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Control through Criminalization

The U.S. Legal System and the Construction of Criminal Aliens

By Kyran Doyle Schnur

Immigration laws and policy in the United States underwent a metamorphosis during the second half of the twentieth century and the beginning of the twenty first. Beginning with the Immigration and Nationality Act of 1965, immigration across the US-Mexico saw its first serious levels of restriction. Radical shifts in policy in the 1980s made documented immigration impossible for many, and these legal hurdles were compounded by border militarization in the 1990s. In the 21st century a new emphasis on criminalizing undocumented immigrants has developed. These dramatic shifts have all contributed to a modern policy that seeks to control undocumented immigrants rather than deter their immigration. Modern undocumented immigrants find that because of these policies they have no true path to citizenship due to their criminalization. They are also denied the protection of the law that protects them through the plenary power doctrine and the ascending scale of rights theory. These policies have failed to deter large scale immigration across the US-Mexico border, and indeed are not designed to do so. They have succeeded in forcing undocumented laborers into very weak negotiating positions that have enabled the growth of a highly exploitative US labor system, while also catering to xenophobic desires to prevent Latin American culture to enter the US mainstream.

The issue of immigration across the U.S.-Mexico border has undeniably captured the attention of the people of the United States. Immigration policy defines our current debates on national identity, and it is important that we work to understand what our current policies supposedly working to prevent undocumented immigrants from crossing the southern U.S. border actually do. Over the past few decades, U.S. immigration policy has shifted to one that prioritizes criminalizing undocumented immigrants rather than preventing their immigration. Policy makers have introduced this shift in order to better exploit, incarcerate, and contain the culture and influence of, the immigrant Latino community.

For much of the second half of the twentieth century, U.S. border control policy was centered around a so-called “catch-and-release” policy. During this time immigrants attempting to cross the border who were intercepted by border patrol agents would quickly be returned to Mexico at little financial cost to themselves or the U.S. government.¹ However, beginning in the 1980s this policy began to fade away to be replaced by doctrine referred to as “prevention-through-deterrence” culminating in a government program known as “Operation Streamline.”² We will discuss the stunning inaccuracy of these names later. For now, we will focus on the policy shifts that brought about the prevention-through-deterrence (PTD) policy.

Whatever animosity may seem evident in media coverage, the United States and Mexico have enjoyed one of the most amicable relationships in the Americas for quite some time. The stigma now attached to immigrants from Mexico and the rest of Latin America is a very modern phenomenon, and until the 1960s immigration between the U.S. and Mexico was far less inhibited than immigration from Asia and Eastern Europe. This system changed dramatically with the passage of the Immigration and Nationality Act of 1965, which abolished immigration quotas from Asia and Europe but initiated the first strict immigration quotas for people coming from the Western Hemisphere. This marked the beginning of modern restricted immigration from Mexico.³ Two decades of restricted immigration under this act prompted an immigration controversy like the one we face today. The U.S. government found in 1986 that there were between three million and five million undocumented immigrants residing in the U.S., having been unable to immigrate with necessary documentation with the immigration quotas in place.⁴

The U.S. government concluded that its previous policies had not been restrictive enough. With the Immigration Reform and Control Act of 1986, the government gave three million undocumented immigrants the opportunity to change their status but set exceptionally high barriers to further immigration and status changing. Would-be immigrants now had to prove that they both had the funds to cover possible expenses in the U.S. and that they had “compelling social and economic ties abroad.” Even for those who had lived in the United States for most of their lives, obtaining documents after immigrating would prove extremely difficult after the passage of the Immigration Reform and Control Act (IRCA).⁵

The IRCA also made clear the U.S. government’s intent to begin border militarization and fortification

1 Catalina Amuedo-Dorantes and Susan Pozo, “On the Intended and Unintended Consequences of Enhanced U.S. Border and Interior Immigration Enforcement: Evidence from Mexican Deportees,” *Demography* 51, no. 6 (2014): 2256.

2 Heidy Sarabia. 2012. “Perpetual Illegality: Results of Border Enforcement and Policies for Mexican Undocumented Migrants in the United States,” *ASAP Analyses of Social Issues and Public Policy* 12, no. 1 (2012): 55.

