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Publication Date

2005-11-03

ISSC WORKING PAPER SERIES 2003-04.06

**Undue Process:
Immigrant Detention, Due Process
and Lesser Citizenship**

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University of California, Berkeley
November 3, 2005



INSTITUTE FOR
THE STUDY OF
SOCIAL CHANGE

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The paper traces the genealogy of social and legal inequalities in citizenship and in the racialization of immigrants in the U.S. that are constitutive of contemporary immigrant detention practices. Presenting a challenge to the exceptionalism which frames policy responses to 9/11 and the “war on terror,” the paper argues that contemporary detention policies emerge from an episodic history of immigrant detention, precipitated by a series of broadly defined national security crises over the last century—from fear of contagion, to the demonization of “foreign” ideologies, to international military conflicts and domestic “wars” on crime, drugs and terrorism. These “crises” have been invoked to reduce the rights and civil liberties of racialized immigrants and citizens in the detention process. Even before the “war on terror” began, the coordinates of race, noncitizenship and national crisis were mobilized by the government through the vehicle of detention to deny due procedural rights to racialized immigrants. Such policies, often practiced legally and extralegally, serve to highlight the broad formation of a near permanent lesser class of persons vulnerable to institutionalized inequalities in the United States.

Introduction¹

The federal government's detention of Arab, Muslim, and South Asian immigrants in the aftermath of the September 11, 2001 attacks has provoked increased public and academic scrutiny of immigrant incarceration. The widespread, yet racially targeted, detention of noncitizens, which has been motivated by a *fear of* immigrants as potential terrorists in the interior of the nation, has also motivated a *fear for* immigrants—especially for those who bear the brunt of the federal government's anti-terrorist strategies and the general public's hysteria and willingness to act against noncitizens. Immigrant detentions, following 9/11², and immigration law in general continue a historical tradition of racialization of foreign nationals, whereby government policies are used to mark non-white noncitizens, who are socially and materially vulnerable, with a lesser racial and legal status.

Race and noncitizenship work together. They are intertwined vulnerabilities that make whole communities susceptible and at times defenseless against incursions on their fragile constitutional status. While racial and noncitizen “others” have their supporters, advocates for racial justice and immigrants’ rights often work in isolation from each other. As such, it is critical to analyze and unravel the patterns and particularities of detention history at the nexus of racial and immigrant statuses, and also, to evaluate the reach of detention policy into broader communities and society at large. This is especially important as arriving immigrants and their children generate unprecedented demographic and social changes in a reformulated metropolis.

¹ This working paper represents an early stage of my project, which has since developed into a completed dissertation of the same title filed in June 2005. I would like to thank the Institute for the Study of Social Change for its generous support and encouragement at this critical stage of the project.

² In this essay, I will use 9/11 to refer to the terrorist attacks on the United States on September 11, 2001.

Grounded in a well-documented history of racial oppression and white supremacy in the United States, it is not difficult to trace how immigration laws have underscored U.S. racist principles, while simultaneously producing new categories of undesirables. Racial and immigrant status intersect along a very slippery slope, where noncitizen discrimination and inequality can be extended along racial lines, or where racial antagonism is exacerbated by a reduction in rights for noncitizens. According to Joseph Nevins (2002) in *Operation Gatekeeper: The Rise of the “Illegal Alien” and the Making of the U.S.-Mexico Boundary*, “While yesterday's undesirables were distinguished by racial factors, today’s unwanted immigrants are marked by their legal status—or lack thereof. And given the power of ‘the law’ as an ideological construct dividing good from evil in the contemporary United States, this very fact—in addition to their ‘otherness’—serves to marginalize these immigrants in the eyes of much of the public” (121). Predicated on a more vulnerable legal status before the law and society, noncitizens’ increased detentions signify the production of undesirables who are simultaneously products of blatantly racist histories of reception and of incorporation into U.S. society. As such, immigrant detainees, and immigrants and their families in general, find themselves at the intersection of their reduced rights before the law and their racialized position within society. Given immigrants’ concentration in urban areas nationwide, this development is of paramount importance in the face of widespread demographic change and economic restructuring that relies on immigrant labor.

Old Patterns, New Wrinkles

“We are a nation of immigrants. However, the simplicity of that statement conceals the nation’s consistent history of tension over whom we collectively regard as ‘real Americans’ and, therefore, whom we would allow into our community” (Hing 2004, 3).

Despite the unprecedented nature of the terrorist attacks in autumn 2001, and the Bush administration’s use of national security as the definitive trump card against civil liberties and governmental checks and balances, the detention of immigrants is not a new story, but instead, a new chapter in the criminalization of immigrants, whose continuity underscores the persistence of the legal and social hierarchy that is at the foundation of our “nation of immigrants.” The government’s strategic use of the detention of immigrants as a response to 9/11 and under the rubric of “homeland security” is part of a broader pattern of criminalizing noncitizens. During the late 1990s, the number of immigrant detainees dramatically increased by 300 percent (U.S. Department of Justice 2002b).³ Similarly, the 1980s witnessed large-scale expansion of detention facilities due to the “war on drugs” as well as mass detentions of Cuban and Haitian refugees.

It is largely unknown that immigrant detention has a long history in the U.S., and intense periods of immigrant incarceration have taken place since the early 1900s. Most often, such episodes are viewed as individualized events in which the federal government responds to distinct national security crises, utilizing a temporary strategy of incarcerating noncitizens, and thus protecting the nation and “homeland” from enemies within its borders. Although the 9/11 detentions mark a new episode in this process, with new precedents, the domestic “war on terror”

³ See especially Bulletin NCJ 195189, p. 10, Table 12 and Bulletin NCJ 200248, p. 8, Table 10. Immigrant detention also doubled in the 1970s and further expanded in the 1980s due to Latin American foreign policy and the “war on drugs.” See Dow 2004, 8; and Kahn 1996.

is also consistent with patterns in detention history that predate by over one hundred years the recent terrorist attacks and ensuing detention expansion.

