

Democracy in Danger

S4 E12: Criminal Laws

Will Hitchcock [00:00:03] From the University of Virginia's Deliberative Media Lab, this is Democracy in Danger. I'm Will Hitchcock. Siva Vaidhyanathan is away this week.

President Joseph R. Biden [00:00:12] Immigration has always been essential to America.

Will Hitchcock [00:00:15] Since taking office last year, president Biden has had his hands full trying to undo many of the reckless and discriminatory policies of the Trump years, especially on immigration.

President Joseph R. Biden [00:00:26] It's time to fix it. On day one of my presidency.

Will Hitchcock [00:00:29] Biden put an end to the Muslim ban on his first day in office. That was pretty straightforward, but he and his team have had to walk a fine line as they deal with a sharp uptick in border crossings.

Reporter [00:00:42] Republican lawmakers are turning up the heat on DHS officials as the Biden administration.

Journalist [00:00:48] Help me understand the administration's policy. Are you trying to stop illegal immigration anymore? Or have you given up on that?

White House Spokesperson [00:00:52] Sir, we are committed to enforcing the laws that Congress has enacted at the border.

Will Hitchcock [00:00:57] Then there is, quote, "Remain in Mexico." Now by all accounts, that policy has put people already in desperate circumstances in even greater danger. The U.S. Supreme Court will soon decide whether Biden can rollback that rule.

Journalist [00:01:13] Okay. So that sounds like a yes. So that's a yes. You're still trying to stop illegal immigration?

White House Spokesperson [00:01:18] That is correct, sir.

Will Hitchcock [00:01:20] Meanwhile, the administration has tried to fit out overcrowded detention centers. They have done away with arresting entire families. They've reduced beds by as much as 25%. They are using ankle bracelets, even phone apps, to track undocumented immigrants while they await their day in court.

Reporter [00:01:40] According to the Department of Homeland Security, the number of minors in border custody has dropped 88%.

Will Hitchcock [00:01:47] Now, all of that sounds like an improvement less draconian, maybe more humane, more sympathetic to the complexities of migration, especially from Latin America. But there is one assumption in all of this that almost no one ever questions. It's not just that it's against the law. It's not just that you can be deported or have your possessions taken from you. It's that migrants are labeled as criminals, illegals, and can be thrown in prison. The criminalization of the undocumented. That's what we're focusing on today. With help from a scholar who's going to take us back to the moment when that idea

became rooted in the law. But first, we're going to turn the show over to our producer, Robert Armengol, who caught up recently with a couple of attorneys whose innovative challenges to those laws have had some surprising results of late. Here's Robert:

Robert Armengol [00:02:41] Kara Hartzler studied the law to help people, and now she was fed up with a sham.

Kara Hartzler [00:02:47] It was horrifying to see people traipse through in this honestly faux legal proceeding where they very rarely sort of understood exactly what was going on, how their case was proceeding...

Robert Armengol [00:03:04] Hartzler, a federal public defender, is talking here about mass deportation hearings. They became common under Homeland Security's Operation Streamline, which dates back to the early 2000s. But they really ratcheted up with the Trump administration's zero tolerance stance on immigration. By 2018, Hartzler says, she was seeing federal courtrooms where as many as 70 migrants were tried at once.

Kara Hartzler [00:03:31] They were usually exhausted. They were dressed in the same clothes that they had been arrested in. And it is very far afield from what I had always thought, the constitutional protections of a criminal proceeding provided.

Robert Armengol [00:03:52] To many advocates, the situation seemed hopeless. Under a section of U.S. code that has been on the books since 1929, crossing the border without permission is a crime. It's a fact most people take for granted. But Hartzler's team wasn't most people.

Kara Hartzler [00:04:08] It can be hard to fight. You can say, well, the person is here in the United States and they don't have papers so obviously, you know, they must be guilty and we're not going to fight this. But there's a lot of other creative ways to litigate these cases with just as much vigor as we would litigate any other criminal case. So when Operation Streamline came, we decided that we were going to zealously fight by bringing all of these types of legal challenges that you would bring in any other type of criminal case.

