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CAN YOU “ENFORCE” WITHOUT “FORCE”?

Decriminalizing illegal immigration would have serious consequences

For Police Issues by Julius (Jay) Wachtel. Given a belt-busting load of twenty candidates and only four hours air time, we didn't expect that the Democratic debates of June 26 and 27 would dive into crime and justice in any depth. And for the most part we weren't surprised. What's more, the “arguments” that did take place seemed so fine-tuned to avoid offending ideological sensibilities – in this case, of the “blue” persuasion – that we were unsure whether the owners of those lips knew that should their quest prove successful they would be [Constitutionally bound](#) to faithfully execute the laws that already exist.

That takes us to immigration. (We'll be referring to debate transcripts published by the *New York Times*. Click [here](#) for a transcript of the first debate and [here](#) for the second.) [Title 8, U.S.C., Sec. 1325](#), “improper entry by alien,” makes it a crime to sneak in. First offenders can draw six months in prison, and repeaters can get two years. That's essentially how the law has read [since 1950](#), when its text used the terms “misdemeanor” and “felony” to distinguish between penalties.

In all, the debaters seemed opposed to treating illegal entry as a crime. During the first round, former H.U.D. Secretary [Julián Castro](#) advanced perhaps the most extreme view. First, he called for repealing section 1325 and making immigration a strictly civil matter. While that drew nearly unanimous approval – Senator Cory Booker, Newark's former mayor, promptly interjected “I already have” – Castro cranked it up by explicitly calling for the Government to establish pathways to citizenship for potentially “millions” of otherwise law-abiding illegal immigrants already in the U.S. And as a back-handed concession to worry-warts, Castro also championed a new “Marshall plan” that would enable citizens of Central American countries to “find safety and opportunity” – meaning, of the economic kind – “at home instead of coming to the United States to seek it.”

That's a bold approach, and not everyone was sold. Instead, most of his colleagues tried to navigate around cost and ideology by specifically tailoring their remarks to families escaping violence. Among them was former Representative [Beto O'Rourke](#). Even then, he apparently felt compelled to address the expense of admitting immigrants fleeing “the deadliest countries on the face of the planet” by suggesting that potentially

impacted communities adopt his supposedly cost-effective “family case management” approach.

Of course, laying out a welcome mat has all kinds of consequences. When it became obvious that the debaters were avoiding a key issue, [NBC moderator Savannah Guthrie](#) stepped in. Here are brief extracts from her tangles with Senator [Amy Klobuchar](#) and Representative [Tim Ryan](#):

GUTHRIE: He [Castro] wants to no longer have it be a crime to illegally cross the border. Do you support that? Do you think it should be a civil offense only? And if so, do you worry about potentially incentivizing people to come here?

KLOBUCHAR: Immigrants, they do not diminish America. They are in America and I am happy to look at his proposal but I do think you want to make sure that you have provisions in place that allow you to go after traffickers and allow you to go after people who are violating the law. What I really think we need to step back and talk about is the economic imperative here and that is that seventy of our Fortune five hundred companies are headed up by people that came from other countries....

GUTHRIE: Congressman Ryan, same question. Should it be a crime to illegally cross the border or should it be a civil offense only?

RYAN: Well I—I agree with Secretary Castro. I think there are other provisions in the law that will allow you to prosecute people for coming over here if they are dealing in drugs and other things. That is already established in the law. So there is no need to repeat it and I think it’s a bore it we are talking about this father who got killed with his daughter and the issues here....

Guthrie soon gave up trying to get a direct answer. On the next evening, NBC anchor Jose Diaz-Balart brought up decriminalization:

DIAZ-BALART: If—if you would be so kind raise your hand if you think it should be a civil offense rather than a crime to cross the border without documentation? Can we keep the hands up so we can see them?

[According to the New York Times](#), eight candidates put up their hands, while a ninth, former V.P. [Joe Biden](#), “raised a finger.” During follow-up questions, all, including Biden, focused on their humanitarian obligation to help families fleeing violence and disorder:

BIDEN: The first thing I would do is unite families. I would surge immediately billions of dollars' worth of help to the region the immediately...second thing we have to do, the law now requires the reuniting of those families. We would reunite those families period and if not we would put those children in a circumstance where they were safe until we could find their parents....

Here's a bit of what Senator [Bernie Sanders](#) had to say:

SANDERS: ...picking up on the point that Joe made, we got a look at the root causes. And you have a situation where Honduras, among other things, is a failing state, massive corruption. You got gangs who are telling families that if a 10-year-old does not join their gang, their family is going to be killed....

And here's an extract from Representative [Eric Swalwell's](#) reply:

SWALWELL: Day one for me, families are reunited. This president, though, for immigrants, there is nothing he will not do two separate a family, cage a child, or erase their existence by weaponizing the census. And there is nothing that we cannot do in the courts and that I will not do as president to reverse that and to make sure that families always belong together....

No one ventured into dangerous turf. And they really didn't have to. Unlike his more probing colleague, Diaz-Balart didn't probe the possible effects of creating incentives. Needless to say, none of the guests volunteered.

One might think that for those, like Border Patrol agents, who must personally deal with the problem, creating incentives that generate even more illegal crossings might be the last straw. But it gets worse. *Much* worse. Should illegal immigration be decriminalized the issue of incentives would take a back seat to a more fundamental concern. As every border agent – indeed, as all cops well know – physical force is an intrinsic aspect of catching those who run away. But your blogger, who's been there a few times, knows of no legal or procedural precedent that authorizes forcefully detaining someone who is neither a criminal suspect nor dangerously mentally ill. Given current controversies, allowing, let alone *encouraging* the use of force when no crime has been committed and no one is at risk of physical harm seems a non-starter. Indeed, it would likely require a new body of law.

Bottom line: should section 1325 be repealed and illegal immigration ceases being a crime, all that Border Patrol agents will be able to do is beg for compliance. Well, good luck with that. Trump's walls would have to go up. (Good luck with that, too.) There is one possible workaround. Section 1325 includes a provision that prohibits eluding

“examination or inspection by immigration officers.” If that aspect remains a crime, illegal entry might be compared to, say, traffic enforcement. Doing forty in a twenty-five mile an hour zone isn’t a criminal offense. But if you don’t stop for the cop, the running away *is*. (It’s not a perfect analogy, as the high speeds and dangerous maneuvers intrinsic to getting away *are* crimes. But it’s as close as we can get.)

And there’s yet another vexing issue. Even the staunchest anti-immigration types concede that most illegal immigrants aren’t criminals but are fleeing poverty and violence. [Yet as we’ve pointed out](#), good intentions can’t always make up for a lack of income, skills and education:

Imprisonment data reveals that third-generation Hispanic males are more than twice as likely to be incarcerated as non-Hispanic whites. Why is that? Many illegal immigrants are unskilled, poorly educated and reside in poverty-stricken, crime-ridden areas. This might expose their descendants to role models and behaviors that the grandchildren of legal migrants can’t begin to imagine.

America’s crime-ridden inner cities offer a uniquely poor landing spot. Yet where else would the immigrants whom the panelists are so eager to welcome go? We might be more upbeat had our President followed through [on his campaign promise](#) to invest in and revitalize our poverty-stricken urban areas. But, gee, he didn’t. So until that “New Deal” really happens (we’re not holding our breath) encouraging immigrants to flee their own troubled neighborhoods to find relief in America seems at best a false promise, and at worst, foolish.

But don’t take that from your blogger. Take it from a long-retired Fed who got (legally) dragged from South America to the U.S. when he was ten. His name – which he’s sorry to have changed – was “Julio.” Oops, that’s me! Oh, well...