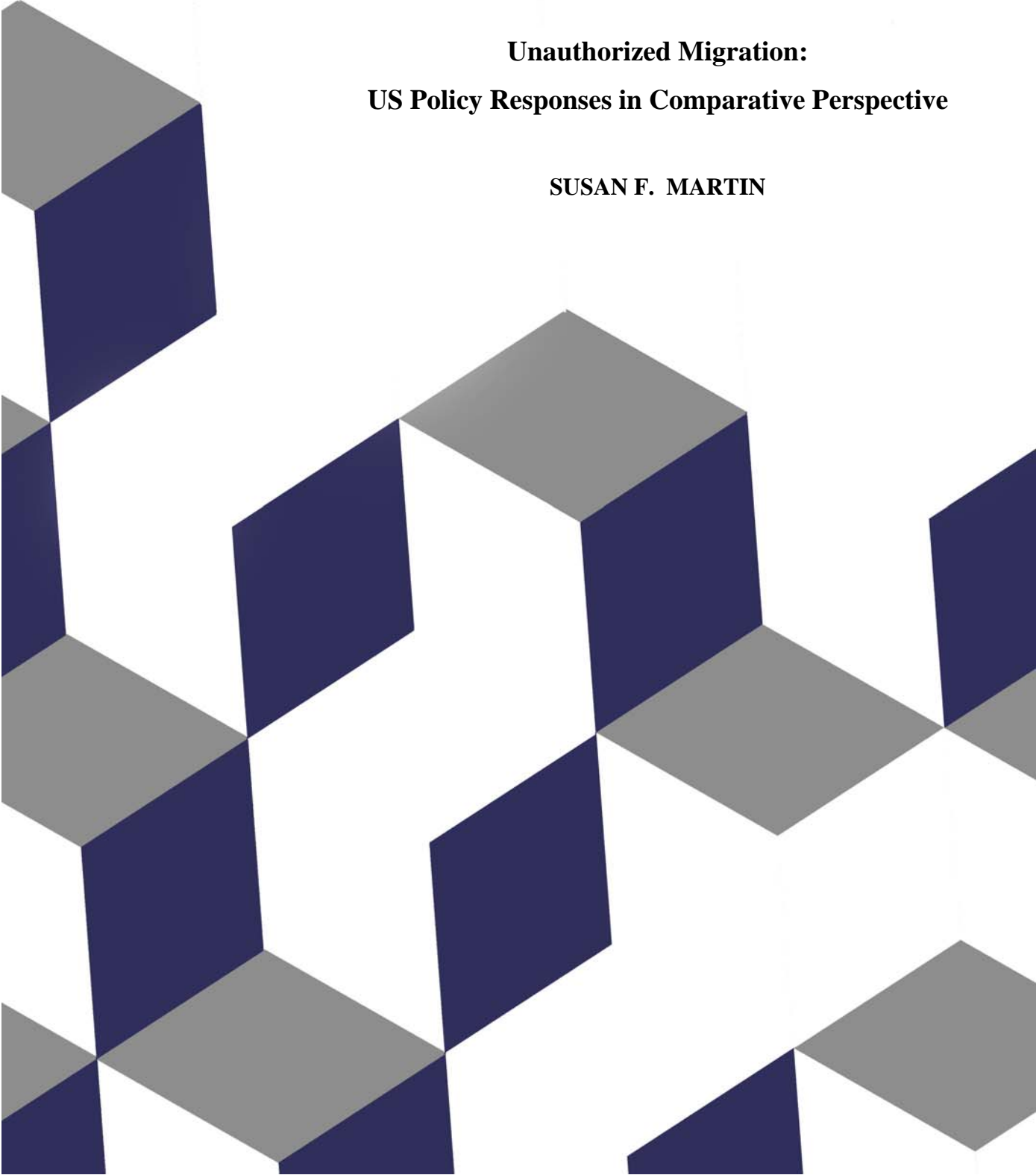


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**Unauthorized Migration:  
US Policy Responses in Comparative Perspective**

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***Introduction***

Irregular migration is a global phenomenon that is already large and has grown significantly over the past decades. Generally, irregular migration for employment purposes is fuelled by the same forces that propel people to move through legal channels: a ready supply of people seeking greater economic opportunities, particularly from developing countries; a demand for usually inexpensive labor in destination countries; and networks that are able to match workers to employers. In contrast to legal immigration, however, irregular migration is the resort of those who are unable to enter under the often strict requirements imposed by governments on their temporary or permanent foreign work programs. These requirements may be numerical—rigid limits on the number of visas issued each year—or they may be qualitative—educational, occupational or skill requirements. Often, they are imposed on employers, rather than workers—requirements regarding wages, working conditions, or benefits in addition to what may be costly administrative procedures to obtain permission to hire legal foreign workers.

Employers may prefer irregular workers if the costs of participating in legal foreign worker programs exceed the risks posed by the hiring of irregular migrants. Moreover, networks (family, relatives, labor recruiters and sometimes smugglers and traffickers) are often very efficient in arranging the employment of irregular migrants, reducing costs still further since the networks take care of recruitment, vet the new workers, and may even train them until the newcomers are proficient. For their part, migrants may trust these informal networks more than government programs that may be more unreliable and costly even when weighing in the heavy risks that irregular migration entails, particularly to the safety and security of the migrants.

Given the advantages of irregular migration, governments face many challenges in curbing its use. This chapter begins with a discussion of the various forms of irregular migration. It then sets out the reasons to be concerned about its growth. The next section

lays out the contours of a comprehensive policy response that includes enforcement, diversion to legal channels and a focus on the root causes. The chapter concludes with a case study of irregular migration to the United States.

