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DECRIMINALIZING MIGRANT SMUGGLING

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ABSTRACT

While historical narratives often cast smugglers helping people escape persecution as heroes, modern discourse portrays migrant smuggling as an inherently predatory criminal enterprise. This Article argues that the criminalization of human smuggling through 8 U.S.C. § 1324 should be abolished. The criminalization of migration, including anti-smuggling provisions, has made border crossing increasingly lethal while failing to deter unauthorized entry. Contrary to government narratives of sophisticated criminal enterprises, empirical evidence reveals that smuggling networks typically operate as small-scale, localized operations that migrants employ as survival strategies in response to militarized borders and restricted legal pathways. These realities, combined with evidence that anti-smuggling laws actively undermine migrant safety without providing meaningful law enforcement benefits, demonstrate that criminalization cannot be justified on either retributivist or consequentialist grounds. Instead of criminalization, this Article proposes that expanding legal migration pathways would better serve both humanitarian and administrative goals.

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INTRODUCTION

The rescue of over 7,000 Danish Jews to Sweden in 1943, facilitated by smugglers who helped them escape Nazi persecution, stands today as a celebrated example of moral courage.[1] Similarly, the Underground Railroad, a network of safehouses that helped enslaved Blacks escape from the American South in the nineteenth century, is now remembered as a valiant part of the history of the struggle against slavery.[2] More recently, North Korean defectors, many of whom employ human smugglers to escape, are welcomed and celebrated in the West.[3]

In stark contrast with these historical narratives, modern discourse on human smuggling in the United States, Europe, and Australia portrays smuggling and harboring migrants not as a lifeline for refugees but as a predatory criminal enterprise.[4] While this distinction partly reflects the difference between

1. *See* LEO GOLDBERGER, THE RESCUE OF THE DANISH JEWS: MORAL COURAGE UNDER STRESS (1987).

2. *See* ERIC FONER, GATEWAY TO FREEDOM: THE HIDDEN HISTORY OF THE UNDERGROUND RAILROAD (2015).

3. Maroosha Muzaffar, *Inside the secretive organisation smuggling people along a 3,000-mile route out of North Korea*, INDEPENDENT (Dec. 9, 2023, at 10:15 EST), https://perma.cc/522N-6SGG.

4. *See, e.g.*, JULIE KALMAN & RUTH BALINT, SMUGGLED: AN ILLEGAL HISTORY OF JOURNEYS TO AUSTRALIA (2021) (detailing heroic accounts of people being smuggled to Australia–from Jews escaping the Holocaust, Eastern Europeans escaping from communism to refugees fleeing from violence in Asia, Africa, and the Middle East–to reverse the recent political turn against migrants and smugglers);

smuggling people out of versus into countries, both forms of smuggling fundamentally serve the same human need: avoiding death and persecution.[5] Yet despite this humanitarian dimension, smuggling has become a primary target of national and international law enforcement, spawning multinational task forces, treaties, and enforcement programs funded by billions of dollars.[6] So much so that even humanitarian efforts are targeted for criminal prosecution.[7] This Article focuses on the U.S. context to argue that criminalizing human smuggling cannot be justified on either retributivist or consequentialist grounds, meaning that 8 U.S.C. § 1324, the migrant smuggling statute, should be abolished.

Human smuggling is "a form of illegal trade in which the commodity is an assisted illegal entry into a country."[8] In the United States, this conduct is proscribed under 8 U.S.C. § 1324, which criminalizes both bringing in undocumented migrants to the United States and/or harboring undocumented migrants once they are inside the country. It states that it is a crime to knowingly "bring. . .or attempt[] to bring to the United States [a noncitizen] at a place other than a designated port of entry" or to "conceal[], harbor[], or shield[] [them] from detection." Crucially, statutorily as well as conceptually,

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Stefano Becucci, SMUGGLING AND TRAFFICKING OF MIGRANTS IN SOUTHERN EUROPE: CRIMINAL ACTORS, DYNAMICS AND MIGRATION POLICIES (2024) (DETAILING THE VARIOUS ROUTES AND CONDITIONS THAT ARE USED TO SMUGGLE MIGRANTS INTO AND ACROSS SOUTHERN EUROPE). *SEE ALSO SECRETARY MAYORKAS DELIVERS REMARKS ON A PRESS CALL REGARDING BORDER NUMBERS*, DEP'T HOMELAND SEC. (JAN. 16, 2025), HTTPS://PERMA.CC/VDS9-W53C (STATING THAT THE U.S. HAS "EXPANDED THE USE OF ENFORCEMENT MEASURES AGAINST THE *RUTHLESS* SMUGGLERS THAT PROFIT OFF OF IRREGULAR MIGRATION, INCLUDING SANCTIONS ON TRANSPORTATION COMPANIES THAT FACILITATE IRREGULAR MIGRATION" (EMPHASIS ADDED)); ANTÓNIO GUTERRES (@ANTONIOGUTERRES), X, *SMUGGLERS & HUMAN TRAFFICKERS ARE ROBBING PEOPLE OF THEIR RIGHTS AND STEALING THEIR DREAMS. THE ONLY WAY TO BREAK THEIR STRANGLEHOLD IS TO ESTABLISH PATHWAYS FOR MIGRATION IN CLOSE COOPERATION BETWEEN COUNTRIES OF ORIGIN & DESTINATION*. (FEB. 20, 2022 AT 20:31 ET), HTTPS://PERMA.CC/97SZ-MGAA.

5. *See infra* Part II.B.

6. *See, e.g.*, *Operation Stonegarden (OPSG) Program*, HOMELAND SEC. GRANTS https://perma.cc/RH3K-4UVN (last visited June 23, 2025) (a federal border security grant program); *Border Patrol, Mexican Government Partner to Combat Human Smuggling*, CUSTOMS & BORDER PROT. (June 23, 2017), https://perma.cc/2E9Z-YJ3F (The Joint Mexico and U.S. "Operation Against Smugglers Initiative on Safety and Security" (OASISS) "enables the prosecution of Mexican human smugglers, through Mexican courts, using information obtained via interviews conducted by Border Patrol agents while in U.S. custody"); Protocol against the Smuggling of Migrants by Land, Sea and Air, *adopted* Nov. 15, 2000, 2241 U.N.T.S. 507; G.A. Res. 73/195, annex, Global Compact for Safe, Orderly, and Regular Migration (Dec. 19, 2018) (stating that a key objective is to "strengthen the transnational response to smuggling of migrants"); *European Migrant Smuggling Centre - EMSC*, EUROPOL, https://perma.cc/C8P6-E5FY (last visited June 23, 2025) (task force established within the EU's Agency for Law Enforcement Cooperation to tackle "the organized criminal groups profiting from migrant smuggling" to Europe). *See also* Ryan Devereaux, *Humanitarian Volunteer Scott Warren Reflects on the Borderlands and Two Years of Government Persecution*, INTERCEPT (Nov. 30, 2019 at 11:30 ET), https://perma.cc/GFT5-SX7T (detailing the prosecution of Scott Warren, the leader of a humanitarian organization devoted to protecting migrant lives in the desert who was arrested and charged with harboring and conspiring to transport undocumented immigrants 40 miles north of the U.S.-Mexico border near the town of Ajo, Arizona, in violation of 8 U.S.C. §1324).

7. *See* Rachel Landry, *The 'humanitarian smuggling' of refugees: Criminal offence or moral obligation?* (Refugee Studies Ctr. Working Paper No. 119, 2016) (documenting the rise of humanitarian prosecutions).

8. Paolo Campana, *Human Smuggling: Structure and Mechanisms*, 49 CRIME & JUST. 471, 471 (2020).

smuggling is distinguished from human trafficking, which is done against the will of the person being displaced or moved.[9]

The anti-smuggling statute represents a critical component of the broader framework of "managing migration through crime."[10] Scholars have extensively documented how, for the last forty years, the U.S. government has increasingly deployed criminal law enforcement mechanisms to regulate migration, resulting in significant deterioration of both immigration and criminal justice systems, and the people impacted by them.[11] Building on arguments from both academics and advocates calling for the abolition of illegal entry and reentry crimes,[12] this Article contends that similar scrutiny should be applied to the anti-smuggling statute.

My argument is, in sum, that migrant smuggling and harboring should be decriminalized because their criminalization is not justified by any of the traditional justifications of punishment. 8 U.S.C. § 1324 does not deter illegal entries and is part of a penal and policy architecture that has only made migration more deadly generally and has led to the criminalization of migrants qua migrants.[13]

U.S. government officials characterize human smuggling across the U.S.-Mexico border as the work of sophisticated, hierarchical criminal organizations systematically exploiting vulnerable people.[14] However, academic research consistently reveals a markedly different reality. Studies demonstrate that smuggling operations typically function as small-scale, decentralized networks of independent intermediaries operating locally along migration routes.[15] These groups usually comprise individuals who share socioeconomic backgrounds with migrants—

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9. *See* 18 U.S.C. §§ 1589–1591.

10. *See* Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. (SIDEBAR) 135 (2009).

11. *See, e.g.*, *id.* (arguing that civil immigration's relaxed procedural standards are also seeping into criminal prosecutions of immigration-related offenses, effectively weakening traditional criminal law protections); César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457 (2014) (arguing that criminal law became the vehicle for immigration law due to both a history and retrenchment of racial resentment, as well as an expansion of the use of criminal law to target all social harms between the 1970's and the 1990's); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006) (explaining that crimmigration is expanding because it is used to determine who is a proper member of society); David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 157 (2012) (arguing that the merger of criminal and immigration law has occurred, in part, due to a "rising tendency to treat legal rules and legal procedures as interchangeable tools, to be brought to bear pragmatically and instrumentally on an ad hoc basis.").

12. *See infra* Part I.B.

13. GOVERNING IMMIGRATION THROUGH CRIME: A READER, (Julie A. Dowling & Jonathan Xavier Inda eds., 2013) (providing a number of essays outlining the ways in which stronger border enforcement, internal policing through raids and cooperation between federal and state law enforcement, and other ways of targeting undocumented migrants has led to migrants being understood as threats); Judith Ann Warner, *The Social Construction of the Criminal Alien in Immigration Law, Enforcement Practice and Statistical Enumeration: Consequences for Immigrant Stereotyping*, 1 J. SOC. & ECOLOGICAL BOUNDARIES 56, 57 (2005) (arguing that immigrants were seen as criminals once the legal category "criminal alien" was formed).

14. Ezra Klein, *The Real 'Border Czar' Defends the Biden-Harris Record*, N.Y. TIMES (Sep. 13, 2024), https://perma.cc/6PT7-JQBT.

15. *See infra* Part II.; *see also* Campana, *supra* note 8, at 483-89; Gabriella E. Sanchez & Sheldon X. Zhang, *Rumors, Encounters, Collaborations, and Survival: The Migrant Smuggling–Drug Trafficking Nexus in the U.S. Southwest*, 676 ANNALS AM. ACAD. POL. & SOC. SCI. 135, 136 (Mar. 2018) (finding no evidence of centralized power in smuggling groups across the US-Mexico border).

often being former or failed migrants themselves—and generally avoid involvement in other criminal activities, including drug trafficking.[16]

Furthermore, smuggling markets exhibit characteristics more commonly associated with legitimate business operations than organized crime. These operations feature relatively little inter-competitor violence, depend heavily on reputation and trust, and operate through established financing traditions.[17] This evidence fundamentally contradicts the official narrative of smuggling as a centrally coordinated criminal enterprise threatening national security, instead pointing to a more nuanced reality of localized, informal networks responding to the demand for cross-border movement.

Smuggling emerges as a strategy "that migrants employ to navigate the shifting terrain of immigration enforcement, exploitation, corruption, and organized crime in the space of transit."[18] This response arises both from the need to escape your country of origin to survive[19] and from a broader system of structural violence: that of the *non*-immigration system. In a context where legal migration pathways are largely closed,[20] where enforcement policies have made illegal entry increasingly lethal,[21] and where border regions and entire countries have become militarized to suppress migration, [22] people turn to smuggling as the least dangerous option among staying home, traveling alone, or traveling with a smuggler. While smuggling itself carries risks,[23] it often provides protections for migrants unavailable through other means.

On the flip side, the criminalization of smuggling inflicts substantial harm on migrants while offering minimal law enforcement benefits. Although smuggling is a more concrete harm than illegal entry and reentry (because smuggling migrants makes the legal administration more inefficient and costlier),[24] criminalizing it causes greater injury than it prevents.[25] As demonstrated in Part I,

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16. Simón Pedro Izcara Palacios, *Coyotaje and Drugs: Two Different Businesses*, 34 BULL. OF LATIN AM. RSCH 324, 332-37 (2015).

17. Campana, *supra* note 8, at 483.

18. Amelia Frank-Vitale, *Coyotes, Caravans, and the Central American Migrant Smuggling Continuum*, 26 TRENDS ORG. CRIME 64, 64 (Mar. 2023).

19. *See infra* Part II.B.

20. Most people are excluded from the U.S.'s legal migration pathways. *See* Pedro Gerson, *Punitive Legal Immigration*, 112 KY. L.J. 331, 338-48 (2024).

21. *See infra* Part II.B.

22. *See* R. CHUCK MASON, CONG. RSCH. SERV., R41286, SECURING AMERICA'S BORDERS: THE ROLE OF THE MILITARY (2013) (showing that every administration since G. W. Bush's has used the National Guard at some point to reinforce law enforcement at the U.S.-Mexico border). Also, Mexico has deputized the military all across the country to interdict migrants traveling to the United States. *See Mexico's Militarized Migration Crackdown Puts Migrants at Risk*, WOLA (Mar. 23, 2021), https://perma.cc/8679-H752.

23. As detailed in Part II, people smuggled are vulnerable to predatory behavior (from fraud and theft to kidnapping, rape, and murder) from smugglers or the organized crime members they encounter.

24. *See infra* Part III.B.

25. Various scholars have characterized the harm of illegal entry as one akin to trespass, breach of contract, against legal administration, and against a political theory. As I further explain in Part III B, smuggling and harboring are best described as crimes against legal administration because they complicate the enforcement of migration laws (both criminal and civil). *See* Daniel I. Morales, *Crimes of Migration*, 49 WAKE FOREST L. REV. 1257, 1280-84 (2015) (arguing that migration harms a political theory of membership and discarding the theory that illegal entry is a harm against legal administration);

migration deterrence policies, including border smuggling prosecutions, have directly increased migrant deaths without affecting arrival rates or entry attempts.[26] This ineffectiveness stems from migration's nature as a complex phenomenon driven by historical patterns and labor market demands rather than criminal law.[27] The statute's disproportionate harm to those it criminalizes thus renders it unjustifiable on both retributivist and consequentialist grounds.

More effective solutions exist for both migrant protection and immigration system administration.[28] Expanding legal migration pathways would reduce reliance on dangerous clandestine routes without requiring open borders. Pragmatic policy compromises can create more orderly migration systems while offering realistic opportunities for movement—without guaranteeing citizenship, permanent status, or unrestricted entry. These reforms would prioritize migrant safety while maintaining sovereign control over immigration.[29]

This Article is divided as follows: Part I contextualizes this argument within the broader framework of migration criminalization, analyzing both the lethal consequences of deterrence-based policies and their profound impact on social meaning, while exploring existing scholarly arguments for decriminalizing illegal entry and reentry offenses and broader border abolition movements. Part II reframes human smuggling as a survival strategy, presenting empirical evidence of smuggling operations' actual nature and examining why migrants rely on these networks despite their risks. Finally, Part III provides a comprehensive analysis of 8 U.S.C. § 1324, first offering a detailed examination of the statute's scope and application, then evaluating the philosophical underpinnings of smuggling criminalization, and concluding with an assessment of criminal punishment's justifications in this context and alternative approaches for reducing social harm.

I. MIGRATION'S CRIMINALIZATION AND ITS EFFECTS

Scholars have long recognized that immigration and criminal law and enforcement are intertwined, with detrimental effects on both. On the one hand, immigration enforcement itself has been more heavily tied to criminal enforcement through both the prosecution of crimes of migration, as well as

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Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105, 109-10 (2012) (critiquing the trespass and breach of contract theories).

