

Article

PURSUANT TO DEPORTATION: LATINOS AND IMMIGRANT DETENTION

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Abstract

This essay explores the historical genealogy of Latino immigrant detention in the United States. As a critical enforcement practice within the history of racialization and criminalization of nonwhite immigrants in the US, noncitizen detention pursuant to the deportation of immigrants has been utilized throughout the 20th century at the nexus of national crises, xenophobia, and racism. While episodes of detention expansion are often viewed in light of particular national security crises, this essay discusses the parameters and societal impacts of Latinos in detention, as a process possessing historical continuity, links to other racialized immigrants, and one that underscores the structural inequality of all noncitizens, documented and undocumented, before the law.

Keywords

latinos; immigration; detention; deportation; citizenship; racial discrimination

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. (Teresa A. Miller, 2002, 216)

This essay explores the contemporary terrain of Latino immigrant detention outside of the shadow cast by the events of September 11, 2001,¹ and within the context of a larger genealogy of Latino detention. Although one of the most distinctive features of the post-9/11 era is the continual avowal of its inimitability, immigrant detention in the US is

1 From this point forward, I will use 9/11 to refer



to the terrorist attacks on the United States on September 11, 2001.

a long and continuing story, which when understood historically and comparatively, more properly contextualizes the alarming trends in immigrant detention today. In so doing, it allows us to move beyond the exceptionalist rhetoric found in the government's construction of the "war on terror" to a clearer understanding of what the *New York Times* termed the "fastest-growing form of incarceration" (Berestein, 2007, A1). Further, this essay seeks to explore the racialized features of immigrant detention, in particular its long-term effects on Latino noncitizens and citizens, who prior to 9/11 suffered the consequences of immigrant detention as it expanded throughout the last century. Immigrant detention, as a process related to the deportation of noncitizens, is thus part of larger history of federal, local, and individual practices that criminalize immigrants, especially nonwhite immigrants. The incarceration of noncitizens is thus related to their surveillance, punishment, and overall inequality in the areas of labor, education, public health, political representation, and everyday mobility.

Although the histories of Latinos in detention differ in many respects from the experiences of the racially targeted group of Arabs, Muslims and South Asians who were detained immediately after 9/11, critical features of their collective detentions such as racial profiling, legal vulnerabilities stemming from their immigrant status, deplorable and punitive detention conditions, and an unchecked detention authority, reveal commonalities and long-term patterns in detention history. Further, the legal and institutional changes resulting from the "war on terror" have a scope that reaches all noncitizens in the US, undocumented and documented, and will expand the detention infrastructure for the foreseeable future. 9/11 has inspired new and old forms of enforcement that target immigrants comprehensively, well beyond the "war on terror." As Kevin Johnson argues, "Although Arab and Muslim noncitizens felt the brunt of the civil rights deprivations in the immediate aftermath of September 11, *immigrants in general* will suffer the long-term consequences of the many measures taken by the federal government in the name of fighting terrorism" (2003, 849-850, emphasis added). The contemporary expansion of immigrant detention, a key enforcement initiative, especially in the context of national security crises, should be understood within the complex genealogy of non-citizen detention. Latino experiences with immigrant detention, in particular, pose a unique history, one that is complex, recurring, and escalating today.

Exceptionalism and the war on immigrants

One of the greatest challenges to the examination of immigrant detention has been the widespread exceptionalism that surrounds 9/11. It became commonplace after 9/11 and as the major tenets of the "war on terror" were formulated, to read or hear proclamations from various segments of society that "everything had changed" and that this was a time of crisis without precedent.

Then-Attorney General John Ashcroft announced, for example, “On September 11, the wheel of history turned and the world will never be the same” (2001). Similarly, President Bush told the nation, “We have entered a new era, and this new era requires new responsibilities, both for government and for our people” (2001). The post-9/11 construction of “homeland security,” which enveloped and expanded the federal authority to detain noncitizens, also necessitated legislative and policy changes, produced new judicial rulings, and triggered changes in governmental bureaucracies designed to meet the challenges of President Bush’s “new era.” On the surface, many aspects of immigrant detention indeed appeared to be new and catalyzed by 9/11.

While the pace and scope of these changes, like the ensuing debate, drew attention to US immigrant detention practices, such an awareness was long overdue. Prior to 9/11, legal professionals and immigrant advocates engaged with and provided services to detainees and confronted the large-scale expansion of the detention infrastructure, especially the rapid growth in detention mandated by anti-terrorist and immigration legislation which passed in 1996. Yet, the critical work of this focused group of immigrant advocates was often over-shadowed by anti-prison activists and scholars, confronting the mammoth incarceration of over two million persons within the US “prison industrial complex.” Moreover, the issue of immigrant detention, often invisible as a transitional space between apprehension and deportation, was also marginalized by the major foci of the national immigration debate: expanding or restricting “legal” immigration, border militarization, undocumented immigration, labor competition, amnesty, etc. As a result, as much as the post-9/11 anti-terror initiatives initiated a “new” awareness of immigrant detainees, the larger history of immigrant detention was burdened with the exceptionalist shadow of 9/11. Any historical perspective about US detention practices and detainees themselves – who in the fall of 2001 were considered “suspected terrorists” – was overwhelmed by fear and sensationalism, as well as by institutionalized and popular hostility and violence. Although detention as a means of effecting racial expulsions has been a cornerstone in US immigration policy and history, what the public did learn about noncitizen detention dealt specifically with the detention of a racially conflated group of Arabs, Muslims and South Asians, who bore the initial brunt of new anti-terrorist programs and institutions.

Whereas widespread knowledge of US detention practices seems to begin on 9/11 and would later, after the invasions of Afghanistan and Iraq, be disproportionately represented by grisly photos and unsettling narrative accounts from Abu-Ghraib prison in Iraq² and Guantánamo Bay Naval Base in Cuba, the stigma of criminal foreignness and “illegality,” and what I term the “undue processes” (Hernández, 2005) of detention and deportation, are facets of immigration policy which many immigrant communities, in particular Latino communities, have been intimately acquainted for generations. It is important to stress the continuity of such practices. For instance, six months after 9/11,

2 For a critical discussion of how the spectacle of torture at Abu-Ghraib obscures “the naturalized landscape” and “unspectacular”

punishment of persons in US prisons, see Dylan Rodríguez. 2006. (Non)Scenes of Captivity: The Common Sense of Punishment and Death. *Radical History Review* 96 (Fall): 9-32.

3 For a legal and popular culture analysis of Latino criminal stereotypes, refer to Steven W. Bender (2003).

Roberto Martínez of the American Friends Service Committee told the *Los Angeles Times*, “Muslim detainees are complaining in New York, and that’s nothing new for us. They are going through the fear factor that Mexicans have undergone for years” (Serrano, 2002). Martínez’ observation relates the Mexican immigrant community’s longstanding relationship with immigrant detention, and highlights the pervasive anxiety which the ever-present possibilities of deportation and detention engender.

Such fears are not limited to noncitizen detainees. As a broad group of racialized persons in the US, Latino citizens also become fixed to Latino immigrants through their widespread and centuries-old criminalization as “illegals.”³ Contributing to and in turn affected by the detention process, examples of criminalization are ubiquitous, occurring in popular culture, administrative and local enforcement practices targeting Latinos, and within the law. The conflation of whole groups of Latinos as criminals occurs despite Latinos’ profound diversity of incorporation into US society. According to Renato Rosaldo (1999, 255-256), “By a psychological and cultural mechanism of association all Latinos are thus declared to have a blemish that brands us with the stigma of being outside the law. We always live with that mark indicating that whether or not we belong in this country is always in question.” As a result of this criminal “blemish” and categorical racialization, Latino citizens and noncitizens have been central figures in detention history. From lengthy and large-scale detention and deportation operations targeted at Mexican nationals throughout the 20th century, to the detention of Latin American asylum-seekers in the Cold War, to contemporary Puerto Rican US citizen and so-called “enemy combatant” José Padilla, we can observe that there are many types of detainees meeting at the nexus of Latino racialization and criminalization.

