

The Legal Violence of the “Remain in Mexico” Policy

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Jose is a severely cognitively disabled 28 year old man from El Salvador who has the mental capacity of a 4 year old. His mother and siblings had already been living in the United States for several years after they escaped El Salvador to flee the gang violence there. After considerable weeks of travel, in March of this year Jose arrived in El Paso, Texas, with his cousin who was his primary care taker in El Salvador to seek asylum. Upon arriving to the U.S./Mexico Border, Jose was forcefully separated from his cousin, regardless of his mental disability and doctor's note detailing his condition, and put into the "Remain in Mexico" program after being questioned and detained by border patrol for two weeks. Without anyone to help him and separated from his cousin, he was dropped off in Ciudad Juárez with no guidance on where to go, how to come to the United States for his future court dates, and no assistance whatsoever. Jose, a severely mentally disabled man at the mercy of the Trump administration, was stranded in Mexico completely alone.

According to the Department of Homeland Security (DHS), "The U.S. is facing a security and humanitarian crisis on the Southern border," and the response has been to push the legally dubious, highly controversial and bizarrely named Migrant Protection Protocols (MPP) also known as Remain in Mexico. The program forces people such as Jose to wait in Mexico for their asylum cases to conclude. MPP began in Tijuana as a pilot in January of 2019, but was not allowed to expand until May of 2019. As of October of 2019, over 50,000 individuals have been enrolled in the Remain in Mexico program. For this talk, I will discuss the story of Jose, an emblematic case of both the abuses of MPP and the usage of legal violence to deter or prevent people from seeking asylum. During the summer of 2019, I spent ten weeks conducting fieldwork that included court observations, interviews and participant observation with asylum

seekers, lawyers and activists in El Paso and Ciudad Juárez. According to our court observations, 84% of respondents have claimed they have a fear of returning to Mexico while only 5% have passed their non-refoulement interview and been taken out of the program. Additionally, DHS has created a guise that the policy specifically excludes and protects “vulnerable populations,” but this could not be further from the truth.

In the past, wherein individuals who were seeking asylum were apprehended a foot onto U.S. soil if they crossed between ports of entry or if they legally presented themselves at a port of entry, they were still considered to be safe from some of the exceptionally dangerous conditions faced on the journey crossing through Mexico. Although being taken into ICE custody presents its own set of dangers and myriad of abuses, being constricted to wait in dangerous Mexican border cities is a strategic move by the United States to subject migrants to violence such as rape, kidnapping, extortion, and murder to deter further immigration as a whole. As made clear by Jeremy Slack in his recent book, *Deported to Death: How Drug Violence Is Changing Migration on the US–Mexico Border*, “the narco-geography of Mexico often clashes with migration and deportation patterns...sucking people into a conflict that they never expected” (2019, p. 75).

The very placement of migrants into MPP constructs them as “bogus refugees.” Much like how Alison Mountz describes the criminalization and construction of “bogus refugees” from China to Canada in the late 1990s wherein “a person’s location is bound up with his or her criminalized identity,” the United States is effectively “seizing moments of ‘crisis’ [in this case the crisis of migrants coming from Central America to the United States in caravans] to justify tactics to keep displaced persons elsewhere, away from sovereign territory,” (2010, p. 112-113).

Therefore, the physicality of keeping asylum seekers in Mexico reinforces the notion that these individuals are criminals who need to be kept away from the entire geographical sovereign territory of the United States, not even within the confines of a detention center. The official name, “The Migrant Protection Protocols” would suggest that the goal is to protect people from migrants and not the other way around. By altering the geography of the state to encompass both sides of the U.S./Mexico Border it demonstrates the importance of acknowledging how states operate outside of their boundaries (Agnew 1992).

