



## Legal and Ethical Implications of the Over Criminalization of Illegal Immigrants in the United States

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Migration is the movement of people from one place to another. This social process began with the nomads, the earliest of primitive tribes. Migration has been increasing in the late twentieth century and is likely to keep rising in this century. International migration has increased as a consequence of the intensification of global interconnections known as ‘globalization’, which enhances the flow of goods, capital and also people. According to Giddens<sup>1</sup> it is a process whereby distant locations link between each other and it has the effect of shaping local happenings by events occurring in the other side of the world and vice versa.<sup>2</sup> Furthermore, globalization also has an influence on shaping desires: people begin to desire a better life, and start moving around the world in order to achieve that goal. Formerly, border-crossing fell under the umbrella of administrative and civil law; however it is now being seen as a criminological problem.

Globalization has improved communication and technology, but at the same time it has made people around the world aware of the better conditions and opportunities that are enjoyed by the people of the West and North. Hence, international migration may have increased as a consequence of economic inequalities.<sup>3</sup> Moreover, the mass media broadcasts images which create the illusion that there is a privileged life that is easy to achieve. Or perhaps it is better to say that there is a privileged life, but not everybody can enjoy

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1. Anthony Giddens. *The Consequences of Modernity* (Stanford: Stanford University Press, 1990): 64.
2. Katja Franko Aas, “Globalization and Crime” (Sage: London, 2007): 4.
3. Philip Martin and Gottfried Zurcher, “Managing Migration: The Global Challenge”. *Population Bulletin* 63, No. 1 (2008).



it. In fact this has only created more economic, social and emotional gaps between people. Technology and communication encourage people to assume that migration is the solution to improving their quality of life.

Generally speaking, there are two main reasons to migrate: economic and non-economic. Both are caused by either a demand-pull or supply-push factor. For example, a migrant who moves to another place because of unemployment is doing so for economic reasons and a supply-push factor; whereas another person who migrates for family unification is doing so for non-economic reasons as a result of a demand-pull factor.<sup>4</sup> In this dynamic there are two main subjects that face a juxtaposition of interests. On the one side it is the interest of the state to protect their territories from what they consider as imminent threats,<sup>5</sup> therefore outsiders become the undesired. On the other side are people who want to improve their quality of life and rely on the right of free movement, which has forced them to immigrate to other countries.

Issues associated with transnational immigration affect not only individuals and families, but also the institutional structure which enacts the host state's immigration policies and law enforcement procedures. For instance, the United States has reinforced anti-migration measures which has led to violence against Latino migrants, and this has in turn been used as a tool by political leaders in order to capitalize on the anti-immigrant sentiments of the community.<sup>6</sup> Because there is an interrelation between lawmakers and those who are subjected to the law, immigrants are placed in a disadvantaged position. This is because irregular immigrants who are not legally recognized as citizens enter into an ambiguous state of 'being'. In Giorgio Agamben's terms it might be said that irregular immigrants are within the sphere of 'bare life'. Put simply, they have a life that is defined only in terms of biological existence, devoid of legal and political protections.<sup>7</sup> They must obey the law like any other citizen, but they do not enjoy the same benefits, such as access to education, health and justice. In other words, they lose their basic rights and

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4. Ibid., 6.

5. Ben Bowling, "Epilogue: The Borders of Punishment: Towards a Criminology of Mobility". In Katja Franko Aas and Mary Bosworth, *The Borders of Punishment: Migration, Citizenship and Social Exclusion* (Oxford: Oxford University Press, 2013): 291.

6. Ronald Mize and Grace Peña, *Latino Immigrants in the United States* (Malden/Cambridge: Polity Press, 2012): 1.

7. Anne McNevin, "Ambivalence and Citizenship: Theorising the Political Claims of Irregular Migrants". *Millennium 41*, No. 2 (2013): 187.



are unable to participate in the welfare state. The American dream is shadowed by the state's power and sovereignty.