The post-9/11 “war on terror” contributed to the ongoing history of racial discrimination against noncitizens, initiating a variety of legal and administrative changes directly affecting US immigration policy. For example, after 9/11, there was an immediate suspension of asylum adjudications, entrapping some migrants in detention domestically, or abroad, unable to seek refuge from persecution. In addition, it derailed a serious public discussion, and bilateral negotiations with Mexico about a potential amnesty or “regularization” of status for then-over ten million undocumented migrants, a discussion that would remain muted for nearly five years. Latino noncitizens, and their families and communities, were affected by these and other federal and local enforcement initiatives emerging after 9/11. According to Steven Bender (2002, 1153), Latinos’ “negative societal construction made their targeting inevitable as the fervent, amorphous war on terrorism took shape.” Racial profiling in law enforcement, a practice that had been broadly criticized over the last decade, received a shot in the arm after 9/11 and was used widely to apprehend Arabs, Muslims and South Asians in the wake of 9/11, with detrimental effects on Latino and African American communities (Bender, 2002; Johnson, 2003).

While racial profiling in immigration enforcement received limited endorsement by the Supreme Court in *US v. Brignoni-Ponce* in 1975,⁴ its resurgence after 9/11 signals the return of racial profiling as a “common sense” law enforcement practice that disproportionately affects immigrants and people of color.

The emergent post-9/11 discourse of national security, cross-fertilized with existing anti-immigrant sentiment, both of which rely historically on racialized and criminalized constructions of migrants, of whom Latinos for decades have represented the prototypical example and overwhelming majority. Much like other national crises in US history, fighting a war against terrorism came to mean fighting immigrants, even though empirical data on the criminality of immigrants has consistently reflected noncitizens’ lawfulness. As a result, such fears of immigrant and Latino criminality have been called erroneous and a “myth” by scholars of immigration and crime (Martínez and Valenzuela, 2006). According to Rubén Rumbaut and Walter Ewing (2007, 1), “In fact, data from the census and other sources show that for every ethnic group without exception, incarceration rates among young men are lowest for immigrants, even those who are the least educated. This holds true especially for the Mexicans, Salvadorans, and Guatemalans who make up the bulk of the undocumented population.” Presumptions of immigrant criminality, however, in particular Latino criminality, are resilient and are maintained by politicians, the media, and a misinformed general public. As a result, the legal statutes, administrative strategies, and popular suspicions of noncitizens, embedded in detention history serve as a critical prologue to understanding the contemporary detention and deportation of Latino immigrants, which has expanded prior to and after 9/11.

Adding the specter of terrorism to an already contentious immigration debate exacerbated what Juliet Stumpf (2006) has termed the “cimmigration crisis” – that is, the merger of criminal and immigration law. According to Stumpf, “Criminal and immigration law primarily serve to separate the individual from the rest of US society through physical exclusion and the creation of rules that establish lesser levels of citizenship” (2006, 381). Margaret Taylor and Ronald Wright echo this criticism, writing, “However badly these two systems operate by themselves, they work even more poorly when they are haphazardly combined” (2002, 2).⁵ The domestic “war on terror,” while relying on the prosecutorial advantages of immigration law, has also been used to advance a broader war on immigrants. Through the discourse of national security, the “war on terror” has augmented criminal and immigration enforcement at the federal, state, and local level, drawing these apparatuses closer together after 9/11, duplicating efforts, and doubling the punishment of noncitizens.

Latinos and immigrant detention

Several reasons, in addition to the exceptionalist rhetoric of 9/11 and the “war on terror,” help explain the limited knowledge of Latino detention. Because

4 *United States v. Brignoni-Ponce*, 422 US 873 (1975). The Court found that the “reasonable suspicion” requirement is not met “when the *only* ground for suspicion is that the occupants appear to be of Mexican ancestry” (emphasis added).

5 Citing the waste of resources in duplicating the task of trying, convicting and detaining noncitizens who committed deportable crimes that are subject to two different court systems, Taylor and Wright have suggested

empowering the sentencing judge in the criminal trial with the authority of an immigration judge as well, in order to “yield less duplication of resources, quicker deportation, and – notably – lower detention costs” (2002, 3).

detention by immigration authorities is a liminal process that occurs, or is supposed to occur, as an administrative procedure pursuant to the execution of deportation or exclusion orders, little is known about it or its history. Immigrant detention is further eclipsed by the enormity and severity of the “prison industrial complex” in the US, or what Angela Davis has called the “punishment industry” (Gordon, 1998/1999, 146). Over two million people – two thirds of whom are nonwhite – are incarcerated in US prisons and jails, representing a tripling of this population since 1982 (Gilmore, 1998/1999, 171). While this is clearly cause for widespread concern, immigrant detainees, too, tripled in the 1990s (Solomon, 1999), increasing, since then, to over 275,000 annually. Moreover, as a result of existing and proposed legislation, they are scheduled to triple again in this decade. Immigrant detainees, however, are incarcerated outside of the criminal court system and are largely unaddressed by prison literatures. The parameters and conditions of detainees’ confinement thus remain obscured and legally ambiguous.

Consider for example the recent political and social atmosphere surrounding immigration legislation. Despite the intense criticism and praise that the US House of Representative’s 2005 punitive immigration legislation (H.R. 4437) received, and the dramatic nationwide collective action which ensued in the spring and summer of 2006, few have commented on the proposed legislation’s detention and due process provisions that would have dramatically increased the government’s capacity to detain and deport noncitizens, including legal permanent residents. Many of these detention provisions were also in the US Senate’s more “affirmative” immigration law of 2006 (S. 2611), and included: expanding the definition of an “aggravated felony,” which mandates detention and deportation proceedings; increasing mandatory detention without relief and removing barriers to indefinite detention; expanding expedited removal without a court hearing; and redefining “alien smuggling,” such that it would criminalize family members, neighbors, co-workers, and relief organizations who provide nonemergency aid to undocumented migrants. All these provisions, including making unproven membership in a gang a deportable offense even if the person never committed a criminal act, would have considerably impacted Latino communities and families. Yet the seriousness of these provisions has been overlooked by Democrats and national Latino organizations, who offered ambivalent support for Senate Bill 2611 because of its proposed guest worker program (Flores, 2006; National Council of La Raza, 2006). This blind spot to the issue of detention further obscures one of the key federal authorities and disciplinary functions of immigration policy.

The collective demographic profile of Latinos in the United States contributes to their vulnerability to confinement within the detention infrastructure. Latinos’ numerical size, in particular in migration categories, and their “societal construction as violent, foreign, criminal-minded, disloyal, and as overrunning the border” (Bender, 2002, 1154) have contributed to the long history of Latino

immigrant detention. Today, Latinos represent the largest group of foreign born, documented and undocumented migrants, border apprehensions and removals, criminal alien detainees, and the largest minority group in the United States. Researchers estimate a range between 46 and 51% of adult Latinos in the US are first generation immigrants and an additional one-fifth to one-fourth of all Latinos are their children (Mariscal, 2005, 39; Pew Hispanic Center, 2005, 2). In other words, a majority of Latinos in the US are immigrants or directly related to immigrants. The complex range of immigrant issues thus affects a majority of Latinos in the US. In 2005, for example, Latinos represented seven of the top 10 foreign-born groups in immigrant detention, and Mexicans comprised half of all immigrant detainees (Siskin, 2007, 13). Latinos thus predominate over immigrant detention today, and as we shall see, have been key figures throughout its history.

