Migrant "Illegality," Immigrants' Rights, and the Antiterrorism Security State

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In the aftermath of the events of September 11, 2001, the virtually instantaneous hegemony of a metaphysics of antiterrorism has radically reconfigured the politics of race, immigration, and citizenship in the United States.

The new nativism of antiterrorism has clearly not made the vast majority of contemporary (non-Muslim) migrant groups into primary objects of the sorts of racial profiling that proliferated since September 11, 2001. Nevertheless, the practical ramifications for *all* migrations and migrant *trans*nationalism are already profound -- above all evidenced by the complete subsumption of the now-defunct Immigration and Naturalization Service (INS) into the new Department of Homeland Security (as of March 1, 2003) – and may very likely be still more dramatic. Furthermore, in response to the single most expansively punitive immigration legislation in U.S. history, the Border Protection, Antiterrorism and Illegal Immigration Control Act [HR 4437], passed December 16, 2005 in the House of Representatives, mass protest mobilizations during the spring of 2006, overwhelmingly comprised of migrants and citizens of color, forcefully established that undocumented migrant working people, although largely without "rights," are not at all prepared to languish in docile subjection. Half a million marched in Chicago on March 10 (reportedly the largest single demonstration on record in the city's history), followed by at least a million in Los Angeles on March 25 (in addition to several smaller protests that week), hundreds of thousands in New York City

at various rallies in early April, as well as tens of thousands each in numerous other cities, culminating in millions nationally with the "Day Without an Immigrant" one-day general strike and boycott on May 1. These events took the political establishment by storm and forcefully galvanized widespread public awareness of the U.S. Senate's then-ongoing deliberations over the House legislation. Ultimately, the law in question proved to be abortive, but what the parties to the legislative debate finally did approve was a still-punitive but dramatically more limited law, the Secure Fence Act of 2006, requiring further fortification of the U.S.-Mexico border with hundreds of miles of new physical barriers to be added to the existing 125 miles of fence. Amidst the controversy over new immigration proposals, but rather less well known, however, KBR -- a company famous for scandals concerning its war profiteering in Iraq and a subsidiary of Halliburton (the corporation formerly directed by present U.S. Vice President Dick Cheney) -- was quietly awarded on January 24, 2006 a $385 million contingency contract that provides for the creation of new detention facilities "in the event of an emergency influx of immigrants into the U.S., or to support the rapid development of new programs." Those prospective "new programs" that might require mass detentions, predictably, are shrouded in an ominous ambiguity. But "detentions" – which is to say, indefinite imprisonment without formal charges or any semblance of due process or law – have indeed been the hallmark of the Homeland Security State, and non-citizens have overwhelmingly been figured as its special targets. Much, then, revolves around the economy of "illegality" that renders a migrant or other foreign visitor more or less subject to the caprices of the Rule of Law.

Migrant "illegality" and deportability

Undocumented migration, in the United States as elsewhere, is pervasively treated not only in policy debates and mass-media representations but also in much scholarship as a self-evident "problem." Migrant "illegality," however, like citizenship itself, is a juridical status. It entails a social relation to the state; as such, migrant "illegality" is a preeminently *political* identity. If we as academic and publicly engaged intellectuals begin, not from the epistemological standpoint of the state and its functionaries, but rather from the standpoint of the elementary freedom of movement as something like a basic human right, then rather than presupposing that there is something inherently suspect about the human beings who migrate, the real problem comes into considerably sharper focus: that problem, clearly, is the state itself (cf. Harris 1995, p.85).

Once we recognize the irreducibly political character of all questions concerning undocumented migration, and sharply formulate the problem of the state as a defining horizon for such research, then it becomes more immediately apparent that all undocumented migrations are constituted as the historically specific products of the intersections of particular migratory movements with the distinct political and legislative histories of particular states and their consequent legal economies of meaning and differentiation. In other words, there is no such thing as undocumented migration (or migrant "illegality") "in general." These analytic categories do not constitute a generic, singular, universal, and thus, transhistorical and essentialized object of study. In my own previous research on Mexican migration to the United States, I have nonetheless been especially interested in the broadly generalizable characteristic of many, if not most, undocumented migrations as preeminently *labor* migrations (De Genova 2002; 2005).

It is noteworthy that within the regime of U.S. immigration and naturalization law, the term "immigrant" is reserved only for those so-called "legal" migrants who have been certified as such by the state. Yet it is still more instructive to note that the strictly accurate technical category for undocumented migrants is therefore not "immigrant" at all. The legal category that designates an undocumented migrant in the U.S. is not even the politically charged, bluntly hostile, but nonetheless ubiquitous category "illegal alien," but rather, more precisely, "*deportable* alien." Indeed, it is their distinctive legal vulnerability, their putative "illegality," that facilitates the subordination of the undocumented as a highly exploitable workforce. But this is above all true because any confrontation with the scrutiny of legal authorities tends to be always-already tempered by the discipline imposed by their ultimate susceptibility for deportation.

As I've argued in considerable detail elsewhere (De Genova 2005), the law and its enforcement creates an apparatus for the everyday production of a durable and enduring migrant "illegality," yet its disciplinary operation has almost never effectively achieved the presumed goal of mass deportation. On the contrary. It is *deportability*, and not deportation as such, that has historically rendered undocumented migrant labor as a distinctly disposable commodity. Migrant "illegality" is lived through a palpable sense of deportability—which is to say, the possibility of deportation, the possibility of being "removed" from the space of the state. What makes deportability so decisive in the legal production of migrant "illegality" and the policing of state borders, ultimately, is that *some are deported in order that most may remain* (un-deported)—as workers, whose particular migrant status may thus be rendered "illegal" and sustained indefinitely. Therefore, migrant "illegality" is a *spatialized* social condition, and one that pertains above all to the

continued *presence* of the undocumented *within* the space of the state. Likewise, "illegality" is posited, commonly enough, in juxtaposition with the hegemonic production of "national" identities. In the United States, such social productions of *spatialized* difference involve a politics of citizenship that ineffably seems to get transposed into a spatial politics of "national" sovereignty, "national" identity, "national" culture, and so forth. Thus, these productions of *spatialized* ("national") difference tend to become inseparable from concomitant productions of *racialized* differences similarly articulated in terms of "identity" and "culture."