26. *See* Douglas S. Massey, *The Counterproductive Consequences of Border Enforcement*, 37 CATO J. 539, 545 (Fall 2017).

27. *See infra* notes 141-43.

28. Existing criminal statutes sufficiently address smuggler abuse of migrants. Analysis of §1324 prosecutions shows only 30% involved migrant victimization, all of which fell under established statutes covering fraud, coercion, assault, or rape. Of course, enforcement of those criminal laws could also be carried out (and often is) in racialized and discriminatory ways. However, it is possible to safeguard against that possibility when protecting migrants from those harms. *See* Jennifer M. Chacon, *Tensions and Trade-Offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. OF PA. L. REV. 1609, 1612-16 (2010).

29. *See infra* Part III.D.

the ever expanding[30] immigration consequences of criminal involvement.[31] Relatedly, immigration enforcement has, over time, relied more heavily on tools of criminal enforcement: the use of physical force, barriers, and surveillance.[32] On the criminal side, there has been a weakening of criminal procedure protections in the prosecution of migration crimes that has now seeped into much of federal criminal practice. Moreover, using criminal law or immigration law to achieve the goals of immigration deterrence and expulsion has become so intertwined and interdependent that government officials do not see them as distinct.[33]

Much of the "crimmigration" – that is, the merger of criminal and immigration law - discussion in the legal literature has focused on the corrosive effects that this blending has had on law itself. Of course, there has also been plenty of exploration of the different ways in which aspects of the criminalization of migration have worsened the lives of migrants and migrant communities. However, in the legal literature, it is not as often stated that the criminalization of migration is responsible for a significant rise in migrant deaths as well as the perpetuation of social stigma and fear in entire immigrant communities. This discussion is important because it is only when these effects are plainly laid out that we can start to understand the efforts to dismantle the crimmigration system.

In this section, I explore how crimmigration has led to a rise in migrant deaths and the othering of immigrants and immigrant communities in the United States. The section concludes with a brief discussion of some of the efforts that have taken (and are taking) place to change this reality.

A. *The Harms of Migration's Criminalization*

1. *The Deadly Consequence of Deterrence*

The Mediterranean Sea and the US-Mexico border stand as two of the world's deadliest migration routes. In 2022, over 2,400 people died attempting to cross the Mediterranean,[34] while at least 686 migrants lost their lives along the US-Mexico border—making it the deadliest land route for migrants worldwide.[35] These staggering numbers, likely undercounted,[36] are not accidental but rather the direct result of migration deterrence policies.

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30. *See, e.g.*, Laken Riley Act, Pub. L. No. 119-1, 139 Stat. 3 (2025) (amending Section 236(c) of the Immigration and Nationality Act to impose mandatory detention for all noncitizens convicted of any theft-related offense).

31. *See, e.g.*, Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. OF CRIM. L. AND CRIMINOLOGY 613 (Summer 2012); Ingrid V. Eagly, *Criminal Justice in an Era of Mass Deportation: Reforms from California*, 20 NEW CRIM. L. REV. 12 (2017); Juliet P. Stumpf, *The Process Is the Punishment in Crimmigration Law*, *in* THE BORDERS OF PUNISHMENT: MIGRATION, CITIZENSHIP, AND SOCIAL EXCLUSION 58 (Katja Franko Aas & Mary Bosworth eds., 2013).

32. *See* Amy F. Kimpel, *Alienating Criminal Procedure*, 37 GEO. IMMIGR. L.J. 237, 245 (2023).

33. Sklansky, *supra* note 11, at 157.

34. *See Missing Migrants Project*, INT'L ORG. FOR MIGRATION, https://perma.cc/W8ZN-94XA (last visited Jun. 19, 2025).

35. *US-Mexico Border World's Deadliest Migration Land Route*, INT'L ORG. FOR MIGRATION (Sept. 12, 2023), https://perma.cc/55NJ-73F3.

36. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-22-105053, CBP SHOULD IMPROVE DATA COLLECTION, REPORTING, AND EVALUATION FOR THE MISSING MIGRANT PROGRAM (2022) ("Border

In the United States, deterrence became central to immigration control under President Bill Clinton's "Prevention Through Deterrence (PTD)" policy. PTD deliberately channeled migrants away from urban areas into more hostile terrain, operating under the assumption that the heightened risk of death would discourage crossing attempts.[37] That is, the policy was predicated on the belief that making illegal border crossings more difficult and dangerous would deter migrants from attempting to enter the United States unlawfully.

Initially, PTD was implemented in El Paso, Texas, and later expanded across the southwestern border, eventually reaching the Arizona and California borders in the late 1990s.[38] PTD has been expanded by every administration since Bill Clinton's through the introduction of more technological surveillance,[39] the ever-growing militarization of the southern U.S. border,[40] the construction of the border wall,[41] and international cooperation to contain migration flows in "transit countries."[42]

In addition to PTD, immigration deterrence policies grew through the Consequence Delivery System (CDS), which started in 2011.[43] CDS is made up of several enforcement policies designed to increase the penalties or unauthorized migration. It involves the rise in immigration detention,[44] increased prosecutions for illegal entry,[45] and remote

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Patrol has not collected and recorded, or reported to Congress, complete data on migrant deaths, or disclosed associated data limitations.") (The IOM data comes mostly from official government sources and closely matches the figures presented by DHS).

37. U.S. BORDER PATROL, BORDER PATROL STRATEGIC PLAN 1994 AND BEYOND 6–7 (1994), https://perma.cc/5DYE-RYJF; *see also* TIMOTHY DUNN, BLOCKADING THE BORDER AND HUMAN RIGHTS: THE EL PASO OPERATION THAT REMADE IMMIGRATION ENFORCEMENT (2009) (telling the story of how PTD was started in El Paso, Texas).

38. Dunn, *supra* note 37. It is worth noting that Prevention Through Deterrence was a "policy response to a moral panic about the perceived threat of Latino immigration to the United States propounded by self-interested bureaucrats, politicians, and pundits who sought to mobilize political and material resources for their own benefit." Douglas S. Massey, Jorge Durand & Karen A. Pren, *Why Border Enforcement Backfired*, 121 AM. J.OF SOCIO. 1557, 1557 (2016).

39. Secure Border Initiative from 2005, Bush.

40. The first large-scale deployment of the National Guard to the Southern Border was between 2006 and 2008 when 30000 troops supported CBP under "Operation Jump Start." Since then, every administration has used the National Guard at some point to reinforce law enforcement at the U.S.-Mexico border. *See* R. CHUCK MASON, CONG. RSCH. SERV., R41286, SECURING AMERICA'S BORDERS: THE ROLE OF THE MILITARY (2013).

41. While President Trump increased the size of the Border Wall, border tactical infrastructure, including "roads, lighting, pedestrian fencing, and vehicle barriers," has existed and grown since 1990. *See* CARLA N. ARGUETA, CONG. RSCH. SERV., R42138, BORDER SECURITY: IMMIGRATION ENFORCEMENT BETWEEN PORTS OF ENTRY 14 (2016).

42. *See generally*, Anita Sinha, *Transnational Migration Deterrence*, 63 B.C. L. REV. 1295 (2022) (showing how wealthy destination countries increasingly rely on "transnational migration deterrence" - arrangements where they get other countries to prevent migrants from reaching their borders).

43. Argueta, *supra* note 41, at 7.

44. Immigration detention rose dramatically between the early 1990's and the late 2010's. It has remained constant since about 2018-2019, with a downward blip during the year that the border was closed due to the COVID-19 Pandemic. *See e.g.*, Emily Ryo, *Understanding Immigration Detention: Causes, Conditions, and Consequences*, 15 ANN. REV. L. SOC. SCI. 97, 101 (2019); Pedro Gerson, *Embracing Crimmigration to Curtail Immigration Detention*, 12 U.C. IRVINE L. REV. 1209, 1224 (2020).

45. This has been achieved through a number of programs designed to increase the efficiency of prosecutions as well as the severity. For example, Operation Streamline under Obama, and Zero Tolerance under Trump. *See generally* U.S. DEPT. OF HOMELAND SEC. OFF. OF THE INSPECTOR GEN., OIG-15-95, STREAMLINE: MEASURING ITS EFFECTS ON ILLEGAL BORDER CROSSING (2015) (report discussing the

repatriation.[46] Although initially CDS targeted only Mexican migrants, CDS has been expanded to migrants of other nationalities.[47] While both PTD and CDS are about deterrence, the method they use to achieve it is different. As articulated before, PTD aimed to dissuade border crossers by moving them to cross through more dangerous terrain. CDS, meanwhile, seeks to punish, incarcerate, and criminalize undocumented migrants "to deter unauthorized flows by raising the costs to migrants of being apprehended and by making it more difficult for them to reconnect with smugglers following a failed entry attempt."[48]

The list of policies associated with PTD and CDS shows that deterrence is not only achieved through the criminalization of migration. However, the criminalization of migration is one of the main, if not currently the main, drivers of the U.S. government's deterrence efforts. The hope is that making undocumented immigration harder or less attractive (from a physical safety or a legal consequence perspective) will eventually stop undocumented migration. However, as anthropologist Jason De Leon has argued, deterrence has not worked. Rather, deterrence programs have merely displaced undocumented migration to remote areas "in which the Border Patrol can draw on the agency of animals and other nonhumans to do its dirty work while simultaneously absolving itself of any blame connected to migrant injuries or loss of life."[49] That is, the U.S. government has not found a way to dissuade migration, only to make it more dangerous.

There is plenty of evidence showing that, indeed, undocumented migration to the United States has become more dangerous. According to a recent forensic study by the University of Arizona looking at human remains in Arizona between 1990 and 2020, most of the bodies recovered in the region are from 2005 or later. The authors note "the rate of recovered remains of undocumented border crossers has largely increased even as apprehensions have declined, which is a dynamic that suggests undocumented migration in southern Arizona has become increasingly dangerous."[50] Further supporting this conclusion is that over time, border crossers have been found in increasingly remote areas, and evidence shows that

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efficacy of Operation and giving recommendations to implement the Operation more effectively); Catalina Amuedo-Dorantes & José R. Bucheli, *Family Separation and Reunification Under President Trump's Zero-Tolerance Policy*, 58 INT'L MIGRATION REV. 989, 990–991 (2024).

46. The Alien Transfer and Exit Program under Obama, for example, was a lateral repatriation program that returned migrants to different locations along the border than where they entered to disrupt smuggling networks.

47. Argueta, *supra* note 41, at 7 n.43.

48. *Id*. at 9.

49. JASON DE LEON, THE LAND OF OPEN GRAVES: LIVING AND DYING ON THE MIGRANT TRAIL 43 (2015).

50. ROBIN C. REINEKE ET AL., BINATIONAL MIGRATION INST., MIGRANT DEATHS IN SOUTHERN ARIZONA: RECOVERED UNDOCUMENTED BORDER CROSSER REMAINS INVESTIGATED BY THE PIMA COUNTY OFFICE OF THE MEDICAL EXAMINER 3 (2021).

the routes taken by migrants are correlated with the locations of border surveillance technology.[51]

Similarly, studies have consistently shown that deterrence has had no effect on the volume of unauthorized crossings. One study looking at border enforcement between 1986 (the year Immigration Reform and Control Act (IRCA) was passed) and 2008 estimated that the likelihood of entry through the southern border remained relatively stable at around 95%.[52] It is worth mentioning that this negligible effect occurred at a time when most undocumented migration was from Mexico, which could be particularly inelastic migration to deterrence policies.[53] As migration patterns at the southern border change, namely as more migrants arrive coming from different (and further away) countries, it could be that border enforcement has a slightly stronger effect than in the past.[54]

However, even a cursory look at the number of arrivals over the last thirty years shows that the number of people attempting to enter through the southern border has remained impervious to deterrence policies. Before 2021 and 2022 (anomalous years because of the Covid-19 pandemic),[55] arrivals at the U.S. border peaked in 2000 and 2005. Then, after falling consistently for over a decade, they rose again in 2019.[56] All these peaks occurred at times when there was a lot of emphasis on deterrence at the southern border. In fact, the rise in 2019 happened in the shadow of Trump's zero-tolerance policies.[57] At a minimum, therefore, border enforcement has had a negligible impact on the number of migrants arriving at the southern border. This makes sense when we consider that the decision to migrate is not uniquely, or even mostly, conditioned on U.S. border or immigration policy.[58] Rather, it is

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51. Samuel Norton Chambers et al., *Mortality, Surveillance and the Tertiary "Funnel Effect" on the U.S.-Mexico Border: A Geospatial Modeling of the Geography of Deterrence*, 36 J. BORDERLANDS STUD. 443, 443 (2021).

52. Massey, *supra* note 26, at 548.

53. Given the proximity between the countries, the migrants who fail and try again lose relatively little in both time and money as compared to migrants who travel from more distant countries only to fail when entering.

54. Throughout the Biden administration, more migrants started to arrive at the border from countries that traditionally didn't arrive in the US by the southern border, such as Venezuela, China, and Russia. This was partly due to migration through the Darian Gap being made easier. *See* Juan Pappier & Caitlyn Yates, *How the Treacherous Darien Gap Became a Migration Crossroads of the Americas*, HUMAN RIGHTS WATCH (Oct. 10, 2023), https://perma.cc/E6Q4-TFN2. Nonetheless, the majority of migrants arriving at the Southern Border are still from Mexico and the Northern Triangle of Central America. *See* John Gramlich, *Migrant Encounters at U.S.-Mexico Border Have Fallen Sharply in 2024,* PEW RESEARCH CENTER (Oct. 1, 2024), https://perma.cc/XX45-JKV5.

55. *See* Alex Arnon, *The Impact of COVID-19 on Immigration to the United States*, PENN WHARTON BUDGET MODEL (Oct. 15, 2024), https://perma.cc/F368-MJUB.

56. *See Southwest Land Border Encounters*, U.S. CUSTOMS AND BORDER PROT., https://perma.cc/H5KJ-NKCJ (last visited Dec. 12, 2024).

57. Zero Tolerance policy refers to the policy calling for criminal prosecution of all unlawful entries that lead to family separations at the U.S. Border. *See* Memorandum from the Off. of the Att'y Gen. on Zero-Tolerance for Offenses Under 8 U.S.C. § 1325(a) (Apr. 6. 2018) (on file with the Dep't of Just.); *Q&A: Trump Administration's "Zero-Tolerance" Immigration Policy*, HUMAN RIGHTS WATCH (Aug. 16, 2018), https://perma.cc/8G8U-7GKH.

58. It is questionable that deterrence as a whole could even theoretically work. *See e.g.,* Emily Ryo, *Detention as Deterrence*, 71 STAN. L. REV.237, 237–38 (2019) (arguing that there are a number of

more often a decision based on a combination of factors such as personal safety, economic well-being, demography, the environment, existing migrant networks, etc.[59]

On the other hand, these deterrence policies have had the counterintuitive effect of increasing the undocumented population in the United States. As Douglas Massey has shown, between 1986 and 2008, "despite a five-fold increase in Border Patrol officers, a four-fold increase in patrol hours, and a 20-fold increase in budget," the undocumented population in the United States grew from three million to twelve million people.[60] This was because, as has been mentioned, the deterrence strategy displaced migrations to more dangerous desert routes, but also raised the cost of hiring smugglers ("*coyotes*").[61] Furthermore, while deterrence didn't reduce northbound migration it significantly curtailed return migration, by making it much harder and costlier to move back and forth between countries (as most Mexican migrants preferred).[62]

In sum, while the criminalization of migration is not the only legal tool used to displace migrants to ever more dangerous terrains, it remains a key component of the effort. This displacement has directly led to increased migrant deaths and disappearances and a boon to smugglers in Mexico and along the southern U.S. border.

