

Troubled Quests: An Introduction to AmeriQuests in an Era of “Illegals”

By Robert Barsky

After a period of time when it was associated with the Vanderbilt University Center for the Americas, *AmeriQuests*' own quest has taken a turn back to its original status, as an independent on-line journal offering a range of work relating to the many quests to “america” or the Americas. The journal will keep its name, its web address, its on-line format, and it will continue to be hosted by the Jean and Alexander Heard Library of Vanderbilt University. For the future, *AmeriQuests* will turn to a very flexible format, featuring peer-reviewed articles which serve the interests of academic authors in particular, but other sections of the journal have been opened-up for solicited articles, book reviews, opinion pieces, and student contributions. Given the subject of the journal, we will also promote regular creative contributions in the form of poetry, short stories, photographs, reproductions – indeed any form of media supported by the open journal format. And given the urgency of certain issues, -- for example: current discussions on making a first illegal entry (or overstay of a visa) in the US a felony, shifting political horizons in Latin America, on-going issues of security and border control, and so forth, -- we will promote a rapid turnaround on topical articles / notes / reviews to ensure that the journal engages appropriately with the current context.

To meet these many requirements and ambitions, the [Board of Editors](#) of *AmeriQuests* has been deepened and broadened, to offer the kind of expertises required to meet the growing obligations and possibilities of this endeavor. And to expand the viability and pertinence of the work published in the journal, we will also accept and publish submissions on an on-going basis; as soon as pieces are ready for publication they will be posted to the on-going issue, which means that we'll take full advantage of a publishing system that isn't encumbered by the lengthy process of “setting type,” or moving from the screen to the page. Once issues are complete, there may also exist the possibility of producing limited print runs, depending upon funding sources available for particular topics. I urge you as readers to propose works for publication, or projects which may find value in the form of on-line access through the journal. For example, we will accept proposals for special issues, which may include conference proceedings or collections of work which pertain to the kinds of subjects the journal encompasses. Two such collections are forthcoming, one on the “Quests Beyond the Ivory Tower,” and a second on the “Quest for Workplace Equality;” we hope that this will be but the beginning of a whole array of useful publishing and discussion.

Incarcerating “Illegal” Human Beings

The photo for this particular issue was taken by Chalene Helmuth amidst one of the many demonstrations held across the country to promote awareness of the plight of the “illegal,” and this at a time of intense debate in state and federal governments about how to deal with 12 million plus undocumented persons. To be involved in these issues, as many contributors to *AmeriQuests* are, is to risk discovering the truth about what seems to me a very nefarious and boldly unjust system which is most clearly borne out through an examination of how humans come to be “criminalized” in the current context. This process begins at the very moment when immigrants come to the country without “proper” documentation, or when the documents they did receive expire, and it comes to

a head when these same individuals are subjected to the whims of on-the-ground discretionary actions which in the worst of cases can lead illegal migrants with (say) minor drug infractions to long prison sentences, mandatory deportation and, if they return to this country to (say) visit their family, mandatory prison sentences which are at times as punitive as those handed down to violent felons.

For readers of this journal, an appropriate question might be: So what can be done? What are we not being told about these issues? And if we aren't getting the whole story from the press, what role does this journal have to play in the current debate? And what do writers, including myself, have to contribute to this discussion, which ultimately is a struggle between a downtrodden undocumented population and a multifarious assemblage of individuals charged with upholding the many new laws and regulations that emanate from local, state and federal authorities? Given that *AmeriQuests* is an internet-accessible journal with scholarly and personal contributions from a broad array of experienced people, it can be a tool for promoting debate and propagating information beyond the two camps most heavily-represented in current discussions, those who support a high level of "security" at any cost, including the tremendous cost of incarcerating and deporting hundreds of thousands or even millions of people, and those who consider the pragmatics of a twelve million strong population and who favor some form of limited access to our workplaces as well as a path to legalization for those who have lived in the US, crime-free, for at least five years. It seems to me that either option is inoperable and, moreover, unethical, inhumane, and mostly impracticable for reasons that require more imagination, as well as some access to the eventual consequences of our will to segregate between those who are lawful, and those who aren't. By following this more ethical stance, however, more of the cards need to be revealed in this high-stakes game of border crossing, and more exaggerated claims need to be made about what is at stake. In other words, people truly interested in this issue might need to work as a literary person does, with a kind "deviance and subversion that is *tolerated*, using *ostentatious* language expenditures, and even perhaps a form of satire that is protected by the Powers that be."¹ As such, to cite Edward Said, "it's worth making a great deal of one's rare opportunities to speak, catching the audience's attention, being better at wit and debate than one's opponents;"² it is my hope that *AmeriQuests* can offer such opportunities, for a broad array of readers and writers from all kinds of perspectives.

