

STORIES IN MEXICO AND THE UNITED STATES ABOUT THE BORDER:

THE RHETORIC AND THE REALITIES

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I. Introduction

Immigration was a hot topic before the failure of the June 2007 United States (U.S.) President's Immigration Reform Bill¹ and remains so today.² President Obama has promised to work on comprehensive immigration reform.³ This initiative will, of course, involve popular discourse and press coverage. During the time in which the 2007 Immigration Reform Bill was being considered, the media on both sides of the Mexico-U.S. border published numerous

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¹ Comprehensive Immigration Reform Act, S. 1348, 110th Cong. (2007); *see, e.g.*, Stephen Dinan, *Immigration Bill Quashed, Senators Swayed by Pressure From Public*, WASH. TIMES, June 29, 2007, available at WL 12315089.

² *See, e.g.*, Julia Preston, *White House Plan on Immigration Includes Legal Status*, N.Y. TIMES, Nov. 14, 2009 at A13; Melanie Trotman, *Immigrant Bill is Back on Table*, WALL ST. J., Nov. 15, 2009 at A5; Julia Preston, *Mexican Data Show Migration to U.S. in Decline*, N.Y. TIMES, May 15, 2009, at A1.

³ Doug Palmer, *Obama Pledges Push this year for Immigration Reform*, REUTERS, June 25, 2009, at <http://www.reuters.com/article/politicsNews/idUSTRESS5O6Q220090625> (last visited June 29, 2009).

stories,⁴ editorials, advocacy pieces, and opinions. We became intrigued by the stories, images, and cultural metaphors that were used by the media in the border states of Arizona, California, New Mexico, and Texas. While some of the stories seem carefully crafted to shape the political debate, other stories are almost like folktales and mythology spreading from person to person among the population. Indeed, many of these stories are transmitted through song in *corridos* (ballads)⁵ that are sung by Mexican musicians.⁶

Our goal in this article is to demonstrate how perspective, political agenda, and personal experiences affect how stories about the Mexico-U.S. Border are framed. The framing is shaped by audience and emotional appeal, as well as political agenda. Stories framed and portrayed as personal experiences and stock narratives about a group or country can shape the attitude, experience, and behavior of others. Law Professor Richard Delgado has famously urged academics from traditionally under-represented groups to share their stories and name their own lived experiences.⁷ George Lakoff has written several books urging persons who want to further a progressive agenda to frame their positions in more accessible and persuasive language because metaphors shape how people think.⁸ In *Moral Politics*, Lakoff suggested that liberals working toward a progressive agenda were not adept at framing metaphors to further their agenda.⁹ Lakoff's work has been influential in political circles

⁴ See, e.g., Immigrant X, *My Life As An Illegal, As Told to John Spong*, 34 TEX. MONTHLY 102 (2006), available at <http://www.texasmonthly.com/preview/2006-07-01/feature2> (last visited June 15, 2009).

⁵ The translations of the Spanish in this document are by the authors. The authors' translation includes their familiarity with both standard and slang Mexican usage of the terms.

⁶ Randal C. Archibald, *Far From Home, Mexicans Sing Age-Old Ballads of a New Life*, N.Y. TIMES, July 6, 2007, at A1.

⁷ Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2412-414 (1988).

⁸ GEORGE LAKOFF, DON'T THINK OF AN ELEPHANT! KNOW YOUR VALUES AND FRAME THE DEBATE: THE ESSENTIAL GUIDE FOR PROGRESSIVES ix-xv (2004); GEORGE LAKOFF, MORAL POLITICS: HOW LIBERALS AND CONSERVATIVES THINK (2d ed. 2002); George Lakoff, *Metaphors of Terror*, IN THESE TIMES, Sept. 26, 2001.

⁹ See generally GEORGE LAKOFF, MORAL POLITICS: WHAT CONSERVATIVES

and his insights inspired us to think about how immigration issues are framed in popular discourse. Another important work, *Brown Tide Rising*¹⁰ by Otto Santa Ana, examined how metaphors have been used in the framing of issues about immigrants. He reviewed the L.A. Times newspaper for its use of metaphors in discussing Latinos. Santa Ana found that the metaphors used by the paper induced subtle negative perceptions of Latinos. This article seeks to elucidate the rhetoric and the realities in stories about the border between Mexico and the United States.

Our discussion will: 1) examine the concept of using word choices and metaphors as devices in storytelling to frame political, economic and social issues, which are meant to evoke certain emotional responses among specific audiences in the immigration debates; 2) describe the legal history of the border as a legal and social construct as background for the stories that are told about immigration; 3) demonstrate with examples of stories published in Mexico and the U.S. that portray how some stories about the border are being framed in the U.S. and in Mexico by identifying word choices, metaphors, audience, social and/or political connections and emotional responses provoked in these narratives, particularly examples of stories published in Mexico; 4) examine the traditional mental frames created by the border stories that do not describe the effect of U.S. policies and practices on a cross-national indigenous community; and finally 5) demonstrate how the members of the transnational tribal communities have worked to tell their own stories about the lived realities of their border experiences.

KNOW AND LIBERALS DON'T 384-88 (1996).

¹⁰ See generally OTTO SANTA ANNA, *BROWN TIDE RISING: METAPHORS OF LATINOS IN CONTEMPORARY PUBLIC AMERICAN DISCOURSE* (2002).

II. Framing Immigration Issues in Border Narratives

Immigration represents a window through which one sees how people live between cultures. In the movements of people between Mexico and the United States, we see the Mexican and American economies and cultures as well as how individuals survive, aspire, and adapt . . . [After doing fieldwork in the 1960s] I realized that the border . . . was a place of contrast between two cultures and economies, but it was also a place where people worked out everyday accommodations between those cultures. It was a place where nationalists imposed their prejudices, but it was also a place where pragmatists developed a spirit of solving problems and getting along.

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Storytelling, of course, has a long and vibrant history.¹² Its place as a genre of legal academic literature is more recent,¹³ and not uncontested.¹⁴ Professor Richard Delgado issued a challenge for academics of color to tell their stories and broaden the academic perspective to include the views of law professors of color. In Delgado's seminal article, he argued that counter-stories are a powerful instrument to challenge the "dominant narrative."¹⁵ That is, stories that are written by members of groups that have been underrepresented by the academy can challenge the mindset of those who are unaware of injustices and privilege.¹⁶ Delgado claims that

¹¹ Jorge A. Bustamante, *Demystifying the United States-Mexico Border*, 79 J. AM. HIST. 485 (1992).

¹² William Cronon, *A Place for Stories: Nature, History and Narrative*, 78 J. AM. HIST. 1347, 1350-1362 (1992) (stating that humans are inherent storytellers; perspectives on stories shape our perceptions).

¹³ Delgado, *supra* note 7, at 2414.

¹⁴ See, e.g., Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 807-09 (1993).

¹⁵ Delgado, *supra* note 7, at 1211.

¹⁶ See Antoinette Sedillo Lopez, *On Privilege*, 2 AM. U.J. GENDER & L. 217

stories written by members of outgroups can make visible what was previously invisible by raising consciousness and awareness of different experiences and perspectives.¹⁷ He demonstrates how people who experience the same event can have completely different experiences of the reality of the event. Taking the challenge himself, he then went on to write stories.¹⁸ Other academics have followed. The stories have been written to highlight feminist perspectives,¹⁹ racial perspectives,²⁰ Latino perspectives,²¹ gay and lesbian perspectives,²² and indigenous perspectives.²³ Legal writing and

(1994) (demonstrating that poetry can also have this aim).

¹⁷ Delgado, *supra* note 7, at 2414.

¹⁸ See, e.g., RICHARD DELGADO, *THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE* (1995); Richard Delgado, *Final Chronicle: Cultural Power, the Law Reviews, and the Attack on Narrative Jurisprudence*, 63 S. CAL. L. REV. 545 (1995).

¹⁹ See, e.g., Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991); Lindsey Martin-Bowen, *Words from a Teller of Tales: Can Storytelling Play an Effective Role in Feminist Jurisprudence?* 66 UMKC L. REV. 95 (1997).

²⁰ See, e.g., DERRICK A. BELL, JR., *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992); PATRICIA WILLIAMS, *OPEN HOUSE: OF FAMILY, FRIENDS, FOOD, PIANO LESSONS, AND THE SEARCH FOR A ROOM OF MY OWN* (2004).

²¹ See, e.g., Robert F. Castro, *Rescuing Catalina: Law, Storytelling, and Unearthing the Hidden History of Southwestern Slavery*, 12 LA RAZA L.J. 123 (2001); Michael A. Olivas, *The Chronicles, My Grandfather's Stories, and Immigration Law: The Slave Trader's Chronicle as Racial History*, 34 ST. LOUIS U. L.J. 425 (1989); Antoinette Sedillo Lopez, *Latinas in the Legal Profession—Through the Doors of Opportunity: Assimilation, Marginalization, Cooptation or Transformation?* 13 AM. U. J. GENDER SOC. POL'Y & L. 109 (2005); Margaret E. Montoya, *Mascaras, Trenzadas, y Grenas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 15 CHICANO-LATINO L. REV. 1 (1994).

²² See, e.g., Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 513-14 (1992); Odeana R. Neal, *The Limits of Legal Discourse: Learning from the Civil Rights Movement in the Quest for Gay and Lesbian Civil Rights*, 40 N.Y.L. SCH. L. REV. 679, 711-12 (1996); See generally Francisco Valdes, *Queers, Sissies, Dykes and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CALIF. L. REV. 1 (1995); Francisco Valdes, *Sex and Race in Queer Legal Culture: Ruminations on Identities and Interconnectivities*, 5 S. CAL. REV. L. & WOMEN'S STUD. 25 (1995); see also Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender & Sexual Orientation to*

clinical teachers have effectively used this device to teach legal writing and legal practice skills.²⁴ Law school clinical and legal writing teachers have described this literature as “applied storytelling” and conferences have been developed to promote this type of legal scholarship.²⁵

This article responds to the call of storytelling by proposing a framework for analyzing stories, particularly stories about real events. We agree with Delgado and others who maintain that stories shape how we understand reality and how we interpret events. We seek to make the stories and the storytelling more transparent. Unlike the applied storytelling adherents, we do not necessarily explain how to use storytelling methodology in teaching and in law practice; rather we want the readers and listeners of stories to become more sophisticated in the understanding of the narrative. We want to show how stories about the border reported in the media can appeal to emotion in the way they are framed despite the appearance of neutrality. We would like for individuals to develop enhanced consciousness about the intended audience and the symbolism inherent in the framing of the story. We also want to encourage storytelling by individuals who live the experience. We think that the call of the stories should be heard more deeply when the stories are nuanced lived experiences rather than stock stories. In short, we want to help deepen the understanding of narratives.

Word choices, metaphors, and images create mental frames that are used as storytelling devices. Some accounts are stories about

its Origins, 8 YALE J.L. & HUMAN. 161 (1996).

²³ See, e.g., NATIVE VOICES: AMERICAN INDIAN IDENTITY AND RESISTANCE 245 (Richard A. Grounds et al. 2003); see, e.g., Gloria Valencia-Weber, *Santa Clara Pueblo v. Martinez: Twenty-Five Years of Disparate Cultural Visions*, 14 KANS. J.L. & PUB. POL’Y 49 (2004); see, e.g., Rina Swentzell, *Testimony of a Santa Clara Woman*, 14 KANS. J. L. & PUB. POL’Y 97 (2004).

²⁴ Binny Miller, *Telling Stories About Cases and Clients: The Ethics of Narratives* 14 GEO. J.L. ETHICS 1 (2000); Antoinette Sedillo Lopez, *Making and Breaking Habits: Teaching (and Learning) Cultural Context, Self Awareness and Intercultural Communication in a Client Service Clinic*, 28 WASH. U. J.L. & POL’Y 37 (2008).

²⁵ See, e.g., Ruth Ann Robbins, *An Introduction to Applied Storytelling and to this Symposium*, 14 LEGAL WRITING: J.L. WRITING INST. 3 (2008).

individuals, while others are collective narratives in the social and political discourse. These accounts have political, economic, and social contexts that shape public attitudes. For example, in the U.S., narratives about immigration have a historical inconsistency. On the one hand, immigrants were “taking jobs” away from Americans;²⁶ on the other hand, they were doing “jobs Americans won’t do.”²⁷ Thus, contemporary societal accounts assert that immigrants either continue to take available jobs or provide relief from undesirable jobs.

People who tell these stories and narratives have a particular audience in mind - an audience that may or may not be aware of the political, economic, and social connections that are essential for the audience’s understanding. These published accounts can shape the receivers’ reflective attitudes about the issues. Finally, these stories can evoke powerful emotions that color audiences’ understanding about the stories and the embedded issues.

Economists describe Mexico-U.S. migration as the result of interactive phenomena often referred to as the “push/pull” economic theory.²⁸ This theory posits that economic factors in Mexico push workers out, while economic factors in the United States pull them toward jobs.²⁹ However, economic theories do not explain how

²⁶ Lauren Smiley, *Building Racism: Segregation and Racism are Used to Pit Black and Latino Carpenter Workers Against Each Other*, SAN FRAN. WEEKLY, Mar. 25, 2008, available at <http://www.sfweekly.com/2008-03-26/news/building-racism> (describing strategies used to make Black and Latino Workers resent each other including telling Blacks that Latinos were taking their jobs) (last visited June 16, 2009).

²⁷ Brian Knowlton, *Bush Border Plan Stirs Opposition*, N.Y. TIMES, May 15, 2006, available at <http://www.nytimes.com/2006/05/15/world/americas/15iht-immig.html> (acknowledging President Bush’s sympathy for illegals living in the shadow and doing the “jobs Americans won’t do”) (last visited June 16, 2009).

²⁸ Michael Trebilcock & Matthew Sudak, *The Political Economy of Emigration and Immigration*, 81 N.Y. U. L. REV. 234, 243-255 (2006) (discussing theories of emigration and immigration including the “push/pull” theory of economic incentives for emigration, immigration and return emigration between Mexico and the United States).

²⁹ Gerald P. Lopez, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 U.C.L.A. L. REV. 615 (1981) (describing the “pull” of economic opportunity and the “push” of disparity, but critiquing the

economic, legal, and social information about migration is framed and communicated from individual to individual. These stories are important because they reveal factors that have impacted individual decisions made to migrate or not to migrate. Oftentimes, these stories are developed by policy makers to justify immigration policies.

Attention to the way these debates are framed is important. According to George Lakoff, frames are the mental structures that help us to both understand and shape reality.³⁰ Mental structures usually operate below consciousness, but appear in the words and metaphors we use to communicate our worldview.³¹ These words relate to our underlying values in the debate. For example, in framing the debate about the movement of people across borders, framing the issue as one of the problems of so-called illegal aliens³² conjures up images of criminal behavior, rather than migration of people for a myriad of reasons. This mental structure transforms immigrants into a class of criminal offenders/defendants, something that is not consistent with the data about criminal behavior.³³ Many

theory because of the relative porosity of the border and the benefits to U.S. industry); Gordon H. Hanson, in *THE ECONOMIC LOGIC OF ILLEGAL IMMIGRATION* (2007), available at <http://www.cfr.org/content/publications/attachments/ImmigrationCSR26.pdf> (describing how the flow of unauthorized immigration is tied to U.S. and Mexican Business Cycles) (last visited June 16, 2009).

³⁰ Lakoff, *supra* note 8, at xv.

³¹ *Id.*; SANTA ANNA, *supra* note 10, at 296-97.

³² *McNary v. Haitian Refugee Center*, 498 U.S. 479 (1991). The majority opinion consistently used the term “undocumented alien.” The dissent consistently used the term “illegal alien.” The Court in the majority upheld district court jurisdiction to hear challenges to INS policies so the terminology used by the majority and the dissent certainly revealed their perspectives.

³³ U.S. Chamber of Commerce, *Labor, Immigrant & Employee Benefits Division, Immigration: Myths and the Facts Behind the Fallacies* 8 (2008) <http://www.uschamber.com/NR/rdonlyres/e33skwh6fpcle6afyoz44ysuqkmtjaq3wrlhszzufr2fyucjuaxk7dvtzuoin6bej7gje7isy2yo6rmc5hb6n4kxdje/14484ImmigrationMythFacts.pdf> (stating, “Myth: Immigrants are more likely to commit crimes than U.S. natives. Fact: Immigrants have a much lower incarceration rate than U.S. natives.”) (last visited Dec. 5, 2009); see also Immigration Policy Center of American Immigration Law Foundation, *New State-Level Research Debunks the Myth of Immigrant Criminality*, July 18, 2008, <http://www.immigrationpolicy.org/images/File/onpoint/DebunkingImmigrantCriminality7-08.pdf> (summarizing data and research on crime rates from immigrant-rich states echoing same story as

immigrants to the United States do not cross the border in violation of the law, but overstay their visas.³⁴ Because of this, their presence in this country is most accurately described as foreigners with expired authorization,³⁵ rather than the mental image that using the term “illegal” evokes. Other immigrants are seeking refuge and asylum from oppressive regimes.³⁶ And yet other immigrants were brought in as children. Ascribing illegality to their presence implies that they had some control over the decision.³⁷ As we will discuss later in this article, describing members of transnational indigenous communities as “illegals,” is inaccurate and misleading, particularly when their presence as a tribal community living on the area of the border predates the existence of the border.

The framing of stories and the way they tend to shape public opinion and attitudes about issues may reveal a specific agenda behind an immigration story. These framing techniques are best demonstrated through a matrix (see Tables below) that can help us

national trends: immigrants are *less* likely than the native-born to be in prison and high rates of immigration are *not* associated with higher rates of crime) (last visited June 16, 2009); Matthew T. Lee et al., *Does Immigration Increase Homicide? Negative Evidence from Three Border Cities*, 42 SOC. Q. 559 (2001).

³⁴ Spencer S. Hsu, *U.S. Readies Plan to ID Departing Visitors*, WASH. POST, Nov. 8, 2009 (describing Department of Homeland Security proposal to monitor the estimated yearly 200,000 to 400,000 foreign visitors who enter legally, but overstay their visas, and constitute 40% of the unauthorized immigrants in the U.S.); PEW HISPANIC CENTER, FACT SHEET, MODES OF ENTRY FOR THE UNAUTHORIZED POPULATION (May 22, 2006) available at www.pewhispanic.org/files/factsheets/19.pdf (last visited Oct. 29, 2009).

³⁵ U.S. Dep't of Homeland Sec., *Estimates of the Unauthorized Population Residing in the United States*, (2008) http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2008.pdf. Jeff Passel, *A Portrait of Unauthorized Immigrants in the United States and Mexican Immigrants in the United States*, Pew Hisp. Cntr. (2009).

³⁶ Myron Weiner, *Bad Neighbors, Bad Neighborhoods: An Inquiry into the Causes of Refugee Flows*, 21 INT'L SEC. 5 (1996).

³⁷ See, e.g., Michael A. Olivas, *Undocumented College Students, Taxation, and Financial Aid: A Technical Note*, 32 REV. HIGHER ED. 407 (2009); Joshua Boggiani, *Unofficial Americans—What to Do with Undocumented Students: An Argument Against Suppressing the Mind*, 40 U. TOL. L. REV. 453 (2009); Michael A. Olivas, *IIRIRA, The Dream Act, and Undocumented College Student Residency*, 30 J.C. & U.L. 435 (2004); Victor Lopez, *Equal Protection for Undocumented Aliens*, 5 CHICANO L. REV. 29 (1982).

think about the word choices and images, the political and social connections, the primary audience and the emotional response elicited by the immigration stories. Further, in trying to re-frame the stories and search for realities rather than rhetoric, the matrix can help us understand the historical context, the relevant data, lived experiences and values that shape the content of the stories.³⁸ As you will find below, “Table One Framing the Stories: Analyzing The Rhetoric” is a useful tool because it forces the reader or listener of the story to consider the key words and images that are brought to mind as the story unfolds. The table can be used to help examine the rhetoric by identifying the key words, images, and metaphors. Then, the political and legal connections, the audience and the emotional responses to those words, images and metaphors can be identified.

