

Notes From the Field
**The Criminalization of Undocumented Migrants:
Legalities and Realities**

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Abstract

Undocumented migrants are not criminals. Detention is not prison. Deportation is not punishment. These are truths in the legal system of the United States. However, undocumented migrants are treated like criminals; detainees feel as if they are in prison; and deportees experience their exclusion as punishment. This article examines the contradictions between legal arguments which indicate that immigration proceedings are not criminal proceedings and the experiences of deportees who often feel as if they were treated like criminals and that banishment from the country in which they have lived most of their lives is a cruel punishment.

Keywords

deportation, detention, immigration, undocumented migration, human rights

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What is a sociologist to do with these contradictions between facts and reality? More specifically, do human rights treaties apply to the law or to the reality? In this short article, I examine the contradictions between the legal argument that deportation is not punishment and the experiences of deportees who often feel as if banishment from the country in which they have lived most of their lives is a cruel punishment.

The Law

Undocumented migrants are not criminals

A person is undocumented if they have violated the provisions of

the Immigration and Nationality Act (INA) by overstaying their visa, entering the United States without inspection, ignoring a deportation order, or something similar. None of these are crimes – and there is no punishment for them. Instead, if a person is found to be in violation of the INA, they face detention and then deportation (Kanstroom, 2000).

When Border Patrol agents find people surreptitiously crossing the desert in the night, they arrest them and take them to a Border Patrol holding cell where they are asked a few questions about their immigration intentions. If the border crosser opts for expedited removal, they are usually deported within a week. In most cases, there is no trial, no lawyer, and no jail sentence. Border Patrol agents have the ‘authority to order the removal of aliens whom they have determined to be inadmissible, without providing for further review of such a decision’ (Fragomen, 1997, p. 445). If the agent decides to grant the border crosser a hearing, they must wait months for their hearing, and are usually kept in detention the entire time – costing taxpayers over \$100 per day per detainee. At the hearing, the burden of proof is on the border crosser, and they have no right to appointed counsel (Fragomen, 1997). As immigration proceedings are not criminal proceedings, suspected undocumented migrants are not given the same rights as suspected criminals.

In addition, United States law considers all non-citizens who crossed the border without inspection to be seeking entry to the U.S., no matter how long they have resided in the U.S. Non-citizens who enter the U.S. without inspection are considered to have never ‘made a legitimate entry into the U.S.’ and are thus ‘treated extra-territorially as subjects standing at U.S. border points of entry and [are] made subject to summary exclusion by federal immigration officers without defense or relief through the courts’ (Coleman, 2007, p. 60). An undocumented migrant has no right to remain in the U.S., as no matter how long he has been in the U.S., he is considered to be seeking entry in all immigration proceedings. When an undocumented migrant is deported from the U.S., this is a civil penalty. Deportation is ‘regulatory, not punitive, so constitutional provisions for due process and other rights of criminals [are] not applied’ (Warner, 2005, p. 64).

An undocumented migrant who has lived in the United States for thirty years, who has U.S. citizen children and grandchildren can be

ordered deported without due process. He has fewer rights at his trial than does a murder suspect. Unlike murder suspects, he can be arrested without a warrant. He can appeal his case by applying for cancellation of removal, but may be detained while doing so, has no right to appointed counsel, must bear the burden of proof, and may have no right to judicial review. Most of the evidence he may wish to present – such as his ties to the US and his lack of ties to his home country – will be inadmissible. As deportation is not punishment, immigration trials are not under the purview of the judicial system and people facing deportation have few procedural protections (Kanstroom, 2000).

Detention is not prison

The immigration detention system in the United States is a vast complex of jails and prisons where non-citizens are held while awaiting immigration trial. Unlike prison, you cannot be sentenced to a fixed amount of time in immigration detention. In contrast, immigration detention is where non-citizens go once they have completed their prison or jail sentences and where non-citizens await immigration hearings. As Patel and Jawetz (2007) point out, '[i]mmigrant detainees are not convicted prisoners. Rather they are civil detainees held pursuant to civil immigration laws.' As immigration detention technically is not prison, the United States is not in violation of the International Covenant on Civil and Political Rights (ICCPR) by imprisoning people who have not been accused of crimes.

