CONSTITUTIONAL FAILURE OR ANTI-IMMIGRANT SUCCESS? LOCAL ANTI-IMMIGRANT ORDINANCES AND SENTIMENTS IN THE UNITED STATES

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Over the last five years, local anti-immigration actions have emerged in reaction to the U.S. federal government's perceived inability to secure national borders and control "illegal" immigration. Local restrictionist measures have sought to control, deter, and incapacitate the presence of immigrants by using police authority to regulate public health and safety and to maintain peace and public welfare. Although such ordinances defend the need to control "illegal" immigration by localizing immigration enforcement efforts at the level of municipalities and neighborhoods, anti-immigration measures have attempted to control the everyday practices of undocumented immigrants rather than the processes and policies of undocumented immigration. Local regulations have therefore purposely been conceived to restrict services to undocumented immigrants, forcing them to leave the country or at least relocate to another city.

Since 2006, local anti-immigrant ordinances, officially termed "illegal immigration relief acts," have been introduced across the United States, but very few have been enacted.[1] They have had limited legal and constitutional success, but they have had a tremendous impact in furthering anti-immigrant sentiment by reinforcing the construct of the immigrant as "illegal" and "criminal." Local ordinances have inflamed a fierce divide on how best to address the current and future presence of unauthorized immigrants. On one side are those who hold unauthorized immi-

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[1] In the U.S., more than 100 immigration-related municipal ordinances were introduced or considered in small towns, townships, and counties in 31 different states in the year following the spring 2006 historical pro-immigration mobilizations in the streets of dozens of larger U.S. cities. According to a database compiled by the Fair Immigration Reform Movement (FIRM 2007), 135 municipal governments have introduced or considered anti-immigration measures to regulate the presence of (unauthorized) migrants. As of July 23, 2007, FIRM had recorded 50 general anti-immigration relief acts, 15 combined employment and housing ordinances, 34 employment ordinances, 14 housing ordinances, 9 English-only ordinances, and 6 specific policing/enforcement ordinances. Only 36 percent of these were actually passed by local councils; most of them were deemed unenforceable or unconstitutional. Even more measures were introduced at the state level. According to the U.S. National Conference of State Legislatures (2007), 1 562 pieces of legislation were proposed in 2007 in relation to education, employment, identification (primarily the driver's license), law enforcement, public benefits, trafficking, legal assistance, and voting reform; 244 of them became law in 46 different states.

grants responsible for all the country's economic and social ills; on the opposing side are those who see unauthorized immigration as the result of foreign and economic policies benefiting U.S. employers and ultimately consumers.

In this article, we examine the concept of "public nuisance" as the foundation of these local anti-immigration ordinances and the particular reference to undocumented immigrants as "public nuisances" in order to criminalize them. We look at the narrative of local anti-immigration ordinances inscribed in the larger federal regime of criminalization and securitization prevalent in recent years in the United States. We observe profound changes and tensions in the legislative enforcement of immigration policy and the numerous mixed signals sent to local authorities wishing to get involved in regulating and curtailing immigration. Immigration has long been viewed as a "broken system." Expanding legislation to create new immigration crimes has further strengthened this image of it as a problem. Local authorities have increasingly felt compelled to enforce immigration control on their territories given the lack of progress in enacting comprehensive immigration reform at the federal level. Proponents of local anti-immigration ordinances have marshalled their authority to regulate and remove the "illegals" around the very construct of this "illegality" and through local police powers to regulate public health and safety and to maintain public peace and welfare.

Municipal anti-immigration ordinances in the United States have used the legally broad concept of "public nuisance" to criminalize the presence of immigrants in public and private spaces of their territories. While localities have the power to abate a public nuisance, the particular rationality of how they have become "empowered and mandated…to abate the nuisance of illegal immigration by diligently prohibiting the acts and policies that facilitate illegal immigration and punishing the people and businesses that aid and abet illegal aliens" (City of Hazelton 2006a) is a socio-legal misconstruction used in many ordinances that has been ruled unconstitutional and preemptive to federal authority. Equating "illegal" immigration to public nuisance has nevertheless boosted anti-immigration sentiments, instilled fear, and created the perception of urgency to do whatever is needed to control, deter, and remove unauthorized immigrants from communities. Our argument is that, despite the almost complete legislative failure of local anti-immigration ordinances, their success in mobilizing support and sustaining anti-immigrant sentiment rests on both the discursive use of public nuisance and the broader criminalizing narrative associated with immigration as risk and security management.