As is well known, Mexican migrants in particular were pervasively figured as the U.S. nation-state's iconic "illegal" (or, deportable) "aliens" throughout most of the twentieth century. This was perhaps never more dramatically and unequivocally demonstrated than in the mass deportations and coercive repatriations of Mexican migrants as well as their often U.S.-born (and hence, U.S. citizen) children during of the 1930s. Immediately following what was in fact a mass *im*portation of Mexican/migrant labor driven primarily by a voracious employer demand during the period from 1910 to 1930, when approximately one-tenth of Mexico's total population had relocated north of the border, with the advent of the Great Depression, Mexican migrants and U.S.-born Mexican citizens alike were systematically excluded from employment and economic relief, which were declared the exclusive preserve of "Americans," who were presumed to be more "deserving." These abuses culminated in the forcible mass deportation of at least 415 thousand Mexican migrants as well as many of their U.S. citizen children, and the "voluntary" repatriation of 85 thousand more (Balderrama and Rodríguez, 1995; Hoffman, 1974). Inasmuch as this mass expulsion of Mexicans during the 1930s

proceeded with no regard to "legal" residence or U.S. citizenship or even birth in the U.S. – and migrant and citizen alike were deported simply for being "Mexicans" – the more plainly *racist* character of the illegalization and deportability of Mexican labor became starkly manifest. Notably, this was not the only occasion when Mexican deportability was mobilized to such excessive purpose. In 1954-55, the militarized dragnet and nativist hysteria of Operation Wetback culminated in the expulsion of at least 2.9 million "illegal" Mexican/migrant workers (García 1980). More important, these examples reveal a still more fundamental and general "revolving-door" pattern of simultaneous deportations coupled with an overall mass *im*portation, which has long been the defining feature of Mexican migrant labor (Cockcroft 1986; De Genova 2005).

In short, what the history of Mexican migration to the U.S. makes abundantly clear and irrefutable is the crucial relation between migrant "illegality" and labor subordination. The productivity of immigration law in creating and sustaining distinctive forms of pronounced and protracted legal vulnerability for particular migrants, therefore, is inextricable from the specifically *economic* profitability of migrant deportability, but it is of decisive importance here to emphasize that this is only possible when migrant "illegality" is produced and deployed on a *mass scale*. Again, it is not deportation as such but rather deportability that qualifies undocumented migrant labor as a commodity of choice distinguished by its heightened vulnerability and, ordinarily, its resultant tractability. In the remainder of my talk today, however, I am interested in shifting the angle of vision that has informed my analysis thus far, in order to examine deportability and the politics of space as these have been dramatically reconfigured in the U.S. in the aftermath of the events of September 11, 2001, the proclamation of a purported "War on

Terrorism," and the concomitant implementation of draconian police powers domestically that I will call the Homeland Security State. In other words, I will now redirect my critical scrutiny from the economic profitability of migrant "illegality" and deportability to the specifically *political* profitability of mobilizing "illegality" and deploying deportability, precisely not on a mass scale but rather more selectively, not simply in the banal production of mundane "illegal aliens" but rather in the targeted production of Arab and other Muslims as "*enemy* aliens."

From "illegal aliens" to "enemy aliens"

Before I proceed to the sociopolitical production "enemy aliens," however, it is of course crucial to note that more conventionally construed "illegal aliens" have hardly been exonerated of their dubious distinction. The revised imperatives of the Homeland Security State have certainly not "redeemed" undocumented Latino migrants, or even U.S. citizen Latinos, of the allegations of "foreign"-ness, "illegality," or "criminality" that were already prominent features of their racialization in the years immediately prior to September 11, 2001. The escalation of immigration raids against undocumented Mexican and other Latino migrants, especially those employed in airports, in the name of "homeland security" and the "war on terrorism," as well as the heightened policing of the U.S.-Mexico border, remind us that the pervasive racialized equation of Mexicans in particular (and Latinos, more generally) with the figure of the "illegal alien" has hardly been suspended or diminished. With the advent of the antiterrorism State, the politics of immigration and border enforcement in the U.S. have nevertheless been profoundly reconfigured under the aegis of an unbridled politics of anti-immigrant suspicion and

hostility, (again) above all evidenced by the complete subsumption of the Immigration and Naturalization Service (INS) into the new Department of Homeland Security (as of March 1, 2003), whereby any and all matters concerning immigration and migrants' eligibility for citizenship are now expressly and emphatically subordinated to the rhetoric of antiterrorism. Indeed, the putative War on Terrorism and the resurgence of "national security" concerns has readily supplied a quite convenient ideological rationale for anti-immigration lobbies to reassert their already well-worn obsessions and to re-energize their longstanding campaigns, all of which have conventionally been disproportionately directed against Latinos – from the movement to restrict undocumented migrants' access to driver's licenses, to the call for a rejection of the Mexican *matrícula consular* as a valid form of identification, to the demand that the U.S.-born children of the undocumented should be denied birthright U.S. citizenship (see, e.g. Camarota 2001; Dinerstein 2003; FAIR 2002; FILE 2002; Krikorian 2002; 2003; Martin et al. 2003; cf. Schuck and Smith 1985; Wood 1999).