It is of course true, as Zola says, that no one can speak up all the time on all the issues, but through my current work with persons familiar with the incarceration of "illegals," supplemented by information provided in the public domain, it seems clear to me that the system whereby immigrants are incarcerated for being "undocumented" and then turned into felons for repeated offenses against our highly-discretionary and targeted immigration policy, is unjust and cruel. And even if lawmakers, judges, lawyers, public defenders and police officers are being held hostage to the endless howling for security and being tough on crime, there must be some other voice, of reason and experience, to temper and inform. This is certainly a role for an open journal, a place for debate, a place to ask the questions, rather than deferring to the ink upon the pages that incriminate and

¹ See my introduction to Marc Angenot's work at http://muse.jhu.edu/journals/yale_journal_of_criticism/v017/17.2barsky01.html

² See Edward Said's Reith Lectures, recalled at http://www.dissidentvoice.org/Articles8/Eltantawi_Said.htm .

incarcerate on unjust grounds. As Zola wrote to the President of the French Republic, in his 1898 open letter about the Dreyfus Affair in *J'Accuse*: « Je me doute bien que vous n'avez aucun pouvoir en cette affaire, que vous êtes le prisonnier de la Constitution et de votre entourage. Vous n'en avez pas moins un devoir d'homme, auquel vous songerez, et que vous remplirez. Ce n'est pas, d'ailleurs, que je désespère le moins du monde du triomphe. Je le répète avec une certitude plus véhémence: la vérité est en marche et rien ne l'arrêtera. C'est d'aujourd'hui seulement que l'affaire commence, puisque aujourd'hui seulement les positions sont nettes: d'une part, les coupables qui ne veulent pas que la lumière se fasse; de l'autre, les justiciers qui donneront leur vie pour qu'elle soit faite. Je l'ai dit ailleurs, et je le répète ici: quand on enferme la vérité sous terre, elle s'y amasse, elle y prend une force telle d'explosion, que, le jour où elle éclate, elle fait tout sauter avec elle. on verra bien si l'on ne vient pas de préparer, pour plus tard, le plus retentissant des désastres». ³ But if the system according to which we treat illegals is unjust, as I'm herein suggesting, then we have not only the right and the means, but the obligation to speak out, because we as writers are, to paraphrase Jean-Paul Sartre, *situated* in our time and therefore responsible for our words – and for our silence.

But is this the kind of case for which I should be speaking out? Maybe there's nothing to say here because in some ways, or from a certain perspective, this is a perfect system. We criminalize human beings the moment they enter upon our soil, and this after having overtly enticed them here with seemingly un-enforced or unenforceable laws. Our own *Wall Street Journal* lauds them for their entrepreneurial spirit, our corporations hire them for their work ethic and low hourly wage, our citizens reap the profits of their toil for their devotion. Illegal immigrants are great to have around when we need them. And it is, I repeat, a perfect system, because when we don't need them anymore, when they've finished building our stadium, painting our home, weeding our garden, or when they turn out to be human and make the mistakes that the rest of us make when we slip behind the wheel of our automobile en route to an inebriated ride upon the suddenly blurry interstates that provide us convenient pathways to our malls and our suburban retreats, then we can unceremoniously make them disappear through incarceration and deportation, forever. Cheap and available labor that is always in the wrong, human beings who only have the rights we choose to accord, and only as long as we wish to accord them. A perfect system indeed, as perfect as slavery, nay more perfect yet, for illegals are in the wrong, being, by definition, criminals, unlike us criminals who physically forced emigration from Africa upon those we needed for our dirty work or us criminals who are never wrong because we're so privileged we can gleefully cross any border we wish.

Chomsky says that "intellectuals ought to speak out because they are a privileged minority, for whom Western democracy provides the leisure, the facilities, and the training to seek the truth lying hidden behind the veil of distortion and misrepresentation, ideology and class interest, through which the events of current history are presented to us."⁴ This seems inapplicable to the case at hand, because there's no distortion or

³ <http://fr.wikisource.org/wiki/J%27accuse> contains the full text of the article.