### ***Forms of Irregular Migration***

The term “irregular migration” encompasses two principal sets of migrants: those who move from their country of destination, often through transit countries, and enter a country of final destination without authorization; and those who enter the destination country with legal documents, having been inspected at a port of entry, but then violate the terms of their admission by overstaying their visa and/or working illegally.

Unauthorized entry occurs in a number of different ways. Irregular migrants cross land borders between official ports of entry and they arrive by sea, often in makeshift boats or rafts. They also use fraudulent documents in order to gain entry through official land, air and seaports. Counterfeit passports, visas and other identity documents may be used. The migrants may use the documents to board flights and then destroy them before landing in the destination country. They may also enter via impostor documents, using legitimate documents obtained through illegitimate means. Often, they will use documents of people who bear superficial likeness to their own appearance. These may be documents possessed by family or friends, or they may be purchased for the specific purpose of gaining admission.

This type of unauthorized migration is often arranged by smuggling operations. Human smuggling is defined in international law as “The procurement, in order to obtain, directly or indirectly a financial or other material benefit, of the illegal entry of a person into a state Party of which the person is not a national or a permanent resident.”<sup>i</sup> The definition assumes that the smuggled migrant is a willing party to the arrangement and intends to enter the other country illegally. Smuggling is differentiated from human trafficking, which is defined as “the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat, or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.”<sup>ii</sup> At times, however, smugglers charge exorbitant fees, putting smuggled migrants into debt bondage until they or their families can pay the debt. Under such circumstances, the smuggled become the trafficked.

The smuggling groups vary in their form and size from highly professional criminal enterprises that move large numbers across multiple borders to small ‘mom and pop’ operations that may work in limited locations with small numbers of migrants. The smugglers provide an array of services, including assistance in clandestinely crossing borders, fraudulent documents needed to obtain visas, board planes or obtain jobs, and safe houses. The extent to which the professional smuggling operations are associated with other forms of organized crime is debated and may differ depending on location. For example, Italian and Albanian authorities have cited evidence that the same gangs traffic arms, drugs and people whereas many ‘coyotes’ appear to focus exclusively on

smuggling of people across the Mexico-U.S. border. Often, smugglers work with a loose, though organized, network to bring migrants long distances, particularly when they cross several transit countries and need local assistance for routes and safe houses.

One side effect of enhanced enforcement to curb irregular migration has been the growth in smuggling operations. The increased difficulty in crossing borders on one's own has led many irregular migrants to seek assistance from professionals. As a result, the cost of irregular migration has increased and it takes longer for irregular migrants to pay off the smuggling fees. In turn, the smugglers are willing to take greater risks with the lives of their customers because of the high payoff if they succeed in circumventing efforts to stop them.

A much safer form of irregular migration is visa abuse. For example, migrants obtain legal permission to enter a destination country, often as a tourist, and then overstay the period that the visa covers. Or, they obtain a longer-term visa that does not permit employment, such as a foreign student visa, and then work in contravention of the terms of their admission. In still other cases, the migrants enter as temporary workers but fail to leave when their period of work authorization ends. In some cases, migrants seek the visa knowing that they plan to violate its terms. As with those who come clandestinely, they may seek the visa on their own or obtain it through the assistance of smugglers. In other cases, the migrants have no intention of overstaying or working illegally, but circumstances change and they enter into irregular status.

### ***Reasons to reduce irregular migration***

I began this paper explaining the reasons that irregular migration has grown. This section outlines the reasons that it should be curbed. I use the term 'curb' advisedly. The potential to *stop* irregular migration is remote, particularly in liberal democracies that shun authoritarian mechanisms to control the movements of their populace. The goal is to reduce irregular migration to a manageable level. Why? In my view, the answer is not in the economics of irregular migration. There are economic winners and losers in all migration, including irregular movements. The economic costs and benefits often cancel each other, particularly over the long term. Capital generally gains from the availability of inexpensive labor; consumers may benefit from cheaper goods and services. Taxpayers may bear costs from use of services which are not covered by tax payments. Low skilled workers often lose when there is competition for unskilled jobs and wages remain low. At best or worst, however, the benefits and costs are usually small because the number of irregular migrants is small relative to the entire workforce of most countries.

Fundamentally, irregular migration should be curbed because it undermines the rule of law and exerts a heavy human toll on the migrants themselves. The U.S. Commission on Immigration Reform posited that credible immigration policies must meet a simple yardstick: "People who should get in, do get in; people who should not get in are kept out; and people who are judged deportable are required to leave."<sup>iii</sup> When destination countries tolerate high levels of irregular migration, they undermine their own legal

immigration systems. There is little credibility to immigration law if migrants and, particularly smugglers, are allowed to circumvent the policies in place to determine who enters, for what purposes, and for what period of time. Irregular migration also undermines public support for immigration. Often, the public reacts negatively to migration because it feels that the government no longer has control over who is to be admitted. High levels of irregular migration can then create a backlash that extends to legal immigration as well.

Irregular migration undermines the rule of law in other respects. Generally, smuggling operations cannot function effectively without the aid of corrupt officials in source, transit and destination countries. It also thrives when there is access to counterfeit and fraudulently obtained documents, which in turn create opportunities for identity theft. Many irregular migrants work in the underground economy, allowing unscrupulous employers to violate labor laws with little impunity since the irregular workers are unlikely to complain to authorities.