2. *The Transformation of Social Meaning*

The impact of treating immigration as a criminal matter extends far beyond border enforcement and affects broader society, not just those directly subject to immigration enforcement. Research indicates that the increasing convergence of immigration and criminal law has fostered a public perception that associates immigrants with criminality.[63] This stigma particularly affects

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"deterrence hurdles": the fact that people don't know the law, the fact that even if they know it, they think they will avoid detention, and that even if they are detained, trying to migrate is the rational option). While Ryo's paper is addressing immigration detention specifically, its analysis could be applied to immigration deterrence writ large.

59. Indeed, once seen in this light, it is evident that border law and policy can, over the long term, have at most a marginal effect on migration. For a primer on migration causes, *see*, *e.g.*, Stephen Castles et al., *Irregular Migration: Causes, Patterns, and Strategies*, *in* GLOBAL PERSPECTIVES ON MIGRATION AND DEVELOPMENT: GFMD PUERTO VALLARTA AND BEYOND 117 (Irena Omelaniuk ed., 2012). Thomas Bauer & Klaus Zimmermann, *Causes of International Migration: A Survey*, *in* CROSSING BORDERS (1998).

60. Massey, *supra* note 26, at 539.

61. *Id.* at 544–45.

62. *Id.* at 550–52.

63. GOVERNING IMMIGRATION THROUGH CRIME: A READER, (Julie A. Dowling & Jonathan Xavier Inda eds., 2013) (providing a number of essays outlining the ways in which stronger border enforcement, internal policing through raids and cooperation between federal and state law enforcement, and other ways of targeting undocumented migrants has led to migrants being understood as threats); Judith Ann Warner, *The Social Construction of the Criminal Alien in Immigration Law, Enforcement Practice and Statistical Enumeration: Consequences for Immigrant Stereotyping*, 1 J. SOC. AND ECOLOGICAL BOUNDARIES 56, 57 (2005) (arguing that immigrants were seen as criminals once the legal category "criminal alien" was formed); for empirical evidence *see* Xia Wang, *Undocumented Immigrants as Perceived Criminal Threat: A Test of the Minority Threat Perspective*, 50 CRIMINOLOGY 743, 743 (2012)

Latino and Black immigrants, who face disproportionate criminalization in the immigration system.[64]

Immigration law[65] and the enforcement practices discussed in the preceding section have contributed to the emergence of the "crimmigrant."[66] Scholars have emphasized that militarized border control, immigration detention centers, high-profile deportations, and targeted programs like Secure Communities and Operation Streamline have had a particularly pernicious impact on the social construction of immigrants as criminals.[67–68] These effects have been exacerbated by media and political speech that has repeated and perpetuated the trope of immigrants as criminals.[69]

Some researchers propose an alternative view: that these practices stem from a historical prejudice against immigrants of color, coupled with

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(showing that places where people perceive the immigrant population to be larger than it is are associated with having people that view immigrants as criminals).

64. Amada Armenta, *Racializing Crimmigration: Structural Racism, Colorblindness, and the Institutional Production of Immigrant Criminality*, 3 SOCIO. RACE & ETHNICITY 82 (2017) (arguing that law enforcement agencies' "organizational practices and laws converge to systematically criminalize and punish Latinos in the United States"); Felicia Arriaga, *Understanding Crimmigration: Implications for Racial and Ethnic Minorities Within the United States*, 10 SOCIO. COMPASS 805, 808 (2016); Daniel Martinez & Jeremy Slack, *What Part of "Illegal" Don't You Understand? The Social Consequences of Criminalizing Unauthorized Mexican Migrants in the United States*, 22 SOC. & LEGAL STUD. 535, 549 (2013) (the United States' approach "to unauthorized migration systematically criminalizes an entire segment of the U.S. population and contributes to the continued mass incarceration of people of color in a country with one of the highest incarceration rates in the entire world"); Karla M. McKanders, *Immigration and Racial Justice: Enforcing the Borders of Blackness*, 37 GA. ST. U. L. REV. 1139, 1148–49 (2020) (arguing that Black immigrants have been rendered invisible while at the same time have been targeted by law enforcement, further perpetuating anti-Black racism in the U.S.)

65. Although the criminalization of migration started long before the 1990's, it was the passing of the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA) and the Antiterrorism and Effective Death Penalty Act (AEDPA) in 1996 that truly marked the beginning of the modern era by expanding the range of criminal offenses that would have immigration consequences, that restricted due process protections for certain types of individuals in removal proceedings, and as well empowered local law enforcement agencies to enforce immigration law. *See*, *e.g.*, Leisy Abrego, Mat Coleman, Daniel E. Martínez, Cecilia Menjívar & Jeremy Slack, *Making Immigrants into Criminals: Legal Processes of Criminalization in the Post-IIRIRA Era*, 5 J. MIGRATION & HUM. SEC. 694, 697–98 (2017).

66. Pedro Gerson, *Immigration Detention As An Obstacle To Decarceration*, 58 SAN DIEGO L. REV. 535, 560 (2021).

67. Jize Jiang & Edna Erez, *Immigrants as Symbolic Assailants: Crimmigration and Its Discontents*, 28 INT'L CRIM. JUST. REV. 5, 5 (2018) (arguing that "the portrayal of immigrants as 'symbolic assailants' has facilitated the creation and operation of crimmigration under the guise of crime prevention rather than for addressing terrorism and national security—the presumed purpose of utilizing crimmigration practices."); Heidy Sarabia, *"Felons, Not Families": Criminalized Illegality, Stigma, and Membership of Deported "Criminal Aliens"*, 15 Migration Letters 284, 284 (2018) (making the case that deporting migrants as "criminal aliens" results in their legally permanent characterization as "criminal aliens").

68. Jeremy Slack, Daniel E. Martínez, Scott Whiteford & Emily Peiffer, *In Harm's Way: Family Separation, Immigration Enforcement Programs and Security on the US-Mexico Border*, 3 J. MIGRATION AND HUM. SEC. 109, 109–110 (2015) (arguing that Operation Streamline and ATEP did not have a strong deterrent effect but rather decreased the probability of returning to Mexico, strengthened U.S. ties of migrants, which in turn makes the desire to return post deportation much stronger).

69. Andrea Gomez Cervantes, Daniel Alvord & Cecilia Menjívar, *"Bad Hombres": The Effects of Criminalizing Latino Immigrants through Law and Media in the Rural Midwest*, 15 MIGRATION LETTERS 182 (2018) (looking at how media narratives have contributed "to socially construct a 'Brown Threat' which reproduces anxiety and fears about crime, terror, and threats to the nation, affecting the lives of immigrants and non-immigrants alike."); Ashley R Shapiro, *The Criminalization of the Immigration System: The Dehumanizing Impact of Calling a Person "Illegal,"* 21 RICHMOND PUB. INT. L. REV. 117 (2018). (arguing that describing migrants as "illegals" dehumanizes people and perpetuates stereotypes.).

American society's tendency to apply criminal justice solutions to perceived social problems.[70] Yet the question of whether social attitudes preceded legal frameworks, or vice versa, may be less relevant, as these two factors continuously reinforce each other in a cyclical pattern.

The consequences of the conflagration of migrants as criminals permeate every aspect of immigrants' daily lives, affecting not only those who lack documentation but also their family members, including U.S. citizens. In the workplace and public sphere, criminalization creates conditions of extreme vulnerability and restricted mobility.[71] Immigrants often accept exploitative working conditions and substandard wages because they fear that any interaction with authorities could lead to detention or deportation.[72] The constant threat of enforcement affects even routine activities like driving, as immigrants must carefully plan their routes to avoid checkpoints and law enforcement encounters.[73] This hypervigilance and self-policing behavior extends to documented immigrants and U.S. citizens in mixed-status families, who internalize the fear and stigma associated with immigrant criminalization.[74]

When one understands that criminalizing migration has had deep and long-lasting effects on all immigrant community members, regardless of their own citizenship, it becomes easier to see why there have been growing efforts to decriminalize immigration enforcement. The next subsection briefly looks at some of these efforts.

B. *Decriminalizing Migration*

1. *The Fight to Decriminalize Illegal Entry and Re-entry*

For the last two decades, immigration related offenses[75] have been the most frequently prosecuted federal crimes.[76] According to the latest data,

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70. César Cuauhtémoc García Hernández, *supra* note 11, at 1460.

71. Annie Lai, *Confronting Proxy Criminalization*, 92 DENV. U. L. REV. 879 (2014) (analyzing how states driver's licensing regimes function as a proxy for the criminalization of migrants); Michele L. Waslin, *Driving While Immigrant: Driver's License Policy and Immigration Enforcement*, *in* Outside Justice: Immigration and the Criminalizing Impact of Changing Policy and Practice 3 (David C Brotherton, Daniel L Stageman, & Shirley P Leyro eds., 2013) (tracking the development of state drivers license policies and immigration enforcement and showing how the converged in post 9/11 America).

72. Abrego et al., *supra* note 65, at 706. *See also*, Shirley Lung, *Criminalizing Work and Non-Work: The Disciplining of Immigrant and African American Workers*, 14 U. MASS. L. REV. 290 (2019) (showing how criminalization of work has depended on racialized narratives and stereotypes to justify it and how it has affected the lives of immigrant communities writ large).

73. Abrego et al., *supra* note 65, at 706.

74. *Id.*

75. Immigration-related crimes generally cover three categories of conduct: (1) improper entry and reentry; (2) smuggling, transporting, and harboring aliens; and (3) immigration-related fraud. *See* Kelsey Y. Santamaria, *Immigration-Related Criminal* Offenses, CONGRESSIONAL RESEARCH SERVICES, (2023), https://perma.cc/6PVB-VKKL.

76. *See* JUDITH A. GREENE, BETHANY CARSON & ANDREA BLACK, INDEFENSIBLE: A DECADE OF MASS INCARCERATION OF MIGRANTS PROSECUTED FOR CROSSING THE BORDER 12 (2016) ("Improper entry and re-entry are now the two top criminal charges being filed in our federal court system . . . ."); Eric S Fish, *Race, History, and Immigration Crimes*, 107 IOWA LAW REVIEW 1051, 1053 (2022); Amy F. Kimpel, *Alienating Criminal Procedure*, 37 GEO. IMMIGR. L.J. 237, 245 (2022).

29.2% of the cases filed in federal district court in the 12-month period prior to March 31, 2023, were "immigration offenses."[77] Unlawful reentry,[78] a felony, was the most charged criminal offense (it came second to drug offenses, but only if you combine all drug offenses into one).[79] Scholars have argued that concentrating the federal docket on these laws has had "devastating consequences for the courts and for all defendants, citizens and noncitizens alike" because it has watered down due process protections for all criminal defendants.[80]

It was not always this way. According to data from the Department of Justice, from 1986 to 2003, controlled substance offenses were the most frequently charged federal crimes.[81] In 2003, both immigration and controlled substance offenses represented a practically identical percentage of the federal docket at 27.7%.[82] As of 2004, immigration officially took over as the most charged offense, taking up 27.7% of the docket, to 26.4% devoted to controlled substances. Since then, immigration offenses have oscillated in terms of how much they have dominated the federal docket, some years—2009 to 2012 and 2018 to 2020—they represented over 40% of it. However, they have remained as the most charged federal crime for twenty years consecutively.[83] In fact, all of this data undercounts the extent to which immigration crimes have become the focal point of federal criminal prosecutions since illegal entry misdemeanor prosecutions are often not reported.[84] So, according to one estimate, in Fiscal Year 2019, for example, "59% of all terminated federal prosecutions in district and magistrate courts were for immigration crimes."[85]

This shift in criminal enforcement has led immigration scholars and others to call for reform. Some proposals have asserted that while the crimes of

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77. United States Courts, *Table D-3—U.S. District Courts–Criminal Federal Judicial Caseload Statistics*, (March 31, 2023), https://perma.cc/W49W-97HG.

78. 8 U.S.C § 1326.

79. *Id.*

80. Kimpel, *supra* note 32, at 241 ("Overburdened by cases, the federal courts have begun to take short cuts on due process").

81. *See* United States Attorneys, *Fiscal Year 2014* (2014), https://perma.cc/J9KM-B3MF. Prior to that, at least in the first half of the 1980's, crimes of fraud against the government were the most commonly charged offenses by the DOJ.

82. See Department of Justice, *United States Attorneys' Annual Statistical Report* (2003), https://perma.cc/H767-PLHJ.

83. This is only the cases filed; cases pending are dominated by drugs. This has to do with the average time to resolve a case, which is much longer for drug crimes than immigration crimes, for a number of reasons. First, many immigration crimes are processed together as part of projects like Operation Streamline. Second, there are often more issues of fact and in dispute in controlled substance offense cases than in immigration. *See generally*: CITE.

84. The DOJ reports cases filed in District Court, but Section 1325 prosecutions are mostly done in Magistrate courts because they are Class B misdemeanors. *See* 18 U.S.C. § 1325 (imposing a maximum penalty of 6 months) and 18 U.S.C. § 3559(7) (classifying offenses with a maximum sentence of six months or less as Class B misdemeanors). Courts also don't report the total number of immigration crimes to the U.S. Sentencing Commission because they only report felonies and Class A misdemeanor convictions. *See Overview of Federal Criminal Cases, Fiscal Year 2020,* (Apr. 2021), https://perma.cc/JMC5-XFGZ.

85. Kimpel, *supra* note 32, at 246.

illegal entry and reentry—8 U.S.C. § 1325 and 8 U.S.C. § 1326—should remain on the books, they should be used more sparingly, and sentencing should be reduced to better fit the level of harm.[86]

This would allow the federal government to devote more resources to crimes that are more dangerous while conveying that the border remains secure, which could, in theory, open the door for more legal migration paths.[87] Moreover, the argument goes, the need to continue these prosecutions is important because it signals that irregular crossings will not be tolerated.[88]

Other scholars have been bolder, advocating a total repeal of §§ 1325 and 1326. Both Victor Romero and Daniel Morales have appealed to foundational features of criminal law to argue that illegal entry and reentry cannot be criminalized.[89] Morales has also argued that whatever retributive goals are obtained through criminal punishment, a civil system suffices, given deportation's punitiveness. It's worth noting that even reformers who have not gone as far as Morales in terms of decriminalization agree with him on this point. As Mary Fan writes:

> The principle that unlawful presence is dealt with through civil removal rather than criminal prosecution is not just a matter of normative perspective. We need not wade into the bog of contestation over the quantum of retributive moral desert for unlawful entry and presence. Rather, the principle makes sense as a matter of cost-efficiency and common sense."[90]

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86. *See* David A. Martin, *Eight Myths About Immigration Enforcement*, 10 NYU J.L. & PUB. POL'Y 525, 552 (2007) (arguing that a mix of tougher internal immigration enforcement policies – not border policies – combined with more paths to legal migration can lead to "the greater objective [which] is to reform our laws so that we as a nation can best take advantage of the benefits of immigration in the twenty-first century."); *see also* Mary Fan, *The Case for Crimmigration Reform*, 92 N.C. L. REV. 75, 135 (2013) (arguing that current enforcement strategies are wasteful and do not focus on individuals that cause the greatest harm, urging DOJ to focus criminal prosecution of crimes of illegal reentry on individuals because while "criminal history is an imperfect proxy for risk, it is a better one than mere alienage.")

87. *See* David A. Martin, *Resolute Enforcement is Not Just for Restrictionists: Building a Stable and Efficient Immigration Enforcement System*, 30 J.L. & POL. 411 (2014) (arguing that public perception that migration was out of control had negative outcomes); *see also* Martin, *supra* note 86, at 551 (arguing that "the only politically durable foundation for generous legal immigration policy in the future is the assurance that immigration is under control.")

88. *See* Kit Johnson, *A Cost-Benefit Analysis of the Federal Prosecution of Immigration Crimes*, 92 DENV. U. L. REV. 863, 870 (2015). For a critique of the deterrence value of these prosecutions, *see* K.-Sue Park, *Self-Deportation Nation*, 132 HARV. L. REV. 1878, 1930 (2019) (arguing that deterrence-based policies "contribute[] to the suffering, subordination, and self-deportation of both the people who are their clear targets and the citizens who are part of their networks").