Robert Armengol [00:04:46] Hartzler and her office combed the congressional record on the Undesirable Aliens Act of 1929, which criminalized illegal entry for the first time, enshrining it in U.S. Title XIII, Section 1325. The Act imposed even harsher prison time for migrants who reenter after being deported or who come to the United States after being denied a visa. That's Section 1326.

Kara Hartzler [00:05:11] It is by far and away the most prosecuted federal crime we have. You know, most people think, oh, when they think of federal crime, they think terrorism or drug trafficking or, you know, wiretapping or things like that. But together, these two immigration crimes comprise about two-thirds of the federal criminal docket. So we're spending a huge amount of resources on this.

Robert Armengol [00:05:43] Not only that, Hartzler says, but the new law was racist from the start, and it still is because it targets Latinos far more than others. For that reason, her team argued, it violates the constitutional principle of equal protection. But their efforts fell short. The judge in Hartzler's case didn't even grant her argument a hearing. In a perverse irony, the immigration docket in San Diego was just too full. Then in June 2019, police in

Nevada busted down a front door and entered the home of Gustavo Carrillo-Lopez, an immigrant from Mexico. They found 28 grams of methamphetamine.

Lauren Gorman [00:06:29] It's essentially possession of illegal drugs.

Robert Armengol [00:06:32] This is one of his lawyers, Lauren Gorman. At the time, she says, Nevada had strict laws on nonviolent drug offenses and Carrillo-Lopez pleaded guilty to trafficking meth. The sentence: life in prison. Now, Nevada relaxed its drug laws just a few months later. But these new, more lenient standards didn't arrive in time to help Carrillo-Lopez. Best case scenario, he could be paroled in ten years. After that, the federal government wants him to serve extra time as much as 2-20 years more behind bars because he entered the United States more than once without papers. He had violated Section 1326. So essentially, at the height of a deadly pandemic, U.S. officials wanted to transport Carrillo-Lopez from state prison to Reno, fill a courtroom with as many as 50 potential jurors and hold a trial. As his federal public defender, Gorman didn't see just another immigration case. She saw a pointless public health risk.

Lauren Gorman [00:07:39] I think what I guess I found sort of heartbreaking was how little his life mattered and how difficult it was for me to explain in my own mind any connection between his prosecution and anything having to do with public safety. He was already serving such an extreme sentence for a nonviolent drug offense. And it made me maybe think more deeply about the law and why that law existed. And so that was something that became very interesting to me.

Robert Armengol [00:08:19] So Gorman hit the books and reached out to colleagues. By then, Hartzler, back in San Diego, had become something of a celebrity in the world of immigration advocacy. And Gorman decided to try out Hartzler's earlier logic in a new context. And in northern Nevada, a jurisdiction with far fewer immigration cases. Of course, the government's lawyers pushed back. Yes, they admitted, there were ugly speeches in Congress when the 1929 law was first enacted. Stuff about white racial purity, eugenics, Mexican hordes coming in droves. But they claimed the law's discriminatory effect is simply an outgrowth of geography, not racism. In Gorman's view, the government was turning a blind eye to the past and to the present.

Lauren Gorman [00:09:07] If you have a law that was designed and motivated by racial animus and it was specifically targeting people south of the border, then it becomes sort of circular to say that, well, geography explains this law. So there are other sorts of immigration violations that are like, for example, visa overstayers. Congress has never made a decision to criminalize visa overstayers, right? And so that's another sort of immigration violation where you're going to see a more diverse population of individuals who violate that provision of the law, but you're not going to see criminalization. And so essentially, the court rejected the government's argument that geography is the explanation.

