

Francisca Garfia

The Creation of Criminality in DACA and DAPA Beneficiaries

One of the most controversial and divisive issues in current American politics is immigration, especially with regard to the millions of undocumented immigrants from Latin America living in the United States. To combat this problem, on November 20, 2014, President Barack Obama announced executive actions that would potentially legalize around 4 million of the 11 million undocumented individuals currently living in the United States (Texas v. The United States 2014, 3). DAPA (Deferred Action for Parents of Americans) would have legalized undocumented guardians of United States citizens and legal residents, while DACA 2.0 (Deferred Action for Childhood Arrivals) would have expanded upon the 2012 measure, which legalized those who were brought into the United States as children (Texas v. The United States 2014, 2). However, these programs were halted before their implementation due to a federal lawsuit: Texas v. United States. The plaintiffs, Texas and twenty-two other states concentrated in the American Southeast, claimed an unconstitutional exercise of power by the President, and “dramatic and irreparable injuries” to their state economies and citizens if millions of immigrants were legalized (Texas v. The United States 2014, 2-3). However, this lawsuit is more than an argument against presidential agency and the protection of states’ rights. It is a defense for the criminalization of undocumented immigrants and acts to maintain these populations as cheap sources of labor, scapegoats, and to combat white nativist fears of the Hispanicization of the United States.

In Susan Bibler Coutin’s piece, “Contesting Criminality: Illegal Immigration and the Spatialization of Legality,” criminality is created through social exclusion of deviants and by stripping them of rights and benefits, forcing them to live in the margins of society in a criminalized sphere (Coutin 2005, 6). As such, criminality becomes a condition of an

individual's being, instead of their actions, making their very existence illegal (Coutin 2005, 7). In order to delegitimize the DACA/DAPA measures and their beneficiaries, criminality is employed by the plaintiffs in the Texas v. The United States' argument. Beyond the claim that these immigrants are criminals who will actively encourage immorality due to their breaking of laws and bringing of cartel violence upon white Americans, the very status of immigrants as illegal is attacked as being morally reprehensible (Texas v. The United States 2014, 10-25).

Texas begins the argument by presenting themselves as preventers of future humanitarian crises, deploying a "risk management" strategy. Coutin defines this strategy as the government's attempting to "manage" deviant populations instead of enacting social and legal reform (Coutin 2005, 7). Such a strategy allows the government to evade the responsibility to enact legal reform, and shifts blame onto immigrants for being "criminals." The plaintiffs argue that these policies encourage international child smuggling on the Texas-Mexico Border, citing the Nava-Martinez Order in which a ten-year-old Salvadorian girl was smuggled into the United States to be reunited with her mother (Texas v. The United States 2014, 10). As Anita Ortiz Maddali points out, the expansion of the definition of deportable crimes has increased moral attacks on undocumented Central American parents as legal arguments for deportation (Maddali 2014, 677). She cites the portrayal of an undocumented father during his termination proceeding; the opposition argues he is: "abusive or neglectful of his child because he is an illegal alien who is in danger of being arrested every time he walks out the door" (Maddali 2014, 641). Texas' conflation of undocumented parenthood with immorality presents these parents as unfit and selfish for forcing their children to endure such trauma. This conflation makes it easier to condemn undocumented parents as criminals for the purported moral crime they are committing against their children. It is as if the very state of being an undocumented parent is criminal. Through this argument, the plaintiffs create criminality by portraying themselves as protectors of children and family values, and by presenting undocumented parents as detrimental to society.

While the plaintiffs use a risk management strategy to emphasize the necessity of deterring illegal immigration to curb criminality, there is also an implied fear that the crossing of entire families and young children might be a threat to the “national culture” (DeGenova 2005, 237).