That immigrant detention threatens millions of Latino families and their communities is cause for alarm and further study, especially the relationship between the detention processes and other forms of structural and cultural inequality affecting Latino citizens and noncitizens. Widespread beliefs about Latino criminality, especially as it relates to the widely bemoaned and sensationalized presence of “illegals” or undocumented immigrants, have led to the routine and popular conflation of Mexican nationals and other Latinos with “illegals.” The Department of Homeland Security estimates that Mexicans represent 57% of undocumented immigration and that Latinos account for roughly three-fourths of current and new undocumented immigrants (Hoefler *et al.*, 2006). These figures, although significant, contribute to the widespread criminalization of Latinos, while simultaneously obscuring the fact that roughly half of each year’s cohort of new undocumented immigrants enter by legal means and have instead allowed their legal entry status to lapse, and that there are undocumented immigrants from a variety of nations residing in the US. The vast majority of government efforts to halt undocumented immigration, however, are targeted at Mexican and Latino communities at the US–Mexico border. As a result, Mexicans have euphemistically represented, indeed epitomized, “the illegal,” dominating deportation and detention categories for many decades (De Genova, 2004, 171).

The detention authority plays a significant role in criminalizing Latino noncitizens, duplicating the punishment of the criminal justice system. Detention accentuates not simply the border separating who remains in the US and who is deported, but the real weight of such processes is felt by the creation of a social class inside the US, but outside its legal protections. The appropriate measure of detention, then, is in the nearly 30 million noncitizens – the largest among them Latino immigrants and legal permanent residents – who are subject to the threat of detention and deportation. According to Nicholas De Genova (2004, 161), “Deportability is decisive in the legal production of Mexican/migrant ‘illegality’ and the militarized policing of the US-Mexico

border, however, only insofar as some are deported in order that most may ultimately remain (un-deported) – as workers, whose particular migrant status has been rendered ‘illegal.’” The structural inequalities created by immigrant detention extend beyond the detainees themselves, or even undocumented migrants, and include all noncitizens, their millions of US-born and naturalized children and family members, and their communities. Moreover, the actors criminalizing noncitizens and detainees are not simply the President and Attorney General, or Congress and the Judiciary. State apparatuses, enforcing detention, function through smaller bureaucrats, border patrol agents, local police, detention center guards, and border vigilantes like the Minutemen, who, along with private prisons and detention centers, exemplify a private version of immigration control.

What is immigrant detention?

The Immigration and Nationality Act enacted in 1952 and amended to the present authorizes the Attorney General to detain noncitizens, including persons seeking asylum, pending their deportation or exclusion hearings before an immigration judge (Immigration and Nationality Act, Section 236). Detention ensures that immigrants will attend deportation hearings by preventing their ability to abscond, and restricts mobility if the detainee is determined to be a danger to society. In 2004, there were over 23,000 immigrants in detention daily within the US; over 230,000 immigrants were detained during the fiscal year (USICE, 2004). Estimates since that time have ranged from between 20,000 and 30,000 detainees daily.⁶ While length of stay can range from days to years, the average adult detainee was held in custody 37.6 days in 2007. The annual population of detainees has risen by nearly 100,000 persons since 2001 to 283,115 in 2006. This continual growth is facilitated by the Department of Homeland Security’s increased capacity to detain 30,000 persons daily at 330 adult detention facilities nationwide in 2007 (GAO, 2007).

In general terms, detention is the practice of incarcerating noncitizens who are apprehended at ports of entry or within the nation’s interior. Maintained in custody until they are released, bonded and paroled, or deported from the United States, detainees consist of undocumented immigrants, lawful permanent residents and, at times, particular groups of citizens.⁷ To maintain the government’s claim that detention is an “administrative process” – and not a punitive one – detention is theoretically utilized exclusively as a non-criminal procedure pursuant to deportation. But in practice immigrant detention is employed as a tool for law enforcement, and as witnessed after 9/11, the detention authority is used preventively – in which immigrants can be detained for the purposes of discovering after-the-fact charges that justify long-term detention and facilitate deportation. According to Margaret Taylor and Ronald Wright, “In response to the September 11 attacks, the government has relied on immigration

6 In its January 25, 2007 report, “Immigration-Related Detention: Current Legislative Issues,” the Congressional Research Service reported 20,000 detainees in fiscal year 2005 whereas detainee advocate organization Detention Watch Network reports over 27,000 detainees daily in 2007. See http://detentionwatchnetwork.org/dwn_map (accessed August 2, 2007). The *Los Angeles Times* reported that daily

enforcement tools as a pretext for investigative techniques and detentions that would be suspect under the criminal rules” (2002, 2). Underscoring this observation, legal scholar Peter Schuck argues, “But the detention authority is more than a programmatic resource, ancillary to the power to exclude and deport. Detention is also an awesome power in its own right” (1998, 36).

Formerly managed by the Immigration and Naturalization Service under the Department of Justice, custody of detainees is administered at present by Immigration and Customs Enforcement’s (ICE) Office of Detention and Removal (DRO) within the Department of Homeland Security (DHS).⁸ Immigrant detainees are incarcerated throughout the nation in three types of facilities: federal detention centers managed by ICE; privately contracted prison facilities; and state and municipal jails subcontracting bed space for immigrant detainees. The latter two nonfederal sites, comprising over 300 facilities, are responsible for incarcerating the majority of all detainees nationwide. Because of the variance in standards, conditions, and oversight at the different facilities, federal detention policy is implemented unevenly among the sites. According to Timothy Dunn (1996, 49), “The severity of INS detention practices varie[s] widely across its various districts along the border, depending largely on the availability of detention space and immediate budget resources.”

Long preceding the emerging evidence of torture and abuses of power associated with post-9/11 detainees, gross mistreatment, from sexual abuse and rape to overcrowding and denial of medical attention and religious freedom, has been registered at all three types of detention of facilities. Yet due to the lack of federal oversight and evaluation, privately contracted facilities and local jails have received the most criticism (Tangeman, 2002, 27). “The worst abuses were inflicted in the prisons run by contractors,” writes Robert Kahn (1996, 15), in his study of Central American refugee detention in the 1980s. Poor detention conditions have come under increased scrutiny, especially after it was reported, in June 2007, that 62 persons had died in ICE “administrative” custody since 2004 (Berestein, 2005). “They get treatment that you might see in a Third World country, and it’s really a stain on our system of justice to treat detainees this way,” said Adele Kimmel, attorney for a criminal alien detainee suing ICE for delays in medical treatment that allowed a cancer to spread to his penis, resulting in amputation (Fears, 2007, A4).⁹

Among the key reasons for the unevenness in detention conditions are the weak guidelines that establish detention standards for nonfederal facilities, where over 60% of detainees are held. According to the Government Accounting Office (2007, 9), “The standards are not codified in law and thus represent guidelines rather than binding regulations. According to ICE officials, ICE has never technically terminated an agreement for noncompliance with its detention standards.” The latter point further suggests that violations of detention conditions have negligible consequences for private and contracted detention facilities.

detainees surpassed 30,000 nationally (Gorman, 2007).

⁷ The most notorious example of the detention of citizens is that of Japanese Americans incarcerated during World War II. In addition, among immigrant detainees today are persons who do not know they possess US citizenship (usually because their parents naturalized when they were minors, thus naturalizing the noncitizen children as well). Such persons carry the burden of proving this fact to the government. Lastly, US citizen children of detainees are often taken into custody during the apprehension of their parents.

⁸ On March 1, 2003, the functions of several border and security agencies including the US Customs Service and the Immigration and Naturalization Service (INS) were transferred to the US Department of Homeland Security (DHS). After years of pressure and anticipation, the INS was “split” into three agencies: the Bureau of Immigration and Customs Enforcement (ICE), the Bureau of

Customs and Immigration Services (CIS), and the Bureau of Customs and Border Protection (CBP).

⁹ The detainee was held at both an ICE detention center and a private detention facility in San Diego. This particular for-profit detention center is at the center of multiple lawsuits and allegations of rape of women and men by unsupervised private correction officers (Berestein, 2005).