The historic continuum of immigrant detention, when viewed critically and comparatively, exposes the brittle nature of laws designed to protect immigrants from potential abuses. Kevin Johnson (2004) reminds us of this possibility in his recent book, *The “Huddled Masses” Myth: Immigration and Civil Rights*. Johnson states, “The dominant society’s treatment of noncitizens gives us a view of its potential treatment of U.S. citizens who share similar characteristics if all legal constraints were lifted” (4). Indeed, lifting legal constraints for the treatment of noncitizens and producing new categories of enemy citizens is precisely what the federal government has pursued and achieved in the contemporary war on terrorism. As witnessed in previous episodes of expansive immigrant detention, even citizenship proves to be a delicate defense if persons are linked to groups broadly categorized as “enemies” who do not deserve equal access to due process protections. For example, law professor David Cole (2003) recalls, “As the Japanese internment demonstrated, alienage discrimination is often closely tied to (and a cover for) racial animus, and is therefore particularly susceptible to being extended to citizens along racial lines” (7). Inequality manufactured by the legal divisions between citizens and noncitizens works in concert with other forms of discrimination—i.e., racism, sexism, homophobia, ideological discrimination, etc.—and is thus a significant part of concentrated social and economic inequality in U.S. urban spaces.

Immigration law and “alien” detention are used to promote the racialization of foreign nationals. Indeed, the state of hysteria and racial panic experienced sporadically throughout U.S. history is the defining feature of U.S. immigration historiography. Since its inception with the Naturalization Act of 1790, U.S. citizenship policy has relied on a racial hierarchy entrenched in white supremacy and criss-crossed by other measures of difference, ranging from gender and

sexuality to socioeconomic status and the ideologies of immigrants. Non-white immigrants, in particular, have been constrained by U.S. immigration policy and its institutional, social, and structural components, including national and state legislation, the Immigration and Naturalization Service, the U.S. military, the media, opinion polls, and politicians who crave electoral success. Racialized definitions of citizenship and naturalization, exclusion acts, anti-miscegenation laws, contract labor, social and economic incorporation through war, massive deportations during post-war crises, military internment, gendered “denaturalization,” displacement through foreign policy, second-class citizenship, and detention and servitude create the patchwork of non-white immigrant histories. Quilted into the seams are the untold stories of immigrant participation and apathy, triumph and destitution, patriotism and radicalism, immigrant voices and silences.

Not unlike their European counterparts, non-white immigrants to the U.S. have chiefly emerged from a heterogeneous set of historical circumstances in their home countries and have confronted the extraordinary challenge of resettlement within our so-called “nation of immigrants.” Where they differ is that non-white immigrants migrating for a variety of reasons are met with a hostile reception that is sustained for generations, if not permanently. More importantly, the rules for their social mobility as immigrants change with the social and economic needs of the country, and often make permanent their lesser status before the law and society. The persistence of legislation that treats immigration as an issue “at our gates,” and sweeping definitions of undesirable populations not to be included as part of the nation, have reinforced inequality in domestic society, not only between citizens and immigrants, but also between citizens’ and immigrants’ families and communities.

9/11's Exceptionalism

“. . . [T]he history of civil liberties in times of emergency suggests that governments seldom react to crises carefully or judiciously. They acquiesce to the most alarmist proponents of repression. They pursue preexisting agendas in the name of national security. They target unpopular or vulnerable groups in the population less because there is clear evidence of danger than because there is little political cost” (Brinkley 2003, 45-46).

In addition to the abrupt suspension of adjudications of refugee status, and the derailment of a potential amnesty for undocumented laborers, 9/11 most notably catalyzed the racial profiling of persons perceived to be of Middle Eastern origin, causing popular and official observers to conflate Arabs, Muslims, and South Asians. Institutional racial profiling was accompanied by private acts of violence and paranoia and official divestment of civil, and in some cases, human rights for Arabs, Muslims, and South Asians. In nationwide sweeps immediately following 9/11, over 1200 persons were detained without charges or direct links to the terrorist attacks. Moreover, federal authorities invoked secrecy, both to conceal and to confirm detainees' criminalization.

Advocates, civil libertarians, and the Justice Department's Inspector General have documented the abuses of detainees by federal officials. In response to such charges and reports of abuses of authority, Attorney General John Ashcroft steadfastly refused to apologize,⁴ and attacked his critics for “aid[ing] terrorists” and “diminish[ing] our resolve.”⁵ Criticism of U.S. authorities, in other words, is treason. Relying on the often-invoked exceptionalism of 9/11, Ashcroft has stated, “I don't apologize for a system that can ensure the security of the United States by detaining individuals who were in violation of the law, pending the outcome of their

⁴ After violating a gag order during the government's single successful prosecution (which was later overturned for negligence on the part of the government's prosecution) a federal judge in Detroit admonished the attorney general, who, in an unusual move, issued a written apology.

⁵ See testimony of Attorney General John Ashcroft, Senate Judiciary Committee Hearing on Anti-Terrorism Policy, 106th Congress, Dec. 26, 2001.

adjudication” (Duffy and Ragavan 2004, 33). Ashcroft’s methods of ensuring security, however, are promulgated without transparency or checks and balances from the other branches of government.

The advent of 9/11 and the federal government's global and domestic reactions to it supposedly changed everything, from presumptions about national security to attitudes about the United States abroad, and indeed about immigrants and refugees. According to law professor Teresa Miller (2002), however, “one could argue that the one thing that remained unchanged by the events of September 11 was the United States’ system of immigrant detention” (233). While Ashcroft announced “a new era in America’s fight against terrorism” (Eggen 2001, A20), many observers feared the implications of this “new era.” Representative Maxine Waters (D-CA), concerned that the international war on terror would “spill over into domestic affairs,” cautioned in the months after 9/11, “They’re literally dismantling justice and the justice system as we know it” (“Use of Military Tribunals Draws Objection on the Hill” 2001, A5).