Article 9 of the ICCPR (which the U.S. has ratified) states that 'No one shall be subjected to arbitrary arrest, detention, or exile. It shall not be the general rule that persons awaiting trial shall be detained in custody.' The Department of Homeland Security (DHS) argues that detention is not arbitrary; it is mandatory in most cases and will end once the detainee is deported or granted legalization. And, although it is the general rule that some people are detained while awaiting their hearings, they are not criminal suspects, so the ICCPR does not apply.

The most egregious example is the detention of asylum-seekers in the U.S. If a border inspector finds that an asylum-seeker has a credible fear of persecution, they are often placed in detention while their application is being processed. In 2002, 9,260 of the 9,749 people who

were found to have a credible fear of persecution were detained by the INS. Their average stay in detention was 43.5 days (Frelick 2005). The Universal Declaration of Human Rights states that ‘the right to seek and enjoy asylum is a basic human right,’ and Human Rights Watch argues that individuals should not be punished for seeking asylum in the United States. The DHS, however, argues that detention is not punishment.

Deportation is not punishment

Deportation is not punishment – it is the civil penalty for violating the INA. As deportation is not punishment, people who face deportation are not given the same constitutional protections given to suspected criminals. They have no right to appointed counsel, no right to a jury trial, and, often, no right to judicial review. Deportation is an administrative procedure applied to people who do not have the legal right to remain in the United States (Kanstroom, 2000). For example, a non-citizen who commits a crime in the United States first completes any jail or prison time that is mandated as punishment for their crime. If that criminal conviction renders them deportable, they are deported upon completing their sentence. People convicted of certain crimes classified as aggravated felonies face “mandatory deportation without a discretionary hearing where family and community ties can be considered” (UNHRC, 2008: 8).

As deportation is not punishment, the United States government is not violating the ICCPR that both indicates that a person should not be punished twice for the same crime and that people should not be discriminated against because of their national origin. Article 14 of the ICCPR reads ‘No one shall be liable to be tried or punished for an offence for which he has already been finally convicted.’ Legal permanent residents who are convicted of certain crimes in the U.S. face deportation after serving their sentences. The decision as to whether or not they are to be deported is made by an immigration judge. However, it is not technically correct to say that they are punished twice for a crime – as deportation is not punishment. For example, if a citizen and a non-citizen both shoplift \$900 worth of clothes and both are sentenced to 18 months in prison, the citizen goes free after serving her time, yet the non-citizen is detained and faces deportation after serving her time. Although the non-citizen is treated differently for

the same crime, this is not in violation of Article 26 of the ICCPR which states that 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination ... on any ground such as ... national or social origin, ... birth or other status' because detention and deportation are not punishment.

The Reality

Undocumented people are treated like criminals

In my research with people who were undocumented migrants in the United States, many indicated to me that they had been treated like criminals while in the United States. This was particularly the case when they described how they had been arrested by immigration agents in the U.S. Many interviewees told me that immigration agents treated them like criminals when they arrested them.

Mariluna is a Guatemalan woman in her fifties who was arrested by immigration agents and deported from her home in the United States in 1999. She described to me what happened when immigration agents came to her home.

They knocked on the door around 6am. 'Does Rodrigo Perez live here?' ... They came in, as if we were criminals, as if we were murderers. They just came in [our house].

Tamara, a Brazilian woman in her fifties was arrested by immigration agents in 2007. One morning, as Tamara was leaving her apartment for work, there was an immigration raid in her neighborhood. She was accosted by immigration agents on the street who asked her for her documents. When she produced her Brazilian passport, she was handcuffed and arrested.

Tamara lamented the fact that she was handcuffed and treated like a criminal. Even worse was the fact that she had to spend 42 days in immigration detention, where the food was served in small portions and badly prepared. She recounted that they were never permitted to go outside and that the chicken was often undercooked. She managed to survive by purchasing instant soups in the Commissary.

