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Undocumented Latinos and US Immigration Processing

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The Punishment/El Castigo: Undocumented Latinos and US Immigration Processing
Ruth Gomberg-Muñoz

For undocumented people who become eligible for a US immigrant visa, the pathway to lawful status bifurcates around one central question: how did you get into the USA? While most visa overstayers can adjust their status within the USA, undocumented border crossers must leave the USA to change their status. When they do, all but a few trigger a 10-year bar—often called ‘el castigo’ in Spanish or ‘the punishment’—on their return. This paper draws on a three-year ethnographic study to explore the process of legalisation for Latinos who entered and lived in the USA unlawfully. I pay particular attention to how ‘grounds of inadmissibility’ and federal criminal prosecutions for unauthorised entry disproportionately penalise working-class Latinos, creating a minefield of racialised obstacles to their lawful status. Together, I argue, racialised criminalisation and higher hurdles to lawful status amount to a one–two punch that makes it extraordinarily difficult for undocumented Latinos to ever change their status, even when they are eligible for an immigrant visa based on their marriage to US citizens.

Keywords: Crimmigration; Immigration Policy; Legalisation; Mixed-Status Families; Latino Immigrants

The Punishment

There is a common perception that marriage to a US citizen puts prospective immigrants on a quick and easy path to US citizenship. In 2009, the highest grossing romantic comedy in the USA was a movie called The Proposal. In the film, the lead character, played by Sandra Bullock, forces a US citizen employee into marriage so that she can avoid deportation to Canada. For Bullock’s character, a wealthy Canadian executive in the USA on a work visa, such a ploy just might work. In fact, marriage to a US citizen moves people into the highest priority category for US immigration, and two-thirds of
US immigrant visas, also known as green cards, are granted annually to family members of US citizens and lawful permanent residents (Auclair and Batalova 2013). But for people who have entered the USA unlawfully and live here without papers (known as Entry Without Inspection; here I use the term unlawful entrants), the pathway to lawful residency is neither short nor easy, even for those with US citizen spouses. This is because two parts of the US immigration system collide when they try to become legal. One part makes them eligible for a family-based visa, and thus for lawful permanent US residency, but requires them to leave the USA to get it. Another part then blocks them from returning for 10 years. In Chicago’s Mexican immigrant communities, this 10-year bar is known as ‘el castigo’ or ‘the punishment’.

Only undocumented people with a US citizen or permanent resident spouse or parent can petition to have the 10-year bar waived, and those lucky few face a gauntlet of onerous criteria, complicated forms, expensive fees, and indefinite separation to reach—if their luck holds—lawful permanent residency at the end. In contrast, spouses of US citizens who entered the country lawfully and then became undocumented (usually by overstaying a temporary visa) can typically adjust their status without ever leaving the USA. Because they never leave, visa overstayers do not trigger a bar on their return and do not have to petition for a waiver or endure family separation.

Disproportionately punitive treatment of unlawful entrants in immigration processing is not an accident, but is tied to policies that have penalised undocumented immigrants in uneven ways. In particular, the coupling of immigration enforcement and criminal justice systems has propelled record-breaking rates of immigrant detention and deportation since 1996 (Dowling and Inda 2012; Golash-Boza and Hondagneu-Sotelo 2013). Immigrants’ vulnerability to detention and deportation is not equally distributed: the concentration of federal criminal prosecutions on the USA–Mexico border, coupled with racist policing practices in the US interior, has especially targeted undocumented Latino men (Coleman 2012; Dowling and Inda 2012; Golash-Boza and Hondagneu-Sotelo 2013). In this article, I show that criminalisation of Latinos is not confined to enforcement measures, but follows them down the long and winding pathway to legal status as well.

This essay draws on more than 70 semi-structured interviews that I conducted between 2011 and 2014 with Latinos, mostly from Mexico, attempting to undertake or undertaking immigration processing to legalise their status in the USA. I also interviewed several of their US citizen spouses, immigration attorneys, and Bureau of Immigration Affairs-accredited legal representatives. I supplemented these interviews with participant observation conducted in a Chicago-area legal clinic during the summers of 2011, 2012, and 2013 and in an online forum for families undertaking immigration processing. In this article, I focus on interviews with people who have undergone consular processing following marriage to a US citizen. Consular processing is the only family-based pathway to legal status for those who have entered the USA unlawfully. Because most of my study participants are of Mexican origin, I describe their experiences with consular processing through the US Consulate in Ciudad Juárez, Mexico, the only US Consulate in Mexico that processed waivers at
the time of my fieldwork. In 2013, after most of my fieldwork was completed, the consular processing/hardship waiver system underwent a significant change; here, I describe the process as my study participants experienced it, and later I describe the change and consider its implications.

For undocumented people, consular processing consists of three main steps: (1) applying for an immigrant visa; (2) attending a consular interview in the country of origin; and (3) petitioning to have the bar on re-entry waived with a US citizen’s claim to ‘extreme hardship’. Here, I focus mainly on the second step, the consular interview, to illustrate how racialised criminalisation hinders Latinos as they attempt to meet the criteria for lawful admission. The experiences of people described here, then, occur after they have been determined eligible for an immigrant visa based on their marriage to a US citizen, a significant hurdle. Their path to legal status does not end with the consular interview. The third step, arguably the most difficult of the three, still looms, and many who successfully navigate the consular interview will still be denied re-entry at that stage.

