REFLECTIONS ON PROFESSOR ROMERO'S INSIGHT ON THE DECRIMINALIZATION OF BORDER CROSSINGS

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A Response to Victor C. Romero, *Decriminalizing Border Crossings*, 38 FORDHAM URB. L.J. 273 (2010).

INTRODUCTION

Immigration jurisprudence has had a love-hate relationship with criminal jurisprudence since at least the *Chinese Exclusion* case.[1] That is largely because of sovereign convenience. If deportation is considered a criminal punishment, a full range of constitutional protections would hamper the sovereign's ability to unlawfully search and seize, incarcerate, deprive counsel, subject to double jeopardy, and ultimately remove as expeditiously as the sovereign can. If immigration infractions are considered civil, rather than criminal, then the sovereign would fail to sufficiently achieve its punitive objectives because incarceration may be foreclosed. Notwithstanding such dilemma, my colleague, Professor Romero, who is one of the most respected scholars of immigration law in the country, proposes that unauthorized border

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[Φ] Suggested citation: Won Kidane, *Reflections on Professor Romero's Insight on the Decriminalization of Border Crossings*, 39 FORDHAM URB. L.J. CITY SQUARE 19 (2012), http://urbanlawjournal.com/?p=388.

1. *See* Chae Chan Ping v. United States, 130 U.S. 581 (1889).

crossings must be decriminalized.[2] He advances several notable reasons why such a measure is warranted. I am extremely honored for being asked to offer my own reflections on Professor Romero's insight on this subject. I will attempt to do so in the following three parts. Part I puts the doctrinal dilemma between criminalization and decriminalization in perspective. Part II evaluates Professor Romero's argument in favor of decriminalization. And the Conclusion offers final thoughts.

I. THE DOCTRINAL DILEMMA IN PERSPECTIVE

Professor Romero would eliminate the criminal prosecution process for border crossings and limit the sanction to "civil deportation[]."[3] I completely agree with Professor Romero on the policy and practical reasons for the elimination of the criminal label because I recognize the serious sociological consequences that he describes[4] very well. I also recognize that criminalization serves as a quasi-legitimate weapon for the harassment, intimidation, and exploitation of particular categories of vulnerable persons. I do, however, have a different take on the doctrinal foundation and effectiveness of the proposed remedy. I will attempt to describe my take on the doctrinal foundation issue in the following few subsections.

A. *Malum in se* v. *Malum Prohibitum*

I do not think that a reasonable person would dispute that border crossing would not belong to the category of offenses traditionally considered *malum in se*; that is to say "[a] crime or an act that is inherently immoral."[5] However, Professor

2. *See* Victor C. Romero, *Decriminalizing Border Crossings*, 38 FORDHAM URB. L.J. 273, 275 (2010).

3. *See id.* at 299.

4. *See id.* at 282-83.

5. BLACK'S LAW DICTIONARY 1045 (9th ed. 2009).

Romero argues that border crossing should not even be considered *malum prohibitum*——that is to say, "an offense at worst a piece of misbehavior,"[6] that warrants a nominal sanction that is punitive in character. He does not deny that some kind of sanction may be necessary, but his quarrel is with the nomenclature because of the potential for reinforcing the stigma of criminality and associated ill-effects on social cohesion.[7] I will next attempt to highlight my concerns with this approach.

B. Process v. Sanction: Deportation as Punishment

Both criminal and civil processes could lead to some type of sanction. Criminal sanctions are not necessarily more severe than civil sanctions, but the procedural due process protections that are available in the civil process are almost always inferior. It has long been settled that the immigration deportation process as well as the sanction are civil. The jurisprudence in that area developed almost exclusively in the context of limiting the constitutional rights of the "alien" facing the deportation process or sanction. A good example is Justice O'Connor's majority opinion in *Immigration and Naturalization Service v. Lopez-Mendoza*: "A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry, though entering or remaining unlawfully in the country is itself a crime."[8] Justice O'Connor said this to justify

6. PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 33 (1968) ("The basis for the distinction between *mala in se* and *mala prohibita*, between what one might call a crime and an offence——or between what one might call a felony and a misdemeanour, if one could modernize those terms so that the latter was given its natural meaning——is that crime means to the ordinary man something that is sinful or immoral, and an offence at worst a piece of misbehaviour.").

7. *See* Romero, *supra* note 2, at 275, 279, 299-302.

