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Differences within Accounts of US Immigration Law

This paper will attempt to account for two seemingly irreconcilable assessments of the effectiveness of US immigration law. On the one hand, a body of literature produced by scholars from a variety of disciplines portrays the laws barring illegal immigration as powerless in the face of the economic and structural forces compelling people to enter the United States. On the other hand, policy makers, large segments of the US public, and some illegal immigrants¹ themselves perceive law as a means of restricting unauthorized entry, making the lives of those who do enter more difficult, and compelling these immigrants to return to their countries of origin. How does the operation of US immigration law create these competing perceptions of its impact? The answer, I will argue, lies in the ways that law makes “difference.” Immigration law works by constituting individuals as “illegal aliens,” and thus effectively creates the subjects that this discourse seeks to bar. To the degree that immigration categories have become naturalized, however, the role of *law* in defining individuals as “illegal aliens,” and thus rendering these individuals exploitable, may be difficult to discern. Immigration law is not, of course, invisible to those whom it most affects, namely, immigrants who find that they cannot work, receive medical care, attend school, obtain housing, and so forth because they “lack papers.” Aware that law can be used to repress immigrants, both immigrant advocates and opponents of illegal immigration have made immigration law a focus of policy debate. In short, while immigration scholars may be correct in arguing that law alone cannot “close the border,” those who are attempting to shape US immigration policy are also correct to acknowledge the powerful impact that immigration law can have on the lives of immigrants.

Enforcement and Interest-Oriented Approaches to Immigration Law

The reasoning of scholars who have deemed immigration law ineffective sheds light on why immigration law sometimes seems powerless. Such scholars have generally measured the power of immigration law in one of two ways. The first, which I will call the “enforcement-oriented” method, consists of evaluating the degree to which US immigration law is capable of stemming illegal immigration. Due to the high number of illegal immigrants (some estimate the figure to be 200,000 to 400,000 individuals annually), scholars who use this method conclude that US immigration law is basically inoperative (see for example, Harwood 1985; Briggs 1984). This conclusion is predicated on several assumptions. Enforcement-

oriented scholars assume that the reason that the US government has criminalized entry without inspection and overstaying one's visa is that it is genuinely in the government's interest to stop or at least reduce these practices. Scholars note, for example, that illegal immigration violates national sovereignty and displaces US workers. Enforcement-oriented scholars contend that the reason that the laws barring illegal immigration have failed to stop unauthorized entry is that, despite its interest in preventing illegal immigration, the US government has been unwilling to commit the resources that are needed to effectively enforce immigration laws. Scholars attribute this reluctance to the high cost of effective enforcement, the demands of more pressing social concerns, the public's unwillingness to severely punish illegal immigrants, and the strength of the forces compelling international movement. Despite their negative assessment of the law's current effectiveness, enforcement-oriented scholars argue that immigration law *could* be enforced if the will and resources to do so could be found. These scholars usually conclude by advocating for the legal and political changes that they believe would improve enforcement.

The enforcement-oriented method of assessing US immigration law's effectiveness is incomplete in that it takes for granted what it should examine, namely, the phenomenon of illegal immigration. Enforcement-oriented analyses of illegal immigration begin with the premise that certain people really are "illegal immigrants," rather than with the question, what makes someone "an illegal"? As a result, in such accounts, law is portrayed primarily as a force that bars illegal entry and unauthorized sojourn, rather than as a process that defines certain individuals and certain movements as illegal (Bach 1978). Economic forces, such as employers' need to hire cheap labor, are assumed to act directly on already existing groups, such as the "illegal immigrant labor force."

For example, one scholar who analyzed immigration from Central America to the United States was able to conclude that "the movement of manpower is a question of economic regulation between countries and not basically a question of a nation's sovereign right to determine its immigration policy" (Poitras 1983: 771). Law seems powerless in enforcement-oriented accounts because the way that *law* as opposed to unauthorized entry, constitutes individuals as illegal aliens, remains unexamined.

The second way that scholars have assessed the power of US immigration law has been to examine how US immigration law serves the interests of powerful economic and political groups and forces. I will term this approach "interest-oriented." In contrast to their enforcement-oriented colleagues, interest-oriented scholars argue that criminalizing illicit entry and unauthorized sojourn was never intended to prevent these acts but only to render those who perform them more exploitable than native workers and legal immigrants. These scholars contend that immigration law achieves this goal by placing illegal workers in a

different structural position than native workers, and thus making it advantageous for employers to hire them. As Portes notes, "It is the political status of immigrants and the legal relationship it entails with the state which accounts for their objective position of weakness vis-à-vis their employers" (1978: 474). Because they lack legal status, illegal immigrants who complain about poor working conditions or low pay can be deported by employers (see Jenkins 1978). Additionally, because illegal immigrants are a transient population entitled to few government services, the social costs of maintaining and reproducing this workforce are born largely by sending societies rather than by the United States (see Portes 1978; Calavita 1992). Because illegal immigrants benefit powerful social groups and the capitalist system, interest-oriented scholars reason that it is in the interests of the state to permit, rather than to prevent, illegal immigration. Therefore, rather than being a product of government neglect, the permissiveness of US immigration law is designed to meet the needs of capitalists and capitalism. On the one hand, by criminalizing illegal immigration and by making a minimal effort to enforce the law, the state appeases US labor groups who oppose illegal immigration and thus makes illegal immigrants work "hard" (Marshall 1975, quoted in Jenkins 1978:529). On the other hand, by permitting large numbers of illegal immigrants to enter the United States, the US government enables those who employ illegal workers to meet their labor needs.

