

Human Rights and the Fetishization of SB 1070

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Arizona's SB 1070, passed in April 2010, makes it a crime to not have documents of legal residence and not carry others to prove that one's migratory status is in order. The legislation, also called the "Arizona law," not only permits the detention of anyone who transports an undocumented migrant, even if that person is a relative, but also allows the police to detain and require anyone they have a "reasonable suspicion" is an "illegal" immigrant to produce his or her migratory documents.

Clearly, criminalizing migration inhibits and even prohibits the enjoyment of different universal rights: specifically the right to not live in slavery or be subjected to forced labor; the right to health, to adequate housing, to a family life, to guarantee a minimum subsistence for oneself, to fair conditions of employment, to be a part of a union and other associations, to social security, to a name (in the case of little boys and girls), to education, to equal treatment to that of other nationals in a court of law, to due process if prosecuted, to not being deported collectively, and to not being discriminated against.

Because they are universal, enjoying these rights must not be conditioned to possessing legally recognized migratory sta-



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tus. However, the growing tendency to criminalize migration with legal instruments like the Arizona law systematically violates them. In the more restricted sphere of the U.S. Constitution, the Arizona law also violates fundamental rights, which is why President Barack Obama brought legal suit against it last July 6. Only a few days before that, his Mexican counterpart, Felipe Calderón, filed an *amicus curiae* brief backing the suit brought by civic organizations against the legislation. In its fierce opposition to SB 1070, the Mexican state, through the Congress, also requested and received political backing from parliamentarians from Ecuador, Uruguay, Panama, Bolivia, Guatemala, Cuba, and Chile.

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However—and without denying for a moment the importance and implications of this legislation—it should be said that it is a mistake to make the Arizona law the only focus for criticism and protests against the violation of migrants' human rights. In Arizona and other states of the Union, the criminalization of migration and racism have propitiated the constant violation of Latino migrants' human rights for a long time now, way beyond the scope of this law. Students of migration are concentrating on its unconstitutionality and on promoting its eventual repeal, but by doing that, they fall into a kind of legal fetishism that does not deal with the basic problem: a national crisis of migrants' human rights violations.

Lemaître distinguishes three types of legal fetishism in legal theory. First, he critiques formalism in legal interpretation. This type of fetishism consists of a merely formal, implacable interpretation of the law, without considering a social context or casuistical contingencies. The second kind is Marxist legal theory. In old Soviet law, legal fetishism consisted of making an analogy between law and the commodity in Marxist analysis. Marx criticized a commodity being seen as a good with intrinsic value instead of one with a superstructural value. Law, like the commodity, is not a neutral instrument, but has a function in class relations, which is that of maintaining and reproducing exploitation. Finally, Lemaître points to the legal fetishism that borrows a little from both positions and is blind to the tension between the law and its application, focusing more on legal rituals more than its efficacy.¹

Focusing exclusively on the Arizona law brings us face to face with fetishism of the third kind, since there is emphasis on legal ritual (the approval and possible eventual repeal of SB 1070), which assigns the strategy of legally challenging it a greater effect than it can actually have. While SB 1070 could have an effect similar to that of California's Proposition 187,² focusing on that makes it impossible to deal with the grave panorama of migrants' human rights violations throughout the United States. This is for three reasons:

1. the human rights violations that this law makes legally possible in Arizona had already been going on *de facto* for a long time;
2. the criminalization of undocumented migration is advancing nationwide, not only in Arizona; and
3. the existing generalized climate of racism systematically attacks migrants' rights.