Detention feels like prison

I interviewed 156 deportees in four countries, and asked them to describe their experiences in immigration detention. Most of my interviewees told me that they were not physically mistreated, but that they were treated like prisoners, and as if they were in prison. Most lamented the fact that they had to spend months in immigration detention, even though they had either finished their jail sentences or had not been convicted of any crime. Roberto, a Guatemalan deportee, described his experiences in detention to me

TGB: How many months were you detained?

Roberto: Eleven [months] and three in Houston. They do not punish you, because they will not hit you. The thing is, they do punish you hard, though, with words. The prison sentences are difficult. Who wants to be in jail so that they can just keep punishing you? If you take a little piece of food, you go to the hole. If you don't put your shirt on right, you go to the hole or they take away your telephone privileges. And, when the U.S. Marshals take you, they chain you up, as if you were a criminal.

Roberto also described being taken out of detention to be put on a plane back to Guatemala. He explains what happens when he turned his head around to look back.

When I turned around, you know what one of them did to me? He went "bam" right on my head when I turned around. I told him to get a grip, because I am not a criminal. I was not doing anything [wrong]. He told me that he was going to take me back to Louisiana or Houston, just because of that. I do not want to go through that again. I was in there for 14 months and you almost go crazy in there. I saw people who went crazy in there. I am just talking about immigration detention. We are not talking about prison.

Roberto, like many people who have been detained by immigration authorities in the US, experienced the immigration detention center as similar to prison. The food is similar to prison food. The level of con-

trol they have over your day is similar to that of prison. And, as Roberto describes above, immigrant detainees are transported around the U.S. and out of the U.S. in chains, like prisoners.

Deportation feels like punishment

Nearly all of the deportees that I interviewed felt as though their deportation was punishment, either for being in the U.S. illegally or for committing a crime.

O’Ryan, a Jamaican citizen, moved to the United States as a legal permanent resident when he was six years old. When he was 25 years old, O’Ryan was deported to Jamaica because of a drug conviction. When I spoke to O’Ryan, he had been in Jamaica for seven years and continued to have trouble getting adjusted to life in his birth country. He told me he understands he made mistakes, but did not see it as fair that he should pay the rest of his life for those mistakes. He doesn’t see a future for himself in Jamaica, where he feels like a foreigner. He told me ‘I shouldn’t be deported because I’m really not a bad person.’ For O’Ryan, deportation feels like a cruel punishment that he never had the chance to contest. His deportation was an automatic consequence of his drug conviction. He had no opportunity to explain to a judge that he grew up in the United States, that he was a college student, and that he had no ties to Jamaica.

Hazel is another Jamaican who was deported after living most of her life abroad. She told me that her life in Jamaica is hard, but that she understands that it is her punishment.

[it’s] so rough to come here and no family, nobody, I didn’t know nobody. I got a little sleep-in job, they throw me out, they don’t pay me. I had nothing. I suffer but thanks be to my God, because he is a good God. He kept me. I could have been like one the other deportees that come here and lay in the street, but I didn’t. Because I know that this was my punishment, I come here and work, I go to school, you know? I try to live right.

Nearly all of the deportees with whom I have spoken have told me that they experience their deportation as punishment. However, since deportation is technically a regulatory procedure and not a punitive

procedure, non-citizens do not have the right to contest their deportation in the same way they would had they been accused of a crime.

My research makes it clear that non-citizens in the United States often feel as if they are treated like criminals – even if the laws indicate that they are not criminals but immigration violators. In terms of human rights treaties, which matters more? Should we believe the legal documents that allow one to argue that no human rights treaties are being violated or should we listen to the experiences of people who feel that they are treated as criminals?

Conclusion

As sociologists, the answer to this rhetorical question is clear. If undocumented migrants feel as if they are treated as criminals, then we can argue that undocumented migration is criminalized. If detainees experience their detention as prison, then it is. If deportees experience their deportation as punishment, then it is. Moreover, it is up to sociologists to insist that U.S. laws and practices be modified to reflect the reality.