Given U.S. employers' deeply entrenched historical dependency on the abundant availability of legally vulnerable undocumented migrant labor, however, it hardly comes as a surprise that on January 7, 2004, the Bush administration proposed a new scheme for the emphatically "temporary" regularization of undocumented workers' "illegal" status and for the expansion of a Bracero-style migrant labor contracting system orchestrated directly by the U.S. state (Bush, 2004; cf. Calavita 1992; Papademetriou 2002). Notably, Bush's original immigration "reform" proposal expressly precluded any prospective eligibility for permanent residence or citizenship, and merely sought to devise a more congenial formula by which to sustain the permanent availability of disposable (and still

deportable) migrant labor, but under conditions of dramatically enhanced ("legal") regimentation and control. According to such a formula, the state would, in effect, operate as a broker of virtually indentured laborers whose continued presence in the United States was conditioned by their faithful servitude to designated employers. Confronted with an unanticipated insurgency of immigrants' rights protests, however, on May 15, 2006, Bush revised his formulation of "reform." While declaring that "illegal immigration … brings crime to our communities" and more generally reaffirming the criminalization of undocumented migrants as law-breakers, pledging to deploy 6,000 National Guard troops to the U.S.-Mexico border to assist the Border Patrol, and taking great pains to appear to repudiate anything that might be characterized as an "amnesty" for undocumented workers, Bush nevertheless defended an eventual eligibility for naturalization for some undocumented migrants who have been in the United States for several years and could meet multiple other requirements (Bush 2006). Predictably, those undocumented migrants who could qualify for such an "adjustment of status" would be subjected to several additional years of heightened vulnerability and continued deportability as they sought to satisfy all of these requirements, while those who do not qualify would be immediately subject to deportation and, at best, might merely be invited to join the ranks of the new mass of eminently disposable guestworkers. Those who could finally naturalize as U.S. citizens, moreover, would ultimately have served a very long and arduous apprenticeship in "illegality" and subsequent subjection to considerable scrutiny, surveillance, and discipline as the precondition for their "legalization." This, we may infer, is truly what Bush means when he depicts the plan as "a way for those who have broken the law to … demonstrate the character that makes a good citizen" (2006).

While Latinos are clearly not the primary object of the sorts of racial profiling that distinguish the new nativism of antiterrorism, then, the practical ramifications for Latin American (and especially Mexican) migrations and transnationalism have already been substantial. Indeed, inasmuch as the figure of the "illegal alien" has long been rendered synonymous with a corrosion of law and order, the porosity of the U.S.-Mexico border, and a supposed crisis of national sovereignty itself, one common and remarkably virulent strain of the post-9/11 nativism boldly declares *all* undocumented migrants, in effect, to be potential terrorists. One need only consider the title, for example, of Michelle Malkin's nativist diatribe *Invasion: How America Still Welcomes Terrorists, Criminals, and Other Foreign Menaces to Our Shores* (2002), the first chapter of which declares: "When we assess the security of our borders, our immigration laws, and our tourism policies … we must ask at every turn: *What would Mohamed do*?" (2002:3). Referring literally to 9/11 hijacker Mohamed Atta, but perhaps insinuating the more generic and thus iconic figure of a racialized Arab/Muslim menace by implication, Malkin contends that "illegal immigration through Canada and Mexico is the passageway of countless terrorist brethren" (8), and that al-Q'aeda operatives can readily enter the U.S. from Mexico undetected "alongside hundreds of thousands of undocumented workers" (9). The juxtaposition of "countless terrorist[s]" and "hundreds of thousands of undocumented workers," of course, operates rhetorically to strategically elide any distinction between "illegal aliens" and "enemy aliens."

The term "enemy aliens," as I am using it, is not merely a rhetorical gesture, however. Rather, the category has a precise legal content that has been a convention of U.S. law since the passage of the Enemy Aliens Act of 1798 (Act of July 6, 1798, 1 Stat.

577), which has remained in effect ever since. The Enemy Aliens Act affirms that the U.S. president is authorized during wartime to detain, deport, or otherwise restrict the liberties of any person (over fourteen years of age) who is a citizen of a state with which the U.S. is at war, without any requirement that the individual in question has demonstrated "disloyalty" or engaged in criminal conduct, or has even been alleged to be "suspicious" (Renquist, 1998:209). Following World War II, in the decisions of *Ludecke v. Watkins* (1948), and then again in *Johnson v. Eisentrager* (1950), the U.S. Supreme Court upheld the constitutionality of the Enemy Alien Act, but the "enemy alien" authority has never been formally invoked since (Cole, 2003:12, 237n.23; Renquist, 1998:210). Furthermore, in a strict sense, the rule applies only in a time of *declared* war and may be directed exclusively toward the citizens of a state with which the U.S. is at war. Since September 11, 2001, more than 5,000 foreign nationals in the U.S. (migrants or visitors) have been subjected to detentions and deportations as a result of the purported "anti-terrorism" dragnet, but neither of these criteria pertains to the vast majority of them (who have predominantly been citizens of Arab or other Muslim countries that are ostensibly allies of the U.S. or otherwise "cooperating" with U.S. directives). In this amorphous "war" on such an ever elusive, characteristically transnational, definitively stateless, and distinctly moving target – namely, "terrorism" – an official and explicit application of the "enemy alien" rule to virtually anyone would seem highly implausible if not altogether untenable. Indeed, the Bush administration has improvised a rather more appropriately ambiguous and elastic category with which to preemptively justify the indefinite detention of some of its terrorism "suspects" – without formal charges and without any semblance of due process of law: they have been labeled "enemy