89. *See* Victor C. Romero, *Decriminalizing Border Crossings*, 38 FORDHAM URB. L.J. 273 (2010) (arguing that strict liability should not be used to criminalize crimes of entry and urging that the federal government be forced to prove criminal intent beyond the intent to enter); Morales, *supra* note 25 (arguing that neither utilitarian nor retributive theories of criminal justice allow for the use of criminal punishment of what he calls "crimes of migration").

90. Fan, *supra* note 86, at 136.

More recently, Eric Fish has argued that the explicit racist origins of crimes of illegal entry and reentry make them unconstitutional under the Equal Protection Clause.[91]

Scholars are not the only actors to have advocated for a repeal of § 1325 or § 1326 (nor, for that matter, are they the most influential actors doing so). Ingrid Eagly has documented how both grassroots organizations as well as influential Democratic policy makers like Julian Castro, in part motivated by the extremes of the Trump administration as well as the continued punitiveness of immigration compromises during the Obama administration, started campaigns to repeal § 1325 and/or § 1326.[92]

In addition to advocacy, there has been litigation. Over the years, litigants have raised similar claims to the one articulated by Eric Fish regarding the constitutionality of § 1325 and § 1326.[93] Most recently, in *U.S v. Carrillo Lopez,* District Judge Miranda Du found that § 1326 was, on its face, an unconstitutional violation of the Fifth Amendment's Equal Protection Clause, following the disparate impact standard from *Arlington Heights*.[94] The District Court decision was reversed by the Ninth Circuit Court of Appeals, which found that "Carrillo-Lopez did not carry his burden of proving that § 1326 was enacted with the intent to be discriminatory towards Mexicans and other Central and South Americans."[95] Although this conclusion is a setback for challengers of § 1325 and § 1326, the fact that a district court viewed the law's challenger's position favorably speaks to the future potential that such a litigation strategy holds. After all, as the current Supreme Court has shown, precedents can easily come and go.[96-97]

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91. *See* Eric S Fish, *Race, History, and Immigration Crimes*, 107 IOWA L. REV. 1051, 1091–1093 (2022) (arguing that these laws are race neutral but were passed for racist reasons rendering them unconstitutional under the framework of *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 265–66 (1977), while recognizing that such a challenge is unlikely to pass muster in the current Court. *See* n.320.).

92. *See* Ingrid Eagly, *The Movement to Decriminalize Border Crossing*, 61 B.C. L. REV. 1967, 2012 (2020) (documenting efforts by the organization Mijente, among others, to repeal these sections and by Julian Castro to repeal Section 1325).

93. *See e.g.*, United States v. Machic-Xiap, 552 F. Supp. 3d 1055 (D. Or. 2021) (motion to dismiss denied on ground insufficient evidence of racist intent in 1952 statute §1326); United States v. Lucas-Hernandez, No. 19-MJ-24522-LL-TWR, 2022 WL 1556161, at *1 (S.D. Cal. May 17, 2022) (motion to dismiss denied, finding 1952 and 1990 versions of statutes did not show racist intent in §§1325 & 1326 in 1929 Act).

94. *See* United States v. Carrillo-Lopez, 555 F. Supp. 3d 996, 1001 (D. Nev. 2021), rev'd and remanded, 68 F.4th 1133 (9th Cir. 2023) (citing Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977)).

95. United States v. Carrillo-Lopez, 68 F.4th 1133, 1138 (9th Cir. 2023), cert. denied, 144 S. Ct. 703 (2024).

96. *See e.g.*, William Baude, *Precedent and Discretion*, 2019 SUP. CT. REV. 313 (2020) (noting the frequency with which the current Supreme Court overturns precedents and criticizing the absence of a theory that justifies the overturning of precedent). *See also* BRANDON J. MURRILL, CONG. RSCH. SERV., R45319, THE SUPREME COURT'S OVERRULING OF CONSTITUTIONAL PRECEDENT (2018) (noting that the Roberts Court overrules precedent less often than the Rehnquist, Burger, or Warren Courts). As the hosts of the legal podcasts regularly quip, "stare decisis is for suckers." *See* Crooked Store, *Stare Decisis T-Shirt*, https://perma.cc/TDX2-CA99.

97. I have elsewhere voiced skepticism about the idea of achieving change through litigation. While I still believe that to be true, I can, of course, be proven wrong by advocates who favor this strategy. *See*

These efforts by scholars, advocates, and politicians all call for seriously curtailing the reach of §§ 1325 and 1326. Of course, there is a rift between abolitionists and reformers, a rift that, as Eagly points out, mirrors the debates around criminal law reform writ large.[98] However, there is no doubt that for various reasons, excessive prosecution of illegal reentry and entry has come under increased scrutiny. As Amy Kimpel has argued, whether it is through prosecutorial discretion, decriminalization, or the expansion of legal paths to migration (thereby reducing the need for people seeking entry to cross illegally), a reduction of illegal entry and reentry prosecutions is needed to shore up procedural protections and commitments that the U.S. government has abandoned.[99]

2. *Border Abolition*

The concept of border abolition, once confined to radical political philosophy, has increasingly found its way into mainstream academic discourse, particularly within social science literature.[100] Scholars across disciplines[101] have begun examining the theoretical foundations and practical implications of reimagining a world without traditional borders or border enforcement mechanisms.[102] Justifications are varied and range from fundamental ethical critiques, questioning the moral arbitrariness of birthplace-based restrictions on human movement[103] to utilitarian arguments about how

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Pedro Gerson, *Embracing Crimmigration to Curtail Immigration Detention*, 12 U.C. IRVINE L. REV. 1209 (2022).

98. *See* Eagly, *supra* note 92, at 2012.

99. *See* Kimpel, *supra* note 32, at 284–88.

100. *See e.g.,* GRACIE MAE BRADLEY & LUKE DE NORONHA, AGAINST BORDERS: THE CASE FOR ABOLITION (2022) (summarizing critical literature that focuses on borders are institutions of iniquity); HARSHA WALIA, BORDER AND RULE: GLOBAL MIGRATION, CAPITALISM, AND THE RISE OF RACIST NATIONALISM (2021) (arguing that borders are inextricably linked to capitalism and (neo)colonialism); Bryan Caplan & Vipul Naik, *A Radical Case for Open Borders*, *in* THE ECONOMICS OF IMMIGRATION: MARKET-BASED APPROACHES, SOCIAL SCIENCE, AND PUBLIC POLICY (Benjamin Powell ed., 2015) (summarizing the libertarian case for open borders).

101. Though notably not the legal literature, with a few exceptions. Most notably, Angélica Cházaro, *The End of Deportation*, 69 UCLA L. REV. 1040 (2021). *See also* Adam B. Cox, *Three Mistakes in Open Borders Debates*, 57 NOMOS 51 (2017) (arguing that open borders debates oversimplify three key issues: they conflate distinct questions about the permissibility and control of borders, misinterpret historical legal precedents, and fail to consider that states' legitimate aims might be achieved through means other than territorial exclusion).

102. For a good overview of different philosophical and empirical arguments in favor of open borders, *see* Harald Bauder, *Perspectives of Open Borders and No Border*, 9 GEOGRAPHY COMPASS 395 (2015); *see also* Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POL. 251 (1987); Martina Tazzioli, BORDER ABOLITIONISM: MIGRANTS' CONTAINMENT AND THE GENEALOGIES OF STRUGGLES AND RESCUE (Manchester Univ. Press 2023).

103. As Joseph Carens put it, "... citizenship in Western democracies is the modern equivalent of feudal class privilege – an inherited status that greatly enhances one's life chances." Joseph Carens, *Politics, Principles, and Open Borders*, COLUM. CTR. FOR CONTEMP. CRITICAL THOUGHT: ABOLITION AND DEMOCRACY (Mar. 30, 2021), https://perma.cc/2G8D-3D2G (last visited Jun. 22, 2025); *see more generally* Carens, *supra* note 102. For a similar position but advocating for "more open" rather than just open, *see* Nils Holtug, *Global Equality and Open Borders*, *in* 6 OXFORD STUDIES IN POLITICAL PHILOSOPHY VOLUME 118 (David Sobel, Peter Vallentyne & Steven Wall eds., 2020).

free movement could maximize global wealth and reduce economic inequalities.[104-105]

Some organizations have started translating some of these theoretical frameworks into concrete policy proposals. For example,[106] Mijente, a national Latinx advocacy organization, developed a detailed policy platform that outlines incremental steps toward border abolition, including proposals to defund immigration enforcement agencies, end immigration detention, and curtail the international spread of restrictive immigration policies.[107]

From these, the policy effort that managed to gain the most mainstream notoriety (and perhaps support) was the #AbolishICE campaign during the first Trump administration.[108] However, as Angelica Cházaro showed, the contours and implications of this campaign were not homogeneous even among supporters, ranging from those who were calling for the actual end of deportations to those who more simply called for violent border enforcement, without questioning the "common sense of deportation."[109]

This internal rift is emblematic of some of the fundamental challenges[110] faced by border abolitionist theory in both fully articulating its vision and

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104. In this view, borders are disfavored because they obstruct the free circulation of labor, distorting a potentially self-regulated market, which campers labor competition – and therefore global productivity. *See* Caplan & Naik, *supra* note 100; John P. Casey, *Open Borders: Absurd Chimera or Inevitable Future Policy?*, 48 INT'L MIGRATION 14 (2010); JASON L. RILEY, LET THEM IN: THE CASE FOR OPEN BORDERS (2008). Meanwhile, for Carens, migration restrictions are unjustified because the gains from migrants who relocate far outweighs the cost of migration on receiving communities—therefore, more migration leads to greater collective utility. *See* Carens, *supra* note 102. This argument has been reinforced by recent evidence showing just how much migrants (and their children) benefit economically from migration. *See* RAN ABRAMITZKY & LEAH BOUSTAN, STREETS OF GOLD: AMERICA'S UNTOLD STORY OF IMMIGRANT SUCCESS (2022).

105. There are, of course, numerous perspectives from which border abolitionism has been argued. A significant strand of border abolition scholarship draws parallels and connections between border abolitionism, prison abolition, and environmental justice movements, particularly in their shared analysis of how institutional structures perpetuate systemic inequalities. *See* Tazzioli, *supra* note 102; Bradley & Noronha, *supra* note 100. *See also* Ilana Cohen et al., *A Roundtable on Environmental Injustice and Border Abolition*, 145 RADICAL HIST. REV. 147 (2023). For a summary of other views, such as those grounded in Marxist thought, anticolonial scholarship, and classical liberalism, *see* Bauder, *supra* note 102.

106. *See, e.g.*, *We've joined the Abolish Frontex campaign*, MIGRANTS' RIGHTS NETWORK (Apr. 8, 2024), https://perma.cc/2PNM-DRFB. Freedom for Immigrants, a U.S.-based organization that considers abolitionism as part of the framework that dictates part of their practical agenda, such as their Bond Fund. *See Why Freedom for Immigrants believes in abolishing immigration detention*, FREEDOM FOR IMMIGRANTS, https://perma.cc/7AZE-7GKG (last visited Nov. 17, 2025).

107. *Free Our Future: An Immigration Policy Platform for Beyond the Trump Era,* MIJENTE (2018), https://perma.cc/GJ2V-55R3.

108. For a sampling of press coverage, *see* Fiona Harrigan, *Abolish ICE*, REASON (Dec. 2024), https://perma.cc/EC9P-VMPM; Tina Vasquez, *Abolish ICE: Beyond a Slogan*, THE N.Y. REV. (Oct. 10, 2018), https://perma.cc/D8DQ-BA56; Silky Shah, *Why America Still Needs to Abolish ICE*, NBC NEWS (Oct. 14, 2020), https://perma.cc/XWY3-CPSM.

109. *See* Cházaro, *supra* note 101, at 1042-43 (pointing to different political actors as well as writers that argued in public about what Abolish ICE means and arguing that the belief that some deportation is inevitable or "natural" is so ingrained that it has become common sense).

110. I am not treating as fundamental challenges to the theory based on majoritarian or nationalistic arguments that favor immigration restriction. This is not because these arguments are unimportant; on the contrary, in a pragmatic sense, they dominate the discourse. Nonetheless, there are arguments that are raised from a very different normative position about whether something is owed to migrants generally and about the legitimacy of legal institutions as being dependent on small democratic (majoritarian)

prescribe a practical agenda. In terms of the former, border abolitionists have not articulated how a borderless world would protect vulnerable communities in developing countries from exploitation and resource extraction that is risked by unfettered migration.[111] Moreover, abolitionists have not fully articulated a political vision that takes seriously self-determination as a value that is imperiled through open-borders.[112] In terms of the latter, abolitionists themselves admit that a model for transition is still lacking, but—they argue—this does not detract from the imperative of seeking border abolition.[113]

Nevertheless, the lack of a programmatic consensus or even of what certain policies would implicate, has meant that border abolition, while no longer marginalized to the more radical corners of both academia and activism, has failed to garner the kind of organized support and campaign writ large that the more particular movement to decriminalize illegal border entry has. Of course, decriminalizing illegal entry could be seen as part of a program towards border abolition. However, it is not necessary to hold a particular position on abolitionism to sustain the need to decriminalize illegal entry and reentry.[114] Similarly, the move to decriminalize immigrant harboring or smuggling can be of a piece with border abolition arguments, but does not necessarily imply it. Quite the contrary, as explored further in Part III, decriminalizing 8 U.S.C. § 1324 is compatible with having enforceable borders. Before exploring that argument, I now turn to why immigrant smuggling happens in the first place.

II. IMMIGRANT SMUGGLING AND HARBORING AS CRIMES OF SURVIVAL

Human smuggling is "a form of illegal trade in which the commodity is an assisted illegal entry into a country."[115] In other words, it is the *voluntary* movement of people across borders using an intermediary to avoid law enforcement. The act of human smuggling is hardly novel; smugglers in the past were focused on helping people exit a country rather than enter another one.[116] Today,

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beliefs. For an example of these arguments, *see, e.g.,* David Frum, *If Liberals Won't Enforce Borders, Fascists Will*, THE ATLANTIC (Apr. 2019), https://perma.cc/P2KX-9V5K.

111. SARAH SONG, IMMIGRATION AND DEMOCRACY (Oxford Univ. Press 2018) (arguing that poverty alleviation is not best achieved through open borders and could in fact worsen it).

112. *Id.* (arguing that the state should normatively have authority over immigration because of the political value of self-determination).

113. This line of argument tracks much of the criminal abolitionist literature that posits that although abolitionism does not have all the answers for what to do about the nature of social harm, or how to respond to all of it, abolitionism should still be strived for and invites us to think about abolitionism as an ethic rather than a definite program. *See* Thomas Ward Frampton, *The Dangerous Few: Taking Seriously Prison Abolition and its Skeptics*, 135 HARV. L. REV. 2013 (2022); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156 (2015); MARIAME KABA, WE DO THIS 'TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE (Abolitionist Papers 2021).

114. And, in fact, none of the authors mentioned in the previous section point to border abolitionist arguments.

115. Paolo Campana, *supra* note 8, at 471.

116. *See* CEFRES PRAGUE, *William O'Reilly: Selling Souls. Trafficking German Migrants* (YouTube, Nov. 29, 2017), https://perma.cc/L89B-L73K (discussing smugglers in the 17th and 18th Century moving people from Central Europe to the United States). This also occurred famously in the run-up to World War II and the Holocaust all across Europe. *See, e.g.,* Barnabas Balint, *The Tiyul: Rescuing Jews by Smuggling Across the Hungarian-Romanian Border*, *in* ANTI-AXIS RESISTANCE IN

however, smuggling is mainly used to assist migrants to enter countries where they have no legal basis to request entry.

Paolo Campana has urged us to think about human smuggling as a service that migrants purchase from smugglers.[117] In this sense, smuggling becomes an offense against the state because "the only victim is the state that has seen its borders and its right to exercise control over its territory violated."[118] This distinguishes smuggling from trafficking, which also violates individuals' right over their personhood and freedom. Of course, there are cases in which smuggling turns into trafficking; nonetheless the overwhelming evidence shows that these two behaviors are distinct.[119]

There are two separate, though interrelated issues to consider. First, what human smuggling actually looks like. Second, why migrants turn to smugglers in the first place. Each issue is addressed in turn.

