

**Migrant Criminality in the Age of Trump:
A Procedural and Substantive Claim**

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Her name was Jakelin Amei Rosmery Caal Maquin of Guatemala. She was seven years old. Just last Friday she died of dehydration while in custody of US Customs and Border Protection (CBP).¹ Claudia Gomez, also from Guatemala, was shot and killed by CBP this past June while crossing the treacherous southern border.² Yet most painfully, just as the school year was about to start here at Columbia, a nineteen-month toddler named Marice died in CBP custody from a respiratory infection.³ These stories of migrant death showcase an increasingly alarming trend of injustice currently happening on the ground at the southern border. The Trump administration has denied any responsibility in these deaths, but the culture of cruelty at CBP has been widely noticed. Their go-to response: This is what happens when you *choose* to cross the border. In treating migrants who seek asylum as choosers of their own destiny, rather than as pawns in a political game, the Trump administration has maliciously chosen to ignore its role in shaping and enforcing standing international and domestic law. On the contrary, the choice that truly matters here is the choice of the powerful. Mercy to him who thinks otherwise, for, as Bryan Stevenson and Gandhi have both unequivocally claimed, a society's character is measured by how it treats its most vulnerable members. The question remains: Are migrants part of this collective vision?

In this paper I argue that existing legal liberalist theories of justice are insufficient in transacting justice from state to migrant. Utilizing the leading figure in contemporary legal liberalism, John Rawls, and juxtaposing him to the traditions of substantive justice via Michael Sandel, I first attempt to visualize my own theory of justice that addresses the contemporary role of the migrant in the creation and transaction of rule of law principles. Second, I address the role of the courts in mediating this transaction. I conclude by applying my theory to the social justice issue of migrant criminality.

¹ <https://www.theguardian.com/us-news/2018/dec/14/guatemalan-girl-aged-seven-dies-in-custody-on-us-mexican-border>

² <https://www.theguardian.com/world/2018/jun/02/guatemala-texas-rio-bravo-border-claudia-gomez>

³ <https://www.cnn.com/2018/08/28/us/texas-ice-child-death/index.html>

Rawlsian legal positivist theory assumes “a basic structure within which the pursuit of all other activities takes place,”⁴ that when this basic structure is codified into a legal system, a “conception of formal justice” materializes, and that this basic structure serves as the rule of law.⁵ The rules of law follow a Hobbesian notion of hedges and game in that they “serve to organize social behavior by providing a basis for legitimate expectations.”⁶ These precepts of procedural justice create the conditions for laws to become just: they cannot “impose a duty to do what cannot be done,” nor can they be promulgated *ex post facto*.⁷ However, Rawlsian theory has a huge asterisk at the end: “Because these precepts guarantee only the impartial and regular administration of rules, whatever these are, *they are compatible with injustice*.”⁸ Thus “the failure of judges and others in authority to apply the appropriate rule or to interpret it correctly” constitutes injustice, and thus a failure in the rule of law.⁹ The limitations in Rawlsian theory conclusively originate in man’s creation, execution, and adjudication of rule of law.

In the construction of these rules Michael Sandel’s deontological liberation becomes much clearer. Whereas Rawls’ procedural framework positions men as ends, Sandel’s “universe of the deontological ethic is a place devoid of inherent meaning...Only in a universe empty of *telos*, such as the seventeenth-century science and philosophy affirmed, is it possible to conceive a subject apart from and prior to its purposes and ends.”¹⁰ Men themselves consequently “produce the reality of that to which they refer.”¹¹ This constantly reproducing teleological Rawlsian mission, purportedly in an indivisible and ignorant original position, “is less a choosing of ends than a matching of pre-

⁴ John Rawls, “A Theory of Justice,” 207.

⁵ *Ibid.*, 206.

⁶ *Ibid.*, 209.

⁷ *Ibid.*, 208.

⁸ *Ibid.*, 208. [Italics added]

⁹ *Ibid.*, 206, 207.

¹⁰ Michael Sandel, “Liberalism and the Limits of Justice,” 175.

¹¹ Immanuel Kant (1788: 67-8) in Sandel, 176.

existing desires, undifferentiated as to worth, *with the best available means of satisfying them.*¹² Through Sandel, I claim that the Rawlsian procedure accordingly and conveniently transacts power, not justice.

The Sandelian vision is well-aligned with my theory of justice and the application I intend to use on the issue of migrant criminality. Whereas Rawlsian theory distances relevant and proximate mortal capacities, Sandelian theory conversely suggests that “we cannot regard ourselves as independent in this [Rawlsian] way...without understanding ourselves as the particular persons we are...as members of this family or community or nation or people.”¹³ These obligations, in turn, shape the way we exact justice, for these obligations “go beyond the ‘natural duties’ I owe to human beings as such. They allow that to some I owe more than justice requires or even permits.”¹⁴ Here, men are no longer ends but means in their construction of a just ideal: “We are free to construct principles of justice unconstrained by an order of value antecedently given”¹⁵ Sandel’s theory concludes with our most relevant statement in addressing the social justice issue at hand: “By putting the self beyond the reach of politics, it makes human agency an article of faith rather than an object of continuing attention and concern, *a premise of politics rather than its precarious achievement.*”¹⁶ So far this theoretical discussion has focused on the legislative (creation) and executive (execution) limitations of rule of law procedure in transacting justice. The role of the judiciary (adjudication) plays another role in this procedure.

Justice William J. Brennan extends Sandel’s most relevant statement: “Litigation...is a means for achieving the lawful objectives of equality of treatment by all government...*It is thus a form of political expression...* And under the conditions of modern government, litigation may well be the sole

¹² Sandel, 178. [Italics added]

¹³ *Ibid.*, 179.

¹⁴ *Ibid.*, 179.

