

The term “illegality” is often used uncritically and in facile fashion in public discourses of immigration to refer to the condition in which several million undocumented immigrants live today. As the political debate and public discourse show, language matters a great deal. People often think that they know exactly to what immigrants this term refers, as the term itself has become closely linked to the lives of Latina/o immigrants. Indeed, given the focus of the enforcement side of the immigration regime today, this term has become almost synonymous with Latina/o immigrants. And popular usage of the term “illegality” connotes association with criminality, with violation of the legal order, and, as such, it is often used to undermine the moral character of certain immigrant groups, as Peter Nyers (2010) notes. Thus, the popular use of this term does not simply reflect its technical legal meaning (Menjívar and Kanstroom 2014), and politicized debates frequently ignore the historical permeability of the line between “legality” and “illegality,” obfuscating the distinction between illegality and crime. In immigration matters, unauthorized or undocumented presence is a civil offense and not a crime, but re-entering the country without documentation has recently been redefined as a felony. However, since the act of entering the country undocumented does not produce victims, it has been defined as a victimless crime.

Debates and popular discourses leave out the fundamental point that the law has moved to encompass

increasingly more immigrants under the category of “illegality,” which today is predicated on the construction of certain immigrant behaviors as criminal. Rather than assuming that individuals break laws when they are pushed into illegality, a more fruitful approach would be to begin by examining how this category is created and which immigrants have been moved into it—in short, how certain immigrants become illegalized. As Étienne Balibar (2000) notes, the state makes certain bodies illegal, and as a project of the state the illegalization of immigrants is deeply political and can serve many objectives. In recent years, the political project of merging immigration matters with criminal law (Stumpf 2006) has led individuals living in this category to have altogether different experiences than before, when this merger had not been made. The slew of Executive Orders that the newly-elected president signed in early 2017 attests to the harmful consequences of using law to construct immigrants as criminals and as threats to the nation.

Legal structures produce categories of illegality, and thus a useful avenue to examine this concept is to move away from the individuals who are presumed to be the bearers of this condition to the laws that produce it (Ngai 2004). In this light, it is important to bear in mind the constructed nature of the category of “illegality” (De Genova 2004; Ackerman 2012) and to consider how this category is created by laws, how it affects Latinas/os in particular, and how it intersects with other systems of inequality and oppression, as well as how this category has been transformed as a site of resistance in recent years.

Illegality is historically and legally produced and therefore malleable and changeable (Menjívar 2006; Moloney 2012). With the stroke of a pen, entire groups of immigrants have been moved from illegality to legality and vice versa. For instance, the government can

pass law to grant legalization to certain individuals who meet a set of requirements; however, it can also end certain admissions that were previously lawful. Thus, it is critical to examine the sociopolitical contexts in which such categories are created and allegations of illegality are constructed (Massey, Durand, and Malone 2002).

Perhaps nowhere is the constructedness of the category of illegality more evident than in the comingling of immigrant illegality and criminality. The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 expanded the list of crimes for which immigrants (undocumented and permanent legal residents alike) can be deported. Before this law, there were several civil offenses that would not lead to a deportation, but by expanding the category of “aggravated felonies” and thus deportable offenses, the law created the conditions for the removal (and inadmissibility) of thousands of immigrants. This change in law has had the consequence of illegalizing thousands, moving even immigrants who were legal permanent residents into the category of illegality. At this historical junction—characterized by the merging of criminal with immigration law and new enforcement practices that rely on vast technological networks, and by fears of security threats and a widening and deeper securitization regime—the “illegalization” of immigrants through law acquires new meaning (and multiple consequences) and must be examined critically.

One example of the process of illegalization and criminalization is the creation of a new category of “unlawful reentry.” If an individual is deported from the United States and reenters the country, this “unlawful reentry” is categorized as a federal crime and counts as a criminal offense. Research has found that when deported migrants leave close family members in the United States, they will have a higher likelihood to re-migrate to reunite with their loved ones (Rodríguez and

Hagan 2004). With such attempts to reenter the country now being categorized as felonies, the result has been a dramatic increase in the alleged criminal offenses committed by immigrants. Indeed, “unlawful reentries” represent a significant proportion of the crimes that immigrants supposedly commit. A recent analysis (Light, Lopez, and Gonzalez-Barrera 2014) shows that between 1992 and 2012, unlawful reentry convictions accounted for 48 percent of the growth in the total number of offenders sentenced in federal courts, which increased 28 times in this time period. Not all immigrant groups living in illegality experience this enforcement practice in the same way, as Latinas/os have become overwhelmingly targeted. For instance, whereas in 1992 Latinas/os constituted 23 percent of offenders charged with unlawful entry, in 2012 they made up 48 percent of these offenses.

A key aspect of today’s enforcement practices is that the same behavior—for example, reentering the country after a deportation or using fake documents to work—was not classified as a felonious offense in the past nor would it count as a criminal offense in other contexts today. Furthermore, the immigration regime has created a situation in which the same act, such as shoplifting or driving over the speed limit, has enormously different consequences when it is carried out by someone who is classified as undocumented or by someone who is a citizen. And given that Latina/o immigrants are so overwhelmingly pushed into punitive spaces when they live in illegality, the intersection of illegality and race has acquired particular significance.

