

Immigrant Detention Revisited

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In the relatively short time since my original paper was published (Vasavda, 2016), there have been numerous administrative changes in the treatment of undocumented immigrants in the United States. Moreover, immigration seems to have grown into more of a hot-button subject than ever, with the current President of the United States making it one of his signature issues. Given President Trump's anti-immigrant rhetoric, it is unsurprising that conditions in immigrant detention centers have not improved since the publication of my original paper. It is therefore worthwhile to reexamine the current landscape of immigrant detention in the United States through the lens of punishment theory. Some of the issues here are not specific to the conditions inside detention centers, but instead, are about the treatment of migrants before they are detained – facts that are important to consider when weighing the ethics and legality of immigrant detention. I recognize that in my original paper I failed to scrutinize whether the concept of immigrant detention itself is moral. Nor will I here. There are broader issues with the American immigration regime that I intentionally do not explore. I have purposely chosen, rather, to focus my criticism on the practice of immigrant detention, and how we fail to justly apply the laws that we currently have.

Recap

In my original paper, I argued that immigrant detention practices in the United States are both morally indefensible and inconsistent with American civil law. I based this argument largely on the critical difference between civil and criminal offenses, and their related punishments. Typically, criminal law concerns behavior understood to be an offense against society or the state whereas civil law involves disputes between persons or organizations. This can be confusing, however, since the state can also be a party in a civil lawsuit. It is therefore helpful to differentiate criminal and civil law through the perspective of moral desert.

Violations of criminal law are considered “crimes,” but violations of civil law are considered “offenses,” “infractions,” or “violations.” Crimes are generally associated with retributive punishment and “criminals” therefore bear the taint of moral blameworthiness; civil law does not carry the same connotation (Robinson, 1996, p. 206). While society encourages violators of civil law to somehow compensate an offended party, the same degree of disgrace attached to criminal law generally does not apply. Additionally, as “crimes” are

punished more harshly, it is only through violations of criminal law that a person may be incarcerated. This distinction formed the basis of my argument.

I held that the conditions inside immigrant detention centers are akin to incarceration. As such, subjecting detained immigrants to such punitive conditions when they have not been charged with a criminal offense is inconsistent with American civil law. Building upon this criticism, I further argued that *de facto* incarceration is also morally reprehensible, as it is unduly punitive. This assessment was based on an evaluation of immigrant detention through both retributivist and consequentialist punishment theory.

Neither the retributivist nor consequentialist school of thought justifies incarcerating *and* deporting immigrants charged with civil offenses. Retributivism holds that wrongdoers ought to “pay” for their actions as they “deserve” to be punished while consequentialism is more concerned with the social outcomes of punishment e.g., deterrence, rehabilitation, protecting society from violent offenders. Because many detained immigrants are subsequently subject to deportation, I held that the administration of punitive detention effectively exposes offenders to a double dose of punishment beyond the threshold of moral desert. Such a practice also does not successfully meet any consequentialist ends, rendering its application morally indefensible.

On the “New” Criminalization of Improper Entry

Upon reading my original paper in the current political climate, one may argue that my entire argument has been rendered moot. My argument rested on the notion that in most cases, undocumented immigrants being held in immigrant detention centers were charged with the *civil* offense of unlawful presence. A punishment typically reserved for *criminal* violations was therefore indefensible on moral and legal grounds. Since then, the Trump administration has instituted a policy of charging all undocumented immigrants apprehended at the Southern border with a criminal misdemeanor and referring their cases for criminal prosecution (Jordan & Nixon, 2018). It would follow that, based on this policy, there is no longer a moral or legal conflict with subjecting migrants to a punishment associated with a criminal offense. However, the situation is not that straightforward.

There has not been any change in the law regarding improper entry. First-time improper entry has been a criminal misdemeanor for decades. The difference now is that the government is *pursuing* the misdemeanor charge. In the past, the government often did not press charges for improper entry in order to prioritize violent and/or repeat offenders, and because it is harder to prove; the resulting cases would take longer to resolve. Instead, the government generally opted to pursue deportation proceedings for violations of civil immigration law (e.g., unlawful presence) (Jordan & Nixon, 2018; Vasavda, 2016, p. 70). It was precisely for this reason that I argued detainment of

immigrants in prison-like conditions typically associated with criminal felonies was immoral and illegal. Charging a migrant with improper entry, in contrast, complicates matters.

