Deportation Nation

Outsiders in American History

Daniel Kanstroom

HARVARD UNIVERSITY PRESS
Cambridge, Massachusetts
London, England
2007

Printed in the United States of America

ISBN-13: 978-0-674-02472-4
ISBN-10: 0-674-02472-9

The Cataloging-in-Publication Data is available from the Library of Congress.

For my father,
who taught me about justice and how to reason.

For my grandmothers and my mothers,
who taught me to look beyond reason.

And for my daughters, Emily and Hannah,
who taught me the deepest reasons.

Good-bye to my Juan, good-bye Rosalita,
Adiós mis amigos, Jesus y Maria,
You won't have a name when you ride the big airplane,
All they will call you will be deportee.

—"Deportee (Plane Wreck at Los Gatos),"
words and music by Woody Guthrie
and Martin Hoffman © 1961

1

Introduction

We can no longer afford to take that which was good in the past and simply call it our heritage, to discard the bad and simply think of it as a dead load which by itself time will bury in oblivion.

—Hannah Arendt, *The Origins of Totalitarianism* (1966), xxxi

In May 1920, a remarkable pamphlet was circulated by a group called the National Popular Government League. Signed by well-known lawyers and legal academics, including Dean Roscoe Pound and Professors Zechariah Chafee, Jr., Felix Frankfurter, and Ernst Freund, the work was provocatively titled "Report on the Illegal Practices of the United States Department of Justice." A boldface banner caption on its first page addressed it "To the American People."

The pamphlet dealt with the so-called Palmer Raids, led by then-Attorney General Mitchell Palmer against foreign "radicals." Thousands had been arrested for deportation proceedings. The document recounted, in meticulous detail, what it termed a "continued violation" of the Constitution and the laws of the United States by the Department of Justice. It described "wholesale arrests" made without warrants, men and women jailed and held incommunicado without access to friends or counsel, entry into homes without search warrants, illegal seizure and destruction of property, and the abuse and maltreatment of suspects.

The report had a profound impact. It rallied popular support against Palmer, inspiring many to denounce that now-infamous episode. It has also been cited frequently since, a staple component of works chronicling the period. Upon rereading it, however, I was struck by its constitutional and legal indictments of the deportation procedures of that era.

The authors challenged the lack of bail, arrests without warrants, unreasonable searches and seizures, selective prosecution, the mistreatment of detainees, and the practice of forcing persons to be witnesses against themselves. Although the legal scholars did not offer a full doctrinal analysis of how these constitutional protections applied in the deportation context, it is clear that they believed that they did apply.

One wonders how those who experienced the Palmer Raids would react if they could have foreseen that, nearly a century later, over 325,000 people would face removal proceedings in a single year, many under mandatory detention, unprotected from unreasonable searches and selective prosecution, only a third represented by counsel, and none with the right to appointed counsel.[1] What would they make of the fact that many types of deportation decisions made by government agents are now precluded from any review by the federal judiciary? Surely they would think that this is a situation in need of some serious thought.

The Deportation System

This book examines the nature and the history of a particular exertion of U.S. government power over noncitizens: its power to detain and to deport. Buried within the proud history of our nation of immigrants, shrouded but always present, there exists a distinct system. From its early, decentralized, and inefficient beginnings, this system has grown steadily.

The United States clearly remains a nation of immigrants, with more than 32.5 million foreign-born people, some 20 million of whom are noncitizens.[2] Over 1 million persons became legal permanent residents in 2005, a rather average year by recent historical standards.[3] Millions more temporary nonimmigrants legally enter the United States each year.[4] But these numbers also mean that the deportation system, which controls all noncitizens within U.S. territory, potentially affects tens of millions of legally resident people. Also, uncounted millions have entered the United States without inspection, mostly across the southern border. For the vast majority, there currently is no available path to legalization. By the best estimates, more than 10 million such people without legal immigration status now live in the United States. Millions more live in a variety of tenuous, quasi-legal statuses. They are all potentially subject to deportation.[5] There is also a critical linkage among deportation, race, and ethnicity. The vast majority of those who face deportation proceedings are young people of color.[6]

Any noncitizen, including permanent-resident "green card" holders, may be deported for a wide variety of reasons, some quite clear, others mind-numbingly technical. The law proscribes arcane status violations and requires all noncitizens to report changes of address within ten days.[7] Conviction of minor crimes such as shoplifting and marijuana possession may suffice, as will drug addiction. Another type of deportation law also aims at "any activity *a purpose* of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means."[8]

Millions of noncitizens have become naturalized U.S. citizens, thereby escaping the potential reach of the deportation system. But naturalization is far from easy or automatic. One must first attain lawful permanent-resident status, which can take many years. Then, there is a second waiting period of five years (in most cases), plus additional processing times. A welter of nontrivial requirements include continuous residence, literacy, English-language ability, knowledge of U.S. history and form of government, "good moral character," and proof that an applicant is "attached to the principles of the Constitution . . . and well disposed to the good order and happiness of the United States."[9] Advocacy of a wide variety of ideas and membership in a long list of groups will result in denial of naturalization.[10] From 1999 to 2004, some 3.6 million naturalization petitions were filed. More than one-third—about 1.3 million—were denied, with many denied applicants immediately placed in deportation proceedings.