Detainees' experiences with detention are mediated by the unequal treatment at these sites as well as within the immigration court system, affecting access to counsel and visitation, the pace of legal proceedings, and the length of stay in detention. For example, a report by Syracuse University's Transactional Records Access Clearinghouse (TRAC, 2006) determined that immigration judges' decisions in asylum cases vary widely: some judges deny asylum as much as 98% of the time, and some as little as 10%. Unlike the criminal courts, the constitutional right to legal counsel is not guaranteed in immigration proceedings. As a result, as few as 11% of immigrant detainees have legal representation in the immigration courts (Miller, 2002, 215). In asylum court, for example, the failure rate for an asylum-seeker without legal representation is 93.4% (TRAC, 2006).

Immigrant advocates, citing problems with detainees' access to legal representation and lawyers' access to their clients, insist that detainees' due procedural rights are in turn further denied or infringed upon through numerous administrative mechanisms within the detention apparatus. A recent review of telephone access at detention centers nationwide, for example, revealed "pervasive" problems. The Government Accounting Office (2007) concluded, "Without sufficient internal control policies and procedures in place, ICE is unable to offer assurance that detainees can access legal services, file external grievances, and obtain assistance from their consulates." Ironically, for those detainees fortunate to obtain legal representation – often times legal permanent residents with significant ties to their community – their length of stay in detention is prolonged as they fight deportation.

In considering detention's far-reaching effect on Latino communities, one must also more broadly examine the intersections of race, gender, class and sexuality in the detention experience. Migration, as we know, is a complex process, and gender, sexuality, race, and class background have an enormous effect on the outcomes and experiences of migration, just as migration reshapes these intersecting factors in the workplace, the family structure, and in the detention experience. When considering Latino detainees, gender, for example, can be located as a factor in immigrant detention, in the criminalization of immigrants, the conditions of detention, and in the broader effects on family and community structures which are reorganized due to the absence of detained family members. Among immigrant detainees, it is estimated that 7–10% of detainees are women, reflecting a gendered profile to the criminalization of male immigrant detainees. Of the 9/11 detentions, for example, the prototypical "suspected terrorist" was an Arab, Muslim or South Asian man. The predominance of male detainees creates a set of conditions for women in detention, in which facilities and services are severely lacking. In addition to the numerous documented cases of sexual abuse (Patel and Jawetz, 2007), services for other vulnerable populations of detainees, such as gay-lesbian-bisexual-transgender detainees, detainees with health problems, and children, are often nonexistent or hazardous.¹⁰

Further complicating matters is the fact that detainees are a transient prison population – “one of the most highly transient and diverse populations of any correctional or detention system in the world,” according to the Government Accounting Office (2007). With the exception of a smaller category of long-term detainees called “lifers,” they cycle in and out of immigrant detention at various individual rates. As a result, statistics detailing the national origins of detainees, much like prisoners in general, are difficult to obtain. A survey conducted by the American Correctional Association, Inc. and published in its journal, *Corrections Compendium* (2006) addressed the difficulties of accounting for the number of foreign inmates in US and Canadian correctional facilities. Confirming that little has changed in determining these figures over the last decade, the survey cited its own conclusion from its previous report 11 years prior: “The statement that summarized the 1995 survey still describes corrections’ accounting for foreign inmates: ‘Until a reliable information system is developed and uniformly applied across the country, it will be impossible to know how many ... beds are occupied by foreign nationals and illegal immigrants ...’”

Owing to the prominence of Latinos among the undocumented who are subject to investigations and deportations by the Office of Detention and Removal, most experts agree that Latino immigrants, Mexicans in particular, are the vast majority of detainees.¹¹ Most recently, the Department of Homeland Security’s Office of the Inspector General reported that between 2001 and 2004, 345,006 criminal aliens – the largest detainee category¹² – were apprehended by ICE. Over 250,000, or 75%, were from Mexico, thus dominating the criminal alien category, from which persons are least likely to be released from detention prior to deportation (OIG, 2006, 7). In the early 1990s, the Government Accounting Office (1992, 124) estimated that 51% of detainees were Latinos. This figure, a rate for Mexican detention which remains to this day, was estimated before the unprecedented tripling of detention bed space, and the considerable leap in annual detention as a result of the “war on drugs” and major immigration legislation in 1996. During this time, funding for detention and removal grew to 37% of INS enforcement spending (Dixon and Gelatt, 2005, 5).

While the “war on terror” and the increased detentions of Arab, Muslim and South Asian immigrants has resulted in a significant increase in the detention infrastructure, the majority-Latino category of criminal alien detainees still represents the largest share of immigrant detainees. The Office of Detention and Removal estimates that for fiscal year 2007, there will be 605,000 foreign-born persons admitted to local and state correctional facilities and that half will be removable aliens (OIG, 2006, 2). These persons, who include many long-term legal permanent residents, represent *future* detainees, who will be re-incarcerated on immigration charges after completion of their criminal sentences. The expansion of bed space to accommodate these detainees is central to the long-term expansion of immigrant detention and reflects the increased

10 An escalating problem has been the increased detention of unaccompanied minors who are captured at ports of entry or in the interior of the country. In 2005, 6,460 underage undocumented migrants from Central America were detained, an increase of 35% from the previous year (Aizenman, 2006, A1).

11 It is estimated that there are over 11 million undocumented residing in the US with 500,000 arriving annually (Siskin *et al.*, 2006, 1). The DHS reports that Mexicans represent the largest portion of undocumented at over six million, or 57%, with the next largest groups arriving from El Salvador and Guatemala. These nations account for 65% of all undocumented while South American migrants account for an additional 8%. Asia accounts for 12% of undocumented immigration (Hoefler *et al.*, 2006, 1).

12 The large majority of detainees are criminal aliens who are undergoing removal proceedings (Siskin *et al.*, 2006, 20).

coordination of the criminal justice system with the immigration court system.

New initiatives and administrative changes within the Departments of Homeland Security and Justice have increased the capacity to detain noncitizens and have facilitated longer periods of detention. For example, the Office of Detention and Removal's (DRO) "Strategic Plan 2003–2012: Endgame" seeks a "100% removal rate" of deportable immigrants in order "to maintain the integrity of the immigration process and protect our homeland" (Tangeman, 2003). 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, ii, 1–1) "will require significant increases in detention and removal operations and resources." Responding to this need for detention space, Congress approved the addition of 8,000 detainee beds per year from 2006 to 2010 as part of the Intelligence Reform and Terrorism Prevention Act (2004), effectively tripling detention bed space for the second decade in a row. Although the Department of Homeland Security's Office of the Inspector General reported in 2007 that "ICE is not well positioned to oversee the growing detention caseload that will be generated by DHS' planned enhancements to the secure the border" (2007, 1) proposed immigration legislation in 2006 and 2007 also included further expansions in detention bed space, an increase of 20,000 detention beds. This expansion, buoyed by the bureaucratic shift to a national security context, occurs even though the majority of detainees, Latino criminal alien detainees, have nothing to do with terrorism.