Robert Armengol [00:10:03] That's right. The court rejected the logic the government was pushing. Judge Miranda Du, herself an immigrant, sided with Carrillo-Lopez in ruling last summer that section 1326 is unconstitutional. Hartzler's argument got its day in court and Gorman had won her case. The immediate effect of this ruling remains unclear however. President Biden's Department of Justice is appealing the case. It's very likely to end up before the Supreme Court. And with the high court's current makeup, it's hard to say whether Du's opinion will stand. An even murkier question is, will immigration policy change first? Hartzler and Gorman both say that's what their cases were always really

about. Bringing attention to immigrants and their families, to the millions who endure treacherous journeys, often escaping violence to live and work in America. These are human beings caught in a history not of their making, and they aren't going to be deterred by a system that sees them as subhuman or their choices as criminal.

Kara Hartzler [00:11:07] There is something bigger at stake, and I think that is telling the story behind this law. And I think the people who really need to hear this are obviously everyone who's enforcing it, everyone who is in the system, myself included. But I think the other people who need to hear it are my clients. It is not lost on them what's going on. Because honestly, they they feel it and they know it and it just needs to be said.

Lauren Gorman [00:11:39] When you hear of the journeys that your clients went through in order to come here, I mean, they were willing to die. Those were the stakes.

Kara Hartzler [00:11:52] I had a client one time who his wife had just had a baby, and the baby had a hole in her heart and she was about to have surgery. There is no law that was going to stop that man from coming back and trying to be with his child who was having open heart surgery in the hospital. And I think as soon as we recognize that and start thinking about solutions that take those motivations into account, we're going to be a lot better off in terms of effective solutions and a better use of our money and our resources.

Lauren Gorman [00:12:33] What Congress can absolutely do is reckon with racial animus. So there can be, in some ways, an acknowledgment and have a conversation about it. But what you can't do is you can't pass a law because of racism that will always violate equal protection. And we confront that history and do we still want this law?

Robert Armengol [00:13:02] That was Lauren Gorman. She served as a public defender for Gustavo Carillo-Lopez. Since last we spoke, she has moved to a new position in public service. But her colleagues in Reno continue to defend their client. You also heard from Kara Hartzler. She still works as a public defender on immigration cases in San Diego.

Will Hitchcock [00:13:24] Robert Armengol is our producer. Democracy in Danger is part of the Democracy Group Podcast Network. Visit DemocracyGroup.org to find all our sister shows. We'll be right back after this message from our friends.

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Will Hitchcock [00:14:17] Well, we're going to turn now to the longer history that Lauren and Kara just alluded to. And to help us do that, we have a star witness. One of a number of historians who have provided expert testimony in the sort of cases that Lauren and Kara have tried. Deborah Kang is with me right here in our studio in Charlottesville. She's a colleague of ours at the University of Virginia. Her research focuses on U.S. immigration and border policy. She's the author of *The INS on the Line: Making Immigration Law on the US-Mexico Border*, which Won a bunch of awards. Debbie, welcome to Democracy and Danger.

Deborah Kang [00:14:53] Thank you very much for having me, Will.

Will Hitchcock [00:14:55] Debbie, in season one of our show, we spoke with Erika Lee, an immigration expert at the University of Minnesota, about the racism and xenophobia behind the 1924 Immigration Act. Now, that law banned immigration from Asia. It set very restrictive quotas on immigrants from specific countries. But one piece of the immigration puzzle of the 1920s that we don't talk very much about is the 1929 Undesirable Aliens Act. And that sort of is plugging a hole in the 1924 Act. But it's also really the beginning of the idea that there should be really harsh penalties for unauthorized immigration. Why was this 1929 act passed and what were its consequences?

Deborah Kang [00:15:38] So the 1924 Act, as you just noted, left a hole with respect to Mexican migration. So Southwestern Agribusiness had successfully argued for the exemption of Mexican migrants from the 1924 Act, and they deployed racist arguments in this effort. And these arguments were that Mexican migrants made the ideal, exploitable and deportable labor force for America's farms. But by 1929, another set of xenophobes used a different set of eugenicists arguments to make their point, and their arguments one along the lines of Mexicans as a mixed race population, if they were allowed to remain in the United States, would, quote-unquote, "pollute the nation's bloodstream." And the criminalization of undocumented immigration in 1929 was seen as another tool to again, protect the racial composition of the United States.

