

## Arrest, Incarceration, and Deportation? Or Open Borders?

By Robert F. Barsky<sup>1</sup>

*“I find borders sort of arbitrary and bizarre... I find the whole idea morally repugnant. Particularly, it should not be a crime to try to feed your family.”*

--Lawyer in Tennessee<sup>2</sup>

*“Boundary enforcement as it is now applied inevitably feeds into the systems of exclusion that are antithetical to human rights, to liberalism, and to anti-racism. Immigration patrol is part and parcel of this system of exclusion that inevitably produces inequality and leads to uncertain circumstances of life and death and that are basically the same thing as racism. We are telling people that on the basis of where they were born, something they can’t change, that: “You are not allowed to come here, or if you are allowed to come here, you are going to come here under shitty conditions, and we are going to make your life hell”. How different is that from Jim Crow? Because we do it on the basis of nationalism it’s okay?”*

--Activist scholar

On December 16<sup>th</sup> of 2014, as we were preparing to go to press with this issue devoted to irregular migration, Federal District Court Judge Arthur J. Schwab handed down a decision in the sentencing phase of a criminal case in which he ruled that the Obama Executive Order (E.O.) that will allow for millions of illegal immigrants to remain in the country (temporarily) is unconstitutional. One of the many problems with this widely-reported ruling was that the Judge was never asked his opinion on Obama’s E.O., and the issue wasn’t raised during the hearing because it wasn’t in any way pertinent to the case. Rick Ungar of Forbes Magazine<sup>3</sup> commented:

This was a criminal matter and the Executive Order specifically, and with great clarity, prohibits anyone who recently came across the border illegally to avail themselves of the benefits of the E.O. Considering that this defendant had plead guilty to doing precisely that—recently coming across the border illegally—there really wasn’t any reason to worry about either the constitutionality nor the applicability of the Executive Order.

In making his ruling and adding this commentary, Schwab became the first federal judge to provide an opinion on the E.O., and as such he managed to garner considerable press in what promises to remain an contentious issue for the years that remain in the Obama Presidency. The proclamation is, however, totally unrelated to the case. The defendant in question would not have had any recourse under the E.O., because under Obama’s plan amnesty would never be granted in such cases. In response to the Schwab ruling, the Justice

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<sup>1</sup> This article was reloaded into the Open Journal system subsequent to software issues that deleted footnotes, shifted formatting, and in some cases posted earlier versions of the articles in this issue.

<sup>2</sup> This and the following quote come from interviews I undertook with experts in the area of undocumented immigrants for a book called *Undocumented Immigrants in an Era of Arbitrary Law*, forthcoming in the summer of 2015 from Routledge Law.

<sup>3</sup> <http://www.forbes.com/sites/rickungar/2014/12/17/federal-judge-declares-obama-immigration-executive-order-unconstitutional-problem-is-nobody-asked-for-his-opinion/4>

Department noted: “No party in the case challenged the constitutionality of the immigration-related executive actions and the department’s filing made it clear that the executive actions did not apply to the criminal matter before the court.”

Schwab’s comments came as little surprise, firstly because he is a rogue judge who is often misusing his powers, as Ungar makes clear, but also because this issue and this E.O. are hot-button issues amongst borders. It is not the case, as those who oppose Obama on this claim, that this President has been particularly kind to undocumented immigrants. Even in spite of his June 15, 2012 decision *not* to enforce the removal provisions of the Immigration and Nationality Act (INA) against an estimated population of 800,000 to 1.76 million individuals illegally present in the United States, the Obama White House had been more active than any other in deporting people.

The Obama administration has made historic improvements to border security and immigration enforcement, leading to “record” numbers of deportations that surpass the performance of earlier administrations. In December 2012, John Morton, then-director of U.S. Immigration and Customs Enforcement (ICE), announced that his agency had removed nearly 410,000 illegal aliens that year. Major news outlets, pro-amnesty lawmakers, and other Obama administration allies heralded this apparent milestone as evidence that the border and illegal immigration were now under control.<sup>4</sup>

Even the Obama Administration itself doesn’t pretend that this issue is “under control”, and in fact the enormity of the current situation, involving an estimated 12 million undocumented people, led to Obama’s November 20<sup>th</sup>, 2014 Executive Order, which he described as follows:

[E]ven as we focus on deporting criminals, the fact is, millions of immigrants in every state, of every race and nationality still live here illegally. And let’s be honest — tracking down, rounding up, and deporting millions of people isn’t realistic. Anyone who suggests otherwise isn’t being straight with you. It’s also not who we are as Americans. After all, most of these immigrants have been here a long time. They work hard, often in tough, low-paying jobs. They support their families. They worship at our churches. Many of their kids are American-born or spent most of their lives here, and their hopes, dreams, and patriotism are just like ours. As my predecessor, President Bush, once put it: “They are a part of American life.”