The racialized nature of the system in which the category of illegality operates today is evident in the demographics of the deportation regime. For instance, it is estimated that 52 percent of the approximately 11.4 million undocumented immigrants in the country in 2012 were of Mexican origin (Passel, Cohn, and

Gonzalez-Barrera 2013); however, they accounted for 73 percent of total deportations. The same pattern was observed for Guatemalans, who made up 9 percent of the deported even though they constituted 5 percent of the undocumented population; Hondurans, who constituted 8 percent of the deported, made up only 3 percent of the undocumented population; and Salvadorans, who constituted 4 percent of the deported made up 6 percent of the undocumented (Menjívar, Abrego, and Schmalzbauer 2016). Thus, even though immigrants from these four countries made up 64 percent of the undocumented population in 2012, they represented 96 percent of all deportations in that same year.

Another component of the enforcement system, border apprehensions, mirrors the composition of deportations, with 96 percent of apprehensions at the border made up of migrants from these four countries (*CBP Border Security Report Fiscal Year 2014*). And there is a significant difference in how individuals who become undocumented are treated in the system, with particularly negative consequences for Latinas/os. Immigrants who overstay their visas (that is, who came into the country with a visa but stayed past their allowed time) are not subject to the three-year or, more often, ten-year, bar to readmission if they leave the country (or are deported). However, those who come in without inspection (and more likely to have crossed the border) are barred from reentering the country for three to ten years. These patterns point to a profoundly lopsided enforcement system, embedded in law, which targets primarily Latinas/os. At the same time, the legislative side of the immigration regime continues to push these immigrants into illegality and significantly narrows their paths for admission and legalization.

The category of illegality is also classed and gendered. The overwhelming majority of Latinas/os in detention and those who are deported are poor immigrant

workers, and, as research has noted (Golash-Boza and Hondagneu-Sotelo 2013), men are more likely to be deported; in 2014, 93 percent of those deported were men (TRAC Immigration 2014). Moreover, their deportation affects entire families left behind and can significantly alter gender dynamics and generational relations within families living in the United States and across borders. Furthermore, research has found that for Latinas/os, the combination of skin color and gender significantly increases the odds of police stops (K. M. White 2014). Therefore, the category of illegality is at present lived with particular intensity by poor Latinos.

Significantly, constructed social categories, even when unfounded or created in the context of political agendas, have real consequences for those who have been classified into them. Noteworthy, by its very nature the construct of illegality evolves over time and it is not static; it can change and encompass new groups of immigrants, as well as their descendants. One recent example comes from efforts to strip U.S.-born citizens of undocumented parents of their citizenship or even to rescind the citizenship of naturalized citizens who are found to have made even a minor mistake on their naturalization application. Permanent legal residents (“green card” holders) who are documented are now also at risk of losing their status due to the expanded and retroactive reach of new laws. Thus, the category changes and expands and contracts depending largely on the political currents at a particular historical moment.

As the category of illegality intersects with other social vectors of oppression, the experiences of those who have been pushed into illegality will differ. Thus, for instance, even though living in illegality constrains people’s rights and limits access to social benefits, gender and sexuality create varying experiences in this already marginalized position. Since gender ideologies

position women, even full-time workers, as caretakers of their families, women must interact with the institutions that dispense the social benefits that are often denied to those living in illegality. In these situations, women may experience illegality in particularly acute fashion. On the other hand, in their socially ascribed role of breadwinners, men may experience heightened forms of illegality when they work in jobs that must be performed in public spaces, as their mere presence may elicit suspicion and even trigger an enforcement action.

The category of illegality has multiple meanings and consequences for those who live in it, beyond the denial of social welfare rights and the push to increasingly more marginalized spaces. Often the social, economic, and cultural contributions of illegalized immigrants are devalued, regardless of how much these immigrants' labor contributes to the economy or how their social and cultural practices remake and revitalize communities. But just as often, the category of illegality has been vigorously contested and resisted. Immigrants have mobilized with diverse allies to challenge the ideological underpinnings of illegality and the stereotypes and constructions on which it is based. Examples of these mobilizations include the DREAMers, the National Day Laborer Organizing Network, and the UndocuQueer movement, among others. At a more personal level, in their everyday lives, immigrants who live in this category actively create spaces and practices that give them comfort and hope and through which they confront and produce alternative forms of belonging even as the dominant regime pushes them to the margins. While the immigration regime effectively forecloses paths to membership through expanding the category of illegality, immigrants continue to make a living, support families—here and there—and contribute to reshape the vibrant communities in which they live.

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Incarceration

Michael Hames-García

Incarceration in the United States is geographically distinctive, historically unprecedented, and racially disproportionate. It is geographically distinctive because the United States incarcerates both more people and a larger percentage of its population than any other country in the world—by far. It has only 5 percent of the world's population, but 25 percent of the world's prisoners, and just under seven million people, or one in thirty-five, in the United States were incarcerated, on parole, or on probation in 2012 (more than the entire population of Chicago and Los Angeles combined). It is historically unprecedented because the U.S. incarceration rate fluctuated only mildly from the late nineteenth century until the 1970s and then increased 500 percent in thirty years. No modern democracy has ever imprisoned so many. It is racially disproportionate because people of color make up 36 percent of the nation's population, but 60 percent of those in prison. One in three African American men and one in six Latino men in the United States will spend time in prison during his lifetime (Hartney 2006; Mauer 2006; Public Safety Performance Project 2008; Wacquant 2009; Hames-García 2011a; Tonry 2011; Sentencing Project 2014).

From the medieval Latin *incarcerare* (literally “to put into confinement”), “incarceration” implies a forced removal from society and a limitation of physical freedom or mobility. There is an important distinction to be made between incarceration and slavery. While

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