Legal antecedents and patterns in detention history are concealed by the ahistorical frame applied to contemporary national security concerns. Legal challenges by advocates for detainees and civil libertarians have tarnished the newness and exceptionalism that justified the governmental response to 9/11. While the government constructs an unparalleled *crisis* in national security, advocates point to the historical *continuity* of immigrant criminalization in the name of national security. According to Cole (2002), “Administration supporters argue that the magnitude of the new threat requires a new paradigm. But so far we have seen only a repetition of a very old paradigm—broad incursions on liberties, largely targeted at unpopular noncitizens and minorities, in the name of fighting a war” (20). History matters here because the war on terror’s so-called unprecedented nature is cited to rationalize the reduction and eradication of constitutionally protected freedoms. Historical analysis of immigrant detention is thus

instructive, because the exceptional character of 9/11 requires a re-contextualization that reveals its complexity and traces its preexisting infrastructure.

The events of 9/11 and the federal government's national security response merged with the anti-immigrant sentiment of the 1990s, which perpetuated an age-old fear of immigrants in terms of the traditional concerns about jobs, language, race, crime, and education. In the war on terrorism, homeland security trumps all, and has become, for the time being, the dominant lens from which to view immigrants' insecure position in the national fabric. Whereas 9/11 indeed had dramatic effects on contemporary immigration policies—halting what many expected was going to be a new amnesty for the undocumented, for example—the national security threat was by no means a new catalyst. The internment of Japanese and Japanese Americans during World War II is the most notorious example of the executive application of emergency war powers to date. National security and the questionable logic of military necessity justified this disgraceful episode of racialized detention. However, according to the Commission on Wartime Relocation and Internment of Civilians (1997) appointed in the early 1980s to review the “facts and circumstances” surrounding Japanese internment, “the broad historical causes which shaped these decisions were race prejudice, war hysteria and a failure of political leadership” (459). Such historical reasoning is not unique to World War II, nor to today's “war on terror.” According to Joseph Nevins' (2002) important text on boundary control and immigration, *Operation Gatekeeper*, “The roots of the U.S. Border Patrol are to be found not only in concerns about unauthorized immigration, but also (and perhaps more so) in a preoccupation with matters of national security as related to the boundary” (28).

Immigrant policing efforts have certainly been impacted by 9/11 and new homeland security initiatives. For example, the much maligned and arguably racist policy of detaining all Haitian refugees as a uniquely tailored method to deter their immigration received a boost when

the Department of Homeland Security recently overturned immigration judges' rulings on the parole of Haitian detainees (Bandell 2002).⁶ According to the expansive logic of the attorney general, the detention of Haitians is a matter of national security because the deterrence of Haitian refugees relieves the Coast Guard and provides budgetary savings that can be used for homeland security. Cole (2004) states, "On this theory, any initiative that reduces government expenditures—from welfare reform to cutting spending on environmental protection—is warranted by national security, because those funds can thus be used to fight terrorism" (5).

Contemporary use of the "security card" in the wake of 9/11, then, dovetails with the decades-long expansion of the paradigm of immigration control. For instance, whereas the administrative and political border with Mexico has been undergoing steady, expensive, and deadly militarization, today's military operations against terrorism have "gone administrative"—interpolating policies and practices of civilian bureaucracies in the name of a "war on terror." Ashcroft himself has threatened, "Let the terrorists among us be warned. If you overstay your visas even by one day, we will arrest you. If you violate a local law, we will . . . work to make sure that you are put in jail and . . . kept in custody as long as possible. We will use every available statute. We will seek every prosecutorial advantage. We will use all our weapons within the law and under the Constitution to protect life and enhance security for America" (Eggen 2001, A1, A20).

The accumulation of executive power over immigration has a unique relationship to the declaration and construction of national security emergencies and "wars"—including World Wars I and II, the Cold War, and the "wars" on drugs and terrorism. Power over immigration concerns is supposed to reside with Congress. Indeed, major immigration policies such as California's Proposition 187 in 1994 were struck down in the courts because they interfered with

⁶ . INS spokesman Mario Ortiz said, "We believe that if this group was to be released, it would send a signal back to Haiti saying 'Hey we got in,' and it would trigger a mass migration that would be a threat to our national security."

Congress's authority over immigration. But the war on terrorism illustrates how a great deal of detention policy originates directly from the executive branch (e.g., the executive designation of "enemy combatants" detained on Guantánamo Naval Base), or through the executive branch's interpretation of the federal laws passed by Congress (e.g., enforcement and the proposed permanent extension of the USA PATRIOT Act). Unmitigated executive power, in the form of applying vague labels such as "suspected terrorist," "material witness," or "enemy combatant" to noncitizens and citizens, without the possibility of review by Congress or the judicial branch, extends the reach of national security as a rationale for detaining immigrants without due process.

Immigration Status as Pretext and Euphemism

"The discourse of legal status permits coded discussions in which listeners will understand that reference is being made, not to aliens in the abstract, but to the particular foreign group that is the principal focus of current hostility" (Neuman 2002, 1429).

Noncitizen status and immigration law together serve as the quintessential pretext for criminal and anti-terrorist enforcement because noncitizens are located ambiguously outside the law and do not enjoy the constitutional protections and safeguards of criminal law. National security fears caused by the states of war declared by the White House have implications for ongoing urban and community formations, especially in the context of California's historically negative perception of immigrants. According to Cole (2003), "At every opportunity since September 11, Ashcroft has turned immigration law from an administrative mechanism for controlling entry and exit of foreign nationals into an excuse for holding suspicious persons without meeting the constitutional requirements that ordinarily apply to preventive detention" (26).