Legally speaking, with a criminal misdemeanor charge filed against them, migrants are not “detained” in the same way most of them used to be in advance of their civil immigration proceedings. Instead, according to American criminal law, they *should* be sent to jail to await trial. While it depends on the circumstances, typically a person in such a position has the option to post bail which will secure her release from jail on the condition she appears for her court date. Sometimes a person will be released on her “own recognizance” (O.R.) which means that the accused has promised, in writing, to appear in court for all upcoming proceedings (Goldkamp & Gottfredson, 1979). These pre-trial release options are less available to undocumented immigrants.⁸⁰

Migrants charged with a criminal misdemeanor who are ineligible for release must be held by the state until their trial. Yet the Trump administration perceives no nuance in the distinction between a facility for an immigrant charged with a civil offense and a facility for an immigrant charged with a criminal one. In fact, President Trump has requested an expansion of beds in *existing* facilities to support his criminal prosecution policy which means that that in the eyes of the federal government, there is *no difference* between a civil and a criminal charge when it comes to undocumented immigrants (Elinson, 2018). Accused migrants are sent to the same facilities they would have been in prior administrations, supporting my original thesis that immigrant detention centers are pseudo-prisons.⁸¹

Now allow me to put that aside for a moment as it does not address the

80 While some undocumented immigrants are legally eligible for release on O.R. or bail, their options are much more restrained in practice. Despite an increasing number of migrants being released on O.R. due to courtroom losses and public outcry over the Trump administration’s “zero tolerance” immigration policy, it is unlikely the *majority* of undocumented immigrants would be as doing so would be tantamount to reinstituting the “catch-and-release” policy that President Trump has decried (Siddiqui & Lartey, 2018). Additionally, while some undocumented immigrants are eligible for release on cash bail, not all are (Paul, 2018). Even for those who are eligible, there are several barriers: a lack of family or friends in the United States, family or friends in the United States without the financial means to post bail on their behalf, and a long queue of other migrants also relying on immigrant-defense organizations to get bail. So, while a limited number of immigrants who have been accused of a crime can avoid being detained prior to their trial, there remains a significant number who cannot.

81 I recognize there is an inverse possibility here: Could it be that immigrants now charged with criminal misdemeanors are being sent to facilities which are *insufficiently* like jail? For evidence that immigrants charged with civil offenses are detained in conditions tantamount to prison, see my original paper.

change in the charge being filed. Suppose one argues that the American government *should* charge all suspected migrants at the Southern border with the criminal misdemeanor of improper entry. As the Trump administration has argued: They broke a law; no one is exempt from the law. By the merits of this argument, if the government is now prosecuting these migrants as it “should” have been all along, then there is no problem with detaining them in prison-like conditions before trial. We do so with many people accused of criminal offenses who cannot post bail or are ineligible for release on O.R. Not exactly.

Under the “zero tolerance” policy of the Trump administration, the government still must *prove* improper entry, absent a guilty plea. This can take a long time. By instituting this policy, the government has therefore exacerbated a caseload backlog which has required an increase in the number of “detention facilities” (jails) while migrants await their trial or verdict, and longer detention for those involved. The conditions in such detention facilities have not improved, and have arguably gotten worse, since my original paper was published, so the American government is effectively *incarcerating* more migrants for longer periods of time before they have even been *convicted* (Anapol, 2018). I maintain that it is immoral – and illegal – to subject migrants to incarceration without proving beyond a reasonable doubt that they have entered the country illegally.⁸² The retributivist and consequentialist have no reason to support pre-conviction punishment if a crime has not been duly established.

It follows, from this argument that there is another major flaw with the American justice system: pre-trial jails. From the perspective of moral desert, we ought not to punish people, prior to their trials, in conditions akin to those they would face post-conviction. But I leave this argument incomplete here for the purposes of this paper as it can get murky and complicated.