Table One *Framing the Stories: Analyzing the Rhetoric*

Key Words, Metaphors & Images	Political and Legal Connections
Primary Audience	Emotional Responses

For example, if the metaphor is of a Mexican “invasion” the political and legal connections make one think of war or occupations. The legal connection is a connection to lawlessness. The primary audience is on the U.S. side of the border and the emotional response invoked is likely to be fear. As an image, does the story present a dark skinned person of color of limited means or does it portray a European, light-skinned individual? Consider the differences in a

³⁸ This framework is a modification of a framework developed with Margaret Montoya for an earlier presentation on immigration. Antoinette Sedillo Lopez & Margaret Montoya, *El Marco Del Idioma: Framing Immigration/ Migration in the U.S. and Mexico*, Politics of Language Conference, Albuquerque New Mexico (Oct 20, 2006). The concepts we employed in identifying the framing of immigration issues drew on the work of linguist George Lakoff who has developed a body of work analyzing the framing of public policy issues from conservative and progressive perspectives.

story portraying a migrant crossing a desert, or a tourist crossing the border to shop. With these images portraying a border story, there are different political and legal connections to each story. The migrant crossing the desert may be desperate and perhaps dangerous. The tourist shopping represents economic development. The emotional response to the migrant in the desert may be fear, sympathy, or compassion depending on the context. The tourist is likely to be non-threatening. Stories told by an individual or institution may have differing political perspectives. Sometimes, a story is framed to fit into a legal category. For example, a story about a migrant seeking refuge and asylum from female genital mutilation may be portrayed as a victim of her culture. Contrast this with portraying her as a feminist author who is persecuted for her political beliefs. Each of these stories is connected to a political or legal framework, which could be part of a western liberal agenda.

Thus, one should identify the primary audience for the story. Was it composed for an audience within the U.S. or written for an audience in a different country? It is possible for a similar story to be directed to individuals who might migrate or to working class individuals who are suffering economic hardship because of factory closings in the U.S. For example, each group will receive a different narrative about the economic need for Mexican workers who will be easily hired. Stories on both sides of the Mexico-U.S. border are directed towards policy makers or legislators and are framed according to these audiences.

Of course, stories also elicit emotional responses. They can provoke anger, fear, distrust, sympathy, or understanding, depending on the framing of the story and the audience. When emotional responses connect to the political perspective, we need to inquire how the key words and images affect emotional responses and how they can be used to further a particular perspective or agenda.

Table Two *Reframing the Stories: The Realities*

Historical Context	Data
Lived Experiences	Values

“Table Two *Reframing the Stories: The Realities*” is a matrix that can help a listener or reader to understand the realities underlying the story and assist the reader to make a more informed judgment about how the story fits into a larger framework. We must consider the historical context of the story. As we will demonstrate, the legal history of the Mexican-U.S. border is complex, but has been characterized by cross-border cooperation, collaboration, and communication with a substantial presence of cross-border communities.³⁹ First, the available data should be located and evaluated. The economic, as well as the social data, should be examined. Stories contain data that is subject to interpretation and it is important to be aware of the full picture of the data presented. Is the story one of lived experiences or is it really a fable or a metaphor? Sometimes stories are actually caricatures, so it should be determined whether the story is based on reality and whose reality is being perceived. Is the story told by the person with the lived experience or is it retold, or perhaps retold again?

Finally, as Lakoff suggests, it is important to understand the underlying values represented in the story.⁴⁰ Immigration narratives, especially in non-scholarly accounts, are often fueled by nativist or protectionist sentiment. Perhaps there is a human rights story to be told, e.g., now the U.S. is receiving asylum applications from journalists and from homosexuals who claim that the Mexican government fails to protect them from persecution and death threats. We must consider how these values connect to the rest of the story. How has history and culture shaped those values? For example, the dominant culture in the U.S. places high value on individual

³⁹ See section on Borders and Borderlands, *infra*.

⁴⁰ LAKOFF, *supra* note 8, at xi.

autonomy, while Mexican culture places high value on family unity.⁴¹ An investigation of values can demonstrate how they are shared and in what ways they are different. Some stories are designed with an agenda and it is important to understand both the effectiveness of its persuasive viewpoint and how the agenda is advanced. All of these questions are more than rhetorical questions, especially if one is even to begin to penetrate the surface of an immigration story and reveal the meaning behind it.

In an attempt to use the matrices presented, we will begin our examination of immigration stories and narratives with a brief historical overview about the creation of the Mexico and United States border.

III. A Brief History of the Legal Construct of the Mexico-U.S. Border

Since the establishment of the present U.S.-Mexico border through the Treaty of Guadalupe Hidalgo in 1848, various social forces have acted to socially deconstruct the border. To be sure, the U.S.-Mexico border was never fully constructed from the Mexican side. It was a U.S. border, not a Mexican one. For many mexicanos, Mexico –the people and their culture—continued north of the Rio Bravo (Rio Grande) and other state boundary areas between the two countries.

Nestor P. Rodriguez

*The Social Construction of the U.S.-Mexico Border*⁴²

Understanding how the Mexico-U.S. border was crafted in the law is essential for understanding the social construction of

⁴¹ See, e.g., Edna Erez, *Immigration, Culture Conflict and Domestic Violence/Woman Battering*, 2 CRIME PREVENTION & COMMUNITY SAFETY 27 (Jan. 2000); Leslie Reese, Silvia Balzano, Ronald Gallimore & Claude Goldenberg, *The Concept of Educación: Latino Family Values and American Schooling*, 23 INT'L J. EDUC. & RES. 57 (1995).

⁴² IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 223, 234 (Juan F. Perea ed., 1997).

national dividers. This article's focus is the *social* construction of what borders mean to people directly affected and entangled in immigration issues. Now, with the building of a wall, the border is becoming a physical construction.⁴³ The law, in treaties and national laws, established the limits of the sovereignty that Mexico and the U.S. are each bound to respect.⁴⁴ The next section will discuss how borders are defined in treaties, along with the federal laws of the U.S., shape how people perceive, describe in stories, and conduct their lives in the U.S. and Mexico.

A. Border and Borderlands

The southern border should be considered in the context of how borders are defined, how they are enforced as formal borders and how people at the border live their lives on the border. There is also the critical idea of borderlands where formal physical boundaries are only part of a greater geographical, cultural, political,

⁴³ Litigation against the fence or wall building involves private land owners, municipalities and other government units, as well as indigenous people. Twenty cases were consolidated in the early case challenging the Federal Government, Department of Homeland Security, entering and taking land to build the border fence. An indigenous plaintiff is Dr. Eloisa G. Tamez, elder of the Lipan Apache, who has historically retained small areas of land in the projected site for the new wall. *See United States v. 1.04 Acres of Land*, 538 F. Supp.2d 995 (S.D. Tex. 2008) where The Honorable Andrew W. Hanen ruled that DHS Secretary Chertoff had not violated federal law in the rush to build several hundred miles of border fencing. A subsequent order held that DHS has engaged in bona fide efforts to negotiate with Dr. Tamez, *United States v. 1.04 Acres of Land*, Civil Action No. B-08-044 (S.D. Tex. Apr. 10, 2008). Thereafter, DHS physically moved to take the Tamez land. The latest court order on the surviving case granted the Defendants modification of scheduling to allow Defendants to obtain experts. *United States v. 0.26 Acres of Land (including Eloisa G. Tamez)*, No. B-09-351 (D.C.S.D. Brownsville, Texas Oct. 26, 2009). The court's order states that the U.S. has already constructed the Border Fence across and through Dr. Tamez' property. The projected date for jury trial is March 4, 2010. You can follow the progress of the lawsuit at lipanapachecommunitydefense.blogspot.com.

⁴⁴ GEORGE C. HERRING, *FROM COLONY TO SUPERPOWER: U.S. FOREIGN RELATIONS SINCE 1776*, 651 (2008). The author discusses the notion of respecting boundaries based upon issues of sovereignty that occurred during the Cold War. Issues such as these can be found in the relationship between the United States and Mexico in their mutual respect for treaty and domestic law.

and social regional context and real lives are experienced.⁴⁵ Certainly, when neighboring states reach legal understandings, the goal and results are borders that are established by treaties and other laws. Established borders classify and codify objects, primarily people and commercial goods.⁴⁶ In exercising a sovereign's power, states define, discipline, control, and regulate all types of populations (nationals of each neighboring state and all others who find themselves in the physical space).⁴⁷

Yet, the physical manifestations of a border (fences, walls, dividers in bodies of water) are not the boundaries. Boundaries "exist on the shelves of law libraries, their dimensions defined in treaties. . . Law defines national borders; it delineates the consequences of borders for the peoples within them."⁴⁸ Contemporary concerns at the Mexico-U.S. boundary operate with a focus on control and the citizen or non-citizen status of whoever seeks to enter or depart from that border point.⁴⁹ Interactions at the Mexico-U.S. border have consequences for the individuals and reverberate among their relations and communities on both sides of the border.

In borderlands, the regional places surrounding formal borders, individuals and communities, engage in ordinary life

⁴⁵ MARY L. DUDZIAK & LETI VOLPP, *LEGAL BORDERLANDS: LAW AND THE CONSTRUCTION OF AMERICAN BORDERS* 1 (2006).

⁴⁶ *Id.*

⁴⁷ *See generally* JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* (1980). *See* Section A and discussion of the Borderlands, *infra*.

⁴⁸ DUDZIAK & VOLPP, *supra* note 45.

⁴⁹ The Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002)(DHS Act) is the Federal authority for what happens at the border in fulfilling its mission to "prevent terrorist attacks within the United States" and "reduce the vulnerability of the United States to terrorism." *Id.* §. 101(a)(b)(1)(A)(B). In Subtitles D, E, and F, all immigration control functions were established for DHS who controls how anyone departs and enters the U.S.A. In President George W. Bush's statement on the creation of DHS, he stated that there would be "one department whose primary mission is to protect the American homeland;" which would be the single department "to secure our borders, transportation centers, ports..." The Department of Homeland Security, <http://www.dhs.gov/xlibrary/assets/book.pdf>.

activities that demonstrate a commonality of interests – economic, cultural, and social, often because of shared historical experiences. The concept of borderland has been studied for some time among scholars in geography, history, anthropology, literature, cultural studies, and other fields.⁵⁰

[T]he notion of borderland is of central importance. A borderland is usually understood as the region in one nation that is significantly affected by an international border [W]e favor a cross-border perspective, in which the region on both sides of a state border is taken as the unit of analysis. The approach allows us to take into account the paradoxical character of borderlands. Borders create political, social, and cultural distinctions, but simultaneously imply the existence of (new) networks and systems of interaction across them. The existence of an order is our point of departure, but at the same time, we draw attention to the social networks that reach across the border.⁵¹

There is a special body of such studies in the Southwest. Claudia Sadowski-Smith points out that in the 1980s and 1990s,

[t]he U.S. media have repeatedly linked national security concerns to anxieties over cross-border violations by ‘illegal aliens’ who supposedly undermine the ‘purity’ of the U.S. nation. At the same time, academic work has developed an opposing view of the Southwestern border as a meeting place of diverse cultures and histories. This scholarship has emphasized cultural mixing and border fluidity as alternatives to state-sponsored forms of identity that have historically resulted in the denial of full citizenship rights to populations deemed undesirable

⁵⁰ DUDZIAK & VOLPP, *supra* note 45, at 3; *see* Michiel Baud & Willem Van Schendel, *Toward a Comparative History of Borderlands*, 8 J. WORLD HIST. 211, 212 (1997).

⁵¹ Baud & Van Schendel, *supra* note 50, at 215-216.

and/or culturally and racially ‘other.’⁵²

More recently, studies of border areas have focused on the diasporic notions of cultural identity and citizenship. Treated as a response to globalization, these borderland studies stress border porosity as a harbinger of global change.⁵³ Often there is an emphasis on “the cultural, economic, and social blending of communities across borders that sets border zones apart from other regions in either neighboring country.”⁵⁴ The studies by Gustavo del Castillo V. offer examples in his studies. One example is the urbanized borderlands of Tijuana/San Diego – the most active border in the world.⁵⁵ Workers residing in Tijuana are a significant part of the San Diego workforce and are known as commuters or “borderlanders” who cross everyday to work in the U.S.⁵⁶ In studying the transborder community relations in Laredo/Nuevo Laredo, Nester Rodriguez and Jacqueline Hagan noted that the close social relationship resulted in a common expression on both sides of the border of *los dos Laredos* (the two Laredos).⁵⁷ This study documents extensive transborder cooperation where *los dos Laredos* have meetings of both city councils and engage in joint planning between the departments of

⁵² Claudia Sadowski-Smith, *Introduction: Border Studies Diaspora, and Theories of Globalization*, in GLOBALIZATION ON THE LINE: CULTURE, CAPITAL, AND CITIZENSHIP AT U.S. BORDERS 1, 2 (Claudia Sadowski-Smith ed., 2002). Sadowski-Smith, a professor at Texas Tech University, has published on border studies, literature of the Mexico-U.S. border, and globalization.

⁵³ *Id.* at 2-4 (stating that her edited collection of writers “develops a view of U.S. borderlands as sites where conflicts between oppressive structures of the nation-state and globalization, on the one hand, and emerging alternative notions of societal membership, on the other, are currently being re-articulated in a variety of oppositional forms and strategies that encompass politically constructed affiliations and cross-cultural alliances.”)

⁵⁴ *Id.* at 4.

⁵⁵ Gustavo del Castillo V., *Between Order and Chaos: Management of the Westernmost Border Between Mexico and the United States*, in CAUGHT IN THE MIDDLE: BORDER COMMUNITIES IN THE ERA OF GLOBALIZATION 123-24 (Demetrios G. Papademetriou & Deborah Waller Meyers eds., 2001).

⁵⁶ *Id.* at 124.

⁵⁷ Nester Rodriguez & Jacqueline Hagan, *Transborder Community Relations at the U.S.-Mexico Border: Laredo/Nuevo Laredo and El Paso/Ciudad Juarez*, in CAUGHT IN THE MIDDLE: BORDER COMMUNITIES IN THE ERA OF GLOBALIZATION 92 (Demetrios G. Papademetriou & Deborah Waller Meyers eds., 2001).

each city.⁵⁸ These cross-border relationships fit into Manuel Luis Martinez's analysis of how borderlands activity should be analyzed: "The question then is, where do we want to enact progress and where do we need to locate such activity? I suggest that what is most important is the immigrants' effort to claim a stable communal space from which to practice subsequently full participation."⁵⁹ The southern border and its characteristics offer a vast space for the development of border practices that break with the past.

The Mexico-U.S. border, *la frontera*, is 2,000 miles long, crosses over forty-nine rural and urban U.S. border counties in Texas, New Mexico, Arizona, and California, and over thirty-six rural and urban Mexican "*municipios*" (municipalities) in Tamaulipas, Nuevo León, Coahuila, Chihuahua, Sonora, and Baja California.⁶⁰ While there is some diversity among particular points along the U.S. or Mexican side, this southern border still stands in contrast to the Canada-U.S. border. At the southern border crossings, U.S. immigration involves intense focus on identity, citizenship, control, and interception of drugs, and contraband.⁶¹ The 5,000 mile Canadian border has been referred to as "the world's

⁵⁸ *Id.*

⁵⁹ Manuel Luis Martinez, *Telling the Difference Between the Border and the Borderlands: Materiality and Theoretical Practice*, in GLOBALIZATION ON THE LINE: CULTURE, CAPITAL, AND CITIZENSHIP AT U.S. BORDERS 53 (Sadowski-Smith ed., 2002). Martinez advocates for rehabilitating the notion of community, national identity, and civic participation. "Doing so gestures toward a recognition of social justice and equal access." *Id.* at 62. Martinez, an English professor at Indiana University, also teaches and writes in Chicano and American studies, has forthcoming COUNTERING THE COUNTERCULTURE: REREADING DISSENT IN POSTWAR AMERICA (Verso Press).

⁶⁰ Sadowski-Smith, *supra* note 52, at 7 (citing Martinez, *supra* note 46).

⁶¹ *Id.* at 13, 21. The Congressional Research Service Report prepared for Congress points out the difference between the southern and northern border in numerous ways, such as the increase in Border Patrol agents. At the southern border, between 1992 (3,555 agents) to 2008 (15,442 agents). At the northern border, despite the examples of terrorists entering from Canada, the Border Patrol situation differed with approximately 300 agents from 1992 to 2000. After criticism from Congress and the Executive branch that mandated increases, in FY 2008 the Canadian border had 1,363 border agents. BLAS NUNEX-NETO, BORDER SECURITY: THE ROLE OF THE U.S. BORDER PATROL 2 (2008), available at <http://www.fas.org/sgp/crs/homsec/RL32562.pdf>.

longest undefended border.”⁶² In the north, Canada’s interests are distinguished as it tries to resist the invasion of the U.S. as the stronger economic force that disrupts the Canadian nation’s sense of self-definition.⁶³ In addition, it is perceived in the U.S. that Canada’s majority population appears to be ethnically similar to the majority population in the U.S.⁶⁴ The different historical experiences at the northern and southern borders continue to have an impact on how and where borderlands regions develop.

Both the northern and southern border result from a long history of relations among sovereigns that includes the first sovereign within the Americas, the indigenous nations, in what became Canada, Mexico, and the U.S. Within the U.S., there are 562 indigenous tribes in a nation-to-nation relationship with U.S. national government.⁶⁵ These political relationships began in the treaty making periods with the respective European powers that entered the “New World” from the fifteenth century onward.⁶⁶

These indigenous nations are also the oldest transnational

⁶² See Sadowski-Smith, *supra* note 52, at 19, “Before September 11, the United States prided itself on the the longest open border in the world: the northern border with Canada...” Id. at 22, note 20 (describing the northern border as “the longest, continuous, undefended order in the world.”)

⁶³ See, e.g., Sandrine Cahn & Daniel Schimmel, *The Cultural Exception*, 15 CARDOZO ARTS & ENT. L.J. 281 (1997); Chi Carmody, *When “Cultural Identity Was Not at Issue”: Thinking About Canada—Certain Measures Concerning Periodicals*, 30 LAW & POL’Y INT’L BUS. 231 (1999).

⁶⁴ Sadowski-Smith, *supra* note 52, n.20 (describing a Time-CNN Poll of June 11, 2001 in which “... 53 percent of the U.S. respondents thought that it should become harder for Mexicans to cross the border into the United States as opposed to 21 percent who thought the same about potential Canadian border crossers.”)