The Broken Immigration System And the Criminalization of Immigrants

Immigration has traditionally come solely under federal jurisdiction but has held a relatively low, marginalized status within the federal bureaucracy until it was prominently brought to the foreground of the domestic security regime after September 11, 2001 (Bigo 2002; Tirman 2004; Coleman 2005). Although immigration

law has traditionally been preoccupied with protecting sovereignty by controlling national borders, its rationality and implementation fluctuated according to foreign relations, labor demands, and discretionary powers. Probably more than in any other sector of the federal administration, the legal culture of immigration has been influenced by past and present currents of nativism and xenophobia, putting further political pressure on a process split between market efficiencies and exclusionist policies (Nevins 2002; Tichenor 2002; Ngai 2004). The conflicted perception of the immigration regime extends automatically to the most concerned, immigrants themselves, who, in accordance with their status, generally lack legal, cultural, and political recognition. Whether authorized or unauthorized, immigrants have customarily been blamed for the shortcomings of immigration policy, economic vibrancy, and national homogeneity. These shortcomings then legitimize the necessity of immigration reforms and immigrant control (Chavez 2008; Newton 2008; Koulish 2010).

Immigration has long been associated with securitization issues to justify sovereignty. In the past few decades, control of immigrants and immigration has linked the sovereignty narrative to a new security and risk-management narrative (Walters 2006, 2008). The 1986 Immigration Reform and Control Act, adopted during the Reagan administration, and the 1990 Immigration Act, passed just afterward, increased sanctions and criminal fines for immigration-related offenses. Partisan lines notwithstanding, the Clinton government adopted both the 1996 Illegal Immigration Reform and Immigrant Responsibilities Act (IIRIRA) and the 1996 Antiterrorism and Effective Death Penalty Act, both of which sought to eliminate judicial reviews, strengthen and expedite removal proceedings, create new federal crimes, and intensify law enforcement.

The disquieting events of September 2001 provided an astonishing opportunity and justification for consolidating the earlier efforts of immigration control reforms as risk and crime management. Anti-terrorism statutes enacted under the Bush government were laden with immigration-related criminalizing provisions, all in the name of national security. Under popular and bi-partisan pressure to secure borders, immigrants were redefined through the lens of national security, leading to preemptive strategies, often with little attention to due process or the rule of law. Among the most penalizing crime-control legislation enacted by the last Bush government, the 2001 Patriot Act provided extensive powers to intercept and detain suspected terrorists; the 2005 Real ID Act increased immigration enforcement and authentication mechanisms; and the 2006 Secure Fence Act sought to control "illegal" immigration by building a wall along the U.S.-Mexican border. Programs related to these legislative initiatives increase immigration-related criminal convictions through the erosion of the judicial process, the expansion of law enforcement and surveillance technologies, and the growth of preventive and indefinite detentions (Kanstroom 2004; Koulish 2010). Unauthorized immigrants were seen as a domestic threat to national security. Although "illegal" immigration is largely a civil offense, such a threat justified the redefinition of immigrants as criminals and terrorists. As Koulish argues,

> Criminalization is a tactic in the war on immigrants. It is a form of social control that uses law and legal culture to ostracize and control segments of the population through a myriad of techniques including surveillance, biometrics, extending the reach of the criminal law, and using civil laws to help criminalize people. (2010, 39)

Conflating civil and criminal immigration law, the new risk-management discourse condemned undocumented entry as a criminal nuisance misdemeanor (rather than a violation of civil immigration law). Such discourse therefore depicts immigrants as criminals who put the nation and society at risk and consequently justifies a range of punitive preemptive measures, such as the unprecedented border wall construction and increased immigration law enforcement on local streets, as the necessary fix for the broken immigration system (Nevins 2002; Newton 2008; Doty 2009; Brown 2010).