During the consular process, prospective legal immigrants are screened for dozens of ‘grounds of inadmissibility’. Grounds of inadmissibility (formerly called grounds for exclusion) have a long history in US immigration statutes, dating back to 1882’s Chinese Exclusion Act and restrictions on immigrants who were deemed ‘likely to become a public charge’—that is, to go on welfare (Daniels and Graham 2001). Then, racial, gendered, and class restrictions on lawful immigration were explicit, and they continued to be so until the 1960s, when open mention of race all but disappeared from immigration policy debates. Since then, US immigration policies have prioritised family reunification while restricting access to lawful status for ‘illegal immigrants’ (De Genova 2005), catching members of ‘mixed-status’ families in a political catch-22. As with previous periods, restrictions to lawful immigration are conceptually and administratively tied to concerns about criminality, lack of assimilation, and ‘retaining’ a desired racial heritage, but now they map onto an immigration classification, ‘illegal immigrant’, that is ostensibly divorced from ethno-racial associations (Lee 1999).

But ethnographic attention to US immigration processing shows that immigration status and racialised assumptions about criminality and inassimilability are not so easily decoupled. In particular, popular imaginaries of prototypical ‘illegal immigrants’ and ‘criminal aliens’ map onto a Latino phenotype (Chavez 2008; De Genova 2005; Golash-Boza and Hondagneu-Sotelo 2013; Massey 2009), and Latinos in the USA are especially targeted by anti-immigrant movements (Chavez 2008), immigration enforcement measures (Golash-Boza and Hondagneu-Sotelo 2013), and criminal prosecutions for immigration violations (Light, Lopez, and Gonzalez-Barrera 2014). When they try to become legal, these burdens stack the odds against undocumented Latinos, diminishing their chances for lawful status. To counter them, undocumented Latinos are compelled to distance themselves from ‘real criminals’ and demonstrate their assimilation into the US middle-class: a ‘whitening’ process (Coutin 2003) with significant implications for ‘post racial’ US immigration policies.
This article is organised into five main sections. In the section ‘Illegal’ Is Not ‘Illegal’ in the Same Way for Everyone’, I show that undocumented Latinos are more likely than other undocumented people to be swept up in criminal justice and immigration enforcement dragnets and marked with records as a result. The section ‘How Did You Get In? Uneven Pathways to Lawful Status’, outlines the effects of a legal distinction between unlawful entrants and visa overstayers, showing how unlawful entrants, who are more likely to be Latin American, face disproportionately burdensome criteria when they attempt to legalise their immigration status. The section ‘Grounds of Inadmissibility’ follows unlawful entrants through consular processing, the only family-based pathway to lawful status for them. I show how criminalisation clings to undocumented Latinos through this process, making them suspect for immigration and criminal violations, alcohol and drug use, and gang affiliation. In the section ‘Good Moral Character’, I describe a yardstick for lawful immigration that is undergirded by racialised, heteronormative, and middle-class values. In the conclusion, I consider the implications of this process for the racialised organisation of inequality in a ‘post racial’ USA. In all, I seek to show that, if the US deportation system can be characterised as a ‘gendered racial removal program’ (Golash-Boza and Hondagneu-Sotelo 2013), then the process of legalisation amounts to a gendered racial incorporation programme that actively reproduces long-standing US inequalities.

‘Illegal’ Is Not ‘Illegal’ in the Same Way for Everyone

In the USA, immigration violations have historically been considered civil, not criminal, offenses, and unlawful presence in the USA is a civil violation but not a federal crime (Golash-Boza 2012a). Yet, over the last two decades, criminal prosecutions for certain immigration-related violations, such as unlawful border crossing and the use of fraudulent documents to obtain work, have risen steeply in the USA (Dowling and Inda 2012). Between 1992 and 2012, the number of federal convictions for unlawful re-entry into the USA increased 28 fold, from 690 cases in 1992 to 19,462 in 2012 (Light, Lopez, and Gonzalez-Barrera 2014). By 2012, people convicted of unlawful re-entry, a felony, made up 26% of all sentenced federal offenders, and they spent an average of two years in prison prior to deportation (Light, Lopez, and Gonzalez-Barrera 2014). Three-quarters of all criminal prosecutions for unlawful entry and re-entry occurred in just five southern districts—all of which are located on the USA–Mexico border (Light, Lopez, and Gonzalez-Barrera 2014). Because these prosecutions are concentrated in the southwest border region, they disproportionately ensnare Latin American entrants, and the share of Latinos among federally sentenced offenders rose from 23% in 1992 to 48% in 2012 (Light, Lopez, and Gonzalez-Barrera 2014). Criminal prosecution and sentencing for unlawful entry and re-entry is but the latest iteration of the long-standing concentration of immigration enforcement measures on the USA–Mexico border, a practice that has helped to establish a
broad association of Mexican immigrants with ‘illegality’ and ‘criminality’ in the United States (De Genova 2005; Massey 2009).