⁴ "The Responsibility of Intellectuals," published in *The New York Review of Books*, February 23rd, 1968 and available on-line at <http://72.14.207.104/search?q=cache:UnfeRPkmcBgJ:www.nu.ac.za/undphil/collier/Chomsky/The%2520Responsibility%2520of%2520Intellectuals,%2520by%2520Noam%2520Chomsky.pdf+tr>

misrepresentation here; before Congress in the most public kind of way is a proposal to make the first entry into this country by these “illegals” not just a crime but a felony; this opens up the possibility of prison sentences for first “offenders” akin to what we now offer to those who actually commit crimes. A perfect system. Why? Because these people are criminal, people who do what we can do with an American Express card and a passport as a matter of course are criminal if, well, they aren’t us. If this doesn’t strike us as a perfect system, then we have to say why, which often turns upon our use of language and our moral or ethical process to the more basic questions posed. At that point, we can use Said’s approach, to “use humanistic critique to open up the fields of struggle, to introduce a longer sequence of thought and analysis to replace the short bursts of polemical, thought-stopping fury that so imprison us in labels and antagonistic debate whose goal is a belligerent collective identity rather than understanding and intellectual exchange”.⁵ If we are willing to make this move, then we cease to be the detached observers who, in William Butler Yeats’s perfect phrase, “deliberately sip at the honeypots of our minds.”

If, resisting the idea that this system is perfect, we decide to act upon it, which direction should we pursue? I would suggest the following: first, we must orient our defense of these persons who have found themselves doing such hard time for infractions like illegal re-entry after deportation or being illegal combined with federal crimes such as the possession of pot, by focusing defense upon the second generation. Immigration into this country must be situated, therefore in deep time; within the public discourse is the idea that America is a land of immigrants, we are all immigrants. But this is not a discourse sufficiently convincing in light of the more “expensive” terms, the terms that trump all other terms, such as “security” or “terrorism.” So from a language or propaganda perspective, we need to find ways to trump these latter terms with value-laden ones, particularly in the face of an administration and a judiciary which finds little in ideas of compassion, civility or forgiveness, despite the religious framework within which actions are apparently undertaken. Here I offer the second generation, the children of the incarcerated people who will grow up in this country without the guidance of the fathers and mothers who help make them whole. When thought of through time, things begin to look a little different. Immigration is not, therefore, a present-day phenomenon, it is a process of “longue durée,” connected to the past, but it is also a process that looks to the future. And if this is the orientation we take, “family values” over “security,” children of immigrants over illegal immigrant parents, there may be sway.

A second approach, would be to insist that humans be accorded at least as many rights as institutions, like corporations. Chomsky helps us to recall that when Madison spoke of “rights of persons,” he meant humans.

But the growth of the industrial economy, and the rise of corporate forms of economic enterprise, led to a completely new meaning of the term. In a current official document, ‘Person’ is broadly defined to include ‘any individual, branch, partnership, associated group, association, estate, trust, corporation or other organization or any government entity,’ a concept that

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⁵ Edward Said, *Orientalism*, NY, Vintage Books, 1979, xiii.

doubtless would have shocked Madison and others with intellectual roots in the Enlightenment and classical liberalism -- pre-capitalist, and anti-capitalist in spirit. These radical changes in the conception of human rights and democracy were not introduced primarily by legislation, but by judicial decisions and intellectual commentary. Corporations, which previously had been considered artificial entities with no rights, were accorded all the rights of persons, and far more, since they are ‘immortal persons’, and “persons” of extraordinary wealth and power. Furthermore, they were no longer bound to the specific purposes designated by State charter, but could act as they chose, with few constraints. The intellectual backgrounds for granting such extraordinary rights to ‘collectivist legal entities’ lie in neo-Hegelian doctrines that also underlie Bolshevism and fascism: the idea that organic entities have rights over and above those of persons. Conservative legal scholars bitterly opposed these innovations, recognizing that they undermine the traditional idea that rights inhere in individuals, and undermine market principles as well.”⁶

This recollection of where ideas of human rights come from, and their slow dissolution in favor of corporate rights, is everywhere in evidence in how we treat illegals.