This is illustrated by laws that have been adopted inside the country's jurisdiction. In 1994 the proposal known as 'Save Our State' (later named *The California Proposition 187*) cut off public benefits including prenatal and preventative health care to irregular immigrants. This produced political rewards for the politicians involved- they played on people's fear of mass immigration and took a popular 'tough stance' on immigration.<sup>8</sup> Furthermore, other politicians like James Sensenbrenner, a Republican congressman from Wisconsin, sponsored the bill *HR 4437* whereby any person who aided undocumented immigrants could be punished with up to five years in prison. It also called for the immediate expulsion of apprehended immigrants, denying them due process under the law.<sup>9</sup>

Another example is the *Arizona Act- S.B 1070*, which is considered the most draconian of all immigrant laws. It intends to 'discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States' (*Senate Bill 1070, 2010*, Section 1). Under this law, police officers are allowed to stop, search and apprehend any person who appears to be a non-citizen. These laws based in racial profiling are a means to segregate and penalize non-citizens. Also, this controversial and tough law criminalises immigrants regardless of what they have actually done. More importantly, the burden of proof returns to the person instead of the State. The *Arizona Act* allows police to demand proof of citizenship. These new measures targeted the immigrants directly, rather than just focusing on denying them public benefits.<sup>10</sup> These strategies have the potential to violate the rights of innocent people.

It is worth noting that these measures portray images of the 'other' on societies' social imaginary. The label 'Mexican' is often attached to someone who merely appears to be of Hispanic descent; the stigma of being 'Mexican' in

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8. Jan Carpenter, "The Gender of Control: Violence against women on the United States-Mexico Border". In Sharon Pickering and Leanne Weber, *Borders, Mobility and Technologies of Control* (Dordrecht: Springer, 2006): 168.

9. Mize and Peña, *Latino Immigrants in the United States*, 8.

10. Gebe Martinez, "Learning from Proposition 187", *Center for American Progress*, 5 May 2010, <<https://www.americanprogress.org/issues/immigration/news/2010/05/05/7847/learning-from-proposition-187/>>.



turn carries with it the assumption of being illegal and alien.<sup>11</sup> Migration policies open the gap of discrimination and stratification by placing the United States' white citizens in a higher position than immigrants, which encourages feelings of white supremacy. This functions as a means to breach Latin identity. Many children who grow up in the US want to become more North American hence they adopt customs, cultures and idioms in order to be something different to that which their Hispanic appearance allows them; they wish to be white and 'equal'. Also, the categorization of people as illegal migrants implies a status of criminality ipso facto before any judicial determination of status'.<sup>12</sup> There is a tendency to associate illegal migrants with criminals; hence, migration is (mis)conceived as a crime.

Juliet Stump has referred to the merging of two different regimes of law, namely criminal and migration enforcement law as 'crimmigration law'. Criminal law is applied when acts are committed in breach of the Criminal Code whereas migration enforcement law is related to violations of the *Immigration and Nationality Act*. Unfortunately, not all of the criminal law protections have been transported to 'crimmigration' law. In other words, the integration of criminal justice and immigration systems has limited procedural protections. There is also an increase in the use of criminal-grounds for deportation: the United States applies the criminal justice system as a pathway to deportation.<sup>13</sup>

The system takes into account old convictions as an argument for deportation, which breaches the legal principle that law is not retroactive. Also, immigration reforms have included a number of minor crimes which have not only affected non-citizens, but also United States residents who have been denied readmission to the country. There is also an expansion of immigration infractions which are now called immigration offences, such as: unlawful entry, the overstaying, the entry or the attempt to enter with false documents, and ignoring a removal order. A person guilty of these offences faces detention and deportation. Because the United States does not consider these two measures to be formal punishments they overlook legal and human rights

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11. Mize and Peña, *Latino Immigrants in the United States*, 4-5.

12. Patrick Taran, "Human Rights of Migrants: Challenges of the New Decade", *International Migration* 38, No. 6 (2001): 7-51.