Just as U.S. citizenship has not proven to be a guarantee of equal treatment, the pretextual use of noncitizenship status contains its own hierarchies and legal ambiguities. Immigration law plays a major role in the construction and exercise of power over noncitizens. According to race theorists Kimberlé Crenshaw et al. (1995), “The law is shown to be thoroughly involved in constructing the rules of the game, in selecting the eligible players, and in choosing the field on which the game must be played” (xxv). For immigrants and the policies which seek to manage them, racial identity has always been intimately tethered to citizenship, and in the U.S. context, to whiteness. Kevin Johnson (2004) writes, “We must understand that racially exclusionary immigration laws do more than just stigmatize domestic minorities. Such laws reinforce domestic subordination of the same racial minority groups that are excluded” (49). Immigrants are punished by a racializing process that blurs the boundary between citizenship and noncitizenship and in turn justifies the maltreatment of noncitizens by the state. As Ian Haney-López (1996) argues, “Like racial prerequisites, antimiscegenation laws, and de jure segregation, anti-immigrant laws construct races coercively and ideologically. These laws force people apart, using state violence to assign meanings of belonging and exclusion, racial worth and worthlessness, to people possessing certain features, ancestries, and nationalities” (145).

Immigrant status is thus a powerful euphemism and marker of non-whiteness, and has historically made immigrants particularly vulnerable to the reach of criminalization efforts. According to Teresa Miller (2002), “Increasingly, the immigration system functions—like the criminal justice system—to socially control through confinement in secure, disciplinary facilities the unpopular and the powerless, which in this case are undocumented people of color” (216). In the interest of various government agendas, noncitizen status, then, becomes the pretext and the basis for the government’s extraconstitutional strategy of detaining immigrant undesirables.

Law and Lesser Citizenship

“Unlike the participation of the courts in the struggle for the rights of citizens, judicial review of the constitutionality of laws that provide for the exclusion and deportation of immigrants has been negligible” (Johnson 2004, 3).

Contemporary detention policies emerge from the historical dialectic between immigrant detention and the racialization and “othering” of noncitizens. The crucial border to be considered here is not the militarized border between the U.S. and its North American neighbors, but the social and structural divisions between citizens and noncitizens. The racial context of this unequal relationship has been explored by many scholars, firmly documenting the racist construction, categorization, and treatment of non-white immigrants and citizens. Immigrants from all countries have been met with hardship, but for non-whites, such treatment often lingers for generations. Nonetheless, the legal borderland marks all immigrants, and in turn citizens, characterizing their divergent relationship to the state. According to political scientist Thomas Biersteker (2003), “State jurisdictional claims of authority define the operational meaning of the border, both how hard or how soft it is, and precisely where (in legal, not physical space) the authority is exercised” (161). I contend that the unequal application of federal laws that define citizenship and personhood, in addition to the denial of due process protections for immigrants, reveal an institutionalized, unequal, and often racialized arrangement of citizens and noncitizens. Further, ideological prejudice and the construction of political “others”—especially during “wartime” intensifications of racism, nativism, and political intolerance—complement the racialization of immigrants and are often motivating factors in immigrant detentions and denials of due process.

Well before 9/11, United States immigration policy had been routinely framed by what Saskia Sassen (1999) calls a “control crisis,” in which legislative initiatives historically sought to

stem the flow of immigration, and legal and administrative methods mandated the management, restraint, and deportation of undesirable noncitizens. This perspective has resulted in myopically conceived government strategies that attempt to address the restriction of immigration through various forms of deterrence. The regime of regulatory legislation and enforcement, most often with a focus on borders and ports of entry, narrowly addresses, according to Sassen, “a complex, deeply embedded and transnational process” that government officials “can only partly address or regulate through immigration policy as conventionally understood” (20).

Similarly, federal detention practices, bolstered by the widespread criminalization of immigrants, rely on categorical and blanket presumptions about detainees, often steeped in racial conjecture that can, at the extreme, conflate about the public’s perceptions of noncitizens and citizens. In *Unequal Freedom: How Race and Gender Shaped American Citizenship and Labor*, Evelyn Nakano Glenn (2002) writes, “Citizenship shifted from a restrictive definition of membership that categorically excluded major classes of people, including non-whites, women, and those without property, to one that was inclusive, but assigned differential rights and obligations to different categories of people” (236). Simultaneously, blanket categorization of particular immigrants groups (i.e., Japanese, Muslims, Haitians, etc.) not only produces inequality among these groups, but also negates individual protections, such as due process rights, meant to protect persons from unlawful criminalization. The codification of “difference” into citizenship law, and how this law is administered through detention practices, constructs new embodiments of “non-personhood” and “lesser citizenship.” These categories of individuals juridically and socially endure under fundamentally different sets of legal constraints and rights.

“Lesser citizens” are produced when the rights of citizenship and legal personhood are abrogated by various levels of government and by private members of society. New forms of citizenship have historically been constructed formally before the law, but also socially before

the national populace, along racial, gendered, sexualized, and ideological lines. According to Glenn (2002), “Citizenship is not just a matter of formal legal status; it is a matter of belonging, including recognition by other members of the community” (52). As such, in various periods of U.S. history, significant portions of the population (concentrated in major cities and among specific ethnic and racial communities) have been situated on unequal tiers of citizenry, enforced by legal mandate and social practice. In fact, as Cole (2003) argues, “Double standards predicated on the citizen-noncitizen line are easily extended to racial, religious, and political minorities within the citizenry. In this regard, citizen-noncitizen discrimination is all the more insidious today, precisely because discrimination against noncitizens remains one of the few group-based categories that many people still feel comfortable employing” (100).

Rethinking T. H. Marshall’s three-part citizenship model consisting of civil, political, and social citizenships, Glenn (2002) distinguishes between formal citizenship “embodied in law and policy” and substantive citizenship—“the actual ability to exercise rights of citizenship” (53). The disconnected and uneven development of formal and substantive citizenship in the United States has led to the hierarchical development and proliferation of citizenship classes, in which particular populations enjoy lesser formal and substantive statuses. Immigrant detention, historically and in the 9/11 era, functions in accordance with these unequal tiers. The system of immigrant detention permits the incarceration—fraught with its own history of adverse, if not inhumane, conditions—of persons who are deemed to possess differential rights. This is the real, material meaning of inequality.