The size of the deportation system is impressive, if little known. Since 1925, the number of times an individual noncitizen has been caught somewhere on U.S. soil and determined to be subject to deportation has exceeded 46 million, with more than 44 million people actually ordered to leave. From 2001 through 2004, the total number of formal removals of persons from within the United States was over 720,000, while those expelled pursuant to a grant of "voluntary departure" (an often informal procedure the alternative to which is forced removal) exceeded 4 million.[11]

The number of family members, citizens, and noncitizens who are affected by this system runs into many millions. And the deportation system seems likely only to get bigger. One factor is an increase in detention—a response to well-publicized high rates of no-shows at deportation hearings, especially near the southern border.[12] In 2004, the Department of Homeland Security (DHS) detained over 235,000 people for at least twenty-four hours.[13] Congress has authorized the construction of up to 40,000 additional immigration detention bed spaces over the next five years.[14] A particularly striking new initiative is a "family-focused" detention facility to detain families that "come across [the border] illegally."[15]

Imagine a noncitizen who is arrested as a suspected undocumented alien, a possible visa "overstay," or because of a criminal violation. This may be the result of an anonymous tip, a workplace raid, a call from a probation officer, or even simply because the individual "looks" undocumented.[16] What rights does such a person have? Compared with criminal defendants, the rights of deportees are minimal. Suppression of evidence that may have been seized in violation of the Fourth Amendment will be impossible in most cases.[17] The noncitizen will not be read "Miranda" rights.[18] Indeed, he may not even be advised that he has the right to obtain a lawyer (at his own expense) until after a government agent has interrogated him. He will never have the right to appointed counsel.[19] If he believes he has been singled out due to race, religion, or political opinion, he will generally not be able to raise a "selective prosecution" defense.[20] He will never have the right to a jury trial. If he has a formal hearing before an immigration judge, he will have certain due process rights: to be heard, to examine evidence, and to receive a written decision. He may, however, find that the burden of proof will be shifted to him once the government has made a showing of "alienage."[21] If he wants to appeal the immigration judge's decision, he may face incarceration during the length of that appeal—which could easily be years. He may then receive a summary decision made by a single member of the understaffed and overwhelmed Board of Immigration Appeals produced after a ten-minute review of his case.[22] If he seeks a further appeal to a federal court, he may well find that the court declines review of "discretionary" questions, such as his potential eligibility for "relief" from removal.[23]

Two Deportation Models: Extended Border Control and Post-Entry Social Control

How should we understand this system? Is it simply an instrument of immigration policy?[24] The basic thesis of this book is that deportation is now, and always has been, considerably more than that. To be sure, it is part of our immigration control system, though it has worked remarkably poorly even in that realm. But it is also a powerful tool of discretionary social control, a key feature of the national security state, and a most tangible component of the recurrent episodes of xenophobia that have bedeviled our nation of immigrants. It is a mechanism of scapegoating, ostracism, family and community separation, and, of course, banishment.[25] It lives in a peculiar equipoise with our society's openness to legal immigration, our legal system's general protections for the rights of noncitizens, and our grant of birthright citizenship to virtually all persons born on U.S. soil.[26]

For an appreciation of the complexity of the deportation system, it is useful to note that there are two basic types of deportation laws: *extended border control* and *post-entry social control*. The extended border control model implements basic features of sovereign power: the control of territory by the state and the legal distinction between citizens and noncitizens. Extended border control deportation laws have two variants, each of which has been a part of U.S. law for many years. First, there are laws that mandate the deportation of persons who have evaded border controls, either by surreptitious entry or by fraud or misrepresentation. These laws most directly support the border control regime, and their legitimacy, such as it is, is most closely linked to that of sovereignty itself.

There are also laws that permit the deportation of persons who violate an explicit condition on which they were permitted to enter the country. For example, a person who enters the United States as a student must maintain a full course load, and a person with a work visa must work for a particular employer. The legitimacy of such laws, also derived from border control and sovereignty, is enhanced by the contractual aspect of the deal that permitted entry.

One might well be troubled by various features of the extended border control laws, such as the potential for uneven or discriminatory enforcement and insufficient flexibility for changed circumstances, hardship, strong family claims, or the possibility that a border violation was motivated by fear of persecution. And, of course, if one is uncomfortable with the border regime itself—as many are in the case of Mexico—then extended border control laws are mere adjuncts to an unjust historical structure.