3 Sarabia, “Perpetual Illegality: Results of Border Enforcement and Policies for Mexican Undocumented Migrants in the United States,” *ASAP Analyses of Social Issues and Public Policy* 12, no.1 (2016): 51-52.

4Sarabia, 52.

5 Sarabia, 52.

in earnest. The Act demanded that within sixty days of its passage the president should have a list prepared by the Department of Defense on suitable DOD facilities that could be converted into immigrant detention centers by the Bureau of Prisons.⁶ The need for locations where migrants could be incarcerated would soon make these preparations insufficient. Indeed, the legislatures that crafted the IRCA likely spotted this, because the legislation also designated funds for constructing detention centers on the border as well as new roads, watchtowers, and surveillance cameras.⁷

The IRCA was followed in 1996 by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) which specifically targeted those designated “criminal aliens.” Under the IIRIRA criminal aliens would never be able to become legal citizens of the United States. This was because the Act closed the cases of criminal aliens to judicial review, making it impossible for the immigrant in question to obtain a “waiver of inadmissibility” to make their immigration legal.⁸ The broadest consequences of the IIRIRA would not be realized until the initiation of Operation Streamline, which will be discussed later in this paper.

All of these acts set the stage for the Clinton administration’s abandonment of catch and release in favor of PTD. The aspect of PTD that President Clinton oversaw was the militarization of the U.S.-Mexico border. This fortification program was on a greater scale than anything the U.S.-Mexico border had experienced before. As Jones and Johnson observe, “weapons developed in wars in Iraq and Afghanistan [were] now routinely deployed along the border.”⁹ These weapons were given to a Border Patrol which under the Immigration and Nationality Act (INA) had the power to stop and search vehicles and individuals at will, enter private property without a warrant, and establish checkpoints within 100 miles of any U.S. land or sea border.¹⁰ The Clinton administration laid the groundwork for all of this modern fortification through programs like Operation Hold the Line, which was passed in anticipation of NAFTA being finalized in 1993 and took steps to increase border agents, fortifications, and surveillance.¹¹ Augmented by the 5,500 National Guard troops sent by the Bush administration in the 2006 Operation Jump Start, guns and fortifications closed the easiest and safest routes into the United States from Mexico.¹² Experts estimated that the shutting of these avenues led to around 18,000 deaths in the past decade as migrants were forced to take more dangerous routes.¹³

All of this border militarization forms one pillar of the PTD policy, and is justified by the promise that if migrants must use such deadly routes to get into the United States they will surely stop coming. The second pillar is the misleadingly named Operation Streamline. I point this out because, contrary to what the name might suggest, it makes the business of border security much more complicated. Initiated in the Del Rio sector by the second Bush administration in 2005 before being expanded to much of the rest of the border in 2008, Streamline’s initiation quickly led to a 330% increase in the prosecutions of immigrants being caught for the

6 Gilberto Rosas, “The Border Thickens: In-Securing Communities After IRCA,” *IMIG International Migration* 54, no. 2 (2016): 122.

7 Rosas, 121.

8 Sarabia, 53.

9 Reece Jones and Corey Johnson, 2016. “Border Militarisation and the Re-Articulation of Sovereignty.” *TRAN Transactions of the Institute of British Geographers* 41 (2): 190.

10 Rosas, 119.

11 Rosas, 123.

12 Rosas, 124; and Jones, 196.

13 Jones, 196.

first time trying to cross the border without proper documentation.¹⁴ The year before Streamline's expansion, 2007, less than one half of one percent of those captured by the Border Patrol were prosecuted.¹⁵ The reason for the shift in policy was that Streamline ordered a "federal criminal charged for every person who crosses the border illegally."¹⁶ Streamline seems to have been designed to maximize the number of undocumented immigrants who went through the U.S. criminal justice system, a massive departure from previous policy. Officials in districts that were part of the Operation were required and still are required to refer practically all unauthorized persons to criminal prosecution.¹⁷ Through "secure communities" designated on the U.S. side of the border Immigration and Customs Enforcement (ICE) has any undocumented inmate found in a county jail transferred to an ICE detention center for prosecution.¹⁸ The number of immigrants who must be incarcerated while awaiting prosecution has expanded so dramatically that the prisons on the border must expand to hold them all. The Val Verde prison in Texas, for example, has gone from a capacity of 180 to one of 1,425 since Streamline expanded in 2008.¹⁹ Almost all of the men, women, and children brought into court by these various methods are likely to leave having been branded criminal aliens because Streamline has changed the definition of that term. While it once referred to aliens who committed crimes, it now refers to anyone who crosses the border without proper documentation.²⁰ As a result, today the majority of criminal aliens only have immigration violations on their records, with less than 17% having committed what ICE refers to as "level 1" offenses.²¹