Added to these concerns is the human cost to the migrants who enter through unauthorized channels or who remain illegally in the country. Clandestine migration is dangerous, as is evident in the statistics on deaths along the US-Mexico border or in the Mediterranean Sea. When migrants cross deserts, are packed in containers, or cross in unseaworthy boats, they put themselves at risk of serious harm. When they use the 'services' of professional smugglers who are only interested in profit, their lives are at further risk. Even if the irregular migrants are able to arrive safely to their destination, they find themselves in very vulnerable situations as they attempt to elude authorities and work illegally. They have few rights and face the risk of apprehension and removal (although that risk may be overstated, as discussed below). Irregular migrants find it difficult to maintain contacts with families, since they are not eligible for family reunification unless they are able to obtain legal status. All in all, for the sake of law and for the sake of humanity, reduction in irregular migration is advised.

## ***Policy Responses***

Efforts to reduce irregular migration generally form a three legged stool: 1) prevention of future irregular migration through a combination of law enforcement mechanisms, legal alternatives for migration, and measures to address the underlying causes of the movements; 2) regularization of those who have gained equities in the host countries and whose continued presence is considered beneficial to all parties; and 3) removal of those who pose a threat to the host country.

## Prevention

### Law Enforcement Strategies<sup>iv</sup>

With regard to enforcement, countries tend to fall into two camps: those that follow the 'island' model, focusing their activities on the border; and those that follow an interior model, focusing their enforcement on activities inside their countries. The island model is generally characteristic of the Anglophone countries (whether they are islands or have contiguous neighbors) that tend to eschew national identity documents, sweeps of immigrant neighborhoods, buses and subways, or businesses that employ immigrants. The emphasis is on keeping irregular migrants out, not on finding them after they have entered. By contrast, continental European countries tend to focus more heavily on interior enforcement, with greater willingness to ask foreign looking residents for identity documents and stronger systems for enforcing sanctions against employers who hire irregular workers. These two systems are, of course, pure types, with most countries practicing elements of both types of enforcement.

Prevention of illegal entry is a cornerstone of immigration-related enforcement actions. States are increasingly seeking to enforce their domestic immigration laws beyond their own borders. The issue is one of risk management. For States, the best opportunity to manage risk is to do so as far away from the border as possible. The further away, the more time government officials have to examine the individual and his travel documents. Once travelers reach the border, inspection officers are pressed to make quick decisions so as not to unduly inconvenience *bonafide* travelers.

Visa issuance is generally considered to be the first line of defense against irregular migration, particularly of those deemed likely to overstay their permission to remain in the host country. Visas generally give foreign nationals permission to travel to a destination country, although, as explained below, the visa holders may well be subject to further inspection on arrival. Departure site and en route pre-clearance and pre-inspections by destination-state personnel are a further way to prevent the arrival of irregular migrants. Many countries deploy immigration officials to work with foreign governments and airline personnel to identify persons traveling with fraudulent documents and to combat smuggling and trafficking operations.

Pre-enrollment of frequent travelers is a further way to pre-clear certain foreign nationals, allowing greater time and attention to be paid to visitors about whom the authorities have less information. The Secure Electronic Network for Travelers Rapid Inspection (SENTRI) pre-clears crossers at the US-Mexico border to determine 1) if they have a secure residence in one of the border towns, and 2) if they pose any security risk. Frequent commuters apply and pay a fee for this special privilege. Names, digitized photographs, and vehicle information come up on an Inspector's screen just before the vehicle arrives at the Inspection site. Upon reaching the booth, the driver stops, reaches out the window and swipes an electronically coded PortPass card through a magnetic stripe card reader. Participants in the program generally wait no longer than three minutes

behind other cars to enter the U.S. at the busiest time of day. Technically, the system combines security pre-screening with biometrics and fast crossing/inspection. Those who are not pre-screened are required to go through more extensive checks to determine if they are admissible.

Sanctions against carriers who transport migrants ineligible to enter a destination country is a further means of preventing irregular migration. Domestic law in a number of states requires common carriers (including, in various combinations, sea, air and land carriers) servicing their territories internationally to verify travel documents of all boarding passengers. Financial fines are imposed upon carriers that fail to comply.

Most countries subject arriving passengers to some type of inspection at the border, including those already granted visas. Entry controls suffer from the same weaknesses as visa issuance, in that officials must make judgments about likely overstay with little or no hard information. One of the most ambitious inspection programs is US-VISIT (United States Visitor and Immigrant Status Indicator Technology). The system captures automated information about each arriving (and eventually, departing) passenger. It collects information on, among other pieces of data, date of arrival and departure; nationality; complete name; date of birth; citizenship; sex; passport number and country of issuance; country of residence; U.S. visa number, date and place of issuance (where applicable); and complete address while in the United States. It also records biometric information, a digital photograph and fingerprints of the right and left index fingers. The system was first introduced at air and sea ports of entry and then extended to the land ports of entry, which have far more crossings each day. The departure controls—scanning of the visitor's visa or passport, and recording of the two fingerprints again—are being tested at twelve major airports.

Identifying counterfeit and imposter documents used by irregular migrants is a further enforcement measure. One way to reduce counterfeiting is through the issuance of machine-readable visas and the incorporation of biometric data in travel documents. Incorporating security features into passports, visas and residence documents make them more expensive and more difficult to forge. Documents may also incorporate biometric features such as fingerprints or digital photographs, which will be nearly impossible to replicate. As occurs in the United States, costs can be recovered through fees. In order to have maximum effect, the documents should be linked to a database which allows for identification of *bonafide* recipients of the documents. Increases in document security are supplemented by staff training on identifying fraudulent documents.

The strategies just described refer to the front doors through which migrants try to enter destination countries. Irregular migrants also enter through back doors, bypassing official ports of entry. They cross land borders and arrive by sea. Strategies to curb clandestine entries include personnel to patrol borders and seaways, fences to make it more difficult for migrants to cross land borders, sensors, cameras and other technology to help identify those seeking entry, and lighting to make it more difficult to cross without recognition. Interdiction on the high seas, preferably close to the embarkation point, is used to deter boat departures.