8. 468 U.S. 1032, 1038 (1984).

the inapplicability of the protection against unlawful search and seizure of the Fourth Amendment in deportation proceedings.[9] The determination that the immigration process and sanction are civil in nature has deep roots in the *Chinese Exclusion* era cases, such as *Fong Yue Ting v. United States*.[10] Hence, Justice O'Connor was not announcing a new rule of law. This jurisprudence has never sat so comfortably at any time in U.S. immigration history, although it has always been subject to acrimonious dissent and criticism. Justice Field's dissenting opinion in the *Ting* case captures it very well:

> "But it can never be admitted that the removal of aliens, authorized by the act, is to be considered, not as a punishment for an offense, but as a measure of precaution and prevention. . . . [I]f a banishment of this sort be not a punishment, and among the severest of punishments, it would be difficult to imagine a doom to which the name be applied."[11]

To be sure, there is nothing in Professor Romero's piece that indicates that he accepts the civil sanction rhetoric. There is also no doubt that he is as concerned as Justice Field, if not more, about the severity of the sanction. However, my worry is that his proposal to treat border crossings as civil infractions answerable by deportation or return, rather than by criminal sanctions such as fines or brief incarceration, would unwittingly reinforce the view that deportation is a civil sanction and may be taken so casually. In other words, although Professor Romero's proposal has the great purpose of decriminalizing a minor infraction at the front-

9. *See id.* at 1041, 1050.

10. *See* 149 U.S. 698, 730 (1893) ("The order of deportation is not a punishment for crime.").

11. *Id.* at 748-49 (Field, J., dissenting) (quoting 4 Elliot's Debates 555 (1798) (statement of James Madison)).

end, it does not address the back-end problem. I think we both recognize that unauthorized border crossing cannot be without legal consequence at this stage of development, especially in the North American region, for a wide range of socio-economic and political reasons. Hence, if an open border policy is admittedly not a feasible proposal at this time, then some kind of border enforcement will continue. The question then is, if border enforcement does continue, what should we call the infraction and what should the consequence be? My reading of Professor Romero's thesis is that we should call the infraction a civil violation or infraction and impose the civil sanction of deportation. It is the back-end solution that worries me most because of its potential severity. My own view is that deportation must not be perceived as a natural consequence of unauthorized entry. Therefore, my preference would be to maintain the separation between the criminal and removal proceedings because the decriminalization of border crossings, which necessarily unifies the two processes into one deportation process, would reinforce the casual nature of deportation proceedings and deportation as a civil sanction. Moreover, I believe that it would also deprive the non-citizen of basic due process protections in the criminal context, not to mention the practical benefits that come along with bureaucratic inefficiency when the two systems interact. That said, I will next comment on the advantages of decriminalization that Professor Romero envisions.

II. THE PERCEIVED BENEFITS OF DECRIMINALIZATION IN PERSPECTIVE

Professor Romero envisions at least three benefits to the decriminalization of border crossings: it helps heal racial tensions, saves money, and brings better international reputation

to the United States. I will discuss each briefly below.

A. Healing Racial Tensions

If border crossing stays a criminal offense, border crossers will continue to be considered and treated like criminals. As Professor Romero states in his Article, "this shifts the public discourse from one of empathy to indifference, or possibly disgust; hence, criminalizing conduct that is otherwise sanctioned by civil penalty further marginalizes noncitizens already in the fringes of United States law and culture."[12] I completely agree that this is a true and accurate statement; however, I doubt that decriminalizing border crossings—even assuming it is politically feasible in the face of increasing xenophobia—would help heal tensions for many reasons. First, the "illegal-alien" rhetoric is a purely sociological construct devoid of any legal significance. Hence, a cure in the law does not necessarily cure the sociological phenomenon, as the two have a very attenuated relationship, if any. Second, the sector of society that likes to say, "[w]hat [p]art of [i]llegal [d]on't [y]ou [u]nderstand?"[13] is most likely unaware that the Immigration and Nationality Act of 1952, as amended, criminalizes uninspected border crossing in Section 1325.[14] Third, even if aware of the

12. Romero, *supra* note 2, at 279-80.

13. *Id.* at 280.