A third approach, not currently in the vocabulary, is what I have called “fictional law.”⁷ I believe that the laws according to which illegal immigrants are incarcerated are pure fiction because they stem from actions with such extreme levels of discretion as to not deserve the formal and foreboding nomenclature that law provides. The people who fall into this net provide a whole new definition of the term “vulnerable population.” The situation of incarcerated immigrants, who through lack of resources or knowledge or sheer bad luck land up on the wrong side of our omnipresent prison bars, is incomprehensible because it is erected upon unpredictability. For those incarcerated under any of the myriad of recent anti-immigrant and anti-illegal laws, law is no more real than the series of haphazard circumstances that lead to it being invoked; as such, it is neither formalized, predictable nor even clearly linked to the actions which led to its occurrence. For some, this means that these laws don’t exist, so for them, this is a perfect system from another perspective; some illegal aliens are never arrested, and they live their whole lives in this country with the knowledge that their children will not live in the betwixt-and-between world that they inhabit. For them, the system offers a life of freedom and even, perhaps, relative comfort. Or, and this is the entirely arbitrary or, they can be pulled over for a burnt-out taillight, flagged by a zealous cop who is tipped off by the foreign accent or the driving certificate, taken downtown for being “illegal,” unable to meet bail fast enough to avoid the zealous paper-pusher in the prison who makes late-night phone calls to Homeland Security or I.C.E., sent to a holding institution to await deportation and, a few days or months later, find themselves “back” in a country that some of them have not seen for forty years. If they return to, say, continue their lives with their families, and if they happen to have any kind of “felony” charge in their past, including repeated domestic abuse, any kind of gun or drug offense, or even repeated DUI, they are eligible when stopped again for whatever reason, including a random

⁶ See <http://www.zmag.org/ZMag/articles/chomskysept97.htm>

⁷ See http://www.vanderbilt.edu/french_ital/barsky/fictionallaw

search, to be sent away for years. I have learned about this system through interviews with migrants and those familiar with their plight for a research project at Vanderbilt University, sponsored by the Center for the Americas;⁸ and it has come to be evident that interviewing migrants in this situation is to speak to people who may be willing to place their entire existence into your hands, for I, as a researcher, may represent a tie to the outside world which must be more rational than the Kafkaesque situation in which they have found themselves. Or, on the contrary, I may be another symptom of a discretionary system gone wild, and therefore encounter a stone wall of silence or fear that has grown out of an encounter with a system that is anything other than rational, a system that is, in some sense, fictional, except in its consequences.

Fictional Law

What I'm proposing, therefore, is to provide the nomenclature of "fictional law" to complement and give weight to humanistic arguments about family, second and third generations who suffer from absent parents, and to those who'd invoke pure material costs for our incarcerating society-gone-wild. I'd also propose that we think carefully about what it means to incarcerate people on grounds that are so profoundly unpredictable; indeed, in some cases "legal" actions have nothing to do with the crime itself, but rather are linked to the time it takes to (say) get someone out of custody. This is because every moment an immigrant spends in a legal space, for whatever reason, increases his or her vulnerability, as a lawyer pointed out in one of my interviews for the research project on incarceration: "The thing about it is that it's not unusual – look, there's a guy in jail whose got a criminal charge, and I go in and tell them I don't care where you come from, I don't believe in illegal human beings. All I need to know is, do you have papers? If they don't have papers I go straight to the clerk and ask what it's for, driver's license, speeding, DUI. If it doesn't say "hold for I.C.E." Then we're going to work something out to get him the hell out of here now." If you don't, then "it's not unusual that you call the next day and find out that he's still not out, and now there's a "hold for I.C.E." So some of those evil bastards understand, and wait until after they come back from court, and then they call the INS. So your best plan has just gone all to hell." The vision of law here is one of extreme arbitrariness, but it's also one in which law is necessarily to be avoided; we need to keep immigrants out of legal circumstances because therein it's too volatile, too unpredictable, and each minute that passes can be the minute that decides a ten year fate. The consequences of this extend to the community when anxious illegals fear any involvement with the police, including participating in investigations or reporting crime; in other words, this method of security is making us much less secure in our own neighborhoods.

But the enemy to these people is not only a xenophobic, racist or self-promoting system, it can also be a so-called liberal approach which calls for discretion based upon historical wrongdoing, postmodern approaches to law informed by the likes of Karl Schmitt, the architect of Nazi law, or Chantal Mouffe, the contemporary legal theorist. Here the issue is a bit more tricky, and it is at this point, perhaps, that the intellectual can play a cautionary role. Authors of these approaches, such as Wai Chi Dimock, Anne Coughlin and Robin West, offer some useful antidotes to the arbitrary and highly-discretionary law in question here, even though, and this will be a frequent problem, they