Such concerns may be greater for deportation laws that combine extended border control with a rather different goal: post-entry social control.[27] Deportation laws routinely govern conduct for a specific period following the time of admission.[28] The purest post-entry social control laws, however, proscribe criminal or political conduct within the United States, often without time limit. They are often not directly connected to visa issuance, admission, or immigration processes at all. There is no requirement that a noncitizen be informed of them at entry. Indeed, they may be changed retroactively: a noncitizen may be deported for conduct that was not a deportable offense when it occurred.

Such post-entry social control deportation laws derive from what might be termed an "eternal probation" or an "eternal guest" model. The strongest version of this model would suggest that the millions of noncitizens among us, including long-term lawful permanent residents, are harbored subject to the whim of the government and may be deported for any reason. The earliest federal post-entry social control law, the 1798 Aliens Act, authorized highly discretionary executive deportation power to be used against noncitizen dissidents. A fierce debate arose not only over the politics of the law, but also over its basic legal legitimacy. As James Madison put it, "it can not be a true inference, that because the admission of an alien is a favor, the favor may be revoked at pleasure."[29]

Rethinking Deportation History

The current deportation system is best understood within a long historical frame. It has grown slowly, incrementally, and reactively. Though in many ways "a mess,"[30] it has a rather clear pedigree. Its direct roots lie in the late nineteenth-century exclusion and then removal of Chinese laborers from the United States, the early twentieth-century "war on crime," the Palmer Raids, Prohibition, and the Cold War McCarthy era. Its growth was closely linked to the development of the Federal Bureau of Investigation (FBI) and the careers of J. Edgar Hoover, Frances Perkins, Estes Kefauver, and Robert F. Kennedy, among others. Those who today face deportation for minor crimes would likely be surprised to learn that they bear the burden of decades of government frustration over such well-known criminals as Meyer Lansky, "Lucky" Luciano, and Carlos Marcello. Technical aspects of deportation cases derive from years of politicized deportation proceedings against union leader Harry

Bridges and an experiment in due process presided over by one of the founders of modern administrative law, former Harvard Law School dean James Landis.

To understand our current system fully, we should return to 1919, when Emma Goldman was denaturalized without notice and then deported back to Russia as an "alien radical." The legal doctrines that permitted many of the tactics used against anarchists were crafted in the case of Fong Yue Ting, a Chinese laborer deported some twenty years earlier because of his inability to find the "credible white witness" required by law. The extreme judicial deference to such racist laws was formally grounded in a particularly blunt theory of sovereign authority over immigration-related matters. But the deeper roots of such reasoning long preceded the anti-Chinese hysteria that had swept the country. These ideas extend back to the legitimating theories of the brutal removal of the Cherokee and other American Indians from their lands and to the laws governing thousands of fugitive slaves, captured and forcibly sent back to their masters from the late eighteenth through the mid-nineteenth century. The origins reach to Moreau de St. Méry, who fled the United States, along with many of his French compatriots, in fear of Federalist enforcement of the Alien and Sedition Acts, and to still earlier colonial "warning out" systems. Though clearly different from each other in many ways, especially in their complex use of the citizen/noncitizen construct, these systems also share some striking similarities. They all involved the application of majoritarian power—through legal structures and with the use of force—against a particular group of people, largely identifiable by race or nationality, to compel their removal from one place to another. More specifically, these systems have built one upon the other in important and doctrinally traceable ways to form our current system.

Historical legal discourse about deportation is also fascinating to study. The debates over the 1798 Alien and Sedition laws, in particular, provide a useful framework for current discussions of deportation laws, notwithstanding the many obvious historical differences. Among the more powerful objections to these laws was the assertion that they violated basic principles of separation of powers, constituting "a refinement upon despotism," and that the arguments used by the Federalists to support the bills could equally support similar measures against citizens.[31] In 1798, Thomas Jefferson warned that "the friendless alien has indeed been selected as the safest subject of a first experiment, but the citizen will soon follow."[32] These arguments, grounded in constitutional legal structure and fear of excessive government power, raised concerns that are surely as relevant today as they were more than two centuries ago.[33]

These arguments also help to conceptualize the problems raised by three recent trends in deportation law. First, the post–September 11 period witnessed an increased use of the extended border control regime for social control purposes aimed at certain groups. Second, there has been a dramatic increase in post-entry social control deportations. Third, there has been a recent expansion—deep onto U.S. soil—of informal deportation mechanisms that were originally envisioned as appropriate only at the border and ports of entry.

Deportation Law and the "War on Terrorism"

In 1919, Zechariah Chaffee, Jr., noted how deportation law could operate against "aliens" in ways that would be politically and legally problematic for citizens.[34] A similar phenomenon occurred after September 11, 2001. Thousands of people in the United States were subject to interrogation, intimidation, arrest, and incarceration as the deportation system was used to achieve goals that had little, if anything, to do with immigration policy as such.