Allying himself with Bush on this matter is politics, of course, likely aimed at those who would like to challenge the E.O. on the grounds that such renegade proclamations exceed the President’s mandate. But in the longer term, the E.O. was likely directed at a block of voters who, given the large number of Hispanic voters in the so-called swing-states, could make the difference between a Republican and a Democratic President. Obama explained the amnesty in terms that could best be described as realist:

Now here’s the thing: We expect people who live in this country to play by the rules. We expect that those who cut the line will not be unfairly rewarded.

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<sup>4</sup> <http://cis.org/ICE-Illegal-Immigrant-Deportations>

So we’re going to offer the following deal: If you’ve been in America for more than five years; if you have children who are American citizens or legal residents; if you register, pass a criminal background check, and you’re willing to pay your fair share of taxes—you’ll be able to apply to stay in this country temporarily without fear of deportation. You can come out of the shadows and get right with the law. That’s what this deal is.

The Order, which comes into effect immediately and lasts for three years, came in the wake of the defunct “Border Security, Economic Opportunity, and Immigration Modernization Act,”<sup>5</sup> passed by the Senate on June 27<sup>th</sup>, 2013. On July 3<sup>rd</sup>, the Congressional Budget Office and the staff of the Joint Committee on Taxation reviewed its impact on a range levels, related primarily to the US budget.<sup>6</sup> The review found that had it passed the House, where it was in fact never taken up, the Act would have changed how certain noncitizens who are currently unlawfully present in the US would become eligible for Social Security and Medicare benefits. From a pecuniary standpoint, it would have led to the appropriation of \$46.3 billion for expenses relating to the security of the southern U.S. border and initial administrative costs, as well as \$1.5 billion for an employment program for youth, it would have prohibited certain unauthorized work from counting towards eligibility for Social Security and Medicare benefits, and it would have resulted in fewer unauthorized residents in the country than projected. That reduction in population would, according to the predictions outlined in the report, reduce the taxes paid by, or on behalf of, unauthorized residents by \$3.2 billion over the 2014-2023 period. The review also predicted reducing the inflow of undocumented immigrants by between 1/3 and 1/2, but would also generate a 10 million person increase in the US population, mostly from Mexico, and that these changes would result in a decrease in federal budget deficits by roughly \$685 billion over the 2024-2033 period.

A broad range of media representations of the Bill drove the reception of this information by the US population, with the usual suspects lining up on either side of the debate. The defectors on either side, that is, Republicans who supported the bill and Democrats who opposed it, reflects a political landscape that is increasingly crowded with Latino voters, particularly in certain regions in the country; but the schism is also tied to historical arguments made by nativists, trade union activists and the English-only type xenophobic voters, variously present in different regions of the country. Surprisingly, at least from my perspective, was the dearth of information regarding the life that is being imposed upon a group of people who represent 5% of the total US population, equivalent to the totality of Asian Americans in this country<sup>7</sup>, or the effect that this new law would have on them and their families both in the US, and back home. This is a life in which 12 million people actively avoid law enforcement officials because they know that their life in the US can be cut short in an instant because they are at every moment “illegal”, and thus subject to arrest, incarceration, and deportation. This problem will not go away even if some version of the “Border Security, Economic Opportunity, and Immigration Modernization Act” is ever passed, which is unlikely, and Obama’s Executive order only applies to a small proportion of the overall undocumented population, and at this point only delays possible actions against them.

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<sup>5</sup> <http://www.govtrack.us/congress/bills/113/s744/text>

<sup>6</sup> <http://www.cbo.gov/sites/default/files/cbofiles/attachments/s744aspassed.pdf>

<sup>7</sup> <http://www.infoplease.com/us/census/data/demographic.html>

Virtually nobody from the so-called liberal to so-called conservative end of the spectrum suggested alleviating this problem by considering a more viable and long-term solution: opening the border between the United States and Mexico as a possible first step towards eliminating borders throughout the Americas, including of course the Northern border between Canada and the US. Or, even more to the point, there was no serious discussion about borders and border policy, in the US, in the Americas, and beyond, in an era in which the idea of open borders warrants serious consideration as an antidote to the systems of border adjudication, worldwide. By way of introduction to this issue of *AmeriQuests*, I want to address these lacunae by promoting and discussing ideas of eliminating the dysfunctional borders that bind us, and seek to reinforce this idea by pitting them against a much broader discussion about the experiences of undocumented people, les “sans papiers”. Unlike the current plan to legalize the existing undocumented population and then enforce stronger border controls, as we saw in the failed “Border Security” bill, open borders actually addresses the underlying issues relating to the movement of people, while remaining consistent with such objectives as of promoting free trade and reducing unemployment.

