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**ON BORDERS AND CRIMES: A REPLY TO WON  
KIDANE**

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A Reply to 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>.

In his relatively short time in the academy, Professor Won Kidane has established himself as a thoughtful, pragmatic observer of how current U.S. immigration laws function, both in his scholarship<sup>1</sup> and in his clinical work. I am grateful for his incisive insights<sup>2</sup> on my Article advocating the decriminalization of border

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\* Maureen B. Cavanaugh Distinguished Faculty Scholar & Professor of Law, Penn State. Thanks to Joseph Robbins and the rest of the *Fordham Urban Law Journal* ("FULJ") staff for facilitating this exchange; to Dean Philip McConaughay for his support of this and all my work; to my family in the Philippines and Singapore; and to Corie, Ryan, Julia, and Matthew for their love. Special thanks go to Won Kidane for taking the time from his busy schedule to engage in a second "conversation" with me about my work; I value your feedback and your friendship.

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1. For instance, Professor Kidane has written quite eloquently about the consequences of deportation for asylum applicants accused under an overly broad definition of terrorism. See Won Kidane, *The Terrorism Exception to Asylum: Managing the Uncertainty in Status Determination*, 41 U. MICH. J.L. REFORM 669 (2008).

2. See Won Kidane, *Reflections on Professor Romero's Insight on the Decriminalization of Border Crossings*, 1 FORDHAM URB. L.J. CITY SQUARE 19 (2011).

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crossings, and I appreciate the opportunity to reply.<sup>3</sup>

It is clear that Professor Kidane and I agree on much: that the current entanglement of immigration and criminal law is unacceptable, that crossing borders is not immoral, and that the U.S. immigration system is desperately in need of repair. In his thoughtful review, Professor Kidane raises several important concerns about my proposal to decriminalize border crossings, focusing specifically on the proposal's practicality and effectiveness. In this brief reply, let me focus on three claims: (1) that eliminating the criminal sanctions associated with border crossings sends the unintended message that deportation is not punitive; (2) that leaving deportation as the sole remedy may curtail due process protections available only in criminal processes; and (3) that decriminalizing border crossings is not politically feasible, and even if it were, it may not lead to a conservation of scarce enforcement resources, the enhancement of the United States' standing abroad, or the healing

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3. The original FULJ article on decriminalization of border crossings is part of a larger book project examining the criminalization of undocumented persons. See Victor C. Romero, *CRIMMIGRATION: THE CRIMINALIZATION OF UNDOCUMENTED IMMIGRANTS* (NYU Press) (forthcoming). Since the Article's publication, I have also had the opportunity to present it as the 2011 Barbara Jordan Lecture for the Africana Research Center at Penn State. See Victor Romero, 2011 Barbara Jordan Lecture: Decriminalizing Border Crossings, *AFRICANA RESEARCH CENTER* (Mar. 21 2011), <http://cnet.pegcentral.com/player.php?video=09aa9426bb0dd88fcf11613b9e805617> (additional information about the lecture is available at <http://arc.psu.edu/gallery/2011-barbara-jordan-lecture-victor-c.-romero>). The article was also reprinted in the Hispanic National Bar Association Journal of Law and Policy. See Victor Romero, *Decriminalizing Border Crossings*, 3 *HISP. NAT'L B. ASS'N J.L. & POL'Y* 137 (2011), available at <http://www.hnba.com/publications/hnba-journal-of-law-and-policy/>. Because I am interested in both academic and popular reaction to these issues, I welcome readers to contact me with their reactions to the original Article and this exchange via e-mail at [vcrl@psu.edu](mailto:vcrl@psu.edu).

of our racially-polarized discourse on immigration policy.<sup>4</sup>

First, while Professor Kidane agrees that there is nothing immoral about crossing borders, he wonders whether decriminalizing border crossings would "unwittingly reinforce the view that deportation is a civil sanction and may be taken so casually."<sup>5</sup> At least in the realm of law, deportation has never been treated lightly. Indeed, the Supreme Court has long acknowledged that deportation punishes noncitizens by separating them from all they hold dear. In 1922, Justice Brandeis wrote that deportation may deprive a person of "all that makes life worth living."<sup>6</sup> As recently as last year, Justice Stevens described deportation as an "integral part—indeed, sometimes the most important part—of the penalty"<sup>7</sup> that may be imposed upon noncitizens convicted of specific crimes. If the Supreme Court—long a champion of national sovereignty over immigration control through the plenary power doctrine<sup>8</sup>—has long acknowledged the dire consequences that may attend deportation, I am not sure that leaving deportation as the sole remedy for undocumented border crossings dislodges that firmly-entrenched view. That the Court has deferred to Congress's perspective on the terms of admission and expulsion does not mean it has been insensitive to the punitive nature of involuntary exile. Put differently, unless a statute violates some fundamental norm,<sup>9</sup> the Court will not second-

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4. See Kidane, *supra* note 2, at 22.