Consider the reported case of Tarek Mohamed Fayad, an Egyptian dentist who came to the United States in 1998 to study.[35] On September 13, 2001, he was arrested near his home in California and told that the Immigration and Naturalization Service (INS) thought he was illegal. When friends tried to post bond, they were told his bond had been rescinded. Mr. Fayad was interrogated by FBI agents and then transferred to the high-security Metropolitan Detention Center in New York. Taunted by guards as "a terrorist," he was awakened every half hour during the night. He was held in a cell twenty-three hours a day for three months before anyone could locate him.

Deportation law was a central part of the government's response to the September 11 attacks. In October 2001, Attorney General John Ashcroft referred to an "enemy within our borders." He continued: "Robert Kennedy's Justice Department, it is said, would arrest mobsters for 'spitting on the sidewalk' . . . [We will] use the same aggressive arrest

and detention tactics in the war on terror . . . Let the terrorists among us be warned: If you overstay your visa—even by one day—we will arrest you. If you violate a local law, you will be put in jail and kept in custody as long as possible."

The attorney general was as good as his word, but many more people than "the terrorists among us" were affected. Thousands were held in detention, virtually all for technical violations that were clearly pretextual. Aggressive government action swept many innocent people into the enforcement net. Noncitizens encountered at the scene of the arrest of a person "of interest to the September 11 investigation" were detained. A government report describes how a "Muslim man in his 40s" was arrested after an acquaintance wrote a letter to law enforcement officers stating that the man had made general "anti-American statements." He was arrested for overstaying his visa. Though cleared of any terrorist links, he languished in detention for more than four months before being deported.[36]

In November 2001, a program of ostensibly voluntary interviews began for some 5,000 men who had entered the United States since January 2000 from countries where Al Qaeda was said to have a "terrorist presence or activity." No European country was on the list. In June 2002, INS required similarly defined noncitizens to register.[37] Failure to do so, or the discovery of even minor immigration violations during registration, could result in arrest, detention, and/or deportation.[38] Registrants faced interviews with a wide variety of questions. One "Special Registration Worksheet" reportedly prepared by INS for student visa holders included this rather stunning question, to be answered under oath: "Are you associated with anyone who is potentially dangerous to the United States?"

It has been reported that many thousands of the Arab and Muslim men who registered with immigration authorities have faced deportation proceedings, though almost none of them have been linked in any way to terrorism.[39] In 2005, FBI agents, posing as social workers, interrogated a 16-year-old girl about her religious and political beliefs. Arrested later in an early-morning raid of her home, the girl was separated from her frantic parents for more than two weeks. They were told that she had been incarcerated for deportation proceedings due to her "unlawful presence." In fact, she was being interrogated by agents from the FBI's Joint Terrorism Task Force.[40] Soon thereafter, she was deported.

Deportation and the "War on Crime": The Growth of Social Control Deportation

The Bush Administration has said that the "war on terror" should not be a war on immigrants. But hundreds of thousands of noncitizens have faced a dramatic convergence between the deportation system and an earlier declared "war" against crime. Since 1997, more than 300,000 people have been deported from the United States because of post-entry criminal conduct, some serious, some as minor as possession of marijuana or shoplifting.[41] DHS reported that 88,897 "criminal aliens" were removed from the United States in 2004 alone. More than one-third of these removals were for drug-related offenses.[42]

Over the past two decades, the post-entry social control deportation system has become more efficient, less discretionary, and much more rigid. Such deportations (and the post–September 11 detentions) were facilitated by two laws passed in 1996: the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).[43] Passed in the chaotic aftermath of the Oklahoma City bombing, these laws embodied a prosecutorial wishlist that had awaited the most propitious moment to advance. The laws:

- radically changed many grounds of exclusion and deportation
- retroactively expanded criminal grounds of deportation
- eliminated some and limited other discretionary waivers of deportability
- created mandatory detention for many classes of noncitizens
- expedited deportation procedures for certain types of cases
- eliminated judicial review of certain types of deportation (removal) orders
- authorized increased state and local law enforcement involvement in deportation
- created a new type of streamlined removal proceeding—permitting the use of secret evidence—for noncitizens accused of terrorist activity[44]

The 1996 laws have been severely criticized for the devastation they have wrought on families, for their rigidity, and for their retroactivity.[45] But they endure. A constitutional challenge to mandatory detention was

brought by a long-term lawful permanent resident in 2003. The Supreme Court upheld the statute, noting that in the exercise of its "broad power" over immigration, "Congress regularly makes rules that would be unacceptable if applied to citizens."[46] Thus, a noncitizen merely accused of certain violations of deportation law will not be released from custody until proceedings have been concluded, a process that can—and often does—take years.