The first set of laws has to do with the arrest of undocumented migrants. If undocumented migrants have simply violated a section of the INA that indicates that they should abide by the terms of their visa or not enter the United States without inspection, then they should not be treated like criminals. Immigration agents should not be able to conduct early morning raids on their homes and arrest anyone they suspect to have violated the INA. Under current practices, immigration agents enter homes with a warrant to arrest a particular person, but then ‘proceed to sweep the entire building, knocking on other doors and demanding to see immigration papers from all the inhabitants’ (UNHRC, 2008, p. 17). The collateral arrests of bystanders in these home raids are in violation of international standards against arbitrary arrests. Instead of randomly picking up immigration violators, undocumented migrants should be given the opportunity to adjust their status and comply with the INA. Of course, we would need laws that allow them to do that.

As immigration detention essentially is prison, it is inappropriate to place people in such a place while waiting for an administrative hearing with an immigration judge. In particular, the near-universal detention of asylum seekers ‘violates international standards specifying that

the detention of asylum seekers be limited to exceptional cases under law' (Welch and Schuster, 2005, p. 337). Instead of detaining asylum seekers and others awaiting trial, there are plenty of alternatives to detention available and those should be used. At present, the decision as to whether or not a non-citizen will be detained is discretionary and made by an immigration enforcement agent. 'Given that these discretionary decisions are not subject to judicial review, current US practices violate international law' (UNHRC, 2008, p. 9). To be in compliance with international standards, the United States needs to provide non-citizens with the opportunity to be released from detention while waiting for their immigration trial.

Insofar as deportation is often experienced as a severe punishment, often worse than the punishment for any criminal conviction, it should be treated more carefully in U.S. courts. The lack of a fair hearing for people facing deportation is in violation of human rights law, which 'requires a fair hearing in which family ties and other connections to an immigrant's host country are weighed against that country's interest in deporting him or her' (UNHRC, 2008, p. 15).

There is a tremendous difference between an undocumented migrant who comes to the U.S. with the goal of working for two years and returning to his home country and a legal permanent resident who was brought to the U.S. as an infant. Deportation has vastly different meanings for those two individuals. For the former, it might be experienced as an administrative procedure – especially if he has already met his savings goal in the U.S. and was preparing to leave anyway. For the latter, deportation after serving a year in prison for a drug charge could be the most cruel punishment conceivable. This is especially the case if, for example, this latter young man is deported to Haiti and does not speak Creole or to El Salvador and has gang-related tattoos. Insofar as deportation is often experienced as punishment, courts must take the matter more seriously and allow non-citizens to present more evidence against their deportation than has been the case, especially since the implementation of the 1996 laws.

References

Coleman, Matthew. 2007, 'Immigration Geopolitics Beyond the Mexico-US Border,' *Antipode*, 54-76.

Fragomen, Austin. T. 1997, 'The Illegal Immigration Reform and Immigrant Respon-

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- sibility Act of 1996: An Overview,' *International Migration Review*, 31(2): 438-460.
- Frelick, Bill. 2005, 'US Detention of Asylum Seekers and Human Rights,' Migration Policy Institute. March. <http://www.migrationinformation.org/Feature/display.cfm?ID=296>, Accessed 6 April 2010.
- Kanstroom, Daniel. 2000, 'Deportation, Social Control, and Punishment: Some Thoughts about Why Hard Laws Make Bad Cases,' *Harvard Law Review*, 113: 1890-1935.
- Patel, Sunita and Tom Jawetz. 2007, 'Conditions of Confinement in Immigration Detention Facilities,' Briefing Paper. http://www.aclu.org/pdfs/prison/unsr_briefing_materials.pdf. Accessed 31 May 2010.
- United Nations Human Rights Council (UNHRC). 2008, 'Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development: Report of the Special Rapporteur on the human rights of migrants,' Jorge Bustamante. Addendum Mission to the United States of America. March 5, 2008.
- Warner, Judith Ann. 2005, 'The Social Construction of the Criminal Alien in Immigration Law, Enforcement Practice and Statistical Enumeration: Consequences for Immigrant Stereotyping,' *Journal of Social and Ecological Boundaries*, 1(2): 56-80.
- Welch, Michael and Liza Schuster. 2005, 'Detention of Asylum Seekers in the US, UK, France, Germany, and Italy: A Critical view of the globalizing culture of control,' *Criminal Justice*, 5: 331-355.

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