If we ever hope to actually address the problem of migration across our borders, we have to truly grasp how unworkable the system of adjudicating and managing borders is, and how outrageous it is that people seeking jobs in a so-called free trade (NAFTA) should be treated like dirt, an infestation that menaces the perceived integrity of the United States. If we truly consider the facts about undocumented people, it is my belief that the option of opening up our borders will seem not just logical, but doable, not just less repressive, but also beneficial to all parties concerned. In addressing these issues from what is arguably a more radical perspective than what is usually done, I am not considering some unachievable utopian or dystopian vision, but am rather proposing a more thorough evaluation of the current situation regarding immigration, illegal and otherwise, as well as the social and also financial consequences of a deeply punitive system of incarceration, deportation, and marginalization of vast, undocumented populations, around the globe.<sup>8</sup> In addition to the inordinate toll on the lives of decent, hard-working people, there are also massive pecuniary implications of continued tracking, arresting, investigating, and then incarceration and deportation of illegal immigrants that could be directed instead to job creation and integration rather than creating evermore victims of the punitive system.<sup>9</sup>

By way of illustration, it’s estimated that the apprehension, the legal process, and the eventual removal of undocumented people from the US costs around \$23,000 per person, and nearly 290,000 individuals were deported in fiscal year 2012 alone for a total of \$6,670,000,000.<sup>10</sup> The same problem can be found on the outer edges of the EU and in the United Kingdom, where the magnitude of the task is similarly huge. In 2013 alone, 50,741 people were removed from the United Kingdom, or else departed voluntarily after the initiation of removal. This represents an increase of 14.5% from 2012, and more than double

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<sup>8</sup> For some of the consequences of this growing trend, see: *The Oxford Handbook of Sentencing and Corrections*, edited by Joan Petersilia, Kevin R. Reitz, Oxford; NY, Oxford UP, 2012.

<sup>9</sup> see Dawn L. Rothe and David Kauzlarich, eds., *Towards a Victimology of State Crime*. London, Routledge, 2014. Of particular interest is chapter 6, “Victimizing the Undocumented: Immigration Policy and Border Enforcement as State Crime”, by Raymond Michalowski and Lisa Hardy.

<sup>10</sup> <http://money.cnn.com/2014/09/08/news/economy/deportation-by-the-numbers>.

the number from 2004.<sup>11</sup> Costly and elaborate tracking devices are driving people to ever more difficult border crossings, and we are seeing a growth in ever border deaths as this trend increases.<sup>12</sup>

A relevant historical precedent to loosening border restrictions and offering legal pathways towards employment outside of the country of citizenship was established by the [European Parliament and Council Directive 2004/38/EC](#), that allows citizens of EU member states to freely relocate and work across the broad spectrum of EU countries. The EU has done so without a massive increase in relocations, a significant rise in crime, or a diluting of the national character of member states.<sup>13</sup> Most people have a knee-jerk reaction to the idea of dismantling borders between states as different as Canada, the US and Mexico, or between countries as similar, but contested, as (say) Pakistan, India and Sri Lanka, or Palestine and Israel; but how shocking is this idea, really, when compared to today’s free movement between Germany and France, or Italy and Romania, or Ireland and the UK, considering the history of the 20<sup>th</sup> Century? In the context of North America it’s ironic, in fact, that Americans would have or feign concern about borders given how many people cross them each year (around 110,000,000), and how vast they are. “According to the U.S. Geological Survey (USGS), the length of the International Boundary line of the U.S.-Canadian border, excluding Alaska, is approximately 3,987 miles, while the length of the U.S.-Mexican border is estimated at 1,933 miles. The length of the Alaska-Canada border alone is 1,538 miles.”<sup>14</sup> The fact is, most of these borders cannot really be controlled, and efforts in this direction (walls, tracking devices, and so forth) are enormously expensive and cost inefficient. Furthermore, this entire tracking system has come to favor the wealthy border-crossers who have access to NEXUS, GOES and other costly systems. It will of course be argued that the EU system has proven a failure, in light of recent news about the Euro and delinquent countries (Portugal, Greece, Cyprus); but in fact, this is hardly attributable to opening the borders, and indeed the situation would likely be worse without the EU, and that it can be revised to the advantage of member states on the basis of what the euro crisis has taught us.<sup>15</sup>