Consider how the criminal deportation and detention laws work in practice. Twenty-three-year-old Edna Borges had lived in the United States as a lawful permanent resident since she was a toddler.[47] Her entire family—including its most recent addition, her baby daughter, Juliana, born in late July 2003—lived in the United States. As a teenager, Edna had gotten into some trouble and was arrested for shoplifting and possession of pepper spray. As these are among the most minor offenses in the criminal justice system, Edna pled guilty and was, in effect, placed on probation. But someone notified the immigration authorities, and Edna was ordered to check in with them every three months. She did this without major incident until her August 2003 appointment.

Eight days after baby Juliana was born, and while she was still being breast-fed, Edna showed up at the Boston office of U.S. Immigration and Customs Enforcement (ICE) for her appointment. Without warning, she was immediately arrested and sent to a jail in Dartmouth, Massachusetts. She was not permitted contact with Juliana, who, she was informed, was refusing to drink formula. She was told that her next scheduled hearing date before an immigration judge was more than one year in the future and that as a "criminal alien" she would not be released and had no right to bail at all. As a flurry of publicity began to surround her case, and as lawyers, including myself, rallied to her cause, a spokeswoman for the DHS offered a sad refrain: "We have no discretion . . . It's that conviction that does it"[48] Due to the extraordinary efforts of her primary lawyer, Susan Church, Edna was ultimately granted discretionary relief from deportation and was then released from DHS custody.

Edna may not have thought so, but she was lucky. She had more rights than many others. A fast-track deportation system, known as "expedited administrative removal," applies to certain nonresident aliens with criminal convictions.[49] They have no right to in-person hearings—their cases are adjudicated on paper. They are given only ten days to respond, in English, to charges against them. They do not even have the right to be provided with a copy of the evidence against them. If found deportable, they are barred from applying for asylum or other relief, are permanently banned from the United States, and face enhanced criminal sanctions if they reenter without authorization. Even some spouses and children of U.S. citizens may face expedited administrative removal, as do tourists, business visitors, students, temporary workers, exchange program participants, and other nonimmigrants, many of whom have lived in the United States for many years.[50]

The Growth of Extended Border Control and the Internalized Border

According to the best estimates, some 30 percent of the foreign-born population in the United States is Mexican, by far the largest percentage from any single country. However, the undocumented Mexican population in the United States has grown faster than the legal population.[51] Millions of Mexicans now live in the United States without legal status, heirs to more than a century of failed immigration policies. Indeed, some 80 percent of the Mexicans who entered the United States from 1990 to 2002 remain undocumented today. To date, all proposals to regularize their status have met with failure.[52]

The last major legislative effort to address this issue was the 1986 Immigration Reform and Control Act (IRCA), which "legalized" nearly 3 million people within the United States, some 75 percent of whom were from Mexico.[53] The drafters of IRCA also envisioned a kind of future deal. The law created a new mechanism for the recruitment and hiring of agricultural workers and sought to "regain control of [the country's] borders" by requiring employers, for the first time in U.S. history, to verify whether new hires were authorized to work in the United States.[54] Clearly, this plan has not worked. Still, apprehension by the Border Patrol near the Mexican border is by far the most common form of deportation.[55] Hundreds of thousands of people each year are simply rounded up, processed, and returned to Mexico.[56] Many—driven by desperate poverty, the pull of the U.S. labor market, and deeply ingrained historical patterns—risk danger and death to return. The number of those deported as "previously removed—ineligible for re-entry" grew from 1,052 in 1994 to 19,773 in 2004.[57]

The number of extended border control deportations from the interior is also quite large. Of the more than 202,000 people removed from the United States in 2004, some 86,000 were deemed "present without authorization."[58] These deportees have the right to formal removal hearings before immigration judges. Their hearings must comport with basic standards of "fundamental fairness." Still, extended border control enforcement from the interior may have harsh effects. A 2004 immigration raid at a poultry plant in Arkansas netted 119 noncitizens but apparently left some 30 children stranded in day care. As Mayor Charles Hollingshead reported, "they didn't know why Mommy or Daddy didn't come pick them up."[59]

Those who are caught near the border, however, face a regime of law that is in many respects the same as they would encounter were they apprehended outside U.S. territory. In effect, they experience government power largely unmediated by constitutional or significant legal constraint. The power of government agents to detain and question anyone at the border has been extended to the "functional equivalent of the border."[60] Within many miles of the border, vehicles may be stopped and their occupants subjected to warrantless searches and seizures. Private land may be entered by government agents without warrants, to search for illegal aliens.[61] Hundreds of children—many of whose parents live in the United States without documentation—are held in detention centers. When their parents seek to have them released, the parents themselves are frequently placed in deportation proceedings.

