions over the same time period. The areas that received minimal, or no, additional staffing include the Sonoran Desert, an inhospitable region frequented by migrants and drug traffickers.

121 Id.

122 This idea was explored through the author’s e-mail correspondences with Dan Bauer, an Anthropology professor at Lafayette College who performed substantial fieldwork in rural Mexico. While no study appears to speak precisely to the issue above, studies analyzing the risk-taking behavior of migrant farm workers as related to AIDS and reproduction do exist. See M. Brammeier et al., Sexually Transmitted Disease Risk Behaviors Among California Agricultural Workers – Results From a Population-Based Study, CAL. INST. FOR RURAL STUD., abstract available at http://www.cdc.gov/nchstp/dstd/2002ConfAbstracts/2002ConfA bPoster6.htm. While the high risk-taking behavior among migrant sexual activity is somewhat analogous to the risk-taking behavior involved in crossing the Border, there are both similarities and differences. Each risk-taking behavior is likely linked to actor’s lack of knowledge, or concern, of all of the consequences involved. A major difference between crossing the Border and sexual activity, however, is that a migrant crossing the Border is likely to have planned out her trip, possibly at great cost to her and her family. A migrant partaking in risky sexual activity, conversely, may be taking a spontaneous decision independently and without an expectation of long-term effects.
its assumption on the risk tolerance of Americans, rather than the risk tolerance of those who actually cross the Border.

B. False Solutions

In June, 1998, the INS began a Border Safety Initiative that educated parties contemplating crossing the Border illegally on the dangers involved, and implemented a search and rescue program for migrants lost or abandoned by their group. The INS implemented this Initiative in response to the shift of migrant traffic from traditional Border crossings to more dangerous terrain. Although INS numbers indicate an increase in migrant rescues, those rescue numbers increase in the same years that there are increases in the number of migrant deaths.

As a result of Border activity moving to more remote areas with less developed infrastructure for the Border Patrol and more hazards for migrants, the U.S. included increased safety measures in the ABC. The DHS launched the ABC primarily to combat illegal Border drug trafficking, impair smuggling organizations, and “reduce the need for social services in southern Arizona.” The ABC also includes provisions intended to reduce the adverse effects of illegal immigration in remote parts of the Sonoran Desert. For example, the ABC called for an increase in air resources that could provide emergency rescue services in remote parts of the Sonoran Desert. The ABC also includes plans for outreach efforts to warn would-be migrants about the dangers associated with the Sonoran Desert and human smugglers.

Although the ABC has a humanitarian component, it is not a humanitarian initiative. For example, the aircraft the Border Patrol has touted as increasing its ability to perform emergency rescues includes new helicopters that are significantly quieter than those previously used by the Border Patrol. That the Border Patrol is seeking stealthier means of discovering

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123 Issues Remain After Seven Years, supra note 65, at 25.
124 See id. at 24.
125 Compare id. at 25 tbl.2, with id. at 27 fig. 6.
126 See Arizona Border Control Initiative, supra note 93.
127 It is not clear whether “smuggling organizations” refers to human or drug smuggling. Because of the preventative nature of the ABC, this Note proceeds under the assumption that the U.S. government implemented the ABC with the dual goals of stopping both human smuggling and drug trafficking. See id.
128 Id.
129 Id.
130 Id.
illegal activity around the Border reinforces the point that the ABC’s focus is on patrolling the Border, not saving lives, for there is no need to sneak up on an individual dying of exposure.

The DHS has hailed the ABC as a success.\textsuperscript{132} Yet, while the DHS applauds itself for increasing Border-related arrests since the implementation of the ABC,\textsuperscript{133} it fails to mention that during that same year, deaths of people attempting to enter the U.S. illegally along the Border in Arizona reached an all-time high.\textsuperscript{134} Michael Nicely, chief of the Border Patrol’s Tucson sector, described the humanitarian aspect of the ABC as a failure.\textsuperscript{135}