A. *What Does Human Smuggling Look Like?*

According to American government officials, human smuggling across the U.S.-Mexico border is carried out by sophisticated criminal groups. As Secretary of Homeland Security, Alejandro Mayorkas, recently articulated in an interview, "[n]o longer do we have the solo coyote or the loose affiliation of people moving others, but we have smuggling organizations that are true organizations and hierarchically established and the like. They're very sophisticated, and they are using social media and online platforms to communicate with vulnerable people and facilitate their transit."[120] This view is echoed by most media outlets and mainstream press outlets.[121]

Many academics, however, paint quite a different picture. Scholars have concluded that smuggling operations tend to be small-scale, decentralized, and nonhierarchical.[122] In particular, smuggling operations are carried out through various intermediaries across physical space. That is, in any given route, there are various smuggling groups with micro hierarchies that act independently and (mostly) locally to move migrants from one place to the next.[123] Another

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Southeastern Europe, 1939-1945 (BRILL–SCHÖNING 2023); DALIA OFFER, ESCAPING THE HOLOCAUST: ILLEGAL IMMIGRATION TO THE LAND OF ISRAEL 1939-1944 (OXFORD UNIV. PRESS 1991). IT CONTINUES TO OCCUR IN DIFFERENT COUNTRIES TODAY, SUCH AS NORTH KOREA, OR SYRIA.

117. Paolo Campana, *supra* note 8, at 473.

118. *Id.*

119. *Id.*

120. Ezra Klein, *The Real 'Border Czar' Defends the Biden-Harris Record*, N.Y. TIMES (Sep. 13, 2024), https://perma.cc/D3XA-ZF3Y.

121. *See, e.g.*, Miriam Jordan, *Smuggling Migrants at the Border Now a Billion-Dollar Business*, N. Y. TIMES (July 25, 2022), https://perma.cc/EHR3-URTP.

122. Campana, *supra* note 117, at 483-89; *see also* Gabriella E. Sanchez & Sheldon X. Zhang, *Rumors, Encounters, Collaborations, and Survival: The Migrant Smuggling–Drug Trafficking Nexus in the U.S. Southwest*, 676 ANNALS AM. ACAD. POL. & SOC. SCI. 135 (2018) (finding no evidence of centralized power in smuggling groups across the US-Mexico border); Oguzhan Omer Demir, Murat Sever & Yavuz Kahya, *The Social Organisation of Migrant Smugglers in Turkey: Roles and Functions*, 23 EUR. J. CRIM. POL'Y RES. 371 (2017) (showing that migrant smuggling businesses are established at local, national, and international levels, with ad-hoc and adaptable structures);

123. Paolo Campana, *Out of Africa: The Organization of Migrant Smuggling across the Mediterranean*, 15 EUR. J. CRIMINOLOGY 481, 481 (2018) (carrying out a network analysis based on

important characteristic of smuggling operations is that most often, smugglers tend to share socioeconomic status with migrants, meaning they too are poor and marginalized, many being former or failed migrants themselves. Crucially, smuggling groups are generally composed of individuals who are not engaged in any other criminal activity, including drug trafficking.[124]

Another important way in which the reality of human smuggling diverges significantly from popular perception is the relative absence of violence within the enterprise. Empirical research reveals minimal conflict both among smugglers and between smugglers and migrants.[125] This pattern becomes comprehensible when examining the market dynamics of human smuggling: it operates as a competitive service industry where reputation and recommendations drive success. [126] While the market features numerous migrants and potential facilitators of clandestine border crossings, it suffers from acute information asymmetry.[127] The illegal nature of smuggling services necessitates opacity, compelling smugglers to cultivate trust through demonstrated reliability.[128] Indeed, the surest path to establishing a positive reputation—and thereby securing future clients—is to ensure migrants' safe passage, a goal fundamentally incompatible with violence. Studies of U.S.-Mexico border crossings confirm that successful smugglers distinguish themselves through careful treatment of migrants rather than through coercion or force.[129] These patterns hold true across various smuggling routes, whether it's from China to the United States and Europe, from Turkey, Greece, or Northern Africa to Europe, and across Mexico to the United States.[130] This market-driven emphasis on reputation and client satisfaction helps explain why human smuggling operations typically

police investigation records to conclude that smuggling "activities are segmented and carried out by localized and rudimentary hierarchies with a small number of high-centrality actors operating at various stages along the smuggling route. Coordination is more likely to occur vertically than horizontally, indicating that higher-level smugglers are largely independent and autonomous.")

124. Various surveys find that the majority of smugglers have no criminal background other than smuggling. *See e.g.*, Demir et al., *supra* note 122, at 372, 379; Campana, *supra* note 117, at 471, 490; Victoria Stone-Cadena & Soledad Álvarez Velasco, *Historicizing Mobility: Coyoterismo in the Indigenous Ecuadorian Migration Industry*, 676 ANNALS Am. Acad. Pol. & Soc. Sci. 194, 205 (2018).

125. Simón Pedro Izcara Palacios, *Coyotaje and Drugs: Two Different Businesses*, 34 BULL. LATIN AM. RSCH. 324, 329 (2015) (finding no evidence of violence between smuggling operations as opposed to between drug trafficking ones).

126. Jeremy Slack & Daniel E. Martínez, *What Makes a Good Human Smuggler? The Differences between Satisfaction with and Recommendation of Coyotes on the U.S.-Mexico Border*, 676 ANNALS AM. ACAD. POL. & SOC. SCI. 152 (2018) (discussing survey results about the kinds of conditions and treatment that lead smugglers to be recommended).

127. Think, for example, of how difficult it would be to advertise the services offered, as well as to analyze the different options. The reality is that, aside from word of mouth, there is little for both the buyer and the supplier to go on to learn more about each other.

128. Campana, *supra* note 117, at 476 ("the market for smuggling services possesses many features normally associated with legal markets, including competition and the importance of reputation and trust, and it relies on well-developed financing traditions.")

129. J GABRIELA SANCHEZ, HUMAN SMUGGLING AND BORDER CROSSINGS (2015); DAVID SPENER, CLANDESTINE CROSSINGS: MIGRANTS AND COYOTES ON THE TEXAS-MEXICO BORDER (Illustrated edition ed. 2009); Slack & Martínez, *supra* note 126, at 152.

130. Campana, *supra* note 117, at 483.

exhibit fewer violent characteristics than other illegal enterprises, particularly drug trafficking networks.[131]

While market incentives generally promote non-violent practices in human smuggling, this reality should not obscure the genuine risks and exploitative practices that persist within the industry. Field research documents instances of exploitation where smugglers have detained migrants after unilaterally raising fees,[132] coerced them into drug trafficking or other crimes, or where criminal actors have falsely presented themselves as legitimate smugglers.[133] These abuses, coupled with the inherent dangers of clandestine migration, underscore the complex risks migrants face. [134] Yet these documented cases of exploitation represent deviations from, rather than characteristics of, typical smuggling operations. The underlying market logic remains constant: smugglers' long-term success depends on maintaining a reputation for safe passage, making violence and exploitation counterproductive to their business interests. This dynamic helps explain why most smuggling operations eschew violence, even as they operate within a broader context of danger created by restrictive immigration policies and militarized border enforcement.

In short, human smuggling markets exhibit remarkable consistency in their structure across global contexts. These operations typically consist of small, decentralized groups lacking the hierarchical organization characteristic of traditional criminal enterprises. The smugglers themselves generally come from marginalized communities and seldom engage in other illicit activities. Yet despite—or perhaps because of—this relatively straightforward organizational structure, migrant smuggling remains perilous. As demonstrated earlier, migrants face significant mortality risks during clandestine border crossings, even when their facilitators abstain from violence. This paradox—wherein migrants routinely entrust their lives to smugglers despite well-documented dangers—demands closer examination. The following section explores the rational calculus underlying migrants' decisions to engage smugglers' services, illuminating how structural constraints and border policies shape this seemingly counterintuitive choice.

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131. Palacios, *supra* note 125, at 329 (showing that smugglers are not part of organized crime groups, that organized crime groups do not help migrants cross the border, and that migrants do not carry drugs across the border, all of which points to the very natural synergies between the enterprises while proving that they are distinct).

132. John Doering-White, *Evidencing Violence and Care along the Central American Migrant Trail through Mexico*, 92 SOCIAL SERVICE REVIEW 432 (2018) (revealing that exploitation is a feature of the smuggling enterprise).

133. Simón Pedro Izcara Palacios, *Violencia postestructural: migrantes centroamericanos y cárteles de la droga en México*, REV. ESTUD. SOC. 12 (2016) (surveying 53 migrants kidnapped in Mexico and forced to participate in drug trade to conclude that "labor migrants" do so under duress for fear of losing their lives and torture); Jeremy Slack, *Captive Bodies: Migrant Kidnapping and Deportation in Mexico*, 48 AREA 271 (2016) (arguing that the US-Mexico border has produced an epidemic of kidnappings among "clandestine international migrants").

134. However, as mentioned previously, this is caused by states restricting migration and militarizing border enforcement.

B. *Clandestine Migration as a Crime of Survival: Why Migrants Use Smugglers*

The question of why migrants engage smugglers to facilitate their journeys requires examining the complex landscape of migration enforcement, violence, and limited mobility options that characterize contemporary irregular migration. Despite the well-documented dangers and high costs associated with smuggling, migrants consistently view it as a strategic response to navigate increasingly restrictive and militarized border regimes.[135] Understanding this apparent paradox illuminates both the desperate circumstances driving migration and the rational calculations migrants make in choosing smuggling as their least-worst option.

The dangers of smuggling are severe and well-documented. Migrants face risks of death from exposure in remote desert regions,[136] asphyxiation in concealed compartments,[137] and violence from criminal organizations.[138] These risks are not merely hypothetical—the discovery of seventy-two bodies of migrants in San Fernando, Tamaulipas, in 2010 stands as a stark reminder of the lethal dangers migrants face.[139] Kidnapping has become endemic, with criminal groups typically demanding ransoms of around $4,000 per migrant.[140] Moreover, the financial costs of smuggling are also substantial. According to United Nations (U.N.) estimates, smuggling fees range from $2,000 for crossing the U.S.-Mexico border to $10,000 for transit through Mexico–figures that likely underestimate current prices given intensifying enforcement.[141]

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135. *See e.g.*, Susanne Willers, *"They Don't Care about People; They Only Care about the Money": The Effects of Border Enforcement, Commodification and Migration Industries on the Mobility of Migrants in Transit through Mexico*, 8 FRONT. SOCIOL. (2023) (arguing that border enforcement creates the necessity for "brokers of mobility"); Danilo Mandić & Charles M. Simpson, *Refugees and Shifted Risk: An International Study of Syrian Forced Migration and Smuggling*, 55 INTERNATIONAL MIGRATION 73 (2017) (looking at the Syrian context to analyze that government anti-smuggling operations have only created more dependence on smugglers); Frank-Vitale, *supra* note 18, at 75 ("coyotaje [is a] strateg[y] that migrants employ to navigate the shifting terrain of immigration enforcement").

136. *See supra* Section I.

137. *See* David Montgomery, Manny Fernandez & Yonette Joseph, *Journey Fatal for 9 Migrants Found in Truck in a San Antonio Parking Lot*, N.Y. TIMES (Jul. 23, 2017), https://perma.cc/R4ML-STXC.

138. *See* Slack, *supra* note 133 (arguing that the border itself is a dangerous place as it is the focus of the drug-war which has created a "topology of violence" to which migrants – by necessity – are exposed); *see also*, Amelia Frank-Vitale & Areli Palomo Contreras, *Caravan Migrant Roots*, LINEA84 (May 11, 2019), https://perma.cc/22CT-CVFV (documenting the risks migrants face of being kidnapped); Jeremy Slack & Daniel E. Martínez, *Postremoval Geographies: Immigration Enforcement and Organized Crime on the U.S.–Mexico Border*, 111 ANNALS AM. ASS'N GEOGRAPHERS 1062 (2021).

139. *See Mexican Police Helped Cartel Massacre 193 Migrants, Documents Show*, NPR WAMU 88.5 (Dec. 22, 2014), https://perma.cc/A9XF-C54U.

140. According to the Mexican Commission for Human Rights, between 2011 and 2020, over 70,000 migrants were kidnapped. INFORME ESPECIAL DE LA CNDH SOBRE EL ESTADO QUE GUARDA EL TRÁFICO Y EL SECUESTRO EN PERJUICIO DE PERSONAS MIGRANTES EN MÉXICO 2011-2020, CNDH, 8 (2021); *see also* Frank-Vitale, *supra* note 18, at 68.

141. *See Smuggling of migrants: the harsh search for a better life*, UNODC, https://perma.cc/QGL7-7Y94 (last visited Nov. 17, 2025) ("Based on two of the principle smuggling routes - East, North and West Africa to Europe and South to North America - it is estimated that the smuggling of migrants generates around $6.75 billion a year for criminals operating in these regions alone.").

Yet despite these severe risks and costs, migrants increasingly view smugglers as essential rather than optional. This stems from the transformation of the migration landscape, particularly in Mexico, where intensified enforcement under pressure from the United States has effectively converted the entire country into a borderland.[142] In this sense, Mexico has become a "vertical border," with immigration checkpoints and patrols throughout its territory rather than just at its geographical boundaries.[143] This expanded enforcement zone has pushed migration routes into more remote and dangerous areas, where migrants become vulnerable to criminal groups operating in the shadows as well as corrupt authorities who facilitate exploitation.[144] As Amelia Frank-Vitale argues, "increasingly intensified immigration enforcement contributes to the production of the very characters it claims to police and protect, both the monstrous smuggler and the innocent migrant victim."[145]

The increasing difficulty of successful independent crossing is a crucial factor driving reliance on smugglers. Enhanced border security and interior enforcement have made crossing attempts more likely to result in detention and deportation.[146] Each failed attempt represents not just lost resources but also increased exposure to danger. In this context, smugglers' specialized knowledge of routes, contacts, and evasion strategies becomes invaluable. In essence, smugglers don't only provide physical guidance through dangerous terrain but also access to crucial information networks that help anticipate and avoid encounters with both state and criminal actors. When De León argues, "smuggling isn't the problem," he is not saying that smuggling is not risky, but rather that it is a response to what he terms the "non-immigration system" that provides virtually no legal pathways for much-needed migration.[147]

In other words, the decision to engage a smuggler emerges from a complex calculus in which migrants weigh various forms of vulnerability against one

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142. *See* Eduardo Torre Cantalapiedra & José Carlos Yee Quintero, *México ¿una frontera vertical? Políticas de control del tránsito migratorio irregular y sus resultados, 2007-2016*, 16 LIMINAR. ESTUDIOS SOCIALES Y HUMANÍSTICOS 87 (2018) (looking at Mexican border policy and concluding that from 2006-2017 the Mexican government implemented a strategy of contention that created a "vertical border"); Angel A. Escamilla García, *The "Borderlandization" of Mexico: Mexico's New Policies of Deportation and Detention of Minor Migrants and Their Effects on Migrant Movement*, 29 *in* CHILDREN AND YOUTHS' MIGRATION IN A GLOBAL LANDSCAPE 11 (2022) (establishing that the policies implemented in the wake of the surge of children and youth arrivals to the United States in 2014 expanded the areas of migrant surveillance, detention, and deportation to the entire country).

143. *Id*.

144. Palacios, *supra* note 133, at 18 (arguing that government corruption is a key feature in migrants turning to crimes of survival); Stephanie Brewer, *México debe cesar la violencia contra personas migrantes y ofrecer soluciones para evitar crisis humanitaria en su frontera sur*, WOLA (Sep. 9, 2021), https://perma.cc/F87S-JQ4X (arguing that migrants in Mexico have suffered abuses at the hands of Mexican authorities).

145. Amelia Frank-Vitale, *Stuck in Motion: Inhabiting the Space of Transit in Central American Migration*, 25 J. LATIN AM. & CARIB. ANTH. 67, 69 (2020) (citation omitted).