Spending on border control increased tremendously through the 1990s. High-profile pilot projects were developed with an increasingly militaristic orientation. In July 1993, President Clinton delivered "a strong and clear message. We will make it tougher for illegal aliens to get into the country." High-tech patrols, new walls, fences, and radar soon followed. The Border Patrol, described by Clinton as "breathtakingly understaffed," was expanded with 600 new agents and a 148 percent increase of its budget.[62] The operations have been effective in some ways—such as decreasing the embarrassing spectacles of "kamikaze runs" across the border in Southern California. And they certainly look effective. Operation Rio Grande in Texas used floodlights, watchtowers, video surveillance, and infrared sights along more than thirty miles of border. But the border control operations have also had tragic, if predictable, consequences.[63] Hundreds of thousands of people continue to cross the border each year, but they do so in ever more dangerous ways and through more inaccessible areas. The Mexican government has estimated that more than 2,100 people have died crossing the border since 1997.[64] The vast border regions have now become, in many places, a kind of de facto killing zone in which the bodies of failed migrants lie in the desert or on the banks of the river, a grim and mute testimony to incomplete and ineffective policies.

Moreover, increased border enforcement has created an ever more professional criminal cadre of border crossers (known as "coyotes").[65] A 1997 study concluded that increasing use of professional smugglers, in response to the U.S. border operations, "helps to explain why most migrants attempting unauthorized entry [still] succeed despite significantly more U.S. Border patrol agents and technology on the border."[66] Also, ironically, border enforcement has disrupted deep, historical return patterns.[67] Many migrants have historically worked in the United States but returned to Mexico to rejoin their families when the work season was over. This has now become virtually impossible for many. Thus, workers who might otherwise be temporarily here are now "locked in."[68]

Deportation has expanded as part of this failed system. Much of the attempt to control the border has moved inward.[69] The norms of the external border control system are being increasingly internalized. A system known as "expedited removal" has, since 1996, targeted arriving noncitizens at U.S. ports of entry. It is a quick and efficient system of exclusion.[70] If a DHS officer determines that a person is "inadmissible" (i.e., that he or she lacks proper entry documents or is attempting entry through fraud or misrepresentation), the officer may forbid admission and order the person to return from wherever he or she came. This determination is made on the basis of an informal interview. The arriving person is not permitted to communicate with family, friends, or counsel. The officer's determination is not subject to administrative review by immigration judges and faces only very limited potential judicial review. An order of this type results in the immediate exclusion or removal of the person from the United States and then a five-year ban.[71] At ports of entry, more than 80 percent of expedited removals are accomplished within two days.[72] As problematic as this can be for entrants, it is worse when applied deep within the United States. The government has expanded expedited removal to certain noncitizens apprehended within the United States.[73] It now applies to noncitizens who have been caught within 100 air miles of the U.S. land borders—north and south—and coastal areas, who have not been legally admitted or paroled, and who cannot prove that they have been physically present in the United States continuously for the previous fourteen-day period.[74] Thus, noncitizens can now be removed, virtually without legal process, from vast areas of U.S. territory as if they were simply standing at the border or arriving at an airport.[75] DHS reported 41,752 expedited removals in 2004.[76]

Rethinking Deportation Law

Few would argue with the proposition that all people, regardless of their legal status or what they may be alleged to have done, have the right not to be subjected to an arbitrary, disproportionately harsh system. Most would also agree that punishment should not be retroactive. Whether the U.S. deportation system violates these basic norms, however, involves more nuanced questions. First, there looms the problem of the ambiguous constitutional status of deportation.[77] As Gerald Neuman has noted, constitutional argument "serves as the nation's preeminent vehicle for asserting constraints of fundamental principle."[78] Noncitizens have participated in this argument in important ways since the founding of the republic. But the outcome in immigration and deportation law has been decidedly different from the norms that have emerged elsewhere.

The text of the Constitution does not specifically confer authority to regulate immigration. It says nothing about deportation. This is not a small problem for a nation of immigrants whose Supreme Court made quite clear early on that the federal government has only enumerated powers and may exercise only those powers it has been granted and those necessary and proper for their execution.[79] Congress was empowered to "establish an uniform rule of Naturalization."[80] But the naturalization clause says nothing explicitly about either the admission or the deportation of noncitizens.[81] Although some have seen the migration clause as applicable to immigration, it has long been interpreted to refer only to the slave trade.[82] Nor have the taxation clause, treaty power, the domestic and foreign commerce clauses, or war powers been viewed as sufficient to confer the necessary authority.[83]

The Constitution is also rather ambiguous about the rights of noncitizens. The Fourteenth Amendment was held, in 1886, to protect noncitizen Chinese laundry owners against discriminatory enforcement of a San Francisco ordinance.[84] The most widely accepted reading of the Constitution envisions due process and equal protection guarantees for "persons"—a category that includes both citizens and noncitizens.[85] Noncitizens in the United States are thus entitled to most of the constitutional protections afforded citizens, and in general, discrimination based on alienage requires substantial justification by the government. Indeed, the Supreme Court, in some contexts, has applied "strict scrutiny" to such state discrimination, and something less to the federal government.[86] But even that lesser scrutiny becomes considerably diminished when one challenges immigration and deportation laws or practices.