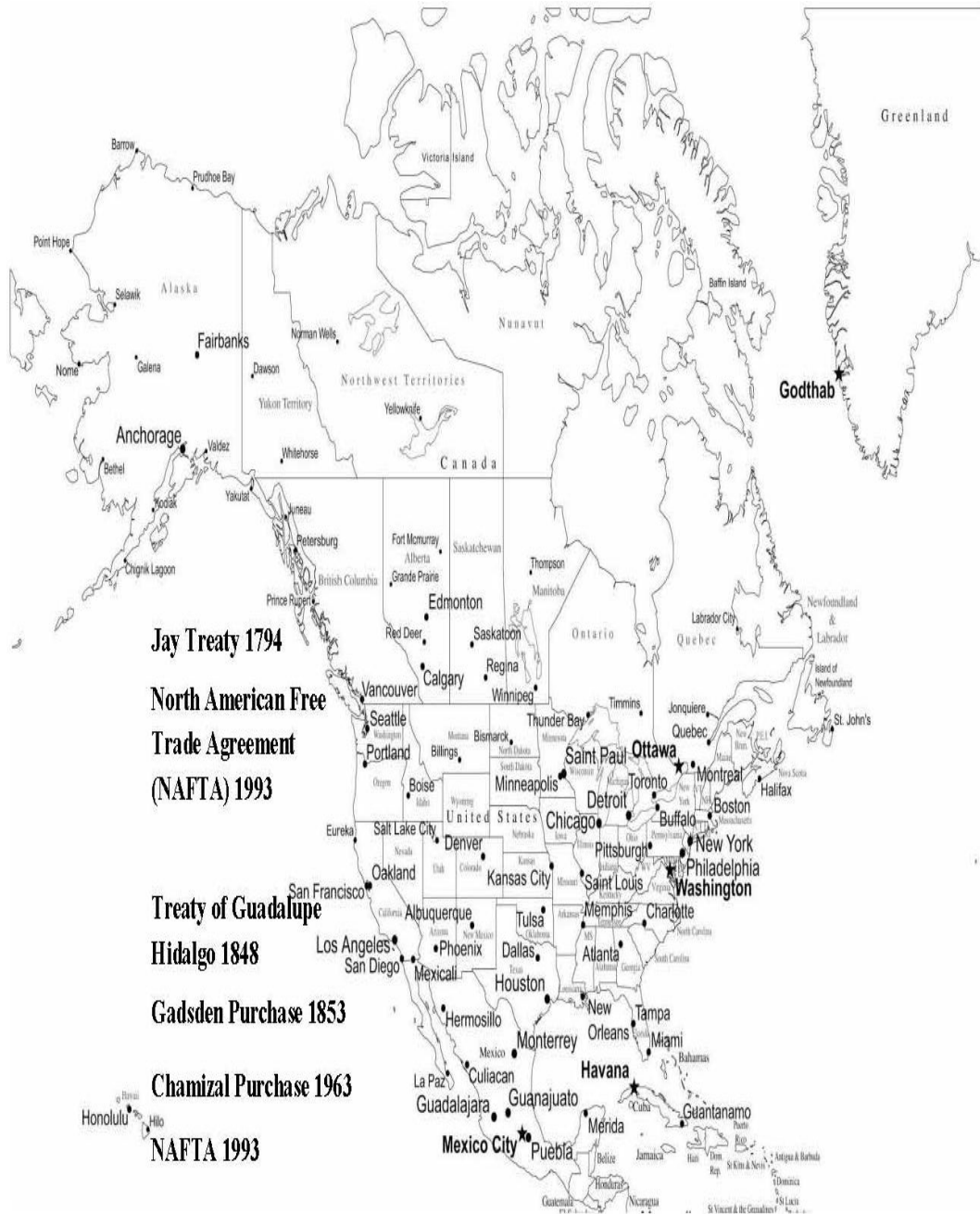
⁶⁵ Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 74 Fed. Reg. 40, 218 (Aug. 11, 2009). The U.S. Department of Interior has the federal mandate to regularly publish this list. Indigenous nations in the U.S. have retained the oldest continuous governance structures in the Haudenosaunee or Iroquois Confederacy in the New York-Canada area and the All Indian Pueblo Council in New Mexico that was established in the 1000 to 1500 period.

⁶⁶ ROBERT N. CLINTON ET AL., *AMERICAN INDIAN LAW: CASES AND MATERIALS* 137-47 (3d ed. 1991). This is generally described as the Colonial period (1492-1776) through 1871 when Congress ended the formal treaty making with the U.S. tribes.

communities,⁶⁷ with homelands, members, culture, and political structures that traverse the U.S. borders with Canada or Mexico. Transnational refers to political communities, including tribal sovereigns, whose past and present homelands and communities are located in Mexico and the U.S. There are various transnational communities, old and new, involved in the Mexico-U.S. border. Initially, one must identify the instruments that created the legal borders and anchored nation-to-nation relations. Persons north and south of the border construct their social understanding and conduct by how the border shifted over their homelands.⁶⁸ See Map of the U.S.⁶⁸

⁶⁷ CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY* 112-13 (1987). “Transnational” as a term is especially important for the indigenous peoples of the Americas. External forces created the borders that tribal nations must now contend with on their homelands. Borders are artificial to the indigenous nations, yet powerful in that they impede and deny access to their business, family and sacred relationships with their community’s members and their lands. In the U.S., this time immemorial situation of American Indians has been described as “preconstitutional, constitutional, and post constitutional” in the political status that the tribes have maintained.

⁶⁸ Map is courtesy of <http://www.mapresources.com>.



1. *The Mexico and U.S. Border*

The Mexico and U.S. border manifests a different pattern than the northern U.S. Canadian border because of the distinct history of the European nations that embarked in colonizing the New World.⁶⁹ In the area that is now Mexico and the southwestern U.S., contact between Native Americans and Europeans occurred with the Spanish in 1540, much earlier than elsewhere.⁷⁰ This area now

⁶⁹ After the U.S. colonists successfully rebelled against the British Crown, the evolving relationship with the new American republic and the British power in Canada led to treaties affecting transnational indigenous tribes. Initially, the Jay Treaty of 1794 protected the right of members of the transnational sovereigns to freely cross the borders and to be free of customs or tariffs on their goods. Subsequently, the Treaty of 1812 ended the war between the U.S. and Britain. The U.S. Supreme Court interpreted the 1812 Treaty as repealing or nullifying certain provisions of the Jay Treaty protections. *Karnuth v. United States*, 279 U.S. 231 (1929). Yet, other federal courts, after the *Karnuth* decision, have interpreted the Jay Treaty as enforceable law and have rendered decisions favoring the protected passage of Indians from Canada. transnational indigenous individuals. *Akins v. Saxbe*, 380 F. Supp. 1210 (D. Me. 1974); Marcia Yablon-Zug, *Gone But Not Forgotten: The Strange Afterlife of the Jay Treaty's Indian Free Passage Right*, 33 QUEENS L.J. 565 (2008); Bryan Nickels, *Native American Free Passage Rights Under the 1794 Jay Treaty: Survival Under United States Statutory Law and Canadian Common Law*, 24 B.C. INT'L & COMP. L. REV. 313 (2001). Congress also acted and today the immigration code has a provision for these cross-border tribal members to freely enter, though a blood quantum requirement is part of this legislation that was not stated in the Jay Treaty. 8 U.S.C. § 1359 (2006). Quantifying the Indian blood of tribal members became a federal government tool for determining who is eligible for the federal services promised to American Indians in the treaties. Today many U.S. tribes have instituted a traceable blood quantum requirement to be eligible for membership within the tribe. In real life experience, Canadian and U.S. tribal members generally had to show their tribal membership documents to exercise the border crossing right. The North American Free Trade Agreement (NAFTA) of 1993, as an agreement among Canada, Mexico, and the U.S., primarily focuses on trade, the movement of goods and money and does not directly address indigenous peoples. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

⁷⁰ THE ALMANAC OF AMERICAN HISTORY 27 (Arthur M. Schlesinger, Jr. ed., 1987). Rubén G. Rumbaut, *Pigments of Our Imagination: On the Racialization and Racial Identities of "Hispanics" and "Latinos,"* in HOW THE U.S. RACIALIZES LATINOS: WHITE HEGEMONY AND ITS CONSEQUENCES 15, 16 (José A. Cobas, Jorge Duany & Joe R. Feagin eds., 2009) "[W]ith the sole exception of the indigenous habitants of the Americas, the country's Spanish roots are older than those of other groups. They antedate by a century the creation of an English

constitutes Mexico and the U.S. The series of external sovereigns in this area also produced laws and treaties not found in other parts of the U.S.

Outside the Southwest, the British prevailed over other European powers and then were succeeded by the new U.S. republic, thus simplifying the international relationships affecting the colonial experience of Euro-Americans.⁷¹ In the northeastern and southeastern U.S., there is a history of British, French, Dutch, and some Spanish interests, competing for the resources (land, furs, and other natural resources) and alliances with the tribal nations in the area.⁷² The earliest colony, Roanoke Island, Virginia, was not settled until 1585 and had disappeared by 1590.⁷³ This is nearly forty years after the Spanish had entered the southwest U.S.⁷⁴

The Spanish entered the area that is now New Mexico during the years of 1540 through 1542, when Francisco Coronado made contact with the “*pueblos* and tribes.”⁷⁵ Initially the encounter was with the Zuni Pueblo, which continues today as one of the nineteen pueblos in New Mexico.⁷⁶ The New Mexican pueblos have retained

colony in North America and have left an indelible if ignored imprint, especially across the southern rim of the United States.... In U.S. popular culture and in official narrative and ritual the American past has been portrayed as the story of the expansion of the English America, suppressing if not silencing the Spanish presence from the nation’s collective memory.”

⁷¹ See, e.g., HERRING, *supra* note 44, at 15. The author refers to Britain affecting the United States’ worldview on European diplomacy and commerce.

⁷² ALAN TAYLOR, *AMERICAN COLONIES: THE SETTLING OF NORTH AMERICA* x-xii (Eric Foner ed., 2002).

⁷³ *THE ALMANAC OF AMERICAN HISTORY* 29 (Arthur M. Schlesinger, Jr., ed. 1983).

⁷⁴ *Id.*

⁷⁵ *Id.*; see also ANGIE DEBO, *A HISTORY OF THE INDIANS OF THE UNITED STATES* 24-25 (University of Oklahoma Press 1970).

⁷⁶ Members of some 23 pueblos and tribes reside in New Mexico. New Mexico Public Education Department, *Tribal-State Indian Education Summit Report, Developing Relationships & Partnerships Between Tribes and the State to Ensure Equitable Resources & Quality Education for Native American Students* 4 (June 26, 2006). Nineteen of the tribes in New Mexico are Pueblos. They did not suffer removal or relocation in the same degree as other indigenous nations. They ultimately retained homelands and they have since time immemorial, though they suffered some loss in size. Numerically New Mexico is home to 173,483 Indian

their distinct identities and are often described as among the most tradition-bound among the federally recognized sovereigns.⁷⁷ Their resistance to the colonial authority of the Spanish crown led to the Pueblo Revolt of 1680.⁷⁸ A coalition of pueblos killed Spanish clerics, leaders, and colonists and drove the Spanish out of New Mexico.⁷⁹ Unwilling to give up the colonial dream of expropriating the pueblo lands and resources, the Spanish organized their military forces in 1692 and managed to return to power over the pueblos.⁸⁰ In some historical accounts, the Spanish are described as trying to govern with less repression than in their prior regime.⁸¹

The Spanish empire in the west included Mexico, which ultimately rebelled and obtained its independence.⁸² Thus, in 1821, Mexico became the next external sovereign in this region. Those that remained in the successor Mexican territory were promised the retention and protection of their prior rights under Spanish governance.⁸³ The Mexican regime ended with the Mexican-

residents, nearly eleven percent of the state's population. "There are twenty-two Indian tribes in New Mexico: nineteen Pueblos, two Apache tribes (Jicarilla Apache and Mescalero Apache), the Navajo Nation, and a large urban Indian population." *Id.* This report did not include the Ute Mountain reservation which extends into New Mexico but whose governmental offices are in Colorado.

⁷⁷ HOWARD R. LAMAR, *THE FAR SOUTHWEST, 1846-1912. A TERRITORIAL HISTORY* (1966).

⁷⁸ See JOE S. SANDO, *PUEBLO PROFILES: CULTURAL IDENTITY THROUGH CENTURIES OF CHANGE* 7 (1998).

⁷⁹ DEBO, *supra* note 75, at 50.

⁸⁰ *Id.*

⁸¹ Regis Pecos, *Foreword* to JOE S. SANDO, *PUEBLO NATIONS: EIGHT CENTURIES OF PUEBLO INDIAN HISTORY* (1992); LAURA GOMEZ, *MANIFEST DESTINIES: THE MAKING OF THE MEXICAN-AMERICAN RACE* (2007). See generally LATINOS IN THE UNITED STATES, 1 HISTORICAL THEMES AND IDENTITY: MESTIZAJE AND LABELS (Antoinette Sedillo Lopez ed., 1995).

⁸² ALMANAC OF AMERICAN HISTORY (Schlesinger) *supra* at 29.

⁸³ See generally Megan S. Austin, *A Culture Divided by the United States-Mexico Border: The Tohono O'odham Claim for Border Crossing Rights*, 8 ARIZ. J. INT'L & COMP. L. 97, 100 (1991) (discussing property rights and voting rights for Indians under the Treaty of Guadalupe Hidalgo, citing Guillermo Floris Margadant, *Official Mexican Attitudes Toward the Indians: An Historical Essay*, 54 TUL. L. REV. 964 (1980)). Margadant, a Professor of Law in the Universidad Nacional Autónoma de Mexico and scholar of Mexican law states: "From 1821 to 1910, after Independence but before the Mexican Revolution, the Indian was

American War, which was triggered by Mexico and the U.S. both claiming the area in Texas between the Nueces and Rio Grande Rivers.⁸⁴ The Treaty of Guadalupe Hidalgo in 1848 terminated that dispute and war.⁸⁵ With this Treaty, the U.S. obtained the major portion of the southwest, present-day Arizona, California, western Colorado, Nevada, New Mexico, parts of Texas, and Utah.⁸⁶

The Treaty also promised that the Mexican citizens who chose to be incorporated into the U.S. would be entitled “to the enjoyment of all the rights of citizens of the United States, according to the principles of the Constitution.”⁸⁷ The tribes and pueblos were not specifically mentioned in the Treaty. However, Indians were considered citizens and equal to other Mexicans and allowed to vote in Mexican elections.⁸⁸ Modern day lawsuits in the U.S. for Indians and non-Indians are anchored in this provision that promised “the free enjoyment of their liberty and property” in the last external sovereign, the U.S.⁸⁹

Two subsequent agreements between the U.S. and Mexico completed the addition of land to enlarge the southwestern U.S. and thus changed the border. In 1853, the two nations completed the Gadsden Purchase to resolve the issue of the location of the border west of El Paso, Texas.⁹⁰ By paying ten million dollars, the U.S. acquired 30,000 square miles of land, now southern New Mexico and

officially considered a citizen equal to all others in the eyes of the law.” *Id.*

⁸⁴ LAMAR, *supra* note 77.

⁸⁵ Treaty of Peace, Friendship, Limits and Settlement between the United States of America and the United Mexican States, U.S.-Mex., Feb. 2, 1848, 9 Stat. 922 [hereinafter Treaty of Guadalupe Hidalgo].

⁸⁶ LAMAR, *supra* note 77.

⁸⁷ Treaty of Guadalupe Hidalgo, art. IX.

⁸⁸ Austin, *supra* note 83, at 100 (discussing property rights and voting rights for Indians under the Treaty of Guadalupe Hidalgo). See Ruben G. Rumbout, *Pigments of Our Imagination: On the Racializations and Racial Identities of “Hispanics” and “Latinos,”* in HOW THE U.S. RACIALIZES LATINOS: WHITE HEGEMONY AND ITS CONSEQUENCES (Jose A. Cobas et al. eds., 2009).

⁸⁹ Treaty of Guadalupe Hidalgo, art. IX. This provision produces continuous litigation on issues of land titles and water rights in the U.S. See also Kevin R. Johnson, *An Essay on Immigration, Citizenship, and U.S./Mexico Relations: A Tale of Two Treaties*, 5 SW. J.L. & TRADE IN THE AMERICAS 121 (1998).

⁹⁰ Gadsden Purchase Treaty, U.S.-Mex., art. I, Dec. 30, 1853, 10 Stat. 1031.

southern Arizona.⁹¹ Other claims were settled with the Chamizal Treaty of 1963, when the U.S. ceded land to Mexico, essentially the northern bank of the Rio Grande near El Paso.⁹² The last Treaty that legally affects the defined border relationships is the North American Free Trade Agreement (NAFTA), which is focused on regulating specific commercial relations among the three signatory nations.⁹³ Since NAFTA, traffic and entries across the Mexico-U.S. border have dramatically increased.⁹⁴ Both Mexico and the U.S. have felt the impact of this increase.

2. Border Control and Transnational Communities

The U.S. borders, however defined in legal instruments, continue to divide transnational communities that straddle the borders. There are approximately twenty-five tribal sovereigns at the northern and southern borders, plus their forty-some affiliated tribes located in the interior of the U.S., Canada, and Mexico.⁹⁵ While the oldest transnational communities include the indigenous nations,

⁹¹ *Id.* at art. III.

⁹² Convention for the Solution of the Problem of the Chamizal, U.S.-Mex., Aug. 29, 1963, 15 U.S.T. 21, T.I.A.S. No. 5515, 505 U.N.T.S. 185. [hereinafter Chamizal Treaty].

⁹³ NAFTA, *supra* note 69.

⁹⁴ John Sharp, *Stopped at the Border*, TRANSPORTATION, July 1998, at 75 (describing increased truck traffic between Mexico and the U.S. after NAFTA); Philip Martin, *Mexico/U.S. Migration in* CLYDE HUFBAUER & GEOFFREY SCHOTT, NAFTA REVISITED: ACHIEVEMENTS AND CHALLENGES (2005).

⁹⁵ Tribal Government Amendments to the Homeland Security Act of 2002, S. 477, 109th Cong. §2 (2005); see *Documents Required for Travelers Departing From or Arriving in the United States at Sea and Land Ports-of-Entry From Within the Western Hemisphere*, 72 Fed. Reg. 35,088 (June 26, 2007) (proposed rules) [hereinafter Documents Required for Travelers] (covering Canadian Indians and U.S. Native American Tribes in sections F-H); see also National Congress of American Indians, Homeland Security: Tribal Responses to Western Hemisphere Travel Initiative (WHTI) [Tribal ID Cards], [http://www.ncai.org/NewsView.19.0.html?&no_cache=1&tx_ttnews\[pS\]=1188622800&tx_ttnews\[pL\]=2591999&tx_ttnews\[arc\]=1&tx_ttnews\[t_news\]=346&tx_ttnews\[backPid\]=18&cHash=2d261a089a](http://www.ncai.org/NewsView.19.0.html?&no_cache=1&tx_ttnews[pS]=1188622800&tx_ttnews[pL]=2591999&tx_ttnews[arc]=1&tx_ttnews[t_news]=346&tx_ttnews[backPid]=18&cHash=2d261a089a) (last visited June 16, 2009) [hereinafter NCAI Tribal Responses] (providing the responses of the National Congress of American Indians to the proposed WHTI regulations on behalf of all affected tribes).

there are other instances. The U.S. practices at the border reflect a social construction, especially at its southern border. People on both sides of the U.S. southern border, at various times, have treated the border not as a hard physical barrier, but as one element in how cross-border communities conduct integrated relationships. This experience is a contrast to the formalized control implemented in the nineteenth century that culminated in 1892 with the construction of Ellis Island.⁹⁶ The northeastern entry point of Ellis Island manifested the procedural and physical barriers for the millions of migrants entering the U.S., especially those from Europe. A formalized regime of inspectors, officers, procedures, and exclusion or deportation of unqualified immigrants underlies the history and mythology of Ellis Island as the doorway to liberty.⁹⁷

By contrast, control at the Mexico-U.S. border was episodic and informal. In 1899, there were only four U.S. immigrant inspectors along the Mexican border.⁹⁸ Congress, bowing to growing Nativist sentiments⁹⁹ resulting in political pressures against

⁹⁶ See generally LESLIE ALLEN, *ELLIS ISLAND* 32 (3d ed. 1995); HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* (2006).