combatants." The term itself exposes a blatant presumption of guilt. Although the overwhelming majority of the alleged "combatants" are foreign nationals, the distinction among them between aliens and citizens has been notably effaced as they are relegated to an astounding state of exception. Indeed, perhaps the premier exemplar of the dreadful truth that the presumably elementary liberties and legal protections of U.S. citizens can be subverted altogether is José Padilla, a U.S. citizen by Puerto Rican colonial birthright, accused of conspiring to carry out a "terrorist" bombing in the U.S. as an al-Qaeda operative, who is likewise the telltale case confirming that Latinos have acquired no newfound immunity from the new (post-September 11) nativism. Without any of the purportedly sacrosanct due process of law to which his U.S. citizenship is supposed to entitle him, Padilla was apprehended in a Chicago airport and has subsequently been indefinitely imprisoned under military jurisdiction. Despite a flagrant refusal by the U.S. government to publicly present any formal charges or evidence against him whatsoever, Padilla was stripped of any semblance of juridical personhood, and until very recently, was effectively "disappeared" (cf. LCHR 2003a, b,c,d). A related case has involved the military imprisonment of Yasser Esam Hamdi, raised in Saudi Arabia and purportedly apprehended on or near a battlefield in Afghanistan, but whose parents happened to have been in the U.S. at the time of his birth, and hence a U.S. citizen; notably, Hamdi's contentious birthright citizenship has been a flashpoint for legal arguments fundamentally directed at overturning the extension of birthright citizenship to the U.S.-born children of undocumented migrants (e.g. FILE 2002). Most of the purported "enemy combatants," however, have been foreign nationals, usually apprehended in the vicinity of actual theatres of warfare during the U.S. war against Afghanistan, and are distinguished for

their indefinite incarcerations at the U.S.'s Guantanamo Naval Base in Cuba. Meaningful and evocative analogies notwithstanding, it is important nonetheless to note that the term "enemy combatant" has *not* been applied indiscriminately to *all* so-called "terrorism suspects." While a more detailed consideration of the historical circumstances, sociopolitical condition, and legal predicament of these alleged "enemy *combatants*" is beyond the scope of the present essay, they provide an absolutely necessary and indispensable conceptual counterpoint to the approximately 5,000 Arab and other Muslim non-citizens – de facto "enemy *aliens*" – who have been detained and in some cases deported as a consequence of the post-September 11 immigration regime. Indeed, these detentions *within* the U.S. and, in some instances, the consequent deportations, have truly been the centerpiece of what I am calling the Homeland Security State.

The most extravagant and deservedly most infamous deployment of the "enemy alien" authority in U.S. history was the mass internment in concentration camps of the Japanese during World War II. As a result of President Franklin D. Roosevelt's Executive Order 9066, on the ostensible grounds of "military necessity," approximately 110 thousand persons of Japanese ancestry were summarily and forcibly evacuated from the West Coast region of the U.S. and often thereby effectively dispossessed of virtually all of their property, to be imprisoned in camps scattered in the country's interior for much of the duration of the war. Notably, the absolute majority – roughly 70 thousand – were U.S. citizens by birthright (see, generally, Bosworth, 1967; Robinson, 2001; Rostow, 1945; Serrano and Minami, 2003; Yamamoto et al. 2001). Their migrant parents were "resident aliens," ineligible, on explicitly racial grounds, to naturalize as U.S. citizens. The vast majority of the Japanese non-citizens, however, had been settled in the

U.S. since prior to 1907 when Japanese labor migration had been prohibited by diplomatic accord. Much like the racialized mass deportations of Mexicans during the prior decade, Japanese internment dispensed with any substantive distinction between migrant non-citizens and their U.S.-born citizen children. The state indiscriminately extended the suspicion of "enemy aliens" to all persons racialized as "Japanese." The fundamentally racist character of the policy toward the Japanese, furthermore, is amply underscored by the strikingly divergent fortunes of persons of German and Italian ancestry who were never subjected to such indiscriminate mass incarceration. In marked contrast with the experience of Mexican labor migrants' forcible repatriation, however, rather than mass expulsion the Japanese were subjected to mass containment. The glaring contrast, here, between the absolute disposability of "*illegal* aliens" and the commodity of their labor-power, on the one hand, and the treatment of "*enemy* aliens," on the other -- in short, the profound disparity between deportability and confinement -- is instructive.

The imprisonment without charges of U.S. citizens (as well as "legal" migrant non-citizens) of Japanese origin or descent as presumptively disloyal "aliens" during World War II provides a poignant analogue to the contemporary elision of Arab ancestry or Muslim heritage with "foreign"-ness and the concomitant presumption of their disloyalty and potential culpability as "terrorists" during the present so-called War on Terrorism (cf. Mark et al., 2002; Saito, 2001). Although much of post-World War II public opinion assessed the Japanese evacuation and detention to have been a grave injustice, three major Supreme Court decisions during the final year of the war had upheld the legitimacy of the government's "military necessity" and "national security"

rationales. Very much more recently, however, William Renquist, the now-deceased former Chief Justice of the U.S. Supreme Court, published an eerily precocious book on the subject of "civil liberties in wartime," which remarkably appeared in print three years *prior* to September 11, 2001. Renquist revisits those World War II-era decisions in order to justify anew the admittedly discriminatory internment of Japanese non-citizens on the explicit grounds of the "enemy alien" authority (1998:203-11).[1] Subsequently, and perhaps predictably in her capacity as one of the most guileless anti-immigration demagogues of the contemporary moment, Michelle Malkin has published another book entitled *In Defense of Internment: The Case for "Racial Profiling" in World War II and the War on Terror* (2004). Recall that there had never been any formal charges against the interned Japanese individuals, but rather only the mobilization of a very palpable over-arching racial hostility conjoined to rather diffuse suspicions of "disloyalty" based on national origins or ancestry.