Anti-immigrant, isolationist, nationalistic or patriotic arguments also fly in the face of history, and ignore early ideals of the Indian poet Tagore, Confucianism, the Islamic concept of the “*umma*”, and the early ideas of a “world empire” touted by Alexander the Great, or “universal morality” upheld in Greek Stoicism. More recently, we can reference the ideal of

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<sup>11</sup> <http://www.migrationobservatory.ox.ac.uk/briefings/deportations-removals-and-voluntary-departures-uk>

<sup>12</sup> “Border enforcement of immigration laws attempts to raise the costs of illegal immigration, while interior enforcement also lowers the benefits. Border and interior enforcement therefore reduce the net benefits of illegal immigration and should lower the probability that an individual will decide to migrate. While some empirical studies find that border and interior enforcement serve as significant deterrents to illegal immigration, immigration enforcement is costly and carries significant unintended consequences, such as an increase in fraudulent and falsified documents and rising border death rates as migrants undertake more dangerous crossings”.

<http://wol.iza.org/articles/enforcement-and-illegal-migration>.

<sup>13</sup> See the *Research Handbook on the Economics of European Union Law*, edited by Thomas Eger and Hans-Bernd Schäfer, Cheltenham UK; Northampton MA, 2012.

<sup>14</sup> <https://www.fas.org/sgp/crs/misc/RS21729.pdf>

<sup>15</sup> Hermann, Christoph and Mahnkopf, Birgit, “Still a Future for the European Social Model?”, *Global Labour Journal* 1.3 (2010): 314-330.

“world citizenship” described by Erasmus and Kant,<sup>16</sup> and a host of those very people now invoked to denounce free movement or free trade, people who in their lifetimes often touted both as part of their credo advocating freedom and promoting happiness. Thomas Jefferson in his instructions to Virginia delegates to the 1774 Continental Congress, declared that “[Nature] has given to all men [a right] of departing from the country in which chance, not choice, has placed them, [and] of going in quest of new habitations, and of there establishing new societies under such laws and regulation as, to them, shall seem most likely to promote public happiness”.<sup>17</sup> Noam Chomsky, recalling Adam Smith’s advocacy for free trade, notes that, “I agree with Adam Smith that free movement of people is a core component of free trade.” This is a crucial point, because many more people are in favor of “free trade” than open borders, even though the latter is implicit in the former, at least for the workforces of the respective countries; moreover, “open borders” do exist in otherwise very restricted areas, such as NAFTA countries, but only for goods and capital. Chomsky notes the irony, and states that “as for free movement of capital, that’s a totally different matter. Unlike persons of flesh and blood, capital has no rights, at least by Enlightenment / classical liberal standards.”<sup>18</sup> And finally, of course, there are Articles 12 and 13 of the Universal Declaration of Human Rights, which serves as the very basis of most of the international conventions pertaining to human rights to which most countries of the world are signatory.

By invoking the European Union, and recalling the likes of Adam Smith, who we consider the touchstone for capitalism, or Thomas Jefferson, the bedrock of American foundational thinking, I aim to demystify and validate the possibility of at least imagining a cosmopolitan world, a world without national borders, and then to propose this solution as a legitimate and all-encompassing approach to the abhorrent situation that prevails. By contrast, the “Border Security, Economic Opportunity, and Immigration Modernization Act,” that includes such ideas as doubling the number of border officials charged with securing the US-Mexico border in the modest hope of a decline in numbers of newly-arrived undocumented people, I would also note that even the passage of substantial immigration reform will *not* address the underlying question of enforcing or legitimizing our borders, and will *not* significantly change how undocumented immigrants will be treated in the future beyond the larger border guard presence.

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<sup>16</sup> Kant is of particular interest since his views can be directly applied to those who have crossed borders without requisite papers, including undocumented immigrants and Convention refugees, through his approach to *hospitality*. “Speaking of cosmopolitan citizens in the beginning led us to Kant, which leads us in turn to an interesting notion: that of a right to hospitality. If we look at the reality of border detention camps, where basic conditions of human rights are usually absent, it appears palpable that Kant’s idealism does not materialize except on a discriminatory basis. Kant argued that “cosmopolitan rights shall be limited to conditions of universal hospitality” (Kant, “Perpetual Peace”, quoted in Brown, C., *International Relations Theory: New Normative Approaches*. London: Harvester Wheatsheaf, 1992 p. 37). As Kant argues, while it might be good that foreigners be granted the opportunity to settle within a state or conduct other activities, the only thing they have a right to is hospitality. They may be turned away, without this causing their death, but so long as they behave peacefully, they should not be treated with hostility (see Kant *Perpetual Peace: A Philosophical Essay*, tr. Campbell Smith. New York and London: Garland, 1972: 137-8).”