146. Frank-Vitale, *supra* note 18, at 68 (These dynamics combine to make clandestine transit migration increasingly expensive, dangerous, and more likely to result in deportation).

147. JASON DE LEON, SOLDIERS AND KINGS: SURVIVAL AND HOPE IN THE WORLD OF HUMAN SMUGGLING (2024).

another. Rather than representing a desperate gamble or a choice made under duress, migrants' reliance on smuggling services reflects a carefully reasoned strategy for navigating what they correctly perceive as a landscape of graduated risks. In evaluating their options, migrants must consider not only the immediate dangers of the journey but also the compounded vulnerabilities that arise from attempting to traverse increasingly militarized border regions without specialized assistance, in addition to the risks of staying behind in a context where they have no legal alternatives to migrate.

The migrant's calculation thus begins with the recognition that avoiding migration altogether—remaining in place—presents its own severe risks. These include immediate threats to life from violence, persecution, or extreme privation, as well as longer-term dangers such as the gradual erosion of economic stability or familial security. These risks cannot be underestimated. In fact, the above-mentioned risks of clandestine migration are well known to migrants and, if anything, are an indication of the dire conditions migrants are escaping.

The current "migration crisis"[148] stems not primarily from individual choices driven by poverty or unemployment, but rather from systemic forces that have fundamentally transformed entire regions and communities.[149] Half a century of data reveals that mass migrations in the Americas[150] have been mainly catalyzed by extreme economic and political instability,[151] great levels of violence,[152] and foreign interventions in other countries, whether they are political[153] or eco-

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148. I, and others, argue that what we are seeing is a crisis of mass displacement, not of migration, and should therefore avoid using the term "migration crisis". *See* Pedro Gerson, *"Root Causes of Migration": Biden's Economic Development Plan Won't Stop Migration from Central America*., SLATE (Apr. 28, 2021), https://perma.cc/4XY6-VQM7.

149. In a sense, migration is rare, with less than 4% of people living in a different country than that of their birth. Yet, global inequality is pervasive and acute. This is why economic factors alone, such as unemployment or poverty, are insufficient to explain mass migration. *See* Simon van Teutem, *Less than 4% of the World's Population Are International Migrants*, OUR WORLD IN DATA (2024), https://perma.cc/B5H8-E53X.

150. *See e.g.,* SASKIA SASSEN, EXPULSIONS: BRUTALITY AND COMPLEXITY IN THE GLOBAL ECONOMY (2014); Jonathan Hiskey, Mary Malone & Diana Orcés, *Violence and Migration in Central America*, AMERICAS BAROMETER INSIGHTS 9 (2014); Michael A. Clemens, *Violence, Development, and Migration Waves: Evidence from Central American Child Migrant Apprehensions*, CENTER FOR GLOBAL DEVELOPMENT (2017).

151. The case of Venezuela is illustrative. While Venezuela has been poorer than the United States, mass emigration from there began only when political disarray became so extreme that people had to migrate to survive. *See* Luisa Feline Freier, *Understanding the Venezuelan Displacement Crisis*, E-INTERNATIONAL RELATIONS (Jun. 28, 2018) (the "Venezuelan exodus qualifies as the largest forced displacement of people in the history of Latin America" caused by a political crisis that created widespread destitution).

152. Clemens, *supra* note 150 (showing the correlation between violence in Central American municipalities and children migrants from those municipalities apprehended in the United States); Sebastián Albuja, *Criminal Violence, Displacement and Migration in Mexico and Central America*, *in* HUMANITARIAN CRISES AND MIGRATION (2014); Linda Alvarez, *No Safe Space: Neoliberalism and the Production of Violence in the Lives of Central American Migrants*, 5 J. OF RACE, ETHNICITY, & POL. 4 (2020); Lirio Gutiérrez Rivera, *Transnational and Local Entanglements in the 'Cycle of Violence' of Central American Migration*, 19 GLOBAL CRIME 192 (2018).

153. Saskia Sassen, in particular, has shown that political intervention has led to an increase in migration flows to the country that intervened. *See* Sassen, *supra* note 151 (showing how migration to the

nomic.[154-155] This latter force has been particularly insidious—contrary to conventional wisdom, large-scale migration often accelerates during periods of economic growth, not decline.[156] Such growth, driven by foreign investment and free-market reforms, has systematically dismantled traditional economies and local ways of life, first displacing people internally and then pushing them across borders.[157] In Central America, development initiatives emphasizing export-oriented agribusiness and manufacturing have not simply created economic change but have literally rendered territories uninhabitable through land grabs, resource extraction, and environmental degradation.[158]

The result is a profound crisis of displacement where millions find themselves pushed from their homes by forces that transcend individual economic calculations. That is, people who become clandestine migrants are not people simply looking to improve their economic conditions or live in a different place, but rather are people who see migration as a strategy of survival.[159]

U.S. from countries such as South Korea, Vietnam, and the Dominican Republic spiked after the U.S. intervened politically and/or militarily there).

154. Though this analysis remains stable worldwide, the focus of this paper is on migration in the Americas because it centers on the U.S.-Mexico border. It's worth noting that while violence and international development/interventions are the biggest push factors, the single biggest pull factor in the region is labor demand. *See* Dany Bahar, *Not a Border Crisis, but a Labor Market Crisis: The Often Overlooked "Pull" Factor of U.S. Border Crossings*, 44 J. POL'Y ANALYSIS & MGMT. 674 (2025); Gordon H. Hanson & Craig McIntosh, *Birth Rates and Border Crossings: Latin American Migration to the US, Canada, Spain and the UK*, 122 ECON. J. 707 (2012).

155. Of course, there are many drivers of migration, such as networks of migration, climate, educational, and skill gaps. Most regional migration cannot be understood only by looking at structural factors and must therefore account for the particular push and pull forces in a given context. *See*, *e.g.*, Nicholas Van Hear, Oliver Bakewell & Katy Long, *Push-Pull plus: Reconsidering the Drivers of Migration*, 44 J. ETHNIC & MIGRATION STUDIES 927 (2018); Sarah Dolfin & Garance Genicot, *What Do Networks Do? The Role of Networks on Migration and "Coyote" Use*, 14 REV. DEVELOPMENT ECON. 343 (2010); Nekeisha Spencer & Mikhail-Ann Urquhart, *Hurricane Strikes and Migration: Evidence from Storms in Central America and the Caribbean*, 10 AM. METEOROLOGICAL SOC'Y 569 (2018). However, because this analysis focuses on the U.S.-Mexico border, it is on the two most salient factors pushing people out in the region. The single biggest pull factor in the region is labor demand. *See* Bahar, *supra* note 154; Hanson & McIntosh, *supra* note 154.

156. *See e.g.*, Michael Clemens, *Does Development Reduce Migration?* (Ctr. for Glob. Dev., Working Paper No. 359, 2014) (providing a literature review that shows that migration increased with development and eventually stabilizes once a particular stage of development has been reached); HEIN DE HAAS, HOW MIGRATION REALLY WORKS: THE FACTS ABOUT THE MOST DIVISIVE ISSUE IN POLITICS (2023); Jonas Gamso & Farhod Yuldashev, *Does Rural Development Aid Reduce International Migration?*, 110 WORLD DEVELOPMENT 268 (2018).

157. *See* SASSEN, *supra* note 150; *see also* Saskia Sassen, *A Massive Loss of Habitat: New Drivers for Migration*, 2 SOCIOLOGY OF DEVELOPMENT 204 (2016) (both showing the mechanisms whereby development destroys local economies which produce migrations); WILLIAM I. ROBINSON, LATIN AMERICA AND GLOBAL CAPITALISM (2008) (showing how economic development in Latin America through export oriented large-scale agrobusiness and manufacturing destabilized national and traditional economies, forcing people to move, at first internally and eventually internationally, in search of the jobs that were replaced by new forms of production);

158. *See* ROBINSON, *supra* note 157.

159. *See* ALEXANDER BETTS, SURVIVAL MIGRATION: FAILED GOVERNANCE AND THE CRISIS OF DISPLACEMENT (1st ed. 2013) (explaining the concept of survival migration as stemming from threats such as environmental change, food insecurity, and generalized violence that force people to leave, who we should therefore understand as refugees despite not legally qualifying under the definition).

The second step in a would-be clandestine migrant's calculation is a recognition of the lack of legal alternatives to migrate.[160] When legal channels for migration are effectively foreclosed, as they are for most people seeking to reach the United States, migrants must then evaluate various clandestine mobility strategies against this baseline of staying put. Some migrants may opt for alternative strategies like caravans or family networks.[161] While these approaches can provide some collective protection, they typically lack the specialized knowledge and established relationships that professional smugglers maintain.[162] And so, most migrants conclude that hiring smugglers is the best (and only) strategy.

Finally, it is worth noting that even a very informed individual is unlikely to properly estimate the costs of smuggling. This not only comes from an inevitable knowledge asymmetry but also from behavioral heuristics that make an accurate risk assessment unlikely.[163] For example, people attempting to migrate often believe that they won't be caught, detained, or deported, or that if they are, they will simply try again.[164] They thus underestimate the financial and emotional costs of failed crossing attempts when deciding to hire a smuggler.

Recognizing smuggling for what it is—a dangerous yet life-saving strategy—does not mean that migrants should not be protected from abusive smugglers. However, as I discuss in the following section, addressing such abuses would be better achieved through existing criminal statutes targeting specific harmful acts rather than broadly criminalizing smuggling itself. I now turn to analyzing the reality of human smuggling under the prism of criminal law to argue that migrant smuggling should be decriminalized.

III. DECRIMINALIZING 8 U.S.C. § 1324

Once we understand clandestine migration as a crime of survival, we can begin to see that the reasons for decriminalizing this offense echo the ones for decriminalizing illegal entry or reentry. Namely, to dismantle a criminal

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160. *See* Hiroshi Motomura, *The New Migration Law: Migrants, Refugees, and Citizens in an Anxious Age*, 105 CORNELL L. REV. 457 (2019) (providing a descriptive account of current immigration categories); *see also* Gerson, *supra* note 20.

161. *See* Frank-Vitale, *supra* note 18, at 72 (2023) ("The caravan and coyotaje are within the same continuum of migration facilitation possibilities of which migrants make use, depending on their resources, needs, timelines, and positionalities").

162. *See id.* at 71.

163. *See* DANIEL KAHNEMAN, THINKING, FAST AND SLOW (1st ed. 2013).

164. *See* Emily Ryo, *Deciding to Cross: Norms and Economics of Unauthorized Migration*, 78 AM. SOCIO. REV. 574 (2013) (showing that individual attitudes to law, risk, and norms are crucial to understanding the decision to migrate without authorization); Christian Dustmann et al., *Risk Attitudes and Household Migration Decisions*, 58 J. HUM. RES. 112 (2023) (showing that less risk-averse households are likelier to migrate); *see also* Emily Ryo, *Detention as Deterrence*, 71 STAN. L. REV. ONLINE 237 (2019) (discussing various "deterrence hurdles", the "legal knowledge hurdle, the rational choice hurdle, and the perceived net cost hurdle" make it so that migrants are not able to properly weigh the likelihood of detention as a factor in their decision to migrate. In sum, immigration detention may not deter because people do not know about it, even if they do, the risk is worth it, or because people will discount the risk that they will be detained).

system that normalizes the idea that any migration is harmful or wrong.[165] Moreover, as I argue in this section, although the argument cannot be sustained on the exact same grounds as decriminalizing illegal entry or reentry, it is still based on the same theories of justice and the real-life consequences of these policies. Holding a mirror to this particular crime reveals that it is contrary to the normative foundations of criminal law and law writ large.[166]

In this section, I proceed by first describing the conduct that 8 U.S.C. § 1324 proscribes and how the offense is currently being enforced by the U.S. Department of Justice (DOJ). I then turn to arguing that § 1324 is best understood as a crime against legal administration, in order to finally turn to providing the normative rationale for abolishing § 1324. Although in Section II of this paper I mainly focused on the crime of smuggling, in this section, I will also explore the anti-harboring provision because the same analysis applies to both. As stipulated in the introduction, Section II focuses on smuggling because the social science literature has been more focused on that conduct. My contention is, however, that the theoretical and legal conclusions derived from that analysis can be applied to the crime of harboring as well, which is why I turn to it now.

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165. Morales argues that "[b]y making migration criminal, crimes of migration have sped the transition of the United States from a nation that sees migration of any sort as legal to one that presumes it to be harmful or wrong." Morales, *supra* note 25, at 1261. *See also* Judith Ann Warner, *The Social Construction of the Criminal Alien in Immigration Law, Enforcement Practice and Statistical Enumeration: Consequences for Immigrant Stereotyping*, 1 J. SOC. & ECOLOGICAL BOUNDARIES 56, 57 (arguing that immigrants were seen as criminals once the legal category "criminal alien" was formed); Xia Wang, *Undocumented Immigrants as Perceived Criminal Threat: A Test of the Minority Threat Perspective*, 50 CRIMINOLOGY 743, 743 (2012) (providing empirical evidence that places where people perceive the immigrant population to be larger than it is are associated with having people that view immigrants as criminals).

166. For several reasons, however, decriminalizing smuggling and harboring is a challenge of a different order than decriminalizing illegal entry or reentry. First, harboring and smuggling are crimes that most often are perpetrated by U.S. citizens, meaning that the alternative punishment of deportation is unavailable to deter the behavior. As mentioned above, Daniel Morales argues that deportation – a civil consequence – more than adequately fills in whatever deterrence factor criminal punishment serves for illegal entry and reentry. *See* Morales, *supra* note 25, at 1317-1318. Separately, while often rejecting the term "punishment" (or artfully eluding it), courts have regularly seen deportation as an extreme penalty. *See*, *e.g.,* Padilla v. Kentucky, 559 U.S. 356, 365 ("We have long recognized that deportation is a particularly severe penalty") (citation modified); Fong Yue Ting v. United States, 149 U.S. 698, 740–41 (1893) (Brewer, J., dissenting) (noting that deportation is a penalty). Moreover, because of this, the offender is in effect a part of the polity that enacted those criminal laws and therefore legitimately constrained by them. Some of the arguments against criminalizing illegal entry and reentry has to do with the fact that the people charged do not belong to the society that passed the criminal laws and therefore have not democratically consented to them, making it wrong to criminalize them not only because it is normatively illegitimate to do also because by definition immigrants exclusion from the law making process (a necessary condition) impairs wholly both the deterrence as well as the expressivist functions of crimes of migration. *See* Morales, *supra* note 25, at 1309-12. Second, the nature of the offense is distinctly different. 8 U.S.C. 1324 is, of course, related to migration, but more broadly, it is in the category of crimes punishing the conduct of helping others evade law enforcement. There are many statutes of this nature: from general statutes punishing accomplice liability, to particularized statutes in the fields of securities, bankruptcy, customs, and everything in between.

A. *A Descriptive Account of 8 U.S.C. § 1324*

The relevant provisions of 8 U.S. Code § 1324 (a) (1) (A) read:

> Any person who—
>
> **(i)** knowing that a person is an alien, brings to or attempts to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner, regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States and regardless of any future official action which may be taken with respect to such alien;
> **(ii)** knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law;
> **(iii)** knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation;[167]

These are the relevant provisions because they contain the conduct that is proscribed by the statute.[168] These provisions, the harboring, transporting, and smuggling provisions, proscribe: aiding undocumented migrants in entering and moving within the United States or remaining in the United States and/or evading law enforcement. This can be divided into two broad categories of conduct: harboring and smuggling. Notably, the proscriptions extend beyond the border to encompass the entire United States. This makes sense when we consider that while smuggling must occur through a border, harboring can happen anywhere in the country. As is common in criminal statutes, each subsection attaches a slightly different mens rea requirement depending on the particular actus reus proscribed.[169]

Understanding what smuggling means is simple enough: helping someone evade immigration authorities across the border or within the United States. What harboring is, however, remains elusive. Courts have long struggled to

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167. 8 U.S.C. § 1324(a)(1)(A).