In 1982, the Supreme Court held in *Plyler v. Doe* that the undocumented children of undocumented noncitizens in Texas had a right to public school education. The Court rejected the argument that undocumented "aliens" were not "persons within the jurisdiction" of the state of Texas and that they had no right to equal protection under the Fourteenth Amendment. Indeed, wrote the Court, "sheer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens," had led to the creation of a substantial "shadow population" within the country's borders. The Court recognized that this situation raised "the specter of a permanent caste of undocumented resident aliens" and that such an "underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law."[87]

Consider this: had the federal government, immediately after *Plyler* was decided, simply arrested and deported all of the affected schoolchildren and their parents, it would likely have raised no cognizable legal claim.[88] The basic reason for this apparent anomaly is the so-called plenary power doctrine. In the 1889 case of *Chae Chan Ping v. United States*, the Court reviewed an exceptionally harsh exclusion law that raised deep problems of basic rights.[89] Could a person who had not violated an entry condition be excluded, following a temporary sojourn abroad, simply because the entry laws had changed after he departed? The Court rejected all arguments asserted by Chae Chan Ping's lawyers: contract, vested rights, constitutional protections, and limited government powers. To do this, the Court defined sovereign, constitutionally unrestrained "plenary power." Soon thereafter, this exceedingly deferential approach to exclusion was applied to extended border control deportation in *Fong Yue Ting v. United States*, a case that has since been cited by the Supreme Court more than eighty times.[90]

The Court has mitigated some of the harshest implications of the plenary power doctrine.[91] Justice Harlan wrote in 1903 that for an "alien who has entered the country and has become subject to its jurisdiction and a part of its population," administrative process must at least comply with certain basic due process norms. It could not be arbitrary and the alien must, at a minimum, be given an opportunity to be heard. Over time, this standard developed into a flexible touchstone of fundamental fairness, which has ameliorated some of the worst procedural problems in deportation cases. Still, the plenary power doctrine has impeded the development of coherent substantive principles of constitutional deportation law.[92]

The modern deportation regime is also based on what has been called "citizenship-as-membership." This is the theory that citizens are full members of the United States' constitutional community, whereas noncitizens are something less. Its strongest version is grounded in a particular conception of popular sovereignty that equates citizenship status with "We, the people."[93] During the Cold War, for example, the Court held that whether a long-term, legal permanent resident could remain in the United States was merely "a matter of permission and tolerance."[94]

Modern constitutional deportation doctrine developed in the late nineteenth century mostly in relation to extended border control laws. Though often quite harsh, these deportation laws were essentially contractual. A condition was imposed at entry. If the condition was violated, the remedy fit the contract model: to return the government and the individual to the status quo ante. Indeed, even an innocent violation of an entry requirement could nullify one's status. In the early twentieth century, however, deportation law expanded from extended border control to increased acceptance of post-entry social control laws. This expansion arose out of a "war on crime" and concerns about political dissidents during a period of mandatory loyalty, rigid conformity, intrusive government, and fear. The Supreme Court's acceptance of such deportation laws was rather incremental and uncritical, standing on the doctrinal shoulders of the earlier Chinese deportation cases. This doctrinal structure has rendered tenuous any claims by noncitizens to concrete, substantive constitutional rights against, for example, retroactive deportation or deportation for espousing unpopular ideas. Reaffirmed in the McCarthy-era deportations of alleged Communists and sympathizers, it has, of course, failed to satisfy some commentators over the years. As one dissenting Supreme Court justice wrote, "Banishment is punishment in the practical sense. It may deprive a man and his family of all that makes life worth while."[95]

Deportation doctrine adopts a remarkably parsimonious reading of the constitutional choice *not* to use the word "citizen" in such significant places as the first, fourth, fifth, sixth, and eighth amendments. It also does not realistically grapple with long-standing demographic realities in the United States. Those whom deportation laws affect live among us and often have formed family and community connections. In an increasingly mobile world, the system seems a rigid, vestigial anachronism. The formalistic exclusion of deportable noncitizens from our rich traditions of constitutional discourse also risks the creation of a caste from a "discrete and insular minority." It facilitates irrational discrimination against the noncitizens who live, work, pay taxes, raise children, and participate in communities alongside citizens every day.[96] And practices that take root against noncitizens may provide models for actions against citizens. It is, for example, quite interesting to view from this perspective the recent Supreme Court opinion in the case of U.S. citizen Yaser Hamdi.[97] Citizens—as Hamdi later was—may be transformed into foreigners in order to be ostracized and banished.[98] Emma Goldman, one of history's most famous deportees, was a U.S. citizen.