I will cede that post-conviction pre-deportation incarceration of adults falls within the purview of the law as it stands. Yet it remains morally questionable for non-violent offenders, as it seems excessively punitive from a retributivist perspective, and both unnecessary and ineffective from a consequentialist one (Vasavda, 2016, p. 79). Now that it has been established that the change in policy has been a change in enforcement of the law and management of the consequences rather than a change in the law itself, and that these changes have not erased the fundamental moral or legal quandaries, I briefly turn to a key development that has occurred over the past two years.

Family Separations

Perhaps the most notorious change to immigration policy in the past

⁸² Again, I take issue with the way American immigration law criminalizes immigrants. This point is specific to the laws in place at the time this article was written. I do not necessarily hold that, absent this law, it is in principle moral to incarcerate immigrants after they are convicted.

two years has been the forcible separation of children from their parents. While separations occur before immigrants are detained, it is a step in the process and an additional layer of punishment to consider. To be clear, family separation is, without a doubt, a form of punishment; it is performed directly as a response to alleged improper entry and is meant to serve as both a penalty and deterrent.

From a retributivist perspective, imposing the punishment of family separation far exceeds the threshold of moral desert. It is cruel, egregiously disproportionate to the offense committed, and can cause long-term (often irreversible) psychological damage. Recent reports have found that among children who have been reunited with their families, many exhibit signs of anxiety, introversion, regression, and other mental health issues (Jordan, 2018). This is especially prevalent among younger children, as the first few years of life are a sensitive period for brain development. While early intervention can help mitigate some of the worst effects, the risk of long-term damage remains, and should have been completely avoided in the first place. Some experts have similarly noted that many children likely internalized the separation from their parents as a form of punishment, potentially causing resentment towards their parents and severe damage to familial ties (Jordan, 2018).

These long-term effects are directly attributable to the punishment imposed by the government. It is also worth remembering that separation is *not* the only punishment being doled out. Family separation is the first punishment, followed by prison-like detainment, which is often followed by deportation. I maintain, as I did in my original paper, that deportation alone is a sufficient punishment according to the retributivist. For these reasons, the addition of family separation to immigration detention is immoral and indefensible.

I recognize that the arguments for family separations are typically not retributivist but consequentialist. According to the consequentialist, optimally punishment should reform people, allow them to see the error of their ways, and return them to society with a positive outlook on life. At the very least, consequentialism holds that punishment should deter the offender (or others) from offending. The government viewed family separations in this way. In response to a (relative) surge in the number of migrants apprehended at the Southern border, the government argued in favor of family separations as a deterrent (Qiu, 2018). Attorney General Sessions expressed as much, “If you are smuggling a child then we will prosecute you, and that child will be separated from you as required by law. If you don’t like that, then don’t smuggle children over our border” (Jordan & Nixon, 2018). Yet the evidence suggests that the consequentialist arguments in favor of family separation do not pass muster.

Family separation does not meet consequentialist ends. Due to the aforementioned psychological damage family separation can do to children (and parents), it is unlikely immigrants suffering such a punishment would return to

society with a positive outlook on life. In regard to its power to deter, people continued to come to the United States after the policy was implemented at a rate consistent with migration waves in the past, given the time of year (Kopan, 2018; Wong, 2018). Moreover, if someone has already had their child(ren) separated from them (and has not had their child(ren) returned prior to or after being deported, as has been common), they are probably *more* likely to reoffend, in an attempt to reunite with their child(ren). As such, the family separation policy is indefensible on both retributivist and consequentialist grounds.

Conclusion

The actions taken on immigration policy over the past two years have exposed serious moral and legal flaws. Many, if not all, of the actions that have been taken have been extremely regressive, making the conditions for immigrants in and outside detention centers even more dire. While President Trump has ordered the end of family separations via executive order, he has demanded in its place the continuation of his “zero tolerance” policy by indefinitely detaining families together and continuing to charge them with criminal misdemeanors (Wu, 2018). This is sure to get caught up in the courts. Meanwhile, the government continues the immoral incarceration of unconvicted migrants and subjects them to double (sometimes triple) jeopardy with excessive levels of punishment beyond the threshold of moral desert.

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