What immigrant detention is: a subtext

The only legitimate purpose of immigration proceedings is to remove those aliens who do not have a legal basis for remaining here.... But where an alien poses neither a danger nor a flight risk, his removal may be effectuated without detention, and detention therefore serves no legitimate government purpose. (David Cole, 2002, 105)

Detention, although intended to be used pursuant to the deportation of noncitizens, instead has long been party to other government agendas. In the past, detention has been used to secure or deter immigrant labor, for military objectives, and to prevent the spread of contagion. In today's episode during the "war on terror," detention is being utilized to extract information, deter asylum claims, and as a form of law enforcement. Most importantly, and following the failed logic and practice of border militarization, immigrant detention is viewed as a strategy for stemming the flow of undocumented immigration. The Government Accounting Office reported in 1992, "INS believes that its detention efforts are a deterrent to illegal entry. Accordingly, INS is expanding

its detention capability in attempting to respond to the increased flow of aliens illegally entering the country as well as the increased number of criminal aliens” (GAO, 1992, 35). As a result of this deterrence strategy, detention has become a growth industry for private corrections companies and a development strategy for local municipalities seeking to contract jail space with the federal government. “Correctional systems therefore have developed a strong financial interest in determining inmates’ immigration status,” write John Hagan and Alberto Palloni (1999, 620). Indeed, of the government’s 15 largest immigrant detention centers, seven are contracted facilities with newer private facilities awaiting completion (USICE, 2006). Private prisons and contracted bed space account for over 60% of immigrant detainee bed space nationwide. The success of deterrence strategies, however, “has been difficult to gauge” concluded the Congressional Research Service (Siskin *et al.*, 2006, 54). Although personnel and resources have been devoted to the border for over a decade, apprehensions have not abated, and continue to rise steadily, remaining at well over one million per year.

Occurring episodically over the last one hundred years, the federal government’s expansive authority to detain noncitizens is another manner in which the government produces “illegality,” both in numbers and perceptions, impacting especially racialized noncitizens who are vulnerable to unequal social relations or are specifically categorized as a group as undesirables or enemies of the state. Hagan and Palloni (1999, 617) have argued that “immigration and criminal justice policies which appear neutral in relation to Hispanic immigrants actually bias and distort public perceptions of immigration and crime by inflating Hispanic rates of imprisonment.” Furthermore, along with increased federal enforcement, over the last three decades, the government has vastly increased the number of immigrant detainees by expanding the definition of deportable and detainable crimes, mandating detention in numerous situations, and eliminating judicial avenues for relief from detention.

Immigrant detainees occupy a limbic legal position between arrest or exclusion and deportation that is steeped in their status as noncitizens, which can itself generate the diminishment of constitutionally protected due procedural rights. While persons charged with crimes are considered innocent until proven guilty, this principle does not apply to migrants never charged with a criminal offense, but instead, who stand accused of administrative offenses, landing them in the immigration courts, which are separate and outside the protections of the criminal justice system. Further, because immigrants are often considered flight risks, they are subject to increased rates of pre-trial detention in criminal cases, and post-sentence detention, as they are transferred from criminal imprisonment to immigrant detention (Hagan and Palloni, 1999).

Crucial to the government’s practice of immigrant detention is the 19th-century legal view that detention and deportation are not considered punishment for criminal activities. In *Fong Yue Ting v. United States* (1893), it was

determined that deportation does not constitute lawful punishment for a crime, but is instead an administrative process for returning undesirable noncitizens to their countries of origin. Detention, then, is merely part of that administrative process, and does not trigger legal protections that would be initiated if one were charged with a criminal offense. The legal fallacy that incarceration in prisons and jails and forced removal from the US are not punitive, is protected by assertions of national sovereignty and, constitutionally, by Congress' plenary power over all immigration matters. As legal scholar, Gabriel Chin, argues, "where the status of immigrants is concerned, almost anything goes" (2005, 7).

The Supreme Court ruled in *Fong Yue Ting* (1893) that, "the power to exclude or expel aliens ... is vested in the political departments of the government, and is to be regulated by treaty or by act of congress, and to be executed by the executive authority according to the regulations so established." The Court added that noncitizens "remain subject to the power of congress to expel them ... whenever, in its judgment, their removal is necessary or expedient for the public interest." Critically, and with lasting effect, the Court argued, "The order of deportation is not a punishment for crime It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation ... has determined that his continuing to reside here shall depend." As a result of this ruling, according to legal scholar, William Preston, "Due process in deportation was smashed on the rock of judicial decision in 1893, never to be put together again" (1994, 11). Three years after *Fong Yue Ting*, the validity and role of detention in the deportation process was more clearly defined in *Wong Wing v. United States* (1896). In that case, the Supreme Court ruled, "We think it clear that detention or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens, would be valid. Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character, and while arrangements were being made for their deportation. Detention is a usual [sic] feature in every case of arrest on a criminal charge ... but it is not imprisonment in a legal sense" (*Wong Wing*, 1896).

As a result of these historic rulings and interpretations, detainees have been situated outside the protections of criminal justice, although they are criminalized in the popular imagination. In short, as one detainee's attorney has stated, "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). Especially in periods of national crisis, immigrants' rights are further abrogated in the detention process because they are subject to far more veiled administrative discretion and practices. Evidentiary standards, secret proceedings, filing deadlines, bond regulations, transfers of detainees, and other "undue processes" such as restricting counsel or limiting judicial review are imposed upon detainees. And ironically, although detainees remain apart

from accused or convicted criminals in terms of their judicial rights, the majority of ICE detainees are housed with the general population of inmates at state and local jails with intergovernmental agreements with ICE (GAO, 2007).

Ultimately, detention is an expression of the inequality of noncitizens in the United States, in particular, racialized immigrants such as Latinos. Used to discipline and refine the citizenry, it is a feature of the racial hierarchy from which dominant society benefits. The detention of Latinos and other racialized immigrants helps constitute the normative white citizen and white nation. It, along with the government's expansive immigration control apparatus, serves a disciplinary function that consolidates the power of the state and formulates US nationalism and sovereignty by constructing and controlling insiders and outsiders. In addition, a great deal of political currency is derived from detention. For politicians, the appearance of being tough on crime, immigrants, and terror – for the moment all linked – is valuable, and draws easily on and contributes to popular criminalized perceptions of immigrants. Detaining immigrants, then, assists in creating an illusion of security. In this sense, the noncitizen is an instrument and constitutive factor of our security state, legitimizing its expansion, and drawing support from voters and popular opinion. When paired with xenophobia, national crises are used to mobilize a permanent state of emergency, which facilitates the accumulation of state power over racialized immigrants.

A brief genealogy of Latino detention

With its near-mythic status in the formation of the United States as a “nation of immigrants,” immigration history, as it is generally known in the US, has also served as a repository for historical amnesia. Unlike the heralded experiences of European immigrants whose racial inscription was nonexistent or temporary, permitting descendant generations to achieve social advancement, immigration for Latinos has been a far more vexed process, in which Latinos' racialization, criminalization, and constant threat of detention and deportation maintain their racialized foreignness before the law and society. In coming to terms with the contemporary detention of Latino immigrants, it is critical to confront this historical erasure and develop a more complex understanding of the continuity of detention policy over the last century. The capacity for the detention of Latino immigrants has been made possible by its genealogical precursors and judicial and legislative precedents. A variety of discourses of exclusion and Latino criminality, reinvented through the detention process, has served to naturalize Latino immigrants' “illegality.” As De Genova argues, “Indeed, the legal production of ‘illegality’ has made an object of Mexican migration in particular, in ways both historically unprecedented and disproportionately deleterious” (2004, 173). Mexican and other Latino immigrants have, thus, long lived with the consequences of their degraded citizenship status in the US.

Detained as a result of biological reasoning and fears of contagion, for ideological motives as refugees, or persistently as criminalized noncitizens, Latino experiences with detention are recurring, and not isolated episodes in the 20th century. They provide the historical context for understanding today's escalation of detention, deportation, and degradation of Latino immigrant communities.

Medical Detention: Several major episodes in detention history, some of them ongoing and which coincide with the construction of national crises, have led to the large scale detention of Latino immigrants. The first such episode for Latinos occurred between World Wars I and II, during a time when Mexican immigrants and Mexican Americans contended with what Natalia Molina has called "medicalized nativism" (Molina, 2006, 58). Motivated by emerging questions of public health, which were steeped in racialized presumptions about contagious diseases that were believed to inhabit the bodies and cultures of arriving migrants,¹³ medical detention and quarantine were instituted along the US–Mexican border from 1917 until the onset of World War II (Stern, 2005, 65). Medical detentions occurred at a time when there was no military threat with which to rationalize the scapegoating or detention of Latino migrants. While an entire discourse of contagion specifically targeted at Asian immigrants emerged on the West Coast (Shah, 2001), for Mexicans, who were exempt from racial exclusion laws and later the racist national quota system, medical rationales were even more critical to the restriction of Mexican immigration, as the quarantine and medical detention of border-crossers "became the status quo on the border" (Stern, 2005, 70) lasting nearly 20 years.