Since September 11, 2001, 80,000 male foreign nationals visiting the U.S. from designated countries of origin (of which, 24 of 25 were predominantly Arab and/or Muslim) were required to register with authorities and be photographed and fingerprinted; 8,000 Arab or other Muslim migrants or visitors were sought out for FBI interviews; and more than 5,000 have been subjected to detentions (culminating in deportations for 515) as a result of the purported anti-"terrorism" dragnet. The vast majority of these presumed "enemies," notably, have overwhelmingly been citizens of states that are ostensibly *allies* of the United States. Furthermore, this policy of "preventive" detentions, directed almost singularly against Arab or other Muslim non-

[1] Notably, however, Renquist does insist on the distinction between Japanese non-citizens and their U.S.-citizen children.

citizen men, has frequently involved arrests with no charges whatsoever and the denial of bond, even in the utter absence of any evidence that the detainees posed any danger or flight risk. Not uncommonly, they have been detained under maximum-security conditions and even 23-hour lockdown, almost always with a communications blackout (at least initially), prohibiting all contact with legal counsel, the rest of the outside world, and even one another. Typically, they have had only extremely restricted possibilities for consultations with lawyers or visitations with loved ones, thereafter. Reports of verbal and physical abuse and other types of discriminatory or otherwise punitive treatment by detention authorities, have likewise been commonplace. Thus, if nothing else, the Homeland Security detentions have effected the selective enforcement against Arab and other Muslims of a generalized presumption of their guilt as "terrorists" (cf. Cole, 2003; Human Rights Watch, 2002). In effect, Arab and other Muslims have been reduced to the sociopolitical status of "enemy aliens" (even if that precise legal designation has been judiciously avoided) (cf. Cole, 2003). Yet, out of the 93,000 Arab and other Muslim non-citizens variously subjected to registration, interrogation, indefinite imprisonment, and also casual brutality, literally *not even one person* has ever been convicted of anything remotely resembling a terrorist crime (Cole 2006:17; cf. Cole 2003).

"Preemptive" war, "preventative" detention

The Homeland Security State's predilection for these indefinite and usually secretive detentions for the purposes of "terrorism" investigations can reasonably be considered a domestic complement to the Bush administration's avowed doctrine of "preemptive war" (see National Security Council, 2002:13-16). Indeed, former Attorney

General of the U.S. Department of Justice, John Ashcroft, repeatedly took decisive measures to modify rules and procedures in order to expand the government's "emergency" powers to arrest and detain non-citizens. Thus, immigration authorities are no longer required to file charges against any foreign national within any specified time frame, allowing non-citizens to be apprehended and detained indefinitely (Ibid. 31). Immigration judges have been ordered that, in "special interest" cases, "the courtroom must be closed … no visitors, no family, no press." (The "special interest" classification has become the standard official euphemism for cases involving "terrorism" investigations; notably, the term was left entirely undefined in the directive). The restriction even went on to prohibit any public confirmation of whether or not the case was being listed on the court's docket, enforcing an even more absolute secrecy for any immigration proceedings involving "terrorism" allegations or inquiries (Chief Immigration Judge Michael Creppy's order, quoted in Mark et al. 2002:11). Moreover, immigration officials have been empowered to override any court order for the release of a non-citizen detainee, merely by registering their intent to appeal the unfavorable custody decision, without any requirement that they present substantial evidence in support of the appeal (Cole, 2003:32-33). Furthermore, then-Attorney General Ashcroft announced in July 2002 that the Homeland Security State would begin vigorous enforcement (inevitably on a selective basis) of a rule that was virtually unknown and previously never enforced, but which was an already standing requirement on the books: this rule requires all migrants and other non-citizens to report every instance of change-of-address to immigration authorities. This became the ultimate pretext by which the vast majority of all non-citizens in the U.S. could be found to be in technical violation of

immigration law and thus, strictly speaking, "out of status" (Cole 2003:31-32). Here was the quintessential example of a policy change not at the level of law but rather with regard to *enforcement* practices that contributed to an unprecedented expansion of migrant "illegality." For Arab and other Muslims from designated countries, moreover, this new mandate was notably coupled with a new more implicitly criminalizing requirement: the regular and repetitive documentation of their photographs and fingerprints (Ibid. 50).

The ultimate authority of U.S. immigration officials to detain any non-citizen is supposed to be constrained by the individual's liability for deportation, his or her actionable deportability. Thus, under ordinary circumstances, whenever the prospect of deportation was uncontested and "deportable aliens" opted for what is called "voluntary departure," the goal of "removal" was achieved without the expense and delay of legal proceedings. Under these circumstances, previously, immigration authorities would be summarily divested of any legitimate justification for continued detention. After September 11, however, immigration authorities instituted a new policy that denied the standard option of voluntary departure to those detained in connection with "terrorism" suspicions. Now, even if a detainee agrees to be deported, the state may refuse to release him until after the Federal Bureau of Investigations (FBI) has completed its usually very protracted inquiries and exonerates him of any plausible charges of criminal conduct, to say nothing of actual "terrorist" activity (Ibid. 33). Finally, the so-called "USA-PATRIOT" Act (P.L. #107-56, 115 Stat. 272) of 2001, a 342-page omnibus bill rushed into law within six weeks of September 11, further authorized the continued detention even of non-citizens who had prevailed in court and won favorable decisions *against*

their deportation in removal proceedings. In such a case, insofar as the migrant in question has been granted a suspension of deportation orders, s/he has literally been pardoned of any immigration violation and effectively determined to be a "legal" resident, thereby negating any plausibly valid grounds for detention by immigration authorities. But the PATRIOT Act subordinated a migrant's "legal" residence in the U.S. to the police powers of the Department of Justice, upholding indefinite detention "until the Attorney General determines that the noncitizen is no longer a noncitizen who may be certified [as a suspected terrorist]" (Ibid. 66; cf. USA PATRIOT Act §412). Thus, whether a migrant has been judged by an immigration court to be definitely deportable or definitely not-deportable, within the adjusted framework of the Homeland Security State, the non-citizen remains subject to indefinite detention. As immigration and civil liberties lawyer and legal scholar David Cole has suggested, in the case of the September 11 detainees, "the government's real goal is not to remove, but to detain" (2003:33).