According to legal scholar Peter Schuck (1998), “The status [of alienage] has always remained a constitutionally permissible ground for classifying individuals for many invidious purposes” (27). Legal permanent residents, non-white citizens, and undocumented immigrants, even in the best of times, are thus often held to different standards of civil responsibility, and

reduced levels of civil rights. Crises in national security, manufactured at home and abroad, place lesser citizens in stark relief compared to those possessing substantive rights before law and society. During these times—especially for women, slaves and former slaves, Native Americans, formerly excluded "aliens ineligible for citizenship," and non-whites conquered and incorporated into the U.S. mainland or imperial holdings—even the attainment of formal citizenship status only weakly inoculates these individuals from their lesser status in the social and at times legal hierarchy.

Undue Process

“Immigration has long been a maverick, a wild card, in our public law. Probably no other area of American law has been so radically insulated and divergent from those fundamental norms of constitutional right, administrative procedure, and judicial role that animate the rest of our legal system. . . . Immigration law remains the realm in which government authority is at the zenith, and individual entitlement is at the nadir” (Schuck 1998, 19).

Historically, immigrant detention has relied on a range of legal antecedents and administrative discretion, from loosely restricted local interpretations of federal laws, to executive fiats and private practices. For example, as border militarization expert Timothy Dunn (1996) surmises, “It is important to note that the INS played an active role in developing this new focus on ‘criminal aliens.’ [. . .] Thus, the criminal-alien enforcement emphasis is rooted in INS initiatives and discretionary power as much as it is in formal legal mandates” (74). As the various parties scramble to capitalize politically and financially on the fruits of detention, the result is an inconsistent tangle of public policy caught in its own discrepancies, while entrapping noncitizens.

In 1996, for example, three federal laws were enacted that effectively reduced the rights of immigrants and together manufactured the penultimate episode of detention expansion.⁷ Legal scholar Peter Schuck (1999) explains, “The 1996 laws together constitute the most radical reform of immigration law in decades—or perhaps ever” (78). Of these, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) most elaborately facilitated detention through a sweeping and regressive denial of due process to noncitizens. By ushering in “mandatory detentions” for immigrants facing deportation, and removing judicial relief, the IIRIRA contributes to the haphazardness in immigration law and order. These tactics have led to numerous other abuses of human rights and incursions on due process.

Furthering the divide between citizens and immigrants in the criminal justice system, IIRIRA redefined the parameters of an “aggravated felony” for noncitizens, including legal permanent residents. This change, effective retroactively, initiates the deportation process, which includes detention for offenses that were not deportable when they were committed. According to Miller (2002), “The retroactivity of the mandatory detention provisions combined with the vastly expanded categories of offenses which subject non-U.S. citizens to deportation are primarily responsible for the threefold increase in the numbers of non-U.S. citizens in federal immigration detention” (220-221). In other words, immigrants and non-immigrants committing similar crimes are punished differently. First, immigrants are punished by the criminal court system and then by the immigration system, imposing a double liability for their offenses. On the surface, this may appear to be a form of double jeopardy. For example, Mark Hamm (1995) refers to the “double punishment” of Cuban excludable entrants, who are “re-arrested” by the INS after serving their sentences (67). But in the logic and structure of immigration law, the

⁷ These statutes are: the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-32 (AEDPA); the Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. 104-193 (“welfare reform”); and the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. 104-208 (IIRIRA).

single criminal act that is also a deportable offense is simultaneously subject to two court systems, one criminal and one administrative. However, deportation is not considered punishment, but instead an administrative proceeding. According to legal scholar William Preston (1994), “Due process in deportation was smashed on the rock of judicial decision in 1893. [. . .] In *Fong Yue v. United States*, the Supreme Court determined the future pattern of expulsion in one simple interpretation: Deportation was not a punishment for crime but merely an administrative process for the return of unwelcome and undesirable alien residents to their own countries” (11). The implications of characterizing deportation and the detention process that accompanies it as an administrative procedure have material consequences for immigrants and their families that are more closely related to criminal punishment than to civil sanctions. As Schuck (1998) states, “Deportation, in fact, serves as an important adjunct and supplement to criminal law enforcement, and it reflects judgments, essentially indistinguishable from those that the criminal law routinely makes, concerning the moral worth of individual conduct” (35).

Situated outside of criminal law, “criminal aliens,” not surprisingly, earn little popular sympathy and possess few legal protections. Cole (2003) believes this fact alone justifies the detainees’ right to due process. He writes, “Precisely because noncitizens do not enjoy the franchise, and therefore cannot rely on the political process for their protection, it is all the more crucial that they be accorded basic human rights enforceable in court” (12). Detainees, while criminalized in the popular imagination, lie outside the parameters of criminal law. In a statutory sense, these immigrants are not considered criminal defendants; therefore they do not receive the legal protections to which alleged criminals are entitled. As one New York immigration attorney representing pre- and post-9/11 detainees states, “You’d rather be charged with a serious murder where you have some rights than a visa overstay. Because it’s civil in nature, the safeguards don’t apply” (Getter 2001, A4).

Such an expansive and ambiguous definition of “illegality”—sometimes criminal and sometimes administrative—contributes to shifts in detention policy and its increasing dimensions. Noncitizenship, in the vehicle of immigrant detention, serves to disappear immigrants from the justice system, leaving them with scant legal or social leverage to contest their criminalization. These legal ambiguities have been a consistent problem for immigrant advocates, predating the equally distressing “disappearances” of exclusively Arab, Muslim, and South Asian detainees stemming from 9/11 security efforts. If, as political philosopher Joy James (1996) argues, “American prisons constitute an ‘outside’ in U.S. political life” (34), then, what about those immigrants who are *outside* of this outside? One answer can be found in Vice President Dick Cheney’s assertion of statutory inequality regarding foreign nationals and military tribunals: “They don’t deserve the same guarantees and safeguards that would be used for an American citizen going through the normal judicial process” (Slevin and Lardner 2001, A28). A different answer is that “the [Supreme] Court has insisted for more than a century that foreign nationals living among us are ‘persons’ within the meaning of the Constitution, and are protected by all those rights that the Constitution does not expressly reserve to citizens” (Cole 2003, 211). The statutory authority over the creation and administration of immigration policy—in which immigrant detainees historically hang in the balance—is thus a contest impacted by the judicial, executive, and legislative branches of government, and one vulnerable to unprecedented accumulations of power in the name of “national security.”