The impacts of this criminalization and shifting of geography can be further explained through Cecilia Menjívar’s theory of legal violence. “The concept of legal violence incorporates the various, mutually reinforcing forms of violence [such as structural and symbolic] that the law makes possible and amplifies” (2012, p. 1384). While Menjívar focuses specifically on the laws’ violent impacts on the three main facets of immigrant incorporation (family, work, and school), I expand further on her definition to include the physically violent effects that are directly caused by immigration law, in this case the Migrant Protection Protocols. Legal violence also “exposes the contradictions on which the formulation and implementation of immigration law rests: the various laws at federal, state, and local levels today seek to punish the behaviors of undocumented immigrants but at the same time push them to spaces outside the law” (Menjívar, 2012, p. 1385). MPP highlights just that. Being forced to remain in Mexico is in itself a form of punishment enforced by the law, but it also pushes them into a place absent the responsibilities or protections of the United States’s Constitution -- Mexico. While the effects of the policy can also be seen as forms of symbolic and structural violence, the notion of legal violence is more apt because “it is embedded in legal practices, sanctioned, actively implemented through formal

procedures and legitimated--and consequently seen as 'normal' and natural because it 'is the law'" (Menjívar p. 1387).

There are countless anecdotal stories that have unfolded over the last several months and during my participatory fieldwork that unfortunately exemplify the violent human impacts of the Remain in Mexico policy. Rape, murder, and extortion are all too common of an occurrence that migrants face when placed to wait in Mexican border cities. One individual working at CAIM (Centro de Atención Integral a Migrantes) in Ciudad Juárez told me that they had never faced so many instances of getting to know someone and then the next week they disappeared -- possibly because they had been murdered or kidnapped. The case of Jose that I used to start this essay is a particularly vivid example of the purposeful ways that this program is designed to exacerbate vulnerabilities and expose people to new levels of violence with the hopes that they give up their legal claims to asylum.

Jose's mother would go days on end without being able to sleep, as well as his cousin who had no idea where Jose was in Juárez. As Menjívar states "increasingly lengthy and uncertain family separations, normalized in the context of enforcement today, bring to light the underlying contradictions of legal violence in immigrant communities: while the law seeks to remove them from society, by pushing them outside the boundaries of jurisdiction, it simultaneously includes them by criminalizing their presence" (Menjívar, 2012, p. 1403). This new method of family separation utilized by DHS represents one of the facets of Menjívar's legal violence: the drastic impact the laws have on family life. Jose being separated from his cousin and unable to connect with his family not only affects Jose, it impacts his entire family's

*social suffering* that “potentially [causes] long-term harm with direct repercussions for key aspects of immigrant incorporation” (Menjívar, 2012, p. 1383).

For a few weeks, Jose’s family was unable to locate him. He spent nights sleeping in the streets of Juárez but eventually was able to make it to a shelter called Buen Pastor, unaware of how he was able to get there. Once he arrived at the shelter, he was able to contact his family but there was nothing they could do to help him. With the assistance of good samaritans in Juárez, Jose was able to make it to his first court appearance on May 8th in El Paso where the non-profit I worked with, Hope Border Institute, noticed the vulnerability of Jose’s situation during their court observation. At his hearing he did not know where he was, his birthday, or how old he was.

When Hope Border Institute tried to notify the court of Jose’s clear mental disability which should exclude him from MPP, the judge claimed he had no jurisdiction to remove Jose from the program and he was immediately bussed back to Juárez once the hearing was over. Jose then disappeared from those who initially flagged his case to the authorities. In what seemed like a miracle, one of the non-profit researchers, Edith Tapia, randomly found Jose at a shelter in Juárez three months after his initial court hearing. She said “it was like finding a needle in a haystack.” It was revealed that Jose had been kidnapped and extorted during his time in Juárez. Several high profile events attempted to pressure DHS into removing Jose from MPP including a Bishop from El Paso accompanying him and another family across the border, and discussing the case with officials, who, at first agreed to release him, but later returned him anyway.