168. Other subsections only expand the scope of the statute, for example, by clearly indicating that conspiracy to harbor or smuggle is also a crime, not only the inchoate version of the crime. *See id.*

169. Note, for example, that the *mens rea* for transporting aliens is more expansive than the one for bringing undocumented people across the border, which indicates that Congress wanted to make sure to punish only intentional smugglers but wanted to broaden the net for people inside the United States transporting undocumented immigrants.

define the term "harboring" under 8 U.S.C. § 1324. Two competing interpretations have emerged. The majority approach, exemplified by the Sixth Circuit, holds that harboring requires what I have called "sheltering plus," that is, not merely providing accommodation, but doing so with the purpose of substantially facilitating an unauthorized immigrant's ability to remain in the United States unlawfully. Under this view, harboring means to "clandestinely shelter, succor, and protect improperly admitted aliens."[170] Many other circuits have followed suit.[171]

In contrast, the Ninth and Second Circuits have adopted a broader interpretation, holding that harboring simply means "to afford shelter."[172] The Ninth Circuit reasoned that since the statute's purpose is to prevent unauthorized presence, any provision of shelter satisfies the harboring element.[173] However, even the Ninth Circuit implicitly narrowed this standard, later requiring an "intent to violate the law."[174]

Traditional tools of statutory interpretation have failed to resolve this split because courts fundamentally disagree about the statute's purpose. Some view it as targeting non-cooperation with law enforcement,[175] while others see it as preventing unauthorized immigration generally.[176] Given the notorious difficulty of discerning congressional intent in criminal statutes, a different analytical framework is needed. I therefore propose analyzing the harboring provision through the lens of culpability and moral blameworthiness.[177] This approach finds support in Supreme Court precedent. In *Durland v. United States*, for instance, the Court explicitly looked beyond statutory text to identify the "evil sought to be remedied" in interpreting criminal fraud provisions.[178]

Examining § 1324 through a culpability lens reveals that "harboring" cannot simply mean providing shelter. This conclusion follows from three key principles. First, criminal liability should attach to knowingly or recklessly

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170. Susnjar v. United States, 27 F.2d 223, 224 (6th Cir. 1928).

171. *See* United States v. Varkonyi, 645 F.2d 453 (5th Cir. 1981); United States v. Belevin-Ramales, 458 F. Supp. 2d 409 (E.D. Ky. 2006); United States v. Costello, 666 F.3d 1040, (7th Cir. 2012).

172. United States v. Lopez, 521 F.2d 437 (2d Cir. 1975).

173. *See* United States v. Acosta de Evans, 531 F.2d 428, 430 (9th Cir. 1976).

174. United States v. You, 382 F.3d 958, 966 (9th Cir. 2004).

175. *Costello*, 666 F.3d at 1040.

176. *Acosta de Evans*, 531 F.2d at 430.

177. This is a role that courts have asserted. *See, e.g.*, Morissette v. United States, 342 U.S. 246, 250 (1952) (arguing that [t]he contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."); Elonis v. United States, 575 U.S. 723 (2015) (circumventing a First Amendment claim and establishing that negligence was not a sufficient *mens rea* to establish criminal liability for crimes involving threats); *see generally* John Shepard Wiley, *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021 (1999) (summarizing Supreme Court Jurisprudence to establish that the Court has focused on ensuring that prosecutions only reach morally culpable conduct). Moreover, the anti-corruption jurisprudence can be interpreted as, in part, tying blameworthiness to prosecution. *See* Pedro Gerson, *Crooked Politicians: Elusive Criminal Punishments and Paths to Accountability*, 54 LOY. L.A. L. REV. 1013 (2020).

178. Durland v. United States, 161 U.S. 306, 313 (1896).

helping unauthorized immigrants evade law enforcement, not merely to providing humanitarian assistance with knowledge of immigration status. The latter interpretation would divorce the wrongful act (obstruction) from the mental state requirement.

Second, criminal statutes should proscribe only morally blameworthy conduct.[179] Interpreting harboring as mere sheltering would criminalize humanitarian assistance, as illustrated by cases like *United States v. Warren*, where providing basic necessities like food and water formed the basis for prosecution.[180] This result cannot be reconciled with fundamental principles of criminal law.

Finally, adopting the "sheltering plus" interpretation brings the harboring provision in line with the smuggling provision from a culpability perspective in the sense that they now both focus on the wrongful act of aiding someone evade immigration law enforcement. The different provisions proscribe different moments in a continuum of one act (clandestine migration), whether it's crossing the border (smuggling), moving clandestinely inside the United States (transportation), or hiding from U.S. authorities (harboring). This is a more harmonious understanding of the statute as a whole, and therefore, it appears, a more correct one.

If we accept 8 U.S.C. § 1324 as a statute that breaks up the different moments of one act, we can better understand why arguing for decriminalizing one element implies decriminalizing all of it. Before turning to this analysis, I briefly account for how often this statute is used and sketch out what a typical prosecution under it looks like.

The TRAC Clearinghouse ("TRAC") database shows that up until now, convictions under this statute have remained relatively stable for the past five years at around 4,000 convictions per year. However, they project that for Fiscal Year 2023, the number of convictions under § 1324 is on track to be 37% greater than in Fiscal Year 2022.[181]

As Table 1 shows, the most frequent conviction is for the subsection, that makes it illegal to transport or attempt to transport such individuals within the United States. However, given the porous nature of the boundaries between the proscribed behaviors in each subsection it is not clear exactly what (or where) the DOJ is focused on. It could be that that subsection is more frequently charged because it has a more expansive mens rea than the cross-border smuggling subsection ((A)(i)), making it easier for prosecutors to successfully win convictions under that provision. [182] It could also be that

179. In general, the law is concerned with preserving lives (see the proportionality limitations in protecting both person and property in both criminal and tort law), meaning we should reject any interpretation that leads to the opposite conclusion.

180. See Devereaux, *supra* note 6.

181. *Convictions for Transporting or Harboring Undocumented Immigrants Jump Under Biden*, TRAC (July 13, 2023), https://perma.cc/WL7P-MFDY.

182. It's hard to see how one could be guilty of the smuggling provision and not the transporting one. In essence, all cross-border smuggling also involves transportation once stateside.

proving that someone helped someone clandestinely cross—if not apprehended at the time of crossing—is much harder than proving transportation, even if they did smuggle someone.[183] My point is not to suggest that actually prosecutions under the transportation provision are for smuggling offenses. Rather, it is to suggest that because the conduct proscribed by each subsection is not as neatly divided in real life, we cannot tell just from these statistics what is the most frequently engaged criminal conduct.

TABLE 1: LEAD CHARGE FOR DEFENDANTS[184] CONVICTED UNDER 8 U.S.C. § 1824[185]

Lead Charge Including Subsection (as labeled in U.S. Attorney records)	FY 2018	FY 2019	FY 2020	FY 2021	FY 2022	FY 2023	Total
08 USC 1324a1Aii - Transport/moves/attempts to transport illegal aliens within the US	1,459	1,533	2,363	1,689	1,925	2,295	11,264
08 USC 1324a1Avl - Bringing in and harboring certain aliens/conspiracy	355	538	929	738	860	767	4,187
08 USC 1324a1Ai - Knowingly brings or attempts to bring in illegal aliens to US	461	138	92	865	1,166	542	3,264
08 USC 1324a1AII - Bringing in and harboring certain aliens/aiding and abetting	195	689	696	198	42	16	1,836
08 USC 1324a2Biii - Failure to bring alien immediately to immigration officer upon arrival	198	348	213	102	83	115	1,059
08 USC 1324a1Aiii - Harboring/concealing illegal aliens	205	216	172	169	114	98	974
08 USC 1324a2Bii - Bringing in/harboring certain aliens for commercial adv/private finc gain	183	101	186	50	54	42	616
08 USC 1324b1 - Any conveyance used in violation of subsection (a) shall be seized	142	175	23	8	2	0	350
08 USC 1324a1Aiv - Encourages or induces an alien to come to, enter, or reside in the US	46	24	21	11	23	12	137
Other	2	5	7	6	0	3	23
Total	**3,246**	**3,767**	**4,702**	**3,836**	**4,269**	**3,890**	**23,710**

Another way to see this is that the most prosecuted conduct is transportation of undocumented migrants within the United States, which could indicate that law enforcement has mounted a nationwide campaign against that offense. However, a closer look at enforcement does not suggest this. Although there have been convictions for § 1324 across most federal judicial districts in the country, most convictions (75%) occur within the five southwest border districts plus the Southern District of Florida (Miami) and the Northern District of New York (Syracuse). When we control for population, we see that "the five districts along the nation's southwest border with Mexico held the top five spots."[186] The geographic concentration of these charges cements furthermore that trying to identify what precise

183. There are just more opportunities for someone transporting a clandestine migrant to be arrested than there are for smuggling, because for the latter, you only have the moment of crossing and nothing after.

184. *See supra* note 181.

185. *See supra* note 181.

186. *Id.*

conduct law enforcement is focused on—whether smuggling or harboring—is a fool's errand.

Despite the projected rise in prosecutions under § 1324 during the Biden administration, prosecutions under this statute remain a minority of immigration related offenses. According to the U.S. Sentencing Commission in Fiscal Year 2022, illegal reentry (8 U.S.C. § 1326) represented over 71% of immigration related convictions.[187] The next most frequently charged offense is illegal entry, and only after that comes § 1324. Moreover, as TRAC data suggests, the charging pattern of § 1324 does not mirror that of illegal entry or reentry, which is noteworthy given that smuggling is positively correlated to the number of irregular entries (because most migrants crossing between ports of entry use smugglers).[188]

To better understand how 8 U.S.C. § 1324 is charged, I created a database of cases in Westlaw and Bloomberg that include 8 U.S.C. § 1324(a) charges and that have written opinions between June 1, 2017, and June 1, 2024. The database consisted of 904 cases.[189] From these, I sampled an even number across the years, looking at 200 cases to properly sketch the kinds of acts and conditions that lead to 8 U.S.C. § 1324 prosecutions.

From the sample, it appears[190] that 84% of defendants are U.S. citizens. The second characteristic is that the DOJ is remarkably successful in these prosecutions. This, however, may not be surprising because the cases looked at were only the ones with written opinions, excluding all cases that pleaded out or were dismissed. Out of the cases with final disposition, I found only one case where the defendant was not convicted, and it was because he was removed. More revealing than either of these statistics is that the facts of the cases analyzed reveal characteristics of the typical § 1324 case charged.

When reading the cases, I attempted to divide the cases in which an immigrant (or many) was victimized by the defendant and the ones where they were not. As discussed previously, smuggling is a service provision between two contracting parties that is rarely associated with other criminal enterprises.[191] So, cases where the migrants had contracted smugglers willingly

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187. *Quick Facts: Illegal Reentry Offenses FY 2022*, U.S. SENT'G COMM'N (2023), https://perma.cc/Q6MT-4X2E.

188. *See* GABRIELA SANCHEZ, HUMAN SMUGGLING AND BORDER CROSSINGS (2015). Also, this discrepancy suggests that the charging decisions of each are not part of a coherent criminal or immigration policy. After all, if the concern is with maintaining the integrity of the U.S. Southern border, then shouldn't we expect the federal government to be using all the tools in its immigration enforcement arsenal in a similar fashion? The discrepancy also gives credence to Sklansky's hypothesis about the ad hoc implementation of criminal immigration laws: institutional actors see laws as different means of achieving their goal (immigration deterrence) and will use laws disparately, choosing whichever best fits their particular purpose. Sklansky, *supra* at XX.

189. This is a much smaller universe than the one of actual cases filed (as Table 1 shows between, 2018 and 2023, there were over 23000 *convictions*, which obviously does not include unsuccessful prosecutions).

190. In most cases, it is not 100% clear what the citizenship status is of the defendants; however, from the opinion, one can infer it. I only hedge because I did not confirm these inferences for every case. These inferences are based on the fact that in cases where the defendant is a noncitizen, immigration enforcement (i.e., the potential or actuality of removal) is discussed.

191. *See supra* Part II (a).

and were not abused, whether physically or mentally, by their smugglers, were ones that I categorized as victimless. Meanwhile, cases in which the migrant was a victim of human trafficking, forced labor, kidnapped, defrauded or scammed, suffered physical, sexual, or psychological violence, were ones that I categorized as ones where an immigrant was victimized.

As discussed further in the next section, it is these cases that are of most concern from a social-harm perspective. Admittedly, in some cases it is difficult to tell if an immigrant is victimized or not because the court is not necessarily focused on these questions. Therefore, to be as conservative as possible, I categorized all uncertain cases as ones where there was victimization. Out of the cases reviewed, immigrants were victimized by the defendants in only 30% of the cases. In all of those cases, the particular victimization is covered by other criminal statutes such as fraud, coercion, assault, or rape. This tells us that the majority of the targeted conduct is victimless. To understand why, I now turn to exploring how the victim is harmed by smuggling and harboring before exploring why neither offense is defensible under the traditional justifications of crime.

B. *What Kind of Wrong is Migrant Smuggling and Harboring?*

As shown in Section II, smuggling is—generally—an act that does not harm the migrant being smuggled. As articulated previously, recognizing this does not mean that smuggling cannot become predatory or that immigrants are not ever harmed by their smugglers, but rather that most human smuggling operates like a business where satisfied customers are necessary for the service provider to endure. In short, migrant smuggling is not wrong for the migrant being smuggled.[192]

If smuggling and harboring are not harms to the immigrant(s) being smuggled, then who is the harm against, if there is a harm at all? Daniel Morales explores four distinct possibilities for articulating what kind of harm illegal entry or reentry is: harm against property, personhood, legal administration, or a political theory, concluding that the latter is the correct framework.[193] He writes: "The political theory that is wronged by a crime of migration asserts. . .that aliens have a duty to respect the unilateral prerogative of the United States to exclude them from its territory on whatever basis it—and it alone—chooses."[194]

Morales rejects the characterizations of crimes of migration as crimes against property akin to trespass because that hinges on the right to exclusion, which harks back to crimes against the political theory. So, illegal entry must

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192. The migrant being smuggled can be harmed otherwise: they can be trafficked, forced into labor, kidnapped, defrauded, raped, assaulted, or any number of other harms, but those are separate harms and should be treated as such. As articulated more fully below, these are victimizations that can be addressed using criminal laws designed to protect people against these harms.

193. Morales, *supra* note 25, at 1277.

194. *Id*. at 1263.

first be a harm against that theory to ever be a crime against property.[195] Morales argues that crimes of migration are not crimes against persons because any alleged harms of undocumented migrants—such as low wages — are unproven and too attenuated to be the kind of harms attended by criminal law.[196] Morales' analysis can be equally applied to the crime of smuggling and/or harboring, which is neither akin to trespass nor directly harming a person.

Morales' reasoning as to why crimes of migration are not harms against legal administration is harder to justify in the smuggling context. A crime against legal administration is one that makes the fair and efficient application of justice and law harder or impossible, like perjury.[197] Illegal entry would plausibly be described as a crime against legal administration because it increases the cost of administering the immigration system as more resources need to be expended in order to apply the laws.[198] Similarly, one could argue that smuggling and harboring hinder law enforcement efforts to apply immigration laws. The reason, according to Morales, that illegal entry is not a crime against legal administration is that "the harms are only such because the political theory underlying the crimes of migration is legitimate."[199] Which, he argues, it is not.

However, there are two reasons why this argument is harder to extend in the smuggling context.[200] First, one of the main reasons for characterizing illegal entry as a crime against sovereignty is that the only person who can commit it is a clandestine migrant. Therefore, that person *must not* be subject to the polity that passed the law in order to be criminalized by it. Meanwhile, smuggling and harboring can be (and more often than not are) carried out by United States citizens.

Second, one need not believe in the validity of an underlying government interest to believe that conduct that aids and abets actions that undermine that interest is properly characterized as a criminal offense. For example, one could hold that the crime of tax evasion for regular individuals is unconstitutional because taxes are unconstitutional,[201] but still believe that tax

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195. *Id.* at 1285.