⁹⁷ *Id.*

⁹⁸ See U.S. Citizenship and Immigration Services, *Early Immigrant Inspection Along the US/Mexican Border*, Feb. 6, 2004, at 1, <http://web.archive.org/web/20040206103301/uscis.gov/graphics/aboutus/history/articles/MBTEXT.htm> [hereinafter *Early Immigrant Inspection*]; see also Deborah Waller Meyers, *From Horseback to High-Tech: U.S. Border Enforcement*, Migration Information Source, February 2006, <http://www.migrationinformation.org/Feature/display.cfm?ID=370> (last visited on Nov. 29, 2009) (stating that seventy-five immigration inspectors on horseback first began enforcing immigration laws on the U.S. Mexico border in 1904).

⁹⁹ The Nativists' goal of excluding immigrants who are judged as incompatible with U.S. political, cultural, and social interests is a recurring phenomenon in the history of immigration to the U.S. In different times and political climates, the targets of the organizations and movements to exclude also changed, e.g., Asians (Chinese and Japanese) in the 19th century and contemporary agitation against Mexicans and Latin Americans. See THOMAS A. ALENIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 157-230 (6th ed. 2008). See also Linda S. Bosniak, "Nativism" *The Concept: Some Reflections*, in *IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES* 223, 234 (Juan F. Perea ed., 1997); BRIAN N. FRY, *NATIVISM AND IMMIGRATION: REGULATING THE AMERICAN DREAM* (2007).

Asian immigrants, passed the Chinese Exclusion Act in 1882.¹⁰⁰ Then, the number of inspectors at the Mexican border was expanded to twenty-three.¹⁰¹ At Ellis Island, extensive documentation was the practice that created the extensive database used today by many Americans for genealogy research.¹⁰² Again, the contrast at the Mexico-U.S. border shows that in 1905 record keeping began with standardized forms.¹⁰³ However, the forms did not document Mexicans who immigrated to the U.S. or those who repeatedly entered for temporary purposes.¹⁰⁴ It was not until 1908 that there was some record of individuals officially admitted at an official Mexico-U.S. port of entry.¹⁰⁵ There remained numerous points along the southern border to freely cross and enter. Further, it was not until 1924 that the U.S. Government posted the Border Patrol at this border.¹⁰⁶ The early twentieth century official practices at the border reflected a social construction of Mexico and U.S. having mutual interests in cross-border or transnational communities.¹⁰⁷

While this border was strengthened to enforce the exclusionary acts Congress passed to prevent the entry of Chinese and others, the border administration was not to interfere with the Mexicans with whom the U.S. had mutual interests.¹⁰⁸ Following reorganization of the border operations in 1907, in the words of President Theodore Roosevelt, the mission was that the Mexico-U.S. border be “closed to all but citizens and bona fide residents of

¹⁰⁰ Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (repealed 1943). *See generally* MOTOMURA *supra*, note 96. The Chinese Exclusion Act was followed by other acts to exclude Chinese and Asians. Angel Island was specifically constructed in the San Francisco area to screen and process these migrants.

¹⁰¹ Early Immigrant Inspection, *supra* note 98, at 2

¹⁰² Allen, *supra* note 96. *See* Ellis Island website to trace migrating ancestors.

¹⁰³ Early Immigrant Inspection, *supra* note 98, at 2.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ See Nestor Rodriguez, Social Construction of the U.S.-Mexico Border, in *IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES* 223, 234 (Juan F. Perea ed., 1997); *see also* Meyers, *supra* note 98.

¹⁰⁷ *Id.*

¹⁰⁸ Early Immigrant Inspection, *supra* note 98, at 2.

Mexico.”¹⁰⁹ The supervisor of the district issued a report in 1908 that divided immigration at the Mexican border into two classes: legitimate and illegitimate.¹¹⁰ The “illegimates,” attempting to enter via Mexico, included migrants from Syria, Greece, Japan, and China.¹¹¹ Preventing the entry, apprehending, and deporting such “illegitimate” immigrants was the focus of enforcement work.¹¹² The “legitimate” migrants were Mexicans and to some extent Spaniards.¹¹³

Thus, the business and social relationships that involved Mexicans and U.S. citizens were generally not to be impeded. Municipalities along both sides of the border act as one community connected in commercial, civil, and social relations; e.g., Columbus, New Mexico allowed children from Mexico to cross the border and attend the U.S. school.¹¹⁴ For these transnational communities, the border is not a hard physical or legal line, but operates as a gateway for opportunities for people on both sides.

Contemporary life has not changed this transnational perspective in the ways that many individuals and families live their lives. In the U.S., it is common for nuclear and extended families to include members with formal citizenship in both the U.S. and Mexico, citizens born in the U.S., members with legal permanent status in the U.S., members without any documented or “legalized” status in the U.S., and individuals in mediated stages of formalizing a status in the U.S.¹¹⁵ Thus, the border still functions as a gateway for

¹⁰⁹ *Id.* (quoting Frank W. Berkshire, Supervisor at the Mexican border).

¹¹⁰ *Id.* at 3.

¹¹¹ *Id.*; see also Meyers, *supra* note 98.

¹¹² Early Immigrant Inspection, *supra* note 98, at 3.

¹¹³ Early Immigrant Inspection, *supra* note 98, at 3.

¹¹⁴ Sarah Viren, *A Bridge to Education: Students made Daily Trek to U.S.: Many on this side we walk as part of border life, but some complain of costs*, HOUSTON CHRON., Apr. 29, 2007, at A1. See also *Plyler v. Doe*, 457 U.S. 252 (1982) (striking down Texas law that denied funding to schools for undocumented children as violating equal protection of the law).

¹¹⁵ This is just the status quo. Julia Preston, *Three Sisters Making a Life in the U.S., but Feeling Mexico's Tug*, N.Y. TIMES, Dec. 19, 2006, at A1, available at <http://www.nytimes.com/2006/12/19/us/19raquel.html> (last visited June 16, 2009); Jennifer Van Hook, Frank D. Bean & Jeffery Passel, *Unauthorized Migrants*

opportunities north and south of the border where people can pursue their personal and economic goals.¹¹⁶ Until recently, U.S. citizens and Mexicans regularly and easily crossed the border for personal and business matters with minimal documentation.¹¹⁷

Some new transnational communities have been created among people from Mexico who reside in the U.S. (as legal permanent residents, U.S. citizens, as well as undocumented immigrants) and who retain their relationships and roles in Mexico. Recently, researchers Michael Peter Smith and Matt Bakker published the results from their five-year ethnographic study of migrants from Zacatecas and Guanajuato who are engaged in political transnational lives.¹¹⁸ They focused on these two states because they historically lead in sending migrants to the U.S. and have a strongly developed hometown association (HTA) system in the U.S. that engages in political and economic relations with Mexican and U.S. political entities.¹¹⁹ The development of HTAs in

Living in the United States: A Mid-Decade Portrait, MIGRATION INFORMATION SOURCE, Sept. 1, 2005, <http://www.migrationinformation.org/USfocus/display.cfm?ID=329> (last visited Dec. 5, 2009).

¹¹⁶ Preston, *supra* note 115.

¹¹⁷ This enabled passage is part of the current DHS regime that provides for expediting the repeated crossings of individuals who enter the U.S. for business, to attend educational institutions in the border areas, and for personal matters. This system includes passport cards, enhanced U.S. driver's license, and specific "trusted traveler" cards such as NEXUS, SENTRI, and FAST. Holders must qualify for these enabling documents. U.S. Department of Homeland Security, *Crossing U.S. Borders*, www.dhs.gov/xtrvlsec/crossingborders/ (last visited June 16, 2009).

¹¹⁸ MICHAEL PETER SMITH & MATT BAKKER, *CITIZENSHIP ACROSS BORDERS: THE POLITICAL TRANSNATIONALISM OF EL MIGRANTE* 4 (2008) (stating that, "In this book we draw extensively on five years of community-based ethnography on the practices of U.S.-Mexican transnational citizenship, while expanding the space of 'community' to encompass the multiple cross-border locations in which our ethnographic subjects are orchestrating their political lives transnationally."). This volume caps a seven-year process in which Smith and Bakker used an extensive methodology in the sending communities in Mexico and receiving communities in the U.S. *Id.* at 215, Appendix detailing "Transnational Ethnography." Smith and Bakker's extensive scholarship and publications in the areas of transnationalism, democracy, and political responses to immigration in the U.S. such as Proposition 187 are listed on pages 228 and 240-41 of the volume.

¹¹⁹ *Id.* at 20-21.

the U.S. continues to increase and in 2003 had reached 623 across the U.S. with interactions with twenty-seven of the thirty-one Mexican states.¹²⁰ Urban areas such as Chicago and Los Angeles, with the longest established communities of Mexican immigrants and HTAs, allow these members to retain their political participation, voting rights, and official representation in their native communities and the legislature.¹²¹ The greater Los Angeles Mexican migrant population mirrors the flow from the states in Mexico that “send” their members to the “receiving” community in California.¹²² These migrants have formed active and visible HTA organizations in the “receiving” L.A. communities from the “sending” states of Jalisco, Michoacán, Nayarit, Sinaloa, Colim, Guanajuato, Yucatan, and Zacatecas. The Smith and Bakker study had a community study of the HTAs as part of the researchers’ commitment to study both the sending community and the experiences in the receiving community in the U.S.¹²³ As will be discussed in more detail below, indigenous

¹²⁰ *Id.* at 203-204.

¹²¹ *Id.* at 131. Chapter 6 on individual right to vote and to hold office in Mexico under the *Ley Migrante*. See SAM QUINONES, ANTONIO’S GUN AND DELFINO’S DREAM: TRUE TALES OF MEXICAN MIGRATION 37 (2007), account of Andrés Bermúdez (the Tomato King) who succeeded at growing vegetables in the California and used this as base for political office in Jerez, Zacatecas. Antonio Olivao & Oscar Avila, *Mexicans in Chicago: A New Kind of Politics/Influence on Both sides of the Border*, CHI. TRIB. Apr. 6, 2007. Luz Pena, *Mexicans Living Abroad Gain Right to Vote*, VIDA EN EL VALLE, May 11, 2005, reprinted in NEW AMERICA MEDIA, http://news.newamericamedia.org/news/view_article.html?article_id=85baab122fb9f48d465ebef64debf07e (last visited June 16, 2009); Elena Shore, *Mexican State Gains First Representative for California Migrants*, PAC. NEWS SERVICE, Jan. 13, 2005, http://www.imdiversity.com/Villages/hispanic/politics_law/pns_saldana_0105.asp (describing professor at Fresno State University who will serve in state legislature of Michoacán) (last visited June 16, 2009). The state of Zacatecas had previously reformed its legislative elections to permit representatives of Mexicans living outside of Mexico.

¹²² DAVID FITZGERALD, A NATION OF EMIGRANTS: HOW MEXICO MANAGES ITS MIGRATION 104 (2009); WAYNE A. CORNELIUS & JESSA M. LEWIS, IMPACTS OF BORDER ENFORCEMENT ON MEXICAN MIGRATION: THE VIEW FROM SENDING COMMUNITIES 7 (2007).

¹²³ Smith & Bakker, *supra* note 118, at 211 (distinguishing their study from prior researchers who only focused on the sending states by also researching the “second face” of transnational citizenship—migrant experiences in the receiving context).

people from Mexico are noteworthy in their retention of ties and they continue to perform duties and ceremonies in their Mexican communities.¹²⁴

However, the attacks on New York City and Washington, D.C. on September 11, 2001 (9/11), have resulted in U.S. policies that have created major new barriers for crossing the border.¹²⁵ The recently created transnational communities, like the oldest indigenous ones, now must contend with the post 9/11 political and legal regime focused on tighter control on migration. All persons trying to cross the border face new hurdles and complexities because of the U.S. sovereign's claims for national security and protection from terrorism.

IV. Crossing The Border: Mexican Immigration Stories

*The stories in the book are about Mexican immigration to the United States—the largest movement of people from one country to another in our time. If you are American or Mexican, this flow of humanity will touch your life and change your country for years to come.*¹²⁶

The United States debates and discourse about tightening the border in the United States led to increased pressure on the U.S. Congress to reform immigration.¹²⁷ These debates culminated in

¹²⁴ Carlos Muñoz, Jr. & Douglas Harper, *Foreword to DAVID BACON, COMMUNITIES WITHOUT BORDERS: IMAGES AND VOICES FROM THE WORLD OF MIGRATION* xv (2006).

¹²⁵ See The Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002), (explaining in Mission Statement and Subtitle D: Immigration Enforcement Functions that places in DHS all functions and authority for the Border Patrol program, detention and removal, intelligence, investigation, and inspection programs previously in Immigration and Naturalization Services within the Department of Justice).

¹²⁶ Quiñones, *supra* note 121, at 1.

¹²⁷ See, e.g., Representative Sheila Jackson Lee, *Why Immigration Reform Requires a Comprehensive Approach That Includes Both Legalization Programs and Provisions to Shield the Border*, 43 HARV. J.L. 267, 284 (2006).

2007 with the introduction of the Comprehensive Immigration Control Act.¹²⁸ Mexican media outlets and policy makers covered the U.S. debates and presented their own perspectives on migration. One area in Mexico, Guanajuato, can demonstrate how the internal Mexican discourse on immigration occurs, with personal narratives and public accounts about what was happening in the U.S.

Guanajuato is a conservative state in central Mexico; it is the home state of former President Vicente Fox, and has been dominated by the conservative political party Partido Acción Nacional (National Action Party or PAN) for over 12 years.¹²⁹ The local newspapers in Guanajuato are typical of Mexican newspapers, focusing primarily on local news, but containing periodic articles on topics of national interest.¹³⁰

An analysis of newspapers that appeared in Guanajuato, Mexico, in June of 2007 revealed several articles discussing Mexican migration to the United States.¹³¹ In 2008, perhaps because there was no immigration bill pending and the U.S. was in the throes of state by state presidential primaries, the local newspapers did not publish feature stories on *migración* (migration), as they had in 2007.¹³²

Many of the articles in 2007 were position papers and information about the migration of Mexicans. In addition, the papers

¹²⁸ Comprehensive Immigration Reform Act of 2007, S. 1348, 110th Cong. (2007).

¹²⁹ Antoinette Sedillo Lopez spent the month of June in 2007 and 2008 in Guanajuato, Mexico directing the UNM/Texas Tech/ Southwestern/ Universidad de Guanajuato Summer Law Institute. She would like to thank her colleague Professor Margaret Montoya who taught in the summer program for helping identify newspaper stories about immigration. Professor Sedillo Lopez has taught or directed the summer program in Guanajuato regularly since its inception in 1991.

¹³⁰ Antoinette Sedillo Lopez has read the Guanajuato papers since she began going to Guanajuato in 1991. She has discussed the Guanajuato papers with residents of Guanajuato and read local papers in other Mexican locales to come to this conclusion.

¹³¹ See newspaper articles discussed, *infra* note 121.

¹³² A computer search of Mexican newspapers in Lexis Nexis confirms the low number of newspaper articles on immigration in 2008 compared to 2007.

published personal immigrant stories. Mexican stories about migration contain a myriad of compelling personal stories of bravery, adventure, risk and tragedy and success.¹³³ They can range from tales of great adventures about wildly successful immigrants to horrific tales of tragedy.¹³⁴

This article will examine two types of stories from the summer of 2007: “cautionary tales” and “Horatio Alger” success-through-perseverance stories. One cautionary example describes the harm migration causes to Mexican communities that lose their residents and another describes the risks of migration.¹³⁵ The Horatio Alger stories are profiles of migrants who have succeeded in the U.S. and returned to Mexico with sufficient resources to start a business or buy a home or otherwise improve their standard of living.¹³⁶

Some of the cautionary tales that appeared in the papers in the month preceding the failure of the immigration bill focused on the harm unchecked migration does to the local communities. For example, an article in *Correo* published in June 2007, described a rural community, Ojo de Agua de Huanumo, as a “*comunidad perdida*” (lost community) because the village is populated by “*niños, mujeres y ancianos*” (children, women and elderly).¹³⁷ The article describes the devastating impact the out-migration of men has had on the community.¹³⁸ The tax base is depleted, leading to insufficient money for infrastructure and services.¹³⁹ The article states that running water, sewage disposal and paved roads are sorely lacking.¹⁴⁰ The community life is devastated and thus further encourages migration to the larger cities or north, to the United

¹³³ See, e.g., QUIÑONES, *supra* note 121.

¹³⁴ JORGE RAMOS, *DYING TO CROSS: THE WORST IMMIGRATION TRAGEDY IN AMERICAN HISTORY* (Kristina Cordero trans., 2005) (detailing the circumstances of the deaths of 19 of 73 people crammed into a travel trailer traveling to Houston).

¹³⁵ See discussion, *infra* note 161.

¹³⁶ See discussion, *infra* note 161.

¹³⁷ Esau Gonzales, *Ojos de Agua de Huanumo, 'Comunidad Perdida'* [Huanamo Waterhole: “Lost Community”], *CORREO*, June 16, 2007, at 7.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

States.¹⁴¹ The consequence is that many rural communities that are largely populated by children, women, and the elderly are not likely to thrive and indeed are likely to die.¹⁴² Of course, the withering of the town presents a vicious circle: the dying town produces more migration. Indeed, sometimes the towns contain the improvements financed by the migrants who send remittances home, but those improvements make the town seem even emptier.¹⁴³ The article quotes an individual who states that he loves his pueblo and intends to stay.¹⁴⁴

The article seems intended to sound a warning to Mexican policy makers and to appeal to would-be migrants to stay in Mexico. It furthers an agenda of trying to encourage Mexicans to stay in Mexico, but its framing may actually make working-class Mexicans feel that their only option is to seek their fortunes in the United States. These cautionary tales are framed to appeal to a sense of concern for the country or even patriotism, but using the words “*comunidad perdida*” (lost community) evokes a concern about Mexico’s future. The term *comunidad* (community) is used to refer to the historical closeness and vitality of the rural community, which is lost when the community does not function well because it is missing vital members.¹⁴⁵ The mental image of a *comunidad perdida* and the use of the term “*pueblo fantasma*” (ghost town) paints the problem as perhaps beyond solution.¹⁴⁶ The quotation of someone who intends to stay either paints the picture of a determined patriot or a dreamer.¹⁴⁷

The legal and political connections to the narrative include the political relationship between the United States and Mexico, as well as the economic well-being of Mexico. The immigration laws

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Gonzales, *supra* note 137. See also QUINONES *supra* note 121, at 205 (describing Atolinga, Zacatecas, a village with big fancy houses built by successful immigrants working in the U.S., but the houses are unoccupied most of the year).

¹⁴⁴ *Id.*

¹⁴⁵ Gonzales, *supra* note 137. See also QUINONES *supra* note 121, at 205.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

and the enforcement in the U.S. are in the background of the story, but the economic draw of the U. S. is in the foreground of the story. The primary audiences for the story are Mexican citizens, leaders, policy makers, and those considering migration to the U.S. The emotional response that is evoked is patriotism and concern for the well-being and future of the communities in Mexico.