With its two main pillars identified, we come to the other misleadingly named government policy, prevention through deterrence. Supposedly between Operation Streamline and border militarization, two policies wholly justified by their supposed deterrence stopping power, immigrants must be being deterred. By forcing them through only the most dangerous paths into the United States and then putting as many as possible through the U.S. legal system to be declared criminals, policy makers insist that they will stop coming. They will be deterred.

However, immigrants are still coming. Chomsky says bluntly, "the detention and deportation approach has little real effect on the flow of Mexican workers into the United States."²² Even the aggressive prosecutions of Operation Streamline, a program that incurs nine to eleven million dollars a month in incarceration costs alone, have deterred few. According to the Survey on Migration to the Northern Mexican Border, every year since Streamline has been instituted a majority of those who have gone through it and been returned to Mexico have had every intention of attempting another crossing.²³ Indeed, between 2008 and 2010 a majority of them intended to try again within the next week.²⁴ Amuedo-Dorantes and Pozo conclude that, "Operation Streamline

14 Amuedo-Dorantes, 2258

15 Andrew Burrige, "Differential Criminalization Under Operation Streamline: Challenges to Freedom of Movement and Humanitarian Aid Provision in the Mexico-US Borderlands." *Refuge (0229-5113)* 26, no. 2: 78.

16 Surabia, 55.

17 Edith Nazarian, "Crossing Over: Assessing Operation Streamline and the Rights of Immigrant Criminal Defendants at the Border." *Loyola of Los Angeles Law Review* 44, no. 4 (2011): 1399-1430.

18 Rosas, 120.

19 Burrige, 80.

20 Rosas, 124.

21 Sarabia, 56.

22 Chomsky, 208.

23 Anuedo-Dorantes, 2260.

24 Anuedo-Dorantes, 2260/4

does not seem to significantly shape deportees' intents to return to the United States (i.e. commit recidivism) in the short run or long run."²⁵

So, prevention-through-deterrence (PTD) is neither preventing a large portion of undocumented immigrants from crossing the border or deterring workers from making the trip to find work. It would be too easy to write PTD off as an ineffective strategy that has been held onto for decades now out of habit. Therefore, we should examine what Operation Streamline and border militarization do accomplish and why policymakers would want to produce those results.

What PTD does accomplish exceptionally well when paired with the legislation discussed at the beginning of this paper is keeping illegal immigrants illegal. While it cannot keep undocumented immigrants out of the United States, it can very effectively prevent them changing their status and obtaining citizenship.

Consider the legal implications of the immigration laws already on the books once the zero-tolerance policy of Operation Streamline is introduced. Between the quotas initiated by the INA and the requirements for immigration established by the IRCA, those wishing to immigrate are far more likely to do so without all the proper paperwork. Because of Operation Streamline they are immediately classified as criminal aliens for nothing more than an immigration violation. This makes eventual legalization, already difficult under the IRCA, next to impossible. Remember, the IIRIRA closed the cases of criminal aliens to judicial review, making a waiver of inadmissibility impossible to obtain. While this was originally intended to keep violent criminals from obtaining citizenship, when paired with Streamline it prevents any undocumented immigrant from ever obtaining the appropriate documents. While catch-and-release policy dictated that all trials regarding immigration violations be civil ones, Streamline has made them all criminal trials. This makes a criminal record very hard to avoid.²⁶