Though the interest-oriented account of illegal immigration acknowledges immigration law's power to differentiate illegal immigrants from other workers and to maximize these immigrants' exploitability, this account also suggests that, when law counters rather than supports economic and structural forces, law is powerless. Curiously, although their analyses suggest that US immigration law and policy are designed to at least permit and perhaps even encourage illegal immigration, interest-oriented scholars usually consider the conclusive measure of law as power to be its ability to counter the economic and structural forces that compel movement. For example, Portes writes, "Illegal or not, ... international labor immigration responds to structural determinants in both sending and receiving countries. Such determinants exist independent of the apparatus of legal immigration (1978:477). Similarly, Calavita concludes, "[E]mployer sanctions were doomed by the mere strength of the push-pull economic forces that trigger immigration in the first place--forces that are far too compelling to be repressed by legislative fiat" (1992:169).² Such juxtapositions of economic and legal forces suggest that within interest-oriented accounts of illegal immigration, law is not powerful in its own right, but only as a tool to further other economic and structural processes. In contrast to the enforcement-oriented perspective, which assumes the differences that law creates, the interest-oriented perspective acknowledges "difference-making" but treats this largely as a product of economic and structural conditions.

Like the enforcement-oriented means of measuring immigration law's effectiveness, the interest-oriented approach produces an incomplete account of the power of immigration law. First, the notion that law is a product of structural and economic forces underestimates the degree to which these forces act on differences that are created by law. As interest-oriented scholars note, it would not be as profitable to hire illegal aliens if they were not illegal. Second, underestimating the degree to which law shapes as well as is shaped by economic and structural conditions leads researchers to overlook one of the ways that immigrants themselves try to transform the conditions that compel them to move. If certain interpretations of immigration law benefit powerful groups and forces, enforcement then when undocumented immigrants challenge these interpretations, they can simultaneously challenge these forces. One of the senses in which immigration law enforcement is powerful, then, is that law enables immigrants to resist the forces and groups that oppress them.

A Constitutional Approach

An alternative to assessing immigration law by its ability to either deter illegal immigration or to exist independently of economic forces, is to measure the power of immigration law according to its ability to constitute individuals within immigration categories. This approach not only suggests that immigration law is powerful, but also accounts for the perception that immigration law is ineffective and is capable of analyzing the agency of undocumented immigrants. To demonstrate the advantages of this method of assessing the power of US immigration law, I will present a brief ethnographic example drawn from fieldwork that I conducted among Salvadoran and Guatemalan immigrants and their advocates in California and Arizona in 1987 and 1988, and then again in California in 1993.

In contrast to the enforcement- and interest-oriented scholars discussed above, the immigrants and immigrant advocates whom I met in the course of my research did not suggest that US immigration law was powerless. On the contrary, these immigrants noted the ways that US immigration law has adversely affected their lives. Clemente Rivera, an undocumented Salvadoran woman I interviewed in Berkeley, California in 1987 told me

When a person asks me for a green card, and when I say I don't have one, then the person says, "I'm sorry. I can't talk to you." It makes a person illegal. I feel very rejected when that happens. And it happens all the time. In banks, in schools. Wherever I go, I always wonder whether or not they're going to ask me for a green card.

Clemente's experiences were echoed by Ramon Palacios, a Salvadoran man whom I interviewed in Tucson, Arizona in 1988. Ramon stated:

Those who don't have documents live a very untranquil life. At bus stops and parties, the immigration could stop someone and ask for documents. Even at the movies, theatres and other places. So, you are never calm. You don't buy alot, because you know that if you're deported, you'll just lose it. There's no point in putting money in the bank, because you'll have to leave it there if you are picked up and deported. Those who don't have documents can't get social benefits, can't work, can't get back their money paid as income tax, and can't apply for health benefits.