Here, it bears repeating, emphatically – the Homeland Security State's real goal is *not to deport but to detain*. In my previous work on undocumented Mexican labor migration, as I have suggested, I argue that the goal of immigration law enforcement has never been deportation as such, but rather deportability, for the purposes of creating and sustaining the "illegality" effect for migrant workers who come to be relegated to a protracted condition of heightened legal vulnerability. The government's real goal, historically, in the context of what I have called the legal production of migrant "illegality," was never to evacuate the space of the nation-state of "illegal aliens," but rather the contrary – to maintain an overall importation of their labor, deporting some so that most would remain, un-deported, as highly disposable (deportable) workers. Under

the radically altered conditions that prevail in the aftermath of September 11, with the advent of a Homeland Security State apparently committed to perpetrating a *domestic* War on Terrorism, how then have the spatialized (and inevitably racialized) politics of migrant "illegality" and deportability been reconfigured? As we have seen, the goal now is not simply to deport any more than it was previously. However, in earlier scenarios, immigration law enforcement was preeminently enacted as a spectacle of frontier policing (overwhelmingly directed against Mexicans in particular), shadowed by what Josiah Heyman has called the "voluntary departure complex" whereby "deportable aliens" (who are in fact overwhelmingly Mexican) "are permitted (indeed, encouraged) to waive their rights to a deportation hearing and return to Mexico without lengthy detention, expensive bonding, and trial," and then, upon release in Mexico near the border, "they can and do repeat their attempts to evade border enforcement until they finally succeed in entering" (1995:266-67). In what I have called the Border Spectacle (De Genova 2002; 2005), a beleaguered Border Patrol customarily performed its unrelenting duty in the futile effort to hold back what public discourse and political debate incessantly depicted as a "flood" or "invasion" of "illegal aliens" poised to "steal" the jobs of "American" workers. This border spectacle thereby served to confirm that there really was such an uncontrollable and debilitating "invasion" after all, enhancing and intensifying the fetishized appearance of "illegality" as a sociopolitical "fact." And it surely continues to do so. Now, however, in the aftermath of September 11, the antiterrorism regime needs to generate and intensify the fetish of a 'terrorist" menace as a "fact" of the contemporary sociopolitical moment. Thus, immigration law enforcement is deployed selectively, "preventively," indeed "preemptively" in the production of pretexts

for surveillance and detention. In a sociopolitical context such as prevails in the U.S., where the state has long enjoyed an extraordinarily high degree of presumptive legitimacy and, even worse, where the democratic fetish of "the rule of law" has been profoundly conjoined to authoritarian discourses of "law and order," selectively targeted detentions against an identifiable minority uphold and sustain racialized suspicion, and confirm that minority's more general susceptibility for detention, their *detainability*. The detentions (and other discriminatory practices facilitated by the Homeland Security State), almost singularly targeting Arab and other Muslim men with no legally defensible probable cause, have been condemned by those concerned with the protection of civil liberties as a policy of racial or "ethnic" profiling for the purposes of selective law enforcement (Human Rights Watch, 2002; cf. Cole, 2003:47-56). Furthermore, these detentions have not yielded even one bona fide case of criminal conduct, and that no one detained has been even charged with anything vaguely resembling culpability for "terrorist" activity. Thus, one predictable liberal criticism has been that this inefficient policy may very probably compromise and actually undermine security (e.g. Cole, 2003:183-97) and quite simply, is appallingly "counterproductive" (e.g. Mark et al. 2002:11-14). But from my perspective, the theoretical task at hand is all the more urgently to ask the critical question: What are the real *effects* of these revised immigration law enforcement policies? Without engaging in the unwitting apologetics of presumptively characterizing the consequences as "unintended" or "unanticipated," and without busying ourselves with conspiratorial guessing games about good or bad "intentions," the challenge of critical inquiry and meaningful social analysis commands that we ask: What indeed do these policies *produce*? The subsequent detention dragnet

that has imprisoned thousands of law-abiding migrants initially relied upon a mandatory "Special Registration" program (which was later discontinued on December 1, 2003), reserved almost exclusively for Arab and other Muslim non-citizen men, based on a list of designated countries of origin. In other words, most detainees were originally imprisoned because they dutifully presented themselves for government scrutiny in compliance with Homeland Security mandates. This Special Registration program was indisputably a form of de facto racial targeting and scapegoating -- that much is fairly obvious. Still more important, however, the Homeland Security State is an apparatus that *produces the spectre of "guilt"* that presumptively hovers over the migrants' mere detainability. In practice, as we may infer from the PATRIOT Act's language, detainability becomes the predicament of any "noncitizen who *may be* certified" as a *suspected* terrorist – not even who *may be* determined to truly be a terrorist, but rather who might yet be designated to be a mere *suspect*. Detainability, then, is contingent upon nothing more than *susceptibility to suspicion*, and consequently, actual detention *appears* to confirm *susceptibility to culpability*. The expansive technicalities of immigration law and the selective scrutiny of any conceivable minor violation, the mobilization of migrant "illegality" as mundane delinquency, has supplied innumerable pretexts for continued "preventive" incarceration. This manipulation of pretexts for the purposes of detention, then, appears to corroborate the original presumption of potential "terrorist" culpability, and subjects the detained non-citizen to further scrutiny in a compulsive quest to uncover truly "criminal" illegalities. Thus, the enforcement spectacle generated by selective detentions involves a staging of presumptive "guilt" that, in effect, *produces culprits*.