Will Hitchcock [00:16:48] So the 1929 Act makes it a crime to cross the border illegally, and it imposes stiff penalties. But before that time, was it not a crime? How were undocumented people treated, generally speaking, before this 1929 act?

Deborah Kang [00:17:03] Yeah, that's a great question. The 1929 Act is significant because it's the first time one can be put in prison for crossing the border without papers. Prior to that, there were other kinds of civil penalties for illegal border crossings, and these would have included deportation and a procedure known as voluntary departure. But when it came to Mexican migrants and especially those who worked on the nation's farms, those tools, those civil tools were only used sporadically. It, in fact, remains the case for almost all of the 20th century that corporate agribusiness has pushed hard against strong border enforcement.

Will Hitchcock [00:17:47] And it's not because they want lots of people crossing the border. It's because they want to decide when the tools should be used against them and when they should be allowed to bring workers into the country.

Deborah Kang [00:17:58] Yes.

Will Hitchcock [00:17:59] So as I hear you talk about these two strands that we have to think of, it's really helpful because, you know, typically if we're doing a quick gloss over, boy, look at all of these, these immigration acts of the early part of the 20th century, we'd go to race as the explanation. But you are layering over or under, along with a racial explanation, an economic story about, yes, that we need access to labor, but we also want to be able to control that labor and then, you know, remove it when we don't need it if times are slow or whatever. So talk a little bit about the dual braiding together of, on the one hand, racial and eugenicist ideas, but on the other, this sort of fundamental inequality of capitalism that is shaping these statutes.

Deborah Kang [00:18:44] So these economic ideas that you're referring to, they're inseparable from the racism. So Southwestern agribusiness characterized Mexican migrants as being genetically inclined to being birds of passage. They argued that they were biologically more likely to migrate and comparisons were made to homing pigeons. And so these very ugly, racist ideas about Mexican migrants and Mexican farm workers were used by Southwestern Agribusiness to justify their hiring.

Will Hitchcock [00:19:22] To that point, Debbie, what happens to the 1929 Act? As I understand it, it gets wrapped up in a series of later measures that sort of try to codify and pull together immigration law. And the 1952 Act is one that's often pointed to as one of the most regrettable pieces of legislation passed. But it's also passed in the early phases of the Cold War, in a somewhat different economic and political context than the 1920s. Is this another site to which historians look when they're trying to figure out where our immigration policies actually live?

Deborah Kang [00:19:53] So one of the interesting things about the Undesirable Aliens Act and its subsequent iterations in 1952 and 1988, 1990, 1994 and '96 and '97, is it's actually something that Congress doesn't debate to a great extent. And it's understood by historians that this is because Congress widely accepts or takes for granted that the criminalization of undocumented immigrants is a good thing. And in 1952, what's important to note, is that Congress knows, and particularly Pat McCarran, who is a co-sponsor of the 1952 Act, he knows he's seen the data that Mexicans constitute a disproportionate number of people prosecuted under the Undesirable Aliens Act. So Congress knows this, and yet they decide to re codify this racist law in 1952.

Will Hitchcock [00:20:58] That's so interesting. So your sense is that the Congress accepts the racist language of the twenties, decade after decade after decade. There's no political will to rip open this statute, to pull out its most offensive components, to really rethink how we govern, how we police, how we criminalize immigration.

Deborah Kang [00:21:17] Yes.

Will Hitchcock [00:21:18] Well, I want to talk, I want you to talk a little bit more about the ways in which this debate has shaped our own time and really from the fifties on up to the present. So imagine a presidential candidate standing on the U.S.-Mexican border and kicking off a presidential campaign with these lines: "the failure of the national government of the United States to protect the borders of the United States from an illegal invasion that involves at least a million aliens a year. As a consequence of that, we have social problems and economic problems and drug problems." Now, as you probably know, this is not Donald Trump. It's Pat Buchanan in 1992, and he began his bid for the Republican nomination for president by politicizing immigration. And he did it specifically at the border with the border as a background. What is it? What had happened by the early nineties that drew Pat Buchanan to make this very, you know, visible embrace of xenophobia and racism and his political outlook? But also, what does it tell us about our own times? Why in the nineties did this suddenly seem like a promising avenue for a ambitious politician?

