



Illegal Immigration: A Legal and Moral Analysis



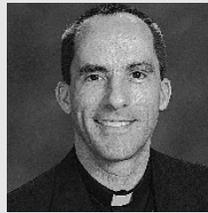
Rev. Stephen F. McGraw, J.D. and Rev. Donald J. Planty, Jr., J.C.D. —

Although immigration policy often seems one of the most divisive issues in American politics, a new consensus may be emerging. American voters now overwhelmingly support granting legal status to illegal immigrants.

A September 2017 Fox News poll showed that 83 percent of voters (including 69 percent of Republicans and 65 percent of Trump voters) favor giving illegal immigrants an opportunity to attain legal residency. The “DREAMers” (illegal immigrants under thirty who were brought to the U.S. as children and who can pass a background check) receive even more support: the same poll shows that 86 percent of voters favor giving them work permits and that 79 percent would grant them citizenship.¹ Recent polls from media across the ideological spectrum reveal similar results, and there are hints that a law protecting the DREAMers may pass in the near future.

But does this new consensus simply disregard the rule of law, perhaps in favor of sentimentalism? If illegal immigration is illegal, shouldn't the law be enforced? And isn't

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deportation the logical penalty? These questions are provocative, but they also raise further legal and moral questions that can help us clarify our thinking on immigration policy. Is there something about the word “illegal”—about law and the violation of law, about how and when and why law binds us—that needs to be better understood? This essay aims to provide clear legal and moral principles that can serve as a foundation for our reasoned discourse on immigration law, its enforcement, and reform.

A LAW IS A LAW, BUT WHAT KIND OF LAW?

Viewed through traditional moral philosophy, immigration laws are human, “positive” laws, so called because they are “posited” or put forth by a human legislative authority. Particular human laws must be in accord with, and in some way based upon, the moral law, or natural law, which is man’s participation, through right reason, in the eternal law of God. In some cases, as in laws forbidding murder or theft, human laws directly mirror the demands of the natural law itself. In other cases, where the natural law itself does not indicate a specific course of conduct to be required or prohibited, human laws make particular determinations for the sake of the common good, determinations that are reasonable and therefore binding, even if legislators could have enacted

other reasonable—and possibly better—laws. Laws that restrict or condition the exercise of the right to immigrate fall into this latter category. That is, the natural law itself does not specify exactly how to regulate the right to immigrate. However, according to the natural law, political authorities should determine, for the sake of the common good, juridical conditions for immigration. To the extent that the particular human laws setting forth those conditions are just, they have a basis in the natural law and are morally binding, even if they are far from the ideal set of laws.

This distinction between two different kinds of human laws is especially clear in actions forbidden by law. Some human laws, those that forbid what the natural law already forbids, are said to prohibit conduct that is *malum in se*; i.e., wrong or evil in and of itself. Other human laws go beyond what is determined by the natural law itself but nonetheless legitimately regulate human conduct in accord with reason and the common good. An action forbidden by such a law is *malum prohibitum*; i.e., wrong, not by its nature, but because it has been prohibited by a legitimate authority. Again, laws restricting immigration fall into this latter category—there is nothing inherently wrong with the prohibited conduct; rather the wrong in question is tied to the fact that a legitimate authority has decided to condition or restrict migration into the country. This is not to suggest that immigration laws, because they do not prohibit intrinsic moral evils such as murder, are not legally and morally binding. Rather, the distinction between *malum in se* and *malum prohibitum* helps us see (1) whether a law is just; (2) whether and under what circumstances transgression of

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even a just law might be justified; (3) what is a just and proportionate penalty for transgression of the law; and (4) what kind or degree of moral reproach attaches to violators of the law.

A similar distinction between a “crime” and a “civil offense” is a hallowed part of our Anglo-American legal tradition rooted in medieval English common law. In this tradition, only actions that, according to the nature of the offense, were deserving of moral reproach are crimes. Actions forbidden by law but not in themselves deserving moral reproach have been deemed civil offenses. Immigrating illegally, in light of the Anglo-American legal tradition, is by nature a civil offense rather than a crime. The foregoing is not intended to suggest that laws forbidding non-criminal offenses do not need to be obeyed, but only that the nature of such offenses helps determine such things as, for example, what constitutes a just penalty for violation of the law.