196. *See* Michael A. Clemens & Ethan G. Lewis, *The Effect of Low-Skill Immigration Restrictions on US Firms and Workers: Evidence from a Randomized Lottery* (Nat'l Bureau of Econ. Rsch., Working Paper No. 30589, 2024).

197. Morales, *supra* note 25, at 1286.

198. Some may also argue that smuggling and harboring migrants affects people who are attempting to migrate the legal way. However, the privileges of people who have a path for migration are not affected in any way by irregular migration. In other words, undocumented migrants do not change either the paths to legal migration or the bureaucratic system that applies those laws. *See* Gerson, *supra* note 20.

199. Morales, *supra* note 25, at 1286.

200. Of course, if one believes that the crime of illegal entry is not harmful or illegitimate, then the same reasoning can likely be extended to the smuggling context. My point, however, is that it need not extend.

201. *See* Moore v. United States, 602 U.S. 572, 573 (2024) (holding that income taxes are constitutional under the Sixteenth Amendment). My point in choosing this example is not to suggest that saying that crimes of migration are not harms is the same as saying that taxes are unconstitutional. Quite the contrary, I agree with Morales' characterization. My point is simply to suggest that one thing is a conduct

professionals who engage in helping people evade taxes should be criminalized. This is because the latter offense is of a different *kind*. Whatever the reasoning the government gives of proscribing the first act, even if illegitimate, it is still the function of law enforcement to enforce those laws, therefore any conduct by a third party that impedes that should properly be proscribed.

Therefore, I contend that migrant smuggling is best understood as a harm against legal administration. The very structure of 8 U.S.C. § 1324 reflects this intuition. As laid out in the preceding subsection, the statute is more cogently understood as one proscribing conduct geared towards helping others avoid law enforcement and breaking up that conduct in its component parts. And so, the harm is best understood as one against the enforcement or administration of immigration law.

Even if migrant smuggling and harboring are a harm against the legal order, however, that does not necessarily mean that the conduct should be criminalized. I now turn to the reasons against criminalization in the next section.

C. *Justifications of Punishment*

Though heavily contested, deterrence, retribution, incapacitation, and rehabilitation are the traditional justifications of punishment.[202]From these, deterrence and retribution receive most attention and carry the weight in terms of justifying punishment for any particular kind of social harm.[203] In this section, I therefore focus on the deterrence and retributive arguments for criminalizing migrant smuggling and harboring.

On the deterrence view, migrant smuggling and harboring should be criminalized in order to prevent individuals from smuggling or harboring migrants across the U.S. border or within the United States.[204] Note that the deterrence focuses on the person aiding, not on the migrant (who is presumably deterred by the crimes

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that is proscribed, and another is aiding and abetting that conduct. One could believe that it is wrong to proscribe the original conduct and therefore no harm, but that aiding and abetting is different because it calls into question the entire legal order.

202. Expressivism is often mentioned as an alternative justification for punishment; however, I omit it because it has never become a core justification and because of the internal theoretical complications of expressivism as a theory. *See* Heidi M. Hurd, *Expressing Doubts about Expressivism*, 2005 U. CHI. LEGAL F. 405, 428 (2005).

203. It is true that incapacitation is often referred to as the ultimate justification for prison. However, here I am only talking about punishment in general, which could but need not mean incarceration. Moreover, because there is very little added benefit in terms of deterrence for every additional year of incarceration, incapacitation serves as a theory mainly to justify incarceration of "the dangerous few", that is, people who have been deemed too dangerous to let free in society. *See* Guyora Binder & Ben Notterman, *Penal Incapacitation: A Situationist Critique*, 54 AM. CRIM. L. REV. 1, 51 (2017) (discussing how the court in *Ewing v. California* treats incapacitation effect as common sense); Rucker Johnson & Steven Raphael, *How Much Crime Reduction Does the Marginal Prisoner Buy?*, 55 J.L. & ECON. 275, 300 (2012) (finding each additional year reduces only about 2.5 violent crimes per year served); Thomas Frampton, *The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics*, 135 HARV. L. REV. 2010, 2039 (2022).

204. The deterrence theory holds that criminal punishment increases the real and perceived cost of committing an offense, thereby reducing the likelihood that someone will engage in it. *See e.g.,* Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 198 (1968).

of illegal entry or reentry and/or various immigration laws making such crossers removable).[205] The problem for advocates of this theory is that it does not work.

In general, there is plenty of evidence showing that people do not choose to engage in criminal acts by calculating the kind of punishment they'll face if caught. Whether it is because of behavioral biases or knowledge gaps, people engaging in crime tend to discount not only the likelihood of punishment but its severity.[206] Moreover, even if they do engage in a cost-benefit calculation, it may be rational for them to engage in the offense because the benefit of committing the offense outweighs the perceived cost.[207] This is not unimaginable given that, as mentioned previously, smugglers tend to be poor, marginalized people with very limited options for economic success or even survival.

Thinking specifically about the crimes of smuggling and harboring, and crimes of migration generally, the evidence presented in Section II shows that indeed criminalization of migration and more stringent enforcement have done little to deter undocumented crossings.[208] As mentioned, prevention through deterrence, of which stringently enforcing 8 U.S.C. § 1324 is a part of, has done nothing to stop migrant arrivals. This is because the number of migrant arrivals depends on factors other than both criminal and immigration laws.

In fact, there is a scenario where criminalization hampers the deterrent effect that laws proscribing smuggling may have. As Robert Blecker wrote, the odds of committing are less dependent on "conscious calculation. . .of punishment [than on the chances] of pulling it off and escaping."[209] In other words, certainty of consequences is more important for deterrence than punishment. Criminal law, with its more stringent procedure, is an obstacle to punishment, making consequences far less certain for people engaged in the acts that have been criminalized. Potentially, a system of civil consequences that is more efficiently enforced could serve as a greater deterrent than criminalizing the conduct.

The retributivist framework for analyzing smuggling and harboring offenses requires careful consideration of both the harm these acts inflict and the proportionality of criminal sanctions as a response. While the primary

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205. *See e.g.,* 8 C.F.R. § 235.3.

206. *See* Richard H McAdams & Thomas S Ulen, *Behavioral Criminal Law and Economics* (U. Chi. L. John M. Olin L. & Econ. Working Paper No. 440, 2008) (describing how prospect theory, cognitive biases, and other motivations besides selfishness can alter traditional deterrence theory); John M. Darley, Kevin M. Carlsmith & Paul H. Robinson, *The Ex Ante Function of the Criminal Law*, 35 L. & SOC'Y REV. 165, 175 (2001) (studying four different states in the United States and showing that "people do not seem to be aware of the laws of their state").

207. Ryo, *supra* note 44, at 247 (arguing that immigration detention may not deter clandestine migrants because "[f]or many unauthorized migrants and asylum seekers, the benefits of migration will often outweigh any perceived costs, including harsh enforcement measures.").

208. In fact, recent events suggest that what deters undocumented migration is having avenues for orderly migration, along with migration consequences for not using those avenues. The launch of the CBPOne app alongside the proscription on asylum claims for people entering between ports of entry under the Biden administration was associated with falling encounters at points of entry. It is still too soon, however, to assert that these trends were causal.

209. Robert Blecker, *Haven or Hell? Inside Lorton Central Prison: Experiences of Punishment Justified*, 42 STAN. L. REV. 1149, 1176 (1990).

harm identified earlier is the undermining of efficient immigration enforcement, that does not necessarily imply that punishment is justified from a retributivist perspective because it does not adequately weigh the competing humanitarian interests at stake. As demonstrated in Part II, smuggling frequently serves as an *ultima ratio* for migrants facing a stark trilemma: remain in dangerous conditions at home, attempt a perilous solo journey through militarized borders and hostile terrain, or engage smugglers' services to maximize chances of survival. Although none of these options is optimal, empirical evidence suggests that professional assistance meaningfully reduces mortality risks.[210]

The conflict between border enforcement and preservation of human life presents a fundamental challenge to the retributivist justification for criminalization. The law's consistent privileging of human life as a paramount value—evident across domains from tort to criminal law—sits uneasily with the prosecution of those whose actions, while technically unlawful, prevent deaths.[211] The incongruity is particularly acute given that standard retributivist theory requires proportionality between the moral culpability of conduct and the severity of punishment.

Furthermore, the government's asserted interest in efficient immigration administration is significantly undermined by the fact that current policies—including border militarization, the externalization of enforcement to Mexico, criminalization of migrants, and restrictions on legal migration pathways—are themselves the proximate cause of migrants seeking extralegal assistance. When individuals flee persecution and seek safety through the only viable means available, the moral culpability of those who assist them is notably diminished. The retributivist case for punishing humanitarian assistance thus appears quite weak when examined against the backdrop of a border enforcement regime that essentially guarantees migrants will require such aid to survive.

The tension between retributivist justifications for punishment and the wrongfulness of the conduct proscribed is even more acute in the case of harboring. In 2018, Scott Warren, a humanitarian aid volunteer with No More Deaths, was arrested and prosecuted by federal authorities in 2018 for providing food, water, and shelter to two undocumented migrants in Arizona's Sonoran Desert. The government charged him with harboring illegal immigrants and conspiracy to transport and harbor illegal immigrants, claiming he was helping them evade law enforcement.[212] Warren, however, maintained he was simply providing humanitarian aid to prevent deaths in the harsh

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210. *See supra* Part II.b.

211. *See* Shalini Bhargava Ray, *The Law of Rescue*, 108 CALIF. L. REV. 619, 623 (2020) (arguing that while rescue laws have historically prioritized property rights and economic interests, they should be reoriented to better protect rescuer liberty and beneficiary dignity, particularly in the context of humanitarian assistance to migrants).

212. *See* Criminal Complaint, United States v. Warren, No. CR-18-00223-TUC-RCC (D. Ariz. Jan. 18, 2018).

desert environment.[213] After a first trial ended in a hung jury in June 2019, Warren was acquitted of all charges in a second trial in November 2019, with the case highlighting the tension between humanitarian aid and immigration enforcement. As Shalini Ray has argued, Warren's prosecution amounted to the prohibition of rescue.[214] A criminal law that is inimical to the protection of human life should be abolished.

The foregoing analysis echoes the deadly consequences of deterrence policies outlined in Part I. To sum up, the retributivist rationale for criminalizing migrant smuggling and harboring collapses when viewed as part of a broader legal architecture that systematically endangers migrant lives. In addition, these prosecutions further entrench the pernicious conflation of immigration and criminality. In other words, the criminalization of migrant smuggling and harboring serves to reify the notion that immigrants are criminals. This notion endangers entire migrant communities regardless of legal status by legitimizing both private animus and aggressive law enforcement targeting.[215] When accounting for these broader societal implications, the retributivist justification for criminalization proves fundamentally unsustainable.

Decriminalizing smuggling and harboring would not preclude protecting migrants from exploitation within such arrangements. Criminal law provides established mechanisms to prosecute smugglers who perpetrate violence, theft, or fraud against migrants.[216] However, relying on criminal enforcement carries inherent risks of discriminatory application and further entrenching the criminalization of migration.[217] The more principled solution lies in eliminating the conditions that necessitate reliance on smugglers—namely, by expanding legitimate pathways for migration and humanitarian protection.[218]

The current U.S. immigration framework imposes severe, often insurmountable restrictions on legal migration. The purported paths to lawful status are so narrowly drawn and administratively constrained as to render them largely illusory for most prospective migrants.[219] Even for those who formally qualify for visas, artificially low statutory caps on permanent resident admissions have created byzantine waitlists that effectively foreclose timely

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213. See Amended Motion to Dismiss Counts 2 and 3, at 5, *Warren*, No. CR-18-00223-TUC-RCC.

214. Ray, *supra* note 210, 623 (2020).

215. *See* Kevin R. Johnson, *Fear of an Alien Nation: Race, Immigration, and Immigrants*, 7 STAN. L. & POL'Y REV. 111 (1995) (describing the animus and racism motivating anti-immigrant sentiment in the U.S.); Jennifer M. Chacon, *Overcriminalizing Immigration*, 102 J. CRIMINAL L. & CRIMINOLOGY 613, 615 (2012) (documenting the expansion of criminal law as a means to effect immigration control); Alina Das, *Inclusive Immigrant Justice: Racial Animus and the Origins of Crime-Based Deportation*, 52 U.C. DAVIS L. REV. 171 (2018) (arguing that racism accounts for the development of crimmigration).

216. *See*, *e.g.*, 18 U.S.C. §§ 1589-91 (2018) (criminally prohibiting forced labor, trafficking, and sex trafficking).

217. Chacon, *supra* note 214.

218. Jaya Ramji-Nogales, *Migration Emergencies*, 68 U.C.L.J. 609 (2017) (arguing for a new international law of migration after identifying international migration law as a root cause of the limited avenues for legal relief for refugees).

219. Gerson, *supra* note 20.

migration.[220] This system proves particularly inadequate for those fleeing political persecution, economic devastation, or climate-induced displacement. The refugee protection regime, on the one hand, was designed in response to World War II's specific historical context, and fails to encompass contemporary forms of forced migration.[221] On the other hand, the ad hoc humanitarian mechanisms like Temporary Protected Status and parole authority have proven structurally insufficient to meet the scale and scope of current protection needs.[222]

A comprehensive solution demands expanding both permanent and temporary legal migration channels, modernizing the international protection framework to reflect contemporary forced displacement, and strengthening multilateral cooperation.[223] Such systematic reforms would more effectively reduce irregular migration and its attendant risks than the current enforcement-centered paradigm that exposes migrants to grave dangers.

CONCLUSION

This Article has argued that 8 U.S.C. § 1324, which criminalizes migrant smuggling and harboring, should be abolished. The criminalization of these activities cannot be justified under either deterrence or retributivist theories of punishment. While smuggling and harboring can be characterized as harms against legal administration, the evidence shows that criminalization has failed to deter these practices while actively contributing to migrant deaths and the stigmatization of immigrant communities. The reality of smuggling operations—typically small-scale, non-hierarchical networks providing services to migrants with few alternatives—stands in stark contrast to government narratives about sophisticated criminal enterprises. This disconnect between rhetoric and reality has enabled an enforcement regime that undermines both humanitarian principles and effective immigration policy.

The solution lies not in criminalization but in expanding legal migration pathways. Current U.S. immigration law provides virtually no realistic options for most prospective migrants, creating conditions where smuggling becomes a survival strategy rather than a criminal enterprise. While protecting migrants from exploitation remains crucial, existing criminal statutes

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220. The wait times to bring a sibling, for example, now exceed 20 years. *See Visa Bulletin For February 2025*, TRAVEL.STATE.GOV, https://perma.cc/5SPZ-QD9J (last visited July 17, 2025); *see also* David Bier, *Immigration Wait Times from Quotas Have Doubled: Green Card Backlogs Are Long, Growing, and Inequitable*, CATO INST. (June 18, 2019), https://perma.cc/UP4G-7BEJ.

221. Andrew E. Shacknove, *Who Is a Refugee?*, *in* INTERNATIONAL REFUGEE LAW (Héléne Lambert ed., 2010) (arguing that both categories of alienage and persecution fully capture what is essential about being a refugee and proposing a more capacious definition); *see also* DAVID SCOTT FITZGERALD, REFUGE BEYOND REACH: HOW RICH DEMOCRACIES REPEL ASYLUM SEEKERS (2019) (showing how democracies have curtailed the right to asylum beyond the circumscribed nature of the asylum categories); E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509 (2019) (showing that international refugee law has limited avenues for protecting economic migrants and arguing for a reconceptualization of state sovereignty to expand states' obligations vis-à-vis economic migrants).

222. *See*, *e.g.*, HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW (2014) (providing an overview of temporary migration protections).

223. *See*, *e.g.*, David Martin, *Taming Immigration*, 36 GA. ST. U. L. REV. 971 (2020) (outlining potential possibilities for the expansion of legal pathways to migrate).

covering fraud, assault, trafficking, and other specific harms provide better tools than broad anti-smuggling provisions. By reconceptualizing smuggling and harboring as rational responses to an overly restrictive immigration system rather than inherently criminal acts, we can develop more effective and humane approaches to migration governance that prioritize both orderly processes and human life.