Invisible Punishment in the New Metropolis

“In a democracy, demography is political destiny. In the American context, that destiny is one in which the traditionally dominant ethnic groups of European ancestry will gradually yield political ground to those of Hispanic and Asian descent” (Schuck 1998, 47).

The legal and institutional bureaucracies governing immigrant detention and due process are central to the formation of bifurcated communities in emerging and reemerging urban areas. As the rights of immigrant groups are reduced by the federal branches of government, the spillover effects and “invisible punishments” of “undue processes” harm immigrants and their families in innumerable ways. In states that receive large numbers of immigrants, such as California—where immigrants settle primarily in urban areas, the racial and class formation of immigrants is of elevated importance. Whole communities are “put on notice,” and their legal status, or relation to persons of lesser status, serves as a continual threat to their well-being, as well as a reiteration of their criminality within the society at large. Even though immigrant groups are long-time, key contributors to the growth of California cities as taxpayers, laborers, consumers, and community members, they are incorporated into urban life at a lower social and legal status. High concentrations of persons possessing lower legal status, and consequent fewer legal protections from abuse by governmental and private actors, drive entire communities into a field of legal ambiguity. This results in the creation of socially stratified communities, hugely affecting city planning, representational politics, labor exploitation, and education, among other political and economic processes.

Immigrants’ demographic importance to U.S. cities continues to grow with each decade, especially in the west. According to a press release from the U.S. Census Bureau, in 2000 foreign-born persons constituted a majority in six cities of 100,000 persons or more; four of these cities are in California (Glendale, Santa Ana, Daly City, and El Monte). Other large California

cities with near majorities (i.e., 40 to 50 percent foreign born) include Garden Grove, East Los Angeles, and Los Angeles. It is important to note that these cities are not located on the U.S.-Mexico border, where for decades border militarization has functioned to criminalize immigrants and those who appear to be immigrants. Instead, the majority of noncitizens today reside at what Mike Davis (2001) calls the “third border”; they are thus subject to social policing that “monitors daily intercourse between two citizen communities” (61) in urban centers.⁸ Similar to the ways that the U.S.-Mexico boundary constructs noncitizens as “illegals” and as threats to the social fabric and security of the nation, interior enforcement procedures stemming from the war on drugs, the war on terror, and new absconder initiatives also construct and criminalize undesirables, and bring border-like enforcement into cities. If immigrant populations continue to be burdened by reduced legal rights, then the criminalization of immigrants will also reflect their concentration in particular urban areas.

This paper has discussed immigrants’ rights within the judicial sphere, but the lack of voting rights,⁹ denial of driver’s licenses, and other forms of criminalization of immigrants will particularly slow the incorporation and mobility of a very significant part of the population. Latinos, for example, are the paradigmatic immigrant “other” in the emerging western metropolis. Latinos comprise 46 percent of the foreign born population in the U.S., according to the 2000 census (“New Facts from Census 2000” 2003). Of the 4.6 million noncitizen adults in California, 3 million are Latinos (Avila 2003). According to Christian Parenti (1999) in *Lockdown America*, “There is a *de facto* apartheid emerging in the Southwest; working class Latinos live under a fundamentally different set of laws than Anglos” (160).

⁸ Davis is referring to the ways that immigration control policies at the border and in the nation’s interior affect U.S.-born and non-U.S.-born Latinos. This not only includes the ubiquitous threat of deportation by the Immigration and Naturalization Service—which has always disrupted the lives of undocumented immigrants and their citizen family members—but the extra-border policing of all Latinos in the form of racial profiling by local police, assaults on bilingual education and bilingualism, and the criminalization of Latino youth culture.

⁹ In CA, 4.6 million noncitizen adults, or 19 percent of the adult population, cannot vote for political representation (Avila 2003).

Immigrants from Latin America are also key figures in detention history. For example, not only were Mexican immigrants specifically targeted for medical detention and quarantine at the turn of the 20th century, as well as for detention and deportation during the 1930s and 1950s, but Latin American immigrants are the primary ethnoracial group among “criminal alien” detainees, who make up 60 percent of immigrant detainees today. While the experiences of Latinos with immigrant detention and border enforcement are significant, it is important not only to maintain a comparative frame to better understand the full complexity of the government’s racialized immigration policies, but also to explicate the deep affinities that Latinos possess with other immigrant groups. In addition to understanding each cultural group’s particular political experience, in today’s atmosphere of declining civil liberties and punitive immigrant legislation, the rights of noncitizens in this country must also be understood in relation to one another.

Another way to think of the implications of detention (or other anti-immigrant) policies is to consider the “collateral consequences” of such policies, which inflict hardships on immigrants’ families, including citizens and noncitizens both in the U.S. and in their home countries. The hardships include financial and emotional distress, increased risk of fatal disease, and increased social risks to vulnerable children. Many of these consequences of immigrant detention fly under the radar of public opinion or concern, and have been termed “invisible punishment” (Travis 2002). As stated above, because of the race and spatial concentrations of immigrants, a larger part of these hardships fall on immigrants and their families in cities and within Latino communities.

Finally, another key aspect often overlooked in studies of immigrants today is the prevalence of mixed-status families, among particular immigrant groups and in the new metropolis. According to Fix and Zimmerman (2001), a mixed-status family is “a family in which one or both parents is a noncitizen and one or more children is a citizen.” Mixed status

includes a variety of noncitizen statuses: permanent resident, undocumented, the range of work and education visas, and so on. While one in ten families in the U.S. is of mixed status, 75 percent of all children in immigrant families are citizens, and 85 percent of immigrant families are of mixed status. There are also important spatial considerations. One in four families in California is of mixed status, and 50 percent of children in Los Angeles are in mixed-status families. In New York, 15 percent of families are of mixed status, and 24 percent of children in New York City (Fix and Zimmerman 2001).