Entangled Enforcement of Immigration Law

Civil immigration offenses have been criminalized and other aspects of immigration legislation have created a series of new immigration crimes resulting in unprecedented collaboration between the Department of Justice and the Department of Homeland Security (Tirman 2004; Chishti 2006-2007; Legomsky 2007; Aldana 2007-2008; Koulish 2010). Official cooperation in immigration law enforcement, federally authorized by the 1996 IIRIRA Section 287(g), as well as local enforcement attempts, as in the recent anti-immigration ordinances targeting direct policing or indirect control strategies, have been some of the many ways to expand the securitization and the criminalization of immigration at the local level (Walters 2006, 2008; Coleman 2007; Varsanyi 2008). Legislative proposals, such as the Border Protection, Antiterrorism and Illegal Immigration Control Act of 2005 (SB4437) by Representative Jim Sensenbrenner (R-Wisconsin), although not passed by the U.S. Congress, nevertheless contributed to the punitive and criminalizing climate surrounding immigrants —and in this particular case, also immigration supporters and advocates.

In recent years, immigration law enforcement has expanded from customs and border patrol agents to numerous untrained and unaccountable hands such as detention officers, airline agents, state officials, sheriff's deputies, and local politicians (Walters 2002; Koulish 2010). The problem with this outsourcing of immigration control from the federal level is that it creates the myth that a multitude of actors are suddenly enforcing immigration law, from police to landlords to vigilante groups. It accentuates the risk for harassment and, again, reifies the idea that the immigration system is broken and therefore requires these local and exceptional measures (Newton 2008). While states and localities might have a larger role to play in the management of immigration given their more direct contact with immigrants, the threat of piecemeal immigration policy and inconsistency in enforcement is highly problematic, especially given the discretionary powers and vagaries of legal norms and

processes related to immigration (Campbell 2007; Rodriguez 2008). As a result, it seems like immigration jurisprudence constantly negotiates with, and is negotiated between, the boundaries of law and exception.[2] New actors and tactics of immigration law enforcement have raised many challenges to its constitutionality at the local level.

The U.S. Supreme Court has consistently ruled that the federal government has broad and exclusive power to regulate immigration, even though such power is not expressly drawn from the U.S. Constitution, but from the Constitution's Supremacy Clause. Immigration power is a plenary power authorizing the legislative and executive branches to regulate immigration free of judicial review in order to invoke the federal government's prerogatives over national sovereignty and security. The federal government can therefore decide to enter into agreements with state law enforcement agencies to perform immigration law enforcement functions, as it has done through IIRIRA Section 287(g). The Tenth Amendment of the U.S. Constitution, however, prevents the federal government from compelling a state to enforce federal regulation. Nevertheless, under specific conditions and agreements state and local police might be given "inherent authority" to make arrests in cases of criminal as well as civil immigration law in the narrow yet quite expandable name of security.[3] However, as McKanders clarifies, "Even though the federal government has authorized state and local governments to cooperate with them in enforcing federal immigration laws, the federal government has not enacted laws that give state and local governments full authority to create laws targeting immigrants" (2009, 36). The blurred line between deputizing the enforcement of federal immigration law and proposing new immigration law exceeding the terms of Section 287(g) agreements raises much debate about the inherent power of state and local governments to make arrests for violation of federal immigration law (Keblawi 2003-2004). State and local police can actually only use 287(g) authority when people are already in custody as a result of violating other state or local criminal laws (Koulish 2010).

As states and localities have increasingly sought to enact their own measures to control immigration and ordinances defending their "inherent powers," courts across the country have so far reaffirmed the unconstitutionality of most state and

[2] Plenary powers imply that the federal government can decide how to enforce immigration law. The absence of normal judicial restraint means that the government can justify the criminalization of immigrants because of the security argument or what Giorgio Agamben (2005, 7) describes as the state of exception (i.e., "exceptional circumstances of necessity or emergency"). Koulish rightly states, "Perhaps more than any other field of law, immigration practices occur in the exceptional space where petty sovereigns assert their will upon the bare life of individual immigrants, specifically, the undocumented immigrants" (2010, 27). "Petty sovereigns" is a term borrowed from Judith Butler (2004) to describe the emergent class of control officials and risk managers (see also Bigo 2002).

