Criminal Law's Borders

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Mona Lynch, *Backpacking the Border: The Intersection of Drug and Immigration Prosecutions in a High Volume U.S. Court*, 57 **Brit. J. Criminol.** 112 (2015).

When a sanction as massive and punitive as deportation is triggered by a criminal sentence, it is all but inevitable that the system responsible for processing and administering the criminal sentence will be transformed by its proximity to this substantial "collateral" effect. Mona Lynch's *Backpacking the Border: The Intersection of Drug and Immigration Prosecutions in a High Volume U.S. Court*, provides new and important insights into the nature and degree of this transformative effect. In her *Backpacking* article, she illustrates how drug prosecutions in one high-volume U.S. district court along the southern border have ceased to be driven by the presumptive goal of deterring and punishing drug crimes at all; instead, they operate almost entirely in the service of migration control objectives. "[I]mmigration policy has become so criminalized here that the immigrant status rather than criminal status of the defendants in drug cases drives the adjudicatory logics and practices." (P. 5.)

Lynch's article is the product of a comparative qualitative field research study that she conducted in four federal district court jurisdictions around the United States. She conducted in-depth interviews and engaged in direct observation of court proceedings, "supplemented by analysis of social artifacts and secondary source data." (P. 5.) Her particular interest was finding out how drug cases are selected and adjudicated in the federal court system, and her focus was on legal process rather than legal outcomes. By analyzing four distinct jurisdictions, she hoped to see how local courtroom actors in distinct contexts "conceptualize and shape outcomes." *Id.* This particular paper draws from her work in "the Southwestern district," which is one of the highest-volume federal district courts in the country, which has a caseload of primarily drug and immigration crimes. While she noted local variations in all four of the districts she studied, "all three of the non-border districts had modes of adjudicating cases that bore resemblance to each other and that diverged considerably from" the southwestern border district that she studied. (P. 6.)

In other districts, drug dealing was the trigger for federal intervention, including in cases involving small, street-level distribution—cases that might seem like better fits for state courts. In her two more urban districts, "those targeted for prosecution have primarily been young men of color who come from select highly policed minority neighborhoods. Even the rural district has had episodes of low-level drug law enforcement sweeps headed up by multi-jurisdictional task forces." (P. 6.) In all three districts, prosecution is animated by a stated desire to take aim at drug trafficking offenses. "[D]rug cases were drug cases." (P. 6.)

In contrast, in the southwestern district, drug cases were immigration cases. And there were lots of them. The district she studied processed nearly 6,600 non-petty criminal convictions in 2014, and 87% of those were for immigration or drug crimes. (P. 7.) Eighty percent of those convicted are foreign nationals. Lynch describes two possible routes to adjudication in this high-volume setting: mass-processing and individualized adjudication. In the mass-processed mode, defendants generally are charged with a "mixed complaint" that includes felony and misdemeanor charges. The defendant is offered a deal that will allow him to plead to the lesser charge with a sentence of less than 360 days in exchange for a guilty plea and waiver of sentencing procedures. Those who decline are individually processed and misdemeanor plea opportunities are taken off the table. *Id.* Lynch's article provides a textured discussion of the workings of "flip flop" court in this district, (Pp. 9-11) as well as the individualized sentencing model that is used in the alternative. (Pp. 11-13.)

Given the patterns in other districts, one might expect that the misdemeanor plea options would be extended in cases

involving individuals carrying small amount of drugs for apparent personal use. It almost certainly would not apply to individuals carrying up to 100 kilograms of marijuana across the border. Those individuals fit into the drug trafficking frame that appears likely to trigger federal felony prosecution in the other districts Lynch studied. But over the period from 2012 through 2013, the U.S. Attorneys in the southwestern district set a ceiling on the number of backpacking cases that could be processed as felonies, meaning that many such cases are sent to flip flop court, and a "backpacker" with up to 100 kilos of marijuana could be prosecuted as a misdemeanant. As Lynch tells us, "these defendants become part of a mass of unauthorized border-crossers who happened to be carrying backpacks of marijuana, and the imperative driving their criminal adjudication is swift and efficient resolution to get them out of the system and out of the country." (P. 9.) Processing and sentencing in their cases (generally resulting in sentences between 60 and 240 days) were largely indistinguishable from the processing and sentencing of non-backpackers charged with misdemeanor illegal entry, who generally received sentences of around 180 days. The fast-track processing of drug offenses has generated a huge spike of drug convictions in the district. "This district's possession convictions, alone, accounted for 83 per cent of the nation's federal drug possession convictions." (P. 9.)

Those who proceed to individualized sentencing, either because they refuse to take the misdemeanor plea or are not given that option, experience more traditional criminal processes, including full sentencing proceedings. This is true for both drug couriers and for individuals charged with felony illegal re-entry (as opposed to first-time entry misdemeanants.) Lynch provides detailed accounts about how those cases are processed and about the fast-track sentences that defendants typically receive in both kinds of cases. She observes that "the ironic effect of the sorting process in this system, in that for both sets of defendants—the drug couriers and the illegal re-entrants—the more rooted they had been in the United States portends a much more punitive response." (P. 14.) Family and community ties become a reason to give harsher sentences, purportedly in order to better deter, rather than a reason to treat a defendant less harshly. Or as Lynch concisely puts it, "assimilation, which should mitigate treatment by the court, is indeed an aggravator." (P. 17.) The system shows little interest in individual equities, and instead focuses on creating efficient territorial exclusion through criminal adjudication.

