Article

THE LEGAL PRODUCTION OF MEXICAN/MIGRANT ''ILLEGALITY''

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Abstract

Mexican migration to the United States is distinguished by a seeming paradox that is seldom examined: while no other country has supplied nearly as many migrants to the US as Mexico, major changes in US immigration law since 1965 have created ever more severe restrictions on "legal" migration from Mexico in particular. This paper delineates the historical specificity of Mexican migration as it has come to be located in the legal economy of the US nation-state, and thereby constituted as an object of the law. More precisely, this paper examines the history of changes in US immigration law through the specific lens of how these revisions with respect to the Western Hemisphere, and thus, all of Latin America, have had a distinctive and disproportionate impact upon Mexicans in particular.

Keywords

undocumented Mexican migration; illegality; deportability; immigration law; race; citizenship

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The caprice of sovereignty and the tyranny of the rule of law

When undocumented migrants are criminalized under the sign of the "illegal alien," theirs is an "illegality" that does not involve a crime against anyone; rather, migrant "illegality" stands only for a transgression against the sovereign authority of the nation-state. With respect to the politics of immigration and naturalization, notably, sovereignty (as instantiated in the unbridled authoritarianism of border policing, detention, deportation, and so forth) assumes a pronouncedly absolutist character (cf. Dunn, 1996; Simon 1998). Such an absolutist exercise of state power relies decisively, of course, upon a notion of "democratic" consent, whereby the state enshrouds itself with the political fiction of "the social contract" in order to authorize itself to act on behalf of its sovereign citizens, or at least "the majority." In the US, this circular logic of sovereignty conveniently evades the racialized history of the law of citizenship, just as this species of majoritarianism sidesteps altogether the laborious history that has produced a "majority" racialized as "white." The racialized figure of Mexican/migrant "illegality," therefore, can be instructively juxtaposed to what is, in effect, the racialized character of the law and the "democratic" state itself. Inasmuch as the political culture of liberalism in the US already posits and requires "the rule of law" as a figure for "the nation," the instrumental role of

11 The 1990 law increased the global annual quota for non-exempt migration and also significantly restructured the preference system.

the law in producing and upholding the categories of racialization reveals something fundamental about the glorified figures of "American" sovereignty and "national culture" that are invariably conjoined in the dominant discourses of "immigration control."

"Illegality" has been historically rendered to be so effectively inseparable from their migrant experience that some Mexicans even defiantly celebrate their "illegal" identity. However, the considerable legalization provisions of the 1986 Amnesty afforded Mexican migrants a rare opportunity to "straighten out" or "fix" [*arreglar*] their status that few who were eligible opted to disregard. The immigration status of "legal permanent resident" vastly facilitated many of the transnational migrant aspirations that had been hampered or curtailed by the onerous risks and cumbersome inconveniences of undocumented border crossing. By 1990, however, 75.6% of all "legal" Mexican migrants in the state of Illinois, for instance, notably remained non-citizens (Paral, 1997, 8). In other words, the rush to become "legal" migrants did not translate into an eagerness to become US citizens. By the mid-1990s, nonetheless, especially amidst the political climate of heightened nativism and anti-immigrant racism that was widely associated with the passage of California's vindictive ballot initiative "Proposition 187," Mexican migrants began to seriously consider the prospect of naturalizing as US citizens in much greater proportions than had ever been true historically.

As the veritable culmination of such anti-immigrant campaigns, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Public Law 104–208; 110 Stat. 3009), quite simply, was the most punitive legislation to date concerning undocumented migration in particular (cf. Fragomen, 1997, 438). It included extensive provisions for criminalizing, apprehending, detaining, fining, deporting, and also imprisoning a wide array of "infractions" that significantly broadened and elaborated the *qualitative* scope of the law's production of "illegality" for undocumented migrants and others associated with them. It also barred undocumented migrants from receiving a variety of social security benefits and federal student financial aid. In fact, this so-called Immigration Reform (signed September 30, 1996) was heralded by extensive anti-immigrant stipulations in the Anti-terrorism and Effective Death Penalty Act – AEDPA (Public Law 104-132, 110 Stat. 1214; signed into law on April 24, 1996), as well as in the so-called Welfare Reform, passed as the Personal Responsibility and Work Opportunity Reconciliation Act (Public Law 104-193, 110 Stat. 2105; signed August 22, 1996). The AEDPA entailed an "unprecedented restriction of the constitutional rights and judicial resources traditionally afforded to legal resident aliens" (Solbakken, 1997, 1382). The "Welfare Reform" enacted dramatically more stringent and prolonged restrictions on the eligibility of the great majority of "legal" immigrants for virtually all benefits available under Federal law, and also authorized States to similarly restrict benefits programs. Without belaboring the extensive details of these acts, which