[3] According to the U.S. Immigration and Customs Enforcement agency, as of October 29, 2010, ICE currently "has 287(g) agreements with 71 law enforcement agencies in 25 states. Since January 2006, the 287(g) program is credited with identifying more than 185 000 potentially removable aliens —mostly at local jails. ICE has trained and certified more than 1 213 state and local officers to enforce immigration law" (2011).

local immigration initiatives that attempted to regulate any aspects of immigration.[4] The widely-known refrain of anti-("illegal") immigration proponents reviling the federal government's incapacity to regulate borders and enforce immigration law is justified in their view given municipal police authority and mandate to protect the general welfare of the people.[5] State and local police power has traditionally encompassed some authority to enforce criminal provisions, but until 1996, civil provisions of immigration were an exclusively federal responsibility. Civil enforcement of immigration law remains contentious terrain. Many state and local police agencies feel that enforcing civil provisions of immigration law clearly exceeds their mandate, training, and resources, and undercuts the last decades' community policing efforts to gain the trust of communities (Harris 2006; Chishti 2006-2007). It also exposes the police force to civil liability since the enforcement of civil provisions of immigration law is greatly misunderstood and can easily result in civil rights violations stemming from racial profiling practices that target "illegal" immigrants —immigration status is, of course, impossible to profile.

The problem with immigration enforcement is that it has been broadly deployed with no consideration for constitutional protections for immigrants. Enforcement agencies have "pretextually relied on the more flexible immigration law enforcement to conduct criminal investigations to also charge persons with non-immigration crimes, including allegations of identity theft, terrorism, and drugs" (Aldana 2007-2008, 1129).[6] Recent years of immigration enforcement clearly reveal that the civil offense of "illegal" entry and the administrative process of deportation are far more often sanctioned than an employer's criminal offenses of hiring undocumented people (Legomsky 2007). Legomsky concludes that the criminal justice system has asymmetrically incorporated criminal justice norms into immigration control without the procedural and substantive rights recognized in criminal cases. As he suggests,

> from a procedural standpoint, this asymmetry leaves policymakers with little political appetite for allowing adjudicative fairness and accuracy to temper cost and efficiency

[4] Numerous state and local measures have been ruled unconstitutional on the basis that they infringed the federal government's exclusive jurisdiction over matters relating to immigration. Among the most notorious cases are the California's 1994 Proposition 187 (Save Our States initiative) that sought to prohibit "illegal" immigrants from using health care, public education, and other social services, and the 2010 Arizona State Bill 1070 (Support Our Law Enforcement and Safe Neighborhoods Act), adopting an "attrition through enforcement" approach and granting Arizona's state and local agencies the power to identify, prosecute, and deport "illegal" immigrants. A federal injunction prevented the law from going into effect. At the municipal level, the most scrutinized and comprehensive anti-"illegal" immigration ordinance was drafted by Hazleton, Pennsylvania. Hazleton's illegal immigration relief act, tenant registration program, and English-only ordinances were adopted in 2006 but, in a verdict long-awaited by other small towns considering Hazleton-like legislation, were ruled unconstitutional.

[5] Anti-(illegal) immigrant proponents turned to the Bybee Immigration Memo of 2002, which finds inherent sovereignty in the state's police power; a state can enforce federal civil immigration law when actions are authorized by state law and not preempted by federal law (Koulish 2010).

[6] Civil and criminal immigration enforcement conflates to the point that detention, once reserved for the most dangerous, is now broadly applied to all removal cases. Immigration detention is currently the fastest growing segment of jail population in the U.S. (McKanders 2009; Koulish 2010).

> concerns. From a substantive standpoint, it leaves them little incentive to balance the government interests in deterring and incapacitating immigration offenders against either the interests of the immigrants themselves or the interests of the U.S. citizen family members, friends, employers, and communities who are left behind. (2007, 473)

Indeed, in recent years, immigrants and their families across the U.S. have lived in fear of arrest in their worksites, neighborhoods, shopping malls, and homes, and of detention and charges of immigration crimes leading to their removal.

Anti-immigrant measures have drawn on exceptions of law; they have enabled an indiscriminate climate of enforcement where people have been targeted, arrested, and detained without probable cause or reasonable suspicion of having committed a crime. They have done so targeting the "illegality" of residents outside established legal and constitutional norms preventing them from identifying the status of immigrants and because they are driven by and further a populist anti-immigrant agenda motivated by NIMBYism and prejudice (Chavez 2008; Newton 2008).

The Ambiguous Success Of Local Anti-immigration Ordinances

Local ordinances are defended as acts resulting from the federal inability to control national borders and efforts to give local and state government (police, department of motor vehicle clerks) and non-government actors (employers, landlords) control powers over "illegal" immigrants' everyday spaces and encounters and apprehend them to force them out of their communities. Conflating immigration control with threats of terrorism, anti-("illegal") immigration ordinances sought to extend the Department of Homeland Security's post-9/11 security regime away from the border, into small towns and neighborhoods (Gilbert 2009).