Recently, the U.S. has experimented with a Voluntary Interior Repatriation Program. The Program attempts to deter Mexican nationals apprehended by the Border Patrol from trying to reenter the U.S. illegally through the Sonoran Desert after they have been captured on U.S. soil.\textsuperscript{136} According to the DHS, “[u]nder this interior repatriation pilot program, Mexican nationals will be given the option of returning to their place of origin when apprehended for illegal entry.”\textsuperscript{137} This repatriation program was only available for Mexican nationals apprehended entering the U.S. illegally in the Sonora-Arizona region who volunteered to be flown either to Mexico City or Guadalajara.\textsuperscript{138} Once in Mexico City or Guadalajara, the Mexican government provided the national with transportation home.\textsuperscript{139}

Asa Hutchinson, Undersecretary of the DHS, said that “[t]he goal of [the voluntary repatriation] program is to save lives by safely returning Mexican nationals to their homes, away from the dangers of the Arizona-Sonora desert where smugglers and the harsh summer climate contribute to the deaths and injuries of illegal border crossers.”\textsuperscript{140} Normally, when the Border Patrol catches a Mexican national attempting to enter the U.S. illegally, the Mexican national will be processed and released at the nearest

\begin{itemize}
\item \textsuperscript{133} \textit{Id}.
\item \textsuperscript{134} Susan Carroll, \textit{Record Deaths Along the Border}, \textit{ARIZ. REPUBLIC}, Sept. 17, 2004, at 1A.
\item \textsuperscript{137} \textit{Id}.
\item \textsuperscript{138} \textit{Id}.
\item \textsuperscript{139} \textit{Id}.
\item \textsuperscript{140} \textit{Id}.
\end{itemize}
According to Hutchinson, without this program, the Border Patrol apprehends 25 percent of the Mexican nationals they released just across the Border attempting to reenter the U.S. illegally. In contrast, Hutchinson reported that "only [five] percent of Mexicans returned through the repatriation program have been arrested [along the Border] after taking a flight home."

Before the U.S. and Mexico agreed to this "deep" repatriation program, the U.S. had experimented with a "lateral" repatriation within the U.S.'s own borders. The lateral repatriation moved deported Mexican nationals apprehended in the Sonora-Arizona region to Texas, away from the dangers associated with the harsh Sonoran Desert climate. Texas officials, however, were dissatisfied with lateral repatriation because they felt the program saddled Texas with illegal immigration problems that should be handled by the state in which the infraction occurred.

142 Susan Carroll & Chris Hawley, Repatriation Flights Reviewed; Effectiveness, Cost Questioned, ARIZ. REPUBLIC, Oct. 1, 2004, at 1A.
143 Id.
145 See id.
146 Senator John Cornyn (R-TX) commented that, with the new, "deep," repatriation program, the "DHS recognized that apprehended immigrants must be provided a secure re-entry point to their country, away from the 'coyotes' [(human smugglers)] prevalent in many border towns, and Texas border communities must not be faced with the additional economic and security burdens of [2003's] lateral repatriation pilot program." Jerry Seper, Safety a Repatriation Plan's Goal, WASH. TIMES, July 1, 2004, at A8, available at http://www.washingtomes.com/national/20040630-111107-4279r.htm. Lateral Repatriation Programs, as well as any U.S. Border policy, involve Federal decisions that have their most significant impact on individual Border states and communities. Illegal Border activities negatively impact Border communities by resulting in economic drains such as unpaid hospital bills, unpaid burials, and the need for increased local law enforcement. Local and state governments pay many of the costs related to illegal Border activity, even though such activity is the direct result of U.S. policy decisions. For example, in the wake of the ABC illegal Border activity shifted away from Arizona and into New Mexico's more remote, and less scrutinized, Border. Federal funds spent preventing illegal Border activity along traditional routes has placed a new and unwelcome burden on communities to which the illegal Border activity has shifted. Thus, by continuing to implement an unsuccessful Border policy, the U.S. government is shifting the burden of illegal Border activity from one state to another while failing to address the underlying issues faced along the Border. See generally Barlett & Steele, supra note 17.
The results of the U.S.-Mexico deep repatriation program are not definitive. Former Secretary of the DHS, Tom Ridge, commented that "[p]rograms such as the joint US-Mexico Voluntary Interior Repatriation program have helped reduce exposure-related deaths in the Tucson sector by almost 70 percent."\textsuperscript{147} Others have not been as optimistic as Secretary Ridge.\textsuperscript{148} One academic notes that "bus tickets are cheap in Mexico, and even from the southern part of the country it should cost only about $100 and take two or three days for the average migrant to get back to the border."\textsuperscript{149}