Since 2003, immigration enforcement has broken the confines of the USA–Mexico border region and rapidly expanded across the landscape of the US interior (Dowling and Inda 2012). The most pervasive immigration enforcement programme, ‘Secure Communities’, links the databases of local police agencies with those of the US Department of Homeland Security (DHS) and Federal Bureau of Investigation (FBI). When people are arrested in a ‘Secure’ community, their fingerprints are run through the DHS database and, if there is a ‘hit’ (often the result of being caught at the border), arrestees can be deported whether or not they are ever charged with or convicted of a crime. In fact, even though Immigration and Customs Enforcement (ICE) states that it targets ‘criminal aliens’, about half of those deported are never convicted of any crime, and many deportations result from simple traffic stops (Coleman 2012; Golash-Boza and Hondagneu-Sotelo 2013). As of 2014, ICE boasts that Secure Communities is now implemented in 100% of US municipalities (US ICE 2014); as a result, any contact with police anywhere in the USA can, and increasingly does, result in an undocumented person’s deportation.

Yet, the proliferation of immigration enforcement measures far away from the USA–Mexico border region has not more evenly distributed their effects. In fact, even though Latinos constitute about 75% of the total undocumented immigrant population, they comprised 93% of those detained through the Secure Communities programme in 2011 (Kohli, Markowitz, and Chavez 2011). Evidence for racial profiling of Latinos in areas where local police cooperate with immigration enforcement has been found in Arizona (Romero 2008), Illinois (Mahr and McCoppin 2009), Tennessee (Lacayo 2010), North Carolina (Coleman 2012; Golash-Boza and Hondagneu-Sotelo 2013), and Texas (Gardner and Kohli 2009). This evidence suggests that discriminatory local policing practices in the US interior have helped to drive racialised inequities in federal deportation rates, and it indicates that the association of Mexicans with ‘illegality’ persists far outside of the USA–Mexico border region (Chavez 2008; De Genova 2005).

Together, militarisation of the USA–Mexico border and expanded interior enforcement have pushed deportation rates to historic levels. Between 1997 and 2012, more than 4.2 million people were deported from the USA—more than double the total number of all prior deportations in US history (Golash-Boza and Hondagneu-Sotelo 2013). And while deportations have increased for all national origin groups, the rise has been especially sharp for Latinos (Golash-Boza and Hondagneu-Sotelo 2013). Immigrants from Latin America, about 75% of the undocumented population, have accounted for over 90% of deportees each year since 2000 (Fussell 2011; US Department of Homeland Security 2013). Mexicans alone make up 59% of the undocumented population, but constituted between 65% and 80% of deportees between 2000 and 2009 (Fussell 2011; Passel and Cohn 2009). And while deportation patterns reveal significant ethno-racial bias, their gender bias is even more pronounced: while nearly half of all undocumented people are women, upwards of 90% of US deportees are men (Dreby 2015; Golash-Boza and Hondagneu-Sotelo 2013).
Coupled with the criminalisation of unauthorised entry on the USA–Mexico border, racist policing practices in the US interior amount to a one–two punch for Latinos who attempt to legalise their status. Because undocumented Latinos are more likely to have these violations on their records, they are less likely to meet the criteria for lawful admission. Furthermore, the penalisation of unauthorised entry carries civil consequences, which make it more difficult for unlawful entrants to initiate the process of legalisation in the first place.

How Did You Get In? Uneven Pathways to Lawful Status

Nearly half of the estimated 11 million undocumented people in the USA entered lawfully with a visa, then overstayed its expiration date or otherwise violated its terms; the other half entered without permission, usually by surreptitiously crossing a land border (Pew Hispanic Center 2006). In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) established a legal distinction between these two groups, determining that visa overstayers had been lawfully ‘admitted’ to the USA, while unlawful entrants had not. This distinction has two important consequences for immigration processing.

First, in order to legalise their status, unlawful entrants have to leave the country and apply to be admitted—as though they were never here (Immigrant Legal Resource Center 2012). In contrast, because overstayers have been lawfully admitted, they do not have to leave and apply for admission—they can adjust their status from within the USA. Second, applicants for lawful admission must prove that they do not meet any ‘grounds of inadmissibility’. Yet, one ground of inadmissibility is a history of unlawful presence in the USA. Anyone who has lived in the USA unlawfully between 180 days and 1 year is barred from re-entry for 3 years. Anyone who has lived in the USA unlawfully for more than 1 year is barred from re-entry for 10 years. These bars are automatic and non-discretionary—applied without regard to a person’s length of residence, family ties, work history, criminal record, need, or any other consideration. Because these bars are triggered when a person leaves and applies to come back, they almost exclusively apply to unlawful entrants and not to visa overstayers. The ‘legal nonexistence’ (Coutin 2000) of unlawful entrants in mixed-status families thus creates a great absurdity: US family reunification policies require mixed-status families to separate in order to, ultimately, remain together.