In the United States, the focus is primarily on the U.S.-Mexico border. In the 1990s, several new enforcement efforts were launched under codenames such as Operation Hold the Line and Operation Gatekeeper. The goal was to increase the risk of apprehension to deter migrants from attempting crossing. Additional personnel were deployed in El Paso and the San Diego area, which had the largest number of illegal border crossers. Fences were built and new technology was put in place. The operations succeeded in reducing movements in these corridors, but the migration soon shifted to other locations. As they moved east from San Diego into more rugged and inhospitable terrain, the migrants became more dependent on professional smugglers and subject to more hazards, which increased the cost in financial and human terms. There is no evidence, however, that irregular migration decreased as a result of these initiatives. Rather, the late 1990s saw a major increase in the number of unauthorized migrants in the United States, largely due to the strong economy and the many parts of the border that remained relatively open to illegal crossers. This issue is discussed in greater detail below.

The growth in smuggling and trafficking presents challenges to any efforts to prevent irregular migration. These operations have proven to have a global reach, able to move migrants from China to the United States, Afghanistan to Australia, and Africa to Europe—to give just three examples. Counter-smuggling and trafficking requires significant cooperation between source, destination and transit States through which irregular migrants move. National policies are evolving in different ways, but most are intensifying their efforts at policy and legislative reform, following the signing of the UN Protocols on Smuggling and Trafficking. Most countries already have legal provisions against aiding and abetting illegal border crossing. Many governments now provide for significant criminal penalties against human smugglers and traffickers. Measures on money laundering, and the identification, tracing, freezing, seizing and confiscation of means and assets from crime, are important means also to prevent and reduce smuggling and trafficking. To assist intra-governmental co-ordination on combating smuggling and trafficking, such governments as Australia, the Philippines and the United States have created inter-Ministerial mechanisms to deal with the multifaceted policy issues of the phenomena.

To the extent that irregular migration is fuelled by the demand for labor, enforcement at the worksite comes into play as an important deterrent. Many countries impose sanctions on employers who hire irregular migrants. The standard differs as to the level of knowledge that an employer must have about the worker's immigration status. In the 'island' countries, where systems to verify identity are weak, employers are often able to skirt sanctions because they have not 'knowingly' hired the irregular migrant who poses as an authorized worker. In countries in which there are rigorous systems to verify identity, any hire of a person unauthorized to work may be a violation.

In addition to immigration status verification, enforcement at the worksite includes violations of basic labor standards—payment of minimum or prevailing wages, health and safety standards, overtime payment, child labor restrictions, etc. Employers may also be investigated for failure to pay required taxes on wages. The logic behind this broader

set of enforcement actions is to identify employers who are hiring irregular migrants because they are more vulnerable to labor standards abuses or they are more willing to work in the underground, cash economy because of the precariousness of their immigration status.

## **Diversion into Legal Channels**

A comprehensive approach to irregular migration provides alternative avenues for employers to hire foreign workers when domestic workers are unwilling or unable to perform the jobs that irregular migrants hold. There is an important caveat on this statement, however. Often, domestic workers are unwilling to take the jobs held by irregular migrants at the wages and under the working conditions offered. Or, jobs that are held by irregular migrants could be performed offshore (bringing the jobs to the workers, rather than the workers coming for the jobs) or could be mechanized. Indeed, there is a difference between a *demand* for foreign workers and a true *need* for those workers.

Even with these stipulations, however, there are likely to be jobs that cannot be mechanized or sent offshore and for which domestic workers are unavailable even at higher wages. Establishing legal work programs or increasing the number and type of work permits issued would present an alternative to irregular migration for some migrants. The extent to which legal programs will offset irregular migration will be determined by a number of factors, including: the sanctions and incentives in place for employers to hire legal workers rather than maintain an irregular workforce (as discussed above); the eligibility of those in irregular status for the legal work programs (as discussed in the next section), the relative size of the work programs (whether the number of visas matches the demand for workers and the supply of would-be migrants), the procedures used to process applications from employers, and the requirements imposed on would-be workers to obtain visas.

Legal foreign worker programs can admit migrants for different durations of stay. Seasonal programs generally assume that the work is temporary and the migrants will remain only through the season, to return home when the job is finished. This type of program often involves circulation, with workers coming the following year to perform the same service. It is most often used in perishable crop agriculture but can also be used to fill jobs where there is a clear season—resorts, for example. Temporary work programs are usually of longer duration but, again, the assumption is that the foreign workers will return home. The duration of stay can be from several months to several years. Problems arise, though, when temporary workers are hired for permanent jobs. Since there is no natural end to the job, the pressure is often to overstay the visa. Employers do not want to lose good workers, and employees do not necessarily want to return home. Increasingly, temporary work visas are actually transitional visas that admit workers for a testing period. If the employer wants to retain the worker, he or she can apply for permanent residence. Or, if the worker's visa is renewed a certain number of times, and the migrant can demonstrate the potential for continuing employment, the

government may issue a permanent work permit. Few countries give unskilled workers immediate avenues of entry for permanent residence, and in many cases, do not provide any vehicle for transition. In these cases, foreign workers are highly dependent on the good will of employers and may be reluctant to question their wages and working conditions.

Reducing irregular migration may require the targeting of foreign worker programs on particular at-risk occupations rather than opening them to all sectors. In many cases, a majority of irregular migrants work in a relatively small number of occupations within a small number of industries. And, only a few occupations/industries tend to have a large proportion of irregular migrants among the workforce. Industries can change quickly in their reliance on foreign labor, however. For example, in the United States, food processing shifted from a largely native-born workforce to a largely immigrant workforce within a decade.