13. Franko Aas, *Globalization and Crime*, 5.



protections, such as the right to due process. In the words of Jennifer Chacon, “although there is a convergence of criminal law and immigration law, the procedural protections of criminal adjudication have been excluded”.<sup>14</sup>

In the name of safety and national security the State is interested in control over territory and people; hence, the movement of people across borders is subject to state control as well. Borders are established to mark the physical territory in which a State’s sovereignty can be exercised. It is said that ‘migration law is about borders: geopolitical borders, and borders between nationalities’.<sup>15</sup> International law recognizes three branches of sovereignty: First, the external aspect, which shapes the relationship between States; second the internal aspect, which is the States’ right to determine their own institutions and enact laws that each State considers necessary, and third the territorial aspect in which the State exercises authority over all persons and objects that are within its territory. Sovereignty enables the State’s power to develop the measures that are considered necessary to prevent other States and inhabitants of other States from ‘interfering with the territorial integrity of the State’ as prescribed in the Charter of the United Nations (1945, Art. 2 [4]).

The United States has reinforced its immigration policies relying on the discourse of sovereignty and national security, focused in a pre-emptive approach or risk management theory. It has been extended to immigration law enforcement in general and to border control, in particular. However, states are not allowed to exercise sovereignty deliberately, they are regulated by international law which limits their discretion in name of individual human rights. As Louis Sohn and Thomas Buergenthal argue:

A State has the competence to control and regulate the movement of persons across its borders. This competence is not absolute. It is limited by the right of individuals to move across borders and by the obligations of the State that arise from generally accepted principles of international law and applicable international agreements.<sup>16</sup>

One of the rationales of regulation of migration on immigration-related criminal grounds is to increase the punishment for unauthorized border crossing. Enforcing borders is generally considered to be a means to protect the

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14. Jennifer Chacon, “Managing Migration Through Crime”, *Columbia Law Review* 109 (2009): 135-148.

15. Brian Opeskin, Richard Perruchoud and Jillyanne Redpath-Cross, *Foundations of International Migration Law* (Cambridge: Cambridge University Press, 2012): 124.

16. *Ibid.* 126.



State's territorial integrity, or National Security. Accordingly, migration control has led to the use of mechanisms that are used in domestic crime control, such as intelligence surveillance, the development of specialized legal processes, creation of courts and detention centres. In theory, immigration control is supposed to be separate to criminal justice, but it has become parallel to the domestic crime-control industry.<sup>17</sup> For example, in 1994 'Operation Gatekeeper' fortified the United States-Mexico border with 'floodlights, fences, and an assortment of hardware such as buried sensors, night vision goggles and military-style infrared scopes capable of distinguishing human forms in the darkness'.<sup>18</sup> Even though Border Patrol declared Operation Gatekeeper to be very successful in stemming the tide of illegal immigrants, it has not in fact been a means of stopping the flow of people that enter the country. In fact, in 2010 there were 11.2 million unauthorized foreigners living in the United States. This represents 3.7 per cent of the nation's population.<sup>19</sup>

Katja Franko Aas and Mary Bosworth claim that conceiving border crossing as a crime rather than a civil violation has changed government institutions<sup>20</sup> and this has been heightened in the aftermath of the attacks that occurred on September 11, 2001. In fact, the United Nations Security Council adopted a resolution asking the United States to take the necessary measures to have 'effective border controls and control on issuance of identity papers and travel documents' (*UN Security Council Resolution 1373*, 2001). The United States has responded with measures that are now understood as responsible rather than reactionary; they have decided to get serious about immigration.<sup>21</sup> There is now a militarization of the southern border due to the increase in the number of Border Patrol agents and the National Guard presence, which are the largest armed law-enforcement body in the United States' federal government. In the journey of the immigrant, the border is the inevitable door that

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17. Bowling, "Epilogue: The Borders of Punishment: Towards a Criminology of Mobility", 299.

18. Carpenter, "The Gender of Control: Violence against women on the United States-Mexico Border".

19. Pew Research Center, "2011 National Survey of Latinos", 25 September 2013, <<http://www.pewhispanic.org/2013/09/25/2011-national-survey-of-latinos/>>.