DeGenova briefly explains nativist white Americans’ fears that “uncontrolled immigration” will bring an unassimilated, separatist population and pose a threat to the white majority culture (DeGenova 2005, 237). According to DeGenova, a large and unified cultural group like the Hispanic population can undertake the “Reconquista” of the American Southwest (ibid). This fear is fueled by the fact that Hispanics will soon outnumber white Americans and might have access to political power to overthrow systems of stratification (Pew Research Center 2015). These nativist fears spur such political backlash from white conservative lawmakers as can be seen in this lawsuit. Examples of such systems of stratification include the fact that white Americans who hire undocumented laborers are exonerated for their crimes while immigrants face deportation and criminalization. White Americans have much to lose if the Hispanic voice is heard politically. As such, this attack upon DACA 2.0 and DAPA is an attempt to preserve the white hegemony that affords whites sociopolitical power. It is important to notice that this lawsuit does not attack the original 2012 DACA despite the expansion being similar except for the DACA age cap of 31 (applicants cannot be older than 31 in 2012) meaning those who arrived after June 15, 2012 are ineligible for citizenship. As a result, older immigrants, who are likely to be parents of American citizens, continue to be criminalized and new immigrants are discouraged from supporting and seeking political reform in fear of deportation. However, under DACA 2.0 undocumented immigrants who are older than 31 or arrived in the summer of 2014, estimated at 90,000 persons, would be able to apply to DACA 2.0 and DAPA for legal status (Texas v. The United States 2014, 11). Under the protection of DACA and DAPA, the threat of deportation is eliminated and the resulting shift of illegal presence and illicit labor to a lawful setting allows these families to become legally integrated into the United States. As described in

American school system, being treated by American health care, and being “woven into the American fabric” (Texas v. The United States 2014, 22). Texas’ implicit argument against these policies is for the protection of white America and to prevent the Hispanicization of the United States. Therefore, to stop the threat of “Hispanization,” these lawmakers conflate the very being of these undocumented immigrants with criminality and use that to justify the relentless attack on progressive immigration reform.

To further emphasize the detrimental effects the DACA 2.0 and DAPA policies would have upon the United States, the plaintiffs claim that legalization of millions of immigrants would be economically crippling. They cite the 2014 humanitarian border crisis during which extra reinforcements were necessary to patrol the border, resulting in an additional \$38 million cost (Texas v. The United States 2014, 12-13). Moreover they state that the legalization of undocumented immigrants places an economic strain upon social resources, as well as the processing and issuing of work permits, licenses, and benefits (Coutin 2005, 26). However, Coutin and DeGenova highlight that the discretionary use of undocumented labor is tolerated because criminalization and threat of deportation create a cheap and vulnerable labor pool that benefits certain industries (Texas v. The United States 2014, 13). As such, undocumented individuals may be tolerated as long as they contribute to the United States economy with the exploitation of their labor. With the implementation of DAPA and the expansion of DACA, the “deportability” of these individuals ceases to exist as well as their labor as a “disposable commodity” (Coutin 2005, 8). Since work permits would legally protect them, immigrants would be more willing to unionize and defend their rights to humane workplace conditions. Furthermore, American business managers would be unable to reap the benefits of cheap labor, and a scared workforce that obeys out of threats of deportation. These business managers would also need to provide the same benefits for immigrants they do for American citizens. Additionally, this lawsuit neglects to mention the processing fees immigrants must pay to be

and must be renewed every two years (Center for American Progress 2015). These processing fees benefit the economy, as more individuals need to be employed to handle the influx of applications. Moreover, The Center for American Progress has examined the economic effects of the 2012 DACA executive order and found that states saw gains in cumulative gross domestic product (GDP) and increases in income and employment (ibid). The idea that undocumented immigrants leech money from the United States government is a way to further demonize this population. As pointed out by The Center for American Progress, legal reform has the potential to increase GDP, income, and job opportunity. However, this narrative contradicts the image conjured by *Texas v. The United States* that undocumented immigrants are a drain for American resources. Therefore, the plaintiff's argument on economic imbalance refers to the loss of a scared and exploitable source of labor, rather than the costs mentioned by the plaintiff.

The *Texas v. The United States* lawsuit has the power to define the United States' immigration policy as well as set limits upon the executive branch. Officially, the plaintiff's argument is that this lawsuit is not about immigration but rather that it is about "the rule of law, presidential power, and the structural limits of the constitution" (*Texas v. The United States* 2014, 3). However, with the implementation of DAPA/DACA 2.0, the population the plaintiff states represent stands to lose economic, cultural, and social standing. As such, the undocumented immigrant community is criminalized through an attack of their morality, cultural legacy, and economic impact. Currently, this lawsuit is being contested in the Supreme Court after being debated in the Fifth Circuit. On November 9, 2015 the Fifth Circuit Court in a 2-1 majority affirmed the preliminary injunction, prompting an appeal to the Supreme Court on November 20, 2015.