did not otherwise introduce new *quantitative* restrictions, it will suffice to say that their expansive provisions (concerned primarily with enforcement and penalties for undocumented presence) were truly unprecedented in the severity with which they broadened the purview and intensified the ramifications of the legal production of migrant "illegality." By penalizing access to public services and social welfare benefits, these legislations especially targeted undocumented migrant women (and their children), who had come to be equated with Mexican/Latino long-term settlement, families, reproduction, and thus, the dramatic growth of a "minority group" (Coutin and Chock, 1995; Chock, 1996; Roberts, 1997). Given the already well-entrenched practices that focus enforcement against undocumented migration disproportionately upon Mexican migrants in particular, there can be little doubt that these acts, at least prior to September 11, 2001, nonetheless weighed inordinately upon Mexicans as a group. Indeed, the language of the 1996 legislation, with regard to enforcement, was replete with references to "the" border, a telltale signal that could only portend a further disciplining of Mexican migration in particular.[12]

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12 In strict legal terms, "the border" is constituted not simply by the territorial perimeter of the physical space of the nation-state, but also by entry points internal to the territory, e.g. airports (Bosniak, 1996, 594n.95). The Immigration Act of 1996 specified, however, that the increased number of Border Patrol agents and support personnel would be deployed "along the border in proportion to the level of illegal *crossing*" (Title I, Section 101[c]; emphasis added).

13 See Heyman's discussion of "the voluntary-departure complex" (1995, 266–267).

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Yet the disciplinary operation of an apparatus for the everyday production of migrant "illegality" is never simply reducible to a presumed quest to achieve the putative goal of deportation. It is *deportability*, and not deportation *per se*, that has historically rendered Mexican labor as a distinctly disposable commodity. Here, I am emphasizing what have been the real *effects* of this history of revisions in US immigration law. Without engaging in the unwitting apologetics of presumptively characterizing the law's consequences as "unintended" or "unanticipated," and without busying ourselves with conspiratorial guessing games about good or bad "intentions," the challenge of critical inquiry and meaningful social analysis commands that one ask: What indeed do these policies *produce*? Although their argument is insufficiently concerned with the instrumental role of the law in the production of "illegality," Douglas Massey and his research associates have understandably nominated the post-1965 period as "the era of undocumented migration" and even characterize the effective operation of US immigration policy toward Mexico as "a de facto guest-worker program" (2002, 41, 45). There of course has never been sufficient funding for US immigration authorities to evacuate the country of undocumented migrants by means of deportations, nor even for the Border Patrol to "hold the line." The Border Patrol has never been equipped to actually keep the undocumented out. At least until the events of September 11, 2001, the very existence of the enforcement branches of the now-defunct INS (and the Border Patrol, in particular) were always premised upon the persistence of undocumented migration and a continued presence of migrants whose undocumented legal status has long been equated with the disposable (deportable), ultimately "temporary" character of the commodity that is their labor-power. In its real effects, then, and regardless of competing political agendas or stated aims, the true social role of much of US immigration law enforcement (and the Border Patrol, in particular) has historically been to maintain and superintend the operation of the border as a "revolving door," simultaneously implicated in importation as much as (in fact, far more than) deportation (Cockcroft, 1986). Sustaining the border's viability as a filter for the unequal transfer of value (Kearney, 1998; cf. Andreas, 2000, 29–50), such enforcement rituals also perform the spectacle that fetishizes migrant "illegality" as a seemingly objective "thing in itself."

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tion for American Immigration Reform, could contend that 24 states did not explicitly require legal residence for migrants to apply for a license.

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