HUMAN RIGHTS VIOLATIONS IN ARIZONA BEYOND THE SCOPE OF SB 1070

The violations of migrants' human rights in Arizona dates at least since 1999, when Operation Safeguard was launched to apply the same strategy of "prevention by dissuasion" used in the early 1990s in El Paso, Texas, with Operation Blockade/ Hold the Line, and in San Diego, California, with Operation Gatekeeper. This strategy consists of preventing undocumented migration by dissuading prospective migrants with the presence of hundreds of border agents and the detention and search of any "suspected" migrants. Very often the people stopped and searched were legal residents and even U.S. citizens of Latino descent. The strategy was so effective at those border crossings that the routes of undocumented migration moved to the Sonora desert, across the border from Arizona, making it the ideal place to implement Operation Safeguard. With this program, southern Arizona has become the most important crossing, where migrants die from dehydration, sunstroke, and heat stroke. From 1995 to 2002 alone, 1,600 deaths were registered along this stretch of border.³

This sparked a solidarity campaign that has in turn triggered the criminalization of migrants'-rights defenders. For example, in 2005, volunteers Shanti Sellz and Daniel Strauss were accused of human smuggling after trying to transport a group of injured immigrants to the hospital. In 2008, Dan Millis, from the migrant aid humanitarian organization "No

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More Deaths,” was fined by the U.S. Fishing and Wildlife Service for leaving bottles of water near the paths used by immigrants. He refused to pay the US\$175 fine arguing that humanitarian aid is not a crime.

Even though this kind of repressive atmosphere to prevent undocumented migrants from crossing the border is nothing new, direct criminalization of undocumented migration inside Arizona itself is more recent, but predates SB 1070. It began immediately after the federal migration reform bill was put on hold in 2006.⁴ HB 2779 was passed by the state Congress in 2006 and confirmed in 2008, authorizing administrative and criminal sentences for employers who hired undocumented immigrants, requiring the state attorney general to notify immigration authorities of the presence of undocumented workers, and broadening out the definition of identity theft. The Legal Arizona Workers Act requires employers to verify whether their employees are authorized to work in the United States using a federal data base called e-Verify. It should be mentioned that a similar reform was carried out in 2007 in Oklahoma mandating state employers to use the Basic Pilot electronic system, whose application is optional federally.

Simultaneously, in the light of this anti-immigrant climate, in 2006, Arizona Attorney General Terry Goddard confiscated remittances of more than US\$500 being sent to Mexico through Western Union. According to Goddard, the entire amount he confiscated (US\$14 million) was going to be used to finance human smuggling. In the health care field, in Phoenix, St. Joseph’s Hospital repatriates 96 migrants a year; the hospital justifies itself legally arguing the irregular migratory status of its patients.⁵ Civil rights organizations have also uncovered 16 hate groups acting with impunity, two of them expressly anti-immigrant: United for a Sovereign America-American Patriots, in Phoenix, and the American Border Patrol, in Sierra Vista. Along these same lines, in 2009, a federal court found in favor of rancher Roger Barnett who detained at gunpoint 16 Mexicans who were entering the United States without documents. The court denied that this was a violation of the Mexicans’ civil rights, although it did find that the defendant should pay six of the immigrants US\$78,000 in damages for suffering and emotional distress.

SB 1070 was passed in this kind of legal panorama and atmosphere of human rights violations. Nevertheless, the problem did not stop there: since May 2010, ethnic studies have been banned if they focus on the structural position of systematically and historically discriminated-against racial

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groups, like Hispanics, who make up almost 30 percent of the state’s total population. This is a clear affront to Mexican-Americans’ cultural rights, but has remained in the shadows because of the predominance of SB 1070.

THE CRIMINALIZATION OF MIGRATION BEYOND ARIZONA

Since 2006 when the federal reform bill did not pass, each of the 50 states of the Union has focused on making local reform proposals. According to a 2008 report by the National Center on Immigrant Integration Policy and the Migration Policy Institute, in 2007, a total of 1,059 migration reform bills were presented, but only 167 were voted into law.⁶ The writers of the report underline that among the bills passed, a greater proportion of the laws actually extend migrants’ human rights (19 percent of the 313 bills of this kind) rather than limit them (11 percent of 263 proposed bills). However, if the ones that restrict human rights are added to those dealing with enforcing the law (11 percent of 263) and those that regulate employment (10 percent of 237), the percentage of bills approved that criminalize migration is greater than that of those that promote human rights (40 percent versus 19 percent). This is because the bills dealing with enforcing the law and employment are just as restrictive as those that openly limit rights.