Even though the court was witness to Jose’s severe cognitive disability, forcing him back to Mexico is precisely the form of violence Menjívar describes as “legal, sanctioned, and legitimated through formal structures of power that are publicly accepted and respected”

(Menjívar, 2012, p. 1413). In MPP, judges have practically no jurisdiction over certain cases, as DHS always makes the final decision about keeping them in the program. The judge in MPP court only refers migrants to non-refoulement interviews, in which asylum officers evaluate claims of fear of returning to Mexico with an incredibly high burden of proof. Additionally, migrants in immigration court, including within MPP, are not entitled to attorneys and they must seek them out on their own which is virtually impossible to do with limited access as migrants wait in Mexico. “According to the latest court records available, as of the end of June 2019, a total of 1,155 MPP cases had already been decided. Yet only 14 of these—just 1.2 percent—were represented by legal council” and none had been successful (TRAC). To date there have only been a handful of people to win their cases in asylum.

Luckily, Jose was one of the 1.2% able to be represented by an attorney for his following hearings. Since his doctor’s note from El Salvador and his clear signs of cognitive disability were not enough to take him out of the Remain in Mexico program, activists and his lawyer were able to have him further evaluated by a psychiatrist in Juárez. Like the doctor in El Salvador had diagnosed him before, Jose was once again evaluated to have the mental capacity of a 4 year old and this time was also diagnosed with anxiety and depression. At his next court date in July, the attorney representing DHS argued against the legitimacy of the doctor’s note, stating that they had no idea of the credentials of the psychiatrist and the court should therefore omit this information and keep him in the Remain in Mexico program. This time after his hearing, instead of being returned to Mexico, Jose was detained by ICE for two weeks while his lawyer attempted to fight on his behalf to have him released. Thankfully in this case, after 11 torturous months of continually being returned to Mexico, Jose was released from ICE custody and with the help of a

charity in which people donate unused airline miles, he was flown to his mother and siblings. His asylum case is currently being moved to Virginia, where he is now residing with his family.

Unfortunately, Jose's case is not the only one we observed where an individual with apparent cognitive disability was not granted a competency hearing or taken out of the Remain in Mexico program. In another instance during one of our court observations, an older gentleman had no idea which country he was in and could not even speak in complete sentences. The judge continued to rephrase her questions in a way that would bring him to a yes or no answer when he was obviously confused about everything that was happening. He was returned to Mexico after the judge stated he was competent enough to be in the program as he was able to respond to her questions, even though she had coerced answers out of him. Those with mental disabilities are just one example of individuals who could be considered part of "vulnerable populations" who have not been excluded from the legal violence of MPP.

Another frequent trend of Remain in Mexico's cruelty is the majority of those placed into the program are family units, with many families who traveled together being separated at the border when they arrive. Additionally, when observing in MPP Court, the courtroom overflows with families and the sounds of children crying. Over the weeks, the docket (the list of the respondents and their hearing) continued to grow. Mothers have to attend to their infants and young children as they respond to the judge. During their crucial removal hearings, they are offered no assistance with their children. We observed women who had to breastfeed while the judge was questioning them, with the judge becoming irritated that the mother's full attention was not directed to answering his questions.

In another case we witnessed, a woman named Fatima was separated from her 5 year old daughter and her brother and she was placed into MPP upon arriving to the U.S./Mexico Border. During her hearing after she had already been sent to wait in Mexico, she courageously took it upon herself to tell the judge and the rest of the courtroom her deeply personal story in an effort to advocate against the Remain in Mexico program. After the judge asked all respondents if they had any questions, Fatima shakily stood up in tears and told the court that she was raped when she was 13 years old and because of this she had not been able to register herself as the mother of her daughter since she was too young to even do so. Because of this age constraint, Fatima's parents had to be listed as her daughter's parents. When she arrived at the border, Border Patrol separated Fatima from her daughter because she was not listed as her mother on her daughter's birth certificate. Fatima then begged to be reunited with her daughter, not knowing where she was for the past three months she was in the program, and to be taken out of MPP because of the dangers of Mexico she was facing. The judge responded to Fatima saying he was sorry about what happened to her but there was nothing he could do to help her.