When one compares the price of a bus ticket from the interior of Mexico to the Post-Gatekeeper human-smuggler price of $2,000-a-head, the $100 dollars to travel within Mexico seems negligible, and is unlikely to stop a determined migrant.\textsuperscript{150} Even if Hutchinson's numbers are correct and the Border Patrol apprehended fewer migrants attempting a second trip across the Border during the summer of 2004, it is difficult to determine whether illegal immigrants are not crossing a second time, or instead are simply more aware of the presence of the Border Patrol, and are better able to cross the Border unnoticed. Thus, while the DHS may applaud the results of the “deep” repatriation program,\textsuperscript{151} it is unclear whether repatriation is treating the illness surrounding illegal immigration, or merely temporarily suppressing its symptoms.

For the U.S., repatriating Mexican nationals is not a novel idea. In 1948, American troubadour Woody Guthrie recognized the futility of flying Mexican nationals back to Mexico. Eulogizing migrants who died in a plane crash, Guthrie sang: "You're flying them back to the Mexico border, to pay all their money to wade back again."\textsuperscript{152}


\textsuperscript{148} See Ann M. Simmons, Region & State; Rights Groups Take on Deportation Program; Action Deprives Illegal Immigrants of a Hearing and Fails to Address Why They Come, Activists Say, L.A. TIMES, Aug. 30, 2004, at B4 (quoting pro-immigration activists stating their beliefs that the interior repatriation program puts too much authority in the hands of the Border Patrol, and that it does nothing to address the roots of the illegal immigration problem).

\textsuperscript{149} Cornelius, supra note 144, at 8.

\textsuperscript{150} "Pre-Gatekeeper, coyotes charged up to $300. But now costs can go as high as $2,000, making smuggling a multibillion-dollar industry that has become increasingly dangerous." Meek, supra note 82. The costs for non-Mexicans can be much higher. See Freeman Sawyer, Friends of the Border Patrol, Altura Credit Union Accepts Matricula, http://www.friendsofthecendarpatrol.com/Guest.html (last visited Nov. 11, 2005).

\textsuperscript{151} Press Release, U.S. Dep't of Homeland Sec., supra note 147.

\textsuperscript{152} WOODY GUTHRIE, Deportees (Plane Wreck at Los Gatos), on THE GREATEST SONGS OF WOODY GUTHRIE, VOL. 1 (Vanguard Records, 1984).
If Mexicans were willing to wade across the Border in the 1940s, there is no reason to believe they will not be willing to trek across the Border in the twenty-first century.

C. Results of "Prevention Through Deterrence"

As noted above, the U.S. Border control strategy has two objectives. First, the Gatekeeper Complex aims at closing off routes that the Border Patrol believes smugglers and those seeking to cross the Border illegally are using, with a focus on urban areas. Second, "prevention through deterrence" aims at moving illegal Border activity to either monitored ports-of-entry, "or to areas that are more remote and difficult to cross." Essentially, the INS sought to either deter illegal alien traffic, or to force it over less hospitable terrain.

The INS achieved its first goal. Border Patrol has significantly reduced illegal Border activity around San Diego and El Paso. But, that is not to say that fewer people are entering the U.S. illegally. As Figure 5 demonstrates, the Border Patrol resembles a person using his fingers to plug leaks in a colander filled with water. Just as the colander is likely to have more holes than the person has fingers, the Border is more porous than the Border Patrol has resources. Plugging a leak in one place does not stop the flow of water; it only changes the water's course.