The danger in a new foreign worker program is that industries that were not dependent on foreign labor shift to this new supply of workers while those comfortable with their existing workforce continues to employ irregular migrants. In this scenario, the legal programs do not serve as a substitute for irregular migration. And, if demand comes to exceed the legal supply of workers, the new programs can actually precipitate new irregular migration to fill the jobs.

Reforming legal immigration systems can help deter irregular migration for family reunification purposes as well as direct employment purposes. In the United States, for example, there are routine waits of five years before the spouses and minor children of legal permanent residents can obtain their own green cards. Residents of Mexico face even longer waiting times. These waits arise because of statutory limits on the number of family visas issued each year as well as administrative delays in processing applications. Rather than endure such long separations, many spouses and children migrate through irregular channels.

## **Addressing Root Causes**

Migration is driven by inequities, particularly in the economic opportunities in source and destination countries. As long as migration remains one of the most effective ways to increase one's household income and to withstand economic shocks at home, people will be tempted to risk everything to get to a wealthier country. When coupled with political instability and insecurity in many parts of the world, as well as severe limitations on human rights, particularly for women and minorities, migration is even more appealing.

It is important to recognize, however, that migrants are not generally the poorest of the poor or those who face the most serious barriers in their home countries. Migration requires financial resources as well as knowledge of and contacts in the destination country. In fact, as countries go through the development process, migration pressures may increase in the short to medium term. More people have access to the resources

needed to migrate and greater awareness of the differences between their earning power at home versus what they could achieve if they migrated. It is only when economic development succeeds and the wage differential between source and destination countries is reduced that emigration pressures reduce. At that stage, as occurred in Ireland, Italy and South Korea (to name three examples), nationals begin to return home and immigrants from poorer countries arrive.

In the meantime, migrants can become a source for poverty reduction and development. The most tangible contribution is in the form of remittances. With migrants sending more than \$200 billion, remittances exceed official development assistance and, in many countries, trade and direct foreign assistance. Most remittances are used for household consumption, which can have a development payoff if used for purchasing food (particularly if produced locally), obtaining needed healthcare, and helping children remain in schools. Some is used to build or purchase homes, supporting construction in home communities, and still more is used to purchase agricultural land or establish small businesses.

Migrants are also a source of philanthropy and investment. The Mexican 3 for 1 program matches each dollar of investment made by hometown associations with three dollars provided by the municipal, state and federal government if the projects are for infrastructure improvements or productive enterprises. Other governments induce Diaspora investment with bonds and other financial instruments.

The danger of an economic development strategy based on emigration, however, is that governments may escape the need to make reforms that would allow people to remain at home or to return there. The same barriers that preclude investment more generally—poor banking systems, corruption, burdensome regulations—also reduce the incentive for migrants to make meaningful investments in their home communities. In addition, irregular migration holds many pitfalls as a tool to promote the type of economic development that would eventually eliminate the need to migrate. It can, for example, be a serious impediment to good relations with the more developed countries whose investment is needed. Moreover, irregular migrants tend to be paid less than those in legal status, reducing the amount they are able to remit or invest. The challenge is to find the correct balance in order to achieve stay at home development so that people do not feel so much pressure to leave that they will find any means to do so.

## **Regularization**

The second leg of a comprehensive policy strategy to address irregular migration is regularization. In other words, efforts are made to provide legal status to unauthorized migrants who are already in the country. Often, regularization takes place in conjunction with new prevention efforts—to wipe the slate clean while the new enforcement measures are put in place. Policy makers often prefer the term regularization to what opponents often call amnesty. Amnesty connotes forgiveness for past misdeeds, whereas regularization is promoted as a way to fix irregularity by giving migrants authorization to

reside and work. Proponents often explain that regularization will apply only to those irregular migrants who have broken no laws other than immigration provisions.

Regularization usually requires the migrants to earn their legal status by continuing to be gainfully employed in the host country. A number of southern European countries have had recurrent legalization programs, granting a one year work permit to migrants who have been illegally residing and working. If they retain their employment, they are able to renew their residence and work permits. After a specified period, they may be granted indefinite residency that puts them on a path to citizenship.

Regularization may apply to the entire irregular population, or it may be limited to a subsection of the migrant population—often defined by their length of residence. Or, different regularization approaches may be taken for different groups. In the 1986 regularization program in the United States, non-agricultural workers could obtain legal status only if they had been in the country for a lengthy period (since before January 1, 1982), whereas Seasonal Agricultural Workers (SAWs) could obtain legalization if they could demonstrate having worked a minimum number of hours in agriculture during the previous three years.

While regularization programs gain the most public policy attention, there are other ways in which irregular migrants are able to gain legal status. They may become eligible to regularize by marrying a citizen or legal permanent resident; they may obtain asylum or other status that precludes their deportation; or they may find a job that affords them the opportunity to convert to a legal status. Countries differ as to the ease with which irregular migrants who become eligible for a recognized status are able to avail themselves of the opportunity. Many countries require migrants to return home to apply for a visa, something that irregular migrants may be reluctant to do if they fear that they will be denied re-entry. The United States has passed legislation to allow irregular migrants who arrived before a certain date to adjust their status within the United States, rather than face potential bars on their re-entry.<sup>v</sup> The legislation is generally time-limited, however, and does not provide a means by which new migrants can adjust their status.