5. *Id.*

6. *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

7. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1480 (2010).

8. See generally, e.g., Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853 (1987); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255 (1984).

9. See, e.g., Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 560 (1990)

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guess Congress's determination as to when noncitizens must be deported. Rather, the Court leaves to the administrative process the application of that presumptively valid law to the facts. If that process leads to deportation, the Court will not upset that finding, absent sufficiently important reasons to do so.

Given this current deference to Congress and the immigration bureaucracy, I believe that, rather than making removal seem less punitive, decriminalizing border crossings will do the exact opposite: It will permit immigration judges to more fairly and carefully weigh the equities in individual cases by removing the stigma of criminality that currently attends unauthorized border crossers. To take an example from my original Article, an immigration judge may well find it easier to sympathize with a mother who illegally crosses a border to be reunited with her daughter if Congress does not view such an act to be a federal crime.<sup>10</sup>

Second, Professor Kidane asserts that decriminalizing border crossings might lead to procedural short cuts that may make deportations easier to accomplish:

[D]eportation must not be perceived as a natural consequence of unauthorized entry. . . [M]y preference would be to maintain the separation between criminal proceedings 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.<sup>11</sup>

Professor Kidane worries about the lack of procedural protections in civil deportation

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(arguing that, in pro-immigrant rights cases, constitutional norms are implicitly protected through favorable statutory interpretation).

10. See Victor C. Romero, *Decriminalizing Border Crossings*, 38 *FORDHAM URB. L.J.* 273, 300 (2010).

11. Kidane, *supra* note 2, at 23.

hearings<sup>12</sup> and fears that noncitizens may end up with less due process protection than they would have had they been criminally charged. To be clear, I believe that noncitizens charged with crimes should be entitled to the full due process protections that attend criminal trials. Indeed, even this conservative Supreme Court held just last year that noncitizens who did not receive advice on the possible immigration consequences of their criminal pleas were deprived of their Sixth Amendment right to effective assistance of counsel.<sup>13</sup> I do not, however, believe that simply crossing the border should continue to be a federal crime.

The consequence, then, of decriminalization would not be a further convergence of the criminal and civil law regimes, but rather a separation of the two. For, if crossing the border is no longer a crime, the most that can be done is to process the person through the civil administrative bureaucracy and not through the criminal justice system. No federal criminal record, nor the attending stigma or possible prison time, will follow the noncitizen. And, as mentioned above, my hope is that the absence of a criminal charge will encourage a more equitable balancing of the equities. As it currently stands, however, the Department of Homeland Security is "double dipping": rather than charging dangerous criminals with border crossing offenses, "Operation Streamline" has targeted migrant workers with no criminal history, who are then subjected to both

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12. Professor Kidane cites, for example, Justice O'Connor's famous quote from *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984), in which she draws a clear distinction between civil deportation hearings and criminal proceedings to justify the Court's denial of the Fourth Amendment's exclusionary rule to deportees. See Kidane, *supra* note 2, at 21 n.8.

13. See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010). For a cogent brief on how *Padilla* applies on the ground, see César Cuauhtémoc García Hernández, *Criminal Defense After Padilla v. Kentucky*, GEO. IMMIGR. L.J. (forthcoming 2012).

criminal sanction and civil deportation.<sup>14</sup> Eliminating "Operation Streamline," like other forms of prosecutorial discretion and deferred action,<sup>15</sup> would certainly provide temporary relief, but only by decriminalizing border crossings will noncitizens be free from criminal prosecution.

Finally, Professor Kidane correctly notes that my proposal may be very difficult to swallow given the current political climate, and, even if it were to pass, may not achieve the three salutary effects I claim: conserve scarce criminal enforcement resources, enhance the United States' standing abroad, and help heal our racially-polarized discourse over immigration policy. I concede the political point, but only because my proposal may be politically unpalatable given the current climate—a climate in which even the eminently sensible DREAM Act (providing a pathway to citizenship for some undocumented students) cannot pass muster.<sup>16</sup> Otherwise, I cannot see why the statutory repeal of two short sections of the

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14. See Joanna Lydgate, *Assembly-Line Justice: A Review of Operation Streamline*, 2010 CHIEF JUSTICE EARL WARREN INST. ON RACE, ETHNICITY & DIVERSITY 1 (2010), available at <http://www.law.berkeley.edu/6807.htm> ("The current administration is committed to combating the drug and weapon trafficking and human smuggling at the root of violence along the U.S.-Mexico border. But a Bush-era immigration enforcement program called Operation Streamline threatens to undermine that effort. Operation Streamline requires the federal criminal prosecution and imprisonment of all unlawful border crossers. The program, which mainly targets migrant workers with no criminal history, has caused skyrocketing caseloads in many federal district courts along the border.").