20. Franko Aas and Bosworth, *The Borders of Punishment: Migration, Citizenship, and Social Exclusion*, 6.

21. Kathleen Arnold, *American Immigration After 1996: The Shifting Ground of Political Inclusion* (Pennsylvania: Penn State University Press, 2011): 1.



must be legally or illegally entered, and it constitutes places of potential crisis.<sup>22</sup> This has turned the border into a ‘war zone’.<sup>23</sup>

Tighter immigration rules have been adopted after September 11. The attacks intensified the concern that foreigners are a threat to the nation’s security. They are now seen as potential enemies. Therefore, ‘migration law and procedures are becoming tools to combat terrorism because international terrorism is very often seen as a migration issue’.<sup>24</sup> Indeed, in 2002 the Department of Homeland Security was created as a response to the terrorist attacks. One arm of this Department is the U.S Immigration and Customs Enforcement. The mission of this agency is to ‘promote homeland security and public safety through the criminal and civil enforcement of federal laws governing border control, customs, trade and immigration’ (U.S Department of Homeland Security 2003). This agency instituted a plan called Operation Streamline, which clearly violates legal principles. Formerly, the United States Attorney’s Office was able to start a criminal prosecution only against migrants who held criminal records or those who attempted to re-enter the country without legal documentation.

However, with immigration law-enforcement policies, particularly Operation Streamline, criminal prosecution is required for all undocumented border crossers. For instance, in the United States immigration penalties range from a six-month maximum sentence imposed for a first time offender who is been prosecuted for misdemeanour illegal entry to a twenty-year maximum penalty if the defendant’s prior removal occurred after a felony conviction (U.S Code [viii] Section 1325). In other words, deportation is accompanied by criminal prosecution and sentence, which makes non-citizens more likely to obtain a criminal record. Another important aspect to take into consideration is that deportation constitutes a penalty in that it operates in the same way as a criminal punishment. Although criminal sentences and deportation orders are considered to be different legal categories, both of them impose deprivation of liberty.

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22. Dorothee Schneider, *Crossing Borders: Migration and Citizenship in the Twentieth-Century United States* (Cambridge: Harvard University Press, 2011), 1.

23. Carpenter, “The Gender of Control: Violence against women on the United States-Mexico Border”, 171.

24. Opekin, Perruchoud and Redpath-Cross, *Foundations of International Migration Law*, 135.



In Tucson-Arizona there are ‘eight men [...] chained around the waist, shackled by their ankles, cuffed at the wrists’.<sup>25</sup> This seems to be an ordinary day in any criminal court, but it is not. This is just like any other day in which more than seventy immigrants are held in the William D. Browning Special Proceedings Courtroom awaiting their hearings. Immigration detainees and prisoners convicted for criminal offenses seem to have more in common than otherwise. Both have to face the criminal justice system; thus, the process *per se* becomes a punishment due to the fact that authorities use procedural elements like arrest and detention.<sup>26</sup> These mechanisms have changed immigration from a civil violation into a state criminal offence.<sup>27</sup> If there is any difference to be claimed between criminal law and immigration law it is that the former has procedural protections whereas the latter has practices that are contrary to traditional and universal criminal justice practices.

As a matter of fact, in border district courts between 2002 and 2008 criminal prosecutions of minor immigration-related offences increased by more than 330 per cent. This means that the number of cases went from 12,411 cases to 53,697 (Administrative Office of the United States Courts 2008). This overload of cases in the courts has had negative consequences for the United States justice. It hardly embraces constitutional principles and the rule of law. There are some legal as well as ethical concerns that also have to be taken into account. Due to the voluminous prosecutions, judges have to lead mass hearings resulting in the violation of due process. The judges are not able to address the defendant personally, and cannot make sure that the person understands the constitutional rights he or she is waiving.

Another consideration is the ethical and legal conflict of interests’ issue. Border Patrol Attorneys work for the Department of Homeland Security and are deputized as special assistant U.S attorneys to prosecute the Operation Streamline docket.<sup>28</sup> Defence attorneys therefore find it difficult to negotiate misconduct by Border Patrol Agents because they work within the same insti-

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25. Joshua Partlow, “Under Operation Streamline, fast-track proceedings for illegal immigrants”, *The Washington Post* (Washington DC), 10 February 2014.

26. Franko Aas and Bosworth, *The Borders of Punishment: Migration, Citizenship, and Social Exclusion*, 9.

27. *Ibid.* 7.