Based on a common template allegedly prepared and promoted by the Immigration Reform Law Institute, the public-interest legal body of the conservative Federation of Americans for Immigration Reform (FAIR 2007), the adoption of the model ordinance spread quickly across the country and took roots in localities that felt uneasy in the face of the growing presence of immigrants. Local ordinances generally sought to discourage the residency of "illegal" immigrants by declaring English an official language, eradicating gathering places for day laborers, establishing registration policies, forcing landlords to verify potential renters' immigration status, and restricting hiring practices and access of services beyond federal standards. In doing so, they make enforcement agents out of local landlords, employers, municipal clerks, and police, all of whom have had no training in immigration law and no accountability.

In creating new forms of regulation for immigrants, local ordinances blatantly violated constitutional and civil rights, and key cases have been ruled unconstitutional. Their unconstitutionality has been clearly expressed by Judge Munley's ruling in the case of *Lozano v. City of Hazleton* (2007). Because "federal law pre-empts IIRA

[Illegal Immigration Relief Act] and RO [Registration Ordinance]," Munley argues that these ordinances "violate the procedural due process protection of the Fourteenth Amendment of the United States Constitution" and, therefore, that "enacting unconstitutional laws is beyond the defendant's police powers" (191-192). Hazleton was therefore permanently enjoined from enforcing its ordinances by the courts, first in 2007, and again in 2010. Other municipalities have experienced similar legal challenges resulting in the same preemption and unconstitutionality rulings. Despite the public expressions of support for Hazleton-like ordinances, their unconstitutionality has been clearly established and regulatory authority over immigration remains concentrated at the federal level. But the controversy does not end here.

Equally contentious is the discriminatory motive behind local ordinances. Proponents of anti-immigration ordinances (among others, Hazleton's former mayor and now U.S. Representative Lou Barletta [R-Pennsylvania] and Kris W. Kobach, former legal counsel with the Immigration Law Reform Institute and now Kansas secretary of state) "readily admitted that the true goal behind the listed protections is to have immigrants relocate or self-deport" (McKanders 2009, 117). The most vicious aspect of anti-immigration ordinances is the belief that local police authorities can determine who may be legal and "illegal" without prejudice and discrimination, by observing such attributes as race, accent, appearance, or surname profiling. Such a flawed assumption indicates a profound conviction that undocumented immigrants are "illegals" and "criminals" and that constitutional provisions of protection and due process do not apply to those entering or present in the country "illegally." However, in the *Lozano v. City of Hazleton* ruling, Judge Munley unambiguously insisted that people unlawfully entering or present in the country are guaranteed due process of law by the Fifth and Fourteenth Amendments.

> We cannot say clearly enough that persons who enter this country without legal authorization are not stripped immediately of all their rights because of this single act. The Fourteenth Amendment of the United States Constitution provides that no State may "deprive any person of life, liberty or property, without due process of law; nor deny any person within its jurisdiction with the equal protection of the laws."…The United States Supreme Court has consistently interpreted this provision to apply to all people present in the United States, whether they were born here, immigrated here through legal means, or violated federal law to enter the country. (*Lozano v. City of Hazleton* 2007, 43-45)

In his conclusion, Judge Munley goes even further by suggesting that the crisis of perception of "illegality" experienced by Hazleton has no bearing on the constitutional provisions of due process and equal protection. He states,

> Whatever frustrations officials of the City of Hazleton may feel about the current state of federal immigration enforcement, the nature of the political system in the United States prohibits the City from enacting ordinances that disrupt a carefully drawn federal statutory scheme. Even if federal law did not conflict with Hazleton's measures,

> the City could not enact the ordinances that violates rights the Constitution guarantees to every person in the United States, whether legal resident or not….Hazleton, in its zeal to control the presence of a group deemed undesirable, violated the right of such people, as well as others within the community. (*Lozano v. City of Hazleton* 2007, 188-189)

Nevertheless, local governments used their political power to challenge federal regulation and to legitimize their ambitions by capitalizing on a climate of national insecurity in order to build consensus in the extremely contentious "illegality" debate. Beyond the constitutional argument, the discriminatory motive underlying the ordinances was promoted by local politicians who seized political opportunities to fast-track political careers in the name of morality and patriotism. Politicians' obsession with "illegal status" was refuted by court rulings, but nevertheless prevailed in sustaining and furthering the anti-"illegal" immigration sentiment. Such sentiment criminalizing a vulnerable segment of the population was supported by a strong current of populism, nativism, and neoconservatism fed by mainstream and conservative media. According to Newton, "Political elites rely on emotion in justifying political choices; they employ stories that are instinctually appealing to their audiences, packing them with language and symbols that tap into widely understood notions of who and what comprises the American immigrant experience" (2008, 3).