⁸ <http://www.vanderbilt.edu/americas/English/Barsky.php>

sometime argue against (negative) discretion with (positive) discretion. They describe their optimism that the vulnerable migrant interviewed in the legal situation will speak from an alternative perspective, emphasizing anti-foundationalism, instability of language and meaning, migration and negotiation. The hope is that this will challenge a formal conception of justice, making it less immanent, less exhaustive, less self-evident both in its ethical primacy and in its jurisdictional scope. Or, pace Coughlin, that their words will supersede the type of self-effacing ‘objectivity’ exemplified in current legal theory and practice. The assumption is that if this population of extreme marginality and therefore vulnerability is given the chance to speak openly, that they will challenge traditional narrative boundaries that exist in the legal domain; but this assumes that these outsiders will not only speak, but also be “heard,” suggesting that they will be able to create, pace Pierre Bourdieu, a new common sense and integrate within it the previously tacit or repressed practices and experiences of an entire group, investing them with the legitimacy conferred by public expression and collective recognition. In cases of migrants who have found themselves on the wrong side of the discretionary fence, this ability to be “heard” is far from obvious because it takes a kind of political or judicial will, not to mention to mention translation, to allow such things to occur, a will that would demand, quite literally, a “good king” and, to be blunt, we really don’t have one. What we do have is a rough-and-tumble group of administrators working nightshifts in prisons, desk shifts in jails, or patrol shifts in police cars who, if the donuts aren’t fresh, the night is too long, the noise is too loud or the O’ Reilly Factor too convincing, just might decide to make all of the worst nighttime phone calls to Homeland Security, I.C.E. or the FBI, those little gestures that can wreak such havoc, as a lawyer indicated in an interview: “The problem is, you can take 15 illegal immigrants out in this parking lot, put them in a van, and start calling the police on them, one after another over a twenty-four hour period. Some of them will be taken out, booked, make bond, and they’re gone. Others will be taken out, get booked, and be picked up by INS, and it’s only because Bubba came out on the midnight shift, and Bubba, who is making 5\$/hour to be a jailer, and the only reason you’d take that job is because you want to fuck with people, why would you want 5\$/hour in a dungeon? You are indoors, you ain’t seeing the sunshine, and you’re dealing with unhappy miserable people who don’t want to be where they are. Bubba don’t like the fact that these damned Mexicans are walking around here anyway, so Bubba, if they don’t speak good English, is calling INS. And there’s no rhyme or reason. You get one guy on aggravated assault who gets a bond and goes home, you get another for driving with no license and he gets an INS hold.”

The feminist legal theorist Robin West in some ways speaks directly to this issue in her *Caring for Justice*, a text that demands not only a new form of justice for the treatment of specifically female persecution, but a whole new approach to justice which would refuse the Kantian insistence upon the primacy of a blind figure of justice who in an unbiased, uncaring fashion simply weighs the facts of each case as though they were so many widgets with values prescribed by an overriding and of course fundamentally masculine economic system. But here again, without a strong sense of how this “care” is to be concretely and consistently defined, the tenets of classical liberal law which she finds appealing are not likely attainable. In other words, her hope that “the pursuit of justice, when successful, *must* also be caring, and the activity of caring, when successful, must be mindful of the demands of justice” is in some ways contradictory. If anything,

caring can go the wrong direction, particularly with a population that is so profoundly criminalized, that is to say, guilty before the proceedings even begin.

So from my reading, people like Robin West are advocating a more arbitrary application of laws which already are contradictory and arbitrarily applied. So with her work, well intentioned as it is, the image of legal fiction grows even further, particularly when we think about its working through arbitrary actions committed by officials with unclear levels of discretion who are dealing with populations from different cultures, often without proper legal counsel. It's a lethal combination. And as the migrants move through the system, from local to state to federal jails, they are quite literally moved from place-to-place, but also from one set of officials to another, with all of the uncertainty this entails. And along the way, they can make some terribly consequential mistakes. So where's the law in all of this, where are the values, where are the norms, where is the security, and where is the "care"? They're there, and not there, depending upon how lucky you are, or how well you know the traffic cop, or if you speak the right language, or have the right color of skin. You can follow the law and head to the courthouse to pay a parking ticket; but while doing so, you can be picked on by a Homeland Security officer who has decided to ask for your status in the country. You can stay out of jail, but when your friend lands up in jail, you can find yourself arrested because you went to visit and had your name run through the system after you signed in. The only predictable part of all of this is that if you "ain't from here", you're a sitting duck in a shooting gallery of arbitrary actions. This is indeed a "troubled quest."