Another type of cautionary tale focuses on the hardships of the journey to the United States. In an article appearing in Guanajuato in late June, two migrants who have returned to Salamanca, Guanajuato describe their ordeal.¹⁴⁸ Jose Celio from Salamanca left to chase the “*sueno americano*” (American dream).¹⁴⁹ He states that while he had luck in the United States obtaining a job in the construction industry, he would not return. He cites the high cost of living in a home that was “*muy amolado*” (in ruins) and loneliness as major reasons he would not return.¹⁵⁰ He and his wife used the money he sent home to Mexico to construct a home. He states that he hopes that his children will not make the journey. He says that while one does not earn much in Mexico, at least one is at home (“*aqui aunque uno gana poco, pero esta en su casa*”).¹⁵¹ He concludes by saying that while he is currently unemployed, now that his sons are old enough to work, his situation is better and if the family works together to help each other they will move ahead.¹⁵²

Such cautionary tales warn about the potential personal hardship faced, and attempts to paint a realistic picture of the “American Dream” and its costs. Its use of the mental images of “*soledad*” (loneliness), “*angustia*” (depression), and “*el trabajo es duro*” (hard work) portray the difficulties of the journey and sound a warning to individuals who might consider migrating to the United

¹⁴⁸ Yadira Cardenas, *La Soledad es Mala Compañera y Mas Lejos de Nuestra Tierra* [Loneliness is a Bad Companion and Very Far From Home], CORREO, June 30, 2007; Isaura Bustos, *Aseguran Migrantes Que Los “Gringos” les Dan Buen Trato, los “Chicanos” son con los Que Sufren* [Migrants State That “Gringos” (Anglo Americans) Treat Them Well, Chicanos (Mexican Americans) Make Them Suffer], CORREO, June 30, 2007.

¹⁴⁹ *Id.*

¹⁵⁰ Cardenas, *supra* note 148; Bustos, *supra* note 148.

¹⁵¹ *Id.*

¹⁵² Cardenas, *supra* note 148.

States.¹⁵³ The economics and the political connections between the two countries again serve as the background for the story. The economic push/pull factors are implicated in his decision to travel to the U.S. and the fact that he had such an easy time getting employment in the U.S. makes individuals believe that the U.S. can absorb the immigration and can provide the employment.¹⁵⁴ The emotional response evoked is apprehension, possibly because of fear about the risk.

Another cautionary tale focuses on the treatment of migrants by employers and others who live in the United States. Jose Muñiz Vallejo, a fifty-three year old man, crossed in Loretto and paid a coyote¹⁵⁵ \$300 dollars when he was forty years old.¹⁵⁶ He worked in a meat packing plant and returned after thirteen months. The second time he crossed the border, he traveled to Loretto by train and paid \$400 dollars to a coyote. The third time he tried, he stated that he almost drowned crossing the river with a coyote and was immediately detained by U.S. immigration officials. He said his identification papers were confiscated and he was told that he could not return to the U.S. for five years or he would be jailed (“*nos metian al bote*”).¹⁵⁷ The article explains that in contrast to what other migrants stated, the “*gringos*” (Anglo-Americans) treated him well, while the “Chicanos”¹⁵⁸ because they had their documentation treated those without documents poorly (“*los que si son gachos*,”¹⁵⁹

¹⁵³ *Id.*

¹⁵⁴ The story about the ease of getting employments induces Mexican to believe that they will have an opportunity to obtain employment. Attitude studies reveal that Mexicans come to the United States, primarily for jobs. Roberto Suro, *Attitudes About Immigration and Major Demographic Characteristics, Survey of Mexican Migrants*, PEW HISP. CNTR. (2005), <http://pewhispanic.org/reports/report.php?ReportID=41> (survey of 5,000 Mexican migrants who were interviewed about attitudes involving work in the United States).

¹⁵⁵ A *coyote* smuggles persons across the border for a fee, rather than for family or noncommercial reasons.

¹⁵⁶ Bustos, *supra* note 148.

¹⁵⁷ *Id.*

¹⁵⁸ Chicanos are individuals of Mexican heritage who were born in the United States or who became U.S. citizens.

¹⁵⁹ “Gacho” is slang for mean, disrespectful, rude. Juan Castillo, *Immigrants Find People Like Them May Not Always Offer Respect*, AUSTIN AM.-STATESMAN,

son los chicanos, que porque ya tienen la ciudadanía quieren hacer menos a los demas, esos si, son los mas gachos de todos.)¹⁶⁰ (Those who are disrespectful, are the Chicanos, because they have their citizenship, they make less of the others, those yes, they are the rudest of all.) This cautionary tale again demonstrates the powerful economic pull of the United States and the economic push from Mexico, but also describes the risk of the U.S. immigration authorities and the indignities of poor treatment, particularly and unexpectedly from those of Mexican heritage who are U.S. citizens. Thus, the connections between the political and economic background serve to educate would-be migrants about how to navigate the journey. And the story evokes the emotions of danger, excitement, risk, and potential reward.

Another type of story that appeared in the Guanajuato paper invokes the Horatio Alger archetype.¹⁶¹ Marin Camarillo Torres, a thirty-seven year old migrant returned to Silao, Guanajuato after a sojourn in the United States.¹⁶² The article states that he paid a “*coyote*” an average of \$1600 to cross the border. He did this because he wanted to experience life in the United States and to earn more money for his wife and six children. He endured thirst and hunger, but when he arrived in the United States, it took him about a week to find a job working for a clothing importer. He worked eight hours a day earning seven dollars per hour. He said that because of the strength of the dollar compared to the peso, he earned enough in eleven months to provide his family with things he is unable to provide as a merchant in Silao.¹⁶³ The terms “*vale la pena*” (it is

Nov. 11, 2007, at A7 (stating that “Some Chicanos really try to help us. But with others, I feel it’s like a constant fight to win a place here in the U.S. They have it; we don’t.”).

¹⁶⁰ Bustos, *supra* note 148.

¹⁶¹ Horatio Alger is an American author who wrote tales about young men who through perseverance and luck and often help from a wealthy benefactor, works out of poverty into a job that can serve as step on the ladder toward the middle class. See CAROL NACKENOFF, *THE FICTIONAL REPUBLIC: HORATIO ALGER AND AMERICAN POLITICAL DISCOURSE* 1, 4, 14-15 (1994).

¹⁶² Cayetano Ramirez, *Vale la Pena Arriesgarse, Cruzar el Desierto Para Llegar a EU* [It is Worth it to Take the Risk and Cross the Desert to the United States], *CORREO*, June 16, 2007, at 7.

¹⁶³ *Id.*

worth it) and “*aventura*” (adventure) frame the journey as a worthwhile adventure.¹⁶⁴ The political and social connections to the gap between the U.S. and Mexican economies are explicit. The information about the cost and the process of crossing the border across the dangerous desert provides important information to potential migrants. And, the comments about the relative strength of the dollar to the peso seem directed to policy makers as a problem, but also demonstrates the potential reward of the journey. The emotional responses evoked by the story include excitement, risk and reward. Thus, the way the issues are framed in these cautionary tales and success stories is consistent with the economic theories explaining Mexico-U.S. immigration.

V. Immigration Frames in the United States: constructing a wall

*Our Wall: A Wall Along the U.S.-Mexico Border Prompts Divided Feelings: It Offends People. It Comforts People. And It Keeps Expanding. “It looks like the Berlin Wall. It is horrible. It is ugly. You feel more racism now. It is a racist wall.”*¹⁶⁵

In the perspectives voiced in the U.S., the framing of the

¹⁶⁴ *Id.*

¹⁶⁵ Charles Bowden, *Our Wall*, 211 NAT’L GEOGRAPHIC 211, May 5, 2007, 116-139; see also Adrian Campo-Flores & Andrew Murr, *Brownsville’s Bad Lie*, NEWSWEEK, May 5, 2008, at 40-42 (“For five generations, the Benavidez family has lived on a seven-acre plot of serene farmland near the U.S.-Mexico border west of Brownsville, Texas. ...[W]hen federal employees arrived asking to purchase a rectangular slice abutting the levee for \$4,100 to make way for a border fence aimed at deterring illegal immigrants, they refused. ...If the Feds get their way, an 18-foot-high barrier will soon traverse the Benavidez property, cutting off their cows from a pasture south of the fence’s proposed path. “It’s going to be ugly,” says Benavidez. Worse still, she predicts, “it’s not going to work.”) *Morning Edition: Border Fence a Great Divide for Texas Landowners* (NPR radio broadcast Mar. 24, 2008) available at <http://www.npr.org/templates/story/story.php?storyId=88802928> (“The [federal] judge also dismissed one of the more controversial suits, against the University of Texas at Brownsville... According to government blueprints, the proposed fence would cut off parts of the university, including the golf course and the city’s history Fort Brown.”). See Angelique EagleWoman, *Fencing Off the Eagle and the Condor, Border Politics, and Indigenous Peoples*, 23 NAT. RESOURCES & ENV’T. 33 (2008).

issues in the narratives in the social and political discourse about Mexican immigration are often conflicting accounts. We hear stories about Mexicans “taking jobs” from the United States work force, yet we also hear tales about the need for Mexicans to do the work that Americans “will not do.”¹⁶⁶ We see the issues about immigration framed as stories about workers, thus negating the rest of their humanity.¹⁶⁷ The President’s immigration bill that failed in June 2007 sought to increase the number of temporary workers and to have undocumented workers earn their documentation and legal status through payment of fines, longevity, and returning to their home country.¹⁶⁸ While the bill failed, the debate framed the mental images about the immigration problem. The debate was framed as the question about what to do about the millions of “illegal immigrants” in this country. Efforts to harden the border were trumpeted and the decision to build a “fence” or “wall” between the United States and Mexico was made although it was insufficiently funded.¹⁶⁹

¹⁶⁶ Donald L. Bartlett & James B. Steele, *Who Left the Door Open*, TIME, Sept. 20, 2004, at 13. (statement of President George W. Bush) (pushing immigration reform based on economic need, “I put forth what I think is a very reasonable proposal, and a human proposal, one that is not amnesty, but in fact, recognizes that there are good, honorable, hardworking people here doing jobs Americans won’t do.”).

¹⁶⁷ See Gordon Hanson & Philip Martin, *Immigration's Cost and Benefits*, WALL ST. J., June 26, 2006, available at http://online.wsj.com/public/article/SB115100948305787940-tA5PP0Ya_9U0AIXBQQhnaDyMIYc_20060725.html?mod=tff_maintfftop.

¹⁶⁸ Comprehensive Immigration Reform Act of 2007, S. 1348, 110th Cong. (2007).

¹⁶⁹ See generally Secure Fence Act of 2006, Pub. L. 109-367, 120 Stat. 2638 (2006); Jason Ahern, *Border Fence Construction Falls \$400 Million Short*, FT. WORTH STAR-TELEGRAM, Sept. 10, 2008, at A5; Josh Brodesky, *Border Fence Funds Short; Land Condemned Anyway*, ARIZ. DAILY STAR, Sept. 11, 2008, at B; Eileen Sullivan, *Bush's Border Fence Costs Extra \$400 Million / Higher Prices for Fuel, Materials and Labor Blamed*, HOUS. CHRON., Sept. 10, 2008, at A9. See also U.S. Gov’t Accountability Office, *Border Security: Despite Progress, Weakness in Traveler Inspections Exist at Our Nation’s Ports of Entry*, GAP-08-329T (Jan. 3, 2008), at 1-2, available at <http://www.gao.gov/new.items/d09244r.pdf>; GAO, *Secure Border Initiative: Technology Deployment Delays Persist and the Impact of Border Fencing Has Not Been Assessed*, GAO-09-1013T (Sept. 17, 2009) available at <http://www.gao.gov/new.items/>

The U.S. rhetoric and the U.S. political and legal actions concerning immigration are thus inconsistent, and the mental images conjured up by these words and images are similarly polarized as well as polarizing. For example, the use of the term “illegal alien” is distancing. Painting the face of an individual of Mexican heritage as the “other,” makes it easier to dehumanize and devalue. In discussing “constructing the ‘alien,’” Nestor P. Rodriguez reminds that “a principal aspect of the social construction of the southern border involves promoting the perception that the border is absolutely essential to protect the United States from the potential Latino entrant, who is very different from ‘Americans,’ in other words, to protect the United States from ‘aliens.’”¹⁷⁰ The refusal to call them immigrants, in this country of immigrants, reveals the impulse of exclusion. Stating that they are “taking jobs” implies that American citizens are forced out of positions to accommodate immigrants. This claim ignores that the legal work force is comprised of more individuals than just citizens; legal permanent residents and other non-citizens are authorized to work in the U.S.¹⁷¹

Verifiable evidence is lacking to show citizens’ employment is being expressly terminated to hire Mexican arrivals.¹⁷² Loss of jobs in the United States seems to be caused by corporations and manufacturers choosing to close American factories and plants to move them to countries where the wages are cheaper and the legislation protecting workers less vigorous.¹⁷³ However, using the

d091013t.pdf; GAO, *U.S. Customs and Border Protection’s Secure Border Initiative Fiscal Year 2009 Expenditure Plan*, GAO-09-274R (Apr. 30, 2009) available at <http://www.gao.gov/new.items/d09274r.pdf>.

¹⁷⁰ Rodriguez, *supra* note 106, at 230-32. Rodriguez reminds that the history of the southern U.S. involved indigenous peoples and *mestizos* who predated the arrival of Europeans-origin populations by thousands of years. Rodriguez, a professor of Sociology at the University of Houston, frequently publishes in the area of immigration, the social construction of the border, and transnational communities.

¹⁷¹ See Classes of Aliens Authorized to Accept Employment, 8 C.F.R. §274a.12 (2009) (listing 20 classes of non-citizens who are authorized to accept employment in the U.S.).

¹⁷² Robert Pear, *White House Report Lauds Immigrants’ Positive Effects, Says Native-Born Workers Benefit, Too*, N.Y. TIMES, June 20, 2007, at A17.

¹⁷³ DAVID BACON, THE CHILDREN OF NAFTA: LABOR WARS ON THE

phrase “taking our jobs” provokes anger and fear especially in the current economic climate. This rhetoric is directed toward middle-class and working U.S. citizens.

Another rhetorical device used by Samuel P. Huntington, a well-known political writer, is to worry about the “browning of America”¹⁷⁴ and to tell an immigration story that sees Mexican migration as a threat to the core cultural values of “the Christian religion, Protestant values and moralism, a work ethic, the English language, British traditions of law, justice, and the limits of government power, and a legacy of European art, literature, philosophy, and music.”¹⁷⁵ He feels that Mexicans do not adhere to “the American Creed with its principles of liberty, equality, individualism, representative government, and private property.”¹⁷⁶ Thus, the tale he tells is of Mexicans coming to this country and refusing to assimilate to those values. Huntington presents a historical account at variance with other scholars’ accounts of U.S. immigration history.¹⁷⁷ He sees “multi-culturalists” who accept and value differences as threats to U.S. identity.¹⁷⁸ The nativist rhetoric he uses is framed to present mental images of Mexicans as “non-western other” and to stir up fear of their migration.¹⁷⁹

Another interesting framing technique used by anti-immigrant pundits and activists is to accuse pro-immigrant

U.S./MEXICO BORDER 46-51 (2004).

¹⁷⁴ Ginny Hoyle, *Demographics Experts Says America Browning and Graying*, HERALD-SUN, Aug. 22, 2007.

¹⁷⁵ See, e.g., SAMUEL P. HUNTINGTON, WHO ARE WE?: THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY 40 (2004).

¹⁷⁶ *Id.* at 41.

¹⁷⁷ Smith & Bakker, *supra* note 118, at 9-13 (summarizing Huntington’s argument and scholars’ research challenging his thesis and noting that “[a]side from the two-thousand-mile-long land border and the scale of Mexican migration, the entire set of assumptions on which Huntington’s argument rests has been vigorously contested by social science researchers and by other public intellectuals who have reviewed his book”).

¹⁷⁸ SMITH & BAKKER, *supra* note 118, at 10.

¹⁷⁹ *Id.* at 12-13 (discussing Huntington’s and others’ discourse that because of the migrants’ “continuing connections to their homelands.... transnational migrants to the United States and other core countries are unlikely to acquire a sense of loyalty to their new abode”).

individuals of labeling anti-immigrant pundits and activists as “racist.”¹⁸⁰ The pundit begins by stating that he is not a racist and proceeds to voice his resentment of being called a racist “just because” he is concerned about immigration and national identity.¹⁸¹ Rather than using data and analysis to make their points, these anti-immigrant pundits accuse pro-immigrant pundits and activists of name calling and using the term “racism” indiscriminately and irresponsibly.¹⁸² Linda S. Bosniak points out that there is “one particular form of ‘hostility to foreigners’ that is consistently associated with nativism in both the scholarly literature and in colloquial usage: I refer to race- or ethnicity-based animus toward immigrants.”¹⁸³ Bosniak further notes that “[M]any hard-core restrictionists furiously repudiate the charge; as they characterize it, calling anti-immigration views ‘nativist’ (or ‘xenophobic’ or ‘racist’) is a form of ‘intimidation’ by politically correct liberal zealots which serves to suppress real substantive debate.”¹⁸⁴ This technique sets up a mental image that immunizes against examination of motive, while distracting the audience from the facts and realities of immigration. The emotional response to the perceived irresponsible use of “race” is anger.

A core thesis of this article is that the U.S. practice of ignoring the historical and current factual realities of the Mexico-U.S. border has exacerbated the problems there. For Mexican nationals it has increased the risks, including death, when they choose to meet economic needs by entering the U.S. by any means necessary. Yet the U.S. has failed to legislate a comprehensive immigration policy that allows orderly and authorized entry for Mexicans who seek work from U.S. employers who need their labor.

Likewise, the same historical blinders and failure to

¹⁸⁰ Jonah Goldberg, *You Can't Say That*, USA TODAY, July 3, 2007, at 09A, available at <http://usatoday.com/oped/2007/07/you-cant-say-th.html>.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ Linda S. Bosniak, *supra* note 99, at 282. Bosniak, a professor at the Rutgers School of Law, Camden, studies and publishes extensively in immigration law.

¹⁸⁴ *Id.* at 283.

appreciate the daily life experienced by transnational indigenous communities has increased border difficulties for tribes. These indigenous sovereigns are not just another “immigration” problem. Thus, this popular U.S. framing of immigration law becomes even more inaccurate. Like the physical construction of a wall, the framing has created a conceptual barrier. Because of the continuous *political* relationships among the tribes, Mexico, Canada, and the U.S., the current border issues are anchored in the doctrines of international law and political states. U.S. federal and constitutional laws do not treat tribes as a collective of a discrete race or ethnic minority. The key and primary legal status is as political entities in nation-to-nation relationships, formalized in almost 400 treaties, plus many statutes, and regulations.¹⁸⁵ The U.S. Supreme Court affirmed this political status (not race or ethnicity) in 1974 in *Morton v. Mancari*, which upheld a Bureau of Indian Affairs employment preference for Native Americans who were members of federally recognized tribes.¹⁸⁶

These relationships, manifested in treaties among the tribes and the other nations, raise the question whether one nation (the U.S.) can unilaterally establish a “new” enforced border where none previously existed. Since 9/11, the U.S. has closed or severely restricted the border crossing of the transnational tribes at the southern and northern borders.¹⁸⁷ At the Mexican border, the U.S.

¹⁸⁵ See generally COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 26 (2005 ed.). Cohen discusses treaty making relations between tribal sovereigns and European nations in the History of the Formative Years of Federal Indian Policy. The tribes’ political status has not disappeared into general federal law as American Indian law is *sui generis*. Gloria Valencia-Weber, Tribal Courts: Custom and Innovative Law, 24 U.N.M. L. REV. 225 (1994).

¹⁸⁶ *Morton v. Mancari*, 417 U.S. 535 (1974), *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831) and *Worcester v. Georgia*, 31 U.S. 515 (1832) where Supreme Court recognized that tribes were sovereigns with nation status. Because of the tribes’ *political* status (not racial or ethnic category), Titles 25 of the U.S.C. and the C.F.R. are exclusively for American Indian subject matter.