Deborah Kang [00:22:27] So immigration history hasn't changed in the sense that nativism always wins votes. This goes back to 1789 and the Alien and Sedition Acts. And then it's also true of the Chinese Exclusion Acts. When you look at the years in which the Exclusion Acts were passed, they were all election years. And that's not a coincidence. And then why specifically one saw the reemergence of nativism and xenophobia in the early 1990s? You had a confluence of both short-term and long-term factors, and the

American Right, American conservatives, since the passage of the Immigration and Nationality Act of 1965, as well as the host of civil rights measures passed by the Kennedy and Johnson administrations, were simply angry, furious. And they worked from 1965 to the present to unravel what they saw as the wrongs of the civil rights movement. And thanks to the Immigration and Nationality Act of 1965, the racial composition of the nation actually changed. So this once again makes xenophobes very angry. And then you have various groups of refugees and asylum seekers entering the country, ranging from the Vietnamese to Haitians and Cubans. And then by the early 1990s, you add these changes to an economic recession, as well as the first bombing of the World Trade Center and you see an all time high in American xenophobia. And scholars have looked at the poll data and they found that xenophobia in the 1990s was as high as it was in the 1920s.

Will Hitchcock [00:24:16] Perfect storm.

Deborah Kang [00:24:17] Yeah.

Will Hitchcock [00:24:18] Well, I'm wondering what impact a sort of global war on terror has had, in your view, on our conception of immigration and who should be in and who should be kept out? It certainly seems to have strengthened the powers of the state. Has that also echoed down into immigration policy and in particular, the tools that federal agents possess to police immigration?

Deborah Kang [00:24:41] Yeah. So 9/11 is one of the most important turning points in immigration policy history, because after 9/11, you see the implosion of what was known as the Immigration and Naturalization Service or the I.N.S. the I.N.S. was blamed for the events of 9/11, and as a result of that, you get the creation of the Department of Homeland Security and three new immigration agencies that are housed within DHS. And the mission of these three agencies and our immigration bureaucracies in general changes dramatically. And while there had always been an emphasis on national security after 9/11, you also see the former I.N.S. finally getting these huge appropriations from Congress that it typically was not able to get for much of the 20th century. So thanks to those increased appropriations, you see an increase in manpower and resources. And I think to this very day, the budgets of the immigration agencies within DHS are higher than the budgets of all the nation's criminal law enforcement agencies combined.

Will Hitchcock [00:26:02] Wow, that really tells us about essentially, where we placed our our values.

Deborah Kang [00:26:07] Yeah. But I think that, you know, another important turning point here is this shift in our approach to enforcement that one sees happening by about 2011 and the creation of this thing called the consequence delivery system. Immigration officials have never been good at naming. And the philosophy underlying CDSs shifted what had been the philosophy since the mid 1990s. By the mid 1990s, immigration agencies decided that the best way to deter undocumented migration was to try to shift the flow of that undocumented migration through the deserts, especially the Sonoran Desert. So immigration agencies were using geography as a deterrent. But by 2011 and the creation of CDSs, you see the nation's immigration agency saying, we're going to use punishment, we're going to put you in prison, right, through these criminal penalties. We're going to inflict pain to try to deter you from coming to the United States. So that marks a radical and important shift in the way that we enforce the nation's criminal and civil laws.

Will Hitchcock [00:27:30] Now, some version of that sense of penalization was present in 1929. But as you're describing, that was just the beginning of developing a whole spectrum of practices and some of which we now look upon with shock and horror, separating parents from children, for example. But these have been implied in the law all of this time.

Deborah Kang [00:27:55] Yes. And they became explicit by the early 21st century.