<sup>17</sup> Jefferson, Thomas]. *A Summary View of the Rights of British America. Set Forth in Some Resolutions Intended for the Inspection of the Present Delegates of the People of Virginia. Now in Convention. By a Native, and Member of the House of Burgesses*. Williamsburg: Printed by Clementina Rind, [1774].

<sup>18</sup> <http://www.chomsky.info/interviews/2006----.htm>

Many critics support border controls and modest improvements to the existing system because they consider that the free circulation of people across borders in the current juncture to be utopian. Open border would indeed require substantial efforts, particularly in the realm of integration of new populations, but I think that advocating for this idea helps foster a fecund *attitude* in regards to borders; just as we have developed an attitude of free circulation of goods in “free trade” zones like NAFTA, AFTA, APTA, SICA, CEFTA, COMESA, G-3, GCC, SAFTA, SADC, MERCOSUR and TPP (to name but a few). If our attitude is consistent with approaches to free trade that envision the free circulation of workers and the goods that they produce, for example, then we find that the European Union, despite its many flaws, is a reasonable *starting point* for considering new attitudes towards the movement of workers across borders. And if we go beyond workers, we might suggest that everyone should be able to freely circulate inside of their country of origin, and also have the right to leave any country, including their own, and to return to that country. An attitude that favors the free movement of all people has a long history and some significant support in a host of communities (see the compendium of work assembled at <http://openborders.info/immigration-and-trade>). Incidentally, the idea that everyone should be able to circulate across borders is taken almost verbatim from Article 13 of the Universal Declaration of Human Rights, which states, quite simply, that “Everyone has the right to freedom of movement and residence within the borders of each State. Everyone has the right to leave any country, including his own, and to return to his country”. In other words, this utopian-sounding doctrine is part of international law, adopted by the United Nations General Assembly on December 10<sup>th</sup>, 1948 in the course of a General Assembly meeting in Paris. Eight nations abstained from that vote, but not one dissented. One of the members of the drafting sub-Committee was Hernán Santa Cruz of Chile, who wrote:

I perceived clearly that I was participating in a truly significant historic event in which a consensus had been reached as to the supreme value of the human person, a value that did not originate in the decision of a worldly power, but rather in the fact of existing—which gave rise to the inalienable right to live free from want and oppression and to fully develop one’s personality. In the Great Hall...there was an atmosphere of genuine solidarity and brotherhood among men and women from all latitudes, the like of which I have not seen again in any international setting.<sup>19</sup>

Instead of upholding the general principle of free movement that this Declaration takes as a kind of founding principle, most people support the kind of rigid and inflexible borders that led to the need for the Convention in the first place (World War II), and continue to foster the current international crises surrounding undocumented or “illegal” people.

Perhaps this issue of *AmeriQuests* will foster new attitudes towards irregular migration if readers situate the contributions in regards to political catchwords, such as “family values”, “humanism” and the intentions of the American “founding fathers”, or the objectives of “international law”. These realms may help us to identify a common set of criteria that most people, on a rather broad political range, will find acceptable. For example, most people in the world valorize keeping families together, and as such they look for ways to facilitate the active participation of both parents in the lives of their children. Most people also see the importance of educating people of all ages, in particular children, as a means to providing the

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<sup>19</sup> <http://www.un.org/en/documents/udhr/history.shtml>

diverse opportunities that education can offer. And finally, most people also aspire to finding common ground for all citizens within a particular community so as to promote civic pride and constructive participation in efforts that promote the common good. The “me and mine” arguments that are invoked to argue against these collective values would seem to me both minority positions and, moreover, counter-productive to the larger project of treating people humanely. Furthermore, punitive perspectives promoted by those who consider that they are under siege from foreigners support unjust or inhumane treatment of underclasses or marginalized people contribute to a weakening of the social systems within which everyone lives, in ways comparable to how air pollution poisons the environment of everyone including those who don’t believe in regulations to protect the environment.

Universal values and fundamental human rights that an instrument like the 1948 Declaration meant to uphold is undermined by the mistreatment of undocumented immigrants, and legislation such as the “Border Security, Economic Opportunity, and Immigration Modernization Act” simply reinforce, rather than undo, the systemic obstacles to social justice. We were never lacking reasons to consider more radical solutions to the current crises, worldwide, in regards to irregular migration. But as the numbers grow so too does the suffering, and even a relatively courageous Executive Order issued by a President anxious to solidify a Hispanic or “liberal” voting base does little to change the landscape.