Oscillating between the discourses of security threat and economic scapegoating, the narratives of "illegality" and criminality continue to add confusion to the "broken federal immigration policy" discourse and to the entangled relationships of immigration enforcement. Meanwhile, in the complementary narratives of fear and urgency about reforming the so-called broken system, preemptive immigration law enforcement finds political and public support, and therefore means that exceptions and abuses will likely occur, be tolerated and, even more problematically, be rationalized through law (McKanders 2009; Koulish 2010). Central to this hortatory language of local politicians and local policies is the construction of immigrants and their practices as a public nuisance.

"Illegal" Immigration as Public Nuisance

Public nuisance has been used preemptively as the operative foundation of local anti-immigration ordinances. The legal concept of "nuisance" has traditionally been used to describe the activity or condition that unreasonably harms, annoys, or interferes with the rights of individuals (private nuisance) or with the rights of the general public (public nuisance). A nuisance is controlled by local police powers derived from a fundamental role of government (authorized by the Tenth Amendment of the U.S. Constitution) to regulate public health, safety, and welfare. The common law concept of nuisance deals with violations of common interests after they occur, such as the already-operating factory that contaminates a neighbor-

hood's air, soil, or water. In such a case, neighbors can demand the abatement of a nuisance that inhibits their health, safety, and welfare. A police agency or court would then make a judgment in the particular case as to whether or not a nuisance exists (and a tort or breach of duty has been committed). Nuisance *in fact* always requires proof of the act and its consequences; and its outcome, if any, will be compensatory rather than a solution to the problem. Municipal corporations also have the right and responsibility under the police power to adopt regulations to limit the uses and occupations either considered nuisances *per se* or that tend to become nuisances in certain situations and conditions.[7]

Legal scholars have described public nuisance as an "impenetrable jungle" and a "legal garbage can" full of "vagueness, uncertainty, and confusion" and "notoriously contingent and unsummarizable" (quoted in Faulk and Gray 2007). The concept nevertheless provides a flexible judicial tool to address conflict in land use and social welfare and to prove substantial interference. Although the principle has since been replaced by more precise legislation, governmental authorities generally used public nuisance to stop conduct that was considered quasi-criminal because, although not strictly illegal, it was deemed potentially harmful to the general public's peace, comfort, and morals (Faulk and Gray 2007). Moreover, police power is the most comprehensive of government powers, but also the vaguest, as the precise components and definitions of public health, safety, and welfare are not unanimous and fixed; rather they vary according to the social, economic, and political conditions of a place. Thus, the determination of nuisance as serious crime or simple annoyance is not only difficult to establish but also requires proof of wrongdoing and consequent harm.

Anti-immigrant local politicians have legitimized their control-oriented actions by using their police power authority "to abate public nuisances…and…to abate the nuisance of illegal immigration by diligently prohibiting the acts and policies to facilitate illegal immigration" (City of Hazleton 2006a). Proponents of anti-immigration ordinances translate "illegal" presence in the country into criminal presence within their town boundaries. As perceived criminals, immigrants are seen as illegitimate members of local communities who are undeserving of social benefits and protections.

"Illegal" immigration as a whole and "illegal" immigrants more specifically are understood as a "public nuisance," a perceived aggravation and threat to the local quality of life and neighborhoods. Embedded in the "illegal" and nuisance narratives are the explicit collective beliefs and affirmations that legitimate members of society are victimized by the presence of criminals among them. In anti-immigrant sentiment and, in the texts of ordinances, the annoyance and menace of "illegal" immigrant others legitimize arrests and deportations because undocumented immigrants are not authorized to be in the country. By using the concept of public nui-

[7] In 2009, the City of Hazleton developed and adopted "Chronic Nuisance Properties, providing a new process for enforcement and abatement of certain nuisance activities that repeatedly occur or exist at chronic nuisance properties within the confines of the city" (City of Hazleton 2009).

sance, local advocates for tightening U.S. immigration laws evoke local police powers to control, deter, and repel immigrants from their jurisdictions.