28. Joanna Lydgate, “Assembling Line Justice: A Review of Operation Streamline”, *The Chief Justice Earl Warren Institute on Race, Ethnicity & Diversity, Berkeley Law School, University of California, Policy Brief* (January 2010): 15.



tution. Furthermore, because of the nature of the mass hearings it is not possible to provide to the defendants effective counsel. The lack of time does not allow them to construct a well-prepared defence. All of the factors mentioned should be seen as a threat to the rule of law and universal legal principles. Finally, immigration detention in some cases is prolonged or even indefinite. It is important to note that the detention centres share the same architecture of prisons, which once again blurs the difference between criminal law and immigration law.

Even though there is an emerging need to address these issues, international law has failed to take this up. ‘Violations of migrant’s human rights are so generalized, widespread and commonplace that they are a defining feature of international migration today’.<sup>29</sup> International migration is not covered by any norm or law in particular. Nonetheless, there are a number of legal bodies that provide the right to freedom of movement and of course protection of human rights, such as the Universal Declaration of Human Rights (Article 13) and The International Covenant on Civil and Political Rights (Article 12), both of which recognize that everyone has the right to leave any country, including his own. On the one side there is the fundamental right to leave and return to one’s country. On the other side there is not any treaty or convention that guarantees the right to enter other territories. Put simply ‘the right to leave and the right to enter are not symmetrical’.<sup>30</sup>

Even though there are no international conventions or regional instruments protecting immigrants’ right to enter a foreign state, this should not be a justification for the breach of human rights. Human rights legal instruments should be applied to non-citizens in the same way as nationals of the host State.<sup>31</sup> On account of this, in 1951 the International Organization for Migration (IOM) was created in order to consolidate International Migration Law. This initiative led to developments such as the creation of the Global Migration Group in 2006 by the United Nations Secretary-General. In 2013 they

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29. Taran, “Human Rights of Migrants: Challenges of the New Decade”, 9.

30. David Fisher, Susan Martin and Andrew Schoenholtz. “Migration and Security in International Law”. In T. Alexander Aleinikoff and Vincent Chetail, *Migration and International Legal Norms*, (The Hague: T.M.C. Asser Press, 2003): 129.

31. David Weissbrodt, “International human rights of migrants.” In Brian Opeskin, Richard Perruchoud and Jillyanne Redpath-Cross, *Foundations of International Migration Law* (Cambridge: Cambridge University Press, 2012): 152.



held the Second High-level Dialogue on Migration and Development. Since these are relatively new advances in the field, there is still a long path to follow in order to address ‘cimmigration law’.

In conclusion, migration is a predominant feature of globalization. The forces of globalization, namely free trade agreements and neo-liberal reforms in Latin America have produced mass migration. The right of free movement conceived as the right to leave perhaps is not any more a right, but it has been transformed into a necessity in order to seek better opportunities. The United States’ aim to protect their territory has strengthened the link between immigration and the concept of sovereignty and national security; as a result, there is an increase in the nexus between crime and immigration law. Consequently, ‘cimmigration law’ has been applied to control immigration. ‘The border between the United States and Mexico is frozen in time, naturalized, and its history ignored to produce the binaries of patriotic/traitorous, citizen/enemy, legal/illegal’,<sup>32</sup> which has led to the death of more than 444 migrants trying to cross this border per year.<sup>33</sup> In addition, from a criminological point of view borders trigger new crimes, new processes of criminalisation and new means of breaching human rights. Thus, co-operation within States must be enhanced in order to enforce laws regarding immigration control activities that do not place human rights in risk. The challenge of international law is to find a point of balance in which states’ national security is not undermined, whilst at the same time migrants’ human rights are not curtailed. More importantly, procedural rights ought to be placed into ‘cimmigration law’. Borders are criminologically significant not only for understanding the new trends of migration law enforcement, but also for extending the scope of criminology to a more global perspective.

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32. Arnold, *American Immigration after 1996: The Shifting Ground of Political Inclusion*, 30.

33. IOM, “International Migration Law”, 4 June 2014, <<https://www.iom.int/international-migration-law>>.



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