The legal distinction between unlawful entrants and visa overstayers both represents and reinforces broader inequalities among the global migrant population. Most of the world’s wealthiest nations—including most European countries, such as England, France, Germany, Sweden, Austria, the Netherlands, Finland, Greece, and Spain, as well as Australia, New Zealand, Japan, Taiwan, and South Korea—are part of the US Visa Waiver Program (US Department of State 2014). Citizens of these nations do not need a visa to enter the USA. They can enter lawfully and stay up to 90 days without a visa; this makes them very unlikely to ever be unlawful entrants.
For the rest of the world, whether a person can procure a temporary visa to visit the USA is often based on their ‘assets’ in the home country. Ample assets are considered evidence that visitors will return home promptly after a visit, making middle-class and wealthy people more likely to be granted these visas than poor and working-class people (Gerken 2013; Heyman 2001). In all, the confluence of several factors—including a long history of migration, neo-colonial economic practices (Rosas 2006), US foreign policy (Golash-Boza 2012b), geographic proximity, restrictive immigration policies (Massey 2009), and the likelihood that prospective Latin American immigrants will be working-poor—makes undocumented Latin Americans more likely to be unlawful entrants than undocumented people from elsewhere in the world (Coutin 2000; Pew Hispanic Center 2006).

The automatic bar on re-entry, and the need to have it waived with a hardship waiver petition, dramatically increases the financial and emotional costs of legalisation for unlawful entrants. While visa overstayers will typically spend up to $3000 in filing and attorney fees to adjust their status, unlawful entrants spend upwards of $10,000 on consular processing. The petition to have the 10-year bar waived costs $5000–7000 in attorney fees alone and is compounded by filing fees, travel expenses to go to Juárez and stay in Mexico, and weeks, months, or years of lost income. Many working-class families cannot afford, financially or emotionally, to risk a 10-year separation, and the bar on re-entry pushes legalisation out of the reach for all but the most financially secure. Importantly, the financial expense is greatly compounded by the emotional toll: people undertaking consular processing must leave their families and homes behind for an indefinite period, knowing that they may or may not be able to return. In contrast, visa overstayers with US citizen spouses can typically adjust their status at a US Citizenship and Immigration Services (USCIS) office within the USA—a process that takes them about a year to complete and does not require them to separate from their US families.

In sum, the path to lawful status for undocumented people in the USA bifurcates around one central question: how did you get in? At the starting gate, unlawful entrants and visa overstayers face similar hurdles, including the need to have a US citizen or lawfully resident spouse or parent who can petition for them. But once their family-based visa petitions are approved, the road ahead diverges. Unlawful entrants must leave the USA to get their visas, apply to be admitted, get barred, and petition to have the bar on their re-entry waived. This pushes the cost and risk of immigration processing to the ceiling for them, all but guaranteeing that most will remain undocumented regardless of their length of residence or family ties to US citizens. And among those who do take the risk and move forward with processing, the criminalisation of unauthorised migration dogs their footsteps at every turn.

**Grounds of Inadmissibility**

As a result of IIRIRA, unlawful entrants can never meet the criteria for admission to the USA. When they go to their consular interviews, they already know that their
applications for admission will be denied and their re-entry prohibited for 3 or 10 years. Their task at the consulate is to avoid all other grounds of inadmissibility, so that they may be eligible to apply for a waiver of the bar. There are dozens of grounds of inadmissibility in current US immigration statutes; these are roughly divisible into four main categories: health-related grounds, criminal grounds, immigration-related grounds, and economic grounds (Immigrant Legal Resource Center 2012). In consular processing, applicants are screened for these during three appointments: a medical exam, a biometrics appointment, and a consular interview.

In the following sections, I draw upon interviews to show how undocumented applicants navigate this legal minefield during their consular processing journeys in Ciudad Juárez, Mexico. In particular, I describe roadblocks to lawful status that have long-standing legacies in US immigration policies, including the association of ‘undesirable’ immigrants with communicable disease and criminality, and the exclusion of anyone thought likely to need welfare assistance (Daniels and Graham 2001). I also describe the effects of the legal conflation of criminal and immigration violations in the current period, which often present insurmountable obstacles to legalisation.

The Medical Exam

From the ‘Irish scourge’, to ‘filthy’ Jews, to ‘lice-ridden’ Mexicans, the racialised perception of working-class immigrants as a public health menace dates back at least to the early nineteenth century (Kraut 1995). The invocation of public health anxieties to restrict immigration and limit access to US citizenship, which Kraut (1995) has called ‘medicalized nativism’, has long justified invasive and humiliating medical procedures at US ports of entry, as well as segregation and displacement of immigrants in the US interior (Molina 2006; Ngai 2004). Since the 1920s, medical inspections of new immigrants have largely been conducted at US consulates abroad (Ngai 2004), and today, when undocumented immigrants undertake consular processing in Ciudad Juárez, the first appointment they attend is the medical exam. The explicit purpose of the medical exam is to inspect applicants for health-related grounds of inadmissibility, though doctors and psychologists also screen applicants for signs of ‘criminality’, as well.

On any given day, there are hundreds of people waiting to have their medical exam completed at a US government-approved clinic in Juárez. Applicants are given a number on their arrival at the clinic, and when their number is called, they proceed through a battery of tests, all performed by different doctors. First, they are photographed, then weighed, then they give a urine sample, then a blood sample, then they disrobe and are physically inspected. Finally, they are vaccinated. At each juncture, the doctor asks them questions. Some are health related, such as, ‘Have you ever had surgery?’ And others are not: ‘Do you have tattoos? Have you ever been arrested?’