The bills dealing with enforcing the law establish the competencies of enforcing immigration law at a local or state level, reform the criminal justice system, or create new offenses related to migration. These kinds of bills deal with issues like requiring proof of migratory status to get any kind of official identification; increasing state police or state’s attorneys’ powers to detain migrants; excluding offenders without legal migratory status from the benefit of fines as sentences; and requiring jail staff to demand that detainees held for administrative offenses prove their migratory status. These

are actually very damaging, as proved by Arizona's law 2779 and Oklahoma's law, which categorizes transporting, giving refuge to, hiding, and hiring undocumented migrants as a serious crime, and punishes anyone who aids an undocumented migrant with up to a year in jail or a US\$1,000 fine. It also requires landlords to verify the migratory status of anyone who wants to rent from them.

The measures that directly restrict migrants' rights condition access to public benefits, like demanding that a person show citizenship in order to get a driver's license, and exclude from work-compensation programs all persons who cannot prove their legal presence in the country. The states that approved the most restrictive reforms are the ones that are new destinations for migrants: South Carolina, Nevada, Arizona, and Oklahoma.

Measures affecting access to employment regulate undocumented migrants' income and treatment on the job, as well as their relationship to federal employment supervision programs *vis-à-vis* migration. This includes positive measures, like labor rights protection, but that also criminalize immigrants, like the measures that sanction employers who hire people without documents; those that grant winning bids for public works only to employers who can prove they have not hired unauthorized workers; and also when professional or commercial licenses are only awarded to those who can show their migratory status is regular.

By contrast, the bills that broaden out migrants' rights include actions like eliminating the citizenship requirement for jobs with the police and fire departments and as teachers, as well as for migrants' children's access to public benefits; undocumented students access to education; making it giving crime to blackmail immigrants (for example, to threaten them with calling in immigration or other kinds of authorities in charge of enforcing the law); and writing into the law more offenses related to slavery and human smuggling or the destruction of migratory documents. The states that approved

more bills promoting migrants' rights are those that have a long immigration tradition like California, New York, Illinois, and Texas.⁷

RACISM AND HATE CRIMES IN THE UNITED STATES

In addition to the criminalization of migration in Arizona and different states of the Union, the existing climate of racism and discrimination systematically violates migrants' human rights. These violations often go unpunished because the victims do not make a complaint for fear of being deported or jailed. This in itself is a violation of the right to receive the protection of the state from hate crimes.

According to the latest Federal Bureau of Investigation (FBI) figures, 51.3 percent of hate crimes are motivated by race. Although the majority of them are committed against African-Americans (72.6 percent), from 2003 to 2007 attacks against Latinos increased every year: 426 attacks affected 595 victims in 2003; 475 attacks affected 646 people in 2004; 522 attacks against 722 persons in 2005; 576 attacks affected 819 victims in 2006; and 595 attacks against 830 persons in 2007.⁸ The total increase for this time period is 40 percent. This rise has coincided with the discussion about immigration reform and the economic crisis, which in turn has been marked by the racist language of anti-immigrant groups lobbying for repressive laws against foreigners who enter the country without papers. These groups have also grown in number: from 2000 to 2008, the count rose from 602 to 926, a 54-percent jump. Although many of these groups openly promote white supremacy, many have incorporated the anti-immigrant discourse into their ideology.⁹

Despite the gravity of the problem these figures indicate, the phenomenon may be much more serious because the figures are enormously biased. FBI statistics are developed based on local police reports, and the last poll on this topic, in 2007, indicated that only 15 percent of them report hate crimes, and some report only a single case. The Local Law Enforcement Hate Crime Prevention Act, which has both passed and been voted down in both the upper and lower houses of Congress several times since 1999, would allow for greater coordination among federal, state, and local authorities to fill in these gaps and to make it possible for some particularly grave cases to be channeled to federal jurisdiction. However, the law cannot revert one of the main problems, which is undocumented migrants' fear of making a complaint: they

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are rightly afraid that this could be the basis for their eventual deportation. And the cases themselves illustrate the problem.