In one notable section of the paper, Lynch writes about two individualized "fast-track" plea adjudications she observed. The first was for a middle-aged returning migrant charged with an enhanced felony re-entry charge—enhanced because of a prior record of removal for an aggravated felony. The sentencing guidelines range for the offense was 57-71 months, and the prosecutor sought 42 months, largely because the defendant's family ties generated a risk that he would "re-offend" by trying to return to them. The defendant was ultimately sentenced to 54 months plus three years "supervised release," although it was all but inevitable that he would be deported before serving the supervision period. The second case involved a drug courier who also had a prior history of drug offenses. The sentencing guidelines range was 188-235 months (130-162 months for fast-track). Both prosecutor and defense counsel expressed concern at the extreme length of the sentence. The judge sentenced him to 63 months on the new conviction, and six months to be served consecutively for the violation of the conditions of a previous sentence. The judges added a term of four years supervised release to follow the incarceration. As Lynch observes, "the defendant's past record in the United States set the stage for the present in the form of a sentence more than 11 times longer than his peer backpackers. And it once again paved a new future whereby any further official encounter in the United States would expose [the defendant] to the potential of life in prison." (P. 16.) Notably, there is little difference in the sentences of the drug offender and the felony reentry defendant. The central focus in both cases was on establishing the triggering conditions for harsh future consequences for illegal re-entry.

Lynch's conclusion harkens back to a prediction made by Anil Kalhan over a decade ago that what we are seeing is not so much the criminalization of immigration as an "immigrationization" of other laws and legal practices.[1] Indeed, Lynch uses that very term to describe what has happened to adjudication in the southern border district. (P.17.) The central logic of all southern border prosecution is to deter the return of excludable outsiders—and this is true whether there are drugs involved or not, and whether the individual has strong ties to our community or not. Sentences are structured to foster particular immigration consequences that will be triggered by return and "the creative use of supervised release terms for defendants who will never likely be released on U.S. soil hammers home the system's goal of deterring reentry." (P.17.) In flip flop adjudications, processes and sentences for all defendants looked essentially the same

regardless of the presence or absence of drugs, and the only people who are, in fact, treated differently are those who resist pleading guilty. The compelling reasons that drive people to migrate and commit other offenses are obscured as individuals are efficiently processed.

For the past twenty years in the United States, scholars working at the intersection of criminal law and immigration law have documented the effects that two substantial bodies of law—criminal law and immigration law—have on one another as they are drawn substantially and unevenly into each others' orbits. The back-end collateral sanction of deportation (or "removal" to use the technical term) has an impact on whether and how criminal procedural protections operate in the context of policing, both on the streets and in the jails.[2] It can influence county officials' bail determinations and decision-making about access to diversionary programs.[3] It can constrain and reshape plea negotiations, ultimately setting the stage for differential punishment.[4] It can incentivize new forms of criminal prosecutions.[5] It may help to explain the significant citizenship penalty in criminal sentencing.[6]

Lynch now shows us that immigration logic can completely displace the logic of the substantive criminal law at issue in a criminal proceeding. This does indeed look like the "immigrationization" of criminal procedure. But perhaps it is not uniquely emblematic of "crimmigration." It appears of a piece with the streamlined administration of punishment that is occurring across legal domains in the adjudication of the rights of liminal legal subjects, where punishment is deployed as little more than an efficient method of managing racialized populations deemed risky.[7] *Backpacking the Border* gives a vivid sense of the new frontier, where the criminal justice system is used to manage the perceived risks posed by human beings deemed unwanted or undesirable.

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1. *Immigration Enforcement and Federalism After September 11*, Remarks at Symposium on Immigration, Integration, and Human Security Issues Post-9/11 in Comparative Perspective, Fondation Nationale des Sciences Politiques, Paris, France, June 9, 2006. Kalhan has highlighted the increasing salience of immigration status across legal contexts in a variety of later works. *See*, *e.g.*, Anil Kalhan, *Immigration Surveillance*, 74 **Maryland L. Rev.** 1, 64-70. (2014). [?]

2. See, e.g., Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 **Duke L.J.** 1563, 1607 (2010) [hereinafter Chacón, *A Diversion*] (contesting the sufficiency of the legal incentive structure to check excesses in policing of immigrant communities). [?]

3. Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 **N.Y.U. L. Rev.** 1126, 1129–31 (2013). [?]

4. Indeed, the Supreme Court has suggested that it should be a central consideration in plea bargaining. "By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties." *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010). [?]

5. *See*, *e.g.*, Jennifer M. Chacón, *Tensions and Trade-offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 **U. Pa. L. Rev**. 1609 (2010) (identifying state human trafficking prosecutions as state-level immigration control efforts); Ingrid V. Eagly, *Local Immigration Prosecution: A Study of Arizona Before SB 1070*, 58 **UCLA L. Rev.** 1749 (2011) (identity alien smuggling prosecutions as state-level immigration control efforts). [?]

6. On the citizenship penality, see Michael T. Light, et al., *Citizenship and Punishment: The Salience of National Membership in U.S. Criminal Courts*, 79 **Am. Soc. Rev.** 825 (2014). [?]

7. Jennifer M. Chacón, *Producing Liminal Legality*, 92 **Denver L. Rev.** (forthcoming 2016), available at SSRN. [?]

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