Will Hitchcock [00:28:00] Well, there is some surprising news on this front. So as we heard earlier in the show, a federal district court judge essentially ruled that the 1929 Immigration Act, or at least the key component of it, is unconstitutional because it violates the fundamental guarantee of equal protection under the law. This is a pretty big win, isn't it, for the effort to decriminalize immigration? I wonder if you could just, you know, in your words, talk about the significance of this ruling and, and where does this leave us now?

Deborah Kang [00:28:32] So I think that this is a historic win. I like to tell my students that American immigration law and policy has yet to have its *Brown v. Board of Education* moment. And this victory in Nevada might be seen as the first crack in the wall of racism that infuses our nation's immigration laws and policies. So it's a tremendous victory on the part of the federal defenders and scholars who fought for it.

Will Hitchcock [00:29:06] Well, Debbie, you're one of them. And I want to just end by asking you to talk a little bit about what it's like to take your historical scholarship and historical knowledge and place it into public debates on public issues. What's that like? How do you, how do you manage to wear these two hats?

Deborah Kang [00:29:22] So the motivation for me is very personal. It comes from the work that I did in my very first academic job in California. I worked at a state university, which was and is a predominantly Latino-serving institution. Most of my students, as they acknowledged in class, had regular encounters with ICE, and they would share with me in my immigration history classes that they expected to be stopped for being brown, whether they were citizens or undocumented immigrants. I'll never forget the day when I taught the history of Angel Island. And one student raised his hand and he said, I really enjoyed that lecture, Professor Kang. And it really resonated with me because my uncle is in detention. And then when President Trump became president, I decided to start one class by talking about the rescission of DACA by Jeff Sessions. Sessions had gone on TV and announced that. And when I began the class with that talking point, a student sitting in the front row began to cry hysterically. And this is the worst nightmare of any faculty member to have your students crying in class. And she called out, what am I supposed to do? I'm DACA, what am I going to do? And over the course of the semester and the next couple of years, I saw her and students like her struggle tremendously. She fell into a deep depression. Other students refused to get medical care because they were so worried that if they went to their local hospital, they'd be, you know, detained and then deported. And so when I saw this happening on my college campus, something inside of me clicked. And I said to myself, I just, I just, I can't do it anymore. Meaning, I can't just do the academic work anymore. And I have to find a way to help. And so I volunteered to work at a think tank at UCSD, a think tank that focuses on immigration policy. And the director is Tom Wong, a political scientist. And I'm sure he thought I was a nut because, you know, the meetings are full of undergrads and then me and I had tenure. You know, I can just see the look in his face now. Just I know he was puzzled. But I was adamant about being there because I wanted to try to learn a new skill set to make a difference. And so that experience in California informs my work to this very day.

Will Hitchcock [00:32:13] Well, Deborah Kang, thank you so much for joining us on Democracy in Danger.

Deborah Kang [00:32:17] Thank you very much for having me.

Will Hitchcock [00:32:21] S. Deborah Kang is an associate professor of history at the University of Virginia and the author of a 2017 book called *The I.N.S. on the Line: Making Immigration Law on the US-Mexico Border 1917-1954*. She's also a member of the UVA Democracy Initiative, which supports our show. That's all for this week's show. We're taking a short break next week so we can replay a really important episode we did earlier this season about democracy and abortion rights.

Rebecca Traister [00:32:53] They got a majority of people and more than a majority and close to 70%. 70% of people who want abortion to remain legal.

Will Hitchcock [00:33:02] Stay in touch. In the meantime, tag us on Twitter @DinDpodcast. That's D-i-n-D podcast. And visit our Web page, DinDanger.org. Democracy in Danger is produced by Robert Armengol. Jennifer Ludovici is our associate producer. Sidney Halleman edits the show and our interns are Denzel Mitchell, Jane Frankel and Elie Bashkow. Support comes from the University of Virginia's Democracy Initiative and from the College of Arts and Sciences. The show is a project of UVA's Deliberative Media Lab. We're distributed by the Virginia Audio Collective of WTJU Radio in Charlottesville. I'm Will Hitchcock. Until next time.