The particular use of the nuisance rhetoric in anti-immigration ordinances responds to a series of unsubstantiated assumptions (expressed in the preamble sections) contending that "illegal immigration leads to higher crime rates, subjects our hospitals to fiscal hardship and legal residents to substandard quality of care, contributes to other burdens on public services, increasing their cost and decreasing their availability to legal residents, and diminishes our overall quality of life" (City of Hazleton 2006a). The initial use of the concept of nuisance in immigrant-related ordinances might actually be linked to the control of day laborers in an early —and rejected— ordinance in San Bernardino, California (prepared by Joseph Turner of Save Our State in 2006). In that particular ordinance, "illegal" immigration, people driving any vehicle used to solicit day laborers, as well as the vehicle itself, are declared a nuisance (Turner 2006). Although targeting the use of property, the proposal seems better intended for the eradication of day laborers' presence by criminalizing both immigrants and employers, and more broadly the regulation of public space. Other increased social controls in public space ordinances have also been unsuccessfully linked to immigration.

In fact, anti-immigration ordinances are reminiscent of past attempts by local police to regulate disorder by enforcing criminalizing laws for vagrancy, loitering, panhandling, and homelessness through property regulation tools like zoning laws. When recent anti-immigration ordinances specifically attempted to control the presence of immigrants by using trespassing laws, courts ruled that criminal trespassing charges were unconstitutional attempts at regulating immigration (Varsanyi 2008). The use of trespassing laws was seen as just another disingenuous strategy to regulate "undesirable" persons or activities.

The use of "public nuisance" to refer to undocumented immigrants is, however, misleading. The legal concept of public nuisance cannot be used preemptively. Nuisance is usually determined after the fact and requires proof of harm. In the case of local anti-immigration ordinances qualifying "illegal" immigration as public nuisance, proof of harmful conduct and consequent harm of the perceived negative impacts of immigrants is merely impossible as it would require proof that "illegal" immigrants have offended the rights of the public at large. As confident as they are, anti-("illegal") immigration proponents are rather equivocal in their proof of harm. In the case of Hazleton, the mayor clearly admitted he did not have data substantiating his claims but insisted that the claims were simply well-known facts (McKanders 2009). Such threat and truth narratives become pervasive and work particularly well because the basic premises are taken for granted (Chavez 2008).

Moreover, in his work on the control of misconduct in city spaces, Ellickson asserts that nuisance can only be created by acts, and not by status. He writes, "Both classical-liberal ideals and the Constitution demand that the law of street nuisances regulate a person's choices, not some unalterable status. In particular, it is impermissible to criminalize either the status of poverty or the status of homelessness" (1996, 1186-1187). Rationalizing "illegal" immigration as a nuisance is

therefore highly problematic because it promotes a discriminatory "public interest" that criminalizes a particular group with immigrant traits (however defined and identified) not for any breach of local ordinances, but rather for their mere presence in the urban setting. The latter point takes us back to the disguised and unconstitutional attempt to regulation immigration locally.

The spirit of local anti-immigrant ordinances that make it "illegal" for undocumented immigrants to loiter in public spaces, occupy housing, or secure employment goes against the Fourth Amendment (curtailing abuses of policing powers) because it attempts to justify their arrest (often without reasonable suspicion or probable cause) in public, quasi-private, and private spaces because their constructed "illegality" makes them neither deserving nor reasonably expectant of the protection of their privacy (Aldana 2007-2008). Local anti-immigration ordinances and their associated registration programs offer neither due process nor due protection (and some would argue privacy and confidentiality of the gathered information) and therefore increase the likelihood of people being subjected to excessive searches by private and public officials. Though recent appellate court decisions have found that anti-immigrant statutes are a violation of the application of police power, the use of "public nuisance" in anti-immigration ordinances continues and conflates criminal and civil violations, national and local sovereignties, preemptive security and anti-immigrant discrimination. Equating "illegal" immigration and nuisance is motivated by the politics of exclusion and oppression.