Addendum August 2017

Since the writing of this article in 2015, the future of DACA 2.0/DAPA has become even more uncertain and the criminalization of beneficiaries has intensified. After the Fifth Circuit Court affirmed the initial decision of *United States v. Texas*, the lawsuit went to an appeal at the Supreme Court level. On April 18, 2016 the US Supreme Court heard oral arguments in the case of *United States v. Texas* and on June 23, 2016 a 4-4 split decision left in place the ruling of the Fifth Circuit Court (CitizenPath 2017). This tie effectively halted all progress on DAPA and expanded DACA programs during the Obama administration, and placed it in the hands of the next administration.

As a result, with the election of Donald Trump, the future of DACA, DACA 2.0, and DAPA programs are in even more jeopardy due to the criminalizing rhetoric that drove President Trump's campaign. By launching his campaign with "When Mexico sends its people, they're not sending their best [...] They're bringing crime. They're rapists. And some, I assume, are good people," as well as rationalizing mass deportation of undocumented immigrants through the phrase "bad hombres," Donald Trump and his administration have championed the criminalization of immigrants (Ross 2016). Because of these statements, the rhetoric used to describe undocumented immigrants in the *Texas v. United States* lawsuit was amplified through the man that would eventually become the nation's president. The normalization of such rhetoric has then bolstered new attacks upon the original DACA executive order with a new lawsuit led by Texas Attorney General Ken Paxton (Bernal 2017). Unless the White House or Justice Department decides to defend the program or rescind it by September 5, 2017, the case will go to United States District Judge Andrew Hannon's court which could be the demise of a program that has benefited 800,000 people (Bernal 2017). Through these events it is possible to recognize the power of such criminalizing language that invites attack upon the immigrant community by constructing them as threats to America. The language used by the entities that drafted the *Texas*

v. United States lawsuit reflects the current national climate against undocumented immigrants, which seeks to strip them from their humanity and recast them as simply “bad hombres.”

Bibliography

Center for American Progress. 2015. "State-by-State Analysis of the Economic Impact of DACA, DAPA, and the DACA Expansion" Last modified June 15.

<https://www.americanprogress.org/issues/immigration/news/2015/06/15/114894/state-by-state-analysis-of-the-economic-impact-of-daca-dapa-and-daca-expansion/>

Coutin, Susan Bibler. 2005. "Contesting Criminality: Illegal Immigration and the Spatialization of Legality" *Theoretical Criminality* 9 (1): 5-33 DOI: 10.1177/1362480605046658

De Genova, Nicolas. 2005. "The Legal Production of Mexican/Migrant Illegality" in *Working the Boundaries: Race, Space, and "Illegality" in Mexican Chicago* (Durham: Duke University Press), 213-249

Maddali, Anna Ortiz. 2014. "The Immigrant "Other": Racialized Identity and the Devaluation of Immigrant Family Relations" In *Indiana Law Journal*. 89: 643-702

Pew Research Center Hispanic Trends, 2015. "Modern Immigration Wave Brings 59 Million to US, Driving Population Growth and Change through 2065" Last Modified September 28.

<http://www.pewhispanic.org/2015/09/28/modern-immigration-wave-brings-59-million-to-u-s-driving-population-growth-and-change-through-2065/>

Ross, Janell. 2016. "From Mexican Rapists to Bad Hombres, the Trump Campaign in Two Moments" Last modified October 20. https://www.washingtonpost.com/news/the-fix/wp/2016/10/20/from-mexican-rapists-to-bad-hombres-the-trump-campaign-in-two-moments/?utm_term=.302e1bc862e7

Texas v. The United States. 1:14-cv254 Office of the Attorney General of Texas 2 (2014)

<https://www.texasattorneygeneral.gov/files/epress/files/ImmigrationStatesFirstAmendedLawsuit12092014.pdf>

CitizenPath. 2017. "United States v. Texas: The Case for DAPA and Expanded DACA" Last Modified June 6. <https://citizenpath.com/dapa-expanded-daca-status/>

USCIS. 2016. "I-821D, Consideration of Deferred Action for Childhood Arrivals." Last modified March 9. <https://www.uscis.gov/i-821d>