14. *See* 8 U.S.C. § 1325 (2006). The provision itself is technical. It is reproduced as follows for ease of reference:

> (a) . . . Any alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offense, be fined under Title 18 [United States Code]

legal technicality, this sector is unlikely to be impressed by a change in terminology and process and to treat non-citizens more favorably. Fourth, as Professor Romero notes, the majority of Americans favor state initiatives criminalizing the presence of non-citizens in the state without documentation (criminal trespass, for example).[15] Are those who voted "yes" to criminalization likely to promote racial harmony just because the law "civilizes" border crossing? I am doubtful. Finally, it is impossible to completely prevent illicit trafficking of persons and objects. As long as that remains so, decriminalizing the one-time entry of an innocent person is unlikely to erase the criminal taint that exists in the popular psyche because true criminals will continue to cross the border and people will continue to hear about it. The taint is almost

> or imprisoned not more than 6 months, or both, and, for a subsequent commission of any such offense, be fined under Title 18 [United States Code] or imprisoned not more than 2 years, or both.
>
> (b) . . . Any alien who is apprehended while entering (or attempting to enter) the United States at a time or place other than as designated by immigration officers shall be subject to a civil penalty of-
>
> (1) at least $50 and not more than $250 for each such entry (or attempted entry); or
>
> (2) twice the amount specified in paragraph (1) in the case of an alien who has been previously subject to a civil penalty under this subsection.
>
> Civil penalties under this subsection are in addition to, and not in lieu of, any criminal or other civil penalties that may be imposed.
>
> (c) An individual who knowingly enters into a marriage for the purpose of evading any provision of the immigration laws shall be imprisoned for not more than 5 years, or fined not more than $250,000, or both.
>
> (d) Any individual who knowingly establishes a commercial enterprise for the purpose of evading any provision of the immigration laws shall be imprisoned for not more than 5 years, fined in accordance with Title 18 [United States Code] or both.

Id.

15. *See* Romero, *supra* note 2, at 274 & nn.1 & 2.

impossible to erase from the public's mind, just like any stereotype.

B. Resource Saving by Targeting True Criminals

Professor Romero argues that if we decriminalize initial and innocent border crossings, we will conserve resources and use those resources to target true criminals.[16] This may be true, but I doubt that the conservation can come solely from a switch to a civil sanction system. Even if the consequence of unauthorized border crossing is limited to a civil sanction, we need to have some kind of legal process to determine if unlawful crossing has occurred. I cannot imagine that that would cost less money than criminal prosecution, unless, of course, it is at the expense of due process. That is probably not a desirable outcome.

To the extent that it is argued that imprisoning those who have been convicted of criminal crossing costs money, this cost is almost inevitably offset by the cost of detaining civil border violators during the deportation process. Even if we envision a situation where the civil violators are removed immediately, there will always be those who come back. Those who re-enter would have to be detained at government expense and perhaps prosecuted or removed again. These are unavoidable costs of border protection, which we will have to incur whether the penalty is criminal or civil. The only true way of reducing cost and using the savings to target true criminals is to forego enforcement in some of the innocent crossing cases – much like what the U.S is doing now. The criminal or civil label is probably of less significance.

16. *See id.* at 301.

C. International Reputation

Finally, Professor Romero argues that the international reputation of the United States might be enhanced if border crossings are decriminalized.[17] However, with reputation comes a promise that cannot be kept. There is no doubt that the first responders to this promise will be aspiring immigrants across the world. When they arrive, they will immediately discover that the civil sanction is deportation. I fear that this may raise expectations on the part of prospective immigrants and cause immeasurable disappointment when the reality is experienced and appreciated. When deportations inevitably increase because more people are likely to come as a result of their misinterpretation of the law, the reputational benefit gained at first might gradually be lost.

CONCLUSION

I completely share Professor Romero's concerns about the ever-increasing criminalization of the immigration system. I also do not believe that initial border crossing should be a criminal offense. However, the fact that it remains ***malum prohibitum*** does not concern me as much because of my reaction to the doctrinal basis and the perceived benefits stated in the previous two sections. Mindful of priorities and political feasibility, I would think that a § 245(i)[18] type remedy would solve most of the problems about which Professor Romero is concerned. I worry that

17. *See id.* at 302.

18. *See* 8 U.S.C. § 1255(h)-(i) (2006). Section 245(i) of the Immigration and Naturalization Act had allowed unauthorized entrants to adjust status with a payment of $1000. *See id.* But, this allowance is no longer available. *See id.* at § 1255(h)(i)(B)(i). Efforts to reinstate it have so far been unsuccessful. *See, e.g.*, Vincenta Montoya, *Keep Immigrant Family Unity! Reinstate 245 (i)*, IMMIGRANT SOLIDARITY NETWORK (Aug. 22, 2007), *http://www.immigrantsolidarity.org/cgi-bin/datacgi/database.cgi?file=Issues&report=SingleArticle&ArticleID=0935*.

focusing on such politically charged issues as decriminalization at this juncture in the country's history would add to the list of demands that are not likely to be met and potentially complicate the immediately needed, practical and more politically feasible solutions.