It is also important to note that in many cases, local police do not wish to become involved in immigration enforcement because it is counterproductive to police work and threatens the efforts of community policing. The mandate of the local police force is to prevent criminal acts rather than civil violations of immigration law. The level of discretion associated with enforcing civil offenses leads policing agencies to abuse, discrimination, and profiling. Discretionary police powers might serve as a bridge (as in community policing), but might also serve as a wall (with deep foundations in discrimination). Sossin identifies three types of discretion: legal (authority to determine); interpretive (accountability of meanings); and communicative (modes of interactions and engagement) (1996). It is particularly because of these discretionary latitudes that police power must be subjected to constitutional rights in order to protect people. The Fourth Amendment of the U.S. Constitution curtails abuses of policing powers (particularly against vulnerable people), and such protection applies to non-citizens despite the regulatory expansion of immigration enforcement into everyday spaces and practices. In the face of such protection and the often vague and ambiguous definition of nuisance and extended police power, the courts have imposed liability on a wide variety of activities and conducts deemed to violate public health, safety, and welfare. Historically, the concept was used to condemn socially undesirable forms of behavior and alleged misconduct to protect public interest, health, safety, and morality (Keetin 1984 and Wood 1893, quoted in Faulk and Gray 2007). Nowadays, local police are asked to conduct immigration enforcement in the name of national security, even though immigration control has in fact very little to do with terrorism prevention (Harris

2006; Keblawi 2004; Koulish 2010). Still, the oversimplified message linking immigration to "illegality," criminality, and national security continues to gain much support among anti-immigration and conservative forces (Chavez 2008; Newton 2008; Doty 2009).

Conclusion

Immigration is a complex issue with contentious social, political, and economic implications, of which law enforcement is presented as the most apparent in the current debate. Immigration was nevertheless always subjected to legislative ambivalence and judicial lassitude, making it a perfect conduit to fully advance a post-September 11 security regime. Rationalizing the urgency to fix the "broken immigration system," congressional and local anti-("illegal") immigration proponents were able to develop policy measures that exploited the pervasive anti-immigrant sentiment. Undocumented immigrants were no longer seen just as undesirable; their presence in the U.S. was described by anti-immigrant proponents as "illegal," who argued that such "illegality" meant that a crime had been committed against the nation and that this crime warranted arrest and deportation. How "illegality" is constructed is a contentious debate in and beyond the rule of law, but it remains one of the most powerful myths surrounding immigration.

With the increasing presence of undocumented immigrants throughout the country, and the federal government's persistent inability to control and reform immigration policy, numerous local governments "took the law into their own hands" with anti-("illegal") immigration ordinances that sought to regulate immigration in their territories. With the goal of punishing and eliminating the crime of "illegal" immigration, local anti-immigration ordinances represented the impacts of "illegal" immigration as public nuisances to be abated. However, as Rose reminds us, "programs of crime control have always had less to do with control of crime than they have to do with more general concerns with the government of moral order" (2000, 321). This is most evident in local anti-immigration ordinances that have alleged the depletion of resources and services as a rationale for passing (unconstitutional) laws that apply the vague legal concept of public nuisance to certain immigrants to discourage them from entering and residing in a given locality. These ordinances successfully remind us that immigration continues to be about "who we are as people and who we wish to include as part of the nation" (Chavez 2008, 23).

Local anti-immigration ordinances, despite their constitutional failures in court, have been able to extend the discourses of preemptive criminalization and enforcement. They have done so by using the legally broad concept of public nuisance to regulate crime, annoyance, and inconvenience in which they found rhetorical and emotional comfort. However, ordinances failed to reasonably demonstrate that the "illegality" of some residents is indeed an offense to the public at large. The impossibility of linking "illegal" presence or entry to harmful intent and proving that a tort has been committed refutes the premise of nuisance. In disguising their

intent to regulate "illegal" immigration under the concept of public nuisance, ordinances propose to use nuisance and police power preemptively when the enforceability of this law is customarily reactive.

Local anti-immigration ordinances can nevertheless be seen as powerful events that publicize the perceived untenable state of immigration, the alleged crimes committed by undocumented immigrants, and the urgency of reforming immigration policy. Local ordinances have not only been instrumental in spreading the immigration debate to local communities throughout the U.S.; they have intensified that debate by reaching out to conservative and general patriotic emotions reifying the construct of "illegality," and therefore justifying the need for protection against it.

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