Countries also regularize through quasi-legal statuses, rather than grant a full amnesty. For example, Germany has a ‘toleration’ (*duldung*) status for individuals who cannot be removed for humanitarian purposes. The United Kingdom uses ‘extraordinary leave to remain’ whereas the United States offers ‘deferred enforced departure’ for similar cases. While the individuals do not face immediate deportation, they do not have a secure legal status. They can generally work, but they may not be able to bring their families to join them, and they are not on a track to citizenship.

Perhaps the most often used strategy to address the presence of irregular migrants is benign neglect. The government makes little or no efforts to identify or apprehend those living without status, but it also takes no steps to recognize them. Should they be unfortunate enough to come to the attention of authorities, they may be removed. In many cases, however, they are free to live and work without much danger of detection.

Regularization initiatives, whether formal or informal, can be counter-productive if implemented without adequate measures to prevent future flows. If it appears that everyone who enters illegally is able to adjust their status if they can only stay for a long enough period, regularization serves as a magnet for more irregular migration. By contrast, implemented in combination with new enforcement or legal admission measures, regularization can allow authorities to focus attention on preventing new movements rather than apprehending those who have already established links and equities in the destination country. The great concern of policymakers is that the regularization programs have measurable outcomes (the numbers legalized) but the impact of prevention strategies is much more difficult to measure since the counterfactual is never completely clear. Often, the preference is to begin with programs to prevent new flows and then trigger regularization when there is some measure of success, but the success of prevention actions may be contingent on programs to bring the irregular migrants out of the shadows. Otherwise, employers who might fear losing an established workforce and migrants who might fear apprehension and removal have few incentives to cooperate with the new prevention measures.

## **Detention and Deportation**

Although prevention is the preferable policy approach to deter future flows and regularization often makes sense when introducing new prevention measures, removal of some irregular migrants may be in the best interest of the destination country. For the most part, however, finding irregular migrants can be difficult. Countries attempt to track the presence of foreign nationals within their territories through registration requirements, checks of identity documents, and systems for matching entry and exit from the country.

Tracking systems are costly mechanisms that, if inappropriately implemented, may infringe on privacy and civil liberties of citizens and foreign nationals alike without efficiently and effectively identifying those in the country or engaged in employment without proper authorization. Tracking systems are particularly problematic when they appear to involve racial, ethnic or religious profiling. Profiling is not in and of itself problematic. If based on solid information encompassing a wide range of indicators and used in conjunction with other law enforcement tools, profiling becomes one among an arsenal of techniques to give greater scrutiny to certain individuals relative to others. However, when profiling is based on crude characteristics—such as those who look or sound foreign—it can be a counterproductive tool for law enforcement that places an excessive burden on innocent persons.

The capacity to identify, detain and deport irregular migrants is limited in all countries. Generally, efforts to do so are focused on targeted groups. Those who pose security risks—terrorists and criminals, for example, are the principal targets. Others are put into removal proceedings because they come to the attention of authorities, for example, in worksite raids or because their application for asylum or an immigration benefit has been rejected.

Generally, it is easiest to remove those identified at ports of entry, as compared to those who have resided for a longer period in the destination country. States have different processes for removing individuals found inadmissible at ports of entry. The United States, for example, has an expedited exclusion procedure that permits inspectors to issue an order for removal of all aliens who enter with no documents, counterfeits or legitimate documents fraudulently obtained. If removed under these provisions, the foreign national may not reenter the United States for five years. The only exception to the expedited process is for those who request asylum.

Detention plays an important role in securing persons prior to their removal. Absconding is a significant risk and detention provides the solution. Detention policy varies across the world. In some countries, such as the United States and Australia, detention is automatic and can be used for an extended period for certain categories of foreign nationals, particularly those arriving without proper documentation and those who have committed certain criminal offenses. In other countries, detention is used on a case by case basis and only for short periods. The European Convention on Human Rights, for example, does not permit long-term detention unless a member State has the real possibility of removing someone. Even in the European Union, however, there is variation in detention policies. The standards regarding arbitrary detention under the ECHR are not clearly spelled out. In one major case, the European Court of Human Rights did not find four years of detention during deportation proceedings to be excessive.

The cost of removal can be very high, which is one reason that it is not a first resort in reducing irregular migration. The potential for irregular migrants to abscond is very high if they are not detained. Detention costs can run into thousands of dollars. If a migrant resists removal, the costs of transporting them home can be quite significant—not just for the transport itself but for guards to accompany the migrant to the country of origin. Public opinion, although negative about irregular migration, may recoil from images of migrants in shackles, protesting their deportation. In addition, removals can create tensions with countries of origin, particularly when criminals who may have learned their craft in the host country are deported.

For these reasons, removal is the hardest part of a comprehensive strategy to address irregular migration, but without some capacity to remove irregular migrants, there is little credibility to immigration policies. This is particularly the case in countries that practice ‘island’ models of enforcement. Without removal, the message is clear: if one makes it past the border controls, one is home free and able to reside more or less permanently without legal status.

### ***Irregular migration in the United States: A Case Study***

About 12 million irregular migrants reside in the United States, of whom about 7.2 million are in the labor force.<sup>vi</sup> They represent about 30 percent of the foreign born. The net annual increase is estimated to be more than 500,000 per year. This number does not include migrants who come for short periods to work, often in seasonal agricultural labor, or commuters who live in Mexico and work in the United States.

