Criminalizing Immigration: Is It Justified?

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During the summer of 2015, American media was flooded by stories of Central American families and unaccompanied children entering the United States in unprecedented numbers.\(^1\) Although immigration is nothing new to the United States, the government’s dysfunctional response to this influx sparked debate about how America deals with its immigrant populations.

While immigration is typically handled through civil law in the United States,\(^2\) an often-overlooked part of the United States’ immigration system is the criminalization of “illegal” entry or reentry into the country.\(^3\) Although these crimes were written into the 1952 Immigration and Nationality Act,\(^4\) immigration officials did not typically refer immigrants caught entering “illegally” for criminal prosecution until the Department of Homeland Security (DHS) implemented “Operation Streamline” in 2005.\(^5\) However, as entire populations are being uprooted due to extreme violence and/or poverty, the United States must determine whether migrants who enter through “irregular”\(^6\) means—or “outside of the regulatory norms”—deserve to be marked as criminals and whether this criminalization can be justified on traditional punishment grounds.\(^7\)

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2. In the United States, authority to enforce and adjudicate immigration decisions is delegated to administrative bodies, including the Department of Homeland Security and the Department of Justice, which are held within the Executive Branch. See generally Megan Davy, Deborah W. Meyers & Jeanne Batalova, Who Does What in U.S. Immigration, MIGRATION POL’Y INST. (Dec. 1, 2005), http://www.migrationpolicy.org/article/who-does-what-us-immigration/ (giving an overview of the immigration system and which agencies are involved).


5. See Joanna Lydgate, Assembly-Line Justice: A Review of Operation Streamline, 98 CAL. L. REV. 481, 482–84 (2010) (discussing how Operation Streamline has transformed Customs and Border Patrol policies by “requiring criminal prosecution of border crossers”). Through this “operation,” Customs and Border Patrol officials may refer immigrants caught crossing the border without proper documentation to a federal judge for prosecution under the “illegal” entry and reentry statutes. See Donald Kerwin & Kristen McCabe, Arrested on Entry: Operation Streamline and the Prosecution of Immigration Crimes, MIGRATION POL’Y INST. (Apr. 29, 2010), http://www.migrationpolicy.org/article/arrested-entry-operation-streamline-and-prosecution-immigration-crimes/. The individual, who is typically advised by his or her appointed attorney to plead guilty, then participates in a mass hearing before a federal judge who sentences the individual after they have pleaded. Id. Once an individual serves the required jail time, he or she is referred back to the civil immigration system where he or she is expeditiously removed to his or her country of origin. Id.

6. Key Migration Terms, INT’L. ORG. FOR MIGRATION (last visited Nov. 19, 2015), https://www.iom.int/key-migration-terms (defining “irregular migration” as “movement that takes place outside the regulatory norms of the sending, transit and receiving countries” and noting that “the irregularity is... seen in cases in which a person crosses an international boundary without a valid passport or travel document”).

7. See infra note 15 and accompanying text for a discussion of the traditional theories of punishment.
Since the implementation of “Operation Streamline”—and the resulting increase in criminal prosecutions and convictions under 8 U.S.C. §§ 1325–26—scholars have discussed the many deficiencies of the law and how it is applied. Legal challenges against the law have focused on Fifth Amendment due process violations and on a court’s requirement to advise the immigrant of his or her rights under Rule 11 of the Federal Rules of Criminal Procedure.

Additionally, in May 2015, the Department of Homeland Security’s Office of Inspector General (“OIG”) released a report of its findings about the efficacy and costs of “Operation Streamline.” Among other issues noted in the report, the Inspector General cited concerns that Customs and Border Patrol (“CBP”) “does not have guidance on using Streamline for aliens who express fear of persecution upon return to their home countries.” The use of Streamline with such aliens, stated the Inspector General, “is inconsistent and may violate U.S. treaty obligations.” Specifically, immigration advocates are concerned that referring immigrants for criminal prosecution under Operation Streamline would violate the United States’ obligation to provide protection for those fleeing persecution under the 1967 Protocol Relating to the Status of Refugees. Both the 1967 Protocol and U.S. domestic law guarantee certain individuals the right to seek asylum. However, because CBP does not provide guidance to agents about what to do in situations where an individual who is referred for criminal prosecution expresses fear, Operation Streamline effectively denies certain individuals that right. The legal challenges to “Operation Streamline,” and the underlying law itself, raise two important questions. First, why has the United States chosen to criminalize “illegal” entry and reentry into the United States? Second, is the criminalization of such conduct supported by the traditional justifications for punishment?

Society traditionally criminalizes conduct that it views as so abhorrent that it wants to punish people who engage in it. The punishment of the criminal conduct is then either

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8 See Lydgate, supra note 5, at 532–33 (noting that en masse hearings raise due process concerns); Turning Migrants into Criminals: The Harmful Impact of US Border Prosecutions, HUMAN RIGHTS WATCH (May 22, 2013), https://www.hrw.org/report/2013/05/22/turning-migrants-criminals/harmful-impact-us-border-prosecutions#fn119 (providing specific accounts of individuals involved in the Operation Streamline system on how the system leads to “short cuts, putting the basic due process rights of defendants at serious risk”).


11 Id. at 2.

12 Id.


14 See Convention Relating to the Status of Refugees art. 31, Jul. 28, 1951, 189 U.N.T.S. 137 (stating that signatory countries will not impose criminal liability on persons seeking refuge); 8 U.S.C. § 1158 (2014) (providing that any “alien” may apply for asylum “irrespective of such alien’s status”).