Clinic doctors are inspecting applicants for signs of four main health-related grounds of inadmissibility. The first consists of communicable diseases, such as
tuberculosis, syphilis, or gonorrhoea, which potentially present a public health risk. The second health-related ground of inadmissibility is a failure to prove vaccinations. Unless the applicant has an updated vaccination record at the ready, doctors at the clinics make rough determinations of which vaccinations immigrants are likely to need, and then they administer them at an additional cost. Third, doctors inspect applicants for signs of a mental or physical disorder that could pose a danger to themselves or others. Alcoholism, past institutionalisation, and suicide attempts are all potential indicators of a mental disorder, and driving under the influence (DUI) arrests can raise a red flag for alcoholism. Finally, they are tested for drug use and addiction, the fourth health-related ground of inadmissibility. When clinic doctors suspect applicants of criminality, substance use, or mental disorder, they refer them to a psychologist at the clinic for additional evaluation.

According to attorneys, Latino men are especially likely to be suspected of alcohol and drug abuse and referred to the clinic psychologist. One attorney explained,

> Until quite recently … any young man that went for their medical was treated as a drug abuser … Then the psychologist breaks them down, and in their medical exam [results] that they present to the consulate the next day, it says, 'This person is a drug abuser.'

Clinic staff may even try to trick or coerce applicants into admitting to substance abuse. The attorney continued,

> [One client] was reduced to a blubbering mass and admitted that he had smoked pot three times in his life or something, which shouldn't be a bar. [He] was left crying and hysterical by this doctor and then psychologist. He admitted it after the doctor said, 'You know, we are taking your urine sample and if you have ever used any kind of drug in your life, it will show up here.' And he's like, 'Okay, I smoked pot three times.'

The bar for drug abuse is three years long and ineligible for a waiver.

Applicants may also be referred to the clinic psychologist if they have a criminal record, so that the psychologist can evaluate their ‘criminal’ character. This is what happened to Alberto, who had been arrested in the USA after a street fight. Alberto went for consular processing following his marriage to a US citizen, and the clinic psychologist questioned Alberto about the fight and his subsequent arrest. When Alberto had a hard time remembering details of the event, the psychologist became angry and told him, ‘Well, you don’t remember. You don’t remember. You don’t remember, so I put down on my sheet that you’re mentally retarded.’ When Alberto attended his consular interview two days later, the immigration agent barred him from the USA and determined that he was ineligible for a waiver. ‘We don’t let criminals back into the United States,’ she told him.

Tattoos can also be a source of complication at medical exams, not because they present a health risk, but because they make a person suspect for gang affiliation. Savvy attorneys ask their clients about tattoos during intake meetings, and they advise them to cover or remove any problematic tattoos. And because popular
tattoos are often common among both gang members and non-gang members, all but the most innocuous tattoos can cause problems. For instance, people have been barred from the USA for tattoos depicting grim reapers, happy/sad theatre masks, hands praying the rosary, and certain sayings, such as ‘my crazy life’ (Jordan 2012). One young man, Enrique, has what he describes as a ‘tribal’ tattoo, consisting of intertwining black lines, on his left bicep, which the doctor at his medical exam quizzed him about. Enrique recounted,

[The doctor] asked me, ‘What does it mean?’ I told him, ‘Nothing. It’s tribal.’ ‘Well, why did you get it?’ [I told him] ‘I liked it, and I wanted a tattoo, and I didn’t know what to get, and I liked this and that’s why I got it.’

Enrique laughed when he recounted this exchange, but the stakes of having a ‘suspicious’ tattoo are high and can include a permanent bar for affiliation with organised crime (Immigrant Legal Resource Center 2012).

**Biometrics**

On their second day in Juárez, applicants attend their biometrics appointment, which must be completed at least one day prior to the consular interview. During the biometrics appointment, immigrants’ fingerprints and photographs are taken and then run through US federal criminal and immigration databases. The purpose of the biometrics appointment is to check whether an immigrant meets any grounds of inadmissibility related to criminal or immigration violations. The fingerprinting and photographing procedures are fairly straightforward, but the implications of these checks can be complex and life changing.

There are several grounds of inadmissibility related to criminal violations. Convictions for felonies such as terrorist activity, murder, or sexual assault all make a person inadmissible to the USA. But even petty offenses, including almost any offense involving controlled substances, such as being under the influence of drugs or minor drug possession, also make a person inadmissible (Immigrant Legal Resource Center 2012). Several ‘criminal’ grounds of inadmissibility are specifically related to immigration violations, including ‘document fraud’, or using false documents to enter the USA, and ‘alien smuggling’, which covers everything from helping someone cross the border to sending money for a family member’s passage (Immigrant Legal Resource Center 2012). By itself, ‘unlawful presence following unlawful entry’ is a ground of inadmissibility and is the reason why unlawful entrants must have the bar on their admission waived before they can return.