Most irregular migrants come from Mexico (about 56%) and Central America, but they represent a wide array of countries. The majority is concentrated in about seven states within the United States. During the past decade, however, there has been a significant dispersal throughout the country, with large numbers of irregular migrants now living in new settlement areas. Many irregular migrants live in mixed households, with legal permanent resident spouses/parents and U.S. citizen children. On average, the irregular migrants are less educated than natives or legal immigrants. They work primarily in services, building cleaning, perishable crop agriculture, food processing, construction, landscaping and gardening, light manufacturing

Efforts to prevent irregular migration largely failed in the 1990s and early 2000s. The Immigration Reform and Control Act of 1986 ostensibly followed the three track approach described above. The legislation introduced new enforcement measures at both the border and interior. The most controversial was provisions to sanction employers who knowingly hired unauthorized workers. The legislation IRCA also gave legal status to almost 3 million of an estimated 4.5-6 million in country. To address prevention at the source, IRCA authorized a commission to recommend ways to reduce emigration pressures. A notable recommendation was adopted in the 1990s as the North American Free Trade Agreement.

The employer sanctions provisions did not succeed in slowing down unauthorized migration, as had been promised in IRCA. In fact, the mechanisms for determining work authorization were so faulty that it was no more difficult for irregular migrants to find jobs post IRCA than it had been before its passage. A proliferation of fraudulent documents allowed employers to hire unauthorized workers with little risk of sanction. Employers were not expected to weed out the counterfeits if the documents looked valid on their face. In fact, if an employer requested additional documentation, he or she faced penalties imposed to ensure that employers did not discriminate against foreign-looking or sounding workers.

In the early 1990s, when public outcry about the loss of control of the southern border erupted in California, in particular, the Clinton Administration adopted new border strategies to try to halt unauthorized entries. Operations Hold the Line in El Paso and Gatekeeper in San Diego succeeded in slowing movements in these locations, but the illegal crossings just moved to other parts of the border. Crossings became more expensive and, in some locations, more dangerous, but most of those who were serious about entering the United States succeeded in doing so. Moreover, the border enforcement did nothing about visa overstayers, who were estimated to compose about 40 percent of the unauthorized population. Calls for new employment verification

systems to strengthen the employer sanctions regime were largely ignored although Congress passed legislation in 1996 to pilot test electronic verification.<sup>vii</sup>

During the second half of the 1990s, with an economic boom that produced record number of new jobs, irregular migration increased still further. As long as the economic boom continued, little was done to curb the growth in irregular migration. In fact, the Immigration and Naturalization Service suspended most worksite raids because of complaints that these enforcement actions were too disruptive of business. Even after the recession of the early 2000s, and the September 11 attacks, immigration reform received little attention. In fact, nascent efforts to arrive at a US-Mexico migration agreement were tabled after September 11, not to be renewed.

More recently, irregular migration has become a hot button issue in American politics. In January 2004, President Bush announced a broad framework for resolving some of the many problems that plague the U.S. immigration system. Chief among these, in the words of President Bush, was the need to better “match willing foreign workers with willing American employers, when no Americans can be found to fill the jobs.”<sup>viii</sup> Bush proposed a new temporary worker program, designed to deflect criticism from conservative political groups that opposed amnesty. Instead, program participants would be eligible to work in the U.S. for an initial period of three years, with the possibility to renew their temporary work visa for an unspecified number of three-year periods. Return to the country of origin otherwise would be required at the end of three years.

The proposal received some support in the Senate and widespread opposition in the House of Representatives. By mid 2006, both houses had passed their own versions of immigration reform. The House version focused primarily on enforcement, beefing up border controls with triple fencing across much of the southern border with Mexico and increasing the number of offenses that would be bases for removal. It also made illegal presence in the U.S. a felony and made it a felony to assist anyone in the country illegally. These latter provisions were met by great opposition in the Hispanic community and among immigrant and religious groups, leading to nationwide demonstrations against the legislation.

The Senate version was billed as comprehensive reform. It included some of the enhanced enforcement measures; both bills, for example, include new worksite verification systems. The Senate legislation also included a regularization program for those already in the country and a new temporary work program for those seeking employment. It expands the ‘green card’ program to provide additional visas in order to permit adjustment to permanent residency for those regularizing or wishing to remain in the U.S. beyond the period of temporary work.

At the time of writing this paper, the new Congressional leadership and the President have indicated an interest in considering legislation along the lines of the Senate bill. Whether such legislation passes, however, is an open question.

This raises the question of why it is so difficult to address irregular migration. Here, I come back to my starting point. One reason that it is difficult to achieve reform is the very efficiency by which irregular migration matches the supply of workers with the demand of employers. Compared to formal, bureaucratically implemented programs, irregular migration holds many advantages. It provides the willing workers to willing employers that President Bush applauded, and it does so with little government interference or cost. At least in the American case, irregular migration provides financial advantages to employers, workers and consumers. To date, the problems I outlined as reasons to curb irregular migration have not outweighed this simple cost-benefit analysis.

Complicating the task is the general ambivalence in the United States about irregular migration, particularly when it is for work purposes. Although the public expresses concerns about high levels of irregular migration, there is far greater tolerance of the specific individuals encountered working illegally—the cleaner, landscaper, nursing aide, for example, who is providing services to American families. In addition, most Americans remember fondly their own immigrant past. While worried about today's immigration, they understand that similar concerns were voiced about their own immigrant forebears. Further, the public are by no means in agreement about the specific proposals to reduce irregular migration, whether it is the construction of new border fences or the development of an employer verification system that would be applied to them as well as to migrants.

A third, and related reason, is the lack of political will to adopt enforceable immigration policies. Lack of leadership and public ambivalence has resulted in ad hoc, episodic implementation of policies. Comprehensive approaches that balance enforcement and regularization are particularly difficult to achieve. On one side of the debate, regularization programs are taboo, even though the politicians who oppose them agree that it would be impossible to remove 12 million persons from the country. They speak of attrition as the main way to reduce the numbers in the United States. Those who support regularization, for their parts, often speak of it as a one-time initiative but they provide little evidence that their policies will curb future flows. On the other side of the debate, the specter of a national identification card makes it difficult to adopt policies that would enable employers to determine who is eligible to work legally in the United States. Most experts agree that an electronic verification system will work only as well as the underlying documentation in support of it, but that documentation seems to be too closely related to a national ID card.