THE ERROR OF LEGAL POSITIVISM

Nevertheless, there is a prevalent tendency to disregard or deny the foregoing distinctions, particularly regarding laws that restrict immigration. Some contend that “illegal is illegal” and make no further distinction. This popular perspective is partially rooted in a modern ideology known as legal

positivism. The legal positivist divorces law from morality and disallows any distinction between a law proscribing action that is *malum in se* and a law proscribing action that is *malum prohibitum*. What matters is that a law has been posited by a legitimate authority. Questions of morality, if entertained at all, are to be relegated to a separate discipline that does not encroach upon the legal field. Similarly, if permitting a distinction between crimes and non-criminal offenses, the legal positivist looks only to the classification posited by the law and refuses to look to the nature of the act itself. If the positive law classifies a particular violation of immigration law as a crime, not because of the nature of the offense but in order to send a message or to increase the penalty, then that violation is considered a crime, even if the offense in itself—in its nature—does not rise to that level.

ARE U.S. IMMIGRATION LAWS JUST?

If the act of immigrating to our country without permission of the government is not wrong in itself, but only wrong insofar as it has been prohibited by human law in accordance with right reason and the just demands of the common good, then a question arises: Is such a law in fact reasonable and just? The ideology of legal positivism does not allow such a question to be asked. But the Western tradition—rooted in ancient Greek and Hebrew

thought, and developed in early Christianity—has indeed seen this question as not only legitimate but also necessary; for if a human law is against reason and justice, it does not bind one to obey it.

A thorough examination of the justness of our country's immigration laws would be a daunting task. The natural right to migrate is conditioned by the state's legitimate interest in controlling its borders for the sake of the common good. But are the conditions currently placed on the exercise of that right truly reasonable and just? Under our present system, large numbers of men and women of good will, seeking security and livelihood that are gravely lacking in their own countries, have recourse to a legal immigration process that admits only a tiny fraction of them and, for most, constitutes a practical impossibility. Is this reasonable and

the fact that a much better set of laws could be conceived does not necessarily mean that the current set of laws is unjust and therefore not binding. Indeed, despite the serious difficulties that many have raised about U.S. immigration laws, reasonable persons can disagree as to whether they are just or unjust. Moreover, even if some of these laws are unjust, to act in conformity with them does not make one complicit in the commission of an intrinsic moral evil. Indeed, in some cases, the common good might even require action in conformity with an unjust immigration law if greater harm might result from refusal to conform and conformity does not involve any act that is immoral or unjust. In such a case, it is not the law itself that is binding but the demands of the common good.

MAY A JUST LAW EVER BE TRANSGRESSED?



Border fence near El Paso, Texas

just? Honest reflection upon the present conditions highlights some of the fundamental human goods at stake and suggests that some of our immigration laws are at least problematic from the standpoint of reason and justice.

There are few, perhaps, who would not concede, when faced with the evidence, that there are serious problems with some of our country's immigration laws. But

Presuming, then, that there is generally a moral obligation to comply with immigration laws, let us consider more closely whether and under what circumstances a person might nonetheless transgress the law without being morally blameworthy. Recall that we are not dealing with a law forbidding actions, such as murder or perjury, that are wrong in and of themselves and therefore wrong everywhere and in all circumstances. Rather, we are dealing with a law forbidding action that is deemed to be wrong only because it has been prohibited by the law. In Christian ethics, it has traditionally been held that a person may act contrary to such a law for a proportionately weighty reason, and in such a case, the prohibited “wrong” is not in fact a morally wrong action under the circumstances. This exception to

the usual binding force of a law is said to spring from a presumed will of the legislator, who, it is held, would grant an exception to the law in such circumstances if the particular case were before him. Or it might be said that the force of the law is simply overridden, in the compelling circumstances of the case, according to reason and justice. Regardless of the way in which one conceives of the exception, the action in question,

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although contravening the terms of the law, is seen to be morally justified under the circumstances. In the context of immigration, a person entering or remaining in the country illegally might be justified in doing so by weighty circumstances—such as destitution, extreme hunger, or endemic drug violence—affecting himself or his family. Such a person would still be morally bound to have respect for authority and for the law, and could not rightly lie or commit fraud in order to enter or remain in the country, even though the entry was morally justified in itself.

“STRICT LIABILITY” AND PROPORTIONATE PENALTIES

If illegal immigration were in the nature of a crime, compelling circumstances justifying entry into the country might translate into a legal defense that would preclude a finding of the requisite criminal

intent. But as we have seen, illegal immigration is in the nature of a civil offense, which does not carry with it the moral culpability and the severe penalties that potentially attach to a crime. Such matters are typically governed by a standard of “strict liability.” That is, the state does not have to inquire at length into potential justifications or available defenses. Because the conduct is not in the nature of a crime, the penalty is necessarily a moderate one and is generally imposed on all alike. Even those who may have had a good reason for disobeying the law are generally bound to pay the penalty for its transgression.