One particularly punitive ground of inadmissibility is the ‘false claim’ to US citizenship. Any noncitizen who has ever claimed to be a US citizen, even on a job application, will be permanently barred from re-entering the USA. False claims can even occur without a noncitizen’s knowledge: one legal representative explained that, in the past, Illinois Secretary of State employees were obligated to ask people applying for a driver license if they wanted to be registered to vote. Years later, if they attempted
to legalise their status (or if lawful residents attempted to naturalise as US citizens), noncitizens who had answered ‘yes’ to that question would be permanently barred (or deported) from the USA on the grounds that they had falsely claimed to be US citizens.

Some of these bars, such as the bar for unlawful presence and bars for certain criminal violations, can be waived. Others, such as the bar for ‘false claim’ to US citizenship, cannot. One unwaivable bar that especially penalises Central and South Americans is the five-year bar for failing to attend removal proceedings. According to long-standing practice, Mexicans who are caught unlawfully entering the USA are typically taken back to Mexico immediately, while people from elsewhere in the world, but predominantly from Central and South America, are given a court date for removal hearings and released on bond. Not surprisingly, many people who are released on bond subsequently proceed to their US destinations and decline to appear in court. When they attempt to legalise their status, they often get a 10-year bar for unlawful presence, which is waivable, and a 5-year bar for failing to attend court, which is not.

This is what happened to Paolo, a Brazilian man who entered the USA unlawfully in 2005. When he was caught on the border, US immigration officials first offered Paolo a deal: if he joined the US military, he could get on a ‘fast-track to U.S. citizenship.’ But Paolo was concerned that the income he would receive as a soldier would not enable him to cover his $10,000 debt to a coyote (a guide or smuggler), and he declined. He was given a court date in Arizona 12 months in the future and released. Paolo travelled to Chicago, where he joined his brother working in asbestos removal; he did not return to Arizona to attend his court hearing. Five years later, he met and married Wendy, a US citizen. When they consulted with a lawyer about the possibility of changing Paolo’s status, Paolo and Wendy were stunned to learn that his failure to appear in court would result in a five-year unwaivable bar. Unable to face the prospect of a five-year separation, Wendy and Paolo declined to pursue consular processing. Five months later, ICE agents showed up at their door looking for Paolo’s former roommate. The roommate was not there, but Paolo was. He was arrested and, a month later, deported to Brazil, where Wendy has since moved to be with him.

Finally, there is what is known as the ‘permanent bar.’ The permanent bar is applied to anyone who unlawfully re-enters the USA after being removed, and to anyone who has lived in the USA for a year or more without authorisation, then leaves, then comes back unlawfully (Immigrant Legal Resource Center 2012). The permanent bar is designed to punish those who repeatedly violate immigration law, though its effect is to target people who practise cyclical migration, a long-standing labour migration pattern of Mexican migrant workers (Massey 2009). The permanent bar is waivable, but only after a 10-year wait period. Knowledgeable and scrupulous attorneys discourage applicants from moving forward with consular processing if they are susceptible to the permanent bar. But not everyone has reliable legal counsel; for the unwary, the permanent bar results in a sudden and unexpected banishment.

For example, Lupita was permanently barred from the USA when she undertook consular processing to legalise her status in 2012. Lupita came to the USA without
authorisation in the early 1990s; in 1997, she married Jorge, a US citizen, and they had three US citizen children together. In 2002, Lupita’s mom fell ill, and Lupita decided to visit her in Mexico. After her mom recovered, Lupita attempted to return to her family in Chicago. She was caught by the US Border Patrol and returned to Tijuana, Mexico by bus. As she was unloaded from the bus, a US agent whispered in Lupita’s ear, ‘They are not checking [vehicle] trunks today.’ Lupita called Jorge, and Jorge drove to Tijuana to pick up his wife. She climbed into the trunk of their car, and Jorge drove through the border checkpoint and back into the USA. They picked up their children and went home to Chicago. Ten years later, when Lupita attended the consular interview in an attempt to legalise her status, the immigration agent barred her from returning to the USA for 99 years, to the shock and dismay of Lupita, her husband, and their 3 young children.

The Consular Interview

The applicants’ three-day trek in Juárez culminates in their interview with a consular official at the US consulate. There, all of the evidence will be put together and weighed by the official, who will assess whether the applicant is admissible to the USA and, if not, will determine which bars to admission apply.

The US consulate in Ciudad Juárez is not a single building, but a secured compound. As applicants approach, they join hundreds of other people standing in line, all clutching their files. The files, now quite thick, include the visa application, sealed results from the medical exam, certified court dispositions, proof of income such as tax returns and pay stubs, birth and marriage certificates, passports, passport photos, and any other documents that the State Department or USCIS has deemed relevant. The applicants must enter the consulate alone, since only people with appointments are allowed inside. The entrance to the consulate is kept clear by armed security guards; family members wait on the other side of a covered fence and peer through gaps, hoping to get a glimpse of their loved ones as they come out with the decision.

According to my study participants, consular agents begin the interview by reviewing their file and asking them selected questions from it. The questions start out easy: ‘What is your name? Where were you born? What is your spouse’s name?’ And then they move into more precarious territory: ‘When did you come to the United States? How many times? Have you ever been arrested? When and what for?’ Agents compare verbal answers to written records, looking for hints of dishonesty; any deviation or uncertainty could invite suspicion. According to attorneys, agents may even try to trick applicants into admitting to additional violations by pretending to have evidence of unlawful crossings or criminal activity (see also Heyman 2001).