While MPP attempts to create a guise that it is a set of orderly protocols protecting migrants and citizens in the United States, in reality it is calculated chaos. There are no "protocols" to really even determine who is placed into the program and who isn't. This results in family separation as well as putting migrants into even more dangerous situations in Mexico to deter them from pursuing their asylum claim. When respondents do not show up to their hearings, they are ordered to be deported "in absentia," regardless of the reason for not showing up to their hearing. As seen in Fatima's case, individuals beg to be reunited with their family and

to be taken out of Mexico because of how dangerous it is. Yet, the judge has absolutely no power over taking them out of Mexico or helping reunite families.

Any semblance of guidance for migrants in MPP has ultimately been eliminated to cause even further confusion both for the migrants themselves and for the judges. There is a shortage of pro bono and low-cost attorneys in the areas where MPP is executed and many simply will not take MPP cases because they need to cross the border to communicate with clients. As stated earlier, for the thousands of migrants who need legal help and guidance, it is rare for migrants to be able to be represented by an attorney and they then must advocate for themselves. 90% of individuals who represent themselves are denied asylum versus 57% of total asylum claims. MPP is likely to be even worse. During our court observations, several respondents would attempt to inform the judge that it was impossible for them to find an attorney to help them, especially while waiting in Mexico and having practically no way to contact a lawyer who is in the U.S. side of the border. In one case there was even one respondent who told the judge that he had gotten in contact with an attorney, only for the attorney to end up telling the respondent that he could not represent him because he did not want to go to Juárez to meet with him because it is “too dangerous.”

When MPP was first instigated, individuals called “friends of the court” were able to conduct “Know Your Rights” presentations for everyone, and particularly for those who did not have attorneys to guide them through the confusing legal process. Friends of the court are volunteers who have vast legal knowledge to assist respondents throughout the proceedings. During hearings, the friends of the court would help respondents ensure they had the correct paperwork they needed as well as assisting with answering questions about the process. While

friends of the court could not give exact legal advice, they were immensely beneficial for everyone involved with MPP. The judge would not have to repeat themselves as frequently, hearings were conducted more efficiently, and respondents were able to know their rights before even starting their trial. The friends of the court would also encourage respondents to maintain faith in continuing to search for an attorney, knowing how important it is for their cases. Scared and confused, when the judge would initially ask all respondents in the courtroom if they were afraid of returning to Mexico, they would hesitate at first because they believed saying yes would impact the outcome of their asylum trial. Friends of the court were able to advocate to the respondents to speak up if they were afraid and on several occasions the courtroom would go from no one saying they were afraid (out of fear it would impact them), to afterwards when all respondents had the courage to admit that they were in fact afraid of returning. In a violently strategic manner, the court in El Paso decided to completely eliminate friends of the court. They can no longer give know your rights trainings, or even speak to the respondents in the courtroom.

Through eliminating friends of the court, which was the only semblance of legal guidance and hope available to the majority of migrants in MPP, the court strategically implores legal violence even further. The structural domination of the court itself transforms “as a form of violence due to the blurring of immigration and criminal law that leads to a progressive exclusion of immigrants from ‘normal’ spaces and societal institutions” (Menjívar 1391). MPP court becomes a vessel that no longer follows the societal and institutional normalcy that even a regular immigration court would have. Through purposeful and frequent changes meant to confuse everyone involved, migrants are forced into even more uncertainty in a space that usually is supposed to be structurally organized.

DHS attempts to claim that the Migrant Protection Protocols protect migrants themselves as well as the general population of the United States -- it states that “MPP will help restore a safe and orderly immigration process,....and reduce threats to life, national security, and public safety, while ensuring that vulnerable populations receive the protections they need”

(Department of Homeland Security). Menjívar states that legal violence manifests itself in a way that appears “to have the positive objective of protecting rights or controlling behavior for the general good, [yet] simultaneously gives rise to the practices that harm a particular social group”

(p. 1387). As we have shown, the Remain in Mexico program is the epitome of legal violence.

In this seemingly liminal period, migrants are forced to experience the consequences of legal violence not just within the United States, but are now faced with the physically dangerous conditions of being forced to wait in Mexico as the state has altered its geography to now encompass both sides of the border.

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