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153 Issues Remain After Seven Years, supra note 65, at 4.
154 Id.
155 Id.
156 Id. at 4-5.
157 See id. at 5-6.
As indicated by Figure 5, when Operation Hold-the-Line took effect in El Paso in 1994, apprehensions decreased in El Paso, but that reduction was negated by the increase of apprehensions elsewhere in Texas, predominantly in the McAllen-Laredo, and Del Rio-Marfa sectors. As the Border Patrol is increasing its presence in Arizona with the ABC, it should not come as a surprise that New Mexico is experiencing a rise in illegal Border activity.\footnote{Illegal Immigrant Apprehensions Hit 3-Year High in N.M, TUCSON CITIZEN, Oct. 6, 2004, available at \url{http://www.tucsoncitizen.com/index.php?page=border_news&story_id=100504a12_newmexico}.}

The INS also achieved its second goal of moving crossings to more remote areas, but rivers, mountains, and the harsh Sonoran Desert climate did not secure those remote locations along the Border.\footnote{Claudine LoMonaco, No Drop in Migrant Flow or Deaths; Multimillion-Dollar Border Effort Had Little Impact, Analysis Shows, TUCSON CITIZEN, Mar. 2005, at pg 1A, available at \url{http://www.tucsoncitizen.com/index.php?page=local&story_id=031605a101abc}.} Using Border apprehension rates as a proxy, the INS determined that natural barriers along the Border did not effectively deter illegal immigration; instead, the barriers merely added to the dangers already present for those seeking to cross the Border illegally.\footnote{Issues Remain After Seven Years, supra note 65 at 3. Those illegally crossing the Border face a host of dangers other than exposure and dehydration. Vehicle accidents, poisoning from traversing through polluted bodies of water, and anti-immigration civilian groups pose additional threats to migrants.}

The arrest rates along the most open and dangerous part of the Border, the Sonoran Desert, where Arizona and Mexico meet, have proven that harsh desert terrain is not an effective deterrent. Despite the U.S. spending $30 million to control this portion of the Border in 2004, “[m]ore than a million [migrants] got past Arizona’s border defenses, and a record number died trying.”\footnote{Boudreaux, supra note 1, at A1.}

\section*{D. Role of Humanitarian Groups}

As if signaling to the world that the U.S.’s Border policy is failing, Humane Borders attaches flags that fly 20 feet high in the air above 65 gallon water jugs that it places along common Border crossing routes in Arizona.\footnote{Goodstein, supra note 15, at A1.} The water jugs provide life saving hydration to migrants that pass through the Sonoran Desert. Despite acknowledging its concern that water in the Desert may give migrants a false sense of security,\footnote{Id.} Border Patrol and local park officials not only permit groups like Humane Borders to op-
erate in the Desert, they also make the humanitarian group’s job as easy as possible.

Bill Wellman, the Superintendent of Organ Pipe Cactus National Monument, allows the Humane Borders volunteers to fill up its water tanks at the Park’s facilities.\(^{165}\) The Border Patrol too has accepted Humane Borders’s method of reducing death in the Sonoran Desert. The Border Patrol has a “gentleman’s agreement” with Humane Borders not to “stake out” the water stations.\(^{166}\) In fact, the Border Patrol has even commended Humane Borders’s work as a “humanitarian effort.”\(^{167}\) Reverend Robin Hoover, the founder of Humane Borders, responds to claims that placing water stations in the Sonoran Desert may give would-be migrants a false sense of security by noting that such action is necessary to prevent the deaths of migrants who will cross the Border with or without the water stations.\(^{168}\)

The irony is clear. Migrants that have illegally entered the U.S. are guilty of a crime—violating the Immigration Act. Providing water to migrants gives the migrants the sustenance necessary to continue onward into the U.S. and to avoid capture by the Border Patrol. Humane Borders, and by their acquiescence, the Border Patrol and Park officials, are aiding and abetting criminals who are in the process of violating U.S. law. Reverend Hoover understands this irony, commenting that the Border Patrol knows it “can’t encourage death. [The Border Patrol is] losing the P.R. war. Their only other option is to say, ‘We like death. Let’s have some more.’”\(^{169}\)

IV. ONE POSSIBLE SOLUTION—MONITORED ENTRY

\textit{If you want to seal off the entire border, be my guest, but as an alternative you don’t have the right to keep funneling people to their deaths.}\(^{170}\)

The U.S., by perpetuating the Gatekeeper Complex and its policy of “prevention through deterrence,” is neither creating a secure Border, nor acting responsibly towards individuals who seek to share in the American dream. In light of the problems associated with the current U.S. Border control strategy, the U.S. should consider new options that will make the Bor-

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\(^{165}\) See id.