The "terrorism" effect

Antiterrorism's requisite phantom menace of nefarious and elusive "evildoers," ultimately, commands a *material* enemy. "Suspects" must be transformed into veritable culprits. Thus, the Homeland Security State dredges up a host of Arab and other Muslim migrants who almost universally, if they can be charged with anything at all, are merely "out of status." That is, they are only culpable of minor violations of what are often procedural technicalities of immigration law. Since there is no requirement that they be held on any formal charges, however, suspicion alone ensures detainability, and is sufficient cause for preliminary detention. The slightest infraction nevertheless serves as an adequately durable pretext for their prolonged detention. The distinctly secretive spectacle of their protracted detentions then sustains and enhances what I will call the "terrorism" effect. It renders them collectively to be de facto "enemy aliens" and still more important, at least by implication, it substantiates the allegation of a palpable and immanent threat of terrorism in the U.S. "homeland." Whereas border enforcement conventionally provided a highly *visible* spectacle of "illegal alien" "invasion," Homeland Security's tedious, unrelenting, and above all secretive enforcement of inconspicuous technicalities produces the rather more mysterious, indeed terrifying, spectacle of an *invisible* infiltration of "sleepers" (the War on Terrorism's "secret agents") – and serves to justify increasingly invisible government. Thus, the manipulation of petty immigration "illegalities" and the mobilization of migrant detainability ultimately serves to verify the War on Terrorism's official state of emergency. Insofar as these practices produce "enemy alien" culprits, they simultaneously produce the Homeland Security State's most precious and necessary

political resource, and advance what may likewise be its most politically valuable end – namely, heightened insecurity. Producing culprits produces insecurity – this indeed is the goal of Homeland Security.

One predictable response to allegations of Japanese "disloyalty" during and after World War II, especially among many U.S.-born "Japanese American" citizens, was to adopt various strategies aimed at the restitution of their political credibility and civil standing as "good Americans" in spite of their supposedly "alien" racial character; many felt compelled to pledge their allegiance and perform their patriotism. An analogous dynamic is evident today as many spokespersons for Arab and other Muslim organizations and communities in the U.S. rise to their own self-defense – agonistically trying to confirm that they really are not "terrorists" by affirming their commitments to U.S. nationalism. But in another important respect, again, it is crucial to discern the marked contrast and not only the obvious similarity with Japanese internment. Almost the entirety of the Japanese migrant and "Japanese American" population in the U.S. – more than 100 thousand people – were herded into concentration camps as "enemy aliens" during World War II on the racialized grounds of guilt by association with what was a quite conventional enemy, namely, another state. Today, with U.S. imperial military power unhindered and, in effect, unchallenged as a global hegemony, the U.S.'s bombastic proclamation of a war without limits, without borders, without definition, and virtually without end against something as amorphous as "terrorism" has mandated a rather more selective production of "enemy aliens." In the U.S. today, there are 6.5 million Muslims and 1.2 million persons of Arab ancestry (Cole 2003:250 n.34). The Homeland Security State's detentions of approximately 5,000 foreign nationals, on the

racialized basis of their Arab or other Muslim national origins or ancestry, who are very probably universally innocent of any real crimes, to say nothing of "terrorism," is indisputably an immense and deplorable outrage. But both numerically and proportionately, it is dramatically different than the scale of the mass deportations of Mexicans, and -- the more appropriate comparison -- it is a very far cry indeed even from the mass persecution of the Japanese. This does not diminish the insidiousness of mass imprisonment without charges, but it calls attention to the politics of the detention policy's very deliberate and calculated *selectivity*. Cornered between an enormous state-sponsored mobilization of racialized suspicion and a simultaneous official repudiation of racial profiling or generically anti-Muslim bias, many Arab and other Muslims in the U.S. today are thus enlisted into the service of the hegemonic ideological script that has doggedly and dogmatically insisted that the War on Terrorism really does *not* indiscriminately target Muslims but rather more carefully sorts and ranks them as either "with us or with the terrorists," differentiating them as either "good Muslims" or "bad" ones (Mamdani 2002; 2004)

It is detainability rather than deportability that is most decisive for the purposes of an immigration regime premised upon what I call the metaphysics of antiterrorism, but this of course does *not* mean that there have been no deportations. What is most significant about the detainees who are ultimately deported, however, is precisely that their deportations are inadvertently the ultimate certification of their actual *innocence* of any and all allegations of "terrorism." Their deportations confirm nothing so much as the fact that the U.S. state has determined that they are genuinely no longer even vaguely *suspected* of "terrorism." As suggested earlier, the Bush administration's crucial

improvisation of a category of "enemy combatants" provides the necessary analytical counterpoint with which to appreciate this important aspect of the "enemy alien" detainees' deportability. Those who have been designated "enemy combatants" may in fact be innocent of any genuine involvement in terrorism, but in general they are labeled "enemy combatants" because they were either captured by the U.S. military or its junior partners in the vicinity of a foreign theatre of warfare, or are otherwise linked (admittedly on the basis only of secret "evidence" or "intelligence") with organized activity that has been categorized as "terrorist." Without belaboring the U.S.'s flagrant violations of international law and the utter abrogation of many of the alleged combatants' elementary human rights, what was absolutely clear is that there was no foreseeable prospect for their release until very recently, due to the Supreme Court's rulings on June 28, 2004 in *Rasul v. Bush* as well as *Hamdi v. Rumsfeld*. In the case of the "enemy combatants," therefore, "deportation" (which is to say, *release* from detention) was plainly out of the question, and indefinite incarceration and interrogation have been the defining horizon of their perfectly abject condition. Stripped of any rights and bereft of all legal personhood, the U.S.'s "enemy combatant" detainees epitomize the figure evoked by Hannah Arendt of stateless refugees who are effectively reduced to "the scum of the earth" (1951/1968:267-302).

Abject horizons … or, the revolt of the denizens?