Detention, Repatriation, and Operation Wetback: During the same period as the border quarantine, concerns over Mexican criminality as well as economic competition in the 1930s Depression-era, led to a nationwide repatriation campaign which effected the removal and voluntary departure of a conservative estimate of one half million Mexicans and their children, many of them citizens, in what Francisco E. Balderrama and Raymond Rodríguez called "the first major contingent of displaced refugees in the twentieth century" (2006, 329). Mexican "illegality," which was established with the criminalization of undocumented entry in 1929 (Nevins, 2002, 54), has dominated public anxieties for three quarters of a century. Statutory notions of "illegality" are sustained by popular conceptions of criminality, as both the popular and the statutory constructions of "illegality" shape each other. According to Steven Bender (2003, 1), who traces Latino criminalization to the 19th century construction of the Mexican "greaser," "For Latinas/os and certain other groups, stereotypes actually drive their distressing legal and societal treatment."

In the 1950s, concerns about Mexican immigrant criminality would again lead to record-setting detentions and deportations.¹⁴ On June 9, 1954, the INS initiated what was officially termed Operation Wetback, a nationwide deportation campaign to round up, detain, and deport Mexican nationals.

13 Charles M. Goethe wrote in the pages of the American Eugenics Society's journal, *Eugenics*, in 1929, "Eugenically, as low-powered as the Negro, the [Mexican] peon is, from a sanitation standpoint, a menace. He not only does not understand health rules: being a superstitious savage, he resists them." See Charles M. Goethe. The Influx of Mexican Amerinds.' *Eugenics* 2(1): January 1929. 6–9. Cited in Stern (2005, 68).

14 By 1954, Mexican deportations represented 84% of

The operation led to the highest number of persons ever held in detention by the INS in a single year, at over one-half million (Swing, 1954, 31, 36). Although Operation Wetback resulted in outrage from Mexican American communities and organizations regarding harassment of citizens, the break-up of families, and widespread fear of law enforcement, the INS hailed Operation Wetback a huge success. “For the first time in more than ten years, illegal crossing over the Mexican border was brought under control,” after “the backbone of the wetback invasion was broken,” proclaimed the INS commissioner (Swing, 1955, 10, 14, 17).

Refugee Detentions: In the 1980s, the detention of Latino refugees was a distinguishing feature of the decade, set in motion in 1980, when 125,000 Cuban *marielitos* fled Cuba departing through the port of Mariel. In addition, roughly one million Salvadoran, Guatemalan, and Nicaraguan refugees entered the US during the decade, fleeing political upheaval and violence, which was maintained by US Cold War policies and extralegal actions in Central America. The exodus from the Caribbean and Central America fueled a racial panic about refugee streams which were feared to be black and Latino, criminal, ideologically left, and diseased. Fearing a criminal class of Cuban immigrants among the mostly young and male refugees, the US broke with its former policy of proactive acceptance, as several thousand Cubans were detained *en masse* in the early 1980s, leading to severe overcrowding and riots at detention centers in Georgia and Louisiana (Hamm, 1995; Welch, 2002, 95–97; Bahadur, 2004, A1/A12).

Refugees from Central America further clogged detention centers during the decade, especially after the attorney general ordered, in 1981, that all undocumented refugees be detained until the final adjudication of their asylum cases (Kahn, 1996, 16). According to historian María Cristina García (2006, 91), “Detention centers along the United States-Mexico border filled to capacity with people the Border Patrol called the OTMs (other than Mexicans).” As a result, the Port Isabel immigration prison in South Texas expanded, through tent construction, its bed capacity from 425 to 10,000 (Kahn, 1996, 13). In addition, there was also an expansion of contracted facilities all along the US–Mexico border, and a reopening of a federal facility once used to detain Japanese Americans (Kahn, 1996, 20). Encumbered with pervasive allegations of human rights abuses – from denial of legal counsel and translated legal material to invasion of private correspondence and sexual abuse – the newly expanded detention infrastructure facilitated Cold War foreign policy objectives, defined differently for various countries of origin. While the asylum applications of Salvadorans and Guatemalans fleeing US-backed administrations were rejected 97–99% of the time, Nicaraguans fleeing a socialist government which the US opposed were granted either asylum, at rates as high as 84% in 1987, or a suspended deportation, leading to release from detention (Kahn, 1996, 21).

all deportation proceedings, and Mexican immigrants were the largest national group in 10 of the 13 deportation categories listed in the INS annual report. The remaining three categories were non-criminal reasons for deportation (Swing, 1954, Table 24).

Criminal Aliens: While refugees were being detained at ports of entry in the 1980s, domestic criminalization and detention policy initiatives during the “war on drugs” shifted the enforcement focus inside the nation, to “criminal aliens.” Detained for having been convicted of deportable offenses, “criminal aliens” represent the largest share of all immigrant detainees today. Any noncitizen, whether undocumented or a lawful permanent resident, can be detained as a “criminal alien,” and placed into deportation proceedings. Constituting what border expert, Timothy Dunn, called a “historic change in INS detention practices” (1996, 73), the increased detention of “criminal aliens” resulted from increased policing, the reclassification and expansion of deportable crimes such as drug or gun trafficking, and mandatory drug sentencing, and reduction of avenues for relief from detention. According to the Congressional Research Service, by 2002, of the 202,000 immigrants detained, over 51% had criminal records (Siskin, 2004, 12).

As legal status generated inequality in criminal law in the 1980s and 1990s, the largest group of immigrants, Mexican nationals, suffered disproportionately from “criminal alien” enforcement. Like African Americans, Mexican and Mexican American communities were already targeted for criminal enforcement of drug crimes, contributing to the massive prison expansion taking place nationwide. Such criminal enforcement has a direct effect on increases in detention, as noncitizens convicted of deportable crimes are placed in detention and deportation proceedings at the completion of their criminal sentences. Noting that Hispanic incarceration rates have risen 43% since 1990, Marc Mauer and Ryan King state, “While the disproportionate rate of incarceration for African Americans has been well documented for some time, a significant development in the past decade has been the growing proportion of the Hispanic population entering prisons and jails” (2007, 1–2). As they were in the 1950s, Mexican nationals are again the largest number of detainees held each year, representing 50% of persons in detention, or 101,000, in 2002 (Siskin, 2007, 12).

A forerunner to the detentions stemming from the “war on terror,” this pre-9/11 episode in detention growth in the 1990s, transpired by means of a combination of new legislation that targeted immigrants by reducing their due procedural rights, and the reintroduction and codification of “national security” in the wake of foreign and domestic terrorism in the mid-1990s. Two laws were passed in 1996 in the wake of the 1995 Oklahoma City bombing that dramatically increased noncitizens’ vulnerability to detention and deportation. The Antiterrorism and Effective Death Penalty Act (AEDPA, 1996), enacted near the one-year anniversary of the Oklahoma City bombing, was drafted as anti-terrorism legislation, but instead had its greatest impact on noncitizen criminal offenders, making them easier to deport, and mandating their detention pursuant to their deportation. Five months later, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA, 1996), elaborately facilitating “criminal alien” detention through a sweeping

denial of due process to noncitizens. According to Taylor, “IIRIRA amended some of AEDPA’s most controversial immigration provisions, but overall made things worse for non-citizen criminal offenders” (2005, 353). By reinforcing “mandatory detentions” for immigrants facing deportation, removing avenues for judicial relief, and expanding the category of “aggravated felony” which triggers mandatory detention and deportation proceedings, IIRIRA is responsible for the tripling of immigrant detention in the 1990s.