15 See Henry M. Hart, Jr., The Aims of the Criminal Law, 23 L & CONTEMP. PROBS. 401, 404–05 (1958) (noting that society criminalizes conduct that it views as deserving of “moral condemnation”).
justified by one’s view that the person has committed a wrong and simply deserves to be punished—a retributivist view—or because the punishment will offset the harm done to society—a utilitarian view. Thus, one would think that criminalizing an immigrant’s “illegal” entry or reentry into the United States derives from society’s view that such conduct is offensive to society as a whole and that the punishment is justified on one of the traditional retributivist or utilitarian grounds. However, polls conducted in recent years suggest that a growing number of Americans recognize the dysfunctional state of the U.S. immigration system and the need for immigration reform. Furthermore, in its 2013 report, “Turning Migrants into Criminals,” Human Rights Watch found that nearly all of the individuals interviewed (who had been convicted of “illegal” entry or reentry crimes) sought entry into the United States for one of three reasons: “1) to seek work; 2) to reunite with family . . . ; or 3) to flee violence or sometimes persecution abroad.”

These two facts—the dysfunctional state of the American immigration system and that migrants generally do not have malicious intentions when entering the United States—suggest that society as a whole does not view this conduct as “abhorrent” or “morally condemnable.” Thus, while a retributivist may argue that punishment is justified simply because the person broke the law (and is deserving of retribution), their argument falls flat if the underlying basis for labeling the conduct as “criminal” is unsupported.

Furthermore, proponents of the criminalization of “illegal” entry and reentry may argue that criminal penalties serve as deterrence not only for the individuals convicted, but also for other immigrants who might consider entering “illegally.” However, the recent OIG report questions whether CBP has the ability to determine the deterrent effect these laws—including Operation Streamline—really have. As the report notes, CBP does not measure reentry of migrants over multiple years. Therefore, a person who irregularly crosses the border, is caught, and criminally penalized under Operation Streamline during one year and then chooses to reenter “illegally” the next year may not be counted as a “recidivist” in the CBP statistics. Moreover, immigration advocates have also questioned whether criminalization of “illegal” entry into the United States would actually deter

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16 Kent Greenwalt, *Punishment*, in 3 *ENCYCLOPEDIA OF CRIME AND JUST.* 1282–84 (Joshua Dressler ed., 2d ed. 2002) (“Briefly stated, a retributivist claims that punishment is justified because people deserve it; a utilitarian believes that justification lies in the useful purposes punishment serves.”).
18 HUMAN RIGHTS WATCH, supra note 8.
20 OFF. OF INSPECTOR GEN., supra note 10, at 2.
21 Id. at 8.
22 Id. Additionally, although not noted in the OIG report, it is important to keep in mind that CBP can only report on the numbers of migrants who are apprehended by government officials. Thus, immigrants who are able to avoid encountering law enforcement along the border may be “recidivists” but will not be counted in CBP’s numbers.
migrants from coming when their motives derive from essential human needs.  
People who are hoping to work to provide basic necessities for their families or who are fleeing death threats are unlikely to remain in their home countries if doing so would result in death. The utilitarian theory of deterrence also seems to fail on multiple grounds. Not only does the criminal penalty have questionable deterrent effects, but, again, if society does not view the conduct as morally condemnable, a true Utilitarian would argue that such punishment is unnecessary because it causes further harm to society.

While proponents of Operation Streamline note that the criminalization of border crossing allows the government to apprehend more violent criminals, Human Rights Watch’s analysis of the data collected from 2002 to 2011 on convictions for immigration offenses shows that convictions of defendants who had “less serious criminal histories” or no criminal history increased 725% and 418% respectively, while convictions for defendants with a prior conviction for a “most serious offense” increased by only 113%. The government does have a legitimate interest in protecting society by regulating the number and nature of people coming into the United States. However, there is already a civil system in place to handle cases of migrants who have come to the United States through “irregular” methods. This civil system is fully capable—when appropriately funded—of determining when a migrant has violated administrative immigration laws and is wholly inadmissible for legal status. Likewise, the criminal justice system could deal with immigrants who commit crimes in the United States without criminalizing entry into the United States. Unless society views such immigration as morally reprehensible and unsolvable by the civil systems already in place, the criminalization of “irregular” entry into the United States is unnecessary and wasteful.

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23 Human Rights Watch, supra note 8 (“[P]eople seeking to join their children or other loved ones are not likely to simply give up.”); Ted Robbins, supra note 18 (“If dying in the desert is not a deterrent, it’s hard to imagine why spending no or little time in federal prison and being returned to your home country is a deterrent.”). Claims of Border Program Success Are Unproven, NPR (Sept. 13, 2010), http://www.npr.org/templates/story/story.php?storyId=129827870.
24 Utilitarian theorists generally believe that punishment is only justified insomuch as it offsets the harm criminal conduct does to society. Thus, if the conduct, such as fleeing harm or providing for one’s family, does not actually harm society, there is no need to punish it. See Greenwalt, supra note 15 at 1286 (“Since punishment involves pain, it can be justified only if it accomplishes enough good consequences to outweigh this harm.”).
25 Robbins, supra note 19 (“The third and final reason the Border Patrol labels Operation Streamline a success, Sinclair [the deputy chief patrol agent in Del Rio, Texas] says, is that it allows agents to pursue more drug dealers and violent criminals.”).
26 Human Rights Watch, supra note 8. While the increase of 113% for defendants with a prior conviction for a “most serious offense” may seem alarming, it is important to remember that Operation Streamline’s purpose was to enforce laws that were not previously enforced on a large scale. Thus, the numbers were bound to increase. However, these numbers show that the people most likely to be criminally prosecuted under Operation Streamline are those with the least violent history—or no criminal history at all.