¹⁸⁷ The transnational tribes at both borders have held or participated in forums to make known the problems they regularly experience in the border areas of their homelands and specifically ask for corrections in how they are treated at the borders. *Indigenous Border Summit Opposes Border Wall and Militarization*, AMERICAS PROGRAM, Oct. 2006, <http://americas.irc-online.org/pdf/series/20.wall.pdf> (describing summit held September 29-October 1, organized by

has substantially prohibited the ordinary personal, business, and cultural activities of the original citizens of the Americas.¹⁸⁸ Under DHS regulations now, the U.S. government can demand that a tribal member possess a passport to visit family members and friends, to participate in social and political events of the tribe, and to engage in the requisite ceremonies for sacred culture or religion.¹⁸⁹ These burdens imposed on indigenous peoples make a searching inquiry appropriate: What has produced this situation?

The contemporary angry anti-immigrant response also clouds the reasoning about the indigenous peoples of the Americas. In the context of the transnational tribes, the response should more accurately reflect the legal and historical status of these indigenous nations. An examination of the historical context, data, the lived experience, and the values inherent in the story of one tribe, the Tohono O'odham Nation, illustrates how these indigenous border experiences should be described.

Tohono O'odham members, the International Indian Treaty Council, and the American Indian Movement in which tribal peoples from both border areas participated). *See also* Brenda Norrell, *U.S. Civil Rights Commission Hears Indigenous at Border*, U.N. OBSERVER, Oct. 6, 2004, <http://www.unobserver.com/printen.php?id=1945>. At both events the tribal witnesses described invasions of their homelands, done without consent or the consultation required by federal policy. Border Patrol intrusion of private homes, desecration of sacred sites, and unexplained deaths of members.

¹⁸⁸ *Id.*; *see* Brenda Norrell, *Mohawks in Solidarity with Tohono O'odham*, 45 NAVAJO TIMES, at C7 (Oct. 5, 2006) (coalition of tribes asking for halt to the militarization of their lands by the U.S. Border Patrol, National Guard and federal agents).

¹⁸⁹ *Id.* For those unable to satisfy the U.S. demand for U.S. birth certificates and U.S. documents, humanitarian special efforts have been made. *See, e.g.*, Chet Barfield, *Baja Indians Seek Help With Border Demands*, SAN DIEGO UNION-TRIB., Jan. 17, 2002, at B-8 (Kemeyaay Indians have eight indigenous villages on both sides of the border and were getting special ID cards from the Mexican Government that would allow them to get Mexican passports and then get border-crossing cards from the American Consulate in Tijuana.).

*VI. Why Border Issues Faced by Indigenous Transnational Nations
Do Not Fit the Frames*

*We were here long before other countries were established We are not immigrants. It just so happened that they put the line between us. We did not put any line or border anywhere to separate us. There are no borders among our people.*¹⁹⁰

History and political relationships between the pre-existing tribes and the later occupying governments underlie current events. Some experiences between the federal government and tribes as sovereigns were common to indigenous peoples at the northern and southern borders. Policies such as removal and allotment had wide impact, yet the individual tribes, such as the Tohono O'odham can illustrate the situational effects.

A. Indigenous Transnational Communities

The framing of contemporary immigration reform debates ignores that the creation of the southern border involved the historical contests among international sovereigns for the possession and power over the western lands of the U.S.¹⁹¹ In contrast, the rest of the U.S. did not experience this extended historical cycle.¹⁹² Moreover, the relationships with the indigenous peoples, the

¹⁹⁰ Eileen Luna-Firebaugh, *'Att Hascu 'Am O 'I-oi? What Direction Should We Take?: The Desert People's Approach to the Militarization of the Border* 19 WASH. U. J.L. & POL'Y 339, 359-360 (2005) (publishing statements by former Tohono O'odham Councilman Kenneth Williams and Chief Ernie Campbell of the Musqueam Nation, respectively). This article also describes the formation of alliances among tribes at the southern border, Alianza Indígena Sin Fronteras (Indigenous Alliance Without Borders) with tribes at the northern border, Canada's Assembly of First Nations, with the National Congress of American Indians from the U.S.

¹⁹¹ Gloria Valencia-Weber, *The Supreme Court's Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets*, 5 U. PENN. J. CONST. LAW 405 (2003) (describing how the Revolutionary War, Articles of Confederation, and formation of the Constitution were shaped by the colonies/states struggles over the Western lands).

¹⁹² The Louisiana Purchase in 1803 and the War of 1812 settled in some form the competing claims and disputes among Britain, Spain, and France.

southwestern tribes and pueblos, often depended on outsider sovereigns recognizing critical tribal claims of political autonomy and land tenure.¹⁹³ As sovereigns and as owners with land title, the indigenous peoples in the southwest, especially the New Mexican pueblos, exercised means to protect their interests. While the westward movement of non-Indians who demanded land and resources constantly threatened the indigenous unique cultural societies, American Indians nonetheless obtained some victories in the Supreme Court and Congress to protect indigenous homelands.¹⁹⁴

Homelands were cut up and divided during the creation of the U.S. southern border.¹⁹⁵ Until the late twentieth century, the free passage of tribal members was not impeded in a broad general practice, though problems occurred and were noticed.¹⁹⁶ The policies instituted after the attacks of 9/11 have aggravated the prior problems and created new barriers for the first sovereigns in the Americas. As section IV details, the post 9/11 obstacles include new procedural demands that tribal members prove with documents their U.S. citizenship and obtain a passport or border-crossing permit, and new physical barriers include closed gates on tribal lands, new walls and fences.¹⁹⁷

As the borders of the U.S. made the historical shifts in location through treaties with Mexico and Canada, the status of the indigenous nations and their homelands was addressed in some treaties about them. At the northern border, the Jay Treaty explicitly

¹⁹³ COHEN'S HANDBOOK OF INDIAN LAW, *supra* note 185, at 965.

¹⁹⁴ See *United States v. Joseph*, 94 U.S. 614 (1876); see also *United States v. Sandoval*, 231 U.S. 28 (1913). Both cases recognize the fee simple title to land held by the Pueblos in New Mexico that pre-existed the U.S. takeover of the Southwest.

¹⁹⁵ COHEN'S HANDBOOK OF INDIAN LAW, *supra* note 185, §§15.01-15.10.

¹⁹⁶ Richard Osburn, *Problems and Solutions Regarding Indigenous Peoples Split by International Borders*, 24 AM. INDIAN L. REV. 471, 473-77 (2000).

¹⁹⁷ Editorial, *For O'odham border fence poses real problems: Our view: Congress needs to consider how barriers could disrupt binational culture*, ARIZ. DAILY STAR, Sept. 25, 2006, at A8; Greg Gross, *Triple Fence along Mexico border would split Indian nations*, SAN DIEGO UNION-TRIB., Oct. 23, 2006, at A1; Stephanie Innes, *Cultures Divided; Star Investigation: Sealing our border: Why it won't work*, ARIZ. DAILY STAR, Sept. 28, 2006, at A1.

provides for the Native Americans their right to freely cross.¹⁹⁸ Also at the northwestern border, the Stevens treaties protected the Northwest tribes in the use of their cross-border homelands.¹⁹⁹ These treaties also protect the cyclical interactions among affiliated tribes in the interior of Canada and the U.S.²⁰⁰ In the Treaty of Guadalupe Hidalgo, the indigenous nations' members are among the citizens of Mexico who retained their rights, including tribal lands in the southwest. Contemporary Indian law, especially on land claims, operates on this principle of retained rights of the tribes in the southwest area under the Treaty between Mexico and the U.S.²⁰¹ Consequently, approximately twenty-five tribes situated on the two borders and approximately forty affiliated tribes are directly affected by these treaty rights.²⁰² Of course, this affects a significant number of tribes, members and other individuals.

Historically, the official and the informal practices at the southern border generally accommodated the ordinary life needs of the cross border people. Everyday life includes visiting with family

¹⁹⁸ Treaty of Amity, Commerce and Navigation, U.S.-Gr. Brit., Nov. 19, 1794, 8 Stat. 116 [hereinafter Jay Treaty].

¹⁹⁹ When Congress ordered treaty negotiations as quickly as possible with the Northwest tribes, "Isaac I. Stevens, Governor of the Washington Territory proved ideally suited to that purpose for in less than one year during 1854-1855 he negotiated eleven different treaties..." *United States v. Washington*, 384 F. Supp 312, 330 (W.D. Wash. 1974). The Stevens treaties had certain recurring provisions, including, e.g., "The right of taking fish at usual and accustomed grounds," which could be on both sides of the northern border. Treaty of Point Elliott, art. V., Jan. 22, 1855, 12 Stat. 927. *See also* Northwest Ordinance, July 13, 1787, 1 Stat. 51 note (a), reenacted by Act of Aug. 7, 1789, ch. 8, 1 Stat. 50: "The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them." *Id.* at 52.

²⁰⁰ *Id.*

²⁰¹ *See Pueblo of Sandia v. Babbitt*, 231 F.3d 878 (U.S. App. D.C. 2000); *Pueblo of Sandia v. Babbitt*, 1996 WL 808067, 1996 U.S. Dist. LEXIS 20619 (D.D.C. 1996) recognizing Sandia Pueblo's land title to the Sandia Mountains that pre-existed the U.S. acquisition of this geographical area.

²⁰² *See supra* note 95, at 25 (describing a lack of a definitive list).

and friends on both sides of the border; children attending the schools on the U.S. territory; individuals obtaining medical services at facilities on either side; participating in cultural ceremonies at sacred sites on both sides of the border; and participating in community meetings and political events such as voting, which for U.S. federally recognized tribes occurs on the U.S. side.²⁰³ These are the rights, personal and civil, that the treaties and laws are meant to protect and which are protected as human rights in the emerging international law that pertains to indigenous peoples.²⁰⁴

In the twentieth century, the tribes began to experience some problems that led to litigation and some decisions that favored the indigenous in the exercise of their right to personally cross the border.²⁰⁵ It is fair to say that in the twentieth century the crossing

²⁰³ Pre-9/11 accommodating practices at the Southern border are described in *IT IS NOT OUR FAULT: THE CASE FOR AMENDING THE PRESENT NATIONALITY LAW TO MAKE ALL MEMBERS OF THE TOHONO O'ODHAM NATION UNITED STATES CITIZENS, NOW AND FOREVER*, (Guadalupe Castillo & Margo Cowan, eds. Tohono O'odham Nation, Executive Branch 2001).

²⁰⁴ See generally JAMES S. ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 58-61 (2d ed. 2004); ILO, *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, June 27, 1989, No. 169, 1650 U.N.T.S. 383, available at <http://www.unhchr.ch/html/menu3/b/62.htm> (last visited June 15, 2009).

²⁰⁵ *Karnuth v. United States*, 279 U.S. 231 (1929) (holding that the War of 1812 and Treaty of Ghent abrogated the Jay Treaty). Modern study of the two treaties yields different understanding of the provisions at issue. *But see* Joshua J. Tonra, Note, *The Threat of Border Security on Indigenous Free Passage Rights in North America*, 34 SYRACUSE J. INT'L L. & COM. 221, 223-225 (2006) (describing how the context and express provision in the Treaty of Ghent restored and protected the possessions, rights, and privileges enjoyed by the tribes in 1811); Valencia-Weber, *supra* note 191, at 427-28 (to conclude the 1812 War, the British maintained that the Crown would sign a treaty only if "the Indian nations are included in it, and restored to all the rights, privileges, and territories which they enjoyed in 1811"); Eileen Luna-Firebaugh, *supra* note 190, at 342 ("The Jay Treaty establishes the right of free passage across the border to "Indians dwelling on either side of said Boundary Line. The Treaty of Ghent restored this right, which had eroded due to the War of 1812."). See also Donald A. Grinde, Jr. (Yamasee), *Iroquois Border Crossings: Place, Politics, and the Jay Treaty*, in *GLOBALIZATION ON THE LINE*, *supra* note 39, at 167 (discussing Iroquois from Canada and the U.S. and the notion of the "unnatural border" as a manifestation of colonialism). *Karnuth* progeny cases then imposed duties on goods carried across the border; see also *United States v. Garrow*, 88 F.2d 318 (1937) and *Akins v.*

has been enabled by formal treaty rights that have not been abrogated, federal statute, and informal practices that were arranged and continued with some tribes and the immigration control authorities at the borders. There is no Supreme Court decision that has settled the varying interpretations and practices used at the borders.

Then, the 9/11 attacks resulted in exacerbating old problems and made new difficulties as the U.S. became more focused on tightening or hardening the border. Besides the control of migrants who enter unlawfully or without immigration status, the U.S. cited security needs and terrorism, along with crimes involving illegal drugs and other contraband to justify new programs and practices.²⁰⁶ There are some variations in the transnational tribes' experience because of the geography and demographics of location. Many tribes are in isolated rural areas and some live in climates that produce death for the inadequately prepared migrants who attempt to cross through the southwestern deserts.

However, all transnational tribes experience certain common difficulties in maintaining their culturally based political communities that require activities on both sides of the border. The members' reactions to the problem are emotional, and involve more than anger about inconvenience, as one tribe documented in the

United States, 551 F.2d 1222 (1977). After the U.S. began deporting Canadian born Indians, the practice was successfully challenged in *United States ex rel. Daibo v. McCandless*, 25 F.2d 71 (1928). Then Congress passed 8 U.S.C. § 1359 in 1928, which applies to American Indians born in Canada: "Nothing in this subchapter [immigration law] shall be construed to affect the right of American Indians born in Canada to pass the borders of the United States, but such right shall extend only to persons who possess at least 50 per centum of blood of the American Indian race." *See also Akins v. Saxbe*, 380 F. Supp. 1210 (1974) (holding that the statute recognizing the right of American Indians born in Canada "to pass the borders of the United States," exempted Indians from restrictions imposed on aliens by the immigration laws).

²⁰⁶ John Pomfret, *As Border Crackdown Intensifies, A Tribe Is Caught in the Crossfire*, WASH. POST, Sept. 15, 2006, at A1, available at http://artsci.wustl.edu/~anthro/courses/306/articles/WP_TohonoBorder.htm (last visited June 16, 2009); Melanie Grinnell, *Homeland Security: Elder says the War Against Terrorism is Being Waged on Tohono O'odham Homelands*, 4 THE NATIVE VOICE, Apr 1-15, 2005, at C5 [hereinafter *Homeland Security*].

many stories in their book, *It is Not Our Fault*, published by the Tohono O'odham Nation.²⁰⁷ The bureaucratic procedural and physical barriers provoke emotions anchored in cultural identity. They are experienced as insults to the tribe's sovereignty and as the denial of core human rights involving family and community relationships.²⁰⁸ From the tribal perspective, the surrounding nation states should not be able to obstruct these primary rights. This response requires a re-framing of the immigration issues to fit the political status and real life needs. Here the Tohono O'odham stories can help us understand how the federal post 9/11 border actions have negatively affected the sixty-four or so transnational tribes.

B. The Tohono O'odham Nation: A Transnational Example

For purposes of this article, the Tohono O'odham Nation (Tohono O'odham or Nation) located in southern Arizona, near Tucson, will be used as the example manifesting the post-9/11 problems. The historical experience of the Tohono O'odham demonstrates the interference with community life that is critical for maintaining their culturally distinct sovereignty. Unlike problems for other groups or individuals at the Mexico-U.S. border, the barriers for the Tohono O'odham, a U.S. federally recognized tribe, are entangled in its political status. New U.S. practices greatly affect how the Tohono O'odham can exercise governance over events involving members and outsiders on tribal territory.

The Tohono O'odham Nation historically occupied and

²⁰⁷ IT IS NOT OUR FAULT, *supra* note 203.

²⁰⁸ Among the international instruments that would cover the interests of the transnational tribes are the following: International Covenant on Civil and Political Rights, arts. 1, 17, 27, G.A. Res. 2200A (XXI), at 43, U.N. Doc. A/6316 (Dec. 16, 1966); ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries, arts. 3, 5, 32, June 27, 1989, 1650 U.N.T.S. 383; United Nations Declaration on the Rights of Indigenous Peoples, arts. 3, 5, 9, 33, 36, G.A. Res. 61/295 U.N. Doc. A/Res/61/295 (Sept. 13, 2007). These are examples from existing international law and norms and not intended as a comprehensive list of instruments or provisions that could be invoked. See Angelique EagleWoman, *The Eagle and The Condor of the Western Hemisphere: Application of International Indigenous Principles to Halt the United States Border Wall*, 45 IDAHO L. REV. 1 (2009).

practiced irrigation farming in the southwest of the U.S., extending into central Mexico.²⁰⁹ Members are of Pima and Papago indigenous ancestry and belong to the Uto-Aztecan language family.²¹⁰ A federally recognized tribe, the Tohono O'odham membership today is approximately 24,000 enrolled members.²¹¹ Of these, it is estimated that 7,000 reside on the Mexican side of the border, though they were born in the U.S., but do not have a birth certificate to establish that fact.²¹² Another estimated 1,400 were born on the Mexican side and now are subject to demands for an immigration visa required of foreign nationals.²¹³ The birthplace question and a birth certificate requirement became sources of problems in the twentieth century.²¹⁴ The increased difficulties arising since 9/11 were not always part of the tribe's relations with the U.S. or the everyday life of the members.

The history of the relations between the Tohono O'odham and the U.S. Government demonstrate the tribe's sovereign status and recognition that all members of the tribe enjoyed citizenship in the U.S. In 1937, the Tohono O'odham reorganized their government under the terms of the Indian Reorganization Act (IRA),²¹⁵ an act aimed to restore tribal autonomy, sovereignty, self-governance, and communal land tenure. The IRA was enacted as a corrective to the failures of the Allotment Act of 1887,²¹⁶ which

²⁰⁹ See generally VERONICA E. VELARDE TILLER, TILLER'S GUIDE TO INDIAN COUNTRY: ECONOMIC PROFILES OF AMERICAN INDIAN RESERVATIONS 352-254 (2005) (providing a basic description of the nation).

²¹⁰ *Id.* at 352.

²¹¹ *Id.* at 353.

²¹² It has not been possible to obtain the census data on the Tohono O'odham from the 1930s. See, e.g., IT IS NOT OUR FAULT, *supra* note 203 (showing member numbers and situations); OFFICE OF THE CHAIRMAN AND VICE CHAIRMAN, TOHONO O'ODHAM NATION, BRIEFING BOOK (2001).

²¹³ *Id.*; Carmen Duarte, *Tohono O'odham: Campaign for Citizenship; Nation Divided*, ARIZ. DAILY STAR, May 30, 2001, <http://www.azstarnet.com/tohono/>; Brenda Norrell, *Death of Native American Veteran Renews Attention to New Mexico Tribe*, INDIAN COUNTRY TODAY, Aug. 31, 2001.

²¹⁴ *Id.*; see IT IS NOT OUR FAULT, *supra* note 203.

²¹⁵ Indian Reorganization Act of 1934, Pub. L. No. 73-383, 48 Stat. 984 (1934) (codified at 25 U.S.C. §§ 461-479 (2006)).

²¹⁶ See generally General Allotment (Dawes) Act of Feb. 8, 1887, ch. 119, 24

aimed to de-tribalize Indians, terminate their governments and divide communal land holdings into individual tenure, and, ultimately, assimilate the members as self maximizing individual farmers.²¹⁷ Under the Allotment policy, there was an immense loss of lands, tribal and individually held, and collateral losses of cultural life anchored in the homelands, community cohesiveness, and individual identity.²¹⁸ The general poverty of the 1930s Depression era was more extreme in Indian Country²¹⁹ than the rest of the country. To address this, the New Deal regime of President Franklin D. Roosevelt produced the IRA for tribes.