¹⁵ *Ibid.*, 177.

¹⁶ *Ibid.*, 183. [Italics added]

practicable avenue open to a minority to petition for redress of grievances.”¹⁷ Because litigation campaigns have largely been used as a mechanism in “the making of new rules of law” and the “enforcement of existing rules,” they have become a “regular part of the business of the courts” such that they have effectively been able “to interpret the Constitution and statutes generously to effect social change.”¹⁸ In transacting justice, courts have played an enormous role given the legislative and executive limitations of rule of law procedure. Because the function of courts are to interpret rules and validate that they operate under fair rule of law procedures, the courts often serve as an last resort in transacting justice. Jack Greenberg claims that “when we proceed beyond theory to practice, the undemocratic aspects of the non-judicial branches” become easily visible, but the “real issue” is not in their undemocratic qualities “but how the political organism works as a whole when all the parts interact with each other.”¹⁹ I struggle to cope with this argument because all parts of the political organism ought to function under rule of law principles, not leave the judiciary to be the backstop to unjust government behavior.

The role of the judiciary in mediating the transaction of justice is underscored but gaining traction as perhaps the sole method to do so. In the framework of immigration law affecting noncitizens, the judiciary seems to be the only method. Fortunately, an upward trend in the “unstopping of procedural channels to facilitate the movement” toward justice represents “a commitment that the doors to federal courts should open widely to those with claims of social injustice,” given that the doors of Congress and the President remain shut.²⁰

My theory of justice has taken an extensive approach to understand the theoretical framework of rule of law through different procedural and substantive lenses. Through Rawls and

¹⁷ William J. Brennan in Jack Greenberg, ““Litigation for Social Change: Methods, Limits, and Role in Democracy,” 40. [Italics added]

¹⁸ Jack Greenberg, “Litigation for Social Change,” 9, 10, 39.

¹⁹ *Ibid.*, 42.

²⁰ *Ibid.*, 39.

Sandel, I have posited two competing theories in order to accurately apply my own to the issue of migrant criminality. My theory of justice borrows extensively from Sandel arguing that Rawls' procedural transaction is tainted by manmade constructions, biases, and prejudices that have led us to where we are today in this issue of social justice. I first argue that Rawlsian limitations of procedural justice are a manifestation of the problem that exists today because rule of law principles only apply to citizens, making these existing principles outdated and in serious need of updates. Secondly, I argue that the flexibility that civil immigration enforcement tools provide—such as policing without constitutional limits on racial profiling, arrests without warrants, detention without criminal charges, deportation without jury trial, and sometimes capital punishment—allows prosecutors to borrow from the immigration enforcement regime in ways that can distort the normal procedural protections of the criminal system, making migrant criminality a true complication in a state's complete transaction of justice.

Existing rule of law principles, according to Rawls, assume that “those who enact laws and give orders do so in good faith,” and that good faith “must be recognized by those subject to their enactments.”²¹ Current immigration rules of law do not follow this procedure because noncitizens are not viewed as subjects whom the law is meant to protect, making the ‘good faith’ clause a moral guideline, at best. Issues of constitutional protection are further complicated by an executive branch that thinks it can uproot constitutional protections with an executive order.²² Although existing legal scholarship offers varying perspectives on this issue, if noncitizens are not protectable subjects under the constitution (i.e. constitutional protections do not extend to noncitizens), then I argue that neither a procedural nor substantive ideal can ever be achieved. In the case of due process, basic human rights, and international law, the migrant caravan crisis is an example of the procedural complications that have arisen because of these outdated and limited procedural interpretations of

²¹ Rawls, 208.

²² <https://www.nytimes.com/2018/10/30/us/politics/trump-birthright-citizenship.html>

justice. Given my theory of justice, which heavily relies on the Sandelian notion of deontological constructivism, I argue that this issue could be easily and quickly facilitated if Congress viewed migrants not as political agents but as people with real needs and deserving of rights. If Congress saw themselves as being part of “a moral universe inhabited by subjects capable of constituting meaning on their own — as agents of *construction* in case of right, as agents of *choice* in the case of the good,” this crisis would be solved overnight.²³ In the case of the good, they have chosen wrongly. Woe to them.

The state’s procedural claim is further complicated by the tools and methods used by the state in enforcing immigration law. Again, because they function outside a rule of law framework, executive agencies such as ICE and CBP are given free rein in their enforcement of current policy. This points to more troubling complication in the transaction of justice. Yet, as I have argued, the courts offer a backstop to these procedural and substantive injustices, making the judicial branch the only part of government that can most effectively carry out these transactions of justice, so long as the judiciary remains independent, unbiased, and unprejudiced, a troubling concern that has complicated the landscape of this political battlefield given the current administration. It remains that all three branches of government are able to fix this human rights crisis, but “politics” continue to alienate and obstruct possible reform.

In conclusion, in her lecture on October 30, Emma Kaufman traced a genealogy of the emergence of segregation by citizenship in US federal prisons, showing that increased bureaucratic coordination and increased criminalization led to a boom in the private prison industrial complex. Kaufman also noted how deportation as a collateral consequence of criminal behavior became a tool of the twentieth century for state policing of noncitizens. Kaufman’s literature is indispensable on the issue of migrant criminality, showing how certain methods and tools have been employed to

²³ Sandel, 176, 177.

criminalize migrants and noncitizens, further complicating the state's transaction of a procedural and substantive ideal. This is the social justice issue of today because it hinges on that first word: social. Are migrants and noncitizens part of this collective vision? Are they worthy of protection under the aims of the state's transactions of procedural and substantive justice? For generations upon generations, this country has been known as the land of the free, but for migrants like Jakelin and Claudia, this became a land of demise. Let us welcome with open arms those teeming with the thirst for freedom. Let there be no more Jakelins.