Why is this important? Because hurting immigrants also hurts immigrant families and thus citizens as well. These family members are, for all intents and purposes, also lesser citizens. Deportations split families. Curbs on social benefits hurt citizen children. And limiting the right to legalize one's status through bogged down bureaucracies perpetuates the mixed-status situation. The result is what Fix and Zimmerman call an undue "hereditary disadvantage" passed down to the children of immigrants, so that some children and U.S.-born citizens have deeply impaired fates based on the treatment of their immigrant parents. The point here is not simply that there is something seriously wrong with our citizenship laws and access to legal rights because citizens living in the shadows are being hurt, although that is true. The argument is that inequality based on differing rights associated with ambiguous legal status is increasingly widespread. Substantive justice is, sadly, becoming the right of the few.

Criminalizing Immigrants

“When I look at the world, I see terrorism has not abated. It's flourished. . . . So preventing, or interrupting, disrupting, displacing, dislocating, delaying—*anything* we do to prevent terrorist attacks, is important.”

Attorney General John Ashcroft (Ragavan 2004 , 36, *emphasis added*)

David Cole (2003) writes, “Short of execution, the power to lock up a human being is the most serious authority the government exercises” (46). The dehumanizing conditions faced by immigrants in immigrant detention centers parallel, and often exceed, the conditions experienced by inmates within the United States’ penitentiary system. Indeed, almost two million people—two thirds of whom are non-whites—are currently locked up in U.S. prisons and jails, representing a tripling of this population since 1980. The number of immigrants in INS detention has also tripled since as recently as 1994 (Solomon 1999). While the severity of conditions within what Angela Davis calls the “punishment industry” is being rightfully questioned (see Gordon 1998/1999, 146), the criminalization of immigration has not yet been satisfactorily addressed in the discourse on the “prison-industrial complex.” Instead, the cultural stereotype of the “illegal alien” as one who invades the U.S., challenges national sovereignty, threatens national security, and is forever committing treason remains unchallenged. The “illegal” is therefore constructed symbolically and juridically through his or her non-citizenship. This criminalized condition leads to a permanent state of delinquency that “authorizes the perpetual surveillance and control of the immigrant population” (Behdad 1998, 105). Whereas the international border functions as the geographical and ideological mechanism that articulates the boundaries of citizenship, detention policy illustrates how non-citizenship is further delineated—politically, administratively, socially, and punitively—and controlled in the interior of the nation.

The war on terrorism, catalyzed by the September 11, 2001 terrorist attacks, generated a new episode in the long pattern of immigrant detention in the United States. The terrorist-related growth of immigrant detention has merged with the rapid expansion of detention bed space for housing other “criminal aliens,” especially those netted in the war on drugs and as a result of the 1996 immigration laws. The contemporary expansion of immigrant detention has spawned a growth industry in the middle of a nationwide economic recession exacerbated by 9/11. The budding “homeland security industry”—exemplified by corporations such as InVision, whose stock has risen by nearly 1500 percent since September 10, 2001, after struggling to stay afloat for its first ten years in business—includes corporations that produce X-ray inspection systems, facial and fingerprint recognition systems, anthrax detection, and other security and surveillance services. According to business columnist Kathleen Pender (2004) of the *San Francisco Chronicle*, “Although most companies existed before Sept. 11, 2001, the toppling of the twin towers, the anthrax scare and President Bush’s wide-ranging war on terrorism created new markets or applications for their products or services” (C1, C5).¹⁰ In the public sector, the Department of Homeland Security (DHS) has also produced an increase in public spending, sometimes at the expense of other programs. In 2003, for example, \$4.4 billion was spent on homeland security grants (Borgelt-Mose 2004, 32).

Critics charge that the focus on homeland security comes at the expense of disaster preparedness. For example, grants made by the Federal Emergency Management Agency (FEMA) and the Office of Domestic Preparedness (ODP) totaled less than \$400 million between 1999 and 2002, compared to the \$4.4 billion in DHS grants in 2003 (*ibid.*). Critics also assail the narrow focus of homeland security, which makes rooting out suspected terrorists a top priority while ignoring the social backlash created by such an effort. According to Robin Toma,

¹⁰ See also Pimentel 2004, C1, C5.

executive director of the Los Angeles County Human Relations Commission, homeland security “needs to be widened to include the security of the people who are not terrorists but are hit by the backlash” (Borgelt-Mose 2004, 34). Los Angeles County, for example, suffered a 1,000 percent increase from the previous year in hate crimes in the three months following 9/11 (ibid.). Indeed, one of the “collateral consequences” rarely recognized by the government has been increased hate crimes and anti-immigrant sentiment stemming from 9/11 and the government’s strategic response.

While the war on terror and the increased detentions of Arab, Muslim, and South Asian immigrants has resulted in an increase in the detention infrastructure, “criminal aliens” and absconders (who disappear after receiving their final orders to leave the country) still represent the lion’s share of immigrant detainees. New initiatives and administrative changes within the Departments of Homeland Security and Justice have facilitated longer periods of detention and more detainees. Due to these changes, the expansion of bed space for these detainees is also a growth industry.

For example, the Office of Detention and Removal (DRO) recently issued its “Strategic Plan 2003-2012: Endgame” which seeks a “100% removal rate” of deportable immigrants in order “to maintain the integrity of the immigration process and protect our homeland.” Because detention is a central part of any individual or mass deportation effort, Endgame’s “operational focus on fugitive apprehension,” according to former DRO Director Anthony Tangeman (2003) “will require significant increases in detention and removal operations and resources” (ii, 1-1). Under the rubric of Endgame, the Department of Homeland Security introduced the pilot program “Operation Compliance” in Atlanta and Denver in April 2004. The program, which is designed to “curb the chronic problem of ‘absconders’—an estimated 300,000 to 400,000 scofflaws in the United States in defiance of orders to leave,” assigns Immigration and Customs

Enforcement officers to the immigration courts and gives them the authority to immediately arrest those who lose their deportation cases, and detain the immigrants until all their legal appeals are exhausted (Alonso-Zaldivar 2004). As a result, the Department of Homeland Security is planning to add 8,000 beds to the 22,000 existing spaces in the detention infrastructure in preparation for projected increases in detention due to recent initiatives at the DRO. Garrison Courtney, spokesperson for the Bureau of Immigration and Customs Enforcement, states, “When we get all these people into custody, we have to have a place to keep them” (Finley 2001, A1). However, according to New York immigration attorney Gay Yerman, “If this pilot program becomes national policy, I personally believe our immigration system will stop dead in its tracks, because aliens will not take the chance of being incarcerated and sent back to their countries” (Alonso-Zaldivar 2004).