When the Tohono O’odham became an IRA government in 1937, the U.S. Government performed a census of the tribe’s members on both sides of the border.²²⁰ All members were encompassed within the government-to-government relationship the tribe has with the U.S. Thus, members are part of the U.S. population of citizens. In the early twentieth century, the U.S. government accelerated its policy and practice of removing Indian children from their families to send their children to boarding schools away from their homelands.²²¹ In response, the Papago Indian Good Government League was formed in 1911 and led to the provision of

Stat. 388, (codified in various sections of title 25), amended by the Indian Land Consolidation Act Amendments of 2000 § 106(a), Pub. L. No. 106-462, 114 Stat 1991, (codified in various sections of title 25).

²¹⁷ See generally DEBO, *supra* note 75, at 331.

²¹⁸ *Id.*

²¹⁹ See 18 U.S.C. § 1151 (2006), defining “Indian Country” as the following:

a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,

(b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and

(c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

²²⁰ IT IS NOT OUR FAULT, *supra* note 203, at 12-13; Courtney E. Ozer, *Make It Right: The Case for Granting Tohono O’odham Nation Members U.S. Citizenship*, 16 GEO. IMMIGR. L.J. 705, 708-709 (2002).

²²¹ VELARDE TILLER, *supra* note 209, at 352

land for on-reservation day schools.²²² In 1916, four schools in reservation communities were completed. Into the 1970s, it was the practice to send the school bus from the north side to the south side of the border to pick up member children to attend the schools located on the U.S. side.²²³ Thus, the everyday life of members has always required free access to cross the border, which recently became complicated and restricted.

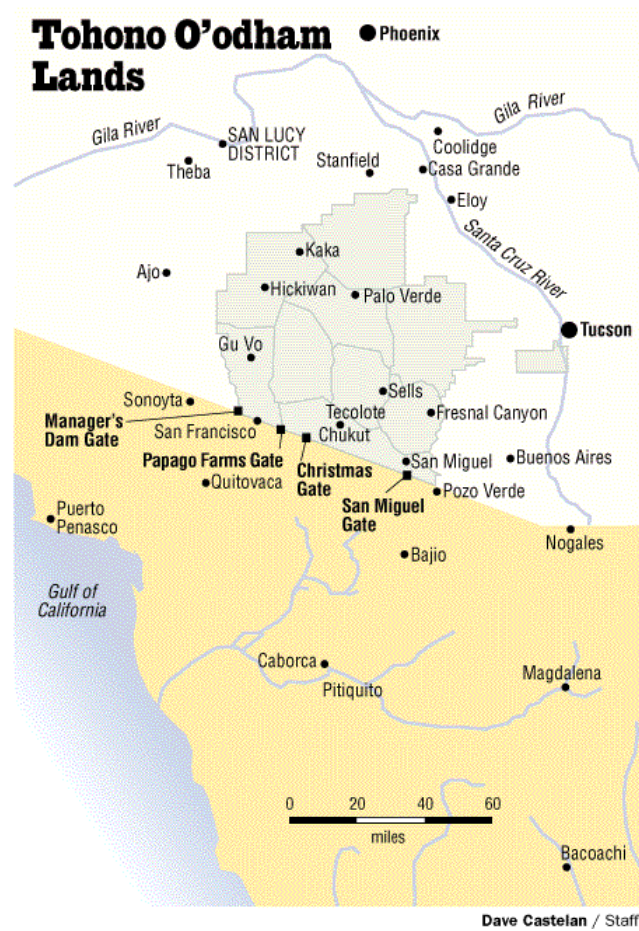
Now, the Tohono O'odham must contend with new difficulties at the border that continuously alarm and disturb their lives. The framing of the border issues ignores the reality that they experience. Their free access will effectively be closed off under the Department of Homeland Security (DHS) plans to control the border. DHS aims to close the access gates on the reservation. (See map, 2). In conjunction with new fences (initially 700 new miles) and physical barriers to be installed along the border, closing reservation gates will force tribal members to travel additional miles, 100 miles in some instances, to reach a processing gate.²²⁴ What is practical now with walking will require a vehicle to visit family members and friends, to participate in the social and civil life of the community, and to access to services such as schools, health care, and agricultural resources.²²⁵

²²² VELARDE TILLER, *supra* note 209, at 352; Norrell, *supra* note 213.

²²³ Homeland Security, *supra* note 206.

²²⁴ Ozer, *supra* note 220, at 720-21.

²²⁵ Carmen Duarte, *Tohono O'odham: Campaign for Citizenship; Nation Divided*, ARIZ. DAILY STAR, May 30, 2001, <http://www.azstarnet.com/tohono/> (illustration by Jeffrey Scott/Arizona Daily Star, 2001).



Especially disturbing to the Tohono O'odham are the barriers to access sacred sites, especially south of the U.S. border, at which the cultural obligations and ceremonies must be performed. For the tribal elders responsible for these ceremonies, the new restrictions and procedures are personally offensive and discouraging. There is also an invasive inspection policy, which violates and, in some instances, destroys the sacred bundles of plant life and objects required for the ceremonies.²²⁶ Exposure of and handling of this

²²⁶ IT IS NOT OUR FAULT, *supra* note 203; Ozer, *supra* note 220, at 719-721.

matter is restricted, and profane treatment can nullify their use for ceremonies.

Besides physical barriers, DHS now will require U.S. citizenship or an immigration visa as a foreigner to cross at the formally designated entry points.²²⁷ For the Tohono O'odham there are four categories of members who face new regulatory and financial hardships if they want to secure or demonstrate U.S. citizenship:

- A. Members born in the U.S., but unable to prove this;
- B. Members born and residing south of the U.S. border;
- C. Members born south of the border and now living in the U.S. without documents; and
- D. Members who are the children of U.S. citizens whose births cannot be documented.²²⁸

The custom of home childbirth, delivered by the senior women within the tribe, means that many Tohono O'odham of the tribal members lack a birth certificate from either the Mexican or U.S. Governments. The rural tribal communities on both sides of the border have been outside the urban style of childbirthing and government documentation.²²⁹ The younger members of the tribe are more likely to have a documented birth with a corroborating birth certificate. Yet, the youngest members can also have problems establishing their U.S. citizenship if it is derived from a parent without a birth certificate. Younger Tohono O'odham members have

²²⁷ See Western Hemisphere Travel Initiative requirements, *infra* at note 230; see also Zimmerman, *infra* note 243 (regarding fences and gates at the border); Innes, *supra* note 197 (explaining the Tohono O'odham Nation's struggle to cross at the designated entry points without U.S. citizenship); Scott, *supra* note 225 (exhibiting the map for location of the gates on O'odham).

²²⁸ Ozer, *supra* note 220, at 712-16.

²²⁹ See Antoinette Sedillo Lopez, *Evolving Indigenous Law: Navajo Marriage: Cultural Traditions and Modern Challenges*, 17 *ARIZ. J. INT'L & COMP. L.* 283, 304-07 (2000) (displaying another example of tribal custom concerning marriage that also did not involve documentation).

been denied opportunities to serve in the military or to enter graduate school because they cannot establish their derivative U.S. citizenship.

Under new DHS rules, the Tohono O'odham members can no longer use the membership documents issued by their own government, the sovereign's prerogative that sufficed in years past.²³⁰ Under the new rules that DHS has imposed for all U.S. citizens who depart and enter the U.S., the Tohono O'odham members must have a proof of U.S. citizenship, a passport or a federal border-crossing permit.²³¹ Or, if the member lacks the U.S. passport, then he or she must obtain a visa as a foreign national from Mexico to enter the U.S.²³² If lacking either document, the Tohono O'odham member can be categorized as an alien, unlawfully present in the U.S. All these requirements are counter to the understandings that the tribe, historically, had in its nation-to-nation relationship with the U.S.²³³

Besides denying the sufficiency of the Tohono O'odhams' traditional means of demonstrating membership, the new rules encumber life in ways other U.S. citizens do not experience. The Nation's members ask: Why should one need a passport or visa in order to visit one's nuclear or extended family or to receive government services or participate in one's own civil community? When passports are required for all members of a family, it is a financial burden for families struggling to maintain their lives with

²³⁰ Dept. of Homeland Sec., *Department of Homeland Security and Tohono O'odham Nation Announce Agreement to Develop Enhanced Tribal Card* (Nov. 30, 2009), http://www.dhs.gov/ynews/releases/pr_125727224339.shtm. The Western Hemisphere Travel Initiative (WHTI) regulations issued by DHS now require that all persons departing or entering the U.S. must provide a passport, which means all U.S. citizens must have a passport.

²³¹ *Id.*

²³² *Id.*

²³³ See *infra* notes 69, 83, 85, 90, 92, 198, 199, 205, 208 (discussing the treaties that have allowed the tribes to enter and depart the U.S. using their tribal membership documents). Members of those tribes have not been required to possess a U.S. passport. See also Gloria Valencia-Weber, *Racial Equality: Old and New Strains and American Indians*, 80 NOTRE DAME L. REV. 333 (2004) (reviewing past law and naturalization of American Indians as U.S. citizens).

the poverty incomes of many members of the Tohono O'odham people.²³⁴ A U.S. passport for persons over sixteen years old and adults is \$100 and for those under sixteen years of age the cost is \$85.²³⁵ These individual hardships are not the only impact of the new DHS rules.

The extensive barriers and added enforcement officers at the western part of the border, such as the San Diego area, have pushed the undocumented flow eastward with negative consequences.²³⁶ Numerous harmful costs are experienced in Arizona and New Mexico and intensively on the 75 miles of border on Tohono O'odham lands.²³⁷ The increased flow of migrants has resulted in harrowing risky experiences in the Tohono O'odham desert.²³⁸ These include the deaths of both desperate migrants and tribal members.²³⁹ The Immigration and Customs Enforcement (ICE) of DHS has essentially invaded tribal lands and built facilities on tribal lands. They have treated the tribal members as "illegals" when they cannot provide the documentation that ICE officers demand.

The increased numbers and more desperate people who cross

²³⁴ VELARDE TILLER, *supra* note 209, at 353 (per capita income for members is \$6,998).

²³⁵ See, e.g., U.S. Department of State, <http://travel.state.gov/passport/get/fees/html>.

²³⁶ Douglas S. Massey, *Battlefield: El Paso*, NAT'L INTEREST, July 1, 2009, at 44; Cristina Blackwell, *Rising Deaths in U.S.-Mexico Border Crossing*, LA PRENSA SAN ANTONIO, Oct. 25, 2009, at 1A; MARIA JIMINEZ, AMERICAN CIVIL LIBERTIES UNION OF SAN DIEGO AND MEXICO'S NATIONAL COMMISSION ON HUMAN RIGHTS, HUMANITARIAN CRISIS: MIGRANT DEATHS AT THE U.S.-MEXICO BORDER (2009), <http://www.aclu.org/files/pdfs/immigrants/humanitariancrisisreport.pdf>; Statement of Richard M. Stana, Director, Homeland Security and Justice, Immigration Enforcement: Controls Over Program Authorizing State and Local Enforcement of Federal Immigration Laws Should Be Strengthened (2009), available at <http://www.gao.gov/new.items/d09381t.pdf>.

²³⁷ Pomfret, *supra* note 206; Homeland Security, *supra* note 206.

²³⁸ See *supra* note 236.

²³⁹ See generally Tyche Hendricks, *On the Border: For the Tohono O'odham, the U.S.-Mexico border is a Recent and Difficult Development*, S.F. CHRON., Dec. 3, 2005, at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2005/12/03/MNGHQG2FV91.DTL> (last visited June 16, 2009)(describing the deaths of immigrants and the drug traffickers recruiting tribal members for their smuggling).

the border in this area now commit crimes against the tribal people who had generally shared water or food with weakened border crossers.²⁴⁰ Drug smuggling has moved eastward, injecting criminal activity and violent actors into tribal lands.²⁴¹ They have, in some tragic instances, induced tribal members to join their smuggling enterprises.²⁴² Additionally, along the border there are federal public lands where the conservation projects and restoration of habitat for endangered species, like the jaguar, are now facing termination because of plans to build massive walls rhetorically misnamed as “fences.”²⁴³ Along with prior problems at the border, these post 9/11 border policies have had devastating impacts and have renewed the Tohono O’odham’s objective to seek a political remedy in the U.S. Congress.

²⁴⁰ *Id.*; see generally Sylvia Moreno, ‘Shadow Wolves’ Prowl the U.S.-Mexico Border, *American Indian Offers Use Traditional Methods of Tracking to Try to Capture Drug Smugglers*, WASH. POST, May 6, 2007, at A6, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/05/AR2007050500771.html> (last visited June 15, 2009).

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ Jeffrey P. Cohn, *The Environmental Impacts of a Border Fence*, BIOSCIENCE, Jan. 2007, at 96; Amy Leinbach Marquis, *Fenced In: New Efforts to Secure the Nation’s Border Pose Serious Threats to Wildlife*, NAT’L PARKS, Mar. 22, 2008, at 12; Associated Press, *Environment – MSNBC.COM, Immigration Fence Seen as Dead End for Wildlife*, available at <http://www.msnbc.msn.com/id/1878833>; Emil B. McCain & Jack L. Childs, *Evidence of Residence Jaguars (Panthera Onca) in the Southwestern United States and the Implications for Conservation*, J. OF MAMMOLOGY, Feb. 1, 2008, at 1; James Pinkerton, *Critics Rake Plan to Speed Up Border Fence*, HOUS. CHRON., Apr. 2, 2008, at A9; Eileen Zimmerman, *Border Protections Imperil Environment: Last Wilderness Area South of San Diego Could Be Damaged*, SAN FRAN. CHRON., Feb. 27, 2006, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/02/27/MNG2GHFBFL1.DTL&type=printable>; David Stout, *Justices Refuse Checks on Border Fence*, N.Y. TIMES, June 24, 2008, available at http://www.nytimes.com/2008/06/24/washington/23cndscotus.html?_r=1&pagewanted=print; Eileen Sullivan, *Court Dismisses Border’s threat to Environment/Supporter of U.S.-Mexico Fence Calls It National Security Victory*, PRESS OF ATLANTIC CITY, June 24, 2008, at A3.

C. The Tohono O'odhams' Political Request to the U.S.: Make it Right Campaign

The cumulative problems at the border have again pushed the tribe to seek a Congressional solution and obtain a new political discourse. Previously in 1987, Morris Udall, the Democratic Representative of the State of Arizona (D-AZ) responded to the tribe, his constituents, by introducing a bill to resolve some past problems. The bill provided for the "establishment of a roll of the Tohono O'odham Indian people and clarify certain of their rights."²⁴⁴ Under the bill's provisions, the members whose descent qualified them for the tribal rolls, under standards set by the Tohono O'odham, would be entitled to freely cross the border and to live and work in the U.S.²⁴⁵ The 1987 bill did not succeed and a subsequent bill was introduced in 2001.²⁴⁶ The bill in 2001 aimed to clarify the citizenship eligibility of certain members of the Tohono O'odham.²⁴⁷ The 2001 bill did not get passed by Congress.

The Tohono O'odhams' goal of a Congressional act to affirm their border crossing rights and their citizenship status is not unusual, as other tribes have sought, and, in some instances, succeeded in obtaining relief. The Texas Kickapoo Band obtained special legislation in 1983 that allowed them to freely cross the border permanently.²⁴⁸ Their communities are centrally located in Eagle Pass, Texas, and Nacimiento in Mexico, their destination after removal from the Great Lakes area of the U.S.²⁴⁹ The Kickapoos' travel cycle goes beyond Texas to rejoin Kickapoos in Oklahoma.²⁵⁰ The 1983 Act made permanent the border-crossing right previously addressed by Immigration and Naturalization Services (now

²⁴⁴ H.R. 2506, 100th Cong. (1987). *See also* Ozer, *supra* note 220, at 716.

²⁴⁵ *Id.*

²⁴⁶ H.R. 1502, 107th Cong. (1st sess. 2001).

²⁴⁶ *Id.*

²⁴⁷ H.R. 1502, 107th Cong. (1st sess. 2001).

²⁴⁸ Texas Band of Kickapoo Act, Pub. L. No. 97-429, 96 Stat. 2269 (codified at 25 U.S.C. § 1300b-13 (1983)).

²⁴⁹ Velarde Tiller, *supra* note at 209 (describing Kickapoo Tribes, history, and movement between Mexico and the U.S. in Oklahoma and Texas).

²⁵⁰ Kickapoo Act, *supra* note 248.

subsumed into DHS) and its flexible practice of issuing border-crossing cards to the Kickapoo.²⁵¹ The Act did not recognize or grant U.S. citizenship, but allowed for five years after a roll of members was established, the Kickapoo individuals could apply for U.S. citizenship.²⁵²

In 2001, the Tohono O'odham again sought Congressional legislation and began their "Make it Right" campaign. This campaign aimed to change the social perception of the tribe's members as "aliens" and to use political means to enforce that members must be treated as citizens of the U.S. Representative Ed Pastor (D-AZ) introduced the Tohono O'odham Citizenship Act in June of 2001.²⁵³ The bill would directly make a tribal member listed on the official membership rolls a citizen of the U.S. The Tohono O'odham's valid membership credential would be considered equivalent to the certificate of citizenship issued under the Immigration and Nationality Act or of a State-issued birth certificate.²⁵⁴ However, it would not provide derivative benefits to relatives of the individual member. This bill attracted some ninety co-sponsors.²⁵⁵ In conjunction with the bill's introduction, the tribe embarked on the "Make it Right," campaign to create public understanding and support for the bill.

Members working on the "Make It Right" campaign went to Washington, D.C., with their briefing books, buttons, and skills of persuasion to tell their stories.²⁵⁶ They re-framed immigration discourse with their history and stories. This re-framing was necessary so that outsiders and policy makers could understand the harm being done to the Tohono O'odham. The campaign obtained national media coverage, from major newspapers and received

²⁵¹ See Ozer, *supra* note 220, at 710 (explaining a brief account of the Kickapoos' experience).

²⁵² Kickapoo Act, *supra* note 248.

²⁵³ H.R. 2348, 107th Cong. (2001).

²⁵⁴ *Id.*

²⁵⁵ H.R. 2348 had 122 cosponsors.

²⁵⁶ See generally Courtney E. Ozer, *Make it Right: The Case for Granting Tohono O'odham Nation Members U.S. Citizenship*, 16 GEO. IMMIGR. L.J. 705, 718-19 (2002).

endorsement of the leading Arizona newspapers for the passage of the bill.²⁵⁷ Tribal members in all the four categories of the Tohono O’odham who experience hardship in crossing the border (previously summarized) told their stories to make the reality of their lives understandable to outsiders. Simply labeling them as foreigners from Mexico or undocumented immigrants did not capture what is involved in the relationship between sovereigns that the Tohono O’odham have with the U.S. They are beneficiaries of the Treaty of Guadalupe Hidalgo and have maintained a nation-to-nation relationship with the U.S. Government. Yet, they were treated as “illegal aliens” even though their ancestors were on the borderlands before the U.S. or the border existed.²⁵⁸ They wanted to change this categorical misperception to one that formally treats members as citizens of the U.S.²⁵⁹

Objection to the bill came from Representative Jim Kolbe (R-AZ) who supported the part allowing for free border crossing, but not that the Tohono O’odham members should be granted U.S. citizenship.²⁶⁰ Allowing the official tribal membership documents to establish who could qualify, for Representative Kolbe, would remove the control over citizenship away from the Department of Justice or the Department of State.²⁶¹ That the Department of Interior would be required to approve the tribal membership did not suffice for Representative Kolbe, though this Department is charged with the federal recognition and membership matters of American Indian

²⁵⁷ See, e.g., Ken Ellingwood, *Tribes Are Caught on the Border*, L.A. TIMES, May 8, 2000, at A1; Editorial, *Citizenship for all Members: An American Tribe Yearning for Justice*, ARIZ. REP., Sept. 22, 2001, at B6; Editorial, *The Burden of a Boundary*, ARIZ. DAILY STAR, May 18, 2000, at 2.