\(^{168}\) Id.

\(^{169}\) Id.

\(^{170}\) See Meek, \textit{supra} note 82 (quoting Claudia Smith, attorney for the California Rural Legal Assistance Foundation, describing her thoughts on United States border control policy in the Southwest).
der both more secure and more humane rather than continuing with policies that have proven ineffective.

One strategy that the U.S. has not attempted involves reducing the strain on non-official entry points along the Border by allowing immigrants who do not pose a security threat to enter the U.S. legally through monitored ports-of-entry.\(^\text{171}\) By funneling migrants through official ports-of-entry rather than through the Desert under the assumption that the harsh terrain will stand guard in the Border Patrol’s absence, the U.S. could both greatly reduce illegal Border crossing and the senseless deaths that accompany it. The byproduct of reduced illegal Border activity would be a Border environment in which the Border Patrol could more readily identify security threats. By allowing “safe” immigrants into the U.S. through organized checkpoints, the Border Patrol will be free to deploy its resources in ways that best protect the U.S. from actual security threats, rather than using its limited resources to chase women and children around the Desert.

The idea of allowing migrants to enter the U.S. through ports-of-entry may conjure up the image of floodgates opening along the Border. In reality, however, these floodgates have never been closed. In 2000 alone, over one million migrants illegally crossed the Border and entered the U.S.\(^\text{172}\) It is not possible for the U.S. to identify those who slipped past the Border Patrol, thus by processing migrants at official ports-of-entry, at the very least the U.S. will be able to identify who is living within its borders.

Before the U.S. implemented Operation Gatekeeper and Operation Hold-the-Line, illegal entry into the U.S. took place in areas where crossing the Border was least difficult. By the same reasoning, if the U.S. allows

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\(^{171}\) This is not to say that a giant prison-style wall should be erected between the U.S. and Mexico. Rather, sealing the Border could consist of focusing all of the Border Patrol’s resources on detection. As the following discussion will demonstrate, if the U.S. channels all those seeking to enter the U.S. through official ports-of-entry, and allows for the passage of immigrants that do not pose a security threat, the only people crossing the Border illegally will be the type of people the U.S. has reason to fear the most, i.e. terrorists, drug traffickers, or those deemed a security risk to the U.S. In Organ Pipe Cactus National Monument, the Border Patrol is building the type of barrier that would be satisfactory if it was combined with a policy that shifts illegal migration through ports-of-entry. The barrier consists of a low vehicle fence with alternating high and low posts. Animals (and people) will not have a problem bypassing the fence by crawling between the posts, or over the fence. Vehicles, however, which are used in the park predominately to smuggle drugs and not people, will be stopped by the barrier. The alternating posts in the fence’s design is an improvement over past, level, vehicle barriers, over which drug traffickers were able to construct impromptu vehicle ramps. Interview with Staff, Organ Pipe Cactus National Monument, in Ajo, Ariz. (Mar. 7, 2005).

\(^{172}\) See Figure 2 supra; see also Bartlett & Steele, supra note 17, at 58-59 (indicating that for every one illegal immigrant caught, and estimated three enter the United States undetected). Seventy-five percent of 1.6 million (the amount of migrants apprehended in 2000) means over 1.2 million migrants entered the U.S. illegally along the Border in 2000.
select populations to enter the U.S. through official ports-of-entry, rather than requiring them to trek through the Desert, it is likely that migrants not posing a security threat will enter the U.S. through the ports-of-entry, thus reducing the number of people crossing the Border in areas more difficult for the Border Patrol to monitor. Official ports-of-entry into the U.S. already exist along the Border, complete with immigration inspectors trained and equipped to detect illicit activity.