Despite the emphasis on opening as many new criminal records as possible, these programs are clearly not targeting violent criminals. Recall that earlier it was pointed out that less than 17% of those designated criminal aliens had committed what the ICE refers to as level one criminal violations. Even those who have committed such crimes are not necessarily violent, in fact many of their crimes would be misdemeanors were they citizens. Level One offenders do include murder and weapons trafficking, but they also include crimes such as disorderly conduct, minor traffic offenses, and OUIs.²⁷ Indeed under the IIRIRA and the Antiterrorism and Effective Death Penalty Act (ADEPA) detention, prosecution, and deportation are mandatory for crimes such as shoplifting.²⁸

Once the police and border patrol agents working within Operation Streamline have sent those soon to be criminal aliens to court the procedures they go through seem designed to ensure conviction. Immigrants are likely to be put on trial within a day or two of their capture if they are seized near the border, with the dirt and sand of the unforgiving terrain still caked onto their skin.²⁹ If they hope to challenge the charges brought against him they have little time to prepare a defense, as they will have no more than one hour to speak with a lawyer. The lawyer they speak with has little time or attention for them, as lawyers assigned to Operation

25 Anuedo-Dorantes, 2267.

26 Nazarian, 1425.

27 Rosas, 125-26.

28 Rosas, 124.

29 Sarabia, 1405.

Streamline represent four or five defendants every day.³⁰ Few will decide to challenge the charges, however, as most have already agreed to plead guilty in statements prepared for them by the court in the hope of escaping incarceration faster. In randomly chosen groups of 70 they must, through an interpreter, navigate as best they can a justice system they are encountering for the first time. The proceedings are always conducted in the same Tucson courthouse, and are always in English.³¹

Those who are experiencing this process for the first time are fortunate that their business with the U.S. legal system ends here. They will be returned to Mexico with a new U.S. criminal record and a warning not to return. Those passing through a second time, and many of those passing through the courtroom in Tucson have been there before, must contend with a potential 180 days of incarceration. Those who have been through the system more than twice face a potential 2-10 years in migrant detention facilities, and those who keep making attempts may be facing 20 years or more.³² The fates of these repeat offenders reveal the intensity of the U.S.' reliance on the carceral system to solve its more unsavory problems. In order to stop repeat offenders from attempting another border crossing, they are brought into the country for years to be as unproductive as possible at the state's expense. This is hardly a sensible solution, but as we will discuss later it does benefit some.

While immigrants passing through Streamline are undoubtedly in a desperate situation, some rights have been extended to them through Supreme Court decisions. In *Shaughnessy v. United States ex Mezi* it was ruled that undocumented migrants could not be deported without due process of law³³ and trying immigrants en masse was ruled unconstitutional in *Roble-Solis v. United States*.³⁴ While these may be touted as adequate protection, they are of course only the most basic rights one can hope to have in the U.S. legal system. More rights are unlikely to be extended soon for two reasons: the plenary power doctrine and the ascending scale of rights theory.

The plenary power doctrine holds that the legislature should have absolute authority over the area of immigration. This means that judicial review should be virtually nonexistent when it comes to immigration laws.³⁵ As a result of the doctrine's adoption throughout state and local governments as well as the federal government, there is very little oversight to prevent laws from violating the rights of immigrants. Judicial review of immigration laws is so taboo that even judges who believe a law to be violating constitutional rights often do not dare raise the issue directly. The judge must instead use what is known as a "constitutional phantom." Rather than strike down a law based on the constitution, the judge will instead cite a statute that stands on its own within an existing law or court procedure that has a link to defending constitutional rights.³⁶ This means that constitutional rights can be extended to individual immigrant cases but there is very little chance that the case will be appealed to the Supreme Court. Thus the plenary power doctrine severely handicaps the protection of immigrant rights in the courtroom.

Even without the plenary power doctrine the current Supreme Court adherence to the ascending scale

30 Chomsky, 206.

31 Burrige, 80.

32 Burrige, 79.

33 Nazarian, 1407.

34 Nazarian, 1407.

35 Nazarian, 1409-11.

36 Nazarian, 1409-11.

of rights theory prevents the courts from having a significant impact. The current judicial interpretation holds that “the people” that the constitution protects are defined as “a group of persons who have formed such a connection to the United States that they can be deemed part of its community.”³⁷ This definition is extremely dependent on subjective interpretation and yet still sets quite a high bar for having the full protection of the law. Many have argued that the ascending scale theory should be replaced with the far more straightforward doctrine of “territoriality.” Territoriality is simple: if you are subject to the laws of the United States then you are protected by the rights those laws are supposed to protect.³⁸ Unless the Supreme Court officially adopts the theory of territoriality it is unlikely that immigrants being tried on the border and turned into criminal aliens will get much relief in the form of protected constitutional rights.