Additional screens for inadmissibility not completed by the medical exam or biometrics check occur during the interview. One of the most important of these is the requirement that the applicant will not become a ‘public charge’, or receive cash welfare or long-term care at government expense. This prohibition, instituted in 1882, is the longest standing ground of inadmissibility in US statutes today (Daniels
and Graham 2001). At consular interviews, agents pay special attention to applicants’ proof that they will not become a public charge (Immigrant Legal Resource Center 2012). The key piece of evidence for this is an ‘Affidavit of Support’, a legally binding document in which the US citizen or legally resident petitioner, who must have a household income of at least 125% of the federal poverty level, promises to assume financial responsibility for the applicant for at least five years. Agents may also look at characteristics such as the age, health, skill level, and education of the immigrant applicant to assess their likelihood of becoming a public charge (Immigrant Legal Resource Center 2012). Meeting the financial requirements to avoid this ground of inadmissibility can be a major burden on working-poor families seeking to lawfully reunite. This requirement also firmly ties a potential immigrant’s admissibility to their capacity for work and their family’s socio-economic status in the USA.

In addition to the ‘hard evidence’ contained in the file, immigration agents will make subjective observations of the immigrant applicant. According to my study participants, an applicant’s English proficiency, ‘clean cut’ appearance, and observance of middle-class norms may all help to persuade immigration agents to approve an application. In the end, all of this evidence, objective and subjective, is brought together in the final decision.

**Good Moral Character**

For undocumented applicants, the best possible outcome of the consular interview is a bar for unlawful presence. Those fortunate enough to avoid all other grounds of inadmissibility can then move on to the third and final step of consular processing: petitioning to have the 10-year bar waived on the grounds that a 10-year separation or relocation would constitute an ‘extreme hardship’ to the US citizen or lawfully resident spouse. What constitutes ‘extreme’ hardship is entirely up to the discretion of the immigration adjudicator and can vary, but it must be more severe than ‘regular’ hardship that an agent would expect to result from a 10-year family separation. In other words, the pain and loss of being separated from one’s spouse for a decade, and of separating children from a parent, are not considered extreme—not because such pain is not agonising, but simply because it is expected. Instead, mixed-status families must find ways to compellingly articulate their claim to extraordinary hardship in mostly financial and/or medical terms. The hardship claim of the US citizen is then ‘weighed’ against the gravity of the violations committed by the undocumented spouse. Thus, the strongest waiver cases present overwhelming evidence of the US citizen’s extreme hardship coupled with convincing evidence of the undocumented person’s ‘good moral character’.

The criterion of ‘good moral character’ dates back to the very first major citizenship policy in the USA: the Naturalization Act of 1790. The 1790 Act restricted US citizenship to ‘free white men of good moral character’, creating not only racial and gendered yardsticks for citizenship, but also socio-economic ones. The criterion of ‘good moral character’ was key to the exclusion of poor white men from citizenship, since good
moral character was (and is) largely defined in opposition to activities associated with poor people, such as loitering, theft, prostitution, and gambling. These prohibitions were central to the creation of what Thomas Jefferson called a ‘responsible and virtuous electorate’ (in Glenn 2002, 27), characterised by the amalgamation of whiteness, wealth, and political empowerment.

Today, like extreme hardship, good moral character is subject to interpretation, but it is typically evidenced by a clean arrest record, community or church involvement, consistent work history and/or attainment of higher education, a body free of tattoos, piercings, or anything else that might invite suspicion of gang affiliation, and evidence of assimilation into US society such as English language proficiency. As families put together a hardship waiver petition, they compile a dossier attesting to the undocumented spouse’s good character; assembling such a case takes months and often requires the help of an experienced attorney. To establish good moral character, US citizen petitioners attest to their spouses’ dedication to family, their work ethic, and their deep integration into US society. They also secure dozens of letters from relatives and friends, neighbours, co-workers, church clergy, and community members. All of these letter writers must document their own citizenship status by attaching copies of the front page of their US passports or immigrant visas to their letters.

The criteria of extreme hardship and good moral character accomplish two important shifts: the hardship waiver rationalises the legal exception made for undocumented applicants by shifting attention to the extreme suffering of US citizen relatives, while the criterion of good moral character justifies the selective conversion of ‘undeserving’ undocumented immigrants into ‘deserving’ lawful residents without undermining the political legitimacy of either category. Together, these shifts uphold dichotomous immigration statuses, confer value on US citizenship, and politically reconcile the contradiction of exclusionary and inclusionary policies that target the same person.

The criterion of ‘good moral character’ also constitutes a vetting process that limits lawful status to a selective few who can meet particular raced, classed, and gendered criteria. At a time in which black and Latino men are being incarcerated and detained in record numbers (Gomberg-Muñoz 2012; Western 2006), applicants must have succeeded in largely avoiding encounters with state authorities. Additionally, they must conform to middle-class US norms such as financial stability, English language proficiency, a consistent employment record, and, until 2013, membership in a heterosexual nuclear family. The criminalisation of unauthorised entry, exclusion of the working-poor, and association of Latinos with criminal activities all make it more difficult for undocumented Latino men to meet the criteria that comprise good moral character.