The U.S. already has the technology necessary to identify people who seek entry into the U.S. The IDENT technology used by Border Patrol to identify those caught illegally crossing the Border can be used by immigration inspectors to identify people at official ports-of-entry. This way, immigration inspectors can process people they identify as security threats to the U.S. at official ports-of-entry. By placing the burden of identifying people crossing the Border on immigration officers, the Border Patrol will be free to apprehend those attempting to enter the U.S. in places other than official ports-of-entry. Because there is no reason for non-security threats to cross the Border anywhere except for official ports-of-entry, the Border Patrol can presume people crossing the Border through unofficial channels are a security threat, and treat them as such.

Under the current U.S. Border policy, migrants continue to cross the Border illegally on a daily basis, and the Border Patrol uses much of its resources to capture the migrants and remove them from the U.S. As the discussion above indicates, as many as three illegal immigrants enter the U.S. for every one captured. National Geographic estimates that over 1,000 people attempt to cross the Border illegally every day. By routing migrants who do not pose a security threat to the U.S. through official ports-of-entry, the Border Patrol can focus its attention on the greatly reduced number of people attempting to circumvent the ports-of-entry.

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173 A new policy would have to include safeguards to ensure that foreign citizens seeking entry into the U.S. do not simply go to Mexico and enter the U.S. along the Border.  
174 See Appendix infra. Immigration Inspectors monitor official ports-of-entry. While the officers work in conjunction with Border Patrol, immigration inspectors stationed at official ports-of-entry work on the Border at the ports-of-entry, whereas Border Patrol operates away from ports-of-entry along remote parts of the Border and further inside the U.S. along highways known to be used by migrants entering the interior of the U.S.  
175 Bartlett & Steele, supra note 17, at 53 (indicating that for every one illegal immigrant caught, an estimated three enter the United States undetected); but see American Immigration: Dreaming of the Other Side of the Wire, ECONOMIST, Mar. 12, 2005, at 28 (criticizing Time Magazine’s system of counting because it does not take repeat offenders into account). Regardless of how the numbers are counted, every moment the Border Patrol spends on migrants is a moment the Border Patrol is not spending on the more pressing issues of U.S. national security, i.e. thwarting terrorist activity and drug trafficking.  
176 Meek, supra note 82.
It is unlikely that any policy will stop people from trying to cross the Border. Many commentators have expressed ideas for eliminating the pull factors that encourage people to cross the Border illegally.\textsuperscript{177} Regardless of what the U.S. does internally, however, because of the great economic disparity between the U.S. and the countries immediately south of it and the strong ties many of those who illegally cross the Border have with the U.S., it is unlikely that even the most tightly guarded Border will deter some of the migrants from trying to make it safely across.\textsuperscript{178} These pull factors, when combined with other countries' lack of support for the U.S.'s desire to control its Border,\textsuperscript{179} have created a situation where the U.S. must take immediate action along its Border.

While there appears to be an unlimited number of people who seek to enter the U.S. illegally, there is a finite number of Border Patrol Agents and resources. Due to the volume of people who illegally cross the Border, Agents spend a great deal of their time processing apprehended subjects instead of monitoring the Border.\textsuperscript{180}

Additionally, Border communities are paying a price for the risk migrants are taking in the Sonoran Desert.\textsuperscript{181} Because many of the migrants that end up in Border community hospitals and morgues were traveling to the interior of the U.S.,\textsuperscript{182} allowing for safe passage through these communities would relieve the economic strain illegal immigration is placing on already cash-strapped U.S. Border towns.\textsuperscript{183}

Although it may seem counterintuitive, this solution would also help accomplish the U.S. goal of reducing the number of illegal immigrants who remain in the U.S. permanently. By allowing safe passage through of-

\textsuperscript{177} Much of the commentary focuses on enforcing the laws that make it illegal for employers to hire illegal immigrants. Such commentary has recently been thrust into the spotlight because of a large Wal-Mart settlement with the U.S. government. See Jerry Seper, \textit{Wal-Mart Pays $11 Million to Settle Alien Case}, \textit{WASH. TIMES}, Mar. 19, 2005, at Al.