After this thorough examination of the systems currently in place to deal with undocumented immigrants we can conclude that they exist not to prevent the immigration of the bulk of undocumented workers, but instead to criminalize as many of them as possible and to make it near impossible for them to change their status. Having arrived at this conclusion we must consider why policymakers, throughout our recent history, have pushed our policy in this direction.

From the perspective of our nation’s large and small employers, keeping undocumented immigrants not only undocumented but also criminalized makes them far easier to exploit. As Sarabia notes, immigrants in the age of Operation Streamline live under very high levels of “deportability.” While only a minority of the immigrant population is being deported, deportation and even incarceration is a very real and ever-present reality for every undocumented immigrant in the U.S..³⁹ Knowing that an employer could at any time report them to a government engaged in an operation with a self-described zero-tolerance policy puts undocumented workers in a very weak negotiating position. Powerful employers who rely on this set up make sure their voices are heard when policy is crafted.

Raising voices alongside them are those who profit from incarcerating the would-be immigrants captured at the border. Recall the example of prison expansion given earlier, where the Texas Val Verde prison grew to over eight times its original capacity with the introduction of Streamline. Someone needed to be hired and given taxpayer money to construct those necessary additions. Indeed businesses such as Geo Group Incorporated and Corrections Corporation of America (CCA) have turned migrant detention into a thriving industry. These companies make a great deal constructing and running detention centers for the dozens of immigrants who pass through Operation Streamline every day. Geo Group and CCA even supply the buses that shuttle migrants around during processing.⁴⁰

The lobbyists employed by these corporations have been some of the staunchest supporters of Streamline and PTD whenever their effectiveness is challenged in Congress.⁴¹ These advocates of Operation Streamline have a deep interest in preserving a system that does not deter immigrants, but instead relies on prosecuting and incarcerating a large minority of them.

A final great force that has shaped our current immigration policy has been a xenophobic desire to

37 Nazarian, 1418.

38 Nazarian, 1422-23.

39 Sarabia, 54.

40 Burrige, 80.

41 Sarabia, 63-64.

exclude Latino people and culture from U.S. American identity. This xenophobia is being displayed every day across the modern-day U.S., but it has been present from the beginning of the shift to PTD and the first planting of the seeds that would grow into Streamline. The congressional debate over the 1986 IRCA is rife with examples, including an expressed desire to control the “brown others” supposedly streaming across the border. In the same debate it was warned that these foreigners should be feared for their “contagion possibilities” and excluded from the mainstream U.S. at all costs, lest they destroy “cultural enclavism.”⁴² Criminalization serves the desires for exclusion and containment well. Undocumented immigrants, who live, work, and build families in the United States, are the greatest potential source of Latino U.S. citizens. Through the Streamline system they are barred from ever achieving citizenship, and high levels of deportability ensure that any cultural solidarity they may have with one another must be celebrated in the shadows.

Undocumented immigrants in the United States have been forced into lives of harried criminals because of simple immigration violations. Prevention through deterrence policies, capped by border militarization and Operation Streamline, have been made to work towards full immigrant criminalization rather than truly seeking to deter them. Immigrants crossing the border are abused by our justice system the ascending scale of rights theory and the plenary power doctrine prevents them being given true due process as they are not afforded the full protection of the law that prosecutes them. This policy has been shaped and preserved by a labor system that relies on exploitation, a rapidly growing new sector of the prison industrial complex, and the xenophobia that has been woven through so many of our laws. Unless serious and responsible reform is undertaken, we will continue to litter our southern border with thousands of corpses every year while simultaneously transforming hopeful immigrants into an exploited and subjugated criminal underclass. Few modern realities stand in starker contrast to the ideals of our nation.

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