The "scum of the earth," I would contend, is precisely the sociopolitical condition that the imperialist metaphysics of antiterrorism reserves as the ultimately de-humanized status assigned to the figure of "the terrorist." Within the hegemonic discourse of the

War on Terrorism, the so-called "terrorists" are *designated* to be the stateless (transnational) enemies of "civilization" itself, *disqualified* from inclusion in a global human community purportedly distinguished by a universal allegiance to "democracy" and "human rights," and thus, in effect, are reduced to sub-human beings. Outlaws and outcasts, indeed, atavistic "savages" and, finally, imprisoned, *in their naked human-ness*, they are rendered undeserving of the most elementary of human entitlements. The dismal plight of the "enemy combatants," therefore, underscores the fact that as long as detainees (and undocumented migrants, more generally) remain ultimately deportable, they have still not been reduced to the condition of utter statelessness and abject rightslessness that the United States – in its imperialist capacity as an effectively global sovereignty – reserves for "the terrorists."

As long as migrants remain deportable and can conceivably be deported *somewhere*, in short, they still retain some residual degree of legal personhood and juridical standing in relation to some state or another. (Here, one is reminded of the cruel and revealing irony underscored by Arendt that common criminals in fact had more legal rights and recognition than stateless refugees [1951/1968:286]). There is always, of course, an incongruity between these deportable migrants' substantive social personhood and their very real social location – above all, as labor – within the space of the United States (in its more parochial capacity as a mere nation-state), where they happen to have no secure juridical standing, on the one hand, and the abstract legal personhood inscribed in their passports or birth certificates, on the other. This is the contradiction at the heart of migrant "illegality," after all (Coutin 2000). But while this "illegality" may entail a significant contradiction within the politics of nation-state space, it nevertheless has

remained under ordinary circumstances a quite viable way of life and transnational mode of being within the global space of capital. For undocumented migrants, deportability has long tended to be the means for mediating the politics of space across these mutually constituted spatial scales of national states and global capital.

In the aftermath of antiterrorism and the Homeland Security State, when the very notion of national security has been elevated to the status of a kind of metaphysical redemption in a putatively limitless war of bombastic righteousness against nefarious transnational networks of "evildoers," however, the fateful equation of "illegal aliens" with nation-state borders perceived to be deplorably "out of control" is indeed made to conjure the phantasmatic hallucination of a nation prostrate before the predations of "terrorist" interlopers of nightmarish proportions. In an antiterrorism regime that has assiduously and selectively relegated its suspected internal enemies – namely, Arab and other Muslim migrant men utterly innocent of anything remotely resembling "terrorism" – to the abject condition of rightsless-ness in indefinite detentions, undocumented migrants need not be generically branded as actual "terrorists." Indeed, given that they are absolutely desired and demanded for their labor, to do so would be counter-productive in the extreme. Rather, it is sufficient to mobilize the metaphysics of antiterrorism to do the crucial work of continually and more exquisitely stripping these "illegal" workers of even the most pathetic vestiges of legal personhood, such that their own quite laborious predicament of rightsless-ness may be further amplified and disciplined. This is precisely what is presently at stake in the ongoing immigration debate in the United States.

In retrospect, it ought to be painfully – torturously – clear that the production of these de facto "enemy aliens" within the United States, the demonological construction of them as terrorism "suspects," and their flagrant relegation to an astounding state of exception bereft of even the most elementary protections of the law through secretive and extra-legal procedures of "preventative" detention and political disappearance have served above all to render still more vulnerable and precarious the great mass of labor migrants. Indeed, the Military Commissions Act of 2006 (passed at the end of September) has now re-affirmed the legality of the President's executive authority to designate any non-citizen for indefinite detention as an 'enemy combatant," with no recourse to any legal procedure or challenge whatsoever. Predictably, as the circle of ever-increasingly authoritarian law enforcement has defiled any meager pretense of the sacrosanct rule of law and due process, the production of utterly rights-less denizens reveals itself to be a permanent menace to the presumed security and stability of the putative rights of citizens.

The detainability of the Homeland Security State's "enemy aliens," nevertheless, far exceeds the precarious uncertainties of the more mundane deportability of routinely undocumented migrants. Indeed, detainability becomes a zone of indistinction where the very meanings of "legality" and "illegality" seem to crumble. Detainability signals a perilous state of exception in which indefinite imprisonment without charges or legal recourse is always an already immanent prospect – a state of emergency, moreover, that threatens always to collapse into the condition of perfect abjection reserved for alleged "terrorists" – the War on Terrorism's dehumanized "scum of the earth" – persons without even the right to have rights. Recall, furthermore, despite the Supreme Court's modest

exercises of judicial restraint over the most exuberant excesses of executive "wartime" prerogative, that even U.S. citizens remain in no sense immune from being designated "enemy combatants," and subjected to the attendant conditions of detainability, disappearance, torture, and juridical and social death. Recall, in short, that none of what I have described has been fundamentally challenged, conclusively suspended, or radically overturned. Quite to the contrary. In conclusion, then, it seems imperative to make explicit and still more emphatic that our (global) political present may nonetheless be a source not only of deep distress but also of profound hope.

As eloquently established by the mass mobilizations for "immigrants' rights" in the United States during the spring of this year (which forcefully reinstated May 1 as International Workers' Day), even the most ostensibly disenfranchised migrants need not look to the state like beggars in search of "legal" entitlements, as they finally have only those rights that they dare to take and are prepared to fight to defend. Against all the depredations against their ostensible "rights" as "immigrants" that may be concocted by nativist politicians and perpetrated by the state's immigration system, the productive power and creative capacities of migrant working people, finally, are the only genuine source of their potential political prerogative and social dignity. Precisely during an era when the abjection of noncitizens has become scandalously routine and the insecurity of citizens has been rendered a political resource of onerous gravity, the gathering revolt of the denizens may yet signal the stringent clarification of our universal political predicament – as always-already susceptible to suspicion, always-already potentially cuplrits.

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Migrant "Illegality," Immigrants' Rights, and the Antiterrorism Security State

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