No Administration has been willing to date to take meaningful action against employers who hire irregular migrants or infringe upon labor standards. As discussed above, the Clinton Administration almost completely suspended worksite enforcement actions because of complaints about the disruption to business activity. The Immigration and Naturalization Service had launched a series of raids in manufacturing and agriculture during the mid 1990s with the aim of pressuring employers into hiring U.S. workers and checking the documents provided by new hires through the new pilot verification program. After raids threatened to disrupt the Vidalia onion harvest, however, the outcries from members of Congress were so strong that INS agreed to stop its

unannounced worksite visits. During the Bush Administration, even routine employer sanctions enforcement disappeared. In 2005, only three employers were fined for violating employer sanctions laws. Only since public opinion has turned against irregular migration has there been a resumption of worksite enforcement activities, with the INS' successor agency, Immigration and Customs Enforcement, launching several high profile criminal investigations and indictments of companies hiring irregular workers.

So, what are the prospects for reform? It is difficult to predict. Immigration has historically been a bipartisan issue with strange bedfellows. These alliances often crossed party affiliation. In years past, social liberals and representatives of the new ethnic groups have joined with businesses to support generous immigration policies, while social conservatives and law and order proponents have allied with labor to support more restrictive policies. Organized labor has changed its views on immigration, however, becoming a proponent of regularization—largely in support of its efforts to unionize many low-wage workers who are immigrants. Unions and civil rights groups<sup>ix</sup> generally remain reluctant, however, to embrace temporary work programs, particularly large-scale ones with few labor standards protections.

The wildcard in the debate on irregular migration is the immigrant community itself. The willingness of hundreds of thousands of immigrants and their supporters to demonstrate throughout the country presages a new political role that has not yet come to fruition. Because so many immigrants are new to the country, they have not yet naturalized and have not become a potent voting bloc. Both political parties recognize, however, that Hispanics, in particular, will become a deciding voice in many states. It is by no means clear, however, what stance they will take on irregular migration. In 2004, 47 percent of Latino voters voted for Proposition 200, the Arizona initiative with tough provisions regarding unauthorized migration. Interestingly, 49% of all voters who favored an increase in legal immigration voted for Proposition 200.<sup>x</sup>

## **Conclusion**

Whether the movements are by air, land or sea, irregular migration presents challenges to liberal democracies. Market forces attract migrants and sustain their presence in low-wage, often dangerous and degrading occupations. As long as migration to rich countries presents opportunities for the unemployed and underemployed of poor countries, people will take risks to migrate in support of themselves and their families. Without comprehensive policies, there is little chance of curbing such movements. Prevention must be multi-faceted, including enforcement, legal work alternatives in destination countries and economic development of source countries. But, even with effective prevention, a residual population will still remain in destination countries. For most of those who have built up equities in their new country, regularization will be a necessity, but countries must also have the tools to effect the removal of those who pose security threats to their hosts. Whether public opinion and political leadership will permit comprehensive policies to be enacted is another issue. As the U.S. case study

demonstrates, the gap between rhetoric and reality makes actual reform difficult to achieve.

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- <sup>i</sup> UN Protocol against the Smuggling of Migrants by Land, Sea and Air (2000)
- <sup>ii</sup> UN Protocol to Prevent, Suppress and Punish Trafficking in Persons (2000)
- <sup>iii</sup> U.S. Commission on Immigration Reform, *U.S. Immigration Policy: Restoring Credibility*, (Washington, DC: Government Printing Office, 1994), p.
- <sup>iv</sup> This section draws heavily upon two previous papers: Susan Martin and Philip Martin, "International Migration and Terrorism: Prevention, Prosecution and Protection," *Georgetown Immigration Law Journal*, 18/2, Winter 2004, 329-44 and Andrew Schoenholtz and Susan Martin, *Migration and Security*, Background Paper prepared for the Bellagio Dialogue, Bellagio, Italy, June-July 2006.
- <sup>v</sup> Under US law, someone residing illegally in the US for more than six months is barred from re-entering the country for three years; if they resided illegally for more than one year, the bar is for 10 years.
- <sup>vi</sup> Jeffrey S. Passel, *Size and Characteristics of the Unauthorized Migrant Population in the U.S.*, Washington, DC: Pew Hispanic Center, 2006
- <sup>vii</sup> The U.S. Commission on Immigration Reform recommended adoption of an electronic verification system in its 1994 report to Congress. The author of this chapter served as the Executive Director of the Commission.
- <sup>viii</sup> "President Bush Proposes New Temporary Worker Program," 7 January 2004, [www.whitehouse.gov/news/releases/2004/01/20040107-3.html](http://www.whitehouse.gov/news/releases/2004/01/20040107-3.html).
- <sup>ix</sup> The opposition from Latino groups may be diminishing, however, as witnessed by a recent article by the President of the National Council of La Raza indicating that a temporary work program may be an acceptable alternative to large-scale unauthorized migration. See Janet Murgua, *A Change of Heart on Guest Workers*, *Washington Post*, Sunday, February 11, 2007, Page B07.
- <sup>x</sup> CNN.com, *Ballot Measures / Arizona Proposition 200 / Exit Poll*, viewed at <http://www.cnn.com/ELECTION/2004/pages/results/states/AZ/1/01/epolls.0.html> on February 12, 2007.