In 2007, in Gaithersburg, Maryland, several anti-immigrant groups tried to burn down a day-laborer's work center; in Woodbridge and Culpepper, Virginia, migrants are subject to provocations like being photographed and insulted from moving automobiles or detained by individuals pretending to be police. In December 2007, Mexican citizen Miguel Barrón Martínez was beaten to death when he tried to defend his nephew and other persons: he was attacked by two U.S. citizens in his workplace. He had been living in Roger City, Arkansas for 14 years. Also in December 2007, in San Francisco, California, two men shot two Maya youths, José Chel Cámara and Javier Nah Carrillo, originally from Akil, Yucatán, killing them instantly. Javier had been in the United States for three years and his childhood friend, José Chel,

just a month. They both worked in a restaurant, which they had just left to go to the store where they were murdered.

In 2008, 37-year-old Ecuadoran Marcelo Lucero was stabbed to death by a white teenager in Patchogue, New York, as he and a friend walked to an acquaintance's house. The teenager who insulted and taunted them before stabbing Lucero had a record of prior violence against Latinos and was sentenced to 25 years in prison. In 2008, brothers Oswaldo and Romel Sucuzhana, from Ecuador, were attacked by a group of youths who shouted racist slogans at them as they walked home after leaving a night club. Oswaldo suffered grave injuries to his head and Romel escaped with a few cuts on the hand after being attacked with a glass bottle wielded by a pair of African-American youths, according to witnesses. The attackers were caught and are now facing charges that could carry a sentence of up to 78 years in jail. ■■■

NOTES

¹ J. Lemaître, "Legal Fetishism at Home and Abroad," *Unbound Harvard Journal of the Legal Left* no. 3 (2007), pp. 6-18.

² In California, Proposition 187, which passed but was revoked by a federal court in 1994, attempted to ban undocumented migrants' access to public education and free medical services (except in emergencies) in order to dissuade them from entering the United States. It also simplified the appeals process in deportation cases and gave the Border Patrol and immigration officers more elements for investigating about fraudulent documents, employers, and people who remained in the country once their visas ran out. The greatest impact of this failed proposition was its influence federally, since it was the inspiration for the 1996 Personal Responsibility and Work Opportunity Reconciliation Act which took away undocumented immigrants' access to public social services and increased financial and human resources for border surveillance. See Mónica Vereá, *Migración temporal en América del Norte. Propuestas y respuestas* (Mexico City: CISAN, 2003).

³ *Ibid.*

⁴ The Comprehensive Immigration Reform Act (CIRA, S. 2611), introduced by Senator Arlen Specter, proposed stepping up security all along the border with Mexico and granting amnesty to the 7 million undocumented migrants. It also included the creation of a "blue visa" or H-2C, which would have made it possible to bring in temporary guest workers for up to six years, at the end of which the worker would have to return to his/

her country for at least one year. It also proposed increasing the annual number of H-1B visas from 65,000 to 115,000, with a 20 percent increase yearly.

⁵ Since the 1996 federal immigration reform, neither undocumented nor recently arrived documented migrants have a right to government social services. However, since the law stipulates that hospitals cannot deny emergency health care or abandon an injured person in the street, they are obliged to offer first aid. If the cases are very serious, the hospitals must either take charge of their care or refer them to private institutions. When this happens and the hospital does not want to be held responsible, the patients are repatriated.

⁶ L. Laglagaron, C. Rodríguez, A. Silver, and S. Thanasombat, *Regulating Migration at the State Level: Highlights from the Database of 2007 State Immigration Legislation and Methodology* (Washington, D.C.: National Center on Immigrant Integration Policy/Migration Policy Institute, 2008).

⁷ *Ibid.*

⁸ "2008 Hate Crime Statistics," <http://www.fbi.gov/ucr/hc2008/index.html>. [Editor's Note.]

⁹ "Confronting the New Faces of Hate: Hate Crimes in America," Leadership Conference on Civil Rights Education Fund (LCCREF), Washington, D.C. (2009), http://www.civilrights.org/publications/hatecrimes/lccref_hate_crimes_report.pdf.