The episodic development of Latino immigrant detention discussed above reflects different constructions of national security in a variety of social, political, and historical contexts. Discourses of national security in these eras cross-fertilize with anti-immigrant sentiment and the legal and social inequalities of noncitizens, and result in the expansion of immigrant detention during periods of national crisis. National security is threatened, so it is argued, by the very presence of immigrants. From fears of disease and particular ideologies from abroad, to concern about refugees streams, and to the constant fear of criminal activity among immigrants, detention has served as an operational nexus for these fears and the construction of Latinos as criminals and undesirables. As Jonathan Inda has argued, “a variety of immigration ‘experts’ – social scientists, INS/DHS bureaucrats, policy analysts, immigration reform organizations, and the popular press – have constructed ‘illegal’ immigrants – typically imagined as Mexican – as anti-citizens incapable of exercising responsible self-government and thus as threats to the overall well-being of the social body” (2006, 63–64). Latino immigrants – with diminished legal rights as noncitizens and limited social benefits as racialized subjects – have borne the lasting burden of expanding detention policies, which have articulated the boundaries of Latino citizenship over the last one hundred years.

Contesting immigrant detention

This essay has addressed the history of Latino detention from the institutional level, examining the state’s constructions of Latino noncitizenship, national crises, and punishment in creating a system for detaining immigrants. My hope is that the analysis of the racial structures of immigrant detention moves us toward a closer examination of detention conditions and detainee experiences not explicitly addressed in this essay. The historical persistence of Latino immigrant detention, flowing from the categorical racialization and criminalization of immigrants, the lesser legal status of Latino noncitizens, and the official construction of detention as a legally “non-punitive” exercise, sustains the inferior conditions of incarceration suffered by detainees.

Immigration law, in particular the detention authority, is regularly utilized to address national crises because it is anomalous to normative forms of governmental checks and balances, and because immigrants are not provided the constitutional safeguards of criminal law when they face deportation



proceedings. And historically, when immigration law and the international laws of war and human rights present procedural obstacles to government enforcement initiatives utilized by detainees and their lawyers, the United States repeatedly pushes detention into ambiguous and indeterminate legal territories in order to confound and prevent oversight or obstruction of its detention goals. One must remember that the post-9/11 detention of so-called “enemy combatants” at Guantánamo Bay Naval Base in Cuba was preceded by the detention, at the same site, of Cuban and Haitian refugees and asylum-seekers interdicted at sea precisely because territorial and legal ambiguities created enforcement policy advantages for the government. According to Scott L. Silliman, executive director of the Center on Law, Ethics and National Security at Duke University, “If you move them to the United States there’s no question these people [off-shore detainees] will have more legal rights” (Cooper and Glaberson, 2007). Detention practices during the “war on terror” – secrecy, discretionary actions of the executive branch, denials of legal safeguards, and invented legal categories – are thus central to the maintenance of “undue process” in detention, and have been factors in detention practices since the inception of the Bureau of Immigration in 1891.

It is critical to mention that against the large bureaucratic detention system in the United States, there are three broad levels of opposition and detainee advocacy: juridical, community-based, and the resistance of the detainees themselves. Since noncitizens are denied particular rights, such as the right to vote, to hold certain jobs, and a variety of social benefits, it is imperative that they be protected by the Constitution to which they are held responsible. Especially for individuals in detention, lawyers, community organizations, and fellow detainees provide, oftentimes, the only avenues of support and advocacy in a very isolating and dismal situation. Although incarcerated and vulnerable to the variety of “undue processes” available to the state, immigrant detainees have historically contested their detention using the most basic means for protection, and to bring public awareness to the conditions of detention. In the 1980s, for example, major riots at detention centers took place in Louisiana and Georgia, as a result of the indefinite state of detention of Cuban migrants. The strategic prison sieges, which lasted nearly two weeks, were in opposition to the deprivation of due procedural rights for Cuban detainees, and the ensuing negotiations resulted in each detainee receiving a “full, fair, and equitable review.” According to Mark Hamm, as a result of the riots, “the detainees were guaranteed more rights in the United States than at any other time since their arrival on the 1980 boatlift” (1995, 176). Violent prison takeovers by detainees, which in this case included hostages, are a sign of the desperation of some detainees, especially under adverse conditions of confinement and in the absence of due process.

Community-based protests as a mode of resistance to Latino detention practices have also occurred throughout the century. Provoked by their concern

and fear for immigrants and detainees, community-based organizations have organized a variety of protests in their support, especially those directly saddled with the federal government's anti-terrorist strategies, and the general public's hysteria and willingness to act against noncitizens in times of national crisis. Prior to the grassroots-driven marches and demonstrations in Spring and Summer 2006, when hundreds of thousands took to the streets on multiple occasions nationwide, in opposition to punitive immigration legislation, families, communities, and churches have created active protest networks and have succeeded in aiding detainees directly, maintaining ongoing protests outside of federal and contracted detention centers, and keeping immigrant detention in the public eye.

New Jersey detention activists, in one such effort, maintained persistent pressure and presence at Passaic County Jail over the last 10 years, which resulted in the dissolution of the jail's federal contract to detain immigrants, in what the New Jersey Civil Rights Defense Committee called "a significant victory for citizen and detainee activists and their supporters" (2006). The sanctuary movement of the 1980s in support of Central American asylum-seekers and detainees, as well, served as what some have called a 20th century "underground railroad" and what historian María Cristina García refers to as "one of the most important acts of civil disobedience of the late twentieth century" (2006, 98). Recalling the outset of the medical detentions in the early 20th century and the border quarantine discussed previously, "excited [Mexican] women" border crossers, in a 1917 protest, "inveighed against all Americans" in a demonstration on the international bridge between Ciudad Juárez and El Paso. According to the *New York Times*, the women rioted, blocked traffic for several hours, and shouted "Viva Villa!" because they "resented the American quarantine order that all persons of unclean appearance seeking to cross the bridge must take a shower bath and have clothing disinfected" (Quarantine, 1917, 4; Viva, 1917, 11). In addition to the individual struggles of detainees in the form of hunger strikes, sit-ins, internet blogs, these collective efforts, and other acts of resistance to the conditions of their confinement, create the risk of retaliation by guards and wardens within detention centers. Moreover, they often transpire at great risks to family members outside the detention center or in the detainees' respective home countries.

In addition to concentrated support for detainees and their families from the existing infrastructure of nonprofit immigrant agencies, community-based organizations, and fellow detainees, one of the most complicated yet productive forms of resistance to state detention practices, comes from lawyers and legal advocates. Nonprofit organizations, law school legal clinics, individual lawyers working pro-bono and federal public defenders working for all classes of detainees – "criminal aliens," asylum seekers, unaccompanied children in detention, and 9/11 detainees – have taken their clients' cases all the way to

Supreme Court providing a vigorous and public critique of noncitizen detention. In one crucial case, *American Baptist Churches v. Thornburgh* (1991), a coalition of churches and refugee-service organizations reached an out of court settlement with the government, which overturned over 100,000 politically biased judicial decisions – “more judicial decisions than any other case in US history” – granting Salvadoran and Guatemalan asylum-seekers who had been denied asylum new hearings under more positive conditions (Kahn, 1996, 22–23; Coutin, 2000, 17). Before and after 9/11, organizations like the ACLU, the Center for Constitutional Rights, or faith-based legal services like Catholic Legal Immigration Network, Inc. have argued individual cases, filed countless Freedom of Information Act requests, and have sued the government on behalf of immigrant detainees. Legal counsel is invaluable because, for criminal alien detainees, their incarceration does not result in a robust due process, but a diminished set of rights. Even in the most remote of detention centers, at Guantánamo Bay Naval Base, lawyers have managed to argue on behalf of detainees, in cases where “some of the detainees don’t even know they have attorneys” (Lewis, 2005, A12). According to Michael Ratner of the Center for Constitutional Rights, at the outset of the “war on terror,” “The only lawyers willing to help were anti-death-penalty lawyers who were used to representing unpopular clients” (2004, xvi). This has slowly changed and the *New York Times* (Lewis, 2005, A12) reported that increasing numbers of lawyers are traveling to Cuba to represent the most ostracized of detainees, “suspected terrorists.”