Executive orders at the Department of Justice have also led to an increased backlog of immigration appeals at U.S. District Courts of Appeal, and increased periods of detention. The average length of stay is 41 days. This figure is actually skewed downward by the large number of short detentions of Central American and Mexican immigrants who are returned after a few days of incarceration (Finley 2001, A1). The Administrative Office of the U.S. courts, however, reports a 400 percent increase in appeals to circuit courts from the Bureau of Immigration Appeals (BIA). The appeals by immigrants who fail to win relief from detention and deportation result from recent changes in procedures under Attorney General Ashcroft (Coyle 2003).

The key streamlining rule at the BIA is the allowance and expansion of “affirmances” of lower court immigration judges’ decisions (usually denials of bond, asylum, or other relief for detainees) without the need to provide written opinions. The backlog at the BIA has abated, but appeals at the circuit level have increased dramatically. Moreover, successful appeals at the BIA level have dropped from 1-in-4 to 1-in-10 as affirmances have risen from 10 percent to 50

percent of BIA decisions (*ibid.*). As a result, it is more difficult than ever for immigrants seeking relief from detention. According to Ed Yohnka of the American Bar Association, “Right now this [appeal] process combined with the government's new authority to detain people for longer periods of time clearly are resulting in individuals being in detention for far longer than is necessary to resolve their status questions and to advance security and safety here in the United States” (*ibid.*).

Today, over 22,000 immigrants are in detention centers, and over 200,000 immigrants are detained each year in the U.S. The federal Bureau of Prisons also reports that almost 50,000, or 29 percent, of its inmates are noncitizens, and just under 40,000 of them are Latino immigrants (Federal Bureau of Prisons 2003). Not only do these immigrants represent more than double the daily detainee population, but nearly all of them are future detainees, having committed deportable offenses, for which they will serve time after they are released from federal prison. In addition, similar crimes are classified differently for immigrants and citizens, resulting in dissimilar penalties. From 1990 to 2000, the number of offenders in federal prisons on immigration violations increased eightfold, and by 2000 the average length of time served was six times greater than it was in 1990 (U.S. Department of Justice 2002a). As such, immigrants and their families are caught between two systems of punishment, the immigration courts and the criminal courts, in which their lesser citizenship simultaneously criminalizes and multiplies the effects of that criminalization.

Conclusion

This study examines how the government has used its authority to legitimate the increasing surveillance of all segments of the U.S. population, especially noncitizens, and more so, vulnerable noncitizens, who are specifically categorized en masse as undesirable or enemies of the state. It has shown that the government's response to the attack of 9/11 and the ensuing expansion of immigrant detention is part of a broader pattern of noncitizen incarceration that reaches beyond the war on terror.¹¹ The study of immigrant detention also reveals a unique relationship between immigrants and the federal prison system, in which immigrant status intersects with sentencing guidelines and the reclassification of crimes for noncitizens.

According to Kevin Johnson (2004), "Because of the unpopularity of—even hatred toward—foreigners among the general population in times of crisis and social unrest, a meaningful political check on the unfair treatment of immigrants does not exist. As a result, both Congress and the president have the ability to direct the most extreme action toward noncitizens with little fear of provoking a judicial response" (3). The Bush administration is currently rewriting the laws of citizenship and personhood, of torture, and of war. New concerns about national security and the supposed exceptionalism of 9/11 have ushered in what Ashcroft has called "a new era in America's fight against terrorism" (Eggen 2001, A20). However, Ashcroft's "new era" of anti-terrorism strategies echoes tactics introduced over eighty years ago during the Red Scare, where noncitizenship also served as the government's "prosecutorial advantage." For example, a 1922 Bureau of Naturalization radio release states, "As long as the advocates of these malignant and un-American doctrines remain aliens, they may be deported and their gospels may

¹¹ Immigration control can be traced bureaucratically through the location of immigrant enforcement in the government structure. For example, bureaucratic movement of the INS—from the Department of the Treasury (1891-1903), to the Department of Commerce and Labor (1903-1913), to the Department of Labor (1913-1940), to the Department of Justice (1940-2003) and now, to the Department of Homeland Security (Spring 2003)—reveals distinct shifts in the government's attitude toward immigration enforcement and control.

be overthrown at their inception, but once they succeed in obtaining their citizenship, this method of purging our country becomes more difficult, if not impossible” (Bureau of Naturalization 1922). The national security trump card and the reduced and lesser status of immigrants thus work hand in hand, and are deliberate strategies of immigration control.

The Department of Justice under Ashcroft has broadened its prosecutorial and investigative powers, using minor immigration charges, material witness statutes, military justice, and unprecedented secrecy to fight the war on terrorism. According to the ACLU’s executive director Anthony Romero, “Clearly the actions, policies, and laws [Ashcroft has] promulgated show a fundamental lack of concern for enforcing civil liberties and civil rights” (Ragavan 2004, 36). Civil libertarians, the Inspector General of the Department of Justice (DOJ), and recently the commission investigating 9/11 have criticized the DOJ’s handling of post-September 11 detainees (Janofsky 2004, A8). Contemporary detention policy is beginning to function like political scientist Peter Andreas’ (2003) characterization of border control policies—that is, as “politically successful policy failures” (2). They are valued more for their political symbolism and high visibility than for deterring immigration or terrorism.

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