This extraordinarily burdensome process has not gone uncontested, and in response to mounting pressure from members of mixed-status families, the consular processing/hardship waiver process was changed in 2013. The new procedure allows families to apply for a provisional waiver before the undocumented applicant leaves for the consular interview. This way, families know before the interview whether or not their bar on re-entry will be waived, dramatically reducing the uncertainty and prolonged separation of consular processing for those who qualify. However, while the
provisional waiver programme shuffles the order of consular processing, it leaves all of its various components in tact, including the need to leave the USA and avoid grounds of inadmissibility during a medical exam, biometrics check, and interview at a US consulate abroad.

While the provisional waiver programme was instituted after most of my fieldwork was completed, early data on the provisional waiver programme found a very high rate of denial: nearly 40% of initial applications to the provisional waiver programme were denied (Schreiber and Wheeler 2013). Of denied applicants, almost half were denied for ‘reason to believe’ that they meet grounds of inadmissibility other than the 10-year bar for unlawful presence. This suspicion appears to be largely triggered by a record of arrests and/or convictions that would not ordinarily meet a ground of inadmissibility, such as repeat traffic violations (Schreiber and Wheeler 2013). These early data suggest that the provisional waiver programme has done little to ameliorate the criminalisation of undocumented applicants; indeed, the widened net cast by ‘reason to believe’ confers the suspicion of criminality on more applicants and fortifies the distinction between ‘criminal’ and ‘noncriminal’ applicants.

**Conclusion**

For all undocumented people in the USA, the criminalisation of unauthorised migration has profound consequences. These consequences, like record-breaking deportation rates, are most obvious in immigration enforcement measures that turn local police into proxies for federal immigration agents. But criminalisation seeps into civil immigration processing as well, burdening undocumented people not only with criminal records, but also with indefinite and prolonged bars on re-entry. It is ironic, in fact, that the bar for unlawful presence is often called ‘the punishment’ in Spanish, since US law classifies the bar as civil, not criminal, and thus does not consider it punitive at all. Yet, for members of Chicago’s Latino immigrant community, bars on re-entry are precisely that: punishment, a 10-year sentence to life apart from loved ones.

Since 1996, changes to immigration processing have made it impossible for millions of undocumented people to ever become legal, regardless of their family ties or length of residence in the USA (Menjivar 2006). The obstacles to lawful status that immigrants face are not evenly distributed: criteria that penalise unlawful entrants, the working-poor, cyclical migrants, and anyone suspected of criminal or immigration violations especially burden undocumented Latinos. Thus, US immigration law is ‘post racial’ in name only—immigration policies create a threshold for ‘good moral character’ that immigration practices push out of the reach for many Latino men. The net result is that millions of Latinos who have established families and lives in the USA are trapped more or less permanently in undocumented status, with significant implications for the subordination of their labour and formal political participation (De Genova 2005).

Significant as they are, the implications of this process reach far beyond their direct effects on undocumented people and their lawfully resident family members. Insofar as
legalisation compels undocumented applicants to demonstrate middle-class credentials and distance themselves from criminality, it upholds wider distinctions between ‘worthy’ and ‘unworthy’ immigrants that map onto racial and class characteristics. Given that African Americans in the USA are six times more likely than whites to be in the criminal justice system, and Latinos three times more likely (Western 2006), the opposition of ‘criminality’ and ‘good moral character’ also legitimises racial inequalities among the wider US population. This process of differentiation both ignores the complicity of US policies in creating categories of immigrant and criminal in the first place and masks the degree to which contemporary legalisation policies reproduce historical inequalities.

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Notes

1. In November 2014, US President Barack Obama announced that the US DHS would replace Secure Communities with a more ‘targeted’ interior enforcement programme; whether the new programme will ameliorate racial bias in deportation rates remains to be seen. During the same announcement, Obama introduced an executive action, Deferred Action for Parental Accountability or DAPA, which would defer deportation for select undocumented parents of US citizen or lawfully resident children. Like the process that I describe here, applicants for DAPA will need to show that they have largely ‘clean’ criminal records, and they can lose eligibility for DAPA for certain kinds of convictions, such as DUI. Moreover, DAPA is a deferral of deportation, but is neither lawful status nor a pathway to lawful status; most unlawful entrants with DAPA who are seeking lawful permanent residency would still need to undertake consular processing. As of May 2015, DAPA has been blocked from implementation by an order in federal district court.

2. This distinction is sometimes also made in scholarship, with the term undocumented reserved for unlawful entrants and unauthorised or irregular used to describe visa overstayers.

3. Between 1996 and 2001, Congress periodically ‘opened’ a provision in the law that allowed unlawful entrants to adjust without leaving, but this provision has been ‘closed’ since 30 April 2001 (Immigrant Legal Resource Center 2012).

4. It is noteworthy that vaccinations are required of applicants for admission—but not of children in the USA—a point of much recent controversy.
5. Establishing a case of financial hardship can involve an especially tricky balancing act for mixed-status families, since US citizens also must show household earnings of at least 125% of the federal poverty level in order to sponsor their family member for a visa.

References