²⁵⁸ See prior discussion of rhetorical terminology that distances and makes persons “the other,” the alien.

²⁵⁹ The most recent legislative efforts to help the Tohono O’odham were H.R. 731, 108th Cong. (1st Sess. 2003) and H.R. 1333, 108th Cong. (1st Sess. 2003); neither bill passed.

²⁶⁰ Robert Gehrke, *U.S. Borders Vexing for Bi-Country Tribes*, L.A. TIMES, Aug. 12, 2001, available at <http://articles.latimes.com/2001/aug/12/local/me-33245>; Tim Vanderpool, *A Tribe’s Tale of Three Identities*, CHRISTIAN SCI. MONIT., Apr. 30, 2003, available at <http://www.csmonitor.com/2003/0430/p0430/p02s02-usgn.html>.

²⁶¹ Gehrke, *supra* note 260.

tribes. In both the tribe's and the Representative's views there is a common concern: the right of a sovereign to determine who qualifies for membership or citizenship. In telling their stories, the Tohono O'odham demonstrated that, in fact, their members had historically been accepted as and functioned as U.S. citizens.

Pablo Lewis, a Tohono O'odham elder, had one of the most persuasive of the personal stories documented and revealed in the "Make It Right" campaign. Lewis was born on the Mexican side with a traditional at home birth and he did not have a birth certificate. His family went to the U.S. side where he attended school. After graduation, during World War II, he enlisted in the U.S. Army.

We studied the war in school and I wanted to help. I was a corporal in the Second Armored Division and I was stationed in Germany. I earned a Good Conduct Medal. The Army asked me to stay on [. . .] but I said to the Army people, no, no, I have go to my home in the land of the cactus.²⁶²

Later in life, Pablo Lewis encountered problems because of his lack of a birth certificate.

I have worked hard all my life but I can no longer work. Recently I went to Social Security to get my benefits. The Social Security lady asked me for my birth certificate. This was the first time in my life that anyone asked me for my birth certificate. When I enlisted in the Army, they never asked me. When I worked for the federal government, they never asked me. When I first got my social security card, they never asked me. [. . .] Now I worry. I worry that my Social Security might not get straightened out. I worry that the U.S. Border Patrol might make me leave.²⁶³

Pablo's story is not unusual as many Tohono O'odham and members of other tribes served in the U.S. military in World War II

²⁶² IT IS NOT OUR FAULT, *supra* note 203, at 76-77; Ozer, *supra* note 220, at 714.

²⁶³ IT IS NOT OUR FAULT, *supra* note 203, at 77.

and other conflicts.²⁶⁴



While Pablo Lewis' story has a poignant historical quality that engenders a demand for fairness, the contemporary generation of Tohono O'odham members face similar problems, as the Tohono O'odham Citizenship Act did not pass. Subsequent efforts to obtain a congressional act to resolve the tribe's problems were unsuccessful also.²⁶⁵ Congress has its own reasons, not explainable, for refusing to act. Yet the difficulties for members continue among the new generations.

One woman's story tells how from Head Start²⁶⁶ through graduation from an Arizona College in 1999, Francina Francisco had

²⁶⁴ Carmen Duarte, *Tohono O'odham: Campaign for Citizenship; Nation Divided*, ARIZ. DAILY STAR, May 30, 2001, <http://www.azstarnet.com/tohono/> (photo by Jeffry Scott/Arizona Daily Star, 2001).

²⁶⁵ H.R. 731, 108th Cong. (1st sess. 2003); H.R. 1333, 108th Cong. (1st sess. 2003).

²⁶⁶ A federally funded pre-kindergarten program to prepare children for school.

managed without a birth certificate. She was born in Mexico in Magdalena.²⁶⁷ She was named after St. Francis as she was born unexpectedly on his feast day when Tohono O'odham gather in Magdalena for this event.²⁶⁸ Community health workers traveled from Sells, the Nation's capital in Arizona, to bring mother and child north to their home.²⁶⁹ Mother and child crossed the border as U.S. citizens on this return.²⁷⁰ After college, she attempted to join the military service, but was denied, as she was unable to prove that she is a U.S. citizen.²⁷¹ Francine's mother recounts that her daughter was inspired by her grandfather and talked to military recruiters about joining the service: "[S]he could not prove she is an American citizen. Francine's dream to follow Grandfather's footsteps in the military would not come true."²⁷²

Another young woman, Silvia Parra, graduated from the University of Arizona and then sought to enter graduate school.²⁷³ However, Silvia was blocked as she could not produce proof of her citizenship, as Silvia's mother was unable to prove U.S. citizenship or residency.²⁷⁴ Shortly after Silvia's birth in Sonoyta (south of the U.S. border), mother and child entered the U.S. as citizens.²⁷⁵ Upon being denied opportunity for a graduate education, Silvia stated:

I was angry. From one day to the next, I went from being a life-long American citizen to being categorized as an "illegal alien" by the United States. I faced deportation. I have lived in the United States since I was seven days old. My mother, Maria Refugio Parra, is a United States born citizen. I do not understand this injustice. Was it because

²⁶⁷ IT IS NOT OUR FAULT, *supra* note 203, at 80.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.* at 81; Ozer, *supra* note 220, at 715.

²⁷² IT'S NOT OUR FAULT, *supra* note, at 81-82.

²⁷³ *Id.* at 82-83.

²⁷⁴ *Id.* at 82-85. Mother was told to prove her residency with utility bills, but she was born before utilities were provided to her birthplace.

²⁷⁵ *Id.* at 82.

my family was O'odham?²⁷⁶

Other Tohono O'odham members, U.S. citizens, tell stories of traveling north to obtain medical care, but then being turned back by the U.S. border officials.²⁷⁷ The Reyes Salcido family attempted to take a sick daughter to the Indian Health Hospital in Arizona, the government health service for members of federally recognized tribes. Salcido recounts the experience when “[t]he Immigration officials yelled at me and said my birth record was no good and they would not let me cross the line. They said I was violating the law . . . It hurts me a lot when O'odham are called ‘illegals.’”²⁷⁸ These sample stories all demonstrate why the U.S. laws and federal practices at the southern border must be changed to stop abusive and inhumane treatment of the members of transnational nations.

At the Mexico-U.S. border, the indigenous transnational communities are entitled to have unnecessary barriers removed from their lives and this is not an insurmountable task. First, the amelioration of the current physical and procedural barriers is manageable for the distinct tribes²⁷⁹ as they do not have large memberships. The fear of hordes overrunning the border must confront the facts. Second, the tribes have their own interests in preventing false claims of membership as they aim to recognize as members, only those with the requisite descent and qualifications.²⁸⁰

²⁷⁶ IT'S NOT OUR FAULT, *supra* note 203, at 81-82.

²⁷⁷ IT'S NOT OUR FAULT, *supra* note 203, at 18-20 (statement by Reyes Salcido).

²⁷⁸ *Id.* at 20.

²⁷⁹ National Congress of American Indians (NCAI), to U.S. Customs and Border Protection, Office of International Trade, Office of Regulations and Rulings: Comments to Notice of Proposed Rulemaking (NPRM): Documents Required for Travelers Departing From or Arriving in the United States at Sea and Land Ports-of-Entry From Within the Western Hemisphere (WHTI-LAND REGS) (2007), available at [http://www.ncai.org/ncai/whti/NCAICommentsWHTINPRM August2007FINAL.pdf](http://www.ncai.org/ncai/whti/NCAICommentsWHTINPRMAugust2007FINAL.pdf) (last visited June 16, 2009). “The argument that there are too many Tribes is no excuse. There are nearly 200 countries in the world. It would be unacceptable for the United States to suggest consolidation of their governmental identification.” *Id.* at 8. Among most affected southern tribes are the Kickapoo in Texas, the Pascua Yaqui in southern Arizona, the Kumeyaay Tribe in Baja, California, and the Tohono O'odham.

²⁸⁰ *Id.* at 16-17.

As a priority interest, tribes protect the integrity of their cultural identity. Then, there are economic resources to be shared among members so tribes must ensure that only members are allocated the tribal benefits. Some tribes use identification cards (IDs), but even these may be fraudulent.

Tribal ID cards have no more or less likelihood of being fraudulently copied or accessed than any other government ID, they need to be protected equally. Tribal ID cards are closely guarded by Tribes in general. Not necessarily because of this border crossing discussion, but because with those cards comes a number of Tribal governmental benefits as well, including housing and health care. Tribal ID safety and fraud is not taken lightly and there are already federal and Tribal criminal laws in place regarding document fraud.²⁸¹

Who can present himself or herself as a member at the border is not a minor concern for tribes.

In the most significant U.S. effort to affect life and conduct at the border, on June 26, 2007, the DHS issued the proposed Western Hemisphere Travel Initiative (WHTI) regulations to cover all who enter and return at U.S. borders, including the transnational tribes.²⁸² The National Congress of American Indians (NCAI) made a lengthy response on behalf of all tribes to this notice of proposed rulemaking, as did numerous tribes who detailed the specific burdens for these tribes and their geographical situation.²⁸³ The NCAI and the tribes offered cooperative responses on some issues, especially where the

²⁸¹ NCAI, *supra* note 279, at 17.

²⁸² Documents Required for Travelers, *supra* note 95, at §§ F-H (proposing rules that also cover all persons who enter or leave the United States, i.e., U.S. mandates a passport for everyone vacationing in Mexico, Canada, Bermuda or the Caribbean when previously the U.S. did not require a passport).

²⁸³ NCAI Tribal Responses, *supra* note 95; *see generally* U.S. Customs and Border Protection, *CBP and Idaho's Kootenai Tribe Sign Memorandum of Agreement to Develop Enhanced Tribal Card*, CBP News Release, Mar. 3, 2009, available at http://www.cbp.gov/xp/cgov/newsroom/news_releases/march_2009/03032009_4.xml (last visited June 15, 2009) (describing the WHTI proposed rulemaking where DHS received 42 comments, reflecting primarily those tribes within the northern and southern border regions).

tribal governments had already increased the validity and security of their tribal identity document.²⁸⁴ There were also critical tribal responses anchored in the failure of DHS to respect and comply with treaties, statutes, and regulations that require proper notice, consent or consultation with the tribes. The National Congress of American Indians has consistently protested the U.S. failure to consult or honor treaty provisions.²⁸⁵

On April 3, 2008,²⁸⁶ DHS issued the final WHTI rules: “Under the final rules, tribal enrollment or identification cards from a Federally-recognized tribe or group of federally-recognized tribes will be permitted for use at entry at any land-port of entry when arriving from a contiguous territory, if designated by the Secretary of Homeland Security.”²⁸⁷ Recently, DHS has clarified that the tribal identity document must have a photo affixed, and that this is a transitional arrangement, subject to when the tribes and DHS reach agreement on an “Enhanced Tribal Cards” (when available).²⁸⁸ DHS rejected tribal suggestions on some factors that will continue to complicate and burden the lives of tribal people.²⁸⁹ The development

²⁸⁴ NCAI Tribal Responses, *supra* note 95.

²⁸⁵ See, e.g., National Congress of American Indians (NCAI) Wraps up Mid-Year Conference; Border Resolutions Highlighted, June 21 2006. <http://www.ncai.org/National-Congress-of-American.19.0.html>. The WHTI and the Tribal responses are the focus of a pending article by Valencia-Weber.

²⁸⁶ *Documents Required for Travelers Departing From or Arriving in the United States at Sea and Land Ports-of-Entry From Within the Western Hemisphere*, 73 Fed. Reg. 18,384 (Apr. 3, 2008) (to be codified at 8 C.F.R. pts. 212 and 235, and 22 C.F.R. pts. 41 and 53).

²⁸⁷ U.S. Dept. of Homeland Sec., *Privacy Impact Assessment for the Western Hemisphere Travel Initiative Land and Sea Final Rule*, March 24, 2008, [http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_cbp_whit\)landandsea_fr.pdf](http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_cbp_whit)landandsea_fr.pdf) (last visited June 16, 2009); see also www.dhs.gov/xlibrary/assets/privacy/privacy_pia_cbp_whti_landandsea_fr.pdf (last visited June 16, 2009).

²⁸⁸ Letter from Juliette Kayyem, Assistant Secretary for Intergovernmental Programs, U.S. Department of Homeland Security, to Heather Dawn Thompson, Director of Government Affairs, National Congress of American Indians (May 15, 2009), available at <http://turtletalk.files.wordpress.com/2009/06/homeland-security-letter.pdf>.

²⁸⁹ See *Documents Required for Travelers Departing From or Arriving in the United States at Sea and Land Ports of Entry from Within the Western*

of an Enhanced Tribal Card, developed by DHS and specific tribal collaboration, is the projected future means to ease tribal peoples' travel across the border.²⁹⁰ The Department of State and Federal Government were unprepared to meet the demands for U.S. passports from the general population.²⁹¹ Full enforcement of the WHTI regulations was delayed until June 1, 2009. Now begins the implementation of what the U.S. considers the proper methods to protect national security while regulating the border crossings that indigenous people make for ordinary life's needs.

Most important for the tribes and the U.S., it is time for the U.S. to restore and strengthen the nation-to-nation relationship with the tribes that was promised in treaties that neither the indigenous sovereigns nor the U.S. have abrogated. Respect for the tribes' authority to define their membership to continue their culturally distinct way of life should be manifested in how U.S. procedures at its southern border actually operate. *Tribes want their official member identification to suffice for border passage, without the added physical obstructions, procedural complications, and expense of passports or other federal documents that the U.S. wants to require.* The U.S. performance of good faith to enable cross border tribes or the lack of such conduct fits in the insight of Felix S. Cohen

Hemisphere, 73 Fed. Reg. 18384, 18391 (Apr. 3, 2008) (to be codified at 22 C.F.R. pts. 212 & 235) (showing that passport fee waivers for Indian Tribal Members were denied). *Id.* at 18391 (discussing U.S. Native Americans and Canadian Indians rejecting the "multitude of documents" issued by many Canadian First Nations and privacy concerns where information is requested from tribes but not requested from other state or government entities).

²⁹⁰ Joanne Ferreira, *U.S. Custom and Border Protection, CPB and Idaho's Kootenai Tribe Sign Memorandum of Agreement to Develop Enhanced Tribal Card* (Mar. 3, 2009), http://www.cbp.gov/xp/cgov/newsroom/newsreleases/march2009/03032009_4.xml (last visited June 16, 2009); see also Office of the Press Secretary, U.S. Department of Homeland Security, *Secretary Napolitano Announces Tribal Consultation Policy* (Mar. 3, 2009) (announcing a "first ever" policy with open and continuous communication with tribes and appointment of Intergovernmental Programs officer for tribal relationships.), www.dhs.gov/ynews/releases/pr_1236118838765.shtm (last visited June 16, 2009).

²⁹¹ *Passport Delays: Affecting Security and Disrupting Free Travel and Trade: Hearing Before the H. Committee on Foreign Affairs, 110th Cong.* (2007), available at <http://foreignaffairs.house.gov/110/36725.pdf>.

that “[l]ike the miner’s canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, more than our treatment of other minorities, reflects the rise and fall in our democratic faith.”²⁹² No one disputes that the international political climate has greatly changed with the terrorists’ attacks on 9/11. Collaterally, numerous federal and constitutional law controversies have erupted in response to how the U.S. protects national security in the ways it treats its citizens and foreign nationals. Yet 9/11 and its related events do not change the historic obligations of the U.S. to comply with treaties and understandings with the indigenous nations, to correct past breaches, and to build a twenty-first century relationship that benefits both the U.S. and the original sovereigns in the Americas.

VII. Conclusion

The polarized debates in the U.S. about immigration have generated stories about the border, which have created mental frameworks on the subject. This article has tried to demonstrate that the mental frameworks, while shaping perception, do not reflect reality. Mexican citizens, U.S. citizens, and policy makers should reevaluate these frameworks. This article has proposed a method to restructure the discourse and focus on border realities rather than rhetoric. We have suggested mindful consideration of the word choice and conceptualization that shows up in the collective narratives. The stories of individuals show that some critical elements have been omitted in the popular discourse.

The real life experiences of individuals affected by how immigration law is enforced should inform how policy and law are made. Congressional hearings on immigration can become more than a strategizing opportunity for members of congress, officials, and lobbyists with an agenda. After the failure of the 2007 legislative attempts to reform or restructure immigration, the House of Representatives’ Judiciary Committee held hearings to review its

²⁹² Felix S. Cohen, *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy*, 62 *YALE L.J.* 348, 390 (1953).

proposed bill, H.R. 1645, the Security Through Regularized Immigration and a Vibrant Economy Act of 2007 (STRIVE Act).²⁹³ The panelists offering testimony included House Members, lobbyists for organizations that supported and objected to significant reform of current immigration law and private individuals.

The individual citizens and legal permanent residents revealed how their families had been dismembered because a spouse or family member who was eligible for legal status or had been denied a proper hearing, was erroneously deported. One citizen, preparing for his third tour of duty in the Gulf region, had his wife deported while the husband was still on duty overseas.²⁹⁴ However, one House Member, Steve King (R-Iowa) criticized these individuals for their stories because they did not sufficiently stress being a part of the U.S. community in their testimony.²⁹⁵ Another House member, Luis V. Gutierrez (D-Ill.) intervened so that the private individuals had the opportunity to reject the accusations of insufficiently joining the “greater American culture.”²⁹⁶ One individual was successful as a legal permanent resident (LPR) in creating a business and applying for citizenship, yet his wife and six year old son were deported.²⁹⁷ Representative Gutierrez also asked, “what greater sacrifice and what greater tax can a citizen pay than the tax of their body and the tax of their blood, as Petty Officer Gonzalez has done and continues to do for each and every one of us?”²⁹⁸ The Interpreter Releases account of this post-mortem on the 2007 legislative failure also reveals the perceptions of immigrants as criminals and outsiders that do not budge when facts of real immigrants’ lives are revealed in the same room.²⁹⁹

²⁹³ House Immigration Subcommittee Holds Hearing on STRIVE Act, 84 No. 36 Interpreter Releases 2109 (Sept. 17, 2007) (stating that the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law held a hearing on September 7, 2007 where the House passed its STRIVE Act, but the Senate had failed to pass any legislation).

²⁹⁴ *Id.* at 2112-113.

²⁹⁵ *Id.* at 2114.

²⁹⁶ *Id.*

²⁹⁷ *Id.* at 2112.

²⁹⁸ *Id.* at 2114.

²⁹⁹ See Julia Preston, *White House Plan on Immigration Includes Legal Status*,

As immigration law reform begins another cycle of public discourse under President Obama, an understanding about how that discussion is being framed is crucial. Homeland Security Secretary Janet Napolitano has framed the Obama position. She has laid out a “three legged” stool involving tougher immigration enforcement, a streamlined system for immigration, and a “tough and fair pathway to earned legal status.” Her metaphor of a stool implies balance and stability. Her political agenda is less anti-immigrant and is focused on national security. It also makes the case that it protects American workers from unfair competition from easily exploitable undocumented workers. Her audience is clearly American. The “stool” seems designed to calm emotion. For the public discourse and the debate in the legislative and executive branch, speakers should exercise an awareness of the political and social connections, audience, and emotional response. In order to “re-frame” issues we suggest that: (1) stories and narratives be understood in their historical context, (2) appropriate data be used to evaluate, (3) the underlying values be considered, and, finally, (4) lived experience be respected and used as a source for shaping policy. We believe that framing and “re-framing” the stories and narratives can enhance understanding and shape better public policy.

N. Y. TIMES, Nov. 14, 2009; *see also* Rob Capriccioso, *Tribes Dissatisfied with Obama's Border Policy*, INDIAN COUNTRY TODAY, Sept. 8 2009, available at <http://www.indiancountrytoday.com/national/57700447.html>.