We therefore should not view deportation law solely as an adjunct to sovereignty or as merely a part of the immigration border control system. We need an understanding of sovereignty, membership, citizenship, and government power that is "supple and flexible" and more functionally reflective of reality as it is experienced by those who have faced this kind of state power.[99] The rights of noncitizens, in sum, should be clearer and grounded more in mainstream constitutional norms, more in their humanity than in their immigration status.

As Gerald Neuman has noted, "the vast bulk of immigration enforcement involves such routine matters as poverty, crime, regulatory violations, and protection of the domestic labor market."[100] But even deportation practices aimed at foreign relations or national security do not override basic rights claims. Consider how extended border control laws were used in the service of stepped-up post–September 11 "spitting on the sidewalk" enforcement as promised by Attorney General Ashcroft. One might analogize this practice to the use of IRS audits against certain political dissidents, selected by race or ethnicity. The fact that the targets may actually have claimed an improper deduction certainly does not compel the conclusion that the prosecutorial selection process evades scrutiny. There are powerful, legitimate concerns about executive-prosecutorial discretion being exercised in such ways. It is the role of the judicial branch to police the outer boundaries of such hard cases, especially when the executive branch seeks to avoid the rights protections of the criminal justice system.[101]

More specifically, the constitutional norms applicable to criminal cases should inform the approach to deportation for crime. The proponents of these laws often understand them as punishment. As Senator William Roth once put it, in a typical formulation, "the bill broadens the definition of aggravated felon to include more crimes *punishable by deportation.*"[102] The concern is not with the quantity of immigrants but with their personal qualities. Criminal deportation laws aim permanently to cleanse our society of certain people, many of whom have lived here legally for years. Locally, and in the short-term, deportation as a crime control strategy may seem efficient.[103] If "criminal aliens" are no longer here, and if they are prevented from returning, they are apparently no longer part of our crime problem. They may, of course, become somebody else's problem, as recent news accounts of increasing gang violence in Central America attest.[104] Nevertheless, "'[o]ut of sight, out of mind' perhaps best describes the traditional U.S. response" to the problems that our deportees may cause in their receiving nations.[105] Indeed, the propriety of our current criminal deportation laws seems so self-evident to some that much of the recent scholarly literature on the subject has focused more on critiques of the government for its alleged failure to deport enough criminal aliens than on why we have such a policy in the first place and what its constitutional and foreign policy implications are.[106] But it does not require much analysis to see that the dramatic increase in deportation of long-term legal residents, who may have lived in the United States since early childhood, for increasingly minor post-entry criminal conduct raises profound humanitarian and constitutional concerns.[107]

Deportation, in sum, is now—and always has been—about much more than border control. It implicates the concepts of belonging, cleansing, and scapegoating, as the very term "illegal alien" demonstrates.[108] It facilitates tighter bonds of solidarity among others who share anger and indignation. Like criminal enforcement, it "brings together upright consciences and concentrates them."[109] It renders the offender not simply a foreigner, but an expelled, banished, criminal foreigner—as complete an outcast as one can imagine. Given its size, its consequences, and its trends, this system deserves considerably more thought than it has received.

2

Antecedents

Laws of exclusion and deportation, paradoxically, may be understood as both the darker sides of and the necessary prerequisites to the ideal of the United States as a nation of immigrants.[1] U.S. political leaders, from the earliest days of the republic, have been acutely aware of this complex dynamic. In a 1783 address to a group of recent Irish immigrants, George Washington expressed the point clearly: "The bosom of America is open to receive not only the Opulent and respectable Stranger, but the oppressed and persecuted of all Nations and Religions; whom we shall welcome to a participation of all our rights and privileges if, by decency and propriety of conduct, they appear to merit the enjoyment."[2]

These underlying concerns of "decency," "propriety of conduct," and the particularly vague, discretionary notion of "merit" have long coursed like a dark underground river beneath the fertile landscape of the nation of immigrants myth. To understand how these concepts have influenced the development of the deportation system, it is necessary to distinguish between two rather distinct pedigrees. The first, of course, is that of the formal, legal concept of citizenship. This aspect, well considered by other writers, is not the major theoretical focus of this work.[3] The second, which is less well studied, is that of various historical forms of exclusion and forced removal, many of which had little to do with citizenship law as such.

In the modern view, it is the lack of citizenship status in a particular nation-state that allows one to be deported from it. This is, of course, the basic legal premise on which the deportation system is based. But to view the history of deportation only through this formal lens would be