Such a regime of strict liability is eminently reasonable as a general matter. The common good requires order and a reasonable amount of control over the immigration process, and so rules are made. There may be some for whom such rules present a considerable hardship, but the state does not have the resources, except in narrowly defined cases of asylum, to consider the causes in each case of immigration contrary to the law. Nor in many cases would a state be able to entertain blanket claims of necessity even when grounded in harsh economic realities. However, the substantive and procedural conditions to which the right to immigrate is subjected must in general be reasonable; that is, bearing some reasonable relationship to the real-life situation of most immigrants searching for the security and livelihood that they cannot find in their country of origin. If the substantive and procedural conditions are in general reasonable, then the fact that some would-be immigrants find themselves in dire straits not accounted for by the law (and

therefore may be morally justified in transgressing it) does not make the law unjust or unreasonable. This is true even if a regime of strict liability prevails; that is, even if cases of exceptional necessity or justification are not exempted from the law's force, *as long as penalties for transgression of the law are not disproportionate*. The transgressor is morally obliged to respect the law and the competent authority, and he would be morally obliged also to pay the penalty for transgressing the law.

In the context of our nation's current immigration laws, however, there are two fundamental problems. One is that the process of legal immigration is unduly burdensome, not just for an exceptional few but for the vast majority who seek to immigrate. It often demands thousands of dollars, months and even years of waiting before entry, and multiple steps involving hundreds of pages of paperwork and documentation that even college-educated native English speakers cannot navigate without an immigration lawyer. The process does not even begin to approach a reasonable accommodation of the real-life situation of most people impelled to come to our country seeking basic security and a means of livelihood. The right of such persons to immigrate is not being subjected to juridical conditions that can reasonably be met by the vast majority of them. In this situation, there are many illegal immigrants who may be, in their personal circumstances, justified in transgressing the law. This reality, in turn, casts doubt on the reasonableness and justice of such laws.

THE PENALTY OF DEPORTATION

The other fundamental problem lies in the penalty that commonly attaches to illegal immigration—deportation. In the first place, it should be noted that our current legal regime does not even treat deportation as a penalty but as a remedial action that simply restores the *status quo ante*. This is entirely reasonable in the case of one who

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has just entered the country. But to make no distinction between such a case and that of one who has been living in the country for years, often since childhood, or who has entered into marriage and formed a family—to pretend that deportation in such a case merely remedies the earlier violation and restores the *status quo*—is to indulge in what amounts to a legal fiction unsustainable in the face of basic demands of reason and justice. Thus the penalty of forcibly expelling the offender from the country is generally disproportionate to the offense of illegally entering or remaining in the country, particularly for the large number who have done so for reasons that are truly just and grave in nature, and especially for those who have not recently entered but have established themselves and are residing in our country.

Here it is also relevant to note the well-known fact that in many sectors of our society the immigration laws were for a long time not enforced. On the contrary, while official quotas for legal immigration were kept absurdly low in comparison with our country's actual economic capacity for assimilation, there was a tacit acceptance and even encouragement of illegal immigration; e.g., on the part of business and other sectors of our society. This acceptance was not only rooted in narrow economic interests but was rooted, for many people, in an understanding that, economically and otherwise, our country was in fact fit and able to receive these newcomers, who were ready to live and work here in peace, regardless of their potential future citizenship status.

In such a context, deportation is clearly a penalty, not merely a procedure to restore the *status quo ante*, and moreover a penalty

that, in view of the goods of which it effectively deprives those immigrants who have established a life for themselves in our country, is not generally proportionate to the original violation. We need in many cases to examine alternative penalties. These could be monetary in nature—the billions of dollars sent to their home countries every year by illegal immigrants suggests that significant monetary penalties would be feasible—and would be a source of income, hitherto largely untapped, for the state or nation providing for their care. While many illegal immigrants already pay taxes, the prospect of being able to “emerge from the shadows” and obtain legal status would make it worthwhile to pay significant amounts of money in fines. The imposition of civil disabilities, even including the withholding of a path to citizenship, are alternatives to deportation that might be considered.

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The overwhelming majority of Americans who support granting legal status to illegal immigrants are not simply ignoring the rule of law, nor is their moral judgment overpowered by their emotions. The emerging consensus conforms not only with our intuitive sense of justice, but also with distinctions that are integral to our legal and ethical tradition. If the path to immigration reform is one lined with thorny questions, then all the more do we need our reasoned conversation to be guided by this great tradition. 

ENDNOTE

1. <http://www.foxnews.com/politics/interactive/2017/09/28/fox-news-poll-september-28-2017.html>

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A handwritten signature in blue ink, appearing to read 'John Ciskanik'. The signature is fluid and cursive.

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