These and similar accounts of immigrants' experiences describe the powerful ways that immigration law constitutes individuals within immigration categories. Increasingly, the enforcement of US immigration law has been displaced from government officials to private citizens who can be held legally accountable for the immigration status of those whom they drive, hire, house, assist, and teach (Coutin 1993, 1994). As a result, it is not only government officials, but also landlords, employers, doctors, college admissions officials, and social service agents who scrutinize individuals' identity documents, determine individuals' legal statuses, and decide whether or not to render services. Such definitional scrutiny *differentiates* those who lack valid identity documents from the rest of the population in both a categorical and material sense. Categorically, these individuals are named as "illegal aliens" while materially, they are denied work, housing, social services, medical care, and so forth, and thus are *physically separated* from those around them. It is this continual but informal surveillance and "judging" that is overlooked by enforcement-oriented scholars who fail to treat categories like "illegal alien" as social and legal constructions. If the interest-oriented account of immigration is at least partially correct, then the effect of successfully defining someone as an illegal alien may not be to compel the individual to leave, but rather to make this person desperate enough to work long hours for low wages in unsafe conditions. For example, a Guatemalan day laborer I met in Arizona was so desperate to work that he chose to forego a much-needed operation that a physician had agreed to perform free of charge in order to be available to work in case a job opportunity arose.

The strategies adopted by politicians and activists who are attempting to make immigration law more effective provide further evidence that examining how individuals are situated in immigration categories produces a more compelling account of the power of immigration law. During the past two years, government officials have suggested building trenches along well-traveled portions of the US-Mexico border, increasing the number of border patrol agents, improving the surveillance technology used by the border patrol, creating a tamper-proof national identity card, making citizenship a prerequisite for a greater number of public services, and requiring more individuals to check other people's identity documents. For

“refugee status.” This strategy attempted to extend the immigration category “political asylee” to include individuals who had never had formal asylum hearings. In addition to claiming legal status for undocumented individuals, such renegotiations of US immigration categories have the potential to challenge the economic and political forces that compel them to immigrate. For example, during the 1980s, when undocumented Salvadorans began entering the United States in large numbers, Salvadoran activists sought public recognition--in the form of congressional legislation, court rulings, or executive action--that Salvadorans were refugees. Activists reasoned that obtaining refugee status would not only prevent Salvadorans from being deported but also would draw attention to human rights abuses in El Salvador and thus prevent further US military aid to the Salvadoran government (Coutin 1993). A moratorium on US military aid might end the Salvadoran civil war with, some hoped, a guerrilla victory, or at least concessions from the Salvadoran government. An end to the war might lead to economic restructuring in El Salvador. By the 1990s, when peace accords had been signed in El Salvador, this legal strategy had changed. Salvadoran activists in Los Angeles, California were rejecting the term “refugee” to define themselves as “immigrants,” a permanent segment of the US population. These activists reasoned that if Salvadorans could obtain legal status, and ultimately citizenship in the United States, they could influence US policy and continue to provide El Salvador with much-needed economic support through remittances. Clearly if law can be used by immigrants to try to shape economic and political forces, then law is not simply a product of these forces.

Conclusion

The foregoing analysis of scholarly and popular assessments of U.S. immigration law explains how it is that the operation of US immigration law is simultaneously powerful and hidden. On one hand, US immigration law is powerful in that it materially constitutes individuals within immigration categories. On the other hand, to the degree that immigration categories have become naturalized and that judging individuals’ legal identities have become common social practices, the ways that immigration law shapes individuals’ lives may be hidden. Moreover, as strengthening immigration law simply constitutes individuals as illegal aliens more effectively than before, immigration law may actually promote rather than prevent illegal immigration. Let me note that in arguing that US immigration law is powerful, I do not mean to suggest that it is possible to stop unauthorized entry and sojourn by criminalizing these practices as that has been tried and failed. However, to conclude from this failure that immigration law is either powerless or simply the product of economic forces is a mistake. To understand the powerful ways that immigration law shapes social reality, it is important to ask: what are the effects of criminalizing unauthorized entry and sojourn; what identities does such criminalization construct and what economic relations does

criminalization make possible; how do immigrants themselves use law to claim, contest, and reject legal identities; what are the effects of the immigrants' strategies? Addressing these questions will reveal the political implications of the ways that immigration law creates difference.

Notes

1. I am using the term "illegal immigrant" to refer to individuals who could be deported or placed in deportation hearings if detained by Immigration and Naturalization Service agents. These individuals include those who entered the US without being inspected by government officials or with false identity documents, and individuals who entered the US legally but then stayed on after their visas expired.
2. Calavita's analysis of the interests that US immigration policy serves is quite complex and includes the institutional interests of the US Immigration and Naturalization Service. She characterizes her own perspective as that of a dialectical-structuralist, which she defines as a model that "posits that the political economy of a capitalist democracy contains within it specific contradictions, and that law often represents the state's attempt to grapple with or reconcile the conflicts derived from those contradictions" (Calavita 1992:8).
3. In 1987 and 1985, I conducted 15 months of fieldwork within segments of the US sanctuary movement in the San Francisco East Bay and in Tucson, Arizona. During the summer of 1993, I interviewed Salvadoran activists who were members of immigrant advocate groups in Los Angeles, California.
4. The law increased the number of individuals who are required to examine and judge individuals' legal identities. An interesting side effect of the law is that some of the individuals who are required to do the examining, such as teachers and social service agents, have mobilized to oppose the law.

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