These efforts at resistance to the detention process are filled with challenges. Complicated changes in the legal structure, emerging law enforcement initiatives, and myriad forms of “undue process,” all hamper detention activism. One dynamic, which saddled the immigrants’ rights movement in the 1990s and divided Latino community activists, was a form of divide and conquer in which some immigrants’ rights groups, in an effort to narrow their political losses, sacrificed the defense of the rights of undocumented migrants in exchange for more support for “legal” migrants. Such efforts, which create a “good versus bad” dichotomy of immigrants, have been replicated in the defense of immigrant detainees as well. The most common binary situates the majority-Latino category of “criminal aliens,” who have been convicted of crimes prior to their detention, against more “innocent” detainees, often refugees and asylum-seekers fleeing persecution. According to Heba Nimr, a Soros Justice Fellow at INS Watch, “Even immigrant rights advocates were less willing to advocate for more reasoned policies regarding noncitizens with criminal records, because that might jeopardize the tenuous rights of ‘innocent’ noncitizens” (Nguyen, 2002, 6). Such dichotomies are misleading because not only are “good” and “bad” detainees often from the same communities, if not the same families, but the undue processes which harm them usually harm all immigrants.

Contextualizing Latino detention

As briefly articulated at the outset of this essay, it has been useful to disaggregate Latino immigrant detainees from the sensational and extraordinary post-9/11 detention period, in order to shed light on the pervasive history of Latinos in detention, as well as the key role of immigrant detention in the criminalization, immobilization, and racial expulsion of noncitizens from the US. These histories are part of a broad and complex set of racist experiences that Latinos have endured at all stages of the processes of immigration and settlement, ranging from policies and practices at the federal, local, and popular level, which impinge on Latinos' civil rights, cultural practices, and economic advancement. This strategic move notwithstanding, I want to suggest that it is critical to understand Latino detention in a comparative racial frame. The detention of noncitizens in the United States, as it has developed over the last one hundred years, has entrapped a variety of racialized groups in very different political and social contexts. This is because the convergence of national security, race, and noncitizenship is an episodic occurrence in US history, and a comparative racial analysis better reveals the systemic arrangements and institutionalized racism in detention policy.

In addressing Latino immigrant detention in this essay, it has been difficult to speak only of Latinos. With a heterogeneous background, Latinos in and of themselves already have a complex and vexed history of incorporation to the US: as former colonial subjects, as refugees, as victims of direct military conquest, or as persons displaced by US global economic power. Correspondingly, and as I hope this essay has shown, Latinos have inhabited nearly every category of detainee across an entire century, including medical detainees at the border prior to World War II, persons entrapped in large-scale deportation campaigns in the 1930s and 1950s, refugees and criminal aliens detained because of the Cold War and "war on drugs," and lastly, as a result of the contemporary enforcement of the "war on terror," we should also include so-named "enemy combatant," José Padilla. As the prominence and complexity of Latino experiences with detention demonstrate, the detention of immigrants can affect all noncitizens and their families and communities, in particular historically racialized groups.

Immigrant detention thus underscores the structural inequality of all noncitizens in the US, and therefore it is vital that we come to know Latino detainees alongside similarly positioned persons. Critical episodes of immigrant detention also include Chinese and Chinese Americans detained for biological and eugenic reasoning, Japanese and Japanese American citizen detainees during World War II, immigrant laborers occupying the margins of whiteness, detained during the early 20th century Red Scare and the Cold War, Haitian detainees since the 1970s and, most recently, 9/11 detainees. These racialized episodes of immigrant detention are related directly and indirectly to

contemporary Latino detention because they have created legal prerequisites, diminished legal avenues for relief, and generated the construction and escalation of the detention infrastructure. While this essay centers on the detention of Latino immigrants, the larger scale of its impact occurs beyond detainees and their families, and extends to the creation of severe legal inequalities for all noncitizens. As the largest of this group today, Latino immigrants and their families and communities are extremely vulnerable to the hardships created by this process. Unless challenged, Latinos will suffer disproportionately from the government's domestic "war on terror."

The trends of escalating detentions and deportations, in particular the expansion of the detention infrastructure established with the dramatic changes in immigration and detention law in 1996, have continued into this new century. More than six years after 9/11, national security anxieties continue to occupy the popular imagination and serve to generate political energy for politicians invoking the security threat presented by immigration. According to Heather MacDonald, a fellow at the conservative Manhattan Institute, 9/11 was a "freebie" for persons whose real agenda is to halt undocumented immigration. "Talking about security makes it easier to talk about immigration without being called a racist," says MacDonald (Corcoran, 2006, 4S). Merging traditional arguments for and against immigration, with fears of international terrorism, politicians from both sides of the aisle have reframed the immigration debate, suggesting that immigrants are the cause of the nation's security vulnerabilities. Candidates in both the Republican and Democratic parties have campaigned on the professed links between terrorism, security and undocumented workers, reinforcing these connections in campaign advertisements, and signaling the merger of discourses of immigration control with national security and terrorism (Corcoran, 2006, 4S).

In today's context of an ever-expanding "war on terror," the provision of "homeland" security substantiates a vast, secretive, and racially driven security state, domestically and internationally. Thus, while terrorism prosecutions have dropped (Eggen, 2006, A6; Lichtblau, 2006, A7), older methods of enforcement, such as immigrant detention, have intensified as the array of issues surrounding detention, asylum, undocumented immigration, and border security, are couched in their so-called threat to national security. According to Border Patrol Chief David V. Aguilar, "The nexus between our post-Sept. 11 mission and our traditional role is clear.... Terrorists and violent criminals may exploit smuggling routes used by immigrants to enter the United States illegally and do us harm" (Archibold, 2006, 26). This restructuring of immigration control policies, and the current and heated struggles over "enforcement-only" legislation, testify to the ascendancy of this terror context. As legislative mandates continue to limit the judicial protections and sources of relief for detainees as well as immigration judges' ability to grant such relief or maintain legal safeguards, the trend in detention policy is to advance a variety of "undue

processes” against noncitizens and detainees by depriving them of their due procedural rights, both statutorily and through administrative minutiae.¹⁵

Latino migrants and US-born Latinos – demographically the largest of all migrant groups and US minority populations – will bear the burden of the US’s increased capacity to surveil, control, and detain noncitizens and persons perceived to be immigrants. According to Kevin Johnson, “Ultimately, persons of Mexican ancestry – citizens and noncitizens – will be disparately affected by the legal changes triggered by September 11” (2003, 852). Popular sentiment supports this trend; the political currency it generates for politicians and pundits makes it possible; and history has provided the legal precedents and historical trajectory to execute this punitive tendency. As the huge increases in federal funding and private investment that will triple detention capacity by the end of the decade make obvious, the federal government has unbridled its enforcement initiatives in the wake of 9/11, collaborating with local and international governments and the domestic criminal justice system, and formulating highly problematic information-sharing networks. These efforts at protecting the “homeland” through scapegoating, burdening, and reducing the rights of immigrants, have distorted the meaning of national security, producing long-term challenges and adverse human consequences for a vital and permanent segment of our society.

15 In July 2007, a federal judge upheld a near two-decades-old injunction to protect Salvadoran asylum-seekers because of ongoing widespread abuses in detention and barriers to due process. National Immigration Law Center, “Orantes Injunction Upheld: Judge Finds Widespread Abuses in Immigrant Detention,” press release, July 31, 2007.

About the author

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