15. See, e.g., Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, U.N.H. L. REV. (forthcoming 2012); Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 243 (2010).

16. See, e.g., Michael A. Olivas, *The Political Economy of the DREAM Act and the Legislative Process: A Case Study of Comprehensive Immigration Reform*, 55 WAYNE L. REV. 1757 (2009). For my own take on immigrant education in the context of post-Brown v. Board of Education politics, see generally Victor C. Romero, *Immigrant Education and the Promise of Integrative Egalitarianism*, 2011 MICH. ST. L. REV. 275 (2011).

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immigration code<sup>17</sup> would be more cumbersome than passing comprehensive immigration reform.

Now, on to the critique of the three benefits of my proposal. Professor Kidane believes that costs from criminal prosecutions would simply shift to civil ones; he advocates the prudent exercise of prosecutorial discretion instead.<sup>18</sup> Nothing in my proposal precludes smart enforcement through deferred action. While Professor Kidane may be right that, in the absence of criminal grounds, the government will pursue border crossers in civil proceedings, my hope is that new enforcement priorities would channel resources into true criminal activity committed by noncitizens rather than into deporting productive irregular migrants. Indeed, "Operation Streamline" shows us how enforcement priorities become skewed when, in the name of prosecuting "criminal aliens," our government focuses on undocumented migrant workers instead.<sup>19</sup>

Professor Kidane next wonders whether, by returning to a civil enforcement regime only, would-be border crossers will be sorely disappointed when deported, thereby marring any reputational boost the United States receives from decriminalization.<sup>20</sup> While it is understandable that some might read my proposal as a call to open borders, it clearly is not, and would-be border crossers would be acting at their peril. I do think, however, that border crossers would be correct to assume that, under my proposal, they would not be regarded as criminals. Accordingly, should they face deportation, they can rest assured that any claims they have for relief would not be tainted by the stigma of criminality.

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17. 8 U.S.C. §§ 1325, 1325-26.

18. See Kidane, *supra* note 2, at 26.

19. See generally Lydgate, *supra* note 14.

20. See Kidane, *supra* note 2, at 26-27.

Finally, Professor Kidane is skeptical of my claim that decriminalization will help heal our racially-polarized discourse on immigration policy for several reasons: (1) a technical change in the law will not necessarily change our racially-prejudiced culture; (2) the segment of society most likely to espouse prejudicial beliefs is least likely to be aware that the federal law criminalizes border crossings; and (3) even if that segment of society is aware that federal law criminalizes border crossings, that segment will not likely be impressed by the law's repeal; (4) a majority of Americans currently favor Arizona-like state trespass laws and will therefore be unpersuaded by a federal decriminalization effort; and (5) because it is impossible to completely prevent border crossings, society will continue to confuse those who cross the border to commit crime with those who do so only to work, irrespective of a repeal.<sup>21</sup>

I appreciate Professor Kidane's perspective, and I often wonder whether the law can ever adequately remedy deeply entrenched social norms. Yet, I believe that the United States has been particularly successful in using the law as one tool in helping to alleviate racial oppression. While historians may debate the significance of the landmark decision in *Brown v. Board of Education*,<sup>22</sup> thanks in part to *Brown*, it is now generally understood that discrimination on the basis of race is presumptively illegal and immoral. That is not to say that there is no more work to be done; indeed, progressives lament the pervasiveness of institutional racism that plagues contemporary America.<sup>23</sup> Nonetheless, laws help shape behavior, which then influences perspective. And so, although decriminalizing border crossings

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21. See *id.* at 24-25.

22. See *Brown v. Board of Education*, 347 U.S. 483 (1954).

23. See, e.g., Shirley Better, *INSTITUTIONAL RACISM: A PRIMER ON THEORY AND STRATEGIES FOR SOCIAL CHANGE* (2d ed. 2008).

may not change minds today or tomorrow, it will prevent immigration authorities from prosecuting individuals simply because they can, it will permit judges to consider their cases free from the taint of illegality, and it will, over time, help civilize our discourse over immigration policy.