\textsuperscript{178} If economic opportunity is the driving force behind migration from the Americas, modern groups like the Border Militia may find that the best way to combat illegal immigration is not sitting on lawn chairs on the Border, but instead would involve working on farms and in slaughterhouses, restaurants, and hotels. If such jobs were not plentiful in the U.S. it is likely that those in search of economic opportunity would reconsider looking for a job in the U.S.


\textsuperscript{180} \textit{Southwest Border Strategy Implementation}, supra note 19, at 10.

\textsuperscript{181} Bartlett & Steele, supra note 17, at 54-55.

\textsuperscript{182} \textit{Id.}

ficial ports-of-entry, migrants will not fear returning to their native land after working in the U.S. Because the migrant knows that he or she will be able to freely enter and exit the U.S. at any time, seasonal workers could come to the U.S. when work is abundant, and leave when the season is over.

This solution is not comprehensive. The U.S. and its southern neighbors must consider many factors in order to create a Border that facilitates organized rather than chaotic migration into the U.S. There are alternative ways of managing the Border, and the U.S. should not expand on a Border policy that has already been proven inadequate and inhumane.\(^{184}\)

V. CONCLUSION

[The present immigration system is “unsuited to the needs of [the U.S.] economy and to the values of [the U.S.] [The U.S.] should not be content with laws that punish hardworking people who want only to provide for their families . . . It is time for an immigration policy that permits temporary guest-workers to fill jobs Americans will not take . . . and closes the border to drug dealers and terrorists.”\(^{185}\)]

The Gatekeeper Complex and “prevention through deterrence” are not working. The following demonstrates the problem: One Border Patrol apprehension equals three successful illegal entrances into the U.S. along the Border.\(^{186}\) In 2000, over 1.6 million people were apprehended crossing the Border.\(^{187}\) Thus, in 2000 it is possible that over 4.8 million people made it across the Border undetected. While terrorists and drug traffickers were entering the U.S., migrants crossing the Border in search of economic opportunity or family were dying at the rate of more than one person a day.\(^{188}\)

By identifying only twenty five percent of those crossing the Border illegally, the U.S. is not protecting itself from security threats. Additionally, U.S. Border policies do not distinguish actual security threats from migrants in search of employment or family or both. By failing to make this distinc-

\(^{184}\) U.S. President George W. Bush recently presented the idea of providing temporary access for guest-workers. According to the Pew Hispanic Center, 71 percent of surveyed Mexicans “said they would participate in a temporary visa program that would force them to return home but allow them to legally work [in the U.S.] and travel to and from Mexico.” Sergio Bustos, Most Migrants Want to Stay in U.S., TUCSON CITIZEN, Mar. 3, 2005, available at http://www.tucsoncitizen.com/news/bordernews/030305a3_immigstudy.

\(^{185}\) American Immigrations: Dreaming of the Other Side of the Wire, supra note 175, at 29 (quoting George W. Bush’s 2005 state-of-the-union address).

\(^{186}\) Bartlett & Steele, supra note 17, at 53.

\(^{187}\) See Figure 2 supra.

\(^{188}\) Press Release, Univ. of Houston, UH Researchers Establish Link Between Border Deaths and U.S. Immigration Policy, (Feb. 14, 2001) (indicating that in calendar year 2000 there may have been as many 491 migrant deaths).
tion, the U.S.'s Border policy has created a Border that has a deadly effect on migrants and fails to satisfy U.S.'s security needs.

The Border Patrol is stretched so thin trying to apprehend and process those seeking work or family in the U.S. that its ability to catch and identify terrorists and drug smugglers is greatly impaired. Evidence demonstrates that the U.S.'s Border policy has not reduced illegal Border migration; rather, it has just shifted the activity out of the public eye. By reconsidering its Border policy in light of the available evidence, the U.S. can stop relying on humanitarian groups to counterbalance its policy's deadly effects and create a Border that is both humane and secure on its own.

APPENDIX:

![Map of U.S. Land Ports of Entry Along the Southwest Border](image)

Note: Some locations have more than one point of entry.

Source: INS.

189 *Southwest Border Strategy Results Inconclusive, supra* note 69, at 8 fig.2.